CHAPTER 2

Give Way to the Right: The Evolving Use of Human Rights in New Zealand Refugee Status Determination

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New Zealand acceded to the 1951 Convention relating to the Status of Refugees (Refugee Convention) on 30 June 1960[1] and to the 1967 Protocol relating to the Status of Refugees (1967 Protocol) on 6 August 1973.[2] However, long before the development of this international legal regime, persons fleeing what would now be regarded as Convention-based persecution had arrived in New Zealand. As far back as the 1870s and 1880s, small numbers of Jews fleeing anti-Semitism in Tsarist Russia arrived.[3]

As in many other countries, with the end of the Cold War and the democratisation of international air travel in the late 1980s, New Zealand experienced a sharp rise in the number of persons arriving at its border and spontaneously claiming refugee status. Given New Zealand's geographical situation as an island in the vast oceanic territory of the South Pacific, arrival by boat is particularly difficult and, typically, spontaneous arrivals have been at airports, although there continue to be cases of commercial ship-jumpers.

In response to the increase in numbers, from the early 1990s onwards, New Zealand's system of refugee status determination (RSD) was fundamentally overhauled. In this process, it has also developed a rich jurisprudence which draws heavily on international human rights norms and standards. The very first determinations issued by the Refugee Status Appeals Authority (RSAA) – the body established under the revised institutional arrangements for RSD – made no mention of human rights at all.[4] Nevertheless, at an early stage, two events in Canada were crucial in determining the path New Zealand RSD

1 Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (entered in force 22 April 1954).

2 Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

3 A. Beaglehole, 'Refugees – 1870s–1940s: Refugee Groups' (Te Ara – the Encyclopaedia of New Zealand, 13 July 2012) <http://www.teara.govt.nz/en/refugees/page-2> accessed 7 October 2015.

4 *Refugee Appeal No 1/91 and 2/91 Re TLY and LAB* (11 July 1991) and *Refugee Appeal No 4/91 Re SDJ* (11 July 1991).

 | DOI 10.1163/9789004288591_003

would take. The first was the publication of Hathaway's first edition of *The Law of Refugee Status*.[5] The second was the decision of the Supreme Court of Canada in *Canada* (*Attorney General*) *v Ward*.[6]

Drawing on these two sources, the RSAA aligned New Zealand RSD with the notion of providing 'surrogate' protection of 'core human rights'.[7] What has taken place in the almost quarter of a century subsequently has been an attempt to develop a cohesive account of both why and how international human rights law can inform the scope of Convention-based protection. The first phase in this development was directed at the issue of why international human rights should be used in RSD, with the second phase being directed at the issue of how international human rights inform RSD.

This chapter charts the evolution of this approach. It examines how international human rights law is used by New Zealand decision-makers to determine the boundaries of protection under the Refugee Convention, and examines challenges in its integration into domestic RSD.

1 Refugee Status Determination in New Zealand

For many years, the Refugee Convention was not incorporated into New Zealand domestic law by legislation.[8] Prior to its incorporation, during the 1980s, decisions on refugee status were made jointly by the Ministers of Foreign Affairs and Immigration acting on the recommendation of a committee of officials known as the Inter-Departmental Committee on Refugees (ICOR). However, the ICOR's procedures, established by the Executive, were eventually found wanting by the High Court.[9] In consequence, in 1990, Cabinet approved new procedures for the determination of applications for refugee status.[10]

The RSD procedure adopted was non-statutory in nature and functioned in law as an expression of prerogative powers of the Executive.[11] The procedures were set out in Terms of Reference issued in March 1991 and provided for a two-tier structure of status determination. While amended Terms of Reference

5 J.C. Hathaway, *The Law of Refugee Status* (Butterworths Limited 1991).

6 *Canada* (*Attorney General*) *v Ward* [1993] 2 SCR 689.

7 See *Refugee Appeal No 11/91 Re S,* New Zealand (5 September 1991).

8 The historical background is usefully summarised by the New Zealand High Court in *Singh v Refugee Status Appeals Authority* [1994] NZAR 193, 197–200 per Smellie J.

9 *Benipal v Minister of Immigration* HC Auckland A878/83, 29 November 1985 per Chilwell J.

10 *Refugee Appeal No 1/92 Re SA,* New Zealand (30 April 1992).

11 *Singh v Refugee Status Appeals Authority* [1994] NZAR 193, 200 per Smellie J.

entered into force in April 1992, August 1993 and April 1998, they left this basic structure unchanged.[12] This structure also preserved the nature of New Zealand RSD as being, essentially, an expression of the Executive prerogative.

Following doubts expressed by the Court of Appeal as to whether (as the High Court had largely held up to that point) this structure rendered the RSD procedures amenable to judicial review, the Immigration Act 1987 was amended.[13] In 1999, a new Part 6A was introduced, which placed the RSD process on a statutory footing.[14] The same two-tier structure was retained.[15] In late 2010, the Immigration Act 2009 entered into force. The RSAA was disestablished and a new institution, the Immigration and Protection Tribunal (IPT) was established in its place.[16]

It is indubitably correct that, upon New Zealand's accession to the Refugee Convention, the latter became part of the domestic legal fabric. Even so, over time, the Refugee Convention has become more tightly woven into that fabric. Although the system was placed on firmer legal footing through legislation specifically empowering a status determination process, under both the 1987 and 2009 Immigration Acts, there is no provision expressly incorporating the Refugee Convention into New Zealand domestic law.

Rather, the Refugee Convention and the 1967 Protocol have been included in a Schedule to both Acts.[17] Nevertheless, under New Zealand law schedules are generally regarded as part of the relevant Act and assist with the interpreting of its main provisions, particularly where they contain important provisions which go to the workings of the Act.[18] The multiplicity of express references to the Refugee Convention in statutory provisions that are fundamental to giving effect to New Zealand's *non-refoulement* obligations means that the treaty may be regarded as being effectively, if not expressly, domesticated into New Zealand law.

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12 See Terms of Reference (in force from 1 April 1992); Terms of Reference (in force from 30 August 1993); and the Rules Governing Refugee Status Determination Procedures in New Zealand (in force from 30 April 1998).

13 *Butler v Attorney-General* [1999] NZAR 205, 218–220 per Richardson P, Henry, Keith, Tipping and Williams JJ; *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291, 294 per Henry, Keith and Blanchard JJ.

14 Immigration Amendment Act 1999, Section 40.

15 Immigration Act 1987, Section 129 N.

16 Under the Immigration Act 2009, the IPT assumed the statutory functions of not only the RSAA, but of three other immigration-related appellate tribunals: the Deportation Review Tribunal, the Removal Review Authority and the Residence Review Board.

