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Immigration Law Series: Making Good Use of Useful International Conventions

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Auckland District Law Society Inc

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INTRODUCTION

[1] Picture, if you will, the Court of Appeal in Molesworth Street, Wellington in November 1993. It is hearing a late-afternoon application for an interim injunction to restrain the removal of an overstayer. Counsel for the applicant – eight years out of law school (so, wise enough to know what he is doing but young enough not to be daunted by the slim prospects) – is seeking to persuade the Court that the recent birth of his client's child raises human rights issues which have not been considered by the Minister or the Immigration Service. Asked to respond, counsel for the respondent gets to his feet and submits that, even if New Zealand *has* signed various international conventions, the Crown is not bound by them. A certain look passes over the face of Cooke P…. A few weeks later he writes:[1]

> "[T]he main burden of [the Crown's] argument was that in any event the Minister and the department are entitled to ignore the international instruments.
>
> That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution.
>
> ….
>
> A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights, norms, or obligations, the Executive is necessarily free to ignore them.
>
> This emerges as a case of possibly far-reaching implications…."

[2] It is strange to reflect, now, that these few paragraphs, in a late-night, last-gasp interim injunction application in a seemingly hopeless case, should have changed the landscape of human rights law in New Zealand in ways far more profound than have ever been achieved by domestic human rights legislation.

[3] It is 22 years since the course of Viliamu Tavita's life was changed by a Court of Appeal decision which did not even make a final ruling. Faced with the Crown's "unattractive argument", the Court had simply noted that:

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1 *Tavita v Minister of Immigration & anor* [1994] 2 NZLR 257.

> "Universal human rights and international obligations are involved. It may be thought that the appropriate Minister would welcome the opportunity of reviewing the case in the light of an up to date investigation and assessment. Nothing of the sort appears to have occurred within the department. Still less has the case been reconsidered, in the light of current circumstances, at ministerial level. This is fully understandable. The opportunity of reconsideration should be given."

[4] With that, the injunction application was adjourned *sine die*. It never needed to be brought back on for hearing.

[5] *Tavita* had immediate impact. Within two years, Temm J was able to record, in *Puli'uvea v Minister of Immigration*:[2]

> "[T]he *Tavita* case threw into relief the impact of international covenants to which New Zealand is a signatory."

[6] By the time *Puli'uvea* got into the Court of Appeal the following year, the requirement to take into account obligations arising from international conventions was so unreservedly accepted by the Crown that the Court was able to cite an Immigration Service memorandum, advising:[3]

> "Following the Tavita decision, NZIS decision making processes have been redefined to ensure a balance between, on the one hand, recognition of the rights of New Zealand citizens and residents (under relevant international conventions) affected by immigration decisions, and on the other hand, New Zealand's right to determine who may lawfully enter and remain within its borders."

[7] This responsible reaction by the relevant government department undoubtedly eased the transition to a new era in which executive control of New Zealand's borders became susceptible to regular judicial scrutiny of that balance between an individual's rights at international law and the right of a sovereign state to decide who to admit and who to expel.

[8] Of course, one small corner of New Zealand law had already been dabbling in international law for more than 20 years before *Tavita*. Since the 1960s, the Interdepartmental Committee on Refugees (ICOR) had been determining occasional claims for refugee status brought under the Refugee Convention. ICOR was a creature of Ministerial prerogative and its application of international law in a domestic context in this country was unique on the legal map. Events of the 1980s, however, were to expose the inadequacies of ICOR.

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2 (Auckland High Court, M264/95, 17 October 1995).

3 *Puli'uvea v Minister of Immigration* [1996] 3 NZLR 538.

[9] First, on 26 November 1985, Chilwell J strongly rejected ICOR's handling of a refugee claim in *Benipal v Ministers of Foreign Affairs and Immigration*,[4] finding some 65 errors in the processes and decision. Then, within a few years, substantial numbers of claimants from India (fleeing the conflict in the Punjab), China (after Tiananmen Square) and Sri Lanka (fleeing the LTTE and JVP conflicts) overwhelmed ICOR. All this led to the establishment of the Refugee Status Appeals Authority in 1991. That body promptly adopted the human rights framework proposed by Jim Hathaway in *The Law of Refugee Status*, which had just been published, as the cornerstone of understanding what "being persecuted" meant. Hathaway defined "being persecuted" as:

> "… the sustained or systemic violation of basic human rights, demonstrative of a failure of state protection."

