The Legal Condition of Refugees in New Zealand

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PREFACE

The International Academy of Comparative Law commissioned Professor James C. Hathaway, Osgoode Hall Law School, York University, Toronto, to co-ordinate a study on "The Legal Condition of Refugees". The intention of the study was to promote a critical analysis of the refugee-specific rights regime established by the Convention Relating to the Status of Refugees, 1951, Articles 2 to 34.

Nearly thirty national rapporteurs were appointed to report on the legal condition of the refugee within their own country. Those reports were synthesized by Professor Hathaway and John A Dent, who presented the General Report on the Legal Condition of the Refugee at the meeting of the Academy at the XIVth International Congress of Comparative Law, which convened at Athens in August 1994. The authors' synthesis of the results of their comparative research is published in Hathaway & Dent, Refugee Rights: Report on a Comparative Survey (York Lanes Press, Toronto, 1995).

Each National Report was required to consist of three parts:

1 An analysis of the record of the particular country in complying with the refugee-specific rights regime established by the 1951 Convention Relating to the Status of Refugees.

2 An assessment of the appropriateness of the Convention-derived rights regime as a barometer of those human rights which are in fact most critical to meeting the protection needs of refugees.

3 Views on the value of a refugee-specific rights regime distinguished from international human rights law.

The report on New Zealand conforms to this requirement. The version of the report published here is an updated version of the original conference report.[1]

The author of this report is also a member of the New Zealand Refugee Status Appeals Authority. The opinions expressed in this paper are the personal views of the author and should not be taken as in any way reflecting the position of the Refugee Status Appeals Authority.

1 An edited and condensed version of the conference report was published by Oxford University Press in (1994) 7 Journal of Refugee Studies 260.

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Introduction

1 The New Zealand Government acceded to the 1951 Convention Relating to the Status of Refugees on 30 June 1960 (New Zealand Treaty Series 1961 Number 2). It acceded to the 1967 Protocol Relating to the Status of Refugees on 6 August 1973 (New Zealand Treaty Series 1973 Number 21).[2]

In this paper the Convention and Protocol will be referred to as "the Convention".

2 No part of the Convention has been incorporated into New Zealand domestic law by legislation. The only legislative reference to the Convention is in the Immigration Act 1987, s18(b) where it is mentioned in the context of the return to New Zealand of holders of residence permits who have also been granted by the New Zealand Government a refugee travel document in accordance with the Convention.

3 The refugee status determination procedure itself is non-statutory in spite of repeated recommendations to the Government.[3] The informal nature of the process has led to litigation on jurisdictional issues. The landmark decision is *Benipal v Ministers of Foreign Affairs and Immigration* (HC Auckland, A878/83 & A993/83, 29 November 1985, Chilwell J) in which a person refused refugee status by Government officials was found by a High Court Judge to satisfy the inclusion provisions of Article 1A(2) of the Convention. More recently in *Singh v Refugee Status Appeals Authority* [1994] NZAR 193 (Smellie J) it was held that the non-statutory refugee status determination procedure had been validly set up outside of the Immigration Act 1987 under the prerogative powers of the Executive. At the appellate level, in *D v Minister of Immigration* [1991] 2 NZLR 673 (CA) asylum seekers were unsuccessful in preventing their expulsion from New Zealand during the Gulf War even though provisionally classified by immigration officials as refugees under emergency procedures introduced in response to the outbreak of hostilities. The procedures in question had been prescribed by the Minister of Immigration without express legislative authority. The judgment delivered by the Court of Appeal did not explore the source of the Minister's power to prescribe such procedures outside of the Immigration Act 1987.

4 On the positive side, however, nearly all persons who are granted refugee status in New Zealand are subsequently given residence permits. The number of persons

2 The text of the Convention is conveniently reproduced in Brownlie, *Basic Documents on Human Rights* (3rd ed 1992) 64.

3 See, for example, *Ali v Minister of Immigration* (HC Auckland, M2270/91, 13 December 1991, Barker J) [1992] BCL 361. The most recent recommendation that the refugee status determination procedure be placed on a statutory footing was made by W M Wilson in his *Report to the Rt Hon W F Birch, Minister of Immigration, on the Process of Refugee Status Determination* (29 April 1992) 18.

who are recognized as refugees but not subsequently granted residence is minute. The significance of this point lies in the fact that the rights possessed by holders of residence permits are extensive, and for most purposes are the same as those possessed by New Zealand citizens. Principal exceptions relate to exclusion from certain public offices, the right to be a candidate for or member of Parliament (Electoral Act 1993, s 47(3)) and the right to obtain and hold a New Zealand passport.

5 Because most persons granted refugee status in New Zealand are subsequently granted residence permits, the Convention becomes for those persons largely academic. Residual relevance remains, however, in relation to the obtaining of a Convention travel document and in relation to the protection afforded by Articles 32 and 33 upon expulsion following revocation of the residence permit[4] or upon expiry of the residence permit following departure from New Zealand.

As to the latter point, s 41 of the Immigration Act 1987 provides that when the holder of a residence permit leaves New Zealand, the permit shall be deemed to have expired. Thus the holder of a residence permit has no unqualified right of re-entry to New Zealand unless at the time of re-entry a returning resident's visa is possessed. It is therefore possible for a refugee to be refused admission to New Zealand in spite of having previously held a New Zealand residence permit.

While the cessation provisions of Article 1C of the Convention are outside the scope of this paper, it should be noted that the circumstances in which a residence permit can be revoked do not include the circumstances enumerated in Article 1C.

Spontaneous refugees and resettlement refugees distinguished

6 In New Zealand there are two distinct categories of refugees. There are resettlement refugees on the one hand, and "spontaneous" refugees on the other.

Resettlement refugees

7 Resettlement refugees are those who enter New Zealand as part of an annual quota and who are generally issued with residence visas prior to arrival in New Zealand. Upon their arrival in this country they are issued with a residence permit at the airport. The exceptions are emergency cases (where there is usually insufficient time or opportunity to complete residence processing requirements). In such cases a visitor's visa is granted and the individuals are given the opportunity to apply for residence in New Zealand after arrival.[5]

8 Resettlement refugees are selected from individuals who have been assessed by the United Nations High Commissioner for Refugees ("the UNHCR") as either meeting the criteria for refugee status (more usually) or being "persons of concern" to the UNHCR (less usually). These individuals must also be considered

4 The circumstances in which a residence permit may be revoked are contained in the Immigration Act 1987, s 20(1). In general, revocation is permitted where the permit has been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

5 Letter to author from New Zealand Immigration Service dated 13 August 1993.

by the UNHCR as being in priority need of resettlement.[6]

9 Since 1988 the quota for resettlement refugees has been set at a maximum of 800 places per year. However, the quota is not always filled. Statistics provided by the New Zealand Immigration Service of persons who have actually arrived in New Zealand as resettlement refugees are as follows:[7]

1 April 1990	—	30 June 1991	993[8]
1 July 1991	—	30 June 1992	619
1 July 1992	—	30 June 1993	412
1 July 1993	—	30 June 1994	737[9]
1 July 1994	—	30 June 1995	822
1 July 1995	—	31 December 1995	533[10]

10 The New Zealand Immigration Service selects resettlement refugees according to the following criteria.[11]

Protection

People who are recognized as refugees by the UNHCR and require protection either from *refoulement* or expulsion or where there is a physical threat to their security.

The protection group can also include humane protection and vulnerable categories as follows:

Emergency

People recognized as refugees by the UNHCR and who are in danger of immediate *refoulement* to their country of origin from a country which is not a party to the 1951 Convention.

Women at risk

This category comprises women who are recognized as refugees by the UNHCR and who are either in a refugee camp and are either alone or alone with dependent children (ie, women without the support of family or spouse) and who are at risk in the refugee camp.

Medical/disabled

This category comprises people recognized as refugees by the UNHCR and who have a Medical condition which cannot be treated in the country of refuge but after referral to the Health Department it is considered can be treated or helped in New

6 Ibid.
7 Ibid.
8 NB, the quota for 1990–1991 covered a period of fifteen months and was set at a maximum of 1,000 places.
9 Letter to author from New Zealand Immigration Service dated 13 June 1995.
10 The figures for 1994–1995 were supplied to the author in a letter from the New Zealand Immigration Service dated 18 January 1996. Note the figure for the period 1 July 1995 to 31 December 1995 covers six months only.
11 Letter to author from New Zealand Immigration Service dated 13 August 1993.

Zealand or are disabled, eg, people with a disability due to polio, amputation etc who may not necessarily require special medical treatment but may require support.

New Zealand is unable to consider persons who are severely traumatized and those with psychiatric disorders as there are limits to New Zealand's ability to deal with medical/disabled cases.

Family reunion

Again this category comprises people recognized as refugees and who have immediate family links in New Zealand.

11 Because the residence permits granted to resettlement refugees upon arrival in New Zealand confer rights which are for most practical purposes the same as those possessed by New Zealand citizens, the Refugee Convention has little remaining relevance to such persons except in relation to Convention travel documents and expulsion from New Zealand or upon a refusal to readmit to New Zealand following a trip overseas.

Spontaneous refugees

12 Spontaneous refugees, on the other hand, are refugees who either claim refugee status at an airport or seaport upon arrival in New Zealand or who, having arrived and having been issued with a temporary permit under normal immigration policy subsequently lodge an application for refugee status either before or after the permit has expired. In recent years the number of such applications have been as follows:[12]

1987	27
1988	145
1989	330
1990	600
1991	1,200
1992	771
1993	347
1994	423
1995	683[13]

13 Since January 1991 New Zealand has operated a two-tier system for determining "spontaneous" refugee applications. At first instance the applications are processed within the New Zealand Immigration Service by immigration officers in a specialized section of the Service known as the Refugee Status Branch. Upon receipt of an application the Refugee Status Branch schedules an appointment at

12 The statistics for the years 1987 to 1991 appear in Wilson, *Report to the Rt Hon W F Birch, Minister of Immigration, on the Process of Refugee Status Determination* (1992) 4. The figures for the years 1992 to 1994 are published by the Ministry of Foreign Affairs & Trade in *Human Rights in New Zealand: New Zealand's Third Report to the United Nations Human Rights Commission on implementation of the International Covenant on Civil and Political Rights* (Information Bulletin No 54, June 1995) 50.

13 Letter to author from New Zealand Immigration Service dated 18 January 1996.

which the applicant is interviewed. Interpreters from outside the Immigration Service are provided at no cost to the asylum seeker. The applicant is entitled to be accompanied by a lawyer or other representative who is given the opportunity to make submissions in support of the case. The asylum seeker is subsequently given an opportunity to comment in writing on the interview report compiled by the Refugee Status Branch, on any prejudicial information and upon the course of action under consideration by the Refugee Status Branch.

14 Where the application for refugee status is declined there is a right of appeal to the Refugee Status Appeals Authority, an independent body presently staffed by practising or recently retired lawyers drawn entirely from outside Government. A representative of the UNHCR is ex officio a member of the Authority.

Appeals proceed by way of a hearing de novo.[14] There is no burden on an appellant to establish that the decision of the Refugee Status Branch is wrong. All issues of law, fact and credibility are at large. The appellant is interviewed once more and where necessary an independent interpreter is provided by the Authority. The appellant is entitled to be accompanied by a lawyer or other representative who is invited to make submissions both before and after the appellant's evidence is given. All decisions of the Authority are delivered in writing. The Authority considers only the question whether the appellant is a refugee. It has no jurisdiction to consider immigration issues and in particular, whether the particular individual should be granted a permit under the Immigration Act 1987. This is a decision only the Minister of Immigration or his delegate may make.[15]

15 Legal aid is available to asylum seekers for the appeal but not for the first instance hearing by the Refugee Status Branch: Legal Services Act 1991 s 19(1)(j). This omission has drawn strong criticism from lawyers and advocacy groups but the Government claims that the New Zealand legal aid system as a whole has become too expensive and that cutbacks are necessary.

16 In relation to asylum seekers who are recognized as refugees (either at first instance or on appeal), New Zealand Immigration Service policy and practice is to invite such persons to lodge an application for residence. Residence is granted to such refugees, subject to meeting normal formalities, particularly in relation to character and health requirements.[16]

A grant of refugee status and a grant of residence are regarded as separate matters involving two distinct processes. Although in practice refugees are almost invariably granted residence, a very small number of refugees may not meet the formal requirements of residence (eg, in relation to the medical or character requirements). In practice, the Immigration Service would be likely to waive medical requirements, particularly where a medical condition is relevant to the circumstances which gave rise to the refugee claim. The most likely situation in which a refugee may not be granted residence is where the person fails to meet the

14 See *Refugee Appeal No 523/92 Re RS* (17 March 1995) 10–27.
15 See *Refugee Appeal No 2286/94 Re BC* (12 July 1995) 2.
16 Letter to author from New Zealand Immigration Service dated 13 August 1993.

"good character" requirement for a grant of residence. In brief, there are certain persons who are statutorily ineligible for a permit by reason of their convictions, their previous removal from New Zealand or deportation from another country or because they are a threat to national security or likely to engage in criminal activities in New Zealand. While these categories of persons are excluded by the Immigration Act s 7, Immigration Service policy provides that there are further categories of persons who should not normally be granted a residence permit. These categories include persons convicted of offences involving prohibited drugs or dishonesty, offences of a sexual nature, offences involving violence or offences against the immigration, citizenship or passport laws of any country.[17]

17 Refugees who are not granted residence in New Zealand are permitted to remain in New Zealand, usually on a temporary permit, but possibly without any permit. The latter situation would arise if the person was barred under s 7 of the Immigration Act from being granted a permit. The circumstances of such a refugee would be likely to be re-examined at a future date in the context of Article 1C of the Refugee Convention.[18]

Human rights in New Zealand

18 A brief explanation of the human rights framework in New Zealand will assist an understanding of the analysis which follows of the record of New Zealand's compliance with the Refugee Convention.

