

# NEW ZEALAND'S APPROACH TO THE INTERNAL PROTECTION ALTERNATIVE IN REFUGEE STATUS DETERMINATIONS

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*The internal relocation principle (IRP), also known as the internal relocation/protection/flight alternative (IRA/IPA/IFA), refers to the principle that refugee status may not be granted to the applicant who can find genuine protection against the well-founded fear of persecution in an alternative area within the applicant's country of origin. Two main analytical frameworks have formed in international practice and academic commentaries to provide interpretative guidance to IRP – the Relevance/Reasonableness framework and the Internal Protection framework.*

*While most State parties to the Convention relating to the Status of Refugees (1951 Convention) adhere to the Relevance/Reasonableness framework, New Zealand is widely regarded as the most important (if not sole) supporter of the Internal Protection framework. New Zealand has adopted the IPA approach which derives from academic commentaries of the Internal Protection framework. Many academic commentators and national courts also equate New Zealand practice with the IPA approach under the Internal Protection framework.*

*This article explores whether and to what extent New Zealand practice of IPA is in line with the discourse system of the Internal Protection framework. It is argued that although the New Zealand Refugee Status Appeals Authority has formally endorsed academic commentaries of the Internal Protection framework in its landmark decisions of Refugee Appeal 71684 (1999) and Refugee Appeal 76044(2008), New Zealand Immigration and Protection Tribunal decisions from 2011 to 2016 reveal that the "everyday" application of IPA is highly similar to the Relevance/Reasonableness framework. The purported clear distinction between the Relevance/Reasonableness framework and the Internal Protection framework is not supported by New Zealand's practice of IPA.*

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## I INTRODUCTION

The internal relocation principle (IRP), more often known as the internal relocation/protection/flight alternative (IRA/IPA/IFA), refers to the principle that refugee status may not be granted to the applicant who can find genuine protection against the well-founded fear of persecution in an alternative area within his country of origin.<sup>1</sup> Although not explicitly spelled out in the 1951 Refugee Convention, this principle emerged in German jurisprudence in the 1980s<sup>2</sup> and has been firmly established in refugee status determinations (RSD) through international practice of more than three decades.<sup>3</sup> Today, it is considered an inherent part of RSD in most State parties to the Convention relating to the Status of Refugees (1951 Convention)<sup>4</sup> and has been incorporated into domestic and regional laws.<sup>5</sup> National authorities, regional courts and treaty bodies have also started to consider IRP in the context of non-refoulement obligations under human rights treaties.<sup>6</sup>

Despite wide acceptance of the concept of internal relocation,<sup>7</sup> there are considerable disagreements on how to interpret and apply IRP in RSD. The simple formulation of internal

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- 1 There have been ongoing debates on the terminology of this principle, and different writers may use different terms for various reasons. To avoid confusion, this article uses IRP to refer to this principle in general. Specific terms (such as IPA) are used when specific legal implications are attached to the choice of term.
  - 2 BN Ghráinne "The Internal Protection Alternative Inquiry and Human Rights Considerations – Irrelevant or Indispensable?" (2015) 27 Intl J Refugee L at 29 and 30; and JC Hathaway and Michelle Foster "Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination" in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 357 at 362.
  - 3 See *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, (2007) 233 CLR 18 at [68]; and Penelope Mathew "The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited" in SS Juss (ed) *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, Farnham, 2013) 189 at 191.
  - 4 Ghráinne, above n 2, at 30. See Convention relating to the Status of Refugees 189 UNTS 150 (opened for signature 28 July 1951, entered into force 22 April 1954).
  - 5 See for example Migration Act 1958 (Australia) s 5J; 8 CFR § 208.13(b)(2)(ii); and Directive 2011/95/EU on standards for the qualification of third-world country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9, art 8 [Recast EC Qualification Directive].
  - 6 CW Wouters *International Legal Standards for the Protection from Refoulement* (Intersentia, Morsel, 2009) at 288–93, 398–9, and 493–6; and Jessica Schultz "The European Court of Human Rights and Internal Relocation: An Unduly Harsh Standard?" in Jean-Pierre Gauci, Mariagiulia Giuffré and Evangelia Tsoardi (eds) *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Brill Nijhoff, Leiden, 2015) 31.
  - 7 See for example *SZATV*, above n 3, at [68]; and *SZFDV v Minister for Immigration* [2007] HCA 41, (2007) 233 CLR 51 at [24] [*SZFDV*].

relocation masks the huge variation among practices,<sup>8</sup> and divergent practices have emerged both within and across jurisdictions.<sup>9</sup> The lack of consensus on even the terminology reflects the significant inconsistency in State practice.<sup>10</sup>

Within the extensive jurisprudence concerning IRP, two main analytical frameworks have formed in refugee law and discourse: the "Relevance/Reasonableness" framework and the "Internal Protection" framework. In this article, the Relevance/Reasonableness framework refers to all the approaches, doctrines and discourse that focus on the reasonableness of internal relocation, and the Internal Protection framework refers to all the approaches, doctrines and discourse that focus on the quality of internal protection upon relocation in terms of human rights standards instead of the standard of reasonableness. Although both frameworks are largely shaped by academic commentaries and United Nations High Commissioner for Refugees (UNHCR) guidelines which are not binding on State parties to the 1951 Convention, they are rather visible in the development of State practice. While the reasonableness test – the essence of the Relevance/Reasonableness framework – has been the "dominant practice"<sup>11</sup> already adopted by Australia,<sup>12</sup> Canada,<sup>13</sup> Norway,<sup>14</sup> the United Kingdom,<sup>15</sup> the United States<sup>16</sup> and the European Union,<sup>17</sup> New Zealand is always considered as the most important (if not sole) supporter of the Internal Protection framework.

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8 Hathaway and Foster, above n 2, at 360.

9 United Nations High Commissioner for Refugees *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* HCR/GIP/03/04 (2003) at [1] [UNHCR Guideline].

10 Jonah Eaton "The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive" (2012) 24 Intl J Refugee L 765 at 766.

11 See JC Hathaway and Michelle Foster *The Law of Refugee Status* (2nd ed, Cambridge University Press, 2014) at 350.

12 *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [1994] 52 FCR 437 at 442; *SZATV*, above n 3, at [18]; and *SZFDV*, above n 7, at [51].

13 *Rasaratnam v Canada (Minister of Employment & Immigration)* [1992] 1 FC 706 at 707 and 710–711; *Thirunavukkarasu v Canada (Minister of Employment & Immigration)* [1994] 1 FC 589 at 598–601; and *Ranganathan v Canada (Minister of Citizenship & Immigration)* [2001] 2 FC 164 at [14]–[15].

14 Immigration Act of 15 May 2008 (Norway), s 28.

15 See *R v Secretary of State for the Home Department and another, ex parte Robinson* [1998] QB 929, [1997] ImmAR 568 (CA) at [18], [20] and [29] [*Robinson*]; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 at [8]; and *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [2].

16 8 CFR § 208.13(b)(3).

17 Recast EC Qualification Directive, above n 5, art 8.

This article aims to look into the New Zealand approach to IPA in RSD by examining its domestic law and jurisprudence. The significance of this study is twofold.

First, features of international refugee law and IRP highlight the significance of in-depth study of State practice. Since there is no international authority entitled to provide conclusive interpretation of the 1951 Convention,<sup>18</sup> the task of determining the Convention's meaning has fallen principally to domestic decision makers.<sup>19</sup> In fact, State practice plays a critical role in initiating and shaping the legal understanding of IRP because this principle is not explicitly spelled out in the Convention<sup>20</sup> and has not always been a factor considered in RSD.<sup>21</sup> Both academic commentaries and UNHCR soft laws have drawn considerably on State practices especially those of common law countries,<sup>22</sup> and two main analytical frameworks have emerged and developed through the interaction between State practices, academic commentaries and UNHCR soft laws.

Second, New Zealand practice is one of the main reasons for the Internal Protection framework to co-exist and compete with the Relevance/Reasonableness framework. The Internal Protection framework was initiated by the Michigan Guidelines on the Internal Protection Alternative (Michigan Guidelines) in April 1999<sup>23</sup> and principally developed by two subsequent academic commentaries co-authored by Professor James Hathaway and Michelle Foster.<sup>24</sup> While most State parties adhere to the Relevance/Reasonableness framework, New Zealand was the first to change its previous jurisprudence to adopt the Internal Protection framework. The New Zealand Refugee Status Appeals Authority (NZRSAA) produced two landmark decisions – *Refugee Appeal 71684*<sup>25</sup> and *Refugee*

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18 Although the Convention provides that disputes relating to its interpretation and application can be referred to the ICJ upon the request of State parties, that mechanism has never been initiated.

19 Hathaway and Foster (*The Law of Refugee Status*), above n 11, at 3.

20 Hugo Storey "The Internal Flight Alternative Test: The Jurisprudence Re-examined" (1998) 10 Intl J Refugee L 499 at 500–501.

21 See Ninette Kelley "Internal Flight/Relocation/Protection Alternative: Is it Reasonable?" (2002) 14 Intl J Refugee L 4.

22 For a critique of common law dominance on international refugee law-making, see CM Bailliet "National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance within the UNHCR Guidelines on International Protection" (2015) 29 Emory Intl L Rev 2059.

23 "First Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative" (1999) 21 Mich J Intl L 134 in James C Hathaway "International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative" (1999) 21 Mich J Intl L 131 [Michigan Guidelines].

24 See the background paper Hathaway and Foster, above n 2, which was submitted to UNHCR's Second Track of the Global Consultations on International Protection in the San Remo expert roundtable of 2001 (San Remo roundtable paper); and "Section 4.3 Internal Protection Alternative" in Hathaway and Foster, above n 11, at 332–361.

25 *Refugee Appeal No 71684/99* [2000] INLR 165 (NZRSAA) [*Refugee Appeal 71684*].

*Appeal 76044*<sup>26</sup> – to incorporate respectively most provisions of the Michigan Guidelines and the main arguments of the San Remo roundtable paper into New Zealand refugee law. Both decisions constitute precedents for the Tribunal and Rodger Haines QC, a co-author of the Michigan Guidelines, was the chairperson for both decisions.<sup>27</sup>

While the Relevance/Reasonableness framework is preferred by most State parties,<sup>28</sup> New Zealand practice and the Internal Protection framework identify with and reinforce each other by New Zealand authorities quoting academic commentaries of the framework and then new commentaries quoting existing New Zealand jurisprudence. National courts and academic writers also use expressions like "Hathaway/New Zealand rule",<sup>29</sup> "Hathaway/New Zealand approach"<sup>30</sup> and "Michigan Guideline/New Zealand approach"<sup>31</sup> to equate New Zealand practice with the Internal Protection framework, and hardly any other State party is identified by commentators as adopting the Internal Protection framework. Therefore, New Zealand practice is key to studying the Internal Protection framework.

There has always been the question of whether the Relevance/Reasonableness framework and the Internal Protection framework are substantively different or just the same thing "by a different name".<sup>32</sup> Academic writings on the Internal Protection framework and New Zealand decisions quoting them claim their approach to be significantly different from the dominant practice, and this claim is examined here by a closer look at the State practice of New Zealand.<sup>33</sup> Part II reviews the two analytical frameworks of IRP with the focus of their purported differences. Parts III to V analyse the interpretation and application of IRP in New Zealand by looking at its historical development,

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26 *Refugee Appeal No 76044* [2008] NZRSAA 80 [*Refugee Appeal 76044*].

