IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M143 of 2013

BETWEEN:

FTZK
Appellant

and

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Minister for Immigration and Citizenship
First Respondent

Administrative Appeals Tribunal
Second Respondent

APPELLANT'S SUBMISSIONS

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PART I: PUBLICATION

1. The Appellant certifies that these submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. The issues are as follows:

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2.1 Did the Second Respondent (**the Tribunal**) misconstrue or misapply Article 1F of the *Refugees Convention* as amended by the *Refugees Protocol* (**the Refugees Convention**)?

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2.2 Did the Tribunal take into account irrelevant matters in finding that there were "serious reasons for considering" that the appellant had committed the crimes alleged?

2.3 Did the Full Court impermissibly read into the Tribunal's decision findings on critical issues of fact that had not been made by the Tribunal?

PART III: NOTICE UNDER S 78B OF THE *JUDICIARY ACT* 1903 (CTH)

3. The appellant has considered whether any notice should be given to the Attorneys General in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and has concluded that no such notice should be given.

PART IV: CITATION OF REASONS FOR JUDGMENT

4. The Reasons of the Tribunal constituted by Deputy President Constance delivered on 23 May 2010 have not been published in any report. The medium neutral citation is *FTZK and Minister for Immigration and Citizenship* [2012] AATA 312 (23 May 2012).

5. The Reasons for the judgement of the Full Federal Court of Australia constituted by Gray, Dodds-Streeton and Kerr JJ have not been published in any report. The medium neutral citation is *FTZK v Minister for Immigration and Citizenship* [2013] FCAFC 44.

PART V: STATEMENT OF FACTS

6. The appellant is a national of the People's Republic of China ("**the PRC**").

7. The appellant's visa and legal history in Australia is lengthy and the appellant refers to the attached chronology.

8. On 1 February 1997 the appellant entered Australia on a Business (short stay) subclass 456 visa.

9. On 8 December 1998 the appellant lodged a protection visa application.

10. On 20 January 1999 a delegate of the First Respondent refused the application.

11. The appellant applied to the Refugee Review Tribunal ("**the RRT**"). On 17 December 1999 the RRT affirmed the delegate's decision. The appellant sought judicial review and his application was remitted to the RRT for reconsideration. On 24 September 2008 the RRT reaffirmed the delegate's decision. The appellant again sought judicial review and his application was remitted to the RRT for reconsideration.

12. On 11 May 2010 the RRT found that the appellant satisfied Article 1A(2) of the Refugees Convention and otherwise remitted the matter to the delegate for reconsideration which could include whether the applicant was excluded from Convention protection by Article 1F of the Convention.

13. On 24 May 2011 the delegate decided that it was not satisfied that the appellant was owed protection obligations for the purposes of section 36 of the *Migration Act* and criterion 866.221 of the *Migration Regulations* on the ground that Article 1F(b) had application.

14. It is alleged that on 20 December 1996 the appellant, along with accomplices Weidong ZHONG ("**ZHONG**") and Zhijun WU ("**WU**") (and possibly others) committed the crimes of kidnapping and murder. On 26 May 1997 a warrant of arrest issued for the appellant. On 21 May 1998, ZHONG and WU were executed by the Chinese authorities.

15. On 23 June 2004 the appellant was advised of the arrest warrant by an officer of the First Respondent.

16. On the 23 May 2012 the Tribunal affirmed the delegate's decision. The Tribunal found that there were serious reasons for considering that the appellant committed the alleged offences and relied upon four discrete findings/reasons, as outlined in paragraphs [69] to [72] of its decision. It stated that its conclusion was reached based on the totality of the evidence and any one of the various factors relied upon would not have been sufficient to establish serious reasons.

17. On 1 March 2013 the majority of the Full Federal Court found no error in the Tribunal's approach, concluding that the Tribunal's failure to state the basis of the relevance of the factors it took into consideration did not rob them of their objective relevance[1].

PART VI: ARGUMENT

I. The Tribunal misconstrued or misapplied Article 1F of the Refugee Convention.

18. The Refugees Convention is concerned with the status and protection of refugees. In so far as it is relevant to this case, a "*refugee*" is defined in Article 1A(2) of Chapter I as 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 as a result of

1 *FTZK v Minister for Immigration and Citizenship* [2013] FCAFC 44 at [46].

such events, is unable or, owing to such fear, is unwilling to return to it.

