
**THE CESSATION CLAUSES (ARTICLE 1 C):
AN AUSTRALIAN PERSPECTIVE**

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THE CESSATION CLAUSES (ARTICLE 1C)

1. INTRODUCTION

This paper considers the so-called cessation clauses of the 1951 *Convention relating to the Status of Refugees*—Article 1C(1) to 1C(6)—from the perspective primarily of Australian policy and case law.

After considering the nature and intent of the Article, each clause is examined separately. Particular attention is given to the tests that need to be met before the clause may properly be said to result in cessation of refugee status and the loss of protection.

2. THE NATURE AND INTENT OF ARTICLE 1C

Article 1C provides that:

This Convention shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily re-acquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connection 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 his nationality;

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 avail himself of the protection of the country of nationality;

- (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;

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."

These six clauses indicate the conditions under which a refugee ceases to be a refugee. They relate to situations where Convention protection is no longer justified or necessary because of changes in the individual's circumstances, or in conditions in their country of nationality or former habitual residence.

The first four clauses identify situations where a person ceases to be a refugee because of changes in circumstances that have been brought about by the person. The last two identify situations where a person ceases to be a refugee because conditions in the country where

persecution was feared have changed, to an extent that the reasons for the person becoming a refugee no longer exist.

The clauses do not deal with situations where a person should never have been determined to be a refugee in the first place; for example, where it is subsequently found that refugee status was obtained on the basis of false or inaccurate information, or that the person has another nationality, or that one of the exclusion clauses would have applied to the person if all the relevant facts had been known.

While evidence to support this conclusion may at times arise during a re-assessment of refugee status under Article 1C, in these situations a protection visa can be cancelled without reference to this Article.

2.1 THE INTENTIONS OF THE CONVENTION'S FOUNDERS

The inclusion of Article 1C in the Convention, together with the absence of a right to permanent residence, indicate an intention by the founders to maintain the right of signatory states to decide for how long they admit refugees. According to Hathaway and Castillo,¹ the Article reflects a concern that states be able to divest themselves of their protection 'burden' once national protection is available once more. Grahl-Madsen² considers that it is intended to prevent a person from having the 'best of two worlds', so that they cannot at the same time avail themselves of the benefits of their country of nationality and claim the status of refugee.

Underlying Article 1C, therefore, is the principle that international protection is a form of surrogate protection, in the absence of national protection, that should continue only so long as it is justified or necessary.

However, the Convention's founders did not want to leave too much discretion to states in determining the circumstances under which a person's refugee status would cease. As noted in UNHCR's Handbook,

The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.³

Once a person is determined by a state to be a refugee according to the Convention's criteria, he or she remains a refugee, and the state should continue to provide protection and meet the other obligations under the Convention, unless and until circumstances arise in which the cessation clauses can be legitimately brought into effect.

2.2 CESSATION PROCEDURES

UNHCR Executive Committee (ExCom) Conclusion No 69 (XLIII) on Cessation of Status in 1992 provides that the application of the cessation clauses rests exclusively with the contracting states.

Further, the Convention sets no time limit on when Article 1C can be invoked. Unless a person has become a citizen of the country of refuge, it could be applied at any time, whether after one month or 20 years, if warranted by the circumstances. In principle, however, a refugee's status

¹ Hathaway 1997 p 2

² Grahl-Madsen 1966 Vol.1 p 391

³ UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, para 116

should not be subject to frequent review to the detriment of his or her sense of security, which international protection is intended to provide.⁴

However, consistent with the UNHCR Handbook, ExCom Conclusion No 69 suggests that a careful approach is needed when considering cessation of status. Clearly established procedures should be used, and the UNHCR appropriately involved.⁵

As a general principle, and while certain presumptions and onuses may be relied on for particular purposes, when considering any action of a person that may indicate cessation, all aspects of the relationship and details of the contact between the person and his or her country of nationality should be taken into account.