19 Human rights in New Zealand are afforded protection by long-established and well-entrenched precepts of the common law and by legislation. With few exceptions these rights extend to both citizen and non-citizen alike. Among the principal Acts addressing human rights in New Zealand in 1993 were the Race Relations Act 1971, the Human Rights Commission Act 1977 and the New Zealand Bill of Rights Act 1990.

20 The Race Relations Act 1971 was described in the long title as an Act to Affirm and Promote Racial Equality in New Zealand and to Implement the International Convention on the Elimination of All Forms of Racial Discrimination.

Discrimination on the grounds of "colour, race, or ethnic or national origins" was prohibited in such fields as access by the public to places, vehicles and facilities, the provision of goods and services, employment, land, housing and other accommodation.

The Human Rights Commission Act 1977 was described in its long title as an Act to Promote the Advancement of Human Rights in New Zealand in General

17 *New Zealand Immigration Service Operational Manual*, Ch 1, Pol 1 28–33. There is also a category comprising any person who, in the course of a current or previous application for a visa or permit for New Zealand, has made any statement or provided any information, evidence or submission that was false, misleading or forged, or has withheld material information. Finally, there is a category which includes any person who has been convicted at any time of any offence for which the person was sentenced to a term of imprisonment. Separate and specific provision is made for racism.

18 Letter to author from New Zealand Immigration Service dated 13 August 1993.

Accordance with the United Nations International Covenants on Human Rights.

21 As from 1 February 1994 both the Race Relations Act 1971 and the Human Rights Commission Act 1977 were consolidated and amended by the Human Rights Act 1993, the long title of which states that it is An Act to Provide Better Protection of Human Rights in New Zealand in General Accordance with United Nations Covenants or Conventions on Human Rights. As from the date of commencement of the new Act it became unlawful[19] to discriminate against persons on the basis of their sex, marital status, religious belief,[20] ethical belief, colour, race, ethnic or national origins, disability,[21] age, political opinion,[22] employment status, family status,[23] and sexual orientation. The particular fields in respect of which such discrimination is made unlawful are, generally speaking, similar to those earlier prescribed, namely access by the public to places, vehicles and facilities, the provision of goods and services, employment, land, housing and other accommodation.

22 It is relevant to note that Part 1 of the Human Rights Act 1993, s 5 confers on the Human Rights Commission wide functions which include the power to receive and invite representations from members of the public on any matter affecting human rights, to report to the Prime Minister on matters affecting human rights, including the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights, and the making of public statements. Other functions with potential relevance to refugees is the power to publish guidelines for the avoidance of acts or practices that may be inconsistent with, or contrary to, the provisions of the Human Rights Act 1993 (these are non-binding); the power to enquire generally into any matter, including any enactment or law, or any practice, or any procedure, whether governmental or non-governmental, if it appears to the Commission that human rights are, or may be, infringed thereby; and to make public statements in relation to any group of persons in, or who may be coming to, New Zealand, who are or may be subject to hostility, or who have been or may be brought into contempt on the ground of the colour, race, or ethnic or national origins of that group of persons.

23 The New Zealand Bill of Rights Act 1990 is described in its long title as an Act

19 Human Rights Act 1993, s 21(1).

20 Human Rights Act 1993, s 21(1)(d) provides that ethical belief means the lack of a religious belief, whether in respect of particular religion or all religions.

21 Human Rights Act 1993, s 21(1)(h) provides a wide definition of disability. It includes physical disability or impairment, physical illness, psychiatric illness, intellectual or psychological disability or impairment, any other loss or abnormality of psychological, physiological, or anatomical structure or function, reliance on a guide dog, wheelchair, or other remedial means, the presence in the body of organisms capable of causing illness.

22 Human Rights Act 1993, s 21(1)(j) provides that political opinion includes the lack of a particular political opinion or any political opinion.

23 Human Rights Act 1993, s 21(1)(l) provides that family status means having the responsibility for part-time care or full-time care of children or other dependants; or having no responsibility for the care of children or other dependants; or being married to, or being in a relationship in the nature of a marriage with, a particular person; or being a relative of a particular person.

to Affirm, Protect and Promote Human Rights and Fundamental Freedoms in New Zealand and to Affirm New Zealand's Commitment to the International Covenant on Civil and Political Rights. The Act is, however, limited in at least three significant respects. First, the Act only applies to acts done by the legislative, executive or judicial branches of the Government of New Zealand or to acts done by any person in the performance of any public function, power or duty conferred or imposed on that person by or pursuant to law. Second, the Act is not entrenched and does not override inconsistent legislation. Third, the Act does not have a general enforcement provision. However, the Act has been given a purposive interpretation by the New Zealand Courts in criminal cases and the hope has been expressed that the protection of the Act will be enhanced in other areas as well.[24]

There are other statutes addressing human rights issues but a discussion of their provisions lies outside the scope of this paper. Two only are mentioned. First is the Geneva Conventions Act 1958 which implements at domestic level the four Geneva Conventions together with the First Protocol and the Second Protocol of 8 June 1977. Secondly, it should be noted that the Abolition of the Death Penalty Act 1989 abolished the death penalty in New Zealand.

24 By way of completeness it should be added that New Zealand signed the International Covenant on Civil and Political Rights on 12 November 1968 and ratified it on 26 December 1978. It acceded to the First Optional Protocol as from 26 August 1989 and thereby recognized the right of individuals to communicate directly with the Human Rights Committee concerning alleged violations of the Covenant, and is also a party to the Second Optional Protocol concerning capital punishment.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was signed on 14 January 1986 and ratified on 10 December 1989. Several provisions of the Convention are implemented by the Crimes of Torture Act 1989. However, the non-refoulement obligation contained in Article 3 of the Convention is incorporated into the Act only in relation to extradition.

The Convention on the Rights of the Child was ratified by New Zealand on 13 March 1993. The impact of this Convention in the immigration context was considered but not determined in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

Overview

25 In assessing New Zealand's record of compliance with the refugee-specific rights regime established by the Refugee Convention, it is necessary to bear in mind that many Articles appear to have little present day application. This is due to the fact that most persons recognized as refugees are given residence permits, either upon

24 Paciocco, "The Pragmatic Application of Fundamental Principles: Keeping a Rogues' Charter Respectable" *The New Zealand Bill of Rights Act* 1990 (Legal Research Foundation 1992) 1,2; McLean, Rishworth & Taggart, "The Impact of the Bill of Rights on Administrative Law" *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation 1992) 62–63.

arrival, if resettlement refugees, or upon grant of refugee status in New Zealand following a successful "spontaneous" claim either at first instance or on appeal.

26 However, it does not necessarily follow that the rights regime under the Convention is entirely irrelevant in the New Zealand context.

As mentioned, the entire refugee regime in New Zealand is extra-statutory and administratively based. It can be changed overnight. The usual inhibitors to change such as formal incorporation of the Convention into domestic law or a legislative structure which requires formal amendment are entirely absent. These features were emphasized by the informal manner in which the 1991 Gulf War procedures were promulgated and enforced, a matter addressed in greater detail later in this paper.

Nor can it be assumed that successful "spontaneous" asylum seekers will continue to be granted residence permits. The Government has in recent times been advised that it would be justified in taking the position that New Zealand will comply with its obligations under the Convention, but no more than that. The possibility of granting temporary asylum only is also being openly discussed.

The Convention-based rights regime is important in the sense that at least Government is set a minimum standard for the treatment of *refugees*, a standard which is contained in one document and which is specifically associated with refugees. It may be that similar or enhanced standards are to be found under other conventions or in international human rights law. But experience has shown that in New Zealand Ministers and their officials more usually focus on the particular, ie, the relevant legislation and policy. In most cases it is beyond their training or conceptual frame of reference to resort to international conventions or international human rights law, even assuming that such law was readily accessible to them, which it is not. And also assuming that they have the time and resources to identify and quantify such law.

New Zealand's record of compliance with the refugee specific rights regime established by the 1951 Convention relating to the status of refugees

Chapter I—General provisions

Article 2—General obligations[25]

27 This article imposes on refugees no greater a burden than that imposed by the general law. See *Arnerich v The King* [1942] NZLR 380, 385 line 40, 388 line 20–389 line 50 (CA) discussing the duty of "local allegiance" owed by aliens. See further *Laws NZ* Citizenship & Nationality para 41 and *4 Halsbury's Laws of England* (4th ed) para 951. Article 2 and the domestic law of New Zealand are in accord.

25 Article 2 states: "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as measures taken for the maintenance of public order".

28 It would be unfortunate, however, were Article 2 to be employed as a bed of Procrustes, exacting from refugees conformity to absolute standards of lawful conduct. Such tendency has been detected in New Zealand notwithstanding the humanitarian purpose of the Convention. In particular, Article 2 has been cited by the New Zealand Immigration Service as justification for the decline of work permits for asylum seekers who, while holding a visitor permit only, undertake employment in breach of the terms of that permit.[26] While their actions are unlawful, the breach is understandable and not of a serious kind. Such literal adherence to the terms of the Convention in respect of the duties of refugees is to be contrasted with the wide degree of latitude allowed by the New Zealand Government to itself in discharging its own duties under the Convention.

Article 3—Non-discrimination

29 New Zealand is a party to the International Convention on the Elimination of All Forms of Racial Discrimination which it ratified on 25 October 1966. The original domestic analogue was the Race Relations Act 1971,[27] the long title of which provided (inter alia) that it was "an Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination". The Act prevented discrimination on grounds of colour, race, or ethnic or national origins in relation to such matters as access by the public to places, vehicles and facilities, in the provision of goods and services, in employment and in relation to such matters as land, housing and other accommodation.

Neither the Convention on the Elimination of All Forms of Racial Discrimination nor the Human Rights Act 1993 apply directly to the Refugee Convention, but they nonetheless reinforce important principles.

30 Religious discrimination is dealt with by the various provisions of the Human Rights Act 1993.

Section 153(3) of the Human Rights Act 1993, however, appears to exclude from the ambit of the statute "any enactment or rule of law, or any policy or administrative practice of the Government of New Zealand that relates to immigration". The reason for the introduction of this exemption is not entirely clear and does not appear to have been addressed during the Select Committee hearings. The effect of this provision in relation to refugee issues in particular has yet to be seen. However, as it is the position of the Minister of Immigration that the grant or refusal of refugee status is a process entirely outside of the Immigration Act 1987,[28] refugee issues would appear to remain within the purview of the Human Rights Act 1993 notwithstanding s 153(3) of the Human Rights Act 1993. If they

26 See *Refugee Appeal No 391/92 Re CFK* (22 April 1994).

27 As mentioned earlier, the Race Relations Act 1971 was repealed by the Human Rights Act 1993 from 1 February 1994. The relevant terms of the new Act are not materially different to those of the Race Relations Act 1971.

28 *Singh v Refugee Status Appeals Authority* [1994] NZAR 193, 200, 201, 207–208, 210–212, 214 (Smellie J).

do not it is difficult to understand why this should be the case.

The New Zealand Bill of Rights Act 1990 s 19(1) does, in any event, provide that everyone has the right to freedom from discrimination on the grounds of (inter alia) religious or ethical belief.

31 It could be said that these domestic law statutes appear, on their face, to contain adequate measures to ensure compliance with the non-discrimination provisions of Article 3. However, during the Gulf War asylum seekers were expelled from New Zealand on the basis (inter alia) that they were of the Muslim faith. Regrettably, neither Article 3 of the Refugee Convention nor the domestic law provisions referred to above were considered by the New Zealand Court of Appeal when the expulsions were (unsuccessfully) challenged by judicial review in *D v Minister of Immigration* [1991] 2 NZLR 673 (CA). This decision and the Gulf War procedures will be considered in greater detail in the context of Articles 31 and 33.

32 It is relevant to note that the New Zealand visa regime does discriminate against refugees on the basis of their country of origin.[29]

It should also be observed that until early 1993 when a small number of Somali women in refugee camps in Kenya who had been identified by the UNHCR as being "at risk" were accepted for resettlement in New Zealand, few resettlement refugees from Africa had been selected for entry to New Zealand.

33 These exceptions apart, it can be said that generally New Zealand applies the provisions of the Convention uniformly to all refugees without discrimination.

Article 4—Religion

34 Under New Zealand law refugees enjoy the same rights in relation to religious matters as citizens and holders of residence permits. They enjoy freedom to practice their religion as well as freedom as regards the religious education of their children: New Zealand Bill of Rights Act s 17; Human Rights Act 1993 s 21(1)(c); Education Act 1989 and in particular s 25A.

Article 5—Rights granted apart from this Convention

35 The grant to refugees under New Zealand law of rights and benefits outside of the Refugee Convention is not impaired by the Refugee Convention.

However, there is a tendency on the part of the New Zealand Government to overlook the significance of this Article and in particular the fact that the purpose of the Refugee Convention is to grant refugees as many rights as possible, not to restrict them.[30]

29 The list of countries the citizens of which are visa-exempt are in the main countries which do not currently produce refugees: Immigration Regulations 1991, First Schedule (SR 1991/241) Conversely, persons required to obtain transit visas before transiting through New Zealand are citizens of countries from which refugees flee in number: Immigration (Transit Visas) Regulations 1994 (SR 1994/106) as extended by the Immigration (Transit Visas-Extension) Regulations 1995 (SR 1995/122).

30 Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation—A Commentary* (1953) 79.

