

# The refugee convention contains four elements law european essay

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In examining (i), this is referred to as the alienage requirement and is strictly linked to the national sovereignty of states, a notion which signifies the right of a state to exercise full and unlimited jurisdiction within its own borders. However, other states have a duty not to interfere in the inner workings of another. It is essential in accordance with the definition that an applicant for refugee status is outside their country of origin borders. This element also encompasses the so-called refugee sur place. These are individuals who did not flee their nation in order to avoid persecution, but who are already outside their national borders before the prospect of persecution began. In a nutshell, a refugee sur place is a person who was not a refugee when they left their country of origin, but who became a refugee by happenings occurring after departure. It should be noted that this will apply if they are already present in a foreign state, or just arriving. However, if a person has dual nationality they shall not be deemed a refugee until they have availed themselves for protection to one of the other country's which they are a citizen of[1]. Further, the aforementioned also applies to a stateless person these are defined as (a person who is not considered as a national by any State under the operation of its law)[2]. However, once it is established that an applicant is beyond their national borders, it must then be looked at who is behind the persecution. The sources may stem from government or State itself. Even, certain Legislation may discriminate or persecute people on grounds of their sexuality or gender. State bodies, like the police or the army, may be acting under acting on government orders and enforcing harassing rules. Further, persecution may originate from the State if it fails to take steps to protect its citizens from officials who abuse their power.

Persecution can also take place by citizens themselves; these are known as non-state actors which will be discussed later. With the source of the persecution established persecution its self needs defining. There is no definition of ' Persecution' in the Geneva Convention on refugees. The UNHCR Handbook suggests that " it will involve a threat to life or liberty; it could extend to other threats. In agreement with the UNHCR Handbook and on the foundation of the relevant case law, nevertheless it may be established that while a threat of deprivation of life or physical freedom permanently amounts to a well-founded fear of persecution, other desecrations of human rights can constitute persecution within the meaning of The Refugee Convention article 1 A(2). Furthermore, GOODWIN-GILL has argued that " less overt measures, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society' can give rise to persecution as well. The fear of any persecution for must be present[3], yet, past persecution will be a good indicator as to whether a person may have a current well-founded fear of persecution. The Immigration Rules para 339K provides " that the fact that a person has already been subject to persecution, or to direct threats of such persecution, will be regarded as a serious indication of the person's well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated". Conversely, no history of past persecution is not determinative of any future risks. However, it is down to the applicant to show a fear of persecution. Difficulties may be apparent in obtaining evidence to supports the credibility of applicant's testimony

because of current affairs within their Country of Origin. In fact, it is a fair assumption that a person fleeing persecution may leave behind documentation. However paragraph (196) of the UNHCR hand book states " if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt". Although this statement puts the burden of proof on the person claiming refugee status, this is in stark contrast to the large majority of British Law. The British legal system presumes innocence until proven guilty. Here it seems to be in an ideological way guilty until proven innocent. However, when assessing a claim the Home Office will apply a Subjective test and an Objective one. Yet, a person may fear persecution; however, a claim may be rejected if there is very little likelihood of that persecution ever coming to fruition[4]. Yet, the pivotal point of any claim is the testimony of the claimants. The Home Office will ask the question does the claimant have a genuine fear of persecution (the subjective element). Yet, the Home Office may exam evidence of the current state affairs within that country to debunk any claim of persecution, (the Objective element). At times the claimant may have within their possession documents to support their claim. This may include things such as Newspaper clipping, Political party membership cards and arrest warrants. If a claimant can produce evidence of injuries and scarring, this will be assessed by an expert and should it be found to be contestant with the testimony this evidence will also be given consideration[5]. Medical evidence may also be supportive in that the claimant may provide evidence of injuries sustained. These injuries should be consistent with the applicant's claims and will also need to be verified by a medical expert[6]. Yet the persecution

must fit into the Five ground mentioned earlier. Not every form of persecution which the individual fears leads is recognised by Article 1a. The persecution must be associated with one of the five grounds counted therein: race, religion, nationality, membership of a particular social group or political opinion. These Convention grounds are generally constructed rather broadly, especially the concept of membership of a particular social group. A social group' refers to persons who fit to a group characterised by a shared and habitual features, such as background, sex, colour or social standing. The UNHCR has defines these as " 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 interpretation was adopted in Secretary of State v. K [2006] UKHL 46 by the House of Lords. An applicant for refugee status claim for may therefore be considered as authenticated each time it is based on a feared persecution for reasons of, family or relationship ties, sexual orientation, membership of a caste, professional activity or membership of a trade union. To establish persecution on grounds of political opinion, the applicant must show more than they hold opinions which there government opposes. It needs to be proven that a state government does tolerate their opinions, and that they are aware that they hold them. However, a claimant that has committed a criminal offences regarding political opposition, cannot base a claim on fear of his country's normal judicial treatment. However, a claim can be based even if a claimant has no political views opposed by their government

