IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 19/2004
[2005] NZSC 38

BETWEEN	ATTORNEY-GENERAL Appellant
AND	AHMED ZAOUI First Respondent
AND	INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY Second Respondent
AND	HUMAN RIGHTS COMMISSION Intervener

Court:	Elias CJ, Gault, Keith, Blanchard and Eichelbaum JJ
Counsel:	T Arnold QC, Solicitor General, K L Clark and A S Butler for Appellant R E Harrison QC and D Manning for First Respondent R M Hesketh and S A Bell for Intervener
Hearing:	12 and 13 April 2005
Judgment:	21 June 2005

JUDGMENT OF THE COURT

A The first respondent is granted leave to cross appeal.

B The declarations made by the Court of Appeal are set aside.

C The Court makes the following declarations:

1 Those applying article 33.2 of the Convention relating to the Status of Refugees 1951 under Part 4A of the Immigration Act 1987 are to apply it in its own terms. In particular, to come within article 33.2, the person in question must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial.

2 In carrying out his function under Part 4A of the Immigration Act the Inspector-General of Intelligence and Security is concerned only to determine whether the relevant security criteria – here s 72 and article 33.2 – are satisfied. He is not to determine whether Mr Zaoui is subject to a threat which would or might prevent his removal from New Zealand.

D To the extent that the above declarations differ from those made by the Court of Appeal, the appeal and the cross-appeal are allowed.

REASONS
(Given by Keith J)

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The facts and proceedings in brief

[1] Mr Zaoui is a refugee. The Refugee Status Appeals Authority (the RSAA) so decided on 1 August 2003. He accordingly has the protection accorded by para (1) of article 33 of the Convention relating to the Status of Refugees 1951 as amended by its 1967 Protocol to both of which New Zealand is party:

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

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

[2] In terms of para (2) the benefit of that protection may not, however, be claimed by a refugee

> whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[3] On 20 March 2003, the Director of Security, depending in part on article 33.2 of the Refugee Convention, issued a certificate in respect of Mr Zaoui under s 114D of the Immigration Act 1987 in the following terms:

> 2. I hold classified security information (as defined in section 114B(1) of the Immigration Act 1987) ("the Act") and I am satisfied that the information:
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> (a) relates to Ahmed ZAOUI ("the person") and that the person is not a New Zealand citizen and is a person about whom decisions are to be, or can be, made under the Act; and
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> (b) is credible, having regard to the source or sources of the information and its nature, and is relevant to the relevant security criteria referred to below; and
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> (c) would mean, when applying the relevant security criteria referred to below to the person in light of that information, that the person meets the criteria.
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> 3. The relevant security criteria are the relevant refugee deportation security criteria in section 114C(6) of the Act, namely that:
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> (a) the person's continued presence in New Zealand constitutes a threat to national security in terms of section 72 of the Act; and
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> (b) there are reasonable grounds for regarding the person as a danger to the security of New Zealand, in terms of Article 33.2 of the Refugee Convention (as defined in section 2 of the Act).

[4] Section 114C(6) is as follows:

> (6) The relevant refugee deportation security criteria are a combination of any 1 or more of the criteria listed in subsection (4) as relevant deportation security criteria, taken together with either or both of the following criteria:
>
> (a) That there are reasonable grounds for regarding the person as a danger to the security of New Zealand, in terms of Article 33.2 of the Refugee Convention:

(b) That the person is a danger to the community of New Zealand, having been convicted by a final judgment of a particularly serious crime, in terms of Article 33.2 of the Refugee Convention.

The relevant deportation security criterion in subs (4)(a) applied to Mr Zaoui is

> That the person constitutes a threat to national security in terms of section 72.

[5] Section 72 reads as follows:

> Where the Minister certifies that the continued presence in New Zealand of any person named in the certificate constitutes a threat to national security, the Governor-General may, by Order in Council, order the deportation from New Zealand of that person.[1]

[6] Four days after the Director issued the certificate, the Minister of Immigration made a preliminary decision to rely on that certificate and issued a notice to that effect under s 114G. Three days later, on 27 March 2003, Mr Zaoui applied to the Inspector-General of Intelligence and Security to review the making of the certificate under s 114I. After the review had begun, Mr Zaoui asked that it be delayed until the RSAA had decided his appeal against the initial refusal of refugee status.

[7] Following the decision of the RSAA in Mr Zaoui's favour, the Inspector-General issued an interlocutory decision on the procedure he would follow and on the scope of his review. This appeal by the Attorney-General arises from Mr Zaoui's application for judicial review of that interlocutory decision. The Inspector-General has yet to resume his process of review, pending the outcome of this litigation.

[8] The provisions invoked in this case were introduced into the Immigration Act in 1999 in a new Part 4A. That part introduced, as its title states, special procedures in immigration cases involving security concerns. The object of the part, according to s 114A, is to

(a) Recognise that the New Zealand Security Intelligence Service holds classified security information that is relevant to the administration of this Act; and

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[1] Under s 114D(4) references to the belief or opinion of the Minister in the wording of a security criterion are to be read, for the purposes of Part 4A, as including an alternative reference to the belief or opinion of the Director.

(b) Recognise that such classified security information should continue to be protected in any use of it under this Act or in any proceedings which relate to such use; and

(c) Recognise that the public interest requires nevertheless that such information be used for the purposes of this Act, but equally that fairness requires some protection for the rights of any individual affected by it; and

(d) Establish that the balance between the public interest and the individual's rights is best achieved by allowing an independent person of high judicial standing to consider the information and approve its proposed use; and

(e) Recognise that the significance of the information in question in a security sense is such that its approved use should mean that no further avenues are available to the individual under this Act and that removal or deportation, as the case may require, can normally proceed immediately; and thus

(f) Ensure that persons covered by this Act who pose a security risk can where necessary be effectively and quickly detained and removed or deported from New Zealand.

[9] In brief, the process established by the new part is that the Director of Security has the power to provide the Minister with a security risk certificate if satisfied the grounds are made out; the Minister has the power to make a preliminary decision to rely on the certificate; the person affected may then seek a review of the Director's decision to make the certificate by the Inspector-General of Intelligence and Security (acting under his own statute as well as under Part 4A); the Inspector-General on review decides whether or not the certificate was properly made; if the review application fails, the person then has the right to appeal to the Court of Appeal on a point of law; the Minister has the power within three days to decide to rely on a confirmed or non-challenged certificate; if the Minister does so decide the immigration process resumes with the immediate prospect of the person being removed from New Zealand.

[10] Mr Zaoui, supported by the ruling of the RSAA, fears that if he were removed to Algeria, his country of nationality, he would be subject to the threat of torture or arbitrary deprivation of his life.

The Court of Appeal ruling

[11] The High Court decision of Williams J given on 19 December 2003[2] was the subject of an appeal by the Attorney-General and a cross appeal by Mr Zaoui. The Court of Appeal, on 1 October 2004, made the following declarations:

> (1) Whether there are reasonable grounds for regarding the person as a danger to the security of New Zealand must be decided in terms of art 33.2 of the Refugee Convention. This follows from the explicit reference to the Refugee Convention in s 114C(6)(a) and requires the Inspector-General to consider whether there are reasonable grounds for regarding Mr Zaoui as a danger to the security of New Zealand in light of New Zealand's obligations under that Convention.
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> (2) The security criteria in s 114C(6)(a) will be met only if there are objectively reasonable grounds based on credible evidence that Mr Zaoui constitutes a danger to the security of New Zealand of such seriousness that it would justify sending a person back to persecution. The threshold is high and must involve a danger of substantial threatened harm to the security of New Zealand.
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> (3) There must be a real connection between Mr Zaoui himself and the prospective or current danger to national security and an appreciable alleviation of that danger must be capable of being achieved through his deportation.[3]

[12] Anderson P and Glazebrook J supported all three declarations while William Young J endorsed only the first.

The issues before this Court

[13] The Attorney-General, with leave, appeals against the second and third declarations, seeking the deletion of the final phrase of the first sentence of the second – "of such seriousness that it would justify sending a person back to persecution" – and the setting aside of the third. His written submissions also address the relative roles of the Director of Security, the Inspector-General of Intelligence and Security and the Minister of Immigration, matters not expressly covered by the declarations. The submissions on behalf of Mr Zaoui and the Human Rights Commission similarly extend beyond the declarations.

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2 *Zaoui v Attorney-General* [2004] 2 NZLR 339.

3 *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 at [26].

