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**DETENTION OF REFUGEES IN NEW ZEALAND
LAW:
STRIKING A BALANCE BETWEEN REFUGEE
RIGHTS AND NATIONAL SECURITY**

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I INTRODUCTION

New Zealand, as a sovereign State, has both the right and the duty to control its borders. One of the most effective ways of exercising this control is to detain those who the State does not want to enter. This not only prevents that unwanted person from entering the community, but also deters other undesirables from trying to do so.

However, New Zealand has voluntarily limited this right to control its border by acceding to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol (the Convention¹), which require that certain rights be afforded to refugee status claimants that other illegal aliens do not enjoy. This special treatment is in recognition of the difficult circumstances refugees face. In particular, it is often difficult for them to obtain valid travel and entry documents for the country where they wish to seek asylum. Article 31 of the Convention stipulates that refugees should only be detained where necessary; the mere fact that they do not have valid documents is, of itself, not enough to warrant detention.

Events of the past year highlight the conflicts that can arise between these different interests, and the impact this has on the way refugees are dealt with. On the one hand the terrorist attacks of September 11, and the concerns about people smuggling which were raised by the Tampa affair, focussed attention on the importance of national security. On the other, the widespread condemnation of the actions of the Australian Government in relation not only to the Tampa refugees, but also to refugees generally, reinforced the need for acceptable standards of treatment of refugees internationally.

As the New Zealand Representative, Sarah Paterson, said to the United Nations General Assembly

The recent Tampa incident in the West Pacific brought home sharply to New Zealand and other countries in our region that even geographic isolation does not make us immune to the problems of people smugglers and illegal migration. The activities of these criminals has pushed the issues of irregular and illegal migration to new levels of exploitation, conflict and, often, human tragedy. And they are putting the international refugee protection framework under increasing stress.²

Thus the State needs to accommodate the rights of refugee status claimants under the Convention, with the right of the Crown to defend its borders. The question is whether New Zealand has found the appropriate balance.

In New Zealand, the statutory authority for the detention of illegal immigrants is found in section 128(5) of the Immigration Act 1987. Two recent developments have modified the position as to detention of refugee status claimants under this section. The first is the judgment of Baragwanath J in *Refugee Council of New Zealand and the Human Rights Foundation Aotearoa New Zealand and D v Attorney General*,³ in which he interpreted section 128(5), and in particular whether it can apply to refugee status claimants. The second is the Immigration Amendment Act 2002, which inserted a new section 128AA providing for conditional release of those detained under section 128(5). In this paper I will discuss both of these developments in light of New Zealand's international obligations. Have we achieved the correct balance between national security and liberty of the person? Are we any closer to it?

II IMMIGRATION ACT 1987 (PRIOR TO 2002 AMENDMENTS)

The principal Act in New Zealand dealing with refugees and providing for their detention on arrival in this country is the Immigration Act 1987. An analysis

¹ For ease of reference this term will be used to describe both the Convention and the Protocol combined.

² Sarah Paterson, New Zealand Representative to the United Nations, Third Committee: Item 114: Report of the High Commissioner for Refugees, Questions relating to Refugees, Returnees and Displaced Persons and Humanitarian Questions (19 November 2001) <<http://www.un.int/newzealand/humanrt.htm>> (last accessed 28 June 2002).

³ (27 June 2002) High Court Auckland M1881-AS01.

of this Act and the way it has been interpreted, is necessary in order to determine whether the right balance has been struck.

◁The Immigration Act 1987 was amended in 1999 to deal specifically with refugee status claimants. From the debates in Parliament it is evident that in passing the Immigration Amendment Act 1999 (No 1), Parliament sought to improve the balance between refugees' rights, and the need to control our borders. It was aimed at "ensuring that people who are an immigration risk are identified and removed from New Zealand at the earliest possible stage, while still allowing people with genuine humanitarian needs to have them met."⁴ Prior to the introduction of the Amendment Act, the Courts had often expressed the need for legislation to deal with refugee status claimants in line with our international obligations.⁵ The new Part VIA was inserted into the principal Act to meet this concern. >

Outside of Part VIA, certain provisions in the Act apply to illegal aliens generally, and set out what measures can be taken against those in New Zealand illegally.

Section 4(1) of the Immigration Act 1987 allows persons other than New Zealand citizens to be in New Zealand only if they hold a permit granted under the Act, or are exempt from holding such a permit. Any person in contravention of section 4(1) is deemed to be in New Zealand unlawfully.

Section 128 relates to the detention and departure of persons refused permits. Subsection (5) allows for detention pending that person's departure from New Zealand on the first available craft. This has been used to detain refugee claimants and other illegal aliens alike.⁶

⁴ Hon TJ Delamere, MP (29 September 1998) NZPD 12789.

⁵ See in particular *Butler v Attorney General* [1999]NZAR 205 (CA).

⁶ The question of whether it should have been used for refugees is discussed in Section IV of this paper - The Refugee Council case.

If such persons are to be detained for more than 48 hours from the time of their detention, then section 128(7) stipulates that an immigration officer or member of the Police must apply to a Registrar for a warrant of commitment. This warrant authorises detention for a period of up to 28 days, which can be extended, or further extended, under section 128(13) by a District Court Judge. The Judge may extend the warrant for a further period of 7 days, or, in the case of mass arrivals, for such period as he or she thinks fit.

According to subsection 15, there is no power to grant bail to people detained under section 128. However, where review proceedings are brought by a person detained under section 128, section 128A allows a District Court Judge to then order the release of the person on bail if certain conditions are met,⁷ or to extend the warrant of commitment for a further 7 days.⁸

Section 128B deals with detention of persons whose eligibility for a permit is not immediately ascertainable. It is relevant to the present discussion in that it applies to people who arrive without appropriate documentation for immigration purposes, or with documents which appear to be false. Asylum seekers are often in this situation due to the special circumstances of their persecution or flight from their country of nationality.⁹

Subsection 3 states that any person to whom section 128B applies may be detained by the Police and placed in custody while a determination is made as to

⁷ See s 128A(4) Immigration Act:

- (a) The review proceeding have not been completed at the time the person is brought before the Judge; and
- (b) The Judge is satisfied that the review proceedings are not likely to be completed within the next 7 days; and
- (c) The person detained under the warrant satisfies the Judge that he or she is not likely to abscond, or to breach any condition imposed under subsection (6) of this section.

⁸ Immigration Act 1987, s128A(3).

⁹ See UNHCR Standing Committee *Detention of Asylum Seekers and Refugees: The Framework, the Problem and the Recommended Practice* (4 June 1999) para 7.

whether section 7(1) of the Act applies.¹⁰ No later than 48 hours after a person is taken into custody, a member of the police or an immigration officer must apply to a District Court Judge for a warrant of commitment for a period of 28 days.¹¹ If they are not released or given a permit before the 28 days expire, then section 128B(10) provides that the person detained shall be brought before a District Court Judge to review that person's continued custody under the warrant. While the person remains in custody, they must be brought before a Judge at least every seven days in order to have that question considered. Under subsection 11 the Judge must extend the warrant if satisfied the person is still a person to whom the section applies.

III INTERNATIONAL OBLIGATIONS

In order to determine whether the provisions of the Immigration Act do strike the correct balance between national security and the rights of refugees to liberty, consideration must first be given to the nature of the rights refugees have. The principal source of these rights is the Convention Relating to the Status of Refugees 1951, which prescribes minimum rights to be afforded to refugees.¹²

¹⁰ Section 7(1) concerns persons who are not eligible for a permit. It includes people with certain criminal convictions; who have been deported, or who are the subject of a removal order; or about whom the Minister has reason to believe has terrorist or criminal motives or associations; and so on.

¹¹ Immigration Act 1987, s 128AB(6).

¹² This paper is primarily concerned with protection from detention under the Refugee Convention. However, it is important to note that besides the Convention, several other international documents give rise to obligations to refugee status claimants, and, arguably give broader protection, by including those outside the restrictive Convention definition of "refugee". [See James C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) 24-25.] For example, Article 14 of the Universal Declaration of Human Rights protects the right "to seek and to enjoy in other countries asylum from persecution". This is not a right to receive asylum, only to seek and enjoy it. However, when asylum seekers are not given adequate opportunity to present their case, or if once accepted as a refugee, excessive restraints or unreasonable conditions of detention are imposed, this may violate article 14. [Richard Plender and Nuala Mole "Beyond the Geneva Convention: Constructing a de facto right of asylum from international human rights instruments" in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, Cambridge, 1999) 81, 81-82.] Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), more explicitly concerns detention. It states that

"Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

This gives an enforceable right to compensation where a person has been unlawfully arrested or detained. Domestically, there may also be remedies in the Bill of Rights Act 1990, particularly ss 21 and 22.

A *The 1951 Refugee Convention and the 1967 Protocol*

1 *Introduction*

The Convention Relating to the Status of Refugees was adopted by the United Nations General Assembly on 28 July 1951, and came into force in April 1954. Essentially the Convention lays down minimum standards for the treatment of refugees. It consolidated previous international instruments relating to refugees and provides "the most comprehensive codification of the rights of refugees yet attempted on the international level".¹³

Initially, the Convention was limited in application to people who became refugees as a result of events before 1 January 1951. Refugees were considered a temporary problem resulting from World War II, which would in time go away. Thus the United Nations High Commissioner for Refugees (UNHCR),¹⁴ who is entrusted, inter alia, with promoting international instruments for protection of refugees and supervising their application, was originally given a projected life span of a mere three years.¹⁵

However, rather than going away, the problem grew. It became necessary to enact the 1967 Protocol Relating to the Status of Refugees to remove the geographical and temporal limits from the 1951 Convention. Fifty-one years

¹³ UNHCR, *Convention Relating to the Status of Refugees 1951*, Introductory Note (Geneva, 1996).

¹⁴ The UNHCR was established on the 14 December 1950 by the United Nations General Assembly, although there were High Commissioners for Refugees before this time.

It is one of the world's principal humanitarian agencies and seeks to protect refugees and help them restart their lives in a normal environment. An important part of the agency's work involves International protection, promoting human rights agreements and monitoring governmental compliance.

Its efforts are mandated by statute and guided by the 1951 Refugee Convention and 1967 Protocol. However it also works with groups, such as internally displaced peoples, which do not fit within the Convention definition of "refugee".

The UNHCR policy and programmes are approved by the Executive Committee of 57 Member States which meets annually. The High Commissioner reports annually to the UN General Assembly.

See <<http://www.UNHCR.ch/cgi-bin/texis/vtx/home?page=basics>> (last accessed 6 August 2002).