27 The list of co-authors of the Michigan Guidelines can be found in Michigan Guidelines, above n 23, at 141.

28 Hathaway and Foster, above n 11, at 350; Mathew, above n 3, at 192; and Maria O'Sullivan "Territorial Protection: Cessation of Refugee Status and Internal Flight Alternative Compared" in SS Juss (ed) *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, Farnham (United Kingdom), 2013) 216.

29 *Januzi*, above n 15, at [13] and [15].

30 *AH(Sudan)*, above n 15, at [150].

31 *Ghráinne*, above n 2, at 38.

32 Massey contends that the "internal protection" approach only constitutes the reasonableness test "by a different name": see H Massey "Reasonableness Rescued? The Michigan Guidelines on the 'Internal Protection Alternative' and UNHCR's Position on 'Relocating Internally as a Reasonable Alternative to Seeking Asylum'" (draft working manuscript, May 2001) at 4 as cited in Hathaway and Foster, above n 2, at 404, n 152.

33 See for example Michigan Guidelines, above n 23, at [23]–[24]; Hathaway and Foster, above n 2, at [381–389]; Hathaway and Foster, above n 11, at 350–361; and *Refugee Appeal 76044*, above n 26, at [132]–[179].

applicable legal standards and actual practice in recent decisions. Part VI conveys the concluding remarks.

## ***II TWO ANALYTICAL FRAMEWORKS IN REVIEW: PINPOINTING THE PURPORTED DIFFERENCES***

The Relevance/Reasonableness framework and the Internal Protection framework are generally perceived as competing theories with distinct differences with respect to the interpretation and application of IRP. This perception is largely formed by the self-identification of the Internal Protection framework as the alternative to rather than an improvement of the Relevance/Reasonableness framework.<sup>34</sup>

This section reviews the two analytical frameworks of IRP by pinpointing their purported differences in two aspects: (1) the relation between IRP and art 1(A)(2) of the 1951 Convention; and (2) the threshold standard of internal relocation. Although both frameworks consist of sub-approaches and sub-doctrines that may have nuanced variation, this author uses two well-known commentaries as the starting point to sketch the outline of the frameworks: the UNHCR *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (UNHCR Guideline) for the Relevance/Reasonableness framework,<sup>35</sup> and Hathaway and Foster's second edition of *The Law of Refugee Status* for the Internal Protection framework.<sup>36</sup>

### ***A What is the Relationship between IRP and Article 1(A)(2) of the 1951 Convention? Holistic View v Exclusive View***

The relation between IRP and art 1(A)(2) has drawn much attention given the increasing application of IRP and the enthusiasm for linking IRP to the text of the 1951 Convention. Article 1(A)(2) defines refugee as a person who, owing to well-founded fear of persecution for enumerated Convention reasons (the persecution clause), is outside their country of origin and is unable or, owing to such fear, is unwilling to avail him or herself of the protection of that country (the protection clause). A frequently discussed issue is whether IRP should be addressed in the persecution clause or in the protection clause.

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34 The Michigan Guidelines initiated the Internal Protection framework by advocating the removal of the reasonableness test – the cornerstone of the Relevance/Reasonableness framework, see Michigan Guidelines, above n 23, at [23]–[24]. Hathaway and Foster unequivocally oppose to the Relevance/Reasonableness in their subsequent academic commentaries; see Hathaway and Foster, above n 2, at 383–389; and Hathaway and Foster, above n 11, at 350–354.

35 UNHCR Guideline, above n 9.

36 Hathaway and Foster, above n 11, at 332–361.

The Relevance/Reasonableness framework has adopted a holistic view that the persecution clause and the protection clause are inherently interrelated as a whole and IRP could be addressed via either or both clauses. In contrast, the Internal Protection framework insists that the protection clause is the exclusive textual home of IRP and addressing IRP in the persecution clause would lead to undesirable consequences.

### *1 The Relevance/Reasonableness framework's holistic view*

As the UNHCR observed in its Guideline issued in July 2003, some States have located IRP in the persecution clause and others in the protection clause, and these practices "are not necessarily contradictory, since the definition comprises one holistic test of interrelated elements".<sup>37</sup> In other words, as long as the issue of internal relocation is properly addressed, it is not a significant concern of the Relevance/Reasonableness framework which part of art 1(A)(2) is specified as the textual home of IRP.

This holistic view alters UNHCR's previous position in its 1999 Position Paper<sup>38</sup> in which the Relevance/Reasonableness framework was initiated and IRP was conceptualised in the "well-founded fear" component of the persecution clause.<sup>39</sup> This shift of view may partly serve as a response to the Internal Protection framework and certainly reflects the variety of views on the interpretation of key concepts, such as persecution and protection, in art 1(A)(2).

Virtually every word of the core phrase of the refugee definition has been subject to interpretative dispute,<sup>40</sup> and the concepts of persecution and protection in art 1(A)(2) are no exception. There has been much debate on whether the word protection in the protection clause refers to internal/domestic protection or external/diplomatic protection.<sup>41</sup> While textual and historical analysis do suggest that the intended meaning of the term at the time of drafting and adoption was external protection,<sup>42</sup> some States have shown a willingness to reinterpret the term as internal protection in order to adapt the

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37 UNHCR Guideline, above n 9, at [3].

38 United Nations High Commissioner for Refugees *UNHCR Position Paper on Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-Called "Internal Flight Alternative" or "Relocation Principle")* (1999) [UNHCR Position Paper].

39 At [9].

40 DJ Steinbock "The Refugee Definition as Law: Issues of Interpretation" in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, Cambridge, 1999) 14.

41 For arguments for diplomatic protection interpretation, see Antonio Fortin "The Meaning of 'Protection' in the Refugee Definition" (2000) 12 Intl J Refugee L 548. For counterarguments, see Hathaway and Foster, above n 2, at 373–381.

42 United Nations High Commissioner for Refugees *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (2001) at [35].

Convention to modern needs.<sup>43</sup> However, for States that adhere to the external protection interpretation of the protection clause, IRP would be solely linked to the persecution clause.<sup>44</sup>

## 2 *The Internal Protection framework's exclusive view*

As advocates of the Internal Protection framework, Hathaway and Foster argue that the protection clause in art 1(A)(2) is the exclusive and correct textual home and conceptual basis of IRP.<sup>45</sup> They justify this exclusive view on the relation between IRP and art 1(A)(2) mainly by arguing why it is wrong to address IRP via the persecution clause. Hathaway and Foster's arguments against locating IRP in the persecution clause are as follows.

First, as a linguistic matter, it is awkward and illogical to say a person does not have a well-founded fear of persecution in a country where he or she faces a real risk of persecution at location A yet can find meaningful protection at location B in that same country.<sup>46</sup>

Second, as a matter of legal application, linking IRP to the persecution clause is said to have three significant problems:<sup>47</sup>

- (1) it can lead to the requirement to establish "country-wide persecution" which may impose an unduly high onus on the applicant;
- (2) it may encourage decision makers to move directly to the question of internal relocation without first assessing the claim of feared persecution in the original area; and
- (3) it can allow decision makers to require the applicant to physically hide, suppress, or conceal his fundamental beliefs and opinions, or to be "discreet" as long as well-founded fear in the original area can be negated in the place of relocation.

## 3 *Evaluation*

This author contends that the holistic view of the Relevance/Reasonableness framework is to be preferred over the exclusive view of the Internal Protection framework for three reasons. First, different options for the location of IRP would lead to the same legal consequence – in other words, the applicant would not be covered by the scope of application *ratione personae* of art 1(A)(2)<sup>48</sup> –

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43 See *The International Protection of Refugees*, above n 43, at [36]; and *Januzi*, above n 15, at [66].

44 See *SZATV*, above n 3, at [53]–[61].

45 Hathaway and Foster's arguments have been cited with approval by NZRSAA in *Refugee Appeal 76044*, above n 26, at [117]–[120].

46 Hathaway and Foster, above n 2, at 366–367; and Hathaway and Foster, above n 11, at 336–337.

47 Hathaway and Foster, above n 2, at 368–372; and Hathaway and Foster, above n 11, at 336–339.

48 Andreas Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, Oxford, 2011) at 446.

and the Convention itself, which grants State parties a significant amount of flexibility in the way they choose to determine refugee status, can hardly be interpreted as containing a clear preference.<sup>49</sup> Second, both external protection and internal protection interpretation of the protection clause can find support in the rules of treaty interpretation,<sup>50</sup> and State parties are entitled to interpret the Convention as they wish so long as it does not defeat the object and purpose of the Convention. Third and most importantly, the legality and legitimacy of IRP comes directly from the surrogacy of international refugee protection,<sup>51</sup> which governs art 1(A)(2) as a whole.<sup>52</sup> It was only after the legitimacy of IRP was established by the surrogacy of international refugee protection that art 1(A)(2) started to be interpreted as including the inquiry of internal relocation. The consideration of internal relocation was not derived from the very same text of art 1(A)(2) before the 1980s, therefore it would be incorrect to insist any component of art 1(A)(2) is the inherent textual home of IRP.

It is also necessary to provide some brief arguments to counter Hathaway and Foster's attack on locating IRP in the persecution clause. As for the linguistic awkwardness and the problem of countrywide persecution, it is not unusual in the realm of law to endow a concept with special meanings by the means of legal fiction.<sup>53</sup> Therefore, there is no reason why IRP cannot be construed as requiring "a well-founded fear of persecution" to be countrywide, since the countrywide criteria only requires that no relocation alternative of sufficient protection exists in the country of origin instead of requiring the applicant to establish that everywhere across the country is unsafe from persecution.<sup>54</sup>

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49 At 448.

50 While external protection is the meaning that the parties to the Convention intended to give at the time of drafting and adoption, the internal protection interpretation may qualify as subsequent practice in the application of the Treaty. Both factors contain normative weight in treaty interpretation and neither is of a higher hierarchy than the other. See Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31 [VCLT].

51 See Reinhard Marx "The Criteria of Applying the 'Internal Flight Alternative' Test in National Refugee Status Determination Procedures" (2002) 14 Intl J Refugee L 182; Hathaway and Foster, above n 11, at 332; and *Rasaratnam*, above n 13, at 711.

52 See *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (HL) at 497:

The surrogacy principle which underlies the issue of state protection is at the root of the whole matter. There is no inconsistency between the separation of the definition into two different tests [of the persecution clause and the protection clause] and the fact that each test is founded upon the same principle.

53 It is in accordance with the rules of treaty interpretation that special meaning can be attached to a legal term if it is established by parties' intent or subsequent agreement or practice. See VCLT, above n 50, art 31.

54 See *Mazariegos v Office of US Attorney General* 241 F 3d 1320 at 1327; 8 CFR § 208.13(b)(2)(ii); Migration Act 1958 (Cth), s 5J(2); and Storey, above n 20, at 524.

