Is it lawful to detain people who are seeking to be recognized as refugees as lawfulness does not only depend on the applicable national law but also compliance to Article 31 of 1951 of the Convention Relating to Refugee Status and international law[1]?

A dissertation submitted

By

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[1] Michael Kagan "Limiting deterrence: Judicial Resistance to Detention of Asylum Seekers in Israel and The United States" (2016) 51 TILJ 191 at 192.

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Authorship

This dissertation is my own work and, to the best of my knowledge and belief, it contains: no material previously or written by another person, except where this explicitly defined in the acknowledgements; no material which to a substantial extent has been accepted for qualification of any other degree or diploma of a university or other institution of higher learning.

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Abstract

New Zealand domestic law allows detention of individual asylum seekers and members of 'mass arrival group' despite not being concerned with the exceptions provided by the Convention Related to the Status of Refugees of 1951[2] and the Convention Protocol of 1967 and international law.[3] Currently, In New Zealand there is no research conducted to evaluate the existing safeguards which can guarantee an avoidance of unlawful or arbitrary detention of asylum seekers.

In my dissertation, legal comparative method is used and evaluates the current safeguards in New Zealand vis a vis international standards. Two international documents are of importance for this study namely the United Nations High Commission for Refugees Guidelines on the Detention of Asylum seekers of 2012 and Synthesis Report on Defending Migrants' Rights in the Context of Detention and Deportation published in 2017.[4].

My dissertation shows that in New Zealand, asylum seekers without proper documents are being detained on facts that their identity is not certain, some also are detained based on security risks and members of 'mass arrival group' will experience automatic detention and might be in detention for a long period based on the current time an individual case takes to get the result of their interview. My dissertation also found some main domestic legal issues like asylum seekers are not allowed to seek for Judicial review before the tribunal has delivered its final determination and some decisions are not appealable.

New Zealand domestic law, refugee law and international law have a similar goal which is to assist asylum seekers but differ on how to process them. My conclusion is that New Zealand should not be detaining asylum seekers on facts that they do not have proper documents or

[2] "Convention relating to the Status of Refugees 28 July 1951 by the United Nations Conference of Plenipotentiaries" (28 July 1951) <www.ohchr.org> at Article 33 (2).
[3] UN High Commissioner for Refugees (UNHCR) "Refworld | Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention" (2012) Refworld <www.refworld.org> at Guideline 4.
[4] Alix Loubeyre and Maite Fernandez *Defending Migrants' Rights in the Context of Detention and Deportation; Synthesis Report* (2017).

the way they arrived in New Zealand. An individual assessment should be conducted in order to avoid spoiling the good reputation of New Zealand in promoting human rights especially as detention is a bad action which has potentiality of affecting other human rights.

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Chapter 1: Introduction

In 2015, United Nations High Commission for Refugees highlighted that asylum seekers detention was a routine act in different countries and some States were using detention of an asylum seeker as a means to dissuade or deter others to apply for asylum.[5] New Zealand did not make exception of this trend. Minister of Justice confirmed in 2019 that "Asylum claimants or undocumented passengers who were refused entry can be detained in low security open immigration facility or in prison"[6].Currently, individual asylum seekers are detained based on Immigration Act 2009[7] and members of 'mass arrival group' of asylum seekers will be detained based on section 317 A (1) (a) of Immigration Act 2009[8]. New Zealand has not yet experienced mass arrival of asylum seekers therefore, this section is not tested. The drill conducted during the enactment of the section should highlight whether they applied warrant of commitment which allows immediate detention.

Can New Zealand detain asylum seekers based on a sole domestic law or refugee law and international law need to be considered? New Zealand signed and ratified core international treaties which promote rights of asylum seekers. The question which arises is whether these treaties are enforceable in New Zealand. New Zealand was a part of British Empire and one of the consequences was the adoption of common law system which influenced the adoption of dualist approach to international law[9]. New Zealand signed and ratified The Covenant Related to the Status of Refugees of 1951 and it is Protocol of 1965 and did both acts (signature and ratification) for International Bill of Rights[10] which is made of Universal Declaration of Human Rights (UDHR), The International Covenant on Economic, Social and

[5] UNHCR "Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees 2014-2019" (2015) 27 IJRL 375 at [375].
[6] Hon Andrew Little *Proactive release - Seventh Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: request to release the draft report for public consultation* (2019) at [255].
[7] Immigration Act 2009 s 115.
[8] Immigration Act 2009, s 317 A (1) (a).
[9] Kris Gledhill "The New Zealand Bill of Rights Act: Maximising its Potential" [2016] Auckland District Law Society Inc at 4 (i).
[10] At 6.

Cultural Rights of 1966 (ICESCR)[11] and the International Covenant on Civil and Political Rights of 1966 (ICCPR)[12].

The importance of this International Bill of Rights is that they contain obligations which require the country which signed and ratified them to strive for their implementation. For instance, Article 2 (1) provides that "each State party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdictions the rights recognized…, without distinction"[13] while Article 2 (2) requires that if the State Party legislative or other measures did not provide, the State needs to undertake the necessary steps 'in accordance with its constitutional processes[14]. New Zealand has the obligation to implement international refugee law and human rights law[15].

Despite all these tools which are available to use to afford proper protection for asylum seekers, some asylum seekers experience detention once they are in New Zealand Jurisdiction. Four percent of asylum seekers were detained prior to the terrorism attack in United States of America on 11th of September 2001. The detention of asylum seekers was based on Immigration Act of 1987[16]. After this terrorist attack on United States of America, it is indicated that between 85 and 94 percent of asylum seekers were detained in New Zealand. During this time, Immigration Act of 1987 was not changed but New Zealand Immigration Services General Manager issued on 19th September 2001 an 'Operational Instruction' which gave rise to the detention of asylum seeker.[17] Some asylum seekers still

[11] United Nations General Assembly "International Covenant on Economic, Social and Cultural Rights" (16 December 1966) <New Zealand signed on 12th November 1968 and ratified on 28th Match 1979 and can be found on <treaties.un.org/Pages/showDetails.aspx?objid=080000028002b6ed?>.>.
[12] United Nations Human Rights "International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49" (16 December 1966) <ohchr.org/en/professionalinterest/pages/ccpr>.
[13] At Article 2 (1).
[14] At Article 2 (2).
[15] Baird Natalie *"The Rights of Refugees" International Human Rights Law in Aotearoa New Zealand*, Margaret Bedggood, Kris Gledhill, and Ian Mclntosh (eds) (Thomson Reuters New Zealand Ltd, Wellington, 2017) at ch 9.
[16] Immigration Act of 1987.
[17] *Attorney-General v Refugee Council of New Zealand, Inc* [2003] 2 NZLR 577 (Court Appeal) at [20].

experienced detention on their arrival as it is indicated that between 2014 and 2020, eighty asylum seekers were detained in New Zealand Corrections Facilities[18].

The duration to process an asylum seeker application and time spent in detention is questionable. Gill Bonnett's interview with the General Manager for Refugees and Protection Unit Andrew Lockhart reveals that on average individual's asylum seeker will need to wait on average 7 months to learn the decision of their application[19]. It was also revealed that some asylum seekers spent one year and half in New Zealand Prisons[20].

In general, New Zealand domestic law, refugee law and human rights law agree on the purpose of short initial detention of asylum seekers which focus mainly on individual identification[21] Current literature also shows that there is an agreement on what can permit extension of warrant of commitment, but it is indicated that attention should be made to avoid what initially was lawful becoming unlawful therefore arbitrary detention[22].

Despite the difference of initial detention between individual asylum seekers and members of mass arrival group, continuing detention is governed by judicial supervision through a warrant of commitment which domestically is regarded as one of the safeguards which helps to avoid unlawful detention[23]. On face value this may be seen as judicial review, but Deborah Manning touched the manner the Judge of a District Court extends warrant of

[18] "Govt urged to protect asylum seekers in NZ prisons" (20 December 2019) RNZ <www.co.nz/national/programmes/checkpoint/audio>.
[19] "Asylum seekers in NZ waiting 7 months on average for decision" on *New Zealand/ Refugees and Migrants* (4 August 2019) <https://www.rnz.co.nz/news/national/395952/asylum-seekers-in-nz-waiting-7-months-on-average-for-decision>.
[20] "Asylum seekers in NZ waiting 7 months on average for decision", above n 19.
[21] United Nations High Commissioner for Refugees "Refworld | Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention" (2012) Refworld <www.org/docid/503489533b8.html> at [4]. The office of the United Nations High Commissioner for Refugees in 2012 set another milestone of when detention of asylum seekers can be resorted like to verify identity, to determine the elements on which the claim for refugee status or asylum is based, in cases where asylum-seekers have destroyed their travel or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum, to protect national security and public order.
[22] Refugees, above n 21.
[23] *Submission to the Transport and Industrial Relations Committee on the Immigration (Mass Arrivals) Amendment Bill 2012* (New Zealand Human Rights Commission, 2012).

commitment and did not notice the importance of the asylum seekers counsel attendance to the Court during the exercising of warrant of commitment[24]

> "The process by which the warrant commitment is extended usually takes no more than a few minutes for each detainee and does not usually involve any consideration of the person's circumstances. …except where there is an application for conditional release, initially a pro forma exercise, one must question the value of counsel appearing".

An immigration officer is primarily empowered with administrative authority to determine whether an asylum seeker should lose liberty in "accordance with grounds enumerated in national legislation or an international instrument"[25].

My dissertation investigates whether the detention of asylum seekers based on New Zealand domestic law is lawful. My study also will investigate whether New Zealand compliance of Article 31 of 1951 of the Convention Relating to the Status of Refugees and it is Protocol of 1967 and international law should be observed in order to avoid unlawful detention or arbitrary detention of asylum seekers. My dissertation will also highlight existing safeguards afforded by New Zealand domestic law and those afforded by international law. My dissertation will show the similarities and differences which will allow me to identify my recommendations.

Chapter one is introduction to my study which shows why there is a need to study rights afforded to asylum seekers as many countries are using detention to control those who are seeking international protection. This will be followed by chapter two which is concerned with methodology I used in order to investigate whether New Zealand practice is unlawful vis a vis international law and refugee law. The next chapter is about what is known in the field of asylum seekers detention. In this chapter key definition are clarified, theory of legal system is highlighted, and safeguards principles are pointed which allow to identify the

[24] Deborah Manning "The Detention of Refugee Claimants: Law, Procedure and Practicalities" (paper presented to Auckland District Law Society Seminar, Auckland, 2002) at [5.1].
[25] Claire Macken "Preventive Detention and the right to Personal Liberty and Security under Article 5 ECHR" (2006) 10 International of Human Rights 195 at 195.

differences and similarities of New Zealand domestic law and international law in regards to human rights afforded to asylum seekers. The next chapter is analysis which shows whether detention of asylum seekers standard in New Zealand is at international standard level. The last chapter is the conclusion which shows that New Zealand should afford asylum seekers all human rights once they applied for asylum and should avoid using detention to stop asylum seekers seeking asylum in New Zealand.

Chapter 2: Methodology

New Zealand has the right to control its borders as is for other countries[26]. My dissertation will investigate whether the detention of asylum seekers based on New Zealand legislation is lawful as it might amount to arbitrary detention if it does not comply with Article 31 of the Convention Related to the Status of Refugees of 1951 and international law.