[14] In response to a Minute issued by the Court following the filing of the submissions, Mr Harrison QC for Mr Zaoui applied for leave to cross appeal, seeking the following declarations:

> 1 The test or criterion of "danger to the security of New Zealand, in terms of Article 33.2 of the Refugee Convention" requires by way of minimum standard that there be reasonable grounds for regarding the subject of the security risk certificate as posing a very serious (or alternatively serious) and substantial danger to security;
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> 2 If and to the extent that the Inspector-General concludes that a claimed danger satisfies the test articulated in para [1], it is a mandatory (or alternatively a permitted) inquiry, in the context of an Inspector-General's review conducted pursuant to s 114I of the Immigration Act of the making by the Director of Security of a security risk certificate based (in part) on the s 114C(6)(a) criterion, that the potential adverse consequences for the individual the subject of the certificate be balanced or weighed against the claimed danger to the security of New Zealand which formed the basis of the Director's decision to make the certificate;
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> 3 Where in the course of a review under s 114I of the Act it is established to the satisfaction of the Inspector-General that deportation or removal of the individual the subject of the certificate, were it to occur, would be likely to result in refoulement contrary to Article 3.1 of the Convention Against Torture (or any comparable international law or Bill of Rights standard), the effect of Article 33.2 and thus the s 114C(6)(a) criterion, properly interpreted, is that Article 33.2 and/or the criterion cannot properly apply to the individual concerned, by reason of the operation of an absolute prohibition on refoulement (or in the alternative, under the *Suresh*[4] approach, a prohibition on refoulement except in "extraordinary circumstances").

[15] In the course of argument, Mr Harrison refined those declarations by:

(a) deleting in para 2 the lesser alternative of permitting rather than requiring the wider inquiry;

(b) referring in para 3 to arbitrary deprivation of life as well as to torture, effectively in place of the "comparable … standard"; in addition to those two matters, Mr Harrison also emphasised Mr Zaoui's right to natural justice; the references we make to those rights in these reasons, particularly in the last part, are not to be taken as exhaustive; and

(c) deleting the alternative at the end of para 3.

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[4] The reference is to *Suresh v Canada (Minister of Citizenship & Immigration)* [2002] 1 SCR 3.

[16] On the final point, as we also mention later, the statement of defence filed by the Minister of Immigration and correspondence on behalf of the Crown did not suggest such a qualification and the Solicitor-General, Mr Arnold QC, in argument accepted that, contrary to what was said in *Suresh*, the obligations in respect of torture and arbitrary deprivation of life were absolute. That position appears plainly to be the correct one.[5] The two rights protected by the prohibition are stated in absolute terms in international law, even in wartime.[6] We need not consider that matter further.

[17] The Solicitor-General, on behalf of the Attorney-General, did not oppose the application and we grant leave to Mr Zaoui to cross appeal.

[18] Reflecting the written submissions and the proposed grounds of appeal, the oral argument before this Court ranged over three matters:

1 The meaning of article 33.2 of the Refugee Convention.

2 The scope of the functions, powers and duties under Part 4A of the Immigration Act and their allocation between the Director of Security, the Inspector-General of Intelligence and Security on review and the Minister of Immigration.

3 The role of other protections of human rights under the New Zealand Bill of Rights Act 1990 and treaties other than the Refugee Convention in relation to the operation of Part 4A and other parts of the Immigration Act.

1 The meaning of article 33.2; "proportionality" or weighing and balancing

[19] The Attorney-General's principal challenge to the declarations made by the Court of Appeal is to what he refers to as a test of proportionality, requiring the

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5 Eg Mullan "Deference from *Baker* to *Suresh* and Beyond – Interpreting the Conflicting Signals" in David Dyzenhaus (ed) *The Unity of Public Law* (2004) 22, 45-47.

6 The power to derogate from the protected rights and freedoms conferred by article 4 of the ICCPR does not extend to articles 6 (right to life) and 7 (prohibition on torture), set out in para [48] below; see also eg article 3(1)(a) of each of the 1949 Geneva Conventions for the protection of war victims, and article 75 of the first additional protocol of 1977 to the Conventions.

Inspector-General to assess the possible consequences for the refugee of deportation or removal and to weigh those consequences against the extent of the danger to the security of New Zealand. The Attorney-General's position in brief is that the Inspector-General is not obliged, indeed has no power, to have regard to the dangers to the refugee of being deported or removed, with one possible qualification, and accordingly no question of proportionality or weighing and balancing arises. The possible qualification arises from the fact that decisions on security risk are made in the context of the prospect of refugees facing a threat to their life or freedom on the proscribed grounds.

[20] The possible qualification, it may be seen, is apparent rather than real since it does not involve a particular weighing of the risk to the individual in question. Rather it is a matter of the gravity, indicated by para (1) of article 33, of the consequences of deportation or removal. It is that seriousness that explains the elaboration of article 33.2 in the second declaration made by the Court of Appeal, of the elements of objectively reasonable grounds based on credible evidence, of a high threshold and of a danger of substantial threatened harm to security. Those elements are close to those stated by the Supreme Court of Canada in the *Suresh* case in its elaboration of article 33.2 and were not challenged in substance on behalf of the Attorney-General before us. We return to the detail of the statement later.

[21] Mr Harrison, in his written submissions for Mr Zaoui, contends that article 33.2 does not require a "proportionality analysis" and that the Court of Appeal judgment, properly read, does not contain that requirement. The Human Rights Commission takes the same position. But those submissions do call for the two paragraphs of article 33 to be related in various ways. More significantly, the second declaration proposed for Mr Zaoui would require (or permit) the Inspector-General to weigh the threat to the particular individual and then to balance it against the claimed danger to national security; and the third would require the Inspector-General to make rulings about the possibility of the individual being tortured or arbitrarily deprived of life, a ruling which would either be conclusive or, in the alternative, could be overridden by "exceptional circumstances".

[22] Accordingly, we consider (a) whether the national security limit placed by article 33.2 on the bar on deportation stated in para (1) sets a single standard which,

if satisfied, operates by itself as an exception to the bar or (b) whether it requires or permits consideration of the dangers to the individual by reference to the human rights law beyond the express terms of article 33.2, and whether, as a result, it incorporates some element of proportionality or balancing. We consider this question in the first place in terms of the position under international law and in particular under article 33.2, leaving until the next part of these reasons the role under the Immigration Act of the various decisionmakers, especially the Inspector-General of Security. We are able to do this because article 33.2 is directly incorporated into the law of New Zealand by s 114C(6)(a).

[23] Glazebrook J reached the conclusion that article 33 required what she referred to as proportionality or "a sliding scale of seriousness of the risk to national security, depending on the possible consequences for a particular refugee of refoulement" by reference to the opinions of commentators, the drafting history, the UN High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* (1992 edition) para 156 and remarks made by members of the House of Lords in *Secretary of State for the Home Department v Rehman*.[7] The proceedings in this Court have brought more material to our attention.

[24] In terms of articles 31 and 32 of the Vienna Convention on the Law of Treaties, which are accepted on all sides as stating the rules of customary international law for the interpretation of treaties[8] and which, as such, are part of the law of New Zealand, we consider the terms of article 33 of the Refugee Convention, other provisions of the Convention as part of the context, relevant rules of international law, subsequent practice of the parties, and the drafting history. We also consider relevant judicial decisions and commentaries.

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[7] [2003] 1 AC 153. Glazebrook J saw the weighing or the proportionality under article 33.2 as being primarily or solely for the Minister; eg paras [153] and [157]. We are of course concerned at this stage with the substantive test rather than with who is to decide whether it is satisfied, the subject of the next part of these reasons.

[8] Eg Lord Diplock in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 282-283 and *Edwards v United States of America* [2002] 3 NZLR 222 at [26] (CA).

The plain meaning and the purpose

[25] Article 33, in its plain terms, first places an obligation on the States parties not to expel a refugee whose life or freedom might be threatened in certain circumstances but, second, notwithstanding that prohibition, empowers them to expel a refugee for certain reasons including the endangering of national security. The two considerations are stated distinctly in each paragraph. According to their ordinary meaning, the two provisions operate in sequence. They are not related in any proportionate or balancing way. The second, if satisfied in its own terms, defeats the prohibition in the first. That is so although, as we have said in paras [19] and [20], the second operates and must be interpreted in the context of the serious consequences of return to persecution contemplated in the first.

