

Convention Refugees in New Zealand: Being Trapped in Immigration Limbo Without the Right to Obtain a Visa

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Abstract— Multiple Convention Refugees in New Zealand are stuck in a state of immigration limbo due to a lack of defined immigration policies. The Refugee Convention 1951 does not give the right to be issued a permanent right to live and work in the country of asylum. A gap in New Zealand's immigration law and policy has left Convention Refugees without the right to obtain a resident or temporary entry visa. The significant lack of literature on this topic suggests that the lack of visa options for Convention Refugees in New Zealand is a widely unknown or unacknowledged issue. Refugees in New Zealand enjoy the right of non-refoulement contained in Article 33 of the Refugee Convention 1951 whether lawful or unlawful. However, a number of rights contained in the Refugee Convention 1951, such as the right to gainful employment and social security, are limited to refugees who maintain lawful immigration status. If a Convention Refugee is denied a resident visa, the only temporary entry visa a Convention Refugee can apply for in New Zealand is discretionary. The appeal cases heard at the Immigration Protection Tribunal establish that Immigration New Zealand has declined resident and discretionary temporary entry visa applications by Convention Refugees for failing to meet the health or character immigration instructions. The inability of a Convention Refugee to gain residency in New Zealand creates a dependence on the issue of discretionary temporary entry visas to maintain lawful status. The appeal cases record that this reliance has led to Convention Refugees lawful immigration status being in question, temporarily depriving them of the rights contained in the Refugee Convention 1951 of lawful refugees. In one case, the process of applying for a discretionary temporary entry visa led to a lawful Convention Refugee being temporarily deprived of the right to social security, breaching article 24 of the Refugee Convention 1951. The judiciary has stated a constant reliance on the issue of discretionary temporary entry visas for Convention Refugees can lead to a breach of New Zealand's international obligations under Article 7 of the International Covenant on Civil and Political Rights. The appeal cases suggest that, despite successful judicial proceedings, at least three persons have been made to rely on the issue of discretionary temporary entry visas potentially indefinitely. The appeal cases establish that a Convention Refugee can be denied a discretionary temporary entry visa and become unlawful. Unlawful status could ultimately breach New Zealand's obligations under Article 33 of the Refugee Convention 1951 as it would procedurally deny Convention Refugees asylum. It would force them to choose between the right of non-refoulement or leaving New Zealand to seek the ability to access all the human rights contained in the Universal Declaration of Human Rights elsewhere. This paper discusses how the current system has given rise to these breaches and emphasizes a need to create a designated temporary entry visa category for Convention Refugees.

Keywords— Domestic Policy, Immigration, Migration, New Zealand.

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I. INTRODUCTION

Many believe that once the New Zealand Government grants a person refugee status, they are all given the right to live and work permanently in New Zealand. This is not the case. The New Zealand Government has created two different categories of refugees, Convention Refugees and Quota Refugees[1]. Which category a refugee belongs to dictates their access to rights and services in New Zealand.

Quota refugees have been granted refugee status by the New Zealand Government whilst they were offshore. After the grant of asylum, they are given permanent resident visas, transported to New Zealand, and participate in a refugee resettlement programme coordinated by the New Zealand Red Cross. They receive access to resettlement services and assistance.

This research focuses on Convention Refugees. Convention Refugees are asylum seekers granted refugee status onshore. On the grant of refugee status Convention Refugees are given the protection of non-refoulement under Article 33 of the Convention Relating to the Status of Refugees 1951 ("Refugee Convention") and are given limited access to social services. Convention Refugees have no defined immigration status category within the Immigration Act 2009 ("the Act") or immigration policy. The silence of the policy and legislation has led to a Convention Refugee having no legal entitlement to be granted a visa of any kind to lawfully remain in New Zealand. The grant of refugee status for onshore refugee claimants merely allows them to apply for resident status in New Zealand[2]. However, to be eligible for the grant of residence, the Convention Refugee must meet further character and health requirements found in immigration instructions A4 and A5. The evidence demonstrates that the maintenance of lawful immigration status for Convention Refugees who do not meet the residence immigration instructions is constantly uncertain[3].