[10] Over the next two decades, international law continued to strongly influence decision-making in both immigration and protection decisions. By the establishment of the Immigration and Protection Tribunal in November 2010, it had become well-established that international conventions had a direct bearing on decisions concerning a person's status. Today, it is routine to see them raised in submissions to a number of bodies:

To INZ in respect of:

(a) discretionary decisions, such as character waivers;

(b) the discretionary grant of relief to persons liable for deportation; and

(c) the discretionary grant of relief generally, such as special directions;

To INZ, the Minister of Immigration and/or to the IPT in respect of:

(d) the deportation of residents who criminally offend;

(e) the deportation of residents who obtain residence by fraud;

(f) the deportation of persons unlawfully in New Zealand;

(g) the deportation of persons who have breached the conditions of a resident visa; and

(h) 'special circumstances' recommendations on residence appeals;

[4] (HC Auckland, A 878/83, 16 December 1985).

To the RSB and the IPT in respect of:

(i) protection under the Refugee Convention; and

(j) complementary protection against torture, arbitrary deprivation of life or cruel, inhuman or degrading treatment.

THE RELEVANT INTERNATIONAL CONVENTIONS

[11] New Zealand is a signatory to eight conventions which have a particular bearing on human rights in the immigration context. There are many others to which it is a signatory, but an understanding of this core group is the foundation of presenting cases and arguments in relation to immigration and protection issues. They are:

(a) the 1966 *International Covenant on Civil and Political Rights* (the ICCPR);

(b) the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR);

(c) the 1984 *Convention Against Torture* (CAT);

(d) the 1989 *Convention on the Rights of the Child* (the CRC);

(e) the 1965 *Convention on the Elimination of All Forms of Racial Discrimination* (CERD);

(f) the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW);

(g) the 2006 *Convention on the Rights of Persons with Disabilities* (the CRPD); and

(h) the 1951 *Convention Relating to the Status of Refugees* (the Refugee Convention).

[12] The specific needs of protection cases will be discussed later. First, it is helpful to consider the primary human rights instruments relevant to general immigration issues. They are the ICCPR, ICESCR and the CRC.

[13] As to the ICCPR and ICESCR, these two treaties brought into the international arena, for ratification by signatory states, the core elements of the 1948 *Universal Declaration on Human Rights*. Together with the UDHR, they are universally known as the "International Bill of Human Rights". With 168 states ratifying the ICCPR and 164 ratifying ICESCR, they establish a broad international acceptance of objective benchmarks for the observance of basic human rights. They are, of course, supplemented by the more specialised instruments of CAT, the CRC, CEDAW, CERD and the CRPD, most of which have come into being in later years.

[14] With such widespread adoption of the ICCPR and ICESCR, an understanding of human rights (and a state's obligation to respect them) became no longer a matter for individual states to determine subjectively – there were objective standards at a widely-accepted international level against which the actions of a state were able to be measured. No state could legitimately shelter behind domestic legislation or customary law as grounds for committing human rights violations.

[15] In spite of this, acceptance of the role of international human rights instruments as a benchmark for assessing the exercise of administrative powers took root only slowly. Even *Tavita* did not emerge until 15 years after the ICCPR had been ratified by New Zealand, in 1978. However, at the same time that *Tavita* was finally opening doors in New Zealand, similar developments were occurring throughout Europe (where the European Convention on Human Rights offered similar protections) and in much of the rest of the world. The 1990s are probably not remembered for very much, but it *was* the decade in which the courts in most western jurisdictions finally began to grapple openly with the international law aspect of human rights. For that, we can be grateful.

RESERVATIONS

[16] It is worth noting briefly that states are entitled to ratify a convention with reservations. New Zealand, for example, entered four reservations to the ICCPR, in the areas of prison conditions for young persons, *ex gratia* payments for miscarriages of justice, public expressions of racial hatred and membership of trade unions.

[17] As to ICESCR, New Zealand's only reservation was in respect of Article 8 (the right to form trade unions).

[18] Reservations by New Zealand clearly have little relevance in the immigration context. But reservations by other countries might. If, say, you want to make a submission that a particular country will be unable to provide education to a child, through lack of resources, it might be worth checking to see if the country entered any such reservations. Bangladesh, for example, entered a reservation for Article 13 of ICESCR that *it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country*. Such a reservation might well lend some evidential support.

A HIERARCHY OF RIGHTS?

[19] The expression a "hierarchy" of rights has been used by some commentators, notably Professor J C Hathaway, when discussing the rights protected by the ICCPR and ICESCR. It arose in the context of a perceived distinction between (i) immediately binding non-derogable rights, (ii) normally non-derogable rights from which derogation is permissible in times of public emergency and (iii) rights from which a degree of derogation is permissible in specified circumstances. The first and second of these are largely contained in the ICCPR and the latter in ICESCR. If there were any uncertainty about the nature of non-derogable rights, it is removed by Article 4 of the ICCPR, which provides precisely for this. A simple example of an immediately-binding, non-derogable right is Article 8 of the ICCPR, which provides that no one shall be held in slavery. An example of a normally non-derogable right from which derogation is permissible in times of public emergency might be the ICCPR's Article 9 right to freedom from arbitrary arrest or detention, which is non-derogable "except on such grounds and in accordance with such procedure as are established by law".