17 Schedule 1, Immigration Act 2009; Schedule 6 Immigration Act 1987.

18 See, generally, J. Burrows and R. Carter, *Statute Law in New Zealand* (4th ed, LexisNexis, 2009), 437–440.

2 Use of International Human Rights Law in the RSAA and IPT Jurisprudence

There are a number of interrelated features which shape and contextualise the use of international human rights law in the New Zealand RSD system. First, from the outset the system was not immigration-focused but rather protection-focused. As such, at every level, the decision-makers that exercise functions in relation to RSD have no power to make immigration decisions.[19] Moreover, a claim for refugee status is not characterised under the wider immigration scheme to be raised only as a shield against removal action or an otherwise unlawful status, but instead as a positive claim in its own right. There is no dispute between an individual asylum claimant and the New Zealand State. This is reflected in the largely inquisitorial mode of the proceedings in which the State, although technically a party to proceedings, is typically unrepresented.[20]

Second, what constitutes a well-founded fear of being persecuted is not defined in the Immigration Act 2009. Nor was it defined in the 1987 Act or in the pre-statutory Terms of Reference.[21] From the outset, it has been the express terminology of the Refugee Convention itself which has exclusively set the relevant statutory criteria by which immigration officials, appellate decision-makers and the wider judiciary must assess whether or not New Zealand owes protection obligations to a claimant as *a refugee*. There are no other statutory criteria independent of those inherently contained in the Refugee Convention itself. This has meant that New Zealand refugee law decision-makers have had to look elsewhere in order to arrive at an understanding as to what they believe to be the proper basis for determining the scope of the refugee definition set out in Article 1A(2) of the Refugee Convention. This understanding has been expressed via the language of human rights.

Third, by and large, it is been the expert tribunals, namely the RSAA and now the IPT, that have developed the most important jurisprudence. Historically, there has been a low rate of judicial review, and the higher courts will typically

19 See *Refugee Appeal No 75692,* New Zealand (3 March 2006) paras. 49–51.

20 Immigration Act 2009, Section 227.

21 Paragraph 5 of the Terms of Reference provided that, in relation to the function of the then newly established RSAA:

> 5. The Authority's function shall be to make a final determination on appeal from decisions of officers of the Refugee Status Section of the New Zealand Immigration Service of claims to refugee status, that is, to determine whether persons are refugees within the meaning of Article 1, Section A(2) of the 1951 Convention Relating to the Status of Refugees, as supplemented by the 1967 Protocol Relating to the Status of Refugees.

acknowledge and defer to the specialist nature[22] and expertise of these Tribunals.[23] Only on very rare occasions have New Zealand's superior courts overturned the approach adopted by these Tribunals on the basis that their interpretation of the Refugee Convention was wrong.[24] Indeed, in recent months, both the Court of Appeal and the High Court have expressly endorsed the IPTs approach to potentially controversial cases based on the adverse impacts of natural disasters and climate change.[25] The fusion of both jurisprudential and decision-making expertise within these Tribunals has shaped New Zealand's approach to RSD by fostering a concern to ensure that a robust, clear and principled approach is developed and applied.

3 Phase One: Why Human Rights in RSD?

In the absence of statutory glosses seeking to define who is a refugee, international human rights law has from an early date been adopted in New Zealand as appropriate to determine the scope of refugee protection. It is possible to identify in the jurisprudence four principal justifications for the use of international human rights law for this purpose.

The first may be termed a *'legitimacy justification'.* The RSD analysis is anchored in what States have themselves agreed as being the appropriate standards for determining the scope of the duty of protection a State owes to its citizens.[26] It would be a mistake, however, to see this as a State-centric approach. Rather, the predicament of the claimant takes centre stage and is the focus of the inquiry.[27] In this sense, New Zealand RSD embraces the

22 Section 218 of the 2009 Act expressly designates the IPT as 'a specialist body'.

23 See, for example *BV v IPT* [2014] NZHC 283, 31.

24 Notable exceptions are *Butler v Attorney-General* [1999] NZAR 205 at 218–220 per Richardson P, Henry, Keith, Tipping and Williams JJ regarding the internal protection alternative, and *Attorney General v Tamil X* [2010] NZSC 107 (27 August 2010) regarding the application of joint criminal enterprise principles to the Article 1 F Exclusion Clause.

25 See, *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173 and *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 endorsing approach taken in *AF* (*Kiribati*) [2013] NZIPT 800413.

26 See *Refugee Appeal No 74665* (7 July 2004) para 66.

27 See *Refugee Appeal No 72635* (6 September 2002) para 168 where the RSAA stated:

> Looking first at the language of the Refugee Convention, the "for reasons of" clause relates not to the word "persecuted" but to the phrase "being persecuted". The employment

development in understanding of international human rights law under which the individual is regarded as a rights holder and, as such, a proper subject of international law.[28]

Second is a *'transparency justification'*. Early on, the RSAA recognised that RSD may involve normative judgements that go beyond mere fact finding. It is therefore important for the process to 'reveal and openly discuss the norms upon which those judgments are based'.[29] This transparency will be of particular importance in the context of an interpretive approach which requires conclusions to be drawn on the permissible limitation of rights.

Third is a '*dynamism justification*'. By embedding RSD within a wider body of international human rights law, a dynamic approach is fostered which allows refugee determination to take account of changes in society as to what amounts to unacceptable infringements on human dignity.[30] While New Zealand refugee law recognises that the use of international human rights law to interpret the refugee definition in Article 1A(2) does involve placing limitations on its scope of application, it does not regard these limitations as impermissibly restricting the Refugee Convention's capacity to act as a 'living instrument' able to respond to changes in society.[31] The dynamism fostered through the use of human rights norms can be clearly seen in the New Zealand jurisprudence on

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of the passive voice ("being persecuted") establishes that the causal connection required is between a Convention ground and the predicament of the refugee claimant. The Convention defines refugee status not on the basis of a risk "of persecution" but rather "of being persecuted". The language draws attention to the fact of exposure to harm, rather than to the act of inflicting harm. The focus is on the reasons for the claimant's predicament rather than on the mindset of the persecutor, a point forcefully recognised in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at para 33 & 65 (HCA). At a practical level the state of mind of the persecutor may be beyond ascertainment even from the circumstantial evidence.

28 See W. Kälin and J. Kunzli, *The Law of International Human Rights Protection* (OUP 2010) 13–14.

29 *Refugee Appeal No 2039/93 Re MN* (12 February 1996) para 51, citing C.P. Blum 'Political Assumptions in Asylum-Decision Making: The Example of Refugees from Armed Conflict' in H. Adelman (ed), *Refugee Policy: Canada and the United States* (York Lanes Press 1991) 282 at 283.