Hathaway and Foster seem to link the enumerated misinterpretation and misapplication of the 1951 Convention in State practice directly to the approach that locates IRP in the persecution clause when they speak of the danger of "[pre-empting] the analysis of well-founded fear in the first region"<sup>55</sup> and "[requiring the] applicant to physically hide, suppress, or conceal his or her fundamental beliefs and opinions, or to be 'discreet'".<sup>56</sup> However, the link is non-existent. For example, the NZRSAA in *Refugee Appeal 76044* explicitly identifies four cases in the United Kingdom and Australia – *Januzi*, *AH (Sudan)*, *SZATV* and *SZFDV* – that locate IRP in the persecution clause.<sup>57</sup> In all four cases the applicants' claim on the fear of persecution in the original area is carefully assessed before moving to the issue of internal relocation.<sup>58</sup> This demonstrates that locating IRP in the persecution clause does not necessarily "[encourage] decision-makers to pre-empt the analysis of well-founded fear in the first region by moving directly to the question of an internal flight alternative".<sup>59</sup> By the same token, the location of IRP is also not to blame for the wrong interpretation that the 1951 Convention requires the applicant to hide, suppress, or conceal fundamental beliefs or act discreetly to avoid the risk of persecution. National courts and tribunals make such mistakes due to their misunderstanding of the refugee definition as a whole. The question of which part of art 1(A)(2) is regarded as the textual home of IRP is not relevant, because even if the protection clause is identified as the textual home of IRP, the same mistake will not be avoided, but rather it will appear in the formulation that applicants should hide, suppress, or conceal fundamental beliefs or act discreetly in order to avail themselves of the protection of the country of origin.

### ***B What is the Threshold Standard of Internal Relocation? The Reasonableness Test vs Human Rights Standards***

As for the threshold of IRP, the Relevance/Reasonableness framework places the reasonableness of internal relocation at its core. In contrast, the Internal Protection framework proposes that the focus of inquiry should be the quality of internal protection measured by human rights standards instead of the standard of reasonableness.

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55 Hathaway and Foster, above n 2, at 370.

56 Hathaway and Foster, above n 11, at 338. See also Part II A 2 above.

57 *Refugee Appeal 76044*, above n 26, at [99].

58 Conclusions of findings in lower courts and tribunals are provided in *Januzi*, above n 15, at [1]; *AH(Sudan)*, above n 15, at [1]; *SZATV*, above n 3, at [6]; and *SZFDV*, above n 7, at [9].

59 *Refugee Appeal 76044*, above n 26, at [119], citing Hathaway and Foster, above n 2, at 370.

### 1 *The reasonableness test as the core of the Relevance/Reasonableness framework*

The reasonableness test, which originally derives from the UNHCR Handbook first issued in 1979,<sup>60</sup> has been "readily and widely accepted" in international practice and remains the core of the Relevance/Reasonableness framework.<sup>61</sup> According to the UNHCR Guideline, the assessment of whether or not there is a relocation possibility requires two main sets of analyses: the relevance analysis and the reasonableness analysis.<sup>62</sup>

The relevance analysis requires that:<sup>63</sup>

- the area of relocation is practically, safely, and legally accessible to the applicant; and
- the applicant is not exposed to risk of original or any new form of persecution or other serious harm in the area of relocation.

The reasonableness analysis requires that:<sup>64</sup>

- it would be reasonable to expect the applicant to relocate, in the sense that he or she can lead a relatively normal life without facing undue hardship upon relocation.

In short, the relevance analysis requires the safety of relocation, focusing on the risk of serious harm. The reasonableness analysis goes beyond the consideration of safety to require more, because technically safe parts in the country of origin which are uninhabitable – desert areas or mountainous terrain being straightforward examples – will not satisfy the reasonableness analysis.<sup>65</sup> In some State practice, the reasonableness of internal relocation is conceptualised as an overarching test to include both the relevance analysis and the reasonableness analysis.<sup>66</sup> This author sees it most appropriate to

60 United Nations High Commissioner for Refugees *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* HCR/IP/4/ENG/REV.1 (1992) [UNHCR Handbook]. The Handbook provides at [91] that:

...a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.

61 *Januzi*, above n 15, at [8].

62 UNHCR Guideline, above n 9, at [7].

63 At [7].

64 At [7].

65 *Robinson*, above n 15, at [10].

66 See 8 CFR § 208.13(b)(3); and Lauren Sanders "Finding a Reasonable Alternative: An Integrated Approach to Refugee Law, Relocation and the Internal Flight Alternative" (Research Paper No 09-05, ANU College of Law, November 2008) at 8.

conceptualise the reasonableness test to include both the relevance analysis and the reasonableness analysis, because "what is reasonable pervades all aspects of [IRP]"<sup>67</sup> and it can hardly be reasonable to expect the applicant to relocate to somewhere that is not safe for him or her. The dichotomy of the relevance analysis and the reasonableness analysis is only to provide a more clarified structure to assess the reasonableness of internal relocation, and this author uses 'the reasonableness test' as the overarching threshold to include both analyses.

The reasonableness test lies at the heart of the Relevance/Reasonableness framework as the legal threshold of IRP. Although views are still divided in international practice on how the reasonableness test should be applied,<sup>68</sup> significant consensus has been reached regarding the nature of the test. As the ground-breaking Canadian case of *Thirunavukkarasu* first articulated in 1993, the reasonableness test is a flexible test and an objective test.<sup>69</sup>

The flexible nature of the reasonableness test means the reasonableness of internal relocation cannot be decided in a mechanistic or dogmatic fashion - one declaring for all persons in a particular category that there is or is not a viable relocation alternative.<sup>70</sup> Instead, the decision should be made by a holistic and individualised assessment, taking into account all relevant factors of the asylum seeker and his or her country of origin in a cumulative manner, to determine whether in all the circumstances it would be reasonable to expect him or her to relocate.<sup>71</sup> Factors to be considered in relation to the asylum seeker may include his or her age, sex, health, family situation and relationship, ethnic and cultural group, political and social links and compatibility, social and other vulnerability, language abilities, educational/professional and work background and any past persecution;<sup>72</sup> the country of origin might be evaluated by its safety and security, human rights situation and socio-economic conditions.<sup>73</sup> The flexible and holistic nature of the reasonableness test also means that the

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67 Sanders, above n 66, at 8. In the UNHCR Guideline, the consideration of reasonableness is also visible in the relevance analysis; see UNHCR Guideline, above n 9, at [10] and [18]. The House of Lords also implicitly incorporates the examination of serious harm into the reasonableness analysis by breaking down IRP into two prongs: the risk of persecution, and the reasonableness of relocation; see *AH (Sudan)*, above n 15, at [2].

68 *Januzi*, above n 15, at [8].

69 *Thirunavukkarasu*, above n 13, at 598.

70 Hugo Storey "From Nowhere to Somewhere: An Evaluation of the UNHCR 2nd Track Global Consultations on Internal Protection: San Remo 8–10 September 2001 Expert Roundtable on the IPA/IFA/IFA Alternative" [2002] IARLJ Conference 359 at 364.

71 *Rasaratnam*, above n 13, at 712; *Thirunavukkarasu*, above n 13, at 599; *Robinson*, above n 15, at [18]; *Januzi*, above n 15, at [21]; *AH (Sudan)*, above n 15, at [5] and [27]–[28]; UNHCR Position Paper, above n 38, at [15]; and UNHCR Guideline, above n 9, at [22]–[30].

72 UNHCR Position Paper, above n 38, at [16].

73 UNHCR Guideline, above n 9, at [27]–[30].

relevance and weight of those factors to the reasonableness of internal relocation cannot be presumed, but rather "depends on all the circumstances of the case and [is] not necessarily determinative".<sup>74</sup>

The flexibility of the reasonableness test does not mean it is a subjective or arbitrary test. Instead, it asks whether it is "objectively reasonable" or, put in another legal term, not "unduly harsh" to expect the claimant to relocate.<sup>75</sup> The unduly harsh interpretation of the reasonableness test, whose vitality is generally credited to Lord Carswell,<sup>76</sup> has also been appraised by the United Kingdom Court of Appeal as "particularly helpful" and fairly reflecting "whether a person claiming asylum can reasonably be expected to move to a particular part of the country".<sup>77</sup> The objective nature of the reasonableness test requires a claimant to provide "actual and concrete evidence" of undue hardship for him or her to travel or relocate to the proposed relocation alternative.<sup>78</sup> The evidential requirement of the reasonableness test is parallel to that of the well-foundedness of feared persecution.

## 2 *The Internal Protection framework: Replacing the reasonableness test with the human rights standards*

The Internal Protection framework criticises the reasonableness test for lacking a textual basis in the 1951 Convention<sup>79</sup> and being an inherently vague and subjective standard<sup>80</sup> that invites an "unfocused and open-ended inquiry which is not anchored in the language or object of the Convention".<sup>81</sup> Hathaway and Foster propose an alternative analytical framework to replace the Relevance/Reasonableness framework. Their framework contains four requirements:<sup>82</sup>

- accessibility;
- negation of original risk (of persecution);
- no new risk of being persecuted or of refoulement; and
- minimum affirmative State protection.

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74 8 CFR § 208.13(b)(3).

75 *Thirunavukkarasu*, above n 13, at 591 and 599–600.

76 *Januzi*, above n 15, at [64].

77 *Robinson*, above n 15, at [29].

78 *Ranganathan*, above n 13, at [15].

79 *Refugee Appeal 71684*, above n 25, at [68]; *Refugee Appeal 76044*, above n 26, at [135]; Hathaway and Foster, above n 2, at 263 and 383; and Hathaway and Foster, above n 11, at 333.

80 *Refugee Appeal 76044*, above n 26, at [135]; Kelley, above n 21, at 24; and Hathaway and Foster, above n 2, at 385.

81 Hathaway and Foster, above n 2, at 387. See also Michigan Guidelines, above n 23, at [23]–[24].

82 See Hathaway and Foster, above n 11, at 342–361.

The first three requirements share no substantial difference from the relevance analysis of the Relevance/Reasonableness framework, therefore the purported difference could only lie with the requirement of "minimum affirmative State protection".<sup>83</sup>

The Internal Protection framework suggests that an objective and unified criteria – the standards of human rights – should be employed to replace the alleged subjective test of reasonableness. In this way, the minimum affirmative State protection should be measured by a checklist of human rights. There are generally three approaches as to which human rights should be included in the checklist for IRP:

- the comprehensive human rights approach: all human rights that are binding on the country of origin should be included in the checklist;
- the basic human rights approach: only "basic human rights" should be included in the checklist; and
- the 1951 Convention rights approach: only rights contained in arts 2–34 of the 1951 Convention should be included in the checklist.

The 1951 Convention rights approach was initiated by the Michigan Guidelines and subsequently developed through Hathaway and Foster's commentaries. Since both the Michigan Guidelines and Hathaway and Foster's commentaries insist on the term "Internal Protection Alternative" (IPA), sometimes IPA is used to refer to the 1951 Convention rights approach specifically.<sup>84</sup> To avoid confusion, in this article the term IPA refers specifically to the 1951 Convention rights approach (the IPA approach/framework) and New Zealand practice that claims to follow this approach (New Zealand practice of IPA<sup>85</sup>). Today, the IPA approach is certainly the most influential doctrine under the Internal Protection framework of IRP.