[20] "Third-tier" rights, from which some derogation is permitted, come in different guises. A right from which some derogation is permitted might, for example, be one which is limited to express circumstances, such as Article 18(3) of the ICCPR:

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

[21] Or it might be located in the use of language which creates an aspirational context, such as Article 12 of ICESCR:

> "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

[22] Or the language might convey a more blunt recognition that the limited resources of some states preclude immediate full compliance – see, for example, Article 13(2)(e) of ICESCR:

> "The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved."

[23] Finally, it can be mentioned briefly that there is a fourth 'level' of hierarchy in respect of two provisions of the UDHR which were never codified into either the ICCPR or ICESCR (the right to own property and the right to be protected against unemployment). They need not concern us.

[24] The term "a hierarchy of rights" is unfortunate because it has been taken by many to mean that the rights contained in ICESCR are in some way inferior to, or less important than, the (non-derogable) rights in the ICCPR. The role of ICESCR has, regrettably, been muted by this misperception. The language of a hierarchy, with its connotations of higher and lower ranking rights, has driven some decision-makers to trivialise ICESCR rights, to regard them as being less serious, or to regard a breach as "a violation of a relatively low-level right"[5]. This misconstrues Hathaway's intended focus on the nature of the state's obligation with the "normative priority" or relative importance of the right in question. Michelle Foster has described this as:[6]

> "… not a matter of mere semantics or a minor difference in emphasis; rather it has important ramifications for the assessment of individual claims, because the notion that economic and social rights are inherently inferior to civil and political rights, and thus that [a] breach of such rights is less significant, leads to a corresponding under-valuation of… claims based on such deprivations."

[25] What the 'hierarchy of rights' risks doing is obscuring the fact that the rights protected in ICESCR are just as binding on state parties as any non-derogable right in the ICCPR, if the permitted derogation does not come into play. What the hierarchy does achieve, however, is to remind us that there are limitations on the extent of a state's obligation in respect of some rights and that the specific context is critical to a full understanding of a state's obligation.

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5 *Refugee Appeal No 71605* (16 December 1999), at p7.

6 *International Refugee Law and Socio-Economic Rights* (Cambridge University Press, 2007) at pp122-123.

FAMILY UNITY

[26] Migration has been a feature of human activity for hundreds of thousands of years. Just as populations of our ancestors left Africa in search of habitable land and resources so, too, have people continued to migrate to try to find a better life, a safer life or just a new life. With human settlement, however, came notions of property ownership and, ultimately, state sovereignty.

[27] Still fundamental to our sense of identity and belonging are issues of kinship and nexus to our social group. But migration both dislocates the individual from a previous sense of identity and belonging and, at the same time, launches a process of acquisition of a nexus to a new place and society. It should come as no surprise, then, that the most frequently encountered human rights issues in the immigration context are those which relate to family bonds and to the protection of children.

[28] Both the ICCPR and ICESCR refer to the right to family unity, but it is the ICCPR's Articles 23 and 17 which attract the most attention:

> **Article 23**
>
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> **Article 17**
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

[29] How do we interpret these? An important source of commentary on international treaties are the *General Comments* issued by the body charged with the supervision of the convention in question. Supervision of the ICCPR, for example, is the responsibility of the UN Human Rights Committee. Its *General Comment 16*, written in 1988, gave helpful advice to state parties as to an understanding of Article 17. In particular, it explained:

> 3. The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.
>
> 4. …. The expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for

> by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."

[30] The Human Rights Committee is also able to hear complaints against states. Its rulings on such complaints are also a helpful source of commentary. Article 17, for example, was considered in *Toonen v Australia*[7] and again in *Madafferi v Australia*[8]. Those cases reinforced the principle that interference with the right of family unity must be reasonable – that is, proportionate and necessary in the circumstances. Deportation which destroys family unity will breach Articles 23 and 17 unless it meets that test.

[31] Before turning in any greater detail to the practical application of human rights, it is necessary to add to the mix the particular need to have regard to the best interests of children.

THE BEST INTERESTS OF CHILDREN

[32] Article 3 of the Convention on the Rights of the Child provides:

> **Article 3**
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[33] There is, today, a huge body of case law which touches on this issue. Much of it, regrettably, simply repeats the well-established refrain that a child's best interests are *a* primary consideration and not *the* paramount consideration. Helpful statements have, however, been made by the Courts on a number of occasions. In *Al-Hosan v Deportation Review Tribunal*,[9] for example, Harrison J tried to exemplify the difference between giving a passing nod to a child's best interests and making a considered, in-depth assessment of them. In describing what is needed, he said:

> "[53] …. Care is necessary to ensure the inquiry does not diminish the best interests of the child from a factor of primary consideration to one of equal consideration.
>
> ….
>
> [55] …. An observation that children are adaptable, while probably true, does not approach the threshold of proper consideration of their best interests.