[26] The dual purpose of the article is plain enough. The prohibition on exit in para (1) of article 33 mirrors the entry definition in article 1A set out in para [28] but, as with article 1 and its exceptions, the prohibition on exit is not absolute. Those who prepared the Convention[9] were, and the 142 States party to it and the 1967 Protocol now are, willing to allow the entry of refugees and to protect them against deportation to persecution, but that willingness had and has its limits.

[27] That distinct sequential reading, based as it is on the ordinary meaning of the terms of the two paragraphs of article 33 and their purpose, is supported by a consideration of what the proportionality or sliding scale proposition would require. The decision-maker would have to measure against one another two matters which are very difficult to relate: the level of threat to the life or liberty of an individual, on the one side, and, on the other, the level of reasonably perceived danger to the security of the State. While the law may sometimes appear to require such weighing, such an interpretation is to be avoided unless it is plainly called for.

The context

[28] The sequential reading is also supported by the interpretation given to related provisions of the Convention, part of the context in which article 33 is to be read.

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[9] See the positions of the United Kingdom and French governments at the 1951 Conference which adopted the Convention, para [37] below.

Article 1A contains the basic definition of a refugee – persons who owing to a well founded fear of being persecuted for the proscribed reasons are outside their country of nationality and are unable or, owing to such fear, unwilling to avail themselves of the protection of that country. As mentioned, that definition, applicable at the stage of entry, is understandably paralleled by the prohibition on compulsory exit stated in article 33. And, as with that provision relating to exit, the entry obligation is subject to limits: under article 1F(b), the Convention does not protect persons with respect to whom there are serious reasons for considering that, among other things, they have committed serious non-political crimes outside their country of refuge before their admission as refugees.

[29] In the case of entry, as with expulsion, the argument has been made that the gravity of the crime is to be weighed against the gravity of the possible persecution. That very argument was rejected by the Court of Appeal in *S v Refugee Status Appeals Authority*,[10] a judgment to which the Court of Appeal in this case does not appear to have been referred. Article 1F was held to be clear and unambiguous:

> It directs attention to the commission of a serious crime, nothing more, nothing less. The seriousness of a crime bears no relationship to and is not governed by matters extraneous to the offending. There is nothing in art 1F to justify reading into its provisions restrictive or qualifying words such as those which would be necessary to require a balancing exercise of the kind suggested.[11]

[30] In support of that conclusion, the Court referred to Canadian, Australian and British authority. It is convenient to mention here that the passage in the UN High Commissioner for Refugees' *Handbook*[12] to which the Court of Appeal referred in this case related to these entry provisions and not to the exit provisions of article 33. With the Court of Appeal in *S*, we do not find the *Handbook's* assertion persuasive. Further, when in the course of 2001 the UN High Commissioner for Refugees undertook a wide ranging consultation on the Refugees Convention fifty years after it had been adopted, the relevant expert roundtable said this in respect of article 1F(b):

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[10] [1998] 2 NZLR 291.

[11] At 297.

[12] *Handbook on Procedures and Criteria for Determining Refugee Status: under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1988).

> 12. There was considerable debate on the question of proportionality and balancing. In considering this question:
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> (i) State practice indicates that the balancing test is no longer being used in common law and in some civil law jurisdictions.
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> (ii) In these jurisdictions, other protection against return is, however, available under human rights law.
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> (iii) Where no such protection is available or effective, for instance in the determination of refugee status under UNHCR's mandate in a country which is not party to the relevant human rights instruments, the application of the exclusion should take into account fundamental human rights law standards as a factor in applying the balancing test.
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> *The meeting did not reach consensus on point (iii), although some support for it was expressed.* It is suggested that this be examined further at the second roundtable in the context of the discussion on Article 33 of the 1951 Convention.[13]

State practice

[31] That second roundtable, which is of course the one most relevant in this appeal, supported the distinct, sequential reading of the two paragraphs of article 33, without any reference to balancing or proportionality. That is so although the paper on article 33 for the UNHCR roundtable, prepared by two renowned Cambridge international lawyers, Sir Elihu Lauterpacht QC and Daniel Bethlehem QC, did support "the requirement of proportionality":

> 177. Referring to the discussions in the drafting conference, Weis put the matter in the following terms:
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> > The principle of proportionality has to be observed, that is, in the words of the UK representative at the Conference, whether the danger entailed to the refugee by expulsion or return outweighs the menace to public security that would arise if he were permitted to stay.[14]
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> 178. The requirement of proportionality will necessitate that consideration be given to factors such as:
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> (a) the seriousness of the danger posed to the security of the country;
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> (b) the likelihood of that danger being realized and its imminence;

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[13] Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (2003) 481 [emphasis added]. The statements adopted by the roundtable may be seen as a step up from academic commentary but not as equivalent to State practice: those participating attended in their personal capacity.

[14] Weis, *The Refugee Convention*, 1951 (1995) 342.

(c) whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned;

(d) the nature and seriousness of the risk to the individual from *refoulement*;

(e) whether other avenues consistent with the prohibition of *refoulement* are available and could be followed, whether in the country of refuge or by the removal of the individual concerned to a safe third country.

179. It must be reiterated that a State will not be entitled to rely on the national security exception if to do so would expose the individual concerned to a danger of torture or cruel, inhuman or degrading treatment or punishment or a risk coming within the scope of other non-derogable principles of human rights.[15] Where the exception does operate, its application must be subject to strict compliance with principles of due process of law.[16]

[32] Shortly we indicate why we consider the statement made by the United Kingdom representative does not support the principle of proportionality. So far as the listed factors are concerned, it will be observed that the wording of the third is reflected in the third declaration made by the Court of Appeal.[17] If, in terms of the last factor, the prohibition of refoulement is not engaged, then no issue of any kind arises under para (2) of article 33. Later in these reasons, we return to the proposition stated in the first sentence of para 179 and also in para 12(ii) of the conclusions of the article 1F roundtable. Here we note that that proposition does not involve weighing or proportionality; the prohibition is absolute and, if it applies, it avoids any need to make a judgment about danger to national security. In that event, any ruling about the meaning of article 33.2 would be of no practical moment.

[33] More significant than those points is the result of the UNHCR consultation based on the paper. The statement of the broad consensus of the Cambridge expert roundtable comprised seven points. The only one relating to para (2) of article 33

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[15] The authors instance as the other non-derogable rights the prohibitions on the arbitrary deprivation of life and on slavery and servitude, 132 n 105.

[16] Sir Elihu Lauterpacht and Daniel Bethlehem "The scope and content of the principle of *non-refoulement*: Opinion" in Feller, Türk and Nicholson, n 13 above, 137-138.

[17] Para [11] (3) above.

gives no indication of any support at all for paras 177 and 178 of the paper and their "requirement of proportionality". It does, by contrast, accept the proposition about torture stated in para 179 and valuably emphasises the need for a narrow reading of the exceptions:

> 7. There is a trend against exceptions to basic human rights principles. This was acknowledged as important for the purposes of the interpretation of Article 33(2). Exceptions must be interpreted very restrictively, subject to due process safeguards, and as a measure of last resort. In cases of torture, *no* exceptions are permitted to the prohibition against *refoulement*.[18]

[34] The UNHCR consultation reflects and in some degree consolidates general state practice bearing on the meaning of the Convention and in particular of article 33. The relevant practice of individual states to which we were referred also does not accept – indeed rejects – any proportionality or weighing and balancing linkage between the assessments made under the two paragraphs of article 33. It is the practice of three major countries of refuge. United Kingdom statutes of 2001 and 2002 make it explicit that article 33.2 shall not be taken to require consideration of the gravity of a threat by reason of which article 33.1 would or might apply.[19] United States legislation makes it explicit that the provision of para (2) of article 33 is an exception to para (1) and provides that an alien who engages in terrorist activity as defined comes within the security limb of the paragraph; that definition includes no element of proportion. It also determines that a five year sentence meets the standard of a "particularly serious crime" for the purposes of the second limb of para (2).[20] That legislative determination of course precludes an argument of balancing or proportionality as does a comparable Australian provision defining "particularly serious crime".[21] The Australian Government in a paper prepared for the UNHCR consultation also rejects proportionality as an element of article 33.[22]

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[18] Note 13 above, Summary Conclusions: the principle of *non-refoulement*, 179 [emphasis added].

[19] Anti-Terrorism, Crimes and Security Act 2001, s 34; it makes the same provision for article 1F; see paras [28]-[29] above; and Nationality, Immigration and Asylum Act 2002, s 72(8).

