REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 71684/99

AT AUCKLAND

Before: R P G Haines QC (Chairperson)
P Millar (Member)

Counsel for the Appellant: Mr R Chambers & Mr L Cordwell

Appearing for the NZIS: No appearance

Date of Hearing: 1 October 1999

Date of Decision: 29 October 1999

DECISION

INDEX

[1] This is an appeal against the decision of the Refugee Status Branch of the New Zealand Immigration Service declining the grant of refugee status to the appellant, an Indian national of the Sikh faith born in the Punjab.

INTRODUCTION

[2] The appellant is a 23 year old single man who arrived in New Zealand at Auckland International Airport on 27 August 1999. At the airport he applied for refugee status but was taken into custody under s 128 of the Immigration Act 1987 (as amended by the Immigration Amendment Act 1999, s 37). On the following day, in a letter dated 28 August 1999 addressed to the UNHCR Liaison Officer for New Zealand, the Immigration Service explained their decision in the following terms:

> "Following an initial interview it has been determined that the applicant has no appropriate documentation for immigration purposes and a decision as to whether or not to grant a permit to this person has not been made. This is because of concerns about this person's identity which cannot be immediately ascertained and also for security reasons. The applicant's claim may also be considered to be manifestly unfounded."

[3] The statement that the appellant has "no appropriate documentation for immigration purposes" is a reference to the fact that at the time of his arrival in New Zealand, he was not in possession of a passport. The "security reasons" mentioned in the letter are not elaborated upon in the letter and no reference to them is to be found in the Refugee Status Branch file transmitted to the Authority for the purposes of the appeal hearing.

[4] The appellant remains in custody down to the present time.

[5] The Refugee Status Branch interview took place on 9 September 1999. In a decision delivered on 14 September 1999 the application was declined on the stated ground that the fear of persecution held by the appellant is not well-founded

and in the alternative, as the problems he experienced at the hands of the police were entirely localized, he would, in the opinion of the refugee status officer, be able to relocate elsewhere in India.

[6] On appeal the appellant challenges both findings. On the question of his settling elsewhere in India, he relies on the decision of this Authority in *Refugee Appeal No. 135/92 Re RS* (18 June 1993). The submission is that having suffered severe ill-treatment at the hands of the police in his village, his trust in the government of India has been severed and it would be unreasonable to expect him to find some other place in India in which to live.

[7] As to this point, the Secretariat wrote to the appellant's counsel on 27 September 1999 asking that legal submissions be addressed to the question whether the Authority should adopt the principles set out in *The Michigan Guidelines on the Internal Protection Alternative* (April 1999). No such submissions were filed prior to the hearing, but the issue was discussed at some length with counsel on the morning of the hearing while the Authority waited for the appellant to be produced by the prison authorities. Due to an administrative mix-up he had been taken to the Otahuhu District Court to enable the Immigration Service to obtain a further remand in custody notwithstanding that counsel for the appellant had given notice that the remand would be unopposed. In the event, the appellant and his prison escort did not arrive at the Authority's premises until 12.30pm.

[8] At the conclusion of the hearing, counsel sought and was granted leave to file submissions on *The Michigan Guidelines* on or before 15 October 1999.

[9] Subsequently by letter dated 20 October 1999 Mr Chambers advised that no submissions would be made.

THE APPELLANT'S CASE

[10] It must be recorded from the outset that although educated to secondary level, the appellant is not an articulate individual and the various accounts of his case given at the airport, the Refugee Status Branch interview and at the appeal hearing are not notable for their clarity or for their coherence. In assessing his credibility, we have taken into account the fact that upon the death of his father in 1994, the appellant at 18 years of age assumed responsibility for working a modest-sized family farm. He has two siblings, a younger brother who is intellectually handicapped and a sister who is currently 18 years of age. Our assessment of the appellant's credibility has also taken into account the fact that on this his first overseas trip he has been held in custody in New Zealand for far longer than he has ever been detained by the police in the Punjab and also the fact that on the morning of the appeal hearing, he spent some time in the cells at the Otahuhu District Court before being brought into the city for a hearing as to his refugee status.

[11] The appellant's difficulties with the police from his village first commenced in April 1995. One evening, while he and some companions were playing cards, they were approached by a group of men who ordered that they stop what they were doing. Shortly after this the lights in the village went off and in the darkness three prostitutes were killed. The appellant could not say who the men were beyond noting that they were dressed as Sikhs and were not from his village.

[12] A few days later the appellant was arrested at his home by police and taken to the village police station where he was detained for nine to ten days. He was questioned about the men he had seen and although the appellant's evidence in this regard is not entirely clear, it would seem that the police believed that the men were associated with a Sikh terrorist group and that the appellant had either assisted them, or was withholding material information as to their identity.

[13] While under detention the appellant was beaten on three separate occasions.

The first occasion was the evening of his arrest. After his hands were tied he was hit on the soles of his feet. He was then suspended from the ceiling and beaten over his body, but particularly in the area of the chest. He also described being flailed with leather straps by means of a mechanical device. He lost consciousness. The second beating occurred one or two days later. Again he was beaten about the body and on the soles of his feet. He was also flailed with leather straps. Although the beating went on for some time, he did not, on this occasion, lose consciousness. The third beating occurred one day before his release was secured by the village Sarpanch. On this occasion he was punched, kicked and beaten with batons. Following his release he was hospitalized for five to six days.

[14] After his return home the village police visited and required that he report to the village police station every second day or so and warned that he was not to leave the village. The appellant reported as required for some considerable period of time through to approximately March 1997. When he reported he would be asked whether he had seen the men thought to be responsible for the murders.

[15] In June or July 1997, some two to three months after he had unilaterally decided to stop reporting to the police, the appellant was arrested once more at the farm and taken back to the police station. The police accused him of providing food and shelter to the terrorists and of failing to report the presence of the men to the police. The appellant gathered from what the police said that there had either been a theft or a robbery in the village and the police suspected that terrorists had been involved and that the appellant had been giving them (the terrorists) assistance. During this period of detention the appellant received two further beatings. The ill-treatment mentioned by him included assaults with belts and straps, kicks, the crushing of his fingers, having his legs tied and being forced to stand for long periods. As a result he lost consciousness and was taken to hospital. He is unsure whether the village Panchayat had to pay money for his release. His stay in hospital on this occasion lasted 13 to 14 days.

[16] Following his release he was given no instructions to report to the police station, but if there were any incidents in the neighbourhood, he would be taken in and questioned. This was the pattern of events from mid-1997 to mid-1999. The police appeared convinced that the appellant was assisting terrorists.

[17] In January 1999 he was taken once more to the police station and questioned for one to two hours about the terrorists. He was accused of providing them with food. Although not beaten, the appellant was frightened and left for a village in the nearby state of Haryana. There he stayed with a friend's uncle for some two to three months. He returned to his home village after hearing that the police were harassing his family, wanting to know where he (the appellant) was. On his return, the appellant reported to the police in the company of the Sarpanch and was asked similar questions about the terrorists and his association with them. He was not, however, detained. He returned to the village in Haryana but moved on after a few days after being told by the friend's uncle that during his absence, local village police had made inquiries of the uncle about the appellant, wanting to know who he was and where he had come from. Believing that he might be arrested, the appellant sought assistance at a local Gurdwara. There he was introduced to a person who took him to New Delhi where he stayed for one week. He also spent a brief period of some four to five days in Maharashtra. The man to whom he had been introduced at the Gurdwara arranged for his (the appellant's) departure from New Delhi on a false passport. The appellant is not entirely sure of his route to New Zealand but, as mentioned, he arrived in this country on 27 August 1999 and was taken into custody.

[18] On the issue of internal protection the appellant says that he cannot live in another state in India because he believes that he will always be found by the police, just as he was found by them in Haryana. He also believes that it would not be possible for him to live and work outside of the Punjab because his accent would always identify him as a Punjabi and people would always want to know who he was and the police would want to do a check on him.

THE ISSUES

[19] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

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

In terms of *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996) the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

2. If the answer is Yes, is there a Convention reason for that persecution?

[20] After addressing these questions, we will turn to the issue of internal protection.

