

THE CONTRIBUTION OF THE
NEW ZEALAND REFUGEE STATUS APPEALS AUTHORITY
TO INTERNATIONAL REFUGEE JURISPRUDENCE:
A SUBMISSION TO BOTH ACKNOWLEDGE THE CONTRIBUTION
OF THE AUTHORITY AND TO ADVOCATE FOR ITS RETENTION

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I. THE REFUGEE STATUS APPEAL AUTHORITY WITHIN THE
NEW ZEALAND LEGAL FRAMEWORK

New Zealand is one of 142 states having ratified the 1951 *Convention Relating to the Status of Refugees* [the Refugee Convention] and its 1967 *Protocol Relating to the Status of Refugees* [the Protocol]. In so doing New Zealand committed itself to an important framework to both promote human rights and provide protection for victims of human rights violations. These goals are achieved inter alia, by ratifying states granting asylum to people accorded refugee status and affording them the protection of those deemed to be refugees in accordance with Article 1(2). A refugee is defined as a person who has:

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.

The circumstances placing a person within the parameters of the definition does not; however, mean that the person will be accorded refugee, or ongoing refugee, status. Status will be denied or continue to apply under the circumstances set out in clauses C–F of Article 1 of the Refugee

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Convention¹ thereby making refugee determination complex, challenging and at times difficult.² Essentially refugee status is determined in the following two ways:

A) *Mandated refugees*

The *United Nations High Commissioner for Refugees* [UNHCR] accords refugee status where people are, for example, living in refugee camps. These people are known as UNHCR ‘mandated refugees’ and once mandated refugee status is accorded countries such as New Zealand grant asylum to fulfil refugee quotas.³

B) *Convention refugees*

New Zealand government agencies must determine whether to grant refugee status in accordance with the terms of the Refugee Convention after consideration of claims of people who, upon arrival to New Zealand or at some later date, claim refugee status. Appellants accorded status in this manner are known as ‘convention refugees’.⁴

The statutory framework for determining status under this head is found in Part 6A (ss 129A–129ZB) of the Immigration Act 1987 [the Act] as inserted on 1 October 1999 by the Immigration Amendment Act 1999 s 40. Section 129A states:

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

Under the Act refugee claims are initially assessed and determined by a Refugee Status Officer, [RSO] being an employee of the Department of Labour designated by the Chief Executive to undertake refugee status determination.⁵ Where refugee status is declined by the RSO the appellant has the right to appeal that decision to the Refugee Status Appeals Authority [the RSAA]. The statutory provisions guiding the work of the RSAA are set out in Schedule 3C ss 129N–129T of the Act.⁶ While the RSAA may comprise one member, the chairperson has the discretion to direct that more than one member hear the appeal.⁷ Further, if appropriate – this is usually in more com-

1 These circumstances include:

- persons who while meeting the requirements of the refugee definition are already receiving assistance from the United Nations (e.g. Palestinian refugees);
- people who while initially meeting the requirements of the refugee definition can no longer hold this status on the basis that the circumstances of his/her country of habitual residence which gave rise to the refugee status no longer exist;
- persons who while initially meeting the requirements of the refugee definition cannot be accorded this status on the basis that there are serious reasons for believing that the person has committed a crime against peace, a war crime, a crime against humanity, a serious non political crime outside of the country in which he is seeking asylum, or is responsible for an act which is contrary to the purposes and principles of the United Nations.

2 The fact that determinations can at times be difficult has been acknowledged by Toohey J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 386 (Mason CJ), 398 (Dawson J), 405 (Toohey J), 414 (Gaudron J), 432 (McHugh J) (HCA).

3 The yearly refugee quota is determined by the Department of Labour and Immigration New Zealand. Last year New Zealand granted refugee status to people who had been child soldiers in Myanmar.

4 The terms ‘applicant’, ‘appellant’ and ‘claimant’ for the purpose of this paper, are synonymous.

5 For the role and functions of RSOs see Immigration Act 1987 Part 6A ss 129E–129M.

6 Essentially dealing with the RSAA composition and terms of reference.

7 Immigration Act 1987 s 129N(4)–(5).

plicated appeals – a representative of the UNHCR can be present in an ex-officio status to provide assistance in refugee determination.⁸

The RSAA from its outset has always emphasised the non-adversarial nature of its proceedings and that its practice is to conduct a detailed and lengthy examination of all appellants and witnesses called.⁹ This practice acknowledges the special situation of refugee appellants who have often had to flee their country of nationality or habitual residence in haste and in fear of their lives. The need to be non-adversarial, careful and thorough in refugee determinations is further acknowledged in the Act according the RSAA the powers of a Commission of Inquiry.¹⁰ Under s 129D of the Act RSOs and the RSAA are required to act in a manner that is ‘consistent with New Zealand’s obligations under the Refugee Convention.’

It is suggested that this statutory obligation provides the Refugee Convention with an interesting status. Traditionally for ratified international instruments to be accorded the status of domestic law it is necessary for the provisions of the instrument to be enacted into domestic legislation.¹¹ Ratified instruments – without further domestic enactment – can however be used to assist the courts in interpreting domestic legislation.¹² Indeed if at all possible the domestic courts should adopt an interpretation which is in accord with the obligations as set out in the relevant international treaty.¹³ The New Zealand legislature, while not incorporating the Refugee Convention into domestic law but in establishing a statutory framework which requires compliance with the Refugee Convention, provides the Refugee Convention with an interesting legal status in New Zealand. This statutory framework has enabled the RSAA to conduct its work:

- in a manner which enables it to focus solely on obligations under the Refugee Convention thereby enabling it to be totally ‘true’ to the Refugee Convention;¹⁴
- in a manner which makes full use of judicial decisions and academic commentary from a vast range of jurisdictions and international scholarship.

This has assisted in providing the RSAA the scope and depth to undertake refugee determinations in such a way as to enable the RSAA to make a significant contribution to international refugee jurisprudence. The purpose of this paper is to acknowledge this contribution.

More specifically this paper will focus on the RSAA’s contribution in justifying refugee status in two differing situations. Firstly: where persecution comes from non-state agents and where the state is not complicit in, or does not directly condone, the persecution. Secondly: in consideration of how the RSAA has acknowledged that people persecuted on the basis of sexual orientation or gender discrimination can, in certain circumstances, be acknowledged to be members of ‘a particular social group’ facing persecution and thereby warranting refugee status.

Acknowledgement of the contribution of the RSAA has come from significant judicial bodies and leading international scholars in the field.¹⁵ It is important to note the acknowledgement given by Professor James Hathaway about the contribution of the RSAA.

8 Ibid s 129(N)(3)(B).

9 *Decision 523/92*, 12.

10 Immigration Act 1987 Sch 3 C cl 7: powers of a Commission of Inquiry as set out under the Commissions of Inquiry Act 1908.

11 This is generally referred to as the ‘principle of transformation’.

12 *R v Secretary of State for the Home Department Ex parte Brind* [1991] AC 696; [1991] All ER 720, 723.

13 *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 28 ALR 353.

14 E.g. it is not required to take account of obligations contained in other conventions.

15 E.g. House of Lords and Australian High Court.

Professor Hathaway writes:

The New Zealand Refugee Status Appeal Authority is second to none in the world today for the clarity of reasoning, for its constant concern to reconcile principle to hard realities. It has provided leadership to the rest of the world on hard refugee law issues.¹⁶

Using the comments of Professor Hathaway's acknowledgement as a basis to consider the workings and contribution of the RSAA to international refugee jurisprudence, the framework which the RSAA has adopted to determine refugee claims will be considered. This will be followed by a discussion and assessment of the work and contribution of the RSAA in the areas of carefully extending the scope of the Refugee Convention with regards to a 'particular social group' and in acknowledging that persecution from non state agents can still come within the parameters of the Refugee Convention in certain circumstances.

The paper will conclude with some general comments and acknowledgements concerning the contribution of the RSAA.

II. FRAMEWORK TO DETERMINE REFUGEE CLAIMS

The RSAA has over the years worked very hard to develop an appropriate framework to determine refugee claims in a manner which is in accord with the Refugee Convention, thus ensuring that New Zealand is fulfilling its international obligations. The work of the RSAA has received acknowledgement for its clarity of reasoning. It is suggested that this clarity can be attributed, in some degree, to the procedural and evidential framework it has developed. This framework has been developed through:

- careful consideration of the content of the Refugee Convention in particular Article 1(C);
- a critical overview of influential comparative refugee decisions to determine appropriateness as to guidance or precedent setting in a particular field;
- an acknowledgement of the special and often difficult circumstances facing refugee appellants; and
- considering the above to achieve a fair and appropriate balance between core human rights protection obligations of the Refugee Convention on the one hand, and the required realisation that there are justifiable limits to this protection on the other.

This is reflected in the view that the refugee scheme has been deemed to be 'surrogate or substitute protection' activated only upon a failure of national protection.¹⁷ The approach of a review body in determining refugee claims is therefore of key importance. There is a clear requirement to construct a framework which ensures compliance with the Refugee Convention in a manner which is fair and flexible while at the same time accurate. 'Accurate', in this sense, means working within the accepted parameters of the Refugee Convention, while at the same time remembering it is a 'living document'¹⁸ needing to be appropriately applied to new situations reflective of the constant changing state of global affairs.

The RSAA has adopted an interpretative approach to the Refugee Convention in accord with 1969 Vienna Convention on the Law of Treaties [VCLT] Article 31 which provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.