Convention Refugees who have held limited visas at any time are not eligible to apply for a permanent resident visa. They can only be granted a permanent resident team by the Minister of Immigration ("Minister") or their delegate under s 61 of the Act. This can only occur once their temporary entry visa expires, and they become unlawful[4].

New Zealand is a signatory of the Refugee Convention[5], the Protocol Relating to the Status of Refugees ("1967 Protocol")[5], and has ratified the entire document of the Refugee Convention into the Act[6]. However, certain rights within the Refugee Convention only apply to refugees lawfully in a country. Therefore, a Convention Refugee must remain lawful to access all the rights in the Refugee Convention. If they become unlawful, New Zealand is only obligated to provide them the rights in Article 33, the principle of non-refoulement.

Convention Refugees who have declined residence applications, have their resident applications under process or are not eligible to apply for residence in New Zealand do not have a visa category available to them and must apply for discretionary visas. This research uses Convention Refugee resident appeal decisions to demonstrate that having no legal entitlement to obtain a visa of any kind in New Zealand leaves them in immigration status limbo, either becoming unlawful or having to remain on discretionary temporary entry visas potentially indefinitely. This situation may have occurred three times in *AJ (Refugee and Protection)* [2014] NZIPT 201576, *AG (Refugee and Protection)* [2018] NZIPT 205054 and *AM (Refugee and Protection)* [2015] NZIPT 202919.

The data shows that our current system results in Convention Refugees having uncertain immigration status. The discretionary nature of the visa process means that the Government can intentionally strip Convention Refugees of rights contained in the Refugee Convention. Such a system enables the New Zealand Government to contract out of their obligations under the Refugee Convention and their ethical obligations to these people. This research establishes breaches of international human rights law that occur by Convention Refugees not having the right to be granted a visa of any kind in New Zealand. Namely, Articles 24 and 33 of the Refugee Convention and Article 7 of the International Covenant on Civil and Political Rights ("ICCPR").

An empirical approach was employed, analysing Refugee and Protected Person resident appeal decisions released by the Immigration and Protection Tribunal ("Tribunal") and other literature to establish the breaches of the mentioned international treaties. This study primarily addresses the question of the legal immigration status and the rights of Convention Refugees in New Zealand. It aims to explore the challenges that Convention Refugees face due to the lack of visa options and to provide evidence to support the formation of a temporary entry visa category to protect their legal immigration status. Creating a temporary entry visa category for Convention Refugees eliminates the possibility of these breaches.

This paper will not discuss the parameters of such a temporary entry visa category.

II. LIMITATIONS

Due to s 9 of the Official Information Act 1982, Immigration New Zealand's ("INZ") decisions documenting the reasons for a declined resident visa application are confidential. Therefore, this paper gathers the reasons for declined residence decisions from publicly available Refugee and Protected Person resident appeal decisions heard by the Tribunal. There have been 15

appeal decisions since 2013.

Because not all migrants will exercise the right of appeal to the Tribunal after declining a resident visa, this paper's methodology reverted to released INZ statistics to determine how many Convention Refugees had been declined residence by INZ. These statistics report that only six Refugee and Protected Persons residence applications have been declined since the 2012/2013 financial year[7].

This number is inconsistent with the number of residence appeals heard by the Tribunal. One of the limitations of this paper is the unavailability of data that could explain the reason behind the inconsistency in information. The data published by INZ is unhelpful in this analysis and shows a shortfall of INZ statistics available, which hindered meaningful analysis of INZ data that can be analysed alongside the decisions heard by the Tribunal.

III. PREVIOUS RESEARCH

There has been little literature written on this subject. Refugee research typically overlooks the topic of Convention Refugee. Presumably, this is because there are few instances of Convention Refugees not being granted residency.

