Republic of Nauru
Department of Justice & Border Control

REFUGEE STATUS DETERMINATION

HANDBOOK

August 2013

Table of Contents

APPROACH TO ASSESSING PROTECTION OBLIGATIONS .... **VII**
BACKGROUND .... **VIII**
WHAT IS REFUGEE STATUS DETERMINATION (RSD)? .... **IX**
PART 1: REFUGEE LAW .... **X**
FOREWORD: .... **XI**
GUIDING UNHCR DOCUMENTS : XII
CHAPTER 1 – INTRODUCTION **15**
1 THE 1951 REFUGEE CONVENTION AND 1967 PROTOCOL 15
1.1 Background to the Refugee Convention and Protocol *15*
1.2 General Principles *16*
1.3 The Inclusion Clause *16*
1.4 The Cessation Clauses *16*
1.5 The Exclusion Clauses *17*
1.6 Non-Refoulement *17*
1.7 The Expulsion Clauses *18*
CHAPTER 2 - NAURUAN LEGAL CONTEXT **19**
2 THE STATUTORY FRAMEWORK 19
2.1 Merits review and judicial review *19*
2.2 International law *19*
2.3 Steps for Assessing Refugee Status – the relevant questions *20*
CHAPTER 3 - COUNTRY OF REFERENCE **22**
3. IDENTIFYING COUNTRIES OF REFERENCE 22
3.1 Meaning of 'Country' *23*
3.2 What is the Applicant's nationality? *23*
3.3 Evidence of nationality or citizenship *23*
3.4 Stateless persons *24*
3.5 Multiple countries of reference *25*
CHAPTER 4 - PERSECUTION **27**
4 SUMMARY - THE THRESHOLD OF "PERSECUTION" 27
4.1 Definition *27*
4.2 Fear of being denied fundamental human rights *28*
4.4 Fear of multiple harmful acts *31*
4.5 Discriminatory conduct *32*
4.6 Involvement of the State *32*
4.7 Military service and conscientious objectors claims *33*
4.8 Punishment for a 'common law offence' *34*
4.9 Questioning or interrogation *35*
4.10 Civil war *35*
4.11 A State's involvement in the claimed persecution *36*
4.12 Adequacy of State protection *37*
CHAPTER 5- THE CONVENTION GROUNDS **39**
5.1 Overview *39*
5.2 Race *39*
5.3 Religion *40*
5.4 Nationality *42*
5.5 Membership of a particular social group *44*
5.6 Political Opinion *48*
5.7 Gender *54*
CHAPTER 6 - WELL-FOUNDED FEAR **57**

6. WELL-FOUNDED FEAR 57
6.1 Overview *57*
6.2 Assessing the Fear *58*
6.3 Adequacy of State protection *61*
6.4 The relocation principle – Internal relocation *62*

CHAPTER 7 - SUR PLACE CLAIMS 64

CHAPTER 8 - CREDIBILITY ISSUES 66

8. OVERVIEW 66
8.2 Establishing the facts *68*
8.3 Considering the facts *70*
8.4 Assessing the credibility of the claims *71*
8.5 Procedural fairness - The Applicant's opportunity to comment *77*
8.6 Benefit of the doubt *77*

CHAPTER 9 - MAKING AND RECORDING CREDIBILITY FINDINGS 78

9.1 Making credibility findings *78*
9.2 Findings that may be reached *78*
9.3 Recording credibility findings in the Assessment Form *79*

CHAPTER 10 - CONCLUSION ON ASSESSING CREDIBILITY AND FURTHER INFORMATION . 80

10 CONCLUSION 80
10.1 Testing the Applicant's claims - Overview *80*
10.2 Explaining the reasons behind a finding on credibility *81*

CHAPTER 11 - CESSATION OF REFUGEE STATUS - ARTICLE 1C 83

11 ARTICLE 1C CESSATION – OVERVIEW 83
11.1 Article 1C(1) - Voluntary re-availment of protection *84*
11.2 Article 1C(2) - Voluntary re-acquisition of a lost nationality *85*
11.3 Article 1C(3) - Acquisition of a new nationality that provides protection *86*
11.4 Article 1C(4) - Voluntary re-establishment in country of origin *87*
11.5 Articles 1C(5) and (6) - Change in circumstances *87*

CHAPTER 12 - EXCLUSION FROM REFUGEE STATUS 90

12. ARTICLE 1D: PRIOR UN PROTECTION OR ASSISTANCE 90
12.1 Overview of Article 1D *90*
12.2 Article 1E" Residence with Rights and Obligations of a National *92*
12.3 Article 1F: Persons who do not deserve protection *94*
12.4 Article 1F(a) – "Crimes against peace" *97*
12.5 Article 1F(a) – "War crimes" *97*
12.6 Article 1F(a) – "Crimes against humanity" *99*
12.7 Determining the applicability of 1F(a) *99*
12.8 Article 1F(b) – "Serious non-political crimes committed outside the country of refuge prior to admission to that country as a refugee" *100*
12.9 Article 1F(c) – "Acts contrary to the purposes and principles of the United Nations" *101*

CHAPTER 13 - ARTICLES 32(1) EXPULSION AND 33(2) - PROHIBITION ON EXPULSION OR RETURN (REFOULEMENT) 103

13. EXPULSION OF A PERSON 'LAWFULLY IN' NAURU– ARTICLE 32 - OVERVIEW 103
13.1 The principle of non-refoulement – Article 33(1) - Overview *104*
13.2 Exceptions to the principle of non-refoulement – Article 33(2) - Overview *105*

PART II: PROCEDURAL GUIDELINES FOR DETERMINING REFUGEE STATUS 106

CHAPTER 1 - CORE STANDARDS AND PRINCIPLES IN REFUGEE STATUS DETERMINATION 107

CHAPTER 2 - PROCEDURAL STANDARDS AND GUIDELINES 108

CHAPTER 3 – SPECIAL CONSIDERATIONS/VULNERABILITIES 109

3.1 Overview *109*

3.2 Survivors of torture or other trauma *109*
3.3 Women Applicants *110*
3.4 Claims based on Sexual Orientation and Identity *111*
3.5 Child Applicants *112*
3.6 Elderly Applicants *114*

CHAPTER 4 - CONFIDENTIALITY AND DATA PROTECTION 115

4.1 The Applicant's Right to Confidentiality *115*
4.2 Disclosure of Information *115*
4.3 Disclosure of Evidence to the Applicant *117*

CHAPTER 5 - FILE MANAGEMENT 118

5.1 Procedures for Opening RSD Files *118*
5.2 RSD File *119*

CHAPTER 6 - INTERPRETERS AND RSD PROCEDURES 121

6.1 Access to Interpreters *121*
6.2 Impartiality of Interpreters *121*

CHAPTER 7 - COMPLAINTS PROCEDURE 123

CHAPTER 8 - THE RSD APPLICATION 124

CHAPTER 9 - THE INTERVIEW 126

9.1 General Information *126*
9.2 Preparing for the Interview *127*
9.3 Participation of CAPS or other representative *129*
9.4 Participation of the Interpreter *130*
9.5 Attendance by Third Parties (other than RSDO Mentors, Interpreters, CAPS or other Representatives) and Observers *130*
9.6 Conducting the Interview *131*
9.7 Questioning the Applicant *134*
9.8 Recording the Interview *135*

CHAPTER 10 - CLOSING THE RSD INTERVIEW 136

10.1 Assigning Date of Notification *136*

CHAPTER 11 - THE RSD ASSESSMENT FORM 137

11.1 Overview *137*

CHAPTER 12 - THE APPLICATION OF THE EXCLUSION CLAUSES 139

12.1 General Principles *139*
12.2 Procedures for Examining the Application of Article 1F *140*
12.3 Notification of Exclusion Decisions *141*
12.4 Implications of Exclusion on Family Members *141*

CHAPTER 13 - PROCESSING CLAIMS BASED ON FAMILY UNITY 143

13.1 Derivative Refugee Status *143*
13.2 Persons Eligible for Derivative Status *143*

CHAPTER 14 - NOTIFICATION OF DECISIONS 145

14.1 Procedures for Notifying Applicants of RSD Decisions *145*
14.2 General Principles regarding Notification: *145*
14.3 Notification of Negative RSD Decisions *146*

CHAPTER 15. CLOSING/RE-OPENING THE RSD FILE 147

CHAPTER 16. CANCELLATION OF REFUGEE STATUS 148

INTRODUCTION

This Handbook provides detailed guidance on both *the law* relating to refugees as well as step-by-step guidelines on *the process* to follow to consider and determine whether a person is a refugee.

This Handbook is primarily aimed at Refugee Status Determination Officers ("**RSDO**s") to provide guidance in their work, but is applicable to all those involved in the status determination procedure in Nauru.

The Handbook is divided into three parts:

(1) Part I provides the relevant Nauruan and international law and legal criteria for determining refugee status. It analyses and explains the various components of the definition of refugee and outlines the applicable conventions and Nauruan laws. Part 1 is divided to reflect the essential elements relevant to whether protection obligations are owed. Emphasis has been placed on giving RSDOs a concise explanation of the relevant legal concepts which must be used in their assessments.

(2) Part II provides detailed guidance on the procedure to gather information and make a determination on refugee status. It covers:

- Core standards and Principles in refugee status determination
- Procedural Standards and Guidelines
- Confidentiality and Data Protection
- File Management
- Interpretation
- Complaints procedure
- The RSD Application
- Conducting and documenting RSD interviews
- Preparing written RSD assessments
- Application of the Exclusion Clauses
- Family Unity
- Notification of decisions
- Cancellation of RSD decisions

(3) Part III – Annexures
UNHCR Handbook
Refugee Convention
UNHCR Glossary of Terms

Parts I and II of this Handbook either directly repeat or draw heavily from the UNHCR Procedural Standards for RSD, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, as well as other UNHCR documents and guidance. This Handbook has been purposely written to be straightforward and compact. It is expected that the Handbook will be regularly updated and supplemented, as RSD experience in Nauru develops.

APPROACH TO ASSESSING PROTECTION OBLIGATIONS

The *Refugees Convention Act* 2012 ("the **Act**") gives effect to the 1951 Convention relating to the Status of Refugees ("the **Convention**") as amended by the 1967 Protocol relating to the Status of Refugees ("the **Protocol**"). The principle of non-refoulement is contained in section 4 of the Act as follows:

> *The Republic must not expel or return a person determined to be recognised as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion except in accordance with the Refugees Convention as modified by the Refugees Protocol.*

The Act does not otherwise define obligations under the Convention. This means that in assessing protection obligations, RSDOs must interpret the Convention in accordance with the UNHCR model. Some case law from Australia and other jurisdictions is mentioned in the Handbook in order to provide examples or to assist with explanation of concepts. **Cases mentioned in this Handbook are for illustrative purposes only**; they may be used as an aid to interpreting the Convention.

BACKGROUND

In August 2012, the Government of Nauru signed a Memorandum of Understanding ("MOU") with Australia formalising arrangements for establishing a Regional Processing Centre in Nauru. The MOU provides for refugee status determination under the 1951 Refugee Convention, and emphasises that asylum seekers are to be treated with dignity and respect in line with human rights standards.

Subsequent to the signing of the MOU, the Government of Nauru agreed to assume responsibility for determining the claims for asylum of all persons transferred to Nauru under the MOU.

WHAT IS REFUGEE STATUS DETERMINATION (RSD)?

Nauru has ratified the 1951 Refugee Convention and has incorporated its international obligations into Nauruan legislation, through the *Refugees Convention Act* 2012. This means that Nauru has binding legal obligations to make a refugee status determination (RSD) when a person in Nauru brings an application for asylum. Determining whether an asylum seeker is a refugee therefore is not only an obligation which Nauru has taken on under its agreement with Australia. It is a statutory obligation that arises in relation to any person who enters Nauru seeking protection.

The purpose of RSD is to determine whether an asylum seeker fits within the criteria of a refugee, as defined in Nauruan and international law. This determination can have profound impacts on the life, livelihood and future of an individual, and Nauru is committed to providing a procedure which is fair, transparent and in accordance with the law.

Under the *Refugees Convention Act* 2012, the Secretary for Justice and Border Control is empowered to make the determination. To facilitate this, a number of Refugee Status Determination Officers (RSDOs), working under the Secretary for Justice and Border Control ("the Secretary"), assess the claims for asylum and make a recommendation whether refugee status should be recognised.

If a person is determined to be a refugee, he or she will be recognised as needing protection, resettled and given the chance to live in safety. The person cannot be returned to the country where he or she may face persecution.

Where it is determined that a person does not fall within the refugee definition or is excluded from refugee protection, grounds for "complementary protection" will then need to be considered. "Complementary protection" refers to protection of people who cannot be returned to their home country safely, but who do not fall under the strict refugee definition in the Convention. In practice, this means that Nauru will carefully consider whether there are any other legal reasons why that person may need to be protected, for example whether the person may be tortured or suffer similar treatment if he or she would be returned. However, an individual does not have international protection needs, in most cases, that person can be lawfully returned to the home country.

PART 1: REFUGEE LAW

FOREWORD:

Section 1 of the Handbook aims to provide advice on the law relevant to determining whether an Applicant in Nauru is recognised as a refugee in accordance with the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together the "Refugee Convention"). It is to be read together with the "*UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*" and where appropriate it annexes UNHCR Guidelines on International Protection which provide authoritative advice and guidance on interpretation of various concepts.

Some sections of text are taken directly from the UNHCR Handbook and other UNHCR documents, such as its training materials. Other parts of the structure and text of Part I of the Handbook draw directly from the Australian DIAC 'Refugee Law Guidelines". Where foreign cases are cited, it is important to note that they are not authoritative in Nauru, and are therefore for **illustrative purposes only**. In particular, RSDOs should take care to ensure that they do not adopt interpretative tests and approaches from foreign case law which are not part of Nauru's RSD process. Nauru's RSD procedures and principles seek to follow international standards, as used by UNHCR in its RSD processes.

This Handbook will be regularly updated and improved, as RSD in Nauru develops.

GUIDING UNHCR DOCUMENTS :[1]

1. RSD: General Resources

- ***Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV.3, December 2011 (Compilation)**
- ***Conclusion on Determination of Refugee Status*, Executive Committee Conclusion No. 8 (XXVIII – 1977) (12 October 1977)**
- ***Refugee Protection: A Guide to International Refugee Law*, UNHCR and Inter-Parliamentary Union (IPU), December 2001**
- ***The 1951 Convention: Questions and Answers*, September 2007**
- ***Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee*, UNHCR (September 2005)**

2. Inclusion Criteria

- ***Position on Agents of Persecution, UNHCR (March 1995)***
- ***Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees, UNHCR (April 2001)***
- ***Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, UNHCR (May 2002)***
- ***Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, UNHCR (May 2002)***
- ***Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/03/04, UNHCR (July 2003)***
- ***Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, UNHCR (April 2004)***
- ***Note on Refugee Claims Based on Coercive Family Planning Laws or Policies, UNHCR (August 2005)***
- ***Position on claims for refugee status under the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud, UNHCR (March 2006)***
- ***Guidelines on International Protection: The application of Article 1A (2) of the 1951***

[1] This is not a comprehensive list of guiding UNHCR documents. While it list many of the relevant documents, RSDOs and decision-makers in Nauru should still ensure that they use the most up to date UNHCR guidance and may also seek to use and rely on additional UNHCR sources such as statements from its Executive Committee and its Eligibility Guidelines.

Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07 UNHCR (April 2006)

- *UNHCR Guidelines on International Protection: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/12/01 UNHCR (23 October 2012)
- *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, UNHCR (May 2009)
- *UNHCR Guidelines on International Protection on Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UNHCR (22 December 2009)
- *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, UNHCR (31 March 2010)

3. Exclusion Criteria

- *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/05, UNHCR (September 2003)
- *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR (September 2003)
- *Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR (February 2006)
- *Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, UNHCR (March 2009)
- *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, UNHCR (October 2009)

4. Cancellation

- *Note on the Cancellation of Refugee Status*, UNHCR (November 2004)

5. Cessation

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

6. RSD Interviewing and Decision Making

- *Guidelines for Interviewing (Separated) Minors*, Finland: *Directorate* of Immigration, 2002
- *Manual on Effective Investigation and Documentation of Torture and Other Cruel,*

Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol"), HR/P/PT/8/Rev.1, OHCHR (2004)

- *Interpreting in a Refugee Context*, Self-Study Module 3, UNHCR (January 2009)
- *Note on Burden and Standard of Proof in Refugee Claims*, UNHCR (December 1998)
- *Researching Country of Origin Information: A Training Manual, Module B – Knowledge and Assessment of Sources*, Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) & COI Network & Training (September 2004)
- *Researching Country of Origin Information: A Training Manual, Annex – Source Descriptions & Navigation Guides*, Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) & COI Network & Training (September 2004)

7. Special RSD Issues

Secondary Movement

- *Conclusion on Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Whi*
- *h They Had Already Found Protection*, Executive Committee Conclusion No. 58 (XL – 1989) (13 October 1989)
- *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, UNHCR (February 2003)

Persons Fleeing Armed Conflict

- *Note on International Protection*, UN doc. A/AC.96/830, UNHCR (7 September 1994)
- *Conclusion on Civilian and Humanitarian Character of Asylum*, Executive Committee Conclusion No. 94 (LIII – 2002) (8 October 2002)

Eligibility Guidelines

- UNHCR publishes Eligibility Guidelines for assessing the international protection needs of asylum seekers from a variety of countries. These should be checked on Refworld as they are regularly updated.

CHAPTER 1 – INTRODUCTION

1 The 1951 Refugee Convention and 1967 Protocol

1.1 Background to the Refugee Convention and Protocol

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

However, the Convention permitted a person to be classified as a refugee only as a result of events occurring *before* 1 January 1951 and was limited in geographical scope to European refugees. With the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the Convention applicable to post-1951 and non-European refugees. As a result, the Protocol modified the refugee definition by removing this date restriction and the geographical limitation, meaning that a person could now be classified as a refugee as a result of events occurring in or outside Europe before or after 1 January 1951. The Protocol entered into force on 4 October 1967.

In effect, by accepting the Protocol, States agree to apply the Convention with no date or geographical restriction. The Protocol does not otherwise change the obligations under the Convention.

The Convention consists of 46 articles setting out the rights and obligations of contracting States and refugees. Article 1 has three significant parts directly relevant to the process of refugee status determination:

- the definition of who is a refugee (“ **the inclusion clause**”),
- the conditions under which a refugee ceases to be a refugee (“**the cessation clauses**”),
- the circumstances whereby a person is excluded from being a refugee (“**the exclusion clauses”).**

The Convention also contains very limited circumstances whereby a refugee may be expelled from a host country ("**the expulsion clauses**"). The Convention also includes provisions defining the *legal status* of refugees and the *rights and obligations of refugees* in the country of refuge as well as provisions dealing with the *administrative and diplomatic implementation* of the Convention (eg, Article 39 relating to signature, ratification and accession of the Convention).

1.2 General Principles

A person is a refugee under the Convention as soon as he or she fulfils the criteria in the definition. Nauru makes the determination recognising that the person is a refugee: it does not "make" someone a refugee.

Determination of refugee status is a process which takes place in two stages. Firstly it is necessary to ascertain the relevant facts of the case. Secondly the definitions of the Convention have to be applied to the facts.

1.3 The Inclusion Clause

Article 1A(2) is the inclusion clause relevant for RSDOs when they assess whether someone is a refugee. It provides that a refugee is a person who:

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

1.4 The Cessation Clauses

The cessation clauses in Article 1C list the circumstances in which a person ceases to be a refugee. The particular circumstances the cessation clauses cover include:

- where the person has "re-availed" themselves of the protection of the country of nationality;
- where the person has re-acquired a lost nationality or acquired a new nationality;
- where the person has re-established themselves in the country of claimed persecution;

- where country conditions have changed to such an extent that the person has ceased to be a refugee.

The person should have already been assessed to be a refugee under Article 1A before the 1C cessation clauses can apply.

1.5 The Exclusion Clauses

The exclusion clauses in Articles 1D, 1E and 1F set out the conditions under which persons are excluded from the protection of the Convention, even if they would otherwise satisfy Article 1A:

- Article 1D deals with persons already receiving United Nations protection or assistance;
- Article 1E deals with persons who are not considered to be in need of international protection;
- Article 1F lists the categories of persons who are not considered to be deserving of international protection. However, even if a person is excluded under Article 1F, Nauru's protection obligations under international human rights law may prohibit refoulement.

If any of the exclusion provisions referred to above apply, the person is not entitled to protection under the Convention.

1.6 Non-Refoulement

The principal obligation under the Convention is contained in Article 33(1). This Article prevents States from returning a refugee to a country where the refugee has a well-founded fear of persecution for a Convention reason.

Article 33(1) provides:

> ***'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'***

This is known as the "non-refoulement" obligation. The word derives from the French word "refouler" meaning to force back or turn away.

1.7 The Expulsion Clauses

Articles 32 and 33(2 provide the limited circumstances whereby a contracting State may expel a refugee. These Articles are known as the **expulsion clauses.**

Article 32(1) provides:

> *'The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.'*

Under Article 32(1), while a recognised refugee may be expelled, he or she cannot be refouled. In other words, he or she cannot be returned to the persecuting country, but may be sent to another country.

Article 33(2) provides:

> *'The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'*

Article 33 (2) sets out the only two very limited exceptions to the prohibition against refoulement. In other words, the prohibition against returning a refugee to a place where he or she fears persecution may not apply in the case where:

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

However, even if Article 33(2) of the Convention is found to apply to a refugee, Nauru's protection obligations under international human rights law may prohibit refoulement of the refugee to his or her country of origin.

