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Fighting or Facilitating Family Violence? Immigration Policy and Family Violence in New Zealand

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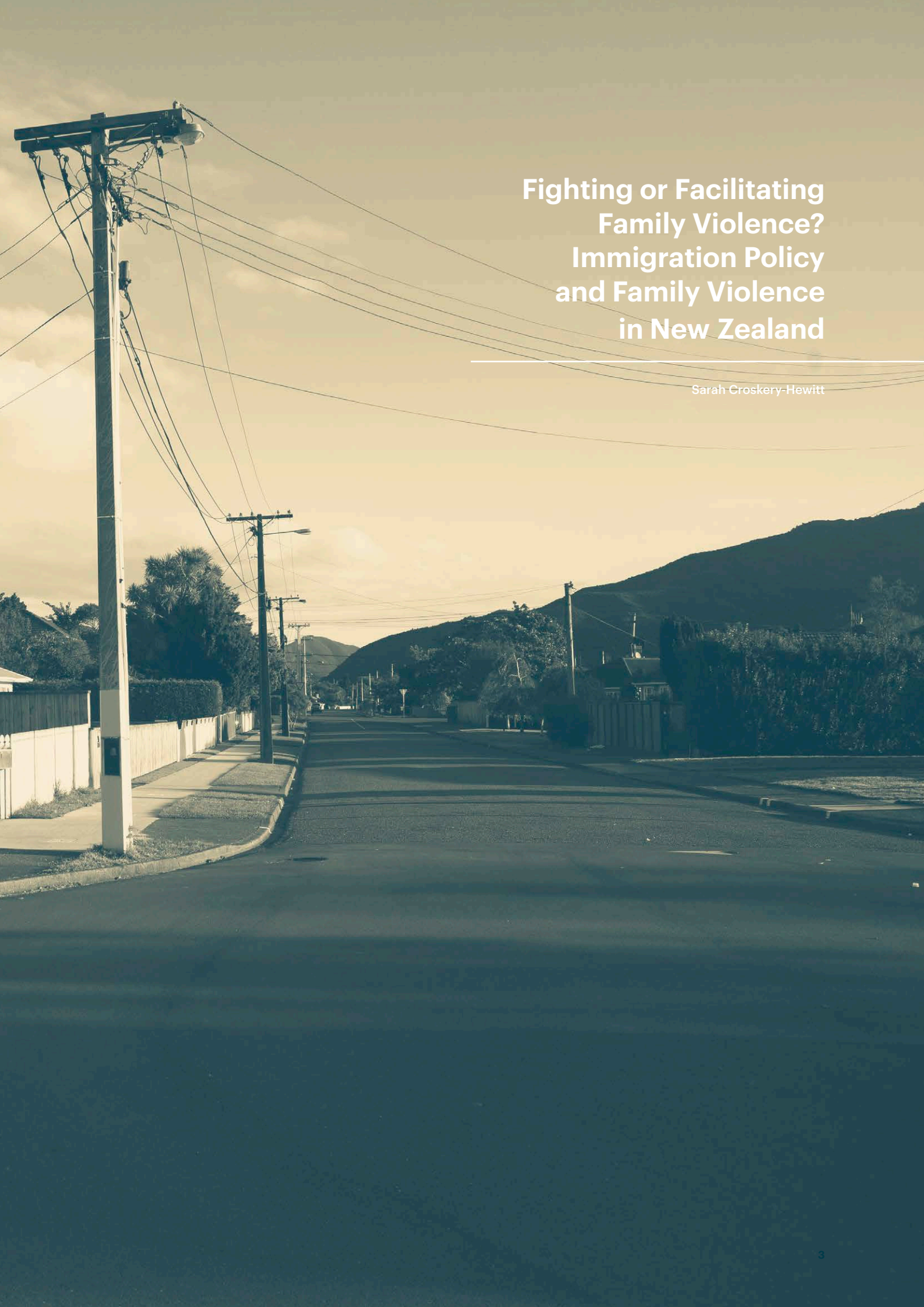
Please cite this report as:

Sarah Croskery-Hewitt *Fighting or Facilitating Family Violence? Immigration Policy and Family Violence in New Zealand* (The Michael and Suzanne Borrin Foundation, Wellington, 2023).



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Sarah Croskery-Hewitt

Acknowledgements

This research would not have been possible without the generous support of the Michael & Suzanne Borrin Foundation, through their Community Law Fellowship programme. The Borrin Foundation's strong support for this kaupapa is greatly appreciated. I would also like to acknowledge my colleagues within Community Law – Dhilum Nightingale, Megan Williams, and Vasudha Gautam – who provide tireless support and advocacy for victim-survivors with insecure immigration status. I am privileged to work alongside such dedicated and inspiring women.

I would like to thank the incredible colleagues and mentors who have provided feedback throughout this research project, including Pooja Sundar, Silvana Erenchun Perez, Luke McNamara, and Julia Quilter. My thanks go to Anna Hodge for her thoughtful and thorough editing of this report, Phil Dunstan-Brown and Jo Maguire for sensitive design work, and to Jack Liang for careful citation checking. I am greatly indebted to Elisabeth McDonald for her endless generosity in providing guidance across many areas of my work; her advice was invaluable in embarking upon my first project of this nature.

Special thanks are also owed to Megan Sety at the New Zealand Family Violence Clearinghouse for sharing her wealth of family violence knowledge and providing support and encouragement throughout this project. My constant gratitude goes to my partner, Kieran Dale-O'Connor, and dear friend, Rosie Jimson-Healey. They have been thoughtful sounding boards and providers of endless encouragement, wisdom, and cups of tea. I am deeply grateful for their faith in me and my work.

Finally, I want to acknowledge the many victim-survivors whose experiences have shaped this research – both the women and children at the centre of the decisions in this study, and those who have entrusted our Community Law centre with their stories. Whilst the decisions cited in this report only provide a very limited window into the appellants' experiences, each decision represents the life of a victim-survivor (or multiple victim-survivors, where appellants have children). I hope that I have elevated victim-survivors' voices wherever possible and given their experiences appropriate recognition and respect.

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Executive Summary

Background

- Many migrants are dependent on a partner's ongoing support to secure or maintain their New Zealand visa. This dependency is a well-recognised barrier to migrant victim-survivors being able to exit a situation of family violence.
- New Zealand's Victims of Family Violence (VFV) immigration policy allows a work and/or residence visa to be granted to eligible migrant victim-survivors who leave a relationship with a New Zealand resident or citizen due to family violence.
- New Zealand's VFV visa eligibility criteria are significantly narrower than comparable visa schemes internationally.
- The VFV policy has been in place for more than 20 years with minimal change to eligibility criteria during this time. Concerns about the adequacy of the VFV policy have been raised by both domestic and international organisations.
- This report presents the findings of a research project examining New Zealand's VFV immigration policy. It identifies key exclusions from VFV policy coverage, analyses how the policy is being implemented in practice, and identifies opportunities for strengthening the immigration response to family violence.
- Because immigration instructions are certified by the Minister of Immigration, legislative change is not needed to amend the VFV visa criteria. Reform would therefore be straightforward to effect.

Key 'Victims of Family Violence' policy exclusions

- Low numbers of victim-survivors are accessing New Zealand VFV visas, with an average of 43 VFV residence visas granted per year over the five years for which Immigration New Zealand has published data. A contributing factor to the low rates of access to VFV visas is the exclusion of many migrant victim-survivors from the eligibility criteria.
- The VFV policy requires applicants for residence to establish that they are 'unable to return to their home country' due to the impacts of stigma or a lack of financial support. This requirement is a significant barrier to VFV visa eligibility and has been the central policy issue in 80 per cent of Immigration and Protection Tribunal appeals against the decline of a VFV visa.
- Other significant exclusions from VFV visa eligibility include victim-survivors whose violent partners do not yet hold New Zealand residence and victims of 'transnational abandonment' who have been abandoned offshore.
- The VFV policy recognises only four prescribed forms of evidence of family violence. The fact that these forms of evidence require the victim-survivor to have engaged with the justice system and/or two designated professionals in relation to the violence can be another significant barrier to accessing VFV visas.

VFV visa appeals in the Immigration and Protection Tribunal

- To assess how the VFV policy is functioning in practice, it is vital to understand how the Immigration and Protection Tribunal (IPT) is interpreting and applying the policy. IPT decisions guide Immigration New Zealand's application of the policy and the IPT is typically the only appeal avenue for applicants whose VFV residence application has been declined.
- This report provides a qualitative analysis of all 49 published IPT decisions under the current VFV policy. These decisions were made between 2012 and 2021.
- At least 39 out of 49 IPT decisions (80 per cent) related to applications that had been declined because Immigration New Zealand was not satisfied that the applicant was 'unable to return to their home country'. This requirement therefore was a key focus of the analysis.
- Unlike Immigration New Zealand, the IPT can consider exceptions to the VFV residence policy where appellants may not fit its strict criteria but have 'special circumstances'. The 'special circumstances' assessment was the other key focus of analysis.

'Unable to return' decisions:

- Most appellants were ethnic minority women from the Global South. The most common countries of origin of appellants were Fiji (11 cases), India (7 cases), and China (6 cases). Many appellants raised significant financial and social barriers to returning to their country of origin.
- Just three decisions found that there had been an error in Immigration New Zealand's assessment of the appellant's ability to return to their country of origin.
- Qualitative analysis indicated that the IPT is applying a very high threshold to the 'unable to return' test and that the IPT's evidential expectations are practically challenging for appellants to meet. For example, the expectation that appellants establish that they would be 'shunned' or 'disowned' and the expectation of direct (written) evidence of hostility or threats of abuse.
- Unduly narrow interpretations of both the financial and social elements of the 'unable to return' test were identified. For example, highly specific interpretations of the meaning of 'stigma' and 'community', and determinations that appellants would not be without 'financial support' in their home country based upon support that is insecure and/or inadequate to meet basic needs.
- Analysis also identified reliance on indicators of an 'ability to return' that were not attentive to cultural context. For example, ignoring or misunderstanding customs and attitudes around dowries, divorce, and remarriage.

‘Special circumstances’ decisions:

- Fifteen IPT decisions found the appellant had ‘special circumstances’ warranting consideration of an exception to policy. Appeals were therefore far more likely to succeed on the basis that an appellant had ‘special circumstances’ than on the basis she met the VFV policy criteria.
- Consideration of children’s interests, rather than appellants’ own interests, appeared to account for most findings of ‘special circumstances’. Only one childless appellant was found to have special circumstances.
- Family violence and its mental and physical health impacts received little recognition as ‘special circumstances’ and were frequently normalised or minimised. Appellants’ contributions and nexus to New Zealand were often assessed in terms that did not account for the impacts of violence upon them. There was little recognition of children’s status as victims of violence when assessing their best interests.
- The risk of separation of mother and child was given variable weight across the decisions. Several decisions stated that Family Court orders preventing a child’s removal did not operate as a ‘trump card’ warranting a grant of residence to the mother, while others gave significant weight to the likelihood of separation.
- Similarly, the effective expulsion of children from New Zealand with their mother, and the impact this would have on their ‘best interests’, was given variable treatment. A decision of particular concern sanctioned the effective expulsion of a Māori New Zealand citizen child with his mother.
- Positively, recent decisions appear to have prioritised children’s interests more consistently. Several recent decisions have recognised children’s needs for stability in their relationship with their primary carer and identified an appellant’s parenting role as a valuable contribution to New Zealand.
- Recent decisions have given particular deference to children’s care arrangements as approved by the Family Court, which has led to more positive outcomes overall. However, a tension was identified in the focus upon Family Court orders that facilitate contact between a child and a father who uses violence, as such contact may be at odds with the victim-survivor mother’s own safety interests.

Broader trends of concern that were noted included:

- The need for complex decisions to be made about victim safety and family violence risk prediction, typically without access to appropriate expertise.
- Use of euphemistic or minimising language in relation to acts of family violence.
- Use of an appellant’s strengths, such as resilience in the face of violence, as a reason she could be expected to withstand a return to a hostile environment.
- Reference to safety risks to an appellant in New Zealand as a reason that it would be better for her to return to her country of origin (against her own wishes to the contrary).
- The characterisation of victim-survivors’ VFV visa applications as somewhat ‘opportunistic’ and motivated merely by a desire for a higher standard of living.
- A lack of attention to the international obligations in relation to family violence that are cited in the VFV policy objectives. These obligations do not appear to be having a meaningful impact on decision-making and in fact are primarily cited in support of narrow interpretations of the policy’s scope.

Improving the immigration response to family violence

- Analysis of IPT decisions identified deficiencies in understanding of and responsiveness to family violence. Comprehensive and ongoing education should be provided to immigration decision-makers on the dynamics of family violence generally, as well as forms of violence that are specific to migrant and culturally diverse communities.
- New Zealand's VFV visa eligibility criteria are very narrow and the IPT's approach to the 'unable to return' requirement has narrowed the visa's coverage even further. This means that VFV residence visas are realistically available only to a small subset of migrant victim-survivors, leaving many women and children to face removal from New Zealand and significant material hardship if they leave a situation of violence. Removal of the 'unable to return' requirement is urgently needed and would make the single greatest improvement to VFV visa accessibility.
- Removing this requirement would also bring New Zealand's VFV policy closer to schemes in comparable jurisdictions and would better uphold New Zealand's international obligations in relation to family violence.
- Other key changes that would greatly improve the efficacy of the VFV visa regime include providing for:
  - **Applicants whose partner was not *'a New Zealand citizen or residence class visa holder'*.** VFV visas should be made available to partners of temporary visa holders who had intended to seek residence based upon the partnership.
  - **Applicants who are no longer *'in New Zealand'*.** VFV visas should be available to victims of transnational abandonment.
  - **Children's safety.** The inconsistency of the IPT's approach to Family Court orders relating to children's care should be addressed. A pathway to residence is required for all victim-survivor parents whose children are required to stay in New Zealand.
  - **Other forms of evidence of family violence.** Discretion should be given to accept forms of evidence of violence other than the four current conclusive forms of evidence.
- Practical barriers to accessing VFV visas should also be addressed, including: providing information at the time of migration on family violence and how it affects one's visa; providing Legal Aid for VFV visa applications and appeals; removing the application fee for IPT appeals concerning VFV visa applications; improving the social welfare support available to VFV visa applicants; and ensuring access to publicly funded healthcare, emergency housing, and free interpreting services for migrant victim-survivors.

Introduction

The ability of one partner in a relationship to deprive the other of their visa is an extremely powerful tool of control, and threats to do so often form part of the abuse experienced by victim-survivors of family violence who are migrants.[1] For a migrant victim-survivor of family violence, losing the right to remain in New Zealand may mean returning to a country where she and her children are at risk of poverty, ostracism, or further violence.[2] If she has children, she may face the risk of being returned to her country of origin without them. At the least, losing the right to remain in New Zealand is likely to mean losing any employment she holds, her home, her local support network, and the life she has built here. It is easy to appreciate the enormous power of such threats; when combined with the heightened risk of violence during separation,[3] social isolation, limited access to culturally and linguistically appropriate support services, ineligibility for social welfare,[4] and ineligibility for legal aid for immigration matters,[5] the barriers to leaving a situation of violence are often insurmountable for migrant women. Despite the obvious scope this creates for immigration policy to be exploited as a tool of abuse by perpetrators, the intersection between immigration status and family violence has received surprisingly little attention in New Zealand.[6] This report seeks to address this gap through an analysis of New Zealand's current Victims of Family Violence (*VFV*) visa regime[7] and of Immigration and Protection Tribunal decisions concerning applications for VFV visas. Given the government's current efforts to address family violence in an integrated and cross-agency manner,[8] it is vital to investigate the extent to which immigration policy and practice may be facilitating abuse.[9]

1 See Neville Robertson and others *Living at the Cutting Edge: Women's Experiences of Protection Orders, Volume 2: What's to be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (University of Waikato, 2007). This Ministry of Women's Affairs-funded report investigated women's experiences of seeking Protection Orders. The report was based upon 43 case studies divided into four streams: Māori women, Pākehā women, Pasifika women, and other ethnic minority women. The report writers found at 218 and 221 that immigration issues were a significant part of 17 of the women's stories: "Our case studies show that immigration issues play a significant role in the lives of Pasifika and other ethnic minority women experiencing domestic violence. Uncertain immigration status can make women particularly vulnerable to abuse by men who exploit that uncertainty as a tactic of power and control over them. … Women whose partners were their sponsors for residence applications, or whose partners were the principal applicant on such applications, were particularly vulnerable. To all intents and purposes, such men had the power to have their partners removed from the country".

2 In this report, victims of family violence are referred to as 'she' and perpetrators as 'he' to reflect the heavily gendered nature of family violence and the dominant gender dynamic in the cases being analysed. It is in no way intended that this terminology diminish the experiences of victims of other genders.

3 Separation and the post-separation period are typically the highest risk time for victims of family violence, with efforts to separate often triggering an escalation of the perpetrator's violence. For example, 50 per cent of New Zealand's intimate partner homicides from 2009 to 2012 happened post-separation or where separation was planned: Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality and Safety Commission New Zealand, June 2014) at 16.

4 Section 16 of the Social Security Act 2018 provides that social welfare benefit recipients must be New Zealand citizens or residence class visa holders. Very limited exceptions are provided in s 205 (for applicants for refugee or protected person status and residence visa applicants who are "compelled to remain in New Zealand because of unforeseen circumstances") and in "special assistance programmes" established by the Minister under s 101.

5 Section 12 of the Legal Services Act 2011 provides that Legal Aid may not be granted for proceedings involving a decision under the Immigration Act 2009 where the applicant holds a temporary entry class visa. Legal Aid is generally available only for immigration matters relating to refugee or protected person status claims (Legal Services Act 2011, s 7(1)(j)–(m)).

6 Few publications have considered New Zealand's immigration policy in relation to family violence in recent years, except for Irene Ayallo "Intersections of Immigration Law and Family Violence: Exploring Barriers for Ethnic Migrant and Refugee Background Women" (2021) 33(4) Aotearoa New Zealand Social Work 55.

7 See Immigration New Zealand *Operational Manual* (2022) at S4.5 for the "Residence Category for victims of family violence" policy and at WI7 for the "Special work visas for victims of family violence" policy.

8 Implementing integrated and effective responses to family violence is a key focus area for the current government, which established the cross-agency Joint Venture for Family Violence and Sexual Violence in 2018. The joint venture has since become Te Puna Aonui, an interdepartmental executive board. Notably, however, Immigration New Zealand was not included in the joint venture or Te Puna Aonui.

9 As Toy-Cronin has highlighted in the tenancy context, "the coordinated state effort to combat family violence … can be undermined by law and practice that is adjacent to, but intersects with, family violence". Bridgette Toy-Cronin "Compounding the Abuse: Family Violence, Damages and the Tenancy Tribunal" (2020) 29(2) NZULR 201 at 201.

Introduction CONT.

New Zealand's Victims of Family Violence (formerly 'Victims of Domestic Violence') visa regime was introduced more than 20 years ago and has undergone relatively few changes since.[10] While policy-makers cited Australia's domestic violence visa regime in describing the impetus for our own scheme,[11] New Zealand has favoured far narrower eligibility criteria that diverge from visa regimes in comparable jurisdictions. Part I of this report will provide an analysis of the scope of our current VFV visa regime, with a focus upon New Zealand's unique (and problematic) 'unable to return to their home country' requirement. I will discuss the key amendments that have been made to the visa criteria since the regime's inception and, given the policy was the subject of criticism during New Zealand's most recent review by the United Nations Committee on the Elimination of Discrimination against Women,[12] I will comment on the extent to which the policy meets New Zealand's international obligations. Part II will explain the work of the Immigration and Protection Tribunal (*IPT*) and the parameters of this study. Parts III and IV will provide a qualitative analysis of all IPT appeal decisions concerning VFV visa applications, focusing on the IPT's application of the 'unable to return home' requirement and their assessments of appellants' 'special circumstances'. Given that the IPT is generally the only appeal avenue,[13] and that IPT decisions guide immigration officers' application of policy, it is vital to understand how the IPT is interpreting and applying the VFV policy criteria. As the IPT also has the power to recommend that the Minister grants a visa as an 'exception to immigration instructions' due to an appellant's special circumstances,[14] these decisions also provide insight into the IPT's broader responsiveness to the hardships faced by migrant victim-survivors of family violence. Finally, Part V will argue that reform of the VFV policy is essential in order to make protections from family violence realistically accessible to migrant women and children.

10 The name change came out of INZ's Victims of Family Violence Project in 2019. Ministry of Business, Innovation and Employment *Recent Migrant Victims of Family Violence Project 2019: Final Report* <https://www.mbie.govt.nz/dmsdocument/12138-recent-migrant-victims-of-family-violence-project-2019-final-report> at 35.

11 Cabinet Paper "Interim financial support for domestic violence victims who are holders of temporary work permits" (September 2000) (obtained under Official Information Act 1982 request to the Ministry of Business, Innovation and Employment) at [4]: "Family sponsored immigration policy is currently under review. Officials are due to report back to Cabinet on 30 September 2000 .... The introduction of a Domestic Violence Provision (DVP), similar to the Australian provisions, will also be considered. ... Australia has a DVP, allowing spouse/partners to remain eligible for permanent residence if their relationship with the Australian spouse/partner breaks down during a two-year temporary residence period if they, or a member of their family unit, have suffered domestic violence."

12 See Committee on the Elimination of Discrimination against Women *Concluding Observations on the Eighth Periodic Report of New Zealand* UN Doc CEDAW/C/NZL/CO/8 (25 July 2018). The committee's observations on New Zealand raised concerns at [45] that "women may remain in abusive relationships so as not to lose their visa status" and that there is a "lack of legal aid" for these women, and called on New Zealand to revise its immigration laws, particularly "with a view to facilitating access to permanent residency permits for mothers of children who hold New Zealand nationality".

13 Section 187(1)(a)(i) of the Immigration Act 2009 provides a right of appeal to the Tribunal to applicants for a residence class visa whose application was declined by an immigration officer. Section 245 provides for appeals to the High Court on points of law only by leave.

14 Immigration Act 2009, s 188(1)(f).

It is important to acknowledge that I am a Pākehā New Zealand citizen by birth and that I do not purport to speak on behalf of migrant women. My approach to this topic is informed by experience establishing a dedicated service at Community Law Wellington and Hutt Valley for victim-survivors of violence whose immigration status is dependent on their abuser.[15] Through this service our Community Law centre has worked with more than 50 women and their children who were at risk of losing their right to remain in New Zealand after experiencing family violence. I am deeply grateful to these women for placing their trust in our service at a time when the risks were so high for them. It has been a privilege to be entrusted with their stories and to witness their extraordinary courage and resilience in the face of immense challenges.

My approach is grounded in an intersectional feminist analysis,[16] and begins from the position that protections from discrimination (in this case, gender-based violence) must be responsive to structural inequities for marginalised communities to realistically be able to benefit from them. New Zealand's Family Violence Death Review Committee has recognised the need for an intersectional approach to family violence and adopts a 'social entrapment' framework for understanding violence, which emphasises that family violence has structural and collective dimensions.[17] This 'social entrapment' lens recognises that "structural inequality may exacerbate the coercive control of the person using violence and weaken the safety options available to the victim",[18] as the greater the number and severity of inequities a victim experiences, "the more scope a predominant aggressor has to isolate, control and coerce her".[19] With this study, I hope to explore the extent to which immigration policy and practice is providing structural support for the entrapment of migrant women and their children in situations of violence.[20] From this analysis, opportunities will be identified for the immigration system's responsiveness to family violence to be improved.

15 I would like to acknowledge my Community Law colleagues Dhilum Nightingale, Megan Williams, and Vasudha Gautam whose tireless work has ensured the ongoing success of this service.

16 Broadly speaking, intersectionality posits that the experience of discrimination for individuals occupying multiple marginalised identities – for example, women of colour experiencing both racism and sexism – will be "greater than the sum of racism and sexism"; individuals holding intersecting marginalised identities will face distinct and specific forms of discrimination, in addition to the discrimination faced by those possessing only one such marginalised identity: Kimberlé Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1(8) University of Chicago Legal Forum 139 at 140. Purdie-Vaughns and Eibach drew upon Crenshaw's work in developing their theory of 'intersectional invisibility', which posits that possessing intersecting devalued identities (in this case, the identities of 'migrant with insecure status', 'woman', and often others such as 'ethnic minority') renders people "marginal members within marginalized groups" and thus "relegates them to a position of acute social invisibility". A specific consequence of intersectional invisibility is 'legal invisibility', whereby "legal anti-discrimination frameworks tend to privilege people with a single disadvantaged identity" and fail to provide the same protections for people with multiple devalued identities. Valerie Purdie-Vaughns and Richard Eibach "Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities" (2008) 59 Sex Roles 377 at 381–386.

17 Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality and Safety Commission, 2016) at [3.1].

18 Heather Douglas and others "Facts Seen and Unseen: Improving Justice Responses by Using a Social Entrapment Lens for Cases Involving Abused Women (as Offenders or Victims)" (2020) 32(4) Current Issues in Criminal Justice 488 at 489.

19 Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" (2018) 2 NZLR 181 at 197.

20 On the social entrapment framework for understanding family violence, see Douglas and others "Facts Seen and Unseen", above n 18.

I. The 'Victims of Family Violence' (VFV) Visa Regime

This section provides an overview of the ways in which family violence can jeopardise the victim-survivor's immigration status and discusses the extent to which the Victims of Family Violence visa regime responds to this. An analysis of the key exclusions from the VFV visa policy is provided, as well as brief discussion of other practical barriers to accessing VFV visas.

Background to Immigration Policy

Conditions and eligibility criteria for New Zealand visas are specified in 'immigration instructions' that are certified by the Minister of Immigration.[21] These instructions are published online in the Immigration New Zealand (*INZ*) *Operational Manual*.[22] INZ immigration officers apply the immigration instructions in determining visa applications. Immigration officers may, at their discretion, grant a temporary visa as an 'exception to immigration instructions',[23] but only the Minister may grant a residence visa as an 'exception to instructions' (and doing so is a matter of absolute discretion).[24] Appeals against certain decisions may be made to the Immigration and Protection Tribunal (*IPT*); most importantly for the purposes of this article, appeals may be made to the IPT against decisions to decline to grant residence visas,[25] but not temporary visas (such as VFV work visas).[26]

The two available grounds for appeal are that either the decision was not correct in terms of the relevant residence instructions, or the 'special circumstances' of the appellant are such that consideration of an exception to those residence instructions should be recommended to the Minister of Immigration.[27] The Ombudsman cannot conduct an investigation where the decision in question is subject to a right of appeal or review,[28] and the Immigration Act 2009 precludes the Human Rights Commission from receiving complaints on the content or application of immigration instructions.[29] The latter prohibition has received repeated critique from the UN Committee on the Elimination of Discrimination against Women.[30]

21 Immigration Act 2009, s 22.

22 Immigration New Zealand *Operational Manual* (2022) <https://www.immigration.govt.nz/opsmanual/>.

23 Immigration Act 2009, s 76(1).

24 Immigration Act 2009, s 72(3).

25 Immigration Act 2009, s 217(2)(a)(i).

26 Immigration Act 2009, s 186(1): "No appeal lies against a decision of the Minister or an immigration officer on any matter in relation to a temporary entry class visa, whether to any court, the Tribunal, the Minister, or otherwise." An applicant who is still lawfully in New Zealand may, however, apply for a reconsideration of their application by another immigration officer (s 185). Residence class visas allow a person to remain in New Zealand indefinitely while temporary visas, as the name suggests, are for a finite period of time.

27 Immigration Act 2009, s 187(4).

28 Ombudsmen Act 1975, s 13(7)(a).

29 Immigration Act 2009, s 392.

30 See Committee on the Elimination of Discrimination against Women *Concluding Observations on the Eighth Periodic Report of New Zealand*, above n 12, at [20]: "The Committee ... recommends that the State party repeal section 392 of the Immigration Act 2009 with a view to ensuring that the Commission is mandated to receive and process complaints from migrants, in line with the recommendations issued in 2016 by the Global Alliance of National Human Rights Institutions." See also *Letter from Louiza Chalal (Rapporteur on Follow-up, CEDAW Committee) to the UN High Commissioner for Human Rights* UN Doc BJ/follow-up/New Zealand/78 (5 March 2021): "the Committee regrets the information that there is no plan to reform section 392 of the Immigration Act 2009. It considers therefore that the recommendation has been **partially implemented**." The committee has again asked New Zealand to report on this matter in its 2023 periodic report: Committee on the Elimination of Discrimination against Women *List of Issues and Questions Prior to the Submission of the Ninth Periodic Report of New Zealand* UN Doc CEDAW/C/NZL/QPR/9 (8 July 2022) at [7].

Consequences of Violence and Separation for Victims' Immigration Status

As feminist interest in migration policy has grown, the gendered and racialised implications of policies that enforce dependency on a partner have received critique.[31] Women are more likely to migrate under visa categories that are dependent on a partner and are underrepresented in 'independent' grants of residence; for example, in New Zealand from 2017 to 2021 women accounted for 66 per cent of successful partnership-based residence applications, but only 42 per cent of successful Skilled Migrant category applications and 24 per cent of successful residence applications in the Residence from Work category.[32] Women's opportunities to migrate independently under 'skilled' visa categories are heavily influenced by patriarchal gender norms;[33] migration policy tends to value migrants who will make significant financial contributions, while women undertake a disproportionate share of unpaid domestic labour and may have lesser access to educational opportunities, formal employment, and financial resources. This exclusion from 'skilled' visa categories is particularly marked for women from the Global South.[34] Meanwhile, norms of patrilocality mean that women in transnational marriages are typically expected to relocate to reside in the husband's country of settlement,[35] and across the globe women tend to be overrepresented in family reunification migration and 'marriage migration'.[36]

New Zealand's visa policies can render a woman's immigration status dependent on her partner by several means. Where her partner is a New Zealand citizen or resident, she may require their ongoing support to maintain partnership-based work visas or visitor visas.[37] If she has no independent pathway to residence available, she will remain dependent on her partner for her visa status until such time as she is successfully sponsored for residence by her partner (which an abusive sponsoring partner may refuse to do or delay in doing, and applications typically take many months to process). Where her partner is a temporary visa holder, such as a work or student visa holder, she may also require their ongoing support to maintain partnership-based work visas or visitor visas.[38] In these instances, her partner will often have a pathway to residence (such as under the Skilled Migrant or Residence from Work categories[39]), and she will anticipate being included in this residence application as the partner of the 'principal applicant'. She will remain dependent on her partner for her visa status until any such residence application is approved. (And, again, he as the principal applicant may delay applying for residence, or remove his partner from the application at any point. At the time of writing, Skilled Migrant applications are typically taking over three years to process.)[40]

31 See generally Sundari Anitha "Legislating Gender Inequalities: The Nature and Patterns of Domestic Violence Experienced by South Asian Women with Insecure Immigration Status in the United Kingdom" (2011) 17(10) Violence Against Women 1260; Catherine Briddick "Combatting or Enabling Domestic Violence? Evaluating the Residence Rights of Migrant Victims of Domestic Violence in Europe" (2020) 69(4) International and Comparative Law Quarterly 1; JaneMaree Maher and Marie Segrave "Family Violence Risk, Migration Status and 'Vulnerability': Hearing the Voices of Immigrant Women" (2018) 2(3) Journal of Gender-Based Violence 503.

32 Data supplied to the author by Immigration New Zealand pursuant to the Official Information Act 1982 (1 March 2022).

33 Christiane Timmerman and others *Gender and Migration: A Gender-Sensitive Approach to Migration Dynamics* (Leuven University Press, Belgium, 2018) at 8.

34 Vathsala Jayasuriya-Illesinghe "Immigration Policies and Immigrant Women's Vulnerability to Intimate Partner Violence in Canada" (2018) 19(2) Journal of International Migration and Integration 339 at 341.

35 Tuen Yi Chen "Marriage Migration as a Multifaceted System: The Intersectionality of Intimate Partner Violence in Cross-Border Marriages" (2017) 23(11) Violence Against Women 1293 at 1298–1299.

36 Timmerman and others *Gender and Migration*, above n 33, at 8.

37 See Immigration New Zealand *Operational Manual* (2022) at WF2 and V3.15 for eligibility criteria.

38 See Immigration New Zealand *Operational Manual* (2022) at WF3, WF4 and V3.10 for eligibility criteria.

39 See Immigration New Zealand *Operational Manual* (2022) at SM1 and RW1 for eligibility criteria.

40 Immigration New Zealand "How long it takes to process a visa application" <www.immigration.govt.nz>.

While a woman remains dependent on her partner's support for her visa, she is at risk of losing her right to remain in New Zealand if she separates.[41] This presents an obvious barrier to women being able to separate from a partner who is using violence against them, and this dependence creates heightened vulnerability to violence[42] – indeed, Australian studies have shown that family violence is more likely to occur in situations where a woman is dependent on her partner for residence.[43] Additionally, being subjected to violence may of itself jeopardise her visa eligibility. Applicants for partnership-based visas must establish that they are in a partnership that is "genuine and stable",[44] with 'stable' defined as "likely to endure".[45] INZ may determine that violence against the applicant means that her relationship is 'unstable' and therefore decline her visa application. IPT decisions have upheld this approach.[46] Given that in applying for a visa an applicant is required to consent to police (and, indeed, 'any agency') sharing information with INZ,[47] many women experiencing violence who seek help from our Community Law centre are extremely reluctant to seek police help. In some particularly egregious cases, we have encountered immigration officers making adverse character findings against women experiencing violence on the basis that they did not proactively notify INZ that they were being abused.[48]

The VFV Visa Policy

A 'Special Work Visa for Victims of Domestic Violence' was first introduced in New Zealand in October 2000,[49] followed by a 'Residence Category for Victims of Domestic Violence' in October 2001.[50] Cabinet papers from this time outline the intention of the visa regime to "provid[e] protection and options for people who are placed in vulnerable situations by their New Zealand resident or citizen partner who is violent".[51] However, the regime as enacted provides protection to only a narrow subset of migrant victim-survivors of family violence. Current VFV visa requirements are set out in the immigration instructions as follows:[52]

- Applicants may be granted a 6-month Special Work Visa for Victims of Family Violence if:
  - They are **in New Zealand**; and
  - They are, or have been in a **partnership with a NZ citizen or resident**; and
  - They had **intended to seek NZ residence** on the basis of that partnership; and

41 Per s 157(5)(e) of the Immigration Act 2009, 'sufficient reason' to deport a temporary entry class visa holder includes "a situation where the person's circumstances no longer meet the rules or criteria under which the visa was granted".

42 See Rachel Simon-Kumar *Ethnic Perspectives on Family Violence in Aotearoa New Zealand* (New Zealand Family Violence Clearinghouse, Issues Paper 14, April 2019) at 13.

43 Hayley Boxall and others *The "Pathways to Intimate Partner Homicide" Project: Key Stages and Events in Male-perpetrated Intimate Partner Homicide in Australia* (ANROWS, Research Report Issue 4, February 2022) at 99.

44 Immigration New Zealand *Operational Manual* (2022) at F2.5a and WF2a.

45 Immigration New Zealand *Operational Manual* (2022) at F2.10.1b.

46 See [2017] NZIPT 204060 (Samoa); [2017] NZIPT 204079 (Fiji); and [2016] NZIPT 203025 (Sri Lanka). Note that in this report, IPT decisions are cited by reference to the appellant's country of origin rather than the anonymised initials the IPT has used.

47 See the 'Declaration' sections of relevant application forms, including the INZ 1015 Work Visa Application and INZ 1000 Residence Application at Immigration New Zealand "Forms and Guides (application)" https://www.immigration.govt.nz/documents/forms-and-guides.

48 The grounds for such a finding are typically that the woman "withheld material information" in the course of applying for her visa (Immigration New Zealand *Operational Manual* (2022) at A5.25i). An adverse character finding can have very serious implications for future visa applications, as applicants for all visas "must be of good character" (Immigration New Zealand *Operational Manual* (2022) at A5.1).

49 For background, see Minister of Immigration Briefing Note "Guidelines for Granting Work Permits to Victims of Domestic Violence" (18 August 2000) 00/004787 (obtained under Official Information Act 1982 request to the Ministry of Business, Innovation and Employment) and Cabinet Paper "Interim financial support for domestic violence victims who are holders of temporary work permits", above n 11.

50 For background, see Cabinet Paper "Domestic Violence Provision" (17 July 2001) 01/003702 (obtained under Official Information Act 1982 request to the Ministry of Business, Innovation and Employment).

51 Cabinet Paper "Domestic Violence Provision", above n 50, at [3].

52 Conditions and eligibility criteria for New Zealand visas are specified in the immigration instructions certified by the Minister of Immigration (Immigration Act 2009, s 22). These instructions are published online in the Immigration New Zealand *Operational Manual*. INZ immigration officers apply the immigration instructions in determining visa applications.

I. The 'Victims of Family Violence' Visa Regime CONT.

  - The **partnership has ended due to family violence** by the NZ citizen or resident or someone with whom the applicant is living with in a family relationship; and
  - The applicant shows a **need to work** in order to support themselves.[53]

- Applicants may be granted a Resident Visa for Victims of Family Violence (which enables them to remain indefinitely in New Zealand) if:
  - They are **in New Zealand**; and
  - They are, or have been in a **partnership with a NZ citizen or resident**; and
  - They had **intended to seek NZ residence** on the basis of that partnership; and
  - The **partnership has ended due to family violence** by the NZ citizen or resident or someone with whom the applicant is living with in a family relationship; and
  - They are **unable to return to their home country** because:
    - they would have **no means of independent financial support** from employment or other means, and have no ability to gain financial support from other sources; or
    - they would be at **risk of abuse or exclusion** from their community because of stigma; and
  - They meet **health and character** requirements.[54]
- In order to prove that family violence has occurred, applicants for either visa must provide:
  - a final **Protection Order**; or
  - a **New Zealand conviction** of a family violence offence against them or their child; or
  - a complaint of family violence investigated by the New Zealand Police where **Police are satisfied that domestic violence has occurred**; or
  - a **statutory declaration** from the applicant stating that family violence has occurred AND **two statutory declarations** by unrelated designated professionals stating that they are satisfied that family violence has occurred (registered social workers, doctors, nurses, psychologists, counsellors, and experienced Women's Refuge or Shakti staff).[55]

A low number of VFV visas are applied for and granted each year, with VFV residence visas being particularly uncommon. Over the five years for which INZ has published data,[56] there were 652 applications for VFV work visas, 585 (90 per cent) of which were successful. Over the same period there were just 308 applications for VFV residence visas and 214 (69 per cent) were successful.[57] The lower number of VFV residence applications and approvals is unsurprising, given the additional requirement for residence that the applicant must be 'unable to return to their home country'.

Additionally, multiple VFV work visas may have been granted to the same applicant, as residence applications can take longer to process than the duration of the VFV work visa. By way of comparison to the average of 43 VFV residence visas granted per year, during the 2020/21 financial year there were 13,903 applications for residence under the Partnership category, 12,931 (93 per cent) of which were successful.[58]

53 Immigration New Zealand *Operational Manual* (2022) at WI7.1.

54 Immigration New Zealand *Operational Manual* (2022) at S4.5.2.

55 Immigration New Zealand *Operational Manual* (2022) at WI7.5 and S4.5.5. The 'designated professionals' must have the professional registrations specified at WI7.10 of the Immigration New Zealand *Operational Manual* (2022).

56 From the 2016/17 financial year until the 2020/21 financial year.

57 Immigration New Zealand, "Immigration Factsheets: Victims of domestic violence" (September 2021) <www.immigration.govt.nz>.

58 Data supplied to the author by Immigration New Zealand pursuant to the Official Information Act 1982 (1 March 2022).

Key Requirements of the VFV Visa Policy Lead to Exclusions

The number of victim-survivors who are accessing the VFV residence visa seems surprisingly low, given New Zealand's high rates of family violence and the fact that migrant and ethnic minority women are disproportionately impacted by violence.[59] An obvious contributor to low application and success rates is the restrictiveness of the VFV residence criteria, which exclude a large proportion of victim-survivors from protection.

1. 'Unable to return to their home country'

Most notably, the 'unable to return to their home country' requirement for residence is unique among visa regimes in comparable jurisdictions. For example, the United Kingdom's and Australia's domestic-violence-based visa schemes do not impose any such requirements regarding conditions in the applicant's home country; separation due to domestic violence is the central concern.[60] In contrast, New Zealand's regime effectively limits eligibility to women from a narrow range of countries that are deemed particularly hostile to separated or divorced women. This suggests a different intent behind the respective regimes; while in the United Kingdom and Australia these visas are designed to ensure that immigration policy does not incentivise any woman to stay with the person who is abusing her or her children, in New Zealand the VFV residence visa is more akin to a form of refugee status for women who face particularly severe hardship or risks if returned to their country of origin. Women who cannot meet the high threshold of 'unable to return to their home country' can obtain only a six-month visa and no pathway to residence is provided. For them, the consequence of fleeing violence is likely to be having to leave New Zealand. The 'unable to return home' requirement has been the central policy issue in the majority of IPT appeals (39 out of 49 appeals) and will be the main focus of this report.

The threshold for what amounts to an inability to return home was lowered somewhat in 2008, following recommendations in *Living at the Cutting Edge*, a report commissioned by the Ministry of Women's Affairs.[61] The test applied prior to that point was that an applicant:

> *Has been, or would be, if they returned to their home country, disowned by their family and community as a result of their marriage to or relationship with the New Zealand citizen or resident which has ended, and*
>
> *If they returned to their home country, would have no means of independent support (e.g. state financial support) or ability to gain that independent support (e.g. through employment or marriage) for whatever reason.*[62]

59 In terms of the prevalence of intimate partner violence in the general population, 55 per cent of women in New Zealand experience at least one type of violence in their lifetime and 18.2 per cent experience violence in any given year: Janet Fanslow and Elizabeth M Robinson "Sticks, Stones, or Words? Counting the Prevalence of Different Types of Intimate Partner Violence Reported by New Zealand Women" (2011) 20(7) Journal of Aggression, Maltreatment & Trauma 741. Australian studies have shown that family violence is more likely to occur in situations where a woman is dependent on her partner for residence: Boxall and others *The "Pathways to Intimate Partner Homicide" Project*, above n 43, at 99. A wide range of other socio-demographic factors impact on rates of violence against migrant and ethnic minority women, and Rachel Simon-Kumar explains that underreporting means that "an accurate profile of prevalence rates in ethnic minority communities is difficult to establish". However, she cites international research that has found that violence against ethnic minority and 'foreign-born' women is "more frequent, has higher victimisation, greater severity, injury and associated guilt for women". Simon-Kumar *Ethnic Perspectives on Family Violence in Aotearoa New Zealand*, above n 42, at 8–9.

60 For Australia's policy, refer to the "Family Violence Provisions" in Division 1.5 and Schedule 2 of the Migration Regulations 1994 (Cth). For the United Kingdom's policy, refer to paragraph 289A-289D of the Immigration Rules (UK). For an overview of comparable schemes across a range of European countries, and the relevant provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the *Istanbul Convention*), see: Platform for International Cooperation on Undocumented Migrants (PICUM) *Insecure Justice? Residence Permits for Victims of Crime in Europe* (Publications Office of the European Union, Luxembourg, 2020). See also: Policy Department for Citizens' Rights and Constitutional Affairs *The Legislative Frameworks for Victims of Gender-Based Violence (Including Children) in the 27 Member States* (European Parliament, Brussels, 2022) at 4.5.3.

61 Cabinet Paper "Review of Victims of Domestic Violence Policy" (28 February 2008) CAB 07/73236 (obtained under Official Information Act 1982 request to the Ministry of Business, Innovation and Employment).

62 Immigration New Zealand *Residence Policy* (29 September 2003) at S4.5a.

I. The 'Victims of Family Violence' Visa Regime CONT.

The *Living at the Cutting Edge* report presented the findings of a comprehensive study into women's experiences of seeking Protection Orders, and identified that immigration issues played a significant role in the situations of 17 of the 43 women in the project's case studies.[63] It critiqued the 'unable to return home' test and argued that stipulating remarriage as a means of independent support "may have the effect of forcing women into undesirable marriages as their only means of support".[64] Marriage was subsequently removed as a form of support for applicants to negate, the social and economic elements of the test were changed to an 'either/or' standard, and the requirement to be 'disowned' was changed to 'at risk of abuse or exclusion because of stigma'. However, the slight lowering of this threshold did not address the many other concerns raised in *Living at the Cutting Edge* about the 'unable to return home' requirement. The report writers discussed:[65] the difficulties of evidencing "an event that has not happened"; the lack of guidance on how INZ should assess evidence of inability to return home; INZ's tendency to draw conclusions based on generic country information despite a woman's evidence of her personal circumstances; the pressure placed on women to speak ill of their own culture, religion, and family; the 'double-edged sword' for women with regard to contact with their family;[66] and the need for women "to provide evidence that goes beyond proof of facts within her personal knowledge" (i.e. evidence on the status of women in her country). Part III of this report will comment on the extent to which many of these issues are evident in IPT appeals.

Also at the recommendation of the *Living at the Cutting Edge* report, a statement of 'objectives' was added to the VFV immigration instructions in 2008 to clarify that the intention of the policy is to give effect to New Zealand's international obligations. This states:

> *The objectives of the residence category for victims of family violence is to … recognise New Zealand's international obligations, particularly to:*
>
> i. *end discrimination against women in all matters related to marriage and family relations (Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women); and*
> ii. *protect children from mental and physical violence (Article 19 of the United Nations Convention on the Rights of the Child).*[67]

It is questionable whether the restrictive 'unable to return home' test is compatible with these obligations. As General Recommendation 19 of the Committee on the Elimination of Discrimination against Women provides, "[g]ender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of [the Convention on the Elimination of All Forms of Discrimination against Women (*CEDAW*)]".[68] The Declaration on the Elimination of Violence against Women comments specifically on violence against migrant women, identifying migrant women as a group that are "especially vulnerable" to violence,[69] and provides that states should adopt measures directed towards the elimination of violence against women who are "especially vulnerable" to violence.[70]

63 Robertson and others *Living at the Cutting Edge*, above n 1, at 218.

64 At 232.

65 At 229–232.

66 At 230: "Contact with family can often become a double-edged instrument for an ethnic minority woman facing domestic violence. If she decides not to put up with indignities from her extended family and community she risks putting more strains on her relationship with them and she will have nowhere to go should her residence application fail. On the other hand, if she decides to endure those indignities from her birth family she could fail the evidence test required to prove she will be disowned by her family if she returns to her home country."

67 Immigration New Zealand *Operational Manual* (2022) at S4.5.1b.

68 General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women General Recommendation No. 19 (1992) at [7].

69 Declaration on the Elimination of Violence against Women GA Res 48/104 (1993), preamble.

70 Declaration on the Elimination of Violence against Women GA Res 48/104 (1993), art 4(l).

The Declaration further provides that states should ensure that victim-survivors "have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures".[71]

Limiting effective protection from violence to an unduly narrow subset of migrant women, as the current New Zealand immigration instructions do, fails to fulfill the protective intention of these instruments. Instead of protecting all women from violence as a form of 'discrimination', the VFV visa regime focuses on protecting women from the stigma and hardship of divorce in countries perceived to be less progressive in terms of women's rights. I argue that, in doing so, the policy fails to uphold New Zealand's obligation to combat discrimination (in the form of family violence) occurring within its own borders. In terms of the protection of children from violence, there is extremely limited scope for this objective to have any effect since children's safety is not relevant to any of the policy criteria in the immigration instructions; children cannot apply for VFV visas in their own right,[72] and the 'unable to return to their home country' test applies to the principal applicant (i.e. the child's parent). The *Living at the Cutting Edge* report writers envisaged that the addition of an 'objectives' statement referring to New Zealand's international obligations would "provide useful guidance to officers faced with marginal or ambiguous cases" and "be helpful for women appealing against decisions to decline applications for residence or work permits if it could be shown that such decisions ran counter to the purposes

71 Declaration on the Elimination of Violence against Women GA Res 48/104 (1993), art 4(g).

72 See Immigration New Zealand *Operational Manual* (2022) at S4.5.2(a). Principal applicants for VFV visas must have been "in a partnership with a New Zealand citizen or residence class visa holder", so children are only included in applications as dependants.

of the policies".[73] Parts III and IV of this report will discuss the extent to which the statement of objectives has succeeded in encouraging consideration of New Zealand's international obligations in IPT appeal decisions.