ASSESSMENT OF THE APPELLANT'S CASE

[21] We have already remarked upon the lack of clarity and coherence in the accounts given by the appellant of his case at the airport, at the Refugee Status Branch interview and at the appeal hearing. However, bearing in mind his lack of

sophistication, the difficulties an inarticulate person has in giving evidence through an interpreter and the possible disorientation caused by his detention in custody from the time of his arrival in New Zealand, we are not prepared to make an adverse credibility finding. The appellant strikes the Authority as a somewhat simple fellow. In the result, we are prepared to accept his evidence at face value. Our findings are:

(a) The police in the appellant's village mistakenly believe that the appellant has provided assistance by way of food and shelter to suspected terrorists;

(b) The suspicions of the police are not strong enough to result in prosecution or close monitoring of a continuous kind. Rather, when terrorist activities occur in the village, the appellant is taken in for questioning in the hope that he will provide information of some use to the police. He is not himself suspected of being a terrorist;

(c) Police interest in the appellant is entirely localized, that is, it is confined to his own village. The appellant was able to live with the friend's uncle in Haryana for two to three months without any enquiry being made of him in that locality;

(d) The subsequent enquiry by police in Haryana was, in these circumstances, no more than a routine enquiry about a "stranger". There is, on the evidence, nothing to suggest that the enquiry was in any way linked to the on-going but low level interest in the appellant by police from his village in the Punjab. This is supported by the fact that when the appellant voluntarily presented himself to his village police in Punjab, he was questioned, not arrested.

[22] Turning now to the issue of Convention reason, the facts are not entirely clear. On one view the police interest is attributable to the perception that he could provide useful information about persons who have committed common law

offences (murder, robbery). On the other hand, in the context of the Punjab the allegation repeatedly made against the appellant that he has been assisting ***terrorists*** arguably introduces an imputed political opinion, namely support for the Khalistan cause. Applying the benefit of the doubt, we are prepared to accept that the breaches of the appellant's human rights have been for reason of an imputed political opinion.

[23] Turning now to the issue of well-foundedness, it is clear that the appellant has, in the past, suffered beatings of some severity. In view of the fact that police interest in him has continued throughout the period 1995 to 1999 (although the level of that interest has fluctuated), we are satisfied that there is sufficient evidence here to justify a finding that there is a real chance that the interrogations, arrests and beatings by the village police will continue in the future. That is, the appellant's fear of future persecution by his village police is well-founded.

[24] It follows that in one locality in India, namely in the precincts of his village in the Punjab, the appellant does hold a well-founded fear of persecution for a Convention reason. However, it is our further finding that this potential for future persecution is confined to his village locality. It does not exist elsewhere in the Punjab, or in any other state in India.

[25] This brings us to the question whether the appellant, by leaving his village, will be able to access internal protection in India. Hitherto, in New Zealand jurisprudence this issue has been known as the "relocation" issue while in other countries the preferred expression is the internal flight alternative. It is correct, as the appellant points out, that this Authority in *Refugee Appeal No. 135/92 Re RS* (18 June 1993) and in *Refugee Appeal No. 523/92 Re RS* (17 March 1995) mapped out a two-tiered analysis of this issue, namely:

(b) Can the refugee claimant genuinely access domestic protection which is meaningful?

(c) Is it reasonable, in all the circumstances, to expect the refugee claimant to relocate elsewhere in the country of nationality?

[26] The New Zealand Court of Appeal in *Butler v Attorney-General* [1999] NZAR 205 (CA) (Richardson P, Henry, Keith, Tipping and Williams JJ) implicitly approved the first limb of the test but warned that under the second limb the Authority appeared to have stepped outside the proper bounds of the Convention. The context would suggest that the Court of Appeal disapproved of the decision in *Refugee Appeal No. 135/92 Re RS* (18 June 1993) insofar as that decision holds that refugee status can be granted to victims of torture notwithstanding that objectively, upon return to their country of origin, there is no risk of further persecution.

[27] Given the appellant's explicit reliance on *Refugee Appeal No. 135/92 Re RS* (18 June 1993) and the reasonableness limb of the test hitherto applied by the Authority, the issue of internal protection must be reassessed in the light of the observations made by the Court of Appeal in *Butler* and in the light of fresh approaches which have been taken to the issue of internal protection.

INTERNAL PROTECTION

Introduction

[28] Because so much of the analysis of the refugee definition takes as its focus the twin issues of persecution and Convention reason, the often overlooked fact is that the fundamental concept on which the Refugee Convention is based is the notion of protection. On close analysis, the refugee definition requires not only a well-founded fear of persecution for a Convention reason, ***but also*** that the refugee claimant, owing to such fear be:

> "... unable, or ... unwilling to avail himself of the ***protection of that country***...." [emphasis added]

[29] In the case of a person with more than one nationality, as Article 1A(2) provides, the protection principle applies to each of the countries of which the person is a national. So such a person will not be treated as lacking the protection of the country of his or her nationality if without any valid reason based on well-founded fear he or she has not availed him or herself of the protection of one of the countries of which he or she is a national. Similarly, the reasons for the cessation of refugee status set out in Article 1C are based on the protection of a country becoming available. Article 1E is to the same effect while Article 1D turns on protection or assistance being available from a United Nations organ or agency other than the United Nations High Commissioner for Refugees.

[30] The underlying assumption of the Convention is that sufficient national protection is inconsistent with status as an internationally recognized refugee. As succinctly put by Professor James C Hathaway in *The Law of Refugee Status* (Butterworths, 1991) at 135, refugee law exists in order to interpose the protection of the international community in situations where resort to national protection is not possible. The following quote is taken from p 133:

> "A person cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be to one's own state."

[31] The points made by Professor Hathaway were adopted and applied in *Canada (Attorney General) v Ward* [1993] 2 SCR 688, 709 (SC:Can):

> "International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason,

> James Hathaway refers to the refugee scheme as 'surrogate or substitute protection', activated only upon failure of national protection; see *The Law of Refugee Status* (1991), at p. 135."

[32] Later, at 722 La Forest J, in delivering the judgment of the Supreme Court of Canada stated:

> "It is clear that the lynch-pin of the analysis ***is*** the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality."

[33] As a result, in assessing whether a refugee claimant's fear of persecution is well-founded, many countries take into account whether the claimant can avail him or herself of a safe place in the country of origin. This concept, sometimes known under the name of the internal flight alternative and sometimes under the name of relocation has not, however, always been applied on a principled basis.

[34] Indeed, the UNHCR has expressed concern at the way in which the notion of internal flight is increasingly being used to reject asylum-seekers: see UNHCR *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* (1995) 30-32. Surveys of the recent (and not always reconcilable) international jurisprudence are to be found in G de Moffarts, "Refugee Status and the 'Internal Flight Alternative'", *Refugee and Asylum Law: Assessing the Scope for Judicial Protection* (International Association of Refugee Law Judges. Second Conference, Nijmegen, January 9-11, 1997) (Nederlands Centrum Buitenlanders, 1997) 123; Hugo Storey, "The Internal Flight Alternative Test: The Jurisprudence Re-Examined" (1998) 10 IJRL 499; *ELENA Paper on the Application of the Concept of Internal Flight Alternative* (October 1998) Refworld CD-Rom 7th ed (January 1998); UNHCR Position Paper, *Relocation Internally as a Reasonable Alternative to Seeking Asylum - (The So-Called 'Internal Flight Alternative' or 'Relocation Principle'*) (February 1999).

[35] In more recent times, Professor James C Hathaway has initiated a collective

study of the relevant norms and state practice. This study, convened by the Programme in Refugee and Asylum Law, The University of Michigan Law School, in April 1999 has led to the publication of a set of "guidelines" known as *The Michigan Guidelines on the Internal Protection Alternative*. More detailed reference to these guidelines will be made.

The Internal Protection Principle in New Zealand

[36] A brief summary of the development of the internal protection principle in New Zealand domestic law is necessary. This summary must be seen against the background that as late as 1990, when Professor Hathaway completed *The Law of Refugee Status*, little jurisprudence had emerged outside Germany and The Netherlands where the internal flight alternative appears to have been developed in the early 1980's: G de Moffarts, "Refugee Status and the 'Internal Flight Alternative'", *Refugee and Asylum Law: Assessing the Scope for Judicial Protection* at 124. Indeed, writing as he was in 1990, Professor Hathaway devotes only two pages of his text to what he terms the internal protection principle. Since then, however, there has been an exponential application of the concept, though, as mentioned, under different names and not always on a principled basis. The jurisprudence in New Zealand must be seen against this evolving background.