Where refugee status ceases following application of Article 1C, then the person becomes subject to ordinary laws governing the residence of foreign nationals. According to Goodwin-Gill, the corollary is that he or she is entitled to the same standards of treatment, including the right not to be arbitrarily expelled. This right entails not only that decisions on expulsion be in accordance with law, but that his or her 'legitimate expectations' be taken into account, including such 'acquired rights' as may derive from long residence and establishment, business, marriage, and local integration.⁶

2.3 APPLICATION IN AUSTRALIA

Australian law provides that the definition of refugee in the Convention comprises the whole of Article 1.⁷ In some cases, therefore, a conclusion may be made that an applicant may have been a refugee at some time in the past, but is no longer one at the time of determination.

However, there has been little judicial interpretation of Article 1C, and Australian case law exists only for clauses (1) and (5).

In practice, cessation issues have arisen mainly in two areas:

- where protection obligations are being re-assessed in respect of a person who has been determined as a refugee at some point in the past, but is subsequently being considered for criminal deportation or visa cancellation on character grounds; and
- where immigration authorities have become aware of circumstances that prima facie may invite cessation; for example, where a refugee returns to his or her home country shortly after grant of refugee status, or makes repeated trips home, or obtains and uses the passport of the home country.

A determination that a person has ceased to be a refugee has consequences under Australian law only to the extent that Australian law makes it relevant to a decision whether to cancel a visa, deport the person or grant the person another visa. Natural justice, as provided in domestic legislation⁸, requires that the person affected be put on notice by reference *inter alia* to information concerning the possible application to him or her of Article 1C.

In the past, there has been little attempt by Australian authorities to pro-actively seek out refugees whose circumstances might invoke application of a cessation clause. However, a number of factors are leading to a greater interest in identifying people who may no longer require protection, or are abusing protection arrangements. These include the recognition that, whatever

⁴ UNHCR Handbook, para 135

⁵ EXCOM 69 (XLIII)-1992 Cessation of Status

⁶ Goodwin-Gill 1978 p 262.

⁷ Support for this position can be gleaned from *Thiyagarajah v MIMA* (1997) 80 FCR 543 which expressly notes that a refugee is defined by the whole of Article 1, not just Article 1A.

⁸ See *Migration Act 1958* s116(1)(a), s118A and s119.

the size of Australia's annual refugee intake, it is dwarfed by the number—some 12 million or more—of refugees worldwide.⁹ There is a parallel desire to provide protection to those most in need, and to address the growth in illegal migration and people smuggling which is threatening to undermine international protection arrangements.

An attempt to address these concerns is exemplified in Australia's new Temporary Protection Visa (TPV) arrangements.¹⁰ Under the TPV scheme, a person who is determined to be a refugee and owed protection by Australia may be granted a (temporary) protection visa. This temporary visa continues for a period, ordinarily 30 months, after which that person may be granted a permanent protection visa. In order to be granted the permanent visa, he or she must at this later time be determined to be a refugee and be owed protection by Australia, in accordance with the criteria set out in the Convention and domestic legislation.

3. ARTICLE 1C (1): RE-AVAILMENT OF NATIONAL PROTECTION

Article 1C (1) provides that:

[This Convention shall cease to apply to any person ... if] He has voluntarily re-availed himself of the protection of the country of his nationality.

The term re-availment is sometimes used loosely to refer to situations where a person has returned to the country of origin or former habitual residence. However, clause (1) properly refers to a refugee who is still outside the home country, but whose actions indicate an intention and ability to take advantage of the protection of that country.

Importantly, while an actual visit to the home country may serve as additional evidence of re-availment, such a step is not necessary for this clause to come into effect.

3.1 THE TEST

Three elements are required before a person ceases to be a refugee under this cessation clause.¹¹ These are:

- *voluntariness*: The refugee should have acted voluntarily in approaching and making requests of the authorities of their home country. For example, if the refugee has applied to the home country's embassy or consulate for a national passport or its renewal, this should have been done freely rather than in response to some instruction from the home country, or to facilitate the issue of a residence permit from the country of refuge.
- *intention*: The refugee should have an intention to re-avail himself or herself of the protection of the home country (for example as indicated by seeking a passport or entry documents), rather than, for example, simply making contact with the authorities to obtain documents which are needed in the country of refuge (such as birth certificates and marriage or divorce papers).
- *re-availment*: The refugee should actually obtain formal diplomatic or consular protection, for example in the form of a national passport or entry permit.