19. Articles 1C, D, E and F set out circumstances in which the Convention does not apply to a person who otherwise comes within the definition of a refugee. Article 1F is relevant in the circumstances of this case and provides:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> ...
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee ...

20. Article 1F limits the reach of the definition of refugee in Article 1 and thereby gives content to the criterion in s36(2)(a) of the *Migration Act* 1958[2].

21. Article 1F(b) was designed to protect the safety of the public in the country of refuge, as well as preventing the creation of a haven for fugitives from justice[3]. It operates to deprive a person of refugee status and exposes them to refoulement to a place where, as in the appellant's case, it is accepted that they have a well founded fear of persecution[4].

22. In Australia the interpretation of the test of "serious reasons for considering" has been considered in *Dhayakapa v Minister for*

2 *M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [37].

3 *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7; 209 CLR 533; 186 ALR 393; 76 ALJR 514 (7 March 2002) [94]-[96]; UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, para 151; Hathaway, The Law of Refugee Status, 1991, p221.

4 This is to be contrasted to the application of Article 33(2); see *SZOQQ v Minister for Immigration and Citizenship* (2013) 296 ALR 409; [2013] HCA 12.

Immigration and Ethnic Affairs[5], *Ovcharuk v Minister for Immigration and Multicultural Affairs*[6] and *Arquita v Minister for Immigration and Multicultural Affairs*[7].

23. The leading Australian cases establish that in determining whether "there are serious reasons for considering" that a person has committed an Article 1F crime:

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23.1 The receiving state need not 'make a positive or concluded finding about the commission of the crime[8]'.

23.2 It is sufficient that there be 'strong evidence of the commission of' the crime[9]. Strong evidence is evidence that is not 'tenuous or inherently weak or vague' and supports a case built around more than just 'suspicion'[10].

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23.3 "It is necessary to bear in mind the fact that the Article operates to deprive a claimant for refugee status of the opportunity to have his or her claim considered on its merits. An unduly wide interpretation of the word "serious" in this context would affect the rights of the individual in a most profound way. One would expect, therefore, that the material in support of a belief that a person has committed an offence of the type specified would have significantly greater probative value than the material required to support an interlocutory injunction[11].

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5 (1995) 62 FCA 556 at 563 (French J) ("*Dhayakapa*").

6 (1998) 88 FCR 173 at 179 ("*Ovcharuk*").

7 (2000) 106 FCR 465 at 476 ("*Arquita*").

8 *Dhayakpa; Arquita* at[53].

9 *Arquita* at [53].

10 Ibid at [63].

11 Ibid at [58].

24. To meet the requirement of Article 1F the evidence needs to establish that there are "serious reasons" for considering that the appellant committed the alleged offences. In *DD v Secretary of State for Home Department*[12] the House of Lords stated, *inter alia*:

> (1) "serious reasons" is stronger than "reasonable grounds."
>
> ...
>
> (3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decision-maker.

25. It was the duty of the Tribunal to determine whether there were "serious reasons for considering" that the appellant had "committed a serious non-political crime" outside Australia prior to his admission to Australia as a refugee.

26. The Tribunal correctly stated the issue for determination [13] but misapplied or misconstrued the relevant principles and/or the function it was required to undertake.

27. The manner in which a decision maker sets out its findings of fact may reveal that it misconceived its statutory function[14].

28. The Tribunal's reasoning process indicates that it failed to address the question it was required to consider and failed to apply the governing principles:

28.1. It gave probative weight to matters that were not relevant.

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12 *DD v Secretary of State for Home Department* [2012] UKSC 54 at [75].

13 *FTZK and Minister for Immigration and Citizenship* [2012] AATA 312 (23 May 2012) at [7].

14 *FTZK v Minister for Immigration and Citizenship* [2013] FCAFC 44 per KERR J at [141]; *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [69].

28.2. It relied upon factors that could have been relevant only to the appellant's general credibility.

28.3. It disregarded logically relevant evidence, namely the evidence of two expert witnesses.

29. The factors relied upon by the Tribunal were not capable of satisfying the requirement of "serious reasons" and the Tribunal therefore failed to address the question it was required to consider.

