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THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS STANDARDS IN NEW ZEALAND: THE REFUGEE CONVENTION

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INTRODUCTION

[1] New Zealand is a State party to both the Convention relating to the Status of Refugees 1951 and the Protocol relating to the Status of Refugees, 1967 (the Refugee Convention) and has thereby assumed a non-derogable duty not to expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.[2] The persons to whom this obligation is owed are those who satisfy the refugee definition in Article 1A(2) of the Convention, namely persons who:

> ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term the country of his nationality shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

[2] The implementation of the non-refoulement obligation is therefore a matter of some significance to New Zealand at both the international level (the duty to perform treaty obligations in good faith) and the domestic level (the practical implementation of that duty).

[3] Beyond domestic incorporation is the equally important question of the proper interpretation of Article 1A(2). The refugee definition does not itself articulate expressly those human rights which, if denied, give rise to a circumstance that can properly be described as a risk of being persecuted. Nor does the Refugee Convention contain any provision addressing the question whether individuals have a duty to avoid the risk of being persecuted, that is, whether they should forego the exercise of a fundamental human right in order to avoid the harm which might follow from the exercise of that right. All of these fundamental issues are left to interpretation.

[4] The domestic incorporation of the Refugee Convention and its interpretation by domestic tribunals is therefore a question of no little importance.

THE DOMESTIC INCORPORATION OF TREATIES

[5] In a common law-based system the domestic law path to international human rights is at times complicated and hazardous. This is because the Executive may enter into treaty obligations, but only Parliament can enact legislation. The twin doctrines of separation of powers and parliamentary sovereignty mean that domestic law and obligations under international treaty law are treated as independent systems. International treaty obligations are not binding in domestic law until they have been incorporated by legislative action.3

[6] There have been notable attempts by the judiciary in several common law jurisdictions to ameliorate this rule, particularly in the case of unincorporated human rights treaties, most often the International Covenant on Civil and Political Rights, 1966, the Convention on the Rights of the Child, 1989 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (Torture Convention). The aim of this paper is not to explore the propriety of these attempts.4 It is sufficient only to note that some have foundered, as in Australia where the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*5 was instantly neutralised by the Executive of the Federal Government in *Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch - International Treaties and the High Court decision in Teoh* (10 May 1995). This has led to fundamentally differing views as to whether any role has been left for international human rights conventions in Australian domestic law.6 In the Supreme Court of the United States of America, the majority in *Lawrence v Texas* notably referred to international human rights jurisprudence to support the proposition that a Texan law criminalizing private adult homosexual conduct was invalid by the standards of the US Constitution.7 Justice Scalia, a member of the dissenting minority, described the majority discussion of foreign views as meaningless dicta and was of the view that the Supreme Court should not impose foreign moods, fads, or fashions on Americans .8 One commentator has described the possible outcome of the majority decision

as heralding a jurisprudence of unexperienced rights ... that is truly untethered, permitting the [Supreme] Court to roam the world freely, fashioning due process guarantees based on its own conception of the common good and international human rights tribunals are described as providing fertile soil for such unfettered constitutionalism .9 In Canada, on the other hand, while it has been said that since the Canadian Charter of Rights and Freedoms, 1982, the Supreme Court of Canada has been much more proactive in bringing international human rights law and comparative law into domestic decision-making, one commentator has very recently asked whether the integration of international human rights law may have gone too far, limiting if not impeding the forward-looking protection of the Charter.10

[7] In New Zealand it has been suggested that the new dawn promised in *Tavita v Minister of Immigration*11 has led to doctrinal confusion of serious proportion in that, in post-*Tavita* jurisprudence the Court of Appeal has adopted two potentially inconsistent conceptual models to explain the relevance of unincorporated treaties to administrative power.12 The first model is that unincorporated treaties may amount to a mandatory relevant consideration that decision-makers are obliged to have regard to (the mandatory relevant consideration model). The second is that when interpreting legislation, the courts will presume that Parliament did not intend to legislate contrary to New Zealand s international obligations (the consistency model). It has been pointed out that an aspect of the tension between these two models is that the first is limited to issues of process (the considerations the decision-maker must take into account), whereas the second is not so confined. Unincorporated treaty obligations under the consistency model can dictate the ***outcome***. Beyond this tension is the (so far) largely neglected significance of s 6 of the New Zealand Bill of Rights Act 1990.13

[8] The most notable decisions of the Court of Appeal in which the consistency model has been applied are *New Zealand Air Line Pilots Association Inc v Attorney-General*14, *Sellers v Maritime Safety Inspector*15 and *Wellington District Legal Services Committee v Tangiora*.16 The consistency principle was most clearly articulated in *New Zealand Air Line Pilots Association Inc v Attorney-General*17:

> We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand s international obligations, eg *Rajan v Minister of Immigration* [1996] 3 NZLR 543 at p 551. That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text. So this Court in interpreting guardianship legislation enacted to give effect to the Hague Convention on the Civil Aspects of International Child Abduction has said that it is incumbent on it to construe the Act in a manner that will as far as possible give effect to that purpose, *Gross v Boda* [1995] 1 NZLR 569 at pp 573 and 574. And it read the general language of the Employment Contracts Act 1991 conferring jurisdiction on the Employment Court as not overriding the customary international law of sovereign immunity. In the absence of such an approach almost any general statute would displace well-settled doctrines accepted by New Zealand in its international relations, *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 at pp 430 and 438. In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates. A related instance appears in the references to good faith compliance with obligations in the Charter of the United Nations and the Vienna Convention on the Law of Treaties in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at p 682; see also *Commissioner of Inland Revenue v JFP Energy Inc* [1990] 3 NZLR 536 at p 540.
>
> The application of the presumption depends on both the international text and the related national statute.