¹⁵ Parliamentary Library "Refugees – an Overview" (14 November 2001) Background Note 2001/12, 1.

after its creation, the UNHCR still has plenty to do, and the Refugee Convention it promotes is as relevant today as it was then.¹⁶

2 Definition of "refugee"

Article 1A(2) of the Refugee Convention defines the term "refugee". It applies to any person who

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

Claimants must (a) prove they are outside their country of origin; (b) establish that they are unable or unwilling to avail themselves of the protection of their country of origin; (c) establish that they are unable or unwilling to do so due to a well-founded fear of persecution; and (d) establish that the persecution is on the basis of criteria outlined in Article 1A(2) - race, religion, nationality, membership of a particular social group, or political opinion.¹⁷

The Convention definition of "refugee" is thus much narrower than the ordinary meaning of the word and does not include those fleeing natural disasters, internally displaced people or economic migrants for example. Regardless of genuine need for assistance, these people will not benefit from the rights under the Convention, as their situation is not due to a well founded fear of persecution, but to other circumstances. "Persecution" is not defined in the Convention itself but has been generally defined in New Zealand for the purposes of status determination as "the sustained or systematic violation of basic human rights

¹⁶ For example, as recently as 4 April 2002, the Ukraine ratified the 1967 Protocol. As at 15 April 2002 there were 140 State parties to the 1951 Convention, and 139 to the Protocol. 144 States are party to one or both of the Convention and Protocol, and 135 States are party to both. See UNHCR <<http://www.unhcr.ch>> (last accessed 26 August 2002).

resulting from the failure of state protection".¹⁸ However, any decision as to whether a fear of persecution is well-founded or not is necessarily "an essay in hypothesis" as it concerns what might happen to the applicant *in the future* if returned to the country of origin.¹⁹ Nevertheless, any well founded fear will require examination of the class of persons affected, the interests in respect of which they stand to be punished, the likelihood of punishment, and the nature and extent of the penalties.²⁰ If the persecution claimed is not for a Convention reason, or no longer exists at the time of the status determination, the claimant is not considered to be a refugee.

There is also a number of exception provisions, which provide that the Convention shall not apply to people who would otherwise qualify as refugees under Article 1A, but to whom Articles 1C to 1F of the Convention apply. This includes people who have ceased to require protection, receive protection from other United Nations Agencies, have been given rights similar to nationals in their country of refuge and those who have committed certain crimes making them unworthy for protection. The Convention definition is limited to those who need and deserve protection.

The Convention definition has been adopted in New Zealand by section 129F of the Immigration Act.

Within this limited definition, the Convention recognises two types of refugees, quota refugees and spontaneous refugees. This paper deals only with

¹⁷ For a comprehensive examination of these requirements see James C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991).

¹⁸ This definition comes from James C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) 10 and was adopted by the Refugee Status Appeals Authority in *Refugee Appeal No 1039/93 Re HBS and LBY* (13 February 1995) 19 - 20. See also *Refugee Appeal 71427/99* [2000] NZAR 545 at para 51.

¹⁹ Guy S. Goodwin-Gill *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 35.

²⁰ Goodwin-Gill, above, 77.

spontaneous refugees who make their claim for refugee status on arrival at the New Zealand border, or after entry into New Zealand.²¹

3 Protection of refugees

Despite the fact that so few claimants are eventually accepted as genuine refugees, all claimants must receive the benefit of certain Convention provisions while their claim is being determined.²² This is because the definition is a declaratory statement. Refugee status exists as soon as the criteria in Article 1A are met, and independently of recognition by State parties. As the UNHCR states, a refugee "does not become a refugee because of recognition, but is recognised because he is a refugee".²³ This means that refugees are entitled to the rights in the Convention even before their status is recognised. Unless status assessment is virtually immediate, the only acceptable solution is for State parties to treat refugee status claimants as if they are genuine refugees and afford them their Convention rights.²⁴ However, there is reason to suggest that where a refugee status claim is clearly not bona fide, such rights do not apply.²⁵

Article 31.2 of the Convention protects spontaneous refugees from arbitrary detention. Article 31 states -

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom

²¹ By contrast, quota refugees are selected, while still overseas, by the New Zealand government from countries predetermined by UNHCR for resettlement in New Zealand. For the most part these refugees are part of a mass movement provoked by invasion or oppression. New Zealand currently accepts 750 UN quota refugees. (Rodger Haines "International Law and Refugees in New Zealand" [1999] NZ Law Rev 120, 125).

²² The statistics relating to refugee status claimant applications demonstrate that the Convention definition of "refugee" is not an easy test to satisfy. In the year 2000 - 2001, only 13.2 % of the 2350 refugee status applications decided by the Refugee Status Branch in New Zealand were accepted, with 86.8% declined. [Statistics found at <<http://www.refugee.org.nz/stats/htm#Table%203>> (last accessed 9 July 2002)].

²³ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979), para 28.

²⁴ Rodger Haines "International Law and Refugees in New Zealand" [1999] NZ Law Rev 120, 129 citing Professor JC Hathaway and R A Neve.

²⁵ Atle Grahl Madsen *Commentary on the Refugee Convention 1951* (Division of International Protection of the United Nations High Commissioner for Refugees, Geneva, 1997) 180.

was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States *shall not apply to the movements of such refugees restrictions other than those which are necessary* and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. (Emphasis added)

It has been argued that the words "such refugees" in Article 31.2 refer back to Article 31.1, whose requirements must also be satisfied in order to claim protection under Article 31.2.²⁶ If this argument were accepted, refugees would need to show that they (a) came directly from a persecuting country; (b) immediately reported their refugee claim to airport authorities before their entry was discovered to be illegal; and (c) had good cause for their illegal entry or presence (although this should be a low standard, considering the difficulties inherent in determining this at the airport).²⁷ Support for this interpretation comes from the UNHCR itself via the Guidelines.²⁸

However, such an interpretation would severely limit the scope of Article 31.2. There is no support in the *travaux préparatoires* for this approach, and others have argued that "such refugees" means simply people who enter or are present in a territory unlawfully and who claim refugee status.²⁹

²⁶ Asher Davidson *Article 31(2) of the Refugee Convention and its Implementation in New Zealand: Is Detention Defensible?* (LLB(Hons) Dissertation, University of Auckland, 2000) para 21 -28.

²⁷ Davidson, above, para 30 -33, 43. See also Guy S. Goodwin-Gill *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 249.

²⁸ UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, 1999 Introduction, para 2.

²⁹ Atle Grahl Madsen *Commentary on the Refugee Convention 1951* (Division of International Protection of the United Nations High Commissioner for Refugees, Geneva, 1997) 179 - 180.

In New Zealand there has been no authoritative comment as yet as to which interpretation is preferred.³⁰

In either case, Article 31.2 which requires greater justification for detention of refugees than other illegal aliens.

(a) Detention

“Detention” has been defined by the *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*³¹ (the Guidelines) as

confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.³²

In its framework paper on the detention of asylum seekers and refugees, the UNHCR makes it clear that their detention “raises significant concerns”, and is to be avoided.³³ Most asylum seekers have not committed crimes, nor are they suspected of having done so. Furthermore, refugees and asylum seekers are in a special situation in that they are fleeing persecution and may be unable to enter a country legally.³⁴ The fact that someone has entered a Contracting State's territory illegally does not prohibit them fulfilling the Convention definition of refugee, or enjoying the benefits this entitles them to. The Conference of

³⁰ See *Abu v Superintendent of Mount Eden Women's Prison* [2000] NZAR 260 (HC) para 15 where the Crown argued that the former more restrictive approach applied. However, this approach was neither adopted nor dismissed by the Court.

³¹ Note that although the guidelines may be relevant for interpretation purposes – particularly for judges exercising their discretion under ss128 and 128A, they do not have the same status as the Conclusions of the Executive Committee of the UNHCR and do not impose obligations on the Minister in considering applications for temporary permits by refugee status claimants: See *Attorney General v E* [2000] 3 NZLR 257 (CA) para 39 (majority).

³² UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) Guideline 1.

³³ Executive Committee of the High Commissioner's Programme Standing Committee *Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice* (4 June 1999) para 1.

Plenipotentiaries expressly rejected the submission that fraudulent entrants be excluded from protection, as Article 31 demonstrates.³⁵ The right to liberty is a fundamental human right.³⁶

Detention is arbitrary when it is not in accordance with the law, or the law allows for arbitrary practices, or the law is enforced in an arbitrary way. This can include random, capricious, and disproportionate practices of detention, or where its duration is indefinite or there is no fair and efficient review procedure available.³⁷ To avoid arbitrariness, detention must be clearly prescribed by law, free from inappropriateness or injustice and accessible to all.³⁸

Arbitrary detention is a human rights violation, and can be a form of persecution.³⁹ This provides further justification for the prohibition on arbitrary detention by a Contracting State. If a person is entitled to refugee status on the basis that they are fleeing arbitrary detention, it would seem bizarre if the Contracting State in which they seek refuge was then able to arbitrarily detain them.

(b) "Necessary" restrictions under Article 31.2

Article 31 clearly states that restrictions on movement are permitted where necessary. The Executive Committee *Conclusion No 44 (XXXVII) – 1986 Detention of Refugees and Asylum Seekers* defines when detention may be necessary under Article 31.⁴⁰ These grounds must be prescribed by law and are limited to verifying identity, determining the elements on which the claim to refugee status or asylum is based, dealing with cases where refugees or asylum

³⁴ Executive Committee of the High Commissioner's Programme Standing Committee *Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice* (4 June 1999) para 1.

³⁵ James C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) 50 -51.

³⁶ See ICCPR Article 9(1) and New Zealand Bill of Rights Act 1990 s22.

³⁷ Executive Committee *The Framework* above, para 10.

³⁸ Executive Committee *The Framework* above, para 10.

³⁹ Hathaway, above, 113.

seekers have destroyed their travel and/ or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum, and the protection of national security or public order.

The Guidelines make clear that the grounds where detention may be “necessary” are narrowly confined.⁴¹ Verification of identity cannot be used to justify detention for the entire status determination process, or for an unlimited period of time. As for asylum seekers without documents, their detention is only necessary where there has been an intention to deceive, and should not occur simply for the reason that they have been unable to obtain the necessary documentation due to the circumstances of their persecution.

Detention to protect national security is only necessary where evidence shows that the asylum seeker has a criminal record or affiliations, and cannot be used as part of a policy to deter future asylum seekers or to dissuade others from continuing their claims. Detention is not to be used as a punitive or disciplinary measure for illegal entry or presence in a country.⁴²

It follows that measures applied must not go beyond what is necessary in a particular circumstance. If there are few illegal entrants, detention is harder to justify than in cases of massive influx where the authorities are overwhelmed and need to detain in order to investigate the basis for the claims.⁴³ Article 31.2 obliges Contracting States to differentiate their restrictive measures according to

⁴⁰ The Court of Appeal in *Attorney General v E* [2000] 3 NZLR 257 at 269 para 38 (majority), para 94 (Thomas J) recognised the authority of the Executive Committee in New Zealand.