CHAPTER 2 - NAURUAN LEGAL CONTEXT

2 The Statutory Framework

Nauru ratified the Convention and Protocol on 17 June 2011. The *Refugees Convention Act 2012* gives effect to Nauru's obligations under the Convention. Under the Act, an Applicant may apply to the Secretary for Justice to be recognised as a refugee. The Secretary is bound to make a determination about whether an Applicant is recognised as a refugee and notify the Applicant of the decision "as soon as practicable". Part 3 of the Act establishes a Refugee Status Review Tribunal and Part 5 provides for judicial review of decisions of the Tribunal.

2.1 Merits review and judicial review

The Act also provides for both merits and judicial review of decisions. The Refugee Status Review Tribunal, established in Nauru by the Act, provides "**merits review**" of the determination. This is where the Tribunal "stands in the shoes" of the RSDO and makes a fresh decision on the basis of evidence before it. The Tribunal may agree with the decision or it may decide to change the decision, or it can instruct the Secretary to reconsider the decision.

An appeal from the Tribunal can be made to the Supreme Court of Nauru ("**judicial review**") on a question of law. An Applicant can appeal a decision of the Tribunal but the court is not able to make a fresh decision. Rather, it determines whether the decision making process was correct or whether it was flawed. It looks to see if there was an "error of law" in making the decision. The Supreme Court will not consider the merits of the case, only whether the conclusion was reached according to law.

2.2 International law

International law relevant to protection processing includes:

- 1951 UN Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees
- 1966 International Covenant on Civil and Political Rights (ICCPR) *–NB. Nauru has not ratified this Covenant, however it has signed it, which signifies its intention to be bound by the obligations in the Covenant.*
- 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

- 1989 Convention on the Rights of the Child (CRC).

RSDOs need to be aware of Nauru's obligations under these treaties and how they relate to protection processing.

2.3 Steps for Assessing Refugee Status – the relevant questions

The following is a checklist of fundamental questions relevant to assessing a person's claims for refugee status as defined by the Convention.

Q1: *Who is the Applicant? (establish the Applicant's identity)*

Q2: What is the Applicant's country of nationality or habitual residence (if stateless)?

Q3: Does the person meets the definition of a refugee in Article 1A(2) by asking the following further questions:

Q3a: Does the person fear persecution?

Q3b: Does the person fear persecution for reasons of:

- *race, and/or*
- *religion, and/or*
- *nationality, and/or*
- *membership of a particular social group, and/or*
- *political opinion?*

Q4: Is the person's fear well-founded?

- *Is State protection unavailable to the person?*
- *If the agent of persecution is a non-State agent, is there no reasonable internal relocation alternative (see UNHCR Guidelines on "Internal Flight or Relocation Alternative")*

If the answer to questions 3 and 4 is "YES" – the Applicant is considered by Nauru to be a refugee.

If the answer to questions 3 and/or 4 is "No", the Applicant is not a refugee.

If the person meets the 1A(2) definition, a RSDO should consider whether the person is excluded from protection under the Convention through the question:

- *Does the person come within one of the exclusion clauses in Article 1D, 1E or 1F?*

Other questions to keep in mind throughout the whole assessment process are:

- *Has procedural fairness been afforded to the Applicant?*
- *Are there any credibility concerns and have they been addressed?*

CHAPTER 3 - COUNTRY OF REFERENCE

Key issues
What is a 'country'?
What is the Applicant's nationality?
Is the Applicant stateless?
If so, what is his/her country of former habitual residence?
Does the Applicant have more than one country of reference?
What if the Applicant is not from the claimed country of reference?

3. Identifying countries of reference

The first step in assessing an Applicant's claims for protection is to determine the country or countries against which the Applicant's claims are to be assessed. This will involve identifying:

- *the Applicant's country or countries of nationality or*
- *if the Applicant is stateless, the Applicant's country or countries of former habitual residence.*

This is because the definition of a refugee in Article 1A of the Convention requires the Applicant to be outside their country of nationality or country of former habitual residence in order to be a refugee. In the context of looking at whether a person is outside his or her country of nationality, , nationality means "citizenship". The phrase 'is outside the country of his nationality' relates to persons who have a nationality, as distinct from stateless persons.

An explicit determination of the country of reference should be made by RSDOs, which includes the reasons for their finding. An individual determination on country of reference should also be made for each family member included in the application.

To simplify the language used in this chapter, the use of the word "country" from this point will be used to refer to either one or more countries. If an Applicant has more than one country of reference, read the word "country" in this chapter as meaning all countries applicable to the Applicant.

3.1 Meaning of 'Country'

An ordinary meaning is given to the term "country". A country can be any nation or state which is generally recognised as such in international law and international relations. In international law, it is generally agreed that a "country" should have:

- a permanent population,
- a discrete territorial area,
- a government, and
- the capacity to enter into relations with other States and to enact laws.

3.2 What is the Applicant's nationality?

Where an Applicant claims fear of persecution in relation to the country of his/her nationality, it should be established that he or she does in fact possess the nationality of that country. Whether an Applicant has a particular nationality is a question for the decision-maker and will involve a determination of both fact and law.

Where an Applicant has a passport that is current and validly issued, the answer to the question is clear. However, some Applicants arrive without any form of documentation or with false or fraudulently obtained documents. Hence their nationality might be difficult to determine definitively. Sometimes the Applicant may not know his/her nationality, or may wrongly claim to have a particular nationality or to be stateless. Where a person's nationality cannot be clearly established but the Applicant's country of former habitual residence can, refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of assessing the claim in relation to the 'country of nationality', it should do so against the country of 'former habitual residence'.

3.3 Evidence of nationality or citizenship

An Applicant will usually indicate their citizenship on the Application Form. If the Applicant holds a passport he or she must submit a copy with the Application. This will usually confirm the Applicant's citizenship. UNHCR Handbook states at paragraph 93:

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

If the Applicant provides false or fraudulently obtained documents or provides no documentation at all, the RSDO will have to make a determination as to nationality. In these circumstances, the RSDO will need to obtain further information from the Applicant. In particular, the Applicant's claimed nationality should generally be consistent with language(s) spoken and local knowledge. If information provided by the Applicant appears to be inconsistent with the nationality that s/he claims, the RSDO will need to ensure that the Applicant has an adequate opportunity to provide clarifications. However, RSDOs should keep in mind that inconsistencies are not necessarily proof that the Applicant is not from the country claimed. Generally, if doubts or inconsistencies cannot be proved, the RSDO should give the Applicant the benefit of the doubt.

If it is not possible to make a finding of fact on citizenship based upon the Applicant's own evidence, the following general points may also be helpful to RSDOs:

- The citizenship laws of a country should indicate whether a person in the Applicant's circumstances has, has acquired or has lost citizenship;
- General enquiries can be made to an embassy or consulate. However, RSDOs must be extremely careful not to disclose the Applicant's identity, any information that might lead to the identification of the Applicant, or the Applicant's presence in Nauru in the context of that person having sought refugee status;

If an Applicant is properly denied refugee status on some other basis, such as the harm feared does not amount to persecution, or the Applicant comes within an exclusion clause, it may not be necessary for an RSDO to determine all other aspects of the Applicant's claims, including making findings as to actual nationality.

3.4 Stateless persons

3.4.1 Overview

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

Statelessness is not in itself enough to attract refugee status. There must still be a well-founded fear of persecution for a Convention reason (ie, a stateless person still has to fulfil the refugee definition).

Under Article 1A(2) of the Convention, a stateless person must be assessed against their ‘country of former habitual residence’.

3.4.2 Country of former habitual residence

If an Applicant is stateless, the RSDO needs to consider their claims against their country of former habitual residence. In the Refugee Convention, in the case of stateless refugees the term “country of nationality” is replaced with “the country of his former habitual residence”.

The term ‘former habitual residence’ involves residence or settlement of some duration that is more than a short term or temporary stay, but need not require formal permanent residence or domicile. An Applicant who does not have a nationality may be able to establish that a country was his/her former habitual residence by demonstrating, for example, a stay of long duration, continuity of stay, or a settled intention or purpose to stay.

3.5 Multiple countries of reference

3.5.1 Dual or multiple nationality

Article 1 A (2), paragraph 2, of the 1951 Convention states:

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

This means that the Convention excludes from refugee status those who can find protection in at least one of the countries of which they are a national. As the UNHCR Handbook advises, wherever available, national protection takes precedence over international protection. So, even if a person has a well-founded fear or being persecuted in one of his or her countries of nationality, there is no basis for determining that person to be a refugee.

3.5.2 Countries of former habitual residence

In the case of stateless Applicants with more than one country of former habitual residence, UNHCR advises that the Applicant does not need to have a well-founded fear of persecution in each such country. In other words, a stateless person may have more than one country of former habitual residence, but the refugee definition does not require that he or she satisfies the criteria in relation to all of them.

CHAPTER 4 - PERSECUTION

4 Summary - the threshold of "persecution"

Not every violation of an Applicant's human rights or instance of discrimination or harassment is serious enough to be considered persecution. In general, serious violations of *non-derogable* rights would normally constitute persecution. Serious breaches of other rights would generally also be considered persecution, particularly if these have a systematic or repetitive element. Discrimination can constitute persecution if it is linked to a protected right (such as, for example, freedom of religion) or if there has been a persistent pattern of discrimination. The threshold of persecution is clearly met if the Applicant's enjoyment of fundamental human rights – for example, access to the basic means of survival – is seriously restricted. Moreover, discriminatory measures which, taken separately, would not amount to persecution, may have the combined effect of rendering the situation for the Applicant intolerable. This would be considered persecution on "cumulative grounds".

When assessing whether actual or anticipated measures amount to persecution, RSDOs should also consider their impact on the specific individual concerned as the same act may affect people differently depending on their previous history, profile and vulnerability.

In each case, RSDOs must determine whether or not, in the specific individual circumstances, the threshold of persecution is reached. (See UNHCR's Handbook, at paragraphs 53–55.)

4.1 Definition

The Convention requires Applicants to establish a well-founded **fear of being persecuted** for reasons of race, religion, nationality, membership of a particular social group or political opinion.

'Persecution' is not defined in the Convention and whether conduct constitutes 'persecution' will depend on the circumstances of each case. It can be inferred from Article 33 of the Convention that a threat to life or physical freedom constitutes persecution, as would other serious violations of human rights. However, "persecution" is not limited to human rights abuses. It also encompasses other kinds of serious harm or intolerable predicament – often, but not always with a systematic or repetitive element.

In addition, an Applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), as well as other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances and the context.

The general principles in assessing claims of persecution are:

- Persecution can take a wide variety of forms;
- A Convention ground must be a relevant factor for the person's fear of persecution (ie, the fear of persecution must be "**for reasons of**" one of the five grounds. However it does not need to be the sole or even dominant cause;
- Persecution may be established on cumulative grounds;
- In some circumstances, persecution may be demonstrated where fundamental human rights have been contravened for a Convention reason;
- The State need not be the agent of persecution, however to satisfy the Convention definition, it is necessary that the State condone or acquiesce in the persecution or be unable or unwilling to prevent it, or not provide the Applicant with the level of State protection required by international standards.
- Persecution is a forward thinking test, asking the question, what will happen to the person if they were to be returned? Naturally, however, what has happened to a person in the past can be an indication of what might happen in the future.

4.2 Fear of being denied fundamental human rights

In certain circumstances, the denial of fundamental human rights for a Convention reason may constitute persecution under international law.

International human rights standards are an important consideration in the area of refugee law. There are a number of international treaties, which set out standards of which RSDOs should be aware. These include:

- the Universal Declaration of Human Rights (UDHR)
- the International Covenant on Civil and Political Rights (ICCPR)

- the International Covenant on Economic, Social and Cultural Rights (IESCR)
- the Convention on the Rights of the Child (CRC)
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the Convention on the Elimination of Racial Discrimination (CERD)
- the Convention on the Elimination of Discrimination Against Women (CEDAW)
- the Convention on the Rights of Persons with Disabilities (CRPD)

When determining whether particular acts amount to persecution, RSDOs should keep in mind that under international human rights instruments, States may never legitimately restrict certain fundamental rights. These are referred to as "*non derogable*" rights. Examples of such core rights include:

- the right to life;
- the right to freedom from torture or cruel, inhuman or degrading treatment or punishment;
- the right to freedom from slavery of servitude;
- the right to recognition as a person before the law;
- the right to freedom of thought, conscience and religion.

UNHCR has stated that: "*Persecution commonly takes the form of violations of the rights to life, to liberty and to security of the person – including through torture or cruel or inhuman treatment or punishment motivated by race, religion, nationality, membership of a particular social group or political opinion. In addition, individuals who are denied the enjoyment of other civil, political, economic, social and cultural rights may have a valid claim for refugee status where such denial is based on any of the relevant grounds, and its consequences are substantially prejudicial for the persons concerned to the point where daily life becomes intolerable. Serious, particularly cumulative, violations of the rights to freedom of opinion and expression, to peaceful assembly and association, to take part in the government of the country, to respect for family life, to own property, to work and to an education, among others, could provide valid grounds for refugee claims".*[2]

[2] UNHCR *Note on International Protection* 1998.

In making the determination of what amounts to persecution, RSDOs can make reference to the human rights standards set out in the various international human rights instruments. Persecution can be seen along a continuum (see Figure 1 below). At one end are threats to life and liberty and other serious violations of human rights that would always amount to persecution. On the other end are acts of discrimination which, taken alone, would not amount to persecution. In between is a range of prejudicial acts and threats which may amount to persecution depending on the circumstances of the particular case.

Figure 1. Persecution: Human Rights Continuum[3]

As UNHCR has stated: *"It is clear that some human rights are more quintessential than others. Where the harm feared involves the violation of a core human right, such as the sanction against torture, then an isolated episode might constitute persecution. Where the harm feared involves the violation of some lesser human right, then the decision maker might require evidence of a sustained or systemic denial of the rights that have a cumulatively intolerable effect, for the threshold of persecution to be met."* [4]

RSDOs should be aware that the mere fact that a particular right is denied is not necessarily enough to establish persecution and may need to ascertain the importance the Applicant places upon the exercise of the particular right in issue. For example, the Australian High Court has found that harm or threat of harm will amount to persecution *only where it is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it.*[5] While this is not a binding test in Nauru, it illustrates that an assessment of tolerability of harm may also be relevant for a RSDO in assessing whether denial of human rights may amount to persecution.

[3] International Association of Refugee Law Judges, Seminar Materials 2005.
[4] UNHCR submission in *Gashi and Nikshiqi* [1997] INLR 96
[5] *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* [2000] HCA 55

4.3 The threshold for persecution in relation to children.

The principle of the best interests of the child requires that the harm or threat of harm must be assessed from the child's perspective. RSDOs should analyse how the child's rights or interests are, or will be, affected by the harm. This is because children who face similar or identical forms of harm as adults may experience them differently. Further, ill-treatment which may not cross the threshold of persecution for an adult may do so in the case of a child. Where the harm feared is more than harassment, but less severe than a threat to life and freedom, the individual circumstances of the child, including his or her age, may be important factors in deciding whether the harm amounts to persecution. The question of whether the particular harm feared amounts to persecution is an analysis that needs to take in to account the situation of each individual child, after an examination of the details of each case.

The rights enumerated in the Convention on the Rights of the Child (CRC) provide guidance in determining whether the act or harm constitutes persecution. There are a number of child-specific rights in the CRC which are fundamental to the protection, development and survival of children. These include: the right not to be separated from parents; protection from all forms of physical and mental violence, abuse, neglect and exploitation; protection from traditional practices prejudicial to the health of children; a standard of living adequate for the child's development; protection from under-age recruitment.

See: UNHCR Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees http://www.unhcr.org/50ae46309.html

4.4 Fear of multiple harmful acts

A well-founded fear of persecution may arise on *cumulative* or *composite* grounds. This means that while individual acts may not amount to persecution, the combination of these acts over time, when taken together, produces an overall effect on the person's mind that can reasonably justify a well-founded fear of persecution.

This is important when the RSDO finds that an Applicant will be subject to harm but each form of harm taken alone, is not sufficiently serious to amount to persecution. RSDOs should then consider:

- whether each of the harm feared is directed at the Applicant for one or more of the Convention grounds, and

- whether the combined and sustained effect of the harm so directed, can amount to persecution.

4.5 Discriminatory conduct

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only if measures of discrimination lead to *consequences of a substantially prejudicial nature* for the person concerned (e.g. serious restrictions on a person's right to earn a livelihood, or to practise his or her religion, or to access normally available educational facilities) that such measures would amount to persecution against a person for a Convention reason. At the same time, and although relevant to the assessment, the fact that some members of society who are similarly situated suffer discrimination not amounting to persecution, does not necessarily disprove an individual's claim that s/he would suffer consequences of a substantially prejudicial nature.

Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.

Whether discriminatory conduct constitutes persecution in the Convention sense also depends on whether it discriminates against a person because of a Convention ground. In other words, there still must be a connection with a Convention ground. The UNHCR Handbook (at para. 68) highlights that discrimination for reasons of race has been condemned as one of the most egregious violations of human rights, and will almost always amount to persecution.

4.6 Involvement of the State

Determining whether a State is involved in the persecution or whether it is being conducted by a non-State agent is important when considering persecution claims. Persecution often relates to action by the authorities of a country. However, persecution can also be perpetrated by non-governmental entities ("non-State actors") such as irregular forces, the local population, guerrilla organizations and paramilitary groups. Where persecution is committed by a non-State actor, it has to be demonstrated that the State was either unwilling or unable to

provide protection. To give an example, religious intolerance resulting in serious discriminatory or other offensive acts committed by a group of the population may amount to persecution if the acts are *knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection* (see further below at 4.10).

4.6.1 Laws of general application and legitimate State objectives

Persecution for a Convention reason will be difficult to establish where the conduct in question is directed at achieving a legitimate State objective. A law that applies to all citizens of a State even if it places additional burdens on members of a particular race, religion, nationality or social group would not ordinarily constitute persecution. Sometimes though, it may not be the law itself but its application that is discriminatory. Prosecution for an offence against "public order", e.g. for distribution of pamphlets, could for example be applied in a discriminatory way, resulting in the persecution of an individual or group of individuals on the grounds of the political content of the publication.

4.7 Military service and conscientious objectors claims

As a law of general application, military conscription (compulsory military service) will not of itself establish persecution for a Convention reason as long as it is applied across the population without discrimination. Further, fear of punishment for avoiding compulsory military service or punishment for desertion does not, in itself, constitute a well-founded fear of persecution under the refugee definition. A person will not be a refugee if the only reason for desertion or draft evasion is because he or she dislikes military service, or fears combat.

However, persecution may be established in some situations. For example:

- persecution within the armed forces is feared for one of the Convention grounds;
- disproportionately severe punishment for draft evasion or desertion for one of the reasons in the Convention, for example, actual/imputed political opinion (e.g. refusal to serve is perceived to be anti-government and thus a political opinion is imputed to the person);

- where the performance of the military duty would be contrary to political, religious or moral convictions, or for valid reasons of conscience ("conscientious objector claims"). For example, forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason.

When dealing with claims relating to compulsory military service, RSDOs should remain aware of a possible **conscientious objector claim** by the person, even if it is not expressly articulated. That is, RSDOs should consider:

- whether the person has raised such a claim expressly
- if not, whether there is evidence that may give rise to such a claim.

4.8 Punishment for a 'common law offence'

If an Applicant claims that they have been persecuted or expect to be 'persecuted' for committing a common law offence, persecution under the Convention will often be hard to establish. A **common law offence** can be described as an offence under a country's laws of general application that does not violate internationally recognised human rights. If the common law penalty or punishment is applied only selectively for a Convention reason, and it is not appropriate and adapted to achieving a legitimate State objective, then it may amount to persecution.

RSDOs may need to consider the criminal code in the relevant country and its application to determine whether the penalty is harsh, excessive, cruel, inhuman or degrading.

Criminal law offences will rarely openly discriminate against persons on a Convention ground. By way of illustration, in the case of *Lama v Minister for Immigration and Multicultural Affairs*[6] the Australian Federal Court rejected the Applicant's claim that his punishment under Nepalese law for killing a cow amounted to persecution. The Applicant claimed he was being persecuted for not strictly adhering to the Hindu religion. The Court found no error with the RRT's conclusion that there was 'no evidence of intent or motivation to harass either Hindus or non-Hindus for reasons of religion either in the letter or enforcement of the law' as it was a law of general application that applied equally to all persons in Nepal.

[6] [1999] FCA 918

> 'What is governed by the law is the act of killing the cow and not the social or political or religious beliefs of the person who commits the killing.'[7]

Nevertheless, RSDOs should be aware that in some circumstances, discrimination may be reinforced through the misuse of laws or practices of apparently general application. This may result from the application of general laws, which impact differently on different persons and thus operate discriminatorily, or through the selective enforcement of a law of general application.

4.9 Questioning or interrogation

Simply being arrested and detained for questioning and interrogation does not amount to persecution, unless the person has been interrogated and detained for a Convention reason and the arrest and detention is arbitrary, the person is subject to human rights abuses in custody or the detention is unreasonably lengthy.

RSDOs should consider in this context whether arrest and detention is justifiable as appropriately adapted to achieving a legitimate State objective. Arrest, detention or interrogation which involves unnecessary and disproportionate acts of harm or the use of excessive force, or is unreasonably lengthy, is not legitimate and, if arising for a Convention reason, can amount to persecution.

Claims involving arrest, detention and interrogation are likely to involve strong factual issues. It is recommended that RSDOs approach these claims with a degree of caution and carefully consider the facts of each individual case. RSDOs should closely scrutinise the evidence to determine if there is a causal connection between the harm complained of and a Convention ground.