The UNHCR adopts quite a firm approach in its Handbook:

⁹ According to UNHCR, there were some 21 million people of concern to it at the end of 2000, of which some 12 million were refugees (Provisional Statistics on Refugees and Others of Concern to UNHCR for the year 2000).

¹⁰ The Temporary Protection Visa was introduced in October 1999 as part of a series of initiatives to address illegal migration and people smuggling. The visa is granted to refugees who arrive in Australia illegally, or who were immigration cleared on fraudulent documents.

¹¹ UNHCR Handbook, paras 119 & 120

If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality ... [O]btaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status.¹²

In these circumstances, a state party may legitimately place the onus on the individual to prove a different purpose and to justify why he or she should continue to enjoy international protection.

Alternatively, the option would appear open for a state to determine that the person has ceased to be a refugee and promptly cease protection.¹³ If the person wishes subsequently to renounce his or her re-availment intentions, a completely new assessment of the merits of their protection claims could be undertaken. This course of action would be consistent with advice provided in UNHCR's Handbook, that,

If he subsequently renounces either intention [that is, either to avail himself of the protection of his country of origin while staying outside that country, or to return to that country] his refugee status will need to be determined afresh. He will need to explain why he changed his mind, and to show that there has been no basic change in the conditions that originally made him a refugee.¹⁴

Australian case law would appear to support either of these procedures in response to re-availment, at least in respect to cases involving use of a national passport or travel documents. In *Bengescu*,¹⁵ the Administrative Appeals Tribunal concluded that the applicant fell within Article 1C (1) and that the Convention ceased to apply to him from the date of grant of his Romanian passport. The Tribunal reasoned that where an applicant has sought and been granted a passport by the country of his or her nationality, the applicant has voluntarily re-availed himself or herself of the protection of that country and there is no need to go further and identify the purpose of, or motive for, the acquisition of the passport. In other words, the Tribunal accepted that acquisition of a national passport could be taken to imply a resumption of national protection.¹⁶

Establishing re-availment is less clear-cut where a travel document issued by the country of refuge rather than a national passport is used to visit the home country. While it is open for a decision to be made that re-availment has occurred in these circumstances, the UNHCR Handbook advises that,

Cases of this kind should ... be judged on their individual merits. Visiting an old or sick 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.¹⁷

This passage from the Handbook has been cited with approval by the Full Federal Court in the case of *A*,¹⁸ where the Court went beyond merely the act of *A* obtaining the travel document to look at the motives of the travel.

Among commentators, Hathaway¹⁹ considers that the receipt of a passport or travel document from the home country is not determinative or inherently a means of securing national

¹² UNHCR Handbook, paras 121 & 122

¹³ However, cancellation of a visa should be subject to procedural fairness and the principle of non-refoulement.

¹⁴ UNHCR Handbook, para 123

¹⁵ *Re Bengescu and MIEA*, Administrative Appeals Tribunal 9250, DP McMahon, unreported, 17 January 1994

¹⁶ The Federal Court subsequently rejected Mr Bengescu's appeal. However it was not asked to and did not address the question whether the Tribunal was correct in concluding that the claimant was no longer a refugee. *Bengescu v MIEA* (1994) 35 ALD 429

¹⁷ UNHCR Handbook, para 125

¹⁸ *A v MIMA* [1999] FCA 227

¹⁹ Hathaway 1991 p 192

protection. Goodwin-Gill suggests that the application for or renewal of a passport of the home country, and a visit to the home country, may be presumed prima facie, and in the absence of evidence to the contrary, to indicate an intention of re-availment.²⁰ Grahl-Madsen takes the view that it is the refugee's intentions rather than any specific actions that are the key to determining whether re-availment has occurred. In his view,