30 See *Refugee Appeal No 74665* (7 July 2004) para 67.

31 See, for example, V. Türk and F. Nicholson, 'Refugee Protection in International Law: An Overall Perspective' at 38–39 and A. Edwards, 'Age and Gender Dimensions in International Refugee Law' at 50, 66–67 in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, Cambridge University Press, 2003).

gender-based violence,[32] children,[33] members of the LGBTI community,[34] and persons with disability.[35]

Finally, there is a clear *'consistency justification'* in the jurisprudence. An approach to determining the scope of refugee protection predicated on concepts such as reasonableness or toleration of harm has been expressly disavowed.[36] The subjectivity inherent in such an approach has been rejected as unworkable from the perspective of principled decision-making. After all, whose notion of what is reasonable or the appropriate level of toleration is to count under such an approach? No doubt different decision-makers will have different subjective views about what is reasonable or what a claimant should 'tolerate' before international protection is extended. This is hardly a model for consistent decision-making.

Commenting on the value of using human rights as an objective standard, the RSAA put the matter as follows:

> Instead of making intuitive assessments as to what the decision-maker believes the refugee claimant is entitled to do, ought to do (or refrain from doing), instead of drawing on dangerously subjective notions of "rights", "restraint", "discretion" and "reasonableness", there is a structure for analysis which, even though it may not provide the answer on every occasion, at least provides a disciplined framework for the analysis. A framework which is principled, flexible, politically sanctioned and genuinely international.[37]

Similarly, its successor, the IPT, has stated that the human rights standards developed by the Committee on Economic, Social and Cultural Rights provide:

> ... a readily understandable language of analysis and an objective yardstick around which levels of enjoyment of rights in any given case can be

32 See, for example, *Refugee Appeal No 2039/93 Re MN* (12 February 1996); *Refugee Appeal No 76044,* New Zealand (11 September 2008).

33 See *Refugee Appeal No 76226 and 76227* (12 January 2009). The case concerned child-custody and access rights in Iran.

34 See *BS* (*Fiji*) [2012] NZIPT 800041. The case concerned the predicament of a Fijian transsexual.

35 See *AC* (*Egypt*) [2011] NZIPT 800015. The case concerned the predicament of an albino man.

36 *Refugee Appeal No 1039/93 Re HBS and LBY,* New Zealand (13 February 1995) 6.

37 *Refugee Appeal No 74665* (7 July 2004) para 115.

> assessed. It moves refugee status determination in this potentially complex area away from the inherently variable subjective notions of individual decision-makers as to what level of deprivation he/she considers the claimant can be 'reasonably'expected to tolerate before surrogate international protection is extended, towards an objective and principled assessment.[38]

Aside from advancing these justifications as to why international human rights law forms the best basis for determining the scope of refugee protection, this first phase of development in New Zealand refugee law also sought to identify which components of international human rights law are relevant to RSD and how they relate to one another.

A number of early cases made reference to the Hathaway formulation of a 'sustained or systemic denial of core human rights demonstrative of a failure of state protection'.[39] However, in 1996, the RSAA delivered the first of a number of decisions in which its understanding of this interpretive approach to the scope of the Convention's refugee definition was refined. Thus, in *Refugee Appeal No 2039/93 Re MN*, the RSAA affirmed its preference for an approach based on a 'common international standard' represented by international human rights law[40] over an approach based on reference to the domestic standards of the country of refuge.[41] In this decision, the RSAA embarked on a critique of cultural relativity arguments and defended the use of international human rights law on the basis of the concept of universality.

Further refinement came in *Refugee Appeal No 70366/96 Re C*, where the RSAA held that the use of human rights as an interpretive guide to the meaning of Article 1A(2) was mandated by the general rule of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties, 1969 (VCLT).[42] This position was reaffirmed in *Refugee Appeal No 71427/99*, where the RSAA expressly rejected an interpretive approach grounded in dictionaries.[43]

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38 *BG* (*Fiji*) [2012] NZIPT 800091 para 109.

39 See, for example, *Refugee Appeal No 135/92 Re RS* (18 June 1993); *Refugee Appeal No 1039/93 Re HBS and LBY* (13 February 1995).

40 See *Refugee Appeal No 2039/93 Re MN* (12 February 1996) 9.

41 Obligations under the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) have, to a large extent, been given expression in New Zealand via the New Zealand Bill of Rights Act 1990.

42 *Refugee Appeal No 70366/97 Re C* (22 September 1997).

43 *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 paras. 43–46. At para 46, the RSAA stated:

Instead, the RSAA reaffirmed that 'core norms of international human rights law are relied on to define forms of serious harm within the scope of persecution'.[44]

Taking its lead from the decision of the Supreme Court of in Canada in *Ward*,[45] the RSAA drew heavily on the Preamble to the Convention to shape its understanding of refugee law as an international system for the surrogate protection of fundamental human rights. From this starting point, it was but a short step for the RSAA to recognise the relevance of the norms contained in both the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966[46] (ICESCR), as treaties giving effect to Universal Declaration of Human Rights[47] (UDHR), to determining the scope of protection under the Convention by giving guidance as to what constitutes 'being persecuted'.[48]

New Zealand refugee law has also explicitly acknowledged the relevance of norms contained in the following thematic treaties as being rights which can properly inform the scope of refugee protection:

As a consequence, it is neither appropriate nor possible to distil the meaning of persecution by having resort to English and Australian dictionaries. This can only lead to a sterile and mistaken interpretation of persecution. We refer by way of illustration of this point to the reference (with apparent approval) by Gummow J in *Applicant A* at 284 to a dictionary definition of "persecution" which asserted that it was the action of pursuing with enmity and malignity. This reference was subsequently treated by the Australian Refugee Review Tribunal as an authoritative statement as to how persecution was to be interpreted. The danger of this approach is twofold. First, it erroneously focuses on the intent of the persecutor rather than on the effect of the persecution on the victim. For a discussion of the difficulties this approach has caused in the United States see Deborah E Anker, *Law of Asylum in the United States* (3rd ed, 1999) 268–290. Second, and more relevant to the present context, it is an approach which lends itself to an unseemly ransacking of dictionaries for the *mot juste* appropriate to the case at hand. This does not assist in a principled analysis of the issues.

44 Ibid, para 51.

45 *Canada* (*Attorney General*) *v Ward* [1993] 2 SCR 689.