Further challenges are posed by the evidential burden upon applicants, who have no access to Legal Aid support. Immigration instructions require that "applicants must provide evidence [that they are 'unable to return to their home country'], in the form of documents and/or information provided at an interview with an immigration officer" and "INZ may refer to any relevant information when determining the ability to return to their home country".[74] In reality, more than information given during an applicant's interview is usually required. INZ's Country Research Unit (*CRU*) supplies immigration officers with generic research on the status of women in the applicant's home region and, for her application to be successful, the applicant must respond to any CRU research that INZ interprets as suggestive of an ability to return. As the *Living at the Cutting Edge* report observed, the policy "appears to require evidence of cultural practices as well as evidence of an event [being a lack of financial support, abuse, and/or exclusion] that has not happened".[75] This evidential burden on applicants poses many difficulties, for example: applicants have to 'prove' cultural norms that, for them, are common knowledge; the policy puts applicants in the difficult position of having to speak badly of their own family, community, and culture (the very people she will have to return to if her application is unsuccessful); applicants may not have access to or knowledge of research resources to refute any CRU information that is not an accurate reflection of the risks to her (nor is she likely to have the financial means to have non-English-language evidence translated); and applicants effectively must 'prove' a hypothetical.

The *Living at the Cutting Edge* report accordingly recommended that "the woman's own perception of her circumstances should be the basis for the verification of evidence in support of her claim of an inability to return home", and that "the burden of proving the general status of women in a society should not depend exclusively on evidence provided by the applicant".[76]

This recommendation appears to have been rejected by the Minister of Immigration on the basis of policy advice that it:

> *... does not reflect what is required of applicants. Applicants must provide information about their own personal circumstances, but are not required to be the key source of general information about their home country. The Department uses information from its own library as well as from reliable websites.*[77]

This statement is not an accurate reflection of the position that applicants are in. While it is true that INZ's CRU does collate their own country information, this information is general and is often not an accurate reflection of the position of the specific applicant. Many applicants receive 'potentially prejudicial information' notifications as CRU research has found information that may be suggestive of an ability to return; they then must provide persuasive evidence to refute this research or their application is likely to be declined. For example, it may be suggested that they can avoid stigma by moving by themselves to a different part of the country, but living alone as a woman may be outside their cultural norm and may not be a safe or viable option. It is vitally important for applicants to have access to legal support to prepare appropriate evidence in response.

73 Neville Robertson and others *Living at the Cutting Edge: Women's Experiences of Protection Orders Volume 1: The Women's Stories* (University of Waikato, 2007) at xxv.

74 Immigration New Zealand *Operational Manual* (2022) at S4.5.15.

75 Robertson and others *Living at the Cutting Edge*, above n 1, at 229.

76 Robertson and others *Living at the Cutting Edge*, above n 1, at 232.

77 Cabinet Paper "Review of Victims of Domestic Violence Policy", above n 61, at [57].

2. 'A partnership with a New Zealand citizen or resident'

Another significant exclusion from eligibility is women whose violent partner is not a New Zealand citizen or resident. A woman's partner may soon be eligible for residence (for example, through the Residence from Work category), or may have already lodged a residence application (for example, a Skilled Migrant category application, which currently takes over three years to process), but a woman in this position cannot access the protection of the VFV visas. This exclusion may be exploited by violent partners, who can delay applying for their residence in order to deprive their partner of access to the VFV visas. When the VFV policy was under review in 2008 a proposal was considered to extend eligibility to partners of principal applicants for residence,[78] however this proposal was not adopted.

Therefore, for a woman whose abuser is a temporary visa holder, her only option to obtain residence may be seeking refugee status, for which she would need to prove she has a "well-founded fear of being persecuted [in her country of origin] for reasons of race, religion, nationality, membership of a particular social group".[79] Refugee status claims founded on gender-based violence are challenging[80] and the threshold applied by the IPT appears to require women and children to be at risk of a severe level of violence in their country of origin; one such family violence-based claim by an Indian citizen mother and her children was declined by the previous chair of the IPT, with a key reason being that the husband to whom they would likely be returned in India generally inflicted "low-level physical violence" upon them which did not cause "lasting injuries, other than some pain".[81] This was not considered sufficiently serious harm.

3. 'Intended to seek NZ residence on the basis of that partnership'

In a minority of cases, a VFV visa applicant may have intended to seek residence based on her partnership, but was still holding an independent temporary visa (such as student or work visa) at the time she separated. If she has not previously held partnership-based visas, she will have to prove her partnership and intention to seek residence to INZ as a part of the VFV visa application process.[82] Providing the necessary evidence to prove this once a relationship has ended can be very difficult, as she may have fled her home and no longer have access to the documents that would usually be used to prove a partnership, and she cannot rely on the cooperation of her ex-partner. Additionally, many of the forms of evidence that are usually expected (such as joint bank accounts, joint mortgage/tenancy documents, joint utilities accounts, and joint mail)[83] are inherently difficult for victims of financial abuse and coercive control to provide. If they have been socially isolated, or most of their social group are connected

78 Cabinet Paper "Review of Victims of Domestic Violence Policy", above n 61, at [6].

79 Convention and Protocol Relating to the Status of Refugees GA Res 2198 (XXI), art 1A(2).

80 On the severity of family violence required to amount to 'persecution', see Mathilde Crépin *Persecution, International Refugee Law and Refugees: A Feminist Approach* (Taylor & Francis Group, 2020) at 4.2.2. On the requirement for an absence of state protection, see Constance MacIntosh "Domestic Violence and Gender-Based Persecution: How Refugee Adjudicators Judge Women Seeking Refuge from Spousal Violence – and Why Reform Is Needed" (2009) 26(2) Refuge 147.

81 [2017] NZIPT 801081–083 at [75].

82 The hallmarks of a 'partnership' that INZ relies upon are themselves problematic in situations of violence. Per F2.20b of the *Operational Manual*, INZ considers: "the duration of the parties' relationship" (which may have been relatively short before the victim-survivor sought to leave); "the existence, nature, and extent of the parties' common residence" (which is hard to prove when financial abuse meant the victim survivor was not jointly named on a tenancy or utilities bills); "the degree of financial dependence or interdependence" (which may not be applicable where financial abuse meant the victim-survivor did not have joint access to money); "the common ownership, use, and acquisition of property" (which is challenging as a violent partner is likely to have put major assets in their name alone); "the degree of commitment of the parties to a shared life" (which may be difficult to prove where a relationship has been marked by instability, violence, and periods of separation); "the common care and support of [the parties'] children" (which a violent partner may have played little role in); "the performance of common household duties by the partners" (which, again, a violent partner may have played little role in); and "the reputation and public aspects of the relationship" (which is difficult if a victim-survivor was isolated by a violent partner, or if their relationship conflicted with their community's cultural norms – for example, intercultural or interfaith relationships, cohabiting outside of marriage, or queer relationships).

83 Immigration New Zealand *Operational Manual* (2022) at F2.20.

to their abuser, it will also be very challenging to seek support letters evidencing the relationship. As has been noted in the Australian context:

> *Domestic, family and sexual violence can greatly impact the nature of the relationship and the types of evidence that may be available. This is particularly so in relation to the perpetrators of domestic, family and sexual violence using financial and social abuse. … Good practice of the assessment for a 'genuine relationship' would include consideration and recognition of the impact of financial abuse including dowry abuse, as part of assessing the financial aspects of a relationship.*[84]

While it is acknowledged that some proof of the relationship will inevitably be required, sensitivity should be given to the circumstances of victim-survivors of family violence and allowance made for the limitations of what they can realistically provide. Immigration decision-makers require adequate training in migrant women's experiences of family violence to exercise appropriate discretion.

4. The requirement to be 'in New Zealand'

The requirement that an applicant be physically in New Zealand can also prove problematic for women seeking VFV visas. 'Transnational abandonment' is receiving increasing recognition as a common form of abuse towards women whose immigration status depends on a violent partner,[85] and has received particular attention within South Asian migrant communities.[86] Abandonment across transnational borders is used to deprive survivors of violence of their legal rights in the abuser's country of residence, and often leaves the survivor to a life of destitution, social stigma, and further abuse.[87] For example, our Community Law centre has heard accounts from numerous women of their partners either forcibly or deceptively making them return to their country of origin then, once offshore, refusing to allow them to return to New Zealand. Being offshore is an enormous risk for these women as a temporary entry class visa can be cancelled at any time when its holder is outside New Zealand,[88] which may be triggered if their partner contacts INZ to withdraw support for their visa.[89] In this way, immigration law entrenches migrant women's vulnerability to transnational abandonment, and the VFV policy reinforces this by excluding women who are stranded offshore. This lack of responsiveness to the specific forms of violence faced by migrant women is not unique to immigration law; the Family Violence Act 2018 similarly fails to recognise transnational abandonment and immigration systems abuse[90] as forms of psychological abuse.[91] But as this is an instance where immigration policy creates the vulnerability to abuse, the lack of responsiveness in the VFV policy seems especially stark.

84 National Advocacy Group on Women on Temporary Visas Experiencing Violence *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (2019) at 3–4.

85 For example, in the United Kingdom the president of the Family Division issued a revised Practice Direction PD12J (which came into force on 2 October 2017), setting out at [2B] that "[d]omestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment".

86 See Sundari Anitha, Anupama Roy, and Harshita Yalamarty "Gender, Migration, and Exclusionary Citizenship Regimes: Conceptualizing Transnational Abandonment of Wives as a Form of Violence Against Women" (2018) 24(7) Violence Against Women 747.

87 Sundari Anitha, Anupama Roy, and Harshita Yalamarty *Disposable Women: Abuse, Violence and Abandonment in Transnational Marriages* (University of Lincoln, 2016) at 2.

88 Immigration Act 2009, s 66(1)(a).

89 In contrast, if an abusive partner contacts INZ to withdraw support for the visa of a person who remains onshore, the affected partner would have some opportunity to respond. While a temporary visa holder may be liable for deportation where "the person's circumstances no longer meet the rules or criteria under which the visa was granted", the person is afforded 14 days to give good reason why deportation should not proceed and may appeal to the IPT against their deportation liability (Immigration Act 2009, s 157).

90 The concept of 'legal systems abuse' or 'paper abuse', which is family violence perpetrated through litigation, is receiving increasing attention (see generally Heather Douglas "Legal Systems Abuse and Coercive Control" (2018) 18(1) Criminology & Criminal Justice 84). I adopt the terminology 'immigration systems abuse' to specifically denote the use of a person's insecure immigration status as a tool of psychological abuse. This abuse can take many forms – in discussing the under-recognition of this type of psychological abuse, the *Living at the Cutting Edge* report cited examples such as: "threats to strike off the name of the spouse/partner from the application for residence; control over passport and travel documents; threats of removal and consequently permanent separation from child; … [and] censure, shame, in some cases punishment and loss of dignity at home due to forced removal" (Robertson and others *Living at the Cutting Edge*, above n 1, at 219).

91 Many other forms of psychological abuse are specifically set out in the Act, such as "financial or economic abuse (for example, unreasonably denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education)"; Family Violence Act 2018, s 11(1)(e).

5. Required evidence of family violence

The immigration instructions prescribe a restrictive list as to what is acceptable evidence of family violence and provide no discretion to accept other forms of evidence. Each form of acceptable evidence requires the victim-survivor to have engaged with support services and/or the justice system, which can present practical difficulties.[92] For instance:

- **Final Protection Orders** require an applicant to have engaged with the Family Court system, which safety, cultural, financial, transport/geographic, or linguistic factors may have prevented her from doing. Final Protection Orders can also take many months to obtain, and the fact a Protection Order is not ultimately finalised does not mean that violence did not occur (for example, a woman may be encouraged to settle for an 'undertaking' from the perpetrator not to use violence, or the court may find that there was past violence but an order is no longer 'necessary'[93]). Additionally, forms of violence that are specific to migrant women may not be identified as such by the Family Court; for example, as noted above, immigration systems abuse (such as threats against a partner's immigration status) is not listed as a form of psychological abuse in the Family Violence Act 2018.
- **Convictions or New Zealand Police statements confirming that violence occurred** will also require the applicant to have sought police assistance, which safety, cultural, or linguistic factors may have prevented her from doing. In particular, women may not have felt able to call for police assistance when doing so could jeopardise their visa. They may distrust police after negative experiences with authorities in their country of origin or in New Zealand. Police may be reluctant to confirm that violence has occurred before concluding their investigation, or may have failed to recognise forms of violence that are specific to migrant women.[94] Further, the *Living at the Cutting Edge* report observed "generally inadequate [New Zealand] police service" provided to women included in their study who had insecure immigration status.[95]
- **Statutory declarations from two professionals** require that an applicant has had access to two different support services where staff have the requisite professional registrations. Safety, transport/geographic, financial, cultural, and linguistic factors may have meant that support services were not accessible. Professional registration requirements are also restrictive – for example, counsellors registered with the New Zealand Association of Counsellors are acceptable but registered psychotherapists are not. Similarly, National Collective of Independent Women's Refuges-affiliated refuge or Shakti staff can be accepted, while other refuges and support services (such as Shine or Shama Ethnic Women's Trust) are excluded. Additionally, some

92 On barriers to ethnic women reporting family violence, see generally Simon-Kumar *Ethnic Perspectives on Family Violence in Aotearoa New Zealand*, above n 42, at 14–18. See also Judicial Council on Cultural Diversity *The Path to Justice: Migrant and Refugee Women's Experience of the Courts* (Canberra, 2016).

93 Family Violence Act 2018, s 79(b).

94 See generally Robertson and others *Living at the Cutting Edge*, above n 1, at 225–226. Examples are discussed of police not understanding migrant women's complaints and not recognising an attempt at transnational abandonment as violence.

95 Robertson and others *Living at the Cutting Edge*, above n 1, at 225. See also inTouch Multicultural Centre Against Family Violence *The Causes and Consequences of Misidentification on Women from Migrant and Refugee Communities Experiencing Family Violence* (Melbourne, February 2022). InTouch is an Australian family violence organisation focused upon migrant and refugee women, which estimated that one third of their clients have been misidentified by police as the predominant aggressor at some time. This is often due to a failure to understand the victim's account, for example by failing to use an interpreter or using a family member as an interpreter.

> professionals are reluctant to write declarations due to misconceptions about what is required. Our Community Law centre has received queries from professionals about, for example: whether they can do so if they did not personally witness the violence; whether the abuser might receive the declaration and seek retribution; and whether they will need to be available to be examined in court.

Comparable visa regimes in other jurisdictions do not impose a closed category of documents which may be evidence of violence. For example, the relevant UK rules allow for any evidence of domestic violence to be considered,[96] with their application form suggesting the applicant may provide such things as: a police caution, an undertaking given to a court, medical reports, police reports, or a support letter from a domestic violence agency or social service. In the United States, 'any credible evidence' may be accepted.[97] The relevant Australian rules permit a wider range of evidence, such as medical records, letters from domestic violence support services, and declarations from certain school staff.[98]

6. Other practical challenges in accessing VFV visas

VFV visa applications, and in particular the 'unable to return home' aspect of residence applications, can be challenging and time consuming and require specialist assistance, however Legal Aid assistance is unavailable.[99] Proving that an applicant is 'unable to return home' typically requires the collation of a large volume of evidence specific to the applicant (such as statutory declarations and support letters from people familiar with their circumstances), as well as a broad range of country research that substantiates their concerns. Gathering this evidence can be difficult when the people who could provide evidence, such as family and community members, are the very people the applicant fears hostility from and cannot ask for support. INZ is likely to present its own generic 'country information' (compiled by INZ's Country Research Unit) that an applicant will need to respond to. Applicants are also likely to be formally interviewed by immigration officers. Navigating this process is immensely stressful and challenging, let alone doing so without legal support, with limited English language, and when coping with the effects of trauma and serious material hardship.[100] It is appropriate that Legal Aid should be made available for VFV residence applications and appeals in the same manner as it is for refugee status applications. Similarly, filing fees for appeals to the IPT against decisions to decline VFV residence visas (which presently are $700) should be removed in the same manner as refugee status appeals,[101] in order to make appeal rights realistically accessible.

96 Immigration Rules (UK) s E-DVILR.1.3 "Eligibility for indefinite leave to remain as a victim of domestic violence".

97 Immigration and Nationality Act 8 USC § 1154.

98 The Minister specifies acceptable forms of evidence of family violence, per reg 1.24 of the Migration Regulations 1994 (Cth). The Department of Home Affairs provides guidance on accepted forms of evidence, see Australian Government Department of Home Affairs "Domestic and family violence and your visa" <www.immi.homeaffairs.gov.au>.

99 Section 12 of the Legal Services Act 2011 provides that Legal Aid may not be granted for proceedings involving a decision under the Immigration Act 2009 where the applicant holds a temporary entry class visa. Legal Aid is generally available only for immigration matters relating to refugee or protected person status claims (Legal Services Act 2011, s 7(1)(j)–(m)).

100 Applicants often have very limited (if any) financial means, as they are not eligible for any social welfare payments until a VFV Work Visa has been granted. Limited benefit payments are available to VFV Work Visa holders under the 'Family Violence Programme', but they are not available until the visa is granted. See Ministry of Social Development *Special Needs Grant Programme*, cl 15B.

101 Fees are prescribed by the Immigration and Protection Tribunal Regulations 2010.

II. The IPT's Application of the VFV Visa Policy

Given that the narrow VFV policy criteria discussed above exclude many victim-survivors, appeals to the Immigration and Protection Tribunal (*IPT*) should play a vital role in ensuring that women who fit the policy intent, but perhaps not its strict criteria, can access protection. Indeed, Cabinet papers from the time of the VFV policy's inception noted the need for the policy to allow "Immigration Officers to use discretion to grant work permits and residence to applicants who meet the intent of policy but who may not meet other policy criteria".[102] As this discretion was not ultimately granted for residence visas (presumably because it is a significant departure from the established scope of immigration officers' powers), the IPT is the body with the ability to exercise such discretion. Unlike the initial decision-makers, immigration officers, who are bound by the policy criteria, the IPT has an ability to recommend the granting of residence to appellants who may not meet policy criteria where they have 'special circumstances' that warrant doing so.[103] The intervention of the IPT is also vital in situations not provided for by immigration instructions, particularly in the case of victim-survivors who cannot prove they would be 'at risk of abuse or exclusion' or would have 'no means of financial support', but will face separation from their dependent child(ren) if they cannot remain in New Zealand. Additionally, IPT decisions play an important role in interpreting the scope of the policy and guiding immigration officers' future decisions. Immigration instructions do not prescribe many significant matters relating to the VFV visa criteria, such as what degree of hardship amounts to being 'unable' to return home or what the threshold for evidential sufficiency is to meet this test; such matters are guided by IPT decisions.

Later sections of this report will explore how the IPT has responded to these significant questions; the rest of this section will give an overview of the IPT and lay out the parameters of the study of IPT appeal decisions concerning VFV visa applications.

Background to the Immigration and Protection Tribunal (IPT)

The IPT was established by the Immigration Act 2009 and replaced what was formerly four different specialist immigration bodies.[104] Membership of the IPT consists of a chair who is a District Court judge and members (there were 16 members as at June 2022)[105] who are experienced lawyers.[106] The chair is responsible for directing the education, training, and professional development of members of the IPT.[107] One of the IPT's functions is to determine appeals against decisions to decline to grant residence class visas;[108] decisions to decline temporary visas (such as Victims of Family Violence work visas) may not be appealed to the IPT and have limited rights of reconsideration or review.[109] An appeal against a decision to decline a residence class visa must be lodged within 42 days of the appellant being notified of the decision.[110] The available grounds for appeal are that either the decision was not correct in terms of the relevant residence instructions, or the 'special circumstances' of the appellant are such that consideration of an exception to those residence instructions should be recommended to the Minister of Immigration.[111] It is the responsibility of an appellant to establish her case,[112] however she will not have access

102 Cabinet Paper "Domestic Violence Provision", above n 50, at [2].

103 Immigration Act 2009, s 188(1)(f).

104 The Residence Review Board, the Removal Review Authority, the Deportation Review Tribunal, and the Refugee Status Appeals Authority.

105 Immigration and Protection Tribunal *Annual Report 2021/2022* (December 2022) at 7.

106 Immigration Act 2009, s 219(1). Members must be "lawyers who have held a practising certificate for at least 5 years or have other equivalent or appropriate experience (whether in New Zealand or overseas)".

107 Immigration Act 2009, s 220(1)(b).

108 Immigration Act 2009, s 187(1)(a).

109 Immigration Act 2009, s 185 and 186.

110 Immigration Act 2009, s 187(5).

111 Immigration Act 2009, s 187(4).

112 Immigration Act 2009, s 226(1).

to Legal Aid assistance to assist her in preparing it.[113] Appeals are heard on the papers (rather than by oral hearing),[114] and generally by one IPT member alone.[115]

When an appeal is lodged, the chief executive of the Ministry of Business, Innovation and Employment, within which INZ sits, must lodge any file relevant to the appeal that INZ holds and may also lodge any other information, evidence, or submissions.[116] The IPT may not consider any information or evidence adduced by the appellant that was not provided to INZ before the decision was made, unless the appellant could not, by the exercise of reasonable diligence, have supplied that information or evidence at the time.[117] The IPT may conduct its proceedings in an inquisitorial manner, an adversarial manner, or in a mixed inquisitorial and adversarial manner as it sees fit,[118] and has considerable investigatory powers.[119] It is not bound by precedent and decides each appeal on its own facts.[120] When determining an appeal, the IPT has the following options available to it:

a. confirm the decision appealed against as having been correct; or

b. reverse the decision as having been incorrect; or

c. note the correctness of the original decision, but reverse that decision on the basis of any information properly made available to the IPT that reveals that the grant of the visa would have been correct; or

d. note the correctness of the original decision, but cancel the decision and refer the matter back to the chief executive (or the Minister, if the Minister made the decision) for consideration as if a new visa application had been made that included any additional information properly provided to the IPT; or

e. cancel the decision and refer the application back to the chief executive (or the Minister, if the Minister made the decision) for reassessment, where the IPT considers that the decision was made on the basis of an incorrect assessment but is not satisfied that the appellant would, but for that incorrect assessment, have been entitled; or

f. confirm the decision as having been correct, but recommend that the special circumstances of the applicant are such as to warrant consideration by the Minister as an exception to those instructions.[121]

The IPT must publish its decisions (subject to narrow exceptions),[122] and may remove identifying information. Decisions of the IPT are generally final; a further appeal to the High Court may be made only on a point of law and with the court's leave. (I have not located any High Court decisions relating to the VFV category.)[123]

113 Legal Aid is generally available only for immigration matters relating to refugee or protected person status claims (Legal Services Act 2011, s 7(1)(j)–(m)).

114 Immigration Act 2009, s 234(2).

115 Immigration Act 2009, s 221.

116 Immigration Act 2009, s 226(2) and 226(3).

117 Immigration Act 2009, s 189.

118 Immigration Act 2009, s 218.

119 Immigration Act 2009, sch 2 cl 10–11.

120 See *AK (Partnership)* [2011] NZIPT 200005 at [35]: "Even though the Tribunal strives for fairness and consistency of outcomes, previous decisions do not necessarily create a precedent. Each case must be assessed on its individual facts."

121 Immigration Act 2009, s 188(1).

122 Immigration Act 2009, sch 2 cl 19.

123 Immigration Act 2009, s 245. In deciding whether to grant leave, s 245(3) requires the court to "have regard to whether the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to the High Court for its decision". This has been interpreted in a way that greatly restricts appeals that are not of general or public importance; see the Court of Appeal's finding in *Machida v Chief Executive of Immigration* [2016] NZCA 162 at [8] that s 245(3) can only be met "in an exceptional case involving individual injustice to such an extent that the Court simply could not countenance the Tribunal's decision standing".

IPT decisions present several limitations in terms of the types of analyses that are possible. Notably, "[t]he tribunal when deciding that the circumstances are special does not say why this is the case. It cites the definition of 'special' in [Court of Appeal case] *Rajan*, considers the circumstances and then states whether or not it considers them to be special."[124] Legal scholars Doug Tennent, Katy Armstrong, and Peter Moses have noted that this creates "a gap in the decision-making process" and argued "[i]t would contribute greatly to fairness and consistency if the tribunal were to say what it was that made the circumstances stand out, thereby amounting to special circumstances".[125] Reviewing IPT decisions therefore may not give a full picture of the reasoning underpinning determinations. Similarly, IPT assessments of the correctness of INZ's decisions may contain minimal explanation of their reasoning; often the factors that INZ considered in reaching a decision are stated and the IPT simply affirms the reasonableness of the decision, without indicating which specific grounds it finds persuasive. This can make it difficult to ascertain what was determinative for the IPT. Decisions may also only highlight aspects of appellants' submissions and evidence that the IPT deemed noteworthy; the submissions and evidence that were deemed immaterial may not be visible. In the context of decision-making about family violence, knowing what information has been omitted as irrelevant can be equally as enlightening as that which is deemed relevant.[126] With these limitations in mind, the analysis that follows aims to identify trends across the cases rather than speaking definitively about the reasoning process followed in specific cases.

Sample Selection and Methodology

For the purposes of this study, I sought to include all IPT decisions relating to INZ decisions to decline Victims of Family Violence category residence visas. Cases were identified through a search of the IPT's online database of published decisions.[127] The search for Victims of Family Violence (formerly Domestic Violence) category appeals returned a total of 49 IPT decisions from 2012 to 2021. All 49 decisions have been included in this study. Conveniently, the establishment of the IPT came approximately two years after the 2008 amendments to the VFV policy, therefore all IPT decisions have been made under the current VFV policy. All published decisions by the previous relevant appeal body, the Residence Review Board, relate to the superseded pre-2008 policy so have not been included. The 49 decisions were determined by seven different IPT members; however, interestingly, since 2019 all but one decision was determined by the same member.

Qualitative analysis of the 49 cases was undertaken using NVivo 12 Plus software. First, case 'classifications' were applied to each decision to capture basic quantitative data (such as whether children were involved, the appellant's country of origin, the reason(s) INZ declined the application, and the outcome of the appeal). Next, decisions were manually coded to capture a broad range of qualitative data. For each case, the factors that the IPT cited in assessing the correctness of INZ's decision were categorised, as were the factors considered in assessing whether the appellant had 'special circumstances'. This allowed for broad trends to be identified, as well as the selection of illustrative quotes and excerpts.

124 Doug Tennent, Katy Armstrong, and Peter Moses *Immigration and Refugee Law* (3rd ed, LexisNexis, 2017) at 458.

125 Tennent, Armstrong, and Moses *Immigration and Refugee Law*, above n 124, at 459.

126 On the importance of accurately conveying victims' experiences of violence generally, see Denise Wilson and others "Becoming Better Helpers: Rethinking Language to Move Beyond Simplistic Responses to Women Experiencing Intimate Partner Violence" (2015) 11(1) Policy Quarterly 25.

127 Available at "Residence Decisions" <www.forms.justice.govt.nz>.

Each case was also specifically coded for descriptions and language used in relation to the violence the appellant had experienced. Other 'codes' were added as noteworthy features were identified; for example, a code for 'immigration systems abuse red flags' was added because many decisions mentioned abusers having threatened the appellant's immigration status in some way, though this was not generally recognised as a form of family violence.

Overview of the Cases

Of the 49 VFV appeals, the most common countries of origin of appellants were Fiji (11 cases), India (7 cases), China (6 cases), and the Philippines (4 cases).[128] The majority of appellants (68 per cent) were ethnic minority women from the Global South.[129] All but one appellant was female,[130] and in all cases the prior relationship which the application related was heterosexual.[131] Sixty-two per cent of appellants had dependent children who were either included in or affected by her appeal, and in one such (unsuccessful) case the affected child was noted to be Māori.[132] Appellants varied from 23 to 56 years in age,[133] however there were geographic differences: for example, the average age of appellants from South Asian countries of origin was 28, while the average age of appellants from countries within the Global North was 40.

The vast majority of appeals (at least 39,[134] or 80 per cent) related to applications that had been declined because INZ was not satisfied the applicant met the 'unable to return home' requirement, therefore this requirement became the focus of the study. In a further five cases INZ had not been satisfied that family violence occurred;[135] in two cases the violent partner had not been a New Zealand citizen or resident;[136] in two cases the reason for the decline was not available;[137] and in one case INZ was not satisfied the applicant had established she was in a de facto partnership.[138] Five of the appeals contained limited content for qualitative analysis: two appeals were declined as the appellants had already been granted residence through deportation appeal proceedings;[139] one had its reasoning withheld in full;[140] and two had their reasoning substantially redacted.[141]

128 The full breakdown of appellants' countries of origin is as follows: Fiji (11), India (7), China (6), the Philippines (4), South Africa (3), United Kingdom (3), Brazil (2), Bangladesh (1), Romania (1), Russia (1), Tonga (1), Tuvalu (1 dual citizen), Japan (1), Singapore (1), the Netherlands (1), Norway (1), Germany (1), Canada (1), United States (1). The appellant's country of origin was redacted in two cases.

129 These appellants' countries of origin were Fiji, India, China, the Philippines, Tonga, Brazil, and Bangladesh. Some appellants whose country of origin was within the Global North were also ethnic minority women, though this was not necessarily clear from the decisions.

130 The appellant in [2015] NZIPT 202593 (India) was male. This appellant had himself been cautioned and convicted for acts of violence against his (female) partner and her family; police had been called to two episodes of violence by the appellant against his partner and he had also been convicted for using threatening language towards her father. His appeal succeeded on the basis that his new partnership with a New Zealand resident or citizen woman was a "particular event" warranting reassessment.

131 This lack of visibility of queer relationships should not be taken as reflective of the wider demographics of migrant victim-survivors. As Rachel Simon-Kumar highlights, fears of heterosexist responses are a major barrier to help-seeking for migrant and ethnic minority victim-survivors in queer relationships. See Simon-Kumar *Ethnic Perspectives on Family Violence in Aotearoa New Zealand*, above n 42, at 19.

132 [2013] NZIPT 200770 (India).

133 Of the cases where the appellant's age was listed, 14 were aged 20–29, 16 were aged 30–39, 10 aged 40–49, and 5 aged 50–59.

134 In two cases the reason for the appeal was not available: [2019] NZIPT 204983 (Tonga) and [2016] NZIPT 203633 (Fiji).

135 [2013] NZIPT 200738 (South Africa); [2014] NZIPT 201420 (Brazil); [2014] NZIPT 201535 (Philippines); [2016] NZIPT 203594 (Fiji); and [2018] NZIPT 204430 (India).

136 [2013] NZIPT 201736 (country withheld) and [2017] NZIPT 203801 (South Africa).

137 [2019] NZIPT 204983 (Tonga) and [2016] NZIPT 203633 (Fiji).

138 [2020] NZIPT 205667 (Norway).

139 [2017] NZIPT 203801 (South Africa) and [2019] NZIPT 204983 (Tonga).

140 [2016] NZIPT 203633 (Fiji).

141 [2013] NZIPT 201736 (country withheld) and [2013] NZIPT 201737 (country withheld).

II. The IPT's Application of the VFV Visa Policy CONT.

Twenty-four out of 49 appeals (49 per cent) were dismissed.[142] Of the 25 appeals that were successful: 15 found 'special circumstances' warranting consideration by the Minister of Immigration as an exception to instructions (per s 188(1)(f)); six found procedural errors in INZ's assessment of the application and returned the application to INZ for reassessment (per s 188(1)(e)); and four found that a 'particular event'[143] had occurred since the application was declined that materially affected the applicant's eligibility, so returned the application to INZ as if a new application had been made (per s 188(1)(d)). An initial striking finding was that the IPT did not reverse INZ's decision as incorrect in terms of the residence instructions in any of the 49 cases (pursuant to s 188(1)(b)). In each of the six case where the IPT held that INZ made procedural errors in their assessment of the evidence,[144] rather than reversing the decision the IPT cancelled the decision and returned the application to INZ for reassessment because the IPT was not satisfied that the appellant would, but for INZ's incorrect assessment, have satisfied the visa criteria.[145] This occurred even in cases where the appellant appeared to be at risk of severe stigmatisation and/or financial hardship.[146]

Another striking finding was the significant impact that being childless had on an appellant's prospects of success.[147] In 18 cases the appellant did not appear to have any dependent children,[148] and 13 of these 18 appeals (76 per cent) were dismissed. Special circumstances warranting consideration by the Minister as an exception to instructions were found in only one of these cases, which involved a citizen of the United States who the IPT determined was "clearly able to contribute to New Zealand society through her [employment as a social worker] in hospices" and "may also eventually bring in to New Zealand an investment of around US$2 million [by way of future inheritance]".[149] In the remaining four successful appeals involving childless appellants, their applications were returned to INZ for reassessment as INZ was found to have made procedural errors or there had since been a 'particular event'.[150] Conversely, of the 16 appeals where the appellant had New Zealand citizen children, only four (25 per cent)[151] were dismissed and of those where she had non-citizen children just five out of 13 (38 per cent) were dismissed.[152] Following the interests of children, the next most common circumstance underpinning successful appeals was the appellant having re-partnered with another New Zealand resident or citizen; three appeals were successful on the basis

142 However, as noted above, two were declined as the appellants had already been granted residence through deportation appeal proceedings: [2017] NZIPT 203801 (South Africa) and [2019] NZIPT 204983 (Tonga).

143 Immigration Act 2009, s 189(6).

144 [2020] NZIPT 205653 (China); [2019] NZIPT 205568 (India); [2018] NZIPT 204430 (India); [2016] NZIPT 203594 (Fiji); [2014] NZIPT 201462 (Bangladesh); and [2014] NZIPT 201420 (Brazil).

145 Pursuant to Immigration Act 2009, s 188(1)(e).

146 For example, in [2014] NZIPT 201462 (Bangladesh) the IPT affirmed at [30] that: "the country information … supports the appellant's claims of being at risk of abuse at the hands of her ex-husband's family because of the social stigma brought upon [her family] by leaving the husband due to domestic violence". Similarly, in [2019] NZIPT 205568 (India) the IPT noted at [41] that: "the evidence of [the appellant's] treatment while living in the family home after her first divorce suggested that the appellant had been ostracised and abused. The appellant had stated in her statutory declarations and telephone interview that she had been poorly treated, including by being banished to her room and refused food, and physically assaulted by her father and uncle. She had lost 20 kilograms in weight and attempted suicide."

147 Of the 49 cases, the appellant appeared to have no 'dependent' children in 18 cases; she had New Zealand citizen dependent children in 16 cases; she had non-citizen dependent children in 13 cases; and in two cases it was not evident whether she had children.

148 See Immigration New Zealand *Operational Manual* (2022) at F5.1 for the definition of 'dependent' child. They must be either: aged 17 or younger and single; aged 18–20, single, and childless; or aged 21–24, single, childless, and 'totally or substantially reliant on an adult for financial support'.

149 [2016] NZIPT 203384 (USA).

150 [2020] NZIPT 205653 (China); [2019] NZIPT 205568 (India); [2018] NZIPT 204476 (Fiji); and [2014] NZIPT 201462 (Bangladesh).

151 These were: [2017] NZIPT 203950 (Philippines); [2014] NZIPT 201535 (Philippines); [2013] NZIPT 200770 (India); and [2013] NZIPT 200738 (South Africa).

152 [2013] NZIPT 200839 (Singapore); [2013] NZIPT 201005 (Fiji); [2019] NZIPT 205107 (Brazil); [2019] NZIPT 205151 (Russia); and [2019] NZIPT 205440 (Fiji). Notably, all of these unsuccessful cases involved older children. In a further case ([2017] NZIPT 203801 (South Africa)) the appeal was declined because the appellant and her children had already been granted residence via a deportation appeal, so this case has not been treated as a 'dismissed' case.

that an appellant re-partnering constituted a 'particular event' warranting reassessment of the appellant's residence eligibility by INZ (per s 188(1)(d)).[153]

Given that the impetus for creating the VFV policy was the protection of victims who would be impoverished or "for social and/or cultural reasons would be prevented from reintegrating with their family or social group",[154] it is interesting to note that appellants who were ethnic minority women from the Global South did not have a higher success rate in their appeals. Thirty-two of the appeals were lodged by women from Fiji, India, China, the Philippines, Tonga, Brazil, and Bangladesh, of which 16 (50 per cent) were dismissed. Seven cases (22 per cent) found the appellant had 'special circumstances'. Fifteen appeals were lodged by women from Germany, the United Kingdom, Norway,[155] the Netherlands, Romania, the United States, Canada, Russia, Japan, Singapore, and South Africa, being countries typically included in the Global North. Of these 15 appeals, seven (47 per cent) were dismissed and six (40 per cent) found 'special circumstances'. Obviously this is a small number of cases and situation-specific factors outside the VFV policy criteria (particularly the involvement of children) led to the high proportion of 'special circumstances' findings in the latter group of cases, so no specific conclusions are suggested by this comparison. However, the relatively low success rates for women from countries of the Global South bears noting, given that several of these countries have well-established risks of discrimination against divorced victim-survivors of violence and fare poorly by measures such as the UNDP's Gender Inequality Index and Gender Social Norms Index. The IPT has stated that that the VFV category "is not designed for women from first-world nations"[156] but rather "is designed to avoid a situation where a woman returns to her home country and is discriminated against there, socially or financially, by reason of her divorced or separated status";[157] however, it seems some such women still struggle to access the VFV residence visa.

153 [2016] NZIPT 203160 (Romania); [2015] NZIPT 202593 (India); [2014] NZIPT 201701 (China).

154 Minister of Immigration Briefing Note "Guidelines for Granting Work Permits to Victims of Domestic Violence", above n 49.

155 Notably, this appellant was a migrant of Iraqi Kurdish descent who did in fact have strong concerns of stigma and abuse within her very conservative family and community. Her appeal was unsuccessful.

156 [2016] NZIPT 203384 (USA).

157 [2014] NZIPT 201610 (UK).

III. The IPT's Assessments of the Correctness of INZ's 'Unable to Return Home' Decisions

As noted in the previous section, the key test at issue in the 49 IPT decisions studied was the 'unable to return home' requirement of the residence instructions. The IPT did not reverse any of the decisions on the basis that they were incorrect, thus no cases determined that the 'unable to return home' requirement had actually been met. In three cases the IPT found that INZ had made an error in assessing evidence of the appellant's ability to return home that warranted reassessment of the application by INZ,[158] but did not find that the appellant would, but for that error, have been entitled. Eight decisions did not address the 'unable to return home' requirement because the application had been declined under a different criterion;[159] one decision did not address this requirement because the appellant had already been granted residence via deportation proceedings;[160] and all reasoning was redacted from one decision.[161] This left 39 decisions for analysis in which the IPT addressed the 'unable to return home' requirement.

No Means of Financial Support

Applicants for VFV category residence visas must demonstrate that they are:

> *[U]nable to return to their home country because they would have no means of independent financial support from employment or other means, and have no ability to gain financial support from other sources; or they would be at risk of abuse or exclusion from their community because of stigma.*[162]

Prior to amendments to the VFV policy in 2008, this criterion provided examples of relevant sources of financial support to be considered, including 'state financial support', 'employment', and 'marriage'. At the recommendation of the *Living at the Cutting Edge* report, it was determined in 2008 that it was no longer appropriate to prescribe remarriage as a way to access financial support. The immigration instructions no longer specify what sources of financial support that applicants must negate, nor do they shed light on what evidence is required to do so. My qualitative analysis of IPT decisions therefore sought to answer several broad questions:

- What sources of financial support is an applicant expected to negate?
- What degree of financial hardship will render an applicant 'unable' to return?
- What evidence must an applicant provide in order to negate the possibility of each source of financial support?

To answer these questions, each factor that the IPT cited in assessing the appellant's prospects of financial support was coded into categories.

158 These three cases were: [2020] NZIPT 205653 (China); [2019] NZIPT 205568 (India); [2014] NZIPT 201462 (Bangladesh).

159 [2020] NZIPT 205667 (Norway); [2018] NZIPT 204430 (India); [2017] NZIPT 203801 (South Africa); [2016] NZIPT 203594 (Fiji and Tuvalu); [2014] NZIPT 201535 (Philippines); [2014] NZIPT 201420 (Brazil); [2013] NZIPT 200738 (South Africa); [2013] NZIPT 201736 (country withheld).

160 [2019] NZIPT 204983 (Tonga).

161 [2016] NZIPT 203633 (Fiji).

162 Immigration New Zealand *Operational Manual* (2022) at S4.5.2d.

III. The IPT's Assessments of the Correctness of INZ's 'Unable to Return Home' Decisions CONT.

1. Prospects of employment

As would be expected, an appellant's ability to gain employment was a key focus of the IPT's assessment of her means of financial support. In order of prevalence, common factors seen to bear upon her ability to gain employment were: that she had previously held employment; that she had received some education; the unemployment rate and state of the labour market in her home region; her personal attributes, such as youth or a 'hard-working' nature; and that she had managed to secure employment after a previous separation. An overwhelming majority of decisions discussed the appellant's education and/or employment history and found that having some education or work experience was suggestive of an ability to find employment if returned to her home country. However, some of the experience cited was work that is typically underpaid and insecure, so seems of limited utility in ensuring that an appellant would have a secure and adequate income for herself and her children, such as having worked: "as a house-maid"[163] or "housekeeping attendant";[164] cleaning homes;[165] "as a nanny, housecleaner and shelf-stacker";[166] or in a factory.[167] Similarly, educational credentials were cited that seem of limited assistance in securing an adequate and stable income, such as that "the appellant had had some undergraduate education at university (but did not complete her degree)".[168] In another case, the fact that the appellant "had provided evidence of a good high school education (including a position as a prefect)" was noted in support of her employment prospects, despite her assertion that "her family and community [in Fiji] had not previously allowed her to work because she was a woman".[169]

Notwithstanding some previous employment and/or education, most appellants had identified multiple barriers to them being able to secure employment if returned to their home country. Typically, these barriers related to discrimination due to the appellant's status as a separated victim-survivor of family violence. Appellants cited cultural norms against women being in the workplace after marriage, or against women being employed at all, or discrimination against divorced women, single mothers, or older women. Often barriers were also identified that related to the labour market in their home region, such as high unemployment for women, a lack of opportunities in rural areas, pay that was insufficient to survive on for 'unskilled' work, the necessity of local work experience, a lack of recognition of the appellant's qualifications or experience, and employers' unwillingness to accept any gaps in employment. The IPT was seldom persuaded of the severity of such barriers, and often dismissed them as unsubstantiated or considered the supporting country information 'too general':

> *[The appellant stated] that she had not been allowed to work [in Fiji] and that working after marriage is not an option for women in her culture [and] told Immigration New Zealand that her qualification was not well regarded in Fiji and that she would not be able to obtain employment in Fiji because of the societal stigma she would face as a result of being a separated woman. … On appeal she reiterates that it is considered shameful for a girl to work and support herself in Fiji. She states that once married, a girl is not considered to be a member of her family but rather a guest.* ***No further evidence is provided.***[170]

163 [2019] NZIPT 205356 (Philippines) at [25].
164 [2013] NZIPT 201005 (Fiji) at [35].
165 [2021] NZIPT 206136 (Netherlands) at [29].
166 [2018] NZIPT 204476 (Fiji) at [13].
167 [2018] NZIPT 204476 (Fiji) at [13] and [2013] NZIPT 201005 (Fiji) at [35].
168 [2017] NZIPT 203950 (Philippines) at [51].
169 [2014] NZIPT 201489 (Fiji) at [8] and [26].
170 [2014] NZIPT 201489 (Fiji) at [26]–[28].

[The appellant, whose husband had died by suicide after being charged with family violence offences against her, explained that:] [a] widow whose husband has died from unnatural causes was viewed in China as a person bringing bad luck and she would be thought to be responsible for her husband's death. She would be viewed as an ill-fated woman and people would be generally fearful of associating with her. … She said that as a child she had experienced discrimination resulting from stigma because her mother was a widow. … The appellant expressed fears that she would not be employed because of her age, her lack of current knowledge about the market and prejudice about her marital situation. She also gave evidence of the telephone enquiries she had made regarding employment in China. However, ***the appellant's fears that she would not be able to obtain employment in China are speculative.***[171]

The appellant conceded to Immigration New Zealand that she had been an independent woman in the past, but she maintained that gaining employment in India would be harder for her now because of her age, marital status, and the fact that she was a single mother. … Even taking into account the mores of Indian society, ***the appellant did not establish that being divorced or having a child meant she would be unable to obtain employment*** *or set up in business again in India.*[172]

It was not unreasonable for Immigration New Zealand to conclude that, while the appellant had provided ***general information about the status of separated and divorced women in India and about their position in the workforce,*** *this did not displace the fact that the appellant had been previously employed in India, was educated and had qualifications. On that basis, it would be possible for her to obtain some form of employment in India even if the fact she was separated might pose some problems.*[173]

The appellant's letters of support from a New Zealand Member of Parliament, from the Fiji Council of Social Services and an international human rights lawyer in Fiji attested to Fiji's economic difficulties, high unemployment rate, tolerance of domestic violence, inadequate welfare system, the ostracism of Fijian Indian women who go against family wishes, and the stigma associated with victims of domestic violence. Nonetheless, each of the authors of those letters acknowledged that ***they did not have personal knowledge of the appellant's circumstances.***[174]

171 [2014] NZIPT 201307 (China) at [30]–[31] and [44]–[45].

172 [2013] NZIPT 200770 (India) at [29]–[31].

173 [2013] NZIPT 200861 (India) at [52].

174 [2012] NZIPT 200134 (Fiji) at [43].

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This approach sets a difficult evidential threshold for VFV visa applicants to meet. Because an applicant will seldom have had experience in her own country of seeking employment as a separated survivor of violence and/or single mother, her concerns may be dismissed as 'speculative'. However, if she seeks to substantiate her fears by reference to country research, this may not be considered sufficiently specific to her circumstances. Accessing expert opinions from people who both have personal knowledge of the appellant's circumstances, as well as recognised expertise in her cultural context, is not typically possible or within the means of applicants. As a result, very little attention was paid to the changed social context that applicants would be entering the labour market from (as separated/divorced women and/or single mothers) and significant weight was given to any past employment or education.

A common suggestion by the IPT was that appellants should have supplied evidence of unsuccessful job applications to substantiate their claims, and numerous decisions noted the appellant's failure to do so.[175] However when such evidence was produced it was dismissed, for example:

> *As noted, the appellant responded with (untranslated)* ***unsuccessful applications for jobs in Romania, a claim that over half the employment positions in Romania were filled through referrals, and testimonies provided by people living in Romania as to the extreme difficulty in securing employment.*** *… It is not sufficient to simply claim that a woman of her age, with previous work experience in two countries including her homeland, will be unable to secure employment again.*[176]
>
> *While she told Immigration New Zealand that* ***she had tried for three or four jobs in Fiji*** *when she was there in 2012, t****his does not constitute persuasive evidence*** *that she will be unable to obtain employment if she returns now. Her claim that she will not be able to obtain employment in Fiji is, essentially, a bare assertion for which* ***she has produced little or no evidence.***[177]
>
> *Nor is it accepted that the appellant's* ***efforts to obtain employment, over the internet,*** *while she is living in New Zealand, show that she will be unable to obtain employment in the United Kingdom.* ***The rejections of which she has given evidence*** *do not reveal what type of applications she made or whether she revealed she was living in New Zealand.*[178]

The expectation that women apply for numerous jobs from abroad seems problematic on several fronts, not least because many of the cases where this was raised involved women likely to be working in the informal labour market or in low-wage work that is unlikely to be advertised online. Making futile job applications abroad is also a difficult task to expect of applicants in the aftermath of violence; during this post-separation period they are usually focused on meeting their immediate survival needs, such as securing safe housing, food, and an income for their family, and getting through the many legal proceedings (such as criminal and Family Court proceedings) that may follow their separation.