Literature indicates that: in law we have various legal methods and some of them are qualitative legal research, quantitative legal research, comparative doctrinal legal method etc. The choice of a particular methodology to conduct the research should be linked to the research question[27]. My dissertation learns two legal system which are New Zealand domestic law and international law. In order to understand what New Zealand authorities should do in order to avoid their actions being labelled unlawful or arbitrary, a comparison of safeguards provided by both systems needs to be highlighted.

My dissertation will investigate the differences and similarities of safeguards afforded by both legal systems using a comparative doctrinal legal method. Doctrinal legal method is defined as

[26] Refugees, above n 21; Lisa Hassan "Deterrence Measures and the Preservation of Asylum in the United Kingdom and United States" (2000) 13 Journal of Refugee Studies 184.
[27] Mike McConvile and Wing Hong Chui *Research Methods for Law* (Edinburgh University Press, 2007); Chris Dent "A Law Student-Oriented Taxonomy for Research in Law" (2017) 48 Victoria U Wellington L Rev 371 at 371.

> "a synthesis of rules, principles, norms, interpretive guidelines and values which explains, make coherent or justifies a segment of law as part of a larger system of law".[28]

Doctrinal legal method reflects on the law[29]. Mary-Rose Russel argued that doctrinal research is concerned with the formation of legal doctrines through an analysis of legal rules.[30] The advantage of the comparative method is to allow a comparison of two legal systems and propose what future development should be and demonstrate what we should expect as "possible difficulties". Comparative method affords an opportunity to "stand back from one's own system and look at it more critically. Legal comparison method allows us to demonstrate similarities and differences, which allows us to establish recommendations for the betterment.[31]

The scope of my literature review will be primary sources starting from the Acts of parliament and more specifically Immigration Act of 1987 and Immigration Act of 2009. In the primary source of law of New Zealand, I am going to consider landmark cases heard in High Court and the Court of Appeal since the inception of Immigration Act 1987. I am going to consider also judgements which influenced changes in some countries who adopted the culture of asylum seekers detention like Australia, United States of America, Canada and the United Kingdom. This will be followed by secondary sources; and attention will be related to international treaties, specifically, the Convention Related to the Status of Refugees of 1951 and its Protocol of 1967, and the three international treaties which forms the International Bill of Rights as pointed to earlier. Commentaries and academic knowledge will be considered to support my arguments.

The United Nations High Commission for Refugee's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers and some safeguards principles

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[28] Dawn Watkins and Mandy Burton *Research Methods in Law* (Routhedge, Taylor & Francis Group, London, 2013) at 9.
[29] Dent, above n 27, at 384.
[30] Natalie Baird and others *Legal Research in New Zealand*, Mary-Rose Russell (ed) (LexisNexis NZ Ltd, Wellington, 2016) at 8.
[31] At 8.

identified in Immigration Detention and the Rule of Law written by Michael Fordham QC, Justine N Stefaneli and Sophie Eser are my guidelines for my dissertation.

Chapter 3: Literature review

3.1 Definitions

What does detention mean? Detention refers to the deprivation of liberty or confinement, in a closed place which an asylum- seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception, or holding centres or facilities[32]. On 14 March 2017, the European Court of Human Rights in *Ilias and Ahmend v Hungray;* the Court held that the transit zone which was used to hold asylum seekers constituted a detention[33]. The applicable law in Hungary which is located in section 31 A of Hungary Immigration Act with a title asylum detention provides that "the asylum authority can, in order to conduct the asylum procedure or to secure the Dublin transfer -taking the restrictions laid down in Section 31/ B into account – take the person seeking recognition into asylum detention if his/ her entitlement to stay is exclusively based on the submission of an application for recognition"[34]. One of the transit zones was located in Roszke. The transit zone was made of mobile containers which have a narrow open-air and protected by a barbed wire at the top measuring four metres high and different facilities were provided from these containers while asylum seekers are being processed.[35] The argument of the Court after reading the submissions of the complainant and the respondent was that asylum seekers in Roszeke transit zone:

> "were not permitted to leave in the direction of the remaining territory of Hungary, the country where the zone was located. This is unsurprising having regard to the very purpose of the transit zone as a waiting area while the authorities decided whether to formally admit asylum-seekers to Hungary".[36]

[32] Refugees, above n 21, at [5].
[33] *Ilias and Ahmed v Hungary (Application no 47287/15* 47287/15, 08 01 2018; Alix Loubeyre and Fernandez, above n 4, at 9.
[34] *Ilias and Ahmed v Hungary (Application no 47287/15*, above n 33, at 11.
[35] At [15].
[36] At [232].

> "At the relevant time the Roszeke transit zone covered a very limited surface, was surrounded by a fence and barbed wire and was fully guarded, which excluded free outward or inward movement. Inside the zone, the applicants could communicate with other asylum-seekers and could receive visits, such as by their lawyer, with the authorities' permission. They could spend time outdoors on a narrow strip of land in front of the containers serving as dormitories. The Court finds that, overall, the size of the area and the manner in which it was controlled were such that the applicant' freedom of movement was restricted to a very significant degree, in a manner similar to that characteristic of certain types of light-regime detention facilities".[37]

We understand the meaning of detention; therefore, it is imperative to know who is an asylum seeker? The Convention Relating to the Status of Refugees does not differentiate asylum seekers from refugees[38] and offer a detailed definition

> "any person owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it"*[39]*.

What needs to be understood is that initially, the definition of the Convention Relating to the Status of Refugees adopted on 1st January 1951 was for a specific group of people. It was to respond to the problem of refugees and displaced people from Europe due to WWII.

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[37] At [233].

[38] A Bloom and M Udahemuka "'Going through the doors of pain': Asylum Seeker and Convention Refugee Experiences in Aotearoa New Zealand" (2014) 9 70 at 70; Rachel Carter "For Those Who've Come Across the Seas: Australia's Obligations under International Human Rights and Refugee Law to asylum seekers Processed Offshore in Nauru and Paua New Guinea" (University of Otago, 2016).

[39] "Convention relating to the Status of Refugees 28 July 1951 by the United Nations Conference of Plenipotentiaries", above n 2, at Article 1 (2).

The 1967 Protocol Related to the Status of Refugees which was opened for signature on 31st June 1967 and entered into force on 4th October 1967 abolished the geographical limitation of the Convention Related to the Status of Refugees to cover everyone in the World in the similar situation[40].

> "Asylum seekers are defined as a person applying for refugee status pursuant to the definition of a "refugee" in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees[41] or any regional refugee instrument, as well as other persons seeking complementary, subsidiary or temporary forms of protection"[42].

3.2 Applicable asylum seekers law in New Zealand

A State can choose between two models of theories. The first is the monist which holds that the domestic law and international law are conjoint[43]. This means that an international law will be expressly applied in that country jurisdiction. This international law is what is known as customary international law. As customary international law makes part of common law; these rules (customary international law) are applied in New Zealand without any action taken by the legislature or judiciary[44]. The second option is that known as dualist; a dualist approach holds that international law and domestic law are separate rules[45]. A part of international law is made by international treaties. Under dualist approach rules of international treaties needs to be "incorporated or transformed in some way into domestic law"[46]. New Zealand signed and ratified international treaties, this means that in order to be

[40] "Protocol Relating to the Status of Refugees, 606 UNTS 267, entered into force Oct 4, 1967" http://hrlibrary.umn.edu/instree/v2prsr.htm at Article 1; Baird Natalie, above n 15, at ch 9 pges 379–380.
[41] Refugees, above n 21, at Article 1 (A) (2).
[42] At [9].
[43] Natalie Baird and others, above n 30, at 188.
[44] At 189.
[45] At 189.
[46] At 189.

enforceable in New Zealand the legislature or the judiciary needs to incorporate the rule in New Zealand legal system.

New Zealand ratified the Convention Related to the Status of Refugees on 30th June 1960 and the 1967 protocol Related to the Status of Refugees on 6th August 1973. A full document of the Convention Related to the Status of Refugees was inserted into Immigration Act of19.[47] As the full document of this international treaty was inserted in New Zealand domestic law in 1999 it became enforceable in New Zealand legal system. The Convention Relating to the Status of Refugees of 1951 and its Protocol of 1967 requires that asylum seekers movement restrictions should be applied only when it is necessary and should be applied once "their status in the country is regularized or they obtained admission into another country".[48]

Other important international human rights instruments which prohibit harm on vulnerable people and are ratified by New Zealand and also incorporated in New Zealand domestic law are International Covenant on Civil and Political Rights (ICCPR) of 1966 which was ratified in 1978. The protection of asylum seekers is found in article 2[49], article 10[50] which affords individuals the right to be treated with humanity and dignity if deprived of liberty; other key articles of International Covenant on Civil and Political Rights are article 7[51] and 9.[52] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 which provides in it is article 3 (1) which is an express prohibition of refoulement;[53]

[47] Immigration Act of 1987 pt 6. See schedule 6: Convention Relating to the Status of Refugees.
[48] "Convention relating to the Status of Refugees 28 July 1951 by the United Nations Conference of Plenipotentiaries", above n 2, at Article 31 (2).
[49] United Nations Human Rights, above n 12, at Article 2. See article 2 which states that all individual within a State territory and subject to its jurisdiction, regardless of nationality or statelessness, such as asylum who find themselves under the jurisdiction of a State party.
[50] At Article 10.
[51] At Article 7.
[52] At Article 9.
[53] United Nations General Assembly "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Adopted and opened for Signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with 27 (1)" (10 December 1984) <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx> at Article 3 (1).

> "No State party shall expel, return (refoulement) 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".

For the purpose of my dissertation the focus is the meaning of 'inhuman or degrading treatment' as it does require a low threshold.

New Zealand had shown its commitment to the defense of human rights by signing and ratifying 7 out of 9 international treaties of Human Rights including those mentioned above:

- International Convention on the Elimination All Forms of Racial Discrimination of 1965
- International Covenant on Civil and Political Rights of 1966
- International Covenant on Economic Social and Cultural Rights of 1966
- Convention on the Elimination of All Forms of Discrimination Against Women of 1965
- Convention Against Torture and other Cruel, Inhumane, or Degrading Treatment or Punishment of 1984
- Convention on the Rights of the Child of 1989
- Convention on the Rights of Persons with Disabilities of 2009

In *Teoh v Ministry for Immigration and Ethnic Affairs*, the High Court confirmed that "an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australia municipal law by statute"[54]. The High Court also held that: "signing and ratifying an international instrument creates a 'a legitimate expectation' that instrument will be considered in administrative decision-making even where the international instrument has not been incorporated into Australian domestic law".[55]

The European Court of Human Rights held that national law permitting[56]

> "any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in the national law, but also that lawfulness concerns the quality of the law and implies that a national law authorizing

[54] *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273 (High Court) at [25].
[55] At [287].
[56] *Case of Del Rio Prada v Spain* [2013] Strasbourg (European Court of Human Rights) at [125]; Alix Loubeyre and Fernandez, above n 4, at 14–14.

> the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness".

However, limitation to the above international protection exists, for instance, the Convention Related to the Status of Refugees provides a limitation in its article 33 (2) that

> "the benefit of the present provision may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that country".[57]

3.3 Asylum seekers detention brief statistics

Statistics of asylum seekers can be obtained by using New Zealand Official Information Act of 1982. Official Information Act allows New Zealanders to get access to information held by the government. An example is Checkpoint which used this Act to get access to the number of asylum seekers detained.[58]

Table 1. Asylum claimants detained in prisons[59]

Year	**2014**	**2015**	**2016**	**2017**	**2018**	
Number	5	15	23	26	12	
Total						81

The above table shows those detained in general prisons but the total number of asylum seekers detained for the same period in Mangere Refugee Resettlement Centre for the

[57] "Convention relating to the Status of Refugees 28 July 1951 by the United Nations Conference of Plenipotentiaries", above n 2, at Article 33 (2).
[58] "Govt urged to protect asylum seekers in NZ prisons", above n 18.
[59] Little, above n 6, at pt 23 [261].

period which started in 2014 to 2018 were 33.[60] This is to indicate that in fact asylum seekers are being detained however their detention is not ended as soon as possible despite the claim that detained are given priority.