### 3 Evaluation

It should be emphasised that the Internal Protection framework is distinguished from the Relevance/Reasonableness framework only if the test of minimum affirmative State protection is measured by the checklist of human rights in a strict, literal and exclusive sense. In other words,

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83 See Hathaway and Foster, above n 11, at 342, where the authors also acknowledge that:

... it is only in relation to the fourth [requirement], and in particular whether it is appropriately framed as requiring affirmative protection or, rather, assessed according to a standard of 'reasonableness' that significant disagreement remains.

84 In contrast, some commentators use IPA to refer to internal relocation principle generally (as the way this author uses the term IRP) instead of pointing to any specific doctrine of IRP.

85 New Zealand claimed the adoption of the IPA approach in *Refugee Appeal 71684* in 1999; see *Refugee Appeal 71684*, above n 25. For clarity, this article still uses the term IRP (instead of IPA) to discuss New Zealand practice prior to *Refugee Appeal 71684*.

human rights standards must be the one and only determinative factor for the assessment of minimum affirmative protection. This means the violation of a single right in the checklist would render minimum affirmative protection unavailable. The distinction between the Internal Protection framework and the Relevance/Reasonableness framework will cease to exist if human rights standards operate as "inspiration"<sup>86</sup> instead of strict legal criteria or only constitute one of the many factors that decision makers should consider in determining whether minimum affirmative protection is provided in the place of relocation. This is because consideration of human rights has always been a part of the reasonableness test.<sup>87</sup>

Applied as the exclusive determinative parameter, each of the three checklists of human rights suffers from theoretical and practical challenges. The comprehensive human rights approach is problematic for being "unwieldy and potentially too broad and over-inclusive" because the 1951 Convention is not designed to protect individuals from all forms of human rights violation.<sup>88</sup> The basic human rights approach is problematic because the particular standard of "basic norms of civil, political and socio-economic rights" has no clear legal basis and there is no consensus on what constitutes those "basic human rights".<sup>89</sup> The lack of consensus on the scope of basic human rights may dangerously skew the analysis towards a narrow subset such as non-derogable civil and political rights.<sup>90</sup> The IPA approach is problematic in three respects. First, the protection in the country of origin – the lack of which leads to refugeehood – is mistakenly confused with the protection a refugee would enjoy in the country of asylum as stipulated in arts 2–34.<sup>91</sup> Second, by linking IPA with arts 2–34, IPA is perceived as a de facto exclusion clause,<sup>92</sup> which is contrary to the rationale that IPA

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86 See Hathaway and Foster, above n 2, at 409. Hathaway and Foster once suggested that the IPA approach embraced by the Michigan Guidelines:

... does not suggest a literal application of Articles 2–33 in considering internal protection, but rather that decision makers seek inspiration from the kind of interests protected by these Articles as a way of defining an endogenous notion of affirmative protection in the refugee context.

NZRSAA has emphasised this interpretation in *Refugee Appeal 76044*, above n 26, at [142] and [176]. This perception of human rights standards as inspiration undermines the very foundation upon which the Internal Protection framework can claim to be different to the Relevance/Reasonableness framework. As Storey previously points out, "a rights-based approach must be based on rights, not on inspirations"; see Storey, above n 70, at 380.

87 Respect for human rights and socio-economic conditions viewed from a human rights perspective are included in the reasonableness test; see UNHCR Guideline, above n 9, at [28]–[29].

88 Hathaway and Foster, above n 11, at 354.

89 See Ghráinne, above n 2, at 35.

90 Hathaway and Foster, above n 11, at 355.

91 See Ghráinne, above n 2, at 39.

92 See *Refugee Appeal 76044*, above n 26, at [140]; and *Refugee Appeal 71684*, above n 25, at [61].

disqualifies the applicant from being a refugee and therefore there is no refugee status to be excluded from in the first place. Third, most rights set out in arts 2–34 are inherently defined in comparative terms.<sup>93</sup> Some provisions require State parties to accord to refugees the same treatment accorded to resident foreigners instead of nationals.<sup>94</sup> Applying those provisions means, in terms of certain rights, the applicant – a citizen of the country of origin in most cases – is only entitled to treatment equivalent to that of foreigners rather than that of his or her fellow citizens in his or her own country.<sup>95</sup> Such an implication is clearly at odds with the principle of non-discrimination in international human rights law and should be dismissed for being "manifestly absurd or unreasonable".<sup>96</sup>

In addition to defects particular to each of the three approaches, the overarching presumption underlying all three approaches of the Internal Protection framework that human rights standards can provide objective and unified criteria of IRP also needs scrutinising.<sup>97</sup> Even if there were consensus on an exhaustive checklist of human rights for IRP, the application of those rights would hardly be unified especially the socio-economic rights. The burgeoning economic, social and cultural rights jurisprudence across the world has exposed variation in how courts have interpreted those human rights, which scholars regard as unsurprising.<sup>98</sup> We also cannot disregard the practical difficulty of measuring human rights standards in another jurisdiction. While the difficulty in measuring socio-economic rights is "especially apparent",<sup>99</sup> measuring civil and political rights is not always an easy task either. Even if the same checklist of human rights is employed, it would not be surprising if authorities of RSD across jurisdictions or even within the same jurisdiction adopted different interpretations of the same rights and hence produce inconsistent results. Therefore, it is hard to see how the idea, that the standard of human rights is inherently a more objective and desirable benchmark than the reasonableness test, is more than wishful thinking.

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93 Storey, above n 70, at 377.

94 See for example the Convention relating to the Status of Refugees, above n 4, arts 7(1), 13, 15, 17, 18, 19(1), 21, 22(2) and 26.

95 See Kelley, above n 21, at 35.

96 VCLT, above n 50, art 32(b).

97 The most fundamental presumption and strongest argument for employing human rights standards to interpret international refugee law is that human rights are objective, uniform, and universal standards; see Michelle Foster *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge, 2007) at 36–40.

98 See for example Paul Hunt and others "Implementation of Economic, Social and Cultural Rights" in Scott Sheeran and Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law* (Routledge, Abingdon-on-Thames (UK), 2013) 553.

99 Ghráinne, above n 2, at 35.

### **III HISTORICAL DEVELOPMENT OF THE INTERNAL RELOCATION PRINCIPLE IN THE NEW ZEALAND LEGAL SYSTEM**

The statutory basis of RSD in New Zealand is the Immigration Act 2009. According to s 129(1), "a person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention".<sup>100</sup>

While the Immigration Act 2009 does not explicitly spell out, let alone elaborate on, the concept of internal relocation, decisions of courts and tribunals have played an important role in shaping the New Zealand interpretation of IRP.

The historical development of IRP in New Zealand courts and tribunals can be roughly divided into three chronological stages by three landmark decisions: *Butler v Attorney-General (Butler)* (13 October 1997),<sup>101</sup> *Refugee Appeal 71684* (29 October 1999) and *Refugee Appeal 76044* (11 September 2008):

- Stage I: pre-*Butler* stage;
- Stage II: stage between *Butler* and *Refugee Appeal 76044*;
- Stage III: post-*Refugee Appeal 76044* stage.

#### **A The Pre-Butler Stage**

The NZRSAA in *Refugee Appeal 71684* provided a summary of New Zealand jurisprudence on IRP from the pre-*Butler* stage.<sup>102</sup> Although it is not necessary to go beyond the scope of analysis in *Refugee Appeal 71684* for the purpose of this article, some key aspects of the jurisprudence from the pre-*Butler* stage need highlighting.

First, as the NZRSAA notes, the development of New Zealand jurisprudence must be seen against the historical background that "as late as 1990 ... little jurisprudence had emerged outside Germany and the Netherlands" and since then "an exceptional application" of IRP proliferated "under different names and not always on a principled basis".<sup>103</sup>

Second, as for terminology, IFA was rejected because "to pose any question postulated on an 'internal flight alternative' is to ask the wrong question" and "the question is one of protection and is

<sup>100</sup> Immigration Act 2009, s 129(1).

<sup>101</sup> *Butler v Attorney-General* [1999] NZAR 205 (CA) [*Butler*].

<sup>102</sup> *Refugee Appeal 71684*, above n 25, at [36]–[46].

<sup>103</sup> *Refugee Appeal 71684*, above n 25, at [36].

to be approached fairly and squarely in terms of the refugee definition".<sup>104</sup> 'Relocation' was the term used in the pre-*Butler* stage.<sup>105</sup>

Third, relocation was formulated into two tests: (1) can the individual genuinely access domestic protection which is meaningful; and (2) is it reasonable, in all the circumstances, to expect the individual to relocate.<sup>106</sup> Both tests need to be satisfied to render internal relocation applicable.<sup>107</sup>

## ***B From Butler to Refugee Appeals 71684 and 76044***

Before *Butler*, two tests need to be satisfied for IRP to apply: (1) the meaningful domestic protection test (that meaningful domestic protection is genuinely accessible in the place of relocation); and (2) the reasonableness test (that it is reasonable, in all the circumstances, to expect the individual to relocate). However, it was not clear what 'meaningful domestic protection' really means and what the relationship between the meaningful domestic protection test and the reasonableness test is. Three landmark decisions – *Butler*, *Refugee Appeal 71684* and *Refugee Appeal 76044* – answered both questions and clarified the standard of IRP in New Zealand.

### ***I Butler***

As for the standard of "meaningful domestic protection", the Court of Appeal in *Butler* quoted Hathaway's *The Law of Refugee Status* to stress that what is required is "provision of basic norms of civil, political and socio-economic rights".<sup>108</sup> The Court also quoted with approval the Canadian decision of *Thirunavukkarasu* to elaborate on the meaningful protection test, although the quoted sentence in *Thirunavukkarasu* was meant to illustrate the objective nature of the reasonableness test.<sup>109</sup> *Butler* did not specify the relationship between the two test, but emphasised that the reasonableness test is "not a standalone test"<sup>110</sup> and "must be tied back to the definition of 'refugee' set out in the Convention and to the Convention's purposes of original protection or surrogate protection for the avoidance of persecution".<sup>111</sup> This author speculates that the main if not sole reason why the Court touched upon the reasonableness test was to clarify that refugee status should not be

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<sup>104</sup> *Refugee Appeal No 11/91 Re S NZRSAA 11/91*, 5 September 1991 [*Refuge Appeal 11/91*].

<sup>105</sup> *Refugee Appeal No 135/92 Re RS NZRSAA 135/92*, 18 June 1993 [*Refugee Appeal 135/92*].

<sup>106</sup> *Refugee Appeal 135/92*, above n 105. The first question derives from James C Hathaway *The Law of Refugee Status* (1st ed, Butterworths, 1991); and the second question from UNHCR Handbook, above n 60, at [91].

<sup>107</sup> *Refugee Appeal No. 523/92 Re RS NZRSAA 523/92*, 17 March 1995.

<sup>108</sup> *Butler*, above n 101, at 218.

<sup>109</sup> At [7] quoting *Thirunavukkarasu*, above n 13, at 592: "It is not a matter of a claimant's convenience or of the attractiveness of the place of relocation."

<sup>110</sup> *Butler*, above n 101, at [6].