[37] The Authority first sat on 10 June 1991. At that time, many of the cases coming before the Authority involved claims by Sikhs from the Republic of India who feared persecution by terrorists then operating in the Punjab, or persecution by the police who suspected most young Sikh men of involvement in terrorist activities. In one of the first cases involving a claim by a Sikh to persecution by non-state agents, *Refugee Appeal No. 6/91 Re SSS* (11 July 1991), the Authority, in considering the question whether the appellant and his family could live elsewhere in India in safety, drew on paragraph 91 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* which is in the following terms:

> "The fear of being persecuted need not always extend to the ***whole*** territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

[38] On the facts, the Authority found that the unwillingness of the appellant and his family to avail themselves of the protection of the Government of India was not motivated by any Convention reason but by considerations of maintenance of their quality of life and avoidance of inconvenience and even hardship in settling down in another part of India. After referring to paragraph 91 of the *Handbook*, the Authority concluded that it would not be unreasonable to expect the appellant and his family to seek protection in another part of India, particularly when their good education and linguistic abilities would stand them in good stead.

[39] As a large number of cases coming before the Authority continued to be based on a fear of persecution at the hands of non-state agents (terrorists), the legal issues were further examined in *Refugee Appeal No. 11/91 Re S* (5 September 1991) at 14 to 28. It is not necessary to repeat or summarize what is said in that decision except to note that the Authority at p 11 held that the definition of the term "refugee" in Article 1A(2) makes it clear that the lack of protection by the Government of the country of origin is an essential element of the refugee definition. It rejected the "internal flight alternative" label at p 19, holding that to pose any question postulated on an internal flight alternative is to ask the wrong question. Rather, the question is one of protection and is to be approached fairly and squarely in terms of the refugee definition "... is unable or ... unwilling to avail himself of the protection of that country." It is as much an issue to be established as, for example, the well-founded fear. The Authority expressly adopted the statement of principle taken from Professor Hathaway's *The Law of Refugee Status* at 133. The Authority also accepted that the following passage from the text at p 134 contained a fair summary of the internal protection principle:

> "The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can ***genuinely access*** domestic protection, and for whom the reality of protection is ***meaningful***. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized."

[40] Almost 12 months later, in *Refugee Appeal No. 18/92 Re JS* (5 August 1992) at 10 to 18 the Authority attempted to draw together the experience it had gained in dealing with the continuing (and substantial) flow of cases from the Punjab involving persecution by a non-state agent. A summary of the Authority's decisions was given, highlighting the fact that in ***non-state agent cases***, the Authority had consistently held that the situation in the Punjab was, at best, a regionalised failure of state protection and that persons in fear of persecution at the hands of Sikh terrorists could access meaningful and effective state protection elsewhere in India with the result that refugee status in New Zealand was declined. The Authority noted that the principles as so developed had not as at that time been applied to situations where the state itself was the agent of persecution. This was largely due to the fact that in such cases, the agent of persecution can usually (but not always) be presumed to have a country-wide reach.

[41] The specific situation of victims of state violence was considered in *Refugee Appeal No. 135/92 Re RS* (18 June 1993). The appellant had been the victim of severe ill-treatment on two separate occasions and as a result, suffered permanent disabilities. The issue was whether he could be denied refugee status on the basis that he could access effective protection elsewhere in India. The view taken was that the internal protection principle could apply to persons fleeing persecution from ***state authorities***. This was largely due to the country-specific evidence which established that while persecution (including torture) by the

security forces was widespread in the Punjab at that time, victims of such persecution, by moving out of the Punjab into other states in India, could access meaningful protection. There were, of course, exceptions where, for example, the interest of the authorities was intense and a warrant of arrest had been issued. In those cases relocation was not generally regarded as a live issue because the reach of the Punjab police into other parts of India could be presumed. It should also be said that the internal protection principle was recognized as being inappropriate (at that time) in the context of certain countries such as the People's Republic of China and the Islamic Republic of Iran as the evidence then available was that in such countries the power of the state reached all corners.

[42] The significant points, which for present purposes emerge from *Refugee Appeal No. 135/92 Re RS* (18 June 1993) are as follows:

(a) The Authority affirmed the decision in *Refugee Appeal No. 11/91 Re S* (5 September 1991) at 19 that it was wrong to ask whether a refugee claimant had an internal flight alternative. Rather, the question was one of protection;

(b) What the Authority called the question of "relocation" had to be addressed in terms of the following questions:

(i) Can the individual ***genuinely access*** domestic protection which is ***meaningful***?
This issue was extracted from Professor Hathaway's *The Law of Refugee Status* at 135;

(ii) Is it reasonable, in all the circumstances, to expect the individual to relocate?

This limb of the test was extracted from paragraph 91 of the UNHCR *Handbook*;

(c) The requirements are cumulative. In other words, before an individual possessing a well-founded fear of persecution can be expected to relocate within the country of origin, it must be possible to say ***both*** that meaningful

domestic protection can be genuinely accessed by that person ***and also*** that in all the circumstances, it is reasonable for that individual to relocate;

(d) A high degree of caution must be exercised in making what are, in effect, speculative judgments. Beyond referring to issues of domestic protection and reasonableness, it is not possible to adopt a fixed formula for making the difficult judgments demanded by the relocation issue;

(e) The foregoing principles apply irrespective of whether the agent of persecution is the state or a non-state agent;

(f) Victims of torture at the hands of the state deserve special consideration in the relocation context. In essence, the more severe the torture, and the more severe and visible the long-term *sequelae*, the more readily a decision-maker may find that relocation is unreasonable. But it does not follow that relocation is unreasonable only where the torture is severe and the *sequelae* immediately apparent. The very fact that the issue is one of reasonableness means that a variety of circumstances will affect the particular decision under consideration;

(g) If there is doubt either as to the issue of protection or as to the issue of reasonableness, the refugee claimant must receive the benefit of the doubt with a finding that relocation is not available.

[43] In recognition of the fact that the jurisprudence thereby developed in relation to torture victims might be seen to travel beyond what on one interpretation might appear to be the strict confines of the Convention, the Authority in *Refugee Appeal No. 135/92 Re RS* at p 39 referred to the need to interpret and apply the Convention in a generous and humanitarian spirit and pointed out that the effect of Article 1A(1) is that statutory refugees do not lose their refugee status on the resumption of state protection if they are able to show “compelling reasons arising out of previous persecution” for refusing to avail themselves of the protection of

the country of nationality. The Authority noted that this provision has been extended by the domestic Canadian legislation to apply also to refugees who fall within Article 1A(2). The point made was that the Refugee Convention itself recognizes that there are circumstances in which a person will continue to be recognized as a refugee even though that person, due to a change of circumstances in the country of origin, ceases to have a well-founded fear of persecution.

[44] Almost two years later, the Authority was required once again to re-examine the internal protection principle in *Refugee Appeal No. 523/92 Re RS* (17 March 1995) at 27 to 47. The Authority was able at that point to draw on Canadian and Australian case law, much of it decided after the Authority had delivered its earlier decision in *Refugee Appeal No. 135/92 Re RS* (18 June 1993). Principal among the overseas decisions were *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (SC:Can); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 FC 589 (FC:CA) and *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 124 ALR 265 (FC:FC) (Black CJ, Beaumont and Whitlam JJ).

[45] In *Refugee Appeal No. 523/92 Re RS* (17 March 1995) the Authority found that the Canadian and Australian courts had similarly accepted and adopted both the underlying protection principle and the issue of reasonableness. As to the United Kingdom, the Authority found (at 42) that while the reasonableness element was applied in that country, the jurisprudence was apparently undeveloped. Since then, however, the decision in *R v Secretary of State for the Home Department, Ex parte Robinson* [1998] QB 929, 937-941 (CA) has been delivered in which the elements of protection and reasonableness are also identified. In the result, the Authority in *Refugee Appeal No. 523/92 Re RS* confirmed its relocation jurisprudence and in particular the two stage test formulated in *Refugee Appeal No. 135/92 Re RS* (18 June 1993).