4.10 Civil war

Some hold the view that persons fleeing a war or civil war cannot be refugees within the meaning of the 1951 Convention, because the Convention does not refer to armed conflict. This is clearly wrong. Anyone who meets the criteria of the refugee definition set out in the 1951 Convention is a refugee, and this is no different for those who have fled a situation of

[7] *Lama v Minister for Immigration and Multicultural Affairs* [1999] FCA 918 at [29]

armed conflict. Their fear of persecution may or may not be related to the conflict, and as with all asylum applications, it is necessary to establish whether it is well-founded and linked to a Convention ground.

In other words, in all circumstances, the Applicant must fear persecution in the Convention sense. It is the motivation for the acts of persecution, not the presence or absence of conflict, which is important in this regard. The refugee definition will not be fulfilled if the Applicant fears being involved in incidental violence as a result of civil or communal disturbances, and is not specifically being persecuted for a Convention reason.

By way of illustration, the Canadian Federal Court of Appeal has held that: "...*a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition"*[8]

4.11 A State's involvement in the claimed persecution

Whether the State is implicated in the persecution is relevant in determining if the State can reasonably be considered to be able to provide protection against the harm feared. In many cases, because the agent of persecution is often the State or its officials, direct State involvement in persecution will usually be easy to identify.

If the State is not directly involved, RSDOs will need to consider the following questions:

- is the State indirectly involved through the provision of resources, including funds to the agent of persecution?
- if the State has no indirect involvement, does the State offer adequate protection?
- if there is no adequate protection, is it because the State is unwilling or unable to provide the protection?

It is not always necessary that the State be the 'agent of harm'. It is enough that the State is unable or unwilling to provide effective protection from persecution.

[8] Salibian v M.E.I

Where a State encourages or appears to be powerless to prevent it, persecution by private individuals or groups may bring a person within the Convention definition. A fear of persecution is one that is official, or officially tolerated or uncontrolled by the authorities of the country of the Applicant's nationality. For example, the Australian High Court accepted in *Applicant A*[9] that forcible sterilisation carried out by over-zealous local officials could be persecution which is attributed to the State, due to the tacit approval of the Central Government, or its incapacity or unwillingness to take protective action.

In some circumstances, persecution may be established in a situation where the State tolerates, condones or turns a blind eye, for a Convention reason, to personally motivated violent or discriminatory acts. For example, the practice of female genital mutilation or other forms of sexual or gender-based violence, may be perpetrated by individuals. However if the State refuses or is unwilling to provide protection, or effectively condones the practice, such acts may be considered persecution for the purposes of the refugee definition.

In cases where there is a real risk of serious harm at the hands of a non-State actor (e.g. husband or partner in the case of domestic violence, or other non-State actor) for reasons unrelated to any Convention ground, and the lack of State protection is for reason of a Convention ground, it is generally recognized that the link with the Convention (the "nexus requirement") is satisfied. Conversely, if the risk of harm by the non-State actor is Convention-related, but the failure of State protection is not, the nexus requirement is satisfied as well.[10]

4.12 Adequacy of State protection

When assessing claims which involve persecution by non-State actors, RSDOs must review applicable laws, policies and practices in the country of reference, and assess whether the State would actually intervene to protect the particular individual concerned. Applicable legislation may prohibit the harm and/or treatment the applicant would be exposed to, but it is possible that in practice no action is taken to implement it, either because there is no commitment to enforcement, or because the State lacks the power and/or resources to address the situation.

[9] *A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4
[10] See Cambridge University Press, *Summary Conclusions: Gender-Related Persecution*, June 2003, available at: http://www.unhcr.org/refworld/docid/470a33b60.html

There is no clear level of State protection required. It may be useful to note that the Australian High Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003*[11] has suggested that a State must meet the 'standards of protection required by international standards' and is obliged to:

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

The UK House of Lords in *Horvarth v. Secretary of State for the Home Department* has further found that:

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

Where a State fails to act on account of insufficient evidence, or where the government has not been given the opportunity to respond to and remedy the harm and there is evidence that protection might reasonably have been forthcoming, there would not be a failure of state protection. However, RSDOs should be careful to ensure that the assessment evaluates what would happen rather than what should happen. In other words, there should be sufficient evidence to support a conclusion that effective protection of the Application would be forthcoming.

[11] [2004] HCA 18

Chapter 5- The Convention Grounds

5.1 Overview

To be recognised as a refugee, an Applicant must have a well-founded fear of persecution for reasons of one or more of the five reasons stated in Article 1A(2) of the Convention, the 'Convention grounds':

- Race
- Religion
- Nationality
- Membership of a particular social group
- Political opinion.

This chapter discusses each Convention ground in detail.

5.1.1 Claims involving multiple Convention grounds

Persecution may occur for reasons of multiple Convention grounds and therefore RSDOs may have to consider more than one Convention ground in the same application. The various grounds may overlap with each other or be inextricably linked.

It is sufficient to establish refugee status where just one of the reasons for which persecution is feared is for a Convention ground. Therefore RSDOs who encounter a claim/s involving multiple Convention grounds and are minded to recommend that the person be recognised as a refugee, may base the recommendation on the one Convention ground which provides the best evidence for a well-founded fear of persecution.

However in the context of a negative recommendation, each Convention ground, however many are raised, are to be considered and findings to be reflected in the written assessment.

5.2 Race

The Convention ground of 'race' is generally considered to be a broad concept. It will often be the case that this ground will overlap with other Convention grounds, ie, where race is raised as a possible ground of persecution, generally other Convention grounds will be raised concurrently.

Race is not a precise concept - it has been given a broad meaning and refers to persons of identifiable ethnicity. The factors that are regarded as significant in identifying a person's race are:

- biological ancestry
- self-identification as a member of a race
- spiritual, cultural and linguistic heritage and
- recognition by others as a member of a race.

Self-identification and recognition as part of a race may be one of the most important factors.

The UNHCR Handbook at paragraphs 68 to 70 provides that race has to be understood in its widest sense to include all kinds of ethnic groups which are commonly recognised as races. Included in the term are persons who are members of a 'specific social group of common descent forming a minority within a larger population'.

RSDOs should also note that persecution on the grounds of race does not necessarily require that victims be a minority. For example, the ruling Tutsi minority persecuted the Hutu majority in Rwanda.

5.3 Religion

See Annex 1: UNCHR Guidelines on International Protection No 6: Religion Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees at http://www.unhcr.org/40d8427a4.html

5.3.1 Overview

Religion should be broadly understood to encompass both **practice** as well as **belief**. Religious belief need not be expressly held, and may be imputed to a person. A person may also be persecuted for not having a religion or for transgressing the religious values of others, irrespective of their own beliefs. A person should not be compelled to hide, change or renounce his or her religious convictions.

5.3.2 Does the person claim to hold a 'religion'?

If a person claims to fear persecution for reason of religion, it may be necessary for RSDOs to assess whether a 'religious belief' is actually held. There is no single criterion for determining what constitutes a 'religion' and RSDOs should take a broad view of the word 'religion' in the context of the Convention.

The following definitions of the word 'religion' are taken from the Macquarie Dictionary:

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

It is not always necessary for a person to have a detailed knowledge of their religion. In each case, the degree of knowledge that can be expected of a person will depend upon the degree of engagement with the religion that the person claims and the circumstances in which they came to hold religious beliefs or be part of the religion. For example, a person who claims to be a religious leader will be expected to have more knowledge than a mere follower or member of that particular religion

5.3.3 Does the person fear persecution 'for reasons of' religion?

As the UNHCR Handbook comments, persecution for reason of religion may assume a wide variety of forms, including:

- prohibition of membership of a religious community, of worship in private or in public, and of religious instruction (para. 72)
- serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community (para. 72)

Mere membership of a religious community will normally not be enough to substantiate a refugee claim (para 73).

It may also be possible that a person is discriminated against or persecuted because he or she has (or is imputed to have) a different religion to the State religion.

The issue of persecution for reasons of religion may also arise in a variety of factual circumstances. These include the application of generally applicable religious-based laws, departing from orthodox religious beliefs or transgressing social mores, conversion, apostasy and mixed marriage

5.4 Nationality

5.4.1 What is nationality

While in Chapter 3 above it was said that "country of nationality" generally means "country of citizenship" (as opposed to being stateless), when looking at this Convention ground of nationality, its meaning may be understood to be much broader. The UNHCR Handbook states that the term nationality is not to be understood only as citizenship. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race'. In current practice, the most frequently applied meaning is that denoting ethnicity or ethnic origin.

When looking at this Convention ground, nationality is therefore to be contrasted with "citizenship", a term that captures a narrow and legal meaning of 'nationality'. Citizenship can be viewed as a political and legal concept, whereas nationality should be understood as a social and cultural concept. For example, a person may claim to be a *national* of Palestine, but have no *citizenship* of any country and therefore be stateless. Likewise, tribes in Africa may have a "national" identity which does not necessary correspond to the borders of any one country. Similarly, a person may consider him/herself to be a Serbian national but be a citizen of Croatia, and vice versa. Or, a person might hypothetically declare citizenship of Iraq, Turkey or Syria but claim nationality of "Kurdistan", which is not recognised internationally as a nation state, and the claimed borders of which include territory of all three countries.

Often where 'nationality' is raised as a possible ground of persecution, generally other Convention grounds will be raised concurrently.

In particular, it may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion where a conflict between national groups is combined with political movements.

The general principles in assessing claims based on nationality are:

- nationality as a ground of persecution has a broad meaning;
- nationality may include membership of an ethnic or linguistic group and may occasionally overlap with the term ‘race’;
- nationality is to be contrasted with ‘citizenship’ – a term which captures the narrow and legal meaning of ‘nationality’;
- persecution for reasons of nationality may be directed toward an ethnic or linguistic minority;
- there have also been cases where a person belonging to a majority group may fear persecution by a dominant minority;
- persecution for reasons of nationality may overlap with persecution for political reasons in circumstances where an ethnic or political struggle occurs.

5.4.2 Fear of persecution for reasons of ‘nationality’

The persecution feared must arise because the person is of a particular nationality.

The UNHCR Handbook also addresses the concept of persecution for reasons of nationality at paragraphs 74-76:

> ‘..Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.
>
> ‘The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific “nationality”.

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

5.5 Membership of a particular social group

See Annex 2: UNCHR Guidelines on International Protection No 2: "Membership of a Particular Social Group" within the context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees at http://www.unhcr.org/3d58de2da.html

One of the most complex of the five Convention grounds is '*well-founded fear of being persecuted for reasons of … membership of a particular social group'*. Although the basic principles can be stated fairly simply, their application in practice can be diverse and challenging. The facts and circumstances of individual cases and the RSDO's evaluation of them are paramount. UNHCR's definition of this ground is: "**a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."**

This Convention ground applies where an Applicant belongs to a group of persons who share a common characteristic other than the risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is:

- Innate – such as sex, race, caste, kinship ties, linguistic background, or sexual orientation;
- Unchangeable – for example, because it relates to the individual's past history, such as former military officer, former trade union member, or former landowner; or
- Otherwise fundamental to identity, conscience or the exercise of one's human rights, such that the person should not be expected to change or reject it. [12]

[12] See *Canada (Attorney General) v Ward* [1993]

The group must be set apart in some way from others, either because it sees itself as being different, or because it is perceived as such by the persecutor. It does not matter whether the members of the group know each other and associate together, nor is it necessary that it be a small group – thus, for example, there may be situations in which it is appropriate to recognize "women" generally as a particular social group. One of the most visible examples of a particular social group is the family. Claims for refugee status may arise, for example, where family members of political activists or opposition fighters are targeted for persecution as a means of punishing the latter or forcing them to surrender or cease their activities.

The general principles to be considered in assessing membership of a particular social group are:

- the existence or otherwise of a particular social group will primarily depend on the unique facts of each case, including relevant country information
- it is important to consider how the group is formulated or identified, including whether alternative formulations exist
- the 'membership of a particular social group' ground will not be made out if the alleged persecution is the sole defining element in the formulation or identification of the group
- there must be a causal connection between the feared persecution and the person's group membership.

It is very important that in assessing a 'membership of a particular social group' claim, RSDOs look directly at the unique facts and circumstances of each application and assess them on a case by case basis. It is impossible to define the ground exhaustively as what constitutes a particular social group in one society at any one time may not in another society at another time.

5.5.1 Considering the description of a claimed particular social group

The description of the particular social group provides the starting point for making a decision about a claim under this Convention ground.

Membership of a particular social group may be raised on the facts before the RSDO, even if the ground is not expressly raised by the Applicant. Indeed, the facts before the RSDO may oblige the RSDO to consider the membership of a particular social group ground. For example, in the Australian case of *Applicant S v Minister for Immigration and Multicultural Affairs*[13] the High Court found that the RRT failed to consider a particular social group of 'young, able-bodied Afghan males' despite the claim not being raised expressly.

In formulating the description of a particular social group, RSDOs should be aware of the nature of the Applicant's claims and the context involved. A description that is too wide or narrow may cause an error in the finding that is made.

In defining a group, RSDOs should be guided by what the Applicant claims and what appears to be raised squarely by the facts. For example, in the Australian Federal Court case of *SZBJH v Minister for Immigration and Citizenship,*[14] the Applicant had claimed he feared persecution as a 'Punjabi Sikh Jatt land owner'. The Court found an error by the review body as they widened the particular social group by assessing it as 'Sikh land owners'.

In determining whether a particular social group exists, RSDOs must consider the context of the claims. By way of illustration, the Applicant in the Australian case of *Khawar*[15] had claimed to have suffered persecution by reason of her membership of the particular social group of married Pakistani women. The High Court determined that in assessing a particular social group it was important to consider '*the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships*.' Similarly in the UK case of *Islam*[16], the House of Lords found that: *As social customs and social attitudes differed from one country to another, particular social groups could be recognisable as such in one country but not in others"*

---

[13] [2004] HCA 25
[14] [2009] FCA 942
[15] *Minister for Immigration v Khawar* [2002] HCA 14
[16] *Islam v Secretary of State for the Home Department; R V Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20.

The term 'particular social group' should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms. The ground should be applied flexibly and is intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons. However, 'particular social group' should not be seen as a 'catch all' to cover any form of persecution.

Determining whether a particular social group exists is not always easy to identify. The 'membership of a particular social group' ground is being invoked with increasing frequency in refugee status determinations, with States around the world having recognised women, families, tribes, occupational groups, and homosexuals as, in certain circumstances, constituting a particular social group for the purposes of the Convention.

5.5.2 Sex-based particular social group claims

In principle, membership of a particular social group may be based on sex. By way of illustration, Australian courts have accepted that 'single women in India',[17] 'married women in Tanzania'[18] and 'young Somali women'[19], may constitute particular social groups for the purposes of the Convention in the particular circumstances of these cases. In a number of cases, courts have also discussed whether 'able bodied Afghan men' could be a particular social group.

Courts in Canada, the United Kingdom and the United States have also found women in certain circumstances to constitute a particular social group. According to Hathaway J:[20],:

> 'Gender-based groups are clear examples of social subsets defined by an innate and immutable characteristic. Thus although gender is not an independently enumerated ground for Convention protection, it is properly within the ambit of the social group category.'

[17] *Thalary v Minister for Immigration and Ethnic Affairs* [1997] FCA 201
[18] *Minister for Immigration and Multicultural Affairs v Ndege* [1999] FCA 783
[19] *Minister for Immigration and Multicultural Affairs v Cali* [2000] FCA 1026
[20] *The Law of Refugee Status* (1991) at page 162

5.5.3 Gender preference and sexuality-based particular social group claims

See section in 5.7 on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity.

5.5.4 Occupation based particular social group claims

An occupational group may be a particular social group for the purposes of the Convention. Examples discussed by Australian courts include human rights workers in some countries subject to totalitarian rule[21], landlords after the revolutions in China and Vietnam, prostitutes almost anywhere, swineherds in some countries, ballet dancers or other persons who followed occupations identified with Western culture in China during the Cultural Revolution[22], and traditional drummers and dancers in Sri Lanka.[23]

5.6 Political Opinion

5.6.1 Overview

The concept of "political opinion" as a ground for recognition as a refugee should be interpreted in a broad sense, as encompassing any opinion concerning matters on which the machinery of the state, government or society is engaged[24]. It goes beyond identification with a specific political party or recognized ideology, and may include for example an opinion on gender roles. The mere fact of holding a political opinion which is different from that of the government is not in itself a ground for claiming refugee status. The key question is whether the Applicant holds – or is perceived to hold – opinions which are not tolerated by the authorities or by the community, and whether he or she has a well-founded fear of persecution for this reason. Persecution for political reasons may take the form of criminal prosecution. Political opinion may also be the basis for a refugee claim based on refusal to comply with a military service obligation.

'Political opinion' can cover both actual and imputed political opinion, opposition to endemic corruption and criminality among government officers. Political opinion may be expressed through a wide range of mediums.

[21] see *Minister for Immigration and Multicultural Affairs v Zamora* [1998] FCA 913
[22] see *Nouredine v Minister for Immigration and Multicultural Affairs* [1999] FCA 1130
[23] see *VXAB v Minister for Immigration and Multicultural Affairs* [2006] FMCA 857 and *MZXAE v Minister for Immigration and Multicultural Affairs* [2006] FMCA 1087
[24] Gue S. Goodwin-Gill, *The Refugee in International Law*, 2[d.] 1996, at 49.

A broad approach should be taken to determining what is ‘political’. In particular:

- Political opinion is not limited to party politics;
- Political opinion extends to views contrary to the views of the State or opposition party;
- Political opinion may encompass opposition to corruption or whistle blowing;
- Political opinion may include knowledge of a fact;
- A relevant opinion may be one expressly voiced by the person, or one which is merely imputed to them;
- A political profile is relevant, but not necessary, to a political opinion claim;
- A political opinion may be directly expressed or inferred from dress, music or behaviour, or the adoption of particular values or customs;
- Opinion that is yet to be expressed may be relevant to a claim under this ground;
- As a general rule, prosecution under a law of general application will not amount to persecution for reason of political opinion;

5.6.2 ‘Political’ opinion

‘Political opinion’ is not defined in the Convention, nor are there any definitive guidelines on how RSDOs should interpret the term. The words ‘political opinion’ remain ordinary words of the English language.

The issues of sex or gender demonstrate the necessary breadth of the notion of political opinion. Restrictions in some societies prevent women from demonstrating a political opinion or participating in political life. In such contexts, opinions relating to, for example, wearing a veil, women’s education and employment, choice of partner, reproductive rights or violence against women, may also be considered as opinions of a political nature.

Given the range of what is political, RSDOs should approach the question of political opinion on a case by case basis and provide full and careful reasons in light of all the particular facts and circumstances of a case.

RSDOs should also remember that simply holding controversial political opinions is not in itself a ground for claiming refugee status. Applicants must fear persecution for reason of their political opinion. Fearing persecution presupposes that the Applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the

Applicant. The political opinions of a teacher or writer may be more manifest than those of a person in a less exposed position.

The relative importance or firmness/strength of the Applicant's opinions – in so far as this can be established from all the circumstances of the case – will also be relevant. There may, however, also be situations in which the Applicant has not given any expression to his or her opinions. Due to the strength of his or her convictions, however, it may be reasonable to assume that the opinions will sooner or later find expression and that the Applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, and the evidence suggests that the expressions of such opinions would attract persecutory treatment, the Applicant can be considered to have a well-founded fear of persecution for reasons of political opinion.

It is important that RSDOs keep in mind that an Applicant claiming fear of persecution because of political opinion need not show that the authorities of the country of origin knew of his or her opinions before he or she left the country. The Applicant may have concealed his or her political opinion and never have suffered any discrimination or persecution. However, the mere refusal to avail him/herself of the protection of the Government, or a refusal to return, may disclose the Applicant's true state of mind and give rise to a fear of persecution. In such circumstances the test of well-founded fear would be based on an assessment of the consequences that an Applicant having certain political dispositions would have to face if he or she returned.

5.6.3 Corruption, criminality or whistle blowing

If criminality or corruption is endemic in the government or public affairs, or a section thereof, expressions of opposition to such behaviour, such as whistle blowing, may be considered to be expressions of political opinion. In the US Court of Appeal, it was held that:

> *"Whistleblowing against ones superiors at work is not always an exercise of political opinion. However, when the whistle blows against corrupt government officials, it may constitute political activity sufficient to form the basis of persecution on account of political opinion. Official retaliation against those who expose government corruption may amount to persecution on account of political opinion*".[25]

In the Australian case of *Minister for Immigration and Multicultural Affairs v Y*, the Applicant and a friend investigated and reported an assault by police but the authorities took no action. Soon after, they were both abducted and tortured and the friend was killed. The Applicant moved cities but continued to receive threatening phone calls and his family members were assaulted. The Court accepted that persecution for reasons of political opinion can arise out of the investigation and reporting of an assault by police on the basis that this activity could be perceived as being:

> *'… contrary to the views of the State or its Government, or… antithetic to the Government and the instruments which enforce the power of the State, such as the Armed Forces, Security Forces and Police Forces…. the Tribunal found that corruption was so widespread in government in Brazil that the harm done to Y and his wife was likely to represent government coercion against Y whose knowledge and actions were a danger to the operations of government instrumentalities such as the Police Force. The Tribunal therefore found that Y's 'stance was effectively the expression of a political opinion against a pervasive aspect of the Brazilian State'.'*

RSDOs should ensure a thorough assessment of whether such opposition does reasonably fall within the description of 'political opinion' in a given case.