175 See, for example, [2019] NZIPT 205440 (Fiji) at [54]: "In her interview with Immigration New Zealand, the appellant stated that finding employment in Fiji would be difficult as there were not many jobs available. Whilst this may be true, the appellant stated that she had not made any attempt to look for employment in Fiji, so whether she will be unable to secure employment is speculative"; [2014] NZIPT 201489 (Fiji) at [26]: "No evidence was presented of attempts, failed or otherwise that she had made to secure employment in Fiji"; and [2012] NZIPT 200464 (Fiji) at [25]: "While it is acknowledged that the Fijian economy is depressed and unemployment high, the appellant cannot rely on bare assertions that she will be unable to find employment. She admitted at interview that she had not searched for or applied for any jobs in Fiji".

176 [2016] NZIPT 203160 (Romania) at [29]–[30].

177 [2016] NZIPT 203416 (Fiji) at [51].

178 [2014] NZIPT 201610 (UK) at [32].

After an appellant's employment and education history, the second most prevalent factor cited in favour of their ability to find employment was general employment data on the appellant's place of origin. This data had usually been compiled by INZ's Country Research Unit (*CRU*) during the processing of the appellant's unsuccessful application. For example:

> ***According to the CRU, the unemployment rate in Gujarat was low,*** *at 3.4 per cent in May 2019, and well below the national average of 7.17 per cent. Gujarat was one of the leading industrialised states in India with large petroleum refinery industries, diamond processing and textile production facilities, and many large chemical and pharmaceutical companies. The X city district accounted for 21 per cent of factories and employed 18 per cent of workers in the state.*[179]
>
> *The Tribunal finds that Immigration New Zealand's decision was correct given the evidence before it. The [CRU] advised that there was some unemployment and also underemployment in the Philippines and that most jobs required a professional qualification and experience, but also that* ***there were some entry level jobs, and that skills such as in English language may be beneficial*** *in finding employment.*[180]

> *While the economic climate in Russia remains difficult, and unemployment levels are significantly higher than in New Zealand, the [CRU] advised that* ***unemployment hit unskilled and semi-skilled males especially hard …. The female labour force participation rate was 57 per cent and women appeared to work in a wide variety of fields*** *(such as management, secretarial work, translation, teaching, law, accounting, science and police work) and were well-represented in senior management levels. Accordingly, the possibilities for the appellant were not as limited as for others.*[181]

Generic employment data sheds little light on the status of separated women and/or single mothers specifically, so is of limited utility in assessing the employment prospects of VFV visa applicants who are at risk of discrimination in the labour market. Indeed, in two of the three cases in which INZ error was found in the assessment of appellants' ability to return home, errors were noted in INZ's application of employment data.[182] However many IPT decisions affirmed INZ's reliance on generic employment data.

179 [2020] NZIPT 205587 (India) at [51].

180 [2019] NZIPT 205576 (Philippines) at [23].

181 [2019] NZIPT 205151 (Russia) at [34].

182 [2019] NZIPT 205568 (India) at [45]: "[INZ] stated that the unemployment rate in Gujarat state was merely a reflection of the rate of women who chose to be a part of the workforce, and that the rate could be low because women there were choosing not to work because they did not need to work for financial reasons. The Tribunal can find no basis for this conclusion"; and [2020] NZIPT 205653 (China) at [40]: "[The] CRU had reported on the economic and social conditions in X city, the prefecture-level city in which the appellant's village was located, and in Z province …. However, the appellant was not from an urban area nor was it likely that she would be returning to an urban area. Further, according to an article provided by counsel, such reported [unemployment] figures were unreliable because China's official unemployment data excluded millions of rural *hukou* holders who moved to urban areas in search of work and also unemployed people who chose not to register their unemployment."

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Where an appellant had obtained employment after a previous separation, this was taken as persuasive evidence of her ability to do so again, even where she argued her status had been worsened by the second separation, for example:

> *[The appellant provided] a letter from her grandparents, detailing the embarrassment and humiliation they had experienced in their community as a result of their support for the appellant, following her first divorce. The situation had now been greatly aggravated by her second failed marriage .... A statement from the Hindu Heritage Research Foundation (NZ) ("the Foundation") also detailed the ostracism in Indian society of women whose marriages fail, especially for a second time. Many women in Fiji would kill themselves because of the stress and trauma caused by bringing disgrace to the family. ... [INZ] noted that the appellant had been employed in Fiji prior to coming to New Zealand and had acquired valuable work experience in New Zealand. The Tribunal finds that Immigration New Zealand was correct to decline the appellant's application, on the basis of the evidence before it.*[183]

In her appeal, this appellant had provided further detail about the treatment she faced in the labour market following her first separation, and how this related to her second marriage and separation:

> *When the appellant sought employment after her [first] divorce, she found a number of prospective employers expected sexual favours. She managed to get employment with a travel agency, and was working there in 2007 when her divorce became final. Her family were keen for her to marry again. Her employer contacted her family about one of his relatives in New Zealand, who was a divorced man, looking for a new wife. The appellant ceased her employment in 2008 when she came to New Zealand. Because of the failure of her second marriage, to his relative, that employer would not offer her further employment, even if there was a vacancy.*[184]

This information does not appear to have been a part of the appellant's original visa application, so was not considered in relation to the correctness of INZ's decision. Nevertheless, it highlights the point that having eventually secured a job after a previous separation does not mean an applicant did not face serious discrimination in the labour market. As this appellant illustrated, securing employment within a community where divorced women are heavily stigmatised can be very difficult; such women are in a vulnerable position, at high risk of sexual harassment from employers and colleagues. Yet, even where an appellant did describe significant post-separation discrimination in her original application, the mere fact of having ultimately found employment appeared determinative:

> *The appellant explained that she had been blamed for the failure of her first marriage [in Fiji]. She had therefore left for India to study for her degree. The mentality of people in her community had not changed, and this time (the failure of her second marriage) was worse. She had already been ostracised. She lived in a rural area on the outskirts of X town with her sick mother, who had also been a victim of domestic violence .... She was well-known because of her employment and therefore returning to Fiji would be humiliating. Finding a job in Fiji would not be easy. ... [The IPT holds that] [t]he appellant has also previously faced the difficulties of marriage separation. Despite leaving Fiji to study, she successfully re-established herself there upon her return.*[185]

183 [2013] NZIPT 200969 (Fiji) at [13]–[15] and [36]–[37].

184 [2013] NZIPT 200969 (Fiji) at [52].

185 [2019] NZIPT 205202 (Fiji) at [16] and [35]. See also [2019] NZIPT 205440 (Fiji).

This places women who have previously divorced in a difficult position as, if they withstood the stigma of their previous separation and eventually found some employment, even in the face of significant discrimination, this is likely to be interpreted as evidence that they can do so again.

Several cases commented on personal attributes of the appellant that the IPT considered would aid her in securing employment in her country of origin, such as: young age;[186] good health;[187] "work ethic";[188] "readiness to adapt to changing circumstances";[189] or having a network of friends and contacts.[190] Quotes from appellants' INZ files demonstrate that immigration officers also apply such reasoning, noting applicants': "independence";[191] "young age";[192] and "highly motivated" or "hard working" nature.[193] One file noted that an applicant said she "would do any job given the opportunity".[194] Conversely, when appellants cited their older age as a barrier to employment this was given little weight.[195] The following comments were made by the IPT in relation to whether appellants had 'special circumstances', but are noted here as they similarly relate to the IPT's assessment of the attributes that could help her secure independent financial support:

> *By returning to India and appearing in court [proceedings against her abusive in-laws], **the appellant has shown herself to be independent and resilient.** … As noted above, **her independence of mind and resilience in making a life without her husband in New Zealand** has stood her in good stead on her current return to India. Her supporters here describe the appellant as intelligent, qualified and capable of contributing to this country.*[196]
>
> *The Tribunal has found that even if the appellant cannot expect assistance from her family, and suffers some discrimination in India, she has the means (her education, employment history, and **"capacity for independent assertive actions"**, as confirmed by the psychologist) to ensure the best for herself and her child.*[197]

Such reasoning is problematic as women often seek to emphasise the positive attributes that will make them an asset to New Zealand in both their dealings with INZ and their submissions to the IPT as to their 'special circumstances'. They may provide well-meaning support letters from professionals or social services that applaud the strengths they have displayed; family violence practitioners usually adopt a strengths-based approach and using these strengths as a factor weighing against VFV visa eligibility sits in conflict with their trauma-informed practice. Treating victim-survivors' resilience as a factor weighing against their VFV visa eligibility also arguably penalises them for having withstood such adversity. Further, these positive personal attributes do not negate the very real hardships that appellants may face in their home countries – hardships that are often magnified by the impacts that trauma has had on an appellant's wellbeing. When appellants did raise the mental health

186 See, for example, [2016] NZIPT 203160 (Romania) at [30] and [2016] NZIPT 203416 (Fiji) at [46].

187 [2016] NZIPT 203160 (Romania) at [30].

188 [2016] NZIPT 203160 (Romania) at [30].

189 [2019] NZIPT 205151 (Russia) at [34].

190 [2016] NZIPT 203384 (USA) at [30].

191 [2014] NZIPT 201489 (Fiji) at [12].

192 [2013] NZIPT 200861 (India) at [15] and [2012] NZIPT 200464 (Fiji) at [14].

193 [2012] NZIPT 200134 (Fiji) at [31] and [2014] NZIPT 201489 (Fiji) at [12].

194 [2012] NZIPT 200134 (Fiji) at [59].

195 See [2016] NZIPT 203384 (USA) at [30]: "as people age they become less readily employable. However, the appellant, with her education, contacts and friends in the United States, is in a better position to gain employment than many other women of her age [of 56]"; and [2014] NZIPT 201307 (China) at [21] and [45]: "the appellant had discussed the possibility of employment with some companies who knew her in China. However, although they knew of her previous work they did not offer her a position because of her age [of 45] and her lack of knowledge of the present market. She had been told that the companies wanted young people. … [T]he appellant's fears that she would not be able to obtain employment in China are speculative."

196 [2017] NZIPT 203941 (India) at [68] and [71].

197 [2013] NZIPT 200770 (India) at [83].

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impacts of family violence as a barrier to employment in their home country, this was generally dismissed.[198] For example:

> *The appellant stated that, for [divorced Indo-Fijian] women such as herself, there were only two ways of avoiding stigma and taunting; either to remain outside Fiji or to end their life. … According to the appellant, she had been strongly supported through her traumatic ordeal by her New Zealand family members and church.* ***This support had enabled her to find employment*** *and become more confident and less anxious. Returning to Fiji would result in significant financial and emotional instability and social stigma, and* ***she considered that she did not have sufficient resilience to deal with this.*** *… [The IPT holds that] [w]hile she may find it difficult to return to Fiji, there is no evidence to suggest that the effects of her most recent abusive relationship would prevent her from working [in Fiji] in the future.*[199]
>
> *[The appellant had stated that she]* ***did not have the mental or physical strength to return and re-establish herself*** *[in Fiji] …. The* ***appellant suffers from severe depression and anxiety*** *and has sometimes thought of ending her life rather than going back to Fiji. There is no support for victims of domestic violence in Fiji. She is well cared for by her doctor here and needs ongoing therapy with her therapists. … [The IPT holds that] despite the adversity brought about by her husband's verbal abuse and violence towards her, and the distress of the criminal proceedings,* ***the appellant has managed to establish herself in employment in New Zealand.*** *She now has some work experience as a customer service and sales consultant and delivery centre consultant in a call centre in New Zealand. There is no evidence to show that the effects of the abusive relationship will prevent her from working in the future.*[200]
>
> *The appellant submitted to Immigration New Zealand that she is not as confident a woman as she was prior to her marriage because of the abuse she has suffered. However, the diagnosis of post-traumatic stress disorder was made after one interview with a psychiatrist three months after her separation. There was ample evidence before [INZ]* ***that she had been able to operate successfully nonetheless, in particular maintaining a responsible job.*** *… It is not accepted, as proposed on appeal, that the psychiatrist's or counsellor's letters establish that the appellant needs to stay on in New Zealand to protect her mental health. In fact, as past events have shown, she is a resourceful and determined woman.*[201]

In one case, the IPT determined that the mental health impacts an appellant had raised in her application in fact weighed in favour of returning her to her home country. In this case, the appellant had suffered particularly severe physical violence, seemingly including an assault that killed her unborn child:

> *The appellant has been supported in her recovery from the abusive relationship through counselling and by medical staff in a supportive role. Her counsellor gave the view that she suffers from post-traumatic stress disorder. Her acute stress disorder results in her living in a constant state of anxiety with a fear of her former partner contacting her and harassing her. She seems conditioned to believe that she is always in the wrong. …* ***Because of her ongoing anxiety and stress issues, the Tribunal does not consider that being in New Zealand is necessarily the best place for the appellant*** *due to a fear of her former partner (the first partner) contacting her.*[202]

198 One more positive example was found in [2019] NZIPT 205568 (India), where INZ's assessment of the appellant's employment prospects was criticised on several grounds, including that: "no regard was given to the evidence from the appellant's doctor which was that, as at 24 June 2019, the appellant was suffering from acute post-trauma stress state and anxiety with depression".

199 [2019] NZIPT 205440 (Fiji) at [22]–[23] and [54]. See also [2013] NZIPT 200839 (Singapore).

200 [2019] NZIPT 205202 (Fiji) at [15], [24], and [36].

201 [2014] NZIPT 201610 (UK) at [33] and [47].

202 [2013] NZIPT 200938 (Germany) at [43] and [46].

The health impacts of violence were also commonly raised in appellants' submissions as to their 'special circumstances', so the IPT's treatment of this issue will be discussed at greater length below. At this stage, I simply note that the ability to re-establish oneself in a supportive environment in New Zealand may not translate to being able to do so in a more hostile environment or without an essential support network. Stigmatisation may limit a woman's employment options and compound the adverse mental health impacts she is suffering. It also bears noting that, given VFV visa applicants are often ineligible for publicly funded healthcare and have extremely limited financial means,[203] providing evidence to substantiate their mental health concerns can be immensely difficult.

Interestingly, while the VFV policy only requires that an applicant will face *either* 'no means of financial support' *or* a 'risk of abuse or exclusion because of stigma', some decisions included comments concerning employment that perhaps conflated the two enquiries. The 'no means of financial support' criterion does not require that a lack of financial support is due to stigma, discrimination, or any specific cause, yet remarks such as the following were noted:

> *In any event, even if the appellant was to experience difficulties or some delay in obtaining employment in India* ***these would arise for socio-economic and market-force reasons.***[204]
>
> *The Victims of Domestic Violence category is designed to avoid a situation where a woman returns to her home country and is discriminated against there, socially or* ***financially****, by reason of her divorced or separated status. … [T]here is no evidence that [the United Kingdom] exercises discriminatory* ***gender-based policies with regard to employment*** *for women, let alone against divorced or separated women.*[205]
>
> *[INZ] also acknowledged that the pension amount of RMB350 [NZD$80] per month was meagre. … [However]* ***the appellant will simply be returning to the situation she would be in if she had not left China****, as she would not have been eligible for state employment after the 50-year-old cut-off date in any event.*[206]

A lack of financial support is one of the most significant barriers to separating from a violent partner, no matter the specific cause of this lack of financial means. It is thus questionable whether this narrowing of the 'no means of financial support' criterion is in keeping with the aim of the VFV policy to protect women from violence. A further employment-related comment that may unduly limit eligibility was noted:

> *The Tribunal would observe in passing that Immigration New Zealand did not include in its consideration of her employment prospects the factor that, since January 2014, citizens of Romania have been able to work without restrictions across the European Union.*[207]

It is unclear how the IPT is suggesting that this could be relevant to the 'unable to return home' inquiry, and it again may suggest an unduly high threshold being imposed. The immigration instructions specify that an applicant must be "unable to return *to their home country* because they would have no means of independent financial support"; there is no suggestion that an inability to establish a life in a third country must also be negated.

203 Per cl B5 of the Health and Disability Services Eligibility Direction 2011, VFV work visa holders will be eligible for publicly funded healthcare only where the duration of their current visa (typically six months), together with the period they have been lawfully in New Zealand immediately before the grant of that visa, equals or exceeds two years.

204 [2015] NZIPT 202593 (India) at [47].

205 [2014] NZIPT 201610 (UK) at [29]–[31].

206 [2016] NZIPT 203221 (China) at [34] and [37].

207 [2016] NZIPT 203160 (Romania) at [30].

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2. Prospects of financial support from family

The IPT decisions establish that, in addition to negating the availability of employment, a VFV visa applicant must also negate the availability of financial support from her family; all 39 cases that addressed the 'unable to return home' requirement contain some mention of the availability of family support (or lack thereof). This is perhaps unsurprising, given that the immigration instructions require an applicant to have "no ability to gain financial support from other sources", but nonetheless bears comment, especially as the requirement for applicants to show that they would be 'disowned by their family' was removed in 2008. Despite the removal of this 'disowned' requirement, a similar analysis has now effectively been shifted to the 'financial support' limb of the policy, whereby a woman's family is assumed to be a source of financial support unless they have effectively rejected her. It seems a somewhat Eurocentric assumption that women can be expected to rely on their family for financial support; some appellants explained, for example, the strong expectation within their culture was that the younger generation financially provides for their parents (and not the other way around), but little weight appeared to be accorded to this.[208] At a policy level, rendering victim-survivors and their children dependent on unsympathetic relatives for their survival can also re-create a similar situation of vulnerability to that which the VFV category seeks to respond to. The removal in 2008 of 'marriage' as source of financial support to be negated recognised that women being forced into unwanted marriages in order to survive made them vulnerable to further exploitation and abuse, however requiring them to depend on family (typically male relatives) will in some cases have a similar effect. Indeed, several appellants raised fears that being dependent on their unsupportive families would put them at risk of abuse and/or coercion into an unwanted remarriage.

The cases demonstrate a general assumption that a woman's family will financially provide for her unless they have ostracised her. Where a woman argued her family were unsupportive, the severity of their ill will towards her became a key focus. In this way, there was often a large degree of overlap between the inquiry into the availability of family support and the 'at risk of abuse or exclusion because of social stigma' test.[209] Even if dependency on her family would come at a high cost to the appellant or her relatives, and any support she received would be grudging, she was generally expected to avail herself of it. For example:

> *The appellant considered that going back to Fiji "was not an option". There was no one to help her financially. Her parents are separated and her mother suffers from poor health. … The appellant's mother lived in the [extended] family home in Fiji. … She was not in a position to answer the questions of family members and friends about her daughter's marriage. The situation would be humiliating [if the appellant was returned to Fiji]. … [A case manager from a counselling service stated that] the appellant's return would bring shame to the entire family. … The appellant's brother supports their mother, who is a diabetic patient. He would find it very difficult to support another person as he has very low wages from his work as a taxi driver. … [The IPT holds:] [t]here is nothing to suggest that she would be unable to return to live in the family home with her mother until she obtained employment.*[210]

208 See, for example, [2014] NZIPT 201307 (China) at [29].

209 This overlap creates further scope for inappropriate conflation of the 'no means of financial support' and 'abuse or exclusion because of stigma' tests. While a family's inability or unwillingness to financially support an appellant will sometimes be due to stigma, it does not have to be. Yet in [2013] NZIPT 200969 (Fiji), INZ is noted to have reasoned that "there appeared to be financial reasons that the grandparents would not support the appellant, rather than purely cultural issues".

210 [2019] NZIPT 205202 (Fiji) at [8]–[12], [24], and [37]. See also [2019] NZIPT 205440 (Fiji) at [30] and [55]: "The appellant's relatives were already spreading rumours and ignoring her, and her mother had told her not to return to Fiji because her life would be miserable. She would have to move to another part of Fiji and look for work to support herself and her son …. [The IPT holds:] [t]here is nothing to suggest that she would be unable to return to live with her mother in the family home in Fiji until she is able to fully re-establish herself."

[The appellant's parents wrote that:] [t]he parents survived on the father's retirement pension and were finding it difficult to support the appellant and had to relocate to their son's home for financial reasons. … [Expert evidence stated that:] [a]lthough the appellant had a supportive family, the threat of social ostracism made their support somewhat precarious. The appellant's husband had constructed problematic narratives in which the perceived blame or responsibility for the divorce rested with the appellant. There would be social contempt and isolation for her family. Her parents were not in good health, their financial resources were strained, and her brother was not very supportive. The continued social sanctions could strain family ties, leaving the appellant at risk of parental abandonment, financial and emotional strain, and social isolation. … [The Tribunal holds:] [g]iven the ongoing emotional and financial support from her parents, in the face of social criticism, the Tribunal considers it likely that the parents will continue to support the appellant eventually [sic] and financially upon her return to India.[211]

The appellant's parents and her married sister remain in India. … She had spoken to her brother in Australia approximately nine months previously; she said he was no longer supportive of her. … While she said her parents were retired and dependent on her brother for financial support, she also confirmed that they own their own home and that her father receives a pension. The appellant told the Immigration New Zealand case officer that, when her sister had asked their mother for money recently, their brother had become upset and told his mother that if she was going to support her daughters financially, she should not expect his financial support. … [The IPT holds:] [e]ven if her brother wields the economic power in the family, the appellant confirmed he lives in Australia. There was therefore no persuasive evidence before Immigration New Zealand that her parents would not be in a position, or willing, to lend at least some support to her and her son.[212]

[T]he appellant advised at interview that family members in Fiji "were not as supportive as they had been", that her relationship with her grandfather had deteriorated and that he believed she should have stayed in her marriage [to a violent husband]. … The appellant's representative submits that her parents' support of her decision had put them at odds with her grandfather. … these types of attitudes exist in many families, even families in countries where legislation and the general social attitude toward domestic violence are more advanced than in Fiji. … [T]he Tribunal finds that the appellant will have, at least initially, a place to stay in Fiji with her parents.[213]

211 [2020] NZIPT 205587 (India) at [21]–[23] and [54].

212 [2013] NZIPT 200770 (India) at [33]–[35].

213 [2016] NZIPT 203416 (Fiji) at [34]–[35], [44], and [51].

III. The IPT's Assessments of the Correctness of INZ's 'Unable to Return Home' Decisions CONT.

Two cases were found in which the IPT deemed that INZ had erred in its assessment that the appellant could access family support.[214] In one of these cases, INZ had declined the application, stating they "could find no compelling reason why she would not be accepted by her family [after divorce] for a second time". The IPT held that INZ had failed to give adequate weight to the appellant's evidence of her treatment after her first divorce:

> *[T]he appellant explained that while she had been allowed to live in the family home with her parents, uncles and brother, in an extended family situation after her first divorce, the family members did not accept her. Her father and uncle hit her, and she was refused food. She had lost a lot of weight and tried to kill herself. Her re-marriage was an attempt by her parents to save their reputation. Her family members could not accept that she had been divorced again. They blamed her for her husband's abuse and told her that she would bring shame on the family. They had told her that she should "go to hell" or kill herself rather than return to India. The appellant produced copies of her text messages with her mother and one of her sisters .... In one text, her mother stated: "If you return to India, then we will kill you and kill ourselves as well". ... It is unclear why [INZ] overlooked this consistent evidence from the appellant.*[215]

In the following case, the IPT determined that INZ's assessment that family support was available was reasonable but, after she produced further evidence on appeal, held the appellant had 'special circumstances' based on her daughter's best interests and the high cost that seeking family support would come at:

> *After the failure of her second marriage, the appellant returned to live with her widowed mother who shares a household with the appellant's daughter, the appellant's sister and her sister's husband, and one of her brothers. [She then married a third time.] .... [H]er mother is dependent on the financial support of her son-in-law (the appellant's sister's husband) and he had strongly disapproved of the appellant's marriage to her third husband. ... the appellant told the case officer [who interviewed her] that she was not in contact with, and had no support from, her family in Fiji. Since her father had died, her brother-in-law had taken over responsibility for the family. He disapproved of her marrying her third husband because he was older than her. If her brother-in-law knew she had talked to her mother, "he would go after her", and her sister could not defend her, as that would jeopardise her own marriage. By marrying again, the appellant had brought shame on the family and she would not get any support from her community. ... One support letter suggested that her brother-in-law had been physically abusive towards her but she had not mentioned this at interview. ... Given that the appellant could not produce any direct evidence that she would not be accepted back into their home by her brother-in-law and the rest of her family, as she had been on two previous occasions after her marriages had ended, it was open to INZ to decide that there was insufficient evidence on which it could make a finding that the appellant was likely to be ostracised by her family.*[216]

214 [2020] NZIPT 205653 (China) and [2019] NZIPT 205568 (India).

215 [2019] NZIPT 205568 (India) at [19]–[20] and [41].

216 [2012] NZIPT 200134 (Fiji) at [6], [11]–[12], [16], and [44].

The latter example highlights two important points. First, the characterisation of the test as whether the appellant "was likely to be ostracised by her family" appears strikingly similar to the (repealed) requirement to show she would be "disowned". Secondly, it also highlights the kinds of evidential difficulties that VFV visa applicants face in showing they would not receive family support, as producing direct evidence generally requires the cooperation of her family or community, the very people she may be fearful of. It also requires her to prove what would happen if she were to return home, an event which has not yet occurred. Further, in some cases her family's behaviour towards her while she remains offshore may be quite different to if she were returned to the family home. To some extent, the IPT acknowledged these evidential difficulties later in this decision:

> *The Tribunal's assessment of INZ's decision is that, on the evidence it had before it, INZ made the correct determination. However, the Tribunal has some sympathy with the appellant's position in that to satisfy INZ that her family would not support her, principally because of her brother-in-law's control of the household and its finances,* ***she had to prove a negative state of affairs.*** *Evidence of general cultural concerns was available, but* ***none of those witnesses*** *[an MP, the Fiji Council of Social Services, and an international human rights lawyer in Fiji]* ***could attest to the appellant's personal circumstances.*** *... [S]he presented evidence that was too independent, because it was from people who did not know her personally or know her family. The appellant was* ***in the invidious situation of having to obtain evidence from her own family****, the very people whom she claimed were too frightened to assist her.*[217]

Nonetheless, several cases noted the lack of direct evidence of a family's unwillingness or inability to support the appellant, and where appellants did manage to secure direct evidence of their family's unwillingness it was often deemed unpersuasive:

> *While assertions were made that the family lacked financial means to support her and the children, these were* ***not backed up by documentary evidence, for example in the form of statements from family members.***[218]
>
> *Immigration New Zealand* ***did not receive any communication from the appellant's family as to their refusal to support her.*** *... There was no evidence, other than the appellant's own testimony, before Immigration New Zealand to support her claim that her family would refuse to support her.*[219]
>
> *[The appellant] enclosed a letter from her grandparents, detailing the embarrassment and humiliation they had experienced in their community as a result of their support for the appellant, following her first divorce. The situation had now been greatly aggravated by her second failed marriage, and they could not accept her back. She was a bad omen for the family. They also asked the appellant to resume care of her son as they were now elderly, and had no money. ... [INZ] found the appellant would be able to live with her grandparents again in Fiji, despite the appellant stating in her statutory declaration that the failure of her second marriage meant her grandparents would refuse to provide her with any further support. A joint* ***statement from her grandparents,*** *rejecting her and stating they could no longer afford to look after her son, was weighed against the evidence that she had been able to stay with them between March and July 2010 [prior to her separation]. ... There was* ***no evidence from the appellant's parents or any of her siblings.*** *...*

217 [2012] NZIPT 200134 (Fiji) at [54] and [57]. Another decision similarly acknowledged these evidential challenges, albeit in relation to the 'risk of abuse or exclusion because of stigma' test: "The appellant's representative makes the valid point that for an applicant to 'prove' that he or she will be ostracised by their community in their home country can be difficult. Immigration New Zealand cannot expect, for instance, a letter from an applicant's family stating that they wish to have nothing to do with him or her." [2015] NZIPT 202593 (India) at [33].

218 [2013] NZIPT 201005 (Fiji) at [38]. See also [2014] NZIPT 201307 (China) and [2021] NZIPT 205917 (UK).

219 [2013] NZIPT 200770 (India) at [36].

III. The IPT's Assessments of the Correctness of INZ's 'Unable to Return Home' Decisions CONT.

The Tribunal finds that Immigration New Zealand was correct to decline the appellant's application, on the basis of the evidence before it.[220]

Her parents lived [in Fiji] with her brother, a customs clerk, and his wife and two children. Her father had supported her after her first marriage but would be unable to give her any financial support now, as her parents relied on the support of her brother. … [The appellant provided] two ***letters from the appellant's brother in Fiji*** *… the first letter* ***explaining that he could not financially support or accommodate his sister because he was the sole earner and his parents could no longer support her because they were retired,*** *and the second letter stating that not only would his sister be at risk of stigma if she returned but the whole family also …. [The IPT holds:] it is not accepted that the appellant's brother is unable to assist or even accommodate her.*[221]

As with the abovementioned references to whether the appellant would be "ostracised" by her family, further references to whether she would be "disowned", "shunned" or "ostracised" by her family were noted (despite the fact that the 'disowned' language was removed from the policy in 2008):

[INZ holds that:] [t]he appellant's family were supportive of her and there was no indication that she had been ***shunned or disowned.***[222]

The case officer was not satisfied that the appellant was unable to access family support in Fiji, ***nor that she would be disowned*** *by them due to the stigma of her situation.*[223]

Acknowledging that the Indian population in Fiji is a patriarchal society in which the male head of the family more often than not dictates what a wife or sister or daughter is to do, there is ***nothing in the evidence to suggest that the appellant's parents or brother would disown her*** *or leave this appellant without any means of support.*[224]

[The applicant] did not go as far as to say that she had been ***shunned by her family.***[225]

Further, she did not present evidence to Immigration New Zealand of ***ostracism by extended family members*** *or others.*[226]

Maintaining some level of contact or communication with relatives was often cited in support of their probable willingness to financially support an appellant:

The Tribunal also notes that the appellant continues to have a relationship with her mother and at least three of her four siblings in China. She also remains in communication with her daughter who is now aged 33.[227]

Immigration New Zealand also investigated the prospect of the appellant receiving financial support from her family in India. The appellant's parents and her married sister remain in India. At her interview, ***the appellant confirmed she had spoken to her mother a couple of weeks before.*** *She had spoken to her brother in Australia approximately nine months previously; she said he was no longer supportive of her. Her sister could not support her, and she said she did not wish to tell her father about her problems as he was "a heart patient".*[228]

220 [2013] NZIPT 200969 (Fiji) at [13], [31]–[32], and [37].
221 [2012] NZIPT 200464 (Fiji) at [12], [16], and [27].
222 [2017] NZIPT 203941 (India) at [28].
223 [2012] NZIPT 200134 (Fiji) at [16].
224 [2012] NZIPT 200464 (Fiji) at [29].
225 [2013] NZIPT 200770 (India) at [39].
226 [2018] NZIPT 204476 (Fiji) at [33].
227 [2016] NZIPT 203221 (China) at [36].
228 [2013] NZIPT 200770 (India) at [33].

*The appellant had said her mother was too frightened to support her, but **her mother had visited her** in New Zealand and in fact had nominated the appellant as the sponsor for her visit. The officer did not believe that the brother-in-law [who the appellant and her mother feared] would have been unaware of the purpose disclosed by her mother for visiting New Zealand, which was to visit her daughter for three months. The appellant had also **admitted speaking to her mother on the telephone.**[229]*

Appellants were expected to turn to a wide array of relatives for support. Often it was expected that a sole male breadwinner in the extended family would extend support to the appellant, in addition to the other relatives who might already depend on him:

*Despite [the **appellant's brother** in New Zealand's] responsibility to support his own family and their mother, it was not established **he could not also provide some financial assistance to the appellant and her children.**[230]*

*The appellant advised that her **daughter's boyfriend** is unemployed, as are the **husbands of her sisters** in China. However, these are claims made with no supporting evidence. … Her economic prospects may be improved by the fact that **her son is now 18 years old** and able to work.[231]*

*Whilst evidence was provided to Immigration New Zealand as to the family's debts and financial constraints, it was not established that she would be unable to seek assistance from them. In the past, **her grandfather has provided her with financial assistance.** Even though the room in which she once lived in her mother's house is now occupied by her grandfather, it has not been established that there would be no room at all for her in the house.[232]*

*[The **appellant's] brother explained that he supported their mother by himself,** even though it was also the appellant's responsibility. … While Immigration New Zealand acknowledged that support from her mother and brother could not continue indefinitely, it was not satisfied that there was evidence to demonstrate that they could not provide her with interim support should she relocate to China. … Furthermore, the Tribunal notes that **the appellant's son** has successfully been granted residence in New Zealand under the Skilled Migrant category of instructions. … He and his partner therefore present a possible further source of short-term financial support available to the appellant.[233]*

*[INZ] did not believe the appellant's claims that **her brother-in-law** would not allow her to live in their household or share in the livelihood that he brings to that household.[234]*

*The evidence from the appellant is that her parents [in Fiji] are now retired and unable to support her, that **her brother** cannot afford to financially assist or even accommodate her **… it is not accepted that the appellant's brother is unable to assist or even accommodate her.** While he **appears to be the sole breadwinner** in the household, and the appellant may represent another mouth to feed, she does not necessarily present a burden. She will be able to assist her parents who are described as sickly, perhaps assist with childcare, and possibly bring in cash from part-time or other employment.[235]*

229 [2012] NZIPT 200134 (Fiji) at [43].
230 [2013] NZIPT 201005 (Fiji) at [38].
231 [2016] NZIPT 203221 (China) at [36]–[37].
232 [2013] NZIPT 200938 (Germany) at [31].
233 [2014] NZIPT 201307 (China) at [29] and [47]–[48].
234 [2012] NZIPT 200134 (Fiji) at [43].
235 [2012] NZIPT 200464 (Fiji) at [26]–[27].

III. The IPT's Assessments of the Correctness of INZ's 'Unable to Return Home' Decisions CONT.

The IPT looked to a range of factors in assessing an appellant's family's capacity to financially support her, and often considered a low level of support to be sufficient:

> *In the interview, the appellant explained that her parents and brother continued to live together in Fiji .... Her parents offered emotional but not financial support as they were very poor. Her father was about to retire as a forklift driver and her mother stayed at home. They lived in a rented one-bedroom house because, although they had owned land, the house on the land had burnt down several years before. ... She would not be able to live with them because they shared a one-bedroom house with her brother. The appellant also provided Immigration New Zealand with ... a statutory declaration from her parents stating that they relied on the appellant financially .... The Tribunal agrees that the appellant had not shown that she was unable to return to Fiji .... While Immigration New Zealand's reasoning in its decline decision was spare, it was clearly based on the fact that the appellant* ***would have accommodation (even if cramped and/or temporary) with her parents,*** *that from there she could seek and secure employment and that, because her parents loved and supported her,* ***she would not be wholly excluded from her family*** *or community.*[236]
>
> *[T]he appellant's evidence was that* ***her parents had over the years paid considerable amounts of money, presumably as dowry,*** *to her now former parents-in-law. These payments do not indicate that the appellant's father has "severely limited finances" as had been suggested.*[237]
>
> *[W]hile it is accepted that the appellant and* ***her family members are not well-off,*** *the appellant's family members* ***may still be able to assist her with temporary accommodation*** *and other assistance.*[238]
>
> *[T]he appellant described her parents as* ***living in rental accommodation*** *in Lautoka and* ***having no savings.*** *Those circumstances are not "dire". ... [T]he Tribunal finds that the appellant will have, at least initially, a place to stay in Fiji with her parents.*[239]
>
> *While she said her parents were retired and dependent on her brother for financial support, she also confirmed that* ***they own their own home and that her father receives a pension.***[240]

While it is acknowledged that the 'financial support' assessment is made holistically, it is perhaps questionable whether receiving "cramped and/or temporary accommodation" should be interpreted as any level of financial support for the purposes of the policy. Considering past dowry payments to be proof of the availability of ongoing financial support is also highly problematic; families may have saved for several years or taken out loans for their daughter's dowry, may have complied with additional dowry demands beyond their means in the hopes of preventing further violence to their daughter, and would have viewed dowry as a one-off expense to secure their daughter's future. The loss of a large dowry might also mean that a woman's family is highly unsupportive of her separation.

236 [2018] NZIPT 204476 (Fiji) at [10], [14]–[15], and [32].
237 [2017] NZIPT 203941 (India) at [49].
238 [2016] NZIPT 203221 (China) at [36].
239 [2016] NZIPT 203416 (Fiji) at [46] and [49].
240 [2013] NZIPT 200770 (India) at [33].

At a policy level, it seems contrary to the objectives of the category to return women and children to precarious and dependent situations, when they have just established a hard-won independence for themselves after fleeing violence. Many appellants and their supporters spoke of how highly they valued the independence they had managed to achieve in New Zealand, and the ability they had to earn a living for themselves and their children free from the discrimination they would face in the labour market in their home country. Being forced to return to a situation of dependence has the potential to be hugely detrimental to victims' and their children's emotional and physical wellbeing. The current wording of the 'financial support' test is that the applicant "would have no means of independent financial support from employment or other means, and have no ability to gain financial support from other sources"; I suggest that the latter part of that test (financial support that is not 'independent') does not serve the objectives of the category.

3. Prospects of state support

The other leading source of financial support that was assessed in the decisions was state support. The general availability of support was usually cited, but not the level of support available:

> *There is also evidence of* ***some social support being available to the appellant [in Fiji] as a victim of domestic violence*** *through the social agency, and from the District Advisory Councillor of the X province and AA.*[241]
>
> *Finally, in the alternative [to securing employment], there were* ***some social welfare services*** *provided by the government there [in the Philippines].*[242]
>
> *The information provided from the CRU indicated that the appellant would be entitled to* ***temporary financial support*** *from the government via the social relief of distress grant, while seeking employment, and that she would also be entitled to the* ***child support grant****, in South Africa.*[243]
>
> *Information Immigration New Zealand received from the Women's Crisis Centre in Suva (undated) indicated there were changing attitudes to divorced women in the Indian/Fijian community.* ***Financial assistance from the government was available in some cases.***[244]
>
> *[I]t is likely that any social or financial assistance that she might require is available in Norway.*[245]
>
> *On the information and evidence before Immigration New Zealand it was reasonable to conclude that, even though the appellant might have some difficulty finding employment immediately [in the Philippines], she would eventually find employment and that* ***she could also be eligible for some financial assistance as a sole parent.***[246]
>
> *As [INZ] also recorded,* ***unemployment and other state benefits*** *are available in the United Kingdom. The 'habitual residence' requirements are similar to New Zealand's 'stand down periods' for certain benefits and would not present an insurmountable hurdle to the appellant obtaining state assistance if she needed it.*[247]

241 [2019] NZIPT 205202 (Fiji) at [40].
242 [2019] NZIPT 205576 (Philippines) at [23].
243 [2020] NZIPT 205585 (South Africa) at [33].
244 [2013] NZIPT 200969 (Fiji) at [34].
245 [2020] NZIPT 205667 (Norway) at [4].
246 [2017] NZIPT 203950 (Philippines) at [52].
247 [2014] NZIPT 201610 (UK) at [35].

III. The IPT's Assessments of the Correctness of INZ's 'Unable to Return Home' Decisions CONT.

When appellants raised issues as to their eligibility for state welfare benefits or other entitlements, these were often not accepted as sufficiently evidenced:

> *While a definitive answer was not provided as to the availability of government support,* ***the appellant did not establish that she would be unable to obtain it.***[248]
>
> *The appellant claimed she would have to pay an outstanding sum of RMB12,030 in order to access her pension [in China]. The need for this payment was attributed to her [previous] employer having failed to pay its share of her pension contribution, due to the factory shutting down and the company having no source of income. When asked how the company was subsequently able to provide a letter stating that this amount needed to be paid, she stated that the company still had some administrative staff working there. The claim that the appellant would be required to pay RMB12,030 in order to access her pension is problematic. The appellant did not provide Immigration New Zealand with any* ***independent evidence to verify the company's statement that the amount would need to be paid.***[249]
>
> *As to social security, the appellant provided evidence that she was not eligible for the unemployment benefit (in the form of a translated certificate from her local commune's mayor).* ***The Tribunal acknowledges that there seems to be genuine uncertainty over the possibility of the appellant being granted an allowance for the benefit of her child, as he is a New Zealand citizen*** *and not (as yet) a Romanian citizen or resident. However, the Tribunal notes that* ***it was not investigated as to how quickly the appellant could secure Romanian citizenship for her son.***[250]
>
> *Notwithstanding the fact that the appellant would be unable to receive the unemployment benefit having not worked in Germany in the last two years, if her parents refused to provide her with financial support, she would be eligible for a* ***means tested social assistance as a "needy person".*** *While her particular circumstances may complicate her eligibility and require her to seek assistance from her parents through legal channels,* ***it has not been established that she would be excluded from this assistance outright.***[251]

Definitively disproving the availability of any state assistance is challenging for applicants, given that they are not in the relevant country to be able to test their eligibility, and many countries will not have conclusive eligibility criteria published online. At a policy level, again it seems problematic to take away victim-survivors' hard-won independence and return them to a precarious situation of dependence upon welfare support. This is especially so when the level of support they would receive is meagre.

4. Other potential sources of support suggested

Other sources of financial support were suggested in a minority of cases, for example:

> *[I]t is acknowledged that Fiji has a high unemployment rate and the appellant may not necessarily be able to secure employment immediately on return. In the event she is unsuccessful, she would be able to seek* ***assistance from the Fiji Muslim League.*** *Whilst a letter from this organisation states that it would not be able to "guarantee" assistance, it did not rule out the possibility.*[252]

248 [2013] NZIPT 201005 (Fiji) at [37].
249 [2016] NZIPT 203221 (China) at [31]–[32].
250 [2016] NZIPT 203160 (Romania) at [26].
251 [2013] NZIPT 200938 (Germany) at [32].
252 [2013] NZIPT 201005 (Fiji) at [37].

*Immigration New Zealand recorded that the appellant had an order from a Chinese court that her son's father was to pay her **child support** until her son reached the age of 18. While the appellant said that this "agreement" was unenforceable and that she had had to raise her son herself, the Tribunal notes that the evidence presented by the appellant was that the child support was by way of court order, not agreement, and that there was no evidence that the appellant had ever tried to exercise her option of pursuing payment subject to the order, through the Chinese authorities.*[253]

*INZ noted that the appellant was entitled to **child support** from her second husband [in Fiji], although she claimed that he was unemployed and unwilling to pay. The representative submits that the appellant had never received anything more than FJD10.00 per week from her ex-husband and that INZ should have taken into account the distinction between entitlement to, and actual receipt of, child support. The representative's point is, again, accepted. However, he does not advise how many times the appellant received FJD10.00 weekly maintenance, and it does remain a potential source of some income, albeit not one the appellant and her daughter could live on.*[254]

Relying on support from a charity or ex-partner is even more problematic than state welfare support. Such support is likely to be minimal and temporary, and the victim-survivor's receipt of it is very tenuous. Rendering women dependent upon payments from an ex-partner, and going so far as expecting her to instigate legal enforcement processes against him, is particularly concerning in light of the VFV policy's objectives.[255] I suggest that it is unreasonable to expect applicants to disprove such limited forms of support and, as the following section will discuss, that the 'financial support' inquiry must focus upon income sources that are sufficient to meet the living costs of the applicant and any child(ren).

5. Degree of financial hardship that renders an applicant 'unable' to return

The immigration instructions do not prescribe what level of 'financial support' is sufficient such that an applicant is 'able to return to their home country'; for instance, will the availability of any 'financial support' at all preclude eligibility, or does it need to be sufficient to meet her living costs? Are sources of support that are temporary or not readily available relevant, or does 'financial support' need to be somewhat stable? IPT decisions applied varying thresholds to the level and stability of financial support that applicants must negate, for example:

*[INZ] accepted it might be difficult for the appellant to find a "favourable job" immediately, which would cover **all her living costs,** but she did not provide evidence to demonstrate that she was **excluded from the entire labour market** [in India]. … The Tribunal confirms that [INZ]'s assessment of the likelihood of the appellant being able to support herself financially, through employment or with the assistance of her family, was correct.*[256]

*As to sources of financial support, the Tribunal finds that the appellant will have, **at least initially, a place to stay** in Fiji with her parents.*[257]

253 [2016] NZIPT 203221 (China) at [35].

254 [2012] NZIPT 200134 (Fiji) at [35]–[36].

255 For comparison, in a social welfare context within New Zealand, the requirement for benefit recipients to claim child support from their child's other parent was repealed in 2020 (this was formerly s 192 of the Social Security Act 2018). Even prior to this, benefit recipients were not required to seek child support where doing so would put them at risk of violence.

256 [2017] NZIPT 203941 (India) at [47] and [51].

257 [2016] NZIPT 203416 (Fiji) at [51].

III. The IPT's Assessments of the Correctness of INZ's 'Unable to Return Home' Decisions CONT.

*While the appellant **may find it difficult** to return to Fiji, and it **could take some time for her to obtain the sort of employment she desired,** it is not established that she would have no means of independent financial support from employment there.*[258]

*The Tribunal accepts that it **may take a period of time** for the appellant to obtain employment in Fiji.*[259]

*[INZ] also acknowledged that **the pension amount of RMB350 per month was meagre.** Nonetheless, it noted that the appellant was in the same situation as all other former workers in state-owned factories who managed to live off their pensions following the statutory retirement age. The Tribunal agrees .... [W]hile it is accepted that the appellant and her family members are not well-off, the appellant's family members may still be able to assist her with **temporary accommodation and other assistance.***[260]

*Immigration New Zealand noted that, as the appellant had a dependent child in the Philippines, there was **some social support** available to her as a single parent.*[261]

*While Immigration New Zealand acknowledged that support from her mother and brother could not continue indefinitely, it was not satisfied that there was evidence to demonstrate that they could not provide her with **interim support** should she relocate to China. She therefore failed to satisfy Immigration New Zealand that her family would not be able to provide her with **some financial support** should she return to China, and the Tribunal finds that Immigration New Zealand's determination in this regard was reasonable.*[262]

*Even though the room in which she once lived in her mother's house is now occupied by her grandfather, **it has not been established that there would be no room at all for her in the house.***[263]

However, a recent decision indicated that 'financial support' must be sufficient to cover an appellant's basic living costs:

*[I]f the appellant was to obtain employment, the evidence was that such work was likely to be unskilled and paid at the minimum wage. According to the CRU, in Z province, the statutory minimum wage was 1,550RMB per month in June 2018. The appellant stated that she had previously earned 2,000RMB per month. **Neither income would be sufficient to meet her basic living expenses,** independently of support from her family. ... [I]nformation provided by counsel on the cost of living in China indicated that, in 2018, the expenses of a single person in Z province with shared accommodation, far from Y city, cost an average of 1,250RMB, and rose to 2,416RMB in the city. This excluded utilities, which averaged 270RMB per person, and did not include phone, internet, groceries, transportation, and other essential costs. If this information had been taken into account, it was apparent that the appellant would be unable to support herself financially: she would have to rely on her family members, or gain financial support from other sources.*[264]

Many decisions emphasised the irrelevance of an appellant's standard of living in their home country being far below that which she has in New Zealand:

*[INZ] also acknowledged that the pension amount of RMB350 per month was meagre. Nonetheless, it noted that **the appellant was in the same situation as all other former workers in state-owned factories** who managed to live off their pensions following the statutory retirement*

258 [2019] NZIPT 205202 (Fiji) at [37].
259 [2019] NZIPT 205440 (Fiji) at [55].
260 [2016] NZIPT 203221 (China) at [34]–[36].
261 [2017] NZIPT 203950 (Philippines) at [14].
262 [2014] NZIPT 201307 (China) at [47].
263 [2013] NZIPT 200938 (Germany) at [31].
264 [2020] NZIPT 205653 (China) at [41].

age. The Tribunal agrees and also notes that ***any economic advantage of living in New Zealand is not a relevant factor*** *when considering whether an applicant has independent means of financial support in China. … The Tribunal accepts that the appellant faces an economically straitened future in China.*[265]

One of the appellant's major concerns appeared to be that ***she would not earn as much in India as in New Zealand and consequently would not be able to support her son.*** *However, rates of remuneration between the two countries are not comparable and, in any event, the* ***object of the relevant instructions is not to guarantee a New Zealand-equivalent standard of living*** *in an applicant's home country.*[266]

[The appellant] was also concerned about the rate of remuneration she might receive [in India]. As has been stated in previous decisions of the Tribunal (differently constituted), the ***object of the relevant instructions is not to guarantee a New Zealand-equivalent standard of living*** *in an applicant's home country.*[267]

The appellant may ***well face an economic future inferior to the one she might eventually secure in New Zealand,*** *but she could not establish to Immigration New Zealand's satisfaction (nor to the Tribunal's) that she is unable or even unlikely to secure employment in Romania.*[268]

The objective of the instructions is ***not to ensure that an applicant lives in the same socio-economic comfort*** *she may have had before, or during, her marriage. The Victims of Domestic Violence category is designed to avoid a situation where a woman returns to her home country and is discriminated against there, socially or financially, by reason of her divorced or separated status.*[269]

This general approach to the policy objectives may again be suggestive of a problematic interpretation. It is acknowledged that the policy clearly does not purport to "guarantee a New Zealand-equivalent standard of living"; the words 'no means of financial support' could not be stretched to that extent. The objective is to "recognise New Zealand's international obligations", specifically to "end discrimination against women in all matters related to marriage and family relations" (recalling that 'domestic violence' is a form of 'discrimination'[270]); and to "protect children from mental and physical violence". A lack of financial security is one of the greatest barriers to women and children being able to flee situations of violence. They are unlikely to feel able to separate if they will be ineligible for the VFV category on the basis of financial support in their country of origin that is uncertain, temporary, or leaves them below the poverty line. The fact that such impoverishment is common in their country of origin, is not specifically due to the appellant's marital status, or is no different to what they would have faced had they never come to New Zealand, is irrelevant. In either case, the likelihood of impoverishment is a strong barrier to leaving a situation of violence. An unduly narrow interpretation of 'financial support' therefore limits the efficacy of the VFV category in enabling women and children to live free from violence. Yet, interestingly, in most instances where the policy objectives were cited the IPT was using them to restrict the policy scope. I suggest that this may reflect a misinterpretation of the policy objectives, and specifically of CEDAW Article 16. The IPT frequently cited this objective to support a narrow interpretation of the policy as protecting only women who face discrimination due to their divorced status; a form of discrimination that is framed as a problem of 'other' (non-Western) countries. This culturally essentialist approach to gender inequality overlooks the obligation Article 16 places on New Zealand to protect women from violence within our own borders. This objective is best served by a more expansive, rather than more restrictive, interpretation of the VFV policy criteria.

