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Child refugee claims in New Zealand: what about children's rights?

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Introduction

Article 1A(2) of the Refugee Convention stipulates that any person is a refugee if they can prove they have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" and are "outside the country of [their] nationality ... is unable or, owing to such fear, is unwilling to return to it".[1] The primary benefit of obtaining refugee status is the assurance of non-refoulement — a principle dictating that:[2]

> ... no contracting State shall expel or return ("refouler") a refugee ... where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion.

The *Universal Declaration of Human Rights 1948* (UDHR) encapsulates that all human beings are born free and equal, and are entitled to the rights contained therein free from discrimination.[3] Of the numerous rights protected under the UDHR, one right of particular significance is the right to seek and enjoy in other countries asylum from persecution.[4] This right provides the legal grounding for the United Nations Convention relating to the Status of Refugees (the Convention) which was adopted in 1951. The Refugee Convention is globally recognised as the centrepiece of international refugee protection today.[5]

This article considers how decision-makers in New Zealand give effect to or consider the Convention on the Rights of the Child (UNCROC) in their decisions about children seeking refugee status. This area of law has not been explored by refugee commentators in New Zealand, and so this article offers a synthesis of the case law and its implications in this area. As such, this article will predominately rely upon a focused case analysis to ascertain the current practice of the Immigration Protection Tribunal (the IPT) in dealing with refugee children in refugee decision-making processes. There are a few recent cases where the IPT has engaged with cases involving child refugees, and the aim of this article is to review these cases and consider whether the IPT's overall approach is consistent with the Convention of the Rights of the Child (the CRC).

Overview of the Refugee Convention and the Convention on the Rights of the Child

The Refugee Convention has a broad application and applies to both adults and children alike. However, issues do exist when it comes to refugee children, and tension does exist. Recognising that the protection of children's rights is fundamental in all circumstances, it is crucial to examine how the principles outlined in the CRC intersect with the unique challenges faced by refugee children within the framework of the Refugee Convention. The CRC and Refugee Convention respond independently to difficulties caused by involuntary displacement and to the special care and assistance required by children.[6] These problems arise because consideration at the international level of the distinct needs of refugee children has not always been recognised in domestic practice. For example, at the domestic level there has been a tendency for states to focus on a child's status as a refugee migrant rather than their status as a child.[7] The consequences of this are that if the child is considered a migrant, then this raises discourses of suspicion and is a matter of immigration control rather than a human rights issue. Secondly, by not explicitly considering their status as a child, the state avoids consideration of welfare and protection in favour of immigration control. As a result, a child refugee ceases to be a child due to their asylum-seeking status, because states consider the claimant on their individual circumstances and may overlook the necessary protections which must be afforded to the child.[8]

The CRC was adopted by the UN General Assembly on 20 November 1989 and came into force on 2 September 1990 and was ratified by New Zealand in 1993. The Convention stands as the most widely ratified human rights treaty, with 196 state parties presently, and provides an extraordinary catalogue of rights for children, boasting an extensive impact. Its influence can be seen in the contents of national constitutions, judicial decision-making, the work of international law and national institutions, law reform, policy development, advocacy efforts, service delivery, and research concerning children across a multitude of disciplines.[9] At the core of the CRC is the assertion that "the best interests of child shall be a primary consideration of administrative authorities or legislative bodies when making decisions concerning children".[10] Despite being widely ratified, decision-makers have been reluctant to engage with the CRC when determining the status of refugee children.[11] The CRC can be relevant when determining the refugee status of children, as it can provide procedural guarantees not otherwise provided under international refugee law; it may be invoked as an interpretive aid to inform the interpretation of the Refugee Convention, and it may give rise to an independent source of status outside the refugee protection regime.[12]

The CRC can provide a procedural guarantee by developing a participatory framework to ensure that children are not rendered invisible in domestic asylum processes.[13] For example, Pobjoy notes that while the Refugee Convention is silent on the procedures that a state should implement in designing a domestic system of refugee status determination, it is common practice for dependent children accompanying their parents to receive derivative refugee status if the parent or guardian receives it.[14] Furthermore, the CRC can aid interpretation of the Refugee Convention by allowing consideration of the broader international human rights framework.[15] This is because specialised treaties, such as the CRC, have the capacity to act as valuable interpretive aids to decision-makers when applying the Refugee Convention definition, and by doing so it can promote objective

and consistent decision-making.[16] Furthermore, this interpretive approach would allow for the Refugee Convention definition to evolve in a contextually sensitive way, thus allowing the Refugee Convention to respond to circumstances that may not have been apparent to its drafters.[17] Lastly, the CRC may provide an independent source of protection by precluding the return of a child to their home country notwithstanding the fact that they are not eligible for protection under the Refugee Convention or under non-refoulement obligations.[18]

Overview of how the CRC interlinks with the Refugee Convention and how it impacts refugee children

While there are no specific references to the plight faced by refugee children in the Refugee Convention, Recommendation B, part of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons suggests that in the context of refugee families, an inter alia approach is preferable for governments to adopt. An inter alia approach means that governments should:[19]

> ... take the necessary measures for the protection of the refugee's family, especially with a view to ... protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

In turn, the CRC supports this position as art 22(1) prescribes:[20]

> State parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by their parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights ... in the present Convention and in other international human rights or humanitarian instruments to which the said States are parties.

The CRC affects the application of the Refugee Convention because it calls for a total realignment of protection for child refugee applicants. Article 3(1) of the CRC requires:[21]

> ... in every decision affecting the child, the best interests of child shall be a primary consideration, and where children are concerned ... a duty to protect may arise, absent any well-founded fear of persecution or possibility of serious harm.