[7] *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

[8] *Madafferi v Australia*, Communication No 1011/2001, UN Doc CCPR/C/81/D/1011/2001 (2004).

[9] (HC Auckland, CIV-2006-404-003923, 3 May 2007).

> [56] What is required in a case like this is a careful examination of all of the circumstances including, if necessary, a comparison with the educational, health and welfare facilities available for children in Jordan, a secular Middle Eastern state which may accord less value to the rights and opportunities of a female child than New Zealand. Also, the older the child, the more difficult may be the effects of forced dislocation."

[34] Similar observations have been made by the UN Committee on the Rights of the Children. Its *General Comment 14* (2013) discusses Article 3(1) at length. As to what is meant by a child's best interests, clause 4 provides:

> The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child. The Committee has already pointed out that 'an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention'. It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the 'child's best interests' and no right could be compromised by a negative interpretation of the child's best interests."

[35] The Committee views a child's best interests in three ways:

(a) As a substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child.

(b) As a fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, that which most effectively serves the child's best interests should be chosen.

(c) As a rule of procedure: Whenever a decision is to be made that will affect a child, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. It requires procedural guarantees and the decision must show that the right has been explicitly taken into account, explaining how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations.

[36] It is this last point – the need for an insightful and comprehensive enquiry into what the best interests of an individual child in a given case actually are, and their weighting against other considerations – to which we will return. Before doing so, however, it is necessary to discuss briefly the 'specialised' conventions – CAT, CEDAW, CERD and the CRPD.

THE 'SPECIALISED' CONVENTIONS

[37] Fundamentally, these conventions are designed to address rights in a number of specific contexts – torture and severe ill-treatment by public officials, discrimination against women and the disabled, and discrimination on the grounds of race.

[38] Most of the rights are, of course, already proscribed by the ICCPR and ICESCR. It is difficult to find any aspect of the rights protected by the 'specialised' conventions, which could not reasonably be seen as being protected by one article or another of the ICCPR or ICESCR.

[39] What the specialised conventions do is to highlight the need to respect the rights of particular sectors of society and reflect the concern of the international community that such groups are not to be excluded from protection. In the case of the disabled, for example, the CRPD brings a clear focus on issues of fundamental importance to disabled people, such as the Article 9 right to be able to access the physical environment, transportation, information and communications. One might reasonably look at the ICCPR's Article 12 (freedom of movement) and ICESCR's Articles 13 (education) and 18 (freedom of thought) as already ensuring those rights. Yet it would be impossible to deny their significance to a disabled person, in ways which others need never have to confront. The articulation of those rights in the CRPD provides a specific context which the other, more generalist, conventions inevitably fail to convey.

[40] CAT is a convention of particular note. Unlike most of the other conventions, which were written to define the rights and obligations between a state and its citizens, CAT speaks also to states other than the state of which a person is a citizen. Article 3(1) of CAT provides:

> "**Article 3**
>
> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

[41] This absolute prohibition on *refoulement* in CAT has, of course, a close relation in the *non-refoulement* obligations of the Refugee Convention, of which more later.

APPLYING HUMAN RIGHTS PRINCIPLES IN THE GENERAL IMMIGRATION CONTEXT

[42] It is convenient to look first at the application of human rights in an immigration context in which they are palpably relevant and in which there has been significant judicial commentary – the area of deportation. It is there that the desire of the state to control its borders comes into the starkest conflict with human rights.

TURN TO CASE STUDY 1

THE NEED FOR EVIDENCE

[43] As in most things in the law, there is form… and there is substance. It is one thing to expound on these principles. It is quite another to effectively demonstrate their impact in a given case.

[44] The Tribunal hears variants on these themes regularly. Unfortunately, while they reflect appropriate standards of a general nature, a case is unlikely to succeed if the actual *relevance* of the rights in question is not convincingly established. And that means evidence. This applies whether you are trying to persuade INZ to grant a character waiver, to persuade the Minister not to sign a deportation liability notice or trying to persuade the Tribunal to allow an overstayer to remain. In all cases, it is the applicant who needs to prosecute their cause.[10]

[45] A pointed illustration of this can be gained from the recent High Court decision in *Minister of Immigration v Jooste*[11] which has postulated the principle that the separation of family is not an exceptional circumstance in the context of deportation decisions. If that were truly a blanket principle, then no deportation case involving the separation of family members could ever succeed, because none would get past the hurdle of establishing exceptional circumstances. Yet we know this is not the case and the difference (that is, any exceptionality) will inevitably be determined by the evidence.