[9] It is a striking feature of the New Zealand statutory provisions governing refugee determination that both the consistency model and the mandatory relevant consideration model

have been employed by Parliament. Refugee ***decision-makers*** are required to act in a manner consistent with New Zealand s obligations under the Refugee Convention 18, while immigration officers ***not*** involved in refugee determination but engaged in administering the Immigration Act 1987 generally, must have regard to the Convention when making decisions in relation to a refugee or a refugee status claimant.19 While this may not be quite what Oscar Wilde had in mind when he observed that:

> All that I desire to point out is the general principle that Life imitates Art far more than Art imitates Life.20

it is remarkable that Parliament has in this legislation replicated the public law divide between the two conceptual models applied to unincorporated treaty obligations and vividly illustrates why the mandatory relevant consideration model is undoubtedly of a qualitatively inferior kind to the consistency model.21

[10] But the purpose of this paper is not to explore the point. Rather, it is to describe how the Refugee Status Appeals Authority (RSAA) has interpreted and applied its statutory duty to act in a manner consistent with New Zealand s obligations under the Refugee Convention. As will be seen, it has used s 129D of the Immigration Act 1987 to import into domestic law the human rights standards contained in the Universal Declaration of Human Rights, 1948 (UDHR), the International Covenant on Civil and Political Rights, 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD), the Convention on the Elimination of Discrimination Against Women, 1979 (CEDAW) and the Convention on the Rights of the Child, 1989 (CRC). The application by the RSAA of an international human rights standard in refugee determination is the point of difference between the Authority s decision in *Refugee Appeal No. 74665/03* (7 July 2004) and the problematical, if not controversial, decision of the High Court of Australia in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*.22 Both decisions address the question of how one determines whether the denial of a fundamental human right can sensibly be described as a risk of being persecuted and thus satisfy the refugee definition. While the outcome in both cases was the same (homosexuals cannot be expected to deny their sexual orientation), the New Zealand approach analysed the issue within a framework of international human rights. The Australian analysis made no reference to human rights.

[11] Before explaining the Authority s interpretive approach to the Refugee Convention it is necessary to examine briefly the relevant provisions of the Immigration Act 1987.

THE STATUTORY DUTY TO ACT IN A MANNER CONSISTENT WITH THE REFUGEE CONVENTION

[12] The New Zealand refugee status determination procedures were placed on a statutory footing by the Immigration Amendment Act 1999.23

[13] The 1999 Amendment Act provides two statements of the object of the new Part 6A on Refugee Determinations which it introduced. According to the long title, it is an Act to:

> (b) Create a statutory framework for determining refugee status under the Refugee Convention.

[14] However, as recognised in *Attorney-General v E*24, s 129A puts the matter more broadly:

> **129A Object of this Part** - The object of this Part is to provide a statutory basis for the system by which New Zealand ensures it meets its obligations under the Refugee Convention.

[15] The major substantive provisions aimed at giving effect to the Refugee Convention are ss 129C, 129D and 129X:

> **129C. Refugee status to be determined under this Part -**
>
> (1) Every person in New Zealand who seeks to be recognised as a refugee in New Zealand under the Refugee Convention is to have that claim determined in accordance with this Part.
>
> (2) Every question as to whether a person in New Zealand should continue to be recognised as a refugee in New Zealand under the Refugee Convention is to be determined in accordance with this Part.
>
> **129D. Refugee Convention to apply -**
>
> (1) In carrying out their functions under this Part, refugee status officers and the Refugee Status Appeals Authority are to act in a manner that is consistent with New Zealand s obligations under the Refugee Convention.
>
> (2) The text of the Refugee Convention is set out in the Sixth Schedule.
>
> **129X. Prohibition on removal or deportation of refugee or refugee status claimant -**
>
> (1) No person who has been recognised as a refugee in New Zealand or is a refugee status claimant may be removed or deported from New Zealand under this Act, unless the provisions of Article 32.1 or Article 33.2 of the Refugee Convention allow the removal or deportation.
>
> (2) In carrying out their functions under this Act in relation to a refugee or a refugee status claimant, immigration officers must have regard to the provisions of this Part and of the Refugee Convention.

[16] Sections 129F and 129L also require determinations to be made in accordance with particular aspects of the definition of refugee status set out in Articles 1C, 1D, 1E and 1F of the Refugee Convention.

[17] However, the only provisions of the Refugee Convention directly incorporated into domestic law are those identified in s 129X(1) namely Article 32(1) and Article 33(2). In *Attorney-General v Refugee Council of New Zealand Inc* McGrath J, while describing the 1999 provisions as giving the Refugee Convention legislative effect and incorporating it into New Zealand s domestic law, nevertheless drew attention to the fact that s 129X(1) makes a distinction between direct and indirect implementation[25]:

> ... it is not surprising that in incorporating the refugee convention into New Zealand legislation Parliament used a formula giving some but not all of its provisions the force of law. The expression of a duty under domestic law as being to have regard to a treaty duty can reflect a perception that the international obligation is an inappropriate standard in itself for more direct implementation.

