REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

	REFUGEE APPEAL NO. 72558/01
	REFUGEE APPEAL NO. 72559/01
AT AUCKLAND	
Before:	RPG Haines QC (Chairperson)
	AB Lawson (Member)
	MA Roche (Member)
Representing the Appellant:	Jeanne Donald
Date of Hearing:	24 & 25 July 2001
Date of Decision:	19 November 2002

DECISION

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CONCLUSION **[148]**

INTRODUCTION

[1] The appellants are husband and wife respectively. The husband (Appeal No. 72558/01) will be referred as "the male appellant" or "the husband". The wife (Appeal No. 72559/01) will be referred as "the female appellant" or"the wife".

[2] The male appellant is 42 years of age, a citizen of Malaysia and a Hindu by religion. The female appellant is 23 years of age and a citizen of Indonesia. Her faith is Islam. The couple arrived in New Zealand at Auckland on 4 September 1998. On 2 November 1998 a refugee application was lodged on their behalf by their then lawyer and they were interviewed separately by a refugee status officer on 10 April 2000. On 24 May 2000 the couple were married at the Registry Office, 450 Queen Street, Auckland. The female appellant was further interviewed by the refugee status officer on 13 July 2000. In a decision delivered on 16 February 2001 both refugee applications were declined. Both appellants appealed.

[3] The appeals were heard jointly on 24 and 25 July 2001. At the request of the appellants the evidence of one was treated as evidence in support of the other. No interpreter was required as both appellants are fluent in English.

[4] At the conclusion of the hearing on 25 July 2001 counsel sought and was granted leave to obtain further evidence. The circumstances are more fully set out in *Minute No. 1* (10 August 2001). The Authority ruled that on or before 28 September 2001, the appellants were to file a Memorandum detailing the steps taken to comply with the directions given by the Authority in the *Minute* and specifying when the appellants would file any and all further evidence and submissions. Subsequently, in response to a memorandum filed by counsel, the Authority directed in *Minute No. 2* (2 October 2001) that all further evidence and submissions be filed on or before 23 November

2001. Subsequently on 26 November 2001 the Authority received a substantial volume of supplementary information and evidence together with further submissions on behalf of the appellants. The Authority is grateful for the assistance it has received from counsel.

[5] In the course of preparing this decision the Authority's own research unearthed further legal material of relevance. That material was disclosed to the appellants in *Minute No. 3* (25 September 2002). The appellants were afforded an opportunity to make submissions by 15 October 2002, a date extended at their request to 22 October 2002. The submissions of counsel dated 22 October 2002 have been taken into account in the preparation of this decision.

[6] A brief outline of the case presented by the appellants follows together with our assessment of their respective refugee claims.

THE APPELLANTS' CASE

The male appellant's background

[7] The male appellant was born in Johor, West Malaysia and is Indian by race and Hindu by religion. He comes from a large family in which there are twelve siblings. He is the eighth child. Each of his siblings has married a Hindu partner except for a brother who married a Malay Muslim woman. There was strong family disapproval. A maternal cousin also married a Malay Muslim woman and this too led to disapproval and friction within the family. However, over time it would appear that wounds healed and a reconciliation of sorts achieved.

[8] After completing school the appellant initially worked in the family spice business but later ran a provision shop for his uncle before accepting in March 1997 an

invitation from a friend to work for a wholesaling company trading in spices, curry powder and related items. The appellant was involved in marketing and administration. The job involved him travelling domestically four to five times a week and internationally (mainly to Indonesia) once a month or every two to three months. The appellant is a fluent speaker of Indonesian.

The female appellant's background

[9] The female appellant is Indonesian by race and a Muslim by religion. She comes from a family in which there are four siblings. She is the eldest child. After completing high school she commenced in 1997 a two year college course in travel and tourism. Her father died in the same year.

The meeting

[10] In August 1997 the male appellant was on holiday in Indonesia when he met the female appellant in a shopping mall in Jakarta. From the time of their second meeting they were aware of their different faiths, race and nationality. Over the next year the male appellant visited Indonesia and the female appellant often. He was never introduced to the female appellant's family but was introduced to her mother over the telephone. The male appellant kept his distance as he was concerned that the fact that he was not a Muslim could lead to trouble with the female appellant's family.

[11] Although some of the male appellant's trips to Indonesia were employment related, many were not. In addition, unlike his business trips which lasted only two days, he would stay in Indonesia at least a week if he visited the female appellant. In May 1998 the male appellant was dismissed from his employment because he was making too many trips to Indonesia and his employer had noticed that the telephone bills to Indonesia were too high. The employer was unaware of the male appellant's

relationship with the female appellant though the male appellant suspects that his employer knew that he (the male appellant) had a girlfriend in Indonesia.

The decision to marry

[12] In mid December 1997 the couple decided to marry. When the female appellant asked for her mother's permission, the mother replied that she would only accept the male appellant if he converted to Islam. This the male appellant did not wish to do and he was also conscious that his family would not agree to his taking this step in any event.

Attempts to resolve the difficulties

[13] In August 1998 the couple travelled to Singapore in the hope that they could get married there. The female appellant was at the time on holiday from college and had not informed the college that she was not going to return for her second year of training even though her mother had already paid the tuition fees for that second year.

[14] In Singapore the couple made verbal inquiry with the Registrar of Marriages as to whether they could marry. The answer they received was that while the Singaporean authorities were not concerned about an inter-faith marriage, the position was that the couple had to be Singaporeans and as a result they could not marry in Singapore.

[15] The male appellant departed from Singapore and travelled to Indonesia and there asked friends what he should do if he wanted to marry an Indonesian Muslim woman. They advised him that he would have to convert to Islam. The male appellant did not approach the Indonesian authorities for information or advice on the question as he was afraid that the inquiry would cause problems. He believed that officials would either try to later bribe him or he would be taken to the Sharia court.

[16] The couple discussed the difficulty they faced. In the male appellant's written statement he says that his intended wife stated that she would marry him "regardless what happens". She was willing to stand with him "all the way out to get married and have a happy life. She told me I can be as what I am, and she will be as what she is, or even we can be a free thinker if we were forced to do so".

[17] The male appellant returned to Malaysia and approached the Registrar of Marriages in Johor Bahru to ascertain whether he, a Hindu Malaysian, could marry a Muslim Indonesian woman. He was informed that he could not but his question had to be put in writing and a reply would be given in writing. By letter dated 19 August 1998 the male appellant wrote to the Registrar of Marriages in Johor Bahru identifying himself by name and identity number and his intended wife by name and Indonesian passport number. The Registrar was asked to advise whether their marriage could be registered given the fact that the intended wife was a Muslim. In a reply dated 21 August 1998 the Registrar replied in the following terms:

> With regards to your letter dated 19th Ogos 1998 the Law Reform (Marriage and Divorce) Act 1976 is only applicable to Non-Muslims. As such you can not register any marriage with a Mulsim (sic) under this Act.
>
> 2. As regards for marriage to a Muslim, you are advised to consult the Jabatan Agama Islam, Jahore.

[18] As recommended, the male appellant by letter dated 21 August 1998 wrote to the Director of the Johor Islamic Department asking for advice whether or not a marriage between him and the female appellant could be carried out without his embracing Islam. The reply is dated 21 August 1998 and is relevantly in the following terms (in the English translation):

> According to Sharia law (Islamic law) a non-Muslim is categorically forbidden to marry a Muslim woman.

[19] Considering his options the male appellant bore in mind the example of two acquaintances who had married Indonesian Muslim women. The first was an Indian Hindu from Malaysia who had been "forced" to be a Muslim. He had for the past six years secured a work permit enabling him to live in Indonesia, but had not received a residence permit. The second acquaintance was a Malaysian Chinese Buddhist who worked for an Indonesian company. Although the children of the marriage had grown up, this friend had for eighteen years held only a work permit in Indonesia. He had been allowed to stay in Indonesia not because of his marriage, but because he had employment, or at least so the male appellant believes. This friend too, had been "forced" to convert to Islam. The male appellant also took into account his understanding that his intended wife's family were strongly of the view that he should convert to Islam. He feared that her family would either injure or even kill him if he did not as they would regard his marriage to the female appellant an embarrassment and insult. As to the possibility of the couple living in Malaysia he recalled the example of his own brother who had converted to Islam, but in name only. He did not pray five times a day, did not fast during Ramadan and continued to eat meat which was not halal. He was not given "Bumiputra" status, nor were his children. He also recalled that on the death of the cousin who had converted to Islam in order to marry a Malay Muslim girl, the body had been dealt with according to Islamic rites, not Hindu. The male appellant was also at this time coming under pressure from his family to enter into an arranged marriage. His family were not aware of his relationship with the female appellant and are apparently still not aware.

[20] As to the female appellant, she was at this stage underage and required the consent of her mother before she could marry. As earlier mentioned, that consent was withheld because the male appellant refused to convert to Islam.

Marriage in New Zealand

[21] In late August the couple decided to come to New Zealand and arrived at Auckland by air on 4 September 1998. In November 1998 they made inquiries with the Registrar of Births, Deaths and Marriages at Auckland but were told that as the female appellant was only nineteen years of age the couple could not marry. There could be no marriage unless she obtained written parental consent. As it was clear that such consent would not be forthcoming, it was not sought.

[22] In the same month the refugee application was filed. The couple eventually married on 24 May 2000, one month after their interview by the refugee status officer.

Summary of appellants' case

[23] The essence of the appellants' case is that both Indonesia and Malaysia are Islamic states in the sense that a large percentage of the population are Muslim and in both countries the Sharia law governs who Muslims may marry and further governs the question whether Muslims are able to change their religion. A Muslim male may marry only a Muslim female or a follower of a revealed religion, eg a Christian or a Jew. A Muslim woman, on the other hand, may only contract a valid marriage with a Muslim male. Sharia law also prohibits a Muslim from leaving the faith. It is therefore not possible for a Muslim woman to marry a Hindu man unless the man converts to Islam. The submission made is that the couple love each other, wish to share a married life together but are each committed to their respective religions. As a consequence the male appellant fears that if he is returned to Malaysia:

(a) Unless he converts to Islam, his marriage to the female appellant will not be recognised;

(b) He will be forced to convert to Islam;

(c) If not he will be prosecuted and punished under Sharia law;

(d) Without his conversion, his wife will not be allowed to remain in Malaysia with him;

(e) Any children they may have will be treated as illegitimate;

(f) He will face extra-judicial punishment and harassment because of their inter-faith marriage.