Article 6—The term "in the same circumstances"

36 No comment is necessary.

Article 7—Exemption from reciprocity

37 It is intended to comment on paragraph 1 only of this Article. Refugees are in fact accorded the same treatment as is accorded to aliens generally in New Zealand.

Article 8—Exemption from exceptional measures

38 It is not intended to comment on this provision as it has no current relevance in the New Zealand context.

It is to be noted, however, that by virtue of the Geneva Conventions Act 1958 the Geneva Convention of August 12, 1949 relating to the Protection of Civilian Persons in Time of War (the Fourth Convention) is part of New Zealand domestic law. In the result the limitations permitted by Article 8 of the Refugee Convention may not have application in New Zealand given the terms of Article 44 of the Fourth Convention.[31]

Article 9—Provisional measures

39 Because there is a degree of overlap, this provision will be addressed in the context of Articles 31, 32 and 33. It is to be noted, however, that whereas Article 9 permits provisional measures in "the interests of national security", the detention provisions of s 128B of the Immigration Act 1987 are much wider. This is the result of the detention provisions being based not on national security grounds but on an intention to exclude from New Zealand those categories of persons listed in s 7 of the Act. Subsection (1)(f), (h) and (i) in particular prescribe grounds of exclusion in such terms as "threat to public safety", "danger to the security or public order of New Zealand" and "threat to the public interest or public order". As these concepts are far wider than that of national security, provisional measures taken under these provisions would arguably be in breach of the Refugee Convention.

Article 10—Continuity of residence

40 This provision has little or no relevance in New Zealand and it is not intended to comment upon it.

Article 11—Refugee seamen

41 This provision has little or no relevance in New Zealand and it is not intended to comment upon it.

Chapter II—Juridical status

Article 12—Personal status

42 Legal capacity

Age of majority

The Age of Majority Act 1970 provides that for all the purposes of the law of New

31 Ibid, 92.

Zealand a person shall attain full age on attaining the age of 20 years.

The rights of person under age

These rights are provided for in the Minors' Contracts Act 1969 and the Children, Young Persons and Their Families Act 1989. Their provisions apply irrespective of citizenship and immigration status.

The Guardianship Act 1968 defines and regulates the authority of parents as guardians of their children, their power to appoint guardians, and the powers of the Courts in relation to the custody and guardianship of children. Section 5(1) provides that a Court in New Zealand has jurisdiction where the child who is the subject of the application or order is present in New Zealand when the application is made; or where the child, or any person against whom an order is sought, or the applicant, is domiciled or resident in New Zealand when the application is made.

Capacity to marry

The Marriage Act 1955 s 3(1) provides that the provisions of the Act, so far as they relate to capacity to marry, apply to the marriage of any person domiciled in New Zealand at the time of the marriage, whether the marriage is solemnized in New Zealand or elsewhere.

Section 3(2) provides that the provisions of the Act, so far as they relate to the formalities of marriage, including the provisions relating to consents to the marriage of minors, shall apply to any marriage solemnized in New Zealand, whether or not either of the parties to any such marriage is at the time of the marriage domiciled in New Zealand.

Capacity of married women

The Matrimonial Property Act 1976 s 49 provides that except as provided in in any enactment, the rights, privileges, powers, capacities, duties, and liabilities of a married woman shall, for all the purposes of the law of New Zealand (whether substantive, procedural, or otherwise), be the same in all respects as those of a married man, whether she is acting in a personal, official, representative, or fiduciary capacity. This rule as to legal capacity applies to every married woman whether she was married before or after the commencement of the Act and whether the marriage was solemnized in New Zealand or not, and whether she is or was at any relevant time domiciled in New Zealand or not.

Loss of legal capacity

The law relating to incapacitated persons is principally contained in the Protection of Personal and Property Rights Act 1988. In relation to a person who lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, or who wholly lacks the capacity to communicate decisions in respect of such matters, the Court has jurisdiction to make certain orders in relation to the

administration of property and the appointment of a welfare guardian. Jurisdiction in this respect applies to any person who is ordinarily resident in New Zealand: s 6.

In relation to a person who lacks wholly or partly the competence to manage his or her own affairs in relation to his or her property, the Court has jurisdiction in respect of any property owned by any person who is domiciled or is ordinarily resident in New Zealand: s 25.

The Act also makes provision for the execution of an enduring power of attorney while the donor is mentally capable. The power of attorney continues to have effect if the donor subsequently becomes mentally incapable. These provisions (ss 94 to 108) operate irrespective of the citizenship or immigration status of the donor.

The law relating to compulsory psychiatric assessment and treatment is contained in the Mental Health (Compulsory Assessment and Treatment) Act 1992. No distinction is made on the basis of citizenship or immigration status.

43 Family rights

Marriage

Capacity to marry and the capacity of married women is dealt with above.

The Domicile Act 1976 s 5 provides that every married person is capable of having an independent domicile. The rule that upon marriage a woman acquires her husband's domicile was thus abolished.

As to Article 12 paragraph 2, s 40(2) of the Marriage Act 1955 provides that the validity of a marriage is governed by the *lex loci celebrationis*.

Divorce

The Family Proceedings Act 1980 s 4 provides (subject to certain exceptions) that the Family Courts have jurisdiction:

(a) Where at the commencement of the proceedings, any party to the proceedings resides or is domiciled in New Zealand.

(b) In the case of proceedings relating to a child, where at the commencement of the proceedings:

  (i) any party to the proceedings resides or is domiciled in New Zealand; or

  (ii) the child resides in New Zealand.

Recognition of overseas orders: As to the recognition of overseas orders relating to divorce or dissolution or nullity of marriage, s 44 of the Family Proceedings Act 1980 contains various provisions which depend on factors such as domicile or residence in the overseas country, or nationality. In the confines of this paper it is not possible to enlarge upon this rather incomplete summary.

Adoption

The Adoption Act 1955 s 3 confers jurisdiction on the New Zealand Courts to make an adoption order in respect of any child whether that child is domiciled in New Zealand or not and whether the person making the application is domiciled in New Zealand or not.

Section 16(2)(e) of the Act provides that subject to the Citizenship Act 1977, the adoption order shall not affect the race, nationality, or citizenship of the adopted child. Subsection (2)(f) further provides that the adopted child shall acquire the domicile of his adoptive parent or adoptive parents.

Where the adoption takes place outside of New Zealand and the child is under fourteen years of age the adoption has the same effect as an adoption order validly made under the Adoption Act 1955: s 17(1). Before this provision applies certain conditions must be satisfied. The provisions of the Citizenship Amendment Act 1992 have introduced further qualifications, the effect of which is outside the scope of this paper.

Status of children

By virtue of the Status of Children Act 1969 s 3, for all the purposes of the law of New Zealand, the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly. This provision applies whether the person was born in New Zealand or not, and whether or not his father or mother has ever been domiciled in New Zealand.

Section 5 of the Act provides that a child born to a woman during her marriage, or within ten months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be. This provision applies in respect of every child, whether born in New Zealand or not and whether or not his father or mother has ever been domiciled in New Zealand: s 5.

44 The matrimonial regime

Domestic violence

The Domestic Protection Act 1982 was passed to mitigate the effects of domestic violence and to confer protection from molestation in the domestic sphere. The provisions of this Act apply irrespective of the citizenship or immigration status of the parties.

Mutual rights of spouses to property

The Matrimonial Property Act 1976 is a code: s 4(1). By virtue of s 7 the Act applies to:

(a) immoveables which are situated in New Zealand; and
(b) moveables which are situated in New Zealand or elsewhere if, at the date of an application made pursuant to the Act, or of any agreement between

the spouses relating to the division of their property, either the husband or the wife is domiciled in New Zealand.

It is further provided in s 7(3) that the Act does not apply to any matrimonial property if the parties to the marriage have agreed, before or on their marriage to each other, that the matrimonial property law of some country other than New Zealand shall apply to that property, and the agreement is in writing or is otherwise valid according to the law of that country, unless the Court determines that the application of the law of the other country by virtue of any such agreement would be contrary to justice or public policy. Subsection (4) further provides that where an order under the Act is sought against any person who is neither domiciled nor resident in New Zealand, the Court may decline to make an order in respect of any moveable property that is situated outside New Zealand.

Otherwise, the Act applies irrespective of the citizenship or immigration status of the husband or wife.

45 Succession and inheritance

Wills

Wills made in New Zealand by aliens are governed by the same laws applying to New Zealand citizens.

The Wills Amendment Act 1955 s 14 provides that every will and other testamentary instrument made out of New Zealand by any person (whatever may be his domicile at the time of making the same or at the time of his death) shall, as regards moveable property, be held to be well-executed for the purpose of being admitted in New Zealand to probate if made as required by:

(a) the law of the place where the person was domiciled at the time of his death; or
(b) the law of the place where the same was made; or
(c) the law of the place where the person was domiciled when the same was made; or
(d) The law in force when the same was made in the place where the person had his domicile of origin.

Under the Administration Act 1969 s 5(2) the High Court has jurisdiction to make a grant of probate or letters of administration in respect of a deceased person, whether or not the deceased person left any estate in New Zealand or elsewhere, and whether or not the person to whom the grant is made is in New Zealand. Section 70 of the Act makes provision for the estate in New Zealand belonging to any person who dies abroad.

Family protection

The Family Protection Act 1955 makes provision for claims for maintenance and support out of the estates of deceased persons, whether they died testate or intestate. Certain categories of persons (including the wife or husband of the deceased or the children of the deceased) have the right to bring a claim against

the estate of the deceased person. This right is not affected by citizenship or immigration status.

Simultaneous deaths

The Simultaneous Deaths Act 1958 makes provision in respect of the devolution of property in cases of simultaneous deaths. Section 4 provides that the Act applies in respect of all property of any person that devolves according to the law of New Zealand and that the Act applies whether the deaths occurred in New Zealand or elsewhere: s 4.

46 Domicile

For the purpose of New Zealand law domicile is determined by the provisions of the Domicile Act 1976. In the confines of this paper it is not possible to provide an adequate summary of the provisions of this Act.

47 Right to vote

The effect of the Electoral Act 1993 ss 72 to 74 is that every person of or over the age of eighteen years who is either a New Zealand citizen or a permanent resident of New Zealand is qualified to be registered as an elector.

48 Privacy and official information

In general, the provisions of the Official Information Act 1982 and the Privacy Act 1993 apply irrespective of the citizenship or immigration status of an individual. However, the right to request official information[32] under s 12 of the Official Information Act 1982 and the right of access to personal information[33] conferred by ss 33 and 34 of the Privacy Act 1993 are restricted to individuals who are New Zealand citizens, permanent residents of New Zealand or who are *in* New Zealand.

Article 13—Moveable and immoveable property

49 Section 23(1) of the Citizenship Act 1977 expressly provides that every person who is not a New Zealand citizen shall be entitled to take, acquire, hold, and dispose of real or personal property in the same manner in all respects as if that person were a New Zealand citizen. However, it is expressly provided in subs (2) that subs (1) does not:

(a) Qualify an alien for any office, or for any Parliamentary or other franchise, or for which that person is not otherwise qualified:
(b) Qualify an alien to be the owner of a ship registered in New Zealand, or of a share in any such ship:
(c) Entitle an alien to acquire property under a transaction to which the

32 The Official Information Act 1982, s 2(1) defines official information as including (inter alia) information held by a Government department or a Minister of the Crown in his official capacity and includes any information held outside New Zealand by any branch or post of a Government department.

33 The Privacy Act 1993, s 2(1) defines personal information as meaning information about an identifiable individual; and includes information contained in any register of deaths kept under the Births, Deaths and Marriages Registration Act 1995.

Overseas Investment Act 1973 applies otherwise than in accordance with the provisions of that Act. This means, for example, that the acquisition of five hectares or more of land for which agriculture use is permitted requires the prior consent of the Minister of Lands and the Minister of Finance:

(d) Entitle a person to any right or privilege as a New Zealand citizen, except the rights and privileges conferred on that person in respect of property by subs (1).

50 The requirements of Article 13 are thus complied with to a very high degree.

Article 14—Artistic rights and industrial property

51 The protection afforded New Zealand citizens by the Patents Act 1953, the Trade Marks Act 1953 and the Copyright Act 1994 is also provided to refugees who are not New Zealand citizens.

Article 15—Right of association

52 In relation to non-political and non-profit-making associations, the provisions of the Incorporated Societies Act 1908, the Industrial and Provident Societies Act 1908 and the Friendly Societies and Credit Unions Act 1982 apply to citizens and non-citizens alike without distinction.

The position in relation to trade unions under the Employment Contracts Act 1991 is the same.

Article 16—Access to courts

53 The Courts of New Zealand are freely accessible by all.

54 However, in its civil jurisdiction the High Court of New Zealand has a discretion in certain cases to order a plaintiff to give security for costs. These cases include situations where a plaintiff is resident out of New Zealand or where a plaintiff is temporarily resident in New Zealand or where there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceedings: Rule 60 of the High Court Rules. These provisions apply to all plaintiffs, irrespective of their citizenship or immigration status.

As to the issue of residence, the New Zealand courts have followed and applied *Shah v Barnet London Borough Council* [1983] 1 All ER 226, 235 (HL) in which it was held that "ordinarily resident" refers to a person's abode in a particular place or country which that person has adopted voluntarily and for settled purposes as part of the regular order of his or her life for the time being, whether of short or long duration. Provided a liberal view is taken and it is accepted that a refugee has "voluntarily" adopted New Zealand (as a safe haven) the Convention is apparently complied with.

55 As to legal aid, the Legal Services Act 1991 makes provision for legal aid in respect of both criminal and civil proceedings. Such aid is available irrespective

of the citizenship or immigration status of the individual: ss 5 and 28.