[18] Because the plain general purpose and effect of ss 129A, 129C, 129D and 129X is to ensure compliance with the Refugee Convention,[26] which has thereby been given legislative effect in New Zealand,[27] the RSAA has not found it necessary to give s 129D detailed consideration. In fact the provision has been referred to in only two decisions of the RSAA, and even then, only in passing.[28] However, the unarticulated yet unmistakably clear premise of the Authority s

jurisprudence post 1 October 1999 has been that the terms of the Refugee Convention and Protocol govern the making of refugee determinations in New Zealand.

INTERPRETATION OF THE REFUGEE DEFINITION

THE PRINCIPLES OF INTERPRETATION

[19] To discharge the statutory duty to act in a manner consistent with New Zealand s obligations under the Refugee Convention, the RSAA has applied to the Refugee Convention, not the Interpretation Act 1999, but the principles of customary international law applicable to the interpretation of treaties. This is because the Vienna Convention on the Law of Treaties, 1969 (Vienna Convention) post-dates the Refugee Convention and is therefore inapplicable.29 However, as the Vienna Convention constitutes an authoritative statement of customary public international law on the interpretation of treaties, the Vienna Convention is referred to by the RSAA as a matter of convenience.30

[20] The general rule of interpretation is contained in Article 31 of the Vienna Convention and requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context includes, in addition to the text, the preamble.31 Significantly, the opening recital of the Preamble to the Refugee Convention states:

> ***Considering*** that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

[21] Particular note is to be taken of the explicit reference to the UDHR.

[22] Application of the holistic terms, context, object and purpose rule to the being persecuted limb of the refugee definition led the Supreme Court of Canada in *Canada (Attorney General) v Ward*32 to conclude that underlying the Refugee Convention is the commitment of the international community to the assurance of basic human rights without discrimination. In so holding, the Supreme Court explicitly drew on the first recital in the Preamble33:

> This theme [contained in the first paragraph of the Preamble] outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. Hathaway, *supra*, at p.108, thus explains the impact of this general tone of the treaty on refugee law:
>
> > The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.
>
> This theme sets the boundaries for many of the elements of the definition of Convention refugee . Persecution , for example, undefined in the Convention has been ascribed the meaning of sustained or systemic violation of basic human rights demonstrative of a failure of state protection ; see Hathaway, *supra*, at pp.104-105 .

[23] The relevance of the Preamble to the interpretation of the Refugee Convention was also recognised in *R v Immigration Appeal Tribunal; Ex parte Shah*34. Lord Steyn described the Preamble as significant for expressly showing that the premise of the Refugee Convention was that all human beings shall enjoy fundamental rights and freedoms and more pertinently, they

show that counteracting discrimination was a fundamental purpose of the Convention.35 In the same case Lord Hoffman stated36:

> In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect.

[24] Drawing on these principles the RSAA has for some number of years followed the understanding of " being persecuted" articulated by Professor Hathaway in *The Law of Refugee Status*37, namely that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard. In other words, core norms of international human rights law are relied on to define forms of serious harm within the scope of being persecuted.38 This is also the approach now taken in the United Kingdom.39

[25] The human rights approach to " being persecuted" has been applied by the RSAA in a number of different contexts including sexual orientation40; gender based persecution41; racial discrimination42 and in relation to privacy, religion and family rights.43

IDENTIFYING CORE HUMAN RIGHTS

[26] Recognising that " being persecuted" may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection, the question which arises is how one identifies " basic human rights" .

[27] The Authority has found customary international law of limited assistance primarily due to the difficulty in establishing the two essential elements (State practice and *opinio juris*) and because only a small handful of human rights can be established in customary international law.44

[28] Instead, the Authority has relied on international human rights treaties principally because the Preamble reference to the UDHR provides guidance as to the human rights to which reference should be made in the determination of refugee status. Since the human rights enunciated in the UDHR were subsequently translated into binding treaty form by the ICCPR and the ICESCR, the three instruments must be read together. It follows that on accepted principles of treaty interpretation the phrase " being persecuted" is appropriately to be understood against the background of these norms. Professor Hathaway in his *Law of Refugee Status* explains the point in the following terms45:

> Among the myriad treaties, declarations, rules and other standards adopted by states, the International Bill of Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, is central. More than any other gauge, the International Bill of Rights is essential to an understanding of the minimum duty owed by a state to its nationals. Its place derives from the extraordinary consensus achieved on the soundness of its standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords. Reference to the International Bill of Rights in deciding whether or not a state has failed to provide basic protection in relation to core, universally recognised values is moreover consistent with the Convention" s own Preamble and General Assembly Resolution 2399 (XXIII).

[29] Returning to the subject in an address given in 1998 in Ottawa to the International Association of Refugee Law Judges, Professor Hathaway points out that reliance on core norms

of international human rights law (as contained in treaties) to define forms of serious harm within the scope of "being persecuted" is not only compelled as a matter of law, but makes good practical sense, for at least three reasons[46]:

1. We must look at ***how states themselves*** have defined unacceptable infringements of human dignity if we want to know which harms they are truly committed to defining as impermissible. Human rights law is precisely the means by which states have undertaken that task.

2. Refugee decision-makers who use human rights law to define harms within the scope of "being persecuted" are not combatting the views of governments, but rather relying on the very standards which governments have said to be minimum standards. This is what he calls a dynamic "dialogue of justification".