Similarly, art 3 of the CRC adds an additional layer of consideration to the interpretation and application of the Refugee Convention, in addition to "constitut[ing] a complementary ground of protection in its own right".[22] In some instances, children may not satisfy the art 1 refugee definition due to either not satisfying the inclusion criterion, or found to be no longer needing or otherwise undeserving of protection, but nonetheless at risk of some form of harm.[23] In these cases, the CRC has the capacity to provide a critical international layer of protection.[24]

Additionally, there is a greater level of international oversight of state compliance with the CRC, through the Committee on the Rights of the Child.[25] This oversight is lacking in the context of the Refugee Convention, which has no interstate supervisory body to hold states accountable for non-compliance with the treaty.[26] The oversight is reinforced by the Optional Protocol to the CRC on a Communications Procedure, which provides children with a direct mechanism to bring complaints against a ratifying state for a failure to meet the protection obligations under the CRC.[27]

The CRC and art 3 play an increasingly significant role in decisions involving the admission or removal of a child from a host state. Article 3 plays a role in adjudicating the status of a child seeking international protection, and the extent to which the best interests principle may provide an independent source of protection. That protection may, for instance, prescribe the protection of a child notwithstanding the fact that they are not eligible for protection as a refugee or protection under the non-refoulement obligations in human rights law. Furthermore, art 3 requires:[28]

> ... every legislative, administrative and judicial body or institution ... to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions.

Indeed, the General Committee No 14 outlined that:[29]

> ... the right of the child to have [their] best interests assessed and taken as a primary consideration when different interests are being considered ... and the guarantee that this right will be implemented whenever a decision to be made concerning a child ...

The obligation under art 3(1) attaches to all children within a state's jurisdiction.[30] A state cannot limit the application of the best interests principle on the basis of a child's citizenship or immigration status, due to the non-discrimination guarantee in arts 2(1) and 22, which provides that unaccompanied or accompanied children seeking refugee status are entitled to enjoy all applicable rights in the CRC on a non-discriminatory basis.[31] Lastly, Pobjoy observes that the best interests principle may inform the interpretation of a state's protection obligations under the Refugee Convention and the wider non-refoulement obligations under international human rights law, but that it also demands an age-sensitive and inclusive interpretation of these obligations.[32] Indeed, this would be consistent with the CRC's reaffirmation that where a legal provision is open to more than one interpretation, the decision-maker should favour the interpretation that best serves the child's best interests.[33] In the New Zealand immigration context, the courts uphold the position that the child's best interests is to be a primary, but not paramount, consideration.[34] This nuanced distinction in legal interpretation signifies the importance of examining how this principle interacts with the rights and protections accorded to refugee children, whose additional vulnerabilities add complexity to the application of children's rights within the refugee context.[35]

Despite the significance of art 3 of the CRC, the CRC has a fundamental impact on the Refugee Convention. Firstly, the general issues to consider is that children may either be exposed to action which, given their specific situation, might eventually amount to persecution even if the very same action would not yet amount to persecution if addressed to adults, or they might be exposed to acts of persecution that are specifically focused on their child-specific situation.[36] Therefore, like adults claiming refugee status, as a matter of principle children must be exposed to a well-founded fear of persecution to be recognised as refugees.[37] Therefore, to assess accurately the severity of the acts giving rise to well-founded fear of persecution and its impact on a child, it is necessary to consider the details of each case and to adapt the threshold for persecution for that particular child.[38] Crucially, the principle of the best interests of the child requires that the harm be assessed from the child's perspective.[39] This can include an analysis as to how the child's rights or interests are, or will be, affected by the harm, and both objective and

subjective factors are relevant to establish whether or not a child applicant has a well-founded fear of persecution.[40]

In New Zealand, it is arguable that immigration control does not give the necessary consideration to the CRC when determining child refugee status. For example, in *AW (United States)*,[41] a mother applied for refugee status for herself and her two children. The mother was recognised as a refugee due to the domestic violence perpetrated by her, but the children were denied recognition because they could not satisfy the persecution and serious risk harm requirements because they were not at direct risk of harm from the father. However, the Tribunal held that circumstances where a child may be subjected to torture or other cruel, inhuman or degrading treatment or punishment under art 37(a) of the CRC, can constitute serious risk of harm and persecution in relation to the Refugee Convention.

Analysis of IPT cases involving child refugee claimants

This article will provide an analysis of recent cases where the IPT has been tasked with determining the status of refugee children. The following cases were selected for the purposes of analysing the typical approach the IPT use when determining refugee status for children, and how the approach may have changed. The selected primary cases are *DG (Bangladesh) v Refugee Protection Officer*[42] and *GD (China)*.[43] This article also refers to other cases such as *BF (Colombia)*[44] which illustrates issues within the refugee determination process and refers to *AW (United States)*[45] which shows that there are still issues within the refugee determination process despite any changes in the decision-making process.

The early approach and a rebuke by the High Court

DG (Bangladesh)

DG (Bangladesh) concerned an application to appeal and to review a decision of the Tribunal declining to grant the father or the child of a family either refugee status or protected person status.[46] The mother had been recognised as a refugee by the Tribunal due to her conversion to Christianity, which placed her at serious risk of harm if she were to return to Bangladesh, but the father and child were not recognised as refugees or protected persons because they were not apostates. The father and child sought leave to the High Court to appeal or review that decision of the Tribunal.[47]

Gwyn J stated that s 245(1) of the Act allows for appeal to the High Court from a decision of the Tribunal on a question of law by leave, which "must have regard to whether the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason".[48] It was submitted by the applicants that the Tribunal failed to take into account all relevant considerations and particularly relevant international conventions.[49] It was emphasised that the Tribunal should have had regard to the promotion of the best interests of the child, and to protect the integrity of the child's family unit, which are both encapsulated by the CRC.[50] Specifically, counsel for the applicant cited Jason Pobjoy in relation to art 3 of the CRC who suggests that the best interests principle is engaged in all decision-making concerning children, even in situations where a decision directly or indirectly affects a child. Examples of this in a refugee application includes direct decisions such as if a child is claiming protection, or indirect decisions such as when a child's parent is at risk of being removed from the country.[51]

In ascertaining whether there were sufficient grounds that the application raised issues of general or public concern, Gwyn J began her analysis by referring to the starting point Muir J's observed in *EW (Sri Lanka)*.[52] In that case, Muir J held that:[53]

> The starting point in respect of refugee appeals is that they involve claimants "at the highest end of vulnerability and potentially at risk of gross human rights violation". In assessing whether to grant leave to appeal, this Court needs ... to be vigilant to all reasonable arguments.

