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S.C.C. No. 27790

IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

B E T W E E N:

MANICKAVASAGAM SURESH

Appellant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE ATTORNEY GENERAL OF CANADA

Respondents

FACTUM OF THE INTERVENOR UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES ("UNHCR")

PART I – STATEMENT OF FACTS

1. UNHCR is the international agency mandated by the United Nations General Assembly to provide international protection to refugees and in particular to supervise the application of treaties relating to refugees.

Convention Relating to the Status of Refugees, [1969] Can. T.S. No. 6, article 35, Respondent's Authorities, Vol. 1, Tab 2

Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428(V), December 14, 1950

2. UNHCR, by virtue of its supervisory responsibility, is concerned to ensure a consistent and coherent interpretation and application of international conventions relating to refugees. This factum is confined to legal aspects of the case.

PART II – POINTS IN ISSUE

3. UNHCR's submissions in this appeal are directed at the interpretation and application of international law respecting *non-refoulement*, in particular article 33 of the 1951 *Convention Relating to the Status of Refugees* (the "*Refugee Convention*") and its inter-relationship with article 3(1) of the

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the "*Torture Convention*").

Refugee Convention, article 33

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [1987] Can. T.S. No. 36, Respondent's Authorities, Vol. 1, Tab 5

PART III – ARGUMENT

4. UNHCR's position in this appeal is that:

(a) where there are substantial grounds to believe a refugee, if *refouled*, will be subjected to torture, international law prohibits the *refoulement* of the refugee; and

(b) where there are not substantial grounds to believe a refugee, if *refouled*, will be subjected to torture, *refoulement* can only be justified under article 33(2) of the *Refugee Convention* if there is a very serious threat to the security of the country of refuge that is proportional to the risk faced by the refugee upon *refoulement*.

A. The Court Must Look to International Treaties to Determine this Appeal

5. This appeal raises fundamental questions respecting the interpretation and application of s. 53(1)(b) of the *Immigration Act* and the extent to which it complies with the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The answer to these questions depends in large part on the interpretation of the applicable international human rights treaties.

Immigration Act, R.S.C. 1985, c.I-2, Respondent's Factum at 55

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

6. Section 53(1)(b) of the *Immigration Act* provides:

> ... no person who is determined under this Act or the regulations to be a Convention refugee ... shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless
> ...
> (b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada.

Immigration Act, s. 53(1)(b)

7. Canada has ratified several international treaties that bear upon the interpretation of s. 53(1)(b) and the *Charter* provisions relied upon in this appeal, including:

(a) the *Refugee Convention* and its 1967 Protocol, which Canada ratified in 1969;

(b) the *Torture Convention*, which Canada ratified in 1987; and

(c) the *International Covenant on Civil and Political Rights* ("*ICCPR*"), which Canada ratified in 1976.

Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267

ICCPR, [1976] Can. T.S. No. 47, Respondent's Authorities, Vol. 1, Tab 3

8. Article 33(1) of the *Refugee Convention* establishes the principle of *non-refoulement*. It states:

> 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.
>
> *Refugee Convention*, article 33(1)

9. Article 33(2) of the *Refugee Convention* creates an exception to this principle. It states:

> The benefit of the present provision 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 judgement of a particularly serious crime, constitutes a danger to the community of that country.
>
> *Refugee Convention*, article 33(2)

10. Article 3(1) of the *Torture Convention* deals specifically with *refoulement* when there is a risk that a person will face torture upon *refoulement*. Article 3(1) states:

> 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.
>
> *Torture Convention*, article 3(1)

11. Article 7 of the *ICCPR*, like article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("*ECHR*") and article 5(2) of the *American Convention on Human Rights* ("*ACHR*"), prohibits torture. It states:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. ...
>
> *ICCPR*, article 7
>
> *American Convention on Human Rights* OEA/Ser.A/16(1969)
>
> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N. T.S. 222, Eur T.S. 5

