

INTRODUCTION TO INTERNATIONAL REFUGEE LAW

Parts 8-11

**WELL FOUNDED FEAR
PERSECUTION – ACTS, ACTORS
FIVE GROUNDS OF PERSECUTION,
RIGHTS OF REFUGEES**

**Presented by Boldizsár Nagy,
Brussels, ULB, 2010**

THE STRUCTURE OF THE CLASSES

1. Fundamental concepts - historic development before 1918
2. The formation of the international refugee regime and the foundations of the present system
3. Taking stock of the order of magnitude of forced migration
4. Causes of forced migration and reasons for protecting refugees – ethical inquiries
5. Durable solutions, „alienage”, the refugee experience
6. Definitions in use universally and regionally
7. Fundamental principles, especially non-refoulement
8. **Well founded fear**
9. **Persecution – acts, actors**
10. **Five grounds of persecution**
11. **Substantive rights of recognised refugeeCase**
12. Termination of refugee status
13. Exclusion from protection
14. Reflection

WELL FOUNDED FEAR

WELL FOUNDED FEAR

- Two approaches



- **Mixed** (subjective and objective)

- **Handbook** (§37, 40)

- probability

- of persecution

+

- state of mind

- Purely **forward looking: what would happen** upon return home?

- *(except for interwar categories and IRO who may „invoke compelling reasons arising out of previous persecution for refusing to avail” themselves of the protection GC 1§ C (6))*

Objective

Hathaway

probability

of persecution

WELL FOUNDED FEAR - PROBABILITY

- Well founded fear – assessment of the probability of a future event (persecution)

Conceivable standards of probability(thresholds)

Beyond reasonable doubt

Balance of probabilities

Reasonable possibility

„There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening. ... As we pointed out in *Stevic*, a moderate interpretation of the 'well-founded fear' standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.”

WELL FOUNDED FEAR – TIME AND PLACE

Time: not necessarily at departure

- refugees *sur place*

- at the moment of decision (*Said v Netherlands*, ECHR, Appl. 2345/02)