<sup>111</sup> At [7].

granted in an overly generous or purely humanitarian manner.<sup>112</sup> It is hard to see how the Court in delivering the decision of *Butler* had intended to rule on the relationship between the meaningful domestic protection test and the reasonableness test, let alone to abandon the reasonableness test.

## 2 *Refugee Appeal 71684*

The *Refugee Appeal 71684* decision in 1999 marked the crucial transformation of New Zealand jurisprudence on IRP: the NZRSAA abandoned the reasonableness test and adopted the Internal Protection framework by embracing most provisions of the Michigan Guidelines. In this landmark decision, NZRSAA claimed to be required to re-examine the jurisprudence in light of the guidance given by the *Butler* decision.<sup>113</sup> Although it was acknowledged that *Butler* did not require the reasonableness test to be removed, NZRSAA still read *Butler* as preparing New Zealand to adopt the "more principled approach" to IRP that is "suggested by the Michigan Guidelines".<sup>114</sup> Despite the clarification that the Michigan Guidelines by itself is not a source of New Zealand law,<sup>115</sup> most provisions were adopted because "the Michigan Guidelines properly reflect and summarize ... the principles to be applied in New Zealand" and "may therefore be properly used to inform the New Zealand law".<sup>116</sup> Meanwhile, the old term 'relocation' used in the pre-*Butler* stage was replaced by the term 'internal protection alternative' (IPA).<sup>117</sup>

## 3 *Refugee Appeal 76044*

After the publication of Hathaway and Foster's San Remo roundtable paper which greatly developed the Internal Protection framework and landmark cases in other common law countries expressing disagreement with the New Zealand interpretation of IRP in *Refugee Appeal 71684*, in 2008 the NZRSAA further elaborated on its interpretation of IPA in *Refugee Appeal 76044*. *Refugee Appeal 76044* reinforced the approach adopted in *71684*, and provided lengthy arguments for two specific points: first, the textual home of IPA is the protection clause instead of the persecution clause

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112 See *Butler*, above n 101, at [6] and [7]: According to the Court, the reasonableness test is tied to refugee status, rather than being a standalone test to authorise "an unconfined inquiry into all the social, economic and political circumstances of the application including the circumstances of members of the family". The Court also stressed that the reasonableness test "is sharply different from the humanitarian tests" in the Immigration Act, and at the time of the decision of the RSAA, New Zealand had not become bound by the Convention on the Rights of the Child.

113 *Refugee Appeal 71684*, above n 25, at [50].

114 At [64].

115 At [66].

116 At [65]–[66]. The NZRSAA only named one provision, paragraph 14, of the Michigan Guidelines that was not applicable in the New Zealand context given its contradiction with the Immigration Act 1987.

117 *Refugee Appeal 71684*, above n 25, at [67].

in the refugee definition,<sup>118</sup> and second, meaningful protection in the place of relocation requires "provision of basic norms of civil, political and socio-economic rights".<sup>119</sup>

### ***C The Post-Refugee Appeal 76044 Stage***

The framework ascertained in *Refugee Appeal 71684* and *Refugee Appeal 76044* sets the legal standards of IPA to be applied by the NZRSAA and its successor, the Immigration and Protection Tribunal (NZIPT) in the post-*Refugee Appeal 76044* stage.<sup>120</sup> Four precedent decisions are found on the website of the NZIPT<sup>121</sup> under the topic "Internal Protection (IPA)": *Refugee Appeal 523*,<sup>122</sup> *Refugee Appeal 71684*, *Refugee Appeal 76044*, and *AC (Russia)*.<sup>123</sup>

The pre-*Butler* interpretation of IRP in *Refugee Appeal 523* is no longer applicable, and *AC (Russia)* mostly dealt with the applicability of IPA to protected persons under the International Covenant on Civil and Political Rights and left the framework in *Refugee Appeal 76044* almost intact for refugee status.<sup>124</sup> Therefore, the applicable legal standards of IRP for RSD in New Zealand are those articulated in *Refugee Appeal 71684* and *Refugee Appeal 76044*.

## ***IV THE NEW ZEALAND INTERPRETATION OF THE INTERNAL PROTECTION ALTERNATIVE: APPLICABLE LEGAL STANDARDS***

This section analyses the legal standards of IRP in *Refugee Appeal 71684* and *Refugee Appeal 76044* and explores their relationship with the two analytical frameworks of IRP. To maintain consistent terminology with New Zealand current jurisprudence, the term "Internal Protection Alternative" (IPA) is used.

### ***A IPA and art 1(A)(2) of 1951 Convention***

*Refugee Appeal 76044* has made it utterly clear that "[b]oth in principle and in law" the NZRSAA is bound to conceptualise IPA within the protection clause instead of the persecution clause.<sup>125</sup>

<sup>118</sup> *Refugee Appeal 76044*, above n 26, at [101]–[131].

<sup>119</sup> *Refugee Appeal 76044*, above n 26, at [139]–[179].

<sup>120</sup> The Immigration and Protection Tribunal, established under the Immigration Act 2009, replaced the Residence Review Board, Removal Review Authority, Refugee Status Appeals Authority and Deportation Review Tribunal. See Immigration Act 2009, s 217.

<sup>121</sup> For the NZIPT database, see "Refugee/Protection Decisions" Ministry of Justice <forms.justice.govt.nz>.

<sup>122</sup> *Refugee Appeal No 523/92* NZRSAA 523/92, 17 March 1995.

<sup>123</sup> *AC (Russia)* [2012] NZIPT 800151.

<sup>124</sup> At [95]–[96].

<sup>125</sup> *Refugee Appeal 76044*, above n 26, at [130].

The Tribunal devoted a section entitled "The Textual Foundation for The Internal Protection Alternative" containing 31 paragraphs to justifying its approach.<sup>126</sup> From the outset, the persecution clause was referred to as the "well-founded" element or the element of risk while the protection clause was summarised as the "words 'protection of that country'" or the element of protection.<sup>127</sup> The NZRSAA cited the arguments made by Hathaway and Foster in their San Remo roundtable paper to help in identifying the protection clause in art 1(A)(2) as the exclusive textual home of IPA.<sup>128</sup>

As the Tribunal stated in the "conclusion as to textual foundation for the IPA":<sup>129</sup>

Both in principle and in law the Authority is bound to approach the "internal flight or relocation alternative" as an issue of protection, not one of well-foundedness. Once a refugee claimant has established a well-founded fear of being persecuted for a Convention reason, recognition of that person as a Convention refugee can only be withheld if that person can genuinely access domestic protection which is meaningful.

It seems that art 1(A)(2) is applied in a two-step formula: first, the persecution clause requires the applicant to establish a well-founded fear of persecution for a Convention reason in one area of the country of origin; and second, if the first requirement is satisfied, the protection clause further requires that the applicant does not have a viable IPA. The strict division of the two steps responds to the division of the two clauses.

However, such a strict dichotomy between the persecution clause and the protection clause might, to some extent, be in contradiction of New Zealand jurisprudence on the concept of persecution. As the Tribunal pointed out in an earlier paragraph of *Refugee Appeal 76044*:<sup>130</sup>

The Authority has for many years interpreted the "being persecuted" element of the refugee definition as the sustained or systemic violation of basic human rights *demonstrative of a failure of state protection*.

The Tribunal also cited a previous decision<sup>131</sup> and went on to conclude that the concept of persecution "must be interpreted within the wider framework of the failure of state protection".<sup>132</sup> Since "well-founded fear of persecution = risk of serious harm + failure of state protection",<sup>133</sup> state

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126 At [101]–[131].

127 At [101].

128 At [117], [119] and [127].

129 At [130].

130 At [61] (emphasis added).

131 At [62] citing *Refugee Appeal No 74665/03* [2004] NZRSAA 74665 at [51].

132 *Refugee Appeal 76044*, above n 26, at [62].

133 At [62] quoting with approval *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL) at 653.

protection constitutes an indispensable element to persecution. Since persecution requires failure of state protection instead of merely a *regional* failure of state protection, it is hard to see how the issue of IPA – whose gist is to evaluate state protection in the place of relocation – is not relevant to the persecution clause. The inevitable corollary of defining persecution as violation of basic human rights demonstrative of a failure of state protection is to intertwine the persecution clause and the protection clause and make both relevant to IPA.

It is interesting to note that the NZIPT in *AC (Russia)* reinterpreted *Refugee Appeal 76044* as holding that "the IPA inquiry spoke primarily to the availability of protection in the home country and not the risk of harm (*although the two were, to some extent, intertwined considerations*)".<sup>134</sup>

Since the statement in italics is rather unlikely to reconcile with *Refugee Appeal 76044*'s rather unequivocal pronouncement that IPA is not an issue of the persecution clause, they should be seen as an updated view of New Zealand jurisprudence which implicitly acknowledges that IPA is relevant to both the protection clause and the persecution clause. And New Zealand chooses to deal with IPA primarily with the protection clause, as it is free to do so given the significant flexibility that the 1951 Convention grants to parties to adopt their own law and procedure for refugee status determinations.<sup>135</sup>

### ***B Four-Step Framework of IPA***

In the New Zealand system, the purpose of IPA is to ask whether "the refugee claimant [can] genuinely access domestic protection which is meaningful".<sup>136</sup> *Refugee Appeal 76044* elaborated a four-step normative framework to require that:<sup>137</sup>

- (1) the proposed IPA is accessible to the individual, requiring that the access be practical, safe and legal;
- (2) there is no risk of being persecuted for a Convention reason;
- (3) there are no new risks of persecution, other forms of serious harm or refoulement; and
- (4) basic norms of civil, political and socio-economic rights will be provided by the State. In this inquiry reference is to be made to the human rights standards suggested by the Refugee Convention itself.

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<sup>134</sup> *AC (Russia)*, above n 123, at [92] (emphasis added).

<sup>135</sup> See Zimmermann, above n 48, at 446.

<sup>136</sup> *Refugee Appeal 76044*, above n 26, at [130].

<sup>137</sup> At [178].

This four-step framework is identical to that proposed by Hathaway and Foster in their San Remo roundtable paper.<sup>138</sup>

It is necessary to compare this four-step framework with the previous three-step framework set in *71684*. According to *71684*, the following three requirements need satisfying to render IPA applicable:<sup>139</sup>

- (1) the real chance of persecution for a Convention reason must be eliminated;
- (2) there is no real chance of persecution, or of other particularly serious harms of the kind that might give rise to the risk of return to the place of origin; and
- (3) local conditions must meet the standard of protection prescribed by the Refugee Convention.

This three-step framework is identical to the three requirements proposed in the Michigan Guidelines.<sup>140</sup>

The four-step framework in *Refugee Appeal 71684* and the three-step framework in *Refugee Appeal 76044* have no substantial difference. Steps (2) to (4) in *Refugee Appeal 76044* clearly mirror steps (1) to (3) in *Refugee Appeal 71684*. Although *Refugee Appeal 71684* did not specify the requirement of "practical, safe and legal access to IPA", such a requirement is presumed as access to the proposed place of relocation is the precondition for further assessment of whether meaningful protection – the elimination of persecution, serious harm and refoulement, and fulfilment of minimum protection prescribed by the Refugee Convention – is available in the location. The following parts will refer to the four-step framework in *Refugee Appeal 76044* as the currently applicable legal standard of IPA in New Zealand.