(a) Criminal legal aid—s 5(1) of the Act provides that criminal legal aid may be granted to any natural person charged with or convicted of any offence.

(b) Civil legal aid—s 28(1) of the Act provides that civil legal aid shall be available to any person, whether resident in New Zealand or not, whose disposable income does not exceed a prescribed amount.

Legal aid is available to asylum seekers for the hearing of appeals before the Refugee Status Appeals Authority, but not for hearings at first instance by the Refugee Status Branch of the New Zealand Immigration Service: s 19(1)(j).[34]

Chapter III—Gainful employment

Article 17—Wage-earning employment

56 A person who is not a New Zealand citizen may undertake employment in New Zealand only if that person is:[35]

(a) The holder of a residence permit; or
(b) The holder of a work permit.

A residence permit accords to the holder the same right to engage in wage-earning employment as that conferred on New Zealand citizens. As most refugees are granted residence permits this Article is complied with in most cases.

57 Persons granted refugee status but denied a residence permit are eligible to apply for a work permit but are required to meet the prevailing policy criteria.

58 The issue of wage-earning employment also arises at the refugee application stage given that delays in the determination procedure of two years or more are not uncommon at the present time. Asylum seekers have the opportunity of applying for a work permit either under normal policy, or under the "special work permit" policy.[36]

59 Work permits under normal policy

An asylum seeker awaiting determination of his or her application for refugee status may apply for a work permit under normal immigration policy in the normal way, by paying the usual fee and testing eligibility against the local labour market.[37]

34 The possible application of Article 16 of the Convention in the refugee determination context is discussed by Thomas Spijkerboer in *Higher Judicial Remedies*, a paper presented at the International Judicial Conference on Asylum Law and Procedures, London, 30th November–3rd December 1995 (publication forthcoming). See also *R v Secretary of State for the Home Department, Ex parte Shala Jahangeer* [1993] Imm AR 564, 566 (QBD).

35 Immigration Act 1987 s 5(1).

36 The information which follows has been taken from the New Zealand Immigration Service letter dated 13 August 1993.

37 Ibid

60 Special work permits

The Immigration Service has a discretion to grant special work permits outside of normal immigration policy to applicants for refugee status in certain circumstances. The special work permits are open work permits (that is, they do not specify the employer for whom the holder must work) which are granted free of charge (and, as noted above, on a discretionary basis) to applicants for refugee status who demonstrate a need to work in order to support themselves pending determination of their claims.[38]

There are three general requirements:

(a) The individual must establish a prima facie case for refugee status.

(b) There must be a demonstrated need to work.

(c) The applicant must not be in breach of the Immigration Act.[39]

Prima facie case

Dealing first with the need to establish a prima facie case, it is immigration policy that requests for special work permits will be considered only from applicants for refugee status who pass the basic threshold test of having a case which, prima facie, warrants further consideration under the normal refugee status determination procedures. Applications for special work permits will therefore not be considered from refugee applicants whose cases are considered "manifestly unfounded" as defined by the Executive Committee of the UNHCR (ie, if the applications are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the Convention).[40]

Demonstrated need to work

Applicants must also demonstrate a need to work in order to support themselves pending a decision on their refugee application. Applicants with other, adequate means of support will not be granted special work permits. For example, applicants who are sponsored for a particular period, or who arrive in New Zealand with sufficient funds for a particular period, are unlikely to be granted special work permits for that period.[41]

Applicants must not be in breach of the Immigration Act

Special work permits will not be granted to people who have overstayed their permits or who have otherwise abused New Zealand immigration law before applying for refugee status.[42]

The prohibition on granting special work permits to individuals in breach of the

38 Ibid.
39 Ibid.
40 Ibid. See Excom Conclusion No 30, "The problem of manifestly unfounded or abusive applications for refugee status of asylum" (1983).
41 Ibid.
42 This policy is commented upon in the context of Article 2 above.

Immigration Act 1987 does not apply to asylum seekers who arrive at a port of entry without proper documentation, express their intention to seek refugee status at that point, and are then granted a 30-day permit, provided they lodge their refugee applications within this 30-day period.[43]

61 In accordance with Article 17(2) of the Convention the following categories of refugee applicants are granted open work permits, provided they are not overstayers or otherwise in breach of the Immigration Act 1987:

(a) Those who have completed three years' lawful residence in New Zealand; or
(b) Those with a spouse who is a New Zealand citizen, provided the applicant has not abandoned the New Zealand spouse and provided the Immigration Service is satisfied that the relationship is genuine; or
(c) Applicants with a child who is a New Zealand citizen.[44]

62 Special work permits will be granted for the full duration of the refugee status determination procedure, including the time allowed for the exercise of appeal rights. They will be granted to only one breadwinner per family.

However, there is no restriction on the number of work permits issued per adult members of a family if they each qualify under normal immigration policy and pay the relevant fee.[45]

Article 18—Self-employment

63 Refugees granted residence permits enjoy the same right as New Zealand citizens to engage on their own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

64 Refugees who are not granted residence permits would usually be granted an appropriately endorsed work permit and this would be sufficient for self-employment purposes. The New Zealand Immigration Service is not aware of any cases where this issue has arisen as refugees are almost invariably granted residence status.[46]

Article 19—Liberal professions

65 Paragraph 1 of this Article is observed in New Zealand.

Paragraph 2 of this Article has no practical application in the New Zealand context.

The principal difficulties presently faced by refugees relate to the recognition of their overseas qualifications and the usually strict requalification requirements set by liberal professions as a precondition to practise in New Zealand.

43 Letter to author from New Zealand Immigration Service dated 13 August 1993.
44 Ibid.
45 Ibid.
46 Letter to author from New Zealand Immigration Service dated 13 August 1993.

Chapter IV—Welfare

Article 20—Rationing

66 It is not intended to comment on this provision as it has no current relevance in New Zealand.

Article 21—Housing

67 The Residential Tenancies Act 1986 contains a restatement of the law relating to residential tenancies and defines the rights and obligations of landlords and tenants of residential properties. It applies to all landlords and tenants without distinction as to citizenship or immigration status.

As regards housing which is subject to the control of public authorities, state housing is owned by Housing New Zealand and is rented to tenants without distinction in respect of such matters as citizenship and immigration status. The principal criterion is whether the prospective tenant is able to pay the stipulated rent.

Article 22—Public education

68 If a residence permit is held, there is no distinction between New Zealand citizens and aliens in relation to education at all levels.

New Zealand citizens and holders of residence permits aged between six and sixteen are required to be enrolled at a school at all times during the period between six and sixteen years of age: Education Act 1989 s 20, and attendance at school is compulsory: s 25.

New Zealand citizens and holders of residence permits are entitled to free enrolment and free education at any state (ie, public) school between the ages of five and nineteen: Education Act 1989 s 3. In effect there is a right to free primary and secondary education.

69 However, if a residence permit is not held, an alien requires a student permit: Immigration Act 1987 s 6.

Foreign students (ie, persons who are not New Zealand citizens or holders of a residence permit), once enrolled at a state school have the same rights to remain enrolled, and to tuition at the school as a student who is a New Zealand citizen or the holder of a residence permit: Education Act 1989 s 4(2). However, foreign students are required by s 4B of the Education Act 1989 to pay fees for their education unless exempted. The exemption provisions are contained in s 4C of the Act and are not relevant in the present context.

70 As to the issue of recognition of foreign school certificates, diplomas and degrees, this function is performed by the New Zealand Qualifications Authority constituted under the Education Act 1989 Part XX. Assessment of overseas qualifications is undertaken without reference to the citizenship or immigration status of the certificate, diploma or degree-holder.

71 As Article 22 concentrates on *public* education, private schools have been excluded from this review.

Article 23—Public relief

72 It is not intended to comment on this provision. Unemployment benefits will be addressed in the context of Article 24(1)(b).

Article 24—Labour legislation and social security

73 The principal legislation relating to the matters addressed in Article 24(1)(a) is contained in the Employment Contracts Act 1991. No distinction is made between New Zealand citizens, holders of residence permits and holders of temporary work permits. The prohibition on the employment of school-age children (ie, any person who has not turned sixteen) is contained in the Education Act 1989 s 30. Exceptions are permitted in strictly defined circumstances. The prohibition applies to all school-age children irrespective of citizenship and immigration status.

The Holidays Act 1981 provides (inter alia) for annual holidays with pay for workers and applies irrespective of the citizenship or immigration status of the worker.

74 In relation to employment injury and occupational diseases the Accident Rehabilitation and Compensation Insurance Act 1992 applies to all persons who are in New Zealand without distinction as to citizenship or immigration status.

75 As to actions for damages on behalf of the families of persons killed by accident, the Deaths by Accidents Compensation Act 1952 applies irrespective of the citizenship or immigration status of the deceased. The right to compensation under this provision and the provisions of the Accident Rehabilitation and Compensation Insurance Act 1992 is not affected by the fact that the residence of the beneficiary is outside of New Zealand.

76 With regard to social security under the Social Security Act 1964, holders of residence permits are accorded the same treatment as New Zealand citizens.

Pending a decision on their refugee status, asylum seekers who have not been issued with a work permit are granted an emergency unemployment benefit to meet basic living expenses pending a final decision. Such benefits are granted whether or not the asylum seeker holds a current temporary permit under the Immigration Act 1987.

With regard to pensions, no distinction is made between New Zealand citizens and holders of residence permits as the criteria for eligibility apply equally to both categories of persons.

77 As to medical attendance and hospital treatment New Zealand citizens and holders of residence permits are treated alike in that they receive the same subsidies and are required to pay the same charges for medical attendance and for treatment in

a public hospital. Persons who are neither citizens nor holders of residence permits are required to meet the full cost of medical attendance and hospital treatment.

Chapter V—Administrative measures

Article 25—Administrative assistance

78 There are no formal procedures in place in New Zealand for administrative assistance. Neither the Ministry of Foreign Affairs and Trade nor the New Zealand Immigration Service is aware of specific cases in which this issue has arisen. However, any requests for assistance in recovering documents from a refugee's country of origin would be considered by the Ministry of Foreign Affairs and Trade. If it were possible to help, through a New Zealand post overseas, it is more than likely that such help would be given. However, what could be done would depend, to a large extent, on the co-operation of the government of the refugee's country of origin.[47]

However, once permanent residence is acquired, a refugee is accorded all the rights and benefits entitled to residents of New Zealand. This would include any administrative assistance government departments are required to lend to residents.[48]

79 With regard to the question of consular assistance to refugees by New Zealand's missions overseas, it is New Zealand's policy to give all assistance possible to everyone who is a permanent resident of New Zealand, and not only those with citizenship. The Ministry of Foreign Affairs and Trade notes that in practice, foreign authorities are sometimes less receptive to requests for help on behalf of permanent residents, rather than citizens. While some countries prefer to base consular assistance firmly on citizenship, this is not, however, New Zealand's practice.[49]

In essence, the precondition for consular assistance is permanent residence, rather than the possession of a Convention travel document issued by New Zealand.[50]

Article 26—Freedom of movement

80 Section 18 of the New Zealand Bill of Rights Act 1990 confers on everyone lawfully in New Zealand the right to freedom of movement and residence in New Zealand.

While s 18A of the Immigration Act 1987 permits the Minister to grant a residence permit subject to conditions, such conditions can only be imposed for a maximum period of five years. Conditions imposed to date have not related to or affected freedom of movement within New Zealand.

81 Likewise, conditions may be imposed upon a temporary permit: s 27(1) Immigration Act 1987. Similarly, conditions imposed to date have not infringed the right of

47 Letter to author from Ministry of Foreign Affairs and Trade dated 23 July 1993.
48 Ibid.
49 Ibid.
50 Ibid.

freedom of movement within New Zealand.

Article 27—Identity papers

82 New Zealand citizens are not required as a matter of law to possess identity papers for internal use within New Zealand.

In relation to non-citizens, however, every holder of a permit issued under the Immigration Act 1987 is required by s 38 of that Act to retain in that person's possession or under that person's control the passport or certificate of identity on which the permit is endorsed, or any other document evidencing or constituting the permit. This provision applies to holders of residence permits as well as to holders of temporary permits. As a corollary, the Act imposes a duty on the Minister of Immigration (or his delegate) to endorse the permit on the permit holder's passport or certificate of identity: s 35(3)(b) Immigration Act 1987.

83 For those refugees who do not possess a valid travel document, either because that document has expired or has been lost or destroyed, the New Zealand Immigration Service issues a so-called "certificate of identity" which bears the photograph of the individual concerned and it is upon this document that there is endorsed the relevant permit. Such certificates of identity are informal documents and have no legislative origin.

Article 28—Travel documents

84 Section 16 of the Passports Act 1992 confers on the Minister of Internal Affairs the power to issue a formal certificate of identity to any person, not being a New Zealand citizen, if the Minister is satisfied that the person is unable for any reason to obtain a travel document from the government or other appropriate authority in the country of his or her nationality. The certificate of identity is the property of the New Zealand Government (Passports Act 1992 s 33).[51]

Although the Act employs the term "certificate of identity" and not "Convention travel document", the Department of Internal Affairs does, at an administrative level, interpret s 16 of the Passports Act 1992 so as to include both. The same application form is used. The document is headed "Application for a Certificate of Identity or Refugee Travel Document". The current fee for the issue of a refugee travel document is NZ$35.00. The normal initial validity of a refugee travel document is four years. The document can be renewed for up to ten years from the date of issue. Refugee travel documents are not normally renewed while the holder is outside New Zealand.