⁴¹ UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) Guideline 3. Note that although the guidelines may be relevant for interpretation purposes – particularly for judges exercising their discretion under ss128 and 128A, they do not have the same status as the Conclusions of the Executive Committee of the UNHCR. Nor do they impose obligations on the Minister in considering applications for temporary permits by refugee status claimants. However, while they are not a binding international instrument, the Guidelines are part of the environment in which other more direct sources of law may be better understood. See *Attorney General v E* [2000] 3 NZLR 257 (CA) para 39 (majority), and *Abu v Superintendent of Mt Eden Women's Prison* [2000] NZAR 260, para 37(HC).

⁴² UNHCR *Revised Guidelines*, above, Guideline 3.

the circumstances. If a less severe restriction, such as ordering a refugee claimant to stay within a certain region, is available, this should always be employed first.⁴⁴

The Guidelines state that detention should be the exception, rather than the rule, and alternatives to detention should always be considered first. This requires individual assessment of the personal circumstances of the asylum seeker, and the local conditions.⁴⁵

4 An appropriate balance?

It may be thought that the Convention places too much weight on refugee rights and, if enforced, would leave little room for security measures. But I do not subscribe to that view. Instead, I suggest that the Convention represents an appropriate balance between the two. If anything it could be adjusted in favour of refugee status claimants.⁴⁶

It is true that Article 31.2 requires greater justification for detention of refugees than other illegal aliens. However, it does not oblige a State to admit any refugee claimant into its territory.⁴⁷ While protecting refugees, the Convention also recognises the right of States to control their borders. Just

⁴³ Atle Grahl Madsen *Commentary on the Refugee Convention 1951* (Division of International Protection of the United Nations High Commissioner for Refugees, Geneva, 1997) 181.

⁴⁴ Grahl Madsen, above, 182.

⁴⁵ UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) Guideline 4.

⁴⁶ Andrew Langham describes the rights conferred by the Convention on refugees as weak, providing only limited guarantees ("The Erosion of Refugee Rights in Australia" (1999) 8 Pac Rim L & Poly .651,653.) It is certainly true that while many states pay lip service to the Convention, they invest considerable resources to keeping refugees away from their borders - for example Australia's (a State Party to the Convention since 1954) dealings with the Tampa refugees. For a discussion of the legislative changes brought in at that time see Emily C Peyser "Pacific Solution? The Sinking Right to Seek Asylum in Australia" (2002) 11 Pac Rim L & Poly 431; Alexander J Wood "The 'Pacific Solution': Refugees Unwelcome in Australia" (2002) 9 Hum Rts Br 22; and Parliament of Australia, Department of the Parliamentary Library "Refugee Law - Recent Legislative Developments" Current Issues Brief 5 2001-02 found at <<http://www.aph.gov.au/library/pubs/cib/2001-02/02cib05.htm#top>> (last accessed 1 March 2002).

For a comparison between New Zealand and Australian refugee law see Jeanne Donald "We Don't Know How Lucky We Are, Mate: Australian and New Zealand Refugee Law- A Comparison" (12 April 2002) available at <<http://www.refugee.org.nz/lucky.html>> (last accessed 22 May 2002).

fulfilling the Convention definition of "refugee" is, in itself, hard to do, as the statistics show.⁴⁸ But the State parties went further and were careful to avoid granting refugee status to either war criminals or those who might endanger the internal security of asylum countries, even if they otherwise fulfil the Convention definition.⁴⁹ Further protection of national security is found in articles 9⁵⁰, 32⁵¹ and 33.2.⁵²

By giving effect to their Convention obligations, State parties are not curtailing their right to protect their borders, but are undertaking to do it in a fair way.

The next question to be considered is to what extent the Immigration Act of New Zealand gives effect to these obligations, and the balance contained in them.

B Extent to Which the Refugee Convention 1951 is Incorporated Into Domestic Law by the Immigration Amendment Act 1999

1 Direct incorporation

New Zealand acceded to the 1951 Convention Relating to the Status of Refugees on 30 June 1960,⁵³ and the 1967 Protocol on 6 August 1973.⁵⁴

⁴⁷ Atle Grahl Madsen *Commentary on the Refugee Convention 1951* (Division of International Protection of the United Nations High Commissioner for Refugees, Geneva, 1997) 167.

⁴⁸ In the year 2000 – 2001, only 13.2 % of the 2350 refugee status applications decided by the Refugee Status Branch in New Zealand were accepted, with 86.8% declined. [Statistics found at <<http://www.refugee.org.nz/stats/htm#Table%203>> (last accessed 9 July 2002)].

⁴⁹ See James C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) 214 onwards.

⁵⁰ Article 9 allows a Contracting State, *in time of war or other grave and exceptional circumstances*, to take provisional measures which it considers to be *essential to the national security in the case of a particular person*, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security (emphasis added).

⁵¹ Article 32 states that refugees may not be expelled from a Contracting State, *except* on grounds of national security or public order (emphasis added).

⁵² Article 33.2 allows Contracting State to expel or return (refouler) a refugee for whom there are reasonable grounds to regard as a danger to the security of a country in which he is seeking asylum, or a refugee who has been a convicted by a final judgment of a particularly serious crime, and constitutes a danger to the community of that country.

⁵³ New Zealand Treaty Series 1961, No. 2.

⁵⁴ New Zealand Treaty Series 1973, No. 21.

However, it was not until 1999 that there was any reference to these international instruments in the Immigration Act. Section 60 of the Immigration Amendment Act, which came into force that year, attached the Refugee Convention and the 1967 Protocol to form the 6th Schedule of the Act.

But this does not necessarily mean, however, that a breach of its provisions will constitute a basis for a direct cause of action in the New Zealand Courts. The orthodox position is that conventions are only directly enforceable in domestic law where they have been expressly adopted. Mere annexation as a schedule is not usually enough to do this, although Professor Burrows suggests that if it can be shown that Parliament's intent in annexing the Convention was to enact it, this could be enough.⁵⁵

The parliamentary debates show confusion among the members as to what Parliament's intent was. Speeches of some members in the early debates about the Amendment Act indicate an assumption that the Convention and Protocol were to be "directly incorporated into our domestic law"⁵⁶. However, at the third reading the then Minister of Immigration, Tuariki Delamere, said he saw three objectives of the legislation, the third of which was "a statutory refugee regime", rather than direct incorporation.⁵⁷

Nor is there anything in the Immigration Act itself to suggest direct incorporation. There is no express provision directly incorporating the Convention. In fact, Parliament expressly rejected UNHCR's submission to the Social Services Select Committee that section 129D be amended to give the Convention the force of law.⁵⁸ Instead section 129D merely requires that a refugee status officer and the Refugee Status Appeals Authority "act in a manner

⁵⁵ JF Burrows *Statute Law in New Zealand* (2 ed, Butterworths Wellington 1999) 258.

⁵⁶ M Robson, MP (29 September 1998) 572 NZPD 12796.

⁵⁷ (30 March 1999) 576 NZPD 15756.

that is consistent with New Zealand's obligations under the Refugee Convention" - something much less than what the UNHCR was after.

The fact that certain Articles of the Convention have been implemented, such as the Article 33.1 prohibition on *refoulement* in section 129 X,⁵⁹ is further evidence that the Convention as a whole has not been adopted, as if it had there would be no need to do this.

In such cases where only part of an international document has been incorporated, the traditional approach is that it has been annexed for information only, and has not been directly adopted into New Zealand's domestic law. Nevertheless, the remaining provisions may still have some legal force.⁶⁰

2 *Relevance of the Convention, particularly Article 31.2*

While not expressly incorporated, it is obvious from the Immigration Act that the Convention has some application in New Zealand law. For example, the Convention definition of "refugee" has been adopted by section 129F of the Act. Furthermore, under section 129D(1) refugee status officers and the Refugee Status Appeals Authority are required to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention when carrying out their functions under Part VIA [Refugee Status Determinations].

It could be argued that the relevance of the Convention is limited to Part VIA of the Immigration Act which contains direct references to it and was inserted at the same time as the Convention by the Immigration Amendment Act 1999. This

⁵⁸ United Nations High Commissioner for Refugees "Submission to the Social Services Committee on the Immigration Amendment Bill 1998" (16 November 1998) para 2.

⁵⁹ Protection against *refoulement* is one of the fundamental protections afforded to Refugees by the Convention. It is contained in Article 33 which states that State Parties shall not expel or return a refugee to a territory where his or her life or freedom is threatened because of race, religion, nationality, membership of a particular social group, or political opinion.

would mean that Article 31.2 would not be relevant, as the provisions under which refugees are detained in New Zealand are not in Part VIA where the Convention has been most obviously implemented. However, section 129 X of the Immigration Act states that

(2) In carrying out their functions under this Act in relation to a refugee or refugee status claimant, immigration officers must have regard to the provisions of this Part and of the Refugee Convention.⁶¹

This shows that the Convention is a relevant consideration for discretionary decision making throughout the Act.⁶² It is to be taken into account, not only when determining refugee status applications, but in the exercise of all functions, including consideration of applications for temporary permits, removal of persons unlawfully in New Zealand and associated powers of detention.⁶³ It has even been called "legislative adoption of Article 31".⁶⁴

So while Article 31.2 has not been directly imported into the Act, as Article 32.1 and 33.2 have been,⁶⁵ it would be directly relevant to Immigration Officers' powers of detention under the Act and should be had regard to according to section 129X(2).

As discussed earlier, Article 31 requires that refugees not be detained except where necessary. However, as the Immigration Act prior to its 2002 amendments only provided for two options: detention or release with a permit, to find that they could not be detained would, in effect, give the right to a permit.⁶⁶ This would be inconsistent with section 9 of the Act, which states that no person is of right

⁶⁰ KJ Keith "New Zealand Treaty Practice: The Executive and the Legislature" [1964] 1 NZULR 273, 298. See also the discussion of ways in which treaties can be relevant in JF Burrows *Statute Law in New Zealand* (2 ed, Butterworths Wellington 1999) 293 - 298.

⁶¹ S 129X is found in Part VIA, which was inserted by s 40 of the Immigration Amendment Act 1999.

⁶² Hon Justice Baragwanath "Judicial Review and Administrative Law Issues Arising in Refugee Law Cases in New Zealand" (Conference of International Association of Refugee Law Judges, Auckland, 10 March 2000) 4 <<http://www.lawcom.govt.nz/content/speeches/jud%20rev%20rolaw%20cases%20wdb-4apr.htm>> (last accessed 31 March 2002).

⁶³ *Attorney General v E* (2000) 3 NZLR 257, para 44 (Majority, CA).

⁶⁴ Baragwanath, above, 8.