opposes, but his government believe they have[7]. The concept of race includes, for example, colour, descent, or membership of a particular ethnic group. The fact that a claimant belongs to a certain racial group is not normally enough to prove a claim. Qualification Regulations 2006 reg 6(1)(b) states the concept of religion as holding of theistic, non-theistic and atheistic beliefs. Further, it states the participation in, or abstention from, formal worship in private or in public, either alone or in community with others; other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief. Yet a person can suffer persecution even if it is a family member under duress. Attacks upon an applicant's close family can amount to persecution of the applicant, even though; there was no direct threat towards the applicant. The test set for is to ask " what may reasonable happen to one may amount to persecution for the other". Further, no claimant is expected to take reasonable measures to avoid persecution if they return home. Further, as mentioned at time the persecution can come from non-state actors. The question which will then be asked is did the state of origins government fail to protect the individual or group[8]. It was deemed this was an essential element, and the claimant had to show a fear of persecution which consisted of acts of violence against which the State was unable or unwilling to provide protection Yet, a factor to be implemented into the decision making process was that any state was not expected to accomplish widespread protection against random and isolated incidents[9]. The Qualification Regulations 2006, now states that, the sufficiency of State protection is to be measured not by the existence of a real risk of an abuse of human rights but by the availability of a system for

the protection of the citizen and a reasonable willingness to operate that system[10]. It should be noted thatThe primary instrument for excluding a person from refugee status is found in the Refugee Convention Article 1F. Which states that the provisions of the Convention do not apply to any person whom:(a)he has committed a crime against peace, a war crime, or a crime against humanity,(b)He 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. 9The burden of proof is on the Secretary of State to inaugurate a stern reason for considering that a claimant has committed an act under Article 1F. However, it should be noted that the burden of proof is lower than the Criminal standard of proof, (Beyond reasonable doubt). Clause A is questionably the area in which the jurisprudence is the purest. Clearly there are widespread international law concerning crimes against humanity and war crimes. In the UK Article (1f)a is dealt with in a restrictive manor and more than mere membership of group which may have committed said crimes is required. The UK will look at the personal role in which an individual undertook while acting within a group<sup>2</sup>. This may bring about a more balanced outcome as people claiming refugee status may have joined such groups out of fear of persecution. However, a child soldier can be the source of a Refugee claim and there are reports of Child Solders committing war crimes<sup>3</sup>. Article I of the Convention on the Rights of the Child provides that: " all actions concerning children... the best interests of the child shall be a primary consideration" <sup>4</sup>. It is further stated " ensure the child such protection and care as is necessary for his or her well-being. <sup>5</sup>" U.

N. H. C. R. applies the Convention of the Rights of the Child to its own work by using the rights laid down in the Convention as guiding principles. It is submitted that such an approach is the correct one and that the provisions of the Refugee Convention should be interpreted as far as possible in conformity with the principles set down in the Convention on the Rights of the Child. However, a problem immediately arises, as to the minimum age of criminal responsibility in respect of crimes against humanity and war crimes. There is little help found in the Convention on the Rights of the Child, no age is stipulated. The only provision dealing with the matter is Article 40, on treatment in penal affairs, the relevant provisions of which declare that State parties to the Convention shall seek to establish a minimum age below which children shall be presumed to not have the capacity to infringe the criminal law<sup>7</sup>. This age would appear to be ten years old in the UK as affirmed by The European courts for Human rights<sup>8</sup>. This could possibly have a detrimental effect on a child aged eleven years who has been groomed for the duration of their short life to be a mesanary. Clause b The reference to 'serious non-political crime' includes a particularly cruel action, even if it is committed with an allegedly political objective. The reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall mean the time up to and including the day on which a residence permit [signifying the grant of refugee status] is issued. The application of Article 1F(c) will be straightforward in the case of an active member of an organisation that promotes its objects only by acts of terrorism. There will almost certainly be serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations. However,