85 Section 18(b) of the Immigration Act 1987 specifically provides that a person who is the holder of a residence permit and who is granted by the Government of New Zealand a refugee travel document in accordance with the Refugee Convention for the purpose of travel outside New Zealand and who returns to New Zealand during the period of validity of that document will be entitled, on application in the prescribed manner, to be granted a further residence permit upon such return. It

51 See further *Laws NZ* Citizenship & Nationality paras 65 and 66.

is not clear whether such person would also require a returning resident's visa. All other resident permit holders require such a visa in order to gain automatic re-entry to New Zealand upon return from overseas.

86 The position of refugees who are also stateless is less clear. Eligibility for a certificate of identity under s 16 of the Passports Act 1992 turns on the question whether the Minister of Internal Affairs "is satisfied that the person is unable for any reason to obtain a travel document from the Government or other appropriate authority in the country of his or her nationality".

No difficulty will arise if the quoted words are interpreted as requiring the emphasis to fall on the words "for any reason" rather than on the phrase "country of his or her nationality". If the emphasis is on the latter phrase a stateless person would be ineligible for a certificate of identity as such a person, by definition, does not have a country of nationality.

Article 29—Fiscal charges

87 In general, the tax laws of New Zealand apply irrespective of citizenship and immigration status.

88 However, the fees usually charged by the New Zealand Immigration Service to process permit applications are in certain circumstances waived:[52]

(a) Fees for special work permits for refugee applicants are waived.

(b) Persons granted refugee status are exempted from payment of a fee for the residence application they are invited to lodge upon being recognized as refugees. Fees for returning resident's visa applications which are made at the time of granting of residence are also waived.

No fee is payable on lodging an application for refugee status.

Article 30—Transfer of assets

89 This article is complied with as there are no significant restrictions on the transfer of assets from New Zealand overseas whether by New Zealand citizens or non-New Zealand citizens.

Article 31—Refugees unlawfully in the country of refuge

90 Two unresolved aspects of Article 31 complicate the analysis of New Zealand's record of compliance:

(a) the meaning of "coming directly from the territory"; and

(b) "penalties".

91 As to "coming directly from", the geographical isolation of New Zealand is such that few refugees are able to satisfy this criterion. Most often refugees arrive in

52 Letter to author from New Zealand Immigration Service dated 13 August 1993.

New Zealand having transited through more than one intermediate state where their life or freedom was not under threat.

92 As to the issue of penalties, the opinion expressed by Goodwin-Gill in *The Refugee in International Law* (1983) 158 is that this term appears to comprehend a prosecution, fine and imprisonment, but not administrative detention. However, it is to be observed that administrative detention can last for an indeterminate period and impose, in the result, a "penalty" far more severe than would otherwise be permissible under the Penal Law.[53]

93 The basic premise of New Zealand immigration law is that a person who is not a New Zealand citizen may be in New Zealand only if that person is the holder of a permit granted under the Immigration Act 1987. A person who is thus in New Zealand in contravention of this basic premise is deemed for the purposes of the Immigration Act to be in New Zealand unlawfully: Immigration Act 1987 s 4.

A person who is in New Zealand unlawfully does not commit a criminal offence but is liable to be removed by way of an administrative process under the Immigration Act 1987 without the intervention of the criminal law. Unlawful presence in New Zealand does not attract a fine or imprisonment (though detention pending administrative removal from New Zealand is permitted by the Immigration Act 1987). Persons removed from New Zealand are banned from re-entry for a period of five years: Immigration Act 1987 s 52(1). Whether such a ban amounts to a "penalty" can be argued either way.

94 The principal cause of concern, however, arises in the context of criminal prosecutions for offences committed either in the course of entry to New Zealand or subsequent to such entry. The offences prescribed by the Immigration Act 1987 include such acts as:

(a) Completing an arrival card (or, for that matter, a departure card) in a false or misleading manner: s 126(4).

(b) Making any statement, or providing any information, knowing that it is false or misleading in any material respect, in support of an application or request for a visa or permit: s 142(a).

(c) Refusing or failing to produce or surrender any document or to supply any information when required to do so by an immigration officer: s 142(b).

(d) Producing or surrendering any document or supplying any information to an immigration officer knowing that it is false or misleading in any material respect: s 142(c).

(e) Producing or surrendering or passing off any passport, certificate of

53 As in *Benipal v Ministers of Foreign Affairs & Immigration* (HC Auckland, A878/83 & A993/83, 16 December 1985, Chilwell J) where the period of administrative detention was two and a half months. Benipal was only released after the High Court issued a writ of habeas corpus.

identity, visa, permit or anything purporting to be a passport, certificate of identity, visa, permit:

(i) As relating to that person when in fact, to that person's knowledge, it relates to some other person; or

(ii) Knowing it to be forged or to have been obtained fraudulently: s 142(d).

(f) Resisting or intentionally obstructing any immigration officer or member of the police in the exercise of the powers of that officer or member under the Immigration Act: s 142(g).

The offences in paragraphs (a), (d), (e) and (f) above are punishable by imprisonment for a term not exceeding three months or to a fine not exceeding NZ$5,000. See Immigration Act 1987, s 144(1).

Section 31 of the Passports Act 1992 prescribes further offences in relation to the use of New Zealand passports, certificates of identity or emergency travel documents and there are, of course, the ordinary provisions of the criminal law as contained in the Crimes Act 1961.

95 Asylum seekers are prosecuted from time to time for using false documents. See, by way of example, the following cases:

(a) *The Dominion*, Wednesday, October 18, 1989 reported the case of a Chinese national who had entered New Zealand on a false Thai passport having escaped China following his involvement in the pro-democracy movement. He was charged with producing a false Thai passport. Unable to speak English and without a lawyer he was held in custody for five days until legal representation was arranged whereupon he obtained bail. A District Court Judge rejected an application that the man be discharged without conviction by reason of the fact that the prosecution was in breach of Article 31 of the Refugee Convention. The ruling was based on the view that until the man's status as a refugee was determined the prosecution could properly proceed.

(b) In *Rajinder Singh v Police* (High Court Auckland, AP43/92, 6 March 1992, Barker J) the High Court reduced from nine to two months' imprisonment (already served) a sentence imposed on Rajinder Singh for, without reasonable excuse, having in his possession a New Zealand passport that he had reasonable cause to suspect had been falsified. The appellant, who claimed religious persecution in India, had attempted to travel to Canada as he believed that that country had a reputation for a more liberal acceptance of refugees than New Zealand. He had been successful in leaving New Zealand but upon arrival in Singapore in transit to Canada via San Francisco the falsity of the passport was discovered and he was returned to New Zealand. He then applied for refugee status.

(c) In *Refugee Appeal No 996/92 Re SS* (21 May 1993) refugee status was granted to an individual who had been convicted in New Zealand for unlawful use of a passport. While the conviction related to an unsuccessful attempt to leave New Zealand on a false Canadian passport in order to pursue a refugee application in Canada, the case is nevertheless directly analogous.

Even where no prosecution action is taken, the Refugee Status Branch has, on occasion, made adverse credibility findings on the basis that false documents were used to procure entry to New Zealand. For example, in *Refugee Appeal No 371/92 Re ZJ* (9 May 1994) 9, an adverse credibility finding was made by the Refugee Status Branch on the grounds (inter alia) that the individual had tendered to the New Zealand Embassy in Beijing a "false" work unit reference. The Branch was of the view that the person had committed an offence under s 142 of the Immigration Act 1987. The decision was reversed on appeal. The Refugee Status Appeals Authority stated:

> As to the first aspect, it is common for asylum seekers to commit offences under the Immigration Act 1987. Frequently they are forced, of necessity, to rely on false documentation. Agents of persecution seldom permit their victims to leave the country of origin in safety and with dignity. It is commonplace for *bona fide* asylum seekers to resort to false documentation and deception. It would be a rare case indeed for the possession and use of such documents to be taken into account to support an adverse credibility finding.

96 On the question of detention of asylum seekers, the Immigration Act 1987 in its original form made provision only for the detention and expulsion (turnaround) of persons who arrived from overseas and who were refused a permit at the air or sea port of arrival. The period of detention was restricted to twenty-eight days only and the purpose for which such detention was allowed was, as mentioned, only for the purpose of turning the individual around. At the expiry of the twenty-eight days the individual had a statutory right to be released from custody whereupon the administrative removal procedures could be set in motion. Under those procedures detention in custody is permissible only if a Judge of the District Court is satisfied that the person is likely to abscond otherwise than by leaving New Zealand: Immigration Act 1987 s 55(2). An individual cannot otherwise be kept in custody for the purpose of the Immigration Act 1987.

97 Until the Gulf War the absence of formal provisions permitting the detention of asylum seekers arriving at an airport did not give rise to any difficulties. However, during the Gulf War a policy was introduced whereby asylum seekers were refused permits until such time as they received a security clearance from the New Zealand Police. Until such clearance was given and an immigration permit issued, they were kept in custody. The only section available to justify the detention was s 128 which, as mentioned, had not been intended for this purpose.

In the main, only those asylum seekers who arrived without any or adequate identification and who were of the Muslim faith were refused permits and detained in custody pending removal from New Zealand.

When the refusal of the permits was challenged in court the New Zealand Court of Appeal in *D v Minister of Immigration* [1991] 2 NZLR 673, while upholding the action taken by the Minister of Immigration, drew attention to the lack of any legislative provision in New Zealand for the temporary detention of applicants for refugee status. The absence of such provision had the result, the Court of Appeal acknowledged, that because of the perceived security risk in New Zealand, Government officers may have at times to send away, and perhaps back to persecution, persons who may have genuine reasons to fear persecution for their political beliefs. Such persons were described by the Court "as in a sense casualties of war".

98 As a result, in November 1991 the Immigration Act was amended by the insertion of two new provisions:

(a) Section 128A. This provision provides that where an individual detained under s 128 for the purpose of being turned around challenges by way of judicial review either the refusal of the permit or the decision to expel, the detention continues indefinitely until the judicial review proceedings are completed. There is, however, provision for bail to be granted while the review proceedings are in existence.

(b) Section 128B. This provision provides for the detention of persons whose eligibility for a permit is not immediately ascertainable upon their arrival in New Zealand, as for example, where a person has no appropriate documentation for immigration purposes, or where any such documentation held by the person appears to be false. Such person can be detained in custody until such time as a decision can be made as to whether the person falls within the categories of excluded persons specified in s 7(1) of the Act. It will be recalled that broadly speaking such excluded categories encompass persons with serious convictions or who are a threat to national security or who are likely to engage in criminal activities in New Zealand.

Outside of the very narrow terms of s 128B, there is no legislative provision for the temporary detention of applicants for refugee status.

99 Since the lifting of the Gulf War procedures and the enactment of s 128B the detention of asylum seekers arriving in New Zealand with false documentation, or lacking any documentation has been rare.

Article 32—Expulsion

100 The New Zealand Immigration Service has not found it necessary to enact formal procedures to deal with persons who have been recognized as refugees but who are to be expelled from New Zealand, given the expected rarity of such cases. Indeed, they are not aware of any such cases.[54]

However, the New Zealand Immigration Service advises that if any such situation were to arise, the matter would be dealt with on a case-by-case basis and in a manner which ensures that the Government abides by its obligations under Article

54 Letter to author from New Zealand Immigration Service dated 13 August 1993.

32, including permitting the refugee to seek legal admission to another country. The UNHCR would be kept fully informed of any such case and would be given the opportunity to assist the refugee.[55]

101 In this context it is relevant to note that s 72 of the Immigration Act 1987 enables the Minister to certify that the continued presence in New Zealand of any person constitutes "a threat to national security" and the Governor-General may, by Order in Council, order the deportation from New Zealand of that person. There is no right of appeal. Should this power be exercised in relation to a refugee Article 32 would be breached.

The position of such persons is to be contrasted with the quite different category of persons who are "suspected terrorists". If such persons are ordered to be deported from New Zealand a right of appeal to the High Court is conferred by s 81 of the Immigration Act 1987.

Article 33—Prohibition of expulsion or return ("refoulement")

102 Regrettably, New Zealand cannot claim an unblemished record in relation to Article 33. The following cases are provided by way of example only:

(a) On 13 October 1989 two men and a woman arrived at Auckland International Airport from Iran without visas or passports and sought political asylum. They were refused permits and told that they would be expelled the same day. A lawyer spent four hours at the airport arguing with officials and telephoning officials in Wellington to gain the release of the three individuals. After being held at the airport for eleven hours they were eventually issued with permits and released but only after a senior official in the Immigration Service, Wellington intervened as a result of the lawyer's telephone calls from the airport and only after a fortuitous mechanical fault on the aircraft delayed departure: *New Zealand Herald*, Saturday, October 28, 1989. All three individuals were subsequently granted refugee status.

(b) On 10 February 1990 two Iranian men arrived at Auckland International Airport without travel documents but claimed to be refugees. They were refused entry and expelled to Iran. However, on arriving in Singapore in transit one man tried to kill himself and the men were detained for fourteen days in the transit lounge at Changi airport. The UNHCR intervened on their behalf and the New Zealand Government agreed to take them back in order to process their applications for refugee status: *New Zealand Herald*, Tuesday, March 6, 1990. In a report published in the *Auckland Star* on March 5, 1990 the then Minister of Immigration acknowledged that a mistake had been made and that the men should have been allowed to stay in New Zealand until their status was ascertained. Both men were subsequently granted refugee status.