12. While these treaty provisions do not have direct force of law in Canada, they affect the interpretation of s. 53(1)(b) of the *Immigration Act* and of the *Charter* provisions at issue in this appeal in two ways:

(a) through the rule that statutes must be interpreted, to the fullest extent possible, to comply with international treaty obligations. This principle, founded in the rule of law, is based on the presumption that the legislature intends to act in compliance with international law;

Baker v. Canada (M.C.I.), [1999] 2 S.C.R. 817 at 861
Ordon Estate v. Grail, [1998] 3 S.C.R. 437 at 526

(b) through the rule that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1056

13. As a result,

(a) s. 53(1)(b) must be interpreted, to the fullest extent possible, to comply with article 33 of the *Refugee Convention*, article 3(1) of the *Torture Convention* and other applicable international treaties and customary law; and

(b) ss. 2(b), 2(d) and 7 of the *Charter* should be presumed to provide protection at least as great as that afforded by article 33 of the *Refugee Convention*, article 3(1) of the *Torture Convention* and other applicable international treaties and customary law.

B. International Law Prohibits a Refugee From Being Returned to Torture

14. International law establishes a normative framework that governs the principle of *non-refoulement*. Article 33 of the *Refugee Convention* lies at the core of this framework. But article 33 does not stand in isolation. Where there is a risk that the individual will be tortured upon *refoulement*, article 33 must be read together with the two primary international norms regarding torture.

15. These two norms are:

(i) the norm prohibiting *refoulement* to torture, which is set out in article 3(1) of the *Torture Convention*; and

(ii) the norm prohibiting torture, which is a *jus cogens* norm and is also set out, among other treaties, in article 7 of the *ICCPR*, article 2 of the *Torture Convention*, article 3 of the *ECHR* and article 5(2) of the *ACHR*.

16. The inclusion of these norms within the principle of *non-refoulement* has been affirmed and reiterated by the Executive Committee of the High Commissioner's Programme -- UNHCR's governing body of 57 states, which include Canada. In 1996, for instance, the Executive Committee reaffirmed in its annual Conclusion on International Protection:

> ... the fundamental importance of the principle of non-refoulement, which prohibits expulsion and return of refugees, in any manner whatsoever, to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have formally been granted refugee status, or of persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture, as set forth in the [Torture] Convention ... [emphasis added]
>
> *Executive Committee, General Conclusion on International Protection* No. 79 (XLVII), 1996, para. (j); see also *Executive Committee, General Conclusion on International Protection* No. 81 (XLVII), 1997, para (i); and *Executive Committee, Conclusion on Safeguarding Asylum,* No. 82 (XLVII), 1997, para. (d)(i)
>
> *Executive Committee, Note on International Protection*, UN Doc. A/AC.96/898, July 3, 1998, para. 11

17. The international normative framework governing *non-refoulement* establishes the following set of rules:

(a) article 33(1) prohibits *refoulement*;

(b) article 33(2) creates an exception to article 33(1), allowing *refoulement* on grounds of danger to security of the country and serious criminality;

(c) however, *refoulement* under article 33(2) is prohibited where there are substantial grounds to believe the individual would be in danger of being subjected to torture.

1. Article 33(2) of the *Refugee Convention* Is Restricted By The Prohibition Against *Refoulement* to Torture in Article 3(1) of the *Torture Convention*

18. Article 3(1) of the *Torture Convention* prohibits absolutely the *refoulement* of an individual where there are substantial grounds to believe he or she would be in danger of being subjected to torture.

19. The article 3(1) prohibition prevents a State Party to the *Torture Convention*, such as Canada, from *refouling* a refugee to a situation of torture.

20. ***Article 3(1) prevails over article 33(2).*** Article 3(1) of the *Torture Convention* prevails even in circumstances where article 33(2) of the *Refugee Convention* is considered to be applicable.

21. First, articles 30(3) and (4) of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*") provide that where states have each ratified successive treaties that relate to the same subject matter, the later treaty prevails in relations between those states.