In the "Legal condition of refugees in New Zealand" report by R P G Haines, the author identifies that a small number of Convention Refugees do not meet the health and character requirements. However mitigates this concern by stating, "In practice, the Immigration Service would likely waive medical requirements, particularly where the medical condition is relevant to the circumstances that give rise to the refugee claim"[8]. Although this statement is true, this research highlights cases where exceptions are not given. Apart from this small passage in the report's introduction, Convention Refugees without residence are not mentioned again.

Lisa Yarwood from the Chinese University of Hong Kong published an article called "Refugee convention; Spirit and intent". In this article, she conducts a case review of *AB V Chief Executive of Department of Labour* [2011] 3 NZLR 60. A material fact of this case is that the Convention Refugee did not meet the character requirements. Yarwood points out that New Zealand's need for a temporary entry category for Convention Refugees who are not granted residence creates an additional obstacle to integrating refugees into the community[9]. This approach could be seen as going against the spirit of the international refugee protection framework. At the end of her article, she notes that some form of visa or legal entitlement to remain in New Zealand lawfully must be given.

As highlighted by Yarwood in her 2012 article, Convention Refugees do not have a temporary entry visa allocated to them. This research sits apart from Yarwood as it identifies and explains the breaches of international law arising from the lack of a visa category that grants the right to an appropriate visa to remain lawfully in New Zealand.

IV. THERE IS NO RIGHT FOR A CONVENTION REFUGEE TO BE GRANTED A VISA

The grant of a visa for a Convention Refugee is not a right

under the Refugee Convention, the Act or the immigration instructions. This was confirmed in *Attorney-General v E* CA282/99, 11 July 2000. This decision explored whether there is a presumption in favour of a grant of a temporary permit to a refugee status claimant. The Court of Appeal ultimately found that INZ is not obligated to issue a visa to a refugee claimant under law or policy due to using the word "may" in the policy. However, this case found that Immigration officers must exercise their discretion appropriately when considering New Zealand's obligations under the Refugee Convention[10]. It gave no guidance as to how this discretion should be exercised.

As a solution to the gap in the policy, INZ has attempted to repurpose the visa category used to grant refugee claimants temporary entry visas[11]. However, this is a discretionary visa granted under s 45 of the Act "Grant of visa generally matter of discretion". INZ has issued directions to Immigration officers through Visa Pak 2012-Jan 13 which states: "Granting work visas to approved refugee claimants/asylum seekers who have not yet applied for an/or been granted residence". In this Visa Pak, the guidance is that such a visa should be issued for a recommended year.

As demonstrated in *AJ (Refugee and Protection)* [2020] NZIPT 205580, this solution has proved flawed. The Tribunal has confirmed that visas for Convention Refugees not eligible for residence will be discretionary and at constant risk of decline[12].

V. IMMIGRATION PROTECTION TRIBUNAL REFUGEE AND PROTECTED PERSON RESIDENT APPEAL DECISION ANALYSIS

A. The Tribunal

The contents of the Refugee Convention do not grant the right to live permanently in any country that has granted the applicant refugee status. This is confirmed by the Tribunal in the case of *AL (Refugee and Protection)* at paragraph 46, which states, "Further, the Refugee Convention does not include a right to permanent residence status in the country of asylum"[13].

Upon analysis of the Tribunal decisions, the reported reasons for a resident visa decline were:

- The Convention Refugee did not meet the character in A5 of the immigration instructions and was not granted a character waiver under A5.25 of the immigration instructions[14].
- The Convention Refugee did not meet the health instructions in A4 of the immigration instructions and, due to the type of condition, were not eligible for a medical waiver under A4.60 of the immigration instructions[15][16].