265 [2016] NZIPT 203221 (China) at [34] and [37].
266 [2013] NZIPT 200770 (India) at [32].
267 [2017] NZIPT 203941 (India) at [50].
268 [2016] NZIPT 203160 (Romania) at [30].
269 [2014] NZIPT 201610 (UK) at [29].

270 General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women General Recommendation No. 19 (1992) at [7].

III. The IPT's Assessments of the Correctness of INZ's 'Unable to Return Home' Decisions CONT.

At Risk of Abuse or Exclusion from Their Community because of Stigma

Turning to the second (alternative) criterion for inability to return to one's home country, a 'risk of abuse or exclusion because of stigma', the cultural essentialism underpinning this test also bears noting at the outset. The IPT has interpreted this test to mean that the VFV category "is not designed for women from first-world nations with cultures and laws upholding equal opportunity for women, whatever their relationship status".[271] The differentiation of countries into those with (predominantly Western) "cultures and laws upholding equal opportunity for women", versus those without, paints an essentialist picture of non-Western cultures as regressive and Western cultures as relatively free from gender inequalities. While in no way meaning to understate the unique hardships of women from the Global South who experience violence, I suggest that framing the VFV category in this way arguably avoids responsibility for the many ways in which laws, policies, and attitudes in Western countries (such as New Zealand's immigration policies) also provide systemic support for family violence.[272] This limb of the policy also fails to uphold the objectives of the VFV category, as it limits New Zealand's obligation to "end discrimination against women in all matters related to marriage and family relations" to a highly specific obligation to protect women from cultural stigmas against divorce, rather than protecting women from family violence more broadly. As will be evident in the sections that follow, discussion of this requirement is typically very brief in cases involving appellants from Western countries; their appeals tended to focus more heavily on discussion of any 'special circumstances'.

This limb of the 'unable to return home' test was also amended in 2008. The policy previously required that an applicant "has been, or would be, if they returned to their home country, disowned by their family and community as a result of their marriage to or relationship with the New Zealand citizen or resident which has ended". Following the *Living at the Cutting Edge* report, it was recognised that the requirement of being 'disowned' set too high a threshold;[273] the test was amended to require that an applicant "would be at risk of abuse or exclusion from their community because of stigma". This has changed the test in three key aspects: 'disowned' has been replaced with 'at risk of abuse or exclusion'; 'by their family and community' has been replaced with 'from their community'; and 'as a result of their marriage or relationship which has ended' has been replaced with 'because of stigma'. These three changes all apparently broaden the scope of the policy. Numerous interpretive questions arise, for example: what level of 'abuse' or 'exclusion' is required? What degree of 'risk' of this occurring must there be? What sources of risk are from 'their community'? Given that applicants must prove the likelihood of a future hypothetical event, it is also important to understand what types of evidence are deemed persuasive. To explore these questions, the 39 cases that addressed the appellant's ability to return home were coded according to the factors that the IPT cited in assessing the appellant's 'risk of abuse or exclusion from their community because of stigma'. Common factors cited in finding the test was not met included:

271 [2016] NZIPT 203384 (USA) at [59]. See also, for example, [2014] NZIPT 201610 (UK) at [29]–[30]: "The Victims of Domestic Violence category is designed to avoid a situation where a woman returns to her home country and is discriminated against there, socially or financially, by reason of her divorced or separated status. … A separated or divorced woman in the United Kingdom has the same social status as she has in New Zealand. The ability to support herself financially must also be seen in the same context."

272 On the structural dimension of family violence, see Family Violence Death Review Committee *Fifth Report*, above n 17, at [3.1].

273 The Cabinet paper proposing the change said: "The test of being disowned is high. It implies, for instance, that a family no longer recognises a daughter as their daughter, and explicitly requires evidence to this effect. In some cases, however, the issue is not that a family disowns their daughter. The problem is that cultural and community pressures may mean they are unable to accept her at home, yet do not have the means to support her living elsewhere. Given this, the woman may have no way to independently earn a living and be from a country with no social welfare safety net. The woman may also be excluded from participation in community life because of the strength of stigma." Cabinet Paper "Review of Victims of Domestic Violence Policy", above n 61, at [54].

- The evidence the applicant had provided was too general, or was not from people with personal knowledge of her family circumstances;
- The appellant had remained in her community after a prior separation;
- The type of discrimination that the appellant would face did not meet the threshold of 'a risk of abuse or exclusion';
- The appellant's family had not ostracised her; or
- Generic country information suggested that the status of divorced women or single mothers in the applicant's home country was improving.

Just three out of 39 decisions found errors in INZ's assessment of the appellants' risk of abuse or exclusion, on the bases that: INZ's own country research had in fact supported the appellant's claims;[274] INZ had failed to adequately consider the evidence presented by the appellant;[275] and INZ imposed a higher threshold than required by immigration instructions and failed to adequately consider all evidence.[276] As noted above, there was a large degree of overlap between the assessment of a 'risk of abuse or exclusion because of stigma' and the assessment as to the availability of family financial support, to the extent that some conflation of the tests was noted. On the other hand, one decision appeared to misunderstand the 'either/or' nature of the 'financial support' or 'abuse or exclusion' tests and suggested that both limbs would need to be satisfied for an application to succeed:

> *In fact, Immigration New Zealand having found that the appellant did not satisfy the criteria at S4.5.2.d.i [no means of financial support] need not have gone on to consider the applicability of S4.5.2.d.ii [a risk of abuse or exclusion], but it did so for completeness.*[277]

1. What amounts to 'abuse or exclusion'?

No decision provided a positive definition of 'abuse' or 'exclusion', however one decision noted (albeit in relation to the 'special circumstances' assessment) that: "Abuse can take many forms short of total ostracism or a failure to provide the necessities of life."[278] Many decisions found that the mistreatment the applicant faced fell below the threshold of 'abuse or exclusion'. References to the community's hostility towards the appellant being mere 'gossip' or 'talking behind her back' were particularly common.[279] The dismissal of the risks to an appellant as 'gossip' often stood in stark contrast to the appellant's own description of the likely impact of the community's treatment of her:

> *The appellant stated that after the failure of her first marriage, she was blamed for her father's death, friends distanced themselves from her, and in public people would either directly talk about her separation in front of her or completely ignore her. Her only option was to stop going out. She explained that in Fiji, victims of domestic violence are blamed for what has happened to them. If a woman manages to find a new partner willing to accept her, and encounters any further abuse, she cannot complain and is made to feel that she deserves what she receives. The appellant's relatives were already spreading rumours and ignoring her, and her mother had told her not to return to Fiji because her life would be miserable. … [The IPT holds:] [t]he appellant has been previously married and divorced in Fiji. She was a victim of domestic violence in her first marriage. The evidence demonstrated that she had found life in Fiji difficult after her first marriage ended. People distanced themselves from her and treated her differently. She suffered* ***gossip and taunting.***

274 [2014] NZIPT 201462 (Bangladesh).

275 [2019] NZIPT 205568 (India).

276 [2020] NZIPT 205653 (China).

277 [2013] NZIPT 200839 (Singapore) at [34].

278 [2012] NZIPT 200134 (Fiji) at [61].

279 See, for example, [2017] NZIPT 203950 (Philippines); [2016] NZIPT 203416 (Fiji); [2017] NZIPT 203941 (India); and [2014] NZIPT 201504 (China).

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However, the behaviour the appellant previously encountered as a separated woman living in Fiji, whilst unpleasant and unfortunate, did not rise to the level of abuse or exclusion.[280]

[The appellant stated] that if she were to return to Fiji she would be shunned by the community because of her two failed marriages, one of them failing because of violence. In Fiji Indian culture, women feel ashamed if their husband hits them and the fault is always that of the woman, who will be ridiculed if there is a marriage break-up. She said that she believed the community in Fiji would make an example of her to other women, that it would be very hard for her to find a job because no-one would want to work with her, and that no-one would want to have anything to do with her. … [The IPT holds:] [l]etters from her sister and parents indicated that she would be ***treated with less respect and would be gossiped about,*** *rather than stigmatised to the point that she could not live or work in the community.*[281]

The appellant explained that only her brother and mother knew the truth about her circumstances. Her friends knew that her husband had died but not about the domestic violence and her husband's suicide. She said that if her friends knew about this they would desert her because the domestic violence would not be accepted by her friends, family or society in China. She explained that she contacted them every now and then but it had been several months since she had done so. She said that, if she returned to China, she would be "looked down" on and would not be shown any respect. She said that everyone would discriminate against her and she would not be accepted in the Chinese culture. She said no one would be willing to be her friend, she would have no job or way to support herself and she questioned how she could live without friendship or family support. … While [INZ] acknowledged that the appellant might experience ***unfavourable gossip or speculation*** *should she return to China, the appellant had not established that stigma might attach to her position nor had she established that she faced a risk of exclusion or abuse because of it.*[282]

While we do not have access to the evidence that was before the IPT in each case, it is possible that this tendency to dismiss hostility towards appellants as 'gossip' reflects a lack of understanding of some appellants' socio-cultural contexts.[283] The abovementioned appellants were citizens of Fiji (both were Indo-Fijian) and China; while generalisations about their specific and diverse cultural contexts are inappropriate, they referred to family and community structures that were more collectivist than the Western individualist norm and where marriage was central to a woman's identity and social status. Within collectivist environments, social isolation and disparagement can have a severe impact on a woman's day-to-day life and wellbeing. That is particularly so in situations where she is dependent on her family and community to meet her material needs, as these women would be upon return to their country of origin. In a UK context, a report concerning violence against Indian migrant women specifically called for "a training programme for

280 [2019] NZIPT 205440 (Fiji) at [30] and [58].

281 [2018] NZIPT 204476 (Fiji) at [14] at [33].

282 [2014] NZIPT 201307 (China) at [17] and [52].

283 For example, in terms of the four Indo-Fijian appellants, the severity of the stigmatisation of Indo-Fijian victim-survivors of domestic violence has been well documented, and Indo-Fijian women's exposure to violence and stigmatisation comes with devastating physical and mental health consequences. The Fijian Ministry of Health draft National Suicide Prevention Policy specifically "notes that the rates of both suicide and attempted suicide among Indo-Fijian women (and young women) are very high compared with global data", and the Fijian government acknowledged that "about half of suicides are by victims of domestic violence". See Fiji Women's Crisis Centre *Somebody's Life, Everybody's Business! National Research on Women's Health and Life Experiences in Fiji (2010/2011): A survey exploring the prevalence, incidence and attitudes to intimate partner violence in Fiji* (Suva, 2013) at 95. See also Robert Emery "Fiji" in Robert Emery (ed) *Cultural Sociology of Divorce: An Encyclopedia* (SAGE Publications Inc, California, 2013) at 461.

the judiciary to understand better the social realities of South Asian women who live abroad for whom divorce carries severe stigma and adverse financial, mental health and welfare consequences."[284] Such training seems especially vital in an immigration context where decision-makers are being called upon to determine the extent of the stigma a woman is likely to face within her community.

In some cases, the IPT appeared to accept that the appellant would be stigmatised but did not consider that the stigma was likely to lead to 'a risk of abuse or exclusion':

> *The Tribunal does not overlook the social status of women in India and the* ***strong cultural expectations there that women will marry and remain married.*** *Against that background, it is* ***likely that there will be some social stigma*** *experienced by the appellant as a divorced woman. … [However, the IPT holds:] Immigration New Zealand was correct to find that the appellant did not demonstrate that [she would] … be at risk of abuse or exclusion from her community because of stigma, if she returned to India.*[285]
>
> *Further, while the CRU had provided some information which indicated that single parents and their children faced* ***some stigma,*** *there was no suggestion that such attitudes would result in abuse or exclusion from the community.*[286]
>
> *[INZ's] country information revealed that there was stigma attached to being a divorced woman in Fiji (divorce was strongly associated with* ***disgrace and humiliation*** *for the families involved)* ***but there was nothing to link such stigma to a risk of abuse or exclusion.*** *… [INZ] accepted that there was stigma associated with domestic violence in Fiji. However, there was no evidence that such stigma would result in the appellant being at risk of abuse or exclusion. The Tribunal agrees.*[287]
>
> *[T]he Tribunal recognises that gender inequality in Indo-Fijian society affects women in that society in a wide range of economic and cultural ways. While* ***separated or divorced women within the Indo-Fijian community may be viewed in an unfavourable light, and they may be discriminated against*** *because of their divorce or because they experienced domestic violence, S4.5.2.d.ii requires an applicant to be at risk of abuse or exclusion from her community because of stigma. The appellant has not established that she faces such a risk.*[288]
>
> *The appellant stated that she and her parents did not want to face the* ***ridicule, gossip and stigma*** *of the community once they found out about her separation. She said that she would be* ***treated as an outcast, socially isolated and that it would be difficult for her to establish and maintain a normal life.*** *… The Tribunal acknowledges the gender inequality that exists in Indo-Fijian society. That inequality encompasses economic and cultural issues that affect women in that society in general, not just the appellant. While stigma may attach to her position, she did not establish that she faces a risk of exclusion or abuse because of it.*[289]

284 Sundari, Roy, and Yalamarty *Disposable Women*, above n 87, at 34. In terms of the impact of divorce upon South Asian women more generally, see Surinder Guru "Divorce: Obstacles and Opportunities – South Asian Women in Britain" (2009) 57(2) The Sociological Review 285: "In South Asian cultures where divorce largely remains intrinsically linked to notions of shame and dishonour and where the stigma extends beyond the women to their children and their own parents and possibly siblings, the possibilities of ostracism and exclusion from the community are very real. … This is not to argue that South Asian cultures are more patriarchal and oppressive than others but that they may constrain some women in ways that are very different from those of the West. The experiences and treatment of South Asian divorced women may vary according to their class, education, age, religion and other factors; however, the overall gender ideology promotes a strong adherence to family values based upon marriage and this may make their exclusion from their communities more severe."

285 [2020] NZIPT 205587 (India) at [54]–[56].

286 [2020] NZIPT 205585 (South Africa) at [37].

287 [2019] NZIPT 205440 (Fiji) at [17] and [56].

288 [2016] NZIPT 203416 (Fiji) at [53].

289 [2014] NZIPT 201489 (Fiji) at [31]–[33].

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Given that the policy wording has been changed from 'disowned' to 'at risk of abuse or exclusion', the test for 'abuse or exclusion' presumably must impose a lesser threshold than repudiation by the community. This shift was intended to recognise "that stigma may be sufficiently strong to exclude a person from meaningful participation in the life of their community".[290] However, it is difficult to discern from the abovementioned examples what lesser levels of hostility will amount to 'abuse or exclusion'. 'Disgrace', 'humiliation' and 'discrimination' are cited as not being (of themselves) sufficient; I would question whether there is any meaningful distinction between these forms of hostility and 'exclusion', given that the ultimate effect is to render a woman unable to participate fully in community life. The distance between the existence of a stigma and a likelihood of abuse or exclusion is perhaps not so great; indeed, "stigma is inextricably linked with social exclusion", as "[s]tigma is used by people to interpret specific traits of others as 'unworthy' and thus 'discreditable'; and this results in the stigmatized person becoming 'tainted' or 'discounted.'"[291] The clearest guidance as to what amounts to a 'abuse or exclusion', and what degree of risk of is required, comes from a case where the IPT held that INZ imposed an unduly high threshold:

> *[INZ] stated that there was no evidence provided to demonstrate that the appellant would be at* ***"significant risk"*** *of suffering stigma from the community to the level or to show that she would be* ***"completely ostracised from society".*** *The instructions at S4.5.2.d.ii require that an applicant is unable to return to their home country because she would be at risk of abuse or exclusion from their community because of stigma. Clearly* ***there has to be a real and present risk.*** *However, this* ***does not have to be absolute or extreme risk.***[292]

Nonetheless, many decisions utilised language that was surprisingly reminiscent of the high former threshold of being 'disowned':

> *[B]ecause her parents loved and supported her, she would not be* ***wholly excluded*** *from her family or community.*[293]
>
> *In the appellant's case, her family were supportive of her circumstances and there was no indication that they would* ***shun or disown her.***[294]
>
> *Significantly, even if the appellant has experienced discrimination from her community and ostracism by her brother, it remains that her daughter and other family members* ***have not abandoned or rejected her.***[295]
>
> *[D]uring her interview she said, somewhat carefully in the Tribunal's view, that her mother had "never invited her home", but did not go as far as to say that she had been* ***shunned*** *by her family.*[296]
>
> *Acknowledging that the Indian population in Fiji is a patriarchal society in which the male head of the family more often than not dictates what a wife or sister or daughter is to do, there is nothing in the evidence to suggest that the appellant's parents or brother would* ***disown*** *her .... The Tribunal does acknowledge the gender inequality exists in Fiji Indian society. That inequality encompasses economic and cultural issues that would have affected the appellant before she came to New Zealand, following the end of her first marriage, and do not establish that she would be stigmatised,* ***disowned,*** *or left without financial support upon her return.*[297]

290 Cabinet Paper "Review of Victims of Domestic Violence Policy", above n 61, at [59].

291 Pranee Liamputtong and Zoe Sanipreeya "Stigma, Discrimination, and Social Exclusion" in Pranee Liamputtong (ed) *Handbook of Social Inclusion* (Springer, Switzerland, 2022) 113 at 113.

292 [2020] NZIPT 205653 (China) at [45].

293 [2018] NZIPT 204476 (Fiji) at [32].

294 [2017] NZIPT 203941 (India) at [54].

295 [2016] NZIPT 203221 (China) at [40].

296 [2013] NZIPT 200770 (India) at [39].

297 [2012] NZIPT 200464 (Fiji) at [29] and [33].

*The case officer was not satisfied that the appellant was unable to access family support in Fiji, nor that she would be **disowned** by them due to the stigma of her situation, a third failed marriage. … [The IPT holds:] it was open to INZ to decide that there was insufficient evidence on which it could make a finding that the appellant was likely to be **ostracised** by her family.*[298]

The high bar that such decisions set for what amounts to 'abuse or exclusion because of stigma' means that victim-survivors are being expected to bear a high degree of shame and ridicule, with only the most severe falling within the VFV policy. Given the policy seeks to "end discrimination against women in all matters related to marriage and family relations", and that the requirement to be 'disowned' has been removed, I argue that such a narrow interpretation is not appropriate. "Ending discrimination against women" entails protecting women from forms of abuse or exclusion beyond 'disowning' or 'shunning'.

2. Abuse or exclusion that is considered outside the VFV policy scope

In some cases, a risk of abuse or exclusion was acknowledged but it was deemed irrelevant or insufficient because the people she was at risk from were not viewed as her "community". In other words, the abuse or exclusion was not coming from the 'right' people. For example, the following quotes suggest that risks posed by an applicant's family, ex-partner or in-laws are insufficient:

*[INZ determined:] [w]hile it was accepted that the appellant might face a personal threat from **her husband's family in India,** this was not equivalent to a situation where she would be abused or excluded from **the community.***[299]

*[E]ven though the appellant claimed she had been ostracised in the past, **particularly by her mother and some of her siblings,** she had presented no evidence that this went **beyond those family members.***[300]

Conversely, some decisions seem to indicate that risks from the community at large can be overridden by the presence of some family support:

*Significantly, even if the appellant has experienced discrimination from her community and ostracism by her brother, it remains that **her daughter and other family members** have not abandoned or rejected her.*[301]

*[B]ecause **her parents** loved and supported her, she would not be wholly excluded **from her family or community.***[302]

The exclusion of cases where the primary risk to the appellant is posed by her ex-partner, in-laws, or family would seem to significantly limit the efficacy of the protection from abuse that the VFV category provides; hostile ex-partners, in-laws, and relatives are the very people who are likely to be the greatest risk to her. It also seems problematic to conclude that support from some relatives could override the hostility of the wider community, as the appellant would likely still be prevented from meaningful participation in community life. This approach seems surprising given that the policy wording was changed in 2008 from 'by their family and community' to 'from their community', suggesting applicants need not prove risks from both their family and wider community. The objective of the policy would appear to support a definition of 'community' that includes both the abovementioned scenarios, given that in both instances the appellants face 'discrimination in relation to marriage and family

298 [2012] NZIPT 200134 (Fiji) at [16] and [44].
299 [2017] NZIPT 203941 (India) at [19].
300 [2013] NZIPT 200839 (Singapore) at [33].
301 [2016] NZIPT 203221 (China) at [40].
302 [2018] NZIPT 204476 (Fiji) at [32].

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relations'. Worryingly, in some instances safety risks from New Zealand-based ex-partners or in-laws were ultimately used against appellants by INZ and the IPT:

> *The appellant had also indicated that her ex-husband was threatening her. She had provided a temporary protection order during the interview and had expressed concerns about the fact there was nobody to look after her daughter in China. Therefore, it* ***appeared to Immigration New Zealand, the appellant would be safer in China.***[303]
>
> *Because of her ongoing anxiety and stress issues,* ***the Tribunal does not consider that being in New Zealand is necessarily the best place for the appellant due to a fear of her former partner*** *(the first partner) contacting her.*[304]
>
> *Further, the appellant is under* ***no threat of domestic violence in Fiji.***[305]

It seems paternalistic and inappropriate for the IPT or INZ to be determining that, against a victim-survivor's own assertions, her safety or wellbeing would best be served by leaving New Zealand. Any safety risks to her in New Zealand are not relevant to the policy criteria, which are focused solely on conditions in her country of origin. Additionally, if she is already facing safety risks in New Zealand there will often be a high likelihood that she would be in a far more unsafe position in her country of origin; if her violent ex-partner follows her there, or others such as in-laws seek to harm her, she may not have meaningful police protection, social support, or the benefit of a New Zealand Protection Order (if she has one).

Another important means by which the scope of the policy was narrowed related to the type of stigma that the appellant would face. Several decisions interpreted the requirement that the abuse or exclusion is 'because of stigma' to specifically mean 'because of the stigma of separation in the context of family violence':

> *The stigma referred to is stigma* ***directly linked to the domestic violence inflicted on the applicant and their relationship ending as a result.*** *It cannot be interpreted to refer to stigma more generally that an applicant or others may face for any number of reasons. The fact that the appellant may also be judged* ***because this is her second failed marriage,*** *or that her mother's health may suffer because of her concern of the opinions of others, fall outside the scope of the instructions.*[306]
>
> *The Tribunal acknowledges that the instructions at S4.5 are not explicit as to the source of the stigma. However, the context of the instructions makes it clear that the instructions apply to partners of New Zealand citizens or residents whose relationship has ended because of domestic violence. The instructions at S4.5 require an applicant to demonstrate that they are at risk of abuse or exclusion from their home community* ***because of the stigma that may attach to them as a result of having ended their relationship (in the context of domestic violence). The stigma envisaged is directly linked to the domestic violence and the relationship ending as a result;*** *it cannot be interpreted to refer to stigma more generally that a person returning to their home country may face for any number of reasons. Arguments that the appellant may face stigma as the result of* ***being a widow*** *in China, even when that situation results from a* ***husband's suicide*** *and* ***where there has been an incident of domestic violence,*** *therefore fall outside the scope of the instructions. It was therefore correct for Immigration New Zealand to conclude that the appellant had not established that she would be*

303 [2014] NZIPT 201701 (China) at [30].
304 [2013] NZIPT 200938 (Germany) at [46].
305 [2012] NZIPT 200464 (Fiji) at [40].
306 [2019] NZIPT 205202 (Fiji) at [42]. The first sentence of this quote also appears in another decision involving a twice divorced appellant: [2019] NZIPT 205440 (Fiji) at [59].

at risk of abuse or exclusion because of stigma as envisaged by the instructions.[307]

Any stigma or abuse that the appellant could face ***as a result of suing her parents*** *is not relevant to these instructions.*[308]

Again, it seems questionable whether such a narrow interpretation of the policy scope is justified in light of the policy objectives. Even applying a narrow reading of the policy objectives, the stigma of having a second marriage end or of being a widow is clearly stigma relating to 'marriage and family relations', and specifically relates to these appellants' marital status. The status of these appellants as twice divorced and widowed (the appellant's husband took his life after she reported his violence) related directly to their experience of violence. It should also be remembered that the policy wording was changed in 2008 from the highly specific 'as a result of their marriage to or relationship with the New Zealand citizen or resident which has ended' to simply 'because of stigma', which implies that such specificity as to the source of the stigma is not required. A high degree of specificity is likely to exclude many victim-survivors who would face serious stigma from the protection of the VFV policy. For example, our Community Law centre has assisted LGBTQIA applicants who faced stigmatisation primarily based on their gender identity or sexual orientation; if their applications had been declined and an appeal was necessary, it would seem they would not be able to meet this narrow definition of 'stigma'.[309] At a policy level, stigmatisation in one's country of origin is likely to be a significant barrier to a victim-survivor leaving a situation of violence, irrespective of the specific reason for that stigmatisation. In order to meet New Zealand's obligations to combat violence against women, an expansive interpretation of 'stigma' should accordingly be preferred.

3. How must a 'risk of abuse or exclusion' be evidenced?

Family violence risk prediction – let alone assessing for risk in a different country – is known to be immensely complex,[310] so the way the IPT assessed the risks some appellants raised of abuse from their ex-partners, in-laws, and/or family was of particular interest. In a criminal context, the Family Violence Death Review Committee has stressed the need for evidence from family violence experts in order to make decisions that relate to victim safety, such as bail and sentencing decisions.[311] Unfortunately, in an immigration context, VFV visa applicants rarely have the financial means to seek an expert report on the risks of family violence to them in their country of origin. In the absence of this, most appellants could report only their subjective fears or experiences, and these were not deemed sufficiently evidenced:

The Tribunal considers that the appellant's fear of direct, physical abuse from the husband, or his family members, in China, was ***speculative.*** *There had been no abuse or threats of abuse from the husband, directly, after the separation in New Zealand .... There was also* ***no convincing evidence, such as written statements from community or family members,*** *to suggest that the appellant's family intended to force her to remarry*

307 [2014] NZIPT 201307 (China) at [54].

308 [2013] NZIPT 200938 (Germany) at [33].

309 The Convention on the Elimination of All Forms of Discrimination against Women GA Res 34/180, art 16, which underpins the VFV policy objectives, has also been critiqued as unresponsive to the needs of LGBTIQIA communities. Article 16 is framed in heteronormative terms, referring to protection of women from discrimination in "in all matters relating to marriage", "equality of men and women", and equality in "personal rights as husband and wife". See generally Delanie Grewe "Sexual Orientation, Gender Identity & CEDAW Article 16: An Anti-Essentialist Proposal" (2021) 27(2) U.C. Davis Journal of International Law & Policy 241.

310 The Ministry of Justice has acknowledged the difficulty of assessing future risks of family violence and is in the process of developing risk and lethality assessment tools for agencies. See Ministry of Justice *Family Violence Risk Assessment and Management Framework: A common approach to screening, assessing and managing risk* (Wellington, 2017) at 5.2.5. Overseas, examples of widely used risk assessment tools can be found – see generally Family Safety Victoria's Multi-Agency Risk Assessment and Management (*MARAM*) Framework, which includes an 'Adult Intermediate Risk Assessment Tool'. However, these tools are not very well suited to assessing risks facing migrant women, such as risks of in-law abuse (most are focused on intimate partner violence) or of heightened risk in a different country.

311 Mark Henaghan, Jacqueline Short and Pauline Gulliver "Family Violence Experts in the Criminal Court: The Need to Fill the Void" (2021) 29(2) Psychiatry, Psychology and Law 206.

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or of the proximity of abuse arising as a result of any refusal on the appellant's part to comply with any such intention.[312]

[INZ] noted the affidavits the appellant had provided from her family which suggested that there was a real threat to her life should she return to India. Immigration New Zealand was correct to note that ***this affidavit evidence was speculative only.***[313]

[T]he appellant had given evidence about her ex-husband's harassment for a year following their separation; anonymous information had been received by Immigration New Zealand (the appellant presumed from her ex-husband's family) that the appellant's family were trying to gain residence in any way they could; and that the ex-husband's parents had made trouble for the appellant's sister. With respect, ***these factors do not establish that the appellant is at risk*** *from her ex-husband or his family. First, the* ***so-called pattern of abusive behaviour by the appellant's ex-husband had stopped six months before the interview,*** *during which time the appellant made no claim that her ex-husband or her parents-in-law had tried to contact her. Second, the allegation that the ex-husband's father had said [in a phone call] that he would take revenge on the appellant if she returned to Fiji was* ***unsupported and uncorroborated.*** *... Third, the actions of the ex-husband's family in making trouble for the appellant's sister through her own parents-in-law, criticising the appellant to people in Fiji, and possibly being the source of anonymous information that the appellant and her family were trying to gain residence at all costs, are certainly actions based on disaffection. However, they* ***do not establish that the appellant would be at risk*** *from the ex-husband or his family in Fiji.*[314]

The appellant maintained throughout the processing of her application that she had experienced abuse and discrimination in China after her two previous divorces. Immigration New Zealand noted there was ***no independent evidence to support these claims.***[315]

As for the claims of the effects of "rumour-mongering" and the like on the appellant and her family, ***such claims are easy to make and difficult to substantiate.***[316]

Providing conclusive 'proof' of a risk of abuse offshore presents obvious challenges. For instance, explicit threats to a woman's safety are unlikely to have been made in writing or in front of witnesses who can corroborate them; and an abusive party's behaviour in New Zealand, to which the IPT may look as an indication of risk, may be significantly more restrained than it would be were the applicant returned to her country of origin – for example, the partner might be more concerned about legal repercussions in New Zealand, or be concerned about jeopardising their own visa status. The expectation of 'direct' evidence about risks also poses the same problems as were discussed above in relation to the availability of family support, in terms of the impossibility of proving an event that has not yet occurred, and the fact that evidence collection generally requires the cooperation of the very people the appellant may be fearful of. On the other hand, where appellants provided country information to substantiate their broader fears of abuse or exclusion, this was often deemed 'too general'. For example:

312 [2020] NZIPT 205653 (China) at [46].
313 [2017] NZIPT 203941 (India) at [55].
314 [2016] NZIPT 203416 (Fiji) at [39]–[42].
315 [2016] NZIPT 203221 (China) at [39].
316 [2013] NZIPT 200839 (Singapore) at [48].

The evidence presented by the appellant that she will be at risk of abuse or exclusion from her community because of stigma ranges from the general to the specific. Evidence from the social worker from the New Zealand Sikh Women's Association represents the general. She asserts, ***without claiming any knowledge of the appellant's personal circumstances in Fiji,*** *that the appellant's local community will not support her and will verbally and emotionally abuse her.*[317]

[The appellant provided] a letter from the Fiji Club of New Zealand. This stated, among other things, that in Fijian Indian society divorced (and in the appellant's case twice-divorced women), "had no place in the community and unfortunately were treated as an outcast and in future her children will be ostracised as no-one will want to marry a divorcee's daughter". This letter was one piece of evidence describing ***the general position*** *in Fiji, from the perspective of a New Zealand-based Fijian organisation.*[318]

The news articles provided by the [appellant's] representative ***involved the stigma around reporting domestic violence; they did not address the stigma faced by domestic violence victims.***[319]

The appellant maintained before [INZ] that she would be the subject of gossip and scorn and would as a result be socially isolated. She provided evidence in the form of two newspaper articles which Immigration New Zealand correctly identified as not being relevant to the appellant's circumstances. While the articles discussed the social consequences of divorce, the ***circumstances of the women in the articles were not on all fours*** *with those of the appellant.*[320]

Nonetheless, the IPT often cited generic country information such as divorce rates to support a finding that an appellant was not 'at risk of abuse or exclusion because of stigma':

The appellant's personal circumstances confirmed the advice from the [CRU] that ***divorce was common in Russia,*** *and that the country has one of the highest divorce rates in Europe.*[321]

Research showed that ***divorce and separation rates in Fiji were increasing*** *which made it less unusual.*[322]

The information from the CRU indicated that ***divorce was common*** *[in South Africa] and that many children did not live in the same household as their biological father.*[323]

Even accepting her claims, the Tribunal agrees with Immigration New Zealand that societal ***attitudes to divorce have changed [in China] in recent years.***[324]

Where the IPT acknowledged some degree of stigma in the appellant's country of origin, a variety of factors were suggested to negate the risk of abuse or exclusion in her particular circumstances, for example:

[T]he Tribunal notes that the [CRU] advised that women without family or other support were at high risk of violence and social discrimination. However, when making her application, the appellant stated that ***her mother, step-father, sister and married brother lived in the Philippines.*** *There was nothing to suggest that they could not provide her with some support, which would* ***act as a measure of protection from any harm*** *that may otherwise arise from the community.*[325]

317 [2012] NZIPT 200464 (Fiji) at [28].
318 [2013] NZIPT 201005 (Fiji) at [41].
319 [2019] NZIPT 205440 (Fiji) at [57].
320 [2017] NZIPT 203941 (India) at [54]. See also [2012] NZIPT 200134 (Fiji) at [43].
321 [2019] NZIPT 205151 (Russia) at [37].
322 [2012] NZIPT 200464 (Fiji) at [15].
323 [2020] NZIPT 205585 (South Africa) at [37].
324 [2016] NZIPT 203221 (China) at [40].
325 [2019] NZIPT 205576 (Philippines) at [24].

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As to the appellant's more generalised claim that divorced women and "mixed blood" children are socially excluded in India, the only evidence the appellant has presented is a statement from the Shakti Community Council in which the writer expresses a belief that the appellant would face exclusion because she is the single mother of a child whose father is not Indian. The Tribunal recognises that there is potential for discrimination against divorced or separated women and single mothers in male-dominated Indian society. However, the appellant has a ***tertiary education, qualifications in the cosmetics industry, a full history of employment and self-employment, and is determined to do what is right for herself and her child.*** *She has more attributes than many other women to assist her overcome such discrimination.*[326]

The [INZ] case officer noted also that ***her elder daughter [from her first marriage] had lived with the [extended] family*** *for many years, implying the family's support and tolerance of situations outside traditional models.*[327]

The Tribunal would add that ***the appellant was able to work in a state-owned enterprise*** *notwithstanding the claimed discrimination against her [as a divorcee].*[328]

The Tribunal acknowledges the information contained in the articles provided on the treatment of family violence in China but notes that ***the appellant did receive some support from the police*** *there. [Following multiple police call-outs, including an episode of strangulation, Chinese police gave her husband a warning.]*[329]

[I]t was reasonable for [INZ] to decide that, as ***the appellant intended never to disclose this matter*** *[her experience of family violence] to her parents and hence to anyone else in her community, she could not therefore be at risk of abuse or exclusion because of stigma.*[330]

[T]raditional attitudes were less rigidly held in urban areas *[in Fiji] such as the appellant's home.*[331]

[T]he ***appellant was not confined to an isolated and predominantly rural part of India,*** *where it is accepted that social attitudes and mores concerning women are even more traditional and patriarchal than elsewhere in India.*[332]

The appellant said she was already an outcast among the Indian community in New Zealand and claimed that it would be worse in India. However, the [INZ] case officer observed that ***the appellant had become engaged after her first divorce,*** *which indicated that she lived in a "relatively liberal social environment".*[333]

[INZ] noted that ***her second marriage had been arranged*** *and therefore it appeared that there was no stigma following her first separation which caused her to be unable to find a new partner.*[334]

The extent to which such factors weigh against an appellant being at risk of abuse or exclusion from the community because of stigma is highly variable. The inferences (by INZ, though repeated by the IPT without criticism) that a prior remarriage equates to an absence of social stigma seem especially questionable. Some appellants described quite the opposite, citing immense family pressure to remarry as a means of salvaging their reputation,[335] and noting a divorced woman's status on entering a second marriage as badly diminished and

326 [2013] NZIPT 200770 (India) at [62]–[63].
327 [2012] NZIPT 200134 (Fiji) at [43].
328 [2016] NZIPT 203221 (China) at [39].
329 [2021] NZIPT 206241 (China) at [31].
330 [2014] NZIPT 201504 (China) at [36].
331 [2012] NZIPT 200464 (Fiji) at [15].
332 [2013] NZIPT 200861 (India) at [45].
333 [2013] NZIPT 200770 (India) at [37]–[38].
334 [2018] NZIPT 204476 (Fiji) at [12].
335 [2019] NZIPT 205568 (India) at [19].

vulnerable to abuse.[336] The mere fact a woman has remarried says nothing about the social constraints within which the remarriage occurred, and an unwanted new marriage may in fact be the result of stigmatisation. As to minimal police support or family support being able to protect the appellant from abuse, this provides limited protection only and does not negate the risks she faces. It also bears noting that the VFV visa criteria are quite different to the requirements for refugee status, where an applicant must show a failure of state protection. There is no such requirement in the VFV visa policy and, while the absence of police protection of victim-survivors may indicate a woman is at risk of abuse, the presence of some police protection does not amount to an absence of risk. In terms of family protecting the victim-survivor, placing her in a situation of enforced reliance on family (probably male relatives) for her safety is also problematic, for the reasons discussed in relation to financial support from family.

As with the 'no means of financial support' limb, the fact an appellant had withstood a prior divorce was often cited as evidence of a lack of 'abuse or exclusion because of stigma'. For example:

> *After her first divorce, the appellant* ***experienced gossip but did not experience abuse or exclusion*** *from her community or her family. … [T]here is no evidence to suggest that her second separation or divorce, once again through no fault of her own, will expose her to stigma to the extent that she will be abused or excluded from her family or community.*[337]

> *The appellant divorced from her first husband after he set fire to their house. The reasons for their separation were known within the community and* ***she was provided support by the Fijian Muslim community.*** *… Her past experience of support and offers of assistance indicate that she was not excluded in the past and support the view that she would not be excluded in the future.*[338]
>
> *[W]hile the appellant fears that she would suffer from a risk of stigma upon her return to Fiji, she has been previously married to a different partner and then divorced. … While accepting that she left Fiji to study in India after the breakdown of her first marriage, there was* ***nothing to show that this was in response to any exclusion*** *from her religious or local community because of any stigma arising from her separation and divorce.*[339]
>
> *[INZ] found that the appellant had been cared for by her grandparents since birth and* ***had lived with them after the failure of her first marriage*** *and again for some months in 2010.*[340]

Similarly, having returned to her family home for trips, or maintained contact with her family, was often cited as an indication that an appellant would not face abuse or exclusion:

> *The appellant has returned to India because she was required to appear in the court-ordered mediation arising from what the appellant describes as her case against her "ex husband and in laws "dowry abuse"". … While the appellant claims that her former husband's family will wish to exact revenge by physically harming her,* ***she has been able to return to her family in her home city twice this year*** *without consequence.*[341]

336 [2019] NZIPT 205440 (Fiji) at [30].

337 [2012] NZIPT 200464 (Fiji) at [29]–[30].

338 [2013] NZIPT 201005 (Fiji) at [39] and [44].

339 [2019] NZIPT 205202 (Fiji) at [39].

340 [2013] NZIPT 200969 (Fiji) at [36]. See also [2019] NZIPT 205440 (Fiji); [2019] NZIPT 205151 (Russia); [2018] NZIPT 204476 (Fiji); [2016] NZIPT 203221 (China); [2014] NZIPT 201701 (China); [2014] NZIPT 201307 (China); [2013] NZIPT 200839 (Singapore); [2013] NZIPT 200770 (India); and [2012] NZIPT 200134 (Fiji).

341 [2017] NZIPT 203941 (India) at [67].

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*[INZ] noted that it was clear, from her **four visits to her parent's house** and from their own visits to New Zealand since she had separated, that they continued to support her.*[342]

*While the appellant said that when she returned to Fiji in early 2015, her family had made a "big drama", another 18 months has passed since then and there is **no evidence of ongoing antipathy** towards her by members of her family in Fiji.*[343]

*It also **appears that the appellant continues to have some support from her immediate family** members. The appellant's doctor advised in her report of 22 August 2017 that the appellant had disclosed the abuse to her New Zealand citizen brother and his wife, and also to her mother in Fiji.*[344]

*The Tribunal does not overlook the social status of women in India and the strong cultural expectations there that women will marry and remain married. Against that background, it is likely that there will be some social stigma experienced by the appellant as a divorced woman. **However, the appellant stated in her interview in June 2019, that she remained "very close" to her parents; they usually spoke daily on the telephone.***[345]

*Counsel submits that Immigration New Zealand incorrectly concluded that, because the appellant has the support of her family she would not be subject to abuse and/or exclusion on return to Fiji. … Information suggesting that victims of domestic violence are ostracised from their families appeared to be inapplicable to the appellant, who stated that **her family were supportive of her.***[346]

*[T]he appellant also **had ongoing contact with members of her family** in the Philippines. She confirmed that she had told her brothers about her circumstances and stated that they would tell her sisters. She stated that her family members knew she had left her second partner, and that her sisters "did not care about that". The appellant's family members were disappointed about her circumstances but could not do anything about them. She confirmed that her eldest brother would not turn her away but she was not sure about his family or his wife.*[347]

The problems with using contact with family as an indicator of an applicant's ability to return home without problems were raised some years ago in the *Living at the Cutting Edge* report, which dubbed this a "double-edged instrument":

> *If she decides not to put up with indignities from her extended family and community she risks putting more strains on her relationship with them and she will have nowhere to go should her residence application fail. On the other hand, if she decides to endure those indignities from her birth family she could fail the evidence test required to prove she will be disowned by her family if she returns to her home country.*[348]

There are many additional reasons why visiting or communicating with family does not negate a risk of abuse or exclusion because of stigma, for instance: having some supportive relatives does not prevent the wider community from mistreating a victim-survivor; visiting family may present a far lesser risk than moving home permanently (particularly where the community's knowledge of a woman's status as a divorced victim-survivor can be hidden on visits); and how her relatives are treating her while she is based in New Zealand may be quite different to how they would treat her if she were dependent upon them on return (particularly where stigma would extend to the family if she returned).

342 [2014] NZIPT 201489 (Fiji) at [32].
343 [2016] NZIPT 203416 (Fiji) at [50].
344 [2019] NZIPT 205202 (Fiji) at [41].
345 [2020] NZIPT 205587 (India) at [54].
346 [2019] NZIPT 205440 (Fiji) at [43] and [57].
347 [2017] NZIPT 203950 (Philippines) at [54].
348 Robertson and others *Living at the Cutting Edge*, above n 1, at 230.

Conclusions on the IPT's 'Unable to Return Home' Assessments

The overall picture that emerged from my analysis of the IPT's approach to the VFV policy was of a very high threshold being applied to the 'unable to return home' test, and of evidential standards being imposed that are practically very challenging for applicants to meet. None of the 39 decisions that were analysed found that the 'unable to return home' requirement was satisfied, and only three (7.7 per cent) found there had been an error in INZ's assessment of the appellant's ability to return home that warranted returning the application for reassessment. Several examples of undue narrowing of the 'unable to return home' requirement were found, such as: the conflation of the 'no means of financial support' and 'risk of abuse or exclusion because of stigma' tests (requiring the lack of financial support to also be due to stigma); the treatment of *any* level of financial support as a barrier to VFV visa eligibility (even if inadequate to meet an appellant and her children's basic needs); the exclusion of abuse from relatives or in-laws from the definition of abuse 'from their community'; and the interpretation of 'stigma' to mean only the stigma of separation in the context of family violence. A problematic pattern was noted of using appellants' strengths, such as resilience, as reasons that they could be expected to withstand being returned to a hostile environment. Worryingly, in some instances safety risks from New Zealand-based ex-partners or in-laws were also used against appellants (despite their irrelevance to the policy criteria).

The evidential standards imposed by the IPT were difficult for appellants to meet. For example, in terms of financial support, the IPT was seldom persuaded of the barriers to employment that appellants raised; expected them to disprove the availability of financial support from a wide range of male relatives throughout their extended family; and also expected them to disprove the availability of unstable and minimal sources of income (such as charitable support and child support from ex-partners). In terms of the risk of abuse or exclusion, appellants' claims of social exclusion were frequently dismissed as mere 'gossip'; the language of 'disowning' was often applied (in spite of being removed from the policy criteria); and the IPT's expectation of direct written evidence of threats of hostility or violence was noted as particularly impractical. Concerns were also raised as to the appropriateness of some of the factors the IPT interpreted as evidence of an ability to return home – for example, relying on her family's payment of a dowry to infer that she could access their financial support, or relying on a prior remarriage as evidence that she would not face social stigma.

The stringency of the standards being applied by the IPT are particularly problematic considering the lack of funded legal assistance for applications and appeals under the VFV policy. The consequence of this approach is that VFV residence visas are realistically available only to a very narrow subset of migrant victim-survivors, leaving many women and children facing removal from New Zealand and significant material hardship if they seek to leave a situation of family violence. If the VFV policy itself is unreasonably narrow in scope, as I have argued, the IPT's application of the policy has unduly narrowed its scope even further. This seems to be in direct contradiction to the objectives of the policy and New Zealand's international obligations, which favour more expansive interpretations.