### ***C New Zealand Approach and the Internal Protection Framework***

At first glance, New Zealand appears to be a wholehearted supporter of the Internal Protection framework. The landmark decisions in New Zealand followed when the Internal Protection framework emerged and developed. On 29 October 1999, about six months after the Internal Protection framework was initiated by the Michigan Guidelines, the NZRSAA changed its previous approach and adopted most of the provisions of the Michigan Guideline in *Refugee Appeal 71684*. After the publication of the San Remo roundtable paper which further elaborated and modified the Internal Protection framework, the NZRSAA embraced such elaborations and modifications in

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138 For the four-step framework in Hathaway and Foster's roundtable paper, see Hathaway and Foster, above n 2, at 389–411.

139 See *Refugee Appeal 71684*, above n 25, at [73].

140 Michigan Guidelines, above n 23, at [15]–[22].

*Refugee Appeal 76044*.<sup>141</sup> It is worth noting that Rodger Haines QC, the chairperson on the NZRSAA for both *Refugee Appeal 71684* and *Refugee Appeal 76044*, is also a co-author of the Michigan Guidelines.

On the surface, New Zealand's interpretation of IPA is in line with the Internal Protection framework's two main propositions: to locate IPA in the protection clause and to replace the reasonableness test with human rights standards. As for which human rights standards are relevant to IPA, New Zealand has adopted the "1951 Convention rights approach" which refers to rights in arts 2 to 33 of the Convention.<sup>142</sup> Although it is clear that it is the 1951 Convention rights approach instead of the "basic human rights approach" that is adopted, the rather confusing label of "basic norms of civil, political and socio-economic rights" is also simultaneously used.<sup>143</sup>

A closer look at New Zealand jurisprudence, however, reveals that the purportedly clear distinction between the Internal Protection framework and the Relevance/Reasonableness framework is blurred to some extent. As for the textual basis of IPA in art 1(A)(2), the NZITP acknowledged that the persecution clause and the protection clause are to some extent intertwined.<sup>144</sup> This can be read as an implicit acceptance of the Relevance/Reasonableness framework's holistic view on the relation between IRP and art 1(A)(2), especially given the NZIPT's wording that IPA relates primarily – instead of exclusively – to the protection clause.

As for the human rights standards versus the reasonableness test, although the human rights standards in arts 2 to 33 of the Convention are chosen as the benchmark for IPA, it is also clarified in *Refugee Appeal 76044* that:<sup>145</sup>

... this approach *does not suggest a literal application* of Articles 2 to 33 in considering internal protection, but rather that decision-makers *seek inspiration* from the kind of interests protected by these articles as a way of defining an endogenous notion of affirmative protection in the refugee context.

As clarified in Part II of this article, this nonliteral and flexible application of the human rights standards will dissolve the very foundation upon which the human rights approach can claim

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141 See *Refugee Appeal 76044*, above n 26, at [82] and [117].

142 *Refugee Appeal 76044*, above n 26, at [139]–[140]. See also *Refugee Appeal 71684*, above n 25, at [57].

143 According to the NZRSAA, "meaningful national state protection which can be genuinely accessed" requires the provision of basic norms of civil, political and socio-economic rights and those norms are to be found in arts 2 to 33 of the Convention relating to the Status of Refugees, above n 4. See *Refugee Appeal 71684*, above n 25, at [47]; and *Refugee Appeal 76044*, above n 26, at [139]. This might be seen as an endeavor of the NZRSAA to reconcile its jurisprudence with the Court of Appeal's decision on *Butler*.

144 *AC (Russia)*, above n 123, at [92].

145 *Refugee Appeal 76044*, above n 26, at [176] (emphasis added).

difference from the reasonableness test.<sup>146</sup> The NZRSAA also seems to have an ambiguous take on the relation between its IPA approach and the reasonableness test. While dismissing the reasonableness test for "prone to arbitrariness and subjective interpretation" and involving "an unfocused and open-ended inquiry",<sup>147</sup> the NZRSAA also acknowledged that if the tests in the four-step framework of IPA are satisfied "it necessarily follows that it would be 'reasonable' to expect the claimant to avail him or herself of that protection",<sup>148</sup> which seems to imply that the IPA approach and the reasonableness test will yield the same result. It is therefore necessary to further examine the application of those legal standards to better understand the nature and characteristics of the New Zealand approach.

## V THE APPLICATION OF LEGAL STANDARDS: A STUDY OF THE NZIPT DECISIONS

By searching the exact term 'internal protection alternative' in the online database of the New Zealand Ministry of Justice,<sup>149</sup> 43 NZIPT decisions are recorded as at November 2016.<sup>150</sup> The following analysis is based principally on these decisions.

### A The Place of IPA

In the 43 decisions, the NZIPT normally carries out RSD by asking three questions: (1) objectively, on the facts as found, does the applicant face a real chance of serious harm in the original locality; (2) is there a Convention reason for the serious harm; and (3) is there IPA for the applicant?

<sup>146</sup> See Part II B 2 above.

<sup>147</sup> *Refugee Appeal 76044*, above n 26, at [174].

<sup>148</sup> *Refugee Appeal 76044*, above n 26, at [135].

<sup>149</sup> See "Refugee/Protection Decisions", above n 121.

<sup>150</sup> *AZ (South Africa)* [2016] NZIPT 800922-25; *CB (Pakistan)* [2016] NZIPT 800877-878; *AN (Malaysia)* [2016] NZIPT 800888; *EV (Fiji)* [2016] NZIPT 800841-843; *AK (Brazil)* [2016] NZIPT 800834-35; *AL (Turkey)* [2015] NZIPT 800779; *AY (South Africa)* [2015] NZIPT 800763; *BV (Pakistan)* [2015] NZIPT 800820-21; *AP (Afghanistan)* [2015] NZIPT 800676; *BL (India)* [2015] NZIPT 800795; *AB (Slovakia)* *AF (Czech Republic)* [2015] NZIPT 800734-738; *CI (Sri Lanka)* [2015] NZIPT 800723; *AC (Lebanon)* [2015] NZIPT 800688; *AM (Afghanistan)* [2015] NZIPT 800570; *AL (Afghanistan)* [2015] NZIPT 800725; *AE (Czech Republic)* [2014] NZIPT 800591-800596 & 800794; *BK (Pakistan)* [2014] NZIPT 800727-729; *AV (India)* [2014] NZIPT 800498; *AN (Bangladesh)* [2014] NZIPT 800542; *AH (Afghanistan)* [2014] NZIPT 800531; *AY (Pakistan)* [2014] NZIPT 800348; *AW (Pakistan)* [2014] NZIPT 800460; *AS (South Africa)* [2013] NZIPT 800511; *AG (Iraq)* [2013] NZIPT 800540; *AC (Uganda)* [2013] NZIPT 800397; *AT (Pakistan)* [2013] NZIPT 800409-411; *AR (Pakistan)* [2013] NZIPT 800307-309; *AH (Egypt)* [2013] NZIPT 800268-272; *AN (Pakistan)* [2013] NZIPT 800422-426; *AC (Colombia)* [2012] NZIPT 800279-280; *AR (China)* [2012] NZIPT 800315-317; *AI (Pakistan)* [2012] NZIPT 800374; *AJ (Zimbabwe)* [2012] NZIPT 800262; *AC (Russia)*, above n 123; *AE (Afghanistan)* [2012] NZIPT 800171; *AE (Egypt)* [2012] NZIPT 800226; *AK (South Africa)* [2012] NZIPT 800174-176; *AC (Czech Republic)* [2012] NZIPT 800183-186; *AC (Hungary)* [2012] NZIPT 800143; *AC (Malaysia)* [2011] NZIPT 800126; *AC (Afghanistan)* [2011] NZIPT 800161; *AB (Afghanistan)* [2011] NZIPT 800017; and *AF (Sri Lanka)* [2011] NZIPT 800031.

To simplify the terminology, this author refers to them respectively as the tests of 'real chance of serious harm', 'Convention reason', and 'IPA'.

NZIPT first considers question (1) to deal with the risk of serious harm that the applicant faces in his original locality, and the test of IPA would follow, should question (1) be answered in the affirmative, to determine if meaningful protection can be obtained by internal relocation.

There seems to be no fixed order between the test for a Convention reason and that of IPA. Since refugee status is only granted when all three tests are satisfied, the NZIPT treats the three tests in a holistic manner. In some decisions, lack of Convention reason results in the NZIPT not further considering IPA.<sup>151</sup> Likewise, the finding of IPA would render it unnecessary to examine the test of Convention reason.<sup>152</sup>

### ***B Application of the Four-Step Framework***

The majority of NZIPT decisions – 28 out of the 43 decisions – explicitly refer to the framework in *Refugee Appeal 76044* and/or *Refugee Appeal 71684* when it is necessary to examine the test of IPA: six decisions refer solely to *Refugee Appeal 71684* for its three-step framework, 15 decisions refer solely to *Refugee Appeal 76044* for its four-step framework, and seven decisions refer to both *Refugee Appeal 71684* and *Refugee Appeal 76044*.<sup>153</sup> There are also ten decisions<sup>154</sup> in which the issue of IPA does not arise due to reasons including the lack of Convention reason<sup>155</sup> or the serious harm being nationwide,<sup>156</sup> and five decisions in which the test of IPA is examined without a clear statement of the applicable legal framework.<sup>157</sup>

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151 See for example *BL (India)*, above n 150, at [32]; *AC (Russia)*, above n 123, at [78]; and *EV (Fiji)*, above n 150, at [54].

152 See for example *BV (Pakistan)*, above n 150, at [91]; *AC (Hungary)*, above n 150; and *AC (Malaysia)*, above n 150.

153 When the decisions refer to both *Refugee Appeal 71684* and *Refugee Appeal 76044*, it is the four-step framework in *Refugee Appeal 76044* that is stated as the applicable standard.

154 *AC (Uganda)*, above n 150; *AY (South Africa)*, above n 150; *BL (India)*, above n 150; *CI (Sri Lanka)*, above n 150; *AH (Egypt)*, above n 150; *AJ (Zimbabwe)*, above n 150; *AC (Russia)*, above n 123; *AE (Egypt)*, above n 150; *AN (Malaysia)*, above n 150; and *AE (Egypt)*, above n 150.

155 See *BL (India)*, above n 150, at [32]; *CI (Sri Lanka)*, above n 150, at [36]; *AC (Russia)*, above n 123, at [80]; and *EV (Fiji)*, above n 150, at [54].

156 See *AC (Uganda)*, above n 150, at [59]; *AJ (Zimbabwe)*, above n 150, at [47]; *AE (Egypt)*, above n 150, at [49]; and *AN (Malaysia)*, above n 150, at [68].

157 *AC (Lebanon)*, above n 150; *AL (Afghanistan)*, above n 150; *AN (Pakistan)*, above n 150; *AE (Afghanistan)*, above n 150; and *AC (Malaysia)*, above n 150.