Convention Refugees who are declined a resident visa can appeal to the Tribunal within 42 days of the decision. The right of appeal arises from s 187(1) of the Act on two grounds[17]:

(A) *"The relevant decision was not correct in terms of the residence instructions applicable at the time the relevant application for the visa was made; or*

(B) *The special circumstances of the appellant are such that consideration of an exception to those residence instructions*

should be recommended."

Despite the appeal being successful on either of the two grounds, the Tribunal does not have the authority to issue a residence visa[18]. The Tribunal has two courses of action if the appeal is successful. If INZ applied the immigration instructions incorrectly, the Tribunal will return the application to INZ for reassessment. If INZ's assessment was correct but the appellant has special circumstances[19], the Tribunal can recommend that the Minister grant a residence visa as an exception to the residence instructions.

The Minister has the power of absolute discretion, as found in s 45 of the Act. They do not have to grant a visa of any kind and can decline any such requests from the Tribunal[20].

B. The Decisions

The Tribunal has provided three decisions where it was assessed that although INZ were correct in the assessment of the immigration instructions, a finding of special circumstances was made. Despite this finding, the Minister refused to grant the applicant's residence as an exception to the instructions. This demonstrates the potential for Convention Refugees to rely on discretionary temporary entry visas indefinitely.

The facts were withheld from the judgements regarding *AJ (Refugee and Protection)* [2014] NZIPT 201576, *AG (Refugee and Protection)* [2018] NZIPT 205054 and *AM (Refugee and Protection)* [2015] NZIPT 202919. However, all were found to have special circumstances by the Tribunal and were referred to the Minister. The Minister refused to intervene in these instances. These Convention Refugees must remain on discretionary temporary entry visas for a potentially indefinite period. Appealing Ministerial decisions is expressly prohibited under s 189 of the Act.

The case *AL (Refugee and Protection)* [2015] NZIPT 202110 also demonstrates another scenario where a Convention Refugee is forced to rely on the discretionary temporary entry visa for long periods of time.

The appellants in these cases did not meet the residence immigration instructions as evidenced by their appeal decisions. As such, each time one of these persons applies for a discretionary temporary entry visa they will face the prospect of decline and unlawfulness. This limbo could amount to a breach of Article 7 of the ICCPR.

VI. BREACHES OF INTERNATIONAL HUMAN RIGHTS LAW BY THE NEW ZEALAND GOVERNMENT

A. Breach of Article 7 of the ICCPR

Article 7 of the ICCPR states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[21]. A country can breach Article 7 of the ICCPR by engaging in practices that amount to torture or other forms of cruel, inhuman, or degrading treatment or punishment.

Inhuman treatment is not defined within the ICCPR; however, in 1992, the United Nations Human Rights Committee, which is responsible for monitoring the implementation of the ICCPR, provided guidance on interpreting the term. According to the Human Rights

Committee's General Comment No. 20, "inhuman treatment" refers to treatment that causes "serious mental or physical suffering." The Committee has also noted that the severity of the suffering must be at a level that is incompatible with respect for human dignity[22].

The Tribunal held in *AJ (Refugee and Protection)* [2020] NZIPT 205580 that a person whose visas will always be at risk of decline effectively leaves them "limbo"[23]. The Tribunal went on to say that a limbo without resolution could constitute cruel, inhuman or degrading treatment and be in violation of New Zealand's obligations under Article 7 of the ICCPR[23].

Where the applicant in *AJ (Refugee and Protection)* was found to be in limbo with no prospect of resolution, the Tribunal decided in *AL (Refugee and Protection)* [2015] NZIPT 202110, that it would only assert a breach of the ICCPR when an applicant appears to have no solution to their indefinite stay on temporary entry visas. In this appeal, the Convention Refugee's residence was declined based on not meeting the character requirements. The Tribunal held:

"The representative submits that the appellant is being held in limbo, potentially forever. The Tribunal does not share that view. With the passage of time and in the absence of further offending, the appellant's claim to be eligible for a character waiver will strengthen considerably, and it is also possible that his circumstances may satisfy the statutory test for special circumstances."[27]

Therefore, where the Tribunal offers some support to appellants in this situation, the circumstances leading to a breach of Article 7 are limited to circumstances that will always interfere with the outcome of the application. The applicant in *AL (Refugee and Protection)* must remain on a temporary entry visa until INZ exercises discretion to grant a Character Waiver for a resident visa. A high level of discretion is applied in assessing whether a Character Waiver should be granted. Considering the factors that INZ considers when conducting a character waiver, this applicant could be on a discretionary temporary entry visa for an undefinable time.