[10] Section 226(1) of the Immigration Act 2009.

[11] (HC Auckland, CIV-2014-404-632 19 November 2014).

[46] In *Jooste*, the Court did not address the question that the separation of family members can occur in vastly different circumstances. The deportation of a 27-year-old man might well separate him from his parents but it bears no relation, in terms of its impact and damage, to the separation of a 7-year-old boy from his parents. The 27-year-old may be living independently, be self-supporting and be having only irregular contact with his parents. Deportation for him (and his parents) might not be very different to a case of a young adult who chooses of their own volition to live overseas, as many do. For the 7-year-old, however, separation may well have profound consequences for his or her emotional and intellectual development. That child's whole future persona as an adult may well be radically changed.

[47] What of the consequences of separating a couple who have been married for 15 years? Or for six months? The couple married for 15 years may well have developed a life together which is incapable of being untangled without significant harm. The couple married for six months may not have had time to become so interdependent but there may be other consequences for them. And all of this is through a largely Eurocentric lens. What of the woman in an arranged marriage, whose husband faces deportation? Or the husband, who received a large dowry in the expectation that he would be providing a home overseas for his wife?

[48] These examples are all relatively simple. Other significant contextual differences can also arise, including the intensity of relationships, the quality of parenting, the dependence of the child and personal characteristics such as health issues, distance and conditions in the other country. The point is that the mantra that "the separation of family is not, of itself, an exceptional circumstance" is of little assistance to either counsel or the decision-maker because it fails to contextualise the actual circumstances in a given case. What is needed is an in-depth understanding of the effects of separation in *this* case, which can only be established by appropriate evidence.

[49] A challenge for counsel in such cases is that, having recognised the issues which exist, it can be difficult to know what evidence would best support the case. Issues of family separation and the best interests of children are complex and require the ability to predict outcomes and explain them persuasively. In the end, there is no substitute for expert evidence from appropriately qualified professionals who have had the time to properly investigate the issues. There are psychologists, psychiatrists and related professionals who are able to give comprehensive evidence to establish the likely effect of interference with human rights for a particular family. Counsel who advance human rights issues in the immigration

context, without providing the evidentiary background to support their arguments, are unlikely to succeed.

[50] As a practical side-note, any professional who is asked to provide a report in an immigration context will need to interview the relevant parties, sometimes several times. School teachers, health professionals, employers, CYF workers and others may also need to be interviewed. The field work behind a thorough report can take weeks, if not months. It is incumbent on counsel to be alert to this as soon as instructions are received. The Tribunal tries to alert appellants to this as soon as an appeal is lodged but other decision-makers, such as INZ, do not give warnings. The message is: if your client is likely to be subject to a decision which may interfere with rights under an international instrument, you cannot start the evidence-gathering process too soon – anything else may be too late.

[51] Finally on this topic: if you are tendering an expert report, ensure that the expert is present to speak to it.

PROTECTION CLAIMS

[52] New Zealand has long-standing '*non-refoulement*' (no return) obligations under two international human rights instruments – the Refugee Convention and CAT. It has, by domestic legislation, recently created a third by drawing on Articles 6 and 7 of the ICCPR (the right not to suffer arbitrary deprivation of life and the right to be free from cruel, inhuman or degrading treatment). At the same time, the Refugee Convention and CAT have been brought within New Zealand domestic law, though the interpretation of both is still fundamentally in terms of international law principles.

[53] In essence, sections 129-131of the Immigration Act 2009 now combine to require New Zealand to protect persons who are at risk of:

(a) being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group (Art 1A(2), Refugee Convention);

(b) suffering torture by, or with the acquiescence of, a public official (Art 3, CAT);

(c) suffering arbitrary deprivation of life (Art 6, ICCPR); or

(d) suffering cruel, inhuman or degrading treatment (Art 7, ICCPR).

[54] It should be obvious that the last three of these are, in a sense, subsets of the first. It is difficult to imagine, for example, how torture could *not* be a form of 'being persecuted'. In brief, the role of the last three is explained by the fact that they do not require the presence of one of the 'Convention reasons' which the Refugee Convention requires. They are thus appropriately described as forms of *complementary* protection.

[55] All of which should prompt the next question – what is 'being persecuted'?

[56] For the purposes of refugee determination, "being persecuted" has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, it can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[57] Logically, the core human rights at the heart of 'being persecuted' are those rights enunciated in the two major human rights instruments – the ICCPR and ICESCR. If there is a real chance of a sustained or systemic breach of one or more of the rights in those conventions, and the person's state is unable or unwilling to protect them, he or she is at risk of 'being persecuted'.