... it is the conscious subjection under the government of that country—or in other words, the normalisation of the relationship between State and individual— which matters.²¹

He also considers that physical presence in the territory of the home country does not necessarily constitute re-availment, even if the person had intended to re-avail himself or herself. For example, in his view, a refugee who realises that his or her re-availment of the protection of the home country was a mistake, and that he or she—still or again—has a well-founded fear of persecution, should not have his or her refugee status ceased.²²

4. ARTICLE 1C (2): RE-ACQUISITION OF NATIONALITY

Article 1C (2) provides that:

[This Convention shall cease to apply to any person ... if] Having lost his nationality, he has voluntarily re-acquired it.

This clause is directed at those special cases where a refugee has lost their former nationality as a result of some individual or collective measure by the authorities of the home country.

As with cessation clause (1), clause (2) can come into effect while a refugee is still outside the home country, and without his or her actually visiting that country.

4.1 THE TEST

Under this cessation clause, international protection is no longer necessary where a refugee who has lost his or her nationality has expressly or impliedly accepted an opportunity to reacquire it.²³

UNHCR and most commentators would probably agree that the clause should be interpreted restrictively.²⁴ For example, the UNHCR Handbook states that

A person does not cease to be a refugee merely because he could have re-acquired his former nationality by option, unless this option has actually been exercised.²⁵

Other examples where the clause may not apply are where re-acquisition occurs as a result of marriage (not being voluntary, according to Hathaway); where a refugee applies for, but fails to re-acquire, their former nationality; and where the step from potential to actual nationality involves a step which should not normally be required of a person.²⁶

However, in some circumstances re-acquisition may be expressed through a passive action. As the UNHCR Handbook states,

²⁰ Goodwin-Gill 1996 p 81

²¹ Grahl-Madsen 1966 Vol.1 p 384

²² Grahl-Madsen 1966 Vol.1 p 391

²³ UNHCR Handbook, para 128

²⁴ See, for example, Grahl-Madsen 1966 Vol.1 p 394–95; also Hathaway 1991 p 196–97.

²⁵ UNHCR Handbook, para 128

²⁶ For example, in the case of *Katkova v Canada* (MCI) 26, the Canadian Federal Court found that a requirement for the grant of Israeli citizenship under the Law of Return is that the applicant has a desire to settle in Israel which the applicant did not possess. The Court did not consider it could require the applicant to lie in her application for citizenship to meet this requirement and that as the requirement was discretionary, Israel could thus not be considered a country of nationality of the applicant.

If ... former nationality is granted by operation of law, subject to an option to reject, it will be regarded as a voluntary re-acquisition if the refugee, with full knowledge, has not exercised this option; unless he is able to invoke special reasons showing that it was not in fact his intention to re-acquire his former nationality.²⁷

This places a burden on refugees to signal their rejection of an offer of restored nationality, if they have knowledge that it will operate automatically unless they opt out.²⁸

There is no Australian jurisprudence on this cessation clause.

5. ARTICLE 1C (3): ACQUISITION OF A NEW NATIONALITY

Article 1C (3) provides that:

[This Convention shall cease to apply to any person ... if] He has acquired a new nationality, and enjoys the protection of the country of his new nationality.

In contrast to the first two cessation clauses, which address situations where a refugee resumes the protection of their home country, this clause addresses situations where a refugee acquires the protection of a new country.

Clause (3) can come into effect while a refugee is still outside the country of new nationality, and without his or her actually visiting the country.

5.1 THE TEST

Two elements are required before a person ceases to be a refugee under this cessation clause:

- the refugee has acquired a new nationality; and
- he or she enjoys the protection of the country of new nationality.

Importantly, and in contrast to the previous two cessation clauses, the element of voluntariness is not required.²⁹ Having a new nationality is the critical issue, not how or why it was acquired – for example, by operation of law or by decree.³⁰

The second element of the test is cumulative and requires that the new nationality must be effective and adequate. There is little scope for a presumption here because a new nationality can be acquired without a voluntary act.