[46] Before we turn to the *Butler* decision, four further aspects of the Authority's

jurisprudence must be mentioned:

(a) It is a fundamental principle of refugee law in New Zealand that the relevant date for the assessment of refugee status is the date of determination. See *Refugee Appeal No. 70366/96 Re C* (22 September 1997) at 33-39 where the authorities (principally Australian) are collected. The definition in Article 1A(2) mandates a forward looking assessment of the risks faced by the refugee claimant if returned to the country of nationality or habitual residence. What is required is an assessment of the risk of harm in the future. The corollary is that past persecution is not required before the Convention definition is satisfied. If the refugee claimant (or persons similarly situated) has in fact suffered harm in the past, this is undoubtedly relevant to the issue whether such harm might occur in the future. But past harm, and past persecution in particular, is not a pre-requisite to refugee status, nor, if it exists, is it enough on its own to justify the grant of refugee status. The relevance of this principle in the current context is that it has never been required of refugee claimants in New Zealand that they demonstrate that they were unable to flee to some other part of their country of origin as an alternative to escaping abroad. Contrast the approach taken in some European countries which requires the feasibility of the internal flight alternative to be assessed at the time of the claimant's departure from the country: Macdonald & Blake, *Immigration Law and Practice in the United Kingdom* 4th ed (Butterworths, 1995) para 12.36;

(b) The second important point to make about the issue of internal protection is that the Authority has always seen it as an issue which arises ***only if*** the refugee claimant is first able to establish that ***somewhere*** in the country of origin, there is a well-founded fear of persecution for a Convention reason. Put another way, unless the twin elements of a well-founded fear and a Convention reason are established, the issue of internal protection simply does not arise. But more importantly, the Authority's approach postpones the inquiry into internal protection until after identification of the anticipated

harm and of the degree of the risk of that harm eventuating. This provides a sound foundation from which to then embark upon the inquiry mandated by the protection principle, namely "protection from what?" It also underlines the fact that the individual in respect of whom the inquiry is being made does, prima facie, satisfy the terms of the refugee definition;

(c) The third point is that if the question of internal protection is a live issue, the decision-maker must give notice of this fact so that the refugee claimant has a fair opportunity to meet the issue. This obligation, however, must be tempered with commonsense. There are certain categories of cases where it is self-evident that internal protection is an issue either because of the nature of the case (particularly if it involves a non-state agent of persecution) or because of the country of origin (eg, the Republic of India) or both: *Refugee Appeal No. 523/92 Re RS* (17 March 1995) 40-41. For a general statement of the principles of fairness in the refugee determination context see *Khalon v Attorney-General* [1996] 1 NZLR 458, 463 (Fisher J);

(d) Refugee claimants whose cases are dealt with under the manifestly unfounded claims procedure are entitled to be heard on all issues, including that of internal protection: *Refugee Appeal No. 70951/98* (5 August 1998) 35-37. Indeed, under the new statutory procedures which came into effect on 1 October 1999, all refugee claimants must be offered at least one face to face interview, either at first instance or on appeal. The effect of s 129P(5) of the Immigration Act 1987 (as inserted by the Immigration Amendment Act 1999, s 40) is that the Authority may dispense with an interview only if the refugee claimant has been interviewed by a refugee status officer (or having been given an opportunity to be interviewed, failed to take that opportunity) ***and*** the Authority considers that the appeal is prima facie manifestly unfounded or clearly abusive. It is therefore not possible for the question of internal protection to be considered in a summary manner.

The *Butler* Decision

[47] Against this background the internal protection issue came before the New Zealand Court of Appeal in *Butler v Attorney-General* [1999] NZAR 205 (CA) (Richardson P, Henry, Keith, Tipping and Williams JJ). The facts of the case are largely unimportant in the present context. It is sufficient to note that the appeal by Mr Butler to this Authority was dismissed on 14 December 1992 and while the application for judicial review was filed on 18 January 1993, it was not heard by the High Court until four and a half years later. Judgment of the High Court was given on 29 July 1997 dismissing the proceedings. On appeal to the Court of Appeal, it was argued for Mr Butler that while the two-step relocation test was not available in 1992, fairness required that he, in September 1997, being the date of hearing of the case in the Court of Appeal, should be entitled to the benefit of developments in refugee law which had occurred subsequent to the hearing of the case by this Authority. His argument was that while he had received from this Authority the benefit of an examination of the protection limb of the test, he had not had his case examined from the reasonableness aspect. In a judgment delivered on 13 October 1997, the Court of Appeal was prepared to entertain the argument but found that before this Authority neither Mr Butler's evidence nor his submissions had raised or addressed the issue of the unreasonableness or harshness of relocation. The focus of his case had been on the issue of protection. In the circumstances the Court of Appeal held that it could not be said that the Authority had committed an error of law in not separately addressing a distinct reasonableness element. No such element had been presented to it as arising from the facts. The Court went on to hold at p 215 that Mr Butler's was not the kind of case where either the law or the factual situation before the Authority required it of its own motion to take up any additional element. While these findings were a sufficient basis for dismissing the appeal, the Court of Appeal nevertheless went on to consider the issue of protection. Three significant points were made:

(a) Applying *Ward*, it was held that central to the definition of "refugee" is the basic concept of protection. If there is a real chance that the country of

origin will not provide protection, the world community is to provide surrogate protection. The lynch-pin is the state's inability to protect. The true object of the Convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people when fear of persecution is in reality well-founded. See pp 216-217;

(b) On the issue of relocation, the various references to and tests for "reasonableness" (*Handbook*) or "undue harshness" (*Thirunavukkarasu*) must be seen in context, or against the backcloth that the issue is whether the claimant is entitled to the status of refugee. It is not a stand alone test, authorizing an unconfined inquiry into all the social, economic and political circumstances of the application including the circumstances of members of the family. The test is sharply different from the humanitarian tests provided for in the Immigration Act 1987, ss 63B [now s 47] and 105. It does not in particular range widely over the rights and interests in respect of the family; the refugee inquiry is narrowly focused on the persecution and protection of the particular claimant. See p 217;

(c) Rather than being seen as free-standing, the reasonableness test in the relocation context must be related to the primary obligation of the country of nationality to protect the claimant. Meaningful national state protection which can be genuinely accessed requires provision of basic norms of civil, political and socio-economic rights. It is not a matter of a claimant's convenience or of the attractiveness of the place of relocation. More must be shown. The reasonableness element must be tied back to the definition of "refugee" set out in the Convention and to the Convention's purposes of original protection or surrogate protection for the avoidance of persecution. The relocation element is inherent in the definition; it is not distinct. The question is whether, having regard to those purposes, it is unreasonable in a relocation case to require claimants to avail themselves of the available protection of the country of nationality. See p 218.

In so holding, the Court of Appeal, in rather oblique terms, and without detail or explanation, hinted (p 218) that in the application of these principles, the Authority may have been overly generous to refugee claimants:

> "Rather than being seen as free-standing (as more recent decisions of the Authority appear to suggest), the reasonableness test must be related to the primary obligation of the country of nationality to protect the claimant. To repeat what Professor Hathaway said in the passage relating to relocation quoted earlier, ***meaningful*** national state protection which can be ***genuinely accessed*** requires provision of basic norms of civil, political and socio-economic rights." [emphasis in the original]

[48] Thus the Court of Appeal approved the Authority's formulation of the first limb of the inquiry (genuine access to meaningful protection), but curtailed the reasonableness element by requiring it to be tied back to the purpose of protection.

[49] Because of its importance we reproduce below the relevant passage from the *Butler* decision at 217-218:

> "The various references to and tests for "reasonableness" or "undue harshness" (a test stated by Linden JA in *Thirunavukkarasu v Minister of Employment and Immigration*) must be seen in the context or, to borrow Brooke LJ's metaphor, "against the backcloth that the issue is whether the claimant is entitled to the status of refugee", *R v Secretary of State for the Home Department, ex parte Robinson* p 435. It is not a stand alone test, authorising an unconfined inquiry into all the social, economic and political circumstances of the application including the circumstances of members of the family. The test is for instance sharply different from the humanitarian tests provided for in the Immigration Act 1987, ss 63B and 105. It does not in particular range widely over the rights and interests in respect of the family. The refugee inquiry is narrowly focussed on the persecution and protection of the particular claimant. In no case to which we were referred were international obligations in respect of the family seen as being linked to the definition of refugee. While family circumstances might be relevant to the

> reasonableness element, there is no basis for such a link on the facts of the present case. We note as well that New Zealand had not become bound by the Convention of the Rights of the Child at the time of the decision of the Authority.
>
> Rather than being seen as free standing (as more recent decisions of the Authority appear to suggest), the reasonableness test must be related to the primary obligation of the country of nationality to protect the claimant. To repeat what Professor Hathaway said in the passage relating to relocation quoted earlier, *meaningful* national state protection which can be *genuinely accessed* requires provision of basic norms of civil, political and socio-economic rights. To the same effect Linden JA in the Canadian case cited above, (1993) 109 DLR (4th) 682, 688, stresses that it is not a matter of a claimant's convenience or of the attractiveness of the place of relocation. More must be shown. The reasonableness element must be tied back to the definition of "refugee" set out in the Convention and to the Convention's purposes of original protection or surrogate protection for the avoidance of persecution. The relocation element is inherent in the definition; it is not distinct. The question is whether, having regard to those purposes, it is unreasonable in a relocation case to require claimants to avail themselves of the available protection of the country of nationality."