[58] If a client presents with an account in which the risk of harm is self-evidently a breach of an obvious right – say, the Article 9, ICCPR right to be free from arbitrary detention – the need to seek protection should be easy to see. However, there are many rights in the ICCPR and ICESCR, the breaches of which are not so obvious.

TURN TO CASE STUDY 2

[59] Other less-obvious grounds which have given rise to successful protection claims have included:

(a) victims of domestic violence;

(b) women who reject Islam's restrictions in areas such as employment, spousal rights, custody rights, dress and place in society;

(c) persons seeking to avoid military service in armed forces which commit human rights violations;

(d) religious converts from religions which punish apostasy;

(e) victims of crime, such as protection rackets, organised crime groups; and

(f) victims of sex trafficking.

[60] If a client expresses a reluctance to return home, the first question to consider is whether their reluctance is because a breach of human rights is at issue. That might require some lateral thinking because, as the examples should illustrate, 'being persecuted' does not just mean beatings, imprisonment or execution.

CONCLUSION

[61] At the beginning, I quoted Cooke P's prescient observation that *Tavita* was "a case of possibly far-reaching implications". I like to think that, if Cooke P were here today, he would look at the role that those same international human rights instruments now routinely play in providing a balance to the exercise of administrative power and that he would be at least partly satisfied with our progress.

APPENDIX 1 – CASE STUDIES

CASE STUDY 1

Joe is a 37-year-old man from Ambrosia. He came here as a resident in 2003 and married a New Zealander, Joanne. They have two children: Simon aged 11 and Cara aged 8. Cara has a cleft palate and is awaiting surgery. The family is saving for a private specialist because the public waiting list is two years. Joanne also has a 17-year-old son, Peter, by an earlier partner. Peter, who treats Joe as his father, is excelling at school and plans to study medicine. Joe plays rugby with both boys after school every day and takes the children to the park and on outings on weekends. He speaks Ambronese to the younger children at home and teaches them about Ambronese culture.

Joe works for a courier company as a sorter. Joanne works in a shop. They rent a state house. Joanne does not speak Ambronese and has never been to Ambrosia. All her own immediate family, including her frail mother (to whom she is very close), are here. Joe and Joanne see her parents every weekend and there is a close bond between them.

In his early 20s, Joe had a problem with alcohol for a time and incurred several drink-driving convictions. He then matured and had no convictions for six years. Recently, however, he drank heavily all day at a party and drove home drunk. On the way, he lost control and hit two young children on the pavement. Both were seriously injured and spent months in hospital. One will never be able to walk properly again. The other is traumatised, and is still struggling in her second year of counselling.

After being sentenced to two years' imprisonment, Joe has been served with a deportation liability notice. He asks you to act for him in seeking to have the notice set aside.

Issues

1. *What is the first issue to determine?*

2. *What rights might be at issue and in which conventions are they located?*

3. *As counsel for Joe, how can any interference with these rights be demonstrated at being outside the parameters of "proportionate", "reasonable" and "necessary in the circumstances"?*

CASE STUDY 2

Anne is a 32-year-old woman from the central African republic of Kambanda. She came here on a student visa. Its renewal was declined following her failure to attend lectures and her poor marks. She seeks your help and explains that she is HIV positive and had several long periods of illness which caused her to miss lectures.

Anne says that she is lesbian and does not want to return to Kambanda because the fundamentalist government there has recently passed laws criminalising homosexuality. There has been widespread government invective against the "godless gays" and many clinics distributing anti-retroviral drugs (ARV) have either been closed down or have not received supplies. Anne is worried that she will face prosecution and jail, and that she will not be able to access her ARV drugs.

Issues

1. What rights might be most at issue?

2. Would breaches of those rights amount to "being persecuted"?

APPENDIX 2 – TREATIES AND RATIFICATION

Treaty	Signatories	Parties
Universal Declaration of Human Rights - *Adopted by UN General Assembly (NZ vote in favour):* 10 December 1948: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/PV.183 (see p22)		
Refugee Convention - *Accession:* 30 June 1960 https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en;	19	145
Convention on the Elimination of All Forms of Racial Discrimination - *Signed:* 25 October 1966*; Ratified:* 22 November 1972 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en	87	177
International Covenant on Economic, Social and Cultural Rights - *Signed:* 12 November 1968; *Ratified:* 28 December 1978 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en	71	164
International Covenant on Civil and Political Rights - *Signed:* 12 November 1968; *Ratified:* 28 December 1978 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en	74	168
Convention on the Elimination of All Forms of Discrimination Against Women - *Signed:* 17 July 1980; *Ratified:* 10 January 1985 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en	99	189
Convention Against Torture - *Signed:* 14 January 1986; *Ratified:* 10 December 1989 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en	81	158
Convention on the Rights of the Child - *Signed:* 1 October 1990; *Ratified:* 6 April 1993 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en	140	195
Declaration on the Elimination of Violence Against Women - *Adopted by UN General Assembly (without vote)*: 20 December 1993 http://www.ohchr.org/Documents/ProfessionalInterest/eliminationvaw.pdf		
Convention on the Rights of Persons with Disabilities - *Signed:* 30 March 2007; *Ratified:* 25 September 2008 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en	159	157
***Not* Ratified By New Zealand** International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en	38	48