[20] 8 USC § 1231(b)(3)(A) and (B): see also §§1227(a)(4)(B) and 1182(a)(3)(B)(iv).

[21] Migration Act 1958 s 91U.

[22] *Interpreting the Refugees Convention – an Australian Contribution* (2002) 59. While the paper says there is no requirement in the text of article 33.2 to apply a proportionality test it is open to states for administrative purposes to consider the consequences for a refugee in making the determination under article 33.2.

Relevant rules of international law

[35] The process of interpretation of article 33.2 is also to take account of any relevant rules of international law, as indicated by article 31(3)(c) of the Vienna Convention on the Law of Treaties. In that context Mr Harrison took us to commentaries supporting the conclusion that customary international law also prohibited refoulement. The commentaries in their statement of the customary law do not however in their essence go beyond the text of article 33 including its exceptions in the cases of perceived threat to national security and serious criminality affecting public safety.[23] The real significance of the argument that customary international law now prohibits refoulement is for the 50 or so states which are not parties to the Convention and its Protocol. New Zealand of course is. In its case the customary rule cannot add anything by way of interpretation to the essentially identical treaty provision. Nor can the contention, if established, that the rule with its exceptions now has a peremptory or *ius cogens* character.

Drafting history

[36] We now turn to the passage in the drafting history of the Convention invoked by Glazebrook J. In terms of article 32 of the Vienna Convention, the drafting history of a treaty is to be invoked only to confirm a meaning reached by the means set out in article 31 or to dispel an ambiguity or a manifestly unreasonable or absurd meaning arising from those other means. Given that the passage from the negotiating history is cited in support of the proportionality reading, the unreasonableness or absurdity ground would have to be invoked. But as already indicated, the ordinary meaning of the terms of article 33 read in context by reference to purpose and supported by subsequent practice is not absurd; to the contrary it is perfectly reasonable. There is the further difficulty that the drafting history does not in fact support a proportionality or balancing proposition. The relevant statement was made by the United Kingdom representative when he spoke in support of the French/United Kingdom amendment proposing the addition to the text of what became para (2) of article 33.

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[23] The principal reference is to Lauterpacht and Bethlehem, n 16 above, especially para 219.

[37] The text before the 1951 Conference contained no more than the prohibition on expulsion, essentially in the form now to be found in article 33.1. The United Kingdom Government had commented at the earlier drafting stage on the single paragraph draft that it would continue to act as it had in the past in the spirit of the article. But it had in mind exceptional cases including those where the alien, despite warning, persists in conduct prejudicial to good order and government or where the alien, although technically a refugee, is known to be a criminal. In such exceptional cases it must reserve the right to deport or return the alien to whatever country, including his own, is prepared to receive him.[24] The joint amendment, proposed at the subsequent diplomatic conference called to complete the Convention, followed from that reasoning. The French representative, speaking in support of it, began by drawing the parallel with the exception to the grant of refugee status:

> [He] observed that the text of the draft Convention admitted the principle that a State could refuse the right of asylum. It was therefore only just that countries which granted that right should be able to withdraw it in certain circumstances. If they could not do so, they would think twice before granting an unconditional right.
>
> He agreed that the right of asylum was sacred, but people should not be allowed to abuse it. The French and United Kingdom delegations had submitted their amendment in order to make it possible for States to punish activities carried on in the name of that right, but directed against national security or constituting a danger to the community. France and the United Kingdom, however, had no intention of opposing the right of asylum on grounds of indigence. Reasons such as the security of the country were the only ones that could be invoked against that right.
>
> The right of asylum rested on moral and humanitarian considerations which were freely recognized by receiving countries, but it had certain essential limitations. A country could not contract an unconditional obligation towards persons over whom it was difficult to exercise any control, and into the ranks of whom undesirable elements might well infiltrate. The problem was a moral and psychological one, and in order to solve it, it would be necessary to take into account the possible reactions of public opinion.[25]

The representative of the Holy See, commenting on the joint amendment, admitted that it was very difficult to avoid exceptions to any rule, but suggested a narrowing of the states' power:

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[24] Weis, n 14 above, 325.

[25] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Sixteenth Meeting 11 July 1951. UNGA A/CONF.2/SR.16 pp 6-7.

> What was meant … by the words "reasonable grounds". He considered that the wording : "may not, however, be claimed by a refugee who constitutes a danger to the security of the country" would be preferable.[26]

It was in response to that proposal for a narrowing of state power that the United Kingdom representative made the comment, emphasised below, quoted by the Court of Appeal and by others:

> Mr Hoare (United Kingdom) associated himself with the remarks made by the French representative, who had amply explained the grounds on which States might be justified in making exceptions to the general application of article [33]. The authors of the joint amendment had sought to restrict its scope, so as not to prejudice the efficacy of the article as a whole. It must be left to States to *decide whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay*. Without such a provision governments might find it difficult to accept article [33], to which, as had been pointed out, reservations could not be entered.[27] It must be borne in mind that the climate of opinion had altered since article [33] had been drafted, and that each government had become more keenly aware of the current dangers to its national security. Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency. To condemn such persons to lifelong imprisonment, even if that were a practicable course, would be no better solution.
>
> The representative of the Holy See had raised certain objections to the words "reasonable grounds". As he (Mr Hoare) had suggested their insertion, it was incumbent on him to explain his reason for doing so, which was that it must be left to States to determine whether there were sufficient grounds for regarding any refugee as a danger to the security of the country.[28]

[38] The remainder of the debate suggested no element of balance or proportion. After a minor irrelevant amendment was made to it, the United Kingdom/French proposal was adopted and became what is now para (2) of article 33. We see the British emphasis in the cited passage on letting states weigh relative risks as a response to the Holy See's suggestion which would have restricted states' area for judgment and as not supporting an additional proportionality requirement**.** Nor could the initial French statement be read in that way.[29]

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[26] Pages 7-8 (original emphasis).

[27] See now article 42 of the Convention.

[28] Page 8.

[29] See also Hathaway and Harvey "Framing Refugee Protection in the New World Disorder" (2001) 34 Cornell Int'l LJ 257, 294.

Cases and commentaries

[39] The Court of Appeal records that a balancing approach was taken by the House of Lords in *Rehman.* While there are a number of references to balancing, they were made in a different context.[30] Mr Rehman was not a refugee. Rather, he was a Pakistani national who had been granted entry clearance to the United Kingdom. Five years later he had his application for indefinite leave to stay in the United Kingdom refused by the Home Secretary, who also gave notice that, because of Rehman's association with an organisation involved in terrorist activities in the Indian subcontinent, he had decided to make a deportation order on the ground that it would be conducive to the public good in the interests of national security. That assessment did not involve in any way any risk or danger to Mr Rehman on his return comparable to the assessment to be made under article 33.1. The primary issue was whether the Minister was entitled to take an overall view of national security including indirect effects on it caused by activities directed against other states. The House of Lords ruled that he was so entitled, emphasising the very large policy element which was primarily for the Minister.[31] Accordingly the statements about the Minister's judgment or assessment are not of direct assistance in the determination in this case of whether the weighing and balancing of the impact on the individual or proportionality have a role in the application of article 33.2.

[40] We also do not find the commentaries of great help. We have already discussed the Lauterpacht/Bethlehem opinion.[32] Guy Goodwin-Gill mentions the very broad judgment left to State authorities by the security limb of para (2), but, apparently inconsistently, contends that the application of the "particularly serious crime limb" ought always to involve the question of proportionality, with account taken of the nature of the consequences likely to befall the refugee on return, but of the four cases he cites the two we have been able to access do not support that

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30 Eg paras [16], [56].

31 Eg Lord Slynn at [17], Lord Steyn at [28] and [31], and Lord Hoffmann at [50] (leaving no role at all for the courts in national security matters).