Since the three-step framework in *Refugee Appeal 71684* and the four-step framework in *Refugee Appeal 76044* are identical, the application of IPA in the NZIPT decisions is analysed by the four-step framework in *Refugee Appeal 76044*, as outlined above.<sup>158</sup>

### *1 Access to the place of relocation*

Not all decisions have a clear-cut statement on step one of access. Many decisions simply start their analysis of IPA by proposing a likely place of relocation.<sup>159</sup> When a clear statement on step one is provided, the NZIPT in most cases declares the result with little further explanation. For example, in *AM (Afghanistan)* the NZIPT confirmed the access requirement by saying that "there is no reason why the appellant would be unable to return to the capital, Kabul" and "he has an Afghani passport and entry would be practical, safe and legal".<sup>160</sup> Similar statements include that the place of relocation "is safely and legally accessible to the appellant",<sup>161</sup> that "there is no evidence before the Tribunal", that the applicant's return to the place of relocation "is, at this time, unfeasible, impractical or unsafe",<sup>162</sup> or that "it is feasible for the appellant to be transported safely and legally" to the place of relocation from New Zealand".<sup>163</sup> In *AR (Pakistan)* and *AT (Pakistan)*, the NZIPT also gave a direct negative answer to step one without much elaboration.<sup>164</sup> In some cases, the Tribunal may give an ambiguous statement such as the applicant may safely access the place of relocation by flight.<sup>165</sup>

It is understandable that such little consideration is normally given to step one. For the analysis of IPA, step one only serves as a point of departure. The access to a proposed place of relocation can even be presumed just so that steps two to four can be examined. After all, it is the level and contents of domestic protection – which is the core of steps two to four – that is decisive for IPA. Although step one plays a relatively insignificant role in the whole analysis of IPA, on some occasions the Tribunal has provided some explanation for step one, which includes, for example, consideration of

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158 *Refugee Appeal 76044*, above n 26, at [178]; and see part IV B above.

159 See for example *AI (Pakistan)*, above n 150, at [57]; and *BV (Pakistan)* above n 150, at [73]. Both decisions propose Karachi.

160 *AM (Afghanistan)*, above n 150, at [46].

161 *AN (Bangladesh)*, above n 150, at [41]. See also *CB (Pakistan)*, above n 150, at [76].

162 *AH (Afghanistan)*, above n 150, at [55].

163 *AY (Pakistan)*, above n 150, at [61].

164 *AR (Pakistan)*, above n 150, at [129]; and *AT (Pakistan)*, above n 150, at [64].

165 *AB (Afghanistan)*, above n 150, at [53].

the freedom of movement,<sup>166</sup> whether the applicant holds a passport or can be issued one,<sup>167</sup> and the relocation experiences of similar individuals to the applicant.<sup>168</sup>

## 2 *Elimination of the risk of original persecution*

Step two, which asks whether the risk of original persecution is localised or nationwide, is normally carefully examined in NZIPT decisions given facts and information concerning the applicant and the source of serious harm. The nature of the perpetrator of original persecution is of great importance to step two.

When the perpetrator operates in a strictly localised sense, the applicant normally can avoid being persecuted by relocating internally. When the perpetrator has the potential capacity to operate nationwide, the core issue before the Tribunal becomes whether there is a real risk of the applicant's post-relocation whereabouts being known to the perpetrator in the fullness of time.<sup>169</sup> The NZIPT exercises a high degree of caution in reaching a conclusion on step two when the perpetrator has a connection to the authority (for example the police)<sup>170</sup> or the applicant may easily expose his or her whereabouts by registration requirements,<sup>171</sup> proximity of the place of relocation<sup>172</sup> or "myriad capillaries of kinship or village-based networks".<sup>173</sup>

## 3 *Nonexistence of new risk of persecution, serious harm or refoulement*

Among the 43 decisions, step three is touched upon in 14 decisions. The risk of serious harm – a requirement for both the likelihood and gravity of the harm – lies at the core of step three, as the Tribunal said that:<sup>174</sup>

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166 See for example *AK (Brazil)*, above n 150, at [93].

167 See for example *AH (Afghanistan)*, above n 150, at [55].

168 See for example *AF (Sri Lanka)*, above n 150, at [77].

169 See for example *AL (Turkey)*, above n 150, at [79]; *AL (Afghanistan)*, above n 150, at [71]; *AH (Afghanistan)*, above n 150, at [56]–[57]; *AV (India)*, above n 150, at [70]; *AN (Pakistan)*, above n 150, at [65]; and *AK (South Africa)*, above n 150, at [63]–[64].

170 See for example *AE (Czech Republic)*, above n 150, at [54]; and *AV (India)*, above n 150, at [69].

171 See for example *AL (Turkey)*, above n 150, at [79]; *AK (Brazil)*, above n 150, at [96]; and *AB (Slovakia) AF (Czech Republic)*, above n 150, at [70].

172 See for example *AL (Afghanistan)*, above n 150, at [71].

173 *AN (Pakistan)*, above n 150, at [65]; and *CB (Pakistan)*, above n 150, at [78].

174 *BV (Pakistan)*, above n 150, at [86]. See also *AI (Pakistan)*, above n 150, at [66].

... challenges in resettlement will no doubt present themselves, however, such routine challenges are met by all persons who relocate and are not grounds for assuming that the applicant would return to a region where she is at risk of serious harm.

The Tribunal also stated that it is the risk of serious harm that can lead to new risks of persecution or refoulement.<sup>175</sup>

In the context of armed conflict, civil war and sectarian or ethical confrontation, applicants may be likely to be subject to serious harm for the same reasons that accounted for the original persecution or by simply appearing accidentally in the occurrence of generalised violence.<sup>176</sup> Step three will not be satisfied if by relocation "the appellant may simply be trading one risk of serious harm for another in the internal protection alternative location".<sup>177</sup>

NZIPT decisions concerning refoulement, however, form a rather novel approach. The focus of the Tribunal seems to be more on the likelihood of the applicant returning to the original locality than an assessment based on serious harm. In *AL (Turkey)*, the applicant's "precarious state of psychological health" led the Tribunal to reason that "the applicant would likely find living outside his family support network a struggle" and to conclude that "he would be compelled to seek the sanctuary of his family and thus be drawn back to the area where he would face a well-founded fear of being persecuted".<sup>178</sup> In *AY (Pakistan)*, the applicant's original locality was Quetta while the proposed IPA was Karachi. The Tribunal considered the fact that the applicant's mother still lived in Quetta and upon relocation "he would feel a sense of obligation to help his mother, and feel compelled to return there" which would require the applicant to travel between Karachi and Quetta and to return to Quetta where he was at risk of persecution.<sup>179</sup> In *AP (Afghanistan)* and *AM (Afghanistan)*, after considering the widespread unemployment in Afghanistan and the fact that the applicants had no particular skills "over and above the experience developed within the business" of their fathers,<sup>180</sup>

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175 See for example *AC (Colombia)*, above n 150, at [55].

176 See for example *AC (Lebanon)*, above n 150, at [55]; *AN (Bangladesh)*, above n 150, at [42]; and *AH (Afghanistan)*, above n 150, at [58].

177 *AC (Lebanon)*, above n 150, at [55].

178 *AL (Turkey)*, above n 150, at [80].

179 *AY (Pakistan)*, above n 150, at [71]. In this decision, the Tribunal already found step two not to be satisfied before examining step three.

180 *AP (Afghanistan)*, above n 150, at [51]–[52]. See also *AM (Afghanistan)*, above n 150, at [51]–[52].

the Tribunal referred to the International Covenant on Economic, Social and Cultural Rights<sup>181</sup> to reason that:<sup>182</sup>

... his ability to meet his own basic needs, including adequate food, clothing and accommodation in terms of Article 11(1) of the *International Covenant on Economic and Social Rights* would be severely compromised.

The Tribunal went on to conclude that it was likely that the applicant "would effectively be forced to return" to live with his family where the original risk of persecution occurred.<sup>183</sup> In *AT (Pakistan)* and *AR (Pakistan)*, the applicants were Pakistani women without male support and the Tribunal pronounced that they would not be able to support themselves which, in all likelihood, would result in their return to the original locality.<sup>184</sup> These decisions reveal that the critical question before the Tribunal seems to be whether the applicant is likely to return to the original locality after internal relocation; the question is pretty much equal to the reasonableness test which looks beyond rather than focusing on serious harm.<sup>185</sup>

#### 4 *Provision of basic norms of civil, political, and socio-economic rights as prescribed by arts 2 to 33 of the 1951 Convention*

Step four – the provision of the human rights standards in arts 2 to 33 of the 1951 Convention as the benchmark for IPA – is the test most significant for New Zealand to claim that its jurisprudence is under the Internal Protection framework. However, rather surprisingly, the examination of step four only arises in a few decisions: four out of the 43 decisions. The low frequency of step four being examined is understandable to the extent that it is not necessary to apply step four when the case has already failed to satisfy the test of steps one, two or three.

It is useful to look into how step four is applied in the four decisions. In three of the decisions, there is only one paragraph of reasoning for each applicant under the section of step four entitled: "Do local conditions in the proposed site of internal protection meet the standard of protection prescribed by the Refugee Convention?" The reasoning is reproduced in full as follows.

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181 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

182 Identical phrasing is found in *AP (Afghanistan)*, above n 150, at [52]; and *AM (Afghanistan)*, above n 150, at [52].

183 *AP (Afghanistan)*, above n 150, at [52]; and *AM (Afghanistan)*, above n 150, at [52].

184 *AT (Pakistan)*, above n 150, at [70]; and *AR (Pakistan)*, above n 150, at [129].

185 In the Relevance/Reasonableness framework, the relevance test deals with serious harm and the reasonableness test looks beyond serious harm.

*BV (Pakistan)*:<sup>186</sup>

As a Pakistani national, the mother will have the benefit of access to the same basic norms of civil, political and socio-economic rights which have allowed other citizens, and Pashtuns, in Karachi to generally prosper. At the very least, she will have available to her the minimal standard of protection prescribed by the Refugee Convention itself.

...

As a Pakistani national, the son will have the benefit of access to the same basic norms of civil, political and socio-economic rights which have allowed other citizens, and Pashtuns, in Karachi to generally prosper. At the very least, he will have available to him the minimal standard of protection prescribed by the Refugee Convention itself.

*AI (Pakistan)*:<sup>187</sup>

As a Pakistani national, the appellant will have the benefit of access to the same basic norms of civil, political and socio-economic rights which have allowed other Pashtuns in Karachi to generally prosper. At the very least, he will have available to him the minimal standard of protection prescribed by the Refugee Convention itself.

*AC (Hungary)*:<sup>188</sup>

If living away from Z town, including in a city other than Y city, the appellant would still be able to access the same social entitlements as she has done in the past. While the appellant has experienced discrimination in finding employment she has always managed to find some casual work, either cleaning houses or in agricultural labouring work. The socio-economic position of Hungarian Roma is generally low, but she will not be deprived of the basic rights accorded to refugees under the Refugee Convention.

The above paragraphs include very little elaboration on the human rights situation in the country of origin, let alone point out the rights in which article of the 1951 Convention are or are not provided to the applicant. Instead, it seems that the conclusion on step four is made in a holistic manner based on all factors concerning the applicant and his or her country of origin which are contained in previous parts of the decision. In the landmark decision of *Refugee Appeal 71684*, the NZRSAA also concluded on step four with only one paragraph and clarified that the conclusion was made "in the light of the evidence discussed under the previous sub-heading".<sup>189</sup> The other NZIPT decision *AB (Afghanistan)*

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186 *BV (Pakistan)*, above n 150, at [89] and [105].