Australian case law would support this ‘no presumption’ approach; that is, there should not be a presumption that the country of new nationality will provide adequate state protection to its new citizen; this should be established before Article 1C(3) can be relied on;³¹ and the relevant question should not be whether there is generalised protection, but whether in an applicant’s particular case there is adequate protection.³²

Legislative changes enacted in October 1999³³ have the effect, put broadly, that Australia does not have protection obligations to a non-citizen who fails to take certain steps to avail himself or

²⁷ UNHCR Handbook, para 128

²⁸ However, authorities in the state of refuge should also consider whether the person will enjoy effective national protection in the state of restored nationality before applying cessation under this clause.

²⁹ Hathaway, while noting a difference in views on this matter, concedes that the UNHCR Handbook does not support the need for voluntariness (1991 p 210).

³⁰ It should be noted, however, that traditional practices where women automatically acquire their husband’s nationality upon marriage, even if they do not wish it and have taken no steps to acquire it other than the marriage itself, may result in this cessation clause having a potentially disproportionate impact on women. In these cases, the right to equal protection of the law, as embodied in international human rights law, would need to be taken into account.

³¹ *A, B & C v MIMA* (1999) 53 ALD 545

³² *Prathapan v MIMA* (1997) 47 ALD 41, *Fernando v MIMA* [2000] FCA 760

³³ See subsections 36(3) to (6) of the *Migration Act 1958*.

herself of protection in another country.³⁴ Where a person previously recognised as a refugee to whom Australia has protection obligations has acquired the new nationality of a country that would protect the person against any breach of Article 33, it is possible that this new obligation could be relied on consistently with the Convention, but separately from Article 1C, to find that Australia does not have (that is, in this context, no longer has) protection obligations to the person.³⁵ That would be the case if the obligation applies and the person fails to take the required steps.

Finally, it is open for this cessation clause to be applied to refugees who were formerly stateless, but who have subsequently acquired the nationality of their former country of habitual residence, for example by operation of law. In these circumstances, if their previous claims for protection centred on their treatment in that country, and the reasons for that treatment no longer exist, then there appears no reason why their refugee status should not also cease and international protection be no longer necessary.

6. ARTICLE 1C (4): RE-ESTABLISHMENT IN COUNTRY OF PERSECUTION

Article 1C (4) provides that:

[This Convention shall cease to apply to any person ... if] He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution.

This clause, which applies both to refugees who have a nationality and those who are stateless,³⁶ is a corollary to the requirement in Article 1A(2) that a refugee shall be outside the country of his nationality or former habitual residence.³⁷

There can be little argument with the clause's underlying principle of 'voluntary re-establishment': people who voluntarily resume residence in the country from which they took flight are signalling a willingness to entrust themselves to the protection of that country.

6.1 THE TEST

According to UNHCR,³⁸ two elements are required before a person ceases to be a refugee under this clause:

- *voluntariness*: the refugee has returned freely to the country of origin or former habitual residence; and
- *intention*: the refugee has demonstrated an intention, explicit or inferred, to resume a normal relationship with that country.

A view which emerges from UNHCR and a number of commentators³⁹ is that return in certain circumstances may not justify the cessation of refugee status and the loss of international protection under this clause. These include a temporary return—up to a few weeks—to visit an

³⁴ This new statutory obligation is consistent with the obligation imposed by Article 1A(2) of the Convention on nationals to avail themselves of the protection of their country or countries of nationality, absent valid reason based on well-founded fear of persecution. For the purposes of this new obligation, the protection available in another country must be such as to protect the non-citizen in practice against any breach of Article 33 of the Convention (in other words, it must be 'adequate' in that sense).

³⁵ Such a person may have 'effective protection' in the new country of nationality and therefore may be a person to whom Australia does not have protection obligations by reference also to the common law, as it has developed based on subsection 36(2) of the Migration Act and Article 33 of the Convention. That involves a very similar inquiry to the one posed by Article 1C(3).