32 Paras [31]-[33] above.

position, and he gives no other authority or reason.[33] In the 2001 UNHCR global consultations Geoff Gilbert in his paper on exclusion clauses, including article 1F, also argued for proportionality in that entry context.[34] He refers to a United States decision rejecting the argument and to *Suresh* to support it, but in that case the Canadian Courts were concerned with the application of the guarantee in the Canadian Charter of Rights and Freedoms of the principles of fundamental justice and the express limit to the rights stated in s 1, a provision which has been consistently read as involving assessments of proportionality. Those provisions are in sharp contrast to the wording and structure of article 33. The use of proportionality in *Suresh* has in any event been criticised since it contemplates derogations from absolute protections under international law.[35]

[41] Grahl-Madsen in discussing article 33 in his authoritative *Commentary on the Refugee Convention 1951*[36] makes no reference at all to proportionality.[37] Professor James C Hathaway and Professor Colin J Harvey reject the requirement, calling attention, among other things, to the possibility that it could work in practice against a liberal view of the duty to protect refugees.[38]

The meaning of article 33.2

[42] We accordingly conclude that the judgment or assessment to be made under article 33.2 is to be made in its own terms, by reference to danger to the security, in this case, of New Zealand, and without any balancing or weighing or proportional

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[33] *The Refugee in International Law* (2d 1996) 139-140 and n 107. The US Board of Immigration Appeals in *Matter of Toboso-Alfonso* 12 March 1990 No A-23220644 held only that the offences of the possession of cocaine were not "particularly serious crimes" and rejected the Immigration Service's appeal. It made no reference to balancing. In 1994 the Attorney-General designated the decision as precedent in all proceedings involving the same issue or issues. In *Ipina v INS*, 868 F 2d 511 (1989), the US Court of Appeals for the First Circuit did not even reach the issue presented by para (2), holding that the appellant had not shown she would be subjected to persecution. Again there is no reference to balancing.

[34] Feller, n 16 above, 462-464.

[35] Eg Mullan, n 5 above.

[36] A Grahl-Madsen, *Commentary on the Refugee Convention 1951*: Articles 2-11, 13-37, UNHCR (1963 re-published 1997) 232-243.

[37] He does quote (at 233) the statement by the United Kingdom representative quoted by the Court of Appeal, but in his lengthy commentary makes nothing at all of it in terms of any requirement of proportionality.

[38] Hathaway and Harvey, n 29 above, 294-296.

reference to the matter dealt with in article 33.1, the threat, were Mr Zaoui to be expelled or returned, to his life or freedom on the proscribed grounds or the more specific rights protected by the New Zealand Bill of Rights Act 1990 read with the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Paragraph (2) of article 33 of the Refugee Convention states a single standard.

[43] How can the requirements of article 33.2 be usefully elaborated? As did all members of the Court of Appeal, we draw on the decision of the Supreme Court of Canada in *Suresh*[39] and recall the differing uses of "security of New Zealand" in many different contexts as discussed by the Court of Appeal in *Choudry v Attorney-General*.[40] We emphasise, however, the need for caution in glossing such a statutory text.

[44] One significant feature of para (2) is the contrast between "danger to the security of New Zealand" in its first limb and "danger to the community" in its second, with the second not having a security emphasis but requiring conviction of "a particularly serious crime". Also suggesting a high standard is the consequence of removal to the dangers contemplated by para (1) of article 33. Against those considerations is the wording and drafting history of the provision and its very subject matter which together indicate that the executive has a broad power of appreciation of the relevant facts and considerations.

[45] We adopt essentially the test stated by the Supreme Court of Canada in *Suresh*, a test close to that stated by the Court of Appeal and not really disputed before us : to come within article 33.2, the person in question must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial.

[46] We do not include the element of "appreciable alleviation" included in the Court of Appeal's third declaration: that can be read as incorporating the idea of

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[39] Note 4 above, paras [80]-[92].

[40] [1999] 2 NZLR 582, 594-595; see para [135] of the judgment of Glazebrook J.

proportionality which we have rejected. It also, like the element of "real connection", unnecessarily glosses the test which we have just stated and which, in the hearing, was not disputed in its essentials.

Has article 33.2 been amended?

[47] So far we have been considering the interpretation of article 33.2 in its own terms. A further argument is that the provision has been amended for those states, including New Zealand, which are also parties to the Convention against Torture. Article 3(1) of that Convention provides:

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

The argument is that the limits on non-refoulement in para (2) of article 33 are overridden in the case where torture is threatened.

[48] Much the same argument is made in respect of threats of arbitrary death, as well as of torture, by reference to articles 6(1) and 7 of the ICCPR:

> 6(1). Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> …
>
> 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. …

While those provisions do not expressly deal with state action such as expulsion or deportation which is likely to lead to death or torture in another country, they, like their counterparts in the European Convention on Human Rights, have been applied to such actions by the Human Rights Committee and the European Court of Human Rights. We come back to that matter in the last part of these reasons.

[49] Mr Harrison submits that article 33.2 has been amended by those provisions. He depends on article 30(3) and (4)(a) of the Vienna Convention which, he says, states the relevant rule of treaty law:

> 3. When all the parties to the earlier treaty are parties also to the later treaty … the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States parties to both treaties the same rule applies as in paragraph 3;

Paragraph 5 reads in part:

> 5. Paragraph 4 is without prejudice to article 41 [which is about the amendment of treaties] … .

[50] Those provisions are designed for treaties that create bilateral rights and obligations. They do not easily apply to the present situation where the obligations of article 33 are in substance unilateral as well as being owed *erga omnes* (to all the other parties collectively). More significantly in the present context, the provisions do not, contrary to the submissions, regulate the amendment of treaties. That is a matter dealt with in articles 39-41 which are not applicable in the present case. Rather, as the heading to article 30 shows, its provisions concern the application of successive treaties relating to the same subject matter. That is to say, article 33.2 of the 1951 Convention has not itself been amended by the later ICCPR and Torture Convention.[41] Rather, they have to be applied in a successive way. And there is the further consideration that it is only article 33.2 of the 1951 Convention that is incorporated into New Zealand law by Part 4A of the Immigration Act. As already indicated, we later consider the ways in which those additional treaty provisions are implemented in New Zealand law.

Or voided in part by a peremptory norm?

[51] A final argument goes a step beyond the amendment contention. It is that the prohibition on refoulement to torture has the status of a peremptory norm or *ius cogens* with the consequence that article 33.2 would now be void to the extent that it allows for that: see article 64 of the Vienna Convention.[42] While there is

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[41] The European Court of Human Rights reached a similar conclusion in respect of article 3 of the European Convention and articles 32 and 33 of the Refugee Convention in *Chalal v United Kingdom* (1996) 23 EHRR 413 para 80.

[42] Whether international law recognised *ius cogens* or peremptory norms was the subject of controversy in the lead up to the preparation of the Vienna Convention, eg Sinclair *The Vienna Convention on the Law of Treaties* (2d ed 1984) ch 7 and Reuter *Introduction to the Law of Treaties* (1989) 109-112 and 143-144. Since the Convention included provisions on peremptory norms the debate has moved on to the instances of such norms.

overwhelming support for the proposition that the prohibition on torture itself is *ius cogens*,[43] there is no support in the state practice, judicial decisions or commentaries to which we were referred for the proposition that the prohibition on refoulement to torture has that status.[44] So far as state practice and the commentators are concerned the position appears clearly in the legislation mentioned earlier and the papers prepared for, and the statements emerging from, the 2001 UNHCR consultation. They set out the absolute propositions about torture and arbitrary death distinctly from the requirements of article 33: the obligations are successive, not merged.

Conclusion

[52] We accordingly conclude that those applying article 33.2 under Part 4A of the Immigration Act are to apply it in its own terms. In particular, to come within article 33.2, the person in question must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial.

2 The scope of the functions under Part 4A and their allocation between the Director, the Inspector-General and the Minister

[53] The Attorney-General contends that the Director is concerned under Part 4A only with national security considerations, including in this particular case whether the test in article 33.2 is met. The factors to be considered by the Inspector-General

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[43] Eg *Siderman de Blake v Argentina*, 965 F 2d 699 (1992) 714-719; *Prosecutor v Anto Furundzija* (Judgment) (10 December 1998) IT-95-17/1-T (Trial Chamber, ICTY) paras 144, 147, 153-154, *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 198, 275 and 290 and all the authorities they refer to.

[44] The submissions refer to:

(a) UNHCR Executive Committee Conclusions (1996), but, while stressing the fundamental importance of the principle of non refoulement, they do not address the *ius cogens* issue;

(b) Lauterpacht and Bethlehem, n 16 above, but the relevant passages do not say that the prohibition on refoulement to torture makes article 33.2 void to that extent (paras 53 and 195) or they address the customary law status of the prohibitions on refoulement (paras 230-253);

(c) Gilbert on article 1F, but he too does not contend that the later developments relating to torture voids part of article 33.2; and

(d) de Wet (2004) 15 EJIL 97, 118, which may support the proposition, although the argument is unclear, and it cannot in any event stand against the practice to the contrary.

of Intelligence and Security are the same : that officer's role is a specific and limited one and does not extend to questions about the consequences for the individual of removal or deportation. Rather, it is the Minister of Immigration who is concerned with those matters, including any relevant international human rights obligations protecting Mr Zaoui.