> *Vienna Convention*, [1980] Can. T.S. No. 37, Respondent's Authorities, Vol 1, Tab 4, articles 30(3) and (4)

22. This means that in the case of human rights treaties like the *Refugee Convention* and the *Torture Convention*, which endow individuals with rights and are not primarily inter-state exchanges of mutual obligations, the treaty provision that prevails should be the latest one ratified by the state.

> *Human Rights Committee*, General Comment No. 24(52), UN Doc. CCPR/C/21/rev.1/add.6 at para. 17

23. Second, article 31(3)(c) of the *Vienna Convention* provides that in the interpretation of a treaty, "there shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties".

> *Vienna Convention*, article 31(3)(c)

24. These rules of interpretation make clear that treaty provisions such as article 33(2) of the *Refugee Convention* are intended to be interpreted within the evolving context of international human rights law, which includes the article 3(1) prohibition against *refoulement* to torture.

25. Third, article 5 of the *Refugee Convention* provides that:

> Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.
>
> *Refugee Convention*, article 5

26. Pursuant to article 5, article 33(2) can not be used to impair rights granted by Canada to refugees under article 3(1) of the *Torture Convention*.

27. Accordingly, article 33(2) of the *Refugee Convention* must be interpreted subject to the absolute prohibition against return to torture in article 3(1) of the *Torture Convention*.

28. ***Article 16(2) does not permit derogation from article 3(1).*** Article 16(2) of the *Torture Convention* states:

> The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.
>
> *Torture Convention*, article 16(2)

29. The Federal Court of Appeal's view was that:

(a) the *Refugee Convention* is an international instrument that relates to "expulsion"; and

(b) therefore article 16(2) preserves the right of a state to *refoule* a refugee pursuant to article 33(2) of the *Refugee Convention*, even if that would otherwise violate article 3(1).

> *Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada*, [2000] 2 F.C. 592 at 622-623

30. The Federal Court of Appeal erred in its interpretation of article 16(2).

31. First, the *Refugee Convention* is not an international instrument that relates to expulsion. Although it envisages expulsion in some of its provisions, this does not override its fundamental

objective, as for instance stated clearly in its Preamble, of establishing rights for refugees. As this Court has held in *Pushpanathan*, the *Refugee Convention* has an "overarching and clear human rights object and purpose".

> *Pushpanathan v. Canada* (M.C.I.), [1998] 1 S.C.R. 982 at 1024
> *Refugee Convention*, Preamble, paras. 1, 2

32. Second, the purpose of article 16(2) is to protect the provisions of international instruments that offer greater not lesser protection against torture than the provisions of the *Torture Convention*.

33. During the deliberations of the Working Group established to draft the *Torture Convention* (the "Working Group"), it was stated that this paragraph, like article 1(2) of the *Torture Convention*, was a "saving clause affirming the continued validity of other instruments prohibiting punishments or cruel, inhuman or degrading treatment".

> *Torture Convention, travaux préparatoires*, Respondent's Authorities, Vol. 2, Tab 19 at 137

34. In their authoritative treatise respecting the drafting of the *Torture Convention*, J.H. Burgers, the Chairman-Rapporteur of the Working Group, and Hans Danelius state that the purpose of article 16(2) was:

> ... that a wider protection in international instruments or national law shall not be affected by the limited protection which the Convention gives against other cruel, inhuman or degrading treatment or punishment.
>
> Burgers and Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at 150

35. Burgers and Danelius specifically use article 3(1) of the *Torture Convention* as an example of the kind of protection that article 16(2) was intended to broaden, not to narrow. They state:

> ... insofar as it might be possible to derive from other international or national legal instruments a prohibition against extradition or expulsion to a country where the extradited or expelled person might be exposed to cruel, inhuman or degrading treatment or punishment falling short of torture, the fact that article 3 of the present Convention only deals with torture should not be interpreted as limiting the prohibition against extradition or expulsion which follows from such other instruments.
>
> *Burgers and Danelius, supra* at 150

36. "Saving clauses" like article 16(2) are included in many international treaties and instruments to ensure that the provisions in those treaties are not relied upon to reduce existing rights.