3. International human rights law provides refugee law judges with an automatic means - within the framework of legal positivism and continuing accountability - to contextualise and update standards in order to take new problems into account. Because international human rights law is constantly being authoritatively interpreted through a combination of general comments, decisions on individual petitions, and declarations of UN plenary bodies, there is a wealth of wisdom upon which refugee decision-makers can draw to keep the Convention refugee definition alive in changing circumstances. This flexibility of international human rights law makes it possible to address new threats to human dignity through refugee law, but to do so without asserting either subjective or legally ungrounded perceptions of "what's right, and what's wrong".

[30] Elaborating on the capacity of international human rights law to update itself, Professor Hathaway went on to suggest that while his *Law of Refugee Status* (1991) restricted itself to the UDHR, the ICCPR and the ICESCR, with the benefit of nearly (then) eight years of progress on human rights law, he acknowledged that one could today interpret "being persecuted" by reference to an enlarged set of international human rights instruments. However, he cautioned that one should not rush to embrace every new Convention on human rights, much less mere declarations or statements of principle as legally relevant to defining harms within the scope of "being persecuted". In his IARLJ paper he said[47]:

> If we believe that the standards relied on should ***really*** be agreed by states to be authoritative, if we believe in the importance of genuine accountability through a dialogue of justification with governments, in short, if we want refugee status determination to be taken seriously as ***law-based*** rather than as an exercise in humanitarian "do-goodism", then we have to exercise some responsible constraint on the impulse to embrace every new human rights idea that comes along.

[31] Conceding that drawing the bright line is not a simple task, Professor Hathaway made the following suggestions in his address[48]:

> At a minimum, though it seems to me that a commitment to legal positivism requires, first, that we focus on ***legal*** standards - primarily treaties - not on so-called "soft law" which simply doesn't yet bespeak a sufficient normative consensus. While we can logically resort to these evolving standards as a means to contextualize and elaborate the substantive content of genuine legal standards, they should not, in my view, be treated as authoritative in and of themselves.
>
> Second, as among authoritative legal standards, it is important not to rely on treaties that remain short on serious support from states. Until and unless we are able honestly to say that a given treaty enjoys general support, it ought not to be used to interpret a term in what is meant to be a ***universal*** treaty on refugee protection. In practical terms, one might

> reasonably consider looking for ratification of a given treaty by a respectable super-majority - for example, two thirds of the United Nations membership, including some support in all major geo-political groupings.

[32] Applying this test Professor Hathaway was of the view that one could today interpret " being persecuted" by reference not only to the International Bill of Rights, but also by consideration of CERD, CEDAW and CRC.

[33] These views were adopted by the RSAA in *Refugee Appeal No. 71427/99*.[49] In so doing it explicitly rejected the claims made by some that such approach will lead to ossification[50] or to an impermissibly narrow reading of " being persecuted" .[51] The RSAA stressed that international human rights instruments are " living instruments" , constantly evolving and developing, as has been expressly recognised by the European Court of Human Rights in *Goodwin v United Kingdom* where the following observations were made in the context of the non-recognition in English law of gender reassignment and the failure by the United Kingdom to comply with its positive obligation to ensure the applicants" right to respect for their private lives[52]:

> While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, forseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases [citation omitted]. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved ... It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement ...

[34] The same interpretive approach has been explicitly recognised as appropriate in the context of the Refugee Convention. In *Sepet v Secretary of State for the Home Department* Lord Bingham (with whom Lords Steyn, Hutton and Rodger agreed) said[53]:

> It is also, I think, plain that the Convention must be seen as a living instrument in the sense that while its meaning does not change over time its application will. I would agree with the observation of Sedley J in *R v Immigration Appeal Tribunal, Ex p Shah* [1997] Imm AR 145, 152: " Unless it [the Convention] is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism" . I would also endorse the observation of Laws LJ in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 500:
>
> > It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded.

Indeed *Sepet* is notable for the fact that a claim to refugee status based on a refusal to perform compulsory military service in the Turkish Army on conscientious grounds was determined by reference to international human rights norms.

[35] A further point made by the RSAA is that the universality of the ICCPR, ICESCR, CERD, CEDAW and the CRC will not permit social, cultural or religious practices in a country of origin from escaping assessment according to international human rights standards.[54]

[36] The Authority s decisions have also recognised that in addition to employing the international human rights instruments referred to, it is only appropriate that regard be had to the interpretation of those instruments by the treaty bodies set up under the instruments, particularly the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of all Forms of Discrimination Against Women, the Committee on the Elimination of Racial Discrimination and of the Committee on the Rights of the Child. The RSAA has given recognition to the fact that the binding effect and jurisprudential quality of the decisions of these bodies may be a matter of controversy.55 But the decisions (views) of the Human Rights Committee can be at least of persuasive authority.56

Four qualifications

[37] Qualifications must, however, be noted.