⁶⁵ Immigration Act 1987, s129X(1).

entitled to a temporary permit. It is also inconsistent with the Court of Appeal's decision in *Attorney General v E*.⁶⁷

Furthermore, as recognised in *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v Attorney General*,⁶⁸ (discussed in the next section of this paper) section 128 of the Immigration Act allows for detention whenever someone arrives in New Zealand illegally. As this is largely the case for spontaneous refugee claimants, the Act obviously envisages their detention.

Thus the question must be asked, whether, despite section 129X(2), other provisions in the Act implicitly prevent the recognition of Article 31.2 in New Zealand.

Since the scheduled Convention is part of the Act, it must be read with it. If there is an inconsistency between the Act and the scheduled document, as in this case, the Courts will do their best to reconcile it, taking into account the nature of both the schedule and the inconsistency.⁶⁹ Scheduling the Convention enables the Court to resolve uncertainties in the legislation by referring to the Convention.⁷⁰ While there is some authority to suggest that if the words of a domestic statute are clear, the treaty which it implements cannot affect its interpretation,⁷¹ this view is not favoured by commentators.⁷² According to Professor Burrows, the New Zealand courts adopt a more liberal approach to the use of extrinsic evidence and

⁶⁶ Asher Davidson *Article 31(2) of the Refugee Convention and its Implementation in New Zealand: Is Detention Defensible?* (LLB(Hons) Dissertation, University of Auckland, 2000) para 112.

⁶⁷ (2000) 3 NZLR 257 (Majority).

⁶⁸ (27 June 2002) High Court Auckland M1881-AS01.

⁶⁹ JF Burrows *Statute Law in New Zealand* (2 ed, Butterworths Wellington 1999) 258.

⁷⁰ *Wharton v the Registrar of Patents, Designs & Trademarks* [1921] NZLR 817 (CA) regarding the Treaty of Versailles, discussed in KJ Keith "New Zealand Treaty Practice: The Executive and the Legislature" [1964] 1 NZULR 273, 298.

⁷¹ *Ellerman Lines Ltd v Murray* [1931] AC 126 (HL).

⁷² See JF Burrows, above, 294 and KJ Keith "New Zealand Treaty Practice: The Executive and the Legislature" [1964] 1 NZULR 273, 299.

will not require too much persuasion to deem that the words of the domestic legislation are unclear.⁷³

It is also important to remember that the Courts strive to give practical effect to international covenants, especially those concerning human rights, even in the absence of their incorporation into domestic law.⁷⁴ Some international obligations are so manifestly important that they must be taken into account in decision making. Otherwise New Zealand's commitment to these obligations appears to be mere "window dressing", an outcome that the Courts will do their best to avoid.⁷⁵

Moreover, at a Ministerial meeting of States Parties on 13 December last year, New Zealand reaffirmed its commitment to implement its obligations under the Refugee Convention fully and effectively, in accordance with the object and purpose of the Convention and the 1967 Protocol.⁷⁶ This cannot be said to be meaningless.

New Zealand could have specifically adopted the Convention, and in particular Article 31. It chose not to do so. This has led to some uncertainty in the application of the Immigration Act. In *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v Attorney General* Baragwanath J attempted to reconcile Article 31.2 and the scheme of the Immigration Act in his interpretation of section 128(5). The Immigration Amendment Act 2002 also addresses this issue.

⁷³ JF Burrows *Statute Law in New Zealand* (2 ed, Butterworths Wellington 1999) 249.

⁷⁴ Right Hon Dame Sian Elias CJ "The Impact of International Covenants on Domestic Law" (Inaugural Meeting International Association of Refugee Law Judges, Auckland, 10 March 2000) para 11- 12 <<http://www.refugee.org.nz/IARLJ3-00Elias.html>> (last accessed 22 May 2002).

⁷⁵ *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266 (CA).

⁷⁶ Found at <<http://www.refugee.org.nz/archive2001.htm#13%20December%202001a>> (last accessed 7 August 2002).

IV REFUGEE COUNCIL OF NEW ZEALAND INC & THE HUMAN RIGHTS FOUNDATION OF AOTEAROA NEW ZEALAND INCORPORATED AND D V ATTORNEY GENERAL (2002)⁷⁷

In this case, the Refugee Council and the Human Rights Foundation joined a former refugee claimant, "D", to challenge a Crown policy introduced on 19 September 2001 in response to the events of September 11 that year.⁷⁸ This policy consisted of detaining under section 128 of the Immigration Act most claimants for refugee status while their claim was being determined. In fact, between October 1999 and September 2001 less than 5% of refugee status claimants were detained in custody on their arrival in New Zealand. After the change in policy, 94% were detained⁷⁹ - obviously a significant change in policy!

Baragwanath J determined the immediate issue of the refugees' detention by stating that they were entitled to apply to a District Court Judge for bail under section 128A of the Immigration Act. This was despite the fact that were detained under section 128 which states, at subsection 15, that bail shall not be granted. He considered that the

absence of bail power equivalent to that found in other sections of the Act dealing with criminals for example, indicated that it was of summary character and easily overridden where inconsistent with a context - here that of those who are subject to Part VIA [refugee status claimants], and who enjoy the protection of ss129X(2) and 129D [that the Refugee Convention be taken into account]; and with the presumptions of the common law and the Bill of Rights.⁸⁰

⁷⁷ (31 May 2002 Interim Judgment) (27 June 2002 Supplementary Judgment) High Court Auckland M1881-AS01, Baragwanath J.

⁷⁸ This change in Crown Policy was announced via a New Zealand Immigration Service (NZIS) Operational Instruction issued by the General Manager. Under the Immigration Act 1987, s 13 the Government is required to publish its immigration policy generally, and this is given effect to by the NZIS Manual published at <<http://www.immigration.govt.co.nz>> which is updated quarterly. Amendments may be found at this website, or can be sent directly to registered recipients.

⁷⁹ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (31 May 2002 - interim decision, 27 June 2002 - final decision) High Court Auckland M1881-AS01, para 17.

⁸⁰ *Refugee Council v AG*, (31 May 2002) above, para 64.

Baragwanath J then went on to consider whether refugees should be detained at all under section 128, and if so what was the scope for doing so. He also considered the validity of the Operational Instruction and its policy of detention.

Justice Baragwanath rejected the Crown's invitation to follow Anderson J's reasoning. His judgment merits detailed consideration, dealing with each of the issues covered by him. First, the application of section 128.

A *Reading of Section 128*

1 *The application of section 128 to refugees*

Section 128 allows for the detention in custody of any person who is not exempt from the requirement to have a permit and who arrives in New Zealand and is refused a permit, or fails to apply for one. Detention is allowed pending that person's departure from New Zealand on the first available craft.

Literally read, as the Crown submitted it should be,⁸¹ section 128 applies to every person, who arrives in New Zealand and who is refused a permit. This would necessarily include refugee status claimants.

However, the consequences of reading section 128 in such a way, entails a breach of our international obligations. Under section 129X of the Immigration Act, refugee status claimants cannot be deported while their claim is being determined, unless the provisions of Articles 32.1, or 33.2 of the Convention allow it. Accordingly, the Crown's submission effectively meant that "detain in custody pending departure on the first available craft" could mean indefinite detention for refugees while their status was being determined. As noted previously, the UNHCR Guidelines expressly deemed that while detention for

⁸¹ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (31 May 2002) High Court Auckland M1881-AS01, para 20.

administrative reasons such as to verify identity may be necessary and allowable, this is not so if the detention lasts the entire determination period.⁸²

Justice Baragwanath rejected the Crown's invitation to follow Anderson J's decision in *F v Superintendent of Mt Eden Prison*⁸³ that so long as the underlying purpose of the departure remains, "the first available craft" means the first available craft after a refugee status claim has been denied.⁸⁴ He did so on the basis that he had heard much fuller argument and had to form his own view.

Capitalising on this apparent inconsistency in the Crown case, the plaintiff's argued that section 128 could not have been intended to apply to refugee status claimants, as it is a "turn around provision" and detention is only warranted pending departure on the next available craft. To say that detention pending determination of their claim is detention pending their departure on the first available craft was stretching the language, they said.⁸⁵

As further proof that section 128 does not apply, the plaintiffs relied on subsection 15, which refuses bail to those who fall within section 128. They argued that Parliament would not have intended to put refugees in a worse position than criminals, persons deemed a security risk, and persons about to be deported, who are all entitled to bail. Article 31.2 of the Convention allows limitations on movement only where necessary, but section 128 prohibits bail even without consideration of whether bail is necessary or not.⁸⁶ They argued that to find that refugee status claimants are subject to section 128 would be

⁸² UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) Guideline 3.

⁸³ [1999] NZAR 420.

⁸⁴ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (31 May 2002) High Court Auckland M1881-AS01, para 21.

⁸⁵ *Refugee Council v AG*, (31 May 2002), above, para 21.

⁸⁶ *Refugee Council v AG*, (31 May 2002), above, para 49.

contrary to Article 31.2 of the Refugee Convention 1951 and the Bill of Rights Act.⁸⁷

Moreover, since section 128 was not altered by the 1999 amendments concerning refugees, the plaintiffs said it should be read as if it was under the original 1987 Act which did not concern refugees.⁸⁸

Benipal v Minister of Foreign Affairs and Immigration,⁸⁹ was also advanced in support exclusion of refugees from section 128. However, Baragwanath J distinguished that case on the basis that it was decided under the old Immigration Act 1964 and legislative changes over the past 38 years had rendered the decision obsolete.⁹⁰

Baragwanath J thought that the fundamental problem with the plaintiff's submission that section 128 had no application to refugees, was that it would mean that "every person who arrives in New Zealand" does not mean "every person" at all.⁹¹ It would also grant 42 days liberty to anyone who arrives in New Zealand and claims refugee status. National security would be threatened, as this would allow fraudsters and criminals ample opportunity to commit whatever terrorist, criminal or other antisocial behaviour which founds the basis of their desire to enter New Zealand, thus encouraging abusive claims. As Baragwanath J observed:

All that is needed is the cry "Open Sesame" in the form "I claim refugee status" which such people would soon learn in the unlikely event that they did not know it already⁹²

⁸⁷ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (31 May 2002) High Court Auckland M1881-AS01, para 21.

⁸⁸ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (27 June 2002), High Court Auckland M1881-AS01, para 153, but was later rejected by Baragwanath J at para 186.

⁸⁹ (16 December 1985) High Court Auckland, A878/83, Chilwell J.

⁹⁰ *Refugee Council v AG* (27 June 2002) above, para 189.

⁹¹ *Refugee Council v AG* (31 May 2002), above, para 21.

⁹² *Refugee Council v AG* (27 June 2002), above, para 168.

Baragwanath J was thus faced with two positions demonstrating the problems with section 128, but neither of which was satisfactory in itself. The Crown's submission involved breach of our international obligations, while the plaintiff's submission cut across the ordinary meaning of the statute.