Place: territory of future persecution

- not necessarily state of nationality

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- stateless persons

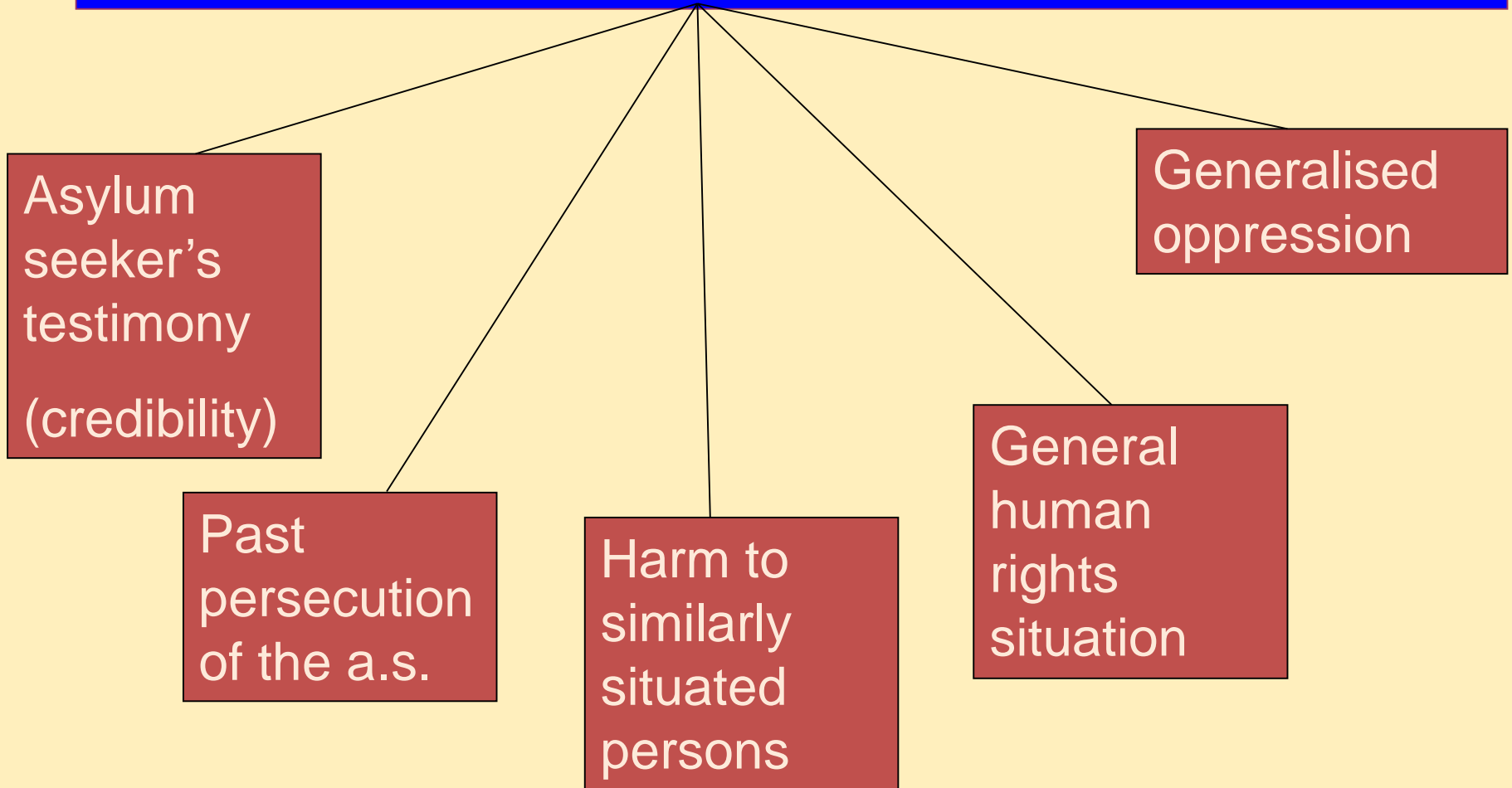
WELL FOUNDED FEAR - EVIDENCE / PROOF / CREDIBILITY

„Because the risk of persecution will never be definitely measurable, decision-makers should ask only whether the evidence as a whole discloses a risk of persecution which would cause a reasonable person in the claimant's circumstances to reject as insufficient whatever protection her state of origin is able and willing to afford her”

Hathaway: The Law of refugee Status, 1991, at p. 80

WELL FOUNDED FEAR - EVIDENCE / PROOF / CREDIBILITY

Tools to establish the well-founded nature of the fear



WELL FOUNDED FEAR - EVIDENCE / PROOF / CREDIBILITY

Credibility

The asylum seekers account („plausible, credible, frank“)

False assumptions of the interviewer

The role of the interpreter

The causes of inconsistencies

- Difference of cultures
- PTSD
- Groups with special needs (torture victims, women, minors, others)

Benefit of the doubt



R
E
M
E
M
B
E
R
!

See: G.Noll ed.: Proof, Evidentiary Assessment
and Credibility in Asylum procedures,
• Martinus Nijhoff, Leiden, 2005

WELL FOUNDED FEAR - EVIDENCE / PROOF / CREDIBILITY – COUNTRY OF ORIGIN INFO

Country of origin information

The reliability of sources

- UNHCR (*Refworld!*)
- International NGO-s
- UN (and regional) human rights bodies
- National, governmental reports

(Said v Netherlands, ECHR, 2005 – separate opinion of Judge Loucaides)

web-based - www.ecoi.net

The access to information – „arms length” – secret information

PERSECUTION

ACTS, ACTORS

PERSECUTION ACTS, ACTORS

What constitutes persecution?

GC does not interpret persecution

Handbook: § 51: Threat to life and freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other **serious violations of human rights** – for the same reasons – also constitute persecution.

§ 52: The subjective element - depends on the perception by the victim

§ 53: Cumulative ground

HB on specific issues: Discrimination (54-55); punishment (56-60); „Republikflucht“ (61); economic hardship – in certain circumstances

Persecution - prosecution difference

NOTION OF PERSECUTION

- **Deborah Anker:**
 - Persecution - universal and flexible meaning
 - Serious harm, not limited to physical harm or threat to life and freedom
 - The state fails to protect
- **Guy Goodwin Gill:** unacceptable interference with the integrity or inherent dignity of the human being
- **J. Hathaway:** the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.