[38] First, in the context of Article 1A(2) of the Refugee Convention, the identification of basic human rights is directed to a single, limited end, namely the illumination of the meaning of the phrase being persecuted . There is no other purpose. The function of refugee law is ***palliative***. It does not hold states responsible for human rights abuses. The determination of refugee status is no more than an assessment whether, in the event of the refugee claimant being returned to the country of origin, there is a real chance of that person being persecuted for a Convention reason.57

[39] Second, only a highly select group of human rights treaties are to be the point of reference.58 This avoids the danger of over-inclusion. As Philip Alston points out, new rights can be claimed with little thought, debate or agreement. Not everything that may serve to improve the well-being of individuals can or should be accepted as a human right.59

[40] Third, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population.60 As Professor Hathaway explains61:

> As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm *per se*, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection. The existence of past or anticipated suffering alone, therefore, does not make one a refugee, unless the state has failed in relation to some duty to defend its citizenry against the particular form of harm anticipated.

[41] Fourth, few rights are expressed in absolute terms. Under the international human rights instruments earlier listed, the exercise of many rights may be restricted. Examples drawn from the ICCPR include freedom of movement (Article 12), freedom of religion (Article 18), freedom of expression (Article 19), right of peaceful assembly (Article 21) and freedom of association (Article 22). Each of these Articles contains a clause subjecting the particular right to (inter alia) the rights and freedoms of others . There are other limitations but they need not be noted here.62 These limitations recognise that since an individual lives in society with other individuals, the exercise of rights by one person must necessarily be regulated, and restricted to the extent necessary, to enable others to exercise their rights. The principle is encapsulated in Article 29 of the UDHR which explicitly recognises that everyone has duties to the community in which alone the free and full development of his or her personality is possible. In the exercise of his or her rights and freedoms, everyone is subject to limitations for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.63 Striking illustration of the application of this principle is to be found in the recent decisions of the European Court of Human Rights in *Refah Partisi (Welfare Party) v Turkey*64 and *Leyla Sahin v Turkey*.65

VOLUNTARY BUT PROTECTED ACTIONS

[42] Sometimes an applicant for refugee status will base his or her claim on the risk that would accrue in the country of origin if he or she were to engage in an activity there which should arguably be allowed as a legitimate exercise of basic, internationally recognised human rights. These cases have frequently proved troubling and difficult, and have usually been resolved with no clear articulation of relevant legal principles.66

[43] A striking example is provided by the recent decision of the High Court of Australia in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*.67 That case involved a refugee claim by two gay Bangladeshi men who feared serious harm in Bangladesh by virtue of their homosexuality. The High Court split over the interpretation of the Refugee Review Tribunal decision, the minority (Gleeson CJ, Callinan & Heydon JJ) being of the view that nothing unexceptional could be detected in the decision, while the majority (McHugh, Kirby, Gummow & Hayne JJ) interpreted the decision as saying that refugee claimants are required, or can be expected, to take reasonable steps to avoid persecutory harm. Thus it was reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society and to act discretely, rather than living openly as a homosexual. In their joint judgment Gummow & Hayne JJ explicitly rejected the human rights approach to understanding being persecuted . The joint decision of McHugh and Kirby JJ is notable for the absence of any meaningful discussion of being persecuted .68 They simply asserted that it would undermine the objective of the Refugee Convention if refugee claimants were required to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before they were given protection under the Convention.69 While one would readily agree with this statement, it is nevertheless a statement of a conclusion and the joint judgment offers no principled explanation as to why behaviour should not have to be modified or hidden. Both majority judgments fold the enquiry into the single issue of well-foundedness - is the person at real risk of harm? If the answer is in the affirmative, refugee status follows. The decision-maker does not analyse the nature and content of the human right being asserted.

[44] By way of contrast, in its recent decision in *Refugee Appeal No. 74665/03* (7 July 2004) the RSAA has held (in relation to a refugee claim by an Iranian homosexual) that understanding the predicament of being persecuted as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm.70 If the right proposed to be exercised by the refugee claimant in the country of origin is at the core of the relevant entitlement and serious harm is threatened, it would be contrary to the language context, object and purpose of the Refugee Convention to require the refugee claimant to forfeit or forego that right and to be denied refugee status on the basis that he or she could engage in self-denial or discretion on return to the country of origin; or, to borrow the words of Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, to exist in a state of induced self-oppression.71 By requiring the refugee applicant to abandon a core right the refugee decision-maker is requiring of the refugee claimant the same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct. The potential complicity of the refugee decision-maker in the refugee claimant s predicament of being persecuted in the country of origin must be confronted. The issue cannot be evaded by dressing the problem in the language of well-foundedness, that is, by asserting that the claim is not a well-founded one because the risk can or will be avoided.

[45] To determine whether the threat of serious harm faced by the particular refugee claimant in Iran could properly be described as a risk of being persecuted, the RSAA embarked on an extended analysis of sexual orientation as a human right. It noted that while sexual orientation is not explicitly recognised or mentioned as a human rights category in any of the human rights instruments to which reference has been made, sexual orientation has nevertheless been

recognised as engaging the non-discrimination provisions of Articles 2(1) and 26 of the ICCPR.72 In this respect the RSAA applied the decision of the Human Rights Committee in *Toonen v Australia* which had found the Tasmanian laws criminalising sexual relations between consenting adult males violated Mr Toonen's rights under Article 17(1) read in conjunction with Article 2(1) of the ICCPR in that the prohibition by law of consensual homosexual acts in private is a violation of the right to privacy.73 In exploring the limits of the right to privacy the Authority also drew on *Joslin v New Zealand*74, *Fretté v France*75 and a range of other decisions from the European Court of Human Rights which address not only the issue of non-discrimination but also the right to privacy.76 The Authority also drew on the decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, particularly the judgment given by Sachs J who emphatically rejected the dichotomy between equality and privacy in the context of anti-sodomy laws.77 The RSAA has expressed the view that in the refugee context the equality principle (enshrined in Article 26 of the ICCPR) cannot lightly put aside, given the centrality of the non-discrimination principle to the refugee definition, and the reference in the first recital of the Preamble to the Refugee Convention to the UDHR and its proclamation of the principle of the equality of all human beings.78