Despite his initial reservations about determining the proper construction of section 128 while legislation dealing directly with this matter was before the House,⁹³ Baragwanath J ultimately held that section 128 does apply to refugee status claimants. In doing so, however, he rejected the Crown's submission that the amendments could inform the construction of section 128 prior to their insertion. He regarded such a proposition as contrary to section 7 of the Interpretation Act that Acts do not have retrospective effect, and inconsistent with the Crown's acceptance of this principle.⁹⁴

In order to apply section 128(5) to refugee status claimants, Baragwanath J interpreted it as saying

... any person to whom this section applies may be detained by any member of the Police and placed in custody pending that person's departure from New Zealand on the first available craft [provided that in the case of a refugee status claimant the period of detention may continue until the determination of the application].⁹⁵

This was considered necessary in order to balance the dual purposes of the Immigration Amendment Act 1999 as expressed in its introduction.⁹⁶

An Act to –

⁹³ See the Transnational Organised Crime Bill 2002, which was divided at its 3rd reading into several parts. On 18 June 2002 (in the period between the interim and supplementary judgments) the Immigration Amendment Act 2002 came into force and this changed the position relating to s 128. These changes are discussed in the next section of the paper.

⁹⁴ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (27 June 2002) High Court Auckland M1881-AS01, para 139, 161.

⁹⁵ *Refugee Council v AG* (27 June 2002) above, para 169.

Incidentally refugee status claimants require at least five weeks for Police and SIS to process security checks (Refugee Council notes of meeting with Minister 14/02/02 as cited in Human Rights Foundation of Aotearoa New Zealand & Refugee Council of New Zealand Inc "*Freedom's Ramparts on the Sea*" *The Detention of Asylum Seekers in New Zealand* (May 2002) 7 <<http://www.humanrights.co.nz>> (last accessed 27 August 2002).

⁹⁶ *Refugee Council v AG* (27 June 2002), above, para 179.

- (a) Improve the effectiveness of the removal regime for persons unlawfully in New Zealand by streamlining the purposes involved...
- (b) Create a statutory framework for determining refugee status under the Refugee Convention....

Although he acknowledged that this reading of section 128(5) requires an element of distortion of language, he justified it on the basis of the history of the legislation.⁹⁷ In his opinion, section 128 must not be interpreted in isolation, but as part of the entire statute, including Part VIA concerning refugee status determinations.⁹⁸

2 Construction of the detention powers under section 128(5)

Despite failing on the first issue as to whether section 128 applied to refugees, the plaintiffs succeeded on the second issue. Baragwanath J accepted their submission that section 128(5) must be interpreted as requiring an immigration officer to exercise a true discretion whether to detain, having regard to the provisions of Part VIA (dealing with Refugee determinations) and the Convention, as required by section 129X(2).⁹⁹

He held that section 128(5), when applied to Refugee status claimants, is to be interpreted as saying

Subject to subsection (7) of this section, any person to who this section applies may be detained by any member of the Police and placed in custody pending that person's departure from New Zealand on the first available craft [only if and so long as the necessity test of Article 31.2 is satisfied, being a matter to which the immigration officer

⁹⁷ Justice Baragwanath considered the legislative response to *D v Minister of Immigration* [1991] 2 NZLR 673 and the 1999 Amendment inserting Part VIA in particular. *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (27 June 2002) High Court Auckland M1881-AS01, para 183.

⁹⁸ *Refugee Council v AG* (27 June 2002), above, para 186.

⁹⁹ *Refugee Council v AG* (27 June 2002), above, para 190.

exercising discretion to request such detention is required by s 129X(2) to have regard]¹⁰⁰

The result is that the language of section 128 is given effect to, in that it does apply to "every person", but there is no unnecessary detention if the discretion is properly used. This discretion is "iterative", in that if a refugee is detained, the decision must be constantly reviewed and the necessity test re-applied as fresh evidence emerges and circumstances change.¹⁰¹

Baragwanath J recognised that this led to a somewhat strained construction of the legislation, but thought it was necessary in order to give effect to both of the important purposes of the legislation.¹⁰²

3 Discussion

This case demonstrates the awkwardness that results from legislation that tries to cover too much. Refugees have special concerns, and deserve special treatment, different from that which is appropriate for other aliens. But despite repeated opportunities, Parliament has declined to accept the suggestion of the Court of Appeal in *D v Minister of Immigration*¹⁰³ that specific legislation for detention of refugees be enacted; instead it has maintained the current framework through several amendments.¹⁰⁴

¹⁰⁰ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated v AG* (27 June 2002) High Court Auckland M1881-AS01, para 202.

¹⁰¹ *Refugee Council v AG* (27 June 2002), above, para 203.

¹⁰² *Refugee Council v AG* (27 June 2002), above, para 207.

¹⁰³ [1991] 2 NZLR 673 (CA).

¹⁰⁴ For a discussion of Refugee legislation in Australia, see Emily C Peyser "Pacific Solution? The Sinking Right to Seek Asylum in Australia" (2002) 11 Pac Rim L & Poly 431, and Parliament of Australia, Department of the Parliamentary Library "Refugee Law - Recent Legislative Developments" Current Issues Brief 5 2001-02 found at <<http://www.aph.gov.au/library/pubs/cib/2001-02/02cib05.htm#top>> (last accessed 1 March 2002).

For a comparison between New Zealand and Australian refugee law see Jeanné Donald "We Don't Know How Lucky We Are, Mate: Australian and New Zealand Refugee Law- A Comparison" (12 April 2002) available at <<http://www.refugee.org.nz/lucky.html>> (last accessed 22 May 2002).

These difficulties have long been recognised, and a determination by the Courts was overdue. Baragwanath J's approach of requiring the necessity test of Article 31.2 to be considered before refugee status claimants are detained, meets concerns about the broad discretion under section 128 to a large extent. Whatever else may be said, his approach is an improvement on the pre-existing position and the ultimate outcome, of a presumption against detention, is to be applauded.

However, while the statement that the test is iterative would seem to allay concerns about indefinite detention, there is some scepticism about the practical application of the test. Will the Judges in fact apply it, or merely extend the warrants of commitment almost unquestioningly, as seems to happen at present. Baragwanath J accepted evidence from barristers that in extending warrants of commitment, District Court Judges have invariably followed *New Zealand Immigration Department v Cindy Abu*¹⁰⁵ to the effect that section 128(13B) does not confer a discretion but an obligation to extend the warrant. This means that the seven day review period is little more than "rubber stamping".¹⁰⁶ Despite the faith placed in it by the Court of Appeal in *Attorney General v E*,¹⁰⁷ this is not an effective check on powers of detention.

Another query about Baragwanath J's approach concerns the linguistic contortions required to implement his test, which could, perhaps, have been avoided. This argument relates to his dismissal of the plaintiff's submission that refugee status claimants should be detained under section 128B rather than section 128 itself. He considered that section 128B offered no practical advantage for refugees. He pointed out that even if it is determined that the person is not one to whom section 7(1) [persons ineligible for grant of permit] applies, the person, unless granted a permit, is liable under subsection (5)(a)(ii) to be dealt with under section 128 anyway. Furthermore, he said, if they are dealt with under section

¹⁰⁵ (District Court Otahuhu 13 October 1999).

¹⁰⁶ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (31 May 2002) High Court Auckland M1881-AS01, para 101 – 102.

¹⁰⁷ [2000] 3 NZLR 257, para 48 (CA)(Majority).

128B they are not eligible for bail, even if judicial review proceedings under section 128A are commenced, which puts them in a worse position than if processed under section 128. Thus, he considered, even if detained under section 128B, Article 31.2 would not be complied with.¹⁰⁸

Baragwanath J failed to appreciate the real point of the submission. If refugees were only able to be detained under section 129B, and not section 128, they would only be detained where there are reasonable grounds to do so. Section 129B allows for detention where the person is suspected of terrorism, or is a criminal, or generally a risk to New Zealand as set out in section 7(1). The plaintiffs admitted that refugee claimants who fall under section 7(1) probably should be detained. But where no such grounds exist, they argued that detention should not be used. If used in this way, Baragwanath J's fears about criminals and fraudsters making unfounded claims and being set loose on New Zealand are shown to be unfounded as such people would still be caught by section 128B. Such an approach would also be consistent with Article 31.2, which permits detention where necessary.

There is evidence to suggest that section 129B was not used by NZIS officials because it was thought to require a higher threshold of reasonable grounds, and thus more difficult to detain people under it.¹⁰⁹ However, convenience of the NZIS should not be sufficient reason to ignore refugee claimants' rights. As previously interpreted, section 128 gave too broad a discretion to detain and did not take into account the individual circumstances of refugees; it therefore should not have been used. But, if section 128B had been used all along as the only

¹⁰⁸ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (27 June 2002) High Court Auckland M1881-AS01, para 176.

¹⁰⁹ Human Rights Foundation of Aotearoa New Zealand & Refugee Council of New Zealand Inc "Freedom's Ramparts on the Sea" *The Detention of Asylum Seekers in New Zealand* (May 2002) 5 <<http://www.humanrights.co.nz>> (last accessed 27 August 2002).

provision to detain refugees, then the changes to section 128 would have been to a large part unnecessary.¹¹⁰

Even if it is accepted that Baragwanath J chose the right approach in modifying section 128 rather than using section 128B, concerns remain. In particular, the decision may conflict with the Court of Appeal judgment in *Attorney General v E*.¹¹¹

In *E v Attorney General*¹¹² thirteen plaintiffs arrived in New Zealand over a period and claimed refugee status on arrival. They also applied for temporary entry permits pending determination of their claims. Their applications were denied and they were detained in prison. They challenged their decision relating to the temporary permits by way of judicial review.

In the High Court Fisher J ordered NZIS to reconsider the claims, holding that the plaintiff's legitimate expectation was breached in that NZIS failed to consider the presumption that temporary permits should be granted to refugees in the absence of special factors to make detention necessary.

This decision was overturned in the Court of Appeal, where the majority (Richardson P, Gault, Henry and Keith JJ) held that while the Immigration officers had to consider the provisions of the Convention and the Immigration Act, there was nothing in either to require a presumptive approach in the

¹¹⁰ The wording "every person" of s 128 would of course remain problematic, as would s 129B(5)(a)(ii). This states that where a determination is made that s 7(1) does not apply, (that is the person does not fall into the categories of people ineligible for a permit), that person may be dealt with under s 128, which allows detention pending the next available flight. In such cases, as Baragwanath J points out, s129B would not be much more help than s128 itself. However, what Baragwanath J does not point out is that s 129(5)(a)(i) provides an alternative to s 128 - that such people may be granted a permit and released immediately. Rather than distorting the language of s 128, it might have been easier to read in a presumption that refugee claimants will be dealt with under s 129(5)(a)(i) rather than s 129(5)(a)(ii). This would mean that refugee claimants who have been detained on the basis of security concerns, for example, which then turn out to be groundless, would be released into the community rather than detained under s 128.