5.6.4 Imputed political opinion

To have a well-founded fear of persecution for reasons of political opinion, the Applicant must hold, *or be believed to hold*, a particular political opinion. It is not necessary that the Applicant in fact hold the political opinion or that the person would describe the opinion as political.

---

[25] *Dionesio Calunsag Grava v Immigration and Naturalization Service* 98-70981 United States Court of Appeals for the Ninth Circuit, 7 March 2000.

In many cases, the Applicant may openly hold a particular political opinion. They may have come to the attention of authorities because the opinion has been publicly expressed or because the person has a public profile. However, it may be the case that persecution for reasons of political opinion may occur if a person is imputed to hold a political opinion, even if the person does not actually hold that opinion. For example, it may be that a person is imputed to hold the same political opinion as other family members or because they live in a particular area, or have a certain ethnic origin.

According to the UNHCR, 'imputed or perceived grounds, or mere political neutrality, can form the basis of a refugee claim…because it is the perspective of the persecutor which is determinative in this respect.' It is sufficient that the alleged persecutors identify the person as a supporter of such opinions and mistreat him or her for that reason.

RSDOs should also be aware that imputed political opinion may arise in the case of a. person returning to their country of origin, having left either secretly or illegally. Departing illegally can attract consequences in certain countries. Whether those consequences are legitimate prosecution (as opposed to persecution) will depend on whether they breach fundamental human rights.

5.6.5 Expression of political opinion generally

Whether a political opinion has been or is likely to be expressed is a relevant consideration in determining whether the Applicant's opinion has, or is expected to come to the attention of the authorities. The nature of the expression of a political opinion may also provide an indication of what the authorities' reaction might be.

Expression of political opinion may take a wide variety of forms, including direct expression such as publishing political works, teaching or speaking out in public. The question of the person's political profile may be a relevant, although not an essential element in this context.
A mere act or refusal to act can also constitute the expression of a political opinion. In this sense the person need not necessarily express their opinion in writing or in words, since the person's actions can disclose true opinions and potentially give rise to a legitimate fear of persecution.

There may be Applicants who have not given any expression to their opinions, but who can be considered to have a well-founded fear of persecution for reasons of political opinion. This may be the case where, due to the strength of their convictions and/or profile, it may be reasonable to assume that the person's opinions will sooner or later find expression and that the person will, as a result, come into conflict with the authorities.

5.6.6 Expression of political opinion in the form of a crime

Where a person is subject to prosecution or punishment for a political offence, a distinction may have to be drawn according to whether the prosecution is for political *opinion* or for politically-motivated *acts*. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the Applicant a refugee.

Whether a political offender can also be considered a refugee will depend upon various other factors. Prosecution for an offence may, depending upon the circumstances, be a pretext for punishing the offender for his political opinions or the expression thereof. Again, there may be reason to believe that a political offender would be exposed to excessive or arbitrary punishment for the alleged offence. Such excessive or arbitrary punishment will amount to persecution.

In determining whether a political offender can be considered a refugee, regard should also be had to the following elements:

(a) personality of the Applicant,
(b) his/her political opinion,
(c) the motive behind the act,
(d) the nature of the act committed,
(e) the nature of the prosecution and its motives, and
(f) the nature of the law on which the prosecution is based.

These elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment – within the law – for an act committed by him or her.

5.7 Gender

"Gender-related persecution" is an encompassing term, used for a range of different claims in which gender is a relevant consideration in the determination of refugee status. The refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. Ensuring that a gender-sensitive interpretation is given to each of the Convention grounds can prove very important in determining whether a particular applicant has a well-founded fear of persecution on account of one of the Convention grounds.

Sex can fall within a "particular social group" category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men. A common problem facing women asylum seekers is the failure of decision makers to incorporate the gender related claims of women into their interpretation of the existing enumerated grounds and their failure to recognize the political nature of seemingly private acts of harm to women.

In other words, persecution that appears to be on account of sex or gender (ie, due to being a woman) may in fact be based on one or more of the other four grounds, not "particular social group". An example of this is where a woman refused to wear particular clothing or to behave in ways prescribed for women. This may be objected to by authorities not because of the sex of the individual but because her refusal to conform indicates an "unacceptable" religious or political opinion.

Gender-related claims of persecution could include (but are not limited to) cases of gender-based violence and gender discrimination including:

- rape, domestic violence, forced prostitution and trafficking, female genital mutilation, forced abortion, social ostracism etc.;

- gender discriminatory laws, policies and practice as well as discriminatory social norms and punishments for not complying with certain norms and laws etc.

While it is generally agreed that 'mere' discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would, for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one's livelihood, the right to practice one's religion, access to available educational facilities or freedom of movement.

See:

- *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, UNHCR (May 2002)*
- *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies, UNHCR (August 2005)*
- *Guidelines on International Protection: The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07 UNHCR (April 2006)
- *Guidance Note on Refugee Claims relating to Female Genital Mutilation, UNHCR (May 2009)*

5.7.1 Persecution on account of one's sexual orientation or gender identity

Refugee claims based on differing sexual orientation contain a gender element. An Applicant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the Applicant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve lesbian, gay, bisexual, transgender and intersex individuals (LGBTI), who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.

If homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalised, an Applicant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable effectively to protect the Applicant against such harm. A proper analysis as to whether such an Applicant is a refugee under the 1951 Convention needs to start from the premise that Applicants are entitled to live in society as who they are and should not have to hide that.

As affirmed by the position adopted in a number of jurisdictions, sexual orientation and/or gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal.

See: *UNHCR Guidelines on International Protection: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/01 UNHCR (23 October 2012)*

Chapter 6 - Well-founded fear

Factors for consideration
Is there a reasonable possibility that the Applicant would be persecuted if returned?
Is there effective state protection?
Is the Applicant"s fear well-founded in relation to the whole country?
Can the Applicant reasonably be expected to internally relocate?

6. Well-founded fear

6.1 Overview

Article 1A of the Convention requires the Applicant's fear of persecution to be 'well-founded'.

The following issues are important to note in relation to well-founded fear:

- RSDOs should assess whether a fear is well-founded at the time of recommendation, not at the date on which the application was lodged or when the Applicant left country, noting this assessment is a forward looking test;
- evidence of past persecution may support a finding that there is a well-founded fear of persecution at the time of decision, but past persecution is not essential for a claim to succeed;
- RSDOs should focus on the 'reasonably foreseeable future' when considering what may happen to Applicant in the future;
- in assessing the existence of a well-founded fear of persecution, RSDOs must cumulatively weigh up and include all relevant incidents and circumstances;
- the adequacy/effectiveness of state protection may be a relevant consideration for RSDOs to assess in relation to well-founded fear;
- if an Applicant can reasonably be expected to relocate to a different part of the country of origin, where he or she would not be persecuted, RSDOs may find that the Applicant's fear is not well-founded fear.

6.2 Assessing the Fear

6.2.1 Overview

There must be an objective factual basis for the fear. Assessing the basis of the fear involves looking at the independent evidence, such as country information, as well as the Applicant's claims, to determine whether the fear is objectively well-founded.

Whether or not the fear is "well-founded" must be assessed in the context of the situation in the Applicant's country of origin and in light of his or her personal circumstances. The RSDO also needs to develop a detailed understanding of the Applicant's background, profile and experiences. Experiences of family members and/or other persons with a comparable profile may also be relevant.

The Applicant's credibility and his or her fear must then be evaluated against independent information on the conditions in the country of origin. Reliable country-of-origin information from independent sources is an essential resource in this regard.

In general, eligibility for refugee protection under the Convention requires a current or future fear of persecution. If the Applicant suffered persecution in the past, it may normally be assumed that he or she continues to be at risk of persecution. However, provided all other eligibility criteria are also met, a person who has not been persecuted in the past may still qualify for refugee status if he or she is avoiding persecution in the future. RSDOs will need to consider, particularly in cases where the Applicant fears harm at the hands of actors other than the State (so-called "non-State actors"), whether or not the State is able and willing to provide protection within the country of origin or former habitual residence: if this is the case, the Applicant's fear will not normally be considered well-founded. However, there may be situations in which the circumstances in the country of origin have fundamentally changed and an Applicant who was previously persecuted there would no longer face a risk of persecution if he or she were to return.

Contacts between an Applicant and the consular authorities of his or her country of origin may be indicative of an absence of a fear, although this would not be the case where the latter only provide administrative assistance.

For more information on the well-foundedness of an Applicant's fear of persecution, see UNHCR's *Handbook* at paragraphs 42-50
and *UNHCR's Note on Burden and Standard of Proof in Refugee Claims,* 16 December 1998.

6.2.2 Threshold of the Fear

The threshold of the fear relates to what standard of proof is to be applied to asylum cases in Nauru to determine if a fear is "well-founded". The UNHCR Handbook states that an Applicant's fear of persecution should be considered well-founded if he or she "can establish, to a reasonable degree, that [his/her] continued stay in [his/her] country of origin has become intolerable...".

In Nauru, UNHCR's Note on Burden and Standard of Proof in Refugee Claims at http://www.unhcr.org/refworld/pdfid/3ae6b3338.pdf is accepted as authoritative. **To establish "well-foundedness", persecution must be proved to be reasonably possible.**

What does "reasonably possible" mean? International jurisprudence generally supports the view that there is no requirement for an asylum seeker to prove their fear conclusively beyond doubt, or even that 'it would be more probable than not' that the feared harm will materialise. Courts in common law jurisdictions have approached the question in different ways. In the US, the Supreme Court has held that an asylum seeker "need not prove that it is more likely than not that he or she would be persecuted in his or her home country".[26] In the UK, the House of Lords determined that the test should be less stringent and ruled that the fear is well-founded if there is a *reasonable degree of likelihood* that the person may be persecuted. In Australia, the High Court has endorsed the standard in both the US and UK cases mentioned above, but preferred to equate it to the term "real chance" on the basis that:[27]:

- a real chance discounts what is remote or insubstantial;
- a real chance is one that is not remote, regardless of whether it is less or more than 50%;
- an Applicant for refugee status may have a well-founded fear of persecution even though there is only a 10% chance that he will be persecuted, however, a far-fetched possibility of persecution must be excluded.

[26] INS v Cardoza-Fonseca
[27] *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* [1989] HCA 62

6.2.3 Past persecution

Evidence of past persecution is relevant as a starting point to assess whether the Applicant's fear of being persecuted is well-founded. RSDOs should be aware however, that evidence of past persecution does not give rise to a presumption that the fear is well-founded unless subsequent events justify that fear.

The relevance given to evidence of past persecution will depend on whether the circumstances that gave rise to the persecution still exist. For example, if there has been significant improvement in the conditions of the country of origin, a RSDO might not attach as much weight to evidence of past persecution as an indicator of the chance of persecution occurring in the future.

RSDOs need to carefully examine the possible effect of any change in conditions on the Applicant's circumstances.

It should be noted that an Applicant does not have to show past persecution in order for Nauru to make a positive RSD. Whether the Applicant has a well-founded fear of persecution is the Convention test and is a prospective assessment of risk.

Similarly, an Applicant who is a refugee "sur place" (see Chapter 7) can have a well-founded fear of persecution even if they have never experienced persecution prior to his/her arrival in the country of asylum.

6.2.4 Cumulative claims

Where the Applicant's claims for protection are based on a number of grounds or different incidents, RSDOs need to consider the claims cumulatively. This means that individual acts may not amount to persecution by themselves but, when considered all together, may still lead to a finding that an Applicant has a well-founded fear of persecution.

RSDOs should keep an overview of the case in mind and avoid artificial segmentation of the Applicant's claims. While a particular claim might be rejected by a RSDO, the facts underlying the claim may still be capable of supporting a finding that the Applicant is at risk of persecution in relation to another claim or in conjunction with other facts.

6.3 Adequacy of State protection

The availability of State protection from persecution in the country of origin may be relevant to the assessment of whether an Applicant's fear of persecution is objectively well-founded and whether the State is implicated in the alleged harm.

The issue of State protection will usually arise where the Applicant claims that they are being persecuted for a Convention reason by non-State agents. In these circumstances, the RSDO will need to assess whether the State is unable or unwilling to provide adequate protection from persecution by non-State agents. If the State is able to provide adequate protection in these circumstances, the Applicant's fear of persecution will not be objectively well-founded. State protection will not usually be an issue where persecution is perpetrated by the State itself.

The adequacy of the relevant State protection is a question of fact, to be determined on the evidence of each case.

While there is no clear level of State protection required, an Australian High Court case *S152/2003* may be useful to refer to. It has suggested that a State must meet the 'standards of protection required by international standards' and is obliged to:

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

Accordingly, in assessing whether the State is able to provide protection against non-State harm, RSDOs should look to evidence such as:

- how the governing authorities of the State in question treat persons in their country,
- how the police, judicial and allied services function, and
- whether the State is governed by the rule of law or has an infrastructure of laws designed to protect its nationals against the sort of harm feared.

See: ***Position on Agents of Persecution*, UNHCR (March 1995)**

6.4 The relocation principle – Internal relocation

The relocation principle can be said to be implied from the definition of a refugee in Article 1A(2), and is consistent with the basic principle underlying the Convention that protection by the international community is appropriate only in the absence of protection within a nation. The possibility of relocation is part of the finding of fact as to whether a person has a well-founded fear of persecution for a Convention reason in relation to the country of claimed persecution.

If the Applicant's fear of persecution is confined to a specific part of the country, outside of which the feared harm would not materialize, it may be appropriate to assess whether he or she can reasonably be expected to move to another part of the country and avail him or herself of State protection there. This is known as the "internal flight or relocation alternative". Where it exists, the Applicant may not be eligible for international refugee protection.

In principle, this "internal flight alternative" is relevant only in certain limited circumstances, where the risk of persecution emanates from "non-State" actors such as guerrilla groups who are controlling only part of the country. The determination of whether or not an internal flight alternative exists requires two steps:

STEP 1

- a relevance analysis, in which it must be examined whether the area identified is practically, safely and legally accessible to the Applicant, and
- whether he or she would be at risk of persecution (for original Convention reasons or new ones) upon relocation, at the hands of the State or non-State actors.

STEP 2

- An analysis of reasonableness. This means determining whether the individual concerned could reasonably be expected to establish him or herself in the area identified and live a normal life there, without undue hardship. This requires an assessment over time, taking into account the original reasons for flight and a consideration of whether the proposed area provides a meaningful alternative in the future. It requires consideration of the person's individual characteristics, such as age, family circumstances, disability etc.

Where the State has been identified as the agent of persecution, the internal flight alternative is normally not relevant, as there is a presumption that its authorities operate throughout the country

See: UNHCR Guidelines on International Protection No 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees at http://www.unhcr.org/3f28d5cd4.html

Chapter 7 - Sur place claims

The requirement that a person must be outside his country to be a refugee does not mean that he or she must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. The person may have decided to ask for recognition as a refugee as a result of events that have occurred after having already been abroad for some time. A person who was not a refugee at the point of departure from his or her country, but who becomes a refugee at a later date, is called a refugee *"sur place"*.

A person becomes a refugee *"sur place"* due to circumstances arising in the country of origin during his or her absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.

A person may become a refugee *"sur place"* as a result of his or her own actions, such as religious conversion in the new country, associating with refugees already recognized, or expressing a political view in the new country of residence. A person may become a refugee *"sur place"* due to his or her actions en route to the country of asylum (for example in a transit country) or as a result of the conduct of third parties, such as the media, or social or political adversaries.

Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether and how such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.

Sur place claims are assessed in the same way as other Article 1A claims. If the Applicant asserts a fear of persecution based on his or her political activities or religious conversion, it needs to be examined whether:

- The Applicant's convictions and/or conduct have come, or are likely to come, to the attention of the authorities in his or her country of origin; and
- Whether there is a reasonable possibility that on return the Applicant would experience persecution for a reason related to a 1951 Convention ground.

If these conditions are met, the Applicant will qualify for refugee status. This also applies where the Applicant may not genuinely hold the political convictions or religious beliefs expressed, but where the mere fact of their expression may nevertheless be considered by the authorities in the country of origin as a hostile act and is likely to give rise to persecution.

There is no "good faith" requirement in the Convention. However, in cases where the Applicant has deliberately engaged in activities in the host country which are designed to bring him or her within the refugee definition by creating a risk of persecution in the event of return, the RSDO must carry out a thorough investigation to establish the existence of each element of the Article 1A(2) definition. If the opportunistic nature of activities designed to bolster claims for asylum would be apparent to the authorities in the country of origin, the Applicant's acts may invite little attention and may not give rise to a well-founded fear of persecution. If they would, however, result in persecutory treatment, the individual concerned would qualify for refugee status provided all other elements of the definition are also met.

It may also be the case that a person may become a refugee *"sur place"* not due to his or her own actions, but because the situation in the country of origin has changed (for example, a new extremist government) and the person may be persecuted if returned.

Chapter 8 - Credibility issues

Important factors
Assess the credibility of the Applicant and the evidence: ▪ establish the facts ▪ consider the facts ▪ test the claims and ▪ make and record credibility findings.

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

8. Overview

The process of determining whether an Applicant has a well-founded fear of persecution under the Convention involves assessing the Applicant's fear in an objective context. This requires RSDOs to assess the credibility of the Applicant's claims and the supporting evidence as to whether the fear of persecution should be accepted as being well-founded for a Convention reason.

An Applicant may not be able to support his or her statements by documentary or other proof. Cases in which an Applicant can provide evidence of all of his or her statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. These circumstances are not sufficient in themselves negatively to affect the credibility of the Applicant's claims.

The RSDO must provide the Applicant with a real opportunity to provide evidence. It may be the case that the RSDO will have to use all possible means to produce the necessary evidence in support of the application. Even independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. **In such cases if, on balance the Applicant's account is capable of being believed, he or she should, unless there are good reasons to the contrary, be given the benefit of the doubt.**

8.1 Assessing Credibility: Key Steps

Key steps in establishing credibility, which are explained in more detail further below are:

8.2 Establishing the facts (*see 8.2*):

- collect information on the Applicant's claims and any evidence provided in support of those claims, include information and supporting documents submitted by the Applicant and information given by the Applicant during the interview and
- obtain country information relevant to the Applicant's claims and, where applicable, seek advice from independent experts.

8.3 Considering the facts (*see 8.3*):

- determine which of the facts are material to the assessment of the Applicant's claims and
- identify any issues regarding the credibility of the Applicant's claims, such as inconsistencies, contradictions, omissions or other factors relevant in assessing credibility.

8.4 Assessing the credibility of the claims *(see 8.4)*:

- test the evidence available in light of a range of factors, always following procedural fairness requirements.

Chapter 9 - Making and recording credibility findings *(see Chapter 9)*:

- after testing the evidence, determine, on an objective basis, what is credible or not credible in the circumstances of the case and when to give benefit of the doubt. These findings should be recorded in the Assessment Form, stating clearly the conclusion reached and including reasons.

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

If there are specific aspects of an Applicant's account that may be important to the assessment and may be open to doubt, RSDOs should ask the Applicant to expand on those aspects of the account. This opportunity to respond is an important aspect of procedural fairness.

8.2 Establishing the facts

1 Why we need evidence

A decision as to whether an Applicant's claims are credible or not should NOT be based on the RSDO's subjective belief or "gut feeling" about whether an Applicant is telling the truth or not. Instead, the RSDO must consider what is reasonably believable in the circumstances taking into account factors including gender, culture, education and social mores. Evidence assists the RSDO in making objective findings based on *fact* regarding the credibility of an Applicant's claims.

2 What evidence is available

RSDOs need to take care to collect all available evidence before assessing an Applicant's claims. This evidence may come from the Applicant or from independent sources. Evidence from an Applicant, other than the information in their Application Form, may take the form of oral statements made at interview, documentary evidence (see point 4 below), or third person (including expert) testimony they have submitted that supports their claims.

Other independent evidence may also be available to RSDOs. This could include information about conditions and laws in an Applicant's country of origin, or documentary evidence or expert reports available to the RSDO.

3 Oral statements

Statements may be collected directly from an Applicant through an interview.
The interview should:

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

4 **Documentary evidence**

Documentary evidence provided by an Applicant might include, but is not limited to, identity documents, news articles, reports from academics, educational qualifications, employment documents, documents evidencing their religious affiliation, such as baptismal certificates, documents relating to their membership of a political or social organisation, UNHCR documents and military service documents. It may also include photographs or video or other digital documentation.

RSDOs should examine all documents submitted by an Applicant and, if relevant to the case, determine whether they accept that evidence as credible and if not, why not.

Passports should be checked for entry/exit stamps, visas, or other evidence of countries visited, or evidence of return to country of origin. This evidence should accord with the Applicant's account of events. If it does not, the Applicant should be invited to comment on any inconsistencies or discrepancies.

Note in Nauru there is no statutory provision allowing RSDOs to draw adverse inferences about an Applicant's credibility if the Applicant fails to provide evidence of identity. Indeed, it is likely that Applicants who have been transferred to Nauru under the Australian Migration Act will not be in possession of travel documents or identity documents. Inability to produce such documentation, or to recall numbers and details of documents which are not in the possession of the Applicant, should not necessarily be used to draw adverse inferences about the Applicant's credibility.

Note that under the *Refugees Convention Act 2012*, where an asylum seeker is in possession of an identity document but declines to provide it upon when reasonably required by the Secretary, the Secretary may then decline to make a determination.

5 **Independent/expert evidence**

Independent evidence includes, but is not limited to, country information confirming the conditions and laws in the Applicant's country of origin which are current and relevant to the claims. As further detailed in RSDO training, and in the Procedural section of this Handbook,

Nauruan RSDOs will have access to reliable databases for the purposes of obtaining current country information.