[46] The conclusions reached by the RSAA on voluntary but protected action follow79:

> **[114]** Understanding the predicament of "being persecuted" as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm. If the right proposed to be exercised by the refugee claimant in the country of origin is at the core of the relevant entitlement and serious harm is threatened, it would be contrary to the language context, object and purpose of the Refugee Convention to require the refugee claimant to forfeit or forego that right and to be denied refugee status on the basis that he or she could engage in self-denial or discretion on return to the country of origin; or, to borrow the words of Sachs J in *National Coalition for Gay and Lesbian Equality* at [130], to exist in a state of induced self-oppression. By requiring the refugee applicant to abandon a core right the refugee decision-maker is requiring of the refugee claimant the same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct. The potential complicity of the refugee decision-maker in the refugee claimant's predicament of "being persecuted" in the country of origin must be confronted. The issue cannot be evaded by dressing the problem in the language of well-foundedness, that is, by asserting that the claim is not a well-founded one because the risk can or will be avoided.
>
> **[115]** The human rights standard requires the decision-maker to determine first, the nature and extent of the right in question and second, the permissible limitations which may be imposed by the state. Instead of making intuitive assessments as to what the decision-maker believes the refugee claimant is entitled to do, ought to do (or refrain from doing), instead of drawing on dangerously subjective notions of "rights", "restraint", "discretion" and "reasonableness", there is a structure for analysis which, even though it may not provide the answer on every occasion, at least provides a disciplined framework for the analysis. A framework which is principled, flexible, politically sanctioned and genuinely international. Under the human rights approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of "being persecuted". A prohibition is to be understood to be within the ambit of a risk of "being persecuted" if it infringes basic standards of international human rights law. Where, however, the substance of the risk does not amount to a violation of a right under applicable standards of international law, it is difficult to understand why it should be recognised as sufficient to give rise to a risk of "being persecuted".

[47] In broad terms the difference between the RSAA and the majority in *Appellant S395/2002* could be said to be about the location of the analysis. Is it in the " being persecuted" element or in the well-founded element? The RSAA unambiguously took as its starting point the " being persecuted" element as it allows identification of the boundaries set by international human rights law for both the individual and the state. Once those boundaries have been identified it is possible to determine whether the proposed action by the claimant is at the core of the right or at its margins and whether the prohibition or restriction imposed by the state is lawful in terms of international human rights law. If the proposed action by the refugee claimant is at the core of the right and the restriction unlawful, the claimant has no duty to avoid the harm by being discrete or by complying with the wishes of the persecutor. If, however, the proposed activity is at the margin of the protected interest, then persistence in the activity in the face of the threatened harm is not a situation of " being persecuted" for the purposes of the Refugee Convention. The individual can choose to carry out the intended conduct or to act " reasonably" or " discretely" in order to avoid the threatened serious harm. None of these choices, however, engages the Refugee Convention.80

CONCLUSION

[48] The jurisprudence of the RSAA is a striking, if not unique, example of the domestic application of international human rights standards. That jurisprudence is qualitatively different to that found in cases which address the use of international materials in the interpretation of domestic statutes (as recently occurred in *Attorney-General v Refugee Council of New Zealand Inc*81). If and when the body of RSAA jurisprudence comes to be considered by the New Zealand courts on judicial review it will present special challenges. The dual system doctrine and the absence of an equivalent to the Human Rights Act 1998 (UK) duty on public authorities to act compatibly with a human rights convention means that the New Zealand courts have yet to be exposed to the issues which daily confront refugee decision-makers.82

Endnotes

1. The author is a member of the Refugee Status Appeals Authority. The opinions expressed are the personal views of the author. The decisions of the Refugee Status Appeals Authority cited in this paper may be accessed at the Case Search page of the *New Zealand Refugee Law* website <http://www.refugee.org.nz> and at the website of the Refugee Status Appeals Authority <http://www.nzrefugeeappeals.govt.nz>.
2. Refugee Convention, Article 33(1). The benefit of this 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 or she is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country: Article 33(2).
3. *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 224 line 15 (Cooke J), 229 line 1 (Richardson J) (CA); *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269, 280 (CA), both of which decisions cite *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347 (PC).
4. Nor does this paper explore the far broader issue of the degree to which human rights norms are challenging sovereignty in the New Zealand immigration context. For a recent examination of Australian and English case law which suggests that in those two countries the rule of law may be emerging as a counter to traditional executive free reign in matters of immigration law, see Catherine Dauvergne, " Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67 (4) MLR 588. A more detailed study is to be found in Nicholas Blake & Raza Husain, *Immigration, Asylum and Human Rights* (Oxford, 2003).
5. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA).