[50] We are now required to re-examine our jurisprudence in the light of the guidance given by the Court of Appeal in the *Butler* decision. We have not found of any great assistance the UNHCR Position Paper, *Relocation Internally as a Reasonable Alternative to Seeking Asylum - (The So-Called 'Internal Flight Alternative' or 'Relocation Principle'*) (February 1999). On one view, it suffers from the same weakness as does the Authority's own jurisprudence to date in failing to explicitly curtail the reasonableness element by requiring it to be tied back to the purpose of protection.

The Internal Protection Principle Reassessed

[51] As explained in *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996), the template of issues currently employed by the Authority when investigating the initial issues of well-foundedness and Convention reason is as

follows:

1. Objectively, on the facts as found, is there a real chance of the refugee claimant being persecuted if returned to the country of nationality?

2. If the answer is Yes, is there a Convention reason for that persecution?

Where the issue of relocation arises, two additional issues are posed:

3. Can the refugee claimant genuinely access domestic protection which is meaningful?

4. Is it reasonable, in all the circumstances, to expect the refugee claimant to relocate elsewhere in the country of nationality?

[52] The formulation of the third issue (meaningful state protection which can be genuinely accessed) has been drawn from Professor Hathaway's text and has been implicitly approved by the Court of Appeal in *Butler*. There is therefore no reason for it to be changed. The point, however, which has never been directly addressed by the Authority, and which is not expanded upon in the *Butler* decision, is what is meant by meaningful domestic protection. Professor Hathaway in *The Law of Refugee Status* (Butterworths, 1991) at 134 does not develop this point either beyond referring (as the Court of Appeal observed at 218) to the need for the protection to meet "basic norms of civil, political and socio-economic human rights". This is an issue to which we must later return.

[53] The other troublesome issue is the role now to be played by the reasonableness element. As pointed out by the Court of Appeal in *Butler*, this element is problematical because of its potential looseness. It facilitates the intrusion of factors not related to the purposes of the Refugee Convention.

[54] But even if the reasonableness assessment can be tied back to the question of state protection, the more fundamental, if not ultimate question which must be asked, however, is whether such assessment in fact adds anything to a meaningful internal protection inquiry. The answer to this question turns to a large degree on the nature and intensity of the inquiry into the protection element.

Neither the Authority nor the Court of Appeal in *Butler* has examined this question. The Authority's omission must now be rectified.

Meaningful Internal Protection - The Nature and Intensity of the Inquiry

[55] In the refugee context, protection must mean, at the very least, an absence of a risk of persecution. It follows that the first requirement of the proposed site of internal protection is that it eliminates the earlier identified well-founded fear of persecution. Put simply the place in question must be one in which the refugee claimant is not at risk of persecution for a Convention reason. As this assessment necessarily looks to the future, before a finding can be made that there is no future risk of persecution in the proposed site, it must be shown that the elimination of the risk is more than transitory. There must be sufficient evidence to allow a finding to be made that the absence of risk is a durable state of affairs. In this context, it is relevant to inquire whether the agent of persecution is a state entity which has the ability to act on a nationwide basis as compared with a non-state agent of persecution whose threat to the refugee claimant may be localized only. Where the fear of persecution stems from the unwillingness or inability of the state to offer effective protection, the inquiry will necessarily focus on the issue whether that unwillingness or inability is localized or nationwide.

[56] The inquiry must, however, go further. We are of the view that meaningful protection means more than the mere absence, in the proposed site of internal protection, of the risk of persecution (for a Convention reason) faced in the original locality. Meaningful domestic protection is not genuinely accessed where, in the proposed site of internal protection, the individual is exposed to a risk of other forms of serious harm, even if not rising to the level of persecution. Accordingly, the internal protection inquiry mandates a second step which is an inquiry whether, in the proposed site, there are other risks which either amount to, or are tantamount to, a risk of persecution. This would include factors which have the potential of forcing the refugee claimant back to the original area of persecution.

[57] But there is a third step to the inquiry. The view that we take is that the notion of ***meaningful*** domestic protection implies not just the absence of a risk of ***harm***, it requires also, as Professor Hathaway has pointed out, the provision of basic norms of civil, political and socio-economic rights. These basic norms are to be found in the text of the Refugee Convention itself and in particular in Articles 2 to 33. The UNHCR, however, has proposed that an effective internal flight alternative can only exist when the conditions correspond to the standards derived from the Refugee Convention ***and*** other major human rights instruments: UNHCR, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* (September 1995) 32. The difficulty with requiring correspondence with other major human rights instruments (which the Authority presumes would include at least the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social, and Cultural Rights 1966) is that no uniform and ascertainable standard of rights for refugees has emerged on which state parties to the Refugee Convention are agreed. Insistence on these human rights instruments would also potentially involve measuring the proposed site of internal protection against a standard which is possibly unobtainable in many states party to the Refugee Convention. But it is primarily the absence of an agreed standard of minimum rights for refugees which we see as the greatest handicap to the International Bill of Rights approach. In particular some "rights" in the hierarchy of rights do not fare well, even though they are essential to the well-being of refugees. Thus the right to work, including just and favourable conditions of employment, remuneration and rest, entitlement to food, clothing, housing and social security are "programmatic" rights ranked third in the hierarchy of rights. See further Professor James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 110-111. The International Covenant on Economic, Social, and Cultural Rights 1966 also suffers from excessive generality: Matthew C R Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995) 25 & 353. The comment made by Asbjørn Eide in "Economic, Social and Cultural Rights as Human Rights" in Eide, Krause & Rosas, (eds) *Economic Social and Cultural Rights: A Text Book* (Martinus Nijhoff, 1995) 21 at 39 is that:

> "... it now becomes understandable that the basic provisions (CESCR, Articles 2 and 11) were drafted more in the form of ***obligations of result*** rather than ***obligations of conduct***. It is also understandable that these obligations, taken at their highest and most general level, cannot easily be made justiciable (manageable by third party judicial settlement)." [emphasis in original]

[58] The analysis by Matthew Craven in *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* at 354 contains the following critique:

> "Further problems evidenced in the text of the Covenant are its confused and inconsistent structure. First, it is not clear whether the obligations clause in article 2(1) relates to all the substantive rights in Part III or only to those that are specifically recognized. Secondly, the substantive articles themselves often contain a confused mixture of rights, objectives, and implementation procedures. Thirdly, it is unclear to what extent the rights are intended to be covered by the general or specific limitation clauses to be found in the Covenant or whether indeed it is possible to derogate from them at all. Finally, and perhaps most crucially, the general State obligations are so obscure that it appears, on the face of it, to be virtually impossible to establish the extent to which a State is in compliance with its obligations under the Covenant."

[59] These factors are not conducive to principled and consistent decision-making in the refugee determination process.

[60] Until a greater consensus has emerged as to the integration of refugee rights with international human rights law, we prefer to adopt the already established refugee-specific statement of rights found in the Refugee Convention itself. It contains express, binding obligations, including duties owed in relation to employment (Articles 17 and 18) and welfare (Articles 20, 21, 22, 23 and 24). Speaking generally, the obligation on state parties under the Refugee Convention is to accord to refugees the most favourable treatment accorded to nationals of a foreign country in the same circumstances (employment - Articles 17 and 18; housing - Article 21) (education other than elementary education - Article 22); while in other respects refugees are accorded the same treatment as nationals

(rationing - Article 20; housing - Article 21; public education - Article 22; elementary education; public relief - Article 23; labour legislation and social security - Article 24). The view we have taken is that the appropriate minimal standard of effective protection for the purposes of Article 1A(2) of the Refugee Convention is the standard of human rights set by the Refugee Convention itself, ie, the rights owed by state parties to persons who are refugees.