³⁶ UNHCR Handbook, para 133

³⁷ Grahl-Madsen 1966 Vol.1 p 370

³⁸ 'Guidelines on the application of cessation clauses', 26 April 1999, UNHCR/IOM/17/99, p 3

³⁹ See, for example, UNHCR Handbook, para 125; Grahl-Madsen 1966 Vol.1 pp 374 and 378; Hathaway 1991 pp 198–99

old or sick parent, or to bring out relatives, friends or property, or to 'test the waters' as a precursor to possible voluntary repatriation, and potentially a prolonged visit where this occurs for reasons beyond the refugee's control.⁴⁰

According to this reasoning, something more than setting foot in the home country would be necessary. However, beyond this, there is considerable scope for different interpretations. Some commentators suggest that prolonged stay—a couple of years or more—and a view to permanent residence are required.⁴¹ This is a very high threshold, and would appear inconsistent with the test for clause (1). Rather, a regular presence in the country for a significant part of a year should be seen as *prima facie* inconsistent with a continued need for protection. Furthermore, in such circumstances the onus should be on the refugee to demonstrate why he or she should continue to enjoy refugee status.⁴² In particular,

Careful scrutiny of more prolonged and frequent visits for such purposes as holidays or business is warranted ... since at some point the degree of attachment may qualify as re-establishment.⁴³

As Hathaway notes:

... both the facts underlying the original, successful claim to refugee status and post re-establishment factors should be taken into account. If the totality of the evidence demonstrates a forward-looking, genuine risk of persecution, this cessation clause is not a bar to continued recognition as a refugee.⁴⁴

There is no Australian jurisprudence on this cessation clause. However, clearly the challenge in interpreting and applying the clause is to distinguish between those cases where a refugee returns briefly to the country of origin for legitimate and compelling reasons in the face of a continued risk of persecution, and cases where return, and behaviour during that return, indicates an ability and intention to enjoy a normal relationship with that country—or indeed that refugee status was obtained by misrepresentation of relevant facts or outright fraud in the first place.

7. ARTICLE 1C (5) AND (6): CHANGE OF CIRCUMSTANCES

Cessation clause (5) concerns persons who have a nationality, while clause (6) concerns stateless persons who are able to return to their country of former habitual residence. They are otherwise parallel clauses. Taken together they provide that:

[This Convention shall cease to apply to any person ... if ...]

He can no longer, because the circumstances in connection 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 his nationality; or

[b]eing a person who has no nationality he is, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;

⁴⁰ For example, due to confiscation of travel documents by authorities or an outbreak of civil war.

⁴¹ Grahl-Madsen 1966 Vol.1 p 372; UNHCR Handbook, para 134. However, in its 'Guidelines on the application of cessation clauses,' UNHCR notes that, 'A short stay may warrant cessation of refugee status if the refugee had carried on a normal livelihood without problems and performed obligations which a normal citizen would, such as paying taxes' (UNHCR Handbook, p 3).

⁴² Hathaway 1991 p 199

⁴³ Hathaway 1991 p 198

⁴⁴ Hathaway 1991 p 199

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 [for those covered by 1C(5)] avail himself of the protection of the country of nationality, or [for those covered by 1C(6)] return to the country of his former habitual residence.

These two clauses reflect an intention by the Convention's founders to maintain the right of signatory states to decide how long refugees should be admitted to their territory, a wariness about equating protection with permanent residence, and a reluctance to feel obliged to continue providing assistance to refugees who could seek the protection of their country of origin.

Just as the Convention leaves the initial determination of refugee status to the country of refuge, so too does it leave to the country of refuge a discretion to initiate a review of that status. As Hathaway notes,

Unlike the forms of cessation ... which are initiated by the voluntary act of a refugee, cessation due to change of circumstances is the prerogative of an asylum state which is satisfied that protection is once more viable in the refugee's state of origin. The clause was intended to allow a state to divest itself of the protection 'burden' when the government of the home country is judged to have become an appropriate guardian of the rights of its involuntary expatriates.⁴⁵