By adopting this approach, Gwyn J concluded that the Tribunal applied "too narrow a focus".[54] Her Honour came to this conclusion by considering Elias CJ in *Helu v Immigration and Protection Tribunal*,[55] who said:[56]

> ... decision-makers commonly seek to organise their exercise of statutory powers of decision according to sequences, tests, and balances which they take from close analysis of the statutory text and scheme. Such methodology ... demonstrate fidelity to the legislative purpose and promotes consistency and better justification of conclusions. Care is needed however, to ensure both that the methodology is consistent with the terms of the statute and that it avoids over-refinement through such elaboration, especially when contextual value-judgment is inescapable. The risk then ... may itself compel outcomes which would not be accepted if the choice for the decision-maker was recognised to be constrained only by the need to reach the decision ... believes to be right after taking into account all considerations contextually relevant.

Gwyn J considered that the statement made by Elias CJ in *Helu* was applicable in the present case. Gwyn J noted that the Tribunal focused "only on the specific, individual circumstances of each applicant" and "whether the specific evidence offered by each of them was adequate to show that they ... also faced an independent and real risk of persecution for Convention reasons".[57] Furthermore, Gwyn J observed that the Tribunal's focus on the specific evidence in relation to each applicant meant that it "risked not seeing the wood for the trees".[58] Indeed, her Honour stated that the Tribunal had not "stepped back from its step by step process, focusing on the specific evidence before it — or the absence of specific evidence" in order to "make the 'contextual value judgement' Elias CJ referred to and is necessary on the facts of this case".[59] Therefore, Gwyn J rightfully observed there is:[60]

> ... a bona fide and serious argument that the Tribunal ought to have had regard to those provisions of the UNCROC and the [International Covenant on Civil and Political Rights] ICCPR on which the applicants rely.

It therefore followed that her Honour rightfully found there was public interest and general importance in "clarifying how decision makers in the refugee context apply relevant international conventions as they relate to the interests of the child and the principle of family unity".[61]

Gwyn J was correct to find that the Tribunal adopted a narrowed focus of interpreting the definition for refugee status under the Refugee Convention. This is because the child was dependent on the mother and particularly vulnerable due to his age and medical condition, as well as the husband's health issues and the fact that he could be held to an extent for his wife's conversion. Indeed, Gwyn J observed that the Tribunal recognised that the wife's profile as a known apostate was likely to be amplified by her son's severe autism which makes her identifiable, but her Honour stated that the Tribunal failed to have "considered the converse proposition ... that the combination of

the wife's apostasy and the child's severe autism may put all members of the family at risk".[62] Gwyn J relied upon Palmer J in *RM v Immigration and Protection Tribunal* who said:[63]

> I consider it is possible to envisage circumstances in which children of a persecuted faith, race or other characteristic might themselves create the pre-conditions of persecution of parents who do not share that characteristic. Or some circumstances may legitimately lead parents to fear cruel treatment of their children if they would be returned to another country. For example a child may face female genital mutilation if returned whereas the parents might not.

In this case, Gwyn J observed that the claim of the child and the husband is largely derivative from the mother's status as someone who has been found to have a "well-founded fear of persecution based on her conversion to Christianity".[64] Counsel for the Refugee and Protection Officer (RPO) submitted that being a family member of someone who is a recognised refugee will not, in and of itself, qualify someone as a refugee themselves, and that in the present case neither the child nor the father identify that they were at risk of persecution arising out of their familial status.[65] However, counsel did concede that obligations in international conventions may be relevant to an assessment of an applicant's refugee claim, for example in assessing the particular nature or extent of any risk the person faces.[66] It was argued that in this case the applicants did not provide evidence to establish that factors such as the protection of the family unit, the child's status as a child, or his medical conditions meant that either of the applicants would face a real risk of persecution if returned for a Convention reason.[67]

The position adopted by the RPO in this case is wrong. This is because, as Pobjoy has suggested, it is common practice for dependent children accompanying their parents to receive derivative refugee status if the parent or guardian receives it. Indeed, the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating the Status of Refugees* (the Handbook) affirms that "if the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity".[68] The purpose of this is because the Handbook affirms the UNHDR's declaration that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State".[69] Lastly, the Handbook clarifies whom is entitled to benefit from the principle of family unity, which at minimum includes the spouse and minor children of the applicant.[70]

The RPO further argued that the Handbook is guidance only and neither it or the Refugee Convention itself incorporates the principle of family unity into the definition of refugee.[71] The RPO argued that New Zealand is able to meet its obligations to ensure the protection of the family unit through other processes, outside the determination of refugee status,[72] and that the principle of family unity was directly relevant to the balancing exercise required to be undertaken as part of the statutory test for deportation, and not for interpreting refugee status.[73]