In Gill Bonnett's interview with Andrew Lockhart of the Ministry of Business, Innovation and Employment (MBIE) National Manager of the Refugee and Protection Unit "cases where asylum seekers are being detained, either in prison or at the Mangere Refugee Resettlement Centre, were prioritized but they were often the ones with problematic factors, such uncertain identity or concerns over security".[61]

3.4 New Zealand grounds of detention of asylum seekers

Asylum seekers become detainable based on New Zealand domestic law which has a long history but for the purpose of my dissertation the Immigration Act of 1987 and Immigration Act of 2009 are considered.

3.4.1 Detention of asylum seekers whose eligibility for the permit is not immediately ascertainable.[62]

Immigration Act of 1987 in section 128 B provides that "persons whose eligibility for the permit is not immediately ascertainable" shall be detained.[63] Factors to consider were to be found in section 128 B (b) which stipulated that the person has no appropriate documentation for immigration purposes, or any such documentation held by person appears to be false.[64] Asylum seekers detention based on the question of identity is to be found in section 316 (1) (b) of Immigration Act 2009[65]

The leading case was of *X (CA746/2009) v The Queen* in which the issue was unsuccessful claimant for the refugee status avail themselves of the reasonable excuse defense to a

[60] At pt 23 [258].
[61] "Asylum seekers in NZ waiting 7 months on average for decision", above n 19.
[62] Immigration Act of 1987 p 128 B.
[63] Immigration Act of 1987, s 128 B (7).
[64] Immigration Act of 1987, s 128 B (b).
[65] Immigration Act 2009 s 316 (1) (b).

charge of possessing a false passport?[66] In July 2009, X was convicted by a Jury in the District Court and was sentenced to two years and three months of imprisonment by Judge Wade.[67] However, X appealed the conviction, and the Court of Appeal allowed the appeal and the conviction was put aside and the conclusion was that there will be no order of retrial.[68]

How was this decision reached? Actually, the issue in New Zealand Statute as indicated in the case is section 31 (1) (f) of Passport Act which provides that:

> "Every person commits an offense who without reasonable excuse, ha in his or her possession or under his or her control within New Zealand a document purporting to be a passport issued by or on behalf of the Government of any country other than New Zealand that he or she knowns or has reason to suspect is not such a passport".[69]

The above section was reprinted in on 1st April 2017 was still applied on asylum seekers while in *X (CA746/2009) v The Queen* the reasoning was that:

> "because of the circumstances facing asylum-seekers it may be objectively reasonable for them to carry false documentation, regardless of whether they are granted asylum or not. The genuine belief must be bona fide. A genuine belief that one will successfully attain refugee status held simultaneously with the knowledge that in fact one is not entitled to refugee status will not give rise to a reasonable excuse. In the end, these questions are all questions of fact. As the crown properly conceded, the appellant's arrival interview and his account of a brush with the Syrian intelligence service was enough to put 'reasonable excuse' in issue. The Crown then had the burden of proving that it was not objectively reasonable for the appellant to think that he could be regarded as a

[66] *X (CA746/2009) v The Queen* (2010) NZCA522 Court of Appeal (Court Appeal) at [12].
[67] At [9].
[68] At [37].
[69] Passport Act of 1992, s 31 sec. 31 (1) (f) (iii) (13 October 1992 1992).

refugee in New Zealand. Whether an accused has such a belief is a question of fact".[70]

Charging asylum seekers was also experienced in United Kingdom where the leading case was of *R v Uxbridge Magistrates Court & Another Ex Parte Adimir* in 3 cases were put together on facts that all accused arrived in England with false passport and applied for asylum. They were prosecuted for possessing false passport but below quotes from the case show that asylum seekers should not be prosecuted based on the documents they hold: Mr Adimi said:

> *"although the decision is for the Secretary of State, I would expect him to follow the conclusion these judgements dictate. The Director of Public Prosecutions will then be required to discontinue the prosecution".*[71]

Lord Justice Simon Brown said:

> "for the reasons given in the judgements which already been handed down, we allow these applications. As we have explained, we have not thought it necessary or appropriate to make specific orders or declarations but rather we let our judgements speak for themselves. We recognize, of course, that our views differ as to whether what respondents propose for the future would or would not strictly comply with the law. Given, however, that both of us express a strong preference for what may be called the Secretary of the State solution, we would expect the respondents to give careful consideration as to how they propose now to give effect to Article 31 (of the Convention Relating to the Status of Refugees of 1951)".[72]

3.4.2 Detention of Asylum seekers based on security risk

Any person suspected to be a security risk under Immigration Act of 1987 should be arrested once a Security Certificated is delivered to him and all steps taken for his asylum

[70] *X (CA746/2009) v The Queen*, above n 66, at [27].
[71] *R v Uxbridge Magistrates Court and Another, Ex perte Adimi* High Court CO/2533/98; CO/3007/98; CO/2472/98; CO/1167/99, 29 July 1999 at [103].
[72] At [104].

application had to be stopped.[73] The Director of Security is the sole authority empowered to issue the security risk certificate[74] and also imbued with power to be the only person to review the certificate once the person concerned applied the review of the decision to issue the security certificate.[75] The Director of Security's power is also visible in the way the Minister who oversees immigration matters may rely on the certificate when making a decision under this Part of immigration Act whether or not the Minister receives an oral briefing under section 114E.[76]

This legislation was tested when the first security risk certificate was issued to Ahmed Zoaoui from Algeria who sought asylum in New Zealand.[77] The security risk certificate was issued while New Zealand Immigration Services declined his refugee status application.[78] As indicated in Immigration Act of 1987 once a security risk certificate is issued all existing processes stop. The security certificate was issued while Mr Ahmed Zoaoui appealed the decision of New Zealand Immigration Services to Refugee Status Appeals Authority of New Zealand.[79] This was a part of the effect of issuing security risk certificate for a person who is in New Zealand based on Immigration Act of 1987.[80] However, as the Refugee Status Appeals Authority was excluded among affected Authorities the Inspector-General issued an

[73] Immigration Act of 1987 s 114 (G) (5). Section 114 (G) (5) provides that "where a member of the Police serves a notice on a person under subsection (4), that member or any other member of Police must arrest the person without warrant and place the person in custody"
[74] Immigration Act of 1987, s 114 D.
[75] Immigration Act of 1987, s 114 I (3).
[76] Immigration Act of 1987, s 114F.
[77] *Ahmed Zaoui v Attorney-General* Supreme Court SC CIV 19/2004, 2005 NZSC 38 at [6].
[78] At [6].
[79] Claire Breen "The Human Rights of Asylum-Seekers in New Zealand" (2005) 8.1 at [8 (1)]; *Ahmed Zaoui v Attorney-General*, above n 77, at [3].
[80] Immigration Act of 1987, s 114G (3) (a) (b) (c). This section provides that: (a) to require the processing of any application or other matter in relation to the named individual by an immigration officer that is currently underway to be suspended, notwithstanding any other requirement of this Act; and (b) to require any matter under this Act in relation to the named individual proceeding in an Authority (other than the Refugee Status Appeals Authority), the Board, the Tribunal, the District Court, or the High Court to be suspended, notwithstanding anything in this Act or any other enactment or rule of law; and (c) to require the detention of the named individual by a member of the Police under subsection (5).

interlocutory decision setting out how he would conduct the review and what matters he would take into account.[81]

Several restrictions were registered in the Immigration Act of 1987. Individuals who were detained due to security risks were denied knowing the summary of the information acted upon and communication with special advocate was very limited which could impact the defense ability.[82] Justice Susan Glazebrook argued that: "these restrictions place obvious limits on the role of the advocate as he or she is unable to take instructions specific to the information and has no independent means of checking its accuracy".[83]

Immigration Act 2009 came with improvement to sharing classified information: Appeal Tribunal must have access to classified information[84], a preliminary hearing must be held in a closed hearing and the chief executive of the relevant agency makes a presentation on the classified information[85] in the presence of the special advocate and this special advocate[86] may not be present in the process of approving, amending, or updating summary which must be served to the affected person or the appellant for comment[87].

The main issue is that there is a limitation in regard to appeal or review rights for classified information matters[88] as section 262 (1) of Immigration Act 2009 provides that "no appeal or review proceedings may be brought in respect of the use of classified information for this Act except as provided for the Act"[89]. Communication between special advocate and the affected person of his or her representative is limited once the special advocate accessed classified.[90]

[81] Justice Susan Glazebrook "From Zaoui to Taday: a Review of Recent Developments in New Zealand's Refugee and Protected Persons Law" (paper presented to International Association of Refugee Law Judges Regional Conference, Sydney).
[82] At 3–4.
[83] At 3.
[84] Immigration Act of 1987, s 241 (1).
[85] Immigration Act of 1987, s 241 (2).
[86] Immigration Act of 1987, s 241 (3).
[87] Immigration Act of 1987, s 242 (7).
[88] Immigration Act of 1987, s 242 (1).
[89] Immigration Act 2009 s 262 (1).
[90] Immigration Act 2009, s 267 (3).

Even if change was made toward disclosing information to the concerned person or another party; the fact that vital information will be withheld presents a big obstacle to defend his or her case.[91]

3.4.3 Detention of asylum seekers who arrive in New Zealand as members of a 'mass arrival' group

Mass arrival is defined in section 9A (1) as a group of more than 30 people, each of whom falls within 1 or more of the classes of the person described in paragraphs (a) to (f) of section 115 (1) who arrive in New Zealand – on board the same craft,[92] on board the same group of craft and within such a time period or in such circumstances that each person arrived,[93] or intended to arrive in New Zealand as part of the group.[94]

The issue with members of 'mass arrival group' is the power of an immigration officer to apply for a warrant of commitment seeking immediate detention of all members of the group[95] except those under 18 years without parent or a guardian. Section 317 A (1) (5) of 2009 Immigration Act provides that

> "Nothing in this section permits an immigration officer to include a person under 18 years of age in an application for a mass arrival warrant unless the person has a parent, guardian, or relative who is a member of the mass arrival group".[96]

The asylum seeker does nothing in regard to their detention for instance to question their detention. The main actors are the immigration officer and the District Court. Immigration officer is responsible to check if the current warrant of commitment is near to expire and

[91] Immigration Act of 1987, s 267 (3). Section 267 (3) provides that a special advocate may communicate with person A or person A's representative on unlimited basis until the special advocate has been provided with access to the classified information concerned, but once he or she has been provided with access to classified information, he or she may not communicate with any person about any matter connected with the proceedings involving the classified information except in accordance with this section.
[92] Immigration Act 2009, s 9 A (1) (a).
[93] Immigration Act 2009, s 9 A (1) (b).
[94] Immigration Act 2009, s 9 A (1) (c).
[95] Immigration Act 2009, s 317 A (b). This section provides that "the members of the mass arrival group are detained in custody under this Part."
[96] Immigration Act 2009, s 317 A (1) (5).

request the extension[97] while the District Judge decides based on information provided by an immigration officer.[98]