[24] The female appellant fears that if she is returned to Indonesia:

(a) Her marriage to the male appellant will not be recognised in law as he is a Hindu;

(b) Her husband will not be allowed to live in Indonesia with her;

(c) Any children they may have will be regarded as illegitimate;

(d) Any children they may have will not be Indonesian nationals;

(e) She may face extra-judicial harassment and punishment because of her marriage to a non-Muslim. Her marriage to a non-Muslim is an act of apostasy.

Credibility assessment

[25] The narrative of facts and events as given by each of the appellants is accepted.

[26] However, we find that they have exaggerated the significance of religion in their personal lives and in the decisions they have made to date and will make in the future.

[27] The female appellant in particular has claimed that on the death of her father she assumed the role of leading her family in the five daily prayer rituals. Yet without her mother's permission she eloped with a man some twenty-two years older than her, of a different race, of a different religion, and of a different nationality. They have lived together without marrying. She told the Authority that she expected problems but did not care and did not think about it. At another point in her evidence she said that she had not anticipated problems marrying a Hindu and did not know why they did not marry in Indonesia. She had a rough idea that members of the two religions could not marry in Indonesia. Our assessment of her is that she is a naive individual and that:

(a) Religion is not a strong factor in her life, her protestations notwithstanding; and

(b) She is not sincere in saying that religion is a big factor in her life.

[28] As the respective claims to refugee status largely depend on the domestic law of both Indonesia and Malaysia relating to marriage, it is necessary for the evidence to be examined.

INTER-FAITH MARRIAGE IN INDONESIA

[29] The United States Department of State *Annual Report on International Religious Freedom for 1999: Indonesia* records that:

Independent observers note that interfaith marriages between Muslims and non-Muslims have become increasingly difficult.

The Butt opinion

[30] Why this should be so is explored by Simon Butt in "Polygamy and Mixed Marriage in Indonesia: The Application of the Marriage Law in the Courts" in Timothy Lindsey (ed), *Indonesia: Law and Society* (Federation Press 1999) 122. Mr Butt points out at *op cit* 122-123 that the draft Marriage Law permitted interreligious mixed marriages. In the face of intense Muslim opposition, the government enacted an amended statute, Law No. 1 of 1974 on Marriage (the Marriage Law), which largely accommodated Muslim interests. The provision in the draft allowing interreligious mixed marriages was removed. Nonetheless, as the author traces at 123-126, the Marriage Law established the state as the ultimate authority in the administration of marriage law and as the arbiter of its legitimacy.

[31] In his chapter, Mr Butt addresses only inter-faith marriages between Indonesian nationals. Nevertheless his analysis is directly relevant to an inter-faith marriage between an Indonesian national and a Malaysian national.

[32] Mr Butt at *op cit* 133-134 points out that the Marriage Law and its implementing regulation do not explicitly provide either for or against marriages between Indonesian nationals adhering to different religions. This has generated a great deal of debate over whether partners of different religions can actually marry under Indonesian law. Some scholars argue that the Marriage Law implicitly regulates mixed marriages via Article 2(1) which provides that the religious prescripts of the parties are to be used to conduct marriages. This is seen to extend to interreligious marriages with the result that such marriages would be permitted only as far as the relevant religious prescripts allowed. Authors who advocate this approach generally conclude that most

Indonesians could not lawfully marry interreligiously unless one of them converted to the other's religion. In this regard Islamic law only permits marriage between a Muslim ***male*** with a non-Muslim female of a religion which adheres to the *khitab*, or sacred text - here, the Old Testament. This definition embraces Christianity or Judaism. In addition, under Islamic law, Muslim ***females*** are not allowed to marry non-Muslim males. Hindus or Buddhists may not marry someone of another religion so non-adherents must convert before marriage (*op cit* 134-135). The Indonesian courts, however, did not accept that Art 2(1) extended to encompass interreligious marriages. The established view was that the Marriage Law did not explicitly provide for mixed marriages, and thus it had no effect on the existing colonial regulations which permitted interreligious mixed marriages (*op cit* 135).

[33] However in 1984 the Ministry of Religion issued a guide to marriage registry officials (who conclude Muslim marriages) stating they could only register marriages between Muslims. By 1987 there were reports that it had become impossible to formalise interreligious mixed marriages at the Civil Registry Office (*op cit* 135).

[34] It is in this context that Mr Butt examines the significance of the Mahkamah Agung *Decision No. 1400K/Pdt/1986*. The Mahkamah Agung is the highest court in Indonesia. The case involved a marriage between a Muslim woman and a Protestant man which officials at the Board of Religious Affairs had refused to formalise because the husband was Protestant and the marriage was thus in discord with Islam. The marriage could not be registered at the Civil Registry Office because the woman was Muslim (*op cit* 136). The couple sued both institutions, arguing that they (the institutions) had acted illegally. After failing before the Central Jakarta District Court, the parties appealed to the Mahkamah Agung.

[35] The panel comprising the Mahkamah Agung included both the President and the Vice-President of the Court, from which it may be inferred that the case was taken

extremely seriously and the decision must be weighed with particular care (*op cit* 136). The court decided that the Marriage Law did not provide for marriages between partners of different religions. Marriage was now a religious affair, not merely a civil relationship. Consequently there was a legal vacuum in the area of mixed marriage. Determined to prevent Registry Officials from obstructing mixed marriages, the court found a legal basis to allow them (*op cit* 136). The Court argued that because the couple had applied to the Civil Registry Office after being refused by the Board of Religious Affairs, the woman must not have wished to marry in accordance with Islam, and had in fact abandoned it. In short, she had apostatised. The mahkamah Agung held that the couple could therefore conclude their marriage at the Civil Registry Office and ordered the institution to formalise the marriage (*op cit* 136).

[36] In his critique of the decision, Mr Butt at *op cit* 137 states that although the Mahkamah Agung legalised interreligious mixed marriages, its decision is relatively vague and has injected a substantial degree of uncertainty - even inconsistency - into Indonesian law. In particular, the court did not state whether by "abandoning her religion" the woman was left with no religion, or became an adherent to her husband's Protestant faith. He concludes at *op cit* 139 that it is hard to determine the practical effect of the decision:

> The judgment seems to have had little impact on the practices of parties who wish to marry interreligiously when many state institutions were refusing to conclude their marriages. Many Indonesians, not wishing to lose their religious status, have misrepresented their religions to marriage officials (Soewondo, 1991 - 1992: 35). Others have converted to their partner's religion for the purpose of their marriage and then reverted to their original religion a short time later (Asmin, 1986: 81). Indeed, the negative social and religious implications of the decision may be pushing people into the informal and illegal sphere of *kumpul kebo* (cohabitation) (Pompe, 1988: 260). Cohabitation is on the rise in Indonesia, in particular among couples of mixed religious backgrounds (Pompe, 1988: 260; Tempo, 1984).

[37] The author at *op cit* 140 then points out that in the particular societal context, the refusal to register an interreligious marriage is not an obstacle of great moment:

> Furthermore, despite the *Mahkamah Agung*, there have been reports that some state registration officers are still refusing interreligious marriages on an ad hoc basis (Law & Society Review, 1994: 485). In this sense, the *Mahkamah Agung* has had less of an impact in "facilitating" mixed marriages, than feeding bureaucratic corruption. Cammack et al (1996: 65) have explained that the state does not pay Marriage Registrars for their work. They rely on a negotiated "honorarium", paid by the couple in return for a marriage certificate. The difference between this payment and an illegal bribe is blurred, and "social norms against bribery are comparatively weak in Indonesia".

[38] The reference to "Cammack et al" is a reference to an article by Mark Cammack, Lawrence A Young & Tim Heaton, "Legislating Social Change in an Islamic Society - Indonesia's Marriage Law" (1996) 44 American Journal of Comparative Law 45 where at 65 the authors state:

> For those determined to marry without complying with statutory requirements who also want to have a marriage certificate there are ways to evade the regulations. The exchange of benefits for government favors is deeply ingrained in Indonesian cultures. Indeed, the marriage registrars are not salaried, but are compensated only through a negotiable "honorarium" paid by the couple for attending the marriage. The line between a legal honorarium and an illegal bribe is not altogether distinct, and social norms against bribery are comparatively weak.

[39] Mr Butt concludes his chapter "Polygamy and Mixed Marriage in Indonesia: The Application of the Marriage Law in the Courts" in Timothy Lindsey (ed), *Indonesia: Law and Society* (Federation Press 1999) at 141 by offering the opinion that the decision of the Mahkamah Agung facilitating interreligious marriages has come at a price. The decision leaves the law of mixed marriages in Indonesia uncertain, and also tends towards contradicting one of the Marriage Law's main goals: to establish the formal legal equality of Indonesian women.

[40] Our view is that the Mahkamah Agung decision is strong evidence that the Indonesian legal system does provide an effective avenue of redress in matters relating to interreligious mixed marriages and it is clear that the highest court of Indonesia takes the issue seriously. Indeed, it has legalised interreligious mixed marriages. While the holding is that application to the Civil Registry Office is to be interpreted as abandonment of Islam by the woman (making marriage at the Civil Registry Office

possible) it is specifically noted by commentators (Butt *op cit* 139 cited at para [37] above) that it is entirely possible for the individual to revert to his or her original religion a short time later. An even more simple expedient is to misrepresent the religions to the marriage officials or to simply pay a "honorarium" in return for a marriage certificate. The uncertainty of the law noted by Mr Butt is not seen by us as a negative. Few, if any legal systems are not attended by uncertainty.

[41] That the Marriage Law is not written in black and white terms is also commented upon by Mark Cammack, Lawrence A Young & Tim Heaton in "Legislating Social Change in an Islamic Society - Indonesia's Marriage Law" (1996) 44 American Journal of Comparative Law 45 in the passage quoted several paragraphs earlier. The authors, while addressing at 46 the specific issue whether the Marriage Law has eliminated or reduced child marriage, make some general observations which help explain to a common lawyer why other systems of law, particularly those which have to accommodate Islam, are not framed in absolutes:

> The marriage age data also offers insights into more general questions concerning the processes of legal and religious change. The case of the Indonesian government's efforts to regulate Islamic marriage practices illuminates the dynamic interaction between state sponsored legal rules and a local belief and practice grounded in a religious world view. The Indonesian Marriage Act poses the contest between state power and religious authority in stark terms. But instead of producing clear winners and losers, this conflict of interests and ideologies has spawned a long process of negotiation, in which both sides have been forced to adopt strategies of accommodation. For its part the government has not abandoned its aim of expropriating family law rules, but has found it expedient to articulate its regulatory efforts in a more Islamic idiom. In its efforts to preserve the religious grounding of Indonesian marriage rules for the Muslim majority, Islamic interests are being pressed to accept novel interpretations of Islamic law and to recognise a larger role for the Indonesian government in interpreting the Islamic tradition.