This approach is apparent in companion cases. These are cases which concern a minor, along with their parents, facing deportation from New Zealand. In these cases, the Tribunal consider other human rights law such as the CRC and ICCPR. For example, in *BW (Malayasia)*,[74] the parents of a 23-month-old child were not recognised as refugees whereas their son was, owing to himself not being conferred nationality of Malayasia due to systemic discrimination. In this case, the Tribunal relied upon art 3(1) of the CRC to ascertain the outcome based upon the best interests of the child. As such, the Tribunal held that the best interests of the child required the parents not to be deported as he is wholly dependent on his parents for his day-to-day care to meet his physical, mental, social and spiritual needs and for his well-being. This theme is also found in *BF (Colombia)* where a mother was recognised as a refugee, but the eight-year-old son was not due to his dual nationality, and as such was liable for deportation. The appellant was granted a resident visa by the Tribunal after they relied upon art 3(1) of the CRC to find it would be unjust or unduly harsh to deport the appellant when he had never known his biological father in the United States, and that separation from his mother would be unjust or unduly harsh as she could not enter the United States, meaning the separation would likely be permanent.[75]

Despite this well-intentioned approach, it is inherently flawed. This is because by not considering relevant international conventions when determining refugee status for children, then New Zealand is likely breaking its international obligations, in particular art 22(1) of the CRC which requires state parties:[76]

> ... shall take appropriate measures to ensure that a child who is seeking refugee status ... receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights ... in the present Convention and in other international human rights ... to which the said States are parties.

It is on this basis that Gwyn J was correct to reject the submission that New Zealand is not required to consider human rights law, such as the CRC, when determining child refugee status. Her Honour rightly held that the Tribunal "ought to have had regard to those provisions of the UNCROC and the ICCPR on which the applicants rely".[77] The RPO's position is that the focus in a claim to refugee status must necessarily be based upon whether the applicant has established a well-founded fear upon return to their country of origin on basis of a Convention reason.[78] As Gwyn J rightly points out, this approach is too narrow.[79] The position maintained by the RPO suggests that the issues raised by Pobjoy, in relation to states tending to focus on a child's status as a refugee claimant rather than their status as a child, can be considered to be applicable in New Zealand. It is apparent that under the individual assessment for refugee status, New Zealand is actively avoiding the consideration of welfare and protection in favour of immigration control. Gwyn J was correct to rebuke the RPO's position in that they are not required to consider human rights law when determining refugee status for a child. Indeed, the Handbook suggests that the best interests principle "requires that the harm be assessed from the child's perspective".[80] This is because ill-treatment which may not rise to the level of persecution in the case of an adult "may do so in the case of a child",[81] and it is apparent the harm was not assessed from the child's perspective.

Therefore, Gwyn J was correct to grant leave to appeal in these circumstances because there is a public interest in "clarifying how decision makers in the refugee context apply relevant international conventions as they relate to the interests of the child and the principle of family unity"[82] as New Zealand may not accord the rights and protections to child refugees that they are otherwise entitled to.

The current approach for family refugee determination that the IPT use

GD (China)

This was an appeal against the rejection of refugee status for the appellants, both Chinese nationals.[83] The family, comprising a

mother, her son, and her husband (who had been recognised as a refugee),[84] applied for protection due to the husband's online political activities in China.[85] In 2018, they left China with New Zealand visitor visas, where the husband continued posting sensitive content online.[86] In early 2019, the husband's primary WeChat account was blocked, prompting suspicion of government surveillance.[87] Concerned, the family refrained from returning to China for fear of arrest and harm, especially to the son, who idolises his father and might not comprehend his arrest.[88] The wife also fears potential emotional and psychological harm to their son, as well as school-related issues if his father is arrested.[89]

Issues with the scope of inquiry

The Tribunal recognised the question on whether the assessment of the anticipated future predicament assumes the presence of the appellant in the country of origin or former habitual residence or depends on if they are returned there, is not settled.[90] Indeed, the Tribunal recognised that the answer to this shapes the assessment of the refugee inquiry in important ways, and generally, a lack of clarity can cause confusion.[91] The Tribunal cited the High Court in *DG (Bangladesh)* to note that cases cited in relation to the domestic application of various international human rights standards and principles relevant to children did not concern the question of entitlement to refugee and protection status, but deportation. This is because unlike refugee claims, the focus of the inquiry concerns the impact of departure from New Zealand on the appellant and other relevant persons such as family members, and the balancing of these impacts where required against other interests.[92] However, the High Court when granting leave to appeal held that there is a "bona fide and serious argument that the Tribunal ought to have had regard to those provisions of the UNCROC and the ICCPR on which the applicants rely".[93]

While the Tribunal agreed that the administrative process of removal must be distinguished from the real risk of persecution on return insofar as on return signals no more than an assumed physical presence in the country of nationality for the purpose of assessing the future risk of being persecuted for a Convention reason there, the Tribunal emphasised that it is key to understand in every risk assessment the current alienage of the claimant is effectively set aside for the purpose of the exercise.[94]

In some jurisdictions, the Tribunal acknowledged that recognition of one family member in a connected group of claims being considered together might influence the assessment of the claim of other family members, and any risk to them is not separately assessed, which is the favoured and promoted approach by the United Nations High Commissioner for Refugees (the UNHCR) as it promotes family reunification.[95] However, New Zealand does not accord derivative refugee status to family members, as refugee status in New Zealand is personal to the individual.[96] This approach can be considered flawed when a refugee application affects children. This is because the UNHCR recommends that derivative refugee status can be granted to the family members or dependents of a recognised refugee in order to protect the right to family unity, which New Zealand does not do.[97]

Alienage and the assessment of the risk being persecuted

The question of whether the Tribunal is obliged to make a de novo consideration of the appeals was raised, which would require the Tribunal to assess the family member's predicament as it would be but for the intervening recognition of status by the Refugee Status Unit (RSU), or with that factored in.[98] In essence, it was argued on appeal that the Tribunal are obliged to grant a type of derivative refugee status, but the Tribunal recognised that any such approach will need to adhere with s 193(3) of the Immigration Act 2009 (the Act), which requires any approach of determining refugee status that is not covered by the Act must provide the best consistency with the Refugee Convention.[99] Therein lay the problem for the Tribunal, determining an approach to accord de novo refugee status that would be consistent with the Refugee Convention.