6. Contrast Justice AM North & Peace Decle, " Courts and immigration detention: " Once a jolly swagman camped by a billabong" " (2002) 10 AJ Admin L 5 with Justice Michael Kirby, " Chief Justice Nicholson, Australian Family and International Human Rights" (2004) 5 Melbourne Journal of International Law 221 and Wendy Lacey, " Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere" (2004) 5 Melbourne Journal of International Law 108.
7. *Lawrence v Texas* (2003) 156 L Ed 2d 508, 522, 524 (Kennedy J).
8. Ibid, 539 and see the general attack on the reference by the majority to the jurisprudence of the European Court of Human Rights as noted by Roger P Alford, " Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on *Lawrence v Texas*" 44 Va J Int" l L 913, 924 fn 72.
9. Roger P Alford, " Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on *Lawrence v Texas*" 44 Va J Int" l L 913, 926 & 929.
10. Anne Warner La Forest, " Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37 UBC Law Review 157, 160-162; 210-216.
11. *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).
12. Claudia Geiringer, " *Tavita* and all that: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.
13. The New Zealand Bill of Rights Act 1990, s 6 provides:

6. Interpretation consistent with Bill of Rights to be preferred - Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

See Janet McLean, Paul Rishworth & Michael Taggart, " The Impact of the New Zealand Bill of Rights on Administrative Law" Legal Research Foundation, *The New Zealand Bill of Rights Act 1990* (August 1992) 62.
14. *New Zealand Air Line Pilots" Association Inc v Attorney-General* [1997] 3 NZLR 269, 280 (CA).
15. *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 57 (CA).
16. *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129, 137 (CA) affirmed on other grounds in *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC).
17. *New Zealand Air Line Pilots" Association Inc v Attorney-General* [1997] 3 NZLR 269, 289 (CA).
18. Immigration Act 1987, s 129D. " Refugee Convention" means the United Nations Convention Relating to the Status of Refugees, done at Geneva on the 28th day of July 1951; and includes the Protocol Relating to the Status of Refugees done at New York on the 31st day of January 1967: s 2(1) definition of " Refugee Convention" . In this paper the Convention and the Protocol will be referred to as the " Refugee Convention" .
19. Immigration Act 1987, s 129X(2).
20. *Intentions* (1891) " The Decay of Lying" reproduced in *The Oxford Dictionary of Quotations* 4th ed (1992) 735.
21. Claudia Geiringer, " *Tavita* and all that: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 82-85.
22. *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 (McHugh, Kirby, Gummow & Hayne JJ; Gleeson CJ, Callinan & Heydon JJ dissenting).
23. The new Part 6A of the Immigration Act 1987 came into force on 1 October 1999. See the Immigration Amendment Act 1999, s 1(3). The context of the statutory amendments is reviewed in Rodger Haines, " International Law and Refugees in New Zealand" [1999] NZ Law Review 119.
24. *Attorney-General v E* [2000] 3 NZLR 257 at [28] & [29] (CA) (Richardson P, Gault, Henry & Keith JJ) Thomas J in his separate decision at [73] agreed with the majority on this point, stating that the Act is explicit in spelling out the overriding obligation to act in a manner which is consistent with Part 6A and the Refugee Convention. The Convention and Protocol are given explicit recognition in s 129A.
25. *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 at [93], [97] & [103] (CA) (McGrath J).

26. *Attorney-General v E* [2000] 3 NZLR 257 at [33] (CA) (Richardson P, Gault, Henry & Keith JJ); Thomas J at [73] agreeing.
27. *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 at [93] & [97] (CA) (McGrath J).
28. See *Refugee Appeal No. 71864/00* (2 June 2000) at [25]; *Refugee Appeal No. 72635/01* (6 September 2002); [2003] INLR 629 at [177].
29. Article 4 of the Vienna Convention on the Law of Treaties, 1969 provides:

Article 4

Non-retroactivity of the present Convention.

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

30. See most recently *Refugee Appeal No. 74665/03* (7 July 2004) at [43] - [50]. The High Court of Australia has held that in construing the text of an international convention set out in the schedule to an Act, regard should be had to the Vienna Convention on the Law of Treaties: *Commonwealth v Tasmania* (1983) 158 CLR 1, 93 (Gibbs CJ) and 222-3 (Brennan J) (HCA). More recently in *Morrison v Peacock* (2002) 192 ALR 173 at [16] (HCA) the High Court, in applying the Vienna Convention on the Law of Treaties, noted that treaties should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation. In so holding it referred to two of its leading decisions interpreting the Refugee Convention. In *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856 (HL) at [6] Lord Bingham (with whom Lords Steyn, Hutton and Rodger agreed) stated that interpreting the Refugee Convention one must respect Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969. See generally Paul Reuter, *Introduction to the Law of Treaties* (Pinter Publishers, 1989) at [62] and Anthony Aust, *Modern Treaty Law and Practice* (Cambridge, 2000) 8-11.
31. Vienna Convention on the Law of Treaties, 1969 Article 31(2).
32. *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (SC:Can).
33. Ibid, 733.
34. *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL).
35. Ibid, 638-639.
36. Ibid, 650-651.
37. James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 104 & 108.
38. See for example *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51]. This approach was approved in *DG v Refugee Status Appeals Authority* (High Court Wellington, CP213/00, 5 June 2001, Chisholm J) at [19] and [22].
39. *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495F, 501C, 512F, 517D (HL).
40. *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995); [1998] INLR 387.
41. *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) and *Refugee Appeal No. 71427/99* (16 August 2000); [2000] NZAR 545; [2000] INLR 608.
42. *Refugee Appeal No. 71404/99* (29 October 1999).
43. *Refugee Appeal No. 72558/01* (19 November 2002).
44. *Refugee Appeal No. 74665/03* (7 July 2004) at [63].
45. James C Hathaway, *Law of Refugee Status* (Butterworths, 1991) 106.
46. James C Hathaway, " The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute" in IARLJ, *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (1998) 80, 85.
47. Ibid, 86.
48. Ibid, 86.
49. *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51].
50. Catherine Dauvergne and Jenni Millbank, " *Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh*" (2003) 25 Sydney Law Review 97, 111-112.
51. See Volker Türk & Frances Nicholson, " Refugee Protection in International Law: An Overall Perspective" at 38-39 and Alice Edwards, " Age and Gender Dimensions in International