In this Immigration Act they do not indicate whether a lawyer will be present during the decision. It is a practice which exists as Helen King pointed out that "an Auckland lawyer, who asked not to be named, said that often when an asylum seekers appear in Court no one is arguing against their detention".[99] It is in this spirit I support the summary of the transport committee of submitters' view at the time a Bill in regards to 'mass arrival group'; "mandatory detention as it does discriminate members of mass arrival as it does impose unjustified limit on the right not to be arbitrarily detained".[100]

3.5 Safeguards principles which help the detention of asylum seekers to be lawful.

Asylum seekers experience can be seen in the way the general population view them. A good example is how asylum seekers are portrayed in United Kingdom, a country with many similarities to New Zealand. Alan Gillbert and Khalid Koser emphasized that asylum seekers are represented as criminals or scroungers who rip off the welfare system and many are not genuine asylum seekers.[101]

In New Zealand, despite being praised for the country support of human rights, some decisions indicate that asylum seekers are not portrayed in positive ways. Examples are for instance how the former Prime minister warned New Zealanders that a huge number of asylum seekers can land on New Zealand shores.[102] This was viewed based on a boat loaded with 500 asylum seekers from Sri Lanka who landed in Canada. New Zealand Prime minister Jacinda Arden got "Praised for encouraging extra funding to prevent asylum seekers boats

[97] Immigration Act 2009, s 317 A (c).
[98] Immigration Act 2009, s 317 B (1) (a) (b) and (2) (a).
[99] Helen King "Asylum Seekers Locked up in Auckland Prison—New Zealand's own Manus Island" (26 March 2017) <www.stuff.co.nz>.
[100] "Submission to the Transport and Industrial Relations Committee on the Immigration (Mass Arrivals) Amendment Bill 2012", above n 23, at 7.
[101] Alan Gilbert and Khalid Koser "Coming to the UK: What do Asylum-Seekers Know About the UK before Arrival" (2006) 32 1209 at 1210.
[102] Christopher Foulkes "The Shafts of Strife and War: A Critical Analysis of the Immigration (Mass Arrivals) Amendment Bill" (2012) 43 VUWLR 547 at 100.

to sail to New Zealand"; the maritime project received extra $25 million in the budget of 2019 to boost prevention of 'maritime of mass arrival'.[103]

Due to this tough stand and decisions academics came up with an article entitled "Asylum Discourse in New Zealand: Moral Panic and a Culture of Indifference'.[104] Another title of interest was published by A Bloom & M Udahemuka which is read as "Going through the doors of pain: asylum seekers and Convention refugee experience in Aotearoa New Zealand".[105] All these articles highlight the difficulties and views towards asylum seekers like in the findings of A Bloom & M Udahemuka it was pointed six main obstacles of asylum seekers in New Zealand namely: lack of access to information and support upon lodging claims, barriers to safety, security and well-being in detention, lack of access to services and resources while awaiting refugee/ residency approval, living with uncertainty, manipulation from community members and discrimination.[106]

The fact that restrictions exist in legal system mean it is necessary to evaluate safeguards afforded by New Zealand domestic law vis a vis safeguards provided by international refugee law and international law. New Zealand domestic law has much similarity with United Kingdom as both are members of common law. I am going to follow safeguards principles without exhausting them, published in United Kingdom as both legal systems New Zealand legal system and United Kingdom have one legal body like those countries with a constitution which is the highest source of law. These safeguards principles are to afford "protections for individuals facing the deprivation of their liberty at the hands of a State exercising immigration powers".[107]

[103] Zane Small "Jacinda Arden praised for encouraging extra funding to prevent boats of asylum seekers" (9 September 2019) <www.newshub.co.nz>.
[104] Rachel Bogen and Jay Marlowe "Asylum Discourse in New Zealand: Moral Panic and a Culture of Indifference" (2017) 70 Australian Social Work 104.
[105] A Bloom and M Udahemuka, above n 38, at 71.
[106] At 74.
[107] Michael Fordham QC, Justine N Stefaneli, and Sophie Eser *Immigration Detention and the Rule of Law* (The British Institute of International and Comparative Law, 2013) at 1.

3.5.1 Individualization

Detention must be based on due appraisal of the individual circumstances.[108] New Zealand Immigration Act of 2009 points that members of 'mass arrival group'[109]

> "An immigration officer may apply to the District Court Judge for a warrant of commitment authorizing the detention, for a period of not more than 6 months, of the members of a mass arrival group (a mass arrival warrant)".

In New Zealand there is no literature on this topic. However, the exception is only that underage without a legal guardian will not be included once a decision is made to apply for a warrant of commitment. This is the only selection provides by Immigration Act of 2009.

Asylum seekers may not be afforded this protection which allows assessment of each person to make sure that the circumstances of a particular person are taken into account in order to make a rational decision.

However, in overseas the issue of individual identification had been examined. In *AT and Others (Article 15c; risk categories) Libya CG v Secretary of State for the Home Department;* Upper Tribunal held that evidence pointed out that detainees in certain facilities with greater or lesser control of Libyan suffered ill-treatment.[110] It was concluded that there is a[111]

> "possibility that there may be cases where a person who would otherwise be at risk would be afforded sufficient protection. However, represents a recognition of the need to assess each individual case on the basis of the circumstances relating to that individual".

[108] At 38.
[109] Immigration Act 2009 s 317 A (1).
[110] *AT and Others (Article 15c; risk categories) Libya CG v Secretary of State for the Home Department* Upper Tribunal (Immigration and Asylum Chamber), [2014] UKUT 00318 (IAC) at [74].
[111] At [75].

Facts of the case indicate that Libya was generally safe but certain groups of people were at real risk of persecution or ill-treatment which might affect their health while also experience detention in a country they requested for protection.[112]

It was pointed that "for efficiency and effectiveness of detention a more rigorous assessment of who to detain should be in place to allow a minimum time possible for detention".[113] In the Conjoint report of the House of Commons and Home Affairs Committee in the Fourteenth Report of Session 2017 – 2019 it was also insisted that before detention it is necessary to "ensure that there is no evidence of vulnerability which would be exacerbated by detention".[114]

United Nations High Commission for Refugee Detention Guidelines Guideline 4 para 19 provides that "decisions to detain are to be based on a detailed and individualized assessment of the necessity to detain in the line with a legitimate purpose".[115] Individualized assessment is necessary to ensure that article 31 (2) of the Convention Related to the Status of Refugee which provides that 'any restrictions on the movement to be necessary' is not violated.[116]

International law emphases on the determination of factors which can demonstrate the necessity to detain an asylum seeker.

In *Shams v Australia* United Nations Human Rights Committee stressed that "immigration detention must be based on factors particular to the individuals so that there are grounds particular to the individual cases which would justify their continued detention".[117]

In *A v Australia*, the United Nations Human Right Committee concluded that the detention of "A" did violate article 9 (1) of the International Covenant on Civil and Political Rights

[112] At 2–3. Specific facts can be found in paragraphs [3], [4], [9] and [10]
[113] Terry McGuinness and Melanie Gower *Immigration Detention in the UK: An Overview* (House of Commons, 2018) at 8–11.
[114] House of Commons & Home Affairs Committee *Immigration Detention: Fourteenth Report of Session 2017-2019* (2019) at [67].
[115] Refugees, above n 21, at [19].
[116] "Convention relating to the Status of Refugees 28 July 1951 by the United Nations Conference of Plenipotentiaries", above n 2, at Article 31 (2).
[117] *Shams v Australia*, Human Rights Committee 39–40 (20 July 2007).

which impose general restrictions on the State party "everyone has the right to liberty;… except on such grounds and in accordance with such procedure as established by law".[118] United Nations Human Right Committee pointed that "A" without any evidence of a risk of absconding or other danger to the community, bail should have been appropriate.[119] Before C got detained "A" was a healthy person but suffered mental health due to incarceration.[120]

In *Paposhvili v Belgium* the European Court of Human Rights had ruled to limit the possibility of deporting people who are seriously ill[121] by indicating that there was a violation of article 3 of European Convention of Human Rights which states that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".[122] The asylum applicant was identified with Chronic lymphocytic leukaemia in Binet stage B, with a very high level of CD 38 expression while he was in prison.[123] The applicant health deteriorates and was subsequently admitted in Bruges prison hospital complex.[124] However despite his health condition his detention did continue with the spirit of deportation.

In the recent case of *Khlaifia and Others v Italy* the European Court of Human Rights Stressed that "the de facto detention of third-country nationals upon arrival for the purposes of identification, without formal detention order and an assessment of necessity and proportionality"[125] is in violation of article 5 (1) (f) of the European Union which asserts that

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save…and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person to prevent his

[118] United Nations Human Rights, above n 12, at Article 9 (1); "A v Australia, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997)" <http://hrlibrary.umn.edu/undocs/html/vws560.html> at [15].
[119] UN Human Rights Committee "C v Australia: CCPR/C/76/D/1999" (1999) <www.refworld.org>.
[120] At [3.1].
[121] *Case of Paposhvili v Belgium* European Court of Human Rights Strasbourg 41738/10, 13 December 2016.
[122] European Convention "European Convention on Human Rights:Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4XI1950" (1950) <echr.coe.int/Documents/Convention_ENG.pdf> at Article 3.
[123] *Case of Paposhvili v Belgium*, above n 121, at [34].
[124] At [35].
[125] *Khlaifia and others v Italy (Application No 16483/12* 16483/12, 2019 at [3].

effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition".[126]

3.5.2 Judicial review

The best solution for individuals who lose their liberty is to be afforded judicial review. A detainee has the right to have the lawfulness of detention reviewed by a court empowered to order release.[127] In New Zealand the Bill of Rights Act in the section 27 (2) affirms the right of any person affected by a determination made by a public authority to apply for a judicial review of that determination in accordance with law.[128] However, in New Zealand, asylum seekers are afforded judicial review once a Tribunal has issued it is last determination.

The Immigration Act of 1987 provided that asylum seekers should have exhausted a lengthy procedure of "four independent review and appeal authorities".[129] The most important appeal body was the Refugee Status Appeals Authority (RSAA) specialized in handling issues concerning the Convention Related to the Status of Refugees.