University of Indonesia panel

[42] It is against this background that we turn to the information compiled by a team of lawyers headed by Professor Hanifa Wiknjosastro from the University of Indonesia law faculty which specifically addresses the issue of mixed marriages, both in the

sense of inter-faith unions and in the sense of marriages between Indonesians and expatriates. On the specific topic of inter-faith marriages they make four points:

(a) Indonesian government regulations do make it difficult for people of different faiths to marry. But while the official government line is that either the bride or groom must convert, this can be either a true conversion or simply a paperwork formality to enable the couple to marry and to ease documentation procedures.

(b) Some inter-faith Indonesian couples purposefully get married while they are overseas and return with the marriage a *fait accompli* and this is one way out of the requirement that the Indonesian partner must convert in order to marry.

(c) However, there may be family or societal pressure for the foreign spouse to convert.

(d) There is "great" leeway in the marriage regulations and that "some people find that they can wind their ways through their document needs in Indonesian officialdom with paying few bribes ... but most will utilise the Indonesian spouse's family connections, and/or facilitating payments, to lessen the trials".

[43] The panel of lawyers notes that where a marriage has been celebrated abroad the couple will need to obtain a translation of their marriage certificate consularized by the Indonesian Consulate or Embassy abroad to register the marriage in Indonesia. In a few cases (usually due to differing religions) the foreign spouse may be asked to convert or the couple must remarry, but in most cases a consularized translation of the marriage certificate is adequate. The regulations also stipulate that the couple must return to Indonesia within a year of the marriage and register the marriage with the Civil Registry Office. The time period for registration would appear to be set in order to avoid payment of a small financial penalty for registration outside the one year period.

[44] The general tenor of the advice given by the panel is that "paper conversions" are well known and that marriage overseas is a recognised method of avoiding the conversion question completely. The law can be interpreted flexibly, particularly where the relevant official is offered money. This is very much in accord with the tenor of the Butt analysis.

[45] The team of lawyers do point out that Indonesian men who marry a foreign spouse are treated more favourably than Indonesian women who marry a foreign spouse. Foreign wives of Indonesian husbands are assumed by the Indonesian government to be housewives and mothers. Foreign husbands of Indonesian women, however, are assumed to be looking for a job. Therefore foreign wives can easily enter Indonesia, the vital document being the marriage certificate. Foreign husbands, on the other hand, must obtain a sponsor and a work permit before they are issued a visa to reside in Indonesia. They are treated in the same manner as any other foreigner who wishes to work in Indonesia. The spouse must find a sponsor and a work permit before a Kitas (limited stay permit) can be issued. There is no special dispensation for foreign men married to Indonesian women to automatically entitle them to limited stay status. The thinking appears to be based on an assumption that foreign men need a job to support their family in Indonesia. It is also noted that as Indonesian nationality law is based on the *jus sanguinis* principle, nationality is transmitted by descent through the husband. As a result, children born in Indonesia to a foreign male spouse do not become Indonesian citizens. They are treated as having the same nationality as the father.

[46] We will return to this point later. It will be seen that while we accept that Indonesian women who marry a foreign spouse are treated in a discriminatory way, this does not by any measure constitute persecution as that term is used in the Refugee Convention. The nationality of children falls into the same category. The operation of

the *jus sanguinis* principle does not *per se* amount to persecution: *Refugee Appeal No. 72635/01* (6 September 2002) at [70] - [75].

[47] The solicitors for the appellants did by letter dated 20 August 2001 write to the Indonesian Embassy in Wellington enquiring whether it would be possible to register with the Indonesian Embassy a marriage entered into by an Indonesian Muslim woman and a Malaysian Hindu man. Enquiry was also made as to whether it would be possible for the husband to secure a visa to live in Indonesia with his wife. No reply having been received, the solicitors wrote again on 25 September 2001. The only response to the inquiry was a telephone call on 8 October 2001 from an Embassy employee of unidentified status. The file note made by the solicitor for the appellants is in the following terms:

> [name deleted] from the Indonesian Embassy telephoned to respond to my written query. He advised that the Consul was away at present and that was why they were unable to respond in writing. He explained that anyone can apply for a work visa to live in Indonesia but they must have a sponsor. The sponsor is the employer, not the spouse. There is no special provision for spouses.
>
> He advised that the couple could seek to register their marriage with the Indonesian Embassy but in Indonesia the marriage can take place only if both are followers of the same religion, and if the couple were to live as a married couple in Indonesia one or the other must convert to the spouse's religion.
>
> I asked [name deleted] to put the Embassy's advice, particularly with regard to the religion in writing for me.

The request notwithstanding, the solicitors for the appellants have received nothing in writing from the Embassy.

[48] By the same token, the appellants have not forced the issue by making a formal request to the Embassy for their marriage certificate to be consularized by the Embassy in order to facilitate registration of the marriage in Indonesia. As will be seen, this omission is a significant one given the advice by the team of lawyers from the University of Indonesia law faculty that one way out of the conversion dilemma is

to marry overseas and then obtain a consularized translation to register the marriage in Indonesia.

The legal opinion relied on by the appellants

[49] The appellants have also submitted a three page letter dated 8 November 2001 from a firm of solicitors in Jakarta. The letter responds to an email inquiry from the appellants' New Zealand solicitors. The Authority has not been given a copy of that email inquiry. The Jakarta solicitors, after referring to Article 2 of the Marriage Law state:

> Therefore, Indonesian Law only recognises Marriage under the same religion and belief, which also be registered at the authorised Office. (sic)

[50] This opinion is essentially unexplained, as is the further statement it contains that where the couple's religions are not the same, the marriage is not recognised under Indonesian law by virtue of the fact that (with reference to the particular facts of the present case) the husband has not converted to Islam. The opinion does not discuss or even mention the Mahkamah Agung *Decision No. 1400K/Pdt/1986* or address the issues canvassed in the article by Simon Butt "Polygamy and Mixed Marriage in Indonesia: The Application of the Marriage Law in the Courts" in Timothy Lindsey (ed), *Indonesia: Law and Society* (Federation Press 1999) 122. Nor does it address the advice given by the panel of lawyers from the University of Indonesia. We have been further hampered in determining the weight to be given to the letter from the Jakarta solicitors by the fact that the author has not disclosed his or her expertise in the matter of Indonesian Marriage Law and in particular mixed marriage between a Muslim female and a Hindu male.

General conclusions

[51] In the circumstances we intend relying on the exposition of the Indonesian Marriage Law by Simon Butt, reinforced as it is by the information compiled by the

team of lawyers headed by Professor Wiknjosastro from the University of Indonesia law faculty. Our general conclusions are:

(a) The *Mahkamah Agung* has legalised interreligious mixed marriage in Indonesia between Muslim women and non-Muslim men.

(b) While the decision is premised on the assumption that the woman has abandoned Islam, the whole issue of "conversion in order to marry" can be avoided by the couple getting married overseas and returning to Indonesia with the marriage a *fait accompli*.

(c) An overseas marriage may be registered with the Civil Registry Office.

(d) A first step in the registration process is to obtain a translation of the marriage certificate consularized by an Indonesian Embassy and to then register that marriage with the Civil Registry Office.

(e) Any obstacles can be challenged in Court and a ruling obtained. In short it is possible for a Muslim Indonesian woman who has entered into an inter-faith marriage with a Malay national to obtain a ruling as to the validity of her overseas marriage. The litigation in *Decision No. 1400K/Pdt/1986* demonstrates that effective domestic remedies are available in Indonesia.

(f) Conversion in order to marry can also be avoided by misrepresenting the religion of the parties to marriage officials.

(g) If the Muslim woman does "convert" it is a "paperwork formality" she may revert to her religion a short time later.

(h) The payment of a “honorarium” or bribe is an even further (and accepted) method of overcoming difficulties in Indonesia.

INTER-FAITH MARRIAGE IN MALAYSIA

[52] The essence of the case for the appellants is that their New Zealand marriage will not be recognised in Malaysia with the consequence that they may face prosecution in that country for the Sharia offences of *khalwat* (close proximity) and *zinat* (adultery). Furthermore, the male appellant will have no right to have the female appellant reside with him in Malaysia, any children born to their marriage will be considered illegitimate and they will not be able to inherit property from each other. In her opening submissions, counsel for the appellants acknowledged that if the New Zealand marriage were to be recognised, the female appellant could live in Malaysia without problems. The essential issue for determination, therefore, is whether the New Zealand marriage will be recognised in Malaysia.

[53] The appellants rely on the letter dated 21 August 1998 from the Registrar of Marriages of Johor Bahru, the text of which has already been set out at para [17]. The relevant sentence reads:

> As such you cannot register any marriage with a Mulsim under this Act (sic).

[54] It is understandable that the appellants should place weight on a letter from an official. The task of the Authority, however, is to look beyond the assertion made by the author of the letter and to examine the relevant law. A wrong or mistaken assertion by a Malaysian official on the question of registration cannot be determinative of these refugee applications. It may be evidence that the official intends to pursue a certain course of action, the domestic law notwithstanding. In the context of some countries where there is a demonstrable absence of state protection, this might be a significant, if not determinative fact. But in others, the state may provide an effective remedy to overcome the actions of an obstructive official.

[55] Apart from the letter from the Registrar of Marriages, the appellants have tendered two legal opinions received from Malaysia. The first is dated 21 April 2001 and is said to be from the firm of Atikah Lau & Chi. The second is dated 4 October 2001 from the firm Lua & Mansor. It is to that evidence we now turn.