¹¹¹ [2000] 3 NZLR 257, para 48 (CA)(Majority).

¹¹² [2000] NZAR 354 (HC).

discretion of the Minister or his /her delegate to grant a temporary permit to a refugee status claimant, even if the UNHCR Guidelines were read in.¹¹³ Nor did the NZIS Operational Manual require such an approach.

As it stood at the time of both cases, section 128 only had two alternatives, detention or release into the community with a permit. By incorporating the presumption against detention in Article 31.2 into section 128 when considering asylum seekers, Baragwanath J effectively created a presumption in favour of granting a permit, which the Court of Appeal had previously rejected. This problem has, of course, been remedied for the future by the Immigration Act 2002, which will be discussed later on in the paper.

The Immigration Minister, Hon Lianne Dalziel, has announced that the Crown will appeal Baragwanath J's decision on the basis that his interpretation of the Refugee Convention was too narrow.¹¹⁴ It will be interesting to see what happens, especially now that Thomas J, who delivered a strong dissent in *Attorney General v E*¹¹⁵ alleging an "unacceptably minimalist" approach by the majority, has retired.

B NZIS Operational Instruction Policy of Detention

1 Baragwanath J's decision

The second ground for review in the *Refugee Council* case was that the manner in which the Crown exercises its responsibilities under the Immigration Act is unlawful in that it does not give due weight to Article 31.2 of the Convention.¹¹⁶

The Crown's policy of detaining refugees

¹¹³ *Attorney General v E* [2000] 3 NZLR 257 para 47 per Richardson P, Gault, Henry and Keith JJ (CA).

¹¹⁴ "Refugee Case Appeal" (1 July 2002) *NZ Herald*, Auckland, A3.

¹¹⁵ [2000] 3 NZLR 257 (CA).

where the identity ... of a refugee status claimant cannot be established [and there do not] appear particular reasons for allowing them to enter the community unrestricted¹¹⁷ reverses the approach required by Article 31.2 of the Convention - that restrictions on movement should be no more than necessary.¹¹⁸ The presumption in the former is of detention, with liberty in exceptional cases, whereas the latter requires the opposite. This also goes against the clear reluctance of Parliament to imprison claimants shown by section 114K(4)(c), which provides that refugee status claimants who are certified security risks are not only protected from deportation, but are also to be released from custody and given the appropriate temporary permit.¹¹⁹

Despite the fact that the UNHCR seemingly accepted the operational instruction in question,¹²⁰ Baragwanath J held that it was fundamentally defective. He construed it as dealing solely with detention, either in a penal institution or at the Mangere Centre. It failed to give prior consideration to the third option required by Article 31.2 in terms of necessity.¹²¹ "Necessary" in Article 31.2 means the minimum required on the facts as they appear to the immigration officer

- (1) to allow the Refugee Status Branch to be able to perform their functions (more than merely to facilitate the performance of their functions)
- (2) to avoid real risk of criminal offending
- (3) to avoid real risk of absconding.¹²²

Those at the Mangere Accommodation Centre are detained, as the centre's manual makes clear. However, the detention of refugee status claimants is not necessary for the refugee status branch to carry out its functions (albeit it may be

¹¹⁶ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (27 June 2002) High Court Auckland M1881-AS01, para 163.

¹¹⁷ As stated in the NZIS Operational Manual, Appendix 3.

¹¹⁸ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (31 May 2002), High Court Auckland M1881-AS01, para 8.

¹¹⁹ *Refugee Council v AG* (31 May 2002), above, para 59.

¹²⁰ *Refugee Council v AG* (31 May 2002), above, para 74.

¹²¹ *Refugee Council v AG* (27 June 2002), above, para 208 – 210.

convenient). And while it may be necessary to prevent some claimants from absconding, it is in no way necessary for all, or even a great number of claimants.¹²³ Furthermore, if detention were necessary for this purpose, the “benign conditions” at the centre are not enough to prevent terrorism, crime or flight.¹²⁴

Just because some refugee status claimants should be detained, does not mean that all must be. Therefore, Baragwanath J decided that their invariable automatic detention cannot be “necessary”¹²⁵ -

The necessity test should be, but under the current regime is not, applied meticulously. The exceptions to the current wholesale policy of detention are insignificant; what the law calls *de minimis*. Detention is essentially indiscriminating. If as I provisionally consider s 128A applies, such policy not only infringes Article 31.2 but falls outside the legitimate range of executive discretion available in terms of the *Wednesbury* and proportionality tests that engage judicial review... It probably also infringes the Bill of Rights.¹²⁶

The Crown’s argument that detention is justified in order to protect the right to compel a carrier to remove a “turnaround” arrival without charge to the Crown under section 125 Immigration Act was rejected as a basis in itself for detention.¹²⁷

2 Discussion

It is obvious that Baragwanath J was right to condemn the Operational Instruction, as it goes against all that Article 31.2 stands for. Furthermore, in condemning the instruction, he was also condemning a worrying practice of

¹²² *Refugee Council v AG* (27 June 2002), above, para 125 – 126.

¹²³ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (31 May 2002), High Court Auckland M1881-AS01 para 85.

¹²⁴ *Refugee Council v AG* (31 May 2002), above, para 108.

¹²⁵ *Refugee Council v AG* (31 May 2002), above, para 107.

¹²⁶ *Refugee Council v AG* (31 May 2002), above, para 111.

¹²⁷ *Refugee Council v AG* (31 May 2002) High Court Auckland M1881-AS01, para 30.

successive New Zealand Governments to take overly protective measures in a panic response to perceived threats to national security.

This trend can be identified in the security procedures adopted during the Gulf War for determining refugee status applications, which required the police to consider whether someone was *not* a threat to national security; if they could not be satisfied of this the claimant would be deported. The result was that asylum seekers were denied clearance on the basis that not enough was known about them, rather than that there were reasonable grounds for considering them a security threat under Article 33.2.¹²⁸

The trend continued during the APEC conference in 1999, when all asylum seekers were detained in Auckland Central Remand Prison; a decision which drew international criticism.¹²⁹

And again, the practice is apparent in the enactment of the Immigration Amendment Act (No 2) 1999. This Act was passed under urgency in response to the threatened arrival of 102 Chinese by boat. It implemented the detention provisions of the Immigration Amendment Act (No 1) 1999 at an earlier date than the rest of the Act, which gave refugees certain rights in the determination process, for example, and which counterbalanced the detention provisions.

The parliamentary debates show evident dissatisfaction by opposition MPs at this early partial enactment, which upset the balance of the Act.

By picking out one part of the legislation – namely, the part relating to detention – we are encouraging the iron fist without encouraging the silk glove at the same time. That is why it is so wrong. So therefore what the Government is doing is bringing forward into

¹²⁸ Rodger Haines QC "International Law and Refugees in New Zealand" [1999] NZ Law Rev 120.

¹²⁹ Human Rights Foundation of Aotearoa New Zealand & Refugee Council of New Zealand Inc "Freedom's Ramparts on the Sea" *The Detention of Asylum Seekers in New Zealand* (May 2002) 23 <<http://www.humanrights.co.nz>> (last accessed 27 August, 2002).

urgency only one part of what is comparatively balanced legislation. That is what is so fundamentally wrong about the way the Government is doing it.¹³⁰

Politicians labelled it a panic move in response to the Chinese boat people, which required ignoring the spirit of the Refugee Convention.¹³¹

The measures taken in response to September 11 complete the quinella.

Undoubtedly September 11 (and the earlier events) required a governmental response regarding immigration. To do so was not inconsistent with the Refugee Convention, which allows provisions to be made for national security.¹³² Indeed, there would be few signatories if it did not. However, the Convention requires that any measures to protect national security be in response to the circumstances of the individual and the local conditions.¹³³ If each of the 208 refugee status claimants who were detained under the Operational Instruction had been individually assessed, some of them may well have justified detention in the climate of the time. But to detain them on the basis of such an arbitrary policy of prima facie detention deserves to be denounced.

Furthermore, the plight of the genuine refugee should not be diminished by over-emphasising the larger problem of terrorism or economic migrants.¹³⁴ The effects of this world wide problem are neatly summed up by the Hon Lucienne Robillard, Minister of Citizenship and Immigration, Canada, who said

The image of the refugee is gradually being superseded in the minds of many by the picture of the irregular migrant illegally gaining access to Canada, irrespective of the need for protection. There is a risk that the refugee-determination system may come to be seen as the vehicle for those who would abuse our generosity. This mistrust

¹³⁰ Tim Barnett, MP (15 June 1999) 578 NZPD 17376.

¹³¹ Matt Robson, MP (15 June 1999) 578 NZPD 17354.

¹³² See Part III A 4 "An appropriate balance?"

¹³³ UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999), Guideline 4.

¹³⁴ *Attorney General v E* [2000] 3 NZLR 257 para 62, per Thomas J (dissent) (CA).

undermines the credibility of the system and, ultimately, affects societal attitudes to newcomers and the ability of those newcomers to integrate at the community level.¹³⁵

It is important that we look at refugee status claims carefully and do not disregard the rights they are entitled to on the basis that others seek to abuse them.

V **IMMIGRATION AMENDMENT ACT 2002**

Like the *Refugee Council* case just discussed, the Immigration Amendment Act 2002 also changes the way that refugees can be dealt with under section 128.

A **History of the Act**

The Immigration Amendment Act 2002 was a response to the events on September 11. Originally contained in the Transnational Organised Crime Bill 2002 ("the Bill"), it was part of a measure to amend various enactments to create offences in respect of, and otherwise discourage, transnational crime of certain descriptions. In particular, migrant smuggling and human trafficking were targeted. The Bill also sought to implement obligations in the United Nations Convention against Transnational Organised Crime and its Protocols on the Smuggling of Migrants and Trafficking of Persons, which New Zealand signed in December 2000.

This Bill was criticised for introducing a number of provisions not directly related to migrant smuggling and for using "hysteria about foreigner dangers to slide through unnecessary threats to New Zealander's freedoms and the rule of

¹³⁵ The Hon Lucienne Robillard, Minister of Citizenship and Immigration, Canada, as cited by Hon Justice Baragwanath "Judicial Review and Administrative Law Issues Arising in Refugee Law Cases in New Zealand" (Conference of International Association of Refugee Law Judges, Auckland, 10 March 2000) 1 <<http://www.lawcom.govt.nz/content/speeches/jud%20rev%20rolaw%20cases%20wdb-4apr.htm>> (last accessed 31 March 2002).

law."¹³⁶ It was alleged that many unnecessary, or overly stringent measures would thereby be introduced via the back door.

To meet these criticisms, the Bill was divided into five separate Acts at its third reading, one of which was the Immigration Amendment Bill 2002. This was assented to on 17 June 2002, and came into force the next day. Sections 9 and 10 of the Amendment Act, modified the position of section 128 of the Immigration Act and the detention of refugees.