Refugee Convention, article 5
Universal Declaration of Human Rights, article 30
ICCPR, articles 5, 6(6), 22(3), 44
International Covenant on Economic, Social and Cultural Rights, article 5
Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993) at 618

37. These clauses are similar to s. 26 of the *Canadian Charter of Rights and Freedoms*, which makes clear that the "guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada".

Charter, s. 26

38. Third, the Federal Court of Appeal's approach to article 16(2), if upheld, would have the absurd effect of protecting all individuals, except refugees, from being returned to torture.

39. This result is contrary to the fundamental principle of international law that individuals are entitled to have their human rights protected without discrimination. As Mr. Justice LaForest stated in *Ward*, the *Refugee Convention* reflects "the international community's commitment to the assurance of basic human rights without discrimination" [emphasis added].

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 at 733
Refugee Convention, Preamble
ICCPR, article 2(1)
Universal Declaration of Human Rights, article 2
International Covenant on Economic, Social and Cultural Rights, article 2(2)

40. Finally, the Federal Court of Appeal's approach is contrary to that taken by the United Nations Committee Against Torture, which has applied article 3(1) even where States Parties have argued that individuals should be *refouled* because of their military or terrorist associations.

Tapia Paez v. Sweden (Communication No. 39/1996) at para. 6.3 and 14.5
Khan v. Canada (Communication No. 15/1994) at para. 3.1, 8.2, 12.1, 12.2
Gorlick, *The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees*, 11 *Int. J. of Refugee Law* 479 (1999) at 488

41. In its November 22, 2000 Conclusions and Recommendations respecting Canada, the Committee Against Torture recommends that Canada:

> Comply fully with article 3(1) of the Convention prohibiting the return of a person to another state where there are substantial grounds for believing that the individual would be subjected to torture, whether or not the individual is a serious criminal or security risk. [emphasis added]
>
> *Committee Against Torture, Conclusions and Recommendations of the Committee against Torture: Canada*, CAT/C/XXV/Concl.4 at para. 6(a)

2. Article 33(2) of the *Refugee Convention* Is Also Restricted By the General Prohibition Against Torture

42. In addition to the express prohibition against *refoulement* to torture in article 3(1) of the *Torture Convention*, the general prohibition against torture is widely-accepted as a *jus cogens* norm of international law and is codified in, among other treaties, article 7 of the *ICCPR* and regional instruments such as article 3 of the *ECHR* and article 5(2) of the *ACHR*.

> *Pinochet Ugarte, Re,* [1999] 2 All E.R. 97 at 108-109
>
> *Prosecutor v. Furundzija* (December 10, 1998), Case No. IT-95-17/I-T 10 (ICTY) at para. 153

43. The prohibition against torture applies to reasonably foreseeable breaches by other states. States are required to protect the individual's right to be free from torture in situations where that right is put at risk through reasonably foreseeable consequences of a state's actions.

> Eur. Ct. H.R. *Soering Case*, judgment of 7 July 1989, Series A No. 161 at para. 91
>
> *Pinochet*, *supra*, at 108-109
>
> *Furundzija* at para.148 and 154
>
> *United States of America v. Burns* 2001 SCC 7 at paras. 54 and 60

44. In interpreting and applying article 3 of the *ECHR*, for example, the European Court of Human Rights has held that a State Party's obligations under article 3 extend to foreseeable consequences suffered outside the jurisdiction of the State Party. In *Chahal v. United Kingdom*, the United Kingdom sought to deport Chahal to India on the basis that he posed a threat to the national security of the United Kingdom, despite evidence that Chahal was likely to be tortured if he was deported to India. The Court held that the deportation would violate article 3. It stated:

> ... it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of

> that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implied the obligation not to expel the person in question to that country.
>
> Eur. Ct. H.R., *Chahal v. the United Kingdom*, judgment of 15 November 1996, 70/1995/576/662 at para. 74
>
> Eur. Ct. H.R., *Ahmed v. Austria*, judgment of 17 December 1997, 71/1995/577/633 at para. 39