(c) As already mentioned, the effects of the procedures introduced during the Gulf War in the period 28 January 1991 to 30 April 1991 were acknowledged

55 Ibid,

by the New Zealand Court of Appeal in *D v Minister of Immigration* [1991] 2 NZLR 673, 676 line 23 to have produced the following result:

> Whatever their number, such persons as the appellants may be seen as in a sense casualties of war. ... It is right, though, that we should draw attention to the lack in New Zealand of any legislative provision for the temporary detention of applicants for refugee status while their status is being investigated. We are told from the Bar that other countries, such as Australia, have such provision. We express no view as to whether or not it is warranted in New Zealand, nor is it feasible in the time now available to undertake a detailed analysis of the obligations under the Convention. The matter is one for the consideration of the Government and Parliament. We say only that the present statute law does have the result that, because of the security risk in New Zealand, Government officers may have at times to send away, and perhaps back to persecution, persons who may have genuine reasons to fear persecution for their political beliefs.

(d) More recently, the *New Zealand Herald* for Monday, April 5, 1993 and Tuesday, April 6, 1993 reported that in early April 1993 an Iranian national was intercepted trying to enter New Zealand with a false passport. After spending three nights in custody at Auckland he was placed on an aircraft bound for Singapore. During the flight he threatened several cabin attendants, demanding the return of his travel papers. At one point he was seen gesticulating aggressively with a cutlery knife. Eventually he was handed his documents. He then locked himself in a toilet and set some of them alight—causing the smoke alarm to sound. The aircraft, with 239 passengers on board, was forced to make an unscheduled stop in Brisbane, Australia. The man was removed from the aircraft and returned to New Zealand. After a further night in custody at Auckland he was expelled under police escort to Singapore en route to Malaysia. It is believed that upon his first arrival in New Zealand he made it known to police officers that he wished to apply for refugee status. But unfortunately, the lawyer with whom he was put in touch by the police was not experienced in refugee issues and after a disagreement over the proposed fee no steps were apparently taken on the man's behalf.

The Gulf War procedures

103 As the Gulf War procedures have been mentioned in several contexts, it is as well were a brief summary to be provided.

On 28 January 1991 the Minister of Immigration issued a document entitled "Provisional Procedures for Determining Refugee Status Applications During the Gulf War Where There is a Security Risk". The procedures came into effect on 28 January 1991 and remained in place until 30 April 1991. During that period, of eighty people who arrived in New Zealand and claimed refugee status, about half were refused security clearance and sent home. The number of people arriving at Auckland International Airport either with false documentation, or lacking any, and seeking asylum, dropped from fifty in January 1991 to thirteen in February

1991 and five in March 1991.[56]

104 The emergency procedures in summary were as follows:

(a) They applied to all persons arriving in New Zealand and applying for refugee status.

(b) Such persons were to be held in custody.

(c) The New Zealand Immigration Service was permitted to determine only whether the applicant had a prima facie claim to refugee status. *No decision* was to be made as to whether the individual was in fact a refugee.

(d) There was to be no appeal against a decision that a prima facie case had not been established.

(e) Where the Immigration Service decided that no prima facie case had been established the applicant was to be removed from New Zealand.

(f) Where a prima facie case had been established it was then necessary for the police to give what was called "a security clearance".

(g) For those cases where the Immigration Service had determined that a prima facie case for refugee status had been established, but the police were unable to state that the applicant *did not* pose a threat to national security, then expulsion was to occur.

105 The procedures were not published or enforced pursuant to any express statutory power and the procedures contained no definition of what was meant by "threat to national security". Nor were the police required to take account of New Zealand's obligations under the Refugee Convention or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Significantly, the question the police had to address was not whether the individual actually constituted a threat to national security. Rather, the question was couched in the negative viz whether it could be said that the person *did not* constitute a threat to national security.

Predictably, the point was arrived at where a security clearance was withheld from asylum seekers on the grounds that "not enough was known about them": *New Zealand Herald*, Saturday, 26 January, 1991 reporting the comments of Mr Brian Davies, Assistant Commissioner of Police.

It will be seen that the terms of the Gulf War procedures were such that it was not claimed that the persons expelled from New Zealand were persons in respect of whom there were, in terms of Article 33(2), reasonable grounds for regarding them as a danger to the security of New Zealand.

The decision of the Court of Appeal in *D v Minister of Immigration* [1991] 2 NZLR 673, in upholding the Gulf War procedures, does not discuss any of these issues. Importantly, no reference is made to Articles 32 and 33 of the Convention or to the

56 *New Zealand Herald,* Thursday, 11 April, 1991.

non-refoulement obligation.[57]

106 In one particularly absurd case[58] a citizen of the People's Republic of China who arrived in New Zealand and sought refugee status on the basis of his fear of being compulsorily sterilized was detained having been refused a security clearance. The letter from the New Zealand Police was in the following terms:

> We are unable to provide a security clearance for this person on the following grounds:
> 1 He arrived in New Zealand without travel documentation.
> 2 We are unable to verify his: 2.1: Identity 2.2: Country of Origin
> 3 It cannot be said in view of his obvious nationality that the gentleman poses a threat arising from our concerns in relation to the Gulf War.

The third stated ground is a clear statement that the individual did not pose a threat in the context of the Gulf War, yet it was advanced as justification for withholding from him a security clearance. Clearance was issued three days later.

107 In rare public statements which were published in the *New Zealand Herald*, Tuesday, March 5, 1991 and *New Zealand Herald*, Wednesday, March 20, 1991 the Deputy Legal Representative of the Office of the UNHCR in Canberra, Australia expressed concern at the provisional procedures and in particular at the fact that people might be sent back to countries where they could be persecuted. He called for the emergency procedures to be dropped as soon as possible.

Later, the United Nations Deputy High Commissioner for Refugees, Mr Douglas Stafford, was reported in the *New Zealand Herald*, Tuesday, November 12, 1991 as saying that the New Zealand Government's Gulf War security provisions involved "one of the most flagrant violations of refugee status determination I have seen". He said that on the face of it, people arriving from a Middle East country or those of the Muslim faith, were not allowed into New Zealand although they could have been genuine refugees.

Mr Stafford's comments were underlined by a police officer's harrowing account of the circumstances in which he escorted an Iranian citizen from New Zealand to Iran following the expulsion of the Iranian from New Zealand under the Gulf War provisions. This account, first published in abbreviated form[59] in *The Listener*, November 18–4, p 15 records that both the solicitor who represented the Iranian and Amnesty International fear that the individual is now dead.

108 As mentioned, New Zealand signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 January 1986 and

57 Compare *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

58 See *Refugee Appeal No 3/91 Re ZWD* (20 October 1992) 9.

59 A meticulously detailed account was subsequently published in serialized form. See Cannons, "Escort to Iran: A Notebook Entry" (1991) 25 International Police Association 80–82; Cannons, "Escort to Iran: A Notebook Entry, Part II" (1991) 25 International Police Association 18–28; Cannons, "Escort to Iran: A Notebook Entry, Part III" (1992) 26 International Police Association 100–108; Cannons, "Escort to Iran: A Notebook Entry, Final" (1992) 26 International Police Association 58–62.

ratified on 10 December 1989. In its Initial Report to the Committee Against Torture, New Zealand made reference to the Gulf War procedures even though the introduction of these procedures fell outside the period under review. The Report acknowledges[60] that a number of persons who arrived at a New Zealand port of entry with false documentation or without documentation were refused entry and detained pending determination of their security status and that twenty such persons were subsequently removed because they were not given security clearance. It is stated in the Report that:

> ... although some questions were raised concerning the consistency with Article 3 of actions taken during the 1991 Gulf War, the New Zealand authorities are satisfied that the terms of the Convention were properly upheld at that time ....[61]

and that:

> The New Zealand authorities consider that the steps taken were justified in the circumstances and that the requirements of the [Torture] Convention were met.[62]

Beyond these possibly self-serving conclusions, the Report did not address either the facts or the issues in any meaningful way.

109 No attempt has been made to document each and every case where there has been a possible breach of New Zealand's obligations under Article 33 of the Refugee Convention. However, it can be said that there is good reason to be gravely concerned at New Zealand's record.

110 To these concerns must be added the fact that under the Immigration Act 1987 there is a comprehensive visa regime which was strengthened in 1991 by the introduction of transit visa requirements. The countries listed in the transit visa regime are all refugee-producing countries.

There are also carrier sanctions which provide for fines of NZ$10,000 for the person in charge of the aircraft and NZ$20,000 for the carrier itself. Certain offences are punishable by a term of imprisonment not exceeding three months: Immigration Act 1987 s 125(6) and (7).

Article 34—Naturalization

111 The Citizenship Act 1977 provides for the grant of New Zealand citizenship to persons over the age of eighteen years who meet certain prescribed criteria. In particular a residence permit under the Immigration Act 1987 must be held and the person must have been ordinarily resident in New Zealand throughout the period of three years immediately preceding the date of application and must also have sufficient knowledge of the English language: Citizenship Act 1977 s 8. However,

60 Initial Report of New Zealand Under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1992) 15 para 3.6.
61 Ibid 7 para 1.21.
62 Ibid 15 para 3.6.

the Minister of Internal Affairs has a discretion to abridge both the three year residence requirement and the English language requirement if the applicant will suffer undue hardship. There is also provision for the grant of New Zealand citizenship to persons who would otherwise be stateless: Citizenship Act 1977 s 9(2).[63]

The legislative framework thus facilitates New Zealand's compliance with the obligations in Article 34. In addition, the fact that most persons recognized as refugees are granted residence status has the practical effect of commencing the process of assimilation of refugees prior to their naturalization.

The appropriateness of the convention-derived rights regime

112 The principal concerns in New Zealand relate to the following:

(a) The absence of a legislative framework incorporating the Refugee Convention into domestic law and making provision for a refugee determination process.

(b) The fact that the administrative policy by which residence permits are issued to most refugees can be changed at any time. If that happens the refugee-specific rights regime established by the Convention will become more directly relevant.

(c) That the record of New Zealand's observance of the obligations imposed by Articles 31, 32 and 33 of the Refugee Convention, especially the obligation of *non-refoulement* has been disappointing and requires considerable improvement.

(d) That inadequate resources are presently allocated to ensure that the refugee determination process is both fair and expeditious.

To a degree the third and fourth concerns are inter-related as border expulsions and the determination process both pertain to the interregnum between arrival and the grant of refugee status. Some may be tempted to dismiss the relevance of this interregnum on the basis that until an individual is in fact recognized as a refugee, the Convention obligations are not invoked as there is no telling whether the person is in fact a genuine refugee. For that reason summary expulsions at the border are not governed by the Refugee Convention. Such a view overlooks an essential premise of the Convention, namely that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which the refugee arrives in New Zealand. Recognition of refugee status does not therefore make the person a refugee but declares him or her to be one. A person does not become a refugee because of recognition, but is recognized because he or she is a refugee.[64]

63 *Laws NZ* Citizenship & Nationality paras 16–18.

64 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1988) para 28.

The minimum duty owed to such person is that of *non-refoulement* and the necessary corollary is that refugee status must be determined as a matter of urgency prior to expulsion.

As the Convention has not been incorporated into New Zealand domestic law, there is no available means by which this essential premise can be enforced. This gives rise to very real difficulties when refugees attempt at a domestic level to access the provisions of the Refugee Convention, and in particular the *non-refoulement* obligation.

113 Consideration could perhaps be given to a regime in which parties to the Refugee Convention are required to implement its provisions at domestic law level and to also set up a complaints procedure under which *individuals* may complain of non-compliance first at domestic level, and then, subject to prior exhaustion of domestic remedies, at an international level.

In both respects there is already a precedent in the International Covenant on Civil and Political Rights which requires certain steps to be taken at a domestic level by contracting States and which also, via the First Optional Protocol, provides an avenue of redress for individuals who claim to be victims of violations of the provisions of the Covenant and who have exhausted all available domestic remedies. A reporting system similar to that under the Covenant would also be valuable.

114 In conclusion, as a so-called developed country, New Zealand presents a picture of contradictions. On the one hand, there is a commendable policy which presently grants to most refugees residence status and with it rights virtually indistinguishable from those enjoyed by New Zealand citizens. In the result, many of the Articles in the Refugee Convention have little practical application. On the other hand, there are signs that there are some in government who wish to take the position that New Zealand will comply with its obligations under the Convention, but no more than that. New Zealand appears to be increasingly adopting a policy of *non-entrée*. The recent expulsions from New Zealand of refugees and asylum seekers coupled with the strict visa regime (backed by carrier sanctions) would certainly support such an analysis, as would the recent mooting of the possibility that refugees be given temporary asylum only. Mention must also be made of the fact that the "compelling reasons" exception to the operation of the cessation provisions of Article 1C paras 5 and 6 has not to date been extended to persons recognized as refugees under Article 1A(2) notwithstanding the opportunity to do so when the refugee determination procedures were reviewed and amended in August 1993.[65]

The assertion of national sovereignty is seen in the according of extensive rights to refugees in New Zealand and the simultaneous adoption of strong measures to prevent refugees from arriving in New Zealand in the first place unless part of a resettlement quota. Plainly, it would be more convenient from the standpoint of

65 See the Terms of Reference *Refugee Status Determination Procedures* which came into force on 30 August 1993.

immigration control to allow into New Zealand only resettlement refugees following selection *off-shore*. Such a notion, while attractive from an administrative point of view, is incompatible with the basic provisions of the Refugee Convention and the good faith obligation imposed by both Article 26 of the Vienna Convention on the Law of Treaties and customary international law.

The value of a refugee-specific rights regime

115 As mentioned in the Overview, at the present time many of the Convention Articles have little present-day application in New Zealand because most persons recognized as refugees are given residence permits. It does not necessarily follow that the rights regime under the Refugee Convention is therefore irrelevant in the New Zealand context. The Convention at least sets a minimum standard for the treatment of refugees, a standard which is immediately accessible, contained in one document and most importantly, associated specifically with *refugees*.

Nor should it be overlooked that the Refugee Convention has accumulated, and will continue to accumulate a potent symbolic value. It embodies a moral obligation which many states subscribe to, albeit imperfectly.