Another restriction is to be found in section 249 (1) (2) (3) of the Immigration Act of 2009 which provides an express restriction in regards to "judicial review of matters within Tribunal's jurisdiction"[130]

Section 249 of the Immigration Act provides limitation to the availability of judicial review of certain decisions which could be subjected to an appeal to Immigration and Protection Tribunal.[131] In *H v Refugee and Protection Officer,* H initiated judicial review proceeding

[126] European Convention, above n 122, at Article 5 (1) (f).
[127] Michael Fordham QC, Justine N Stefaneli, and Sophie Eser, above n 107, at viii.
[128] New Zealand Bill of Rights Act of 1990 1990, s Part 1 (5) Article 27 (2).
[129] Immigration Act of 1987.
[130] Immigration Act 2009 s 249 (1) (2) and (3). Section 249 provides that(1) No review proceedings may be brought in any court in respect of a decision where the decision (or the effect of the decision)may be subject to an appeal to the Tribunal under this Act unless an appeal is made and the Tribunal issues final determinations on all aspects of the appeal, (2) No review proceedings may be brought in any court in respect of any matter before the Tribunal unless the Tribunal has issued final determinations in respect of the matter and (3) Review proceedings may then only be brought in respect of a decision or matter described in subsection (1) or (2) if the High Court has granted leave to bring the proceedings or, if the High Court has refused to do so, the Court of Appeal has granted leave.
[131] Immigration Act 2009, s 249.

before seeking appeal to the tribunal which is the requirement of section 249 of the Immigration Act 2009.[132] H's application was declined by the mere fact that he missed an interview appointment. The High Court supported the argument of the respondent (H),[133] appellant appealed to the Court of Appeal but failed.[134] However, the Supreme Court granted leave to appeal.[135]

During 2013, immigration amendment committee pointed out the existence of limitation of judicial review; for both individuals and those who arrived in "mass arrival', they are restrictions regarding submitting the judicial review.[136] New Zealand as a common law country can be affected by decisions made in United Kingdom. It is important to point out some views on United Kingdom. Dr Ann Lindley in the report of the House of Commons and Home Affairs Committee report proves that in United Kingdom law there is no requirement that "legality of an initial decision to detain be reviewed by a judicial authority within a certain period after the decision order is made" while this requirement should establish whether the initial detention was correctly decided.[137]

Another point of limitation is the ability to submit the *writ of habeas corpus.* As a common law country, it is important to check some decisions of common law community to show the need of judicial review. In *Johnson v Avery* emphasis on the role of the writ of habeas corpus:

> "The basic purpose of the writ of *habeas corpus* is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that

[132] Immigration Act 2009, p 249; *H (SC 52/2018) v Refugee and Protection Officer* Supreme Court SC 52/ 2018, 29 October 2018 at 1.
[133] *H (SC 52/2018) v Refugee and Protection Officer*, above n 132, at [50].
[134] At [53].
[135] At [88].
[136] "Submission to the Transport and Industrial Relations Committee on the Immigration (Mass Arrivals) Amendment Bill 2012", above n 23, at 8.
[137] House of Commons & Home Affairs Committee, above n 114, at 36.

> access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed".[138]

In *Chaudhary v Canada* it was held that migrants subject to lengthy detentions are entitled to seek release through a *writ of habeas corpus.*[139] Judith Resnik compared the functions of the *habeas corpus* as proto-democratic as it promotes "the rights to get access to courts and change adjudication by imbuing it with democratic principles of equality".[140]

In *Experte Hull* the Supreme Court held that "the State and its officers may not abridge or impair a petitioner's right to apply to a federal court for a *writ of habeas corpus".*[141]

It was argued that "where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated".[142] It is in *Wolf v McDonnell* in which Justice Whit argued that "any recognition of prisoners' rights by the Court would be diluted if inmates were unable to articulate their complaints to the Courts".[143] The Australian Human Rights Commission has described limiting access to court as making detention "automatic, indeterminate, arbitrary and effectively unreviewable".[144]

In international community and a general obligation is created by the International Covenant on Civil and Political Rights of 1966 in its article 9 (4) which provides that:

> "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may

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[138] *Johnson v Avery, Commissioner of Correction, Et al No 4*, 483 Supreme Court of United States 393, 485 (supremecourt supremecourt 1969).
[139] *Chaudhary v Canada (Public Safety Emergency Preparedness)* (2015) 700 (Federal Court of Appeal); Stephanie J Silverman "What Habeas Corpus Can (and Cannot) Do for Immigration Detainees: Scotland v Canada and the INjustices of Imprisoning Migrants" (2019) 34 Canadian Journal of Law and Society 145 at 146.
[140] Judith Resnik "Detention, The War onTerror, and the Federal Courts: An Essay in Honor of Henry Mornaghan" (2010) 110 Columbia Lw Review 579 at 668.
[141] *Ex parte Hull, 312 US 546 (1941)*, 312 supreme.justia.com/cases/federal/us/312/546/ 546 (1941); Havard Law Review "The Right to be Heards from Immigration Prisons: Locating a Right of Access to Councel for Immigration Detainees" (2018) 132 HarvLRev 726 at 733 (ii).
[142] *Johnson v Avery, Commissioner of Correction, Et al No 4*, above n 138, at 486.
[143] Havard Law Review, above n 141, at 735.
[144] Australian Human Rights Commission "A last Resort? National Inquiry into Children in Immigration Detention" [2004] at 10.

> decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".[145]

This Obligation is also found in United Nations High Commission for Refugees Detention Guidelines of 2012 in guideline 7 which demands " the right to challenge the lawfulness of detention before a court of law at any time needs to be respected".[146] It is a requirement that: "the authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case".[147] This general obligation is also expressed in regional treaties like the European Convention on Human Rights of 1950 in its article 5 (4) which provides that

> "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily be a court and his release ordered if the detention is not lawful".[148]

The recent obligation was known as Recast European Union Asylum Reception Conditions Directive which became enforceable in mid- 2015 which provides in its article 9 (2) that

> "Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention conducted ex officio and/ or on the request of the applicant. In the case of a review on the request of the applicant, the lawfulness of detention shall be subject to a review to be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall

[145] United Nations Human Rights, above n 12, at Article 9 (4).
[146] Refugees, above n 21, at Guideline 7 [47].
[147] At Guideline 7 [47 (v)].
[148] European Convention, above n 122, at Article 5 (4).

define in national law a period within which the ex officio review and/ or the review on request of the applicant shall be conducted".[149]

3.5.3 Length of detention

The duration of detention must be within a prescribed applicable maximum duration, only invoked where justified.[150] It is provided that once this reasonable period of detention is expired the concerned individual should be automatically released.[151]

In New Zealand there is no time limit to the duration of asylum seekers' detention. New Zealand domestic law provides myriad possibilities for the length of asylum seekers detention. Individuals and members of mass arrival group asylum seekers have to undergo a warrant of commitment regime through different stages of detention and it is rare to argue their detention during the process of warrant of commitment as indicated previously. Comments on England domestic law is important; it is in this regards it is worthy to mention that according to Aiden Seymour-Butler there is no defined time limit for immigration detention in England therefore there is a high chance of indefinite detention.[152] Terry McGuinness and Melanie Gower called for a maximum time limit on the length of detention.[153]

The facts are that for an individual asylum seeker during the initial stage of detention can be subjected to 4 hours limited detention[154] which can be extended to a period exceeding 96 hours without warrant of commitment.[155] After that time, an application can be submitted

[149] The European Parliament and the Council of the European Union *Directive 2013/3/EU of the European Parliament and the Council of 26 June 2013: Laying down standards for the reception of applicant for international protection (recast)* (Official Journal of the European Union, 2013) at Article 9 (2).
[150] Michael Fordham QC, Justine N Stefaneli, and Sophie Eser, above n 107, at vii.
[151] At 82.
[152] Aiden Seymour-Butler "Escaping the Sunken Place: Indefinite Detention Asylum seekers and Resistance in Yarl's Wood IRC" (2019) 31 Denning LJ 167 at 167.
[153] McGuinness and Gower, above n 113.
[154] Immigration Act 2009 s 311 (a).
[155] Immigration Act 2009, s 311 (b).

to a District Court Judge to get permission to continue detention for up to 28 days as long as conditions are approved.[156]

The Immigration Act of 2009 does not only provide the process of individual detention but also provide the detention of 'mass arrival group' of asylum seekers. The Immigration Act of 2009 is not very tacit whether an immigration officer shall or not apply immediately a warrant of commitment for mass arrival group as the term 'may' is used to indicate that a warrant of commitment for a period of not more than 6 months may be sought.[157] After six month of the normal process, an immigration officer is authorized to apply to a District Court Judge for a further warrant of commitment authorizing the continuation of detention[158] for a period of not more than 28 days.[159]

United Nations High Commissions for Refugee Detention Guidelines in guideline 6 provides principle to "guard against arbitrariness, maximum periods of detention should be set in national legislation. Without periods, detention can become prolonged, and in some cases indefinite".[160] In United Nations High Commissions Commission Refugee/ Office High Commission Human Right Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons pointed that "maximum time limits on immigration detention in national law are an important step to avoiding prolonged or indefinite detention".[161] It was further indicated that lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal Practical reasons".[162]

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[156] Immigration Act 2009, s 316 (1). See section 316 (1) (a) to (c) which provides that an "an immigration officer may apply to a District Court Judge for a warrant of commitment (or a further warrant of commitment) authorizing a person's detention for up 28 days in any case where it becomes apparent, in the case of a person detained in custody under Part, that before the expiry of the period for which detention is authorized- (a) there will be not, , or there is unlikely to be, a craft available to take the person from New Zealand; or (b) the person will not, or is unlikely to , supply satisfactory evidence of his or her identity; (c) the minister has made, is not likely to make, a decision as to whether to certify that the person constitutes a threat or risk to security.

[157] Immigration Act 2009, s 317 A (1).

[158] Immigration Act 2009, s 317 E (1). Section 317 E (1) (a) all or specified members of a mass arrival group, members of mass arrival group

[159] Immigration Act 2009, s 317 E (2).

[160] Refugees, above n 21, at Guideline 6.

[161] United Nations High Commission for Refugee and United Nations Human Rights *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons* (2011) at [2].

[162] At [11].

3.5.4 Non-arbitrary

The safeguarding principle identified is that "no one should be subject to arbitrary detention".[163] New Zealand Bill of Rights Act of 1990 section 22 affirms that "everyone has right to be free from arbitrary detention".[164] Some detentions had been questionable as shown in the case of Attorney-General v Refugee Council of New Zealand, Inc.in which a number of issues were raised during to the rise on the number of asylum seekers detained motivated by overseas event known as terrorist attack on United States of America on 11 September 2001. The first issue raised by the Refugee Council In was whether the law concerning normal immigrant does also authorize detention of asylum seeker. In the High Court it was found it was held that in fact the section 128 (5) of the Immigration Act of 1987 includes also asylum claimants "the power to detain created by the immediate turnaround provisions of s128 (5) of the Immigration Act of 1987 applies to refugees status claimants".[165] Blanchard, Tipping, Anderson & McGrath JJ of the High Court point of decision was on the interpretation of the expression "first available craft". He goes on to mention that due to the principle of non refoulement the explanation is applicable once the application has been declined.