8.3 Considering the facts

8.3.1 Materiality - Relevance

Material facts are those that go to establishing whether or not the Applicant is a refugee. It is for the Applicant to provide the details of their claims (note however that it may be appropriate for the RSDO to take a more pro-active role in eliciting details and claims from Applicants who are minors or have some intellectual disability or other factor affecting their capacity to present their claims). The RSDO's role is to identify which facts are material to their claims -what is important to the Applicant may not necessarily be material to the assessment of the claim and what is material to the assessment of the claim may not seem important to the Applicant.

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

Credibility findings should be based on relevant and material facts only. Therefore, RSDOs should first make a determination on the relevance of each piece of evidence before them.

Issues concerning the credibility of facts that are not material to the Applicant's claim, such as inconsistency, misrepresentation, concealment or exaggeration should not lead to an automatic rejection of an Applicant's claims. Instead, the facts themselves may be discounted because they are not material to the claim.

8.3.2 Issues for consideration

Once the material evidence has been identified, the RSDO should consider whether there are any aspects of the Applicant's case that are material to the determination that do not appear to be credible or otherwise cast doubt on the credibility of the Applicant'c claims. If there are

factors evident which may bring into question the overall credibility of the Applicant's claims or a critical aspect of the claim, this will require further investigation.

8.4 Assessing the credibility of the claims

8.4.1 Why we need to assess the credibility of claims

Applicants often make claims that cannot be independently verified or are otherwise lacking in supporting evidence. This does not mean that they are untrue. There is no requirement that evidence provided by Applicants must be independently corroborated before it can be accepted by RSDOs. It is the role of the RSDO to consider whether the Applicant's claims are credible and if the claims should be accepted.

RSDOs must make findings about whether past events have taken place and about the reasonable possibility of future events occurring. In doing so, they must weigh the available evidence and make findings on the credibility of claims based on that evidence.

The following sections concern situations in which credibility concerns may arise and types of behaviour that may lead to doubts about the credibility of an Applicant's claims. However, in assessing the credibility of the person's claims in these situations, *the RSDO will also need to be mindful of any circumstances that might mitigate the existence of inconsistencies in the Applicant's evidence or provide an explanation for the person's behavior or their capacity to present claims, which may include considerations of: age; gender; social, cultural or educational background; experience of torture or trauma; health status (including mental health); and disability.*

8.4.2 Inconsistencies, contradictions or omissions

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

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

Issues for consideration:

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

8.4.3 Implausible, vague or incoherent claims

Claims put forward by Applicants may include implausible, vague or incoherent information. RSDOs need to consider whether this information affects the credibility of the Applicant's claims.

RSDOs may reject claims of an Applicant on the basis that the claims are implausible, irrational or lacking in common sense only if these findings are supported by current country information or other known facts that clearly bring into question the plausibility of the claims.

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

However, RSDOs:

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

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

Issues for consideration:

1. Is there independent evidence (country information or other known facts) that brings into question the plausibility of the Applicant's claims?
2. Is the Applicant's testimony sufficiently incoherent, vague or lacking in knowledge that might be expected of a person in their claimed situation or position, so as to bring into question the credibility of the claims?
3. Are there any extenuating circumstances that could explain why the Applicant's testimony is incoherent, vague or lacking in detail?
4. Has the RSDO provided a real opportunity for the Applicant to respond regarding implausible vague or incoherent claims which raise issues concerning credibility?
5. Has the RSDO provided sufficient reasoning to explain why they believe some or all aspects of the Applicant's story are not credible?

8.4.4 Demeanour

The use of demeanour of an Applicant when presenting or discussing claims during an interview is generally discounted as a reliable measure of credibility. In particular therefore, RSDOs must not form impressions based merely on the Applicant's physical appearance or general mannerisms.

RSDOs should avoid relying on an Applicant's demeanour when making a finding on credibility and should always be mindful of the following factors:

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

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

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

Issues for consideration:

1. Has the Applicant's demeanour sufficiently raised concerns as to the credibility of their claims?
2. Are there any mitigating circumstances or other factors that could affect or explain the Applicant's demeanour?
3. Has the RSDO provided the Applicant with a real opportunity to respond to concerns regarding the Applicant's demeanour?

In assessing the credibility of an Applicant's claims, the RSDO should be aware that there may be mitigating circumstances relating to the Applicant that should be taken into account. As well as the factors listed in the section "Demeanour" that need to be taken into account when considering the manner in which Applicants provide information at interviews, such circumstances may include, but are not limited to the issues addressed below in 8.4.4.1 to 8.4.4.5.

8.4.4.1 Mental or emotional trauma

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

A study conducted in 2002 by British psychologists examined the effect that post-traumatic stress disorder (PTSD) had on the consistency of recollections of persons seeking protection under the Convention.[28] Their findings were that:

- discrepancies between an individual's accounts were common;

[28] Herlihy et al 'Discrepancies in autobiographical memories - implications for the assessment of asylum seekers: repeated interviews study' BMJ (2002) Vol. 324 pp 324-7

- for persons with high levels of PTSD, the number of discrepancies increased with length of time between interviews;
- more discrepancies occurred in details peripheral to the account than in details that were central to the account.

RSDOs should be mindful of how trauma may impact an Applicant's engagement at interview and recollection of events.

8.4.4.2) Forgetfulness

A person:

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

Such confusion and forgetfulness does not necessarily imply that they are not telling the truth. Most people experience some level of confusion or forgetfulness in their recollection of events, especially in stressful situations.

8.4.4.3 - Differences in perception

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

8.4.4.4 Feelings of shame, fear or mistrust of authorities

A person may be unwilling to reveal the whole of their story because of feelings of shame, or for fear of endangering relatives or friends in their home country or due to mistrust of persons in positions of authority. This may explain why applicants are slow to reveal material information.

Claims involving gender-based persecution, especially those of a sexual nature, may give rise to particularly painful memories, as well as shame or embarrassment. In any consideration of

credibility, the RSDO should take into account the effects of such trauma on the Applicant's demeanour and emotional state and on their capacity to recall events.

8.4.4.5)-Special considerations for minors

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

8.5 Procedural fairness - The Applicant's opportunity to comment

8.5.1 Procedural fairness and why it is important

Under procedural fairness principles, if credibility issues arise during the assessment of an Applicant's claims, the Applicant should be given the opportunity to respond to those issues. General procedural fairness principles are that:

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

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

8.6 Benefit of the doubt

8.6.1 When benefit of the doubt may need to be considered

A RSDO is not required to accept uncritically an Applicant's claims and the Applicant is not entitled to have their claims accepted simply because there is a possibility that they might be true. Nevertheless, RSDOs should be sensitive to the difficulties often faced by Applicants and <u>must give the benefit of the doubt if the Applicant is generally credible but is unable to substantiate their claims</u>.

Chapter 9 - Making and recording credibility findings

9.1 Making credibility findings

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

Even if an RSDO rejects some of an Applicant's evidence or claims on account of a lack of credibility, this will not necessarily lead to a complete rejection of their claims. The RSDO must still consider if a well-founded fear of persecution exists for a Convention reason.

9.2 Findings that may be reached

After assessing an Applicant's claims in light of all of the evidence before them, a RSDO may come to one of the following conclusions:

1. The Applicant's claims are credible and consistent with all the available evidence and raise no doubts during assessment, so that the RSDO is satisfied as to the Applicant's overall credibility or
2. the RSDO has doubts concerning some of the Applicant's claims, but finds that those claims are either immaterial to the case, or are not significant enough to outweigh the other evidence or information that supports the Applicant's claims; consequently, the Applicant's claims are found on the whole to be credible or benefit of the doubt is given regarding the claims or
3. there are deficiencies or doubts in relation to some or all of the Applicant's claims that are so serious that the RSDO cannot be satisfied as to the credibility of those claims.

9.3 Recording credibility findings in the Assessment Form

When recording credibility findings in the Assessment Form the RSDO should:

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

Finally, the RSDO should clearly link the reasoning behind their credibility findings to their assessment as to whether the Applicant fulfils the refugee definition.

CHAPTER 10 - Conclusion on assessing credibility and further information

10 Conclusion

Assessing credibility is an important and difficult aspect of the decision-making process. RSDOs must maintain an open mind when assessing individual cases and when deciding whether an Applicant's evidence is to be believed and how much weight is to be given to the information and evidence before them.

RSDOs should be mindful of the issues covered in this Handbook when assessing the credibility of an Applicant's claims. Recognition of the diverse range of factors that influence a person's behaviour and the information they provide and the assessment of that information will assist in ensuring a robust and fair refugee determination process.

For further advice on matters covered in this instruction, including establishing credibility, benefit of the doubt and procedural fairness principles,**see**:

- UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1992 Paragraphs 41-42, 195-196, 203-205 and 219
- UNHCR Note on Burden and Standard of Proof in Refugee Claims 1998, Section III.

10.1 Testing the Applicant's claims - Overview

Several authorities provide that it is appropriate for RSDOs to 'test' claims by reference to externally verifiable evidence or generally known facts. These are mentioned in below.

10.1.1 Linguistic analysis

Linguistic analysis in RSD broadly refers to the practice of analysing an Applicant's language and dialect to determine his or her home country. It is important to note that linguistic analysis is currently used only as the last resort where appropriate. It is generally not considered to be reliable and for this reason will not be used in Nauru's RSD process.

10.1.2 Religious and political knowledge

A RSDO can question an Applicant to test their knowledge of the claimed religion or political belief to further assess their credibility. However a RSDO must do this carefully in light of varying levels of knowledge. For example, an Applicant's knowledge of his/her religion will depend on the Applicant's claimed involvement with the religion, and may also be affected by such factors as gender or educational background.

10.1.3 Geographical knowledge

It is open to a RSDO to assess an Applicant's awareness of the local geography of their home region or other relevant locations to assist with determining credibility. For example, if an Applicant claims to have lived in a particular place, it is reasonable that they will have some knowledge of its local geography such as locations of civic buildings, topography, roads and markets.

The assessment of geographical knowledge has to be used carefully. It is possible for Applicants to research geographical aspects of their claim. Conversely, some Applicants may be generally unaware of, or unable to remember, geography. RSDOs should also keep in mind that an Applicant may not be able to read maps and may therefore need to explain their knowledge of local geography in other ways.

10.2 Explaining the reasons behind a finding on credibility

RSDOs should look at all evidence as a whole and decide which evidence is relevant or material to the application. By law, RSDOs are required to take into account relevant considerations when making a decision on an application.

When looking at evidence, RSDOs should consider whether evidence is:

- relevant;
- reliable;
- credible;
- current; and
- sufficient.

As a result of this process, RSDOs should consider:

- how much weight should be given to the evidence.

If an RSDO decides that an Applicant is not credible, the reasons for this determination should be clear and referable to probative evidence. The reasoning process and supporting evidence that forms the basis on which a finding of evidence is rejected should be explicitly mentioned in the assessment.

10.3 General or specific credibility finding

RSDOs should be aware that there is a difference between an Applicant's general credibility and a finding that a claim made by the Applicant is not credible. Although subtle, the difference is significant - an Applicant's account might be true in the sense that the Applicant's own knowledge and experience lead the Applicant to believe they are at risk, but it might be at variance with known facts such that the fear cannot be said to be well-founded. In these circumstances it is open to argue that although the account is not credible, the Applicant's overall credibility in relation to their claim for protection is. A statement or account can be honestly given but wholly unsubstantiated such that it does not support an adverse conclusion about the Applicant's overall credibility.

Chapter 11 - Cessation of refugee status - Article 1C

Factors for consideration
Does refugee status cease due to one of the following: ▪ Has the person voluntarily re-availed themselves of the protection of the country of origin? ▪ Has the person voluntarily re-acquired nationality, having lost it previously? ▪ Has the person acquired a new nationality that provides protection? ▪ Has the person voluntarily re-established themselves in their country of origin? ▪ Have there been changes in circumstances that no longer make the person a refugee?

11 Article 1C Cessation – Overview

See: UNHCR "The Cessation Clauses: Guidelines on their Application" Geneva 1999 at http://www.unhcr.org/refworld/pdfid/3c06138c4.pdf

Refugee status as conceived in international law is, in principle, a temporary status. Once a refugee can safely return and re-establish him or herself in the country of origin or habitual residence, or obtains the full protection as a citizen of another country, international protection is no longer justified or necessary. If this is the case, the asylum country or UNHCR may decide that a refugee's status should come to an end. The circumstances in which such a decision may be permitted are exhaustively enumerated in the so-called "cessation clauses" of Article 1C of the Convention.

Cessation of refugee status requires a formal decision. It results in the loss of refugee status. Given the significant consequences of cessation for the individual concerned – in particular, the ending of protection against refoulement as provided for under Article 33 of the 1951 Convention, its application requires careful consideration of whether all relevant criteria are met. The cessation clauses must be interpreted restrictively, and procedural safeguards must be in place, including the possibility for the individual concerned to challenge the application of a cessation clause in his or her case.

Article 1C of the Convention specifies six circumstances under which refugee status will cease. Each of the six circumstances is considered in detail below. The six circumstances are exhaustively listed; this means that no other reasons may be used to cease refugee status.

Article 1C is usually not relevant to the assessment of refugee status, so is not an issue which RSDOs need to know in depth. Other officials at the Department of Justice and Border Control however will need to understand and be able to apply the cessation clauses.

11.1 Article 1C(1) - Voluntary re-availment of protection

"He has voluntarily re-availed himself of the protection of the country of his nationality"

Article 1C(1) states that the Convention will cease to apply if the refugee has voluntarily re-availed him or herself of the protection of the country of his/her nationality. There are three elements to this clause:

- Voluntariness: the refugee must act voluntarily, that is, there must be a voluntary act by the refugee to contact or return to the country of origin;
- Intention: the refugee must intend to re-avail him/herself of the protection of the country of nationality;
- Re-availment: the refugee must actually obtain such protection.

Technically, the refugee need not be physically present in the country in which they have re-availed themselves of protection in order for Article 1C(1) to apply. However, in these circumstances the provision should be applied with caution. In particular, the refugee must have acted voluntarily in contacting the authorities in the country of origin. Such contact will not be voluntary if the refugee felt compelled to act, for example, because of a threat or instruction issued by that country. Contact will also not be truly voluntary where the refugee has no option but to contact the authorities for information or documents, such as birth or marriage certificates, or to apply for a divorce in the home country.

The refugee should intend to re-avail him/herself of the protection of the country of origin. This involves looking at the refugee's motivation for contacting the country of origin and the type of contact undertaken. All the circumstances of the contact between the individual and the authorities of the country of origin must be taken into account.[29] The UNHCR Handbook draws a distinction between acts intended as re-availment of protection and those that constitute incidental contact with the national authorities.[30] If a refugee applies for a national passport, or has his or her passport renewed by the authorities of the country of origin, the question of whether this is sufficient evidence that he or she intends to avail of the protection of that country must be assessed on a case-by-case basis taking into account all the circumstances. In contrast, evidence of a request for documents such as birth or marriage certificates would not, by itself, be a sufficient indicator of the refugee's intention to re-avail him/herself of the protection of the country of origin.

Where the refugee visits his/her country of origin using a travel document issued by the country of refuge (eg travelling on a Nauruan passport), as opposed to a passport from the country of origin, the UNHCR Handbook (at para 125) advises that:

> 'Cases of this kind should…be judged on their individual merits. Visiting a sick or old parent will have a different bearing on the refugee's relation to his former home country than regular visits to that country spent on holidays or for the purpose of establishing business relations.'

11.2 Article 1C(2) - Voluntary re-acquisition of a lost nationality

"Having lost his nationality, he has voluntarily re-acquired it"

This clause deals with circumstances where the refugee lost the nationality of their country of origin then voluntarily re-acquired it. It differs from Article 1C (1) above, as in the above clause, the person has not lost his or her nationality.

Many refugees retain the nationality of their country of origin. However, some refugees may lose the nationality of the country of origin through measures taken by the authorities of that country, or through actions taken by the refugee themselves, for example, through renunciation of citizenship or, in some cases, marriage.

[29] Goodwin-Gill, GS: *The Refugee in International Law* (Oxford UP, 1996) p81
[30] UN Handbook at paragraph 121

Again, there is the required element of voluntariness. That is, the refugee must opt to re-acquire the nationality of his/her own free will. As with Article 1C(1), Article 1C(2) does not require the refugee to be physically present in the country of origin. Article 1C(2) can therefore come into effect while the refugee is still outside the country of origin and without him or her actually visiting that country.

11.3 Article 1C(3) - Acquisition of a new nationality that provides protection

"He has acquired a new nationality and enjoys the protection of the country of his new nationality"

Article 1C(3) states that the Convention shall cease to apply to any person who acquires a new nationality and enjoys the protection of the country of the new nationality. Therefore:

- there is no requirement that actual acquisition of the new nationality be voluntary, but the refugee must choose to gain access to the protection offered by the newly acquired nationality; and
- the country of new nationality must provide effective protection.

In contrast to the first two cessation clauses, which deal with situations where the refugee resumes the protection of their country of origin, Article 1C(3) addresses the situation where the refugee acquires the nationality and protection of a new country. Article 1C(3) operates even where acquisition of the new nationality is involuntary, for example, through operation of law or decree. Because the inclusion clause at Article 1A(2) requires that a person with more than one nationality must establish a well-founded fear of persecution in respect of all their countries of nationality, a person who acquires a new nationality would need to re-establish any entitlement to protection.

With this in mind, the new nationality must provide the refugee with effective protection from persecution and must accord the refugee the fundamental and usual rights of being a national. In each case, the RSDO will have to assess whether in fact the protection in the new country will be effective protection.

11.4 Article 1C(4) - Voluntary re-establishment in country of origin

"He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution"

The Convention will also cease to apply to persons who voluntarily re-establish themselves in their country of origin (country where the persecution was feared). Note that:

- re-establishment requires more than mere presence or temporary return to the country of origin, although frequent or prolonged visits may constitute re-establishment and
- re-establishment must be voluntary.

The underlying principle of this clause is that a refugee who voluntarily re-establishes themself in the country of feared persecution is signalling a willingness to entrust themselves to the protection of that country. Article 1C(4) therefore applies to refugees who have voluntarily and willingly returned to and re-established themselves in the country of origin. Both stateless refugees and refugees with a nationality come within the operation of this clause.

'Re-establishment' involves more than just physical presence in the country of origin. The refugee must return with the intention of residing permanently and resuming a normal relationship with that country, , and in fact do so. The question of 're-establishment' should be assessed on a case by case basis, taking into account duration, frequency and purpose of the refugee's return to and presence in the country of origin.[31].

11.5 Articles 1C(5) and (6) - Change in circumstances

See UNHCR Guidelines on International Protection No.3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), 10 February 2003 (HCR/GIP/03/03) at http://www.unhcr.org/3e637a202.html

[31] Hathaway, *The Law of Refugee Status* (1991) p198

“He can no longer, because of circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality”.

“Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence” (applicable if stateless)

Article 1C(5) as shown above provides that the Convention shall cease to apply to any person falling within Article 1A(2) if the circumstances which caused him or her to flee persecution have changed or ceased to exist. Article 1C(6) is written in similar terms but applies to stateless persons who can no longer refuse to return to their country of former habitual residence. They are otherwise parallel clauses.

For these ‘changed circumstances’ provisions to apply, there need to be fundamental changes in the country situation which mean that the refugee can no longer be said to have a well-founded fear of persecution. In the case of a refugee who is a stateless person, the refugee must be allowed to, and able to, return to the country for the clause to apply. These are questions of both fact and law.

“Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence”

Both Article 1C(5) and (6) contain an exception to the cessation provision, allowing a refugee to invoke “compelling reasons arising out of previous persecution” for refusing to reavail himself or herself of the protection of the country of origin. This exception is intended to cover cases where refugees, or their family members, have suffered such atrocious forms of persecution that they cannot be expected to return to the country of origin or former habitual residence. This might, for example, include ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons. It is presumed that such persons have suffered grave persecution, including at the hands of elements of the local population, and cannot reasonably be expected to return. Children should also be given special consideration in this regard, as they may often be able to invoke “compelling reasons” for refusing to return to their country of origin.

The proviso to Article 1C(5) and (6) refers to refugees falling under Article 1A(1). On its face, Article 1A(1) only covers persons who have been considered as refugees under a number of international agreements before 1951. These persons are known as 'statutory refugees'. However, since the Convention was amended by the Protocol, which made it clear that equal status should be enjoyed by all refugees, the distinction between statutory refugees and other refugees is for the most part regarded as defunct. UNHCR considers that the proviso to Article 1C(5) and (6) applies more broadly to *all* Convention refugees, and Nauru is adopting this view.

Cessation notices issued by the UNHCR

The UNHCR can issue a notice declaring that its competence has ceased with regard to certain persons or groups. These cessation notices are issued when the UNHCR considers there has been fundamental and durable change in a country so that there is no longer a basis for fear of persecution. The notice creates a presumption that the persons to whom a cessation notice refers, are no longer to be considered refugees.

Should UNHCR issue a cessation notice relevant to any countries or groups which may be in Nauru, the Secretary will consider each case individually when deciding whether to exercise the discretion to cancel.

See:

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

Chapter 12 - Exclusion from refugee status

12. Article 1D: Prior UN protection or assistance

Factors for consideration
Is the person at present receiving protection or assistance from United Nations agencies other than UNHCR? ▪ If NO, then Article 1D does not apply - assess claims against Article 1A. ▪ If YES, then continue to assess against 2nd paragraph of Article 1D. ***Has the protection or assistance by a UN agency other than the UNHCR ceased?*** ▪ If YES to either protection or assistance ceasing - assess claims against Article 1A. ▪ If NO, neither has ceased - Article 1D applies and the person is excluded from the protection of the Convention.