46 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

47 Universal Declaration of Human Rights, 10 December 1948, GA Res 217, UN Doc A/810.

48 See, generally, *Refugee Appeal No 72558/01 and 72559/01* (19 November 2002) para 113 and para 115; *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 at para 51; and *Refugee Appeal No 76044* (11 September 2008) para 62–69. For explicit acknowledgement of ICESCR's significance, see, *Refugee Appeal No 75221 and 75225* (23 September 2005); and *BG* (*Fiji*) [2012] NZIPT 800091 para 85–109.

i. 1966 Convention on the Elimination of All Forms of Racial Discrimination (CERD);[49]
ii. 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[50]
iii. 1989 Convention on the Rights of the Child (CRC);[51]
iv. 2006 Convention on the Rights of Persons with Disabilities (CRPD).[52]

As regards the substantive content of this body of rights, account is often taken of the interpretation of these instruments by their mandated treaty bodies. This is particularly so where the RSAA or the IPT has been required to analyse a novel or complex point of law.[53] Less often cited are regional instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) or the American Convention on Human Rights 1969.[54] Regional instruments are typically only referred to where a particularly complex issue arises that makes it necessary to traverse a broader

49 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). State obligations under CERD were discussed in relation to the predicament of Fijian-Indians in Refugee Appeal No 76512 (22 June 2010); see also in this context AD (Fiji) [2011] NZIPT 800042.

50 Convention on the Elimination of All Forms of Discrimination Against Women, opened for signatures 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). State obligations under CEDAW were discussed in *Refugee Appeal No 1039/93 Re HBS and LBY*, New Zealand (13 February 1995), in the context of a claim based on a claimed right to have a family.

51 Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). See *Refugee Appeal No 76226 and 76227* (12 January 2009) para 112.

52 Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008). See *AC* (*Egypt*) [2011] NZIPT 800015. The case concerned the predicament of an albino man who had exhaustively sought to exercise his right to work but who faced widespread discrimination on account of his albinism. Refugee status was granted.

53 See, for example, *Refugee Appeal No 1312/93 Re GJ* [1998] INLR 387 at 408–411; *Refugee Appeal No 2039/93 Re MN* (12 February 1996) para 26; *Refugee Appeal No 72752/01* (15 November 2001) para 23; *Refugee Appeal No 72635* (6 September 2002) para 74; *Refugee Appeal No 75221 and 75225* (23 September 2005); and *BG* (*Fiji*) [2012] NZIPT 800091 paras. 85–109.

54 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953); American Convention on Human Rights, 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

international perspective.[55] While the regional provenance of this body of human rights law means that it is applied with caution, it can nevertheless be very influential. For instance, in *Refugee Appeal No 74665*, the decisions of the European Court of Human Rights were central to the RSAA's conclusions regarding the boundaries of the right to privacy.[56] The leading cases of both regional bodies were also cited and followed by the IPT in *AC* (*Russia*) in relation to the duty on States to investigate threats to life as an aspect of the right to life.[57]

As to the relationship between these various component parts of international human rights law, the early jurisprudence of the RSAA is characterised by the use of a hierarchical approach in which different 'levels' of rights are identified as a function of their derogability, whether they are subject to limitation, and whether they were understood to impose any immediately binding obligation on States. Something of a sliding scale was applied. The higher up the hierarchy the right in question fell, the more likely breach was to constitute being persecuted. Under this approach, torture was regarded as first and highest in the level of hierarchy.[58] In contrast, the right to education was regarded as 'low in the hierarchy of rights'.[59]

Indeed, even in decisions which otherwise broke new ground in referencing the sustained and systemic violation of fundamental or 'core' human rights standards in ever greater detail, the language and analytical structure of a hierarchy of rights remains intact. In *Refugee Appeal No 1039/93 Re HBS and LBY*, a rather messy process was adopted through which the right to freedom of religion was characterised as being in the 'first hierarchy of rights' but closely associated rights, such as the right to liberty and security of the person, including freedom from arbitrary arrest and detention, and the freedom from arbitrary interference with one's home and privacy, were regarded as being not in the

55 See, for example, *Refugee Appeal No 3/91 Re ZWD* (20 October 1992) at 51–52 regarding the right under Article 12 of the European Convention on Human Rights of men and women to marry and found a family, discussed in the context of a claim based on a breach of China's one-child policy. Reference to Article 8 of the European Convention on Human Rights and related case-law was made in *Refugee Appeal No 74665* (7 July 2004), para 105, in the context of a claim based on discrimination against homosexuals in Iran.

56 *Fretté v France* (2004) 38 EHRR 21 and *Laskey, Jaggard & Brown v United Kingdom* (1997) 24 EHRR 39.

57 See *AC* (*Russia*) [2012] NZIPT 800151 which cited *Osman v United Kingdom* (2000) 29 EHRR 245 and *Velasquez Rodriguez v Honduras* (1988) 9 HRLJ 212.

58 *Refugee Appeal No 135/92 Re RS* (18 June 1993).

59 *Refugee Appeal No 732/92 Re CZZ* (5 August 1994).

same 'fundamental class'.[60] This is not to say, however, that claims based on rights regarded as falling 'low' on the hierarchy could never succeed. The applicants in *Refugee Appeal No 1039/93 Re HBS and LBY* were recognised as refugees. Similarly, in *Refugee Appeal No 732/92 Re CZZ*, it was recognised that the 'substantial impairment of ability to earn a living coupled with other discriminatory factors could, depending on the circumstances, constitute persecution'.[61]

A more nuanced position was foreshadowed in *Refugee Appeal No 71427/99*.[62] After citing the various international human rights instruments which by now firmly underpinned the approach taken in New Zealand, the RSAA stated that 'while the hierarchy of rights found in these instruments is not to be rigidly or mechanically applied, it does assist a principled analysis of the persecution issue'.[63] The complexities and difficulties posed by insisting on the mechanical application of a rigid hierarchy of rights were again referred to it *Refugee Appeal No 72558/01 and 72559/01*.[64] Finally, in *Refugee Appeal No 75221 and 75225*, the RSAA abandoned the language of hierarchy altogether as a distraction which tended to undervalue international human rights norms which fell outside the scope of the ICCPR.[65] The RSAA observed that, like the ICCPR, the ICESCR contains immediately binding obligations, to begin to take steps to 'progressively realise' the rights and to ensure that ICESCR rights will be exercised without discrimination.[66]

In the present, the language of hierarchies has all but disappeared from New Zealand's RSD analysis. Nevertheless, the differences between various human rights are acknowledged and taken into account. New Zealand refugee law recognises that only very few rights are enjoyed absolutely. The majority are subject to some qualification which allows the State to balance the enjoyment of the rights by the individual against wider societal or public interest. It also recognises that economic, social and cultural rights are subject to 'progressive realisation' provisions.