[61] In essence, our reasoning is as follows. Because under New Zealand law the issue of internal protection does not arise unless and until a determination is made that the refugee claimant holds a well-founded fear of persecution for a Convention reason, the inquiry into internal protection is really an inquiry into whether a person who satisfies the Refugee Convention and who is prima facie a refugee - at least in relation to an identified part of the country of origin - should lose that status by the application of the internal protection principle. There is considerable force to the logic that that putative refugee status should only be lost if the individual can access in his or her own country of origin the same level of protection that he or she would be entitled to under the Refugee Convention in one of the state parties to the Convention. Clearly some state parties will accord to refugees a greater range of human rights and freedoms than the minimal standards prescribed by the Refugee Convention. Other states will barely be able to satisfy the Convention standards. But the Refugee Convention itself sets the minimum standard of human rights which the international community has agreed should be accorded to individuals who meet the Refugee Convention. The “loss” of refugee status by the application of the internal protection principle should only occur where, in the site of the internal protection, this minimum standard is met.

[62] The added attraction of this approach is that it provides decision-makers with an identified, quantified and standard set of rights common to all state parties, thereby facilitating consistent and fair decision-making. The three limbs of the proposed test also satisfy the requirement of the Court of Appeal in *Butler* that the assessment of the protection issue be tied back to the Article 1A(2) definition of refugee and to the Convention’s purposes of original protection. If, on this

analysis, there is no protection-related purpose for the reasonableness inquiry, it has no place in the determination of the internal protection alternative. We will return to this issue shortly.

Some Observations About Guidelines

[63] In this context it is appropriate that we turn to the *Michigan Guidelines on the Internal Protection Alternative*. Before doing so, some preliminary comments must be made about guidelines generally. As one would expect in a legal system based on the common law model, New Zealand refugee jurisprudence has developed incrementally, and will continue to do so. The challenge to this Authority and to the New Zealand courts is to develop refugee law in a progressive and dynamic manner while remaining true to the language, object and purpose of the Refugee Convention, and to avoid the failures which have led other countries to adopt the unusual remedy of regulating their jurisprudence by means of "guidelines" formulated by extra-judicial bodies. Guidelines first emerged in the context of gender issues and have since become rather fashionable. Canada, which took an early lead in these developments has promulgated guidelines which now cover much of the refugee field. New Zealand, however, has adhered to the conventional case by case development of the law through the hierarchy of tribunals and courts. Gender issues in particular have evolved through such cases as *Refugee Appeal No. 1039/93 Re HBS and LBY* (13 February 1995) and *Refugee Appeal No. 2039/93 Re MN* (12 February 1996). Through awareness of the issues and by the application of conventional principles of interpretation, the neglect and difficulty which has hindered other countries has hopefully been avoided. The Authority is therefore not in favour of adopting guidelines as such. It recognizes, however, that guidelines can be relevant in informing the development of refugee law. But as the understanding of that law progresses, the guidelines must not be allowed to become a bed of Procrustes. It is in this context that the Authority approaches the *Michigan Guidelines on the Internal Protection Alternative*.

The Michigan Guidelines on the Internal Protection Alternative

[64] As already mentioned, in April 1999 a collective study of the internal protection alternative was initiated by Professor James C Hathaway and convened by the Programme in Refugee and Asylum Law, the University of Michigan Law School. This study led to the publication of a set of "guidelines" known as *The Michigan Guidelines on the Internal Protection Alternative*. The participants in the study included Professor James C Hathaway; Philip Rudge, Colloquium Chairperson and formerly head of the European Council on Refugees & Exiles; Deborah Anker, Lecturer in Law at Harvard Law School where she heads the Immigration and Refugee Clinical Programme; Professor David A Martin, Doherty Professor of Law, University of Virginia School of Law; Jean-Yves Carlier, Senior Lecturer at the Université catholique de Louvain; Lee Anne de la Hunt, University of Capetown and Professor V Vijayakumar who holds the Chair on Refugee Law at the National Law School of India University. The chairperson of this particular panel of the Authority was also a participant in the study and in these circumstances, some caution must be exercised in promoting the *Michigan Guidelines*. That having been said, however, the collective wisdom of an otherwise distinguished body of persons cannot be lightly ignored, especially when the principles underlying the *Michigan Guidelines* are, to a very large degree, already reflected in current New Zealand jurisprudence. Indeed, on one view, it could be said that the *Michigan Guidelines* and the New Zealand jurisprudence are in accord, subject to the exception that the *Michigan Guidelines* explicitly quantify the nature of meaningful domestic protection and dispense with the reasonableness inquiry. As to the latter point, it is true that the Court of Appeal in *Butler* did not explicitly require the reasonableness element to be removed. But by requiring that element to be related to the primary issue of protection, the expressly intended effect was to remove "reasonableness" as a free-standing inquiry. In many ways, the *Butler* decision prepared the way for New Zealand to adopt the more principled approach to internal protection that is now suggested by the *Michigan Guidelines*.

[65] Drafted as they have been by Professor Hathaway himself, we are of the view that the *Michigan Guidelines* properly reflect and summarize, though more succinctly and more elegantly, the principles to be applied in New Zealand and which we have earlier endeavoured to state. The *Michigan Guidelines* may therefore be properly used to inform the New Zealand law. We reproduce below the *Guidelines* in full.

> "**The Michigan Guidelines on the Internal Protection Alternative**
>
> In many jurisdictions around the world, 'internal flight' or 'internal relocation' rules are increasingly relied upon to deny refugee status to persons at risk of persecution for a Convention reason in part, but not all, of their country of origin. In this, as in so many areas of refugee law and policy, the viability of a universal commitment to protection is challenged by divergence in state practice. These Guidelines seek to define the ways in which international refugee law should inform what the authors believe is more accurately described as the 'internal protection alternative'. It is the product of collective study of relevant norms and state practice, debated and refined at the First Colloquium on Challenges in International Refugee Law, in April 1999.
>
> **The Analytical Framework**
>
> **1.** The essence of the refugee definition set out in Art. 1(A)(2) of the 1951 Convention relating to the Status of Refugees ('Refugee Convention') is the identification of persons who are entitled to claim protection in a contracting state against the risk of persecution in their own country. This duty of state parties to provide surrogate protection arises only in relation to persons who are either unable to benefit from the protection of their own state, or who are unwilling to accept that state's protection because of a well-founded fear of persecution.
>
> **2.** It therefore follows that to the extent meaningful protection against the risk of persecution is genuinely available to an asylum-seeker, Convention refugee status need not be recognized.
>
> **3.** Both the risk of persecution and availability of countervailing protection were traditionally assessed simply in relation to an asylum-seeker's place of origin. The implicit operating assumption was that evidence of a sufficiently serious risk in one part of the state of origin could be said to give rise to a well-founded fear of persecution in the asylum-seeker's country'. Contemporary practice in most developed states of asylum has, however, evolved to take

account of regionalized variations of risk within countries of origin. Under the rubric of so-called 'internal flight' or 'internal relocation' rules, states increasingly decline to recognize as Convention refugees persons acknowledged to be at risk in one locality on the grounds that protection should have been, or could be, sought elsewhere inside the state of origin.

4. In some circumstances, meaningful protection against the risk of persecution can be provided inside the boundaries of an asylum-seeker's state of origin. Where a careful inquiry determines that a particular asylum-seeker has an 'internal protection alternative', it is lawful to deny recognition of Convention refugee status.

5. A lawful inquiry into the existence of a 'internal protection alternative' is not, however, simply an examination of whether an asylum-seeker might have avoided departure from her or his country of origin ('internal flight'). Nor is it only an assessment of whether the risk of persecution can presently be avoided somewhere inside the asylum-seeker's country of origin ('internal relocation'). Instead, 'internal protection alternative' analysis should be directed to the identification of asylum-seekers who do not require international protection against the risk of persecution in their own country because they can presently access meaningful protection in a part of their own country. So conceived, internal protection analysis can be carried out in full conformity with the requirements of the Refugee Convention.

6. We set out below a summary of our understanding of the circumstances under which refugee protection may lawfully be denied by a putative asylum state on the grounds that an asylum-seeker is able to avail himself or herself of an 'internal protection alternative'. Our analysis is based on the requirements of the Refugee Convention, and is informed primarily by the jurisprudence of leading developed states of asylum. No attempt is made here to address the additional limitations on removal of asylum-seekers from a state's territory that may follow from other international legal obligations, or from a given state's domestic laws. In particular, state parties to the Organization of African Unity's ***Convention governing the specific aspects of refugee problems in Africa*** have obligated themselves to protect not only Convention refugees, but also persons at risk due to '... external aggression, occupation, foreign domination or events seriously disturbing public order ***in either part or the whole*** of [the] country of origin or nationality... (emphasis added)'.