16 Personal correspondence between Professor Hathaway and author.

17 James Hathaway *The Law of Refugee Status* (1991), 135.

18 *R v Secretary of State for the Home Department, Ex parte Adan* (unreported, 23 July 1999) Laws LJ paras 71–72.

In considering and determining an appeal from a decision of an RSO the RSAA has to establish whether a appellant has a well founded fear of being persecuted within the meaning of the Refugee Convention. This raises two important issues central to refugee determination:

- a) the standard of proof required to establish the fear is well founded; and
- b) where the onus or responsibility to show that that the fear is well founded for Refugee Convention reasons lies.

A) *Required standard of proof*

Initially the RSAA approached a claim through four questions:

1. Are the appellants genuinely in fear?
2. If so, is it a fear of persecution?
3. If so, is that fear well-founded?
4. If so, is the persecution they fear persecution for a Convention reason? ¹⁹

The RSAA was however quick to appreciate the danger that this approach could on occasion lead to a material misdirection. Too much focus was placed on the subjective views of the appellant rather than on what the objective facts justified.²⁰ The RSAA was therefore prepared to critique its own position and develop a more appropriate approach. In developing a new framework the RSAA was guided by a number of international decisions but in particular the House of Lords in *R v Secretary of State for the Home Department, Ex parte Sivakumaran*²¹ and Australian High Court in *Chan v Minister for Immigration and Ethnic Affairs*.²²

The contribution of *Sivakumaran* is that it emphasises the objective element of refugee definition.²³ Lord Keith noted the fear of persecution needed to be ‘objectively’ determined by reference to the circumstances at the time prevailing in the applicant’s place of habitual residence.²⁴ Lord Templeman stated it is not for the appellant to decide whether the danger of persecution exists but for that decision to be taken by the country in which the appellant seeks asylum.²⁵ This led Lord Goff to say that the appropriate ‘enquiry should be made whether the subjective fear of the applicant is objectively justified.’²⁶

Therefore, while the subjective fear of the appellant is not sufficient in itself to determine refugee status, it is still important. It is the subjective fear which has, in most cases, led the appellant to make a claim. For this reason the normal approach of the RSAA when hearing the claim is to commence by explaining the refugee definition to the appellant together with the importance of the appellant telling the truth. The appellant or representative makes submissions and produces relevant evidence. The RSAA then examines the appellant and the appellant’s case, concerns, and affairs are carefully considered.²⁷

¹⁹ This was the approach that was adopted in the very first decision of the Authority, *Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB* (11 July 1991).

²⁰ *Refugee Appeal No. 70074/96 Re ELLM* (17 Sept 1996), 11.

²¹ *R v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] AC 958 cited in 70074/96 above n 20.

²² *Chan* above n 2.

²³ *Sivakumaran* above n 21.

²⁴ *Sivakumaran* ibid 992G.

²⁵ Ibid 996D.

²⁶ Ibid 1000D [Emphasis added].

²⁷ 523/92 above n 9.

The role of the RSAA is – through consideration of the credibility of the appellant together with other appropriate evidence and information – to determine whether these fears are objectively justified. To assist in such an enquiry the RSAA is accorded the powers of a Commission of Enquiry.

The RSAA has to objectively consider whether fear is ‘well founded’. In determining what is meant by ‘well founded’ the RSAA has adopted the approach taken by the Australian High Court in *Chan*.²⁸ Well founded is to be determined through asking if the appellant faces a ‘real chance’ of persecution. In so doing the RSAA is distinguishing itself from the ‘reasonable chance’ or ‘good grounds’ approach taken in jurisdictions such as Canada and the United Kingdom.²⁹ The foundation for the position of the Australian High Court can be found in the writings of Grahl-Madsen in *The Status of Refugees in International Law*³⁰ where he writes that in determining well founded fear;

the real test is the assessment of the likelihood of the applicant becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his ‘fear’ is ‘well-founded’.

In *Chan* Mason CJ, in adopting the ‘real chance’ approach, noted that it conveyed the notion of substantial as distinct from a remote chance of being persecuted.³¹ Mc Hugh J in his decision concurred with the Chief Justice and acknowledged the position taken by the United States Supreme Court in *Immigration and Naturalization Service v Cardoza-Fonseca*³² that a substantial chance of harm can exist if there is only a 10 per cent chance that a appellant will be shot, tortured or otherwise persecuted. It was a far fetched possibility of persecution which was to be excluded.³³ As Toohey J notes, while one is not weighing the prospects of persecution it is necessary at the same time to discount what is remote or insubstantial.³⁴

This makes sense. One can imagine a scenario in a country where there is a serious breakdown of law and order meaning that the chance of state protection in persecutory type situations is questionable. Further, a person might attract a certain degree of hatred which could be converted into persecution because of certain religious or political views. However should it be difficult (if not impossible) to postulate a situation where that hatred would be converted to persecution and where state protection would be unlikely available then it could be said that there does not exist a real or substantial chance of persecution.

The RSAA sees the ‘real chance’ approach as providing clarity and simplicity of application in a determination process³⁵ in that it avoids the dangers inherent in formulating ‘possibilities’ and ‘likelihoods.’³⁶ In so saying, the RSAA still acknowledges the position taken by various judicial bodies that if there is only a 10 per cent possibility of serious harm being inflicted the standard of proof required for refugee status has been met.³⁷ However, it proceeds to say that it is undesirable

28 *Chan* above n 2.

29 *523/92* above n 9, 15.

30 A Grahl-Madsen *The Status of Refugees in International Law* Vol 1 (1966) 181.

31 *Chan* above n 2, 388–389.

32 *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 94 L.Ed 2d 434.

33 *Chan* above n 2, 429.

34 *Chan* *ibid*, 407.

35 *523/92* above n 9, 35.

36 *Refugee Appeal No. 71404/99* (29 October 1999), 15.

37 *523/92* above n 9, 22.

to express chances in percentages. As noted there are inherent dangers in formulating ‘possibilities’ or ‘likelihoods’.

The RSAA has, over the years, been able to effectively apply the ‘real chance’ criteria in determining refugee claims. This is done in the context of the refugee definition through:

- carefully considering the submissions of the appellant, assessing the appellant’s credibility and considering evidence both at its disposal and, if appropriate, seeking further information including particulars about the country concerned; and
- considering possible scenarios the appellant might encounter if returning to their country of habitual residence.³⁸

This, the RSAA acknowledges, will involve normative judgements which go beyond mere fact finding.³⁹ Where this occurs in a manner based on the above approach it enables the inevitable problem of ‘evidentiary voids’⁴⁰ which are going to be present in refugee claims, to be addressed in a fair and reasonable manner. While some determinations are more complex and difficult than others, this is an inherent part of the work of a review tribunal.

The adoption of the objective and real chance approach has enabled the RSAA to construct the following two step framework to determine refugee claims under the Refugee Convention:

On the facts as found by the decision-maker:

1. Objectively, is there a real chance of the refugee appellant being persecuted if returned to the country of nationality?
2. If the answer is Yes, is there a Convention reason for that persecution?⁴¹

It is submitted that this clear framework developed through guidance from different academic texts and judicial decisions enables clarity of reasoning – one of the reasons Professor Hathaway holds the RSAA in such high regard.⁴²

38 Such an example can be found in *Refugee Appeal No .17462/99* (27 Sept 1999) [2000] NZAR 545; [2000] INLR 608. A Tamil youth and his family been ill treated for a number of years because of their ethnicity. The parents died, the whereabouts of two brothers was unknown and a brother and sister had been granted refugee status in Germany and the Czech Republic respectively. The family had been subjected to attack by the Liberation Tigers of Tamil Eelam (LTTE). When the appellant moved to Colombo he was arbitrarily arrested and beaten. In considering possible scenarios if he were to return to Sri Lanka it was clear it was still dangerous. He had been identified and mistreated by the security forces and the RSAA accepted this as being an indication of the fate which may await him should he have to return. Further the country information provided to the RSAA indicated Sri Lankan security forces carry out mass arrests of Tamils in Colombo – the main targets being young Tamil men and women. (The claimant was 23.)

39 Ibid.

40 This was a phase adopted by Professor Hathaway in *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*. (December 1993) 6, 57.

41 70074/96 above n 20, 14.

42 It could also be said that the approach taken by the RSAA is ad idem with the ‘Michigan Guidelines on Well-Founded Fear’ (2005) 26 *Michigan Journal of International Law* 493 These Guidelines arose out of the *Third Colloquium On Challenges In International Refugee Law* and with the guidelines. However, it can also be said that with the two step test and its manner of conducting hearings the RSAA has stamped its individual mark on determining refugee applications.

B) Onus of establishing a claim

The RSAA has always taken the clear position the appellant shoulders the obligation of establishing the claim. The facts on which the claim is based lie peculiarly within the knowledge of the appellant.⁴³ If the decision maker was required to carry out an investigation without the appellant's assistance, the door to abuse would be opened.⁴⁴ The appellant's obligation is also acknowledged in the *Universal Declaration of Human Rights Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* [the UN Handbook].⁴⁵ The obligation has been codified in the Act. Section 129P states:

It is the responsibility of an appellant to establish the claim, and the appellant must ensure that all information, evidence, and submissions that the appellant wishes to have considered in support of the appeal are provided to the Authority before it makes its decision on the appeal.