Clauses (5) and (6) share a common proviso, namely that in certain circumstances statutory refugees—those determined under pre-1951 Convention arrangements as identified in Article 1A(1)—may be exempted from their application. In 1951, these statutory refugees formed the majority of refugees⁴⁶, and the proviso appears to have been included with a definite situation in mind, namely the possible forced return of Jews to countries such as Germany and Austria, where they had experienced gross human rights violations.⁴⁷

UNHCR suggests that this exception reflects a general humanitarian principle that could be extended to other, modern day refugees as well.⁴⁸ Most states probably share this view, and Canada for example, has adopted this principle in legislation.⁴⁹

7.1 THE TEST

A person ceases to be a refugee under clauses (5) and (6) where a fear of persecution in the country of nationality or former habitual residence no longer exists, or any continued fear of persecution is not well-founded.

The element of voluntariness in terms of the person's return to that country is not required. For this reason, however, judgments by the protecting country about a refugee's circumstances should not be taken lightly. The burden of proof should be on the authorities concerned, not the refugee.⁵⁰ The changes in circumstances should be substantial and lasting.⁵¹ Whether they are the result of rapid developments, or slow and subtle reforms over a number of years, authoritative evidence should exist that the changes are:

⁴⁵ Hathaway 1991 p 199–200

⁴⁶ UNHCR Handbook, para 136

⁴⁷ Hathaway 1991 notes 88 and 90, pp 203–4

⁴⁸ UNHCR Handbook, para 136

⁴⁹ *Immigration and Refugee Protection Act*, Part 2, Division 2, Clause 108

⁵⁰ Goodwin-Gill 1978 p 84

⁵¹ See, for example, Hathaway 1991, pp 200–3; UNHCR Handbook, para 135

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- substantial, in the sense that the power structure under which persecution was deemed a real possibility no longer exists;
 - effective, in the sense that they exist in fact, rather than simply promise, and reflect a genuine ability and willingness on the part of the home country's authorities to protect the refugee; and
 - durable, rather than transitory shifts which last only a few weeks or months (although long-term possibilities, for example an adverse electoral result in a year's time, may be considered irrelevant⁵²).

The quality of amnesties should be judged according to these standards.⁵³

The limited Australian case law in this area supports this careful approach. In *Chan*,⁵⁴ Gaudron J noted the need to focus on meaningful structural changes rather than cosmetic changes in political activities and policies:

... a political situation can only be properly evaluated in the context of its supporting political structures. Those structures are not necessarily revealed by a consideration of current political activities and policies. And where, as here, the claim is to an extent based on political structures, something more is required than a mere evaluation of current political activities and policies

However, Australia's courts have been willing to support the cessation of refugee status when the appropriate circumstances exist. In *Todea*,⁵⁵ the Administrative Appeals Tribunal considered that the applicant was no longer a refugee on the basis that his fear of persecution appeared to have been weak in the first instance, and the conditions in Romania had changed to an extent that any Convention reasons for persecution had ceased to exist for the purposes of Article 1C (5) of the Convention. Further, as he was unable to invoke any compelling reasons why the proviso to Article 1C (5) should apply, the Tribunal concluded that the applicant's fear of persecution was no longer well founded. The Tribunal's interpretation and application of clause (5) was later supported by the Federal Court in rejecting the applicant's appeal.⁵⁶

7.2 EXEMPTION FOR COMPELLING REASONS

As noted previously, clauses (5) and (6) permit exemptions from their application when compelling reasons exist, arising out of the previous persecution, for refusing to return.

According to Hathaway, and with Jewish refugees in mind, the intention of the drafters of the Convention was twofold:

First, to recognise the legitimacy of the psychological hardship that would be faced by the victims of persecution were they to be returned to the country responsible for their maltreatment; and second, to protect the victims of past atrocities from harm at the hands of private citizens, whose attitudes may not have reformed in tandem with the political structure.⁵⁷

The focus was clearly on exempting from repatriation only those who had suffered most seriously in their home countries and who, in most cases, were continuing to suffer the effects of the

⁵² See Dorothy Robb (1987 p 4), cited in Hathaway 1991, note 86, p 203. See also ExCom Standing Committee's May 1997 'Note on the Cessation Clauses' and UNHCR's April 1999 'Guidelines on the application of cessation clauses'.

