chapter 2

Give Way to the Right: The Evolving Use of Human Rights in New Zealand Refugee Status Determination

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New Zealand acceded to the 1951 Convention relating to the Status of Refugees (Refugee Convention) on 30 June 1960 and to the 1967 Protocol relating to the Status of Refugees (1967 Protocol) on 6 August 1973. However, long before the development of this international legal regime, persons fleeing what would now be regarded as Convention-based persecution had arrived in New Zealand. As far back as the 1870s and 1880s, small numbers of Jews fleeing anti-Semitism in Tsarist Russia arrived.

As in many other countries, with the end of the Cold War and the democratisation of international air travel in the late 1980s, New Zealand experienced a sharp rise in the number of persons arriving at its border and spontaneously claiming refugee status. Given New Zealand’s geographical situation as an island in the vast oceanic territory of the South Pacific, arrival by boat is particularly difficult and, typically, spontaneous arrivals have been at airports, although there continue to be cases of commercial ship-jumpers.

In response to the increase in numbers, from the early 1990s onwards, New Zealand’s system of refugee status determination (RSD) was fundamentally overhauled. In this process, it has also developed a rich jurisprudence which draws heavily on international human rights norms and standards. The very first determinations issued by the Refugee Status Appeals Authority (RSAA) – the body established under the revised institutional arrangements for RSD – made no mention of human rights at all. Nevertheless, at an early stage, two events in Canada were crucial in determining the path New Zealand RSD

would take. The first was the publication of Hathaway’s first edition of *The Law of Refugee Status*.\(^5\) The second was the decision of the Supreme Court of Canada in *Canada (Attorney General) v Ward*.\(^6\)

Drawing on these two sources, the RSAA aligned New Zealand RSD with the notion of providing ‘surrogate’ protection of ‘core human rights’.\(^7\) What has taken place in the almost quarter of a century subsequently has been an attempt to develop a cohesive account of both why and how international human rights law can inform the scope of Convention-based protection. The first phase in this development was directed at the issue of why international human rights should be used in RSD, with the second phase being directed at the issue of how international human rights inform RSD.

This chapter charts the evolution of this approach. It examines how international human rights law is used by New Zealand decision-makers to determine the boundaries of protection under the Refugee Convention, and examines challenges in its integration into domestic RSD.

1 **Refugee Status Determination in New Zealand**

For many years, the Refugee Convention was not incorporated into New Zealand domestic law by legislation.\(^8\) Prior to its incorporation, during the 1980s, decisions on refugee status were made jointly by the Ministers of Foreign Affairs and Immigration acting on the recommendation of a committee of officials known as the Inter-Departmental Committee on Refugees (ICOR). However, the ICOR’s procedures, established by the Executive, were eventually found wanting by the High Court.\(^9\) In consequence, in 1990, Cabinet approved new procedures for the determination of applications for refugee status.\(^10\)

The RSD procedure adopted was non-statutory in nature and functioned in law as an expression of prerogative powers of the Executive.\(^11\) The procedures were set out in Terms of Reference issued in March 1991 and provided for a two-tier structure of status determination. While amended Terms of Reference

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\(^6\) *Canada (Attorney General) v Ward* [1993] 2 SCR 689.


\(^8\) The historical background is usefully summarised by the New Zealand High Court in *Singh v Refugee Status Appeals Authority* [1994] NZAR 193, 197–200 per Smellie J.

\(^9\) *Benipal v Minister of Immigration* HC Auckland A878/83, 29 November 1985 per Chilwell J.


\(^11\) *Singh v Refugee Status Appeals Authority* [1994] NZAR 193, 200 per Smellie J.