The Tribunal considered taking an approach that would ignore the grant of refugee status to a family member and assess the predicament of non-recognised family members with the presumption that they would be residing alongside the recognised refugee in their country of nationality.[100] While this approach does appear straightforward to apply, it would prove problematic in principle. This is because the Tribunal recognised that this approach would mean that in order to assess the predicament of a non-recognised family member by ignoring the decision to grant refugee status to another family member by the RSU, this approach would require considering a future in which the recognised refugee has self-refouled by returning to the country of nationality, which in effect would not be consistent with the Refugee Convention as that requires assessing the predicament of family members while *also* preserving the recognised refugee's right to non-refoulement, and would therefore be in breach of s 193(3) of the Act.[101]

The Tribunal next had to consider the impact that is had on the assessment of other family members in refugee status appeals, when the Tribunal recognise one family member as a refugee. The Tribunal acknowledged that previous cases have shown that developing a principled basis for an approach in these situations have proven difficult to establish.[102] This is because there are differences between the two situations. For example, when a family member has been recognised at first instance in the same Refugee Status Determination (RSD) process, at the time an appeal is subsequently lodged by a family member later in the same RSD process, or in a later RSD process, the national RSD system has already declared one or more family member to be a refugee. This means that that person's alienage from their country of nationality is fundamentally a characteristic they possess which must be factored into the assessment of the claims of appeal raised by the other family members.[103]

The key difficulty identified by the Tribunal in establishing a principled basis for establishing a consistent assessment of the predicament of other family members in status appeals when one family member has been recognised as a refugee, is determining *how* the recognition on appeal of family member should influence the assessment of the predicaments of other family members whose appeals are being heard at the same time; whether that recognition should continue to be ignored, or whether a family member recognised at first instance or through a separate RSD process should now be factored into the assessment of the predicament of the remaining family members.[104] This difficulty arises because the RSD is a declaratory process and the focus in RSD is *always* on the future predicament in the country of nationality, which means once the decision-maker is satisfied that a previously non-recognised family member should be recognised as a refugee, the Tribunal considered it difficult to see why that person's current alienage should be treated differently.[105]

The Tribunal considered it difficult to understand why a person's current alienage should be treated differently after being recognised as a refugee on appeal because in the RSD

process a person's alienage is set aside to assess their individual risk of persecution, and the RSD process assumes the person is to have a concurrent presence in the country of nationality alongside that of any other non-recognised family member. However, once a decision-maker is satisfied that there *is* a risk of persecution if returned to the country of nationality to the family member, the Tribunal considered that alike the previously recognised family member, there is no principled basis for assuming the non-recognised person's continued presence in the country of nationality for RSD purposes.[106]

After assessing the difficulties with establishing a principled basis for approaching situations where a family member is appealing on the assessment of the predicament of other family members who *were* recognised, the Tribunal considered that an approach to RSD that is organised around the concept of alienage, rather than returnability, grounds the inquiry more directly in the language of the Refugee Convention, but also captures the reality of predicaments that face refugee claimants and their families.[107] This is because the Tribunal considered that the accepted alienage of a recognised refugee will, when assessing the appeals of family members based on their assumed continued presence in the country of nationality, necessarily involve considering the refugee's separation from their family, and whether any risk previously existing only in respect of the recognised family member can now be effectively transferred to the family member, or gives rise to some new type of risk of persecution.[108]

By adopting an RSD approach that considered the alienage of a recognised refugee when assessing the appeals of family members who were not recognised as refugees, the Tribunal held that decision-makers in New Zealand will need to consider a risk assessment that *cascades* through the family group, which would ensure that the assessment of the individuals that comprise the family group is necessarily considering how that person will be treated by persecution in light of the now accepted refugeehood-related alienage of one or more family members — which could require a question of risk transference or risk creation from one family member to another, but the assessment will remain individualised nevertheless.[109]

The Tribunal emphasised that a cascading approach to risk assessment does not necessarily mean that because one family member has had adverse attention of persecution transferred to them or would now face a new risk given the alienage of a family member that is sufficient to establish an entitlement to refugee status of their own, that all remaining family members will necessarily be at risk of similar transference.[110] This is because the Tribunal cautioned that all family members must establish their own claim of persecution and identify the characteristic(s) or behaviour that would give rise to a risk of transferred adverse interest.[111]

Therefore, when considering refugee appeals by non-recognised family members based on the refugeehood of another family member, the Tribunal adopted an alienage-based approach when assessing the forward-looking risk to family group members who have not been recognised as refugees. This requires an assessment of the claimant's predicament in their country of nationality, secondly that the recognised family member remains in the country of refuge; and finally, that the recognised refugee will continue to exercise the rights and freedoms associated with recognition of refugee status.[112]

Application of this approach is case and context-specific.[113] The Tribunal recognised that owing to the "very fabric of the Refugee Convention's definition via the concept of alienage",[114] there is a potential for a "disruption of family relations whereby the at-risk family member is forced to flee abroad in order to avoid being persecuted".[115] Indeed, the Tribunal recognised separation from family is undoubtedly one of the most keenly felt impacts of having to flee to avoid persecution, as:[116]

> Refugees run multiple risks in the process of fleeing from persecution, one of which is the very real risk of separation from their families. ... the loss of contact with family members may disrupt their major remaining source of protection and care or, equally distressing, put out of reach those for whose protection a refugee feels most deeply responsible.