APPENDIX 3 – SUMMARIES OF THE ICCPR AND ICESCR

Some rights arising often in the immigration and/or protection contexts:

- ***Non-discrimination*** *– Art 2, both*
- ***Right to life*** *– Art 6, ICCPR*
- ***CIDT*** *– Art 7, ICCPR*
- ***Arbitrary detention*** *– Art 9, ICCPR*
- ***Security of the person*** *– Art 9, ICCPR*
- ***Non-interference with family*** *– Art 17, ICCPR*
- ***Family unity*** *– Art 23, ICCPR and Art 10, ICESCR*
- ***Children's protection*** *– Art 24, ICCPR and Art 10, ICESCR (see also Art 3, CRC)*
- ***Health*** *– Art 12, ICESCR (see also Art 24, CRC)*
- ***Education*** *– Art 13, ICESCR (see also Art 28, CRC)*

[NB: The following are summaries only – rely <u>only</u> on the full text]

1966 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Key Points from Preamble:

- Inherent dignity and equal and inalienable rights are the foundation of freedom, justice and peace.
- ICCPR rights derive from the inherent dignity of the human person.
- Civil and political freedom and freedom from fear and want require civil and political rights, as well as economic, social and cultural rights.
- States have an obligation to promote universal respect for, and observance of, human rights and freedoms.
- The individual has duties to others and must strive for the promotion and observance of these rights.

Article 1

- The right to self-determination, political status and to pursue economic, social and cultural development.
- The right to freely dispose of natural wealth and resources.
- The right of a people not to be deprived of its own means of subsistence.
- States shall promote self-determination, and shall respect that right.

Article 2

- The right to exercise ICCPR rights without discrimination.
- The right to have an effective remedy for violations of ICCPR rights.

Article 3

- The right of equal access by men and women to all ICCPR rights.

Article 4

- In a public emergency threatening the nation, states may derogate from the ICCPR only to the extent strictly required by the situation.
- No derogation from Articles 6, 7, 8 (paras 1 & 2), 11, 15, 16 and 18 may be made.

1966 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Key Points from Preamble:

- Inherent dignity and equal and inalienable rights are the foundation of freedom, justice and peace.
- ICESCR rights derive from the inherent dignity of the human person.
- Freedom from fear and want require economic, social and cultural rights, as well as civil and political rights.
- States have an obligation to promote universal respect for, and observance of, human rights and freedoms,
- The individual has duties to others and must strive for the promotion and observance of these rights.

Article 1

- The right to self-determination, political status and to pursue economic, social and cultural development.
- The right to freely dispose of natural wealth and resources.
- The right of a people not to be deprived of its own means of subsistence.
- States shall promote self-determination, and shall respect that right.

Article 2

- Each State to take steps, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant.
- The right to exercise ICESCR rights without discrimination.
- Developing countries may determine to what extent they guarantee economic rights to non-nationals.

Article 3

- The right of equal access by men and women to all ICESCR rights.

Article 4

- ICESCR rights are subject only to limitations determined by law, compatible with the nature of the rights and solely promote the general welfare in a democratic society.