30. In reaching its decision that there were "serious reasons" for considering that the applicant had committed the crimes alleged, the Tribunal took into account four matters. "Any one of the various factors would not have been sufficient to establish serious reasons; it is the combination of factors which gives rise to reasons of sufficient seriousness to satisfy Article 1F of the Convention"[15]:

30.1. Documents provided by the Government of China which included two transcripts of interrogation of alleged accomplices implicating the appellant in the crimes.

30.2. The Tribunal's finding that the appellant "left China shortly after the crimes were committed and that he provided false information to the Australian authorities in order to obtain a visa to do so" and that he "deliberately provided false information when applying to the Australian authorities for a protection visa in 1998."

30.3. The Tribunal's finding that the appellant was "evasive when giving evidence as to his religious affiliations in Australia and China" and falsely alleged that he was detained and tortured in

15 *FTZK and Minister for Immigration and Citizenship* [2012] AATA 312 (23 May 2012) at [73]; at [69]-[72].

China, such false allegations being "fabricated in order to strengthen his claim to remain in Australia."

30.4. The fact that the appellant "had remained in Australia from January 2000 to February 2004 without lawful permission to do so" and had attempted to escape from detention in 2004, shortly after his application for a long-term business visa was refused" and "in attempting to escape he intended to return to live unlawfully in the Australian community."

31. None of the matters referred to in paragraphs 30.2, 30.3 or 30.4 were in any way probative of the appellant's commission of the crimes alleged against him. The Tribunal made no finding that any of the matters relied upon evidenced consciousness of guilt or, in some other way, was logically relevant to, or probative of, the commission of the offences. At their highest, these matters might have brought into question the appellant's credibility but they did not go to the question of whether there were "serious reasons" for considering that the appellant had committed the alleged crimes.

32. Further, in assessing the degree of satisfaction required to find that there were "serious reasons for considering" that the appellant had committed the alleged crime, the Tribunal was required to have regard to the consequences of refoulement to the appellant.

33. The Tribunal considered that it was unnecessary for the purpose of deciding whether there were "serious reasons" for considering that the appellant had committed the alleged offences to take into account evidence as to how the appellant might be dealt with should he be required to stand trial in China[16].

16 Ibid at [67].

34. The United States, United Kingdom, New Zealand and Canada do not recognize any requirement under Article 1F to balance the nature of the crime with the degree of persecution feared[17]. Similarly, Australian courts have found that there is no such requirement to balance the degree of harm feared against the seriousness of the crime committed[18].

35. However, the consequences of refoulement should have been considered in assessing the degree of satisfaction required for the relevant finding to be made. The operation of Article 1F potentially has grave consequences to an appellant. The UNHCR in its 2003 Background Note[19] relevantly states:

> ... in order to ensure that article 1F is applied in a manner consistent with the overall humanitarian objective of the 1951 Convention, the standard of proof should be high enough to ensure that bona fide refugees are not excluded erroneously. Hence, the 'balance of probabilities' is too low a threshold.

36. It appears to be accepted that to attract the operation of Article 1F, it is not necessary to prove, whether on the balance of probabilities or beyond reasonable doubt, it is necessary to have regard "to the seriousness of the allegation itself and the extreme consequences which can flow from an affirmative finding[20]." The Article does require "a decision-maker to give substantial content to the requirement that there be "serious reasons for considering" that such a crime has been committed[21]. The views expressed by Mathews J in *W97/164 v Minister for Immigration and Multicultural Affairs* find support in the

17 *Gonzales v Canada* [1994] 3 F.C. 646 (C.A.); *Gill v Canada* [1995] 1 F.C. 508 (C.A.)

18 *Ovcharuk*; *Dhayakpa*. cf *N96/1441 v Minister for Immigration and Multicultural Affairs* AAT No 12977 [1998] AATA 619; *W98/45 v Minister for Immigration and Multicultural Affairs* AAT No 13450 [1998] AATA 948; *W97/164 v Minister for Immigration and Multicultural Affairs* AAT No 12974 [1998] AATA 618.

19 UN High Commissioner for Refugees (UNHCR) Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 *Convention relating to the Status of Refugees*, 4 September 2007, para 107.

20 *W97/164 v Minister for Immigration and Multicultural Affairs* [1998] AAT 618 at [43].