This reflects the requirement of the appellant to act in good faith, a principle central to the Refugee Convention.⁴⁶

The RSAA supports this position on the basis responsibility is mitigated by three principal factors:

1. Threshold of 'real chance'

The threshold of 'real chance of persecution' is low and recognises the concern noted by a number of authors and commentators that owing to the hasty and unscheduled manner in which appellants have to leave their country of habitual residence they will in many cases have had no opportunity to collect documents and other relevant materials to support their claim.⁴⁷

2. Benefit of doubt

The RSAA adopts the principle of the benefit of doubt, which is central to refugee law, liberally. Where an appellant authority determining refugee claims is unable to reach a decision about status, the decision should go in favour of the appellant. This, again, acknowledges the unique situation of refugee appellants in bringing a claim. In this way the RSAA was able to distinguish an appeal *de novo* (rehearing) in the refugee context from generic appeals of the same nature.

In *Shotover Gorge Jet Boat v Jamieson*⁴⁸ Cooke P stated;

[I]f in the end the appellate Court could not make up its mind as to what was the right decision, the decision under appeal would, I think, stand.

As the RSAA noted the benefit of the doubt principle requires that '[i]f at the conclusion of the hearing the Authority cannot make up its mind as to whether the appellant is a refugee ... a decision in favour of the appellant to be given.'⁴⁹

43 523/92 above n 9, 11.

44 523/92, *ibid.*

45 HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, para 196 opines 'It is a general legal principle that the burden of proof lies on the person submitting a claim.'

46 523/92 above n 9, 11.

47 See for example Grahl-Madsen above n 30, 145–146.

48 *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437.

49 523/92 above n 9, 10.

3. *Conduct of proceedings*

The Authority conducts its proceedings in a non adversarial manner. This enables the enquiry to be shared between the appellant and the decision maker. Here the RSAA is fully ad idem with the UN Handbook which states:

[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.⁵⁰

This position has been fortified by the RSAA having the powers of a Commission of Enquiry. This is however qualified by the RSAA position that the powers are facilitative rather than mandatory.⁵¹ The RSAA does not provide criteria it follows to decide whether such powers are to be revoked.

Perhaps this is an area where the jurisprudence still requires development and it could be said the credibility of the appellant would have a considerable influence.

The RSAA, in taking a non adversarial approach to claims and applying a low threshold further mitigated by the liberal application of the benefit of doubt has adopted a fair and reasonable approach in determining refugee status. On the one hand it acknowledges the genuine and unique situation of refugee appellants. On the other it accepts there are limitations to the granting of refugee status and it should not be granted in situations where only some far fetched possibility of persecution exists.

The application of this framework will now be considered focusing firstly on the manner in which the RSAA has approached the issue of persecution generally and when undertaken by non state agents. Secondly, on how the authority has compellingly justified people facing persecution on the basis of sexual orientation and gender discrimination can be deemed a 'particular social group' thereby justifying refugee status.

III. MEANING OF PERSECUTION AND FAILURE OF STATE PROTECTION

The RSAA in acknowledging Article 1A(2) does not contain a definition of persecution has clearly taken the position that it is inappropriate to apply a dictionary definition to determine meaning.⁵² Like other international judicial bodies it has followed the interpretation approach of VCLT Article 31 being that the particular convention in question be interpreted in good faith in accordance with the ordinary meaning of terms in context and light of the convention's object and purpose.⁵³ By so doing, the RSAA has aligned itself with the approach taken by the Canadian Supreme Court in *A-G v Ward*⁵⁴ that underlying the Refugee Convention is the international community's commitment to the assurance of basic human rights without discrimination.⁵⁵ Persecution from the perspective of international human rights protection has two important considerations. First is the matter of state protection which, as stated by La Forest J in *Ward*, 'International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an indi-

50 UN Handbook para 196.

51 *Refugee Appeal No. 71729/99* (2001) NZAR 183.

52 *71427/99* above n 38.

53 Section 3 Interpretation Of Treaties Article 31 *General rule of interpretation*.

54 *Canada (A-G) v Ward* [1993] 2 SCR 689.

55 *Ward* *ibid*, 733.

vidual is a national.⁵⁶ It is clear ‘the international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged.’⁵⁷ As so articulately stated by Professor James Hathaway ‘the refugee scheme as “surrogate or substitute protection”, activated only upon failure of national protection.’⁵⁸

The second consideration arises from the first and asks what amounts to the failure of state protection? There are two integral parts to this consideration. Is there a presumption of state protection? And can persecution by non state agents come within the ambit of the Refugee Convention?

The failure of state protection goes to the heart of the meaning of persecution. Professor Hathaway views this as being determined by actions which deny human dignity in any way. However, what is the appropriate threshold to determine whether actions which deny human dignity amount to persecution? It is the sustained or systematic denial of core human rights.⁵⁹

Core human rights, according to Professor Hathaway are those contained in the *International Bill of Rights* [IBR] comprising the *Universal Declaration of Human Rights* [UDHR] and, by virtue of their almost universal accession, the *International Covenant of Civil and Political Rights* [ICCPR] and the *International Covenant on Economic, Social and Cultural Rights* [ICESCR].⁶⁰

The IBR has been the progenitor for many more specific human rights accords such as the *International Convention on the Elimination of All Forms of Racial Discrimination* [ICERD]; the *Convention on the Elimination of All Forms of Discrimination Against Women* [CEDAW] and the *Convention on the Rights of the Child* [CRC].

The RSAA in aligning itself with this approach as acknowledges the universal application of these human rights. As stated in *Decision 71427/99* ‘the universality of the International Bill of Rights, CERD, CEDAW and the CRC will not permit social, cultural or religious practices in a country of origin from escaping assessment according to international human rights standards.’⁶¹ The RSAA in clearly distancing itself from a cultural relativist approach.⁶²

The term ‘sustained or systemic denial of core human rights’ is significant. Denial of core human rights implies discrimination. The RSAA has held that when determining refugee claims inspiration can be found in ‘discrimination concepts’.⁶³ But is discrimination in itself sufficient to establish persecution? The RSAA has been firm in drawing a clear distinction between a breach of human rights (discrimination) and persecution.⁶⁴ The purpose of refugee law is not to protect people against *all* forms of harm. If it were, the Refugee Convention would become a potential haven for any person able to show they were victim of *some form* of discrimination.

Rather, refugee recognition is restricted to situations where the maltreatment which has been inflicted or is anticipated to be inflicted is demonstrative of a breakdown of national protection.⁶⁵

56 Ward *ibid*, 709.

57 *Ibid*.

58 Hathaway above n 17 [emphasis added].

59 Hathaway above n 17, 104–108 as adopted in *Refugee Appeal No. 2039/93* (12 February 1996), 15.

60 *Refugee Appeal No. 2039/93*; *Refugee Appeal No. 70133/96*; and *Refugee Appeal No. 71569/99*.

61 71427/99 above n 39, 25 and *Refugee Appeal No. 72558/01 and 72559/01*, 46.

62 For more detail on the RSAA’s position on cultural relativism see ‘particular social group’ below.

63 *Refugee Appeal No. 1312/93 Re GJ* (30 Aug 1995), 27.

64 71404/99 above n 36, 65–67.

65 *Refugee Appeal No. 135/92 Re RS* (18 June 1993), 24–25 adopted in *Refugee Appeal No. 11/91 Re S* (5 September 1991) and in *Refugee Appeal No. 18/92 Re JS* (5 August 1992) cited in 523/92 above n 9, 27. In taking this approach the Authority is concurring with James Hathaway. *Law of Refugee Status* 104.

While one identified breach of human rights does not amount to persecution, the cumulative effect of a number of breaches may.⁶⁶ This was the situation with the female appellant from the Islamic Republic of Iran in *Decision 71427/99*. In noting the various laws in Iran relating to the institutionalised and state-sanctioned discrimination against women which were deemed to be disenfranchising, the RSAA concluded that the cumulative effect of these breaches on the appellant amounted to ‘persecution in the sense of a sustained or systemic violation of basic human rights.’⁶⁷

In determining whether a breach of core human rights is ‘sustained or systemic violation of human rights’ the RSAA has accepted that a appellant should not have to engage in self denial in order to avoid persecution if such self denial were to amount to a breach of core human rights. Ongoing denial would amount to sustained or systemic violation.⁶⁸ This is especially so with practising homosexuals. Sexual orientation has been held by the RSAA to be fundamental to a person’s identity. To suggest – as has been the position by some refugee appeal tribunals – a person can avoid persecution through self restraint is unacceptable.⁶⁹ This would require a person to exist in a state of induced self-oppression.⁷⁰

How then is the level of state protection to be assessed in order to see whether it amounts to failure on the part of the state to provide protection? Here the RSAA has concurred with the approach taken by the Canadian Supreme Court in *Ward*. While there might exist in a appellant’s home country a system of state protection which the state maintains it is willing to operate, this, in itself is not sufficient to demonstrate state protection. If it can be shown the system of protection provided and operated is not able to prevent a real chance of persecution refugee status should not be denied.⁷¹ Citing *La Forest J* in *Ward*:

[I]t would seem to defeat the purpose of international protection if a appellant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.⁷²

The presence of a system of protection accompanied by a reasonable willingness of the state to operate it has been held to amount to an adequate system of state protection for Refugee Convention purposes.⁷³ The RSAA, in distancing itself from this approach, took the view that to interpret convention obligations in such a manner failed to ensure there was some objective assessment as to whether or not there is a real risk of persecution. As such it is at odds with the ‘fundamental obligation of non-refoulement’ contained in Article 33(1).⁷⁴

The RSAA does however take the position that any determination of refugee status starts with a presumption of state protection – again concurring with *Ward*. The presumption stems from the security of nationals as the essence of sovereignty.⁷⁵ Therefore, absent a situation of complete

66 *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 16.

67 *Decision 71427/99*, 35.