⁵³ Goodwin-Gill 1996 p 84; Grahl-Madsen 1966 Vol.1 p 401

⁵⁴ *Chan v MIEA* (1989) 169 CLR 379

⁵⁵ *Todea and MIEA* (1994) 34 ALD 639

⁵⁶ *Todea v MIEA* (1994) 35 ALD 735

⁵⁷ Hathaway 1991 pp 203-4

previous persecution. Less compelling reasons for exemption—for example, family, social and economic ties to the country of refuge, loss of such ties to the home country, age, infirmity, personal convenience, etc—do not warrant exemption from return.⁵⁸

The limited Australian case law in this area supports this narrower approach. In the case mentioned above of *Todea*, the Federal Court noted that the ‘compelling reasons’ must arise out of the previous persecution that gave rise to the person’s recognition as a refugee. It also noted that a decision-maker’s role in applying this cessation clause was to analyse the circumstances ‘in connection with which’ the person had been recognised as a refugee, and then to determine if those circumstances had ceased to exist. In exercising this role, the Court noted that the decision-maker is not deciding whether the original determination that granted the applicant refugee status was wrong.

7.3 CESSATION NOTICES ISSUED BY UNHCR

While the Convention provides states the discretion to initiate the application of cessation clauses (5) and (6), the UNHCR will also occasionally issue a cessation notice in relation to a particular country or group. For example, it recently issued a notice that clauses (5) and (6) applied to all pre-1991 Ethiopian refugees as of 1 March 2000.⁵⁹

In relation to group cessation notices, whether issued by a state or the UNHCR, the UNHCR’s Guidelines refer to a ‘rebuttable presumption’ that the risk of persecution has ceased, and to the possibility that individual members of the group might seek reconsideration of their cases, during which they may present evidence that they face a continuing risk.⁶⁰ In addition, UNHCR’s notice may request states to not apply the cessation provisions, or to give humanitarian consideration to individuals who may retain fears for their safety if repatriated.

This ‘rebuttable presumption’ is consistent with the proviso in clauses (5) and (6) that the clauses should not be invoked where a person has compelling reasons arising out of their previous persecution for not wishing to return to their country of nationality or former habitual residence.

8. CONCLUDING COMMENTS

A closer consideration of the manner in which Article 1C is being interpreted and implemented is one of the measures needed to ensure that international protection is provided to those most in need, and to address the growth in illegal migration and people smuggling.

It is especially important in view of the scarcity and high cost of places available internationally for the local integration and resettlement of refugees, relative to the number of refugees and people of concern worldwide.

Such close consideration would also serve to enliven the intention of the founders of the Convention that international protection should continue only so long as it is justified or necessary.

⁵⁸ ExCom Conclusion No 69 (LXIII) 1992 suggests exemption for two groups: persons who have compelling reasons arising out of their previous persecution for refusing to avail themselves of the protection of their country, and persons who cannot be expected to leave the country of refuge due to a long stay in that country resulting in strong family, social and economic links there. In Australia, humanitarian reasons for permitting a person to stay after ceasing their refugee status, and possible issues relating to other international obligations, may be considered in the context of Ministerial public interest intervention powers under s417 of the Migration Act 1958.

⁵⁹ UNHCR, ‘Information Note on the Application of the “ceased circumstances” cessation clause to pre-1991 refugees from Ethiopia’, September 1999.

⁶⁰ UNHCR ‘Guidelines on the application of cessation clauses’, April 1999 (UNHCR/IOM/17/99)

As noted in the ExCom Standing Committee's 'Note on the Cessation Clauses',

The refugee law regime envisages refugee status as a temporary phenomenon which should last for as long as international protection is needed ... Proper application of the cessation clauses will contribute to limiting abuses of the international refugee protection regime and facilitating States' disengagement from an international responsibility which is no longer required.⁶¹

⁶¹ May 1997 (UN Doc. EC/47/SC/CRP.30), para 39