Blanchard, Tipping, Anderson & McGrath JJ said:

> "interpretation of the expression 'first available craft' in s 128 (5) of the Act must reflect the dictates of the non-refoulement provisions of S129 X of the Act. The inability to remove a refugee status claimant arising from s 129 X necessarily implies that the expression 'first available craft' means the first available craft after the claim has been declined".[166]

The dissenting judgment of Thomas J indicated that due the Act and the policy the immigration officers were very ready to detain asylum seekers and the problem was the level of discretion to detain based on section 128.[167]

It was asserted that

> "Detention of multiple individuals under a single warrant for a longer initial period of detention may be justified in the unique circumstances of

[163] Michael Fordham QC, Justine N Stefaneli, and Sophie Eser, above n 107, at 54.
[164] New Zealand Bill of Rights Act of 1990 1990, s Part 1 (5) Article 22.
[165] *Attorney-General v Refugee Council of New Zealand, Inc*, above n 17, at [[7], [19] & [96].
[166] At [[12] & [13]].
[167] At [227].

a mass arrival, and the existence of safeguards to ensure the detention is necessary and limited to a reasonable period".[168]

The Ministry of Justice justified the detention objective as to prevent immigration systems being overwhelmed by the arrival of 'mass arrival'.[169] The New Zealand Law Society claims that the "advice envisions members of a mass arrival group as illegal migrants and not asylum seekers".[170] Michael Flynn asserted that "regardless of whether the New Zealand domestic law should be considered a form of mandatory detention, the law's provision on designating mass arrivals appears to provide for arbitrary detention".[171] New Zealand Human Rights Commission (HRC) said the Immigration Amendment Act of 2012 "provides for mandatory detention of a 'mass arrival' and imposes other restrictions on people arriving in New Zealand as part of a 'mass arrival'.[172]

Restriction towards arbitrary is also expressed in International Bill of Rights as Universal Declaration of Human Rights of 1948 in article 9 provides that "no one shall be subjected to arbitrary, detention or exile".[173] International Covenant on Civil and Political Rights of 1966 in article 9 (1) expressed in this term "no one shall be subjected to arbitrary arrest or detention".[174]

[168] "Submission to the Transport and Industrial Relations Committee on the Immigration (Mass Arrivals) Amendment Bill 2012", above n 23, at [24].
[169] Melanie Webb *Advice to the Attorney-General on the Consistency with the New Zealand Bill of Rights Act of the Immigration (Mass Arrivals) Amendment Bill* (Ministry of Justice, 2012) at [24].
[170] Email from (Melanie Webb (Acting Chief Legal Council Office of Legal Council)) (Attorney General) "Immigration (Mass Arrivals) Amendment Bill" (3 April 2012) at [24].
[171] Michael Flynn *Immigration Detention in New Zealand: Global Detention Project* (Graduate Institute of International and Development Studies, 2014) at [154].
[172] New Zealand Human Rights *Discussion Paper; Treating Asylum Seekers with Dignity and Respect The Economic, Social and cultural Rights of those Seeking Protection in New Zealand* (2017).
[173] United Nations "Universal Declaration of Human Rights" (6 October 2015) <www.un.org> at Article 9.
[174] United Nations Human Rights, above n 12, at Article 9 (1). Article 9 (1) says "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

3.5.5 Non-penalization

Detention cannot be used as a routine measure to penalize irregular immigration status.[175] This safeguards principle Is also a central prohibition from International Bill of Rights. Article 14 (1) of Universal Declaration of Human Right provides that "everyone has right to seek and enjoy in other countries asylum from persecution".[176] The Convention Related to the Status of Refugees of 1951 says:

> "the Contracting States shall not impose penalties, on account of their illegal entry presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".[177]

United Nation High Commission for Refugee Detention Guidelines of 2012 provides that "detention is not permitted as a punitive – for example, criminal – measure, or a disciplinary sanction for irregular entry or presence in the country".[178]

In the case of *Velez Loor v Panama Inter- America Court of Human Right* it was held:

> "imposing a punitive measure upon a migrant that re-enters in an irregular manner to a country after a previous deportation order cannot be considered a lawful purpose in conformity with Convention, the detention of people for non-compliance with immigration laws should never involve punitive purposes".[179]

[175] Michael Fordham QC, Justine N Stefaneli, and Sophie Eser, above n 107, at 51.
[176] United Nations, above n 173, at Article 14 (1).
[177] "Convention relating to the Status of Refugees 28 July 1951 by the United Nations Conference of Plenipotentiaries", above n 2, at Article 31 (1).
[178] UN High Commissioner for Refugees (UNHCR), above n 3, at Guideline 414.
[179] *Velez Loor v Panama*, (American Court of Human Right American Court of Human Right 2010).

3.5.6 Indefinite detention and prolonged detention are unlawful

New Zealand Bill of Rights Act of 1990 (BORA) prohibits to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.[180] I was not able to find a case law in New Zealand in regards to asylum seeker but even all those raised in criminal justice system of New Zealand did not confirm the section.[181]

This prohibition is also found in many human rights treaties also signed and ratified by New Zealand. The international Covenant on Civil and Political Rights (ICCPR) provides that: "no one shall be subject to cruel, inhumane or degrading treatment or punishment". In order to strengthen the position of International Bill of Rights a specialized treaty was initiated and became to be known as United Nations Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT). It was opened for signature in 1987 and ratified by New Zealand in 1989.[182]

Detention should be used when it is necessary and proportionate.[183] United Nations High Commissioner for Refugees argued that 'indefinite detention for immigration purposes is arbitrary as a matter of international human rights law'.[184] Peter L. Markowitz indicated that mandatory detention gives rise to the number of detainees and this will give rise to prolonged detention.[185] Universal Declaration of Human Rights article 5 provides that

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*[186]

In *Slawomir Musial v Poland* the European Court of Human Rights provided that treatment which humiliates, debases or shows a want of respect for, or diminishes human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and

[180] New Zealand Bill of Rights Act 1990 1990, s 9.
[181] Dr A S Butler and Dr P Butler *Torture or Cruel or Disproportionately & Severe Punishment or Teatment* (2019).
[182] United Nations General Assembly, above n 53.
[183] House of Commons, House of Lords, Joint Committee on Human Rights *Windrush Generation Detention: Sixth Report of Session 2017-19* (2018) at 19.
[184] Kagan, above n 1, at 173; Refugees, above n 21.
[185] Peter L Markowitz "After Ice: A New Humane & Effective Immigration Enforcement Paradigm" (2020) 5 Wake Forest Law Review at 114.
[186] United Nations, above n 173, at article 5.

physical resistance can be characterized as degrading.[187] Lord Bingham in the House of Lords stated that 'treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being.'[188]

Personal characteristics are factors in recognition of inhuman or degrading treatment. In *MSS V Belgium and Greece* European Court of Human Right recognized that asylum seekers are vulnerable, and indefinite detention amounts to degrading treatment as degrading treatment require 'a lower threshold of harm'.[189] The degree of mental stress caused by detention vary from detainee to detainee. The European Court of Human Right supported that breach occurred if evidence points detention caused harm to detainee mental health.[190]

Chapter 4: Analysis

> "immigration detention is not the answer for anyone. In the United Kingdom today, people are detained without a time limit, for months, sometimes even year. It is harmful and expensive. it robs people of their dignity, spirit, and lives. We need to work towards an immigration system that is based on fairness not force and alternatives to detention that are accountable and allow people to contribute to the society".[191]

Detention of asylum seekers is documented in various countries and by various human rights organizations. In order to control this movement, different States enacted rules which enable them to manage asylum seekers and even allow automatic detention of those who are requesting international protection. Examples that can be mentioned are Australia which enacted an Act authorizing mandatory detention of asylum seekers in 1989;[192] Canada enacted a law authorizing designated individual foreign national to face mandatory

[187] *Slawomir Musial v Poland* ECtHR 22380/09, 20 October 2005.
[188] Aiden Seymour-Butler, above n 152, at 175.
[189] *MSS v Belgium and Greece* EHRR, 2011.
[190] Interview with Human Right Watch (May 2003) at 175.
[191] McGuinness and Gower, above n 113, at [3.1].
[192] Fiona McKay "A return to the 'Pacific Solution'" [2013] 24; Jocelyn Lock, Malia Quenault and John Tomlinson "Australia Should Abolish the Detention of Asylum Seekers" (2002) 21 at 21; Dr Mary Crock and Daniel Miller "Mandatory Detention of Asylum Seekers in Australia" (2013) 22 Hum Rts Defender.

detention[193] and the United Kingdom enacted legislation permitting incarceration of asylum seekers.[194] New Zealand followed the same trend and enacted an Immigration Act which has an objective of detaining asylum seekers who arrived in 'mass arrival'.[195]

The common ground is that the above-mentioned countries all signed and ratified all major treaties of human rights. Therefore, as it was emphasized that in reality detention of asylum seekers is based on domestic law while it should conform with the international obligations which they agreed to when they signed and ratified the international treaties.[196]

New Zealand signed and ratified the Convention Relating to the Status of Refugees of 1951 in 1960 and The Convention Protocol of 1967 which was incorporated in Immigration Act of 1987; both International Covenant on Civil and Political Rights (ICCPR) and ICESCR were ratified on 28 December 1078. Another milestone was the incorporation of United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which was ratified on 10th December 1989. It has been concluded that the fact of the ratification of an international treaty is an indication that the State has the burden to respect its obligations.[197]

Elzanne Bester concluded that "Nations who ratified a convention open their door to populations under threat, guaranteeing the human right of protection, support, and refuge".[198] The United Nations Working Group on Arbitrary Detention (UNWGAD) goal is that when an asylum seeker is detained, there must be 'strict legal limitations' and judicial

[193] Jenet Cleveland, Cecile Rousseau and Rachel Knonick "Bill C-4: The impact of Detention and Temporary Status on Asylum Seekers' Mental Health" (Brief for submission to the House of Commons Committee on Bill C-4, the Preventing Human Smugglers from Abusing Canada's Immigration System Act, 2012).
[194] Aiden Seymour-Butler, above n 152, at 167.
[195] Immigration Act 2009 s 317.
[196] Violeta Moreno-Lax "Beyond Saadi v UK: Why the 'unnecessary' Detention of Asylum Seekers is Inadmissible Under EU Law" 5 HR & ILD2 166 at 179.
[197] McKay, above n 192; *Ah Hin Teoh v Ministry of State for Immigration and Ethnic Affairs* [183] Court of Appeal at [183]; Azadeh Dastyari "Detention of Australia's Asylum Seekers in Nauru: is Deprivation of liberty by any other name just as Unlawful?" (2015) 32 668 at 668.
[198] Elzanne Bester "Blog/Protection or Punishment? New Zealand Asylum and Refugee Policies Under the Sportlight" (7 April 2018).

safeguards', and States must justify detention based on criteria that "must be clearly defined and exhaustively enumerated in legislation".[199]

4.1 Non-entrée

There is an international legal right to seek and enjoy asylum which is expressed in various human right treaties and refugee law[200] in conjunction with an obligation to afford refugee status where a person complies with the 1951 Convention Relating to the Status of Refugee.[201]

However, as indicated above the non-entrée restrictive rules were adopted in different countries and are detaining asylum seekers without real cause, like absence of genuine travel document or the way asylum seekers arrived in that country which is the case of New Zealand for members of 'mass arrival' asylum seekers. However, a well-known James Hathaway in refugee matters indicated that the way asylum seekers leave their home country does not permit them to have all documents.[202]

Individuals in New Zealand who do not have correct documents do experience detention without exception. An example is of an Afghan known as Khalid who arrived with a false passport at Auckland international airport and informed authorities that he was seeking international protection. He was sent into jail because of identity question.[203] A direct quote from Helen King from Fairfax NZ provides that "Immigration's Northern compliance manager Alistair Murray says asylum seekers can be detained if there is a concern about

[199] United Nations "Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court" (6 July 2015) <https://ap.ohrhc.org =A/HRC/30/37>; Eleanor Acer and Jake Goodman "Reaffirming Rights: Human Rights Protections of Migrants, Asylum seekers, and refugees in Immigration Detention" (2010) 24 Geo Immigr LJ 507.
[200] Refugees, above n 21, at Guideline 1; United Nations, above n 173, at Article 14.
[201] Helen O'Nions "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience" (2008) 10 European Journal of Migration and law 149 at 150.
[202] Guy S Goodwin-Gill *The International Law of Refugee Protection*, Elena Fiddian-Qasmiyeh and others (eds) (Oxford University Press, OXFORD, 2014).
[203] King "Asylum Seekers Locked up Auckland Prison -New Zealand's Own Manus Island".

their identity. 'We can't say with certainty that they can be released into the community because they might represent a threat to the community'.[204]

One of the justifications of those tough measures is that asylum seekers are not traveling to a particular country by random but a very calculated move as the rationale is that they choose countries identified as 'soft touch' with generous welfare support.[205] New Zealand also adopted this restrictionism by reducing services to asylum seekers like the time an asylum seekers required to be qualified to request family reunification.[206] Des Places argued that multiple factors might have contributed to country choice but the mastermind behind the choice are smugglers and traffickers.[207]

Researchers have indicated that restrictionism does not reduce the number of asylum seekers.[208] Home Office of the United Kingdom found that there is no correlation between more restrictive policies and the decline in the number of asylum applicants.[209] The measure taken by New Zealand is to intimidate those present in New Zealand and those hoping to land in New Zealand by sending messages of the prospect of detention. This is not allowed under international law.