187 *AI (Pakistan)*, above n 150, at [68].

188 *AC (Hungary)*, above n 150, at [59].

189 *Refugee Appeal 71684*, above n 25, at [79]

in which step four was implicitly examined may further illustrate the Tribunal's holistic approach to IPA.

In *AB (Afghanistan)*, the NZIPT provided a two-page six-paragraph analysis for IPA without distinguishing each step.<sup>190</sup> The reasoning started with the citation of the *UNHCR Eligibility Guidelines for Assessing the International Protection Need of Asylum-Seekers from Afghanistan*, stating the indispensable need of family/community/tribal ties for survival in Afghanistan especially its rural areas,<sup>191</sup> then pointed out that the applicant had no family support, resources or property in Afghanistan as he had been living outside Afghanistan for over a decade and had no current ties to persons or groups there.<sup>192</sup> The Tribunal went on to cite various sources to indicate that the protection that most internally displaced persons (IDPs) in Afghanistan receive does not reach the level of basic norms of civil, political and socio-economic rights.<sup>193</sup> In the end, the Tribunal concluded that:<sup>194</sup>

Given the security, political and economic climate in Afghanistan, paired with the appellant's lack of any family or tribal support or resources, the Tribunal considers there to be a real likelihood that he will end up in an IDP camp if returned to Afghanistan. In no way does this provide meaningful protection to him.

It is clear that the Tribunal viewed the issue of IPA as a whole and perceived its role as to decide the availability of IPA by considering all relevant factors in a holistic manner. Human rights is a factor to be considered, but not the sole and ultimate benchmark for IPA.

## **VI CONCLUDING REMARKS**

The study of the NZIPT decisions should leave the impression that the application of IPA in most NZIPT decisions is not as different from the Relevance/Reasonableness framework as is claimed by academic writings on IPA and the New Zealand landmark decisions of *Refugee Appeal 76044* and *Refugee Appeal 71684*. This Part concludes that the New Zealand approach is more similar to than different from the dominant practice in relation to the reasonableness test, by reassessing the role of the analytical framework for IPA in New Zealand practice.

The analytical framework for IPA has significant implications on both the structure and threshold of RSD. As a structural matter, it has been argued that the relation between IRP and art 1(A)(2), or as national courts put it the "textual bases/foundations" of internal relocation,<sup>195</sup> is significant for the

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190 *AB (Afghanistan)*, above n 150, at [54]–[59].

191 At [54] citing United Nations High Commissioner for Refugees *UNHCR Eligibility Guidelines for Assessing the International Protection Need of Asylum- Seekers from Afghanistan* HCR/EG/AFG/10/04 (2010).

192 *AB (Afghanistan)*, above n 150, at [55].

193 At [56]–[58].

194 At [59].

195 *SZATV*, above n 3, at 34; and *Refugee Appeal 76044*, above n 26, at [101]–[131].

structure of RSD. Hathaway and Foster argue that linking IRP to the persecution clause may encourage decision-makers to pre-empt the analysis of well-founded fear in the original locality by moving directly to the question of internal relocation.<sup>196</sup> As a threshold matter, it has been argued that the reasonableness test should be replaced by human rights standards since reasonableness is "inherently subjective"<sup>197</sup> and "prone to arbitrariness" in its application.<sup>198</sup>

The following concluding remarks will show that the significance of the analytical framework of IPA in both the structure and threshold of RSD in New Zealand is overstated.

### ***A Structural Aspect***

In the landmark decision of *Refugee Appeal 76044*, the NZRSAA invested many pages to clarifying that in New Zealand refugee law IRP is exclusively linked to the protection clause of the refugee definition and to argue why this is the right approach.<sup>199</sup> As the Tribunal stated:<sup>200</sup>

... once a refugee claimant has established a well-founded fear of being persecuted for a Convention reason, recognition of that person as a Convention refugee can only be withheld if that person can genuinely access domestic protection which is meaningful.

It follows that in RSD the Tribunal should first assess the persecution clause (well-founded fear of being persecuted for a Convention reason in the original locality), and then move to the protection clause to assess IPA.

As has been analysed above,<sup>201</sup> the dichotomy between the persecution clause and the protection clause can hardly be found in NZIPT decisions. Rather, NZIPT decisions break down RSD into three issues:

- (1) real chance of serious harm;
- (2) Convention reason; and
- (3) IPA.

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196 Hathaway and Foster, above n 2, at 370; and Hathaway and Foster, above n 11, at 339.

197 Hathaway and Foster, above n 11, at 353.

198 *Refugee Appeal 76044*, above n 26, at [174].

199 At [101]–[131].

200 At [130].

201 See Part V A above.

When issue three is involved in RSD, issue one would normally only deal with the chance of serious harm in the original locality,<sup>202</sup> and the chance of serious harm in other parts of the country of origin would be examined under issue three.<sup>203</sup> Therefore, the more accurate name for issue one in decisions that include IPA analysis should be 'a real chance of serious harm in the original locality'.

Using *AC (Colombia)* as an example, in assessing refugee claims the NZIPT respectively reasoned under the section titles "Real chance of serious harm",<sup>204</sup> "Is there a Convention reason for the persecution faced by the applicant?",<sup>205</sup> and "Internal protection alternative".<sup>206</sup> These three sections apparently correspond to issues one to three respectively. There were two applicants in *AC (Colombia)*: the son and the mother. In assessing the mother's refugee claim, the Tribunal concluded there is "no real chance of the mother suffering serious harm"<sup>207</sup> and therefore declined the refugee claim by the mother without examining issues two or three. In assessing the son's refugee claim, the Tribunal concluded that there was "a real chance of being persecuted for the purposes of the Refugee Convention" for issue one,<sup>208</sup> found the Convention reason of membership of a particular social group for issue two,<sup>209</sup> and then declined the refugee claim under issue three by clarifying that "while there exists a real chance of the son suffering serious harm in his neighbourhood in Medellin, it does not follow that he faces a real chance of serious harm in all parts of Colombia".<sup>210</sup> In the NZIPT decisions, the three issues are put in juxtaposition despite the analytical framework of IPA's dichotomy of the persecution clause and the protection clause which would require issues one and two to be put together as a whole in contrast with issue three. In fact, some NZIPT decisions analyse RSD with the order of issues as one, two and three,<sup>211</sup> while some other NZIPT decisions address the

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202 See for example *AK (Brazil)*, above n 150, at [90]; *AL (Turkey)*, above n 150, at [74]; *AP (Afghanistan)*, above n 150, at [48]; *BL (India)*, above n 150, at [26]; *AC (Lebanon)*, above n 150, at [51]; *AL (Afghanistan)*, above n 150, at [64]; *AV (India)*, above n 150, at [61]; *AN (Bangladesh)*, above n 150, at [29]; *AH (Afghanistan)*, above n 150, at [40]; and *AC (Colombia)*, above n 150, at [51].

203 The chance of serious harm in other parts of the country of origin is normally examined in the second and third steps in the four-step framework of IPA established by *Refugee Appeal 76044*, above n 26.

204 *AC (Colombia)*, above n 150, at [46]–[49] and [59]–[61].

205 At [50].

206 At [51]–[57].

207 At [60].

208 At [49].

209 At [50].

210 At [51].

211 See for example *AW (Pakistan)*, above n 150; *BK (Pakistan)*, above n 150; *AY (Pakistan)*, above n 150; *AH (Afghanistan)*, above n 150; *AN (Bangladesh)*, above n 150; and *AV (India)*, above n 150.

issues in the order one, three and then two.<sup>212</sup> The Tribunal treats the assessment of refugee claims in a holistic manner when the negative finding on any issue alone can lead to declining a refugee claim and render it unnecessary to proceed to examine the issue or issues that follow.

### ***B Threshold Aspect***

In both landmark decisions of *Refugee Appeal 71684* and *Refugee Appeal 76044*, the reasonableness test was deemed to be problematic<sup>213</sup> and therefore replaced by the human rights standards in arts 2 to 33 of the Refugee Convention as the threshold for internal relocation.<sup>214</sup> Ambiguity seems to be the biggest criticism of the reasonableness test. In *Refugee Appeal 76044*, the NZRSAA cited academic commentaries that "the term 'reasonableness' is vague and open to vastly divergent subjective interpretation" and added that "this inherent lack of analytical clarity produces wide inconsistency between jurisdictions".<sup>215</sup>

The human rights standards in arts 2 to 33 of the Refugee Convention are asserted to be the legal threshold with greater analytical clarity. But the way in which step four of the IPA framework – protection of basic norms of civil, political, and socio-economic rights as prescribed by arts 2 to 33 of the 1951 Convention – is examined in New Zealand does not show much analytical clarity.

Step four, upon which *Refugee Appeal 71684* and *Refugee Appeal 76044* claim difference from the reasonableness test, is only examined in a very small portion of State practice – four out of 43 NZIPT decisions. Even when step four is examined, the NZIPT tends to treat the "minimum level of civil, political and socio-economic rights"<sup>216</sup> as a whole without specific analysis of the implementation of identified rights in arts 2 to 33 of the Refugee Convention. The way step four is applied in New Zealand – making a holistic assessment of all relevant factors based on the specific circumstances of the applicant and his or her country of origin – does not present much difference from the application of the reasonableness test. This author argues that in New Zealand practice the assessment of the provision of basic norms of civil, political, and socio-economic rights as prescribed by arts 2 to 33 of the 1951 Convention in essence constitutes the reasonableness test by a different name.

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212 See for example *AP (Afghanistan)*, above n 150; *AB (Slovakia) AF (Czech Republic)*, above n 150; *AM (Afghanistan)*, above n 150; *AE (Czech Republic)*, above n 150; *AS (South Africa)*, above n 150; *AB (Afghanistan)*, above n 150; and *AC (Afghanistan)*, above n 150.

213 *Refugee Appeal 71684*, above n 25, at [68]–[70]; and *Refugee Appeal 76044*, above n 26, at [136]–[138].

214 *Refugee Appeal 71684*, above n 25, at [68]–[73]; and *Refugee Appeal 76044*, above n 26, at [136]–[140].

215 *Refugee Appeal 76044*, above n 26, at [136].

216 At [186].

In addition, as has been discussed above,<sup>217</sup> the NZIPT's analysis of refoulement in step three also appears to look beyond the risk of serious harm – the threshold that the analytical framework of IPA establishes – to examine further if it is likely, or in other words reasonable to expect, that the applicant goes back to his or her original locality where he or she would face a real chance of serious harm.

### ***C Conclusion***

By examining the State practice of New Zealand, this article shows the discrepancy between the New Zealand approach to IPA in RSD and the analytical framework of IPA in academic writings. Although academic commentaries tend to construe the Internal Protection framework as the opposing discourse system to the Relevance/Reasonableness framework and the landmark NZRSAA decisions of *Refugee Appeal 71684* and *Refugee Appeal 76044* have formally adopted the IPA doctrine, a closer look at the NZIPT decisions from 2011 to 2016 reveals that the everyday application of IPA in New Zealand is more similar to than different from the Relevance/Reasonableness framework.

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<sup>217</sup> See Part V B 3 above.