what if the organisation pursues its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government? A person may join such an organisation because he agrees with its political aims. Finally, it is not formally required that the abovementioned serious discriminatory or other injurious actions emanate from the (central, regional or local) authorities of the state of origin itself; acts of persecution can also be committed by non-state actors, such as armed opposition groups, death squads and paramilitaries. According to the House of Lords in the *Bagdanavicius* case, for instance, the perceived terror of persecution by non-state agents implies a systematic failure by the authorities of the home country to afford adequate and sufficient protection against those agents. In other words, whenever serious ill-treatment or violence can be attributed to non-state actors, the decisive factor will be whether the government of the country of origin is able and, above all, is willing to offer the necessary protection to the citizens concerned. Next, like any other Convention ground, a broad purposive construction of the term "political opinion" is to be adopted. According to GOODWIN-GILL, for instance, the notion of political opinion refers to "any opinion on any matter in which the machinery of state, government and policy may be engaged". HATHAWAY, on the other hand, defines it as "any action perceived to challenge governmental authority"; a view which was subsequently endorsed by the Immigration Appeal Tribunal in the *Gomez* case. Additionally, in order for the claimant to be qualified as a refugee, it is imperative that his political convictions are not tolerated by the authorities because of their criticism of the political system or the government's policies. The mere fact of having political convictions

which deviate from those of the leaders in the country of origin is in itself not sufficient to warrant the protections established by the Refugee Convention. Hence, the authorities in question must have knowledge of the political convictions expressed or at least impute certain convictions to the applicant for refugee status." Yet, discrimination against a particular group in itself does amount to persecution, however, it may become persecution if it stops a person practising religion, or earning a living. It should be noted that punishment for a crime does not amount to Persecution. Yet, an exemption to this rule may lie if the punishment is seriously discriminatory. No crime will be committed by the United Kingdom if it were to return an applicant to a safe country which is obligated under the Geneva Convention on refugees to grant protection. Generally the principal followed is that an applicant should seek protection in their first port of call. Under EC Council Regulation 343/2003 or the Dublin Convention, the UK is within its rights to return an applicant to other EU Member State which has responsibility under the Geneva Convention on refugees. Yet, the applicant can remain in the UK until the State receiving has accepted its responsibility under the Regulation or the Dublin Convention. An assumption will then be made by the Home Office that the receiving State will consider the claim. The Home Office may refuse these claims 'without substantive consideration', that is without looking at other aspects of the claimant's case, such as whether he fears persecution in his home country. The Immigration Rules para 339Q(i), allows the Secretary of State to issue UK Residence Permit, valid for five years. When these five years are up an application can be made for settlement. However, this status may be revoked, cancelled or annulled. The EU measure

of the Qualification Directive was established and brought about to ensure harmonisation (effect an approximation or co-ordination of different legal provision or systems by eliminating major differences and creating minimum requirements or standards when EU country's where considering refugee claims)<sup>1</sup>. The intention of this harmonisation is to bring equality throughout a substantive claim and the procedures with an overall intention of creating a common criteria throughout the whole process of a refugee application. It should be noted that any decided case law will come from the country of origin in addition to any ruling made in Luxembourg. Further, it should be remembered that any rulings made in Luxemburg will have direct effect in the UK courts and EU law takes Precedent. However, Directive 2004/83/EC is only effective in determination of a person claiming refugee status from third-country nationals or stateless persons<sup>1</sup>. Furthermore, Directive 2004/83/EC states member states may afford more favourable measures when assessing protection as Directive 2004/83/EC purpose is just to set the minimum standard. In a nutshell what Directive 2004/83/EC main purpose is to set the narrowest interpretation of RC 1951 that any state can offer. The above definition of a refugee applies equally to that of a stateless person as a stateless person may be also fleeing persecution from their former country. Yet the different elements of the definition of a refugee according to Art 1A(2) RC 1951, as amended by the Protocol, a refugee will be examined more closely. Qualification Directive and RQR 2006 define persecution as " treatment that is in itself particularly severe or that is repeated or prolonged so that the cumulative effect of the harm is persecutory". It is further recommended by the UNHCR Handbook para 136 " people who have

suffered under atrocious forms of persecution should not be expected to repatriate, thus establishing a general humanitarian principle outside the exact terms of RC 1951 that past treatment may sometimes be so severe that enforced return of the asylum-seeker who has suffered such treatment would be inhumane". The European Union's minimum standards definition of refugee, is found in Art. 2 (c) of Directive No. 2004/83/EC. This definition is essentially a reproduction of the united nations 1951 example. Nonetheless, a person whom has fled a worn torn country is afforded protection under article 2 (e) and 15 of the same Directive. Since 9 October 2006 the UK has had to consider claims for refugee status in accordance with EU minimum standards, set out in Directive 2004/83/EC. The Qualification Directive was implemented into UK law through changes to the immigration rules and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (RQR 2006).