Refugee Law" at 50 & 66-67 in Feller, Türk & Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, 2003).
52. *Goodwin v United Kingdom* (2002) 35 EHRR 18 at [74] (ECHR).
53. *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856; [2003] 3 All ER 304 (HL) at [6].
54. This is fully explained in *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) at pp 19-28 and *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [52].
55. See *Refugee Appeal No. 72558/01* (19 November 2002). Contrast the views expressed by Elizabeth Evatt, a member of the Human Rights Committee, in " The Impact of International Human Rights on Domestic Law" in Huscroft & Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002) at 281, 295, 302 with the views expressed in two other papers published in the same text, namely Paul Rishworth, " The Rule of International Law?" *op cit* 267, 274 - 279 and Scott Davidson, " Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee" *op cit* 305-321.
56. *R v Goodwin (No. 2)* [1993] 2 NZLR 390, 393 (CA) and *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 206 ALR 130 (HCA) at [148] (Kirby J). See further *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129, 134-136, 144 (CA) and *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17, 20-22; [2000] 1 WLR 240, 244-246 (PC). Contrast *Briggs v Baptiste* [2000] 2 AC 40, 53 (PC) where, in the context of the Inter-American system the point made was that while it is to be expected that national courts will give great weight to the jurisprudence of the Inter-American Court, " they would be abdicating their duty if they were to adopt an interpretation of the [American] Convention [on Human Rights, 1969] which they considered to be untenable" . For observations as to the binding effect of decisions of the Committee against Torture, see *Ahani v Canada (Attorney General)* (2002) 208 DLR (4th) 66 at paras 34-40 (Ont. CA).
57. *Refugee Appeal No. 74665/03* (7 July 2004) at [75].
58. Ibid, [76].
59. Philip Alston, " Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) Am. J. Int" l L 613.
60. *Refugee Appeal No. 74665/03* (7 July 2004) at [77].
61. James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 103-104.
62. *Refugee Appeal No. 74665/03* (7 July 2004) at [85] & [122] - [123]. See generally Douglas Hodgson, *Individual Duty Within a Human Rights Discourse* (Ashgate, 2003); Nihal Jayawickrama, *The Judicial Application of Human Rights Law - National, Regional and International Jurisprudence* (Cambridge, 2002), Chapter 7 and Sir John Laws, " Human Rights and Citizenship" (2004) 55 NILQ 1.
63. Article 29 of the UDHR provides:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

64. *Refah Partisi (Welfare Party) v Turkey* (Application No. 41340/98, 13 February 2003) (Grand Chamber) (ECHR).
65. *Leyla Sahin v Turkey* (Application No. 44774/98, 29 June 2004) (Fourth Section) (ECHR).
66. Haines, Hathaway & Foster, " Claims to Refugee Status Based on Voluntary but Protected Actions" (2003) 15 IJRL 430.
67. *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 (HCA).
68. Ibid, [83]:

> Addressing the question of what an individual is ***entitled*** to do (as distinct from what the individual will do), leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning, exemplified by the passages from reasons of the tribunal in other cases, cited by the Federal Court in *Applicant LSLS v Minister for Immigration and Multicultural Affairs*, leads to error ... considering what an individual is entitled to do is of little assistance in deciding whether that person has a well-founded fear of persecution. [emphasis in original]

69. Ibid, [40] & [41].
70. *Refugee Appeal No. 74665/03* (7 July 2004) at [81]-[90].
71. *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 at [130].
72. *Refugee Appeal No. 74665/03* (7 July 2004) at [92].
73. Ibid, [97]; *Toonen v Australia* (Comm No 488/1992, UN Doc CCPR/C/50/D/488/ 1992, 4 April 1994) (HRC).
74. *Joslin v New Zealand* (Comm No 902/1999, UN Doc CCPR/C/75/D/902/ 1999, 30 July 2002) (HRC).
75. *Fretté v France* [2004] 38 EHRR 21 (ECHR).
76. See for example *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (ECHR), *Lustig-Prean and Beckett v United Kingdom* (2000) 31 EHRR 601 (ECHR) and *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 (ECHR).
77. *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6.
78. *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL), 639D per Lord Steyn and *Refugee Appeal No. 74665/03* (7 July 2004) at [114].
79. *Refugee Appeal No. 74665/03* (7 July 2004) at [114] & [115].
80. Ibid, [120].
81. *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) noted by Treasa Dunworth, Public International Law [2004] NZ Law Review 411, 415-418.
82. For an interesting account of the early challenges faced by the English judiciary under the Human Rights Act 1998 (UK) in the immigration and asylum context, see Nicholas Blake & Raza Husain, *Immigration, Asylum and Human Rights* (Oxford, 2003) 1-17.