116 While it is possible that international human rights law will evolve to the point where it overtakes the standards set by the Refugee Convention, we are a very long way from arriving at that point. And how are we to know when that historical event occurs? The answer is, only with hindsight. Until that point has been reached it would be inappropriate to create a climate in which state parties to the Convention are encouraged to believe that the Refugee Convention can be renegotiated. There is a real danger that catastrophic results will follow. In particular, a renegotiated Convention with degraded standards, or no Convention at all. If there are countries in which refugees are accorded human rights in excess of those recognized in the Convention, they are certainly in the minority. And, as illustrated by the case of New Zealand, it cannot be said that such rights will continue to be afforded in the future. The fact that there are countries which accord rights in excess of those recognized in the Convention does not provide a secure foundation for abandoning the Refugee Convention in favour of international human rights law, whatever that expression might mean and however it might be quantified.

LEGAL AID ISSUES IN THE REFUGEE DETERMINATION PROCESS[1]

Introduction[2]

The primary requirement of any refugee determination process is that it accurately identify refugees.[3] The secondary requirement is that the process be both fair and expeditious.

A sina qua non of these requirements is that the individual refugee claim be clearly articulated, cogently presented and persuasively argued. Members of the legal profession cannot claim a monopoly on these skills. They are, however, better placed than refugee claimants themselves. With few exceptions, immigration consultants are inadequate to the task and suffer the considerable handicap of having no, or at best, little understanding of refugee jurisprudence.

The case for legal representation of refugee claimants is a very powerful one, though not necessarily self-evident in the New Zealand context where there is a surprising degree of ignorance of the nature of the refugee determination process, the interests at stake and the proper role of the legal profession in assisting the accurate identification of refugees. There is a commensurate lack of understanding of New Zealand's solemn obligation as a State Party to the Refugee Convention not to expel or return (refouler) a refugee to the frontiers of territories where her life would be threatened on account of her race, religion, nationality, membership of a social group or political opinion.[4] The provision or withholding of legal aid may directly affect New Zealand's ability to discharge its international obligations.

The refugee determination procedure in New Zealand

Since January 1991, New Zealand has operated a two-tier system for determining refugee applications. At first instance, the applications are processed within the New Zealand

1 The author of this paper is also a member of the New Zealand Refugee Status Appeals Authority. The opinions in this paper are the personal views of the author and should not be taken as in any way reflecting the position of the Refugee Status Appeals Authority.

2 This is a slightly amended version of a paper first presented at the International Bar Association 25th Biennial Conference, October 1994, Melbourne.

3 That is, persons who satisfy the Inclusion Clause requirements of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. The New Zealand Government acceded to the 1951 Refugee Convention on 30 June 1960 (New Zealand Treaty Series 1961 No 2) and to the 1967 Protocol on 6 August 1973 (New Zealand Treaty Series 1973 No 21). In this paper the Refugee Convention and Protocol will be referred to as "the Refugee Convention".

4 Refugee Convention Article 33 provides:

> **Article 33. Prohibition of expulsion or return. ("refoulement")**
>
> (1) 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.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Immigration Service by immigration officers in a specialized section of the Service known as the Refugee Status Branch. Upon receipt of an application the Refugee Status Branch schedules an appointment at which the applicant is interviewed. Interpreters from outside the Immigration Service are provided at no cost to the asylum seeker. The applicant is entitled to be accompanied by a lawyer or other representative who is given the opportunity to make submissions in support of the case. The asylum seeker is subsequently given an opportunity to comment in writing on the interview report compiled by the Refugee Status Branch and upon any prejudicial information held by the Refugee Status Branch.

Where the application for refugee status is declined there is a right of appeal to the Refugee Status Appeals Authority (the Authority), an independent body presently staffed by practising or recently retired lawyers drawn entirely from outside Government.[5] A representative of the UNHCR is ex officio a member of the Authority.

Appeals proceed by way of a hearing de novo. There is no burden on an appellant to establish that the decision of the Refugee Status Branch is wrong. All issues of law, fact and credibility are at large. The burden of proving the claim to refugee status is nevertheless carried by the appellant.[6]

The appellant is interviewed once more and where necessary an independent interpreter is provided by the Authority. The appellant is entitled to be accompanied by a lawyer or other representative who is invited to make submissions both before and after the appellant's evidence is given. The hearing is inquisitorial, not adversarial in nature. All decisions of the Authority are delivered in writing. The Authority considers only whether the appellant is a refugee. It has no jurisdiction to consider immigration or humanitarian issues and in particular, whether the particular individual should be granted a permit under the Immigration Act 1987. This is a decision only the Minister of Immigration or his delegate may make.[7]

The number of refugee applications received by the New Zealand Immigration Service in recent years is as follows:[8]

1987	27
1988	145
1989	330

5 The constitution and powers of the Refugee Status Appeals Authority are contained in what are described as Terms of Reference approved by Cabinet. There have been three successive Terms of Reference. In this paper it is intended to refer to the Terms of Reference which came into force on 30 August 1993.

6 See *Refugee Appeal No 523/92 Re RS* (17 March 1995) 10–27.

7 Terms of Reference, Part II, para 5(3). See also *Refugee Appeal No 2286/94 Re BC* (12 July 1995) 3.

8 The statistics for the years 1987 to 1991 appear in W M Wilson, *Report to the Rt Hon W F Birch, Minister of Immigration, on the Process of Refugee Status Determination* (1992) 4. The figures for 1992 to 1994 are published by the Ministry of Foreign Affairs & Trade in *Human Rights in New Zealand: New Zealand's Third Report to the United Nations Human Rights Commission on implementation of the International Covenant on Civil and Political Rights* (Information Bulletin No 54, June 1995) 50.

1990	600
1991	1,200
1992	771
1993	347
1994	423
1995	683[9]

The substantial increases of 1990, 1991 and 1992 were largely attributable to two phenomena. First, after the 4 June 1989 Tiananmen Square massacre, a large number of nationals from the People's Republic of China (PRC) (principally students) who were then in New Zealand applied for refugee status. So did a number of PRC nationals who later entered New Zealand for the purpose of study. Second, in 1988 and 1989, for reasons which are not clear, a visa officer in the New Zealand High Commission, New Delhi, issued visitor visas on a somewhat liberal basis. As a result, a considerable number of individuals (mostly male) from the Punjab came to New Zealand. They were later discovered working in the essentially seasonal farming and orchard industries. Once their permits expired they were processed through the immigration removal procedures, at which point they invariably lodged applications for refugee status based on the deteriorating human rights situation in the Punjab.

Needless to say, visas are now more difficult to come by at the New Zealand High Commission in New Delhi and the flow of Punjabis into New Zealand has stopped. However, those already in New Zealand must be processed through the refugee determination procedures. The PRC nationals were dealt with in a rather more dramatic manner. On 23 June 1994, the Minister of Immigration announced that Cabinet had approved the granting of residence to all PRC nationals who entered New Zealand on or before 31 March 1992.[10]

This had the immediate effect of removing approximately 425 refugee applications from the refugee system.[11]

As to approval rates, at the time of the Wilson Report (29 April 1992), the Refugee Status Branch approval rate was approximately 50%.[12] However, by the end of 1992, the approval rate had declined to 20%.[13] By May 1993, the approval rate had declined even further to approximately 4%.[14]

For the same periods, the approval rate on appeal has averaged approximately 20%. In the result, most cases declined by the Refugee Status Branch are appealed.

9 Letter to author from New Zealand Immigration Service dated 18 January 1996.

10 Media release of Minister of Immigration, 23 June 1994. The requirements specified by this policy are set out in Information Circular 94/11 (24 June 1994).

11 This figure comprises approximately 347 applications at Refugee Status Branch level and approximately 80 appeal cases.

12 W M Wilson, *Report to the Rt Hon W F Birch, Minister of Immigration, on the Process of Refugee Status Determination* (1992) 11.

13 John Matheson, "80% of refugee pleas rejected", *Sunday Star,* 3 January, 1993.

14 Margot Staunton, "Figures show asylum given rarely", *New Zealand Herald,* Thursday, 3 June, 1993.

Refugees and legal aid in New Zealand

Prior to 1 February 1992, legal aid to refugees was governed by the Legal Aid Act 1969. Under this Act, legal aid was available both for the first instance hearing before the Refugee Status Branch and for the appeal hearing before the Refugee Status Appeals Authority.

However, the Legal Services Act 1991 which came into force on 1 February 1992 changed the entire legal aid system in New Zealand for both civil and criminal cases. The nature and scope of these changes lie outside the ambit of this paper and are more fully addressed elsewhere.[15] What is relevant is that the statute removed legal aid from the first level hearing before the Refugee Status Branch. It is now available only at the appellate stage. Section 19(1)(j) of the Act materially provides:

> Subject to subsections (3) to (5) of this section, civil legal aid may be granted, in accordance with the provisions of this Part of this Act, in any of the following proceedings:
>
> ...
>
> (j) Proceedings before any body (by whatever name called) established by the Government of New Zealand to determine appeals against decisions made by immigration officers (within the meaning of the Immigration Act 1987) and relating to the status of persons as refugees.[16]

At the present time the standard grant of legal aid for refugee appeals is approximately NZ$1,500 (inclusive of disbursements).[17] The present number of appeals before the Refugee Status Appeals Authority (both those waiting for a hearing and those heard but not yet decided) is 1,502 as at June 1994.[18]

Assuming that each appellant is legally aided and further assuming that the standard grant is not varied, the total cost to the taxpayer for providing civil legal aid to all present appellants is approximately NZ$2.25m.

By way of comparison, total legal aid expenditure in past years is shown in the following table:[19]

Year	Civil	Criminal	Total
1986	7.3	6.1	13.4m
1991	34.8	16.4	51.2m
1992	49.7	18.7	68.4m
1993	37.0	18.0	55.0m

15 John Rowan, "Legal Aid in New Zealand" [1993] NZLJ 396; Rowan & Harding, *Brookers Legal Services* (1993).

16 Section 19(3) and (5) of the Legal Services Act 1991 have no relevance in the present context.

17 Some grants do exceed this figure and disbursements (eg, for translations and medical reports) are also sometimes allowed as an additional sum.

18 *The Capital Letter*, Vol 17 No 20 (7 June 1994) 3.

19 These figures are taken from Phillipa Stevenson, "Legal aid scheme put under pressure", *New Zealand Herald*, Wednesday, 23 March, 1994 and are to be read with the explanation offered by the Executive Director of the Legal Services Board, Dave Smith, in "Those Legal Aid Figures", *Northern Law News*, 29 July, 1994, 3.

The budget for the 1993/94 year is NZ$44.95m, of which NZ$17.39m (approx) is allocated to criminal legal aid and NZ$25.05m (approx) to civil legal aid.[20]

The Legal Services Board is unable to supply separate figures for refugee cases[21] but claims to be:

> ... well aware of the alarming backlog of appeals to the Refugee Status Appeal [sic] Authority that will absorb a growing amount of legal aid funding.[22]

It is also:

> ... investigating alternatives to litigation with a number of areas in mind, one of which is immigration issues.[23]

The basis of the claim that there is an "alarming backlog of appeals" to the Refugee Status Appeals Authority is not immediately apparent. Nor is it immediately clear whether the Legal Services Board is aware of the unique factors which combined to produce the large increase in applications in the three-year period 1990 to 1992. As will be seen from the earlier table, the number of new refugee applications has dropped dramatically since then.[24] And as mentioned, PRC nationals who arrived in New Zealand prior to 31 March 1992 have been approved for residence. The backlog, such as it is, is clearly a temporary phenomenon and does not provide a sound basis for long-term decision-making. Furthermore, it is difficult to see what "alternatives" to litigation are possible in the context of refugee determination.

What is of significance from this brief discussion is that since 1 February 1992, refugee claimants have experienced significant difficulties in the legal aid area. Not only have they been deprived of legal aid for the first instance hearing, they now face the prospect of funding cutbacks at the appeal level.

Justification for legal aid in the refugee determination process

The ultimate justification of legal aid is to be found in the principle of justice and in particular, that justice should be equally accessible to all.

Article 7 of the Universal Declaration of Human Rights[25] declares that:

> All are equal before the law and are entitled without discrimination to equal protection of the law.

20 Letter from Legal Services Board dated 18 August 1994.
21 Letter from Legal Services Board dated 18 August 1994.
22 Ibid.
23 Ibid.
24 This is in large measure due to very efficient border controls in the form of visa and transit visa regimes which specifically target citizens of refugee-producing countries. There are also severe carrier sanctions. The nature, extent and justification for these control measures lies outside the scope of this paper.
25 Article 14(1) of the International Covenant on Civil and Political Rights 1966 refers to the principle that "All persons shall be equal before the courts and tribunals".

Refugees are, by circumstance, poor and disadvantaged; if their applications fail, the price they pay may be—without exaggeration—loss of liberty or life. They should have the best advice and representation possible.[26]

While in the context of criminal legal aid the interests of justice, the means of the individual and the gravity of the offence are specifically enumerated statutory criteria for the grant of legal aid,[27] these same criteria are not prescribed in the civil context and are all too often overlooked in the case of asylum seekers.

Given the special needs of the asylum seeker and the fundamental nature of the non-refoulement obligation, the adoption of a negative attitude to the grant of legal aid would be difficult to understand. As a State Party to the Refugee Convention, New Zealand has shouldered specific obligations both to the international community and to refugees. These obligations are without doubt relevant considerations (in the administrative law sense) in the context of decision-making in this area. See *Tavita v Minister of Immigration.*[28] Yet the same obligations are seldom, if ever, mentioned in the legal aid debate.