21 Ibid.

decision of the House of Lords in *DD v Secretary of State for Home Department* which held that the provision must be "restrictively interpreted and cautiously applied[22]."

37. The process whereby the seriousness of the allegation influences the level of proof required to substantiate it is well known to Australian courts.[23] The Tribunal should not have been satisfied[24]:

> ... by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires, as a matter of common sense and worldly wisdom, the careful weighing of testimony, the close examination of facts provided as a basis of inference and a comfortable satisfaction that the Tribunal has reached both a correct and a just conclusion.

38. The conclusion reached by the Tribunal did not satisfy this criterion. The Tribunal misconstrued Article 1F, misunderstood its function and committed jurisdictional error.

II. The Tribunal took into account irrelevant matters in finding that there were "serious reasons for considering" that the appellant had committed the crimes alleged.

39. The issue under consideration by the Tribunal was a narrow one, namely whether there were "serious reasons" for considering that the appellant "had committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refuge."

40. The appellant had conceded that the alleged crimes were "serious non-political crimes" and therefore the only issue for determination was

22 *DD v Secretary of State for Home Department* [2012] UKSC 54.

23 *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at [82].

24 Ibid at 350.

whether there were "serious reasons" for considering that he had committed the offences. "In this instance the scope, purpose and ambit of the relevant statutory provisions were narrow[25]."

41. The relevant considerations that the Tribunal was bound to consider were therefore matters probative of the appellant having committed the alleged offences.

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42. The only direct evidence linking the appellant to the alleged offences is contained in the two "transcripts" of the interrogation of the alleged accomplices. Clearly, on the basis of the length of the relevant interrogation and the length of the relevant "transcript" these are not transcripts. The weight to be given to the "transcripts" is also necessarily affected by:

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42.1 The fact that the two alleged accomplices have now been executed; and

42.2 The statements of Dr. Nesossi and Dr. Sapio, both of whose opinions "were unchallenged[26]."

43. In any event, as indicated above, the Tribunal clearly stated that its ultimate finding relied upon all of the factors identified in paragraphs 30.1 to 30.4 (above).

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44. In taking into account the matters set out in these paragraphs, the Tribunal took into account irrelevant matters. None of the matters identified in paragraphs 30.2, 30.3 or 30.4 were in any way probative of the appellant's commission of the crimes alleged against him.

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25 FTZK v Minister for Immigration and Citizenship [2013] FCAFC 44 per Kerr J at [129]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.

26 *FTZK and Minister for Immigration and Citizenship* [2012] AATA 312 (23 May 2012) at [7].

45. The matters relied upon were not capable of being objectively relevant to the question that the Tribunal was required to consider. Alternatively, none of these matters was probative "unless linked to a further fact or circumstance: motive or consciousness of guilt[27]" and the Tribunal failed to make findings creating such a link.

46. By relying upon and taking into account irrelevant considerations the Tribunal committed jurisdictional error[28].

III. The Full Court impermissibly read into the Tribunal's decision findings on critical issues of fact that had not been made by the Tribunal.

47. The majority in the Full Court sought to justify the Tribunal's reliance on irrelevant matters on the ground that the "Tribunal clearly regarded these facts as demonstrating the appellant's consciousness of his guilt of the criminal offences and desire to escape from the consequences of his criminal conduct. It was unnecessary for the Tribunal to express this link in order to make it exist[29]."

48. This interpretation of the Tribunal's Reasons suffers from the following defects:-

48.1 It contains a finding of fact not made by the Tribunal, namely that the circumstantial matters set out in paragraphs 30.2, 30.3 and 30.4 (above) demonstrate the appellant's consciousness of his guilt of the criminal offences charged;

48.2 It purported to give to those circumstantial matters an evidentiary status-

27 *FTZK v Minister for Immigration and Citizenship* [2013] FCAFC 44 per Kerr J at [134].

28 *Craig v The State of South Australia* (1995) 184 CLR 163; *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]; *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1985) 162 CLR 24 at 39-41.

29 *FTZK v Minister for Immigration and Citizenship* [2013] FCAFC 44 at [46].

(i) which they did not possess;

(ii) which the Tribunal did not attribute to them;

(iii) which was not available either as a matter of fact or as a matter of law.