What the abandonment of a hierarchical model of human rights means in practice for New Zealand RSD is that, for the purpose of identifying forms of serious harm capable of amounting to being persecuted, the range of relevant rights engaged by the claimant's predicament are assessed in their own terms.

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60 *Refugee Appeal No 1039/93 Re HBS and LBY* (13 February 1995).

61 *Refugee Appeal No 732/92 Re CZZ* (5 August 1994) 9.

62 *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608.

63 Ibid, para 51.

64 *Refugee Appeal No 72558/01 and 72559/01* (19 November 2002) 114.

65 *Refugee Appeal No 75221 and 75225* (23 September 2005) para 81.

66 Ibid, paras. 85–90.

A good illustration of this approach in play is *AB* (*Germany*).[67] In this decision, the IPT examined rights arising under the ICCPR, the ICESCR and the CRC, without ascribing relative importance or giving greater weight to any particular right. In cases where ICESCR rights are largely engaged, the appeals are decided without any suggestion that these are somehow an inferior category of rights which limits their relevance to determining the scope of refugee protection. On the contrary, by abandoning the lexicon of hierarchy, these rights are assuming a greater prominence in the New Zealand jurisprudence.[68]

4 Phase Two: How International Human Rights Help to Determine the Scope of Refugee Protection

While the decision of the RSAA in *Refugee Appeal No 74665* is most widely known in relation to the issue of 'discretion' or 'concealment', of far greater significance however in terms of shaping RSD in New Zealand is the approach it advocates as to how human rights determine the boundaries of the legal state of 'being persecuted'.[69] It advocates a structured decision-making process in which the norms contained in the international human rights treaties recognised as relevant to the particular facts of the case are given a clear primacy.

Thus, once the facts have been established, the approach requires a decision-maker to first turn his or her mind to the identification of the relevant human rights landscape against which the past or, if relevant, anticipated future behaviour of the claimant is then viewed. From here, judgements can be made as to whether any serious harm potentially arises based on past or anticipated future activity and a conclusion on whether this state of affairs would amount to the claimant 'being persecuted' is made. The risk of any anticipated harm occurring is a separate enquiry, and does not occur in a vacuum devoid of a context framed by the protection of human rights. Rather, it takes place after the rights-focused inquiry into whether anticipated future harm can properly be described as 'being persecuted'.[70]

The approach advocated in *Refugee Appeal No 74665* provides a universally applicable decision-making methodology in New Zealand. Nevertheless, in

67 *AB* (*Germany*) [2012] NZIPT 800107–800111, 800147 para 68–84.

68 See, for example, *AE* (*Hungary*) [2012] NZIPT 800325–800327 regarding the right to education; *AC* (*Egypt*) [2011] NZIPT 800015 regarding the right to work; and *Refugee Appeal No 76342* (23 April 2010) regarding the right to an adequate standard of health.

69 *Refugee Appeal No 74665* (7 July 2004) para 82.

70 Ibid, para 125.

cases where it is found that past activity by the claimant in enjoyment of a fundamental human right already gives rise to a real chance or risk of serious harm such as torture, the arbitrary deprivation of life, or cruel, inhuman, or degrading treatment or punishment, the focus in the decision still tends to be on the determination of the facts and nature of the sanction. From an RSD perspective, future activity is irrelevant. This continues to be the case when cases of this type come before the IPT.[71]

Furthermore, while the decision in *Refugee Appeal No 74665* undoubtedly represents a further development in the understanding of how human rights can shape the boundaries of refugee protection, it would be a mistake to see this as signalling a break with the human rights-based approach taken in earlier cases. For instance, one early case concerned China's one-child policy and allegations of forced sterilization for transgressors.[72] The case is notable for a detailed examination of the scope of the right to procreate under international law and forced sterilization as a breach of Article 7 of the ICCPR. In other early cases, the RSAA also conducted detailed examinations of the right to be free from torture under both international treaty law and customary international law,[73] and had regard to Article 18(3) of the ICCPR in the context of a claim to be at risk of harm in Bangladesh for undertaking Christian proselytising.[74] The focus on the scope and content of the relevant right in these two cases thus foreshadowed the later articulation of the underlying general approach.

The general approach has recently been further refined in *DS* (*Iran*). The IPT has abandoned use of the core-margin concept to describe the first stage of its 'being persecuted' inquiry. While the underlying methodology is the same, this aspect is now framed simply in terms of there being an interference with an act within the scope (ambit) of a right. A four-tiered inquiry into human rights is proposed, characterised as inquiries into scope, nature, legality and impact.[75] One of the clearest examples to date of how this approach is to be applied is that of a claim by parents who asserted a right to home school their children to ensure their education conformed to the deeply-held religious convictions of the parents, and which they wished to instil in their children.[76] The IPT embarked upon a detailed analysis of whether this proposed action fell within the scope of the right to education or the

71 See, for example, *AT* (*Sri Lanka*) [2012] NZIPT 800265; *CA* (*Iran*) [2013] NZIPT 800369. This was also common in the jurisprudence of the RSAA; see, *Refugee Appeal Nos* 76468–76473 (25 June 2010) para 82–84.

72 *Refugee Appeal No 3/91 Re ZWD*, New Zealand (20 October 1992).

73 *Refugee Appeal No 135/92 Re RS,* New Zealand (18 June 1993).

74 *Refugee Appeal No 10/92 Re MI,* New Zealand (22 July 1992).

75 *DS* (*Iran*) [2016] NZIPT 800788.

76 *AB* (*Germany*) [2012] NZIPT 800107–800111, 800147 paras. 68–84.

right to freedom of religion. It concluded that no such right could be located within the ambit of either right.[77] Therefore, the sanction imposed on parents who persisted in home schooling in breach of the law, which could, in extreme cases amount to a loss of custody of the children and even imprisonment for up to six months, was held to be prosecution and not persecution.[78]

The abandonment of the core-margin concept must be distinguished from the concept of the minimum core entitlement of rights set out in the ICESCR. In *Refugee Appeal No 75221* and *75225*[79] and *BG* (*Fiji*),[80] the RSAA and IPT noted how a series of General Comments by the Committee on Economic, Social and Cultural Rights developed this notion through a set of standards giving greater specificity to the substantive content of ICESCR rights, as providing a means by which the minimum core content of these rights could be objectively measured.[81] Concepts such as availability, affordability, accessibility, and appropriateness were regarded as suitable objective proxy measures of whether the right to 'adequate' housing or an 'adequate' standard of living was being enjoyed. This approach has been and remains useful in assisting the IPT to determine complex cases involving ICECSR rights in a principled fashion.[82]

A feature of the approach is that, even if a breach of a right is established, there must be some evidence of serious harm. This point was emphasised by the IPT in *DS* (*Iran*) where the role serious harm plays in the New Zealand approach is extensively discussed.[83] However, the issue of whether the threat of serious harm exists is independent of the question of whether the act lies within the ambit of the relevant right. By first ascertaining which international human rights law norms are in issue on the facts as found, these norms become the prism through which relevant harm is identified.