45. With respect to the United Kingdom's concerns respecting national security, the Court stated:

> In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.
>
> *Chahal*, *supra* at para. 80

46. The prohibition against torture in Article 7 of the *ICCPR* has been interpreted in the same way. In its General Comment No. 20, the United Nations Human Rights Committee, which is responsible for monitoring compliance with the *ICCPR*, stated:

> In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.
>
> *Human Rights Committee*, CCPR General Comment No. 20, 10/04/92 at para. 9

47. The Inter-American Commission on Human Rights, in a report respecting Canada, has also stated:

> ... the prohibition of torture as a norm of jus cogens -- as codified in the American Declaration generally, and Article 3 of the UN Convention against Torture in the context of expulsion -- applies beyond the terms of the 1951 [Refugee] Convention. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.
>
> *Inter-American Commission on Human Rights*, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, OEA/Ser.L./V/II.106/Doc.40 rev. (2000) at para.154.

48. The requirement that states prevent torture that is reasonably foreseeable although outside of their jurisdiction is especially important in the case of refugees who, by definition, have a well-founded fear of persecution in their country of origin.

49. *Jus cogens* norms prevail over treaty provisions. Article 64 of the *Vienna Convention* states:

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.
>
> *Vienna Convention*, article 64
>
> *Yearbook of the International Law Commission*, 1966, Volume II at 261

50. As a result, article 33(2) of the *Refugee Convention* should be interpreted in accordance with the *jus cogens* prohibition against torture, to preclude *refoulement* of a refugee to a country where there are substantial grounds to believe the refugee would be in danger of being subjected to torture.

3. The Risk of Torture Is Not Diminished By Assurances From The Country of Origin

51. The risk of torture is not diminished when the country of refuge receives assurances from the refugee's country of origin that torture will not occur. Although this Court in *Burns* has held that extradition may proceed upon the basis of assurances from U.S. authorities that they will not seek the death penalty, such assurances should be given no weight when a refugee is being *refouled*.

> *United States of America v. Burns* 2001 SCC 7 at para. 8

52. The situation of a refugee is not analogous to that of an extradited person, because the country of refuge has already recognized the refugee to have a well-founded fear of being persecuted in the country of origin. Once the country of refuge has made this finding, absent a significant change of circumstances in the country of origin, it would be fundamentally inconsistent with the protection afforded by the *Refugee Convention* for the country of refuge to look to the very agent of persecution for assurance that the refugee will be well-treated upon *refoulement*.

C. The Test for Applying the "Danger to the Security of the Country" Exception in Article 33(2) of the *Refugee Convention* Where There Are Not Substantial Grounds for Believing The Refugee Would Be In Danger of Being Subjected to Torture

53. Where there are not substantial grounds for believing that a refugee would be in danger of being subjected to torture upon return to the country of origin, article 33(2) is engaged.

54. UNHCR submits that the test for determining whether a "danger to the security of the country" has been made out under article 33(2) should be similar to the *Oakes* test adopted by this

Court for *Charter* s.1 analysis. Like the *Oakes* test, a decision-maker applying article 33(2) should be required to assess:

(a) first, whether the danger to the security constitutes a sufficiently serious danger to the country of refuge; and

(b) second, whether the *refoulement* of the refugee is a proportional response to this danger.

R. v. Oakes, [1986] 1 S.C.R. 103

55. With respect to the sufficiency of the danger, UNHCR's position is that the danger must be:

(a) a danger to the country of refuge; and

(b) a very serious danger.

56. With respect to proportionality, UNHCR's position is that:

(a) there must be a rational connection between the removal of the refugee and the elimination of the danger;

(b) *refoulement* must be the last possible resort to eliminate the danger; and

(c) the danger to the country of refuge must outweigh the risk to the refugee upon *refoulement*.