NOTION OF PERSECUTION

- “Understanding the predicament of “being persecuted” as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm. If the right proposed to be exercised by the refugee claimant in the country of origin is at the core of the relevant entitlement and serious harm is threatened, it would be contrary to the language context, object and purpose of the Refugee Convention to require the refugee claimant to forfeit or forego that right and to be denied refugee status on the basis that he or she could engage in self-denial or discretion on return to the country of origin; or, to borrow the words of Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 at [130], to exist in a state of induced self-oppression.”

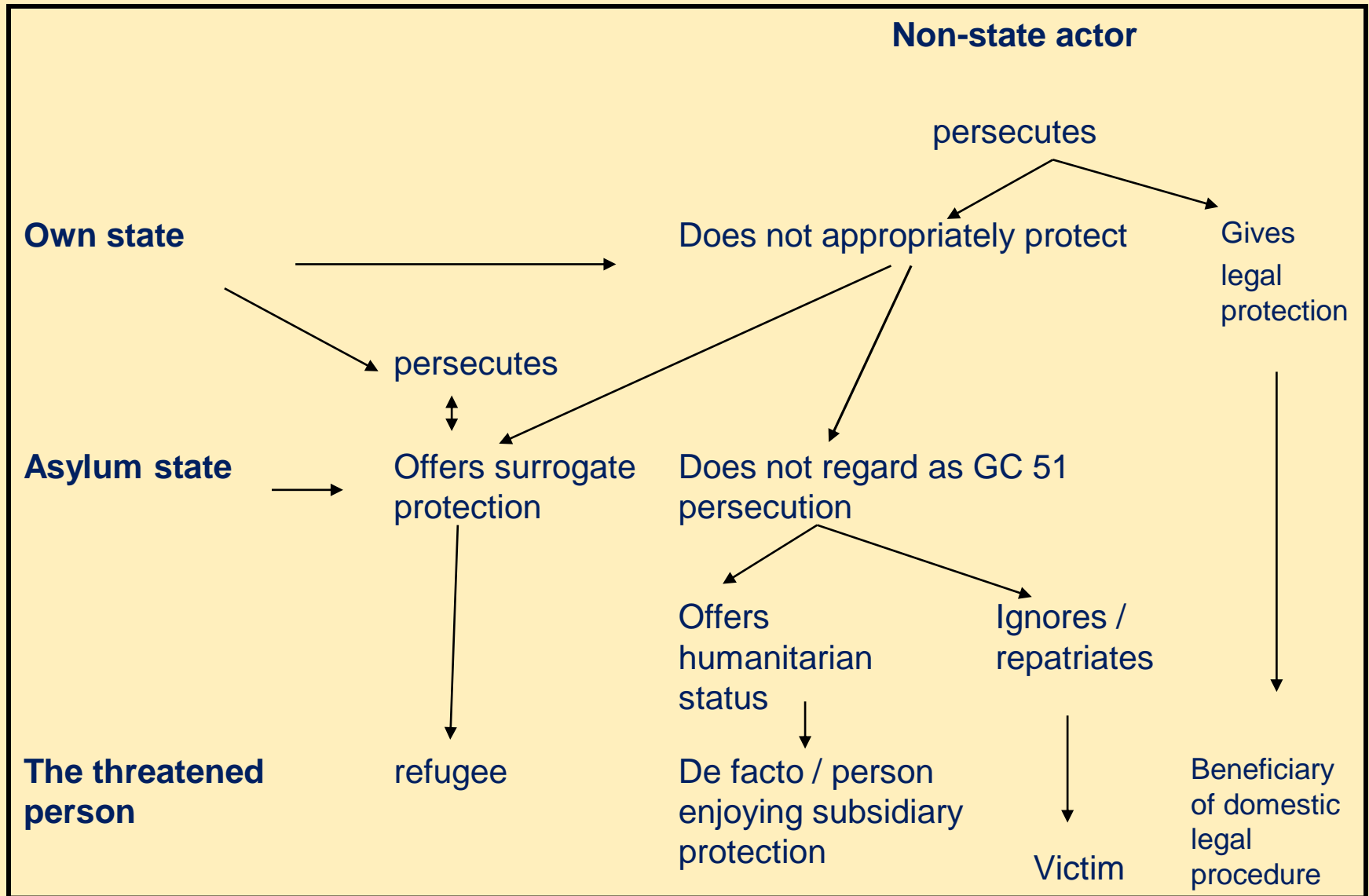
- Roger Haines: *The intersection of human rights law and refugee law: on or off the map? The challenge of locating appellant s395/2002*
- IARLJ Australia/New Zealand Chapter Meeting, Sydney, 9 June 2004