The first legal opinion

[56] At the hearing on 24 and 25 July 2001 the appellants tendered in evidence a facsimile dated 24 April 2001 from a firm of solicitors practising in Johor Bahru known as Atikah Lau & Chi. The unidentified author advises the solicitors for the appellants that they (Atikah Lau & Chi) are unable to provide advice on the topic of a Malaysian Hindu man married to an Indonesian Muslim wife. The letter states that that question can only be answered by "Syariah Lawyers ie lawyers who specialized in Islamic Jurisprudence and usually they are Muslims themselves and are trained in Islamic tradition". The facsimile transmission details on the top of the letter show that it was sent from Malaysia on 24 April 2001. In the same transmission the solicitors for the appellants received a five page document dated 21 April 2001 which appears to be a legal opinion. It has no letterhead, is unsigned and the qualifications and experience of the author are not disclosed. The Authority was told by counsel that the "opinion" was obtained from an individual in Atikah Lau & Chi known to the male appellant personally. This individual did not wish to disclose his or her identity or the fact that the firm had provided an opinion on the issue of a Muslim/Hindu marriage. Hence the anonymity as well as the statement in their letterhead letter that the Malaysian firm could not assist. These factors have not inspired confidence in the contents of the opinion. Measured against the second legal opinion (to which we will turn shortly), this document compares unfavourably. It is difficult to identify to any satisfactory degree what the anonymous author's legal opinion is on the essential issue of registration. Doing the best we can and applying the benefit of the doubt, we read the document as asserting that the New Zealand marriage would not be recognised as valid in Malaysia because of s 3 of the Law Reform (Marriage and Divorce) Act 1976

read against the background of the Sharia law which governs those of the Islamic faith. That is, Sharia law does not recognise the marriage of a Muslim woman to a non-Muslim man.

[57] As a result of concerns expressed by the Authority at the hearing about the informal and anonymous document of 21 April 2001, counsel subsequently tendered a second legal opinion and it is to that document we now turn.

The second legal opinion

[58] The opinion dated 4 October 2001 from the Malaysian firm of Lua & Mansor is seven pages in length and the identity and qualifications of the author are clearly set out. The opinion is accompanied by photocopies of the relevant statutory provisions and of the relevant case law. It commences by noting that in Malaysia the law relating to marriage is governed by the Federal law as far as non-Muslims are concerned and by the State Muslim law as far as Muslims are concerned. For the former the relevant Federal statute is the Law Reform (Marriage and Divorce) Act 1976 and the relevant court of jurisdiction is the Malaysian High Court. Islamic marriages come under the jurisdiction of the State Shariah Court. Apparently each state has its own State Islamic Family Law enactment. These enactments are, with minor differences, the same.

[59] The application of the Law Reform (Marriage and Divorce) Act 1976 is governed by s 3:

> **3. Application.**
>
> (1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.
>
> (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.
>
> (3) This Act shall not apply to a Muslim or to any person who is married under Muslim law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to

prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.

(4) This Act shall not apply to any native of Sabah or Sarawak or any aborigine of West Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom unless -

(a) he elects to marry under this Act;

(b) he contracted his marriage under the Christian Marriage Ordinance; or

(c) he contracted his marriage under the Church and Civil Marriage Ordinance.

[60] Section 104 of the Act provides for the recognition of marriages contracted outside Malaysia:

104. Recognition of Marriage Contracted Abroad.

A marriage contracted outside Malaysia other than a marriage solemnised in a Malaysian Embassy, High Commission or Consulate under section 26, shall be recognised as valid for all purposes of the law of Malaysia if -

(a) it was contracted in a form required or permitted by the law of the country where it was contracted;

(b) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicile; and

(c) where either of the parties is a citizen of or is domiciled in Malaysia, both parties had capacity to marry according to this Act.

[61] It will be seen from both ss 3 and 104 of the Act that the domicile of the parties to the marriage is directly relevant to the recognition in Malaysia of a marriage contracted abroad. For the purposes of this decision we will proceed on the basis that at all relevant times the country of domicile for the female appellant is Indonesia and the country of domicile for the male appellant is Malaysia. The couple have lived in their respective countries for all of their lives apart from their temporary sojourn in New Zealand where their status has been temporary and contingent on the outcome of their refugee application. The facts are straightforward and there is no need to examine the issue of domicile any further.

[62] On the basic question whether the Law Reform (Marriage and Divorce) Act 1976 applies to the male appellant, the answer is unequivocally in the affirmative. Not only is Malaysia his country of domicile in fact, as a citizen of Malaysia he is in any event deemed by s 3(2) to be domiciled in Malaysia. It follows that he falls within the express terms of s 3(1). Prima facie any marriage entered into by him is registerable under the Act ***unless*** his spouse or intended spouse "professes the religion of Islam": see s 3(3).

[63] The application of the Act to the female appellant is less clear. Prima facie the Act would apply to her simply by reason of her being a person "in Malaysia". See s 3(1). However the real issue is whether s 3(3) takes her out of the Act by virtue of the fact that she is a Muslim:

> [t]his Act shall not apply to a Muslim ... and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act.

[64] The opinion provided by Lua & Mansor concedes that on a strict interpretation of s 3(3) the male appellant must convert to Islam before he is permitted to marry the female appellant. The opinion points out, however, that it is not clear from the statute whether this is the correct interpretation and whether the prohibition in s 3(3) applies to the marriage of a Malaysian national non-Muslim and a ***non-Malaysian*** Muslim. The Act does not define who is a Muslim, nor is it defined in any other statute. The interpretation favoured in the opinion is that the prohibition in s 3(3) does not have application to the female appellant as s 3(3) applies to ***Malaysian*** Muslims:

> From the Act and the case law it seems that the overall intent on the prohibition is with respect to Muslims who are Malaysian nationals ie Malaysian national Muslims ***must*** not marry a non-Muslim. [emphasis in original]

[65] On this interpretation the prohibition of marriage between a non-Muslim and Muslim is confined to a Malaysian national Muslim and a Malaysian national non-Muslim. The opinion given is that as the female appellant is a non-Malaysian Muslim

she can marry the male appellant "and seek the recognition of the Malaysian court and can attempt to seek registration of the marriage under the Act pursuant to s 104".

[66] Turning to s 104 of the Law Reform (Marriage and Divorce) Act 1976 and the question of registration the opinion addresses the question whether subsections (a), (b) and (c) are to be read conjunctively rather than disjunctively. The issue is of some significance for if the provisions are read conjunctively, for a marriage contracted outside Malaysia to be recognised as valid for all purposes of the law of Malaysia it must be shown not only that the marriage was contracted in a form required or permitted by the law of the country where it was contracted, but also that each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicile and where one of the parties is a citizen of Malaysia, both parties had capacity to marry according to the Law Reform (Marriage and Divorce) Act 1976. It would therefore have to be shown that under the law of Indonesia the female appellant had capacity in Indonesia to marry a non-Muslim and that both parties could marry under the Law Reform (Marriage and Divorce) Act 1976 of Malaysia. In short, the law of both Indonesia and Malaysia would have to permit the marriage.

[67] This is not, however, how s 104 is read in Malaysia.

[68] The opinion points out that the Malaysian courts have not interpreted section 104 conjunctively. Rather they have read it as setting out three ***disjunctive*** conditions. Cited in support is the judgment of *High Court (Kota Kinabalu) - Originating Summons No. K20 of 1992* (29 July 1993). We have been provided with a copy of the judgment and believe that the summary of the decision given in the opinion is an accurate one:

> In the case of *High Court (Kota Kinabalu) Originating Summons No. K20 of 1992* the court declared that the marriage was legal between a native and a non-native under the Act even though the Act is not applicable to any native of Sabah - which one of the parties is - (*See Section 3(4) of the Act*). The Court relied specifically on Section 104(a) of the Act which gives recognition to marriage as if it was contracted abroad. The Court did not

> address the requirements in Section 104(c) which if considered would have given rise to the issue of whether the Act was applicable because one of the parties was a Sabah native which by virtue of Section 3(4) above would not apply. The only way to reconcile the non-inclusion of Section 104(c) is to read Section 104(a) disjunctively.

[69] The opinion observes that the Judge in *Originating Summons No. K20 of 1992* case (Syed Ahmad Idid J) clearly wished to support the institution of marriage. The judge said:

> The order which I shall make is based on the humanitarian grounds of supporting the relationship of husband and wife and discouraging any party from treating weddings and marriage rituals lightly ... He who contracts a marriage must take it seriously.

[70] This has resonance in the English Conflict of Laws approach to marriage to which counsel has drawn our attention. In *Dicey and Morris on the Conflict of Laws* 13th ed (Sweet & Maxwell 2000) Vol 2 reference is made at para 17-060 to the two main views as to the law which should govern capacity to marry - the dual domicile doctrine and the intended matrimonial home doctrine, the latter espoused by Cumming Bruce J in *Radwan v Radwan (No. 2)* [1972] 3 All ER 1026 (Fam D), a possibly controversial decision which is cited in the opinion by Lua & Mansor. See *Cheshire and North's Private International Law* 13th ed (Butterworths 1999) at 721 - 742. However, as observed in *Dicey and Morris on the Conflict of Laws* at 17-064 the English law is evolving. In 1985, the Law Commission published a Working Paper, *Choice of Law Rules in Marriage*, which supported the dual domicile test. Subsequently, however, the Law Commission decided against recommending the enactment of the test in statutory form: they discerned in the most recent cases a new flexibility of approach based on a policy of upholding (where proper) the validity of marriage, and they felt that this flexibility would be lost if firm statutory rules were adopted. The result is that no legislation has been passed in the United Kingdom on capacity to marry: the courts remain free to develop the law. At para 17-067 of *Dicey and Morris on the Conflict of Laws* it is noted that the exact form which this development will take is not yet clear, though the courts will probably continue the policy of favouring the validity of marriage. The following quote is taken from para 17-065:

> As was noted by the Law Commission, one of the objections to the dual domicile doctrine is that, by requiring the marriage to comply with the law of the domicile of ***both*** parties, it favours invalidity. There might have been some justification for this approach in the days when divorce was difficult or impossible to obtain, but this rationale has long since disappeared.
>
> There are various ways in which effect might be given to a policy in favour of validity. One would be to uphold the marriage if it complies with the law of the domicile of ***either*** party; another would be to apply either the dual domicile test or the matrimonial home test, whichever would be more favourable to the validity of the marriage. Even greater flexibility could be obtained by adopting a rule based on the law of the country with which the marriage has its most real and substantial connection.