12.1 Overview of Article 1D

See: UNHCR's *Note on UNHCRs Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection*, May 2013, available at: http://www.refworld.org/docid/518cb8c84.html

"This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention."

The first paragraph of Article 1D provides that persons who are at present receiving protection or assistance from United Nations agencies other than UNHCR will be excluded from the operation of the Convention. The second paragraph of Article 1D sets out a proviso to the exclusion clause, which is that a person will not be excluded under Article 1D if the protection or assistance provided by other UN agencies has ceased for any reason.

The purpose of this provision is to exclude from the benefits of the 1951 Convention those Palestinians who are refugees *as a result of the 1948 or 1967 Arab Israeli conflicts*, and who are receiving protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA"). If such persons are inside the UNRWA area of operations they are excluded from the benefits of the 1951 Convention by virtue of the first paragraph of Article 1D, as they are deemed to be receiving protection or assistance from UNRWA. Currently, UNRWA is operating in Jordan, Syria, Lebanon, the West Bank and the Gaza Strip. Persons belonging to these two groups of Palestinian refugees are normally entitled to the benefits of the 1951 Convention once they are outside UNRWA's area of operations (unless the other exclusion clauses of 1E or 1F would apply). It should be noted that asylum applications from Palestinian asylum-seekers who do not belong to either the 1948 "Palestine refugee" or 1967 "displaced persons" group, and therefore do not come within the scope of Article 1D, would need to be assessed under Article 1A(2).

Note that any Palestinian asylum seekers on Nauru, should be assessed under the Convention in the ordinary way as they are outside UNRWA's area of operations.

The aim of this exclusion clause was not to deny protection but to avoid overlapping competencies between UNRWA and UNHCR, and, in conjunction with UNHCR's Statute, ensure the continuity of protection and assistance to Palestinian refugees as necessary.

The application of Article 1D is based on a question of fact.

12.2 Article 1E" Residence with Rights and Obligations of a National

See: UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees at **http://www.unhcr.org/refworld/pdfid/49c3a3d12.pdf**

This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

The object and purpose of this Article is to exclude from refugee status those persons who do not require refugee protection because they already enjoy a status which, possibly with limited exceptions, corresponds to that of nationals. A strict test is, therefore, called for in order to be excludable under Article 1E.

The requirements are that the person has taken residence in a third country and the authorities of that country have granted most of the rights normally enjoyed by its citizens. More specifically:

- '**has taken residence'** implies continued residence and not a mere visit. The clause does **not** apply to individuals who *could* take up residence in that country, but who have not done so. "Has taken residence" means that a temporary or short stay, or visit, is not sufficient. Rather the stay must be intended as permanent.

- **the person must have the same rights and obligations as those enjoyed by nationals, although there may be some differences that are so slight as to be negligible.** "Rights and obligations" is a reference to rights and obligations generally, not just to "fundamental" rights and obligations such as those mentioned, for instance, in a national Constitution. The rights and obligations need not be identical in every respect to those enjoyed by nationals of the country in question, but divergences should be few in number and only minor in character. For example, being barred from certain public positions of high office might be acceptable for purposes of the application of Article 1E, but being barred from public positions generally would not. Similarly, an exemption from the obligation to perform military service would also be admissible. No difference is allowed as regards protection from forced removal. Persons to whom the application of Article 1E is considered must, like nationals, be protected against deportation and expulsion. It is of crucial importance that the status provides protection against refoulement as well as the right to leave, return, re-enter, and remain in the country where the person concerned has taken residence.
- **there is no requirement that the person acquire the nationality of the country of residence** - it is sufficient that they have the rights and obligations of a national.

In terms of procedure, normally, an examination of the circumstances described in Article 1E would be undertaken during the process of refugee status determination, generally after having determined that the person fulfils the requirements of Article 1A. If such circumstances become known after refugee status is granted, this may lead to cancellation of refugee status in accordance with the guidance contained in this Handbook.

12.3 Article 1F: Persons who do not deserve protection

Factors for consideration
Are there allegations that a person who falls within Article 1A(2) has committed a serious crime that would justify his/her exclusion from protection as a refugee? ***If so, which paragraphs of Article 1F apply?*** 1F(a): Elements of crimes against peace, war crimes and crimes against humanity ▪ Did the Applicant have the requisite mental knowledge and complicity? ▪ Do any defences to criminal responsibility apply? 1F(b): Serious, non-political crime, outside Nauru 1F(c): Purposes and principles of the United Nations ▪ Do any non-refoulement obligations apply?

12.3.1 Overview of Article 1F

See:

- **UNHCR Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees** at http://www.unhcr.org/3f7d48514.html

- **UNHCR's Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees** at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f5857d24&page=search

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that the person:

a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

b) has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

c) has been guilty of acts contrary to the purposes and principles of the United Nations.'

The rationale for the exclusion clauses in Article 1F, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being brought to justice for their acts. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.

In terms of its relationship with other clauses in the Refugee Convention, Article 1F of the 1951 Convention should be distinguished from **Article 1D** which applies to a specific category of persons receiving protection or assistance from organs and agencies of the United Nations other than UNHCR. Article 1F should also be distinguished from **Article 1E** which deals with persons not in need (as opposed to undeserving) of international protection. Moreover the exclusion clauses are not to be confused with **Articles 32 and 33(2)** of the Convention which deal respectively with the expulsion of, and the withdrawal of protection of refoulement from, recognised refugees who pose a danger to the host State (for example, because of serious crimes they have committed there). Article 33(2) concerns the future risk that a recognised refugee may pose to the host State.

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

An individual excluded under Article 1F may still be protected against refoulement to a country where he or she is at risk of ill-treatment by virtue of other international instruments or customary international law. For example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits the return of an individual to a country where there is a risk that he or she will be subjected to torture.

12.3.2 When to begin assessment of Article 1F

Inclusion should generally be considered before exclusion, so as to allow the RSDO to examine both the reasons justifying recognition as a refugee and the factors related to exclusion in a holistic manner.

12.3.3 'Serious reasons for considering'

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

The burden of proof will very occasionally fall on the Applicant, rather than the RSDO. This would be the case where the individual has been indicted by the International Criminal Court for example. In such a case, it would be up to the individual to rebut the presumption that a grave criminal act has been committed. UNHCR considers that lists established by the international community of terrorist suspects and organisations should not generally be treated as reversing the burden of proof (see further *UNHCR's Background Note on Exclusion*, at paragraphs 105–111.)

Step 1: Is exclusion triggered?

If there are indications that an Applicant may have been involved in conduct within the scope of Article 1F, a thorough examination of all relevant aspects is required. Exclusion considerations may be triggered by statements of the Applicant him or herself, or any other information which suggests that he or she may have been associated with excludable acts.

Step 2: Are there acts within the scope of Article 1F with which the Applicant is linked?

Where the question of exclusion is triggered, RSDOs need to identify the acts which may give rise to the application of Article 1F. The relevant facts must be assessed in light of the legal criteria set out in Article 1F(a), (b) and/or (c). It should be recalled that only the type of conduct listed in Article 1F may result in exclusion under this provision. This is detailed further below.

12.4 Article 1F(a) – "Crimes against peace"

According to the 1945 Charter of the International Military Tribunal ("London Charter"), a crime against peace involves the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan of conspiracy for the accomplishment of the foregoing." Given the nature of this crime, it can only be committed by those in a high position of authority representing a State or a State-like entity, and only in the context of an international armed conflict. A "crime against peace" according to the definition cannot be committed in the context of a civil war, it must be an international conflict. There is currently no international consensus on what constitutes a crime against peace, and there has been only one international case where 'crimes against peace' has been applied.[32] See further UNHCR's Background Note on Exclusion, at paragraphs 26–29.

12.5 Article 1F(a) – "War crimes"

Certain serious breaches of international humanitarian law constitute war crimes. RSDOs should bear in mind that only acts which are committed during times of armed conflict, and which are linked to the conflict (the so-called "nexus" requirement), can constitute war crimes. In conducting an exclusion analysis, it is necessary to consider whether the armed conflict is international or non-international in nature, as different legal provisions are applicable to acts committed in either. War crimes may be committed by, and against, civilians as well as military persons. When determining whether a particular act constitutes a war crime, RSDOs should examine it in light of the definitions contained in the four Geneva Conventions of 1949 and Additional Protocols thereto of 1977, and Article 8 of the 1998 Rome Statute of the International Criminal Court (ICC).

[32] *CPRR No. 99-1280/W7769,* 6 August 2002

Under Article 8 of the Rome Statute, a war crime has been defined as including:

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

Generally speaking, war crimes are crimes committed in violation of the laws and customs of war as set out in the Geneva Conventions of 1949, which may include any of the following acts:

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

Further guidance on this ground for exclusion can be found in *UNHCR's Background Note on Exclusion*, at paragraphs 30–32.

12.6 Article 1F(a) – "Crimes against humanity"

Crimes against humanity are inhumane acts (such as, for example, genocide, murder, rape and torture), when committed as part of a systematic or widespread attack against a civilian population. Crimes against humanity may take place during an armed conflict or in peacetime. Unlike crimes against peace which can only be committed by persons in high positions of authority, any person can commit crimes against humanity, if his or her acts meet the aforementioned criteria. The relevant definitions can be found in a number of international instruments, including, in particular, the 1945 London Charter, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, and the 1998 Statute of the ICC. For more details, see UNHCR's Background Note on Exclusion, at paragraphs 33–36.

12.7 Determining the applicability of 1F(a)

When considering whether an Applicant has committed an international crime, the RSDO is required to give specific and careful consideration to each of the elements of the crime alleged. This is essentially a two-stage test:

- the elements of that offence must be correctly identified and
- each of those elements must be properly addressed.

Working through the elements of crimes against peace, crimes against humanity and war crimes is a good way for RSDOs to structure their thinking. The elements break the task down into small steps and allow the RSDO to give thorough consideration to every relevant element.

There are a range of possible defences to acts committed under Article 1F(a), and these should be considered where there are serious reasons for considering that the person has committed a crime for the purposes of Article 1F(a). Article 31 of the Rome Statute provides a number of '*grounds for excluding criminal responsibility*'. The defences recognised under Article 31 are:

- mental disease or defect

- intoxication
- self-defence or in the defence of another and
- duress.

Articles 32 and 33 of the Rome Statute provide for the defences of mistake of fact and superior orders respectively.

12.8 Article 1F(b) – "Serious non-political crimes committed outside the country of refuge prior to admission to that country as a refugee"

When determining whether an act constitute a "serious crime" for the purposes of an exclusion analysis, RSDOs should judge the seriousness of a crime against international standards. Whether or not a crime is "non-political" within the meaning of Article 1F(b) will depend on a number of factors, including, in particular, the motivation, context and methods, as well as the proportionality of the crime in relation to its objectives. Unlike Article 1F(a) and (c), this exclusion clause is limited in its geographical and temporal scope. Crimes committed within Nauru could not give rise to exclusion from international refugee protection under Article 1F(b). Rather, such acts would need to be dealt with in accordance with Nauru's criminal law process and, in cases of particularly grave crimes, could give rise to expulsion under Article 32 or application of the exception to the principle of non-refoulement provided under Article 33(2).

Article 1F(b) seeks to exclude persons who have committed a serious crime against the domestic law of a country. The assessment is a three-step process:

- First, determine whether there are serious reasons for considering that the person committed a crime outside Nauru;
- Second, consider whether the crime was a serious crime;
- Third, if the crime was a serious crime, consider whether the crime was non-political.

Article 1F(b) is primarily designed to protect public order and the safety of the receiving State; it is not designed to be punitive on the individual claiming refugee status. UNHCR lists examples of crimes which might be considered 'serious' in relation to Article 1F(b). These include offences such as homicide, rape and other serious sexual offences including child molestation and causing grievous harm. Other offences such as burglary, stealing, embezzlement and assault may also be considered serious if factors such as the use of weapons or injury to persons and property damage were present.

Factors that may also affect assessment of the 'seriousness' of a particular crime include the age of the (alleged) offender, parole, a lapse of five years since conviction or completion of the sentence, evidence that the (alleged) offender is generally of good character, evidence that the offender was merely an accomplice, and other mitigating circumstances such as provocation and self-defence. If available, reference should be made to any sentencing comments made by judges or parole reports to assess the severity of the crime and the degree of rehabilitation.

For more detailed guidance on the interpretation and application of Article 1F(b), see *UNHCR's Background Note on Exclusion*, at paragraphs 37–45.

12.9 Article 1F(c) – "Acts contrary to the purposes and principles of the United Nations"

The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter. With this in mind, this exclusion ground would apply to acts which, on account of their gravity and impact, are capable of affecting international peace, security and peaceful relations between States, or serious and sustained human rights violations. In principle, only persons in positions of authority in a State or State-like entity could commit such acts. The meaning and scope of Article 1F(c) is uncertain and it is seldom used. The UNHCR Handbook at para 162 states that the article should be applied with caution due to its very general nature.

Article 1F(c) may extend to the following persons:

- members or organisations or individuals who have denied or restricted the human rights of others;

- people who are engaged in the drug trade, who displace or obstruct democratic and representative governments, or who are opposed to certain liberation movements;
- members of terrorist groups seeking to overthrow democratic regimes.

For further guidance on the kinds of conduct which may fall within the scope of Article 1F(c), see *UNHCR's Background Note on Exclusion*, at paragraphs 46–49.

Chapter 13 - Articles 32(1) Expulsion and 33(2) - prohibition on expulsion or return (refoulement)

Factors for consideration
Has the Applicant been assessed to be a refugee?   ▪ If YES, the refugee can claim the benefit of two important protections under the Convention: ▪ Article 32(1) protects a refugee 'lawfully in' Nauru from expulsion   ▪ Article 33(1) protects a refugee from refoulement.   ***Is there an allegation or evidence that a refugee is a threat to national security or public order, or to the security of the country or community?***   ***Has the refugee been convicted of a particularly serious crime in the country of refuge?***   ▪ If YES, the RSDO needs to consider whether Article 32 or Article 33(2) apply. Protection from expulsion under Article 32 and from refoulement under Article 33 are not absolute. Both contain two exceptions: ▪ Article 32(1) contains exceptions on the grounds of: ▪ national security or   ▪ public order   ▪ Article 33(2) contains exceptions on the grounds of: ▪ danger to the security of Nauru or   ▪ having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of Nauru

13. Expulsion of a person 'lawfully in' Nauru– Article 32 - Overview

As a contracting State to the Refugees Convention, Nauru is subject to Articles 32 and 33, which bind Nauru not to return a person to their country of nationality or country of former habitual residence in certain situations.

Article 32(1) creates an obligation not to expel refugees 'lawfully in' Nauru, except on grounds of national security or public order. If a person is to be expelled on these grounds, Article 32(2) and (3) establish certain procedures that should be followed prior to expulsion.

Article 32 states:

> ‘1. *The Contracting State shall not expel a refugee lawfully in their territory save on grounds of national security or public order.*
>
> 2. *The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.*
>
> 3. *The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.’*

The safeguards against expulsion established by Article 32 apply only to refugees who are considered to be ‘lawfully in’ a territory.

13.1 The principle of non-refoulement – Article 33(1) - Overview

Article 33(1) establishes the principle of non-refoulement, which protects refugees from being returned to a territory in which their life or freedom would be threatened for a Convention reason.

It provides that:

> *‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’*

Unlike Article 32(1), the application of Article 33(1) is not limited to refugees ‘lawfully in Nauru.’ Therefore, Article 33(1) operates to protect a refugee from refoulement whether or not he or she holds a valid Nauruan visa. Because refugee status is a declaratory status, it also applies to asylum seekers whose claims for protection have not been finally determined.

13.2 Exceptions to the principle of non-refoulement – Article 33(2) - Overview

13.2.1 Overview

Although the principle of non-refoulement imposes important obligations on Contracting States, these obligations are not absolute. Rather, Article 33(2) contains two exceptions to the principle of non-refoulement.

Article 33(2) states that the benefit of non-refoulement may not be claimed by a refugee whom:

> *'there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'*

The conditions in which Article 33(2) may be applicable can only be met if a refugee poses a very serious future danger to the security of the host country – such as a threat to the country's constitution, territorial integrity, independence or external peace – or if he or she has been convicted by a judgement that is no longer open to appeal of a crime of a particularly serious nature (e.g. murder, rape, armed robbery) and continues to pose a danger to the community of the host State. The application of an exception under Article 33(2) requires procedures in which guarantees of due process must be strictly observed.

However, notwithstanding the terms of Article 33(2) of the 1951 Convention, the prohibition on refoulement in international human rights law still applies and is not subject to qualification or exception. Thus, for example, Article 33(2) cannot overcome the prohibition against refoulement to a place where a refugee may be subjected to torture or cruel, inhuman or degrading treatment or punishment. This is because the prohibition against refoulement is an inherent part of the absolute prohibition of torture and other forms of ill-treatment, as provided for under Article 3 of the 1984 UN Convention Against Torture and Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR). It has risen to the status of a peremptory norm of international law, or *jus cogens* and, as such, *is binding on all States*, regardless of whether or not they have become party to the relevant instruments (NB. Nauru has ratified the CAT and has signed the ICCPR, signifying its intention to be bound by its provisions, but is yet to ratify that instrument).

PART II: PROCEDURAL GUIDELINES FOR DETERMINING REFUGEE STATUS

Chapter 1 - CORE STANDARDS and PRINCIPLES IN REFUGEE STATUS DETERMINATION

Based on general standards used by UNHCR, Nauru has developed a number of core principles governing its refugee status determination process to ensure its quality, fairness and integrity. These principles underpin the RSD system and it is expected that all those involved in RSD in Nauru will respect and follow these basic standards.

- Asylum seekers should be treated with dignity and respect
- Due process and fair procedures should be ensured
- Asylum seekers should receive the necessary information and support to present their claims
- Particular assistance should be available for vulnerable asylum-seekers and there should be sensitivity regarding gender, age and any other vulnerabilities
- The RSD process should be non-discriminatory, fair, impartial and transparent. It should be efficient and timely
- Decisions can be reviewed
- Staff involved in RSD processes should be appropriately qualified, trained and supervised
- Asylum seekers are entitled to an individual interview
- All aspects of the RSD procedures must respect accepted data protection / confidentiality standards

Chapter 2 - PROCEDURAL STANDARDS AND GUIDELINES

2.1 Procedural Fairness

The concept of procedural fairness is integral to a proper RSD process. Procedural fairness requires that asylum seekers have the opportunity to be heard by an impartial decision maker. In the RSD process in Nauru, procedural fairness requires that:

- asylum seekers have access to a personal interview with access to suitably qualified interpreters;
- asylum seekers will be provided independent advice and assistance on how to complete the application for determination of refugee status by Claims Assistance Providers (CAPS);
- the decision is taken by an appropriately qualified decision-maker;
- there are clear standards on which the decision is based;
- asylum seekers seeking review have access to a written statement of reasons for the decision and, as a general rule, to the information on which the decision is based;
- there is an appeal process that is independent and accessible.

Chapter 3 – SPECIAL CONSIDERATIONS/VULNERABILITIES

3.1 Overview

Applicants who may be vulnerable and/or have special needs may include:

- survivors of torture and persons suffering from trauma;
- women applicants;
- child applicants (under 18 years) including unaccompanied and separated children;
- elderly asylum seekers;
- disabled asylum seekers;
- asylum seekers who require medical care, including mental health care.

3.2 Survivors of torture or other trauma

In any population of asylum seekers, there is a high chance that it will include survivors of torture or other trauma. RSDOs must be mindful of the effects that torture or trauma may have on the asylum-seeker and the potential consequences on the RSD process. It is common for a survivor of torture or trauma to feel stressed, vulnerable, powerless and even fearful in the setting of a RSD interview. S/he may have difficulty relating his/her story or provide explanations that lack coherence or seem contradictory. It is also very common for a victim of torture to have difficulties with memory and concentration.

During an interview, RSDOs should keep in mind that applicants who have experienced torture or trauma may be reluctant to speak openly about an event. This reluctance or inability to communicate freely may stem from a number of factors: applicants may fear not being believed; they may be humiliated or ashamed; they may have repressed certain memories. Sharing information that is sensitive or relates to traumatic events is difficult for anyone to do, particularly in front of strangers and often through an interpreter. The interview can become uncomfortable and distressing for the Applicant. It is also important for RSDOs to be aware that there is no "typical" way for a victim of torture or trauma to behave or to relate their story. Some applicants may relate difficult past events in an emotional way, others may be reserved and down-play the effects of the events. Some applicants may smile or laugh at what may seem inappropriate times. It may be necessary for interviewers to allocate additional time for an interview with an applicant who has experienced torture or trauma, to

accommodate extra time for putting the applicant at ease, and for taking additional breaks if necessary.

In Nauru, asylum seekers who have experienced torture or trauma are entitled to have access to specialised counselling. Counsellors may be able to provide independent verification of aspects of an Applicant's case. However, such information should never be sought without the knowledge of the Applicant and their CAP provider. If RSDOs become concerned about a particular Applicant in the course of an interview, it would be appropriate to remind them of the availability of such counselling.

See also:

- UNHCR *Working with Men and Boy Survivors of Sexual and Gender-based Violence in Forced Displacement*, July 2012, available at:http://www.refworld.org/docid/5006aa262.html

3.3 Women Applicants

Failure to take in to account the particular needs and experiences of women can result in difficulties for women in seeking and obtaining refugee status. These difficulties can be procedural, substantive and evidentiary. UNHCR has developed a number of procedural safeguards aiming to ensure equal access of women and men to refugee status determination.