According to the decisions in the Tribunal, because of the discretionary nature of the temporary entry visa, and a reliance on them due to being in "immigration limbo" would constitute a breach of Article 7 of the ICCPR.

B. Breach of Article 24 of the Refugee Convention

AF (Refugee and Protection) [2018] NZIPT 204475 demonstrates that requiring a Convention Refugee to continuously apply for discretionary temporary entry visas can lead to a breach of Article 24 of the Refugee Convention.

Article 24 states that refugees lawfully in the country have the same rights as nationals for social welfare and employment rights[33]. This applicant's residence visa was declined as they did not have an acceptable standard of health and were not eligible for a medical waiver. They had to remain on and apply for discretionary temporary entry visas and would constantly face the prospect of a declined visa. A number of times the applicant had lodged a temporary entry visa application with INZ was issued an interim visa[16]. An interim visa is issued by INZ when an applicant has lodged a visa application before

the expiry of their current visa. The purpose of an interim visa is to maintain the applicant's lawful status in New Zealand[35].

Despite remaining lawful in New Zealand, Work and Income New Zealand ("WINZ") would not accept his interim visa as evidence that he was eligible for government support. Whenever the applicant was issued an interim visa, WINZ stopped the child's disability benefit. We note that unlawful Convention Refugees are not eligible for a majority of government support as dictated by the Refugee Convention and New Zealand welfare policy. The appeal decision suggests that the applicant had never been unlawful. Therefore, the New Zealand government deprived the appellant of Article 24 of the Refugee Convention and, as such, breached the rights given to lawful refugees under the Refugee Convention.

C. Alleged breach of Article 33 of the Refugee Convention

INZ can decline a discretionary temporary entry visa application made by a Convention Refugee. If the temporary entry visa is declined, the Convention Refugee will become unlawful. An unlawful refugee does not have the right to access the rights contained in Articles 17-28 of the Refugee Convention[36].

Under Article 33, a Convention Refugee cannot be deported, but for the exceptions set out in Article 32.1 of the Refugee Convention and s 164 of the Act. Under s 20 of the Act, an unlawful person has no right to apply for a visa[24]. Instead, an unlawful migrant, including a Convention Refugee, can make a request for a visa under s 61 of the Immigration Act. Immigration officers deciding these applications are delegated the Minister's power of discretion[25]. Under s 11 of the Immigration Act, the Minister and its delegates are not obliged to give reasons for a decision to grant, decline or not consider a request[26].

The Tribunal has stated unequivocally that the grant of refugee status alone does not make a Convention Refugee's circumstances special or warrant the grant of a visa[27]. This means that a Convention Refugee could be actively declined a visa and be made to live unlawfully.

If this is the case, there is minimal additional legal action they can pursue in order to have the decision reviewed. The wording of the Immigration Act intends to significantly limit the means of judicial review for requests made to the Minister[28] to ensure national interest and administrative processes are not undermined[28]. This gives the Government the benefit of removing the safeguard of the New Zealand judiciary testing that all appropriate factors were considered in relation to New Zealand's international law obligations[10][29]. The removal of judicial review as a safeguard is evident in *AJ (Refugee and Protection)* [2014] NZIPT 201576, *AG (Refugee and Protection)* [2018] NZIPT 205054 and *AM (Refugee and Protection)* [2015] NZIPT 202919, where the Minister declined a request from a Convention Refugee who does not meet the residence instructions but has been found to have special circumstances in the judiciary system.