Article 5	***Article 5***
• No-one may seek to destroy any ICCPR rights and freedoms to a greater extent than is provided for.	• No-one may seek to destroy any ICESCR rights and freedoms to a greater extent than is provided for. • No derogation from any other rights shall be admitted on the pretext that the Covenant does not recognise them.
Article 6	***Article 6***
• The inherent right to life. No one shall be arbitrarily deprived of life. • Sentence of death only for the most serious crimes. • Anyone sentenced to death has the right to seek pardon or commutation of sentence. • Sentence of death shall not be imposed on persons under 18 nor be carried out on pregnant women.	• The right to work, including the right to the opportunity to gain a living by work which is freely chosen or accepted. • States to include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment.
Article 7	***Article 7***
• No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.	• The right to just and favourable conditions of work, including: o remuneration which provides, as a minimum: – fair wages and equal remuneration for work of equal value; – a decent living for self and family; o safe and healthy working conditions; o equal opportunity for promotion; o rest, leisure and reasonable working hours and holidays with pay.
Article 8	***Article 8***
• No one shall be held in slavery or required to perform forced or compulsory labour.	• The right to form trade unions and join a trade union. • The right of trade unions to establish national and international federations. • The right of trade unions to function freely. • The right to strike, in conformity with the law. • Restrictions on these rights may be imposed on the armed forces, the police or state administration. • Parties to the 1948 International Labour Organisation Convention cannot prejudice the guarantees provided therein.
Article 9	***Article 9***
• Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.	• The right to social security, including social insurance.
Article 10	***Article 10***
• All persons deprived of liberty shall be treated with humanity and respect for their inherent dignity. • Accused persons shall be segregated from convicts; • Accused juveniles shall be separated from adults and tried speedily. • The essential aim of prisoners' treatment shall be reformation and social rehabilitation.	• States must: o protect and assist the family, particularly while it is responsible for dependent children. Marriage must be freely consented to. o protect mothers before and after childbirth. Mothers should have paid leave or security benefits. o protect and assist children without discrimination and from exploitation. Employment harmful to morals or health should be punishable. States should set age limits for employment.
Article 11	***Article 11***
• No one shall be imprisoned merely for being unable to fulfil a contractual obligation.	• The right to an adequate standard of living, including adequate food, clothing and housing, and the continuous improvement of living conditions. • The right to be free from hunger. • States must improve methods of production, conservation and distribution of food and ensure an equitable distribution of world food supplies in relation to need.

Article 12

- The right to liberty of movement and freedom to choose residence.
- The right to be free to leave any country.
- These rights are subject to restrictions necessary to protect national security, public order, public health or morals or the rights and freedoms of others.
- No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

- An alien lawfully in the territory may be expelled only after a decision in accordance with law.

Article 14

- All persons shall be equal before the courts.
- The right to a fair trial, including appeal.
- For juveniles, to have processes which take account of age and rehabilitation.
- If a miscarriage of justice, the right to compensation.
- The right not to be tried or punished again.

Article 15

- The right not to be held guilty of any criminal offence retrospectively.

Article 16

- Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

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

Article 18

- The right to freedom of thought, conscience and religion.

Article 12

- The right to the enjoyment of the highest attainable standard of physical and mental health.
- States to achieve this by:
  - reduction of infant mortality and the healthy development of the child;
  - improvement of environmental and industrial hygiene;
  - prevention, treatment and control of diseases;
  - access to medical attention in the event of sickness.

Article 13

- The right to education.
- States to achieve this by:
  - primary education shall be compulsory and free;
  - secondary education shall be generally available and accessible, and progressively free;
  - higher education shall be equally accessible, on the basis of capacity, and progressively free;
  - fundamental education shall be encouraged for those lacking primary education;
  - the development of a system of schools at all levels shall be actively pursued, and the conditions of teaching staff be continuously improved.
- States to respect the liberty of parents to choose schools which conform to minimum educational standards and to ensure the religious and moral education of their children.
- Nothing shall interfere with the liberty to establish educational institutions conforming to minimum standards.

Article 14

- Each State which has not been able to secure compulsory, free primary education must, within two years, adopt a detailed plan of action to that end.

Article 15

- The right to take part in cultural life, to enjoy scientific progress and protection, as author, of the interests from any scientific, literary or artistic production.
- States must conserve, develop and diffuse science and culture.
- States must respect the freedom indispensable for scientific research and creative activity.
- States must recognise the benefits of international contacts and co-operation in scientific and cultural fields.

Articles 16 – 24

[The establishment of the Economic and Social Council.]

Article 19

- The right to hold opinions without interference.
- The right to freedom of expression.

Article 20

- Prohibition on propaganda for war and advocacy of national, racial or religious hatred.

Article 21

- The right of peaceful assembly.

Article 22

- The right of freedom of association, including the right to form and join trade unions.

Article 23

- The family is the natural and fundamental group unit of society.
- The right of men and women of marriageable age to marry and to found a family.
- Equality of rights and responsibilities of spouses as to marriage, during marriage and at dissolution.

Article 24

- The right of children to such measures of protection as are needed by minors.
- The right of children to be registered immediately after birth and to have a name.
- The right of children to acquire a nationality.

Article 25

- The right to take part in the conduct of public affairs, to vote and be elected and to seek public service.

Article 26

- All persons are equal before the law and are entitled without discrimination to the equal protection of the law.

Article 27

- The right of minorities, in community, to enjoy their own culture, religion and language.

Articles 28-45

[The establishment of the Human Rights Committee.]

Article 46

- The ICCPR not to be taken as impairing the Charter of the United Nations.

Article 47

- The ICCPR shall not be interpreted as impairing the right of all peoples to utilize their natural wealth and resources.

Articles 48 – 53

[Administrative provisions.]

Article 25

- ICESCR shall not be interpreted as impairing the right of all peoples to utilize their natural wealth and resources.

Articles 26 – 31

[Administrative provisions.]