According to Gina Clayton any action which prohibit asylum seekers of gaining a territory for his or her safety is not is not acceptable in the eye of international law.[210] Gina Clayton examined article 33 of the Convention Relating to the Status of Refugee of 1951. The finding was that there is an agreement that refoulement is not acceptable once the asylum seekers has reached the jurisdiction of the State but found that the main issue is when the asylum seekers still in the area which is not controlled by the State. Gina Clayton conclude that

[204] King, above n 99.
[205] O'Nions, above n 201, at 152.
[206] A Bloom and M Udahemuka, above n 38, at 74–75.
[207] O'Nions, above n 201, at 153.
[208] At 153.
[209] Professor Roger Zetter and others "An Assessment of the Impact of Asylum Policies in Europe 1990-2000 Home Office Research Study 259" [2003].
[210] Gina Clayton *Textbook on Immigration and Asylum Law* (5th Edition ed, Oxford University Press) at 404.

"wherever a State exercises jurisdiction, including at the frontier, on the high seas or on territory of another State" should not refoule asylum seeker.[211]

In *Sale, Acting Commissioner, INS v Haitian Centers Council* the United States ruled that article 33 of the Convention Relating to the Status of Refugees of 1951 was not applied to Haitians intercepted outside of United States of America and got returned to Haiti. The problem was that this was a judicial decision. The criticism from United Nations High Commission for Refugee said this was not decision and the action was unlawful.[212] The conclusion was arrived through the following steps. The advisory group looked the framework of the Convention relating to the status of Refugee of 1951 and its 1967 Protocol and found that the principle of non -refoulement is an imperative and it non derogable element of international refugee protection. It was indicated that "the central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42 (1) of the Convention and Article VII (1) of the 1967 Protocol"[213] it is in this article VII (1) article 33 of the Protocol is found. It is also pointed out that "the General Assembly has called upon States to respect the fundamental principle of nonrefoulement, which is not subject to derogation".[214]

4.2 Penalty prohibition

International law prohibits imposition of penalties on refugees on account of their illegal entry or presence where they present themselves to the authorities without delay and show cause for their illegal entry or presence.[215] This is also shown in the memorandum of the United Nations Secretary-General of 1950 it was observed that:

[211] At 404–405.
[212] United Nations High Commission for Refugee (UNHCR) *Advisory Opinion on the Extraterritorial Application of non Refoulement Obligation under the 1951* (UN High Commission for Refugee 2007) at [12].
[213] At [12].
[214] At [12].
[215] "Convention relating to the Status of Refugees 28 July 1951 by the United Nations Conference of Plenipotentiaries", above n 2, at Article 31 (1).

> "A refugee whose departure from his country of origin is usually a flight and is rarely in a position to comply with the requirements for legal entry into the country of refuge".[216]

New Zealand treatment of refugees is different as identified above for instance asylum seekers without proper document are being detained; members of 'mass arrival group' are being discriminated as they will face automatic detention. The way they arrived is used against them. The available safeguards are set to avoid lawful detention becoming unlawful but international refugee law obligations require necessity rather than simply a lack of arbitrariness.

The penalty does "occur when the asylum applicant has satisfied the formal requirements for verification of refugee status". It was asserted that "once an applicant has complied with the procedural requirements of the refugee determination procedure any further detention would become a penalty unless defined as 'necessary'.

The question which can be asked is that is it necessary to generalize that all asylum seekers without proper documents are to be detained? Is it necessary to generalize that all members of mass arrival should be detained while members of this group might be children, elderly, tortured individuals or pregnant women? New Zealand should avoid this generalization. Grahl- Madsen argues detention can be used to ascertain asylum seeker identity and carry out a required investigation which is limited by the required necessity.[217] The key factor to justify detention is through individual assessment.

United Nations High Commissions for Refugee support restrictions of movement based on necessity. It is indicated that restrictions should be prescribed by law; being necessary; not be discriminatory; applied only when the status is regularized or until the person obtains

[216] *R v Uxbridge Magistrates Court and Another, Ex perte Adimi*, above n 71.
[217] O'Nions, above n 201, at 162.

admission elsewhere.[218]Detention should be avoided and should be an action to take after all other measures had been explored and liberty is to be 'default position'.[219]

4.3 Arbitrary detention

United Nations High Commission for Refugee's guidelines on the detention of asylum seekers provides that 'freedom from arbitrary detention is a fundamental human right'.[220] It was indicated that:

> "the detention of an individual is such a serious measure that it is only justified where other severe measures have been considered and found to be insufficient to safeguard the individual public interest which might require that the person to safeguard the individual public interest which might require that the person concerned be detained. That means that not suffice that the deprivation of liberty is executed in conformity with national law but must be necessary in the circumstances".[221]

The question is that is it appropriate and just while New Zealand domestic law is designed to intimidate people from coming to New Zealand and also stop those already in New Zealand to pursue their applications for refugee status? This deterrence is seen in the way asylum seekers who arrive in New Zealand expect to be detained if their identity is not immediately ascertainable and asylum seekers who arrived in new Zealand in a group over 30 members, services afforded to asylum seekers were reduced.

Former Minister of Justice Andrew Little, the number of asylum seekers per year does not reach ¾ of what pushed to enact the Immigration Amendment Act of 2013 and it does take

[218] O'Nions, above n 201; "Convention Relating to the status of Refugees" (28 July 1951) United Nations Human Rights <www.ohchr.org> at Article 31 (2).
[219] Refugees, above n 21, at Guideline 2 [14].
[220] "United Nation of High Commission of Refugees" The UN Refugee Agency "Asylum-seekers <www.unhcr.org> at [1].
[221] O'Nions, above n 201.

around 20 weeks to do the initial process. It does also take approximately 4 to 6 months for Immigration and Protection Tribunal to process an appeal.[222]

Table 2. Number of asylum seekers arriving per year[223]

YEAR	NUMBER OF APPLICANTS
2014	288
2015	351
2016	387
2017	449

The above numbers are for the whole year. The question which can be raised is if it does take weeks and even months to process asylum seekers arriving one by one what can we expect if 500 people land at the same time? If New Zealand does experience mass arrival based on the current process speed it will take years to be processed. At the arrival of members of mass arrival, an immigration officer may apply a warrant of commitment for 6 months which might not be enough for processing.

What is identified as a justification of why the continuation of detention is juxtaposed with safeguards.[224] Safeguards which help the administration to avoid detention becoming unlawful or arbitrary. The continuation of detention is justified with effective management of the mass arrival group, management of any threat or risk to the security or to the

[222] above n 6, at [81].
[223] At [81].
[224] "Submission to the Transport and Industrial Relations Committee on the Immigration (Mass Arrivals) Amendment Bill 2012", above n 23.

business public which can be generated by members of the mass arrival group, upholding the integrity or efficiency of the immigration system and avoiding disruption the efficient functioning of the District Court which does include the warrant of the commitment application procedure.[225]

The continuity of detention via warrant of commitment might be justified via the regular check that detention remains lawful and in line with the Government's policy and if it is no longer applicable the detainee shall be released.[226]

4.4 Individual assessment

The rule set by international law is that the asylum seekers' detention should be based on the individual assessment as it allows appropriate individualized treatment. United Nations High Commission for Refugee Guidelines on the Applicable Criteria and Standards Relating to Detention of Asylum seekers and Alternatives to Detention Guideline 4 (2) of the 2012 provides that necessity, reasonableness, and proportionality of detention are to be judged in each case, initially as well as overtime.[227] International law promote the consideration of different vulnerable groups like children, pregnant women, elderly etc…

The New Zealand detention regime does not indicate any exception except those underage who are not with an adult responsible for them (legal guardian). The New Zealand mandatory detention does indicate that underage individual with an adult responsible with them will be detained as they are going to be included in the warrant of commitment application.

Individual assessment will help to single out individuals who are at high risk as asylum seeker suffering from a mental health condition or impairment, individuals who had been the victim of torture, victims of sexual or gender – based violence, pregnant women, the

[225] Cesar Cuauhtemoc Garcia Hernandez "Immigration Detention as Punishment" (2014) 35 ImmigrNat'lity L Rev 385.
[226] House of Commons House of Lords Joint Committee on Human Rights *Immigration detention: Sixteenth Report of Session 2017-2019* (HC 1484 HL Paper 278 2019) at 67.
[227] Refugees, above n 21, at Guideline 4 (2) [32].

victim of human trafficking or modern slavery, elderly people and transsexual or intersex individual.[228]

> "The general principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of the person and freedom of movement and public policy objectives of limiting or denying these rights".[229]

The main question will be the detention of families with minors or toddlers as they will be witnessing the stress of uncertainty of their parents or caregivers. The table below indicates that some of asylum seekers are minors based from release of the draft report for public consultation".[230]

Table 3. Number of applicants deported[231]

year	*2014/15*	*2015/16*	*2016/17*	*2017/18*	*2018/19*	*totals*
Adults	27	36	33	35	5	136
Male	24	25	31	26	5	111
Female	3	10	1	9	0	23
Not recorded	0	1	1	0	0	2
Minors	2	8	0	0	0	10
Female	0	6	0	0	0	6
Male	2	2	0	0	0	4

[228] McGuinness and Gower, above n 113.
[229] *Vasileva v Denmark* ECtHR 52792/99, 2003 at [37].
[230] Little, above n 6, at 14.
[231] At 14.

The table indicates that minors were deported. The process of deportation includes detention could be the last bad sign to experience while in New Zealand. If we compare the number of asylum seekers applications received and the number of asylum seekers deported it shows that some asylum seekers end up living in New Zealand community after spending time in prison mixed with normal prisoners which is much harmful to their mental health and wellbeing.

New Zealand mandatory detention may not be at the same level as Australian mandatory detention but as we have not experienced how New Zealand mandatory detention works, we can borrow from the conclusion of Mary Crock and Danial Miller:

> "Given that many of these detainees go on to become members of the Australian community as recognized refugees, it is timely to ask whether the continuation of mandatory and virtually universal detention is in our national interest".[232]

4.5 Deterrence detention

Mass arrival group processing is based on the New Zealand Immigration Act 2009 which was introduced to deter smugglers and people who are attempting to come to New Zealand mainly via maritime route.[233] The central obligation of international refugee law and international law as expressed in the Convention Related to the Status of Refugee of 1951 which provides that:

> *"No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom*

[232] Dr Mary Crock and Miller, above n 192, at 17.
[233] At 73.