68 Rodger Haines QC ‘The Domestic Application of International Human Rights Standards in New Zealand: The Refugee Convention’ Faculty of Law, University of Auckland. Spring Seminar Series: September 2004 page 11.

69 This was the position adopted in *R v Secretary of State for the Home Department, Ex Parte Binbasi* [1989] Imm AR 595 (QBD).

70 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6, para 130.

71 *Ward* above n 54, 724.

72 *Ibid*.

73 House of Lords in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379 (HL).

74 Above n 39, 30.

75 *Ward* above n 54, 724–726.

breakdown of state apparatus; or where the state admits its inability to protect its nationals, it is necessary for evidence to rebut the presumption.⁷⁶

The position that persecution amounts to sustained or systemic denial of core human rights through failure by the state to provide protection justified the acceptance of the formula used for determining the persecution element of the refugee definition. Namely *Persecution = Serious harm + The Failure of State Protection*.⁷⁷ In accepting this formula the RSAA concurs with Hathaway that risk of serious harm is an anticipatory risk in that '[t]he issue is not the fact of the past persecution, but rather whether "that which happened in the past may happen in the future."⁷⁸ Past persecution can therefore, in appropriate circumstances, provide an excellent indication of future risk.⁷⁹ This is especially so where evidence clearly shows past persecution and the country information indicates no change in circumstances since the appellant has left the country of habitual residence.⁸⁰

IV. DOES PERSECUTION NEED TO COME FROM THE STATE OR STATE COMPLICITY?

The RSAA noted in *Decision 2039/93* that Germany, Sweden and France 'have restricted the application of the concept of agents of persecution to the extent that refugee status is only granted to victims of persecution by state authorities or by other actors encouraged or tolerated by the state.'⁸¹ These countries are subscribing to what is referred to as the 'accountability theory' which 'limits the classes of case in which a appellant might obtain refugee status under the Geneva Convention to situations where the persecution alleged can be attributed to the State.'⁸²

The RSAA has clearly distanced itself from such an interpretative approach and instead takes the position that since persecution signifies sustained or systemic violation of core human rights demonstrative of a failure of state protection; this does not require that the state need be an agent of the persecution.⁸³ Justification relates directly to the definition of refugee in Article 1(C): namely; that the appellant is 'unable' or 'unwilling' to avail himself of protection of the country. As noted in *Ward*:

The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution.⁸⁴

And further:

76 The extent of the evidence to advance the rebuttal of the presumption would depend upon the individual circumstances of each case noting in particular the circumstances of the claimant and what evidentiary support can be reasonably expected from them.

77 This was the formula that was adopted in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653F (HL); and *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 515H (HL)

78 Hathaway *Law of Refugee Status* (1991) 88 and *Refugee Appeal No. 70366/97*, 47.

79 *70366/97*, 21.

80 *17462/99* above n 38. The Tamil appellant had received extreme treatment at the hands of security forces and the country information provided suggested there had been no significant change in the approach of the security forces since the appellant left.

81 *2039/93*, 15.

82 *Adan* above n 18, para 43.

83 *71427/99* above n 39, 28.

84 *Ward* above n 54, 716–7.

[I]n the case of ‘inability’, protection is denied to the appellant, whereas when the appellant is ‘unwilling’, he or she opts not to approach the state by reason of his or her fear on an enumerated basis. In either case, the state’s involvement in the persecution is not a necessary consideration. This factor is relevant, rather, in the determination of whether a fear of persecution exists.⁸⁵

Therefore state complicity in persecution is not a pre requisite to a valid refugee claim.⁸⁶ What is important is the approach of the state to the persecution. In not making any effective intervention the state is either directly or indirectly encouraging the persecution or is unable or powerless to prevent it.⁸⁷

While in its decisions following *Ward* the RSAA has referred to *Ward* to support its position that state complicity is not a requirement to establish refugee status under the Refugee Convention, the RSAA has taken this position from its earliest hearings in 1991.⁸⁸ Failure of state protection is an essential element of persecution as applied under the Refugee Convention⁸⁹ and the RSAA accepts that there are four situations in which it can be said that there is a failure of state protection:

- (a) Persecution committed by the state concerned.
- (b) Persecution condoned by the state concerned.
- (c) Persecution tolerated by the state concerned.
- (d) Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.⁹⁰

The RSAA, in defining these situations, is making two contributions to refugee jurisprudence. Firstly it is providing clear categories where the failure of state protection is relevant to refugee determination. Secondly it is emphasising the important factor is not state complicity to persecution but rather the failure of the state to afford protection. This goes directly to the purpose of refugee protection being the provision of surrogate protection activated upon the failure of national protection. However included is a situation in which the state either refuses or is unable to grant protection. Therefore failure of state protection is relevant both where there is an absence of state complicity and also where the state is not condoning the persecution.

This raises a number of possibilities where non state persecution is relevant to refugee status. Persecution from non state agents can still come within the parameters of the Refugee Convention in appropriate circumstances. The RSAA’s categorisation of situations represents a significant contribution to international refugee jurisprudence, having been cited with approval in *Minister for Immigration v Khawar*⁹¹ and acknowledged by Professor Hathaway as effectively reconciling principle to hard realities. The significant contribution of the RSAA is worthy of further discussion.⁹²

85 Ibid 720 [emphasis added].

86 *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 17–18.

87 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (HCA), 258.

88 71427/99, 29. It could be said that *Ward* above n 54 amounts to a confirmation of the RSAA’s position.

89 Ibid.

90 Ibid.

91 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574, paras 114–125.

92 The significance of the situational application of certain principles cannot be emphasised strongly enough.

V. CONTRIBUTION OF THE RSAA IN CLARIFYING THE MEANING OF
'PARTICULAR SOCIAL GROUP' AND APPLICATION TO SEXUAL ORIENTATION
AND GENDER DISCRIMINATION

One of the Refugee Convention reasons for refugee status is that of having a well founded fear of being persecuted for 'being a member of a particular social group.' The RSAA has, over the years, given considerable attention to this ground. The first such decision included consideration of the historical reasons for the inclusion of the ground.⁹³ It came about by a Swedish amendment (A/Conf.2/9) tabled by Mr Petren during the 1951 drafting of the Treaty.⁹⁴ Mr Petren wished to make two general observations on Article 1 stating:

experience had shown that certain refugees had been persecuted because they belonged to particular social group ... Such cases existed, and it would be as well to mention them explicitly.⁹⁵

The amendment was adopted without debate.⁹⁶ In the opinion of Grahl-Madsen⁹⁷ the membership of a particular social group was added as an afterthought in that the notion of social group is of broader application than the combined notions of racial, ethnic and religious groups, and would to stop a possible gap – an approach which has found both judicial and academic acceptance.

In *Ward*⁹⁸ it was acknowledged 'the delegates inserted the social group category in order to cover any possible lacuna left by the other four groups.'⁹⁹ Maryellen Fullerton also saw particular social group as filling a noticeable gap in the categories of victims of persecution.¹⁰⁰

Noting Professor Hathaway's view that the RSAA has been able to reconcile principle to hard realities it is worthwhile to consider the more significant decisions of the RSAA concerning particular social group and to whom this reason has been applied. Consideration reveals how the RSAA;

- has carefully chosen the appropriate judicial and academic commentary to adopt or at least be guided by; and
- has made subsequent developments in the discussion of particular social group based on the foundational writings and decisions from which it found initial guidance and inspiration; and
- has acknowledged that persecution for reason of membership of a particular social group can overlap with other grounds; and
- suggested how this overlapping should be best dealt with; and
- has effectively applied the particular social group ground to situations of gender discrimination and sexual orientation.

93 *Refugee Appeal No. 3/91*, 74.

94 *Decision 3/97*, 75.

95 Statements of Mr Petren of Sweden, UN Doc A/CONF.2/SR 3 at 14, November 19, 1951.

96 It was adopted on 16 July 1951 by fourteen votes to none, with eight abstentions: A/Conf. 2/9.

97 Grahl-Madsen above n 30, 219–20

98 *Ward* above n 54, 732.

99 *Ibid.*

100 M Fullerton, 'Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany' (1990) 4 *Georgetown Immigration Law Journal* 381 and M Fullerton, 'A Comparative Look at Refugee Status Based on Persecution due to Membership in a Particular Social Group' (1993) 26 *Cornell International Law Journal* 505, 534.

The decisions considered include people at opposition to the China One-Child Family Policy,¹⁰¹ and facing persecution for reasons of sexual orientation,¹⁰² and because of gender.¹⁰³

In *Decision 3/91* the RSAA considered whether people opposed to the one child policy formed a particular social group. Detailed consideration of the essential elements of a particular social group for Refugee Convention purposes was undertaken. This consideration became the foundation stone upon which subsequent decisions have developed. As stated:

Generally speaking ... it can be said that the New Zealand jurisprudence to date has necessarily developed on a case by case or incremental basis and the present decision should be seen as part of that ongoing process. Without exception, we have followed and applied *Matter of Acosta* as well as the opinions of both Hathaway and Goodwin-Gill.¹⁰⁴

Goodwin-Gill saw a social group as being brought together by certain unifying features being a 'combination of matters of choice with other matters over which members of the group have no control'¹⁰⁵ It is these features which distinguish the group and make them susceptible to persecution. What Goodwin-Gill also sees to be of central relevance is the perception of the persecutor to this group.¹⁰⁶ What notice do state authorities take of this group? This is a key element to providing the group with its identity.¹⁰⁷

The US Board of Immigration Appeal *Acosta*¹⁰⁸ was clearly influenced by the writings of Goodwin-Gill. The Board in *Acosta* saw the doctrine of *eiusdem generis*, meaning literally, 'of the same kind', to be of importance in construing the phrase 'membership of a particular social group.'¹⁰⁹ Consideration of the 'race', 'religion', 'nationality', and 'political opinion' grounds for persecution showed that persecution is based upon 'immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed.'¹¹⁰

Building on this framework Hathaway formulated the groups as:

- (1) groups defined by an innate, unalterable characteristic;
- (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and
- (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it.