General conclusions

[71] The conclusion we have reached is that while the disjunctive reading of s 104 of the Law Reform (Marriage and Divorce) Act 1976 was challenged by counsel for the appellants, the decision of the *High Court (Kota Kinabalu) - Originating Summons No. K20 of 1992* is one we must accept as this is, after all, how the marriage law of Malaysia is interpreted and applied in that country. Our assessment of the refugee claim must have regard to that law as authoritatively established by the courts of Malaysia.

[72] We prefer the Lua & Mansor opinion to the less than adequate and anonymous first opinion and it follows that we regard the letter from the Registrar of Marriages in Johor Bahru dated 21 August 1998 as a "bureaucratic" letter which does not accurately state the law as it is applied by the Malaysian courts. In fairness to the Registrar, he may not have appreciated that the Muslim partner of the then intended marriage was not domiciled in Malaysia. In addition, the Registrar was not asked to comment on the now added complexity of the recognition of a marriage contracted outside Malaysia. There is nothing on the facts to suggest that the Registrar's letter reflects a de facto marriage law with a parallel existence to the de jure marriage law. We have no evidentiary basis to determine this appeal on the assumption that the appellants will not be able to obtain redress through the Malaysian legal system.

[73] We accordingly accept the opinion offered by Lua & Mansor that because the appellants' marriage took place outside Malaysia and because the Islamic law of Malaysia does not apply to the female appellant, the parties have satisfied s 104 by fulfilling s 104(a). It follows that their marriage will be recognised in Malaysia as valid "for all purposes of the law of Malaysia".

[74] If there is any doubt (because of s 3(3) of the Act) on the fundamental question whether in the first place the Act applies to the appellants, we note that the opinion sensibly observes that the best way of resolving this issue is for the parties to seek recognition of their marriage under s 104(a) or alternatively to obtain advice from the office of the Attorney-General in Malaysia.

[75] In this context we are informed that the solicitors for the appellants by letter dated 20 August 2001 wrote to the Malaysian High Commission in Wellington advising that they were acting for a Malaysian national married to an Indonesian national. The couple wished to know what, if any, steps they had to take to register their marriage with the High Commission. The High Commission were alerted to the fact that the husband was Hindu and his wife Muslim. The letter also inquired what was involved in securing for the wife a visa to reside in Malaysia. A request was made for the forms necessary for registration of the marriage and for securing a visa for the wife. The High Commission responded by sending a number of forms in Malay without any accompanying letter. We are told that the forms request the male appellant's Malaysian identity card number and the religion of the applicants. The forms also ask whether there has been a previous application for a "marriage licence". In her final submissions dated 24 November 2001 at para 9 counsel states:

> In the circumstances, the appellants advise that they are unwilling to apply to the Malaysian High Commission for registration of their marriage because they fear this will put them at additional risk, should they eventually be removed from New Zealand.

[76] As both in relation to Indonesia and Malaysia the appellants have within their power domestic remedies, we will shortly address the consequences of their refusal to avail themselves of those remedies and in particular the question whether they are expected to exhaust their remedies before seeking refugee status.

[77] First we need to digress to deal with a point which was at the forefront of the submissions of counsel for the appellants.

THE REFUGEE DEFINITION

[78] 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."

[79] The issue of statelessness not being relevant to the two appeals under consideration, there is no need to address the Inclusion clause criteria affecting stateless persons.

[80] In terms of *Refugee Appeal No. 70074/96 Re ELLM* [1998] NZAR 252 the principal issues in relation to each of the separate appellants 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?

[81] Looking ahead, our finding will be that the risk of "being persecuted" has not been established. As a consequence neither appellant can establish a "well-founded fear" of being persecuted for a Convention reason.

[82] Counsel for the appellants properly points out that Article 1A(2) requires that a refugee claim be considered in relation to the country of nationality of the refugee claimant. The principle is correctly identified by Professor James C Hathaway in *The Law of Refugee Status* (Butterworths 1991) at 55:

> Where a refugee claimant possesses a formal nationality, her claim to protection should be assessed with reference to conditions in the state of nationality. Issues of surrogate protection in another state may arise at the final stage of the determination process, but the initial inquiry should be limited to an examination of the relationship between the claimant and the country of which she is formally a national.

[83] While the principle is clear, the reference to surrogate protection in another state is a reminder that:

(a) Where obtaining citizenship of another country is a mere formality, the refugee claimant cannot elect not to make such an application. See for example *Tatiana Bouianova v Minister of Employment and Immigration* [1993] FCJ No 576; (1993) 67 FTR 74 (FC:TD) (Rothstein J) recently cited by the Authority in *Refugee Appeal No. 72635/01* (6 September 2002) at [138] and [139];

(b) The claim may be excluded by Article 1E. It provides:

> This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

In view of the findings made in this decision, neither (a) nor (b) need be determined by us on the facts.

[84] We turn first to the issue of persecution.

PERSECUTION

The meaning of persecution

[85] In *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [43] to [70] the Authority set out at length its understanding of the meaning of persecution. It has adopted Professor Hathaway's formulation of persecution as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. This formulation was approved in *DG v Refugee Status Appeals Authority* (High Court Wellington, CP213/00, 5 June 2001, Chisholm J) at [19] to [22]. The Authority's decision in *Refugee Appeal No. 71427/99* has been cited favourably by Kirby J in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574 at [114] to [125] (HCA).

[86] In the context of the present case we refer to only some of the general principles which inform the New Zealand jurisprudence.

[87] Underlying the Refugee Convention is the commitment of the international community to the assurance of basic human rights without discrimination. See the Preamble (first and second recitals) to the Refugee Convention and *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 733 (SC:Can). But the Convention does not protect persons against any and all forms of even serious harm: James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 103. There must be a risk of a type of harm that would be inconsistent with the basic duty of protection owed by a state to its own population: Hathaway *op cit* 103-104. The dominant view is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard: Hathaway *op cit* 108 approved in *Ward* at 733. Persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements recognised by the international community. See Hathaway, *op cit*

104-105, 112 approved in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495F, 501C, 512F, 517D (HL); *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51] and *DG v Refugee Status Appeals Authority* (High Court Wellington, CP213/00, 5 June 2001, Chisholm J) at [19] and [22].

[88] Whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the state's ability and willingness to respond effectively to that risk. Persecution is the construct of two separate but essential elements, namely risk of serious harm and failure of protection. This can be expressed in the formula that: Persecution = Serious Harm + The Failure of State Protection: *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653F (HL); *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 515H (HL); *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574 at [120] (HCA) per Kirby J approving *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [112].

[89] Each case will largely turn on its own facts and on occasion different aspects of the jurisprudence will require emphasis. In the present case we will address separately the "serious harm" and "failure of state protection" elements.

PERSECUTION - THE FAILURE OF STATE PROTECTION ELEMENT

The surrogacy principle - availing state protection

[90] 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. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. See *Canada*

(Attorney General) v Ward [1993] 2 SCR 689, 709 (SC:Can). In that case La Forest J, delivering the judgment of the Supreme Court of Canada, rightly recognised that fundamental to the Refugee Convention is the issue of state protection. He described the refugee scheme as surrogate or substitute protection, actuated only upon failure of national protection:

> At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. 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 p135.

[91] This principle has been applied by the Authority over a large number of years. See for example *Refugee Appeal No. 523/92 Re RS* (17 March 1995) at 35-36; *Refugee Appeal No. 70366/96 Re C* [1997] 4 HKC 236, 276-277; *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [48].

[92] As Professor Hathaway explains in *The Law of Refugee Status* at 57, it is an underlying assumption of refugee law that wherever available, national protection takes precedence over international protection. At *op cit* 104 he adds that the drafters were not concerned to respond to certain forms of harm *per se*, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection. These points are enlarged upon at *op cit* 135:

> Refugee law exists in order to interpose the protection of the international community in situations where resort to national protection is not possible. Because it is fundamentally a form of surrogate or substitute protection, the beneficiaries of refugee law have always been defined to exclude those who enjoy the basic entitlements of membership in a national community, and who ought reasonably to vindicate their basic human rights against their own state. Refugees are unprotected persons, not just in the sense that their basic liberties or entitlements are in jeopardy, but more fundamentally because it is impossible for them to work within or even to restructure the national community of which they are nominally a part in order to exercise those human rights. Their position within the home community is not just precarious; there is also an element of fundamental marginalization which distinguishes them from other persons at risk of serious harm.

[93] In *Ward* at 724-726 the Supreme Court of Canada addressed the issue how, in a practical sense, a refugee claimant proves a state's inability to protect its nationals. The view taken was that "clear and convincing" confirmation of a state's inability to protect must be provided as absent some evidence, nations should be presumed capable of protecting their citizens:

> "The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant."

[94] The Authority has for many years adopted and applied this reasoning, but only as an evidentiary rule. The refugee claimant is not required to risk her or her life seeking ineffective protection merely to demonstrate that the protection is ineffective. See La Forest J in *Ward* at 724:

> Most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.

[95] But where, in Professor Hathaway's words, the refugee claimant ought reasonably to vindicate his or her basic human rights against the home state, refugee status is inappropriate. The application of this principle is illustrated by *Kadenko v Canada (Solicitor General)* (1996) 143 DLR (4^{th}) 532, 533-534 (FC:CA) (Hugesson & Décary JJA & Chevalier DJ):

> Once it is assumed that the state (Israel in this case) has political and judicial institutions capable of protecting its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so. The answer might have been different if the question had related, for example, to the refusal by the police as an institution or to a more or less general refusal by the police force to provide the protection conferred by the country's political and judicial institutions.
>
> ...
>
> When the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her (see *Canada (Minister of Employment and Immigration) v Satiacum* (1989) 99 N.R.171 at 176 (FCA), approved by *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 725, 103 DLR (4th) 1).

[96] The Authority's approach has been very similar. See *Refugee Appeal No. 70074/96* [1998] NZAR 252, 257-260. The position in Australia is the same. See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 233, 248 (HCA) per Brennan CJ and Dawson J

[97] Applying this test to the present case where avenues of legal redress have not been pursued in the relevant countries of origin, the burden on the refugee claimant to demonstrate state inability to protect is a real one. The principle elucidated in *Ward* sits comfortably with ss 129G(5) and 129P(1) which impose on the refugee claimant the responsibility to establish the claim to refugee status. For a further examination of the burden of proof see *Refugee Appeal No. 72668/01* [2002] NZAR 649 and *Jiao v Refugee Status Appeals Authority* [2002] NZAR 845 (Potter J).