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".[234]

What does this mean? New Zealand does not have obligation to grant refugee status but the action of retuning the asylum seeker to the area of persecution is forbidden.[235] The act of sending back asylum seekers to the country of persecution can be done in two ways. The first is direct which happens when the applicant is told that he or she is not welcome and is taken back. The second is that which is not direct; this is implemented by making the life of those who are present in the country miserable.[236] The purpose of indirect refoulement is to make asylum seekers abandon their applications by themselves and decide that the better choice for them is to return and risk prosecution.[237]

Some New Zealand legal provisions forbid some services to asylum seekers such as limiting opportunity to sponsor family members and delay in granting permanent residency for 3 years and the most intimidating is being put in jail and get mixed with prisoners.[238] Under former Prime Minister Theresa May a punitive policy was introduced and known as 'deport first and appeal later'. It was designed to deter asylum seekers through putting in place a hostile environment and encouraging many to return in their home country. The policy was deemed to be unlawful.[239]

In order to have a working deterrence, pain must be inflicted on the individual in order to send a message to others who would consider committing the same act of coming to New Zealand. What will be the benefit of adding pain on a suffering body? The detention should be considered necessary and proportionate in the individual case.[240] Current literature

[234] "Convention relating to the Status of Refugees 28 July 1951 by the United Nations Conference of Plenipotentiaries", above n 2, at Article 33.
[235] Clayton, above n 210, at 406.
[236] At 406.
[237] At 406.
[238] A Bloom and M Udahemuka, above n 38, at 76–77.
[239] Holly Barrow "Criminalised and Chastised: the Brutal Reality of Seeking Asylum in the UK/ View" (11 January 2019) <https://www.euronews.com/2019/11/01/criminalised-and-chastised-the-brutal-reality-of-seeking-asylum-in-the-uk-view>.
[240] Refugees, above n 21, at [33].

demonstrates that detention [241]of asylum seekers in the view of deterrence does not have any effect in regards to uncontrolled migration.[242]

4.6 Right to challenge detention

In New Zealand, asylum seekers detained are allowed to challenge their detention once the Tribunal for asylum seekers has given its last determination. This is in the opposite direction vis a vis international law which requires asylum seekers right to be brought promptly before a judicial to have the detention decision reviewed. International law also adds that there should be regular periodic reviews.[243] If judicial review is not automatic or is obstructed a detainee should be afforded *habeas corpus* which afford asylum seekers right to challenge the validity of his or her detention. In New Zealand both judicial review and *habeas corpus* are accessible at later stage as the last authority in the process of asylum seekers must give their final decision before the applicant can access the general legal system in New Zealand.

The fact that asylum seekers have barriers to access Courts might justify why they might spend months inside prisons. Gill Bonnett reported in 2019 that "targets for decisions on application for asylum seekers have not been met and one person has been waiting for more than three and half years to find out their fate".[244] Gill Bonnett revealed that in the financial year 2019 eight asylum seekers were detained and one had been detained for more than an year.[245] New Zealand should allow a proper judicial review in order to evaluate the validity of the detention as this will motivate officers to finish each case early.

[241] At [47 (iii)].
[242] At [3].
[243] At 47 (iv).
[244] "Asylum seekers in NZ waiting 7 months on average for decision", above n 19.
[245] "Asylum seekers in NZ waiting 7 months on average for decision", above n 19.

4.7 At risk individual

New Zealand domestic law allows detention of minors and children who are with parents or a guardian depending on the way they arrived in New Zealand.[246] In New Zealand domestic law minors must be with a responsible adult to represent their interests,[247] be able to express views on detention, and have these views considered at any of their proceedings.[248] There is an obligation from international law to consider the special circumstances and needs of a particular asylum seeker.[249]

Some individuals need a swift identification and prioritization of these individuals should be recognized and cater to their needs as these are identified in United High Commission for Refugee Detention Guidelines among asylum seekers some are victims of trauma or torture, children, women, victims or potential victims of trafficking, asylum seekers with disabilities, older asylum seekers and lesbian, gay, bisexual, transgender or intersex.[250]

New Zealand needs to have in place a document demonstrating how positive segregation will be carried out once a boat lands with 500 asylum seekers becomes a reality. A research undertaken in United Kingdom shows that

> "both adults at risk policy and other home office policies are silent on how to respond to the needs of those that lack mental capacity, which puts them at a clear disadvantage. More needs to be done to identify vulnerable detainees and treat them appropriately".[251]

[246] Immigration Act 2009 s 317 (7). This section provides that "nothing in this section permits an immigration officer to include a person under 18 years of age in an application for a variation of a mass arrival warrant unless the person has a parent, guardian, or relative who is a member of the mass arrival group.
[247] Immigration Act 2009, s 375 (1A).
[248] Immigration Act 2009, s 377 (1A).
[249] Refugees, above n 21, at 32.
[250] At 32–39.
[251] House of Commons House of Lords Joint Committee on Human Rights, above n 226, at 3.

Chapter 5: Conclusion

New Zealand indicated how as a country is committed to the betterment of asylum seekers as New Zealand signed, ratified, and incorporated the 1951 Convention Related to the Status of Refugee and its Protocol of 1967. New Zealand also signed and ratified the International Bill of Rights which provides general obligations to signatories to implement the treaty without any distinction.

According to Kris Gledhill whom agree with inserted that obligations under international treaties are binding on the country as through judiciary as judiciary system 'exercise the state power', the failings of the judiciary is the failure of the State when the State "is judged at international level for its compliance with the obligations undertaken".[252]

It is also worth to mention that New Zealand Bill of Human Rights Act accepts the relevance of international human rights standards; it gives an opportunity the legislature to be informed of any potential issue "about the compatibility of proposed legislation with the relevant human rights standards" and "interpretation obligation is placed on the courts to strive to find a rights-complaint outcome".[253]However, despite being equipped with all instruments which can safeguard the well-known New Zealand humanitarian spirit, New Zealand joined other countries who adopted strict law aiming to stop and deter people in need of international protection. Is the following conclusion of United Nations High Commission for refugees in 1999 still a concern for New Zealand? The decision to detain is often arbitrary: "in many States the decision to detain is taken on the basis of sometimes very wide discretionary powers, often not prescribed by law. Moreover, even when the grounds upon which such orders are made, are established in law, there are far too frequently applied in an arbitrary manner".[254]

New Zealand made itself vulnerable to overseas influence or overreacted. We saw that after 11th September 2001 by terrorist attack over the soil of United States of America detained a extremely asylum seekers and influence is also seen in the creation of 'mass arrival' group.

[252] Gledhill, above n 9, at 9.
[253] At 16.
[254] Refugees, above n 21, at 3.

This section of Immigration Act was influenced by the landing on Canadian shores a boat travelling with 500 asylum seekers from Sri Lanka. New Zealand geographical position is very different with the countries New Zealand compares with.

The fact New Zealand indirectly refuses the entry of asylum seekers, through enactment or creating policies which create fear among those who consider New Zealand a secure place is a breach of their obligation under the above Conventions and this should be discouraged.

Individual asylum seekers are being detained for holding a false document. In the case of *R v Uxbridge* in 2001, the Court of Appeal in England, lord Justice Simon Brown said: "the problems faced by refugees in their quest for asylum need little emphasis". Asylum seekers difficulties are of gaining access to a friendly shore. Asylum seekers escapes from persecution have long been characterized by subterfuge and false papers.[255]

It is well documented that asylum seekers situation at the time of fleeing from their countries most of the time do not have time to organize identity documents. The fact of not holding proper documents should not be the basis of continuing detention which is the case of New Zealand. New Zealand officials are fully aware that it is too much to ask asylum seekers to have all required documents. Asylum seekers situation is totally different to normal migrants.

Detention is used as a strategy to discourage asylum seekers which is an indirect refoulement. At the top of this other policies are implemented in order to make them feel miserable and 'pack and go' all asylum seekers face reduction of services compared to other refugees , there is in place a programme designed to intercept boats to make sure that those who are taking risk through a rough ocean are returned back. All these laws are believed to deter asylum seekers. New Zealand should abandon all these which are deemed to be unlawful.

New Zealand still have a discrimination law for members of mass arrival as they are treated differently from other individual asylum seekers. New Zealand should put in place a plan

[255] *R v Uxbridge Magistrates Court and Another, Ex perte Adimi*, above n 71.

dedicated to identify those known to be at risk as this will prove to indicate that New Zealand is prepared for the arrival of a big number of asylum seekers and be ready to manage people with different needs. Asylum seekers are from different groups of people as records from United states of America, United Kingdom and Australia proves that it is heterogenic group.

New Zealand domestic law denies asylum seekers the right to have judicial review earlier of their case as they have to exhaust the administrative system. This has a long-term impact as the immigration officer who is viewing the case has no pressure to close the case.

New Zealand still mixing asylum seekers with normal offender. These asylum seekers did not commit any crime except that they run for their safety and arrived in New Zealand in one way or another with wrong method. This can be holding a false travel document as their own identity, prior indication of transit etc. This is to diminish asylum seeker self esteem as the general public will hold the view that he or she is a criminal.

Yes probably, if New Zealand does experience mass arrival asylum seekers most of the will be held in Mangere Accommodation Centre. I have doubt if this will not change the view of the general public in regards to Mangere Accommodation Centre which is seen as a place to welcome refugee. Names like queue jumper, boat people etc. will become familiar for this low medium detention centre. Refence can be made for this of what happened in England when they opened deportation centres.[256]

The above are wrong and change needs to be made starting from undertaking full account of safeguards principles in regards to asylum seekers in order to give a clear direction to the frontline; I mean all those in charge of asylum seekers to make sure cases are closed as soon as possible or release on bail before increasing asylum seekers suffering.

[256] McGuinness and Gower, above n 113.

Judicial oversights of initial decision to detain should "be reviewed by judicial authority within a certain period after the detention decision is made"; this should "establish early in the process of detention…. whether individual has been properly detained".[257]

In Australia mandatory detention was implemented and all asylum seekers without exception were detained or sent to extra territorial. Negative criticism was very strong, and it was very hard to justify how babies, pregnant women etc. … were being treated in such a manner while the negative impact on the health of this vulnerable group of people was well known.[258]

In United States of America immigration policy allowed detention of single women with children to deter others coming to United States of America for refuge. Other critical policy in United States of America was the separation of families. Parents were detained while children were placed in care.

Mass arrival asylum seekers law in New Zealand does not give details on how vulnerable individuals will be managed. A proper individual assessment which can help to avoid aggravating or damaging the mental health of these individuals is not carried out.

My question is whether New Zealand wants to get the negative criticism which other countries like United States of America or Australia experienced which will damage New Zealand current positive reputation?

Detention is bad. Psychiatrists indicated that asylum seekers detained experienced emotional and Psychological damage.[259] The mental health of asylum seekers is poor due to bad experience and this worsened the longer these individuals are detained.[260] In United Kingdom research pointed that detention of only 30 days resulted in 76 percent being

[257] House of Commons House of Lords Joint Committee on Human Rights, above n 226, at [36].
[258] Dastyari, above n 197.
[259] Dr Mary Crock and Miller, above n 192.
[260] Trine Filges, Edith Montgomery, and Marianne Kastrup "The Impact of Detention on the Health of Asylum Seekers: A systematic Review" (2018) 24 399 at 401.

clinically depressed.[261] Research conducted in United States of America showed that asylum seekers detained 5 months were 86% clinically depressed.[262]

Asylum seekers should not be detained. It is also well documented that individuals react differently on detention and asylum seekers especially are vulnerable due to the experience of traumatic events.

In order to conclude I would like to remind that New Zealanders have power to choose how others should get access and enjoy human rights and this is based on the major social interactions involving human rights as identified by Jack Donnelly:

a) Assertive exercise: the right is exercised, activating the obligations of the duty-bearer, who then either respects the right or violates it;

b) Active respect: the duty-bearer takes the right into account in determining how to behave, without the right-holder ever claiming it. The right has been respected and enjoyed, even though it has not been actively exercised and

c) Rights apparently never enter the transaction.[263]

[261] Cleveland, Rousseau and Knonick, above n 193, at 3.
[262] At 3.
[263] Jack Donnelly *Universal Human Rights in Theory and Practice* (3rd Edition ed, Cornell University Press, United States of America, 2013) at 9.

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