Excluded, therefore, are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.¹¹¹

101 3/91.

102 1312/93.

103 1312/93 and 71427/99.

104 3/91, 92. It is in the *Law of Refugee Status* where Professor Hathaway provides a thorough and seminal academic discussion on the law relating to refugees.

105 *Ibid.*, 80.

106 Goodwin-Gill. *The Refugee in International Law* (1983) 30–31.

107 *Ibid.*

108 *Acosta, In re* (1985) 19 I & N 211.

109 *Ibid.*

110 *Ibid.*

111 Hathaway, 161.

The particular social group must therefore be definable by reference to a shared characteristic of its members 'fundamental to their identity'.¹¹² The definition of is wide enough to cover people who face persecution within the parameters of the Refugee Convention, namely linking the fear of persecution to their civil and political status, without it becoming an all embracing net enabling virtually anyone seeking refugee status to align themselves to some group which may be at odds with authorities. The RSAA, in adopting Hathaway's formulation, takes the view that if a unifying immutable characteristic of a group invites persecution, this characteristic should be enough to give the group cognoscibility for the purposes of refugee status.¹¹³

Of significance is the linkage of persecution to civil or political status. In other words persecution is linked to a violation of core human rights and such a violation involves discrimination.

The RSAA has subsequently developed its consideration of particular social group by determining its relevant application to claims relating to sexual orientation and gender. It is the effective application of the refugee definition to such situations which is one of the most significant contributions of the RSAA. It further bears witness to James Hathaway's assertion that the RSAA is able to reconcile principle to hard reality. The three decisions to be considered in depth all involve appellants originating from Iran.

A) *Sexual Orientation*

Decision 1312/93 concerns a claim made by a homosexual and member of the banned communist Tudeh Party. This discussion will focus only on the appellant's homosexuality.

Since arriving in New Zealand and seeking refugee status, the appellant had become a practising homosexual.¹¹⁴ The RSAA undertook a considerable literature research into the treatment of homosexuals in Iran and established that homosexuals, or persons suspected or accused of being homosexuals, are 'punished with extreme severity'.¹¹⁵ It was clear therefore that he had a well founded fear of persecution. The issue was whether the persecution feared by the appellant was, as the appellant claimed, for a convention reason. This led to further consideration and development of the meaning and application of 'particular social group' within the refugee context.

Since *Decision 3/92* the Canadian Supreme Court had given judgment in *Ward*. The influence this decision has had upon the RSAA and the justification for this influence illustrates the ap-

112 Hathaway above n 17, *ibid*.

113 Above n 93 at 41. What is also interesting in this case is that to determine whether or not the claimant could claim persecution for reason of being a member of a particular social group, the Authority felt that it was appropriate to ask four questions;

1. What is the particular social group in question?
2. Does that group have a distinct identity in the eyes of:
 - a) The community at large; and/or
 - b) The agents of persecution.
3. Do members of the group in question share a common immutable characteristic, i.e. a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. Expressed in a shorthand way, is the group definable by reference to a shared characteristic of its members which is fundamental to their identity?
4. Is there a link or causal connection between the fear of persecution and the civil or political status of the members of the group.

114 *1312/93*, 15.

115 *Ibid* 24.

proach of the RSAA to develop jurisprudence surrounding an issue on an incremental and case by case basis finding guidance and inspiration from appropriate decisions.

Two matters from *Ward* had particular influence on the RSAA. The first was the support accorded to Hathaway's position that the Refugee Convention does not apply to all individuals who have a well founded fear of persecution and hence it was not appropriate to adopt a definition of particular social group which was all embracing. While insertion of particular social group was to cover any possible lacuna left by the other four groups:

this does not necessarily lead to the conclusion that any association bound by some common thread is included. If this were the case, the enumeration of these bases would have been superfluous; the definition of 'refugee' could have been limited to individuals who have a well-founded fear of persecution without more. The drafter's decision to list these bases was intended to function as another built-in limitation to the obligations of signatory states.¹¹⁶

The second was (again, Hathaway's position adopted in *Ward*) that the determination of persecution must be considered in the context of core human rights.¹¹⁷ There must be a link between the harm feared to the appellant's socio-political situation and resultant marginalisation.¹¹⁸ *Ward* explicitly recognised that underlying the Refugee Convention is the international community's commitment to the assurance of basic human rights without discrimination.¹¹⁹ The RSAA observed that in distilling the contents of the head of 'particular social group' it is appropriate to find inspiration in discrimination concepts.¹²⁰ To do so it is necessary to consider the core norms of international human rights. Hathaway initially identified the relevant core human rights as those contained in the IBR, ICCPR, and ICESCR.¹²¹ Hathaway has subsequently argued that more recent international instruments such as the CRC are also relevant in determining core human rights norms. Clearly discrimination occurs when a person is denied a core human right by virtue of membership of a particular social group.

An analysis of the ICCPR and other relevant instruments led the RSAA to conclude that no specific provision was made for the protection of the rights of homosexuals.¹²² However, the anti-discrimination provisions of the ICCPR are sufficiently broad to apply to sexual orientation. These included Article 2 – the right to basic rights without distinction of any kind such ... sex; Article 17 – the right not to be subjected to arbitrary or unlawful interference with ... privacy; and Article 26.

Discussed was the United Nations Human Rights Committee [UNHCR] first communication concerning Australia under the First Optional Protocol to the ICCPR: *Toonen v Australia*.¹²³ *Toonen* was a complaint to the UNHCR about Tasmanian laws criminalising sexual relations between consenting males. It was acknowledged by the UNHCR that the prohibiting laws were a breach of Article 17 privacy. The UNHCR found that reference to sex in the other articles should be taken

116 *Ward* above n 54, 732.

117 Hathaway, 136.

118 1312/93, 14.

119 *Ward* above n 54, 733–739.

120 1312/93, 27.

121 Hathaway above n 17, 106.

122 1312/93, 36–7.

123 Communication no. 488/1992; CCPR/C/50/D/488/1992, 4 April 1994.

as including sexual orientation.¹²⁴ To this extent discrimination on the basis of sexual orientation could be held to be a violation of basic core human rights under the Refugee Convention.

The RSAA was also prepared to accept that, as the claim was being heard within New Zealand jurisdiction, the Human Rights Act 1993 [HRA] s 21(1)(m) prohibiting discrimination on the grounds of sexual orientation in the fields of employment, access to places, vehicles and facilities, and provision of goods and services was of significance. The RSAA has some reservations as to the relevance of domestic law when applying international human rights law in the refugee context. However it prepared to follow the Canadian example in *Ward*.¹²⁵ While not specifically stated, a relevant consideration was that the appellant only became a practising homosexual upon arriving in New Zealand where legislation was in place to support practising homosexuals.

The RSAA then proceeded to a cross jurisdictional analysis of decisions concerning sexual orientation. It found jurisprudence in this regard to be somewhat confusing. Some jurisdictions emphasised the internal characteristics of gay people to determine membership of a particular social group – a clear example being *Ward*. The Canadian Supreme Court had acknowledged one of the categories of a particular social group as outlined in *Acosta* was groups defined by an innate or unchangeable characteristic. Such a category would clearly include individuals facing fear of persecution on the basis of sexual orientation.

Other countries such as Germany favoured what was referred to as an ‘objective observer’ approach.¹²⁶ This approach asks how an objective observer would view the treatment of homosexuals in a country such as Iran?¹²⁷ Such an observer would clearly see homosexuals are treated as an undesirable group and as such should constitute a particular social group within the Refugee Convention.¹²⁸ The RSAA understandably expressed reservations about the ‘objective observer’ test in that the making of societal attitudes as determinative of the existence of a particular social group could potentially enlarge the social group category to include any person with some shared characteristic which society had strong feelings about.¹²⁹

In the United States of America the relevant decisions relating to sexual orientation and social group have either emphasised the immutable characteristic¹³⁰ or the voluntary associational aspect¹³¹ namely members associating because of their shared common characteristic. The RSAA did not see the two USA approaches as irreconcilable because ‘sexual orientation is either an innate or unchangeable characteristic or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed.’¹³² Hence, the social group argument would succeed under either head.

Given the various viewpoints and acknowledging the contributions from both the Canadian and USA jurisdictions, the RSAA proceeded to establish a framework that clearly justifies the

124 1312/93, 39.

125 The RSAA however made it clear that this decision did not establish a precedent for other cases.

126 1312/93, 46.

127 This observation comes from a article by Maryellen Fullerton; Persecution due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany’ (1990) 4 *Geo Immigra.L.J* 381, 409.

128 *Ibid*.

129 1312/93, 60.

130 *Matter of Acosta* (BIA Interim Decision 2986, March 1, 1985).

131 *Sanchez-Trujillo v Immigration and Naturalisation Service* 801 F. 2d 1571 (9th Cir. 1986).

132 1312/93, 57 [emphasis in original].

inclusion of sexual orientation as the focus for establishing a particular social group in certain circumstances.