– <http://www.refugee.org.nz/Reference/Sydney04.html> - last visited 28 October 2006

THE ACTOR

- **Historic aspects** of the system – Nazi Germany, totalitarian Soviet Union, Communist systems in eastern Europe, authoritarian states worldwide – the persecutor is the state, its **authorities**
- Increased role of **non-state actors**
 - „**new tribalism**”, nationalism, religious fights
 - Insurgents in civil wars (e.g. in Latin America)
 - Dominant group turning against its subgroup – see particular social group

ROLES IN CASE OF STATE PERSECUTION AND NON-STATE ACTOR ACTION



THE HORVATH CASE

HORVATH V. SECRETARY OF STATE FOR THE HOME DEPARTMENT

[2001] 1 AC 489*

- Facts:
 - Applicant: H. Slovak national, Roma person from the village Palin arrives to the UK in 1997
 - The subject of the complaint:
 - Skinhead threats, police do not protect
 - Refused employment for Roma ethnicity
 - His child is discriminated against in the school system
- Procedure:
 - Application refused by Secretary of State.
 - The Special Adjudicator did not find him to be credible and dismissed the appeal.
 - The Immigration Appeal Tribunal reversed finding on credibility but concluded that, while he had a well-founded fear of violence by skinheads, he had not shown that he was unable to avail himself of the protection of the state.
 - The Court of Appeal dismissed the appeal against the determination of the tribunal
- Decision of the Lords: no recognition, because although threat of persecution real, there is state protection against it.

– *Reproduced in: IJRL, vol. 13 (2001), No 1 / 2, 174 - 201

HORVATH - PROTECTION BY THE STATE

Two issues:

The **relation** of state
protection and persecution

The **required level of**
state protection

Protection and persecution

- Of the 5 lords, 4 opine that persecution = serious harm + lack of state protection
- Starting point: the purpose of GC 51: protection and fair treatment = protection by asylum state is a surrogate of the protection of the country of origin if that persecutes
- But what if the persecutor is a non-state actor?
- Lord Craighead makes lack of protection part of persecution,
- Lord Clyde makes lack of protection part of well founded fear (Lord Browne Wilkinson agrees with both, Lord Hobhose of Woodborough only with Lord Clyde)
- (Fear from) persecution is well founded, if the applicant fears persecution which "consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection"
- Lord Lloyd of Berwick denies the unity of fear/persecution and lack of protection and considers it a separate element of the definition

Holistic approach

Gradual

Horvath - state protection

The required levels of state protection

All the three levels (IAT, CoA, HoL) agree that Slovakia has offered appropriate protection

When is protection appropriate?

“there must be in force ... a **criminal law** which makes the violent attacks by the persecutors **punishable by sentences commensurate with the gravity of the crimes.**

...

There must be a **reasonable willingness by the law enforcement agencies**, that is to say the police and courts, **to detect, prosecute and punish offenders.**”

= **subsequent punishment** (+ preventive effect)

Practical State protection is of such high level that fear does not occur

This would entail an **obligation to prevent**

Merits

- GC51 **living instrument**, to be flexibly interpreted
- **Human rights** constitute the frame for interpretation when searching for the object and purpose of GC51
- It is beyond doubt that **non-state actors may qualify** as persecutors

HORVATH - CRITICISM

„Protection = reasonable willingness” - refused by the Refugee Status Appeals Authority in New Zealand