7. More generally, state parties are under no duty to decline recognition of refugee status to asylum-seekers who are able to avail themselves of an 'internal protection alternative'. Because refugee

status is evaluated in relation to conditions in the asylum-seeker's country of nationality or former habitual residence, and because no express provision is made for the exclusion from Convention refugee status of persons able to avail themselves of meaningful internal protection, state parties remain entitled to recognize the refugee status of persons who fear persecution in only one part of their country of origin.

General Nature and Requirements of 'Internal Protection Alternative' Analysis

8. There is no justification in international law to refuse recognition of refugee status on the basis of a purely retrospective assessment of conditions at the time of an asylum-seeker's departure from the home state. The duty of protection under the Refugee Convention is explicitly premised on a prospective evaluation of risk. That is, an individual is a Convention refugee only if she or he would presently be at risk of persecution in the state of origin, whatever the circumstances at the time of departure from the home state. Internal protection analysis informs this inquiry only if directed to the identification of a present possibility of meaningful protection within the boundaries of the home state.

9. Because this prospective analysis of internal protection occurs at a point in time when the asylum-seeker has already left his or her home state, a present possibility of meaningful protection inside the home state exists only if the asylum-seeker can be returned to the internal region adjudged to satisfy the 'internal protection alternative' criteria. A refugee claim should not be denied on internal protection grounds unless the putative asylum state is in fact able safely and practically to return the asylum-seeker to the site of internal protection.

10. Legally relevant internal protection should ordinarily be provided by the national government of the state of origin, whether directly or by lawful delegation to a regional or local government. In keeping with the basic commitment of the Refugee Convention to respond to the fundamental breakdown of state protection by establishing surrogate state protection through an interstate treaty, return on internal protection grounds to a region controlled by a non-state entity should be contemplated only where there is compelling evidence of that entity's ability to deliver durable protection, as described below at paras. 15-22.

11. The evaluation of internal protection is inherent in the Convention's requirement that a refugee not only have a well-founded fear of being persecuted, but also be "unable or, owing to such fear, [be] unwilling to avail himself of the protection of [her or

his] country."

12. The first question to be considered is therefore whether the asylum-seeker faces a well-founded fear of persecution for a Convention reason in at least some part of his or her country of origin. This primary inquiry should be completed before consideration is given to the availability of an 'internal protection alternative'. The reality of internal protection can only be adequately measured on the basis of an understanding of the precise risk faced by an asylum-seeker.

13. Assessed against the backdrop of an ascertained risk of persecution for a Convention reason in at least one part of the country, the second question is whether the asylum-seeker has access to meaningful internal protection against the risk of persecution. This inquiry may, in turn, be broken down into three parts:

(a) Does the proposed site of internal protection afford the asylum-seeker a meaningful 'antidote' to the identified risk of persecution?

(b) Is the proposed site of internal protection free from other risks which either amount to, or are tantamount to, a risk of persecution?

(c) Do local conditions in the proposed site of internal protection at least meet the Refugee Convention's minimalist conceptualization of 'protection'?

14. Because this inquiry into the existence of an 'internal protection alternative' is predicated on the existence of a well-founded fear of persecution for a Convention reason in at least one region of the asylum-seeker's state of origin, and hence on a presumptive entitlement to Convention refugee status, the burden of proof to establish the existence of countervailing internal protection as described in para. 13 should in all cases be on the government of the putative asylum state.

The First Requirement: An 'Antidote' to the Primary Risk of Persecution

15. First, the 'internal protection alternative' must be a place in which the asylum-seeker no longer faces the well-founded fear of persecution for a Convention reason which gave rise to her or his presumptive need for protection against the risk in one region of the country of origin. It is not enough simply to find that the original agent or author of persecution has not yet established a presence in

the proposed site of internal protection. There must be reason to believe that the reach of the agent or author of persecution is likely to remain localized outside the designated place of internal protection.

16. There should therefore be a strong presumption against finding an 'internal protection alternative' where the agent or author of the original risk of persecution is, or is sponsored by, the national government.

The Second Requirement: No Additional Risk of, or Equivalent to, Persecution

17. A meaningful understanding of internal protection from the risk of persecution requires consideration of more than just the existence of an 'antidote' to the risk identified in one part of the country of origin. If a distinct risk of even generalized serious harm exists in the proposed site of internal protection, the request for recognition of refugee status may not be denied on internal protection grounds. This requirement may be justified in either of two ways.

18. First, the asylum-seeker may have an independent refugee claim in relation to the proposed site of internal protection. If the harm feared is of sufficient gravity to fall within the ambit of persecution, the requirement to show a nexus to a Convention reason is arguably satisfied as well. This is so since but for the fear of persecution in one part of the country of origin for a Convention reason, the asylum-seeker would not now be exposed to the risk in the proposed site of internal protection.

19. Second, the legal duty to avoid exposing the asylum-seeker to serious risk in the place of internal protection may be derived by reference to the Refugee Convention's Art. 33(1), which requires state parties to avoid the return of a refugee '... in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened...' for a Convention reason. Where the intensity of the harms specific to the proposed site of internal protection (such as, for example, famine or sustained conflict) rises to a particularly high level, even if not amounting to a risk of persecution, an asylum-seeker may in practice feel compelled to abandon the proposed site of protection, even if the only alternative is return to a known risk of persecution for a Convention reason elsewhere in the country or origin.

The Third Requirement: Existence of a Minimalist Commitment to Affirmative Protection

20. The denial of refugee status is predicated not simply on the absence of a risk of persecution in some part of the state of origin,

but on a finding that the asylum-seeker can access internal protection there. This understanding follows from the prima facie need for international refugee protection of all asylum-seekers whose cases are subjected to internal protection analysis. If recognition of refugee status is to be denied to such persons on the grounds that the protection to which they are presumptively entitled can in fact be accessed within their own state, then the sufficiency of that internal protection is logically measured by reference to the scope of the protection which refugee law guarantees.

21. Good reasons may be advanced to refer to a range of widely recognized international human rights in defining the irreducible core content of affirmative protection in the proposed site of internal protection. In particular, one might rely on the reference in the Refugee Convention's Preamble to the importance of '... the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'. Yet the Refugee Convention itself does not establish a duty on state parties to guarantee all such rights and freedoms to refugees. Instead, Arts. 2-33 establish an endogenous definition of the rights and freedoms viewed as requisite to '... revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments ... (emphasis added)'. These rights are for the most part framed in relative terms, effectively mandating a general duty of non-discrimination as between refugees and others.

22. At a minimum, therefore, conditions in the proposed site of internal protection ought to satisfy the affirmative, yet relative, standards set by this textually explicit definition of the content of protection. The relevant measure is the treatment of other persons in the proposed site of internal protection, not in the putative asylum country. Thus, internal protection requires not only protection against the risk of persecution, but also the assimilation of the asylum-seeker with others in the site of internal protection for purposes of access to, for example, employment, public welfare, and education.

'Reasonableness'

23. Most states that presently rely on either 'internal flight' or 'internal relocation' analysis also require decision-makers to consider whether, generally or in light of a particular asylum-seeker's circumstances, it would be 'reasonable' to require return to the proposed site of internal protection. If the careful approach to identification and assessment of an 'internal protection alternative' proposed here is followed, there is no additional duty under international refugee law to assess the 'reasonableness' of return to the region identified as able to protect the asylum-seeker.

> **24.** Assessment of the 'reasonableness' of return may nonetheless be viewed as consistent with the spirit of Recommendation E of the Conference of Plenipotentiaries, that the Refugee Convention "... have value as an example exceeding its contractual scope and that all nations ... be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides".
>
> **Procedural Safeguards**
>
> **25.** Because the viability of an 'internal protection alternative' can only be assessed with full knowledge of the risks in other regions of the state of origin (see paras. 15-16), internal protection analysis should never be included as a criterion for denial of refugee status under an accelerated or manifestly unfounded claims procedure.
>
> **26.** To ensure that assessment of the viability of an 'internal protection alternative' meets the standards set by international refugee law, it is important that the putative asylum state clearly discloses to the asylum-seeker that internal protection is under consideration, as well as the information upon which it relies to advance this contention. The decision-maker must in all cases act fairly, and in particular ensure that no information regarding the availability of an 'internal protection alternative' is considered unless the asylum-seeker has an opportunity to respond to that information, and to present other relevant information to the decision-maker."