The justification is well reasoned and based on the following points;

- i) the Refugee Convention grounds forming the reason for persecution focus on the appellants civil and political rights;
- ii) the *Acosta* interpretation of particular social group, in emphasising the ‘same kind’ aspect of a group in question, sees the same kind characteristic requiring that there be an internal defining characteristic shared by members of a particular social group;
- iii) the internal defining characteristic is present when the members of the group share a characteristic beyond their power to change, or when the shared characteristic is so fundamental to their identity or conscience that it should not be required to be changed; and
- iv) when members of such a social group have a well founded fear of harm because of what they believe or what they are, the reason for the harm becomes connected to breaches of civil and political rights. As such they are actions which deny human dignity and therefore should as Hathaway notes¹³³ and as approved in *Ward*,¹³⁴ be the concern of refugee law.

The nexus between harm and membership of a particular social group established in this way achieves two things. Firstly it maintains the social group within reasonably clear and well defined parameters. Secondly it acknowledges Goodwin-Gill’s contribution in regard to the position of the persecutor.¹³⁵ The RSAA highlight that ‘the expert evidence establishes that the situation for homosexuals in Iran is a particularly dangerous one.’¹³⁶ They are a group who because of a clear immutable characteristic (sexual orientation) ‘have been singled out by [Ayatollah] Khomeini and others as a corrupt and dangerous manifestation of “Westification”.’¹³⁷ This immutable characteristic being something so fundamental to their identity is something which should not be required to be changed. As such there was a well founded fear of persecution.

In this regard the perception of the persecutor becomes a vital element in establishing the nexus between well founded fear which is for reason of being a member of a particular social group.

RSAA *Decision 1312/93*¹³⁸ has been cited with approval by the House of Lords in *Islam v Secretary of State for the Home Department*, and *Regina v Immigration Appeal Tribunal & another ex parte Shah (A.P.)*.¹³⁹ Lord Steyn noted how the RSAA had applied the reasoning of *Acosta* to justify the position that homosexuals are capable of constituting a particular social group within the meaning of Article 1A(2) in appropriate circumstances.¹⁴⁰ In considering the decision to be an ‘impressive judgment’ Lord Steyn acknowledges the influence decisions from various jurisdictions had on the formulation of the decision.

The decision and subsequent endorsement illustrate the ability of the RSAA to acknowledge and critically assess all of relevant cross jurisdictional decisions and human rights instruments. From this extensive and often confusing array of material, the RSAA has been able to identify decisions and articles which both acknowledge the human dignity focus of refugee law, while at the same time realising that there must be limits to its application. The adoption of appropriate materi-

133 Hathaway, 108.

134 *Ward* above n 54, 733.

135 Hathaway above n 16.

136 Above n 63 at 34.

137 1312/93, 62.

138 Reported as *Re G.J.* [1998] INLR 387.

139 [consolidated appeals] (1999) 2WLR 1015 (House of Lords).

140 *Ibid.*

als has enabled the development of a framework for determination of refugee status which is thoroughly justified, clear and which can be, and indeed has been, adopted in other jurisdictions. In so doing it is bearing witness to Hathaway's acknowledgement that the RSAA is able to reconcile principle (Refugee Convention and associated law) with hard reality. The framework identifies the centrality of the immutable characteristic shared by membership the group.

The next step is to determine whether this characteristic is innate or alternatively whether the requirement to change would undermine the core human rights (human dignity) of members of the group. It then notes the significance of how the group is seen by officials.¹⁴¹ Does the official position to that group establish a well founded fear (real chance) of persecution by virtue of membership of that group?

B) Social Group and Gender discrimination

The RSAA established sexual orientation can, in appropriate circumstances, constitute a particular social group for the purposes of the Refugee Convention. In considering whether gender can also constitute a particular social group two decisions are of significance – 2039/93 and 71427/99 which both concerned applicant females from Iran.¹⁴²

It is important to firstly provide some factual background to these applications.

The appellant in *Decision 2039/93* experienced pressure from two angles. Her family had involvement with a liberation movement known as the Khuzestan Liberation Movement. Some family members had been leading personalities in the movement and as a result the appellant was constantly under suspicion. While working as an anaesthetist's technician she would, on a weekly basis, be summoned to the Komitech (Islamic Revolutionary Committee) for questioning. A member of the operating theatre team was a Komitech 'spy' and everything the appellant did and said was subject to surveillance. Summoning occurred for a number of years and the constant pressure harassed and humiliated her, eventually becoming unbearable.

The pressure on the appellant from her family is reflected by the control women are subjected to in traditional Iranian families. They are taught to serve others and to treat parents, older brothers, senior members of the family, her husband and his family with respect. Marriages are arranged and controlled by men and based on power rather than equality. Any departure from the required behaviour of women within marriage is treated very seriously. For example when a cousin of hers married a person who was deemed to be an unacceptable outsider a threat was made to kill the cousin. This threat was carried out after the cousin separated from this outsider. Another cousin's husband discovered upon her wedding night she was not a virgin. She was subsequently found to be pregnant and the husband made it clear that he was not the father of the child. She was decapitated by the husband two days after the birth of the child. The husband spent six months in prison and was commended by the family for the action that he had taken to restore the family honour.

The appellant, since arriving in New Zealand, had an unplanned pregnancy which was terminated. If she were to return to Iran and be forced to marry she would be discovered as not a virgin on her wedding night and probably killed.

141 In this regard the Authority is clearly disassociating itself with a position that if a homosexual were to exhibit self constraint the 'real chance' of persecution would not exist. See Rodger Haines. *The Domestic Application of International Human Rights Standards in New Zealand: The Refugee Convention*. Faculty of Law, University of Auckland. Spring Seminar Series: September 2004.

142 It is appropriate to acknowledge the detailed and sensitive manner in which the RSAA has detailed the facts of these decisions.

After all the experiences the appellant had gone through she experienced a 'self awareness process' which made her opposed to the rules governing social organisation and conduct in Arab society, and, in particular, the rules to subordinate women to men.

In *Decision 71427/99* the issue again related to marriage with the appellant a victim of serious domestic violence. The marriage was arranged which was not unusual. However the appellant described being treated like a prisoner and beaten regularly. When pregnant the husband refused to allow her out of the household for tests and checkups despite serious health issues. The beatings intensified. The husband also had another relationship and brought the other woman home. The appellant was locked in a room while the pair had sex. When the appellant went into labour her husband refused to take her to hospital and the appellant's mother in law took her. After the birth of her son she was told the boy had died. The appellant's husband had sold the baby to a couple who were unaware that the child's mother was alive and well. The husband then sent the appellant back to her parents.

Divorce proceedings were difficult owing to the interference and influence of the husband. It was only during the divorce the appellant discovered her child was alive. Even after the divorce the husband instigated Pasdars (Revolutionary Guards) under his control to embark on a campaign of harassment resulting in the appellant being repeatedly arrested, humiliated and beaten.

By the time the appellant was reunited with her son he was almost six years old. She entered into a new relationship and married, resulting in her first husband renewing his harassment. It was decided they would leave Iran. The appellant bribed an official in the passport office to add her child to her passport and left Iran for Turkey. Her second husband was to join them but from Turkey the appellant was unable to contact her second husband or her parents and in fear, she travelled to New Zealand with the help of an agent. At the airport she sought refugee status. At the time of appeal the appellant's second husband remained in Iran. His passport had been confiscated and he had been placed on a blacklist forbidding him from leaving the country. The first husband has arranged for a warrant for the arrest of the appellant.

It can be seen from both these cases that the women had not only faced ill treatment but return to Iran would lead to arrest or even death.¹⁴³ In both of these decisions the RSAA undertook a careful consideration of the status of women in Iranian society and how this is supported through the political framework.

The control that is exerted over women has already been mentioned and the patriarchal nature of society, together with inferior status accorded to women was also set out in the decisions. Two examples are provided:

First, the value of blood money, which is based on how much a person would have earned in a lifetime. It is twice as much in the case of a murdered man as in the case of a woman.¹⁴⁴ Secondly, penal code stipulates the number of witnesses required to prove a crime is higher if the witnesses are female.¹⁴⁵ The official attitude to domestic violence is 'one of condonation, if not complicity'¹⁴⁶ with the abrogation of the Family Protection Act (which did accord women some protection) by the [Ayatollah] Khomeini regime.¹⁴⁷ Additionally women's educational opportunities had been restricted; they had been excluded

143 This would have been the case for the appellant in *Refugee Appeal No. 2039/93* when it became apparent that she was not a virgin.

144 *71427/99*, 7.

145 *71427/99*, 8.

146 *71427/99*, 9.

147 Ann Mayer, *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995) 111–112 cited in *71427/99*, 24.

from a spectrum of prestigious jobs; practically eliminated from politics and government; denied a say in the legal order and subjected to very strict dress codes.¹⁴⁸ The Islamic principle of inferiority of women had 'the basis of the policy of a despotic state that uses extreme forms of violence in order to regulate male/female relations on the basis of Islamic dogmas.'¹⁴⁹

The overview of relevant material led the RSAA to conclude that there existed in Iran a general refusal 'to recognise women as full, equal human beings who deserve the same rights and freedoms as men' and the 'denial of the right of a woman to function as an autonomous and independent individual has enormous implications at every level.'¹⁵⁰ It subjected them to a wide range of discriminatory laws and treatment.¹⁵¹

In linking this discrimination to the Refugee Convention the authority reinforced its earlier position in *Decision 2039/93* that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard.¹⁵² The RSAA further adopted Hathaway's position that the IBR is essential to an understanding of the minimum duty owed by a state to its nationals.¹⁵³ This place of significance accorded to IBR Hathaway believes, derives from the extraordinary consensus achieved by the IBR 'on the soundness of its standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords.'¹⁵⁴

Consideration of the specific situations of both of the appellants would suggest breaches of some central articles of the ICCPR. These include; Article 17 – the right to privacy, Article 6 – the right to life (arbitrary deprivation of life at the hands of Iranian males); Article 18 – freedom of thought, conscience and religion; Article 7 – the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (breach of the dress code can incur at least 74 lashes),¹⁵⁵ Article 23 – the right not to marry without free and full consent. While each of these individually amount to discrimination, the cumulative effect the RSAA held, amounted to a finding of persecution in the sense of a sustained or systemic violation of basic human rights.