IV. The IPT's Assessments of 'Special Circumstances'

The second available ground of appeal against an INZ decision to decline a residence visa is that "the special circumstances of the applicant are such as to warrant consideration by the Minister as an exception to [immigration] instructions".[349] Where the IPT makes such a recommendation to the Minister, the Minister is required to consider it but is not required to grant the visa.[350] The IPT will assess whether an appellant has 'special circumstances' only after they have confirmed that INZ's decision to decline the visa was correct in terms of the immigration instructions. Accordingly, 'special circumstances' were not assessed in the six decisions that found procedural errors in INZ's assessment of the application[351] or the four decisions that found that a 'particular event' had occurred that materially affected the applicant's eligibility.[352] A further two decisions did not assess the appellant's 'special circumstances' because she had already been granted residence via deportation proceedings.[353] This left 37 appeals where the IPT made a determination as to the appellant's 'special circumstances', 15 (40 per cent) of which were successful.[354] Most of the successful appeals do not state what the ultimate determination by the Minister was,[355] though the Minister declined to grant residence in at least one case.[356] All but one of the successful 'special circumstances' appeals for which the IPT's reasoning is available involved children, the one exception being the appeal by a citizen of the United States who the IPT determined would contribute to New Zealand through her employment and future inheritance.[357]

The IPT applies a definition of 'special circumstances' as "circumstances that are uncommon, not commonplace, out of the ordinary, abnormal".[358] Tennent, Armstrong, and Moses have critiqued this definition, noting that it comes strikingly close to the higher threshold of 'exceptional circumstances' that is applied in humanitarian appeals against deportation.[359] Accordingly, the threshold at which 'special circumstances' are found in VFV visa appeals was of interest in this study. Also of interest were the types of circumstances that are deemed to be 'special', and particularly how the impacts of violence were assessed as a 'special circumstance'. Given that the VFV policy objective of "recognis[ing] New Zealand's international obligations" was intended to benefit "women appealing against decisions … if it could be shown that such decisions ran counter to the purposes of the policies",[360] the influence of New Zealand's international obligations in 'special circumstances' assessments was another area of focus. Because IPT decisions do not typically explain why some circumstances are found to be special and others are not,[361] and appellants' circumstances are assessed cumulatively and on a case-by-case basis, a definitive assessment of what factors are deemed most persuasive is not possible. Nonetheless, clear patterns emerged across the 37 decisions being analysed.

349 Immigration Act 2009 s 188(1)(f).

350 Immigration Act 2009, s 190(5).

351 [2014] NZIPT 201420 (Brazil); [2014] NZIPT 201462 (Bangladesh); [2016] NZIPT 203594 (Fiji and Tuvalu); [2018] NZIPT 204430 (India); [2019] NZIPT 205568 (India); and [2020] NZIPT 205653 (China).

352 [2014] NZIPT 201701 (China); [2015] NZIPT 202593 (India); [2016] NZIPT 203160 (Romania); and [2018] NZIPT 204476 (Fiji).

353 [2019] NZIPT 204983 (Tonga) and [2017] NZIPT 203801 (South Africa).

354 All reasoning was redacted from the successful 'special circumstances' finding in [2016] NZIPT 203633 (Fiji), so no substantive analysis of the reasoning in this case was possible.

355 The ultimate outcome was not stated in [2021] NZIPT 206350 (Canada); [2021] NZIPT 206241 (China); [2021] NZIPT 205917 (UK); [2020] NZIPT 205672 (UK); [2020] NZIPT 205607 (Japan); [2020] NZIPT 205585 (South Africa); [2019] NZIPT 205576 (Philippines); or [2019] NZIPT 205356 (Philippines).

356 [2016] NZIPT 203633 (Fiji).

357 [2016] NZIPT 203384 (USA).

358 *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) at [24].

359 Tennent, Armstrong, and Moses *Immigration and Refugee Law*, above n 124, at 453–454. The authors propose that a more suitable definition could be "circumstances that make the situation of the particular appellant stand out in a manner which requires appropriate intervention from the Minister".

360 Robertson and others *Living at the Cutting Edge*, above n 73, at xxv.

361 As Tennent, Armstrong, and Moses explain: "The tribunal when deciding that circumstances are special does not say why this is the case. It cites the definition of 'special' in *Rajan*, considers the circumstances and then states whether or not it considers them to be special." Tennent, Armstrong, and Moses *Immigration and Refugee Law*, above n 124, at 458.

IV. The IPT's Assessments of 'Special Circumstances' CONT.

There is a large degree of overlap between the commentary on the IPT's approach to the 'unable to return home' requirement and the approach to 'special circumstances', as many of the same factors were raised under each appeal ground. A key difference was the prominence of children's interests in the 'special circumstances' assessment, given that there is no scope for children's interests to be considered under the VFV visa eligibility criteria.[362] In addition to children's interests, the factors most commonly raised (though not necessarily successfully) in relation to 'special circumstances' were:

- The impacts of violence upon the appellant, and her consequent need for community and/or professional support available to her in New Zealand;
- The risk of hardship for the appellant if returned to her country of origin;
- The risk of further abuse if the appellant was returned to her country of origin;
- The contributions that the appellant could make to New Zealand; and
- The appellant's nexus to New Zealand.

Family Violence and Its Impacts

Many decisions mentioned the appellant's submissions in relation to the impacts of violence, however only three decisions went on to cite family violence or its impacts upon an applicant in support of a conclusion that she had 'special circumstances'.[363] In this way, family violence was generally rendered invisible or irrelevant by omission from the IPT's conclusions on special circumstances. In other cases, family violence was simply dismissed as 'ordinary'. For example:

> *The failure of a relationship which was to be the basis of residence application is not out of the ordinary.[364] [Making the context of family violence invisible, and her situation 'ordinary'.]*
>
> *The fact of the abuse inflicted upon the appellant, regrettable as it is, does not make her circumstances uncommon or out of the ordinary.[365]*
>
> *[N]either the difficulties relating to the end of the appellant's relationship with her former partner, [nor] her acute disappointment and hurt at his actions, … are out of the ordinary or uncommon.[366]*

362 As explained above, the 'unable to return to their home country' test applies to the principal applicant (i.e. the child's parent) and there is no ability for a child to apply for a VFV visa as a principal applicant. It is the principal applicant who must have 'no means of independent financial support' or be 'at risk of abuse or exclusion', rather than their child(ren).

363 [2021] NZIPT 206241 (China) at [61]: "This considerable [visa] uncertainty has the potential to interfere with the appellant's ability to maintain a stable setting for her two daughters and also to exacerbate the psychological symptoms she experiences as a result of the family violence of her husband. If she has the certainty of residence, then the appellant would be best-placed to provide for her daughters and continue recovering from the impact of the family violence"; [2013] NZIPT 201736 (country withheld) at [65]: "The Tribunal finds that the appellant and her son have special circumstances arising from her situation as a survivor of domestic violence, the support network she and her son have available in New Zealand, the lack of support in [country X] and the familial pressure the appellant would face to reconcile with the husband if she returned to [country X]"; and [2013] NZIPT 200969 (Fiji) at [70]–[71]: "Fijian society and its government rarely extends financial and community assistance to women with children who lack the support of husbands and immediate family members. … Through no fault of her own, the appellant has been the victim of domestic violence, leading to the failure of her two marriages. … The appellant is forging a new life for herself. She is employed in New Zealand and is able to support herself and her son."

364 [2013] NZIPT 200861 (India) at [68].

365 [2021] NZIPT 206136 (Netherlands) at [59].

366 [2014] NZIPT 201504 (China) at [59].

Dismissing violence against women as 'ordinary' seems problematic, and particularly so considering the experiences that appellants described. The final quote of the three above concerned an international student engaged to a man 17 years her senior who was convicted of violence against her, and the decision records:

> *He had thrown metal woks, a kettle and a heater at her and had threatened to kill her. He had damaged the couple's home and there was nowhere the appellant could go.*[367]

This 'normalising' approach to family violence is perhaps not unique to the VFV visa context; in the context of a partnership-based residence appeal involving a victim-survivor client of our Community Law centre the IPT similarly held:

> *Special circumstances are circumstances that are uncommon, not commonplace, out of the ordinary, or abnormal. Regrettably, relationship breakdowns arising from family violence, and the attendant immigration consequences for non-New Zealand citizen or resident partners, are not uncommon.*[368]

However, the normalising of family violence is particularly surprising in the context of VFV visa appeals, given the policy seeks to end violence against women and children and explicitly includes international obligations to this effect. It seems perverse, in light of these obligations, to cite the 'commonness' of family violence in New Zealand as a reason that an immigration response is not warranted.

One positive development is that several recent (2019–2021) decisions included relatively lengthy descriptions of the violence reported by the appellant within the 'special circumstances' section (often as a subsection entitled 'the domestic violence' or similar).[369] This would suggest that family violence is at least receiving some consideration as a possible special circumstance. However, in drawing conclusions as to whether special circumstances exist (which generally occurred under the heading 'Discussion of special circumstances'), only one of these cases explicitly took the family violence into account.[370] It is therefore unclear what weight (if any) the violence in the remaining cases was accorded; instead, the 'Discussion of special circumstances' focused on the appellants' children's interests. As legal academic Bridgette Toy-Cronin has argued, treating family violence as only 'a mention' by raising it but failing to explicitly give weight to it in decision-making may serve to normalise family violence, and overlooks the wider policy context of New Zealand's coordinated response to family violence.[371] Nonetheless, it is noteworthy that all the recent cases where family violence was included as a specific subsection of 'special circumstances' were ultimately successful. This perhaps suggests that when the context of family violence is engaged with more deeply, it supports decision-making that is more favourable to victim-survivors. Conversely, where the IPT failed to adequately engage with the violence experienced by appellants, they were less likely to have a favourable outcome.

367 [2014] NZIPT 201504 (China) at [7].

368 [2020] NZIPT 205633 (UK) at [58].

369 See [2021] NZIPT 206350 (Canada); [2021] NZIPT 206241 (China); [2021] NZIPT 205917 (UK); [2020] NZIPT 205672 (UK); [2020] NZIPT 205607 (Japan); [2020] NZIPT 205585 (South Africa); [2019] NZIPT 205576 (Philippines); and [2019] NZIPT 205356 (Philippines).

370 [2021] NZIPT 206241 (China) at [61]: "This considerable [visa] uncertainty has the potential to interfere with the appellant's ability to maintain a stable setting for her two daughters and also to exacerbate the psychological symptoms she experiences as a result of the family violence of her husband. If she has the certainty of residence, then the appellant would be best-placed to provide for her daughters and continue recovering from the impact of the family violence."

371 Toy-Cronin "Compounding the Abuse", above n 9, at 220–221.

IV. The IPT's Assessments of 'Special Circumstances' CONT.

Family violence can have profound social, economic, mental, and physical health impacts upon victim-survivors and their children.[372] The consequent support needs of victim-survivors and their children have been emphasised in the Declaration on the Elimination of Violence against Women, which provides that states should:

> *Work to ensure, to the maximum extent feasible … that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation.*[373]

As would be expected, a majority of appellants raised the impacts of the violence they experienced, and their consequent need to maintain their New Zealand support network, as contributing to their 'special circumstances'. For example:

> *The appellant submitted that … as a result of her husband's abuse, she was not the same person she was before her marriage. She suffered from post-traumatic stress disorder and had lost a great deal of confidence. She had a lot of* ***support from her in-laws in New Zealand*** *whereas she could never let her elderly mother [in her home country] know that she had been the victim of violence and been savagely beaten several times.* ***She had friends and neighbours and a sense of belonging in New Zealand.*** *… A forced repatriation to her home country would have a serious detrimental effect on her mental wellbeing.*[374]

> *In support of her application to Immigration New Zealand, the appellant provided a range of letters confirming the* ***strong support network which is available to her in New Zealand.*** *She was able to leave her husband largely due to the support she has found in New Zealand. It has also been a crucial factor enabling her to build a new independent life here for her and her son.*[375]
>
> *Since her separation,* ***the appellant has undergone counselling and received significant support from her therapist.*** *However, she remains troubled as a result of the domestic violence, and has concerns about her ability to re-establish herself in Russia.*[376]
>
> *Both the appellant and her daughter have been* ***assisted by the Victim Support Service and other helping agencies in New Zealand.*** *They are both very much aware of the value of these services and grateful for the support that people have given them in this country, support which they are emphatic they would not receive in Fiji.*[377]
>
> *It is clear that the appellant has worked hard to overcome the personal trauma she faced as a result of this turn of events, and* ***has been assisted to do so by a supportive community in New Zealand.***[378]

Many appellants argued that the combination of losing their New Zealand supports and being returned to a hostile or unsupportive environment would have serious mental health effects upon them and/or their children. However, as with the violence itself, the mental health impacts of violence were not mentioned in a majority of the IPT's conclusions on special circumstances. When mentioned, they were often not found to be sufficiently evidenced or were not deemed a serious enough issue:

372 For a discussion of the wide-ranging short and long-term impacts of violence on victims and children, see Ministry of Justice *Family Violence Risk Assessment and Management Framework*, above n 310, at 22–23.

373 Declaration on the Elimination of Violence against Women GA Res 48/104 (1993), art 4(g).

374 [2014] NZIPT 201610 (UK) at [13]–[14].

375 [2013] NZIPT 201736 (country withheld) at [41].

376 [2019] NZIPT 205151 (Russia) at [48].

377 [2012] NZIPT 200134 (Fiji) at [52].

378 [2014] NZIPT 201307 (China) at [65].

[The appellant produced a] letter from a psychiatrist who had seen the appellant at the request of ACC on 30 August 2012, concluding that she had developed post-traumatic stress disorder; [t]hree letters from the appellant's counsellor in New Zealand stating that she was on medication but had managed to maintain full-time employment in spite of her struggle with "depression, anxiety, fear, loneliness, grief and poor health"; and [a] letter from the appellant's general practitioner supporting her application .... Regarding the appellant suffering from post-traumatic stress disorder, that diagnosis was made after one interview with a psychiatrist 20 months ago. It is acknowledged that the appellant was in a fragile state of mind after her abusive relationship and abrupt separation, but there is no evidence that her mental state has remained at the same level, or deteriorated, since then. As her counsellor confirmed, the appellant managed to obtain employment and establish relationships despite her difficulties. ***It is not accepted, as proposed on appeal, that the psychiatrist's or counsellor's letters establish that the appellant needs to stay on in New Zealand to protect her mental health. In fact, as past events have shown, she is a resourceful and determined woman.***[379]

The Tribunal is cognisant of the domestic violence suffered by the appellant and the emotional and physical effects this has had on her. However, while these circumstances are out of the ordinary, ***it is not satisfied of her need to remain in New Zealand because of them.***[380]

Counsel is critical of [INZ's] failure to consider that there is little infrastructure support for the victims of domestic violence in India. Counsel suggests that the appellant's experiences will require her to have counselling and she will need continuing community support to "move on from her experiences". The Tribunal rejects this submission. Nothing beyond general information is advanced to suggest that the appellant will require counselling in the future. This is not to undermine the fact that the appellant was poorly treated by her husband and his parents or that the circumstances leading up to her separation were indeed distressing and challenging for her. The evidence provided by her psychiatrist at the time indicated that she was "suffering from major depression secondary to emotional and psychological abuse and social isolation caused by her husband". However, ***it is not evident that she was prescribed any medication or involved in any counselling or psychiatric treatment on an ongoing basis.***[381]

Evidencing their need for mental health support can be very challenging for VFV visa applicants as, until they have residence, they may not have access to publicly funded healthcare. They are unlikely to have the funds to obtain a psychologist's report or similar, and cultural, linguistic, or geographic factors may be a further barrier to accessing such professional opinions. Even where health professionals, social workers, counsellors, or other support agencies *did* specifically provide an opinion that remaining in New Zealand was important for the appellant's recovery, this was often not found to be persuasive. For example:

[A social agency submitted that] [t]he appellant would not be able to recover from the domestic violence if she returned to Fiji. ... [Counsel submits] [t]here will be no support for the appellant in Fiji and she may end up on the streets. The appellant suffers from severe depression and anxiety and has sometimes thought of ending her life rather than going back to Fiji. There is no support for victims of domestic violence in Fiji. She is well cared for by her doctor here and needs ongoing therapy with her therapists. Her older brother resides in New Zealand and can support her, if necessary. ... [The appellant's doctor advises] the appellant continued to suffer from significant depression

379 [2014] NZIPT 201610 (UK) at [11] and [47].

380 [2013] NZIPT 200938 (Germany) at [46].

381 [2013] NZIPT 200861 (India) at [46].

and anxiety, and low mood and self-confidence, resulting from the stress arising from the breakup of her marriage, and domestic violence, and the strain of the court case. In the doctor's opinion, the appellant needed to continue with ongoing therapy in New Zealand. Any move back to Fiji would negatively impact her mental and emotional health. … The Tribunal recognises the domestic violence suffered by the appellant and that she feels that she cannot return to Fiji. It accepts that her husband's abuse and his conduct amount to a gross breach of her trust. ***The appellant has suffered and no doubt continues to suffer emotional and physical effects as a consequence of his behaviour.*** *It is accepted that she may feel that she had failed her family members and that she will face some scrutiny and judgement from some individuals in her community. However, while being out of the ordinary,* ***it is not demonstrated that these circumstances warrant consideration of an exception to immigration instructions.***[382]

The psychologist concluded that the appellant's psychological difficulties "would be exacerbated should she not be able to stay in New Zealand". This was because, first, it was said to be unlikely that she would be able to access appropriate treatment for her psychological conditions in India. Second, the issue of stigma should she return to live in India "does seem to be a significant one". And, third, there was a possibility of separation from her son if he could not leave New Zealand [there was a Family Court order preventing the son's removal], which would create psychological difficulties. While the Tribunal has taken careful note of the psychologist's report, it must view it in the context of the appellant's circumstances, as the Tribunal has found them. The appellant comes from a middle class, not poor, family background and has a full history of employment and self-employment. ***There is no basis on which to find that she is unlikely to be able to access psychological help similar to that available to her in New Zealand. Second, the self-reported extent to which she will suffer stigma is not supported by reliable independent evidence.*** *As already noted, the Tribunal accepts there is a generalised risk of discrimination toward the appellant as a divorced woman in India. Third, the Tribunal certainly agrees that there would be psychological difficulties for the appellant if she was to be separated from her son.*[383] *[However, the IPT concludes that this is a problem which must be handled by the Family Court.]*

In other cases, the IPT concluded that support systems in the appellant's country of origin were an adequate substitute (often contrary to the appellant and her supporters' submissions):

[T]he appellant outlined the physical, sexual and emotional abuse she suffered during her relationship with her ex-husband. Letters in support of the appellant were provided from her siblings, friends, church and other support groups. These, variously, document the abuse and describe the trauma the appellant experienced in her relationship, and the significant detrimental impact this has had on her. Several letters express concern that the appellant's mental health will deteriorate if she is unable to remain living in New Zealand and thereby retain her primary support networks. … The Tribunal accepts that the appellant may inevitably face some challenges re-establishing herself in Fiji and that she will not have the same familial support networks in Fiji, as her siblings live in New Zealand. However, the appellant has spent the majority of her life in Fiji …. ***The appellant's son, who is now a young adult, and the appellant's mother remain living in Fiji and they should at least be able to provide the appellant with emotional support.***[384]

382 [2019] NZIPT 205202 (Fiji) at [18], [24], [26], and [50].

383 [2013] NZIPT 200770 (India) at [65]–[66].

384 [2019] NZIPT 205440 (Fiji) at [67]–[69] and [75]–[77].

The appellant has had a difficult time in New Zealand. Her partnership with her New Zealand-citizen husband ended as the result of domestic violence in 2012, as did her second partnership in 2015. The appellant has also had mental health difficulties for which she has received counselling and support. ***If the appellant still requires ongoing counselling and support, there is nothing to suggest that she could not obtain that in the Philippines.***[385]

Counsel stated that the … appellant would be excluded from religious and cultural celebrations and festivities as she would be regarded as bad luck. This would be particularly bleak for a religious Hindu such as the appellant. … [The IPT determines:] [i]n New Zealand the appellant has had significant moral and practical support from the members of her religious sect. ***Arguably at least there is no reason why such support should not be available from the same sect in India.***[386]

The appellant has been supported in her recovery from the abusive relationship through counselling and by medical staff in a supportive role. Her counsellor gave the view that she suffers from post-traumatic stress disorder. Her acute stress disorder results in her living in a constant state of anxiety with a fear of her former partner contacting her and harassing her. … The Tribunal acknowledges that she has built a life for herself in New Zealand and has friends who support her here. However, ***the Tribunal considers that support is also available for her in Germany, where her family resides*** *and she has lived the vast majority of her life.*[387]

The Tribunal recognises the domestic violence inflicted on the appellant by her former partner. It understands that she feels that she cannot return to live in Brazil and that she is concerned about the high level of unemployment and crime in her home city. It is also acknowledged that the appellant and her daughter have been living in New Zealand for some three to four years, and that they have formed relationships with New Zealanders. … ***The appellant and her daughter have close family members in Brazil who can provide them with some emotional support,*** *should they be required to return there.*[388]

The [Kurdish] appellant came to believe that she could escape the authority of her older brother by marrying again. She was introduced to AA and they entered a cultural marriage, but he was abusive towards her. She suffered multiple forms of domestic violence and did not know what to do. Eventually, she escaped, with help from a friend, and obtained a protection order and support from Women's Refuge and counsellors. Her community is angry with her for leaving her husband and has reported the situation to her brother and family members overseas. The appellant explains that she wants to settle in New Zealand. She can have a life here and feel safe. … ***The Tribunal expects that any social and emotional support that the appellant is presently receiving from domestic violence support services and counsellors here would also be available to her in Norway.*** *That country has a well-developed healthcare and social support system through which the appellant could seek assistance.*[389]

385 [2017] NZIPT 203950 (Philippines) at [103].
386 [2013] NZIPT 200861 (India) at [24] and [69].
387 [2013] NZIPT 200938 (Germany) at [43] and [46].
388 [2019] NZIPT 205107 (Brazil) at [43].
389 [2020] NZIPT 205667 (Norway) at [58]–[59].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

Counsel submits that the appellant … has been strongly affected by the relationship and is still recovering from the abuse she suffered. She continues to receive counselling and it has been recommended that she engage in long-term therapy including specialist counselling [withheld]. The appellant relies on her counsellor and would not be able to establish such a close, trust-based relationship with another mental health provider. If she has to do so, there could be a serious and significant set-back in her treatment. … Moving back to the Netherlands would mean that the appellant would lose the social, emotional and psychological support that she has in New Zealand …. The Tribunal accepts that the appellant receives significant support from her current counsellor and that she wishes to remain in New Zealand where she can continue to receive the support from her counsellor and be nearby her friends. ***Ideally, the long-term recovery support required by the appellant would be provided by her counsellor in New Zealand. However, there are counselling services available in the Netherlands*** *which the appellant has the right to access.*[390]

Very little reliance upon the international obligations cited in the VFV policy in respect of preventing violence against women and children was found in the decisions,[391] let alone any recognition of the need to "promote women's safety and physical and psychological rehabilitation".[392] This seems surprising, given that the 'special circumstances' assessment provides far greater latitude for such considerations than the assessment of whether the strict policy criteria were met. Where appellants sought to raise such 'policy' arguments, they were rejected:

Finally, the representative submits that the appellant was brought here by a New Zealand citizen with a promise of a better life but was then deprived of these opportunities. As she would have definitely qualified for a residence visa under the Partnership category had she not been a victim of domestic violence, it was unfair that the appellant was now not entitled to a residence visa. … Having considered all the circumstances … the Tribunal finds that the appellant's circumstances do not amount to special circumstances.[393]

Counsel also submits that Immigration New Zealand's failure to grant the appellant residence nullifies New Zealand's obligations under Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women. This submission is rejected. The existence of a special category for Victims of Domestic Violence in residence instructions underscores New Zealand's commitment to that Convention. However, a decision that an applicant fails to meet a criterion of the category is not discriminatory or undermining of the commitment to the Convention, if such decision is fairly reached on the available evidence.[394]

Counsel submits that the appellant's application was not successful because she is of German citizenship. He submits that this is inconsistent with the permissive nature of the policy. The Tribunal disagrees. … The Cabinet papers which detail the background and purpose behind the introduction of this special category, and the evolution of this policy, indicate that the threshold has slightly lowered since its introduction. It has moved from an absolute standard of "must be unable to return" to one in which they "cannot return".

390 [2021] NZIPT 206136 (Netherlands) at [34]–[36], [48]–[49], and [59].

391 The only 'special circumstances' finding that referenced these obligations was [2013] NZIPT 200969 (Fiji) at [70]: "The immigration instructions at S4.5.1.b recognise New Zealand's international obligations, in particular to end discrimination against women and to protect children from mental and physical violence. This appellant and her son will be at risk of ongoing discrimination and violence if they are required to return to Fiji."

392 Declaration on the Elimination of Violence against Women GA Res 48/104 (1993), art 4(g).

393 [2019] NZIPT 205202 (Fiji) at [25] and [51].

394 [2013] NZIPT 200861 (India) at [64].

Similarly, the previous requirement that the appellant be "disowned by their family and community", has been removed. However, contrary to counsel's submissions, the intention of the policy, as is clear from the Cabinet papers and the actual wording of the policy, is not to provide some form of compensation to victims of domestic violence which has occurred in New Zealand.[395]

Interestingly, while the United Nations Convention on the Rights of the Child (*UNCROC*) was often referenced in the IPT's discussions of special circumstances, it was not the article relating to violence against children included in the VFV policy objectives that was relied upon.[396] Instead, it was Article 3(1) (which requires states "to have regard to the best interests of the child as a primary consideration") that was referred to, with the IPT noting that this obligation was affirmed by the Supreme Court in *Ye v Minister of Immigration*.[397] As will be discussed in the section on children's interests, recognition of the impacts of violence on children, and their consequent support needs, was very scant. It appears that the intention behind including New Zealand's international obligations in the VFV policy objectives has not been fulfilled,[398] and the obligations cited in the policy are not influencing the IPT's decision-making in a meaningful way. Indeed, family violence and its mental and physical health impacts received little recognition as 'special circumstances' and were frequently normalised or minimised.

395 [2013] NZIPT 200938 (Germany) at [34]–[35]. We cannot know how counsel framed this argument, so they may have used the language of 'compensation', but the IPT characterising a more inclusive interpretation of the VFV policy as compensatory seems problematic. 'Compensation' implies that women are seeking an advantage they would not have otherwise had. In reality, VFV visas simply ensure that women do not *lose* entitlements as a result of being subjected to violence; per S4.5.2b applicants must show that they intended to seek residence on the basis of their relationship, so the VFV scheme ensures only that women do not lose their pathway to residence as a result of fleeing violence. A more inclusive interpretation would simply ensure that more women can exit situations of violence without penalty, rather than providing an additional advantage or 'compensation'.

396 Convention on the Rights of the Child GA Res 44/25 (1989), art 19.

397 *Ye v Minister of Immigration* [2009] NZSC 76 at [24] per Tipping J.

398 The inclusion was intended to benefit "women appealing against decisions … if it could be shown that such decisions ran counter to the purposes of the policies". See Robertson and others *Living at the Cutting Edge*, above n 73, at xxv.

Risks of Hardship in an Appellant's Country of Origin

The social and economic hardships that an appellant identified in relation to her 'inability to return home' were typically also considered as potential 'special circumstances', therefore much of the earlier commentary on the assessment of appellants' 'inability to return home' is also applicable here. The same evidential challenges were observed, with risks described by appellants often dismissed as unsubstantiated, not sufficiently serious, or as surmountable in light of the resilience she has shown:

As for the claims of the effects of "rumour-mongering" and the like on the appellant and her family, ***such claims are easy to make and difficult to substantiate.***[399]

As to the appellant's more generalised claim that divorced women and "mixed blood" children are socially excluded in India, ***the only evidence the appellant has presented is a statement from the Shakti Community Council … the self-reported extent to which she will suffer stigma is not supported by reliable independent evidence.***[400]

The appellant submits that she will be homeless if returned to Fiji. ***This is not established. She has family members there and previously received housing in a settlement provided for people in need.*** *She could explore these options once again.*[401]

The appellant has proven herself to be a capable and resourceful person *despite the trauma of her failed relationship and the related hardships she experienced in New Zealand.*[402]

In fact, as past events have shown, ***she is a resourceful and determined woman.***[403]

399 [2013] NZIPT 200839 (Singapore) at [48].

400 [2013] NZIPT 200770 (India) at [62] and [66].

401 [2013] NZIPT 201005 (Fiji) at [59].

402 [2013] NZIPT 200839 (Singapore) at [62].

403 [2014] NZIPT 201610 (UK) at [47].

*[The appellant] has **shown that she can move forward with her life.***[404]

*The Tribunal acknowledges the economic conditions in Russia and that the appellant is concerned that she will face some scrutiny and judgement from some individuals in her wider community. However, **while the appellant's circumstances are concerning, it is not demonstrated that they warrant consideration of an exception to immigration instructions.***[405]

Discussion of what constitutes 'special circumstances such as to warrant an exception to immigration instructions' often bore great resemblance to the 'unable to return home' test. For example:

*It is accepted that she may feel that she had failed her family members and that **she will face some scrutiny and judgement from some individuals in her community.** However, while being out of the ordinary, it is not demonstrated that these circumstances warrant consideration of an exception to immigration instructions. Given the appellant's previous work experience, qualifications, and professional connections, **the Tribunal considers that she will be able to obtain employment and go on to successfully re-establish herself in Fiji.** The appellant has some emotional support available there, from her mother, and other individuals.*[406]

*The Tribunal agrees with Immigration New Zealand's finding that **the appellant has the ability to obtain employment in the Philippines** given her previous work history in that country and that **she will have some support, emotional or otherwise, from her family** on a return to that country.*[407]

***Even if accepting, however, that her family will not assist her, the Tribunal considers that the appellant's concerns that she will be unable to cope and will be without options at all, should she return to India, are exaggerated.** As already set out, she has qualifications in more than one field. She has worked continually in New Zealand in the beauty industry. Having worked in retail in this country for some years, she will have excellent English. She is, in fact, in a better situation to obtain employment in India than many of her compatriots.*[408]

*The appellant also describes the social stigma the family experienced in Fiji [after her previous marriage ended, following her first husband attempting to burn their house down while she and daughter were sleeping], for example, not being invited to occasions and ceremonies, and having stones thrown at the house. Whilst these incidents may have been because of her divorced status, they could have also been due to other issues. **No further evidence that these events were linked to her status as a divorced woman who had experienced domestic violence was provided.***[409]

*On appeal, the appellant claims that she cannot return to her family in India because she will be shunned based on her personal circumstances and her family will not accept her back from her "failed marriage" because of the disgrace this brings. A supporter of the appellant who visited her family in India … said the appellant "would be a burden on an already stretched household" and that there "would be stigma attaching" to the appellant's family if she returned without a "good explanation" from the husband or his family. This indicates that **the appellant may have some difficulties with her family, but not that they would fail to accept her back.***[410]

404 [2019] NZIPT 205440 (Fiji) at [70].
405 [2019] NZIPT 205151 (Russia) at [49].
406 [2019] NZIPT 205202 (Fiji) at [50].
407 [2017] NZIPT 203950 (Philippines) at [98].
408 [2013] NZIPT 200770 (India) at [57].
409 [2013] NZIPT 201005 (Fiji) at [58].
410 [2013] NZIPT 200861 (India) at [61]–[62].

The appellant's parents and married brother live in Fiji. This was the home she left when she married [her husband] in June 2007 and went to live with his parents and three children. For the reasons already given, the Tribunal finds she is able to return to that home. She remains in contact with her family and while they might live in constrained circumstances and she is afraid of being a further burden to them, ***it is not accepted that her family, or even her wider community, will exclude her.***[411]

She may face some social barriers in the wider community because of her experiences *here should she choose to disclose them.* ***Otherwise, the appellant returned to Singapore with ostensibly the same social status that she had when she left,*** *that is, as a divorced woman who had raised her children on her own and who had spent time living overseas. None of these circumstances is uncommon or out of the ordinary.*[412]

Such comments seem to impose essentially the same threshold to the special circumstances assessment as the 'unable to return home' test, requiring severe ostracism and/or no financial means at all. Arguably, this unduly narrows the 'special circumstances' assessment, given that it is an entirely separate inquiry that is not restricted by the VFV policy wording and is a cumulative assessment of all the appellant's circumstances. Degrees of hardship short of ostracism or complete destitution could still form a part of the matrix of circumstances to be cumulatively assessed. One case was identified where the IPT took such an approach, finding that hardship and stigma that was insufficient to meet the VFV policy criteria could nonetheless form a part of the appellant's 'special circumstances' (in combination with other factors, including her son's interests):

Leaving China at the time they did has created significant obstacles for the appellant and her son should they have to return. The appellant herself would face considerable difficulty obtaining employment and it will be extremely difficult, if not impossible, for her son to reintegrate into the education system. As already acknowledged, ***while the appellant could not establish that she would necessarily be without financial means in China in terms of Immigration New Zealand's instructions, she is likely to face a difficult financial future. Similarly, while she did not meet the threshold of establishing stigma, the Tribunal accepts that she may well face a degree of discrimination in China. … She failed to meet the special instructions for domestic violence victims by a relatively slender margin.*** *… In all the circumstances, the Tribunal finds that the appellant and her son have special circumstances.*[413]

In two further cases, appellants provided extra evidence on appeal that satisfied the IPT of the risks in her country of origin that she had sought to establish in her original application, and this contributed to a finding of 'special circumstances' (together with other factors including their children's interests):

[E]vidence as to why she could not return to Fiji was not made sufficiently clear until the further evidence was submitted on appeal. *… The Tribunal finds that the combination of events, including the complete withholding of support from her immediate family, the death of the appellant's grandmother in January 2012, her grandfather's refusal to provide any emotional or practical support since the failure of her second marriage, her decision to have a termination of a pregnancy without her estranged husband's consent, and the ongoing harassment from a member of the Indian community in New Zealand, mean she has special circumstances.*[414]

411 [2012] NZIPT 200464 (Fiji) at [40].

412 [2013] NZIPT 200839 (Singapore) at [62].

413 [2016] NZIPT 203221 (China) at [57]–[59].

414 [2013] NZIPT 200969 (Fiji) at [71]–[72].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

> ***The difference on appeal is the existence of further evidence,*** *in particular the record of the interview of the appellant's mother under the auspices of the Fiji Council of Social Services. … The appellant and her mother insist that she is not welcome at the family home in Fiji, which is controlled by her brother-in-law who advised her against her third marriage. The Tribunal determines, as best that it can in an appeal of this kind, that their evidence is credible. Because the appellant is most unlikely to be able to be self-reliant through paid employment, she faces an exceptionally difficult domestic situation in Fiji. While it cannot be ruled out that some financial support might be forthcoming from that household, it would be at such personal cost to herself and her daughter that their circumstances warrant being described as special.*[415]

A particularly common rationale cited against the finding of special circumstances was that gender discrimination is not 'special' or affects a large proportion of women. For example:

> *The appellant's future marriage and employment prospects in India may be compromised as the result of her failed marriage in New Zealand.* ***It is an unfortunate fact that marriages fail and that in a patriarchal society such as India women have their status as individuals diminished or devalued as a result.*** *… The Tribunal acknowledges that gender inequality exists in Indian society and that inequality encompasses economic and cultural issues that would have affected the appellant before she came to New Zealand and will affect her also on her return to India. This does not make her circumstances uncommon or out of the ordinary.*[416]

> *The Tribunal acknowledges that* ***the situation of widows is, in many communities, precarious and that, in some situations, widows experience discrimination.*** *However, that is a plight facing women generally, not just the appellant and does not, of itself, amount to special circumstances.* ***It is not uncommon for people who have lived for some time in New Zealand to have to return to conditions in their home country that are less favourable (and sometimes discriminatory).***[417]
>
> *The Tribunal acknowledges that* ***Indo-Fijian women have less personal freedom and opportunities*** *in Fiji than they might have in New Zealand; however, that is a plight facing women from that culture generally, not just the appellant. …* ***It is not uncommon for people who have lived for some time in New Zealand to have to return to conditions in their home country that are less favourable (and sometimes discriminatory).***[418]
>
> *The Tribunal acknowledges the appellant's evidence of the many difficult circumstances of her life. It accepts, for the purposes of considering her special circumstances, that she has been poorly treated by her brother and suffered domestic violence in New Zealand. She does not wish to return to Norway where she says that* ***she has to abide by oppressive cultural practices with which she does not agree.*** *[The appellant was a Kurdish woman originally from Iraq.] However, even accepting the appellant's evidence on these matters, the Tribunal finds that* ***her circumstances do not warrant the grant of residence.***[419]

415 [2012] NZIPT 200134 (Fiji) at [56] and [65]–[66].

416 [2013] NZIPT 200861 (India) at [63] and [71].

417 [2014] NZIPT 201307 (China) at [70].

418 [2014] NZIPT 201489 (Fiji) at [46]. The final sentence of this quote also appears in another decision pertaining to a woman originally from Fiji: [2016] NZIPT 203416 (Fiji).

419 [2020] NZIPT 205667 (Norway) at [58].

> ***The Tribunal accepts that the appellant fears returning to India. The economic and social status of women there is different to New Zealand*** *and she understands that her estranged husband has spread rumours about her. … Having considered the appellant's circumstances, individually and cumulatively, including the length of her time in New Zealand, the circumstances of her separation from her husband, her qualifications and employment, and familial network and other connections to India, the Tribunal finds that there is nothing about that makes them special such as to warrant a recommendation to the Minister[.]*[420]

Given that the policy objectives include "end[ing] discrimination against women in all matters related to marriage and family relations" (CEDAW Article 16), and the special circumstances assessment provides considerable latitude to implement this objective, it seems surprising that gender discrimination is being treated as ordinary and not relevant as a 'special circumstance'. Each of these appellants had argued that their marital status would give rise to discrimination, which would seem to squarely engage Article 16 and warrant significant weight being accorded to this. The prospect of being removed from New Zealand to face such discrimination is a strong deterrent to separating from a violent partner, and I argue that this overarching policy consideration must be factored into decision-making in order to give effect to Article 16. In three of these cases, the suggestion that gender discrimination is not 'special' was also coupled with a comment that "[t]he appellant would prefer, for economic and social reasons, to remain in New Zealand and pursue the life she has begun to create for herself here".[421] This gives rise to similar concerns as the IPT's previously discussed comments that the policy is not designed to "guarantee a New Zealand-equivalent standard of living". Framing these women's concerns as a mere desire for a higher standard of living does not seem a reasonable summary of their position and minimises the hardship they raised. This aside, New Zealand's obligations to combat violence against women[422] and to ensure appropriate support structures for victim-survivors[423] should cast a different light upon family violence-related cases. For a migrant victim-survivor, there can be huge barriers to establishing an independent life after separation. Being able to do this in a supportive environment, where she can live without stigma and be financially independent, contributes greatly to a victim-survivor's recovery and restores some of the autonomy that was stripped from her. Conversely, taking this away and returning her to somewhere she will face economic and/or social hardship may seriously impede her recovery and amplify the harm she has suffered as a result of family violence. In this way, a victim-survivor's desire to continue the life she has established in a socially and economically supportive environment might properly contribute to her special circumstances.

Risks of Abuse in an Appellant's Country of Origin

Some appellants submitted that in their country of origin they would be at risk of further abuse from their relatives, ex-partner, or in-laws. In one case the Tribunal was persuaded that a return to her country of origin would likely lead to the appellant being pressured into reconciling with her violent husband, and this formed a part of her 'special circumstances'.[424] However, in other decisions appellants' fears of abuse were found to be insufficiently evidenced. The following example bears setting out at some length to explain the appellant's submissions as to the circumstances she faced:

420 [2020] NZIPT 205587 (India) at [68]–[69].

421 [2016] NZIPT 203416 (Fiji); [2014] NZIPT 201307 (China); and [2014] NZIPT 201489 (Fiji).

422 Convention on the Elimination of All Forms of Discrimination against Women GA Res 34/180 art 16; Declaration on the Elimination of Violence against Women GA Res 48/104 (1993), art 4.

423 Declaration on the Elimination of Violence against Women GA Res 48/104 (1993), art 4(g).

424 [2013] NZIPT 201736 (country withheld).

*The representative highlights the appellant's evidence that her older brother is abusive and does not respect the appellant and wishes only to maintain his reputation within their community. The [Iraqi-born Kurdish] appellant is extremely fearful of his reaction if she returns to Norway, where she says she has no rights as a woman. She fears for her life. There are many deaths arising from domestic violence in some ethnic communities and some women, like the appellant, who have run away from domestic violence, have been tracked down and killed. … [T]he appellant advised that she was entered into an arranged marriage by her father when she was nine years old: she was "swapped", in payment for her brother's wife. At one point, she was taken to a room and told that guards were standing outside the door. The appellant was terrified. Eventually, her brother divorced his wife. In response, the appellant's in-laws spread rumours about her and beat her every day and told her that her father would kill her. Eventually, her father came and took her home. She feared that he would kill her. After her father died, her brother was in charge of the family and she was treated badly. He arranged her marriage. She moved to Norway to live with her husband, but he treated her badly and turned the Kurdish community against her. They had a son in 1991 but then divorced and she was left to raise her son alone. Her family members came to live in Norway but treated her more badly than before. Eventually, she came to New Zealand, in 2018. Her sister was angry that she had travelled here unaccompanied, in breach of their cultural practice. The appellant came to believe that she could escape the authority of her older brother by marrying again. She was introduced to AA and they entered a cultural marriage, but he was abusive towards her. She suffered multiple forms of domestic violence and did not know what to do. Eventually, she escaped, with help from a friend, and obtained a protection order and support from Women's Refuge and counsellors. Her community is angry with her for leaving her husband and has reported the situation to her brother and family members overseas. The appellant explains that she wants to settle in New Zealand. She can have a life here and feel safe. … [The IPT determines:] **[t]here is no evidence of any recent abuse or demands from her brothers while she has been in New Zealand.**[425]*

In another case, the IPT similarly held the lack of any recent threats to the appellant in New Zealand negated any risk to her in India. This appellant had experienced legal systems abuse from her ex-fiancé as revenge against her for her commencing dowry harassment proceedings. He had made retaliatory efforts to instigate criminal proceedings against her in India and had an Indian law firm (falsely) claim to INZ that she was charged with 'criminal breach of trust' and 'cheating', and she ultimately abandoned her dowry harassment case. The IPT accepts the accusations against her were "prompted as an act of revenge by her ex-fiancé and his family", but concludes there is no longer a risk to her:

*The appellant told a psychologist … that her ex-fiancé would continue to seek to harm her and her child if she was forced to go back to India. The Tribunal finds there is no basis for this claim. First, the appellant discontinued legal proceedings against her ex-fiancé while in New Zealand, shortly after her son was born. The ex-fiancé's solicitor's letter, written for accusatory and retaliatory purposes rather than for any proper legal one … **is now over seven years old. There is no evidence of the appellant – or her family – receiving contact of any kind from her ex-fiancé's family while she has been in New Zealand.**[426]*

425 [2020] NZIPT 205667 (Norway) at [48], [56], and [59].
426 [2013] NZIPT 200770 (India) at [58]–[59].

Another case involved ongoing dowry harassment proceedings by the appellant, and the IPT concluded that the fact the appellant had been able to return to her home city for the proceedings negated any safety risk to her:

> *The appellant has returned to India because she was required to appear in the court-ordered mediation arising from what the appellant describes as her case against her "ex husband and in laws "dowry abuse"". It appears the case is ongoing, but it also appears that a mediated settlement is possible.* ***While the appellant claims that her former husband's family will wish to exact revenge by physically harming her, she has been able to return to her family in her home city twice this year without consequence.***[427]

As discussed earlier, family violence risk prediction is a complex task,[428] and the Family Violence Death Review Committee has stressed the need for evidence from family violence experts in order to make decisions that relate to victim safety.[429] This task becomes yet more complex when the abusive party has been in a different country to the victim, so she has largely been inaccessible to them. Predicting whether and how their behaviour might escalate when she within reach, and particularly if she is returned to a country with weaker police and community responses to violence, is an immensely challenging exercise. An absence of cross-border written or verbal threats may not amount to an absence of risk. Similarly, returning for short visits does not necessarily mean that a permanent return would be safe; for example, her whereabouts may not be known if she is there for short periods and her abuser(s) may not immediately respond to her presence with abuse. From another perspective, the fact that being in New Zealand has reduced the threats or harassment against an appellant could be viewed as further support for her need to remain.

Evidentially, it is very challenging for a victim-survivor to prove an objective likelihood of abuse in another country, unless she has evidence of specific threats or has already travelled there and been harmed. But it is increasingly being recognised that victim-survivors have the greatest expertise in their own safety, and often make the most accurate assessment of their own risk.[430] European and Australian family violence risk assessment tools have emphasised that the most accurate predictions of risk are made when women's subjective perceptions of risk are considered together with evidence-based victim-survivor and perpetrator risk factors and circumstances.[431] Generalised victim-survivor risk factors can include recent separation, a lack of financial independence, ongoing court proceedings involving the perpetrator, relocation, and isolation,[432] and of course for VFV visa applicants the legal, social, and cultural context in their country of origin will also be of great importance. I argue that an appellant's subjective fear of abuse, if based upon some reasonable grounds in light of her risk factors and any past abuse, should carry significant weight as a 'special circumstance'.

427 [2017] NZIPT 203941 (India) at [67].

428 See above n 310 and n 311.

429 Mark Henaghan, Jacqueline Short, and Pauline Gulliver "Family Violence Experts in the Criminal Court", above n 311.

430 Monique Albuquerque and others *European manual for risk assessment* (BUPNET GmbH, Göttingen, 2013) at 47.

431 See Cherie Toivonen and Corina Backhouse *National Risk Assessment Principles for Domestic and Family Violence* (ANROWS, 2018) at 22; and Al Monique Albuquerque and others *European Manual for Risk Assessment*, above n 430. See also Family Safety Victoria *MARAM Practice Guides: Foundation Knowledge Guide* (Victorian Government, July 2019) at 28.

432 See Family Safety Victoria *MARAM Practice Guides*, above n 431, at 28–31, for risk factors in the Victorian 'MARAM' framework.

IV. The IPT's Assessments of 'Special Circumstances' CONT.

A far lower probability of harm may warrant consideration as a 'special circumstance' in the family violence context than, for example, the objective 'well-founded fear of being persecuted' that is required for refugee status.[433] The reason I draw this comparison is that frequent references to women's fears of harm or hardship as 'speculative'[434] or 'based on assumption'[435] were noted (though not specifically in discussion of 'special circumstances'); this language is possibly drawn from the refugee status context.[436] While the use of this language may not have been intended to import a similar evidential standard, it bears noting that the cumulative 'special circumstances' test provides room to prioritise women's subjective fears and that weighting such evidence accordingly is appropriate in the context of family violence.

A more unusual approach was taken in a case where the appellant raised her mother as a likely source of abuse. Rather than dismissing the possibility of abuse, the IPT appeared to suggest that the appellant's experiences of family violence in New Zealand and her work in the prison system ought to provide her with 'strategies to deal with' future abuse:

> *[T]he appellant stated that she had a father who had not been involved in her life [and] a violent and abusive mother .... On appeal, the appellant reiterated that her prospects of employment and support from members of her family, her mother in particular, were minimal. She feared for her own personal safety and claimed that she would have nowhere to live and be unable to provide for herself. Two of the appellant's children made submissions with their aunt to corroborate the poor relationship the appellant has with her mother. ... The appellant's younger sister (the aunt) now states she is unable to "help" the appellant's family because she has an ill child. She claims she cannot "protect" the appellant against their mother's violent and irrational behaviour. ...* ***After 22 years in the prison service dealing with difficult abusive people and as a result of experiences in New Zealand it is not unreasonable to expect the appellant to have developed further strategies to deal with her mother.***[437]

433 Family violence-based refugee status appeals can raise significant evidential challenges and the IPT's approach to family violence risk assessment also warrants scrutiny in this context. For example, in [2016] NZIPT 800830 (Fiji) the IPT holds: "AA [the appellant and her daughters' abuser] was most recently sentenced to [a term of imprisonment]. ... Even accepting that he is an innately angry man, there is simply no evidence that, upon his release and return to Fiji, AA (or his family, for that matter) would wish to harm the mother or the daughters as an act of vengeance. Accepting that AA was violent toward his wife and daughters during the couple's marriage, there have been no other acts of physical violence (other than on one occasion when he attacked his eldest daughter) since 2010. The same thread runs through all the appellants' evidence, that AA is violent when challenged. Therefore, any such confrontation and reaction by him is much less likely to occur if AA is not living with his family. Claims that, some years after their separation and with his eventual return to Fiji following deportation, the mother and daughters remain at risk of being seriously harmed by him fall below the real chance threshold and are conjecture only."

434 [2020] NZIPT 205653 (China); [2019] NZIPT 205440 (Fiji); [2017] NZIPT 203941 (India); [2014] NZIPT 201535 (Philippines); [2014] NZIPT 201307 (China); and [2013] NZIPT 200861 (India).