See: *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, UNHCR (May 2002)* See Section III Procedural Issues.

The UNHCR Guidelines on Gender-Related Persecution provide a number of measures which aim to ensure that gender-related claims of women are properly considered in the RSD process. RSDOs are expected to be familiar with the measures contained in these Guidelines. One important measure is that women asylum seekers should be interviewed separately, without the presence of male family members. This ensures that they have the opportunity to present their case and enables the RSDO to determine whether the female members of a family group have an independent claim to refugee status.

In Nauru, ***all women applying for derivative refugee status as a spouse/partner will have a separate CAP interview scheduled. It will then be determined whether the woman should make a separate application for refugee status, keeping in mind that it is preferable to make a separate application for refugee status and not rely on derivative status, where a person has his or her own claims.***

Nauru is committed, where possible, to ensure that women refugee applicants are interviewed by a female and provided with a female interpreter. As with all applicants, Interviewers should seek to create an open and reassuring environment, and to be particularly sensitive when questioning about traumatic events, such as sexual abuse. Interviewers should not ask about details of sexual abuse; the important thing is to establish that it has occurred. Interviewers should also remain aware that there may be gender differences in styles of communication, particularly non-verbal communication. For example, in some cultures it may be inappropriate for women to have eye contact with the interviewer.

While in all cases, no documentary proof as such is required in order to recognise a person as a refugee, RSDOs are expected to use country information to assist in verifying an applicant's story. RSDOs must be aware that it may be difficult to document the claims of women asylum seekers, where for example information on human rights conditions of women in a particular country is not readily available. A lack of such information should not necessarily be construed as a lack of human rights abuses against women. Data or reports, for example on the incidence of sexual violence, may not be available due to the under-reporting of cases, or lack of prosecution. Alternative forms of information, such as the testimonies of other women similarly situated in written reports of NGOs, for example, may assist.

See also:

- UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate, http://www.unhcr.org/4316f0c02.html
- UNHCR Handbook on the Protection of Women and Girls, 2008 http://www.unhcr.org/47cfae612.html

3.4 Claims based on Sexual Orientation and Identity

In cases where the veracity of an applicant's claim to a have particular sexual orientation or identity is in doubt, there are a number of considerations to keep in mind when questioning

the applicant. Assessing the sexual orientation or identity of an applicant can be a difficult, sensitive and complex task. General points for RSDOs to keep in mind when interviewing are:

- To reflect on their own assumptions and prejudices about sexual orientation or identity in a way that ensure they are still able to make a fair assessment of the case;
- To have some knowledge and information about the legal and social reality of LGBTI individuals in the country of reference;
- To be aware that the applicant may have kept his or her sexual orientation or identity hidden when in the home country, and therefore may not have experienced past persecution, nor have information about the social reality of LGBTI people in the country;
- There are often important differences in the kind of persecution faced by men and women in sexual orientation and identity claims;
- It is not uncommon for sexual assault is used as a tool to torture, humiliate and degrade LGBTI individuals and the utmost sensitivity must be used when questioning in this area. [33]

3.5 Child Applicants

See:

- UNHCR Guidelines on International Protection No.8: Child Asylum Claims under Article 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. http://www.refworld.org/docid/4b2f4f6d2.html
- UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeker Asylum http://www.refworld.org/docid/3ae6b3360.html

In Nauru, and for the purposes of RSD in Nauru, "children" are defined as all persons below the age of 18 years. The date of reference is the date that the child submits an application and not the date that a decision is reached. This section of the Handbook describes procedures relevant to all child asylum-seekers, including accompanied, unaccompanied and separated children who have individual claims to refugee status. Each child has the right to make an independent refugee claim, regardless of whether he or she is accompanied or unaccompanied.

[33] International Association of Refugee Law Judges, Seminar Materials.

The term “separated children” refers to children who have been separated from both their parents or from previous legal or customary primary caregivers but not necessarily from other relatives. In contrast, “unaccompanied children” are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

All children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims. Generally, claims made by children should be processed on a priority basis, as they often have special protection and assistance needs. **This means that, to the extent possible, the time before RSD interview, and the time for a RSD decision to be handed down, should be reduced in the case of children.**

In Nauru, for unaccompanied or separated children, the Minister for Justice is the formally appointed legal guardian. However, it is envisaged that an independent qualified representative will be appointed for each child who will have delegated authority to make decisions in, and to represent, the best interests of the child.

Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their claims for a range of reasons, and require special assistance to do so. Some children may have difficulty differentiating imagined events or details from reality, or may be unable to express abstract notions, such as time and distance. Interviewers of child applicants must have the necessary training and skills to be able to evaluate accurately the reliability and significance of a child’s account.

In the examination of the factual elements of the claim of a child, particular regard should be given to circumstances such as the child’s stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as to his/her special vulnerability.

The RSDO may have to assume a greater role in children’s claims, particularly in the case of unaccompanied or separated children, and may have to apply the benefit of the doubt liberally, where the facts of the case cannot be ascertained and/or the child is incapable of fully articulating the claim.

During an interview with a child applicant, RSDOs should be prepared to take more frequent breaks, recognising that the children often have shorter concentration spans than adults. Simpler language and concepts may also have to be employed in order to ensure successful communication.

Children should be kept informed in an age-appropriate manner, about the procedures, about confidentiality, about what decisions have been made about them, and about the possible consequences of their refugee status. In all cases, the views and wishes of the child should be elicited and considered.

3.6 Elderly Applicants

Elderly asylum-seekers may have been separated from the traditional support network that was available in their country of origin and may be at higher risk of neglect and abandonment in the host country. Elderly asylum seekers who arrive in Nauru will receive appropriate counselling to assess their social, medical and psychological needs. RSDOs should keep in mind that elderly asylum seekers may suffer from some form of cognitive impairment.

Chapter 4 - CONFIDENTIALITY and DATA PROTECTION

4.1 The Applicant's Right to Confidentiality

All RSDOs, as well as others involved in the procedure such as the RSD Registry Administration officers, interpreters, CAPS, DIAC officers and security staff are under a duty to ensure the confidentiality of information received from or about asylum seekers and refugees, particularly information contained in an asylum seeker's claim for refugee status.

Applicants should be informed of their right to confidentiality. Limits to the right to confidentiality are contained on the Application Form and must be repeated by the RSDO at the beginning of an interview. RSDOs and CAPS must explain to Applicants how the information collected through application forms and interviews will be used.

<u>Applicants should be assured that no information regarding the Applicant, his or her family, or the claim will be shared with the authorities in the country of claimed persecution, unless expressly authorised by the Applicant</u>.

All information collected from Applicants will be kept secure, both electronically and physically, and should be protected by reasonable and appropriate measures against unauthorized modification, tampering, unlawful destruction, accidental loss, improper disclosure or undue transfer. This applies to both paper and electronic records

Any electronic correspondence (even within the Department of Justice and Border Control) containing personal information of an Applicant must be limited to what is strictly required, and marked "Confidential". Staff are trained on privacy and information security considerations.

4.2 Disclosure of Information

The Application Form requires the Applicant to sign his or her acknowledgement that the information contained therein will be used by the Department of Justice and Border Control to make a refugee status determination and that the information may be shared within the Nauruan government, with resettlement countries (as appropriate), with international organizations such as UNHCR or IOM and/or with those involved in review of a decision.

Written consent must be obtained from the Applicant for any further sharing of personal information. Any requests by third parties for access to personal information must state the purpose of the request and include a signed authority from the client if not already received.

There are two exceptions to the rule that written consent from the Applicant is always required:

1) the Secretary retains a right to decide whether to share information to any requests received from international courts, tribunals or law enforcement agencies; and
2) in all cases involving disclosure of information relating to children, the best interests of the child criterion will be paramount and may exceptionally override the necessity for consent.[34]

Disclosure to CAPS or other representatives of the Applicant can only be done where a written authority to act is in place. A copy of such written authority must be kept on the Applicant's file.

Where information is shared with third parties under this section, appropriate measures such as encryption will be used to safeguard personal information, where possible. Third parties must also understand and acknowledge in writing their duty to keep the information secure and confidential.

Where information is shared with third parties under this section, a note must be placed on the RSD file detailing what information was shared, when, to whom and the authorising officer. The Applicant's written consent must also be placed on the file.

For statistical or research purposes, disaggregated, non-identifying data drawn from information collected may be shared with third parties with the prior written approval of the Secretary.

Notwithstanding the absence of privacy laws in Nauru, RSDOs are not allowed to use any information from the file of one Applicant for the purpose of making a decision in relation to

another Applicant, even if the Applicants are related to each other or their claims might impact on each other, unless they have the written consent of the Applicants concerned.

4.3 Disclosure of Evidence to the Applicant

As a general rule, and as an important principle of procedural fairness, an Applicant who has received a negative determination has the right to copies of all documents on his or her file. Upon request, which can be written or oral, the Applicant should be given copies of all documents. This disclosure includes the interview recording, references to country of origin information, any expert evaluations including RSDO assessment, witness statements or other documentary evidence.

Where such documents contain the personal information of another person, names and other identifying information may be redacted (deleted) to protect that other person's privacy. The redaction should only be made to the copy of the document.

In exceptional circumstances, and at the discretion of the Secretary, evidence or documents may be withheld from the Applicant if there is a threat to security, defined as either national security or a real threat to a particular person. In the case of non-disclosure, Applicants must be informed in writing that there is a piece of evidence considered in their case which cannot be provided to them, and should be informed of the reason for non-disclosure and the general nature of the evidence to the maximum degree possible without raising security risks.

CHAPTER 5 - FILE MANAGEMENT

The Department of Justice and Border Control will maintain a **file registry** which will include the RSD file number (which is the Applicant's boat number), the name of the Principal Applicant, the date that the file is opened, and the date that the file is closed.

RSDO's are trained in efficient file management and record keeping. The general principles for good file management include:

- An electronic and paper file will be maintained for all Applicants;
- All RSD files must be complete and be kept up to date;
- All recordings of RSD interviews must be provided to the RSD Administration Team to be placed on both the e-file and paper file;
- All papers on each file should be given a folio number;

5.1 Procedures for Opening RSD Files

Case files will be opened and maintained by the RSD Registry Administration staff An individual file will be opened for each Principal Applicant for RSD as early as possible in the RSD process.

As a general rule, where more than one member of the same household applies for refugee status as a Principal Applicant, as a general rule, a separate linked RSD file should be opened for each Principal Applicant.

As a general rule, documents and developments relating to individuals who are applying for derivative refugee status as family members/dependants of a Principal Applicant should be recorded and retained on the RSD file of the Principal Applicant. A separate linked RSD file may be opened for family members/dependants of the Principal Applicant, at any time in the RSD processing, where this would serve to promote efficiency, confidentiality or other protection standards in processing the Applicants' claims.

5.2 RSD File

Each RSD file must contain:

- The transfer interview notes
- The RSD Application Form
- Any additional documents or information from the Applicant or DIAC including but not necessarily limited to:
  - Copies of signed consent forms, legal authority to act, permission to share information etc
  - Photographs of the Applicant and each member of the family unit if available
  - Copies of all identity documents and other supporting documents such as travel documents or membership documents submitted with the Application
- Recording of RSD Interview
- RSD assessment form
- RSD decision record
- Any correspondence between the Department of Justice and the Applicant.

Each file should also include a **File Action Sheet** which should be used by RSDO staff to record a brief description of any activity related to the processing of the claim, the date of the action, and the staff member involved. The File Action Sheet should record:

- Interviews and appointments with, or relating to, the Applicant(s)
- The date of filing of appeal applications or submissions by the Applicant(s)
- All decisions taken by Nauru regarding the status or entitlements of the Applicant(s)

Files must be stored securely and access is restricted and strictly supervised. File management procedures of the Department are outlined in the RSD Administration Procedural Guidelines, March 2013.

Chapter 6 - INTERPRETERS AND RSD PROCEDURES

6.1 Access to Interpreters

Applicants for RSD in Nauru are entitled to the services of trained and qualified interpreters at all stages of the RSD process.

All RSDOs who conduct interviews in RSD procedures must receive training and direction on communicating effectively through interpreters.

Wherever possible, interpreters should be assigned as appropriate to the gender, age or other vulnerabilities of the Applicant.

Applicants who have concerns about the participation of an assigned interpreter have the right to raise and explain their concerns, in confidence, to a RSDO or CAPS and must be informed of their right to do so. Every effort should be made to ensure that interpreter assignments in RSD procedures anticipate and accommodate reasonable, or otherwise genuinely-held, concerns of Applicants.

6.2 Impartiality of Interpreters

The role of the interpreter is impartial and nonjudgmental. RSDOs must therefore not take into account solicited or unsolicited assessments of credibility, or investigations or comments on the reliability of an Applicant's evidence provided by an interpreter. Interpreters should never engage in advocacy or intervene on behalf of Applicants. Interpreters should be instructed to notify the RSDO of any factors which could, or could be perceived to, compromise the interpreter's impartiality, including previous personal knowledge of an asylum seeker, or threats made or inducements offered.

Interpreters are not permitted to select the Applicants for whom they provide interpreting services, and should not be informed of the identity of the Applicants before the day on which they are requested to provide the interpreting services.

Interpreters should not be engaged to provide counselling to Applicants. Interpreters should not be assigned other tasks unrelated to interpretation if this could undermine the impartiality, or perceived impartiality, of the interpreter in the RSD process.

Chapter 7 - COMPLAINTS PROCEDURE

A complaint or concern raised by the Applicant regarding any aspect of the RSD process, including impartiality of interviewer or interpreter, misconduct, procedural unfairness etc should be directed in the first instance to the Operational Manager at the RPC. The Operational Manager is responsible for ensuring that the complaint is referred to the appropriate body.

If the complaint relates to RSDO officers or CAPS , the Operational Manager will direct the Complaint to the Secretary of Justice for investigation.

Chapter 8 - THE RSD APPLICATION

Prior to completing the RSD Application Form, Applicants will be briefed by CAPS on the refugee criteria and definition, and the procedures for applying for RSD in Nauru, including the various stages of the procedure, the avenues for appeal, and the assistance they can receive. An RSD "Process Map" (attached as Annex) will be available to the asylum seekers at the Centre. Applicants will also be briefed on their rights and responsibilities in the RSD process, the confidentiality of the information collected in the process and any limits on that confidentiality.

Unless accompanying family members/dependants of a Principal Applicant request to have their claim determined independently, or there are other indications (at any stage of the RSD procedure) that this would be appropriate, accompanying family members/dependants should be processed as Applicants for Derivative Status and not as Principal Applicants, and do not need to complete an individual Application Form.

As a general rule, members of the Principal Applicant's household who are under 18 years need not complete the entire RSD Application Form, unless they are applying to have their eligibility for refugee status determined independently of the claim of accompanying adults (ie, as a Principal Applicant in their own right), or there are other indications that this would be appropriate.

Children (under the age of 18 years) who are applying for RSD as Principal Applicants should complete all sections of the RSD Application Form, and should receive all necessary assistance in completing the form from their claims assistant provider and representative. See section 3.5 above.

Given the importance of the factual information gathered on the RSD Application Form for the determination of the refugee claim, every effort should be made to ensure that Applicants have the opportunity to complete the RSD Application Form under appropriate conditions. The Government of Nauru will seek to ensure that Applicants have sufficient time to receive and read information on the RSD process, to consider the evidence that may be relevant to their claim, and to complete all sections of the RSD Application Form. The Government of Nauru is committed to working with service providers at the RPC to ensure that Applicants

have adequate space, privacy and materials to properly complete the RSD Application Form and to prepare any accompanying materials.

Applicants will have access to an interpreter and CAPS to assist them to understand and complete the Application Form.

CHAPTER 9 - THE INTERVIEW

9.1 General Information

All Principal Applicants must have the opportunity to present their claims in person in an RSD interview with a qualified RSDO. Under no circumstances should a refugee claim be determined in the first instance on the basis of a paper review alone.

Interviews should be conducted in a **non-intimidating, nonthreatening, and impartial manner**, with due respect for the safety and dignity of the Applicant.

Where an Applicant has expressed a preference to be interviewed by a RSDO and/or interpreter of a particular sex, the request should be noted and, where possible, every effort made to accommodate this request in the Interview and subsequent RSD procedures. If the request cannot be accommodated, the Applicant should be informed as far in advance as possible.

As a general rule, Applicants who are applying for derivative status need not be referred for an individual Interview unless they so request, or there are other factors indicating that this would be appropriate. All adults in Nauru however are entitled to have a separate CAP interview, to determine whether they should lodge an individual claim for refugee status.

Children who are applying for RSD as Principal Applicants and all unaccompanied and separated children should be referred for an individual Interview. The information gathered at the Interview should inform decisions regarding the appropriate procedures for processing the child's claim and necessary follow up measures for the care and protection of the child.

Interviews for child Applicants should be conducted in an age appropriate manner, taking into consideration the age and maturity of the child as well as any special needs or vulnerabilities of the child. RSDOs who conduct Interviews and claims assistants who provide assistance and counselling to child Applicants should have experience in interviewing and assisting asylum seeking and refugee children. See also section 3.5 above.

Gender and culturally sensitive interviewing techniques should be used to ensure that women are able to discuss protection needs, and female interviewers and interpreters should be available.

9.2 Preparing for the Interview

Preparing for the interview is a crucial part of the process. An interviewer who is well-informed and well-prepared will be in a better position to establish a rapport with the Applicant which provides an atmosphere of confidence and trust. Proper preparation and information will allow an interviewer to ask the appropriate questions, deal with any difficulties which may arise during the course of the interview, and ultimately make a fair assessment of the Applicant's claims.

A thorough understanding of the refugee definition, the criteria it contains, and how they apply is an essential prerequisite for conducting RSD interviews. See Part 1 of the Handbook for guidance on the refugee definition criteria as well as information on what other legal instruments apply to the RSD assessment.

A good knowledge of the country of reference is also essential when preparing for the interviews. Country of origin information (COI) refers to information on human rights, political, cultural, social and economic conditions in countries where asylum seekers claim to fear harm. RSDOs are expected to be familiar with the basic facts about the country from which the Applicant has come. Depending on the nature of the claims made, information gathered prior to the interview may need to include such detail as the following:

- the basic political and administrative organization of the country of origin. For example, does the country have an elected government, political parties, an independent legal system, a civilian police force, autonomous or semi-autonomous local or regional governments, restrictions on freedom of movement, etc.
- whether there is respect for and adherence to fundamental human rights in the country of origin, and any reports of harassment or persecution of any individual or groups of individuals on grounds related to the definition of a refugee;
- the basic geography (maps) of the country of origin, and the economic and social characteristics of the country including: the major population centres, distances

between cities, ethnic or tribal groups, the main sources of employment, the system for the distribution of goods, economic or population dislocations affecting particular groups or areas, etc;

- the culture of the country with respect to such issues as the definition of family and the nature of family relationships, the role and status of women, attitudes towards homosexual relationships, attitudes towards "foreign" influences, etc.;
- the operational methods of the police, military or security services, the criminal and military justice systems, and terms of punishment for criminal, military or political offences.

RSDOs can access Refworld and the European Country of Origin Information Network (ECOI) as the primary bases for their COI research.

RSDOs are expected to be familiar with the content of the Application Form before interviewing an Applicant. They need to examine copies of all documents provided by the Applicant in order to be able to ask the appropriate questions and identify whether there is information necessary to the determination that may be missing, incomplete, inconsistent or unclear.

At the beginning of each interview, the RSDO should explain to the interpreter and Applicant how he or she plans to conduct the interview and what types of questions will be asked. While it is expected that interpreters will already be experienced in or familiar with the RSD process and about their role, the interpreter should be reminded of confidentiality and impartiality obligations. It is a duty of the RSDO to ensure that the interpreting arrangement is working during the interview. This includes observing whether there are any difficulties between the interpreter and the Applicant due, for example, to dialect. Should the Applicant or RSDO feel that the interpreter is not accurately interpreting, or that there is any other problem, the RSDO should stop the interview

RSDOs need to ensure that the interview space is private and adequately equipped. Seating should ensure that the RSDO and the Applicant are face-to-face. Breaks should occur, where the interview is lengthy, or if requested by the Applicant. The opportunity for a "natural

justice" break must be provided at the end of the interviewer's questions, to afford the opportunity to the Applicant to consult with the claims assistance provider.

PREPARING FOR THE INTERVIEW

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

9.3 Participation of CAPS or other representative

CAPS will provide all Applicants with advice and assistance on how to apply for a determination of refugee status unless assistance is specifically refused. An Applicant may also chose to engage their own legal representative or other advocate at their own cost. Normally, a CAPS or other representative will assist the Applicant at the interview. The Applicant should provide written consent to the participation of CAPS or other representative. The original signed consent should be placed in the Applicant's RSD file.

The RSDO conducting the interview should remind the CAPS or other representative that he or she:

- will have the opportunity to address any issues that have arisen during the interview at the end of the interview;

- will have the opportunity to discuss issues in confidence with the Applicant after the end of the RSDO's questions;
- will have the opportunity to provide follow up information or submissions after the interview within an agreed timeframe.

The RSDO should also ensure that the Applicant and the CAPS or other representative understands the inquisitorial and non-adversarial nature of the interview. As such, it is for the RSDO to conduct the interview and it is the role of the assistance provider to intervene only where they believe there has been some confusion or misunderstanding between the RSDO and Applicant or where they believe there has been some breach of procedural fairness.

In exceptional cases, where the involvement of the CAPS or other representative unreasonably obstructs the interview, he or she can be asked to withdraw from the interview. The reasons should be explained to the Applicant and recorded on the Applicant's file. The interview can be suspended at the Applicant's request to enable an alternate CAPS or other representative to be arranged.