This is further substantiated by the evidential findings of the RSAA. In the case of one appellant, not being a virgin at marriage would probably lead to death. An arrest warrant was issued for another. The pressure of forced compliance with codes and requirements fundamentally at odds with one's own conscience, beliefs, and deeply held convictions. And an appellant faced with ongoing pressure of weekly harassment and interrogations. These are but a few of the realities appellants faced.

In reaching the conclusion that the subjection of the appellants to such treatment amounts to a sustained and systematic violation of human rights the RSAA necessarily addressed the issue of cultural relativity. In particular it addressed two misconceptions. Namely, that it is 'wrong to

148 Mayer, *Ibid*.

149 Shahrzad Mojab *Women from Iran* A paper delivered at the CRDD Workshop of Women Refugee Claimants, Toronto, June 21, 1990 cited in *2039/93* 4 and 10 cited in *2039/93*, 35–36.

150 *2039/93*, 25.

151 *2039/93*, 38. In making these statements it is important to note that the RSAA is in no way making a general criticism of Islam. Rather its concern is the manner in which the ruling elite in Iran had manipulated the official version of Islam to enforce their own conservative and fundamentalist viewpoints.

152 Hathaway, 108.

153 Hathaway, 106.

154 Hathaway, 106.

155 D L Neal, 'Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum' (1988) 20 *Columbia Human Rights Law Review* 203, 217–222 cited in *Decision 2039/93*, 23.

judge “Islamic” states by “Western standards” and ‘the claim that somehow “Islam” itself is irreconcilable with human rights.’¹⁵⁶ Two points were advanced to effectively counter any claim justifying a cultural relativist position in refugee determinations and the imposition of Western superiority.

First was that the ‘use of international rights standards as norms in critical examinations of Islamic human rights schemes and restrictions on human rights’ are based on the ‘premise that peoples in the West and the East share a common humanity, which means that they are equally deserving of rights and freedoms.’¹⁵⁷

Second is that claims about cultural relativism and Western superiority was a point advanced mostly by states (usually those facing criticism for their human rights standards) and by liberal scholars. Such a claim is rarely advanced by the oppressed, who are anxious to benefit from perceived universal standards.¹⁵⁸

The comprehensive overview of the plight of women in Iranian society led the RSAA to conclude the two appellants had a well founded fear of persecution. It is in establishing the nexus to one of the Refugee Conventions grounds where arguably the RSAA makes its greatest contribution to international refugee jurisprudence. The ‘theocratic nature of the current regime in Iran,’¹⁵⁹ its use of Islamic law and Islamic morality to deny women equality with men and to advance and justify a wide range of discriminatory law¹⁶⁰ has already been outlined. When applied to the individual circumstances of the two appellants, including clear opposition to key aspects of the regime, the persecution of the appellants would have come within the religion and political opinion grounds.¹⁶¹

However the RSAA also considered whether both appellants could be accorded refugee status as members of a ‘particular social group’. It was recognised in *Decision 2039/93* that this is ‘not an area from free difficulty’ and consequently ‘too often gender issues are deliberately, but unjustifiably, avoided in the refugee context.’¹⁶² It was feared that an approach to refugee determination unjustifiably favouring the political opinion ground to the exclusion of the social group ground ‘will tend to reinforce the male gender bias often complained of by female asylum seekers, and inhibit the development of a refugee jurisprudence which properly recognises and accommodates gender issues within the legitimate bounds of the Refugee Convention.’¹⁶³ The possibility of overlapping Refugee Convention grounds requires identification of the principal or strongest ground. A claim may well come within the traditional religious or political reasons. However, if there are gender issues bringing the claim within the particular social group category the claim *should* additionally be considered under this head. Only by so doing can refugee jurisprudence develop in a

156 2039/93, 18.

157 A E Mayer, *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995) 7–8.

158 R Higgins, *Problems and Process: International Law And How We Use It* (1994) 96–97 who goes on to say: ‘Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial.’

159 2039/93, 35.

160 Mayer, above n 147 at 111–112.

161 2039/93, 35 and 41; 71427/99 41 and 51.

162 2039/93, 41–42.

163 *Ibid.*

manner appropriate to gender based persecution. The RSAA emphasises that fairness requires the *strongest* ground be identified and acknowledged.

In determining *Decision 2039/93* the RSAA focused on the appellants deeply held beliefs, convictions and values. They were found to be fundamentally at odds with the power structure in Iran which actively promoted inferiority of women. A number of women in Iran shared these convictions which are connected to fundamental civil and political rights and consequently their identity, dignity and existence as a human being. The appellant belonged to a social group (women) who, through their commitment to certain basic values rooted in core anti discrimination human rights principles, reject or oppose the way in which women are treated in Iran, and the attendant power structure perpetuated and reinforced by an 'Islamist' justification. To require such women to surrender to them would not only be abhorrent but place them at risk of serious harm both by the state and at the hands of male family members. The appellant was therefore a member of a particular social group facing the risk of serious harm. The *Decision 2039/93* appellant faced a real risk of serious harm through objecting to state policy and because family involvement in a liberation group. The risk of harm was directly related to the actions of the state.

The appellant in *Decision 71427/99* faced the real risk of serious harm from her husband, his family and the people he could influence. However the overarching reason for such treatment is that women in Iran are fundamentally disenfranchised and marginalised by the state – a shared immutable internal defining characteristic. Support for this position is found in *Shah*.¹⁶⁴ The House of Lords, considering women in Pakistan, held women could form a particular social group because they are discriminated against and unprotected by the state. Size of the group should not be a limiting factor particularly as the claim is country specific. What is required is the anticipated harm is for reason of being a member of that group.

Persecution is *Serious Harm + The Failure of State Protection*. Where serious harm comes from a non state agent the persecutory actions may be tolerated by the state or while not tolerated, the state either refuses or is unable to offer adequate protection. Refugee status can be established under particular social group where nexus can be established to either of the two limbs namely serious harm (on Refugee Convention grounds) or failure of state protection (on Refugee Convention grounds). It is not necessary to satisfy both as Convention Refugee grounds. Where risk of serious harm is not on a Refugee Convention ground, failure of state protection *is* such a ground and the nexus requirement is satisfied. The failure of state protection without threat or actuality of serious harm is not capable of amounting to persecution. Persecution is the *combination of two constructs* – serious harm and failure of state protection – both must be present. But, and most importantly, only serious harm *or* failure of state protection must be on a Refugee Convention ground.

In *Decision 71427/99* the nexus could not be found as serious harm was serious domestic violence which occurs in all countries. However the nexus was proven through failure of the state to protect the appellant. Lack of protection stemmed from the fact that women in Iran are fundamentally disenfranchised and marginalised by the state by active condonation, if not complicity. Refugee status was accorded because of the state failure to protect and as such goes to the core of the purpose of refugee law being to provide a form of 'surrogate or substitute protection' activated upon failure of state protection. Failure to accord the appellant refugee protection would be undermine the whole purpose of the Refugee Convention.

164 *Shah* above n 40.

Justice Kirby adopted this framework in *Khawar* which involved a female applicant from Pakistan. The appellant had suffered extreme violence at the hands of her husband and attempts to gain state protection from the police, as an agent of the state, was futile. A considerable amount of material was presented showing a particularly vulnerable group of women in Pakistan. Women in dispute with their husbands and husband's families were unable to call on male support and protection. They were subjected to, or threatened by, stove burnings and other extreme actions as a means of getting rid of them. Despite extreme mistreatment they were unable to secure effective protection from the police or agencies of the law. Kirby notes that when the focus of the harm inflicted upon women is a result of domestic conflicts by their husbands no Refugee Convention ground exists as there is no nexus. The nexus arises when the focus shifts the failure of state protection. The appellant was able to show a well founded fear of being persecuted as state protection was not available to her as a member of a particular social group.

The contribution of the RSAA is significant. It clearly and compellingly demonstrates how a person not directly persecuted by the state can be accorded refugee status. This has been done by acknowledging the two essential constructs of persecution – *Serious Harm + the Failure of State Protection*. Both constructs are essential but different. If only one of the two arise on Refugee Convention grounds, the nexus requirement central to the refugee definition is satisfied. However the RSAA has taken a second step and set out a framework for determining how refugee status can be determined in a manner ad idem with the Refugee Convention and reinforcing the underlying core principles of refugee law.

Additionally the RSSA has established that gender based persecution can, in appropriate circumstances, amount to persecution within the parameters of the refugee definition. The RSAA has both acknowledged and taken effective steps to address criticism that gender based discrimination is not being accorded appropriate attention by refugee review bodies. It has acknowledging that gender discrimination should *always* be identified by authorities when it is an appropriate consideration. And, when gender discrimination provides the *strongest* ground of nexus as its significance must be identified to ensure the appropriate determination of refugee status. The formulation of the framework has achieved a careful and appropriate balance between ensuring refugee status is granted in appropriate situations in accordance with refugee law on the one hand yet while upholding the limitations contained in the Refugee Convention on the other. To be declared a refugee on the basis of facing serious harm for reason of being a member of a particular social group it must be shown that members of this social group share a common immutable characteristic either be beyond the power of the individual to change, or so fundamental to individual identity or conscience that it ought not be required to be changed.