435 [2018] NZIPT 204476 (Fiji) at [31]: "[INZ noted] that her fears about the level of ridicule and stigma she would face in Fiji because of their marriage break-up were based on assumptions"; and [2016] NZIPT 203416 (Fiji) at [19]: "[INZ] recorded that the appellant and her representative had claimed that the ex-husband's father in Fiji would take revenge on her but Immigration New Zealand considered this to be an assumption".

436 In determining what is meant by "well-founded" in art 1A(2) of the Convention Relating to the Status of Refugees, the IPT adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or **speculative**, chance of it occurring. *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 (HCA) at 572 similarly held that: "A fear of persecution is not well-founded if it is merely **assumed** or if it is mere **speculation**." The standard is entirely objective – see Refugee Appeal No 76044 (11 September 2008) at [57].

437 [2013] NZIPT 200839 (Singapore) at [16] and [44]–[48].

Notably, the Court of Appeal has held a similar line of reasoning to be inappropriate in decision-making concerning Protection Orders. In *SN v MN* the Court of Appeal found that the Family Court had erred in treating the applicant's "robust and resilient character" as a factor weighing against the necessity of a Protection Order, noting that this "does not diminish her need for protection".[438] It seems similarly inappropriate in an immigration context to reason that a woman's safety needs may be lesser due to her having withstood abuse in the past.

Contributions and Nexus to New Zealand

An appellant's contributions to New Zealand (typically in terms of their financial contributions) and their settlement in or nexus to New Zealand are factors considered in most special circumstances assessments, not only appeals concerning VFV visas. Victim-survivors can be at a disadvantage when assessed in these terms for obvious reasons, for example: a victim-survivor is more likely to have been kept in a situation of financial dependence by their abuser so may not be making large financial contributions; her ability to work may have been affected by the physical or mental health impacts of violence; she may not have consistently held visas allowing her to work; she is likely to have primary care responsibilities for any children; control and isolation by her abuser may have impeded her ability to settle and form ties with her community; and, if her community has close ties with her abuser, she may have lost contact with them upon separating. This may also disproportionately disadvantage women with limited English and women from the Global South, or from communities where they have not had the resources or opportunities to access higher education and highly paid employment. Indeed, many decisions noted the appellant's limited financial contributions:

While the appellant has been in New Zealand since 2007, she has not been able to establish herself here. She is not employed, has very little income and is reliant on the good-will of others. Notwithstanding her involvement with her church and her limited work experience, her potential contribution to New Zealand would be modest.[439]

Her contribution to the workforce in New Zealand through employment has been modest. There is no evidence before the Tribunal that she has any particular skills or attributes that are in demand in New Zealand.[440]

Her economic contribution through her employment was modest; she was last earning $33,238 per annum.[441]

The appellant's skills, work experience and potential contribution to New Zealand are not out of the ordinary in any way.[442]

Whilst the appellant is working here in New Zealand, her contribution to the economy of New Zealand cannot be regarded as anything more than modest. … She has little to contribute to the economy and her nexus remains limited.[443]

There is nothing particular about the appellant's skills or work experience which indicate that her potential contribution to New Zealand would be anything more than a modest one.[444]

438 *SN v MN* [2017] NZCA 289 at [43].

439 [2014] NZIPT 201535 (Philippines) at [72].
440 [2014] NZIPT 201504 (China) at [57].
441 [2017] NZIPT 203941 (India) at [78].
442 [2013] NZIPT 200770 (India) at [84].
443 [2013] NZIPT 201005 (Fiji) at [62]–[63].
444 [2013] NZIPT 200738 (South Africa) at [45].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

Beyond amounting to a lack of special circumstances, there was some suggestion that limited financial contributions are a factor weighing against an appellant which she must 'outweigh' with other factors:

> *While the appellant's employers speak highly of her contribution, her potential contribution to New Zealand's economy through paid employment cannot be considered to be anything more than modest. The appellant does not possess skills or qualifications in areas in which New Zealand currently faces a skills shortage. … The Tribunal finds that the appellant and her son have special circumstances arising from her situation as a survivor of domestic violence, the support network she and her son have available in New Zealand, the lack of support in [country withheld] and the familial pressure the appellant would face to reconcile with the husband if she returned to [country withheld].* ***These considerations outweigh her modest contribution*** *and the potential separation of the son from his father.*[445]

I argue that judging a victim-survivor's 'contributions' principally by reference to her earning potential, or lack thereof, is unduly narrow and fails to have regard to the violence she has experienced. As the authors of a recent paper with Australia's National Research Organisation for Women's Safety explain, family violence has profound impacts on women's economic capacity:

> *Perpetrators of domestic violence use multiple control tactics which exacerbate women's economic disadvantage. … [Economic abuse] can involve preventing or interfering with women's participation in education, training and employment, or with their acquisition or use of economic resources. It can also involve refusing to contribute to economic resources or generating economic costs for women. Even where tactics of economic abuse do not occur, the physical and psychological dimensions of domestic violence have economic effects, and result in financial disadvantage for women. This disadvantage is experienced in different ways by women in different circumstances. It influences when and how women can avoid or escape violence, and how they can participate in employment and society during and following violence, ultimately undermining women's independence and wellbeing over the life course.*[446]

The period following separation is also likely to have created huge disruption, which will impact on the ability of VFV visa applicants to work for a lengthy period. For example, it may take some time for a victim-survivor to find and settle into safe accommodation, to go through legal proceedings related to the separation and violence, to begin to address the health impacts of the violence and support her children in doing the same, and to establish new schooling or childcare arrangements, phone numbers, bank accounts, and other essential tasks. This process is likely to be vastly more complex for VFV visa applicants, who do not have New Zealand residence and consequently have very limited access to welfare benefits and funded healthcare, have limited access to social housing (so may have to spend very long periods in emergency refuge accommodation), may have very limited social support, likely have primary care responsibilities for any children, and may have limited English and/or knowledge of local systems. Within this context, holding her financial dependence against her arguably blames her for an entirely reasonable need for support in the aftermath of violence.

445 [2013] NZIPT 201736 (country withheld) at [52] and [65].

446 Natasha Cortis and Jane Bullen *Building Effective Policies and Services to Promote Women's Economic Security Following Domestic Violence: State of knowledge* (ANROWS, Sydney, August 2015) at 1.

Unsurprisingly, given the weight accorded to financial contributions, many appellants highlighted their determined efforts to be financially self-sufficient. In some cases, a woman's ability to economically support herself despite the violence and hardships she had faced was cited in her favour:

> *The appellant is described by her church minister as "very industrious, diligent and honest in all she undertakes". **She has held various jobs over the past three years, to provide for herself and her son,** despite having to rely on cycling or walking to work. She has worked long hours in less than acceptable conditions while "maintaining a vegetable garden and an immaculate home". **She is determined to independently provide for her son's education and accommodation needs** .... The appellant came to New Zealand intending to secure a better future for herself and her son through what she thought would be a happy and fulfilling marriage in her new husband's country of residence. She has been unable to do so because she is no longer eligible for residence under the Family (Partnership) category, due to domestic violence in that relationship. **She has nevertheless managed to support herself and her son without recourse to any government assistance.** ... The appellant and her son have made every effort to assimilate and to succeed in New Zealand, having taken up all the opportunities that New Zealand has to offer them. ... The appellant makes a modest but determined contribution. The son excels academically and in sport, which point to his making a valuable contribution in the future.*[447]
>
> *The Tribunal observes that **despite the difficulties the appellant has faced in her personal life, she has managed to perform in her current employment.** She has the clear support of her employer, who sees the appellant as having the potential to progress further in the business.*[448]

However, as was seen in the 'no means of financial support' assessment, efforts to highlight qualities that would make an appellant an asset to New Zealand could be a double-edged sword, and their determined efforts to support themselves were sometimes instead cited as a reason an appellant could withstand a return to her country of origin:

> *The appellant is described by her supporters as a strong resourceful woman who despite all the stresses arising from her failed relationship contributed much to her local community. She was actively involved in supporting women and children in the migrant community and was well respected as a masseuse running her own business. ... **The appellant has proven herself to be a capable and resourceful person** despite the trauma of her failed relationship and the related hardships she experienced in New Zealand.*[449]
>
> *Since her separation, she has continued to work, first in a fast food restaurant and then in a bank. She stated on appeal that she has worked hard, doing 40 to 70 hour weeks to support herself and to keep busy. ... The appellant's counsel stated that the appellant was hard working and motivated and that she had worked hard to establish herself, giving her a great sense of achievement and independence. The appellant holds a Diploma in Information Systems Management from Fiji and **now has almost five years work experience to draw on when seeking further employment [in Fiji].***[450]
>
> ***The appellant has built a successful massage therapy business in New Zealand.** She has worked hard to achieve this and submitted letters of support from her business landlord and others, who speak to her talent and commitment to this work. ... **In Germany, she will be able to obtain employment or set up another massage business.***[451]

447 [2016] NZIPT 203221 (China) at [47] and [56]–[58].
448 [2013] NZIPT 201737 (country withheld) at [57].
449 [2013] NZIPT 200839 (Singapore) at [52] and [62].
450 [2014] NZIPT 201489 (Fiji) at [42]–[43].
451 [2013] NZIPT 200938 (Germany) at [45]–[46].

This puts appellants in a difficult position; if they fail to show their financial self-sufficiency they may be assessed as making negligible contributions, but if they have been financially self-sufficient this may be interpreted as a reason they will fare well if returned to their country of origin. It is unclear on what principled basis appellants' similar employment efforts could be interpreted in these two distinct ways. Again, I would argue that appellants' context of family violence and New Zealand's obligation to combat violence against women ought to influence the way such evidence is interpreted. From this perspective, using a woman's hard-won financial independence to suggest she can simply do the same in her country of origin undervalues the achievement this self-sufficiency in New Zealand represents for a victim-survivor, and the effort it may have taken to reach that position. Instead, when the lens of family violence is applied, greater weight may be accorded to a victim-survivor's efforts to establish a violence-free life for herself and her children as a valuable contribution of itself, irrespective of her need for financial (or other) support to do so. Contextualising her contributions within her experience of family violence means that the quantum of her financial contributions becomes less significant; while appellants who have overcome significant barriers to achieve financial self-sufficiency should indeed be applauded and valued for their resilience and determination, it does not follow that a victim-survivor's contributions are negligible if her earnings are 'modest', nor that victim-survivors with financial support needs do not make valuable contributions. Her 'contributions' must instead be set in the context of the barriers she has faced.

A positive development was noted in some recent (2019–2021) decisions in terms of valuing victim-survivors' contributions to New Zealand in non-financial terms, particularly through the recognition in five decisions of appellants' parenting role as a valuable contribution.[452] This is an important shift that acknowledges the substantial economic and social value of unpaid care work.[453] Particularly in the context of separation following family violence, women are likely to have primary care responsibilities for children and their work in building a safe home for their children ought to be highly valued. This development also seems aligned with the increasing weight being given to children's interests in recent decisions, as will be discussed in the next section. Additionally, some increasing recognition of women's non-financial contributions to their wider community was noted, though the weight given to these contributions is unclear:

> ***The Tribunal also notes the appellant's active engagement in her local community*** *which has extended to directing a series of workshops that focused on traditional hauora, personal wellbeing, leadership and community partnership.*[454]
>
> *It is apparent from the many letters of support for the appellant that* ***she is an active member of her community.***[455]

452 [2021] NZIPT 206350 (Canada); [2021] NZIPT 205917 (UK); [2020] NZIPT 205585 (South Africa); [2019] NZIPT 205356 (Philippines); and [2019] NZIPT 205576 (Philippines).

453 Characterising women who primarily undertake unpaid care work as economically 'unproductive' is inaccurate, as this labour represents a significant economic contribution. A report of the UN Secretary-General explains: "[t]he total value of unpaid care and domestic work is estimated to be between 10 and 39 per cent of GDP, and can surpass that of manufacturing, commerce, transportation and other key sectors. Unpaid care and domestic work supports the economy and often makes up for lack of public expenditure on social services and infrastructure. In effect, it represents a transfer of resources from women to others in the economy." Report of the Secretary-General *Women's Economic Empowerment in the Changing World of Work* UN Doc E/CN.6/2017/3 (December 2016) at [25].

454 [2021] NZIPT 206350 (Canada) at [53].

455 [2021] NZIPT 205917 (UK) at [45].

She intends to set up an organisation to support women who are victims of domestic violence, and to assist them as they deal with various court and other processes. She hopes to return to university and obtain a law degree and specialise in immigration law to help people who have to face situations like her. … She has had some employment here, including as a branch manager, and ***intends to make a positive contribution to New Zealand, through forming an organisation to support victims of family violence*** *and to retrain and then gain related employment.*[456]

The recognition of these contributions to any degree is a positive step. However, the cases where appellants' non-financial contributions were cited favourably all involved children and the children's interests appeared to be the determinative factor. In cases involving childless appellants, similar potential to contribute financially and non-financially did not contribute to a finding of special circumstances – perhaps reflective of the overall trend of children's interests being far more persuasive than victim-survivors' own circumstances and needs:

It is submitted on appeal that the appellant has the potential to make a significant future contribution through her employment in her specialist field [outdoor education]. In his letter on appeal, the general manager for the appellant's current employer states that the appellant is a valued member of staff and that her skills and experience are a huge asset to the business. … The Tribunal also notes that the appellant works as a volunteer for a group which provides care to animals. … The Tribunal accepts that the appellant has the potential to contribute to New Zealand through such employment particularly as a woman working within this field. She is highly regarded for her professionalism and passion for her sport. Nevertheless, ***the extent to which the appellant would be able to make a future contribution through such employment is not such as to warrant consideration by the Minister of an exception to instructions.***[457]

The appellant is well educated. She has a Bachelor of Business Administration degree which she obtained in India and, while she has not worked in that country, she has worked here as a business services administrator. … The appellant is an independent, well-educated woman who has worked in New Zealand and believes she can again find employment here. … ***The fact that she is presently financially independent and has been able to support herself in New Zealand is to her credit but does not make her circumstances uncommon or out of the ordinary.***[458]

The appellant was awarded a Bachelor of Pharmacy, in 2007, and a Master of Pharmacy qualification, in 2009, in India, and then worked as a research associate, from October 2011 to March 2017, in X city in Gujarat state. According to the reference from her employer [in India], the appellant's contribution to the company was valued and cherished. She was a contributing team member and found to be sincere and hardworking. … ***[T]here is nothing to suggest that her settlement in or contribution to New Zealand is out of the ordinary or unusual.***[459]

456 [2020] NZIPT 205585 (South Africa) at [50] and [59].

457 [2021] NZIPT 206136 (Netherlands) at [50], [53], and [60].

458 [2017] NZIPT 203941 (India) at [47] and [76]–[77].

459 [2020] NZIPT 205587 (India) at [63] and [68].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

The only case of an appellant without children being found to have 'special circumstances' was a citizen of the United States who the IPT determined would make significant contributions to New Zealand through her employment and potential future inheritance:

> *[The appellant] currently holds provisional registration as a social worker. … The appellant has a Level 8 qualification, in social work specialising in hospice care. In New Zealand she has practised predominantly in this field and developed expertise and provided what has been described as "exemplary" care. … She may also eventually bring into New Zealand an investment of around US$2 million. … She is clearly able to contribute to New Zealand society through her [social work] service in hospices.*[460]

While it is positive that this appellant's skill and experience was given due recognition, her circumstances seem far removed from those of most VFV visa applicants. She was able to show that she and her family had considerable financial means, that she worked in a field with a skills shortage, and that she would have had a pathway to residence under the Skilled Migrant category but for the fact she was one year above the age limit. The context of her experiences of violence appeared to be of little relevance to the finding of 'special circumstances'.

In terms of appellants' settlement in and nexus to New Zealand, again appellants' context of family violence did not appear to factor significantly into the assessment. Family ties overseas (or a lack thereof in New Zealand) generally appeared to be accorded the greatest weight:

> ***The appellant's family nexus remains to India, where her parents and brother reside,*** *and she continues to have the emotional and financial support of her parents notwithstanding her circumstances.*[461]
>
> *The appellant came to New Zealand as an adolescent in 2002 …. The Tribunal acknowledges that, given the number of years that the appellant spent in New Zealand [over 10 years], she will undoubtedly have made friends here, have social connections here and have become thoroughly familiar with the New Zealand way of life.* ***Even so, the appellant maintained her links with her family in China*** *by communicating with them regularly and by returning to her family home from time to time. …* ***The appellant's family nexus is to China*** *and she now [that she has separated] has no other strong nexus to New Zealand.*[462]
>
> *The appellant has spent a short period of time in New Zealand, of two years. …* ***She has little connection to New Zealand, other than through her sister,*** *and, according to the appellant, their relationship is problematic.*[463]
>
> *The only nexus that the appellant has to this country is that which she developed through her employment and the time she spent here, which is less than four years. … The appellant's second return to India this year [for dowry harassment proceedings] underscores the* ***support she has from her family and friends there.*** *Her family and social nexus to that country is strong.*[464]

460 [2016] NZIPT 203384 (USA) at [46] and [60]–[63].

461 [2020] NZIPT 205587 (India) at [68].

462 [2014] NZIPT 201504 (China) at [51], [56], and [59].

463 [2020] NZIPT 205667 (Norway) at [4] and [59].

464 [2017] NZIPT 203941 (India) at [68] and [78].

While the appellant feels settled in New Zealand and wants to remain living and working here, and acknowledging that it will be difficult for her to leave and break the ties which she has here, ***the appellant maintains a positive relationship with her mother in the Netherlands*** *and is familiar with life there.*[465]

Apart from the fact her daughter is a New Zealand citizen, the only permanent family nexus she has to New Zealand is one of her three siblings, *who has residence status here.*[466]

In this case the appellant has ***little nexus to New Zealand other than having a New Zealand citizen child*** *who has spent his infancy and just commenced school here.*[467]

The appellant has lived in New Zealand since 2007, ***but retains a strong nexus to the Philippines, where all of her immediate family live. She has little nexus to New Zealand other than having a young New Zealand-citizen daughter.***[468]

One of the appellant's brothers and his immediate family are resident in New Zealand. Their mother spends periods of time in New Zealand also. She does not hold permanent residence here. ***The appellant's other brother and sister, and their respective families, remain living in Fiji.*** *... She has little to contribute to the economy and her nexus remains limited.*[469]

Again, the context of family violence may have a significant bearing upon the assessment of a victim-survivor's nexus. For example, a lack of meaningful support from family in her country of origin may make her supports in New Zealand of greater importance, or the support network she has built here may be essential for her continued recovery. However, family ties were found to be determinative of an appellant's nexus even where she argued that her family were unsupportive:

[T]he appellant claims that she cannot return to her family in India because she will be shunned based on her personal circumstances and her family will not accept her back from her "failed marriage" because of the disgrace this brings. A supporter of the appellant who visited her family in India ... said the appellant "would be a burden on an already stretched household" and that there "would be stigma attaching" to the appellant's family if she returned without a "good explanation" from the husband or his family. This indicates that the appellant may have some difficulties with her family, but not that they would fail to accept her back. ... The appellant has no familial nexus to New Zealand. Her social nexus has been established since June 2008 through living and working here and her involvement in her religious sect. ... ***The appellant's family remain in India and she has maintained contact with them. Her familial nexus is to India.***[470]

Similarly, family violence can impact on an appellant's settlement. For example, isolation, surveillance, and other tactics of psychological abuse may have impeded her integration into her community, she may have faced exclusion or derision within her community for reporting violence or separating, or she may have had to focus her energies on attending to her basic safety and mental health needs. This should not constitute a 'failure' to settle on her part, as it appeared to be in the following decision:

465 [2021] NZIPT 206136 (Netherlands) at [61].
466 [2013] NZIPT 200738 (South Africa) at [68].
467 [2013] NZIPT 200770 (India) at [81].
468 [2014] NZIPT 201535 (Philippines) at [77].
469 [2013] NZIPT 201005 (Fiji) at [50] and [63].
470 [2013] NZIPT 200861 (India) at [61]–[62], [65], and [70].

> *The appellant said she was already an outcast among the Indian community in New Zealand and claimed that it would be worse in India. … **Although the appellant has spent a relatively long period in New Zealand, this has not resulted in a particularly successful settlement for her.** The psychologist's report states that she is isolating herself even in this community. A desire to avoid upheaval and change is not the same as having a sense of stability or belonging in New Zealand.*[471]

Even where the appellant *was* found to have settled well in New Zealand, this was not necessarily deemed significant:

> *The appellant has lived in New Zealand for eight years. She has established herself in work and created a life for herself here. **It is not out of the ordinary that, after such a length of time living in New Zealand, a temporary visa holder should become settled here.***[472]
>
> *The appellant has lived in New Zealand for five years. She has established herself in work after her marriage ended and has created a life for herself. She appears to now have a new partner and her application for a work visa based on this relationship is currently being tested. **It is not out of the ordinary that, after a period of time living in New Zealand, the appellant has become settled here.***[473]
>
> *The appellant has been living in New Zealand for the last four years. She has received counselling and support which has helped her to deal with the traumatic experiences arising from her abusive marriage and she has obtained part-time employment and has created a life for herself here, whilst having the support of her siblings, friends and church and community organisations. She has recently entered into a new relationship with a New Zealand citizen. The Tribunal accepts that the appellant may inevitably face some challenges re-establishing herself in Fiji and that **she will not have the same familial support networks in Fiji, as her siblings live in New Zealand. However, the appellant has spent the majority of her life in Fiji …. The appellant's son, who is now a young adult, and the appellant's mother remain living in Fiji** and they should at least be able to provide the appellant with emotional support.*[474]
>
> *Since the appellant has been in New Zealand, she has obtained employment and enjoyed good relationships with her work colleagues and neighbours, made friends, and, following the end of her marriage, received support from her ex-husband's family. … Nonetheless, **her connection to this country has not been a long one.** … It is acknowledged that the appellant has established relationships since she has been in New Zealand but **there is no reason to believe that she has not made similar connections in the many countries in which she has been resident** over the last 30 years.*[475]

Once again, the context of family violence seems largely irrelevant in these assessments; framing the appellants' situations as 'ordinary' instances of a temporary visa holder becoming somewhat settled erases their experiences of family violence. VFV visa appellants typically have relocated to or settled in New Zealand with a reasonable expectation of this being permanent, as their partnership provided a clear pathway to residence. They have established their lives, and often their families, in New Zealand, only to lose their right to remain because of family violence perpetrated against them. In the aftermath of violence, the separation of a victim-survivor from the life, employment, and support network she has built should not be characterised as an 'ordinary' situation of a temporary visa holder needing to leave New Zealand.

471 [2013] NZIPT 200770 (India) at [37] and [83].
472 [2016] NZIPT 203416 (Fiji) at [71].
473 [2014] NZIPT 201489 (Fiji) at [45].
474 [2019] NZIPT 205440 (Fiji) at [76]–[77].
475 [2014] NZIPT 201610 (UK) at [40], [43], and [45].

Children's Best Interests

Finally, I turn to the most influential factor in the IPT's findings of 'special circumstances', the interests of appellants' children. Of the 29 decisions involving dependent children, special circumstances were found in 13 (45 per cent). Special circumstances were not considered in a further seven of these cases (24 per cent), as the IPT had already determined the application should be returned to INZ for reassessment or had directed the appellant be granted residence in deportation proceedings. As noted above, appellants' children's interests were cited in all but one of the published decisions in which 'special circumstances' were found.[476] It is unsurprising that children's interests appear so prominently in 'special circumstances' appeals, given there is no scope within the VFV visa scheme (or any other residence category) to grant a mother a resident's visa on the basis she will be separated from her dependent children if she must leave New Zealand. As noted earlier, the VFV visa policy is woefully deficient in its consideration of children in several regards: despite the policy objectives citing New Zealand's UNCROC obligation to protect children, the policy criteria do not actually allow for any consideration of children's safety or interests.[477] Further, even where a woman meets the VFV visa criteria she can face challenges including her children in the application, as she must show she has a court order or the consent of the child's other parent (typically her abusive ex-partner) for her to 'remove' the child from their country of origin.[478] This hands considerable power to perpetrator of violence, as an applicant must seek his consent to remain in New Zealand with her child(ren) (even if he resides in New Zealand himself), or obtain a court order against him granting her the right to determine the child's place of residence.[479] The separation of a victim-survivor from her child(ren) as a result of leaving a situation of family violence is an appalling outcome, and one that arises because of current immigration policy. This is contrary to the international obligations that are specifically cited in the VFV policy objectives and is a huge barrier to safety for migrant women and children. In the experience of our Community Law centre, the risk of separation from her children is often the dominant factor preventing migrant victim-survivors from leaving a violent partner; New Zealand's immigration policy does nothing to assuage such fears and separation can be a real prospect.

Given that 'special circumstances' appeals are the primary means of averting such perverse outcomes,[480] it is vital to understand the weight the IPT accords to children's interests and particularly the risk of family

476 [2021] NZIPT 206350 (Canada); [2021] NZIPT 206241 (China); [2021] NZIPT 205917 (UK); [2020] NZIPT 205672 (UK); [2020] NZIPT 205607 (Japan); [2020] NZIPT 205585 (South Africa); [2019] NZIPT 205576 (Philippines); [2019] NZIPT 205356 (Philippines); [2016] NZIPT 203221 (China); [2013] NZIPT 201737 (country withheld); [2013] NZIPT 201736 (country withheld); [2013] NZIPT 200969 (Fiji); and [2012] NZIPT 200134 (Fiji). One successful 'special circumstances' appeal ([2016] NZIPT 203633 (Fiji)) had its reasoning redacted in full, so it is unclear whether children were involved.

477 Children's safety is not relevant to any of the policy criteria; children cannot apply for VFV visas in their own right, and the 'unable to return to their home country' test applies to the principal applicant (i.e. the child's parent). There is no basis on which a VFV visa could be granted by Immigration New Zealand based upon safety or hardship concerns for the child in their country of origin.

478 This is a generic requirement for all residence applications (as specified in R2.1.45 of the Immigration New Zealand *Operational Manual*), but the drafting appears ill-suited to VFV visa applications. The provision refers to proof of the right to remove the child from their "country of residence" or "the country in which rights of custody or visitation have been granted". In most VFV visa applications the child is presently residing in New Zealand, any custody and contact arrangements were settled in New Zealand, and the child's other parent is also residing in New Zealand. Interpreted literally, this would mean an applicant had to prove a legal right to remove their child from New Zealand in order to obtain a New Zealand visa. In practice, our Community Law centre has found that in these cases INZ interprets R2.1.45 as requiring proof of the right to determine the child's place of residence (outside their country of citizenship).

479 See Immigration New Zealand *Operational Manual* (2022) at R2.1.45(c). An applicant must provide either: "legal documents showing that the applicant has custody of the child and the sole right to determine the place of residence of the child, without rights of visitation by the other parent; or a court order permitting the applicant to remove the child from its country of residence; or legal documents showing that the applicant has custody of the child and a signed statement from the other parent, witnessed in accordance with local practice or law, agreeing to allow the child to live in New Zealand".

480 Once they become liable for deportation (i.e. once their visa has expired and they are 'unlawfully' in New Zealand), appellants who were unsuccessful in appealing against the decline of a VFV resident's visa may also have a right to appeal their liability for deportation on humanitarian grounds (Immigration Act 2009, s 206). However, I argue that the 'special circumstances' appeal is a more appropriate forum for the risk of family separation to be addressed in VFV visa appeals, as is discussed later in this section.

separation. As was affirmed by the Supreme Court in *Ye v Minister of Immigration*,[481] the IPT is required "to have regard to the best interests of children as a primary consideration". This obligation is drawn directly from Article 3(1) of the Convention on the Rights of the Child. Further, "[t]he word 'primary' implies that the weight to be given to the child's best interests must be substantial".[482] UNCROC Article 3(1) was directly referenced in 10 decisions.[483] One further (unsuccessful) decision cited Article 9 of the Convention on the Rights of the Child, which enshrines the right for a child not to be separated from his or her parents against their will (the right to family unity), except when such separation is "necessary for the best interests of the child". In dismissing this appeal, the IPT reasoned that it was for the Family Court rather than the IPT to give effect to this obligation.[484] This would seem to misinterpret Article 9; the potential separation of mother and child was not at all "necessary for the child's best interests" and the fact that this separation would therefore contravene the right to family unity should be relevant to the IPT's decision-making.[485] There were very few other direct references to children's right to family unity with their primary carer,[486] despite the fact that the High Court has affirmed that, in immigration decision-making, "[o]f real significance, too, in this context of the best interests of the child is the related importance of maintaining the family unit".[487] Interestingly, the UNCROC article contained in the VFV policy objectives (Article 19, concerning the protection of children from mental and physical violence) was not discussed in any decision and appears to have little direct influence upon decision-making.

Overall, a highly variable picture of the treatment of children's interests emerged. For example, several decisions stated that an appellant's inability to remove her child from New Zealand (putting her and the child at risk of separation) did not operate as a "trump card" warranting a grant of residence,[488] while others gave significant weight to the likelihood of an appellant being separated from her children.[489] Some cases cited the disruption, reduced support, and educational disadvantage a child may face if removed from New Zealand,[490] while others swiftly dismissed such arguments and observed that children are

481 *Ye v Minister of Immigration* [2009] NZSC 76 at [24] per Tipping J. On the impact of international obligations concerning children's rights on immigration decision-making, see Tennent, Armstrong, and Moses *Immigration and Refugee Law*, above n 124, at 36–40.

482 Huang v Minister of Immigration [2008] NZCA 377 at [49].

483 [2021] NZIPT 206350 (Canada); [2021] NZIPT 206241 (China); [2021] NZIPT 205917 (UK); [2020] NZIPT 205672 (UK); [2020] NZIPT 205607 (Japan); [2020] NZIPT 205585 (South Africa); [2019] NZIPT 205576 (Philippines); [2013] NZIPT 201737 (country withheld); [2013] NZIPT 201736 (country withheld); and [2013] NZIPT 200969 (Fiji). Interestingly, all 10 decisions that directly referenced Article 3(1) were successful.

484 [2013] NZIPT 200738 (South Africa) at [62]–[63]: "In New Zealand it is clearly the preserve of the Family Court to make decisions about a child's guardianship, day-to-day care, and the terms of contact with the non-custodial parent. … If the ex-partner disputes that it is in the best interests of the child to live with her mother and maternal grandparents in South Africa, he will have the opportunity to participate in Family Court proceedings. In the event of such a dispute, the Family Court is clearly the appropriate forum for decisions to be made as to the child's place of residence and the type of contact to be guaranteed to the non-custodial parent. The Family Court has access to trained lawyers for children, child psychologists, and relevantly experienced counsel, mediators and decision-makers."

485 The High Court considered the significance of children's right to family unity in immigration decision-making in *P v Minister of Immigration* (1999) 18 FRNZ 69 at 80–81: "[The immigration] Minister was obliged by the terms of the Covenant [on Civil and Political Rights] and the Convention [on the Rights of the Child] to take into account the importance of the family unit and to treat the best interests of the child as a primary consideration".

486 There was one direct reference to family unity by the IPT, [2020] NZIPT 205607 (Japan) at [68]: "It is in the interests of family unity that she should have the opportunity to grow up with her siblings"; and one reference to a submission on family unity made by counsel, [2013] NZIPT 201737 (country withheld) at [18]: "Counsel also highlighted international obligations in relation to family unity and the best interests of the appellant's New Zealand-citizen children."

487 *Al-Hosan v Deportation Review Tribunal* HC Auckland CIV-2006-404-3923, 3 May 2007 at [57].

488 See [2013] NZIPT 200738 (South Africa) at [65]; [2017] NZIPT 203950 (Philippines) at [105]; and [2013] NZIPT 200770 (India) at [80].

489 See, for example, [2013] NZIPT 201737 (country withheld); [2016] NZIPT 203221 (China); and [2020] NZIPT 205585 (South Africa).

490 See [2021] NZIPT 206241 (China) at [51]: "AA, who is now aged 15 years, has been living in New Zealand from February 2017. The Tribunal considers that it is likely that she feels settled here and that she will have made some friends and have become accustomed to the New Zealand education setting and teaching methods. While she could return to China, this would require some adjustment particularly as she has been out of the Chinese education system for some four years"; [2016] NZIPT 203221 (China) at [55]: "The difficulties that the son would encounter if he had to try and re-enter the Chinese education system, given the hiatus of three and a half years in which he has not sat the requisite examinations, is recognised"; and [2012] NZIPT 200134 (Fiji) at [64]: "the daughter's best interests will be enhanced by her staying in New Zealand where, after access to professional help, she has been able to thrive emotionally and academically".

adaptable.[491] Markedly different outcomes were seen in cases involving dependent children who were minors versus those who were 18–24 years old;[492] of the 22 decisions where dependent children's interests were considered, special circumstances were found in 71 per cent of decisions (12 out of 17) involving minor children, but only 20 per cent of cases (1 out of 5) involving 18–24-year-old children. Special circumstances were not found in relation to any children who resided offshore at the time of the appeal.[493] No other obviously discernible patterns were noted as to why children's interests were given limited weight in some cases and far greater weight in others but, in a positive development, recent decisions appeared to prioritise children's interests more highly. Since 2019 no appeals involving minor children have failed, whereas prior to this appeals involving minor children were often unsuccessful.

1. De facto removal of New Zealand-citizen children

The obligation to treat a child's best interests as a primary consideration, and New Zealand's other UNCROC obligations towards children, of course apply irrespective of the child's immigration status. However, an unexpected consequence of the IPT's inconsistent application of these obligations was that some decisions sanctioned the de facto removal of New Zealand citizen children, including in one instance a Māori child. In four unsuccessful appeals the affected minor children were New Zealand citizens,[494] who are entitled to "the cardinal and absolute residence right of citizens".[495] In these cases, the affected children's right to reside in New Zealand was effectively being impinged upon by the denial of residence to their mothers. As then Court of Appeal judge Susan Glazebrook explained in *Ye v Minister of Immigration*, in such circumstances the non-citizen parent must either take the child out of New Zealand, which amounts to "a de facto removal of the child by the State", or the child is left behind and the non-citizen parent's removal "must be seen as the real and operative cause of the disintegration of the family unit".[496] The harm that a mother's removal may inflict is heightened in VFV visa appeals (whether or not the child is a citizen), as the child's parents are usually separated and the victim-survivor may not be granted permission to take the child with her (putting the child at risk of considerable psychological harm by separating them from their primary carer), and the other available carer if the child must be left in New Zealand is often the parent who uses violence. Even though such severe outcomes were at stake, the four unsuccessful IPT decisions involving citizen children appear to have given little weight to the effective expulsion of these children with their mothers. In one case, the right of the appellant's five-year-old child to remain in New Zealand was specifically raised but promptly dismissed by the IPT. This right was of particular significance because the affected child was Māori, so his right to remain connected to his cultural identity was in issue. The IPT reasoned:

> *It is acknowledged that there is an order preventing the removal of the appellant's child from New Zealand until further order of the court. The appellant's ex-husband has also written to the Tribunal stating he:*

491 See [2014] NZIPT 201535 (Philippines) at [68]: "While the daughter may find leaving her current life disruptive, given her age, there is no reason that the daughter could not adjust to living in the Philippines, and, with the sensible and loving support and encouragement of her mother, will be able to settle again." See also [2013] NZIPT 200770 (India) at [72].

492 See Immigration New Zealand *Operational Manual* (2022) at F5.1 for the definition of 'dependent' child. They must be either: aged 17 or younger and single; aged 18–20, single, and childless; or aged 21–24, single, childless, and 'totally or substantially reliant on an adult for financial support'.

493 See [2013] NZIPT 200839 (Singapore); [2019] NZIPT 205151 (Russia); and [2019] NZIPT 205440 (Fiji).

494 [2017] NZIPT 203950 (Philippines); [2014] NZIPT 201535 (Philippines); [2013] NZIPT 200770 (India); and [2013] NZIPT 200738 (South Africa).

495 *Ye v Minister of Immigration* [2008] NZCA 291 at [99]. See also *Al-Hosan v Deportation Review Tribunal* HC Auckland CIV-2006-404-3923, 3 May 2007 at [55]: "It is a significant step indeed for the Tribunal to confirm a revocation order where the effect on an innocent and dependent child is either the loss of the practical benefits and rights of citizenship or the disintegration of the family unit by a mother's exercise of Hobson's choice to remain here with the children and separate permanently from the father. In this context the State owes a duty to protect the interests of a citizen such as a child who is in a position of special vulnerability". Internationally, see the High Court of Australia case *Minister of Immigration and Ethnic Affairs v Teoh* [1995] HCA 20 per Gaudron J.

496 *Ye v Minister of Immigration* [2008] NZCA 291 at [104].

> *... will never allow my son to leave New Zealand under any circumstances as he belongs here. This is his land. I feel threatened of him going to India as he will loose his identity and will be at risk of social discrimination and stigma. He is a Maori and it is his birthright to live around his whanau and grow up here in New Zealand and not in India. (sic)*
>
> *... there is no reason the appellant cannot continue to parent her son in India, as she does in New Zealand, and no evidence that the father's contact is so critical to the son's best interests that he needs to stay in New Zealand. Further,* ***while the son is entitled to know about both his parents' cultures, naturally he will be more exposed to the culture of his custodial parent. His father's twice yearly visits can have done little to assist his son adopt a Maori identity or become familiar with his whanau.*** *As for the father's claim that it is his son's birthright to stay in New Zealand, as a New Zealand citizen, the son is free to depart or return to New Zealand at any time.*
>
> ***That is a self-evident, but distinct, principle from the question of whether his mother is entitled to remain in New Zealand.*** *Because this is a situation where a child's parents are separated, and because currently there is an order preventing the son's removal from New Zealand, permission for the appellant to remove him from the jurisdiction and decisions about the type or level or location of contact that the ex-husband is to have with his son will need to be dealt with either by agreement or adjudication in the Family Court.*[497]

It seems surprising that the effective expulsion of a Māori New Zealand citizen was given so little weight, and perverse that his limited contact with his father (seemingly due to safety issues) was interpreted as reducing the child's need or capacity for connection to his Māoritanga. This also appears to apply a very Eurocentric understanding of cultural identity, elevating one parental relationship while ignoring the importance of wider whānau, whakapapa, and whenua connections. It seems inaccurate to characterise this five-year-old's right to remain in New Zealand as "distinct ... from the question of whether his mother is entitled to remain", given that his dependence upon his mother meant she would need to take him with her (assuming the Family Court would allow this). This decision thus effectively deprived a Māori child of the benefits of New Zealand citizenship,[498] at least until his adulthood, which I argue should invoke consideration of New Zealand's obligations under Te Tiriti o Waitangi[499] and the provisions of the Declaration on the Rights of Indigenous Peoples,[500] as well as the general right to the benefits of New Zealand citizenship.[501]

497 [2013] NZIPT 200770 (India) at [75]–[78].

498 While the issue under consideration was somewhat different, it is interesting to note that the High Court of Australia recently considered the citizenship rights of indigenous peoples in *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3. The plaintiffs were non-citizens with Aboriginal ancestry whose visas had been cancelled and were facing deportation. The majority determined that Parliament did not have the power to treat an Aboriginal person as an 'alien', and therefore cannot deport them.

499 In this regard, I note Gallen and Goddard JJ's finding in *Barton-Prescott v Director-General of Social Welfare* HC Napier AP71/96, 27 May 1997 that "all Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty of Waitangi".

500 For example, the right to full participation in cultural life (art 5), the right to belong to an indigenous community (art 9), the right of indigenous peoples not to be forcibly removed from their lands (art 10), the right to practice cultural traditions (art 11), the right to practise spiritual traditions and access cultural sites (art 12), indigenous childrens' right to education in their own culture and language (art 14), the right to improvement of their economic and social conditions (art 21), the right to their lands (art 26), and the right to maintain and develop their cultural heritage (art 31).

501 For further commentary on the expulsion of citizen children with non-citizen parents (in a British context), see Caroline Sawyer "Not Every Child Matters: The UK's Expulsion of British Citizens" (2006) 14(2) The International Journal of Children's Rights 157.

In three of the four unsuccessful appeals involving citizen children the IPT envisaged that the appellant would seek Family Court approval to take her child with her (though in each case the appellant's evidence was that her ex-partner was likely to oppose the child's removal). In dismissing these appeals the IPT made comments that the children were free to come and go from New Zealand:

> *As a New Zealand citizen, the [three-year-old] daughter is able to return here in the future, should she wish to do so. … Even if she lives with her mother in the Philippines in the interim, as a New Zealand citizen, the daughter maintains links with this country and may choose to live here once she is older.*[502]
>
> *[A]s a New Zealand citizen, the [five-year-old] son is free to depart or return to New Zealand at any time. … Even if he lives in India with his mother in the interim, as a New Zealand citizen, her son may choose to live in New Zealand once he is older.*[503]
>
> *[A]s a New Zealand citizen, the appellant's [three-year-old] child is free to depart or return to New Zealand at any time. Even if she lives in South Africa with her mother and grandparents in the interim, she may choose to live here once she is older.*[504]

These comments seem to minimise the children's effective loss of the benefits of their citizenship, suggesting that the children are free to enjoy the benefits of citizenship in future. Besides the obvious absurdity of small children 'returning at any time' without their primary carer or any financial means, such reasoning had been specifically rejected by Justice Glazebrook in the Court of Appeal several years prior in *Ye v Minister of Immigration*:

> *The argument has been posited in other jurisdictions that any de facto deportation or removal [of a parent] is merely a postponement of any citizenship rights [of the child] and not a bar to their exercise … However, since the enjoyment of rights such as welfare, health care and education in New Zealand are dependent on the citizen remaining in this country, even a temporary removal from New Zealand can inflict harm which cannot be remedied by the citizen child returning later to New Zealand (even assuming that the child will be able to afford to do so).*[505]

Accordingly, cases where the de facto removal of a citizen child is at stake require "a careful examination of all of the circumstances including, if necessary, a comparison with the educational, health and welfare facilities available for children" in New Zealand versus the country the child would be taken to.[506] The four studied IPT decisions gave very little consideration to such matters. In an Australian context, the Federal Court of Australia has elaborated on the necessary considerations, including: the deprivation of the "protection and support, socially, culturally and medically" of their country of citizenship; "the resultant social and linguistic disruption of their childhood as well as the loss of their homeland"; "the loss of educational opportunities available to the children"; and "their resultant isolation from the normal contacts of children with their [Australia-based] family".[507] In the context of VFV visa appeals, I would argue that children's previous exposure to violence will often give rise to a heightened need for the support and stability available to them in New Zealand.

502 [2014] NZIPT 201535 (Philippines) at [67] and [76].

503 [2013] NZIPT 200770 (India) at [77] and [82].

504 [2013] NZIPT 200738 (South Africa) at [67].

505 *Ye v Minister of Immigration* [2008] NZCA 291 at [108].

506 *Al-Hosan v Deportation Review Tribunal* HC Auckland CIV-2006-404-3923, 3 May 2007 at [56].

507 *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568 at [30].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

2. Availability of further appeal rights

Several unsuccessful appeal decisions reasoned that the appellant would have a further right to appeal to the IPT against her deportation liability once she became an unlawful 'overstayer',[508] implying that the children's interests could be revisited, and perhaps given greater weight, in deportation proceedings:

> *For the present the appellant holds a [temporary] visa and is not obliged to leave New Zealand, contact with her daughter can continue as provided by the Final Order. If these circumstances change the appellant has recourse to the Family Court and to* ***other statutory rights of appeal in relation to her status in New Zealand.***[509]
>
> ***This is an appeal in which the appellant seeks the grant of residence in New Zealand as an exception to normal residence instructions, not an appeal against the appellant's removal from this country.*** *For as long as Immigration New Zealand grants her temporary visas, she is able to remain here. In the meantime, the fact that the appellant's child is a New Zealand citizen, that he is in her day-to-day care, and that the appellant will require either the permission of her ex-husband to take the child out of New Zealand, or a court order to that effect, do not operate as 'trump cards' for the appellant to remain permanently in New Zealand.*[510]
>
> *In the meantime, the fact that the appellant's child is a New Zealand citizen, that she is in the appellant's day-to-day care, and that the appellant will require either the permission of her ex-partner to take the child out of New Zealand, or a court order to that effect, do not operate as 'trump cards' for the appellant to remain in New Zealand. First,* ***this is an appeal in which the appellant seeks the grant of residence in New Zealand as an exception to normal residence instructions, not an appeal against the appellant's removal from this country.*** *For as long as Immigration New Zealand grants her temporary visas, she is able to remain here. If the appellant is not granted such visas, she will need to either obtain her ex-partner's consent to their child living with her in South Africa, or seek a court order varying the conditions of the parenting order.*[511]

Indeed, the leading cases concerning children's interests in relation to their non-citizen parents' immigration status generally relate to deportation proceedings.[512] However, I would argue that, in the context of family violence, it is not practical nor appropriate to wait until every appeal avenue has been exhausted to secure a child's best interests. First, the separation of a victim-survivor mother and child is an extremely serious risk to leave open. The harm of severing a child's most secure attachment relationship is likely to be even greater for children who have been exposed to violence, and living with this possibility is likely to cause significant distress. Conversely, in the leading 'overstayer' cases there have not generally been issues as to the parent's right to take their child with them. Secondly, the policy considerations underlying VFV visa appeals are very different to the line of leading 'overstayer' cases involving children. In the latter cases, policy concerns such as the integrity of New Zealand's immigration system or the public interest are usually significant, as deportation liability may have arisen due to deliberate flouting of immigration policy and/or criminal offending. Often neither parent is a New Zealand resident or citizen, nor did they have any clear pathway to residence. In the context of VFV visa appeals, these appellants typically had a reasonable expectation of obtaining New Zealand residence through their partnership with a citizen or resident, and became settled with their children on this basis. The reason they did not ultimately obtain

508 Per s 206(1) of the Immigration Act 2009, a person liable for deportation on the grounds of being unlawfully in New Zealand may make a humanitarian appeal to the IPT against their liability for deportation.

509 [2017] NZIPT 203950 (Philippines) at [105].

510 [2013] NZIPT 200770 (India) at [79]–[80].

511 [2013] NZIPT 200738 (South Africa) at [65].

512 Significant cases include: *Ye v Minister of Immigration* [2009] NZSC 76; *Huang v Minister of Immigration* [2009] NZSC 77; *Ewebiyi v Parr* HC Christchurch CIV 2011-409-2010, 7 December 2011; *Puli'uvea v Removal Review Authority* [1996] 2 HRNZ 510; and *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

residence was the occurrence of violence against them. This engages a wholly different set of policy concerns and warrants a more flexible response. Thirdly, the 'special circumstances' test for residence class visa appeals has a lower threshold than the 'exceptional circumstances of a humanitarian nature' test in the deportation context, so should in fact give greater scope for consideration of children's interests. Fourthly, expecting victim-survivors to go through multiple costly and protracted appeals causes undue hardship. If they must wait to become liable for deportation to lodge an appeal, they will also have no work rights nor access to benefits and this will place them and their children in an even more acute position of vulnerability. Fifthly, and finally, a grant of residence is the only way to resolve the predicament of these appellants and their children, and nothing is achieved by deferring this determination. VFV visa appellants generally have no other viable pathway to residence and, even if they can obtain temporary visas for a time, they and their children will remain in a position of acute stress and uncertainty.