9.4 Participation of the Interpreter

At the start of the interview, the RSDO should introduce the interpreter and explain his or her neutral role. The RSDO should then check that the Applicant and the interpreter understand one other. To do this, the RSDO should invite the Applicant to talk informally for a few moments with the interpreter, then ask if he or she is satisfied that they understand each other. In the case of women Applicants, every effort should be made to use a female interpreter and interviewer. This is especially important for claims which may involve aspects of sexual violence.

9.5 Attendance by Third Parties (other than RSDO Mentors, Interpreters, CAPS or other Representatives) and Observers

As a general rule, the participation of third parties in RSD procedures should be limited to the assistance provider/legal representative or, in the case of child Applicants, the designated representative. Where the attendance of a third party other than a legal representative or a designated representative is specifically requested by an Applicant, the RSDO conducting the interview should exercise discretion in determining whether to grant the request. In assessing

the appropriateness of the participation of a third party, the RSDO should consider any special needs or vulnerabilities of the Applicant, the nature of the relationship between the Applicant and the third party, as well as any factors indicating that the attendance of the third party would be likely to promote or undermine the objectives of the RSD Interview.

The Applicant should provide written consent to the participation of the third party, which should be added to the file. The RSDO should explain to the third party the confidentiality of RSD procedures.

The RSDO should deny the request for participation by any third party, or request that a third party leave the RSD Interview, if the RSDO has reason to believe that participation of the third party is likely to jeopardize the security of the Applicant or staff, or otherwise obstruct the fair conduct of the RSD Interview. In any case where a RSDO denies or withdraws permission for a third party to participate in an RSD Interview, the reasons for this decision should be explained to the Applicant and the request and reasons for denial should be recorded on the Applicant's file.

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

A departmental observer or an observer from (for instance) UNHCR may also be present at the interview in the capacity of observer. However, the consent of the Applicant must be sought for the presence of any observers prior to interview. The observer does not have any formal role in the interview and should not be actively involved in the process.

9.6 Conducting the Interview

The objectives of the interview are to:

- Document with as many details as possible the Applicant’s story. The Applicant should have an adequate opportunity to tell his or her story.. The RSDO should plan questions carefully in order to cover all aspects of the claim;

- Assess the Applicant's claims in accordance with the principles and criteria for determination of refugee status. The Applicant's story must be carefully documented and cross-checked.

It is recommended that RSDOs address introductory issues at the beginning of each RSD Interview. RSDOs may design their own pro forma introduction, but should ensure that it includes the issues set out in the following checklist:

Introductions:
The RSDO should introduce him/herself, and introduce the interpreter and any other person in the interview room, by name and functional title.

Gender Issues:
Where staff resources do not permit assignment of an RSDO and/or Interpreter of the sex requested by the Applicant, the RSDO should explain to this to the Applicant and should consider any factors indicating that the Interview should not proceed under the existing arrangement. This should also be documented on file.

Interpretation in the RSD Interview:
The RSDO should confirm that the Applicant and the interpreter understand each other and that the Applicant is comfortable with the interpretation arrangement. The Applicant should be advised that any specific problems with the quality or accuracy of interpretation should be identified during the RSD Interview as they arise.

Explanation of RSD Interview Procedures:
The RSDO should explain the following procedural matters:

- The purpose of the RSD Interview and how it will proceed;
- The purpose and scope of use of notes/recording taken by the RSDO;
- The Applicant's right to ask for a break during the RSD Interview.

Confidentiality:
The Applicant should be reassured that all information disclosed in the RSD Interview, as in all other stages of the RSD process, will be treated as confidential and will not be shared with the authorities of the country of origin without the Applicant's express direction and consent. The RSDO should fully explain the scope and conditions of any disclosure of information regarding the Applicant to third parties as set out above. The Applicant should also be advised that the interpreter is also under a strict undertaking of confidentiality.

Obligation to Tell the Truth:
The Applicant should be advised of the obligation to be truthful and to make the most complete disclosure possible about the facts that are relevant to the refugee claim. The Applicant should be told that if he/she does not know the answer to a question, or if clarification is required, he/she should say this to the RSDO. The RSDO should explain that if information provided during the RSD Interview is not consistent with other evidence provided by the Applicant, this may put in doubt the truthfulness of the Applicant's claims. If this happens, this will be raised with the Applicant and s/he will be given an opportunity to respond.

Applicant's Fitness to Proceed:
The RSDO should ask whether the Applicant feels physically and psychologically fit for the RSD Interview. If the Applicant indicates that he/she does not feel well, the RSDO should ask follow up questions to assess the nature of the problem, and whether it would be appropriate to proceed with the RSD Interview or whether it is necessary to reschedule.

Opportunity for Questions or Comments by Applicant:
The Applicant should be given the opportunity to make preliminary remarks or to ask questions before the RSD Interview.

9.7 Questioning the Applicant

Before starting the questioning, the RSDO should ensure that the Applicant understands the following:

- the applicable refugee definition;
- the procedures followed with respect to the determination of refugee status.

It is particularly important for the Applicant to understand that the following questions must be established:

- Does the applicant fear persecution?
- Is this fear well-founded?
- Is the persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion?

This is why many of the questions that will be asked during the interview will concern:

- the conditions that exist in the country of origin, and more especially in the region where the applicant comes from; what kind of difficulties the applicant, members of his or her family, or similarly situated persons have experienced in the past;
- what difficulties might be expected if he or she were to return to that country;
- why these difficulties will arise.

Questioning by the RSDO during the RSD Interview should facilitate the most complete and accurate disclosure of the facts that are relevant to the refugee claim. Wherever possible, RSDOs should use open-ended questions. This permits Applicants to use their own words to describe the elements that they consider most important to their claim. RSDOs should avoid interrupting the Applicant unnecessarily.

If appropriate, RSDOs should encourage Applicants to describe the events that are relevant to their claim in chronological order. This will permit the RSDO to fully appreciate the significance of facts presented and identify and to follow up on gaps and inconsistencies

during the RSD Interview, thereby avoiding the need for further RSD Interviews. If an Applicant is unable to describe a chronology of events coherently, systematically, or with complete accuracy, RSDOs should keep in mind that this may be for a range of reasons (e.g. education, mental health, age, passage of time).

RSDOs should use the RSD Interview to clarify incomplete or contradictory facts or statements. Inconsistencies in the evidence provided by the Applicant, or between the evidence provided by the Applicant and other sources of relevant information should be pointed out to the Applicant, in a non-confrontational manner, during the RSD Interview. As a general principle, **unless an Applicant has had the opportunity to explain inconsistencies or evidence that is otherwise questionable, the RSDO is not entitled to make a negative credibility finding in the RSD Assessment on facts that are material to the refugee claim.**

The recommendations above are not intended to provide comprehensive guidance on interviewing in RSD Procedures. RSDOs are trained and will have ongoing access to further resources on effective interviewing techniques.

9.8 Recording the Interview

All interviews must be audio-recorded. RSDOs should explain the requirements for recording to the Applicant and respond to any questions. The quality of the recording should be checked at the beginning of the interview before proceeding, and following the interview before the Applicant leaves the interview room. If the recording is inaudible, the Applicant should be interviewed again if necessary.

CHAPTER 10 - CLOSING THE RSD INTERVIEW

Closing the RSD Interview

- Ensure that the Applicant has been given the opportunity to present all elements of the refugee claim and has been afforded a “natural justice” break;

- Ask the Applicant whether he/she would like to add anything to the information provided;

- Read back elements of the RSD notes that are most relevant to the determination of the claim. As a general rule, any part of the evidence presented in the RSD Interview that is unclear, or regarding which there were apparent difficulties with interpretation, should also be read back. Clarification or elaboration offered by the Applicant at this stage should be noted separately at the end of the transcript;

- Confirm and note documents or other information that the Applicant has agreed to provide following the RSD Interview, and the arrangements that have been made to provide it, including an agreed timeframe;

- Explain the next steps in the RSD process, including:
  - How the Applicant will receive the RSD decision;
  - Consequences of a positive or negative RSD decision;
  - Applicant's right to appeal a negative RSD decision and the appeal procedures.

10.1 Assigning Date of Notification

At the end of the RSD Interview the RSDO will inform the Applicant that the legislation requires decisions to be made as soon as reasonably practicable.

In practical terms, the Secretary will endeavor to notify Applicants of the decision within 4 to 6 months from the date of the Interview. Once a timeframe for issuing the RSD decision has been communicated to the Applicant, RSDOs and other relevant staff <u>will work within established timelines to ensure that RSD decisions are issued within that timeframe</u>. Any delay must be communicated to the Applicant.

CHAPTER 11 - THE RSD ASSESSMENT FORM

11.1 Overview

As soon as possible following the end of the interview, the RSDO should prepare the written analysis of the claim, using the Assessment Form. The RSDO should sign and date the form, before passing it, and the file, to the RSD Registry. Delays between the RSD Interview and the writing of the RSD Assessment may adversely affect the quality of the assessment and/or the decision.

All supporting country information used in making the assessment must be mentioned individually on the assessment form, and a copy of or a reference to the information should be kept on the Applicant's file.

All assessments will pass through a Quality Control process, before going to the Secretary for a determination.

The RSD Assessment should include:

- A summary of the claim;
- A statement of the facts which are considered established;
- A credibility assessment, which should identify any evidence that that is accepted as credible and any evidence that was not accepted or was regarded to be insufficient and reasons for these findings (Note: a credibility can only be made with respect to evidence presented);
- A legal analysis of whether the accepted facts bring the Applicant within the refugee criteria; *NB: This requires a systematic approach that breaks down the reasoning process into manageable parts. Each element of the refugee definition should be checked against the facts gathered through the interview. Controversial issues should be addressed and discussed systematically, and the reasoning should be clearly explained. The evidence provided by the Applicant and information about the country of origin must all be examined together to determine whether the Applicant falls within the refugee criteria;*
- An statement as whether exclusion issues arise and, if they do, an assessment of the relevant issues where potential exclusion grounds are identified;

- A recommendation on whether or not the Applicant should be recognized as a refugee;
- If not, a recommendation as to whether any complementary grounds for protection are identified.

11.2 Country Information

When using country information, it is important to remember during the assessment phase that information on the conditions prevailing in the country of origin may only give the interviewer a “general impression” of the situation affecting an individual. Country-of-origin information cannot, therefore, be systematically applied in the process of refugee status determination without being adequately assessed and put in the appropriate context. *The absence of information that supports an Applicant’s claim, should not in itself provide a justification for a negative eligibility decision.*

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt (UNHCR Handbook)

CHAPTER 12 - THE APPLICATION OF THE EXCLUSION CLAUSES

12.1 General Principles

Examination of the applicability of the exclusion clauses (Articles 1D, 1E and 1F) must be conducted on an individual basis, respecting the principles of **due process**. This means that the individual concerned should be informed of the considerations that have given rise to the exclusion examination and should have the opportunity to consider and respond to them.

When the facts relating to the possible application of the exclusion clauses are known before the RSD Interview, the file should be assigned to an RSDO who has experience and knowledge regarding the application of these clauses. If the exclusion issues do not arise until during or after the RSD Interview, the RSDO should seek any necessary procedural or substantive direction from the Department of Justice.

If facts come to light after an individual has been recognized as a refugee that the exclusion criteria were applicable suggesting that the individual may have been incorrectly recognized, examination of the application of the exclusion clauses should be conducted through the procedures for cancellation of Refugee Status.

The recommendations that follow are intended to provide **procedural guidance** for examining the applicability of the exclusion clauses under 1F. For further guidance on substantive issues relating to the interpretation and application of the exclusion clauses, including Articles 1D and 1E, RSDOs should refer to Part 1 of this Handbook.

12.2 Procedures for Examining the Application of Article 1F

The application of the exclusion clauses in Article 1F of the 1951 Convention (exclusion of persons who are undeserving of protection) has the effect of excluding from eligibility for refugee status an individual who is otherwise determined to be in need of refugee protection.

Due process requires that the individual be informed of considerations, including any evidence that is relevant to the exclusion determination, during the course of the exclusion examination, so that he/she has an opportunity to respond to the evidence. However, in exceptional circumstances, generally relating to the security of a witness or other source of information, it may be necessary to limit full disclosure of relevant evidence. The criteria and principles regarding limiting disclosure set out in below in 13.3 *Notifying Applicants of Negative RSD Decisions* are relevant to decisions to limit disclosure during exclusion examinations. Alternatives to withholding relevant information must always be considered, including making partial disclosure, or disclosing the evidence without revealing the source, so that the individual concerned is not unduly denied the opportunity to challenge or explain information upon which the exclusion decision is based.

If the application of Article IF exclusion clauses to children is under consideration, this needs to be exercised with great caution. In the case of young children, the exclusion clauses may not apply at all. Where children are alleged to have committed crimes while their own rights were being violated (for instance while being associated with armed forces or armed groups), it is important to bear in mind that they may be in fact be victims of offences against international law and not perpetrators. Article 1F can be applied to a child only if he or she has reached the age of criminal responsibility at the time of the commission of the act. Thus, a child below the minimum age *cannot* be considered responsible for an excludable act. As the minimum age for criminal responsibility differs among jurisdictions, it is necessary to evaluate the emotional, mental and intellectual maturity of any child over the relevant national age limit. The younger the child, the greater the presumption that the requisite mental capacity did not exist at the relevant time. The following considerations are of central importance in the application of the exclusion clauses to acts committed by children:

- Whether the child had the necessary mental state (*mens rea)* needs to be determined;

- If mental capacity is established, other grounds for rejecting individual responsibility, such as duress, coercion or self-defence, need to be considered;
- If responsibility is established, it needs to be determined whether or not the consequences of exclusion from refugee status are proportional to the seriousness of the act committed. [35]

12.3 Notification of Exclusion Decisions

Individuals who are determined to be excluded from refugee protection should be informed in writing of the reasons for the exclusion decision, in accordance with the principles and procedures set out above in 13.3 *Notifying Applicants of Negative RSD Decisions*. As a general rule, notification of the exclusion decision should permit the individual concerned to know the considerations, including any evidence upon which the decision was based.

In some cases, it may be necessary and appropriate to limit disclosure of the evidence that was relied upon, or other findings upon which the exclusion decision was made. The considerations and principles regarding limiting disclosure during the examination of exclusion cases set out above are relevant to the disclosure of information in notification of exclusion decisions. Limiting disclosure of information can affect the ability of an individual to appeal, so any decision to limit disclosure of evidence must be considered and approved by the Secretary for Justice.

12.4 Implications of Exclusion on Family Members

The internationally recognized human right to family unity generally operates in favour of family members/dependants and not against them. Therefore, where the Principal Applicant is excluded, family members/dependants are not automatically excluded as well. Independent claims for refugee status by family members/dependants should be determined separately. Such claims are valid even where the fear of persecution is a result of the relationship to the excluded individual. Family members/dependants are only excluded from protection of the Refugee Convention if there are serious reasons for considering that they too are individually responsible for excludable crimes or acts.

[35] UNHCR Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees.

Where family members/dependants have been recognised as refugees, however, the excluded Applicant cannot then rely on the right to family unity to secure protection as a refugee.

CHAPTER 13 - PROCESSING CLAIMS BASED ON FAMILY UNITY

13.1 Derivative Refugee Status

Family members/dependants of a recognized refugee may apply for derivative refugee status in accordance with their **right to family unity**.

Family members/dependants who are determined to fall within the criteria for refugee status in their own right should be granted refugee status rather than derivative refugee status.

Individuals who obtain derivative refugee status enjoy the **same rights and entitlements as other recognized refugees**, and should retain this status notwithstanding the subsequent dissolution of the family through separation, divorce, death, or the fact that a child reaches the age of majority. Procedures relating to cancellation and cessation of refugee status will also apply to persons who have received derivative refugee status.

RSD procedures in Nauru will ensure that the accompanying family members/dependants of Principal Applicants have been fully informed about the refugee criteria and the right to make an individual claim, if they have individual protection needs. Accompanying family members/dependants should also be advised of the criteria and procedures for obtaining derivative status.

Persons who may have grounds to make an independent refugee claim should be encouraged to do so, rather than to apply for derivative status under the right to family unity.

13.2 Persons Eligible for Derivative Status

The categories of persons who should be considered to be eligible for derivative status under the right to family unity include:

Nuclear Family Members

- Spouse/de facto partner of the Principal Applicant;
- All children of the Principal Applicant who are under 18 years at the date of Application;

Other Dependants

- someone wholly dependent on the Principal Applicant for financial, psychological or physical support

It may be the case that a family member or dependant will arrive in Nauru after the Principal Applicant has been assessed as a refugee and is waiting a durable solution. If so, the family member/dependant can still be assessed for derivative refugee status.

CHAPTER 14 - NOTIFICATION OF DECISIONS

14.1 Procedures for Notifying Applicants of RSD Decisions

Applicable Law

Article 9 of the Refugees Convention Act states that:

As soon as practicable after making a determination as to whether an asylum seeker is recognized as a refugee or a decision to decline to make a determination, the Secretary must give the asylum seeker a notice specifying:

a) the relevant determination or decision
b) the reasons for the determination or decision
c) of the asylum seeker has not been recognized as a refugee, or the Secretary declined to make a determination – details of the Applicant's right to merits review.

14.2 General Principles regarding Notification:

All notifications must be in writing.

- Notification of positive decisions should inform the recognized refugee of the implications of recognition
- Applicants whose claims are rejected should be informed of the basis for the negative decision (see below)
- All positive and negative notification letters should be reviewed and approved by the Secretary before they are issued to Applicants
- Applicants should also receive an oral translation of the notification letter by a qualified interpreter
- Notification letters should be delivered to the Applicant in person by a CAP and their receipt acknowledged in writing by the Applicant.
- The date on which the Applicant receives notification of the RSD decision should be stamped on the front of the notification letter and the written receipt. The date and manner of notification are relevant in establishing the applicable appeal period for a negative

decision, and informing the Applicant of the deadline to file an appeal (28 days after the person receives notice). This information on the date and manner of notification must therefore be recorded on the **File Action Sheet** in the individual file

- CAPS are required to provide advice and assistance on RSD decisions and appeal processes; psychological counselling for Applicants should be facilitated where necessary.

14.3 Notification of Negative RSD Decisions

Notification letters for negative RSD decisions should be completed using the template letter Notification of Negative RSD Decision. The completed Notification of Negative RSD Decision letter should include sufficient details to permit the Applicant to know the following:

- Evidence submitted by the Applicant that was considered to be insufficient or was not accepted by the decision-maker, and an adequate summary explanation of why evidence was rejected;
- The reason why the accepted facts do not make the Applicant eligible for refugee status.

Notification letters for negative RSD decisions should contain an *Application for Merits Review* form. Information on the review process , including the deadline for submission, is included in the template Notification of Negative RSD Decision.

CHAPTER 15. CLOSING/RE-OPENING THE RSD FILE

Procedures for opening and closing files is contained in the RSD Administration team Procedural Guidelines.

In general, Registry staff will be instructed to close an RSD file in the following circumstances:

- An Applicant decides to withdraw his or her application for asylum, has received advice on so doing, and has signed a formal withdrawal letter;
- An Applicant does not appeal a negative decision within the established time frame, and the decision therefore becomes final;
- The appeal decision (including judicial review if applicable) is negative;
- The Applicant is deceased;
- The Applicant has departed Nauru permanently under a voluntary return arrangement.

Procedures on storing and archiving closed files will be available to Registry staff.

Exceptionally, a claims file may need to be reopened in the following circumstances:

- There is reliable evidence that circumstances have changed to such an extent that the application is based on significantly different grounds as existed at the time of the previous determination;
- The Department of Justice and Border Control receives **reliable and material new evidence** indicating that the claim may have been improperly decided.

The Secretary must approve any recommendation or request to re-open a file..

CHAPTER 16. CANCELLATION of REFUGEE STATUS

Applicable Law

Article 10 of the Refugee Convention Act 2012 states that:

(1) The Secretary must cancel a person's recognition as a refugee if the Secretary is satisfied that:
   - *(a) the Refugees Convention as modified by the Refugees Protocol ceases to apply to the person; or*
   - *(b) the recognition given by the Secretary was procured by fraud, forgery, false or misleading representation, or concealment of relevant information.*

(2) As soon as practicable after cancelling a person's recognition as a refugee, the Secretary must give the person a notice specifying:
   - *(a) the decision; and*
   - *(b) the reasons for the decision; and*
   - *(c) details of a person's right to merits review.*

(3) The Secretary may cancel a person's recognition as a refugee if requested by the person while in Nauru.

The legislation covers two scenarios:

Clause (10)(1)(a) provides for *cessation* of refugee status, where refugee status was properly conferred, but may no longer be necessary owing to a change of circumstances affecting the need for protection.

Clause (10)(1)(b) covers situations where the individual was not properly entitled to refugee status, and the grant of refugee status needs to be invalidated.

If reliable information comes to light, after an individual has been formally recognized to be a refugee indicating that the individual should not have been recognized, the Department of Justice and Border Control will initiate procedures to re-examine the correctness of the RSD decision and to assess whether it is appropriate to cancel the refugee status.

Cancellation procedures must incorporate fairness and due process standards. An interview should take place, where the Applicant has the opportunity to make submissions, prior to the cancellation decision being taken. The Applicant must be given sufficient notice of the

interview as well as the reasons for commencement of the cancellation procedures, so that he or she has an adequate opportunity to prepare submissions. The interview should follow the RSD interview procedures, and a detailed transcript kept on file.

Following the cancellation decision, the Applicant should be informed in writing, given reasons and informed of the procedure for merits review.