It is also worth remembering that refugee status is declaratory, not constitutive. That is, a person is a refugee within the meaning of the Refugee Convention as soon as she fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which her refugee status is formally determined. Recognition of her refugee status does not therefore make her a refugee, but declares her to be one.[29] The right conferred by Article 16 of the Refugee Convention to free access to the Courts of law in New Zealand must be given real meaning and effect.[30] Only a narrow and begrudging interpretation would exclude from Article 16 the administrative tribunal whose very raison d'etre is to determine refugee status.[31]

To pre-empt the formation of a negative attitude to refugees in the legal aid context, two further points must be made.

26 Stefanie Grant, "Refugees and Rhetoric" (1991) 141 New Law Journal 961, 962.

27 Legal Services Act 1991, s 7(1)(a) and (b) and (2)(a).

28 [1994] 2 NZLR 257 (CA). See also *Governor of Pitcairn & Associated Islands v Sutton* [1995] 1 NZLR 426, 430 (CA).

29 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para 28.

30 Article 16 provides:

> **Access to Courts**
>
> 1 A refugee shall have free access to the courts of law on the territory of all Contracting States.
>
> 2 A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi.*
>
> 3 A refugee shall be accorded in the matters referred to in para 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

31 The possible application of Article 16 of the Convention in the refugee determination context is discussed by Thomas Spijkerboer in *Higher Judicial Remedies*, a paper presented at the International Judicial Conference on Asylum Law and Procedures, London, 30th November–3rd December 1995 (publication forthcoming). See also *R v Secretary of State for the Home Department, Ex parte Shala Jahangeer* [1993] Imm AR 564, 566 (QBD).

First, the notion that the system is cluttered with so-called manifestly unfounded claims is misconceived. It has been the universal experience of those who have sat on the Refugee Status Appeals Authority that many cases which on the papers appear "manifestly unfounded" or abusive, have turned out, upon a hearing, to be patently well-founded. Conversely, cases which at first sight appear unassailably strong turn out, in the event, to be without substance. The Refugee Status Appeals Authority has firmly rejected the notion of so-called manifestly unfounded claims.[32] In this context it is to be noted that last year Canada abandoned the first tier "credible basis" enquiry after it was found that in excess of ninety per cent of all cases satisfied this threshold. It was a waste of resources to continue with a pointless first level enquiry. All cases are now referred to the Immigration and Refugee Board Convention Refugee Determination Division for hearing.

Second, the grant or refusal of legal aid on the basis of the "likely" outcome of the case is inherently problematical. There are limits to the degree to which the outcome of one case can inform the likely result of another. Human rights conditions in most countries of origin are in a state of flux. A fear which is determined to be not well-founded at one point might later become well-founded and vice versa. Equally, the understanding or knowledge of human rights conditions possessed by the New Zealand decision-maker might change. This has happened in recent times with the Punjab claims. The Refugee Status Appeals Authority initially took the view that in cases involving fear of persecution at the hands of state agents, the option of relocation within India (otherwise known as the internal flight alternative) was available in many (but not all) cases. However, over the past few months, on the basis of new country information, the Refugee Status Appeals Authority has re-assessed the situation and is now less likely to find that the prescribed test for relocation has been satisfied.[33] Were its earlier line of decisions to be used as a means of denying legal aid in like cases, a great injustice would result. Cases which deserve legal aid would be refused. This very situation has already occurred (albeit in a slightly different context), but was fortunately corrected by the Legal Aid Review Authority on appeal.[34]

The further and perhaps decisive justification for legal aid in the refugee determination process is that it engages the skill and experience of the legal profession. The lawyer becomes the medium through whom the asylum seeker can communicate, at a meaningful level, with "the system" and vice versa. Without this communication facility, the refugee determination process inevitably becomes less efficient and more expensive. A brief examination of the difficulties encountered by the lawyer in refugee cases highlights the considerable value of any legal aid investment.

The lawyer in the refugee determination process

The role of the lawyer in the refugee determination process is to assemble, present and argue the claimant's case. This, however, is easier said than done. Formidable obstacles present themselves:

32 *Refugee Appeal No 1/92 Re SA* (30 April 1992) 12.

33 The test for relocation is set out in *Refugee Appeal No 135/92 Re RS* (18 June 1993) 25 and *Refugee Appeal No 523/92 Re RS* (17 March 1995).

34 See *Decision 76/94* [1994] NZAR 284 (7 March 1994).

1 *Language*

Client and lawyer deal with each other across a language barrier. Few trained interpreters make themselves available without charge. Fees in the private sector range up to NZ$90 an hour for fully trained interpreters.[35] More often than not, unskilled friends or even other asylum seekers are employed. The accuracy of the translations is very much at large. This can later lead to (unjustified) credibility challenges when apparent "discrepancies" and "inconsistencies" emerge.

2 *Trust*

It cannot be assumed that asylum seekers will immediately trust their legal advisor. They are most often suspicious of all authority figures. Trust must be won. This takes time. The legal aid grant must make allowance for this factor.

3 *Process of obtaining account of claim*

The process of obtaining a comprehensive and articulate account of the asylum seeker's claim is a time-consuming and arduous task. Yet it is perhaps the most important the lawyer will undertake. Frequently a statement written in the asylum seeker's own language must be translated and then gone through again, picking up threads, filling in gaps and exploring untouched areas. The need for an accurate translation is critical.

4 *Documents*

Documents in a foreign language must be translated. If the legal aid grant makes no provision for the very substantial charges levied by the private sector the claimant will be prejudiced. An accurate translation provided by a reputable Auckland translation agency costs NZ$45.00 per 100 words.

5 *Forensic reports*

Frequently asylum seekers have been victims of torture or other cruel, inhuman or degrading treatment or punishment. It is essential that a forensic medical report be obtained to confirm the individual's claims. The report is a very important piece of information given that the Refugee Status Appeals Authority has developed a specialized jurisprudence for torture victims.[36] Unless funding is available for the obtaining of a forensic report, severe prejudice might result.

6 *Jurisprudence*

As anyone familiar with the works of Grahl-Madsen,[37] Professor Goodwin-Gill,[38] and Professor Hathaway[39] will appreciate, refugee jurisprudence is substantial and evolving. In New Zealand, a number of important decisions have been delivered by the Refugee Status Appeals Authority over the past four years.[40] Since 1993, immigration and refugee

35 Grant Bradley, "Interpreters' training feared to be lacking", *New Zealand Herald,* Tuesday, 5 April, 1994.
36 *Refugee Appeal No 135/92 Re RS* (18 June 1993).
37 *The Status of Refugees in International Law Vols 1 and* 2 (1966).
38 *The Refugee in International Law* (1983).
39 *The Law of Refugee Status* (1991).
40 A computerized database of Appeal Authority decisions has been created and is available at the Davis Law Library, Faculty of Law, The University of Auckland. As at 30 June 1995, approximately 1400 case abstracts were held on this database.

law has been taught at the Faculty of Law, The University of Auckland. Responsible practitioners cannot ignore New Zealand and overseas jurisprudence in the preparation of a case. Research takes time.

No doubt the list of difficulties can be lengthened. The point being made is that as at the present time a standard grant of legal aid in the sum of NZ$1,500 could hardly be said to be excessive remuneration bearing in mind first, that the grant includes the preparation and filing of a mandatory memorandum[41] and second, the half-day appearance itself.

It can be said unhesitatingly that without the willing and enthusiastic participation of the legal profession, the work of the Refugee Status Appeals Authority would be substantially hindered. If the case is not adequately prepared, the Authority itself has to extract the information and explore every aspect of the claim at the hearing. This substantially increases the length of the enquiry and results in a far greater cost than the legal aid fee that is otherwise "saved".

The new legal aid regime—concerns

Since the termination of legal aid at first instance, the Authority has noted several developments, the following included:

(1) There are more cases involving appellants in person. These cases often take twice as long to hear and even then, investigation of the facts is on occasion less thorough than it would have been had the case been properly prepared in advance by a lawyer.

(2) All too often appellants do not discover their eligibility for legal aid until just prior to the appeal hearing. As a result, lawyers are engaged at the last moment. Adjournment applications in such cases are becoming more frequent, resulting in wasted resources.

(3) Even in cases where legal aid has been granted, untranslated documents are frequently tendered with the explanation that the legal aid grant is insufficient to cover the cost of obtaining a translation.

(4) All too frequently forensic medical reports are not obtained due to financial constraints.

(5) More often than not, little in the way of country of origin material is produced due to the absence of funds to engage in meaningful research.

(6) Frequently, credibility determinations are hampered to a considerable degree by the fact that:

  (a) Written statements are departed from with the explanation that there has been a translation error.

  (b) As appellants were not represented at the first level hearing, statements made at that hearing may not be a reliable indication of what the individual intended to say.

The list can be lengthened.

41 See RSAA *Practice Note 1* of 1991.

The point being made is that the Refugee Status Appeals Authority, which has no budget, staff, or resources of its own, is more often than not now required to spend many more hours than before properly investigating refugee claims. Given its lack of resources and the appellants' similar lack, the risk of arriving at an erroneous decision is substantially increased.

To translate the foregoing into accounting language, the withdrawal of legal aid at first instance and a parsimonious grant on appeal is false economy. First, because there are now more appeals to the Refugee Status Appeals Authority as a result of the inadequate case presentation at first instance. Second, because appeals become more lengthy due to poor preparation, they cost the State more. The point has been succinctly put (albeit in a different geographical context) by Stefanie Grant:[42]

> Well-prepared applications are dealt with more quickly, and so more cheaply, by the Home Office. Interviews are expensive; when the case is fully put in the initial papers, they are not needed. If the refugee is properly advised and the case properly prepared, fewer will go to appeal. With competent lawyers acting at an early stage there are enormous savings in the appeal process—and later in the Divisional Court.

It must not be thought that the legal aid regime under the Legal Services Act 1991 affects only the Refugee Status Appeals Authority. The impact is felt just as much at first instance by the Refugee Status Branch. This was recognized in the Wilson Report:[43]

> The work of the Refugee Status Officers is, I believe, likely to be made more difficult by recent changes to legal aid. Until the end of January 1992, legal aid was available under the provisions of the Legal Aid Act 1969 for the preparation of applications for refugee status and for appearing for applicants at the interview with the Refugee Status Officer. The Refugee and Migrant Service was therefore able to arrange for applicants to obtain legal advice from lawyers experienced in the field. On 1 February 1992 however the Legal Services Act 1991 came into force. The effect of section 19(1)(e)(v) and (j) is that legal aid is no longer available for refugee status determination at the primary level. Unless advice is available to applicants from another source, the consequence will be, I believe, that more work is required of Refugee Status Officers because they will be required to draw out from the applicant much material which would previously have been extracted by the lawyer acting for the applicant and placed before the Immigration Service in a readily intelligible form. Officers will also face the difficulty which is inherent in combining the role of assisting the applicant and then adjudicating on his or her application.

The Wilson Report recommended that a non-governmental organization known as the Refugee and Migrant Commission, or at least one of its agencies known as the Refugee and Migrant Service (RMS) receive government funding in order to provide a refugee advocacy service:

42 "Refugees and Rhetoric" (1991) 141 New Law Journal 961, 962.

43 W M Wilson, *Report to the Rt Hon W F Birch, Minister of Immigration, on the Process of Refugee Status Determination* (1992) 11.

> Fourthly, to compensate at least in part for the unavailability of legal aid, the Refugee and Migrant Service should receive additional funding of say $200,000 per year to enable it to provide an advice and support service for applicants preparing for and appearing at an interview. That sum should be increased by say $25,000 in the first year to cover start-up costs and training. It should also be reviewed year by year and reduced if the work load decreases. These costs would I think be more than offset by savings to the Immigration Service through having cases well-presented to it and by reduced legal aid expenditure through fewer appeals being argued on legal aid after an application has failed because of inadequate presentation.[44]

However, this recommendation has not been implemented and no government funding for a refugee advice and support service has been forthcoming.

In 1991, the RMS predicted (correctly) that removal of the right to legal aid at the first level of determination would result in a rapid decline in the number of lawyers prepared to represent refugee status applicants prior to appeal. In 1991–1992, the RMS Asylum Office dealt with case work for 270 clients of which 246 (91%) were referred to lawyers for legal advice.[45]

In 1992–1993, the RMS dealt with 106 cases, referring only 44 to lawyers (41%). Sixty-one cases were fully represented by the RMS itself.[46]

In the result, the RMS sustained an operating deficit of close to NZ$80,000 in the 1992–1993 year. It is understood that the operating deficit for the 1993–1994 year is NZ$108,656.

In the absence of government funding for the Asylum Office, it is difficult to see how the RMS can continue to sustain deficits of this size.

Conclusion

The withdrawal of legal aid for hearings at first instance before the Refugee Status Branch has not been in the interests of justice and has had the effect of transferring costs from one part of the system to the other (the appellate level). The attempt by one non-governmental organization to fill the gap has been at considerable cost to its meagre resources.

The debate concerning legal aid for asylum seekers will not be advanced at a meaningful level until account is taken of the fact that the Refugee Status Branch and the Refugee Status Appeals Authority comprise a unique body charged with the responsibility of ensuring that New Zealand honours its treaty obligations under the Refugee Convention. It is an onerous responsibility which has no parallel in New Zealand domestic law. An erroneous decision, by the very nature of the subject matter, carries with it the real chance of the refugee being subjected to persecution, torture or death. The interests of justice alone require that those making decisions on refugee status be assisted by the legal profession. The corollary is that legal aid at a realistic level must be made available at both levels of decision-making.

44 Ibid, p 16.
45 These figures are taken from the Refugee and Migrant Service *Annual Report 1992-93*, 8.
46 Ibid, p 8.