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77 Ibid, para 95.

78 Ibid, para 153–155.

79 *Refugee Appeal No 75221 and 75225* (23 September 2005) paras. 96–98.

80 *BG* (*Fiji*) [2012] NZIPT 800091.

81 Ibid, para 95, the IPT cited: UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 4: The Right to Adequate Housing (Article 11(1) of the Covenant)' (CESCR, E/1992/33, 13 December 1991); CESCR, 'General Comment No 12: The Right to Adequate Food (Article 11)' (CESCR, E/C.12/199/5, 12 May 1999); CESCR, 'General Comment No 15: The Right to Water (Articles 11 and 12 of the Covenant)' (CESCR, E/C.12/2002/11, 20 January 2003); CESCR, 'General Comment No 18: The Right to Work (Article 6 of the Covenant)' (CESCR, E/C.12/GC/18, 6 February 2006).

82 In *AB* (*Germany*) [2012] NZIPT 800107–800111, 800147 paras. 73–74, the concept of 'acceptability' of education was used to assist determining the scope of the right to education. In *BS* (*Fiji*) [2012] NZIPT 800041, paras. 61–63, the approach was used to assist determination of a claim involving the socio-economic predicament of a Fijian transsexual.

83 *DS* (*Iran*) [2016] NZIPT 800788.

Given the non-hierarchical approach, a broader range of harm is thus potentially admitted into the scope of refugee protection on the basis that it undermines human dignity in a key way. Harm is not evaluated solely on the basis of physical sanction[84] and the harm does not need to be juxtaposed against some other type of harm such as physical ill-treatment on the basis this is a superior right or some minimal benchmark. This is not to say, however, that there is no threshold of harm. The harm arising from the breach of the right must be of a serious kind. But the form the serious harm can take is shaped by the particular aspect of human dignity that the relevant right- or bundle of rights- speak to and protect, considered in the particular context of the case by reference to the characteristics and circumstances of the individual claimant.[85]

For example, in *Refugee Appeal No 74665*, the finding of being persecuted rested, in part, on a finding that being in a homosexual relationship was an aspect of private life which needed to be hidden from family, friends, and colleagues, as well as agents of the State.[86] The oppression was ongoing and pervasive. In other cases, it has been accepted that the complete denial of the core of the right to work, giving rise to a real risk of the appellant not being able to support himself, was held to constitute serious harm.[87] In another case, the enforced separation of a mother from her child because of the discriminatory laws surrounding custody rights in Iran was also held to constitute a form of serious harm.[88]

5 International Human Rights Law in Specific RSD Contexts

International human rights law is firmly embedded into the interpretive approach taken in New Zealand refugee law to all matters dealing with Convention-related protection. This section will examine how human rights norms have informed New Zealand's approach to core refugee concepts such as effective State protection and the internal protection alternative.

84 *Refugee Appeal No 2039/93 Re MN* (12 February 1996).

85 See, for example, *Refugee Appeal Nos 76226 and 76227* (12 January 2009) para 102–103 and 112–113 which related to the enforced separation of a mother from her child because of the discriminatory laws surrounding post-divorce custody rights in Iran. In *AH* (*China*) [2011] NZIPT 800197, the restrictions on Uighur woman in terms of right to manifest her religion by observing prayer, wearing *hijab* at work found, in particular context of China, to constitute serious harm. A similar finding was made in relation to an Ahmadi appellant from Pakistan; see *AP*(*Pakistan*) [2013] NZIPT 800401–404.

86 *Refugee Appeal No 74665* (7 July 2004), para 126.

87 See *AC* (*Egypt*) [2011] NZIPT 800015, which concerned the denial of the right to work of an albino from Egypt.

88 *Refugee Appeal No 76226 and 76227* (12 January 2009) paras. 102–103 and 112–113.

As regards the question of State protection, the surrogacy principle requiring evidence of a 'failure' of national or State protection in the enjoyment of human rights has been adopted and applied in the context of New Zealand RSD over many years.[89] However, the application of this principle in New Zealand does not mean that it is only where it can be shown that a State will fail to discharge the duty owed under international human rights law that this aspect of the 'being persecuted' definition is met.

In taking this position, the IPT has acknowledged the particular and specialist function of refugee law vis-à-vis the wider body of international human rights law:

> The Tribunal is not a treaty supervisory body. It performs a fundamentally different function. It does not offer states guidance on the good faith discharge of treaty obligations. Nor is its task to apportion blame or to hold the relevant state accountable under international law for breaches of the claimant's fundamental rights. Refugee status determination is concerned with answering a fundamentally different question, namely, whether the appellants' predicament constitutes the international law status of 'being persecuted', thereby requiring surrogate international protection. Where this status arises because serious harm is anticipated to arise due to a failure of state protection, the fact that the state has done what it reasonably could to avoid that situation provides no answer to the claimant's predicament. It is precisely because either agents of the state are the cause of the anticipated serious harm, or are simply unable despite the good faith discharge of their obligations to provide effective protection from serious harm inflicted by non-state agents, that international protection may be required.[90]

New Zealand law has thus rejected the approach taken in *Horvath v Secretary of State for the Home Department.*[91] The question to be addressed in the context of State protection is whether the protection available from the State will

89 See, for example, *Refugee Appeal No 523/92 Re RS* (17 March 1995) 35–36; *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 para 48; *Refugee Appeal No 72558/01 and 72559/01* (19 November 2002); *Refugee Appeal No 74665,* New Zealand (7 July 2004) para 52; *AC* (*Syria*) [2011] NZIPT 800035 para 70. The RSAA's emphasis on the surrogate nature of refugee protection was endorsed by the New Zealand Court of Appeal in *Butler v Attorney-General* [1999] NZAR 205, 216–217 per Keith J.

90 *BG* (*Fiji*) [2012] NZIPT 800091 para 117.