The Tribunal recognised that under an alienage-based approach, the predicament of non-recognised family members is inherently shaped by the refugee status of the other family member, but determined that would not mean that family separation will, in and of itself, amount to the family members being persecuted.[117] Indeed, even children who are separated from their parents need to establish something more because the individual nature of refugee status means the risk of being persecuted must be established by each claimant.[118] The basis of this finding is that the Tribunal does not believe that it was ever intended that "the separation of refugee parents from their children is, in and of itself, sufficient to establish that the child meets the Article 1A(2) definition".[119] The issue with this is that despite the Tribunal trying to maintain family unity under this approach, it is apparent that it still adheres to a strict and rigid approach to applying the refugee definition. Indeed, this is evidenced by the fact the Tribunal rely upon the fact that known refugee groups, including "war orphans, or whose parents had disappeared",[120] were removed from the final Refugee Convention.[121] Therein lies the problem, the Cartagena Declaration calls for an inclusive, evolving and flexible interpretation of the refugee definition.[122]

It is evident that New Zealand does not adopt an inclusive, evolving and flexible approach because if it did, then it is likely New Zealand would be better equipped to protect family unity by way of granting derivative refugee status to close family members or dependants of a recognised refugee. Indeed, the UNHCR recommends that the spouse of the refugee status applicant and/or unmarried children of the applicant or spouse, in particular, be granted derivative refugee status under the right to family unity, as by doing so it affords family members or dependents better protection.[123] However, New Zealand does not do this as the Act requires refugee decision-making to be consistent with New Zealand's obligations under the Refugee Convention and in accordance with the Act.[124] The issue with this is that the same rules apply to the Tribunal as well,[125] meaning there is little room for a flexible approach to be adopted if it is not prescribed for by the Act or the Refugee Convention.

Role of children centred rights in the inquiry

The Tribunal recognised the grant of leave in *DG (Bangladesh)* was notable due to the underlying contextual value judgments which may lie behind statutory decision-making.[126] Indeed, the Tribunal notes that it is "beyond question that the inquiry into refugee status ... includes, where relevant, UNCROC rights".[127] This is because the Tribunal held the UNCROC may "inform entitlement to refugee status has long been recognised in New Zealand refugee law".[128] The Tribunal held that the relevance of the best interests principle is mediated by the reality that it cannot displace the refugee definition as the touchstone of that inquiry. If a child is not a refugee when applying the Refugee Convention definition, the best interests principle will not make the child

so.[129] Indeed, it cannot convert the need for an objective assessment of the well-founded criterion into a subjective one, nor does it mean that a speculative or remote risk is elevated to the real chance level.[130] However, the Tribunal stated that the rights contained in the CRC "reinforce, modify, and contextualise the rights children already enjoyed under general international human rights law treaties", and that "some child-specific rights also arise".[131]

While the Tribunal is correct in recognising that the CRC cannot displace the refugee definition, the Tribunal is incorrect in applying only a general reference to it when considering rights attached to children and child-specific rights. Indeed, the CRC is relevant to refugee status determinations as it can assist interpretation of the Refugee Convention by acting as an interpretive aid when applying the Refugee Convention definition; it would promote objective and consistent decision-making. Furthermore, adopting the interpretive approach would allow for the Refugee Convention definition to evolve in a contextually sensitive way to better align with the preferred approach that the Handbook sets out. Lastly, the CRC can provide an independent source of protection for children by precluding the return of a child to their home country if they do not satisfy the refugee definition criterion under an individualised assessment.

Furthermore, the Tribunal failed to recognise that the best interests principle can inform the interpretation of a State's obligations under the Refugee Convention, but it also demands an age-sensitive and inclusive interpretation of those obligations. By taking the best interests principle into account when determining refugee status that affects a child, the state would be complying with the CRC's reaffirmation that where a legal provision is open to more than one interpretation, the decision-maker should favour the interpretation that best serves the child's best interests. It is therefore evident that for New Zealand to give proper effect to its obligations under the CRC and the Refugee Convention, particular consideration needs to be given to all child-focused rights, including the right to not be separated from their parents;[132] and give due consideration to the best interests principle and relevance the CRC has to Convention applications.

The recent case of *AW (United States)* followed *GD (China)* in which the Tribunal held that they are required to evaluate the reason as to why the appellants are outside their country of nationality and to not depend on their returnability.[133] When evaluating the reasons as to why the applicants, who are children, and were outside the country of nationality, their circumstances raised issues in respect of their right to be free from cruel, inhuman or degrading treatment or punishment contained in art 37(a) of the CRC, which states "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment".[134] The Tribunal found that, owing to past experiences and country sources available, there was a real chance that the children would be subjected to emotional and physical abuse which, having regard to the age vulnerability of the children, would breach their right to be free from cruel, inhuman or degrading treatment or punishment and reach the severity of serious harm within the meaning of being persecuted if they were in the custody of their father and his family in Jordan.[135] Further, there was no state protection to reduce the risk of serious harm in Jordan.[136] In addition, the Tribunal found the appellant's membership of a family as a particular social group contributed to their predicament.[137]

While *AW (United States)* is a good sign that the Tribunal is adjusting its approach to how it interprets the definition of refugee status per the Refugee Convention, there is not enough evidence to conclusively say whether the Tribunal is overall adopting a flexible approach. This is because this is the first case since *DG (Bangladesh)* and *GD (China)* that sufficiently addresses the applicability of the CRC when determining refugee status.

Challenges and recommendations

This article has highlighted that the key challenge faced by refugee children in New Zealand is that they are unlikely to be accorded with the appropriate protection under the CRC that they are otherwise entitled to. This position supports Pobjoy's proposition that states are more likely to consider refugee children as a matter of immigration issues rather than human rights issues. The effect of this is that New Zealand considers refugee children on their individual circumstances to determine whether to grant refugee status, rather than consider additional protection relevant to them, such as failing to consider the best interests of the child, or their right to not be separated from their parents. This individualised approach is flawed as it relies upon a rigid formula in which the individual circumstances of each applicant must satisfy the criterion specified in the Refugee Convention.[138] This approach has been considered too narrow by the High Court as it does not necessarily consider relevant international human rights instruments. Furthermore, this approach does not comply with the flexibility that is recommended by the UNHCR, nor does it allow for the granting of derivative refugee status, which the UNHCR strongly recommends and is indeed followed in other jurisdictions.