[54] Mr Harrison, for Mr Zaoui, submits to the contrary that the Inspector-General, in exercise of his functions under Part 4A, is obliged to determine the potential adverse consequence for the individual; those consequences are then to be weighed against the claimed danger to the security of New Zealand. On this view, while the Crown rightly accepts that it must give effect to Mr Zaoui's rights under the Bill of Rights and related provisions of international law, it wrongly seeks to pigeonhole them to the Minister at a stage after the security risk certificate has been confirmed.

[55] These contentions require us to give close attention to the provisions of the relevant legislation, their purpose and the wider context in which they are to be read.

[56] We begin with s 114D under which the Director of Security has the power to provide a security risk certificate if he is satisfied that three stated conditions are satisfied. They are the conditions set out in the certificate in this case.[45] One of them is that the person meets the relevant security criteria – here those stated in s 114C(6)(a) and (4)(a) involving danger to the security of New Zealand in terms of article 33.2 of the Convention and being a threat to national security in terms of s 72 of the Act. In making that decision the Director may take into account relevant information in addition to classified security information. The certificate by itself has no immediate effect. For that to happen the Minister of Immigration must make a preliminary decision to rely on the certificate. Before making that decision the Minister may, but need not, have an oral briefing from the Director, the content of which may not be recorded by or for the Minister, who also may not divulge the contents of the briefing.[46] A Minister who does rely on a certificate is not obliged to give reasons for the decision and may not be compelled in any proceedings to

[45] Para [3] above.

[46] Section 114E.

provide those reasons.[47] One effect of the Minister's preliminary decision is to suspend the processing of immigration applications and proceedings.[48]

[57] The person may then seek a review by the Inspector-General of the decision to make the security risk certificate.[49] Section 114I(4) is central:

> (4) The function of the Inspector-General on a review is to determine whether—
>
> (a) The information that led to the making of the certificate included information that was properly regarded as classified security information; and
>
> (b) That information is credible, having regard to the source or sources of the information and its nature, and is relevant to any security criterion; and
>
> (c) When a relevant security criterion is applied to the person in light of that information, the person in question is properly covered by that criterion—
>
> and thus whether the certificate was properly made or not.

[58] This provision closely (if not exactly) tracks s 114D(1) under which the Director acts at the beginning of the process, as appears from the certificate given in this case.[50] We return to the function set out in s 114I(4) after considering the procedure the Inspector-General is to follow in undertaking the review.

[59] The Inspector-General, who must be a former High Court Judge and who has similar tenure,[51] in undertaking the review

- may, like the Director, take into account relevant information in addition to the classified security information[52]
- has all the powers conferred by the Inspector-General of Intelligence and Security Act 1996, with prescribed provisions applying with necessary modifications to the review[53]

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47 Section 114F.

48 Section 114G.

49 Sections 114H(1) and 114I(1) and (2).

50 Para [3] above.

51 Inspector-General of Intelligence and Security Act 1996 ss 5(3), 6(2) and 7.

52 Section 114I(4) of the 1987 Act.

53 Section 114I(6)(a) and (b).

- is to be provided with the Labour Department file and any other relevant information held by it.[54]

The person seeking review of the Director's decision to make the certificate may

- be represented by counsel or otherwise in the dealings with the Inspector-General[55]
- have access to the extent provided by the Privacy Act to information about the person other than classified security information[56]
- make written submissions about the matter whether or not they also wish to be heard under one of the prescribed provisions of the 1996 Act.[57]

[60] The prescribed provisions which are to apply with necessary modifications

- require the Inspector-General to have regard to the requirements of security[58]
- permit the person to be heard, to be represented by counsel or any other person, and to have other persons testify to their record, reliability and character[59]
- enable the Inspector-General to receive such evidence as the Inspector-General thinks fit, whether admissible in a court of law or not[60]
- require the inquiry to be conducted in private[61]
- enable the Inspector-General to hear evidence separately and in private if the interests of justice so require or to do otherwise would be

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54 Section 114I(6)(c).
55 Section 114H(2)(a).
56 Section 114H(2)(b).
57 Section 114H(2)(c).
58 Section 13 of the 1996 Act.
59 Section 19(4).
60 Section 19(5).
61 Section 19(6).

likely to prejudice national interests stated in the Act or the privacy of an individual[62]

- require the Inspector-General to give a security agency or person the opportunity to be heard if there may be sufficient grounds to make a report or recommendation adversely affecting them[63]
- enable the Inspector-General to require persons to produce documents and to give information,[64] with those persons having the privilege of witnesses in court proceedings[65]
- enable the Inspector-General, subject to the provisions of the Act, to regulate the proceedings in such a manner as the Inspector-General thinks fit[66]
- place limits on the disclosure by the Inspector-General of certain security information,[67] impose secrecy obligations[68] and restrict publication.[69]

[61] The decision of the Inspector-General must be accompanied by reasons[70] and if the Inspector-General confirms the certificate the person may appeal to the Court of Appeal on a point of law.[71]

[62] One aspect of the Inspector-General's process can be conveniently resolved at this stage. It concerns the role, if any, of the Director during the course of the review in providing the Inspector-General with further relevant information which may become available to the Service during the review period. Mr Harrison submits that the Director's role is complete when he issues the initial certificate, with the qualification that if something new and startling appeared he might issue a new

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62 Section 22, referring to s 26(3).
63 Section 19(7).
64 Section 23.
65 Section 24(3).
66 Section 19(8).
67 Section 26.
68 Section 28.
69 Section 29.
70 Section 114J(4).
71 Section 114P.

certificate; and if the information were favourable to the person he should either withdraw the certificate or provide a summary. We do not read the legislation as imposing such limits. The Inspector-General has broad powers to seek and indeed require evidence and documents and the Director is, as well, entitled to be heard if the SIS may be the subject of a critical report. We would see it as part of the Director's responsibility to provide relevant information, including updated information, to the Inspector-General who must of course be alert to the upholding of the right of the person to be heard.

[63] The procedural provisions have two characteristics among others. They are very close to those included in the Ombudsmen legislation since 1962, with an inquisitorial and informal cast. But, second and qualifying that, they expressly give the individuals concerned the right to a hearing, in provisions copied over from the New Zealand Security Intelligence Service Act 1969.[72] Those more specific protection provisions recognise that the focus of the Inspector-General's function is on alleged concerns about or conduct of the individuals in question. In particular those persons have the right to be heard, to be represented, to have access to information, to make written submissions and to call testimony about their record, reliability and character. That is all of course subject to restraints in respect of classified security information and national security more generally.

[64] The first of the characteristics identified – the inquisitorial, Ombudsmen Act based emphasis – tends to support the Attorney-General's argument that the processes are aimed at nothing more than examining the decisions under review for error. They are bounded by those decisions. The second characteristic may be seen as more equivocal but it too focuses on the actions of the individuals rather than on possible consequences for them.

[65] The main support for the Attorney-General's argument comes however from the consistent statement throughout the relevant provisions of Part 4A setting out the Inspector-General's functions. Further support for that argument comes from the

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[72] Compare s 18(3) of the Ombudsmen Act 1975.

1996 Act. We begin with the provisions of Part 4A setting out the Inspector-General's functions.

[66] The person subject to the Director's certification "may … seek a review by the Inspector-General of Intelligence and Security of the decision of the Director of Security to make the security risk certificate".[73] The noun "review", which recurs throughout the relevant sections, means in this context looking over a particular thing again with a view to the correction or improvement of that thing. The more specific legal meaning (for instance in judicial review) also has that focus on a particular decision already taken. And what is it that is being reviewed? The decision of the Director to make the security risk certificate, nothing more, nothing less. That decision[74] was based, so far as the governing substantive criterion was concerned, only on the understood threats to national security referred to in s 72 and article 33.2. It did not extend beyond those matters to threats to the person who is the subject of the certificate. The substantive criterion to be applied by the Inspector-General is similarly limited by s 114I(4)(c). That officer has no power in terms of substance to go beyond a relevant security criterion. We do not accept the argument for Mr Zaoui that there is a significant difference between the two statutory statements of the functions of the Director and of the Inspector-General. On the contrary, it is the common requirement in them that the applicability of the substantive security criterion be determined that is significant.