91 *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (HL).

reduce the risk of serious harm to below the level of a 'real chance' of serious harm. The duty on the State is not, however, to eliminate all risk of harm.[92] For the purposes of New Zealand RSD, even when it is established that a State has met its protection obligations under international human rights law or, to use the language of *Horvath* – done all it 'reasonably' can, where this nevertheless leaves the claimant with a real risk of serious harm emanating from a breach of human rights, a finding of being persecuted will follow. In terms of the refugee definition under Article 1A(2), the State will be unable to protect the claimant from the anticipated harm.

The centrality of the concept of 'surrogacy' in New Zealand RSD has not, therefore, as Goodwin-Gill and McAdam feared,[93] led to an approach under which the actions taken by the State are given preferential focus in the inquiry. Rather, the predicament of the claimant takes centre stage.[94] Indeed, the approach taken in *Horvath* was expressly rejected because it concentrated not on the risk to the claimant but on the 'reasonable willingness of the state of origin to operate its domestic protection machinery'.[95] Just as New Zealand refugee law has insisted on an entirely objective standard on the assessment of risk, so has it insisted on an objective assessment of the adequacy of State protection. Further, while it is recognised that under international human rights law there is an emphasis on the exhaustion of domestic remedies, and failure by the claimant to avail themselves of those remedies may, in certain instances, be determinative of the State protection issue, this principle is to be applied with caution in the refugee law context.[96]

International human rights law norms have also influenced New Zealand's approach to the internal protection alternative. Following the decision of the Court of Appeal in *Butler v Attorney General*,[97] which required that what was at that time called the 'internal flight alternative' be linked more clearly to the concept of surrogate international protection, the RSAA re-examined its approach. In *Refugee Appeal No 71684/99,* the concept was re-branded for the purposes of New Zealand RSD as the 'internal protection alterative'. Significantly, the RSAA eschewed an approach to assessment of whether there

92 *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 para 66; *BG* (*Fiji*) [2012] NZIPT 800091 para 113.

93 G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (OUP 2007) 10–11.

94 *Refugee Appeal No 72635,* New Zealand (6 September 2002) para 168.

95 *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 para 63. *BG* (*Fiji*) [2012] NZIPT 800091 para 110–117, where the same point is made in relation to ICESCR rights.

96 *Refugee Appeal No 72558/01 and 72559/01* (19 November 2002) para 107.

97 *Butler v Attorney-General* [1999] NZAR 205.

was meaningful protection available over-and-above the absence of harm by any reference to what was 'reasonable'. Rather the RSAA situated the analysis squarely within a human rights paradigm. It was not, however, attracted to the argument that the full range of rights contained within the International Bill of Rights was relevant to the inquiry, and preferred to anchor the analysis within the refugee-specific rights contained in the Refugee Convention itself. The decision is also notable for the emphasis placed on ensuring fair and consistent decision making in this area. The RSAA observed that 'the added attraction of this approach is that it provides decision-makers with an identified, quantified and standard set of rights common to all State parties, thereby facilitating consistent and fair decision-making.'[98]

6 Challenges for the Future

The use of international human rights law to determine the proper scope of refugee protection necessarily requires the decision-maker to grapple with the question of permissible limitations. It is trite that only a few human rights are absolute in nature. Many, if not most, are qualified in nature with some limitation on enjoyment of the right permissible. The question of whether there has been a failure to protect therefore needs to take account of whether any limitation or restriction on enjoyment of the relevant right is permissible under international human rights law.

The RSD methodology in New Zealand expressly directs the mind of the decision-maker to the question of permissible limitations. This methodology requires the decision-maker to determine first, the nature and extent of the right in question and second, the permissible limitations which may be imposed by the State.[99] As to how this approach was to determine the boundary of refugee protection, the RSAA has explained that:

> …the Authority takes as its starting point the "being persecuted" element, not the well-founded assessment as the former allows identification of the boundaries set by international human rights law for both the individual and the state. Once those boundaries have been identified it is possible to determine whether the proposed action by the claimant is at the core of the right or at its margins and whether the prohibition or

98 Ibid, para 62.

99 *Refugee Appeal No 74665,* New Zealand (7 July 2004) para 115.

> restriction imposed by the state is lawful in terms of international human rights law.[100]

While the language of core-margin has been recently abandoned, there are residual complexities – a point recognised in *Refugee Appeal No 74665*.[101] The limitation provisions contained in the ICCPR are expressed in different terms for different rights. Moreover, the RSD process is in many ways ill-equipped to deal with the issue of permissible limitations as aspect of inquiry into 'being persecuted'. Unlike treaty monitoring bodies exercising their functions under individual complaints procedures, the State of origin is not a party to the refugee proceedings and will not be represented. While in many cases this may not matter, in other cases the question of limitations is a live issue. The necessity of the non-representation of the State of origin in the proceedings can impact of the nature and content of the evidence relevant to the issue of permissible limitation. Perhaps reflecting these complexities, the extent to which a decision in New Zealand engages in any limitation question arising is quite variable.

There was some discussion in previous decisions about a permissible limitation on the right to procreate in the context of China's 'one-child' policy.[102] The RSAA has observed that China's laws relating to illegal departure and system of household registration raised 'complex' questions about 'illegitimate restrictions on the rights of freedom of movement and other socio-economic rights' but it was not necessary to resolve the issue.[103]

More recently, the IPT has examined limitations on freedom of religion in the non-proselytizing context. For example, in *BT* (*Iran*), the situation for Christian converts in Iran who do not seek to proselytise was examined.[104] The IPT found that the appellant's desire to participate in communal worship in the form of weekly services and Bible study and to participate in the social affairs of his faith community were at the core of his right to freedom of religion under Article 18 of the ICCPR.[105] The IPT noted there had been a significant increase in the limitations imposed on Christian converts to manifest their religion through meetings and prayer groups in unofficial 'house churches'.[106] The IPT

100 *Refugee Appeal No 74665* (7 July 2004), para 120.

101 Ibid, para 85–86.

102 *Refugee Appeal No 3/91 Re ZWD* (20 October 1992), 19–22.

103 *Refugee Appeal No 75973* (9 March 2007) para 132.

104 *BT* (*Iran*) [2012] NZIPT 800188.