It is recommended that the Immigration Act is amended to incorporate Gwyn J's ruling in *DG (Bangladesh)*, insofar as the CRC and ICCPR are relevant when determining refugee status for children. While this has been followed in *AW (United States)*, this is the only case after *DG (Bangladesh)* where the relevant considerations have been made for refugee status. There is not enough evidence that this is common practice, as indeed in *AW (United States)* the RPO had initially declined the children's application for refugee status as they did not necessarily satisfy the definition at first instance.

Another recommendation is that the Immigration Act is amended to allow for the grant of derivative refugee status in the situations where one family member is recognised as a refugee in a group claim, but the other family members are not. This is because granting derivative refugee status is the favoured approach where refugee decision-making concerns a family claim, as doing so promotes family unity; however, New Zealand has rejected this approach as the Immigration Act, relying upon the black letter law of the Refugee Convention, does not allow it. This is because, in the Tribunal's view, the grant of derivative refugee status would be an inconsistent approach to applying the Refugee Convention if it does not expressly allow for it. The compromise that New Zealand has presently adopted is taking a forward-risk looking assessment when the RSU or Tribunal are determining refugee status in a group application. This operates by considering whether the risk that gives rise to a well-founded fear of persecution to one family member can be transferred to the family members who were initially unsuccessful in their refugee status application.

While this can be considered a form of derivative refugee status on paper, it is effectively not because the Tribunal cautioned that even under this approach, each applicant must individually prove that the same risk gives rise to a reasonable fear of persecution in their own personal circumstances, and if they do not meet that criterion despite the risk transference, they will not be successful in gaining refugee status. The issue with this is that this does not promote nor maintain family unity,

which is to be protected by the state under art 23 of the ICCPR.[139] By not maintaining this, then the state is not acting in a manner that a decision-maker is acting in the best interests of the child, as the forward-risk looking approach can cause family separation between child and parents.[140] Indeed, under the forward-looking approach, otherwise known as alienage approach, while the father was recognised as a refugee in New Zealand, the son was not as the Tribunal was not satisfied that the risks of familial punishment as a response to the father's conduct would give rise to a well-founded fear of being persecuted if returned to China, meaning the son was not given refugee status even under the alienage approach.[141]

GD (China) highlights that New Zealand does not adhere to promoting and maintaining family unity with refugee decision-making, as in this case the wife and husband were recognised as refugees but their child was not.[142] The result is that family unity was broken simply because the Refugee Convention does not allow for the grant of derivative refugee status, despite the UNHCR advocating for this approach. Indeed, this sentiment was echoed in *AW (United States)* where the mother was given refugee status, but because the father did not pose a threat to the children at face value, the children were not initially recognised as refugees in the initial RSU process but *were* recognised under the alienage approach on appeal.

The alienage approach, or a forward-looking risk assessment, is simply not enough in refugee decision-making. New Zealand has an international commitment to uphold family unity and for decision-makers to act in the best interests of the child, and granting derivative refugee status would allow this. By taking an approach that requires following the black letter law of the Refugee Convention, a flexible and modern approach cannot be taken by New Zealand. If the Act allowed for a flexible approach that enabled the grant of derivative refugee status, then New Zealand would be taking a modern approach to refugee decision-making, and by doing so, fulfilling its obligations under international law to protect children. It is evidential that the RPO and the Tribunal are constrained by the Act, as they must make their determination that is compliant with the legislation and by extension the black letter law of the Refugee Convention. If the legislation is amended to adopt these recommendations, then it is likely New Zealand would be able to undertake a flexible approach to refugee decision-making, which should include the ability to grant derivative refugee status where appropriate.

Conclusion

In summary, Pobjoy's insights shed light on issues pertaining to the assessment of refugee children's applications, emphasising the additional protection the CRC and ICCPR afford them. While global commentary on this matter is limited, the examination of New Zealand's immigration system reveals an individualised approach is taken in evaluating refugee children's claims. Unfortunately, this approach often overlooks crucial human rights protections, such as the best interests of the child principle. This is exemplified in *DG (Bangladesh)*, where the Refugee Protection Officer argued that human rights considerations, including the best interests of the child, are reserved for deportation cases and do not apply to refugee status determinations, but this was rightly rejected by the High Court. Gwyn J emphasised that additional human rights protections should factor into refugee applications, as supported by the Tribunal's acknowledgment in *GD (China)*. However, the Tribunal cautioned against altering the objective test, stating that the best interests principle should provide additional context rather than dictate the outcome and that the inquiry must be on an individual basis. This suggests that despite the ruling in *DG (Bangladesh)*, the scope of inquiry is too narrow.

While the Tribunal have stated that family separation is not enough to satisfy refugee status for children, this is incorrect. The UNHCR strongly recommends that a flexible approach is to be adopted by refugee decision-makers, and that derivative refugee status ought to be given to close family members of a recognised refugee to protect the crucial right to family unity, which under the current individualised assessment approach, New Zealand does not do. This article recommends that the law is amended in New Zealand to properly accord for the consideration of relevant international human rights, as by doing so it would allow for decision-makers to adopt a flexible approach to refugee decision-making, and it would allow for the ability to grant derivative refugee status to close family members of a recognised refugee that is recommended by the UNHCR and adopted in foreign jurisdictions.