[66] While it is probably unnecessary to say so, the *Michigan Guidelines* must be read subject to the specific statutory provisions governing the determination of refugee status in New Zealand now found in Part VIA of the Immigration Act 1987. In particular, given that ss 129G(5) and 129P(1) cast on the refugee claimant the responsibility of establishing the claim, the recommendation as to the burden of proof made by para 14 of the *Michigan Guidelines* has no application in the New Zealand context. That having been said, however, we have recognized in the past, and do so again now that:

(a) A high degree of caution must be exercised when determining whether an individual can genuinely access meaningful domestic protection, especially when the agent of persecution is the state; and

(b) If there is doubt, the claimant must receive the benefit of the doubt.

The Term "Internal Protection Alternative" Preferred

[67] In the light of the emphasis on the protection principle in *Butler* and in view of the logic exposed in the *Michigan Guidelines*, we are of the view that the term "internal protection" is to be preferred to the earlier term favoured by the Authority, namely "relocation". Internal protection emphasizes that the central core of the inquiry is protection from persecution. The Internal Protection Alternative label itself helps to reinforce the point made by the Court of Appeal, namely that the issue is not one of flight or relocation, but of protection. For these reasons we propose abandoning the relocation label in favour of "internal protection alternative".

Whether Reasonableness a Part of the Internal Protection Inquiry

[68] If as held in *Butler* there is no free-standing assessment of reasonableness, and if the issue of reasonableness must be tied back to the refugee definition and to the issue of protection, the question which must be asked is whether reasonableness has any part to play in the proposed internal protection analysis. Our view is that as the inquiry mandated by the Convention is whether the refugee claimant can genuinely access domestic protection which is meaningful, there is no conceptual basis for the retention of a reasonableness element. The more so given the rigorous nature of the inquiry into the protection issue which we and the *Michigan Guidelines* now propose. The conclusion we have come to is that if the putative refugee can genuinely access domestic protection which is meaningful in the sense we have earlier explained, there is no place for a super-added assessment of reasonableness. See further the *Michigan Guidelines*, para 23. The reasonableness assessment is therefore to be abandoned by the Authority.

[69] The only remaining issue is whether the reasonableness element should be retained as an element which exceeds New Zealand's obligations under the Refugee Convention. See the *Michigan Guidelines*, para 24. As that paragraph

notes, Recommendation E of the Conference of Plenipotentiaries states:

> "**THE CONFERENCE,**
>
> *Expresses* the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

[70] We do not know whether this Recommendation was brought to the attention of the Court of Appeal in *Butler*. However, in the face of the clear statement by that Court that there is no free-standing test of reasonableness, this Authority is precluded from once more travelling outside the terms of the Convention, even if praying in aid Recommendation E.

[71] This conclusion means that the *Butler* decision requires us to reassess our earlier jurisprudence concerning victims of torture. That jurisprudence is explained in *Refugee Appeal No. 135/92 Re RS* (18 June 1993). The conclusion we have reached is that it is no longer possible for torture victims to be given refugee status in New Zealand simply because of the severity of their past persecution and the "unreasonableness" of the requirement that they return to their country of origin. In future, such cases will fall to be assessed according to the internal protection principles earlier identified.

[72] In view of our conclusions as to the nature and intensity of the protection inquiry, and our further conclusion that reasonableness is no longer an element of the internal protection inquiry, the template of issues to be addressed by the decision-maker must be reformulated.

The Internal Protection Alternative - Formulation of the Inquiry

[73] We see no reason to amend the first two initial issues to be addressed in the

determination of refugee status and they will accordingly continue to be:

1. Objectively, on the facts as found, is there a real chance of the refugee claimant being persecuted if returned to the country of nationality?

2. If the answer is Yes, is there a Convention for that persecution?

However, where the issue of an internal protection alternative arises, the third and final issue is to be addressed is:

3. Can the refugee claimant genuinely access domestic protection which is meaningful?

   In particular:

   (a) In the proposed site of internal protection, is the real chance of persecution for a Convention reason eliminated?

   (b) Is the proposed site of internal protection one in which there is no real chance of persecution, or of other particularly serious harms of the kind that might give rise to the risk of return to the place of origin?

   (c) Do local conditions in the proposed site of internal protection meet the standard of protection prescribed by the Refugee Convention?

   As each of these three requirements is cumulative, an internal protection alternative will only exist if the answer to each question is Yes.

[74] Having disposed of the legal issues, it is now possible to return to the facts of the appellant's case.

WHETHER THE APPELLANT CAN GENUINELY ACCESS MEANINGFUL DOMESTIC PROTECTION

In the Proposed Site of Internal Protection, Is the Real Chance of Persecution Eliminated?

[75] For the reasons we have given at paras 21 and 24, police interest in the appellant is entirely localized, that is, it is confined to his own village. While the degree of that interest fluctuates, it has not reached in the past and will not reach in the future a level sufficient to cause Punjab-wide or nation-wide inquiries to be made for the appellant should he move away from his village. The potential for future persecution is confined to his village locality. It does not exist elsewhere in the Punjab, nor in any other state in India. It follows that an affirmative answer must be given to the first limb of the internal protection alternative test.

Is the Proposed Site of Internal Protection Free of Other Particularly Serious Harms?

[76] It is stated in the paper by the Research Directorate, Documentation, Information and Research Branch, Immigration and Refugee Board, Ottawa, Canada, *India: Sikhs Outside the Punjab* (December 1992) that according to the most commonly cited estimates, about four million Sikhs live in India outside Punjab. Punjab itself is home to a concentration of nine million Sikhs. Sikh communities of various sizes are found in most Indian cities and in virtually all states. Today, Sikhs outside Punjab are predominantly urban and generally prosperous. They tend to concentrate in certain occupations: business, the transportation industry (taxi and bus driving, auto-parts trade), professions (law, medicine) and the military. They control important trades and occupy a predominant position within the central and regional administration.

[77] While Sikhs outside Punjab were viewed with suspicion across India during the insurgency from 1984 to 1997, that is no longer the case. See the Canadian

IRB Response to Information Request, "India: Information From Dr Jasdev Singh Rai on Human Rights and the General Situation in Punjab and on Sikhs Outside Punjab" (IND28217.EX; 10 November 1997):

> "Rai believes there is no problem for the general Sikh population in India now. The situation is similar to what it was before 1984. According to Rai, Sikhs are typically an economically thriving group and tend to be regarded with envy, and associated stereotypes and prejudices remain. But on the whole, there were only a couple of years, starting in 1984, when Sikhs were viewed with suspicion across India. According to Rai that is not the case now, especially if Sikh individuals are not challenging the state's policies."

To similar effect see the Response to Information Request, "India: Current Situation of Sikhs in Calcutta, Including their Number, any Difficulties Experienced at the Hands of the Local Authorities and any Violent Incidents Attributed to Sikhs (IMD30119.E; 2 October 1998).

[78] In the light of this evidence we are satisfied that should the appellant live elsewhere in the Punjab or settle in another part of India where there is a Sikh community (and a large number of such communities are mentioned in *India: Sikhs Outside Punjab* (December 1992)) he will not be exposed to a risk of other forms of serious harm. Specifically, he will not encounter factors which have the potential of forcing him back to the original area of persecution. It follows that an affirmative answer must be given to the second limb of the internal protection alternative test.

Do Conditions in the Proposed Site of Internal Protection Meet the Standard of Protection Prescribed by the Refugee Convention?

[79] In the light of the evidence discussed under the previous sub-heading, it is plain that as an Indian national, the appellant will have the benefit of access to the same basic norms of civil, political and socio-economic rights which have allowed the numerous Sikh communities outside Punjab to generally prosper. At the very least he will be accorded the minimal standard of effective protection set by the

Refugee Convention itself. Again, it follows that an affirmative answer must be given to the third and final limb of the internal protection alternative test.

[80] It is accordingly our conclusion that because the appellant can genuinely access domestic protection which is meaningful, there is an internal protection alternative available to him within the Republic of India. It follows that he is unable to satisfy the Convention's requirement that he not only have a well–founded fear of persecution for a Convention reason, but also that he be unable or, owing to such fear, be unwilling to avail himself of the protection of his country.

CONCLUSION

[81] We find that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

.....
[Rodger Haines QC]
Chairperson