In the discussed decisions the immutable characteristic is that of being women. It cannot be changed. Appellant women from Iran were disenfranchised and marginalised. Risk of serious harm came from either agents of the state, or private individuals who actions and activities were condoned by the state.

Such an approach to membership of a social group enables appropriate refugee determination in accordance with the refugee definition while at the same time not allowing the concept to be so all embracing it becomes meaningless. While the inclusion of 'particular social group' was

intended to fill the gap (lacuna) this did not mean any association bound by some common thread would be included as a social group under the Refugee Convention.

In short the RSAA has very articulately justified the inclusion of sexual orientation and gender for refugee determinations in appropriate claims. It has done so completely in accord with the framework of the Refugee Convention drawing selectively upon a significant amount of cross jurisdictional material in justification. The RSAA has developed a practical framework adopted and followed by the Australian High Court.¹⁶⁵

VI. CONCLUDING COMMENTS

The contribution of the RSAA is significant and acknowledged in two situations. Firstly the justification that persecution from non state agents can come within the parameters of the Refugee Convention definition in certain specified and limited situations. Secondly in holding that in appropriate circumstances people persecuted because of sexual orientation or gender discrimination could be deemed to comprise a 'particular social group' hence warranting refugee status. The RSAA has done this in a manner which ensured the purpose of the Refugee Convention is given effect: namely to provide surrogate protection to people who are denied their human dignity through the sustained or systemic denial of core human rights. In determining people with a well founded fear of persecution from non state agents can be accorded refugee status if either the *Serious Harm + the Failure of State Protection* is for reason of a refugee ground, the RSAA has established gender discrimination as the basis of a particular social group in circumstances where domestic violence is condoned by the state. This in turn provides appropriate protection to people facing such persecution.

In undertaking its work in this manner the RSAA is acknowledging the English Court of Appeal in *Ex parte Adan* which held that the Refugee Convention is a living convention according appropriate protection for refugees in changing circumstances of the present and future world. The RSAA has in no way modified or compromised the convention definition. Rather it has acknowledged the limitations of protection accorded to people who face persecution where there is a failure of state protection. The restricting mechanisms contained in the Refugee Convention reflect the international community's intention not to offer a haven for *all* suffering individuals. The RSAA interpreted the Refugee Convention in good faith and in accordance with its purpose, mindful that such purpose is to provide human rights protection in *certain specified circumstances*. By working within the parameters the RSAA has effectively addressed the tension between adopting a purposive approach while remaining aware of application limitation.

The RSAA approach has enabled it to make a significant contribution to refugee law. Its careful and incremental development of refugee jurisprudence is based on appropriate guidance taken from key international refugee decisions and academic commentary together with its own experience. The two step framework allows the RSAA to consider refugee claims through clarity of reasoning and logical development of refugee jurisprudence in particular situations. The RSAA is able to reconcile principle to hard realities and, by so doing, is able to provide leadership in matters such as particular social group considerations.

165 Affirmed in 'Michigan Guidelines on Nexus to a Convention Ground General considerations point 8' The Michigan Guidelines on Well-Founded Fear, 26 *Michigan Journal of International Law*, 493 (2005).

VII. COMPLEMENTARY ROLES – RSAA AND RRA

The RSAA occasionally declines refugee status in situations where appellants show well founded fear of persecution if returned to their country of habitual residence. This occurs either because of the need to invoke the exclusion clause under Article 1F¹⁶⁶ or because persecution was not for reason of a refugee ground. In *A, B & C (a family of Peru) v Chief Executive of the Department of Labour*¹⁶⁷ the appellant had been a member of the Peruvian Police Force and as part of an anti terrorism unit taken part in activity involving acts of torture. When a particular anti Government group became aware of his involvement in the anti terrorist activities, attacks were initiated against the appellant and his family. The RSAA acknowledged the fact that the appellant had a well founded fear of persecution if he were to return to Peru but in seeing it necessary to invoke the exclusion clause declined him refugee status on the basis that he had been involved in crimes against humanity.¹⁶⁸

Likewise in another matter a female appellant had established that she and her child had a well founded fear of persecution if she were to return to South Africa. Refugee Status was however declined because the reason for the well founded fear could not be linked to one of the Refugee Convention reasons.¹⁶⁹

Both of these appellants made successful appeals to the Removal Review Authority [RRA].¹⁷⁰ The RRA considers appeals on the basis there are ‘exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.’¹⁷¹ This test to determine such claims was discussed in *Patel v Removal Review Authority & Anor*¹⁷² and held to be a ‘stern test’ which sets a ‘high threshold’. It starts with the premise the appellants are in New Zealand unlawfully and are seeking an exemption. In *Nikoo v Removal Review Authority*¹⁷³ McGechan J held ‘exceptional’ to refer to circumstances which were very unusual. Despite the fact the threshold for determining appeals is very high and the RSAA considers the matters ‘on the papers’ rather than conducting a full hearing¹⁷⁴ the restrictions which are part of the Refugee Convention namely the exclusion clauses and the nexus requirement are not included. As stated in *A, B. & C*:

The categories of ‘exceptional circumstances’ need not be closed, and cannot be for ultimately all must depend upon a full consideration of the actual circumstances of the particular case.¹⁷⁵

166 Article 1F – The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

167 *A v The Chief Executive, Department of Labour Alt cit A, B & C (a family from Peru) v Chief Executive Department of Labour* [2001] NZAR 981.

168 *Decision 2511/95*.

169 This was a hearing before the RRA AAS5475.

170 The Removal Review Authority is an independent judicial body established under the Immigration Act 1987. It hears appeals on the papers against the requirement for a person who is unlawfully in New Zealand to leave New Zealand.

171 Immigration Act 1987 s 47(3).

172 *Patel v Removal Review Authority & Anor* [2000] NZAR 200, 204.

173 *Nikoo v Removal Review Authority* [1994] NZAR 509, 519.

174 Immigration Act 1987 s 50.

175 *A, B & C* above n 169, 992.

When determining an appeal the RRA is able to use the evidential findings of the RSAA but must consider them under a completely different statutory framework.¹⁷⁶ Under the statutory framework the RSAA decided in favour of the appellants in both of these matters as the danger of returning to Peru and South Africa had been clearly established. The RRA however was not restricted by exclusion clauses or nexus requirements.

These decisions illustrate the complementary role the RRA provides to the RSAA. The RSAA is able to focus solely upon the determination of appeals against the parameters of the Refugee Convention thereby ensuring protection of human rights in the manner intended. For those appellants whose circumstances reveal genuine humanitarian/human rights concerns but do not come within the parameters of the Refugee Convention appropriate relief can be provided through the RRA.¹⁷⁷ New Zealand is therefore, able to fulfil its international obligations not only under the Refugee Convention but other international instruments as well. The complementary role performed by these authorities is therefore not only effective but ensures on the one hand refugee determinations being appropriately considered while on the other hand that appropriate relief is provided to people having genuine humanitarian concerns.

VIII. FINAL ACKNOWLEDGEMENT

In acknowledging the contribution of the RSAA Hathaway writes:

It would be a tragedy not only for New Zealand but for the broader refugee protection community were the role of the Refugee Status Appeal Authority to be diminished.¹⁷⁸

The RSAA has offered significant leadership in a difficult and complex decision making area. As Ema Altken¹⁷⁹ noted in her 2005 Annual Report for the RSAA, 'Refugee appeal decisions are difficult and complex ... demanding a high standard of professionalism and fairness ... to reach ... "a possible life-and-death decision extracted from shreds of evidence".' The detail and care of decisions discussed above highlight the RSAA's professionalism and absolute commitment to applying the Refugee Convention in a fair manner.

In *Tavita v Minister of Immigration*,¹⁸⁰ consideration was given to the fulfilment of New Zealand's international obligations contained in the various ratified international instruments. The former President of the Court of Appeal Sir Robin Cook described the Human Rights Committee as a judicial body of high standing.¹⁸¹

176 Ibid 991.

177 For example the RRA can clearly focus upon Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which requires 1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Unlike the Refugee Convention the protection contained in this clause is absolute and is not constrained by exclusion clauses (Article 1 F of the Refugee Convention) or concerns about State Security. (Article 33 (2) of the Refugee Convention).

178 Hathaway n 16.

179 Former Chair, RSAA Annual Report 2005 available at http://www.nzrefugeeappeals.govt.nz/Pages/ref_2005annual-report.aspx.

180 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266.

181 This is the Committee established to supervise the International Covenant on Civil and Political Rights. Under an Optional Protocol to the Convention individuals under the jurisdiction of States who have ratified the Convention and its Optional Protocol make a complaint to this committee if it considers that rights contained under the Covenant have been breached. Article 2 of the Protocol requires however that the individual has firstly exhausted all domestic remedies.

It is submitted the same acknowledgement should be accorded the RSAA. Such acknowledgement is justified by the contribution the RSAA has made to international refugee jurisprudence as evidenced through its decisions but also the acknowledgement of senior judicial bodies such as the British House of Lords and High Court of Australia and senior academic commentators such as Professor James Hathaway.

It is hoped this contribution is acknowledged by the New Zealand Government: not only to ensure the continuation of the work and contribution of the RSAA but see that it is appropriately supported and provided for.