Footnotes

1. United Nations Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954), art 1A(2).
2. Article 33(1).
3. *Universal Declaration of Human Rights* GA Res 217A (1948), arts 1 and 2.
4. Article 14(1).
5. Convention and Protocol Relating to the Status of Refugees, Introductory note at 2.
6. Jason M Pobjoy *The Child in International Refugee Law* (Cambridge University Press) at 14.
7. At 14.
8. At 14; see also Jacqueline Bhabha "Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum Seekers" (2001) 3 EJML 283 at 293–294.
9. John Tobin "Introduction" in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) at 1–2.
10. United Nations Convention of the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3(1).
11. Pobjoy, above n 6, at 27.
12. At 27.
13. At 28.
14. At 27.
15. At 28.
16. At 29.
17. At 30.
18. At 31.
19. Andreas Zimmerman and Claudia Mahler "Article 1A, Para 2" in A Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press, Oxford, 2011) at 404.
20. At 405.
21. Guy S Goodwin-Gill and Agnès Hurwitz "Memorandum" reprinted in Minutes of Evidence Taken before the European Union Committee (Sub-Committee E) (10 April 2002) in House of Lords Select Committee on the European Union *Defining Refugee Status and Those in Need of International Protection* House of Lords Art No 156, Session 2011-02 (2002) Appendix 2 at [10].

22. Jason M Pobjoy "The Best Interests of the Child Principal as an Independent Source of Protection" (2015) 64 ICLQ 327 at 328.
23. At 329–330.
24. See *Treatment of Unaccompanied and Separated Children Outside their Country of Origin* UN Doc CRC/GC/2005/6 (1 September 2005) at [77].
25. Tobin, above n 9, at 4.
26. At 4.
27. At 4.
28. At 2.
29. At 5.
30. United Nations Convention of the Rights of the Child, above n 10, art 2(1).
31. Articles 2(1) and 22.
32. Pobjoy, above n 22, at 332.
33. At 332.
34. *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24].
35. Pobjoy, above n 6, at 15.
36. Zimmerman and Mahler, above n 19, at 406.
37. At 405–406.
38. United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating the Status of Refugees, at 148 [Refugees Handbook].
39. At 148.
40. At 148.
41. *AW (United States)* [2023] NZIPT 802135.
42. *DG (Bangladesh) v Refugee Protection Officer* [2020] NZHC 1528.
43. *GD (China)* [2021] NZIPT 801793.
44. *BF (Colombia)* [2020] NZIPT 505190.
45. *AW*, above n 41.
46. *DG*, above n 42, at [1].
47. At [17].
48. At [26].
49. At [33].
50. At [34].
51. At [35]; Pobjoy, above n 22, at 330.
52. *EW (Sri Lanka) v Refugee Protection Officer* [2018] NZHC 2130.
53. At [35] (footnotes omitted).
54. *DG*, above n 42, at [55].
55. *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298.
56. At [1].
57. *DG*, above n 42, at [56].
58. At [57].
59. At [57].
60. At [59].
61. At [61].
62. At [57] (footnotes omitted).
63. *RM v Immigration and Protection Tribunal* [2016] NZHC 735 at [70]; and *DG*, above n 42, at [57].
64. *DG*, above n 42, at [58].
65. At [46].
66. At [47].
67. At [47].
68. At [37]; see also *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/1P/4/ENG/REV.2 (1 February 2019) at [184] [The Handbook].
69. At [37]; see also The Handbook, above, at [181].
70. At [37]; see also The Handbook, above n 68, at [185].
71. At [48].
72. At [49].
73. At [50].
74. *BW (Malaysia)* [2021] NZIPT 505293.
75. *BF*, above n 44.
76. Pobjoy, above n 6, at 405.
77. *DG*, above n 42, at [59].
78. At [46].
79. At [55].
80. Refugees Handbook, above n 38, at [10].
81. At [10].
82. *DG*, above n 42, at [61].
83. *GD*, above n 43, at [1].
84. At [2].
85. At [9].
86. At [13].
87. At [14]. WeChat is a Chinese app that is primarily responsible for instant messaging, social media and mobile payments, that was developed as a response to the strict internet censuring in China. WeChat is answerable to the Chinese Communist Party, which means that users of WeChat are aware that the Chinese Government regularly monitors users for any dissent against the Government. If a user is suspected of anti-government rhetoric or views, their WeChat account is blocked and are likely under investigation by the Government which can lead to arrest and punishment for dissent.
88. At [20].
89. At [20].
90. At [38].
91. At [39].
92. At [39]; *DG*, above n 42, at [50].
93. *DG*, above n 42, at [59].
94. *GD*, above n 43, at [41]–[42].
95. At [44].
96. At [45].
97. UN High Commissioner for Refugees (UNHCR) *UNHCR RSD Procedural Standards Unit 5: Processing Claims Based on the Right to Family Unity* (2020) [UNHCR RSD Procedural Standards].
98. *GD*, above n 43, at [53].
99. At [53]; see also Immigration Act 2009, s 193(3).
100. *GD*, above n 43, at [55].
101. At [55].
102. At [56].
103. At [57].
104. At [58].
105. At [59].
106. At [59].
107. At [60].
108. At [60].
109. At [61].
110. At [62].
111. At [62].
112. At [63].
113. At [64].
114. At [67].

115. At [67].
116. At [67]; see also Kate Jastram and Kathleen Newland "Family unity and refugee protection" in E Feller, V Turk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 555 at 556.
117. *GD*, above n 43, at [69].
118. At [69].
119. At [70].
120. At [70].
121. At [70].
122. *Guidelines on International Protection No 13* HCR/GIP/16/12 (2 December 2019) at [65].
123. UNHCR RSD Procedural Standards, above n 97, 4.
124. Immigration Act, s 127(2).
125. Immigration Act, s 193.
126. *GD*, above n 43, at [74] and [57].
127. At [75].
128. At [75].
129. At [85].
130. At [85]; see also *KA (India)* [2020] NZIPT 801719 at [156].
131. *GD*, above n 43, at [86].
132. 1577 UNTS 3, above n 10, art 9.
133. *AW*, above n 41, at [50].
134. 1577 UNTS 3, above n 10, art 37(a).
135. *AW*, above n 41, at [61].
136. At [60].
137. At [77].
138. *DG*, above n 42, at [63]–[64].
139. At [88].
140. At [88].
141. At [125]–[127].
142. At [128].