In this regard, it is heartening to see that several recent (2019–2021) decisions have explicitly recognised children's need for stability and certainty and noted that only a grant of residence to their mother could provide this:

> *The Tribunal has found, given all of the circumstances, that it is in the son's best interests for the appellant to remain caring for him in New Zealand.* ***Her ability to do so on an ongoing basis is only possible if she can reside here on a permanent basis.***[513]

> *[T]he Tribunal finds that* ***it is in the children's immediate and longer-term interests that they have certainty of their mother's presence in New Zealand*** *where she can continue to care for them and maintain some oversight into the care provided to them by their father.* ***This can only be achieved by a grant of residence*** *as an exception to instructions as the appellant has no obvious pathway to residence.*[514]
>
> ***[The appellant] has no pathway to residence. Without permanent status here, all she can do is apply for one temporary visa after the other.*** *In those circumstances, there is no guarantee that she will be able to continue to care for [her child] AA and a strong prospect that she may have to leave him in New Zealand. The Tribunal considers that this* ***situation presents an unacceptable risk to the ongoing development and welfare of AA.*** *Accordingly, the Tribunal finds that it is in AA's best interests that a grant of residence be made to the appellant.*[515]
>
> *The appellant's ability the remain in New Zealand on a temporary basis is uncertain.* ***It is in the interests of all members of the family unit to have certainty about their future, which could be achieved through a grant of residence to the appellant and [her elder child].***[516]
>
> *The appellant's ability to remain in New Zealand on a temporary basis is uncertain and the* ***ongoing doubt about their mother's future here could be damaging to the children's well-being,*** *particularly the older son, who is likely to be aware of her circumstances.* ***It is in the interests of all members of the family unit to have certainty*** *about their future lives in New Zealand. There appears to be no other pathway by which she may secure residence here.*[517]

513 [2021] NZIPT 205917 (UK) at [53].

514 [2020] NZIPT 205607 (Japan) at [62].

515 [2019] NZIPT 205356 (Philippines) at [47].

516 [2019] NZIPT 205576 (Philippines) at [50].

517 [2020] NZIPT 205585 (South Africa) at [58].

While IPT decisions do not create precedent, and all the decisions quoted above were made by the same IPT member, it is hoped that this recent trend indicates a change of approach. I suggest that it is inappropriate to defer proper consideration of a child's best interests until all appeal avenues have been exhausted.

3. Interaction between immigration decision-making and the Family Court

The 2007 *Living at the Cutting Edge* report critiqued the "insular decision making by immigration officers on the one hand and the Family Court on the other",[518] which creates a 'stalemate' between agencies in determining the future of victim-survivors' children. Unfortunately, similar issues were evident in some IPT decisions that did not perceive the separation of mother and child as a matter that warrants an immigration solution; instead, appellants were expected return to the Family Court (which would be left to decide whether the child is either to be removed from New Zealand or separated from their mother). For example:

> *The appellant has a family nexus to New Zealand through her youngest daughter. However, this family nexus, and the nature of the appellant's rights to have contact with her daughter, do not operate as a "trump card" which mean that the appellant ought to be granted residence. For the present the appellant holds a [temporary] visa and is not obliged to leave New Zealand, contact with her daughter can continue as provided by the Final [Parenting] Order. If these circumstances change* ***the appellant has recourse to the Family Court*** *[to seek to remove her child].*[519]

> *If the ex-partner disputes that it is in the best interests of the child to live with her mother and maternal grandparents in South Africa, he will have the opportunity to participate in Family Court proceedings. In the event of such a dispute, the Family Court is clearly the appropriate forum for decisions to be made as to the child's place of residence and the type of contact to be guaranteed to the non-custodial parent. … [The appellant] has not demonstrated that in order to parent her child adequately she needs to stay in New Zealand. There is no evidence before the Tribunal that a variation of the current parenting order, allowing for a different type of contact and access with her father, would jeopardise the child's best interests to an unacceptable level.* ***Her future best interests will be protected by agreement between the appellant and her ex-partner or, failing such agreement, by order of the New Zealand Family Court.***[520]

> *The appellant has not established that, in order to parent her child adequately, she needs to stay in New Zealand. There is no evidence in this case that the son's best interests will be jeopardised by a cessation of his already tenuous contact with his father. There would need to be a decision from the Family Court, that the father's contact with his child is of such a nature that the son's best interests can only be preserved by him remaining in New Zealand, to disturb that conclusion. … In any event,* ***details as to how his future best interests can be protected can be determined by agreement between the appellant and her ex-husband or, failing such agreement, by order of the New Zealand Family Court.***[521]

518 Robertson and others *Living at the Cutting Edge*, above n 1, at 235–238.

519 [2017] NZIPT 203950 (Philippines) at [105].

520 [2013] NZIPT 200738 (South Africa). In this case, it appears the Parenting Order granted the child's father twice weekly contact and recorded the child's habitual country of residence as New Zealand. It cannot be assumed that the appellant would be granted the right to remove the child from New Zealand.

521 [2013] NZIPT 200770 (India) at [81]–[82]. Again, it cannot be assumed that this appellant would be granted the right to remove the child from New Zealand. The Parenting Order granted contact to the child's father and there was in fact an Order Preventing Removal in place. The father had also written to the IPT to state he would not allow his son to be taken offshore.

In their reluctance to treat the risk of separation as a matter warranting an immigration response, these decisions seem to overestimate the extent to which the Family Court can ensure that children's best interests are upheld in such circumstances. The IPT declining to play a role in resolving these situations, and expecting the Family Court to find an appropriate solution without any immigration intervention, can have devastating outcomes for families. Indeed, these issues were highlighted in the *Living at the Cutting Edge* study 15 years ago through the stories of migrant victim-survivors and their children who had been or were likely to be separated following Family Court proceedings, and the lengthy litigation in *DPC v OFR*.[522] The latter case involved several years of litigation concerning a New Zealand citizen child and his Ukrainian citizen mother ('Ms R'), a victim-survivor who faced removal from New Zealand. INZ intended to remove Ms R from New Zealand after her relationship ended following abuse by her partner, while the Family Court deemed the father unfit to have unsupervised contact with the son due to his past sexual abuse. Ms R unsuccessfully sought to discharge the Order Preventing Removal and the Family Court placed the son under the guardianship of the court due to Ms R's "unsettled life and uncertain immigration status".[523] This decision was upheld by the High Court,[524] leaving Ms R to be separated from her son when she was removed from New Zealand. INZ evidently intended to proceed with Ms R's removal and, in giving evidence in the proceedings, an INZ witness commented "this case unfortunately is not unique, there are people who regularly are removed from New Zealand who have New Zealand born children and they become estranged from those children".[525] The *Living at the Cutting Edge* study predates the IPT decisions I reviewed by at least five years, so it was unfortunate to observe the continuation of similarly insular decision-making in some decisions involving children.

Even where the Family Court had made an order preventing a child's removal from New Zealand, the IPT still sometimes found that an immigration solution was not required. Instead, the applicant was expected to return to the Family Court to attempt to have the order discharged. In one such case, the IPT in fact contacted the appellant's abusive ex-partner to seek his opinion on the discharge of the order. His comments contributed to the dismissal of this victim-survivor's appeal, despite her fears that he was not genuine in his willingness to consent to the discharge:

> *[T]he Tribunal wrote to the ex-husband, seeking his comments on what he considered to be in the [New Zealand citizen] daughter's best interests and on the possibility of her going to live in the Philippines with the appellant. … The daughter is not able to leave New Zealand because there is a Family Court Order preventing her removal currently in force. This Order appears to have been granted at the request of the ex-husband. … [The ex-husband] advised the Tribunal that he would not contest the discharge of the Order and would give his permission for the appellant to return to the Philippines with the daughter. … The appellant claims that the ex-husband is not genuine in his comments to the Tribunal, and, should she apply to have the Order Preventing Removal discharged, he would contest it to try to have the daughter remain in New Zealand without her. … Alternatively, counsel submits that the ex-husband only wishes to avoid paying child support for the daughter, and that he may not be compelled to do so if the appellant and daughter return to the Philippines. These submissions are entirely speculative. … The appellant has not demonstrated that the Order would not be discharged on application; she declined to make an application to the Family Court to have the Order Preventing Removal of the daughter from*

522 Robertson and others *Living at the Cutting Edge*, above n 1, at 235–238.

523 *R v C* FAMC Tauranga FP070/232/02, 20 December 2005.

524 See *C v R* HC Rotorua CIV-2006-470-27, 7 August 2006.

525 *R v C* FAMC Tauranga FP070/232/02, 20 December 2005 at [103].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

> *New Zealand reviewed. From the information that she has provided on appeal, it is clear that the circumstances that led to that Order being put in place have changed since the Order was made. In particular,* ***the ex-husband has advised the Tribunal that he will not dispute where the daughter is to live and will give his permission for the appellant to return to the Philippines with the daughter.***[526]

Inviting a perpetrator of violence to have a say in the victim-survivor's immigration status is alarming.[527] This directly returns enormous power and control to the perpetrator who, as this appellant pointed out, is highly likely to tell the Tribunal he consents to a relocation purely to ensure the appellant loses the right to remain in New Zealand. This provides no assurance that he in fact will consent to the relocation if an application is made to the Family Court, nor that the Family Court will ultimately allow the child's relocation. Indeed, in another case the appellant had already attempted to have an Order Preventing Removal lifted and been unsuccessful, which supported a finding of special circumstances:

> *The appellant is her son's primary caregiver. She made an application to the Family Court for an order to discharge the prevention of removal of child order, but her application was dismissed ....* ***The appellant has taken all possible and reasonable steps to seek to depart from New Zealand with her child.*** *She has no pathway to residence. Without permanent status here, all she can do is apply for one temporary visa after the other. In those circumstances, there is no guarantee that she will be able to continue to care for AA and a strong prospect that she may have to leave him in New Zealand. The Tribunal considers that this situation presents an unacceptable risk to the ongoing development and welfare of AA. Accordingly, the Tribunal finds that it is in AA's best interests that a grant of residence be made to the appellant.*[528]

While the outcome of that case was positive, it perhaps does not shift the general expectation that a victim-survivor should make every effort to seek to depart New Zealand before the IPT will intervene. Expecting a victim-survivor to take all possible (and often futile) steps to depart New Zealand, in order for her to be able to remain, is problematic on both practical and policy grounds. First, instigating further Family Court proceedings can be well beyond the financial and emotional resources of victim-survivors, who will then be embroiled in (often very protracted) legal battles against the person who uses violence against them. The outcome of these proceedings will be entirely uncertain. Effectively, a woman will have to bring successive proceedings, under time pressure, to achieve opposite outcomes: seeking the Family Court's approval to leave with her child (an undesired outcome) while pursuing an IPT appeal to allow them to remain. Secondly, being removed from New Zealand will often not be in a child's best interests, so requiring victim-survivors to first pursue this outcome fails to treat children's best interests as a 'primary consideration'. It is a fallacy that the Family Court on its own can ensure the best outcome for the child in this situation.

526 [2014] NZIPT 201535 (Philippines) at [33], [60]–[62], and [75].

527 The IPT justified doing this by (misguidedly) citing *Gkolfomitsos v IPT* [2013] NZHC 3484. *Gkolfomitsos* concerned the inclusion of a child in a residence application against the father's wishes, so (at [18]) "was in essence an application to dispense with the consent of the joint guardian". However, the VFV case in question did not involve the child's immigration status and the child was in fact a New Zealand citizen. It should also be remembered that, even in cases involving the grant of residence to a child, the other parent remains free to seek Family Court approval to relocate the child should they wish. The IPT emphasised this point in recommending the grant of residence to two children against their father's wishes in a Dependent Child category appeal, [2014] NZIPT 201601-602 (South Africa) at [51]: "A grant of residence to the children will not defeat the father's rights of contact (visitation) nor prevent him from making applications to the Family Court regarding care and guardianship matters. It is through the Family Court, with its specialist jurisdiction, not the Tribunal, that these matters should be addressed, if they come into issue again."

528 [2019] NZIPT 205356 (Philippines) at [29] and [47].

The Family Court's relocation decision will need to be made on the basis that the mother's status is uncertain, typically leaving the court with highly unsatisfactory alternatives – either allowing the separation of the child from their mother or the separation of the child from the family, support networks, and resources available to them in New Zealand. Thus, a Family Court decision that a child can be removed does not mean that that is the best outcome from the perspective of the child's interests. Often an immigration solution is the only effective and straightforward way of upholding both family unity and the child's broader interests. In assessing best interests, the IPT therefore cannot simply defer to Family Court relocation decisions; it must consider the child's right to family unity as well as the social support, educational, health, and welfare facilities available in the respective countries.

An encouraging shift was seen in the approach to cases involving Family Court proceedings from 2019. In the following 2019 case, the IPT acknowledged the difficulty of discharging an Order Preventing Removal and accepted the appellant's submissions that doing so was not a realistic option:

> *The appellant does not feel able to bring an application to discharge the non-removal order because she is still intimidated by her former partner. He has been charged for breaching the protection order. … The Tribunal observes that it would be possible for the appellant to seek to discharge the non-removal order. However,* ***this would involve significant financial cost, and would pit the appellant against her former partner, of whom she remains fearful, and there is no certainty as to the outcome.***[529]

This reasoning is perhaps still underpinned by an assumption that seeking to remove her child from New Zealand should be a victim-survivor's first resort, rather than pursuing the outcome that is in the child's best interests, but nonetheless it seems a significant improvement. Five other recent cases also noted that the outcome of any attempt by the appellant to discharge an Order Preventing Removal would be uncertain,[530] unlikely to succeed,[531] or would not be in the child's best interests.[532] Consistent with best practice in family violence, decisions since 2019 have often also noted the importance of the child's relationship with their primary carer and of stability in their care arrangements, appearing to accord greater weight to these factors than many earlier decisions. For example:

> *According to the appellant, there are no suitable caregivers within her former partner's family. Aside from this,* ***it is likely to be harmful to the long-term development of the child, to be removed from the care of her primary attachment figure.***[533]

529 [2019] NZIPT 205576 (Philippines) at [27] and [45].

530 [2021] NZIPT 206241 (China) at [59]: "[The appellant] hopes to have the order discharged in time but correctly observes that she cannot speculate on the outcome of any such application".

531 [2020] NZIPT 205672 (UK) at [58]: "The Tribunal considers that it would be unlikely that the appellant would be successful in any application to discharge the non-removal order: the former partner and his parents and sister have been and remain actively involved in the son's day-to-day care and he will have formed strong attachments to them." Also [2020] NZIPT 205607 (Japan) at [58]–[61]: "The Tribunal has been provided with a copy of the Order Preventing Removal …. In the attached Memorandum, the Family Court Judge states that the father opposes the children being removed from New Zealand, either for a limited period or indefinitely. The non-removal order is to remain in force until all future care arrangements for the children are resolved. … The Tribunal accepts that there is little prospect, either now or in the foreseeable future, that the children would be able to return to Japan to live with the appellant, as their father wishes to have them remain in New Zealand and has obtained a non-removal order to that effect."

532 [2021] NZIPT 205917 (UK) at [52]: "Even if she could successfully seek the discharge of the non-removal order and return to England, there would be ongoing obstacles to the son maintaining a meaningful relationship with his father: either way, the son would face the prospect of ongoing separation from one of his parents." Also [2021] NZIPT 206350 (Canada) at [55]: "While [the appellant] has been granted primary care of her daughter, the Family Court has also ordered that the child is not to be removed from New Zealand. The Tribunal recognises that these orders reflect the best interests of the child."

533 [2019] NZIPT 205576 (Philippines) at [45].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

The Tribunal finds that it is in the best interests of AA for a grant of residence to be made to her mother (the appellant). ***The appellant is AA's primary caregiver and AA has a strong attachment to her.*** *The appellant is described as a very able, thoughtful and caring parent.*[534]

The Tribunal is aware that there are longitudinal studies that show ***that children are better equipped to face life overall, in terms of development, when they have good care and support.*** *The appellant is the primary caregiver of her children. Notwithstanding her personal difficulties, she has ensured that they have accommodation and provided them with support in their daily lives. The children rely on the appellant to care for them on a day-to-day basis, as their father is no longer living nearby. Understandably, they anticipate remaining in her care and having her support as they face day-to-day challenges in their lives, such as in changing and starting school. Given the* ***settled care arrangements, their dependence on the appellant, and need for certainty,*** *and the geographical distance between them and their father, the Tribunal finds that it is in the children's best interests for a grant of residence to be made to the appellant.*[535]

Any longstanding physical separation from an attachment figure has the potential to cause emotional harm to a child and should be avoided, where possible. *The appellant's son is settled here in the current caregiving arrangements and any change is likely to be very unsettling for him.*[536]

[I]t is in the best interests of the appellant's children that she be granted residence together with her 14-year-old daughter. The younger ***children require their mother's ongoing presence in their lives*** *in New Zealand. The 14-year-old* ***daughter only knows the care of her mother*** *....*[537]

Again, while IPT decisions do not necessarily create precedent, and it must be noted that all these decisions were reached by the same Tribunal member, it is hoped that this trend represents a positive shift that better recognises the right to family unity of victim-survivor parents and children.[538] It appears that greater recognition is being given to the harm of separation, as well as an acknowledgment that the Family Court may not be able to singlehandedly safeguard a child's best interests. Nonetheless, the inconsistencies across the wider data set as to the interaction between IPT and Family Court decision-making perhaps indicates that guidance to IPT members on the responsibilities of each body would be beneficial.

Rather than expecting the Family Court to review its orders in light of an appellant's looming removal from New Zealand, recent decisions have given deference to the arrangements put in place by the Family Court as being in the child's best interests:

*The Tribunal understands that i****n making the parenting order, the welfare and best interests of the child were the first and paramount consideration.*** *These include that a child is entitled to be protected from violence, have continuity in care, and continue to have a relationship with both parents (as reflected in the requirements set out in sections 4 and 5 of the Care of Children Act 2004). ... The Tribunal notes that, at this time, the appellant cannot return with BB to China due to the non-removal order. ... At this time, the appellant is the primary caregiver for BB. Her presence is required in New Zealand so that she can continue to provide this care and to support her daughter in maintaining a relationship with the father.*[539]

534 [2021] NZIPT 206350 (Canada) at [49].

535 [2020] NZIPT 205585 (South Africa) at [53].

536 [2020] NZIPT 205672 (UK) at [58].

537 [2020] NZIPT 205607 (Japan) at [70].

538 This right is derived from Article 9(1) of the Convention on the Rights of the Child ("States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine ... that such separation is necessary for the best interests of the child") and Article 23(1) of the International Covenant on Civil and Political Rights ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State").

539 [2021] NZIPT 206241 (China) at [59].

While [the appellant] has been granted primary care of her daughter, the Family Court has also ordered that the child is not to be removed from New Zealand. ***The Tribunal recognises that these orders reflect the best interests of the child.*** *Nevertheless, the appellant is unable to return to live in Canada with her daughter. … A grant of residence would remove the uncertainty currently faced by the appellant in terms of her ability to continue to care for and provide for her daughter in New Zealand.*[540]

The appellant is her child's primary caregiver. The final parenting order provides that this is to continue. ***The Family Court has also found that it is in AA's best interests to have a proper and meaningful relationship with both parents.*** *… The Tribunal considers that [the appellant's lack of a right to remain in New Zealand] presents an unacceptable risk to the ongoing development and welfare of AA. Accordingly, the Tribunal finds that it is in AA's best interests that a grant of residence be made to the appellant.*[541]

The last of the above quotes highlights an interesting tension for victim-survivor appellants. In their deference to arrangements put in place by the Family Court, recent decisions have often accorded significant weight to the child maintaining meaningful contact with a father who uses violence:

At the present time, [the appellant] cannot leave New Zealand with her daughter as the Family Court has made an order preventing the removal of the daughter from New Zealand. The daughter is also to have regular contact with her father. … ***Despite the difficulties which ongoing contact presents to her, she maintains and encourages AA's ongoing contact with her father*** *…. [T]he appellant should not be separated from her daughter nor her daughter from her mother.* ***Nor should the ongoing relationship that AA has with her father be undermined by her removal at this time, when in-person contact is critical for them to continue to strengthen their attachment bond.***[542]

In her statement on appeal, the appellant explains that despite her own fear of the husband, it is important for BB to have contact with her father. At this stage, BB has mixed feelings about her father; she remains a little afraid of him but also wants his care and love. … At this time, the appellant is the primary caregiver for BB. Her presence is required in New Zealand so that she can continue to provide this care and to ***support her daughter in maintaining a relationship with the father.***[543]

Even if she could successfully seek the discharge of the non-removal order and return to England, ***there would be ongoing obstacles to the son maintaining a meaningful relationship with his father: either way, the son would face the prospect of ongoing separation from one of his parents. In New Zealand, the son will have the best possible care arrangements with both of his parents.***[544]

540 [2021] NZIPT 206350 (Canada) at [46]–[56].
541 [2019] NZIPT 205356 (Philippines) at [46]–[47].
542 [2021] NZIPT 206350 (Canada) at [4], [49], and [55].
543 [2021] NZIPT 206241 (China) at [58]–[59].
544 [2021] NZIPT 205917 (UK) at [52].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

> ***It is in the child's best interests to continue to have an ongoing and meaningful relationship with both of his parents*** *which can only be achieved if the appellant can reside in New Zealand. … The appellant is described as a calm and patient parent who always strives to keep an amicable relationship with her former partner, despite his lack of respect towards her and minimal help and input as a parent. … The appellant has consistently maintained a view that AA should have both parents in his life regardless of their relationship status.*[545]
>
> *The Tribunal accepts that there is little prospect, either now or in the foreseeable future, that the children would be able to return to Japan to live with the appellant, as their father wishes to have them remain in New Zealand and has obtained a non-removal order to that effect.* ***The likelihood of the children remaining in close contact with both parents, should they be living in different countries, is slim.***[546]

The IPT's deference to care arrangements formalised through the Family Court is not criticised; indeed, it is providing vastly better outcomes than the insular decision-making of previous years. Nor can these decisions be faulted for recognising that the Family Court is required to have had the child's welfare and best interests as the first and paramount consideration in reaching decisions as to their care.[547] However, it is concerning that an increasingly important factor in the success of VFV visa appeals is maintaining a relationship between the perpetrator of violence and the appellant's child. This perhaps creates a perverse incentive for victim-survivors to agree to contact between the perpetrator and the child that is beyond what they feel is safe for themselves and/or the child, or at least to argue the importance of contact between their child and the perpetrator (perhaps against their own interests).[548] Indeed, some decisions cited the victim-survivor's efforts to facilitate a relationship between their child and the perpetrator despite her fears of his abuse.[549] This also gives rise to a degree of tension with the VFV policy objectives of protecting women and children from violence as, on the one hand, the VFV policy is intended to facilitate their separation from the perpetrator of violence while, on the other, assessments of children's best interests prioritise ongoing contact with the perpetrator.

Such tensions in responses to family violence involving children are not unique to this context; for example, gender-based violence researcher Marianne Hester describes the contradictory directives that victim-survivors receive from the child protection sector (where they are told to separate from an abusive partner) versus the Family Court system (where they are told to then allow their child to have contact with their abusive father).[550] Child contact is a well-recognised avenue by which perpetrators may seek to continue their abuse towards a woman and/or child post-separation and to undermine the mother-child relationship.[551] The Family Violence Death Review Committee has criticised traditional responses where "men who are abusive to their partners have been accepted as bad husbands but presumed to be 'good enough fathers' for the purposes of unsupervised child

545 [2020] NZIPT 205672 (UK) at [4] and [54].

546 [2020] NZIPT 205607 (Japan) at [61].

547 Care of Children Act 2004, s 4.

548 For example, child contact is a well-recognised avenue by which perpetrators may seek to continue their abuse towards a woman and/or child post-separation. Family violence does not necessarily stop post-separation, and in fact it may escalate.

549 [2021] NZIPT 206241 (China) at [58]; [2020] NZIPT 205672 (UK) at [54].

550 Marianne Hester "The Three Planet Model: Towards an understanding of contradictions in approaches to women and children's safety in contexts of domestic violence" (2011) 41 British Journal of Social Work 837.

551 See, for example, Ravi Thiara and Cathy Humphreys "Absent Presence: The Ongoing Impact of Men's Violence on the Mother-Child Relationship" (2017) 22(1) Child & Family Social Work 137.

contact",[552] and emphasised that "[t]he decision to abuse a child's parent is a harmful, unsafe parenting decision".[553] As Professor of Social Work Cathy Humphreys and her fellow researchers further explain:

> *Although there is no doubt that positive fathering has a highly constructive role to play in the lives of children, the evidence suggests that fathers who use domestic violence may create more vulnerability than resilience in the lives of their children.*[554]

The presumption that contact with both parents is in a child's best interests has thus received substantial criticism from a family violence perspective.[555] The UN Platform of Independent Expert Mechanisms on Discrimination and Violence against Women has called on states to ensure that "intimate partner violence against women is thoroughly weighed in the determination of child custody".[556] The UN Special Rapporteur on violence against women and girls has also very recently called for commentary on this issue, noting "the regular and widespread dismissal of intimate partner violence history and incidents by family courts when examining custody cases" and the "very powerful bias, shared by many welfare and judicial systems, [that] the right of a father to maintain contact with his children should override any other consideration. This is often justified with reference to the 'the best interest of the child'."[557]

Thus, while supporting the IPT's recent deference to Family Court-approved care arrangements, I suggest that it is important to remember the difference between the scope of the IPT and the Family Court's assessments of a child's best interests. The IPT is not being called upon to determine the safety or merits of a child having contact with a parent who uses violence, and should be wary of framing a child's best interests in opposition to their victim-survivor mother's.[558] Obviously relevant Family Court orders will, of themselves, necessitate the grant of residence to a parent in many cases (not only in VFV appeals), but Family Court decisions concerning care arrangements as between two parents do not provide a full picture of the child's best interests from an immigration perspective;[559] they generally deal with discrete issues of parental contact. The IPT's assessment is far broader

552 Family Violence Death Review Committee *Fifth Report*, above n 17, at 56: "IPV [intimate partner violence] and CAN [child abuse and neglect] have traditionally been thought of and responded to as distinct forms of abuse. The result has been that men who are abusive to their partners have been accepted as bad husbands but presumed to be 'good enough fathers' for the purposes of unsupervised child contact or care after separation or the death of the mother. This fails to recognise that allowing a child to be exposed to IPV is CAN and that fathers who commit IPV may also be directly abusing their children. … It cannot be presumed that because there is a biological connection there is also a robust and safe emotional connection (or capacity for such between the adult and child), especially in the absence of a comprehensive consideration of a person's history of perpetrating violence."

553 Family Violence Death Review Committee *Position Brief: Six reasons why we cannot be effective with either intimate partner violence or child abuse and neglect unless we address both together* (Health Quality and Safety Commission, 2017). See also Family Violence Death Review Committee *Submission on Strengthening the Family Justice System* (submission to The Family Court Review Independent Panel, March 2019) at 2: "Exposing children to intimate partner violence (IPV) in all its forms must be understood as violence against the child and as a parenting decision that has been made by the perpetrator of family violence."

554 Cathy Humphreys and others "More Present Than Absent: Men Who Use Domestic Violence and Their Fathering" (2019) 24(2) Child & Family Social Work 321 at 327.

555 In New Zealand, a guiding principle in the Family Court jurisdiction is that "a child should continue to have a relationship with both of his or her parents" (Care of Children Act 2004, s 5(e)). For general critiques of this presumption, see Davina James-Hanman and Stephanie Holt "Post-Separation Contact and Domestic Violence: Our 7-Point Plan for Safe[r] Contact for Children" (2021) 36(8) Journal of Family Violence 991; and Gillian Macdonald "Domestic Violence and Private Family Court Proceedings: Promoting Child Welfare or Promoting Contact?" (2016) 22(7) Violence Against Women 832.

556 Independent Expert Mechanisms on Discrimination and Violence against Women (EDVAW) Platform "Intimate partner violence against women is an essential factor in the determination of child custody, say women's rights experts" (joint statement, 31 May 2019).

557 Special Rapporteur on violence against women and girls, its causes and consequences *Call for inputs – Custody cases, violence against women and violence against children* (2022) <https://www.ohchr.org/>. In New Zealand, this presumption should have been greatly tempered by the amendment of section 5 of the Care of Children Act in 2014 to clarify that the foremost obligation is that "a child's safety **must** be protected and, in particular, a child **must** be protected from all forms of violence". Nonetheless, survey research with victim-survivors has highlighted the ongoing difficulties they face in having their concerns for their child's safety prioritised in decisions about care and contact; see Deborah Mackenzie, Ruth Herbert, and Neville Robertson "'It's Not OK', but 'It' never happened: parental alienation accusations undermine children's safety in the New Zealand Family Court" (2020) 42(1) Journal of Social Welfare and Family Law 106.

558 The overarching objectives of the VFV visa to protect both women and children from violence bear noting here. A child's safety and interests are entwined with their victim-survivor mother's safety; exposure to violence against their mother has profound negative impacts on a child, and violence can undermine the mother-child relationship and negatively impact on a victim-survivor's ability to respond to her child's needs. See Thiara and Humphreys "Absent Presence", above n 551.

559 Per *Ye v Minister of Immigration* [2009] NZSC 76 at [48], "[t]he nature of those issues [to be considered by immigration decision-makers in assessing a child's best interests] will obviously depend on the age of the child but they will potentially include schooling, health and general integration issues". I suggest that a child's exposure to violence also requires special consideration, as it will often heighten the supports and resources that they require.

than this and should be guided by New Zealand's international obligations. The UN Committee on the Rights of the Child has issued a general comment on the assessment of children's 'best interests' under UNCROC. This provides that decision-makers should consider: the care, protection, and safety of the child (which should be interpreted "in a broad sense", and includes the child's material, physical, educational, and emotional needs, such as the development of a secure attachment figure); preservation of family unity (unless separation is necessary for a child's safety); the child's right to health and education; any special vulnerability of the child (including being a victim of abuse); the child's views; and the child's identity (such as gender, cultural identity, and religious identity).[560] As will be discussed in the next section, the safety and interests of a child who has been exposed to violence will also be inextricably linked to the safety and wellbeing of their victim-survivor mother. In the 2019–2021 IPT decisions contact between minor children and fathers who use violence appeared to be a primary concern (second in prominence only to the risk of separation from their primary-carer mother), but this contact need not always be elevated to such a degree; contact with a father who uses violence may not be chief in importance among the various supports open to the child in New Zealand. Again, no criticism is intended of these recent decisions; all the 2019–2021 decisions involving minors in contact with fathers who use violence also involved an order preventing the child's removal from New Zealand;[561] it is entirely appropriate that the Family Court orders took precedence in decision-making.

But in other cases, especially perhaps where there is no contact with a New Zealand-based father, it is hoped that other New Zealand-based supports and resources will be given adequate weight.[562] Specifically, as the next section will discuss, I suggest that children's support needs as victims of family violence require far greater attention.

4. Support needs of children who have experienced family violence

In most cases, the dependent children of VFV visa appellants must themselves also be treated as victims of family violence. Even where the perpetrator's violence is not specifically directed at the child, the Family Violence Death Review Committee explains:

> *Exposure to [intimate partner violence] is a form of emotional abuse, so we do not need to ask if children have also been abused when considering the effects of [intimate partner violence] on children – it has already happened.*[563]

560 Committee on the Rights of the Child *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* Un Doc CRC/C/GC/14 (29 May 2013) at 13–17.

561 The only case that did not appear to involve an Order Preventing Removal was [2020] NZIPT 205585 (South Africa), where the circumstances were quite different as the children's father was not the perpetrator of violence against the appellant (the perpetrator was a subsequent ex-partner). In this case the children's care arrangements appear to have been by agreement.

562 I note that earlier IPT decisions sometimes cited the absence of contact with a child's father in dismissing appeals. See [2014] NZIPT 201535 (Philippines) at [57]: "The Tribunal must also take account of the subsequent lack of contact between the daughter and her father. … [T]here is no evidence that the daughter's best interests and well-being will be jeopardised by relocating to the Philippines and maintaining contact in other ways with her father, whom she has not seen in about 18 months"; and [2013] NZIPT 200770 (India) at [81]: "There is no evidence in this case that the son's best interests will be jeopardised by a cessation of his already tenuous contact with his father".

563 Family Violence Death Review Committee *Fifth Report*, above n 17, at [3.2.1]. The report discusses at [3.2.1] the "significant and long-lasting effects (even into adulthood) that result from emotional abuse in early childhood and, in particular, exposure to family violence". The FVDRC explains: "It is now well established that children exposed to IPV may suffer lasting psychological harm even when they are not physically injured. Often, their symptoms closely resemble those seen in the direct victim of violence. … The terror of exposure to or anticipation of an episode of violence will have lasting effects on a young child. … As time goes on and the child is exposed to ongoing traumatic events, their individual adaptive response becomes apparent as being predominantly one of hyper-arousal or dissociation. … The effects of exposure to violence on children are cumulative and, for some, start prior to their birth."

The Family Violence Act 2018 also recognises that exposing a child to violence against their parent is itself a harmful form of family violence,[564] which illustrates the need for women's and children's safety to be treated as closely entwined. A considerable body of literature exists on the wide-ranging emotional, psychological, and developmental impacts of family violence on children; being exposed to violence "undermine[s] the child's developmental need for safety and security" and "can critically jeopardize the developmental progress and personal ability of children",[565] particularly for young children.[566] Maintaining a secure attachment to a non-violent parent is a very important protective factor in mitigating this harm,[567] which makes the risk of separation of mother and child all the more concerning. Exposure to violence may also affect far more than a child's parental contact arrangements. For example, it may affect a child's needs for: access to social and/or health support services; strong peer relationships; security in other significant relationships, such as relatives, teachers, and neighbours; a settled home environment; and continuity in the educational, extra-curricular, and community support they receive.[568] It may also heighten the importance of the child's primary carer having the support and resources she needs to parent to the best of her abilities and support her child's recovery.[569] Given the profound effect that exposure to violence can have on a child's needs for support and stability, a child's status as a victim-survivor of family violence is a crucial factor in assessing their best interests.

Recognition of children's status and needs as victims of violence was generally very scant in IPT decisions, other than one case where the child had clearly been a direct target of the perpetrator's violence.[570] A small number of decisions specifically noted that children had been exposed to violence:

> *[The appellant's friend] states that the appellant's warmth and love for her children is apparent. The appellant has worked hard to ensure that the children are safe and protected from violence.* ***The Tribunal accepts that the two children have faced very unsettling and difficult circumstances over the past few years. They have witnessed domestic violence by their father/step-father against their mother, family separation, and experienced uncertainty due to changes in their living environment.*** *It also acknowledges that the background circumstances will likely have created a strong sense of protective bonding in AA towards his younger sister. … Accordingly, the Tribunal accepts that it would be very difficult for AA to be separated from his younger sister.*[571]

564 Family Violence Act 2018, s 11(2).

565 Stephanie Holt, Helen Buckley, and Sadhbh Whelan "The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature" (2008) 32(8) Child Abuse & Neglect at 797 at 802.

566 See generally Family Violence Death Review Committee *Fourth Annual Report*, above n 3, at [4.2.1]: "Research has shown that the 'developmental stage' at which children 'witness' and experience abuse is relevant to the impact it has on them. Humphreys' literature review highlighted that pre-school children living with IPV tended to be the group who showed the most behavioural disturbance. The 'LONGSCAN' longitudinal studies in the US suggest that children under eight years find exposure to violence towards their primary caregiver more traumatic than older children. Psychological tests indicated exposure to IPV against their primary caregiver was more disturbing than the effects of direct physical maltreatment."

567 See generally Vanessa Fong, David Hawes, and Jennifer Allen "A Systematic Review of Risk and Protective Factors for Externalizing Problems in Children Exposed to Intimate Partner Violence" (2019) 20(2) Trauma, Violence & Abuse 149; and Holt, Buckley, and Whelan "The Impact of Exposure to Domestic Violence on Children and Young People", above n 565, at 797.

568 For a review of protective factors for children exposed to violence, see Kristen Yule, Jessica Houston, and John Grych "Resilience in Children Exposed to Violence: A Meta-Analysis of Protective Factors Across Ecological Contexts" (2019) 22(3) Clinical Child and Family Psychology Review 406. See also New Zealand Family Violence *Clearinghouse Issues Paper 3: Understanding connections and relationships: Child maltreatment, intimate partner violence and parenting* (April 2013) at 31.

569 For background on the impacts of family violence upon mothering and the mother–child relationship see generally Thiara and Humphreys "Absent Presence", above n 551.

570 [2012] NZIPT 200134 (Fiji) at [50]–[52]: "[T]he daughter arrived in New Zealand to a situation where both she and her mother were subjected to escalating violence. The Victim Support Service Co-ordinator wrote in December 2011 that the daughter had been 'a victim from a very young age but, with the help of the church and school, is slowly dealing with the trauma that has occurred in her life'. … It is accepted that the ongoing assistance these [support] agencies are able to give to the appellant's daughter mean that it is in her best interests if she remains in New Zealand."

571 [2019] NZIPT 205576 (Philippines) at [41]–[43].

> ***The appellant explained in her victim impact statement how [her child] AA was affected through witnessing the family violence and abuse of the former partner.*** *AA had been present when the former partner has assaulted her and had helped her with her injury on 12 November 2017. AA worried that she would have to take responsibility for looking after the younger children, because she had seen how the former partner had refused to provide adequate financial support for their family unit. She did not want her to have to take on an adult role in the family: she wanted her to continue to grow and flourish as a child. … [In finding special circumstances, the IPT notes:]* ***[n]otwithstanding the fact that she has experienced the difficulties faced by her mother during the relationship, and in achieving independence from the former partner,*** *AA has formed strong friendships here and is doing well at school.*[572]
>
> ***The representative points out that the child … witnessed a significant amount of domestic violence during his mother's first marriage.*** *The appellant has uncontested custody of him as his father effectively abandoned the family and his great-grandparents took him and his mother in. The child has had a disrupted and difficult life, involving periods of separation from his mother. … The representative submits that it is essential for this child to have financial and emotional stability. Returning to Fiji will not meet either of these needs. … [The IPT holds:] [t]his appellant and her son will be at risk of ongoing discrimination and violence if they are required to return to Fiji ….* ***The best interests of this child require him to remain with his mother in a safe environment, in New Zealand, where his fundamental needs for shelter and stability will be safeguarded.*** *He and his mother have no family or community support in Fiji and no means whereby his basic needs can, of certainty, be met.*[573]

As is alluded to in the latter example, some decisions noted that removal of a child's mother may put the child at risk of exposure to harm in future:

> *It is submitted that it would not be fair or reasonable for the father to gain custody of the children in such circumstances [the appellant having to leave New Zealand without them] particularly given his violent, intimidatory and reprehensible conduct. …* ***There have been numerous concerning incidents where the children have not been safe in their father's care and she remains concerned for their well-being when they are with him.*** *… [T]he Tribunal finds that it is in the children's immediate and longer-term interests that they have certainty of their mother's presence in New Zealand where she can continue to care for them and* ***maintain some oversight into the care provided to them by their father.***[574]
>
> ***The appellant is very reluctant to leave her daughter here in the care of her former partner or his family because of the history of domestic violence and family dysfunction*** *with the former partner's family.*[575]
>
> *It is not in the son's best interests that he and his mother return to live in [country X]. The appellant would face pressure to reconcile with the husband.* ***A return to a violent home environment is clearly not in the best interests of the son.***[576]

In one recent case, the IPT acknowledged that the appellant and her children would lose the benefit of their New Zealand Protection Order if they were unable to remain in New Zealand. The IPT took into account the appellant's 15-year-old child's fears for her mother's safety were that to occur, and the likely impact of the mother's lack of safety and certainty on her parenting:

572 [2020] NZIPT 205607 (Japan) at [66]–[68].
573 [2013] NZIPT 200969 (Fiji) at [64]–[65], [70], and [73].
574 [2020] NZIPT 205607 (Japan) at [37] and [62].
575 [2019] NZIPT 205576 (Philippines) at [40]–[43].
576 [2013] NZIPT 201736 (country withheld) at [58]–[59].

There is specialist evidence that the appellant will suffer from significant deterioration in her mental health if she has to return to China. This is because the protection order made in New Zealand cannot be enforced in China and the appellant is not guaranteed of receiving assistance from state authorities there because of the blasé attitude and denial towards family violence. If she is in China, the husband will be able to exert more control over the appellant and her family members. … In his psychological report, [psychologist] concludes that the appellant suffers from Post-Traumatic Stress Disorder from repeated exposure to trauma through a disturbing account of family violence and threats to her children by the husband. In addition, the appellant is suffering from several physical health conditions which are stress-related. … ***The appellant's presence in New Zealand is likely to be a settling influence for [her child] AA although, no doubt, she will have ongoing concerns for her mother's safety*** *due to the husband's history of family violence. However, such concerns will be less heightened in New Zealand where the appellant feels more protected due to the final protection order and attitudes against family violence within the broader community as they are enforced by state authorities such as the New Zealand Police. …* ***As her mother feels that a return to China would be unsafe,*** *and AA is accustomed to living in New Zealand and attending school here, and her younger sister must remain here for the foreseeable future, the Tribunal is satisfied that it is in AA's best interests for a grant of residence to be made. …* ***This considerable uncertainty [about the appellant's immigration status] has the potential to interfere with the appellant's ability to maintain a stable setting for her two daughters and also to exacerbate the psychological symptoms she experiences as a result of the family violence*** *of her husband. If she has the certainty of residence, then the appellant would be best-placed to provide for her daughters and continue recovering from the impact of the family violence.*[577]

The recognition of the impact on the child of her mother being unsafe is very positive, and appropriately acknowledges that a child's interests are closely entwined with their primary carer's. The impacts of violence on the child directly (and the risk of future violence against her) perhaps also warranted attention, though it is acknowledged that this may not have been a focus of the submissions and evidence before the IPT. The following decisions similarly acknowledged that it was in a child's interests for their mother to have adequate safety and resources to provide a supportive home environment for her children:

The focus of this appeal is rightly on the best interests of [the appellant's] New Zealand-citizen children. It is in their best interests that they remain living in stable and safe environments, with the highest levels of support available. … If the appellant was required to return to [country X], it may not necessarily result in her being separated from her two older children. However, it is foreseeable that ***it would impact on her ability to continue providing them with a supportive and stable home environment,*** *something she is achieving here in New Zealand with the support available to her.*[578]

The Tribunal finds that it is in the son's best interests that he remains in New Zealand, living with his mother in a stable and safe environment. ***In New Zealand, the appellant and her son have a strong support network available to them.*** *This has assisted their transition away from a violent domestic environment.* ***The appellant is also able to financially provide for her son in New Zealand.***[579]

577 [2021] NZIPT 206241 (China) at [33], [48], [52], [54], and [61].

578 [2013] NZIPT 201737 (country withheld) at [59]–[61].

579 [2013] NZIPT 201736 (country withheld) at [58]–[59].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

On the other hand, two decisions commented that the appellant "has not established that, in order to parent her child adequately, she needs to stay in New Zealand".[580] In one of these cases the appellant was an Indian citizen and argued that she would struggle to support herself and her son in India and that they would face stigma and discrimination, but the IPT reasoned that she had the attributes to 'overcome' this:

> *The Tribunal has given careful consideration to the appellant's submission that she and her son have already been 'disowned' by her family because of her previous failed engagement and marriage(s) and because her son is of "mixed blood". ... [T]he Tribunal will accept that, upon return to India,* ***the appellant cannot expect active support from her family. ... As to the appellant's more generalised claim that divorced women and "mixed blood" children are socially excluded in India .... [t]he Tribunal recognises that there is potential for discrimination against divorced or separated women and single mothers in male-dominated Indian society.*** *However, the appellant has a tertiary education, qualifications in the cosmetics industry, a full history of employment and self-employment, and is determined to do what is right for herself and her child.* ***She has more attributes than many other women to assist her overcome such discrimination. ... No evidence has been put forward that he would be at any particular disadvantage*** *by going to India with his mother, an educated and ambitious woman who will clearly do everything within her power to ensure that her son has the best possible life. ...*
> *[T]here is no reason the appellant cannot continue to parent her son in India.*[581]

The impacts of discrimination upon the child himself were not addressed in the decision. While the appellant clearly raised the stigma her son would face as a "mixed blood" child, as well as the harm to him in losing connection to his Māoritanga, the decision states "[n]o evidence has been put forward that he would be at any particular disadvantage by going to India".
I would further note that the appellant's determination and attributes to 'overcome' discrimination do not necessarily mean that being taken to India would be in her child's best interests. An assessment of 'best interests' requires a careful comparison of the conditions for the child in each country, including "assessment of possible detriments of the [child]'s relocation".[582] UNCROC may provide some guidance as to minimal considerations in this assessment, such as: the child's right to the enjoyment of the highest attainable standard of health;[583] the right to benefit from social security;[584] the right to education;[585] and the right to a standard of living adequate for the child's physical, mental, spiritual, moral or social development.[586] Rather than assessing which outcome (living in India versus living in New Zealand) would best uphold this child's interests, and according that substantial weight, this decision seems to have instead approached the assessment from a negative standpoint whereby the child's interests were relevant only if they "would [be] jeopardis[ed] ... to an unacceptable level" by a return to India.[587] A similar approach was seen in the following decision:

580 [2013] NZIPT 200770 (India) at [81] and [2013] NZIPT 200738 (South Africa) at [66].
581 [2013] NZIPT 200770 (India) at [54], [56], [63], [74], and [76].
582 *Ye v Minister of Immigration* [2008] NZCA 291 at [247].
583 Convention on the Rights of the Child GA Res 44/25 (1989), art 24.
584 Convention on the Rights of the Child GA Res 44/25 (1989), art 26.
585 Convention on the Rights of the Child GA Res 44/25 (1989), art 28.
586 Convention on the Rights of the Child GA Res 44/25 (1989), art 27.
587 [2013] NZIPT 200770 (India) at [82].

The appellant argues that, on the minimum wage in the Philippines, she would not be able to afford medication for the daughter when required, which is free in New Zealand. She says that taking the daughter back to Philippines with her is "not an option" because the daughter has more opportunities in New Zealand than in the Philippines. ***While the appellant argues that the cost of living in the Philippines is high, and it will be hard for her to find employment and support herself and her daughter, she has a familial network of support on which to draw to assist her to settle and to support her daughter.*** *There is no evidence that the daughter's eczema and any other mild childhood illnesses she may experience could not be managed in the Philippines. It has not been submitted that, while the costs may be higher, that the daughter would not be able to access the necessary education and medical services she might require.*[588]

Again, making the observation that it may be difficult, but not impossible, for the mother to support her child in her country of origin does not amount to an assessment of which outcome would be in the child's best interests.[589] Both the above decisions also made comments emphasising children's adaptability:

It is acknowledged that the son has commenced schooling in New Zealand, but he has only attended primary school here for two or three months. His early years have been in an English-speaking environment. English is one of India's official languages and the language prevalent in its education system. ***There is no reason the son could not be expected to adjust to being schooled in India.*** *As his mother's qualifications demonstrate, India has a good education system and tertiary qualifications of high standards are available to those with academic ability.*[590]

Counsel states that the daughter now attends a kindergarten, where she is doing well. She and the appellant also attend church, where the daughter has made friends. Counsel states that the daughter has never been to the Philippines and does not speak the language. The appellant states that, should they relocate to the Philippines, the daughter would have to learn two new languages (national and local). However, the daughter and her mother live with another Filipino family in New Zealand, ***so will no doubt have familiarity with some of the Philippines culture, if not the language. While the daughter may find leaving her current life disruptive, given her age, there is no reason that the daughter could not adjust to living in the Philippines,*** *and, with the sensible and loving support and encouragement of her mother, will be able to settle again.*[591]

The fact that children have the capacity to adjust to change does not necessarily mean that this change would be in a child's 'best interests', as was noted in *Al-Hosan v Deportation Review Tribunal*: "An observation that children are adaptable, while probably true, does not approach the threshold of proper consideration of their best interests."[592] I would further note that citing children's general adaptability fails to account for the impacts that violence may have had upon the children of VFV visa appellants, who may have a heightened need for stability after the trauma and upheavals they have experienced. On a positive note, while recent decisions may not have specifically recognised children as victims of violence, several have acknowledged the 'disruptions' that children have experienced and their need for stability and security:

588 [2014] NZIPT 201535 (Philippines) at [65]–[68].

589 The weighting given to the child's best interests in this decision was particularly difficult to discern. For example, the IPT stated contradictorily (at [76]): "The Tribunal has found that the best interests of the daughter are to remain in New Zealand in contact with both her parents. However, there is no evidence that the daughter's best interests and well-being will be jeopardised by relocating to the Philippines and maintaining contact in other ways with her father".

590 [2013] NZIPT 200770 (India) at [72].

591 [2014] NZIPT 201535 (Philippines) at [68].

592 *Al-Hosan v Deportation Review Tribunal* HC Auckland CIV-2006-404-3923, 3 May 2007.