The obligation of non-refoulement

„ cannot be avoided by a process of interpretation which measures the sufficiency of state protection **not against the absence of a real risk of persecution**, but against the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate that system. ... If the net result of a state's “reasonable willingness” to operate a system for the protection of the citizen is that it **is incapable of preventing a real chance of persecution of a particular individual, refugee status cannot be denied that individual.** ”

Refugee appeal No. 71427/99
decision of 16 August 2000, para 63

ECtHR

*Osman v. United Kingdom**

Protection of life is **not only a negative obligation** (prohibition of arbitrary deprivation) **but also positive:**

„It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person ... the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures **to protect an individual whose life is at risk from the criminal acts of another individual.**”

87/1997/871/1083,
28 October 1998

FIVE GROUNDS OF PERSECUTION, RIGHTS OF REFUGEES

**Presented by Boldizsár Nagy,
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GROUNDS FOR PERSECUTION

The five grounds of persecution

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graph TD; A[The five grounds of persecution] --- B[Race]; A --- C[Religion]; A --- D[Nationality]; A --- E[Political opinion]; A --- F[Particular social group];
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Race

Religion

Nationality

Political
opinion

Particular
social group

RACE

International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965

Article 1

1. In this Convention, the term "racial discrimination" shall mean any **distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect** of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
- HB, § 68: broadest meaning including any ethnic group

RELIGION

International Covenant on Civil and Political Rights

Article 18

- 1. Everyone shall have **the right to freedom of thought, conscience and religion**. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, **to manifest his religion or belief in worship, observance, practice and teaching**.
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- 3. **Freedom to manifest** one's religion or beliefs **may be subject only to such limitations** as are prescribed **by law** and are necessary to protect **public safety, order, health, or morals** or the **fundamental rights and freedoms of others**.

Theistic – non-theistic – atheistic

NATIONALITY

Includes ethnic or language groups, may coincide with minorities, stateless.

POLITICAL OPINION

Not: activity!

Genuinely held - imputed

Government

- probably will learn about it
- probably will not tolerate it

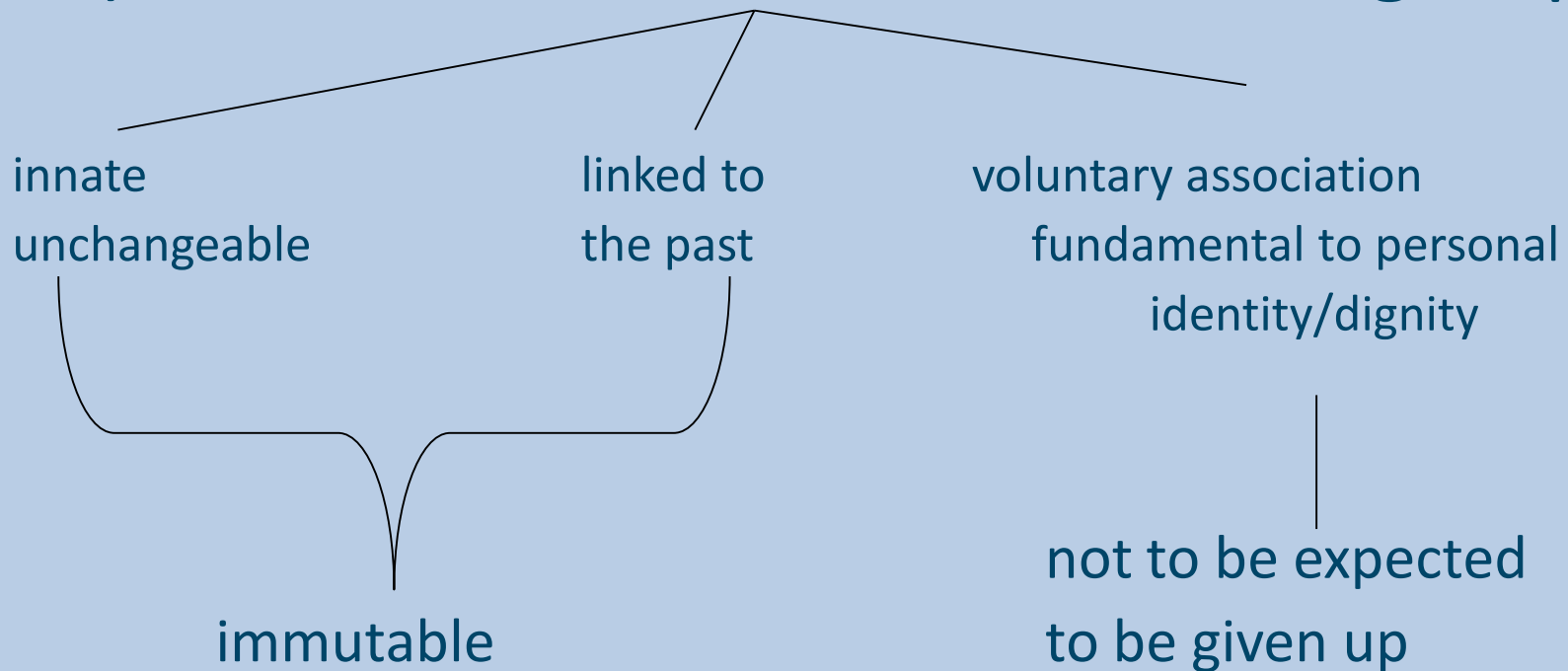
Issues: Republikflucht, desertion, conscientious objection, exclusion clauses