[67] Mr Harrison also contends that the use of the word "properly" three times in s 114I(4), setting out the function of the Inspector-General,[75] is of considerable significance in assessing the scope of that function. That word is not used in relation to the role of the Director or the Minister. We however see its use as actually reinforcing the proposition that the substantive role of the Inspector-General does not extend beyond that of the Director. The Inspector-General's function is to determine whether the person is properly covered by the relevant criterion and accordingly whether the certificate is to be "confirmed" (to move to the word used in s 114K).

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[73] Section 114H(1); see also s 114I(1) and (2).

[74] As set out in para [3] above.

[75] Para [57] above.

The "propriety" of the Director's action would hardly be in question if the Inspector-General were able to act on the quite distinct basis of a threat to the person.

[68] It will of course be the case, to turn to another of Mr Harrison's contentions, that the Inspector-General will have access to information and submissions that were not before the Director. In that sense the review process is a more independent one than that of a court undertaking judicial review which, in general at least, is limited to the situation, including the information, as it was at the time of the decision. But, as with other related processes provided for in the New Zealand Security Intelligence Service Act and the 1996 Act, it does not follow that the scope of the inquiry changes. Rather, the quality of the decision should improve, given the extra assistance provided by the additional information and the hearing. The Inspector-General's powers extend beyond those generally available to a review court in another sense. If the Inspector-General concludes, after the independent assessment aided by the new material, that the certificate should not be confirmed he must substitute his decision for that of the Director. In that we agree with the views expressed by Anderson P and Glazebrook J in the Court of Appeal.[76] But again that does not affect the scope of the issues the Inspector-General may rule on. While the depth of that consideration will be greater, and while the determination is likely to be made in part by reference to new information, its width does not change. It is confined in substantive terms in this particular case to the twin aspects of threats to national security.

[69] One final point about the wording of the Inspector-General's function remains to be considered – the differences in the tenses of the verbs in s 114I(4) which Mr Harrison says are significant. The Inspector-General is to determine whether:

> (a) the information that led to the making of the certificate included information that *was* properly regarded as classified;
>
> (b) that information *is* credible and *is* relevant to a security criterion, and

[76] Paras [18] and [77]-[80].

(c) when a relevant security criterion *is* applied to the person in light of that information, the person in question *is* properly covered by that criterion

and thus whether the certificate *was* properly made or not.

[70] Before we consider the argument based on the tenses, we notice one plain inconsistency between this provision and the extensive array of provisions regulating the Inspector-General's procedures. He will be making the decision whether to confirm the certificate on the basis of information and submissions going beyond that which was available to the Director. Section 114I(4) must be read with that gloss to make the statute work.[77] Turning now to the tenses, those in (b) and (c) correctly contemplate the Inspector-General making a current decision. The question is whether in the light of all the relevant information and submissions (to return to the point just made) the security criterion applies, according to the assessment of the Inspector-General. It follows that the choice of the past tense in the final line of s 114I(4) is unhappy. As s 114K indicates, the real issue is whether the certificate is to be "confirmed" at the time the Inspector-General makes his decision. We do not see those drafting infelicities as affecting in any way the scope of the matters to be considered. That scope remains delimited by the relevant national security criterion.

[71] That limited scope is also supported, if further support be needed, by the roles of the Inspector-General of Intelligence and Security under the 1996 Act and of the Director under the SIS legislation. According to its title, it is an Act to increase the level of oversight and review of intelligence and security agencies by providing for the appointment of an Inspector-General. Under the object provision of s 4 the Inspector-General is to assist relevant Ministers in the oversight and review of intelligence and security agencies, in particular by assisting the Minister to ensure that the activities of the agency comply with the law and that complaints relating to that agency are independently investigated. The agency in this case, the New Zealand Security Intelligence Service, is concerned with gathering and assessing intelligence about New Zealand's security and informing, advising, inquiring and

[77] Eg *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530, 537-538 (CA).

recommending in light of that intelligence. The short point is that the Inspector-General is set up to assist with the review and oversight of such intelligence and security activity. The function of the Office does not extend to possible threats to non-citizens overseas.

[72] A final matter is that any consideration of such threats would involve a contemporary assessment of the situation in the particular country to which the person is to be sent and in particular the threats to human rights there. But the Inspector-General may have no way of knowing the proposed destination. At the time of the review the Government may have no particular destination in mind or there may be several possible destinations. They may change and, further, the human rights situation in possible destinations may change. The Inspector-General has expertise and information about security and intelligence, but not about human rights matters. The powers conferred on the Inspector-General by the legislation provide him with no adequate basis to make an assessment concerning human rights, even less to weigh that assessment against the threat to national security.

Conclusion

[73] Accordingly, in agreement with the Court of Appeal,[78] we conclude that in carrying out his function under Part 4A of the Immigration Act the Inspector-General is concerned only to determine whether the relevant security criteria – here s 72 and article 33.2 – are satisfied. He is not to determine whether Mr Zaoui is subject to a threat which would or might prevent his removal from New Zealand.

[74] We now consider how such a threat is to be addressed under New Zealand law.

3 The protection of the right not to be returned to the risk of torture or the arbitrary taking of life

[75] The result of the two rulings we have already made is that it is not for the Inspector-General to address the existence of any threat to Mr Zaoui were the

[78] [2005] 1 NZLR 690 at paras [169](b), [24] and [171].

Government to act to remove him from New Zealand. But the Government, through the Solicitor-General, accepts that it is obliged to comply with the relevant international obligations protecting Mr Zaoui from return to threats of torture or the arbitrary taking of life. That position was in essence taken in correspondence between the then Minister of Immigration and the solicitors for Mr Zaoui in November 2003, with the consequence that the proceeding against her was discontinued. The Attorney-General does remain as a party, being "sued [according to the amended statement of claim] in respect of the Crown (in particular in light of the Crown's obligations under the New Zealand Bill of Rights Act 1990) …".

[76] In terms of the position taken in that correspondence, in the Minister's statement of defence, and by the Solicitor-General, the Crown accepts in particular that it is obliged to act in conformity with New Zealand's obligations under articles 6(1) and 7 of the ICCPR and article 3 of the Convention against Torture. For convenience we set them out again:

> **Article 6**
>
> (1). Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> …
>
> **Article 7**
>
> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. …
>
> **Article 3**
>
> 1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

[77] The question which remains to be considered is the way in which under New Zealand law those obligations may be met, including the question of who is to meet them, given that it is not the Inspector-General.

[78] The pleadings and the correspondence give part of the possible answer by referring to ss 8 and 9 of the Bill of Rights:

> **8 Right not to be deprived of life**
>
> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.
>
> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

[79] Those provisions do not expressly apply to actions taken outside New Zealand by other governments in breach of the rights stated in the Bill of Rights. That is also the case with articles 6(1) and 7 of the ICCPR. But those and comparable provisions have long been understood as applying to actions of a state party – here New Zealand – if that state proposes to take action, say by way of deportation or extradition, where substantial grounds have been shown for believing that the person as a consequence faces a real risk of being subjected to torture or the arbitrary taking of life.[79] The focus is not on the responsibility of the state to which the person may be sent. Rather, it is on the obligation of the state considering whether to remove the person to respect the substantive rights in issue.

[80] The next question concerns the effect of that obligation on relevant New Zealand legislation. That legislation may include the provisions of the Bill of Rights just mentioned and ss 114K to 114N and s 72 of the Immigration Act.

[81] It is convenient to begin with s 114K which was the provision at the centre of the relevant pleading in the amended statement of claim. It empowers the Minister to decide within three working days whether or not to rely on the confirmed certificate. In making that decision the Minister, under subs (2), "may seek information from other sources and may consider matters other than the contents of the certificate".

[82] That final phrase read by itself might suggest that the Minister could consider humanitarian matters at that point, but that would be a slender base for a wide

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[79] Eg *Soering v United Kingdom* (1989) 11 EHRR 439 (E Ct HR) paras 90 and 91, *Kindler v Canada* (1993) Human Rights Committee CCPR/C/48/D/470/1991, paras 13.1-13.2, *R (Ullah) v Special Adjudicator* [2003] 1 WLR 770 (CA), *Chalal v United Kingdom* (1996) 23 EHRR 413, paras 73-82. See also for extradition the powers of the Minister of Justice in ss 30(2)(b), 48(1)(b) and 49 of the Extradition Act 1999.

ranging inquiry, particularly if it were all to be undertaken within three days. The "other matters" might instead be a relevant security criterion other than that actually contained in the certificate – for instance, a combination of article 33.2 with s 73, which is about suspected terrorists, rather than with s 72. And that expression is not to be read by itself: as we have seen, Part 4A is very much focused on national security issues.