IV. The IPT's Assessments of 'Special Circumstances' CONT.

[The appellant submitted:] [t]he children required a stable and loving home environment given their young age and the problems of the former partner's behaviour. … [The IPT holds:] [t]he ***children require the ongoing stability from a settled life here.***[593]

The appellant's sons have been living in New Zealand for three-and-a-half years and were granted residence in June 2018, as secondary applicants included in their father's application under the Skilled Migrant category. They are now aged 12 years and five years of age. The appellant continues to be their primary caregiver. … ***They are finally settled, happy and thriving after all that has happened. The Tribunal is aware that there are longitudinal studies that show that children are better equipped to face life overall, in terms of development, when they have good care and support.*** *The appellant is the primary caregiver of her children. Notwithstanding her personal difficulties, she has ensured that they have accommodation and provided them with support in their daily lives. The children rely on the appellant to care for them on a day-to-day basis, as their father is no longer living nearby. Understandably,* ***they anticipate remaining in her care and having her support*** *as they face day-to-day challenges in their lives, such as in changing and starting school.* ***Given the settled care arrangements, their dependence on the appellant, and need for certainty,*** *and the geographical distance between them and their father, the Tribunal finds that it is in the children's best interests for a grant of residence to be made to the appellant.*[594]

[The appellant's close friends and her daughter's childcare educators] describe a happy child who has a ***settled, stable and loving environment*** *provided by her mother. This is a huge compliment to the appellant who has, at the same time, had to face her own personal grief and emotional and psychological upset as a result of the end of her personal relationship due to family violence.*[595]

It is evident from all of the above that ***the appellant's four-year-old daughter has experienced several changes of caregivers in her short life,*** *she has been in the care of both parents and in the temporary care of Child, Youth and Family on at least one occasion.*[596]

The appellant's son is settled here in the current caregiving arrangements and ***any change is likely to be very unsettling for him.***[597]

It is in the best interests of the appellant's daughters for their living circumstances to be certain and settled*. … The appellant's older daughter is accustomed to life here as she has now been living here for the past four years.*[598]

593 [2019] NZIPT 205576 (Philippines) at [8] and [50].
594 [2020] NZIPT 205585 (South Africa) at [52]–[53].
595 [2021] NZIPT 206350 (Canada) at [48].
596 [2017] NZIPT 203950 (Philippines) at [94].
597 [2020] NZIPT 205672 (UK) at [58].
598 [2021] NZIPT 206241 (China) at [4].

Because few decisions identified children as victims of violence, there was little discussion of any additional support needs as a result of their exposure to violence. There were two exceptions to this, both being cases where the child was the direct target of violence (though the IPT was not satisfied that the child had experienced violence in the second case).[599] In the first of these cases, the appellant was able to produce supporting evidence from agencies who had worked with them, including Victim Support and Shakti, and the IPT affirmed the importance of such support for the daughter:

> *[T]he daughter arrived in New Zealand to a situation where both she and her mother were subjected to escalating violence. The Victim Support Service Co-ordinator wrote in December 2011 that the daughter had been "a victim from a very young age but, with the help of the church and school, is slowly dealing with the trauma that has occurred in her life". She is doing well at school and the Co-ordinator fears she would find it very difficult to change back to the education system in Fiji, especially as she has no support there from either her natural father or her mother's family. … **Both the appellant and her daughter have been assisted by the Victim Support Service and other helping agencies in New Zealand.** They are both very much aware of the value of these services and grateful for the support that people have given them in this country, support which they are emphatic they would not receive in Fiji. It is accepted that **the ongoing assistance these agencies are able to give to the appellant's daughter mean that it is in her best interests if she remains in New Zealand.** … It is also determined that **the daughter's best interests will be enhanced by her staying in New Zealand where, after access to professional help, she has been able to thrive emotionally and academically.**[600]*

In the second case, the appellant reported that her daughter had disclosed sexual abuse by her father and believed that she needed professional support to recover. However, the IPT determined there was insufficient evidence of the need for support for the daughter, given that no professional evaluation of the daughter had been supplied:

> *The appellant says that the daughter is still affected by the alleged [sexual abuse by her father]; in March 2014 alone, the daughter spoke to her four times about it, telling the appellant that she did not want to visit her father because she was scared. The appellant states that the daughter was "clingy" and "terrified". The appellant states that she would be deeply worried about the safety of the daughter if she was to stay with her father overnight. **She believes that the daughter needs professional help to deal with trauma from the alleged incident.** … Counsel states that the appellant has not been able to afford to seek professional advice for the daughter here, and that she would not be able to afford to seek professional support should she and the daughter relocate to the Philippines. While the appellant has explained her concerns to the Tribunal, **no professional evaluation of the daughter's need for support has been presented to the Tribunal, nor is there any evidence that the daughter has received, or is currently receiving,** such support. The appellant does not provide any indication that she has discussed her concerns regarding her daughter's need for professional support and her inability to pay privately for this with the GP or any other agencies.[601]*

599 [2014] NZIPT 201535 (Philippines) at [56]: "In the absence of criminal charges and with little evidence about how the daughter's allegations have been addressed (in terms of further police or CYFS intervention, or the provision of counselling or other steps taken to address the ongoing trauma the appellant says she observes), the Tribunal cannot reach a finding that it would not be in the daughter's best interests to maintain some contact with her father".

600 [2012] NZIPT 200134 (Fiji) at [50]–[52] and [64].

601 [2014] NZIPT 201535 (Philippines) at [53]–[54].

This was the case in which the IPT had written to the appellant's ex-partner to seek his views on the daughter's best interests; he claimed that the appellant fabricated the child's complaint of sexual abuse. The IPT asked the appellant to provide "independent confirmation" of the sexual abuse, in response to which the appellant supplied a letter from her GP confirming that she and her daughter had met with him 18 months earlier to discuss the sexual abuse and the GP had discussed this with Child, Youth and Family (*CYFS*). The appellant advised that CYFS reported the disclosure to police, who did not pursue charges but gave her ex-husband a "strong warning", however the IPT noted that "the appellant has not presented any further evidence to confirm how the authorities have dealt with the alleged incident, such as a CYFS or police report".[602] It should be remembered that a majority of reports of sexual abuse against children or young people do not result in police action,[603] and a determination that there is insufficient evidence to take action does not mean that no abuse occurred. As this appellant raised, and was discussed above, supplying a professional evaluation of the need for psychological support will be a challenge for many VFV visa appellants given their limited financial means. Funded counselling can be very difficult to access, and this appellant does not appear to have been engaged with a social worker or community organisation that could have helped her navigate this.[604]

Overall, recognition of children's status and needs as victims of family violence was surprisingly limited and, when raised by appellants, could be challenging to provide evidence of. Recent decisions did include some recognition of children's general needs for stability and security, though they tended to be less prominent in the IPT's conclusions than concerns about maintaining contact between the child and the perpetrator of violence were. It is acknowledged that this may simply reflect the submissions that were made to the IPT. Nonetheless, I suggest that concerns about a child's wider support needs should carry significant weight in cases involving family violence, particularly given the VFV policy's objective of protecting children from all forms of violence and the associated UNCROC obligation to "provide necessary support for the child" where violence has occurred.[605]

5. Children's support needs generally

In terms of more general support for children's development and wellbeing, assessments in the studied IPT decisions of the respective resources available to them in New Zealand versus their mother's country of origin were rare and, when undertaken, were scant.[606] While it could be the case that limited submissions were before the IPT on the resources available to the child in each country, this does not relieve the IPT of an obligation to undertake this assessment; in *Ye v Minister of Immigration* the Supreme Court emphasised that immigration decision-makers need to ensure that "everything relevant to the interests of the child comes to the decision-maker's attention",[607] and it should be remembered that the IPT has broad inquisitorial powers.[608] The most common resource cited in favour of a child remaining in New Zealand was access to the New Zealand education system. Several cases involving teenaged children noted the difficulties they would face

602 [2014] NZIPT 201535 (Philippines) at [55].

603 See Ministry of Justice *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Wellington, 1 November 2019) at 41: "Two-fifths (40%) of reported child and young person victimisations [reported to police between July 2014 and June 2018] resulted in Police taking action against a perpetrator, including court action (31%) and non-court action (9%). For 6% the investigation was continuing, 9% were deemed to not be a crime, 3% were withdrawn by the victim, and for 42% Police were unable to take action."

604 She appears to have lived with members of her church community during periods of separation from her ex-partner, rather than liaising with a women's refuge or community organisation: [2014] NZIPT 201535 (Philippines) at [46].

605 Convention on the Rights of the Child GA Res 44/25 (1989), art 19(2).

606 For example, [2013] NZIPT 200770 (India) at [72]: "[a]s his mother's qualifications demonstrate, India has a good education system and tertiary qualifications of high standards are available to those with academic ability"; or [2014] NZIPT 201535 (Philippines) at [66]–[67]: "[t]he appellant argues that, on the minimum wage in the Philippines, she would not be able to afford medication for the daughter when required .... It has not been submitted that, while the costs may be higher, that the daughter would not be able to access the necessary education and medical services she might require."

607 *Ye v Minister of Immigration* [2009] NZSC 76 at [48]. The Supreme Court further noted at [48] that immigration decision-makers will "not infrequent[ly]" need to prompt parents to address the issues concerning their children", including "schooling, health and general integration issues".

608 Immigration Act 2009, s 218(2).

integrating into the education system in their mother's country of origin or the lesser educational opportunities open to them:

> *The appellant's 14-year-old daughter has been living here for five years with the appellant (her mother) and the two younger children (her siblings), and is accustomed to life here, and is likely to face significant obstacles in attempting to re-enter the education system in Japan because of her age. … **The Tribunal accepts that AA will face some difficulty in resuming her education in Japan, particularly in achieving success in the entrance examination to high school: she has been out of the education system there for five years, learning in English in New Zealand, and may well not have the level of written language skills in Japanese that is required.** Notwithstanding the fact that she has experienced the difficulties faced by her mother during the relationship, and in achieving independence from the former partner, AA has formed strong friendships here and is doing well at school. It is in the interests of family unity that she should have the opportunity to grow up with her siblings.*[609]
>
> *AA, who is now aged 15 years, has been living in New Zealand from February 2017. The Tribunal considers that it is likely that **she feels settled here and that she will have made some friends and have become accustomed to the New Zealand education setting and teaching methods. While she could return to China, this would require some adjustment particularly as she has been out of the Chinese education system for some four years.***[610]

> *[The appellant's 15-year-old child] is doing well at school and the [Victim Support] Co-ordinator **fears she would find it very difficult to change back to the education system in Fiji** …. [T]he daughter's best interests will be enhanced by her staying in New Zealand where, after access to professional help, **she has been able to thrive emotionally and academically.***[611]
>
> ***The church minister is concerned that if the son is required to return to China he would have grave difficulty in resuming his education there which, in turn, would seriously jeopardise his future.** It has been confirmed that the son's student status at the school he attended in China has been cancelled, although it is not explained exactly what the consequences of this would be. A former associate professor from a Chinese university (who completed a doctorate in education at a New Zealand university) confirms that sending the son back to China would be "very detrimental to his future education". He describes an education system in China where there are junior entrance, senior entrance and national university entrance examinations, with extreme competition at all stages. With the son having studied at a New Zealand secondary school for the past three and a half years, the associate professor believes that it would be "impossible" for him to reintegrate into the Chinese education system "without catastrophic consequences to his educational, psychological and emotional outcome". In contrast, the Tribunal acknowledges that the son is presently in Year 12, studying toward NCEA Level 2. This is possibly the most significant year, as far as future education and prospects are concerned, in the New Zealand school system. **The difficulties that the son would encounter if he had to try and re-enter the Chinese education system, given the hiatus of three and a half years in which he has not sat the requisite examinations, is recognised.***[612]

609 [2020] NZIPT 205607 (Japan) at [3] and [68].
610 [2021] NZIPT 206241 (China) at [51]–[54].
611 [2012] NZIPT 200134 (Fiji) at [51] and [64].
612 [2016] NZIPT 203221 (China) at [53]–[55].

IV. The IPT's Assessments of 'Special Circumstances' CONT.

The latter case is particularly noteworthy as the only decision where the circumstances of a dependent child who was no longer a minor (he was 18 years old) were found to give rise to special circumstances. In cases involving older children the IPT generally accorded less weight to the hardships they would face:

> *The appellant explains her concerns should she and her [19-year-old] daughter have to return to Brazil. There is an economic crisis in Brazil and 13 per cent of the working-age population are unemployed. Unemployment affects more women than men and many people are homeless.* ***Her family members do not have the capacity to provide them with any financial support. The appellant and her daughter have nowhere to stay and she has no savings to support her. … [T]he daughter may not be able to resume her education*** *there, given that she finished her secondary schooling under the New Zealand education system. … [The IPT holds:] [the daughter] could seek work or pursue a pathway to further education in Brazil. The appellant and her daughter have close family members in Brazil who can provide them with some emotional support, should they be required to return there.*[613]
>
> ***The appellant's [18- and 19-year-old] children are no longer minors.*** *… On appeal, the children have provided statements expressing their desire to stay in New Zealand, in particular because their family background is not known by others here. They wish to pursue further with educational and employment opportunities available here in New Zealand. They have friends in this country and feel they are treated equally here. They describe a life of poverty and feeling unwelcome in Fiji. It is also submitted that the daughter will have difficulty marrying in Fiji, something expected of her shortly, because of her mother's relationship history.*
>
> ***The Tribunal acknowledges that because of the family's history and unfortunate circumstances in Fiji, life would have been and may continue to be difficult. However, it does not consider that this reaches the threshold required to constitute special circumstances. … The children have settled well in New Zealand, attending school and making friends. It is acknowledged that the employment and educational opportunities available in Fiji are more limited than in New Zealand.*** *However, notwithstanding the fact that the appellant has suffered domestic violence here, she does not have special circumstances that warrant consideration of an exception to Government residence instructions. … While a return to Fiji may be difficult for the appellant and her children, the Tribunal finds that there will be support from her family and the Muslim community.*[614]

The lesser weight accorded to older dependent children's interests is perhaps unsurprising, given that there is generally no issue of their inability to accompany their mothers offshore and New Zealand's UNCROC obligations apply specifically to under-18s.[615] Nonetheless, the adolescents in the above cases were still young people whose circumstances were markedly different to those of adults, and their circumstances of family violence must also be borne in mind. They were brought to New Zealand as children, where they were affected by family violence. New Zealand had obligations to keep these children safe from violence and give them support following their experience of violence.[616] They completed their high school qualifications in New Zealand and, as they settled here as teenagers, presumably formed close friendships and community connections through their schooling (possibly even stronger than their connections in

613 [2019] NZIPT 205107 (Brazil) at [43].

614 [2013] NZIPT 201005 (Fiji) at [56]–[57] and [63].

615 Family Court orders under the Care of Children Act 2004 apply only to under-18-year-olds; per s 8 "**child** means a person under the age of 18 years". Therefore, young people are not affected by orders preventing their removal from the age of 18.

616 Convention on the Rights of the Child GA Res 44/25 (1989), art 19; Declaration on the Elimination of Violence against Women GA Res 48/104 (1993), art 4(g).

their country of origin). They settled in New Zealand with the expectation of remaining here, continuing their education and entering the workforce, but their pathway to residence was lost as a result of family violence. In the case of the Fijian citizen siblings, they also faced discrimination in Fiji due to their family's experiences of violence. Such circumstances may lead to greater hardships in returning home and/or a greater reliance on the support and opportunities they have access to in New Zealand.

Conclusions on the IPT's 'Special Circumstances' Decisions

Children's interests carried far greater weight than victim-survivor women's interests in the IPT's 'special circumstances' assessments. Some positive trends were seen in the IPT's 'special circumstances' assessments in recent years, particularly in the treatment of children's interests. Noteworthy developments were: greater deference to children's care arrangements as approved by the Family Court; the recognition of children's needs for stability in their relationship with their primary carer; and the recognition of parenting as a valuable contribution to New Zealand. However, the decisions where these positive developments were seen were largely made by the same Tribunal member, and over the wider data set there was substantial variability in the approach to 'special circumstances' in VFV visa appeals. A possible tension was also noted in the recent focus on Family Court orders that facilitate contact between the child and a father who uses violence, as such contact may be at odds with the victim-survivor mother's safety interests and may not necessarily be chief in its importance to the child's 'best interests'. I have argued that the framing of children's interests in opposition to their victim-survivor mother's is undesirable, and that the two are in fact closely entwined; it is in a child's interests for their bond with their primary carer to be protected and strengthened, for their carer to be protected from violence, and for her to have the resources to parent to the best of her abilities.

Throughout all aspects of the 'special circumstances' assessment, a recurring concern was the IPT's failure to contextualise appellants' and their children's circumstances within their experiences of family violence. This was surprising, given the family violence-related international obligations cited in the VFV policy objectives, and the intention that these objectives should "be helpful for women appealing against decisions to decline applications … if it could be shown that such decisions ran counter to the purposes of the policies".[617] This lack of responsiveness to family violence was seen, for example, in: the dismissal of family violence as 'ordinary' and/or rendering it invisible; the minimisation of the impacts of violence upon victim-survivors, and their consequent need for New Zealand-based supports; assessing victim-survivors' contributions and nexus to New Zealand in terms that did not account for the impacts of violence; using victim-survivors' resilience in the face of violence as a reason such women could withstand a return to their home country; and failing to recognise children as victims of violence when assessing their 'best interests'. As was also seen in the application of the VFV policy criteria, the evidential threshold imposed by the IPT was often difficult for victim-survivors to meet due to their inability to afford to pay professionals to compile the necessary evidence, and the inherent difficulty of proving the likelihood of future abuse offshore. Some recent decisions have included a history of the violence experienced by the appellant, suggesting this context is receiving greater consideration, but it is unclear what weight these decisions accorded to the impacts of violence because children's care arrangements appeared to be the determinative factor.

617 Robertson and others *Living at the Cutting Edge*, above n 1, at xxv.

v. Improving the Immigration Response to Victims of Family Violence

All women and children in New Zealand should have the right to be safe from family violence, irrespective of their visa status. I argue that the current policy response to violence against migrant women and children, whereby many cannot separate from the perpetrator without facing removal from New Zealand, fails to uphold the very international obligations cited in the VFV visa policy. I have also argued that the IPT's approach to the VFV visa policy has unduly narrowed its (already limited) scope, in a manner that is contrary to these international obligations. It should be noted that the UN Committee on the Elimination of Discrimination against Women has again asked New Zealand to report on protections for migrant women in 2023, including:

> *[S]teps taken to … revise [New Zealand's] immigration laws, with a view to facilitating access to permanent residency permits for mothers of children who hold New Zealand nationality; [and] ensure the availability of shelters, legal and psychological support, complaint mechanisms and redress for migrant women who are victims of violence.*[618]

In addition to our international obligations, New Zealand's cross-government efforts to eliminate violence are guided by the vision in Te Aorerekura (the National Strategy and Action Plan to Eliminate Family Violence and Sexual Violence) that "all people in Aotearoa New Zealand … are safe and supported to live their lives free from family violence and sexual violence".[619] Current immigration policy undermines efforts to achieve the vision of Te Aorerekura, and leaves many migrants excluded from it. In this section I examine the need for improved responsiveness to family violence in the IPT's VFV visa decisions and in immigration policy, and highlight opportunities for improvements to policy and practice.

The IPT's Responsiveness to Family Violence

My analysis has indicated that the IPT is applying unduly narrow interpretations of the VFV visa policy and is giving insufficient regard to the impacts of family violence in assessing appellants' 'special circumstances'. More broadly, the language and reasoning employed by the IPT raises questions as to whether the IPT has adequate training and understanding to be making complex decisions involving family violence and its treatment in cross-cultural settings. While an analysis of the IPT's approach to family violence in general is beyond the scope of this report, a few brief observations can be made:

618 Committee on the Elimination of Discrimination against Women *List of Issues and Questions Prior to the Submission of the Ninth Periodic Report of New Zealand*, above n 30, at [22].

619 Board for the Elimination of Family Violence and Sexual Violence Te Kāwanatanga o Aotearoa *Te Aorerekura: The National Strategy to Eliminate Family Violence and Sexual Violence* (New Zealand Government, December 2021) at 27.

V. Improving the Immigration Response to Victims of Family Violence CONT.

- **Euphemistic or minimising language was often used to describe apparent abuse,** such as: "a *domestic incident*";[620] "[h]er husband evidently *treated her badly*";[621] "[t]he appellant was very *poorly treated* by her husband and his parents";[622] "the *so-called pattern of abusive behaviour* by the appellant's ex-husband";[623] "[s]he summarised the physical, emotional and mental consequences of 'prolonged abuse' and its effect";[624] "the personal trauma she faced as a result of *this turn of events*";[625] and "*her troubles* with her ex-partner".[626] Language that appeared to inaccurately mutualise violence or fail to identify the perpetrator was noted, for example: "*The relationship* was unstable and abusive. This culminated in the appellant suffering a miscarriage";[627] "the appellant was in a fragile state of mind after *her abusive relationship* and abrupt separation";[628] and "her *abusive marriage*".[629] Some decisions referred to separations in the context of family violence as 'failed relationships'.[630] Five decisions mentioned acts of strangulation and all but one refer to these acts as 'attempts' (rather than accurately describing them as non-fatal strangulation).[631]
- **Understanding of and responsiveness to forms of abuse specific to migrant and ethnic minority women seemed to be particularly lacking,** such as in the minimisation of dowry abuse: "the appellant became disillusioned with her fiancé's expectation of money and gifts from her";[632] "what the appellant describes as her case against her 'ex husband and in laws "dowry abuse"'."[633] In one case the appellant had undertaken an Islamic marriage ceremony which she later learned was a sham marriage on her husband's part, and the IPT found the relationship therefore did not meet the criteria for VFV visa eligibility.[634] A very high proportion of decisions mentioned acts that were indicative of immigration systems abuse by the perpetrator but immigration systems abuse was rarely discussed as a form of abuse, nor was any policy consideration given to the role of the immigration system in enhancing vulnerability or deterring help-seeking. These acts included, for example: threatening to separate their partner from their child;[635] cancelling their partner's visa while she was offshore;[636] withdrawing support for their partner's visa upon her making a report of violence;[637] threatening to or in fact reporting their partner to INZ;[638] taking their partner's passport,[639]

620 [2016] NZIPT 203160 (Romania) at [5]; [2013] NZIPT 201737 (country withheld) at [9]; and [2013] NZIPT 200738 (South Africa) at [6].

621 [2012] NZIPT 200134 (Fiji) at [5].

622 [2013] NZIPT 200861 (India) at [46].

623 [2016] NZIPT 203416 (Fiji) at [40].

624 [2013] NZIPT 200839 (Singapore) at [12].

625 [2014] NZIPT 201307 (China) at [65].

626 [2013] NZIPT 200738 (South Africa) at [8].

627 [2013] NZIPT 200938 (Germany) at [42].

628 [2014] NZIPT 201610 (UK) and [47].

629 [2019] NZIPT 205440 (Fiji) at [76].

630 For example, [2013] NZIPT 200969 (Fiji) refers to the end of a relationship after the pregnant appellant called police when husband "tried to strangle her and kick her in the abdomen" as her second "failed" marriage. See also [2013] NZIPT 200839 (Singapore) at [52] and [62]: "the stresses arising from her failed relationship" and "the trauma of her failed relationship".

631 [2013] NZIPT 200969 (Fiji), [2016] NZIPT 203594 (Fiji), [2020] NZIPT 205585 (South Africa), and [2021] NZIPT 206241 (China) referred to 'attempts'; whereas [2020] NZIPT 205653 (China) referred to "choking", without calling it an attempt.

632 [2013] NZIPT 200770 (India) at [5].

633 [2017] NZIPT 203941 (India) at [67].

634 [2020] NZIPT 205667 (Norway). In this case, aspects of the perpetrator's abuse (including making the appellant the victim of a sham marriage) were interpreted as factors negating the existence of a genuine relationship, despite the fact the appellant herself was genuine in her commitment to the relationship. The IPT reasoned at [38]–[39]: "AA remained married to his wife and, when the appellant asked that he divorce his wife, so that he would be free to marry her, legally, he refused. The appellant's evidence suggested that her relationship with AA was not exclusive. According to the appellant, AA shared few details of his day-to-day life with her, such as about his work and social activities, and continued to go about his life without any discussion or consultation with her. The appellant did not explain how they had supported themselves, indicating only that AA worked and would not provide her with any money for necessities and demanded that she pay for everything. There was no evidence of their financial interdependence, such as a joint bank account, or of the appellant's financial support of AA, or his support of her, or of the common acquisition of any items during their short relationship."

635 See, for example, [2014] NZIPT 201420 (Brazil) at [10]; [2019] NZIPT 205576 (Philippines) at [37].

636 [2013] NZIPT 200969 (Fiji) at [30].

637 [2014] NZIPT 201504 (China) at [6].

638 See, for example, [2020] NZIPT 205585 (South Africa) at [44].

639 [2019] NZIPT 205576 (Philippines) at [37].

refusing to assist with their partner's visa application;[640] tricking their partner into signing immigration forms;[641] preventing their partner from communicating with INZ;[642] and demanding dowry payments to support their partner's visa.[643]

- **In most decisions, the violence experienced by the applicant and/or her children only received a brief mention by way of background.** It is acknowledged that, at first glance, the assessment of whether specific policy criteria are met may not seem to require much consideration of the violence inflicted upon the appellant. However, even where appellants made their experience of violence central to their 'special circumstances' appeal, the relevance of family violence was often minimised or dismissed. Even when assessing the policy criteria, I argue that including the family violence experienced by the appellant as mere background is inadequate. Treating violence as only 'a mention' without any effect upon decision-making may serve to normalise family violence and, as Toy-Cronin has discussed in the tenancy context, ignores the wider policy context of New Zealand's coordinated response to family violence.[644] It fails to treat immigration policy as "adjacent to the core law preventing family violence" and as having a role to play in preventing family violence.[645] Given that the VFV policy objectives seek to end violence against women and children, it is crucial to give adequate recognition to the violence that appellants have suffered; failure to do so may mean that the policy objectives are not guiding decision-making as they should, may lead to poor assessments of appellants' future risks, and may undermine New Zealand's efforts towards an integrated response to family violence.

I argue that accurate understandings of family violence are vital for immigration decision-makers to make assessments about ongoing risks to the victim and any safety and support needs she and her children may have (which will factor into both their 'inability to return home' and their 'special circumstances'). Failure to recognise forms of violence that an appellant has faced can also mean that relevant evidence as to whether the VFV policy criteria are met is not considered. For example, a partner's threats of deportation may be indicative of there being significant stigma and hardship for the applicant in her country of origin, or if she entered into the marriage under coercive circumstances this may suggest a risk of further abuse if she is returned to her country of origin. The importance of decision-makers accurately understanding and conveying marginalised victims' experiences has been stressed by New Zealand's Family Violence Death Review Committee (*FVDRC*). The FVDRC has raised concerns that "[i]nvariably in records consulted during FVDRC death reviews the way language is used fails to reflect what we know about family violence, and almost always advantages perpetrators and disadvantages victims".[646] In a legal context, FVDRC members have highlighted the need for accurate conceptual models for understanding family violence (particularly the 'social entrapment' model) to be applied in both the Family Court and the criminal jurisdiction.[647] The immigration jurisdiction must also be recognised as playing a core role in responding to family violence, and therefore needs to apply accurate understandings of family violence.

640 See, for example, [2012] NZIPT 200464 (Fiji) at [38].

641 [2020] NZIPT 205587 (India) at [47].

642 [2020] NZIPT 205667 (Norway) at [17].

643 [2017] NZIPT 203941 (India) at [52].

644 Toy-Cronin "Compounding the Abuse", above n 9, at 220–221.

645 Toy-Cronin "Compounding the Abuse", above n 9, at 220.

646 Denise Wilson and others "Becoming Better Helpers", above n 126, at 26.

647 See Henaghan, Short, and Gulliver "Family Violence Experts in the Criminal Court", above n 311; Tolmie and others "Social Entrapment", above n 19.

V. Improving the Immigration Response to Victims of Family Violence CONT.

While the FVDRC has not focused on immigration issues specifically, their 2020 report commented on "the need to further understand intimate partner violence in ethnic migrant communities",[648] and noted that responses to violence such as visa cancellation can render government agencies "complicit in bureaucratic violence" and further women's entrapment.[649] In order to combat such bureaucratic violence, immigration decision-makers must be alert to the ways in which the immigration system has increased the victim-survivor's vulnerability. Interestingly, an IPT member showed this alertness in a 2018 deportation decision (which was unrelated to the VFV visa policy), and this led to quite a different approach. In this case, the appellant was still in a relationship with a partner who had used violence against her. She became liable for deportation after she was declined a partnership-based visa due to her partner's violence against her. In ordering a grant of a resident visa, the IPT acknowledged the power of insecure immigration status to entrap women in situations of violence:

> *The condemnation and deterrence of domestic violence and the protection of women and children are important objectives. However, in this particular case the appellant has lived in New Zealand most of her life and she has an established marriage of over a decade and three New Zealand-citizen children. Deportation will therefore severely penalise the appellant and the three children in her care for her husband's offending. While domestic violence is a risk factor in the appellant's relationship with her husband, the most practical means of protecting her is to grant her residence. If her immigration status is no longer tied to her partnership with her husband, she is not vulnerable to the fear of being deported should she leave the relationship. She will be able to act independently of her husband and therefore be better placed to make decisions about her and her children's future in the event of further domestic violence.*[650]

648 Family Violence Death Review Committee *Sixth Report: Men who use violence | Te Pūrongo tuaono: Ngā tāne ka whakamahi i te whakarekereke* (Wellington, 30 Apr 2020) at 50.

649 Family Violence Death Review Committee *Sixth Report*, above n 648, at 61. The FVDRC's previous report also provided a case study where insecure immigration status "compound[ed] the victim's entrapment": Family Violence Death Review Committee *Fifth Report*, above n 17, at 49.

650 [2018] NZIPT 504290 (Kiribati) at [40].

I argue that similar policy concerns also have a place in decision-making concerning VFV visa appeals.

This review of IPT decisions underscores the urgency of education for decision-makers in this space, both in the dynamics of family violence generally and in culturally specific forms of violence. Te Aorerekura also emphasises the need for workforce competence in forms of violence affecting ethnic communities (including "an abuser's control of visa/immigration status"), as well as the dynamics of family violence more broadly.[651] To this end, family violence workforce capability frameworks were recently launched to improve the capability of government and non-government workforces to respond to family violence.[652] Specialist workforce training is to be implemented for court staff and the legal profession and, while this will not apply directly to the judiciary, the relevant Te Aorerekura 'action point' includes "continu[ing] to support judicial education and benchbooks".[653] In an Australian context, the Judicial Council on Cultural Diversity has stressed the role that immigration status plays in migrant women's experiences of violence,[654] and has raised the need for judicial officers to receive training in forms of family violence unique to migrant and refugee women.[655] It is vital for the IPT to have comprehensive and ongoing education on these matters, given the importance of the decisions they are making to the lives and safety of victim-survivors and their children.

Prospects for Reform of the VFV Visa Policy

Policy-makers have acknowledged problems with the VFV visa policy criteria for many years, with former Immigration Minister Nathan Guy announcing an intention to review the policy some 10 years ago,[656] and Immigration New Zealand's 2019 Victims of Family Violence Project highlighting the major exclusions from the policy through interviews with NGOs.[657] Unfortunately, the report detailing Immigration New Zealand's findings ultimately concluded that "[c]ompeting policy priorities mean that a [VFV] policy review is not currently programmed",[658] but there is reason for optimism that reform may soon be considered. The government's 2022 *Te Mahere Whai Mahi Wāhine: Women's Employment Action Plan* includes a medium-term action of "reviewing the immigration settings for migrants in New Zealand who experience family violence",[659] and an April 2022 Cabinet paper put forward by the Minister of Immigration states:

> *I have directed officials to progress work ensuring migrant partners are suitably supported by the immigration system after situations of family violence. This work will occur within the next 12 months.*[660]

651 Board for the Elimination of Family Violence and Sexual Violence Te Kāwanatanga o Aotearoa *Te Aorerekura*, above n 619, at 59.

652 *Specialist Family Violence Organisational Standards* (New Zealand Government, May 2022) and *Entry to Expert Family Violence Capability Framework* (New Zealand Government, May 2022), available at <https://tepunaaonui.govt.nz/our-work/workforce-capability/>.

653 Board for the Elimination of Family Violence and Sexual Violence Te Kāwanatanga o Aotearoa *Te Aorerekura*, above n 619, at action point 15.

654 Judicial Council on Cultural Diversity *The Path to Justice*, above n 92, at 27–28.

655 Judicial Council on Cultural Diversity *The Path to Justice*, above n 92, at 44–45. The report provides examples such as violence relating to immigration status, threats to family overseas, multi-perpetrator family violence, dowry-related family violence, and forced marriage.

656 See New Zealand Family Violence Clearinghouse "Government to review immigration policy for people experiencing domestic violence" (25 September 2012) < https://nzfvc.org.nz/>.

657 Ministry of Business, Innovation and Employment *Recent Migrant Victims of Family Violence Project 2019: Final Report*, above n 10, at 28–32.

658 Ministry of Business, Innovation and Employment *Recent Migrant Victims of Family Violence Project 2019: Final Report* above n 10,

659 Manatū Wāhine Ministry for Women Te Mahere Whai Mahi Wāhine Women's Employment Action Plan (2022) at 6.

660 Cabinet Paper "Immigration Rebalance – determining the green list and sector agreements" (3 June 2022) 2122-4566 at [62].

V. Improving the Immigration Response to Victims of Family Violence CONT.

On the other hand, the vulnerability of some migrant women to family violence may worsen with the impending removal of work visas for many partners of migrant workers. This change was scheduled to commence in December 2022 but has been deferred until April 2023.[661] The proposed change will require affected partners, who would have previously been eligible for open work rights, to "obtain an Accredited Employer Work Visa with a job paying median wage or more" in order to work.[662] As was raised during initial consultation, this will mean that more migrants are entirely financially dependent on their partner and have no means of supporting themselves should they seek to separate from the violent partner.[663] The proposed change will affect partners of temporary visa holders, who are also ineligible for VFV visas,[664] creating an even more acute position of vulnerability for them; they will be entirely dependent on their partner for both their right to remain in New Zealand and all their basic material needs.[665] This makes reform of the VFV visa policy, and in particular access for partners of temporary visa holders, all the more urgent.

Because immigration instructions are certified by the Minister of Immigration, legislative change is not in fact needed to amend the VFV visa criteria and it would be straightforward for the Minister to make changes to the instructions that would vastly improve safety for migrant victim-survivors. However, to hasten reform, Green Party MP Jan Logie has put forward a member's bill, the Protecting Migrant Victims of Family Violence Bill 2021, that addresses each of the most problematic VFV visa criteria. Crucially, this Bill would mandate the removal of the 'unable to return home' test, as well as expanding VFV visa access to partners of temporary visa holders and to applicants who are offshore (removing abusers' ability to deprive their partner of VFV visa eligibility via 'transnational abandonment'). The Bill would also require that the safety of any children of the applicant is a key consideration for the grant of a VFV visa. The Protecting Migrant Victims of Family Violence Bill, as well as work being undertaken to strengthen family violence immigration protections in other jurisdictions,[666] provides guidance as to key changes that would vastly improve the efficacy of New Zealand's VFV visa regime:[667]

- **Removal of the 'unable to return to their home country' requirement.** This requirement was the central issue in 39 out of 49 appeals included in this study; it would seem that its removal would make the single largest difference to the accessibility of VFV visas. This would enable victim-survivors to access the VFV visa irrespective of their country of origin and would bring New Zealand immigration policy into line with regimes in comparable jurisdictions such as Australia, the United Kingdom, and the United States. The removal of this requirement would enable a far greater proportion of migrant victim-survivors to seek help without fear of removal from New Zealand; would mean that far fewer victim-survivors would be put through costly and stressful appeals; and would drastically reduce the number of victim-survivor mothers at risk of separation from their children.

661 Hon Michael Wood "Changes to partner work visas deferr release, 5 December 2022) <www.beehive. ed to April 2023" (pressgovt.nz>.

662 Cabinet Paper "Immigration Rebalance", above n 660, at [10.5] and [11]. See also Immigration New Zealand *Rebalancing New Zealand's Immigration System* (2022) <https://www.beehive.govt.nz/> at 3.

663 See Matthew Scott "Violence ignored in immigration changes" *Newsroom* (31 August 2022) <https://www.newsroom.co.nz/>. See also Cabinet Paper "Immigration Rebalance, above n 660, at [62].

664 As they were not in a partnership with a 'New Zealand citizen or residence class visa holder' as required by S4.5.2(a).

665 For discussion of the specific ways in which financial dependence can impede migrant victim-survivors' separation, see generally Judicial Council on Cultural Diversity *The Path to Justice*, above n 92, at 20–21.

666 In Australia, see National Advocacy Group on Women on Temporary Visas Experiencing Violence *Blueprint for Reform*, above n 84. On 'transnational abandonment' protections, see Anitha, Roy, and Yalamarty *Disposable Women*, above n 87, at 33.

667 Protecting Migrant Victims of Family Violence Bill 2021, cl 4.

- **Removal of the requirement for a partnership with 'a New Zealand citizen or residence class visa holder'.** Currently, the immigration status of an abuser determines the victim-survivor's access to VFV visas. The removal of this requirement would ensure that victim-survivors who were in a partnership with a temporary visa holder can also access VFV visas. These victim-survivors are presently in an extremely vulnerable position, soon to be worsened by the removal of work visas for many. It should be noted that removing this requirement would not unduly widen access to *any* person who experiences family violence in New Zealand, such as a tourist travelling around New Zealand with their partner on visitor visas. The policy still requires that an applicant "had intended to seek a residence class visa in New Zealand on the basis of [their] relationship". Therefore, the appellant's relationship must still have provided some potential pathway to residence (for example via inclusion in an upcoming application under the Skilled Migrant or Residence from Work category). Similar protections exist, or have been proposed, in other jurisdictions.[668] However the need for them is heightened in New Zealand where, due to the nature of our visa regimes and long application processing times, migrants can spend very lengthy periods onshore in the process of seeking residence.

- **Provision for applicants who are no longer 'in New Zealand'.** Victims of transnational abandonment who are offshore cannot access VFV visas because applicants must be 'in New Zealand'. Once offshore, victim-survivors are vulnerable to having their visa cancelled without an opportunity to respond,[669] which may be triggered if their partner contacts INZ to withdraw support for their visa.[670] This can leave them stranded offshore, separated from their children and unable to access their legal rights (for example, relationship property rights, or the ability to participate in criminal proceedings against their abuser). Similar gaps in policy for transnationally abandoned women have been highlighted in Australia and the United Kingdom, where recommendations have been made to grant affected women temporary visas in order to return and avail themselves of protections for victims of violence.[671] Similar measures are required in New Zealand.

668 For example, the 'U Visa' scheme in the USA is available irrespective of the abuser's visa status (additionally, the Violence Against Women Act self-petition process applies where the applicant was in a relationship with a US citizen or permanent resident). In Australia recommendations have been made to widen eligibility to "[a]ny person experiencing domestic, family and sexual violence who has applied for a permanent visa onshore as a secondary applicant, and their dependants"; see National Advocacy Group on Women on Temporary Visas Experiencing Violence *Blueprint for Reform*, above n 84, at 4.

669 Immigration Act 2009, s 66(1)(a).

670 In contrast, if an abusive partner contacts INZ to withdraw support for the visa of a person who remains onshore, the affected partner would have some opportunity to respond. While a temporary visa holder may be liable for deportation where "the person's circumstances no longer meet the rules or criteria under which the visa was granted", the person is afforded 14 days to give good reason why deportation should not proceed and may appeal to the IPT against their deportation liability (Immigration Act 2009, s 157).

671 See Anitha, Roy, and Yalamarty *Disposable Women*, above n 87, at 33: "[Transnationally abandoned] women should be issued with temporary visas outside the rules, and without conditions attached. … This will enable women to avail the DV Rule". See also National Advocacy Group on Women on Temporary Visas Experiencing Violence *Blueprint for Reform*, above n 84, at 4–5, which recommends: "A new subclass of temporary visa be introduced to protect victims/survivors of domestic, family and sexual violence who … are offshore because they were threatened, coerced or deceived into leaving Australia by the perpetrator and/or the perpetrator's family."

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- **Provision for children's safety.** Despite the VFV visa policy objectives citing New Zealand's UNCROC obligation to protect children from mental and physical violence, children's safety is not in fact relevant to any of the policy criteria. The VFV visa policy should make clear that, as is the case in Australia and the United States,[672] VFV visas are also available where a child is the primary victim of family violence. The lack of a visa pathway for victim-survivor parents whose child is required to stay in New Zealand also creates an unacceptable degree of risk that children will be left in the care of an unsafe parent. As has been proposed in Australia, a pathway to residence is required for all victim-survivor parents who are unable to leave the country with their children.[673] I further suggest that the inconsistency of the IPT's approach to Family Court orders relating to children's care should be addressed, possibly through policy guidance on the scope of each body's responsibilities.
- **Providing a discretion to accept other forms of evidence of family violence.** Currently there are only four accepted forms of evidence of family violence and they require the victim-survivor to have engaged with the justice system or two designated professionals. Such engagement may not have been possible for financial, geographic, safety, cultural, linguistic, or other practical reasons. As discussed in Part I, equivalent immigration protections in other jurisdictions do not prescribe a narrow list of acceptable evidence. I suggest that an appropriate extension of the VFV visa policy would be to treat the existing prescribed forms of evidence as 'conclusive' evidence, but to introduce a discretion to accept any other credible evidence.[674] Adequate family violence training for decision-makers, including education on the barriers to migrant victim-survivors accessing the justice system or professional support, will be essential to ensure that appropriate discretion is exercised.

672 In Australia see the Migration Regulations 1994 (Cth), sch 2, which provides protection where "either or both of the applicant; **[or] a member of the family unit** of the sponsoring partner or of the applicant or of both of them; has suffered family violence". In the United States see the Immigration and Nationality Act 8 USC § 1154, which provides protection where "the alien **or a child** of the alien has been battered by or has been the subject of extreme cruelty". Arguably New Zealand's current policy could apply where a child has been the primary victim, as current policy simply requires "that [the] partnership has ended due to family violence" and is not specific as to who the violence was directed at. However, given the narrow interpretations taken by the IPT and the fact the 'unable to return home' test applies only to the applicant, there is no guarantee that it would be interpreted this way.

673 See National Advocacy Group on Women on Temporary Visas Experiencing Violence *Path to Nowhere: Women on Temporary Visas Experiencing Violence and Their Children* (2018) at 6.

674 I would caution against the introduction of a distinction between 'judicial' evidence being deemed conclusive evidence of violence, and non-judicial evidence not being conclusive (as is presently the case in Australia). It is appropriate to retain statutory declarations as a 'conclusive' form of evidence, as two designated professionals are better placed to assess whether violence has occurred than an immigration decision-maker.

- **Recognising the family violence context when assessing 'partnership'.** The VFV visa policy applies the same test for 'partnership' in situations of family violence as in standard partnership-based visas.[675] This test requires "that they have been living together for 12 months or more in a partnership that is genuine and stable" and that they provide sufficient evidence of this. This poses obvious problems for victim-survivors of violence, for example: they may be forced to stay and endure additional months of violence in order to be eligible for the protection of a VFV visa; it may be very difficult for them to supply the type of partnership evidence that is usually expected (such as proof of joint finances and letters recognising the relationship from community members); and their partner's abusive behaviour may be perceived as negating the 'genuineness and stability' of the relationship (as was seen in an IPT case where the fact the applicant was deceived into a sham marriage negated the 'genuineness' of the relationship, despite her own genuine intentions in entering into the marriage).[676] The test for partnership in cases of family violence has received particular attention in Australia,[677] where it has been recommended that "financial abuse or social isolation must not be used against a person who has experienced violence when assessing the genuineness of the relationship".[678] New Zealand should similarly amend the test for partnership for VFV visa applications; I suggest this could be done by removing the minimum relationship duration, recognising that violence will affect the nature of the evidence of the relationship that can be expected, and focusing on the victim-survivor's intentions in entering the relationship. Adequate training of immigration officers processing applications will also be required, to ensure they can use appropriate discretion when requesting partnership evidence.
- **Enabling applications for VFV visas before the 'partnership has ended'.** The VFV visa policy requires that the partnership be ended before an application can be made, and social welfare assistance is not available until the VFV visa has been granted.[679] For many applicants, this means a period of homelessness and total reliance on charitable support after separation. This is not a viable option for many. Separation is the time at which they and their children are at the highest safety risk,[680] and victim-survivors understandably want certainty that they can feed and house themselves and their children before taking this step. Enabling VFV visas to be granted before a relationship ends would make separation a more viable option. This broadening of access has also been proposed in Australia.[681] This should be accompanied by clear guidance to immigration officers that no compliance action is to be taken against temporary visa holders on the basis that they have suffered violence.

675 Immigration New Zealand *Operational Manual* (2022). S4.5.2 requires an appellant was "in a partnership (see F2.5b) with a New Zealand citizen or residence class visa holder". F2.5b requires "that they have been living together for 12 months or more in a partnership that is genuine and stable". Evidence of 'living together in partnership that is genuine and stable' is prescribed by F2.20.15.

676 [2020] NZIPT 205667 (Norway).

677 See National Advocacy Group on Women on Temporary Visas Experiencing Violence *Blueprint for Reform*, above n 84, at 3–4; Centre for Women's Safety and Wellbeing *Snapshot of Demand and Current Issues for Women on Temporary Visas who are Victims/Survivors of Family and Domestic Violence* (August 2021) at 19–20.

678 Current n 677: National Advocacy Group on Women on Temporary Visas Experiencing Violence *Path to Nowhere*, above n 673, at 6.

679 Per cl 15B of the Special Needs Grants Programme, a welfare programme under s 101 of the Social Security Act 2018.

680 See above n 3.

681 National Advocacy Group on Women on Temporary Visas Experiencing Violence *Blueprint for Reform*, above n 84, at 4.

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- **Improving the support and information available to migrant victim-survivors.** Presently VFV visas are not accessible to many eligible victim-survivors for practical reasons, as separation is likely to mean a period of no financial means and (often lengthy) homelessness, few have knowledge of the VFV visa scheme, and few have the resources to access legal support or the professionals who could provide supporting evidence for an application. As the Protecting Migrant Victims of Family Violence Bill 2021 recognises, improving the broader supports available to VFV visa applicants would greatly improve the accessibility and efficacy of the VFV visa regime. This includes, for example: the provision of information at the time of migration on family violence and how it affects one's visa; providing Legal Aid assistance for VFV visa applications and appeals; removing the application fee for IPT appeals concerning VFV visa applications; improving the social welfare support available to VFV visa applicants;[682] and ensuring access to publicly funded healthcare, emergency housing, and free interpreting services for migrant victim-survivors.

New Zealand's VFV visa scheme is uniquely narrow compared to similar schemes internationally, and its shortcomings mean that many migrant victim-survivors cannot realistically access protections from family violence. The policy's deficiencies have been recognised for many years and changes are long overdue. However, reform is not the whole solution; education for immigration decision-makers is also crucial. Even if the policy criteria are significantly widened, the IPT will still be called upon to determine VFV visa appeals and its decisions will guide immigration officers' application of the policy. It should also be remembered that a range of appeals beyond the scope of this report also involve family violence, including appeals relating to refugee status, partnership-based visas, and deportation. Until such time as reform occurs, the handling of VFV visa appeals could be vastly improved by taking greater guidance from the international obligations set out in the policy 'objectives', and throughout this report I have sought to highlight how this might colour reasoning. It is also vital to recognise that the immigration jurisdiction plays a core in New Zealand's response to family violence and, accordingly, a sensitivity to the context of family violence should be applied in all aspects of decision-making.

682 Specifically, ensuring that the Emergency Benefit and Temporary Additional Support are available to VFV visa applicants (as opposed to the current 'Family Violence Programme Payment', which is more limited and must be renewed each week). Providing access to Community Services Cards would also greatly improve applicants' access to services.


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