105 Ibid, para 135.

106 Ibid, paras. 114–117.

placed these limitations within the context of the 'Arab Spring' uprisings in the region, and the resulting concern for survival by the Iranian regime.[107] Although not specifically addressed, it is implicit in the decision that these limitations were regarded as impermissible.[108]

The question of permissible limitations has been more explicitly dealt with in a series of cases relating to the situation of Uighurs in China.[109] The IPT has observed that:

> While Article 18(3) of the ICCPR provides that freedom of religion may be subject to such limitations prescribed by law as are necessary for the protection of "public safety, order, health or morals", the pervasive policy of suppression implemented by the Chinese government transcends any such description.[110]

One aspect of limitations in the context of freedom of religion that is not fully explored is on the issue of proselytising. In an early case, the RSAA asserted that it was not 'unreasonable' for a predominantly Muslim country to limit Christian proselytizing.[111] The issue was not, however, subjected to any substantial analysis. In recent years, many cases have concerned proselytising in Iran, but the issue has not been subjected to any detailed examination, either by the RSAA or the IPT in relation to the question of permissible limitation. For a number of years, the RSAA and IPT have taken the view that proselytizing was an activity which attracted severe sanction in Iran.[112] However, neither the RSAA nor the IPT has addressed in any detail the question of whether any limitation on proselytizing is permissible under international human rights law. Mindful of the complexities involved, it is fair to say that decision-makers have largely assumed that the act lies sufficiently within the ambit of the right to religion and the limitation, in the context of Iran, is impermissible. Furthermore, the sanction imposed clearly amounts to serious harm.

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107 Ibid, para 118.

108 Ibid, paras. 118–122.

109 See *AH* (*China*) [2011] NZIPT 800197; *AI* (*China*) [2011] NZIPT 800154; and *AF* (*China*) [2013] NZIPT 800370.

110 *AH* (*China*) [2011] NZIPT 800197 para 70.

111 *Refugee Appeal No 10/92 Re MI,* New Zealand (22 July 1992).

112 See, for example, *Refugee Appeal No 74911* (1 September 2004); *Refugee Appeal No 75368–75371,* New Zealand (12 July 2005); *Refugee Appeal No 75376* (11 September 2006); *Refugee Appeal No 76083–76085* (28 June 2008); *Refugee Appeal No 76204* (16 February 2009); *Refugee Appeal No 76367* (5 October 2009); *Refugee Appeal No 76401* (23 February 2010).

An ongoing challenge in the use of international human rights law to determine the scope of refugee protection lies in accommodating claims based on a conscientious objection to the performance of military service. In *Refugee Appeal No 75378*,[113] the RSAA recalibrated New Zealand's approach to claims of this nature. While claims based on the risk that a person would be called upon to participate in a conflict which would require him or her to commit human rights abuses had been accepted by New Zealand decision-makers as falling within the scope of the Convention, this was simply on the basis that no one should be compelled to participate in conflicts that had been 'internationally condemned'. In *Refugee Appeal No75378*, the RSAA abandoned such an approach in favour of an approach which located decisions by individuals to oppose compulsory military service obligations within the framework of Article 18 of the ICCPR.[114]

The RSAA held that, provided the claimant's objection was found to be a belief in the sense it transcended a point-of-view based on issues such as personal inconvenience, it fell within the scope of Article 18 which covered secular as well as religious beliefs. The objection, as a manifestation of that belief, could only be lawfully interfered with by the State via forced conscription if such conscription complied with the limitation provision in Article 18 itself. While the RSAA found that a policy of compulsory military service may, in general terms, be regarded as relating to 'public safety', any legitimate aim the State may have in conscripting persons for participation in armed conflict, does not extend to forcing participation in conduct that amounts to breaches of the laws of war. The State may not, therefore, lawfully interfere, under Article 18(3), with an individual's right to manifest a belief that he/she should not participate in such a conflict, by refusing to be conscripted.[115]

The RSAA specifically left open for another day the wider question of the conscientious objection *per se* as a qualifying basis for recognition as a refugee. Since the date of this decision, both the Human Rights Committee and the European Court of Human Rights have increasingly located the issue of conscientious objection to military service generally within the context of freedom of religion and belief.[116] Such decisions have considered issues relating to the

113 19 October 2005.

114 *Refugee Appeal No 75378* (19 October 2005) para 70–81.

115 Ibid, para 98.

116 See, for example, *Yeo-Bum yoon and Myung-jin Choi v Republic of Korea,* Communication Nos 1321/2004 and 1322/2004, UN Doc. CCPR/C/88/D/1321–1344 (23 January 2004) (HRC); *Eu-Min Jung v Korea* Communication No 1593–1603/2007, UN Doc. CCPR/C/98/D/1593–1603

prosecution and detention of objectors, and the availability and form of alternative forms of service. Recently, a number of IPT decisions relating to the performance of military service have been remitted for rehearing. The cases raise the issue of whether agnostic or religiously uninterested conscripts having to falsely declare in writing on induction that they are Muslim, or undertake compulsory religious worship during their period of service amounts to being persecuted.[117] These developments in wider international human rights law have been factored into the re-examination of this issue by the IPT in *DS* (*Iran*).

7 Conclusion

RSD in New Zealand has been developed in a setting which, although legislative in nature since 1999, has required the decision-makers to determine the scope of refugee protection through direct engagement with the text of the Refugee Convention, unencumbered by the fog of statutory glosses or regionally applicable interpretive overlays. In such a setting, New Zealand refugee law has reached a clear understanding that the object and purpose of the Convention is for the surrogate international protection of fundamental human rights as expressed through widely-adopted international human rights treaties.

From this conceptual starting point, New Zealand refugee law in all its facets has over the past quarter of a century been infused with international human rights law norms and concepts. Through the prism of human rights law, New Zealand refugee law has evolved to include within the ambit of the Convention the predicament of a range of vulnerable or marginalised sections of society, often well ahead of the curve in terms of the international jurisprudence.

Nevertheless, it is recognised that international human rights law is not synonymous with international refugee law. Gaps in understanding as to the application of human rights law within the specific context of refugee protection

(30 April 2010) (HRC); *Min-Kyu Jeong v Korea* Communication Nos 1642–1741/2007 UN Doc. CCPR/C/101/1642–1741 (27 April 2011) (HRC); *Atasoy and Sarkut v Turkey* Communication Nos 1853/2008 and 1854/2008 UN Doc. CCPR/104/D/1854/2008 (19 June 2012) (HRC); *Bayatyan v Armenia* (2012) 54 EHRR 15 (7 July 2011) (ECtHR); *Buldu and others v Turkey* [2014] ECHR 567 (3 June 2014) (ECtHR).

117 See *X v IPT* [2014] NZHC 2779 and *CV and CW v IPT* [2015] NZHC 510.

still exist. Hard cases still remain to be decided. Using international human rights law will not therefore provide an easy or complete answer in all cases but it will provide a principled one and offers an objective framework for guiding decision-making in one of the most complex areas of the law. The evolution in the use of human rights to determine the border of refugee protection in New Zealand continues.