B Sections 9 and 10

While there is no purpose section in the Immigration Amendment Act, it is clear from the content of sections 9 and 10, and also from the comments of the Hon Phil Goff during Question Time, that these sections were included to address the "unduly restrictive" approach to bail under section 128.¹³⁷

Sections 9 and 10 of the Act are aimed at providing a middle ground between detention under section 128 of the Immigration Act, and release into the community with a permit. They promote the rights of refugee status claimants according to the Refugee Convention and the Bill of Rights, while still allowing New Zealand to manage the risks associated with persons claiming refugee status at the border, and recognise that some people currently detained could enjoy greater freedom.¹³⁸

Section 9 concerns the detention and departure of persons refused permits. It repeals section 128(15), which denied bail to a person detained under section 128,

¹³⁶ Stephen Franks, MP "Sinister Add-ons to Terrorism, Boat People Bill" (1 March 2002) Press Release.

¹³⁷ In particular under the old section 128 bail was only available to those who applied for judicial review of their detention under section 128A. Hon Phil Goff MP Questions to Ministers Transnational Organised Crime Bill - Asylum Seekers Question no 11(11 June 2002) NZPD <http://rangi.knowledge-basket.co.nz/hansard/han/text/2002/06/11_012.htm>(last accessed 9 July 2002)

¹³⁸ Transnational Organised Crime Bill 2002, no 201 -1 (Commentary) 13; Hon Phil Goff, MP, (30 May 2002) NZPD <<http://rangi.knowledge-basket.co.nz/hansard/han/text/2002/05/30>> (last accessed 9 July 2002).

and substitutes a new subsection 15, which continues to deny bail, but enables a person detained under that section to be released under section 128A, or the new section 128 AA.

This means that a person detained under section 128 no longer has to apply for judicial review under section 128A, for which there is no legal aid available in order to be released.

Section 10 sets out the new sections 128 AA - 128 AD.

Section 128 AA applies to a person detained in custody under section 128(5) or under a section 128(7) warrant of commitment. An immigration officer may apply to a District Court Judge for an order of conditional release of any such person.¹³⁹ In addition, if the person is a refugee status claimant, they may apply themselves for conditional release.¹⁴⁰

However, if the Judge declines to make such an order for release then, provided the person is not already subject to an order under section 128(7), a warrant of commitment must be issued authorising the person's detention for a period of not more than 28 days.¹⁴¹

Section 128AA also applies to people who are subject to an application under s128(13)(a) for the extension of a warrant of commitment,¹⁴² and in such a case an immigration officer, or the person concerned, may apply to a District Court Judge for an order of conditional release from custody under section 128AA(4).

¹³⁹ Immigration Act 1987, s128AA(3) for people not claiming refugee status, and s128AA(4) for refugee claimants.

¹⁴⁰ Immigration Act 1987, s128AA(4). This was inserted in Committee on 11 June 2002 by the amendment of Keith Locke MP. It is a considerable advantage as it means that refugee claimants do not have to wait 28 days to apply for release.

¹⁴¹ Immigration Act 1987, s128AA(8)(a).

¹⁴² Immigration Act 1987, s128AA(2)(b).

If the Judge declines to order conditional release, he or she may extend the warrant of commitment for not more than 7 days.¹⁴³ However, if the person is part of a mass arrival, all of whom are applying for conditional release, the Judge may extend or further extend the warrant of commitment for such period as the Judge thinks necessary in the circumstances, to allow all the persons in the group concerned to be properly dealt with.¹⁴⁴

The new section 128AB sets out the conditions of an order of conditional release under section 128AA(6). This includes that special condition that refugee status claimants must attend any interview by a refugee status officer or the Refugee Status Appeals Authority under Part VIA. The Judge is free to impose any circumstances, in addition to the residence and reporting times stated in the section, as he or she sees fit.

Section 128AC(7) states that any person released under section 128AA is to continue to be treated as detained under section 128, and nothing in Part II (relating to persons in New Zealand unlawfully and allowing appeal against the requirement to leave) applies to such a person.

C Concerns for Refugees

According to the Explanatory Note to the Transnational Organised Crime Bill, the obligations of state parties to the 1951 Refugee Convention are not altered by the Migrants Protocol, which the Bill aimed to implement.¹⁴⁵ Nor did the Bill itself alter these obligations.¹⁴⁶ Thus, our international obligations regarding refugees have not changed despite increasing security concerns. Whether the new provisions meet those obligations is a moot point, and probably ultimately depends on the interpretation of the Courts.

¹⁴³ Immigration Act 1987, s128AA(8)(b)(ii).

¹⁴⁴ Immigration Act 1987, s128AA(8)(b)(i).

¹⁴⁵ Transnational Organised Crime Bill 2002, no 201-1 (explanatory note) 3.

Baragwanath J thought that

Clause 25 of the [Transnational Organised Crime] Bill [inserting new sections 128AA – 128AD] includes an amendment to the Immigration Act. It will, if enacted, provide additional flexibility in dealing appropriately with persons claiming refugee status at the border upon arrival, in light of their personal circumstances and identity, security, repatriation and other concerns.¹⁴⁷

It is to be hoped that, in considering whether to grant conditional release, District Court Judges will consider the factors highlighted by Baragwanath J, but there is nothing in the Immigration Act 2002 to ensure that they do so. In their select committee submission, the Refugee Council recommended that if clause 25 was to remain, section 128AA(6) should stipulate criteria to be considered. They submitted that this was necessary for certainty, as required by the rule of law, the Refugee Convention and the Bill of Rights.¹⁴⁸

However, in their report to the Foreign Affairs, Defence and Trade Committee on the Transnational Organised Crime Bill the Department of Labour rejected this suggestion. They considered it inappropriate, saying that release requires the balancing of many factors, which differ according to the circumstances of the case.¹⁴⁹

Even so, I think that there should be a requirement that Judges consider the individual circumstances of the case and have regard to the Refugee Convention in doing so.¹⁵⁰

¹⁴⁶ Hon George Hawkins, MP (28 February 2002) NZPD <<http://rangi.knowledge-basket.co.nz/hansard/han/text/2002/02/28>> (last accessed 9 July 2002).

¹⁴⁷ *Refugee Council of New Zealand Inc & the Human Rights Foundation of Aotearoa New Zealand Incorporated and D v AG* (31 May 2002) High Court Auckland M1881-AS01, para 75.

¹⁴⁸ Refugee Council of New Zealand “Submission to the Foreign Affairs, Defence and Trade Committee on the Transnational Organised Crime Bill 2002” para 49.

¹⁴⁹ Department of Labour “Departmental Report on Submissions to the Foreign Affairs, Defence and Trade Committee on the Transnational Organised Crime Bill 2002” 8.

¹⁵⁰ This should not be too problematic. See for example, Bail Act 2000 s8, which lists the criteria that judges must take into account in every bail application. And surely bail is no different from conditional

For example, as I noted previously, if a District Court Judge declines conditional release of mass arrivals, they may extend the warrant of commitment for such period as he or she considers necessary to deal with the whole group. This means that individual circumstances may not be considered, only the fact that the refugee claimant is part of a mass arrival.

Although no comment was made on the mass arrival provisions in the select committee submissions for the Transnational Organised Crime Bill, there were some at the time of the Immigration Amendment Act 1999, which contains similar provisions in section 128(13B).¹⁵¹

In their report regarding the Immigration Amendment Act 1999, the New Zealand Immigration Service argued that the provisions for mass arrivals were necessary because of the desirability of speedy assessment of refugee claims and the potential concerns about public health and security issues. They considered that these would be facilitated by detaining the group as a whole, rather than just selected individuals.¹⁵² The risk of a group wanting to abscond if their claim was refused was seen to be “potentially quite high”, justifying detention.¹⁵³

But even accepting these concerns, individual circumstances should still be considered. If the nature of the particular mass arrival is such that the health and security concerns do in fact warrant detention of the whole group together this would outweigh other individual needs. It is at least plausible that some mass arrivals will not present these concerns, and so do not all need to be detained.

release applications in requiring differing factors to be balanced and the circumstances of the case to be considered?

¹⁵¹ Section 128(13B)(b) allows a District Court Judge to further extend warrants of commitment concerning mass arrivals for such longer period as the Judge thinks necessary to allow all the people in the group to be properly dealt with.

¹⁵² New Zealand Immigration Service “Briefing for Members on the Immigration Amendment Bill 1998” (2 November 1998) 4-5.

¹⁵³ New Zealand Immigration Service “Immigration Amendment Bill 1998 Departmental Report to the Social Services Committee” 23.

In their submissions concerning the Immigration Amendment Act 1999, the Human Rights Commission and the UNHCR both stated that detention of asylum seekers is inherently undesirable and where resorted to, should be clearly prescribed by law. It should be a last resort and should be used only for the minimum period possible. They were concerned that there were no specified limits on the duration of detention of mass arrivals,¹⁵⁴ and the lack of specific provisions ensuring expeditious but fair processing.¹⁵⁵

The NZIS considered that detention under section 128 is prescribed by law as it can be extended if the Judge

is of the view that continued detention is, in the circumstances, justified. There is no requirement for a Judge to extend the warrant merely because an extension is sought. The fact that a case had not been processed expeditiously would clearly constitute grounds for a Judge to consider that detention of an asylum seeker pending determination of his or her claim might no longer be justified. Any detention resulting from a warrant issued pursuant to s 128 is clearly prescribed by law.¹⁵⁶

However, the evidence accepted by Baragwanath J in the *Refugee Council Case* about the almost invariable practice by District Court Judges of extending warrants when asked to, throws these statements into question.¹⁵⁷

Rather than conditional release on what amounts to bail, (even if not so called), the UNHCR favours a presumption against detention in the first place.

The degree to which asylum-seekers can effectively challenge the lawfulness of their detention, however, varies significantly. In many States, asylum-seekers are expected to initiate the review process themselves, by applying for bail or parole, which often poses difficulties given their unfamiliarity with the legal process and, in many cases, their

¹⁵⁴ Human Rights Commission "Submission to the Social Services Committee on the Immigration Amendment Bill 1998" (16 November 1998) para 2.3.4.

¹⁵⁵ UNHCR "Submission to the Social Services Committee on the Immigration Amendment Bill 1998" (16 November 1998) para 8.

¹⁵⁶ New Zealand Immigration Service "Immigration Amendment Bill 1998— Departmental Report to the Social Services Committee" 23.

¹⁵⁷ *Refugee Council of New Zealand Inc & The Human Rights Foundation of Aotearoa New Zealand Incorporated and D v Attorney General* (31 May 2002) High Court Auckland M1881 – AS01, para 101 – 102.

inability to speak the language. These difficulties are even more acute when assistance in the form of legal aid is not available. In order to ensure that the rights of asylum seekers are respected in this regard, there should be prompt, mandatory and periodic review of all detention orders before an independent and impartial body.