[98] Where domestic remedies are realistically available in the refugee claimant's country of nationality which, if availed of will result in effective state protection being afforded to the claimant, the refugee claimant is required, as a matter of principle, to avail him or herself of those remedies; or in the words of *Ward*, to present clear and convincing confirmation of the state's inability to protect.

[99] As we amplify below, our findings on the country information demonstrate that both in Indonesia and in Malaysia the appellants have domestic remedies which are realistically available but which they have not exercised. There is no evidentiary basis to determine this appeal on the assumption that the appellants will not be able to obtain redress through the Indonesian and Malaysian legal systems. On the evidence, the appellants have not established a failure of state protection. There is no demonstrated need for the surrogate protection of the international community to be afforded to either of the appellants. As Professor Hathaway has stated, national protection takes precedence over international protection.

Exhaustion of domestic remedies

[100] Because the issue of domestic remedies is in the present case so directly relevant to the question of state protection, we wish to underline the point that international human rights law itself gives considerable emphasis to available domestic remedies. The *Ward* principle is consistent with the general principle recognised in international human rights law that domestic remedies should be exhausted before recourse is had to an international forum. As we apply international human rights instruments in our determination of the persecution element of the Refugee Convention, it is appropriate that the relationship between the *Ward* principle and the exhaustion of domestic remedies be acknowledged.

[101] The First Optional Protocol to the International Covenant on Civil and Political Rights, Article 2 specifically requires that before an individual may submit a written communication to the Human Rights Committee that person must first exhaust all available domestic remedies:

> **Article 2**
>
> Subject to the provisions of Article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available

domestic remedies may submit a written communication to the Committee for consideration.

Article 5(2)(b) underlines the domestic remedy rule:

Article 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

2. The Committee shall not consider any communication from an individual unless it has ascertained that:

   (a) The same matter is not being examined under another procedure of international investigation or settlement;

   (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual.

[102] The domestic remedy rule also governs admissibility under the International Convention on the Elimination of All Forms of Racial Discrimination 1966, the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment 1984 and the Optional Protocol to the Convention on the Elimination of Discrimination against Women, 2000.

[103] The Human Rights Committee spelt out the rationale behind Article 5(2)(b) of the ICCPR in *T.K. v France* (262/87). The quote from this case which follows has been taken from Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford 2000) at [6.01]:

¶ 8.3. The purpose of article 5(2)(b) of the Optional Protocol is, *inter alia*, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable State parties to examine, on the basis of individual complaints, the implementation, within

> their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seized of the matter.

[104] Local remedies are usually deemed to be exhausted when a final judicial decision has been rendered, and there remains no available appeal: Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* at [6.02].

[105] The subject of exhaustion of domestic remedies can at times be a complex one, the authors concluding at *op cit* [6.33] that:

> [6.33] The HRC has been fairly strict in implementing the domestic remedies rule: it is probably the most common reason for rejecting the admissibility of communications. However, it has demonstrated some flexibility regarding the futility of remedies which may, for example, be demonstrated by a State Party's continuous failure to implement apparently available remedies, adverse higher court precedents, the unreasonable prolongation of available remedies, and occasionally the costliness of available remedies. The HRC has also been flexible in its allocation of the burden of proof between the author and the State Party with regard to questions of the proper exhaustion of effective local remedies.

[106] The general rule of international law that domestic remedies be exhausted before recourse is had to an international forum has been incorporated into the American Convention on Human Rights, 1969 (Article 46) and the Statute of the Inter-American Commission on Human Rights (Articles 19(a) and 20(c)), and reiterated in the Commission's Regulations (Article 37). It has application to both Convention and Declaration cases. The Commission has stated that the reason for the rule "lies in the principle that the defendant State must be allowed, before anything else, to provide redress on its own and within the framework of its internal legal system, which must be exhausted before the international instance is brought into play": Christina Cerna, "The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications" in Harris & Livingstone, *The Inter-American System of Human Rights* at 65, 85. The Inter-American Court and Commission have, however, applied the domestic remedies rule flexibly and in the view of one commentator have paved the way for developing the application of the

local remedies rule so as to pay special attention to the overriding need to protect human rights: Antoniô Augusto Cançado Trindade, "The Inter-American Human Rights System at the Dawn of the New Century: Recommendations for Improvement of its Mechanism of Protection" in Harris & Livingstone, *The Inter-American System of Human Rights* 395, 401-402. See also José Miguel Vivanco & Lisa L Bhansali, "Procedural Shortcomings in the Defense of Human Rights: An Inequality of Arms" in Harris & Livingstone, *The Inter-American System of Human Rights* 421, 429-432.

Exhaustion of domestic remedies and the Refugee Convention

[107] In the context of the Refugee Convention the overriding imperative is to identify those in genuine need of protection. While the exhaustion of domestic remedies may in some cases (such as the present) be an issue of particular significance, refugee decision-makers should, as a rule, avoid being distracted by an obsessive focus on the exhaustion issue. Caution must be exercised. The following observations, although made by Mr Trindade at *op cit* 402 in the context of the inter-American system of human rights, are helpful.

> ... the rule is far from being an immutable or sacrosanct principle of international law. We are here in a domain of protection which is fundamentally victim-oriented, concerned with the rights of individual human beings rather than of States. Generally recognized rules of international law (to which the formulation of the local remedies rule in human rights treaties refers), besides following an evolution of their own in the distinct contexts in which they apply, necessarily suffer, when inserted in human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of the international protection of human rights.

Failure of state protection - Indonesia

[108] Following their marriage in New Zealand in May 2000 the appellants have not taken even the first step to secure registration of that marriage in Indonesia and thereby its recognition in that country. This is not a case where it is possible to say at once that it would be futile for the refugee claimant to exercise his or her rights or remedies

under the domestic law of the country of nationality. The evidence in this case establishes that meaningful domestic law remedies are available to the female appellant (and through her, the male appellant). As Mr Butts points out in his article at *op cit* 123-126, the State, not the Sharia courts are the ultimate authority in the administration of the Marriage Law in Indonesia. There is no proper basis on which the Authority can assume that their marriage will not be registered in Indonesia and recognised in that country as valid in law. It follows that the fear of being persecuted by non-recognition of the marriage is not established. They are asking this Authority to ***assume*** that their fears will materialise notwithstanding that the evidence establishes that by following well-established procedures the anticipated harm will simply not materialise as a real risk and that they can have recourse to the Indonesian courts to obtain an effective remedy if difficulties are encountered.

[109] In the result, available domestic remedies not having been pursued, the female appellant's claim to "being persecuted" must rest on the only "harm" which the evidence does establish, namely:

(a) Family and societal disapproval of her marriage without maternal blessing to a man twenty years her senior and of a different nationality, race and religion. Here the evidence before us is less than persuasive. We are of the view that at most the female appellant and her husband will face low level discrimination which may be inconvenient but falls well short of the seriousness and severity required by "persecution" as used in Article 1A(2) of the Refugee Convention. The male appellant's claim that his wife's relatives may injure or even kill him is a gross exaggeration and entirely bereft of evidentiary support.

(b) The female appellant does face discrimination in Indonesia given that her Malaysian national spouse will have to obtain a work permit in order to obtain permission to live and work in Indonesia. We will return to this issue but while

there is in a limited sense a failure of state protection, the discrimination itself falls well short of the threshold of serious harm.

Failure of state protection - Malaysia

[110] The stance of the appellants (to take no steps to secure recognition in Malaysia of their New Zealand marriage) is at odds with the detailed and reasoned opinion from Lua & Mansor which specifically recommends that the couple pursue certain courses of action available to them under the law of Malaysia. They have elected not to take these steps. Their reasons are not good ones in that there is no evidence that applying for the registration of their marriage increases the feared risk of being persecuted. While they are free to adopt this stance, their failure to avail themselves of remedies clearly provided by the law of Malaysia impacts in a substantial way on their claim to refugee status. As we have held in relation to Indonesia, the fear of being without effective state protection is not established. The evidence we have accepted is that the marriage is registerable in Malaysia and the appellants' case must fail. Their failure to even test the Lua & Mansor opinion by applying for registration makes it all the more difficult for them to mount a meaningful challenge to the evidence.

Consequence of failing to avail state protection

[111] We have found that each of the appellants has available in their respective countries of nationality domestic remedies which are realistically available. If availed of, these remedies will result in effective state protection being afforded to the respective claimant. They each carry their burden of establishing, by clear and convincing confirmation, that the respective countries of nationality are unable to protect them. They have not discharged this burden.

[112] Having found that the claimants have not established the failure of state protection element of "being persecuted" it is strictly speaking not necessary to address the serious harm element. However, in the interests of dealing comprehensively with these two refugee claims, we will complete the analysis. It will be seen that we do not, in any event, accept that the appellants have established that

the difficulties they face amount to persecution as assessed against international human rights norms.

PERSECUTION: THE SERIOUS HARM ELEMENT

Human rights based approach to persecution

[113] In the human rights based approach to persecution the relevant core human rights are those contained in the so-called international bill of rights comprising the Universal Declaration of Human Rights, 1948 (UDHR) and by virtue of their almost universal accession, the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). To these must be added the Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Convention on the Rights of the Child, 1989 (CRC). See Hathaway, *The Law of Refugee Status* at 108-112 and Hathaway, 'The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute' published in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (Proceedings of the 1998 Conference of the International Association of Refugee Law Judges, October 1998) 80, 85-90; *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51]. For a recent analysis of how international human rights law has been critical to the development of refugee law in the context of gender-based persecution, see Deborah E Anker, "Refugee Law, Gender, and the Human Rights Paradigm" (2002) 15 Harvard Human Rights Journal 133.

[114] While it is possible to identify distinct categories of obligation in these international instruments (sometimes referred to as a "hierarchy" of rights), the question whether the anticipated harm rises to the level of "being persecuted" depends not on a rigid or mechanical application of the categories of rights, but on an

assessment of a complex set of factors which include not only the nature of the right threatened, but also the nature of the threat or restriction and the seriousness of the harm threatened. It must also be remembered that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated.