49. It is not the function of a court on judicial review to re-draft the Reasons of the Tribunal below, nor to add to those Reasons by implying into those Reasons a finding of fact not made and a step in the reasoning not expressed by the Tribunal. It is not for a reviewing court to uphold a decision on the basis that the Court is satisfied that there was evidence before a Tribunal that was capable of supporting the conclusion in fact reached and to ignore the reasons actually given by the Tribunal[30].

50. The obligation to provide reasons for administrative decisions serves an important purpose, including the encouragement of good administration "by ensuring that a decision is properly considered by the repository of the power" and promoting "real consideration of the issues[31]."

51. By inferring that the Tribunal had made the necessary findings of fact to establish "consciousness of guilt" and by inferring that the Tribunal had reasoned from that finding to a conclusion that the matters set out in paragraph 30.2, 30.3 and 30.4 (above) were, therefore, relevant, the majority in the Full Court:

30 Salahuddin v Minister for Immigration and Border Protection [2013] FCAFC 141 (26 November 2013); Spruill v Minister for Immigration and Citizenship [2012] FCA 1401 per Robertson J at [18]; Tauariki v Minister for Immigration and Citizenship [2012] FCA 1408 per Cowdroy J at [43]-[44]; SZCBT v Minister for Immigration & Multicultural Affairs [2007] FCA 9 at [26]; SZQII v Minister for Immigration and Citizenship [2012] FCA 402 (22 February 2012) at [25]; Minister for Immigration and Citizenship v SZLSP [2010] FCAFC 108 (2010) 187 FCR 362 at 388.

31 Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex Parte Palme [2003] HCA 56, 216 CLR 212 at [105].

51.1 Exceeded the function of a court conducting judicial review; and/or

51.2 Inferred a finding of fact not open to the Tribunal and a reasoning process that is flawed.

PART VII: LEGISLATION

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52. The relevant provisions are attached as Annexure A. They are:

(a) *Migration Act* 1958 (Cth), ss36, 500.

53. Also relevant will be:

20 (a) The *Refugees Convention* as amended by the Refugees Protocol, Articles 1A and Article 1F.

PART VIII: ORDERS SOUGHT

54. The appellant seeks the following orders:

55.1. The appeal be allowed.

55.2. The order of the Federal Court of Australia dated 6 May 2013 be set aside.

30 55.3. A writ of certiorari issue directed to the Tribunal quashing its decision dated 23 May 2012 and a writ of mandamus issue directed to the Tribunal requiring it to review, according to law, the decision made by the first respondent to refuse the appellant a Protection (Class XA) visa.

55.4. The first respondent pay the appellant's costs in this Court.

55.5. The first respondent pay the appellant's costs of the proceedings in the Federal Court of Australia as agreed or assessed in accordance with Part 40 of the Federal Court Rules.

PART IX: ORAL ARGUMENT

55. The appellant estimates that its oral argument will take 2 hours.

DATED: 13 December 2013

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ANNEXURE A

APPLICABLE STATUTES AND REGULATIONS

Migration Act 1958 (Cth)

Section 36 Protection visas

(1) There is a class of visas to be known as protection visas.
Note: see also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and
(ii) holds a protection visa; or

(c)a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and
(ii) holds a protection visa.

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...

Section 500 Review of decision

(1) Applications may be made to the Administrative Appeals Tribunal for review of:

(a) decisions of the Minister under section 200 because of circumstances specified in section 201; or
(b) decisions of a delegate of the Minister under section 501; or
(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or
(ii) paragraph 36(2C)(a) or (b) of this Act;

other than decisions to which a certificate under section 502 applies.

(2) A person is not entitled to make an application under paragraph (1)(a) unless:

(a) the person is an Australian citizen; or
(b) the person is a lawful non-citizen whose continued presence in Australia is not subject to any limitation as to time imposed by law.

(3) A person is not entitled to make an application under subsection (1) for review of a decision referred to in paragraph (1)(b) or (c) unless the person would be entitled to seek review of the decision under Part 5 or 7 if the decision had been made on another ground.

...

***Refugees Convention* 1951**

Article 1A

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered are refugee under the Arrangements of 12 May1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out- side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In 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.

Article 1F

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

(a) he 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) he has committed a serious non-political crime outside the

country of refuge prior to his admission to that country as a refugee;

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

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