[83] The next relevant provisions are subs (3) and (4) of s 114K:

> (3) On receipt of a direction from the Minister under subsection (1) to rely on the confirmed certificate, the chief executive must ensure that—
>
> (a) Where the person's case was before the Tribunal, an Authority, the Board, the District Court, or High Court before the certificate was made, the relevant body is immediately notified in the prescribed manner of the Inspector-General's determination or the failure to seek review, so that it can dismiss the matter in reliance on this section; or
>
> (b) In any other case, an appropriate decision is made in reliance on the relevant security criterion as soon as practicable.
>
> (4) In either event, the chief executive must ensure that—
>
> (a) Any visa or permit that the person still holds is cancelled or revoked, without further authority than this section, and in such case the cancellation or revocation takes effect immediately and without any right of appeal or review; and
>
> (b) If a removal order or deportation order is not already in existence, an appropriate person who may make such an order makes the relevant order immediately without further authority than this section, and the person is removed or deported, unless protected from removal or deportation under section 114Q or section 129X; and
>
> (c) In the case of a person who is protected from removal or deportation by section 129X, the person is released from custody and is given an appropriate temporary permit.

[84] Mr Zaoui's case falls within subs (3)(b) and then subs (4)(b). Subsection (4)(b) is not to apply if the person is protected as a person applying for refugee status (s 114Q) – which is not the present case – or the person is protected by s 129X:

> (1) No person who has been recognised as a refugee in New Zealand or is a refugee status claimant may be removed or deported from New Zealand

> under this Act, unless the provisions of Article 32.1 or Article 33.2 of the Refugee Convention allow the removal or deportation.
>
> (2) In carrying out their functions under this Act in relation to a refugee or refugee status claimant, immigration officers must have regard to the provisions of this Part and of the Refugee Convention.

[85] Subsection (2) is limited to immigration officers and accordingly does not apply to the Minister. But what of subs (1)? Mr Harrison contends that it continues to apply here. On the hypothesis on which we are proceeding however – that the Inspector-General has confirmed that article 33.2 does apply and the Minister is relying on the certificate – that protection is no longer available.[80] But, the argument continues, does that not empty of content the limit placed on s 114K(4)(b) by its final clause? We think not, since the protection of s 129X is available to those in respect of whom the relevant security criteria do not include article 33.2.[81]

[86] The next question which arises under subs (4)(b) concerns the duty of the chief executive, if no removal or deportation order is in existence, to ensure that

> an appropriate person who may make such an order makes the relevant order immediately without further authority than this section, and the person is removed or deported … .

[87] There was some suggestion in argument that this provision by itself, by using the expression "without further authority than this section", conferred power to make a deportation or removal order. But the reference to "an appropriate person who may make such an order" plainly proceeds on the basis of powers conferred on that person elsewhere in the law. It may be that the "without further authority" expression was designed to remove some of the technical requirements which are generally to apply when particular existing powers of removal or deportation are invoked. Whether that is so or not, along with counsel who were agreed on this matter, we see the "appropriate person who may make [the deportation] order" in this case as determined by s 72, the provision invoked in the security certificate.

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[80] For the same reason subs (4)(c) of s 114K does not protect a person to whom article 33.2 applies.

[81] See s 114C(2), (3) and (4).

[88] For convenience we set s 72 out again:

> **72. Persons threatening national security**
> Where the Minister certifies that the continued presence in New Zealand of any person named in the certificate constitutes a threat to national security, the Governor-General may, by Order in Council, order the deportation from New Zealand of that person.

[89] The phrase at the beginning of subs (4) of s 114K ("the chief executive must ensure") is constitutionally inappropriate. The Secretary of Labour cannot "ensure" that the Minister of Immigration provide the required certificate and that the Governor-General in Council – effectively the Cabinet – make the deportation order. The necessary judgments are to be made by the persons on whom Parliament has conferred the relevant powers. Again the practical interpretation of the legislation requires that. The Secretary can do no more than initiate the process which may result in an Order in Council. Section 114K(4)(b) must be taken to impose on the Secretary no greater obligation than to do that immediately.[82]

[90] As directed by s 6 of the Bill of Rights, s 72 is to be given a meaning, if it can be, consistent with the rights and freedoms contained in it, including the right not to be arbitrarily deprived of life and not to be subjected to torture. Those rights in turn are to be interpreted and the powers conferred by s 72 are to be exercised, if the wording will permit, so as to be in accordance with international law, both customary and treaty based.[83] In this case those presumptions about interpretation and the exercise of statutory powers are supported by para (b) of the title to the Bill of Rights which says that it is an Act to affirm New Zealand's commitment to the ICCPR; further, the wording of the relevant sections of the Bill of Rights closely tracks the matching provisions of the Covenant. As already recalled, the relevant provisions of the Covenant have been interpreted to apply to the situation where the state party in question takes action by way of removal of a person to another country

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[82] The remaining relevant powers conferred by Part 4A under ss 114M and 114N require only brief attention. The Director has the power to withdraw the certificate at any time and the Minister may withdraw the preliminary decision to rely on the certificate, fail to make a decision within three days after the Inspector-General's decision, or revoke the decision to rely on the confirmed certificate. These powers operate within the limited confines of Part 4A. They are moreover largely within the broad discretion of the Director and Minister who are not for instance under any general obligation to consider whether to exercise the powers. Those powers do not provide a firm obligatory foundation for protecting the rights against torture and arbitrary deprivation of life.

[83] Eg *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 57 (CA), the authorities referred to there and Burrows *Statute Law in New Zealand* (3d ed 2003) 341-343.

if that action means that that person faces a real risk of torture or arbitrary deprivation of life. That removal situation is of course expressly covered in the case of torture by article 3 of the Convention against Torture.

[91] Section 72 confers powers on the Minister and the Governor-General in Council. The Minister has the power to certify that the continued presence of any person in New Zealand constitutes a threat to national security. There is nothing in the statement of the broad powers conferred on the Minister and in particular the Governor-General in Council to prevent the Minister or Cabinet having regard to the mitigating factors which the Minister or Cabinet might consider indicate that the person should not be deported. The power conferred by s 72 is to be interpreted and exercised consistently with the provisions of ss 8 and 9 of the Bill of Rights and with the closely related international obligations in the Covenant and the Convention against Torture. Because the power can be so interpreted and applied, those provisions, as a matter of law, prevent removal if their terms are satisfied even if the threat to national security is made out in terms of s 72 and article 33.2.[84]

[92] At this stage we do no more than address three aspects of the procedure to be followed under s 72 particularly in respect of the danger to the individual who may be removed. The first is that there is no pressing prescriptive time requirement : those charged with responsibility, while having regard to the purpose stated in s 114A(f) that a decision can when necessary be taken quickly and effectively, should have adequate time to address the issues of fact and judgment involved. Secondly, the bar on the Minister's obligation to give reasons when confirming the certificate[85] does not apply to decisions under s 72; rather, the general right to have reasons on request found in s 23 of the Official Information Act 1982 applies, although there may be applicable provisions under that Act limiting the statement of reasons. Thirdly, we accept Mr Harrison's submission that the right to natural justice affirmed in s 27 of the Bill of Rights and found in provisions of the ICCPR

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[84] Compare the recent decision of the House of Lords in *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 WLR 1 where broadly stated powers (set out in para [5]) were read as being subject to the proscription under customary international law of racial discrimination: see Lord Steyn at paras [36]-[38] and [46]-[47] and especially Baroness Hale, with whom the other Law Lords agreed, at paras [98]-[103]; and the decision of the Court of Appeal in *Sellers*.

[85] Section 114K(7).

and elsewhere would provide procedural protection, although again security interests may be relevant.[86]

[93] It is accordingly our view that the Minister, in deciding whether to certify under s 72 of the Immigration Act 1987 that the continued presence of a person constitutes a threat to national security, and members of the Executive Council, in deciding whether to advise the Governor-General to order deportation under s 72, are not to so decide or advise if they are satisfied that there are substantial grounds for believing that, as a result of the deportation, the person would be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

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[86] Article 13 of the ICCPR provides as follows:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

See also eg the emphasis on due process in the Lauterpacht/Bethlehem opinion, para 179, final sentence, in para [31] above and para 7 of the relevant roundtable conclusions in para [33] above.