[115] In approaching the international human rights instruments referred to it is only appropriate that regard must be had to the interpretation of these instruments by the "treaty bodies" set up under the instruments, particularly the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of All Forms of Discrimination Against Women, the Committee on the Elimination of Racial Discrimination and of the Committee on the Rights of the Child. Of particular importance is the Human Rights Committee, as this Authority has recognised in leading cases which include *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995); [1998] INLR 387, 408-411; *Refugee Appeal No. 2039/93 Re MN* (12 September 1996) at [26]; *Refugee Appeal No. 72752/01* (15 November 2001) at [23]; *Refugee Appeal No. 72635/01* (6 September 2002) at [74].

[116] We recognise that the binding effect and jurisprudential quality of the decisions of the Human Rights Committee may be a matter of controversy. Contrast the views expressed by Elizabeth Evatt, a member of the Human Rights Committee, in "The Impact of International Human Rights on Domestic Law" in Huscroft & Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 281 295, 302 with the views expressed in two other papers published in the same text, namely Paul Rishworth, "The Rule of International Law?" *op cit* 267, 274 - 279 and Scott Davidson, "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee" *op cit* 305-321. This is not a controversy we need enter here. The decisions of the Human Rights Committee are at least clearly of considerable persuasive authority: *R v Goodwin (No. 2)* [1993] 2 NZLR 390, 393 (CA). See further *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129, 134-136, 144 (CA) and *Tangiora v Wellington District Legal Services*

Committee [2000] 1 NZLR 17, 20-22; [2000] 1 WLR 240, 244-246 (PC). Contrast *Briggs v Baptiste* [2000] 2 AC 40, 53 (PC) where, in the context of the Inter-American system the point made was that while it is to be expected that national courts will give great weight to the jurisprudence of the Inter-American Court, "they would be abdicating their duty if they were to adopt an interpretation of the [American] Convention [on Human Rights, 1969] which they considered to be untenable". For observations as to the binding effect of decisions of the Committee against Torture, see *Ahani v Canada (Attorney General)* (2002) 208 DLR (4^{th}) 66 at paras 34-40 (Ont. CA).

[117] The Human Rights Committee was created under Article 28 of the ICCPR. It performs four essential functions in monitoring the ICCPR:

(a) It conducts dialogues and draws conclusions from states' reports;

(b) It issues *General Comments* which explain the meaning of the provisions of the ICCPR;

(c) It hears interstate complaints under Article 41 of the ICCPR; and

(d) It makes decisions on individual complaints under the First Optional Protocol.

[118] The interplay of these functions is explained by Elizabeth Evatt in her *Foreword* to Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford 2000) at vi:

> These accountability measures have provided a basis for the treaty bodies, in nearly thirty years of operation, to develop a significant jurisprudence, made up of several elements. In the reporting procedures, the treaty bodies receive information from a range of sources, including inter-governmental and non-governmental organisations, and they use this material to challenge States and test their responses. As a result, Concluding Comments, prepared in response to each State report, can be specific and pointed. Although the observations are directed to the situation in a particular State, they have wider significance

> as they represent a consensus view of the Committee of how particular provisions of the instrument should be interpreted and applied. Another element in the jurisprudence of the treaty bodies consists of the views expressed in individual cases decided by the HRC and other Committees. Though not legally binding in themselves, these views are significant indicators as to the application of the instrument. The HRC's Concluding Comments and its views in individual cases are the main source from which it draws in drafting its General Comments on Specific Provisions of the Covenant.

[119] On occasion it might also be appropriate to draw on the jurisprudence of the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 as well as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights under the American Declaration of the Rights and Duties of Man, 1948 and the American Convention on Human Rights, 1969. However, the European and inter-American systems differ in many ways from each other and from that provided for in the international human rights instruments referred to. Caution must be exercised in applying the jurisprudence of these regional organisations outside their proper context. See for example David Harris "Regional Protection of Human Rights: The Inter-American Achievement" in Harris & Livingstone, *The Inter-American System of Human Rights* (Clarendon Press, Oxford 1998) 1-29.

[120] We turn now to the provisions of the ICCPR relied on by the appellants.

THE INTERNATIONAL HUMAN RIGHTS PROVISIONS RELIED ON BY THE APPELLANTS

[121] The appellants rely on ICCPR Article 17 (Privacy) 18 (Freedom on Religion) and 23 (Family).

[122] Article 17 of the ICCPR provides:

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

[123] It is submitted that the refusal of Malaysia to recognise the male appellant's marriage is a breach of Article 17.

[124] Article 18 of the ICCPR provides:

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[125] For the male appellant it is submitted that forced conversion to Islam would be a breach of Article 18, as would be forcing him to choose between his religious belief and his marriage. For the female appellant it is submitted that the breach will lie in her being deemed an apostate under Indonesian family law and being treated as an apostate by the Indonesian Muslim community.

[126] Article 23 of the ICCPR provides:

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

[127] For the male appellant it is submitted that the inability of the couple to have their marriage recognised in Malaysia is a breach of Article 23(1) and (2). For the female appellant it is submitted that Indonesia's discriminatory nationality laws constitute an unlawful interference with her right to found a family.

[128] In her final submissions counsel advised that the appellants do not contend that as citizens of two different countries they have an absolute right to reside in the country of his or her spouse. It was said that their right to reside in Indonesia and Malaysia are relevant to their rights to marry and found a family. It was submitted that where individuals have different nationalities their right to marry and found a family must be balanced with the State's right to determine its members. Addressing the particular facts it was further submitted that no balancing exercise was to be engaged in "because it is pre-empted by Malaysia and Indonesia's discriminatory laws relating to marriage and Indonesia's discriminatory laws relating to residence". Even if the marriage were recognised in Indonesia the male appellant would not be entitled to reside in Indonesia because the female appellant is a woman. The submission is that the appellants are not demanding a choice of country in which to conduct their married lives, but first and foremost that their respective home countries respect both their rights to freedom of religious belief and to marry (and only secondly engage in an appropriate balancing exercise in relation to rights of residence).

ASSESSMENT OF INTERNATIONAL HUMAN RIGHTS PROVISIONS

[129] Articles 17 and 23 are most often cited in the context of the "right" to found a family. They will accordingly be dealt with together.

Articles 17 and 23 of the ICCPR

[130] Whereas Article 16(1) of the Universal Declaration of Human Rights 1948 explicitly guarantees the right to marry, Article 23(2) of the ICCPR merely obligates states to ***recognise*** that right. Whether this difference is material does not fall for consideration in this case. As far as we can tell, no Optional Protocol cases under the ICCPR have dealt with rights regarding marriage in Article 23(2) and (3): Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* at [20.43]. The authors observe that the extent of these rights remains uncertain. Little assistance is to be gained from *General Comment 19 - Article 23* (UN Doc HRI/GEN/1/Rev.1 at 28 (1994)). It does not address the circumstance where the parties to a marriage are of different nationalities. The first paragraph conveys the generality of *General Comment 19*:

> 1. Article 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant. Thus, article 17 establishes a prohibition on arbitrary or unlawful interference with the family. In addition, article 24 of the Covenant specifically addresses the protection of the rights of the child, as such or as a member of a family. In their reports, States parties often fail to give enough information on how the State and society are discharging their obligation to provide protection to the family and the persons composing it.

[131] Para 5 of *General Comment 19* goes on to observe that the right to found a family implies, in principle, the possibility to procreate and live together. But it does not address the ***content*** of the right in the context of marriages between individuals of different nationalities.

[132] The meaning of privacy for the purposes of Article 17 has not yet been thoroughly defined in either the *General Comments* or in the case law. *General Comment 16 - Article 17* (UNDoc HRI/GEN/1/Rev.1 at 21 (1994)) does emphasise that the protection afforded is against both unlawful and arbitrary interference. The term "unlawful" is defined as meaning that no interference can take place except in

cases envisaged by the law which itself must comply with the provisions, aims and objectives of the Covenant. The expression "arbitrary inference" can extend to interference provided for under the law. The concept is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances.

[133] The application of Articles 17 and 23 was considered by the Human Rights Committee in *Aumeeruddy-Cziffra and 19 other Mauritian Women v Mauritius* (Communication No. 35/1978 (9 April 1981) UN Doc CCPR/C/OP/1 at 67 (1984). The authors, including three women married to aliens, complained about Mauritian legislation that conferred different residential rights on foreign spouses, dependent on their sex. Whereas foreign wives were accorded automatic residential rights, these rights were denied to foreign husbands whose residence permits were subject to specified conditions which might at any time be varied or cancelled by a decision of the Minister of the Interior, against which no remedy was available. In addition, legislation subjected foreign husbands to a permanent risk of being deported from Mauritius. The Human Rights Committee noted that there could be no question of regarding the interference as unlawful, since it was the direct consequence of national legislation. The question was whether or not the interference was arbitrary. The Commission found that the legislation was in breach of Articles 2(1), 3 and 26 in conjunction with Article 17(1). They did not make any express finding as to its arbitrariness under Article 17(1), although this may be considered to be implicit in the decision. We set out below some of the more relevant paragraphs from the decision:

> 9.2(b)2(i)2 The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, and as the State party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of Article 17. In principle, article 17(1) applies also when one of the spouses is an alien. Whether the existence and application of immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either "arbitrary

or unlawful" as stated in Article 17(1), or conflicts in any other way with the State party's obligations under the Covenant.

9.2(b)2(i)3 In the present cases, not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands in Mauritius represents, in the opinion of the Committee, an interference by the authorities of the State party with the family life of the Mauritian wives and their husbands ...

9.2(b)2(i)4 Since, however, this situation results from the legislation itself, there can be no question of regarding this interference as "unlawful" within the meaning of article 17(1) in the present cases. It remains to be considered whether it is "arbitrary" or conflicts in any other way with the Covenant.

...

9.2(b)2(i)6 The authors who are married to foreign nationals are suffering from the adverse consequences of the statutes discussed above only because they are women ...

...

9.2(b)2(i)8 The Committee considers that it is also unnecessary to say whether the existing discrimination should be called an "arbitrary" interference with the family within the meaning of article 17. Whether or not the particular interference could as such be justified if it were applied without discrimination does not matter here. Whenever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex ... No sufficient justification for this difference has been given. The Committee must then find that there is a violation of articles 2(1) and 3 of the Covenant, in conjunction with article 17(1).

...

9.2(b)2(ii)3 It follows that also in this line of argument the Covenant must lead to the result that the protection of a family cannot vary with the sex of the one or the other spouse. Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them therefrom for security reasons, the Committee is of the view that the legislation which only subjects foreign spouses of Mauritian women to those restrictions, but not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements.