PARTICULAR SOCIAL GROUP

HB § 77 “A `particular social group` normally comprises persons of similar background, habits or social status”.

The two ways of defining a group

A) *Protected characteristics* of the group



PARTICULAR SOCIAL GROUP

B/ *Social perception*: perceived by the society as a separate group within the society

Key issue: either is enough or conjunctive

UNHCR 2002*:
Alternatives

EU Qualification Directive
Both needed (conjunctive)

UK House of Lords, 2006 *SSHD v K, Fornah v SSHD* (UKHL 46) -No need to meet the dual test

Persecution alone does not create a group (but may indicate the perception as a group)

No need for every member of the group to be threatened with persecution

No need for cohesion (knowing each other)

* Guidelines on International Protection, Membership of a Particular Social Group

SUBSTANTIVE RIGHTS OF RECOGNISED REFUGEES

THE PROCEDURE LEADING TO IT

- Procedure – national matter – GC51 silent
- EU: harmonizing (*Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326/13.*)
- Restrictive trends
 - Non-access to territory
 - Visa
 - Carrier sanction
 - Interception
 - Extraterritorial processing
 - Border zone fictions
 - Non-access to (full, fair and efficient) procedure (eligibility filters)
 - Accelerated (prioritised) procedures
 - Safe third country rules
 - Dublin II regulation
 - First country of asylum
 - Repeat applications!

RIGHTS OF REFUGEES

The matrix of rights

	Simple presence	Lawful presence	Lawful residence
The same treatment (or at least as favourable /AF/) as is accorded to nationals (S)	4 § Religious freedom (AF) 20 § Rationing (S) 21 § (1) Elementary education (S) 29 § Fiscal charges (S)		14 § Artistic rights and industrial property 16 §(2) Access to courts (legal assistance, etc.) 23 § Public relief and assistance 24 § Labour legislation and social security
The most favourable treatment accorded to nationals of a foreign country, in the same circumstances			15 § Right of (non-political and non-profit-making) associations 17 § Right to engage in wage-earning employment
Treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally	7 § (1) /sets as general standard/ 13 § Movable and immovable property 22 § (2) Non-elementary (higher) education	18 § Self-employment 26 § Freedom of movement within the country	19 § Liberal professions 21 § Housing
In countries other than that in which he has his habitual residence, the treatment granted to a national of the country of his habitual residence		14 § Artistic rights and industrial property 16 §(3) Access to courts (legal assistance, etc.)	
General Obligations	2 § Conformity to law of asylum country 3 § Non-discrimination 27 § Identity papers 33 § Non – refoulement ↔ danger to security or crime – to community	32 § shall not expel a refugee national ↔ security or public order ↘	25 § Administrative assistance 28 § Travel document

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THE RIGHTS OF (RECOGNIZED) REFUGEES

- Still a foreigner
- No automatic right to residence
- No protection against extradition to third states
- National systems are usually more generous (but retain exceptions to national treatment!)

THANKS!

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