UNHCR shares the opinion of the Working Group on Arbitrary Detention that in States where such challenges are by way of bail hearings "asylum seekers may have no effective opportunity to challenge the reasons for the detention, as the focus would be on establishing the reliability of the surety and its relationship to the applicant as opposed to the reasons for the detention."¹⁵⁸

In New Zealand a key problem remains that legal aid is not available to challenge detention. While section 128AA provides conditional release, it does not go to the legality of the original detention. However, to provide legal aid at this stage would involve a reversal of the policy decisions of 1999, which extended legal aid in relation to refugee status claims, but, in response to perceived abuse of the system, removed it for other immigration matters not involving residents.¹⁵⁹ Nevertheless, Hon Lianne Dalziel, Minister of Immigration, said that while the Immigration Amendment Act was not directed towards legal aid, she could commit Parliament to looking into funding legal representation for refugee status claimants regarding detention, although not necessarily through the grant of legal aid.¹⁶⁰

As a final point, it is interesting to note that even if conditionally released under section 128AA, people are still officially detained according to section 128AC(7). The reason behind this is probably the fact that if a person is ultimately deported due to their unlawful presence in New Zealand, the airline that brought them here must pay the cost of deportation, so long as the person has

¹⁵⁸ Executive Committee of the High Commissioner's Programme Standing Committee *Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice* (4 June 1999) para 16 – 17.

¹⁵⁹ Department of Labour "Departmental Report on Submissions to the Foreign Affairs, Defence and Trade Committee on the Transnational Organised Crime Bill 2002" 8.

¹⁶⁰ Hon Lianne Dalziel, MP (11 June 2002) NZPD <http://rangi.knowledge-basket.co.nz/hansard/han/text/200206/11_071.html> (last accessed 9 July 2002).

been detained during the interim period.¹⁶¹ There was much discussion in the Select Committee submissions on the Transnational Organised Crime Bill concerning the extension of carrier liability, which I do not wish to enter. Suffice to say, I think that this is a poor reason for prima facie detention of refugee status claimants, as it puts dollars before human rights and fundamental freedoms.

VI THE RELATIONSHIP BETWEEN THE IMMIGRATION AMENDMENT ACT AND THE REFUGEE COUNCIL CASE

One of the main concerns expressed at select committee about the proposed legislation was that it was seen as justifying the use of section 128 to detain refugees, which was at the time being challenged in the High Court in the case of *Refugee Council Case*. Furthermore, that as originally drafted, section 128AA allegedly extended the power of detention under section 128 to include refugee claimants by back door tactics – at that time only mentioning refugee status claimants in a minor provision: section 128AB(1)(b).¹⁶² However, this was changed, and now section 128AA(2) makes it clear that refugees are subject to these provisions.

While it is inherently undesirable for the outcome of litigation to be preempted in such a way, the problem is not so great in this case as Baragwanath J decided that section 128 applies to refugee status claimants anyway. He also invited legislative response to deal with conditional release of refugees, stating that Parliament is normally regarded as "the decision maker which can deal with the issue most effectively and authoritatively".¹⁶³

¹⁶¹ Immigration Act 1987, s125(4).

¹⁶² Refugee Council of New Zealand "Submission to the Foreign Affairs, Defence and Trade Committee on the Transnational Organised Crime Bill" para 22.

¹⁶³ *Refugee Council of New Zealand Inc & The Human Rights Foundation of Aotearoa New Zealand Incorporated and D v Attorney General* (31 May 2002) High Court Auckland M1881 – AS01, para 25.

In any case, it is clear that section 128 does apply to refugee claimants. What can be questioned, is how the new legislation and the *Refugee Council Case* will interact, if at all.

Will section 128 still be read as Baragwanath J decided it should be, with refugees only being detained where necessary? This would mean that section 128AA would only come into play in those same limited circumstances.

This seems an unlikely outcome because if only those that pose a threat are detained, then section 128AA becomes redundant, as these people will presumably be ineligible for conditional release for the very reason that their detention was necessary.

The more likely outcome is that the effect of the *Refugee Council* case will be limited to cases under the pre-2002 amendment legislation. In which case, all future refugees status claimants arriving without a permit will be detained pursuant to section 128(5), but will then be able to apply for conditional release under section 128AA. In that situation, there would still be prima facie detention, which is inconsistent with the Article 31.2 of the Refugee Convention as discussed earlier.

In practice, this whole argument may be academic. A recent newspaper report suggests that that most new arrivals are still being held in detention, contravening both Baragwanath J's decision and the new Act.¹⁶⁴

This is the outcome feared by Keith Locke MP in his speech at the Transnational Organised Crime Bill's second reading:

The changes we are making include a system of conditional release for imprisoned asylum seekers that on the one hand might seem a step forward, but on the other hand could be part of a process of legitimising the routine imprisonment of asylum seekers,

¹⁶⁴ "Policy puts off asylum seekers" (16 August 2002) *The Dominion Post* Wellington A7.

whereby virtually all asylum seekers who arrive in this country are put in prison, often for long periods of several months, which is a huge injustice for people who have suffered so much overseas before they get here.¹⁶⁵

Rather than detaining everyone and then releasing only those that the NZIS consider safe, it would be preferable, from a human rights point of view, to only detain those who are a threat in the first place. The prima facie detention under section 128(5) does not require justification or reasonable cause. The only criterion for detention is that they are a spontaneous refugee, in which case they can expect to be refused a permit on arrival in New Zealand. This arguably breaches not only the Refugee Convention, but also sections 21 and 22 of the Bill of Rights Act 1990.¹⁶⁶

Baragwanath J only allowed detention where necessary. The Immigration Amendment Act on the other hand, allows detention for everyone who arrives in New Zealand unlawfully, but with the conditional release of all except those which it is necessary to detain. While there might not seem much difference between the outcome of the two approaches - both basically require a presumption against detention, the differences could be very important in the future. If detention is retained as the first step for all refugee claimants it is much easier to justify a change in policy such as the one seen after September 11 of not releasing anyone on bail. If the position was that only those necessary to detain were detained from the outset it would be much harder to shift policy to detain everyone. Under this analysis, bail could be seen as mere "sugar coating" of a policy of detention.¹⁶⁷

¹⁶⁵ Keith Locke MP Second Reading Transnational Organised Crime Bill (30 May 2002) NZPD <<http://rangi.knowledge-basket.co.nz/hansard/han/text/2002/05/03>> (last accessed 9 July 2002).

¹⁶⁶ Refugee Council of New Zealand "Submission to the Foreign Affairs, Defence and Trade Committee on the Transnational Organised Crime Bill" para 24.

¹⁶⁷ Keith Locke MP Questions to Ministers Transnational Organised Crime Bill - Asylum Seekers, Question No 11 (11 June 2002) NZPD <http://rangi.knowledge-basket.co.nz/hansard/han/text/2002/06/11_012.html> (last accessed 9 July 2002).

However, considering that these measures were part of a transnational security drive, it is unsurprising that the emphasis is in favour of security. This means that someone is more likely to be detained when it was not necessary (and their rights breached) than someone released who should not be (and national security threatened). This can, perhaps, be justified as protecting the collective right of all New Zealanders to liberty and freedom from harm, over the right of individuals to liberty.

Even if this position is acceptable, another concern is that wrongly detained refugee status claimants are even further sacrificed as they do not get the benefit of the complaints system under the Human Rights Act 1993.¹⁶⁸ This seems to cut across the purpose of the Human Rights Act to "provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights".¹⁶⁹

But, despite all these concerns, it has to be accepted that the enactment of sections 128AA to 128 AD is an improvement on the previous situation, so long as they are properly used.¹⁷⁰ They at least provide an alternative to detention or release into the community with a permit. Prior to the Immigration Act 2002, where NZIS had not issued a permit, detainees could only be released by habeas corpus or judicial review proceedings in the High Court, for which legal aid is not available.

¹⁶⁸ See s149D Immigration Act 1987, as amended by the Human Rights Amendment Act 2001 s 55. These exemptions are much narrower than previously existed under the Human Rights Act s153(3) and the previous Immigration Act s 149D which basically banned any application of the former to the latter. At least now the Human Rights Commission will be able to inquire into matters and make public statements and so on. However, the exemptions still prevent refugees from making a complaint under the Human Rights Act, which is the most valuable part.

¹⁶⁹ Human Rights Act 1993, long title.

¹⁷⁰ See "Policy puts off asylum seekers" (16 August 2002) *The Dominion Post* Wellington A7, which suggests that new arrivals are still being detained without conditional release.

VII CONCLUSION

The right to control borders is an important aspect of State sovereignty, and is jealously guarded.¹⁷¹ Controlling borders requires decisions to be made about who you let in, and how you will stop those that you don't want to enter from doing so. Detention is an effective way of preventing unwanted entry.

Conversely, liberty is a fundamental human right, which needs to be balanced against this right of the State. Where people try to enter a State unlawfully limitations on the right to freedom may well be justified. However, in the case of refugees greater justification is required. New Zealand voluntarily acceded to the 1951 Refugee Convention, and has recently reaffirmed its commitment. It must then respect the consequences of such undertakings.

Article 31 of the Refugee Convention provides that refugee status claimants should not be detained, other than in strictly circumscribed instances of necessity. While not directly incorporated into New Zealand domestic law, the Convention is still important and must be regarded.

Section 128 of the Immigration Act and the way it was interpreted in governmental policy prior to the *Refugee Council* case did not give effect to Article 31. It could have been argued that this expressly overrode it. This would mean that while other parts of the Convention had been specifically imported into New Zealand law, Article 31 had no relevance.

However, recent developments have shown that this is not the case. Clearly Article 31 has a bearing on New Zealand domestic law. In the *Refugee Council* case, Baragwanath J considered that although refugees may be detained under section 128, this was only to be where necessary. The Immigration Amendment

¹⁷¹ Atle Grahl Madsen *Commentary on the Refugee Convention 1951* (Division of International Protection of the United Nations High Commissioner for Refugees, Geneva, 1997) 168.

VIII Act 2002 also requires that conditional release from detention only be denied where necessary.

While these developments, to change this awkward application of section 128 to refugee status claimants, are to be commended for bringing New Zealand closer to her international obligations under Article 31, there is still room for improvement. But so long as refugees and other illegal migrants are not distinguished in the legislation, the problems will continue.

Panic reactions to perceived security threats do not help the situation. While undeniably terrorists, criminals and economic migrants exist and may try to enter New Zealand by improper means, this should not be used to undermine the rights of refugees entirely. Most refugees are not criminals, nor suspected of being so. We should not punish refugees in order to appear to be taking action about other less worthy candidates.

Nevertheless, despite these growing fears about boat people and terrorists, New Zealand is getting closer to finding the appropriate balance between the right of refugees not to be detained, as set out in Article 31.2 of the Convention, and the right of the State to control its borders.

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