9.2(b)2(ii)4 The Committee therefore finds that there is also a violation of articles 2(1), 3 and 26 of the Covenant in conjunction with the right of the three married co-authors under article 23(1).

Discrimination on the grounds of gender

[134] Although *Aumeeruddy-Cziffra v Mauritius* was not initially cited by the appellants in support of their case, it is clear that the discrimination experienced by Mauritian women in relation to foreign spouses is analogous to the discrimination

faced by Indonesian women in relation to their foreign spouses. Applying the decision of the Human Rights Committee it would follow that:

(a) Since the situation results from legislation the interference is not "unlawful" within the meaning of Article 17(1);

(b) However, as no or no sufficient justification for the difference can be discerned, there is nevertheless a violation of Articles 2(1) and 3 of the ICCPR, in conjunction with Article 17(1) and Article 23(1).

[135] This finding does not assist either appellant. A breach of a human right must not be confused with "being persecuted" as that expression is used in the Refugee Convention. Not every breach of a refugee claimant's human rights constitutes persecution: UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para 54; *Refugee Appeal No. 71404/99* (29 October 1999) at [66] - [67]; *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [54]. Both these cases were approved in *Q v Refugee Status Appeals Authority* [2001] NZAR 472 at [5] & [6] (Durie J) and *H v Chief Executive of the Department of Labour* (High Court Wellington, AP183/00, 20 March 2001, Gendall J) at [19]. As pointed out by Professor Hathaway in *The Law of Refugee Status* at 103-104, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population:

> As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm *per se*, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection.

[136] In our view the discrimination experienced by Indonesian women married to foreign spouses does not even remotely constitute "being persecuted" under the Refugee Convention. Our assessment is reinforced by case law under the ECHR.

Foreign spouses and ECHR jurisprudence

[137] While the *General Comments* and Optional Protocol jurisprudence is somewhat patchy, if not silent on the question of marriage to a foreign spouse, the opposite is the case in relation to Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. Article 8, while similar to Article 17 of the ICCPR is nevertheless differently worded:

> **Article 8 - Right to Respect for Private and Family Life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[138] While acknowledging the differences between the ICCPR and ECHR provisions, it is nevertheless instructive that the jurisprudence under the European Convention makes it clear that it is legitimate for a State to have an immigration policy and the mere fact that its implementation will interfere with family life does not render unlawful every such act of implementation. In *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 the European Court of Human Rights considered a case which involved decisions in relation to three married couples. In each case the wife was permanently and lawfully resident in the United Kingdom with the right to remain indefinitely. In each case the husband had been refused the right to remain in the United Kingdom. The United Kingdom Government contended that there was no obstacle to the couples living together respectively in Portugal, the Philippines and Turkey, the countries of origin of the husbands. The European Court of Human Rights

at 497 observed that as a matter of well-established international law and subject to its treaty obligations, the state has the right to control the entry of non-nationals into its territory. The court went on to attach significance to the fact that, at the time of each marriage, the wife had been aware that the husband was unlikely to be granted leave to remain in the United Kingdom. In these circumstances, the court held that there was no "lack of respect" for family life and, hence, no breach of Article 8 taken alone. At 497 the Court stated:

> The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of a country of their matrimonial residence and to accept the non-national spouses for settlement in that country.

[139] The application of Article 8 of the ECHR has very recently been considered by the English Court of Appeal in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 (CA) (Lord Phillips MR, May & Laws LJJ) and in *R v Secretary of State for the Home Department Ex parte Isiko* [2001] INLR 175 (CA) (Schiemann & Tuckey LJJ, Thomas J). The judgments were delivered only twelve days apart. In *Mahmood* the Master of the Rolls at [55] drew six conclusions from the European jurisprudence:

> [55] From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls.
>
> 1 A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
>
> 2 Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple.
>
> 3 Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe article 8 provided that there are no insurmountable obstacles to the family living together in the country or origin of the family member excluded, even where this involves a degree of hardship for some or more members of the family.
>
> 4 Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not

reasonable to expect the other members of the family to follow that member expelled.

5 Knowledge on the part of the one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates article 8.

6 Whether interference with family rights is justified in the interests of controlling immigration will depend on:

(i) The facts of the particular case; and
(ii) The circumstances prevailing in the state whose action is impugned.

[140] In *Isikio* this approach was specifically approved at [30].

Conclusions on Articles 17 and 23 of the ICCPR

[141] In relation to the right to marry and to found a family, the appellants face several difficulties. First, they have not established that in Indonesia and Malaysia respectively their New Zealand marriage will not be recognised. See paras [51] and [73]. Nor have they established that one or other of the countries will not allow the couple to live together to enjoy married life. All that has been established is that should the couple elect to live in Indonesia, the husband will have to obtain a sponsor and work permit before being issued with a visa to reside in Indonesia. This is not a significant breach of Articles 17 and 23 of the ICCPR. In addition, he enjoys several advantages. He has already worked in Indonesia on behalf of his former Malaysian employer. He speaks fluent Indonesian. It is plain that it is possible to live in Indonesia on work permits. His sister and her husband have lived in that country on work permits for six to seven years already. Two of his own acquaintances who are married to Indonesian women have been able to live and work in Indonesia. The couple have in any event the option of living in Malaysia. What the jurisprudence under Article 8 of the ECHR underlines is that no fundamental breach of a human right is involved where spouses of different nationality are able to live in one of the countries of origin. The more so where at the time of the marriage the spouses knew that problems surrounded rights of residence. Over and above this, there is the consideration that a state has a right under international law to control the entry of

non-nationals into its territory. No human rights principle imposes on the state a general obligation to respect the choice of residence of a married couple.

Article 18 - religion

[142] In relation to Malaysia the legal opinion we have preferred is that the marriage entered into by the appellants in New Zealand will be recognised in Malaysia without any issue of conversion of religion arising. In relation to Indonesia, our finding has been that the non-recognition of the New Zealand marriage has not been established. We find in any event that a "paper conversion" (paras [40], [42] and [44]) is not a significant infringement of basic human rights. The evidence does not establish that such a "conversion" leads to any significant societal consequences. Nor does the evidence show that anyone who converts back to Islam after a "conversion to marry" suffers any significant adverse consequence. Our findings at paras [26] and [27] are relevant in this context.

The issue of bribery

[143] Reference has earlier been made to the fact that in Indonesia registration of an interreligious marriage may be achieved by payment of a honorarium. Commentators acknowledge that the line between a legal honorarium and an illegal bribe is not altogether distinct. See paras [37], [38], [42] and [51] above. We do not see, in the circumstances, that the payment of a bribe is a significant factor. It is a minor property loss and not remotely recognisable as a risk of being persecuted. In this connection it is to be remembered that the right to own private property, while recognised in Article 17 of the UDHR, has not been carried forward by either the ICCPR or the ICESCR. It has been described by Professor Hathaway in *The Law of Refugee Status* 111 as a fourth level right and breach of the right will not ordinarily provide the foundation for a claim of failure of state protection.

Refugee Appeal No. 1039/93 Re HBS and LBY

[144] The appellants relied to a substantial degree on the decision in *Refugee Appeal No. 1039/93 Re HBS and LBY* (13 February 1995). In that case refugee status was granted to two Malaysian nationals. Both parties were Chinese but whereas the wife was Buddhist by religion, the husband was nominally a Muslim (though he considered himself to be Christian). The appellants in that case were unrepresented before the Authority and as is common in such cases, there was a paucity of evidence. The Authority requested the (then) Refugee Status Section of the New Zealand Immigration Service to obtain further information. After a chapter of accidents, it transpired that the information could not be obtained. The appeal was accordingly determined on the evidence adduced by the appellants. The Authority concluded that on that evidence various aspects of discrimination, in their cumulative effect, amounted to persecution. However the Authority cautioned that this conclusion had only been arrived at by the application of the benefit of the doubt and explicitly declared that the decision had little value as a precedent:

> In arriving at this conclusion we have borne in mind the principle that the appellants are to receive the benefit of our doubts as to whether the discrimination faced by them crosses the threshold to persecution. Turning as it does on the rather unusual facts of the appellants' case, our decision will have little value as a precedent.

[145] The decision is clearly distinguishable. In addition, the present case involves complexities arising from a marriage between spouses of different nationalities. But above all the Authority has before it much more evidence as to the law in Malaysia affecting the recognition in that country of inter-faith marriages concluded in Malaysia and abroad. In *Refugee Appeal No. 1039/93* the Authority (on the evidence then available) accepted that an inter-faith marriage between Malaysian nationals would not be recognised in Malaysia. Here a crucial difference is that the female appellant is not a Malaysian national, a significant point in the context of s 3 of the Law Reform (Marriage and Divorce) Act 1976, as Lua & Mansor have observed. In addition, the Authority is now aware of s 104 of the Act relating to the recognition in Malaysia of

marriages contracted abroad. The Authority did not have the benefit of this information in the 1995 decision.

[146] Accordingly, apart from a superficial similarity, the two cases are clearly distinguishable both on the facts and as to the evidence available to the decision-maker.

[147] *Refugee Appeal No. 1039/93* was similarly distinguished in *Refugee Appeal Nos 71757/99 & 71768/99* (24 June 2002) at [83] & [84], a case in which two Malaysian nationals claimed refugee status. The female appellant (a Muslim by birth) had converted to Catholicism after her arrival in New Zealand. The claim to refugee status failed on the evidence.

CONCLUSION

[148] The claims to refugee status by the appellants fail because they have not established that in their respective countries of nationality they face a risk of "being persecuted" as that phrase has earlier been interpreted (ie Persecution = Serious Harm + The Failure of State Protection). In particular:

(a) Neither has shown that effective state protection is unavailable in their respective countries of nationality.

(b) The consequences of their inter-faith marriage do not, in relation to both countries, amount to serious harm.

[149] As they have failed to establish the risk of "being persecuted" there is no need to address the issue of well-foundedness at any length. However, it is clear from our findings that as the risk of being persecuted is entirely absent, neither appellant can establish a "well-founded" fear of being persecuted for a Convention reason.

[150] Neither appellant is a refugee within the meaning of Article 1A(2) of the Refuge Convention. Refugee status is declined. Both appeals are dismissed.

	.....
	[Rodger Haines QC]
	Chairperson