After the failure of a request under s 61 of the Act, the options for an unlawful Convention Refugee are:

1. Leave New Zealand; or

2. Stay in New Zealand unlawfully.

1. *Staying in New Zealand unlawfully*

If a Convention Refugee is unlawful but does not leave New Zealand, they no longer have access to the rights of a lawful Convention Refugee in Articles 17-28 of the Refugee Convention. This includes the right to work and access to social services.

Although they cannot be deported, a Convention Refugee with no rights to work and live would be forced to maintain themselves through community organisations, government support, if any, and people around them. This may mean that they cannot maintain an adequate standard of living as defined in Article 25 of the Universal Declaration of Human Rights.

Engineering a situation where a Convention Refugee had to live unlawfully in New Zealand could breach the Universal Declaration of Human Rights. Furthermore, the interpretation of Article 7 used by the Tribunal states that leaving a Convention Refugee in 'limbo' with no resolution constitutes cruel, inhuman and degrading treatment[27]. As such, requiring a Convention Refugee to remain in New Zealand unlawfully could also constitute a breach of Article 7 of the ICCPR[23].

2. *Leaving New Zealand – what does this mean for Article 33*

Depriving a Convention Refugee of an adequate standard of living, could lead to a Convention Refugee feeling as if they have no choice but to leave. We submit that manufacturing conditions where it is not feasible to remain in the country that granted refugee status could constitute a breach of New Zealand's obligations under Article 33, which states:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[30]

The definition of "expel" is to "force somebody (from something)". The example found in the Oxford Dictionary is "to force somebody to leave a country"[31]. It could be considered as a form of expulsion to require a Convention Refugee to leave New Zealand because they are unable to obtain a visa that grants them access to the rights outlined in Articles 17-28 of the Refugee Convention which could potentially leave them incapable of sustaining themselves and their standard of living.

New Zealand cannot deport Convention Refugees; however, under Article 31 of the Refugee Convention, an unlawful refugee will be given a reasonable amount of time to obtain admission into another country[32]. Article 31 highlights that New Zealand's legislation and immigration policy does not consider situations where a Convention Refugee cannot settle in any other country apart from the country where they sought asylum. If the Convention Refugee only has their country of origin to return to, it could be considered a breach of Article 7 of the ICCPR which states that any State is unable to return a person to another state where there are substantial grounds for believing that they would be exposed to a real risk of serious harm[34]. If they stay, they are left in limbo.

VII. CONCLUSION

The Tribunal's decisions have demonstrated that in at least three instances, a Convention Refugee has likely been required to hold temporary entry visas for a significant period, possibly indefinitely.

The discretionary nature of the temporary entry visa category for Convention Refugees who have been denied residence gives rise to the possibility that:

1. Lawful Convention Refugees will have to face being declined a visa repeatedly and have access to their rights under Articles 17-28 of the Refugee Convention restricted and

2. Unlawful Convention Refugees may have to leave or stay in New Zealand unlawfully and not have the right to be able to work, access social welfare or public education.

Not having a visa category for Convention Refugees denied residence is a gap in the policy that can potentially lead to breaches under the Refugee Convention and the ICCPR. The data suggests that creating a temporary entry visa category to grant a visa based on obtaining refugee status in New Zealand would eliminate the risk of breaching international law.

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Saska attended the University of Waikato, New Zealand, to study a conjoint Bachelor of Law and Bachelor of Media and Creative Technologies which she completed in 2015. She went on to complete her Master’s of Law in domestic immigration and foreign policy in 2016 at the same University. She presented her Master’s findings “New Zealand’s Refugee Resettlement Programme and Policies through the lens of an international comparison; how does New Zealand compare?” (2016) at Performing Precarity: Refugee Representation, Determination and Discourse Conference in Canterbury, New Zealand, in 2016.

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