1. Article 33(2) of the *Refugee Convention* Should Be Interpreted Restrictively

57. The purpose of the *Refugee Convention* is to protect the fundamental rights and freedoms of refugees. This is stated expressly in the Preamble of the *Refugee Convention* and has been endorsed by this Court in *Ward* and *Pushpanathan*. The purpose of article 33(1) is to affirm that persons who have already been found by a State Party to be refugees must not be removed from the country of refuge to a country where they would be exposed to danger.

Pushpanatham v. Canada, supra, at 1024
Canada (Attorney General) v. Ward, supra, at 709
Refugee Convention, Preamble

58. The *Refugee Convention* was adopted by delegates to a Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons who met at the United Nations Office in Geneva in

1951. That Conference was convened under the authority of UN General Assembly Resolution 429 (V) dated 14 December 1950. The basis of discussions was a draft Convention prepared by the *ad hoc* Committee on Refugees and Stateless Persons which met in 1950 and 1951.

> Weis, *The Refugee Convention, 1951: The Travaux préparatoires Analysed with a Commentary by Dr. Paul Weis*, 1995 at 1-4

59. A *non-refoulement* clause equivalent to article 33(1) was present in the *Refugee Convention* from its earliest drafts. The prohibition against *refoulement* was viewed, in the words of the Canadian delegate, "as of fundamental importance to the [*Refugee*] *Convention* as a whole".

> *Refugee Convention, travaux préparatoires*, Respondent's Authorities, Vol. 2, Tab 18 at 96

60. In contrast, the paragraph which later became article 33(2) was not included in the version of the *Refugee Convention* drafted by the *ad hoc* Committee, despite discussions of such considerations during the preliminary meetings. The Report of the *ad hoc* Committee stated:

> While some question was raised as to the possibility of exceptions to Article 28, [later article 33(1)] the Committee felt strongly that the principle here expressed was fundamental and should not be impaired.
>
> *Weis, supra*, at 327

61. The article 33(2) exception was only introduced when the draft was considered by the Conference of Plenipotentiaries.

> *Refugee Convention, travaux préparatoires*, Respondent's Authorities, Vol. 2, Tab 18 at 72, 97-98 and 99
>
> Nehemiah Robinson, *Convention Relating to the Status of Refugees - Its History, Contents and Interpretation: A Commentary* (1997) at 136-137

62. The need for a clause such as article 33(2) was raised in response to concerns expressed by some states about refugees at a time of increasing Cold War tension. Two amendments were proposed -- one by Sweden and the other by the United Kingdom and France -- which created an exception to the prohibition against *refoulement* for refugees who endangered the security of the country of refuge. The amendment proposed by the United Kingdom and France was adopted and eventually became Article 33(2).

> *Refugee Convention, travaux préparatoires*, Respondent's Authorities, Vol. 2, Tab 18 at 18 and 72

63. The *travaux préparatoires* respecting article 33(2) make clear that the exceptions set out therein were intended to be interpreted restrictively:

(a) the United Kingdom delegate stated that "the authors of [article 33(2)] had sought to restrict its scope so as not to prejudice the efficiency of the article as a whole" and that "[t]he power to expel him would not, of course, be employed if it would endanger his life";

Refugee Convention, travaux préparatoires, Respondent's Authorities, Vol. 2, Tab 18 at 62

(b) the United States delegate stated that "it would be highly undesirable to suggest in the text of [article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution"; and

Refugee Convention, travaux préparatoires, Respondent's Authorities, Vol. 2, Tab 18 at 62

(c) similar statements were made by the French and Israeli delegates.

Refugee Convention, travaux préparatoires, Respondent's Authorities, Vol. 2, Tab 18 at 62 and 63

64. According to Paul Weis, a leading refugee law scholar who was a delegate for the International Refugee Organization during the drafting of the *Refugee Convention*, article 33(2):

> ... constitutes an exception to the general principle embodied in paragraph 1 and has, like all exceptions, to be interpreted restrictively. Not every reason of national security may be invoked...

Weis, supra, at 342

65. A restrictive interpretation of article 33(2) is also consistent with the principle that exceptions to international human rights treaties must be interpreted narrowly.

Eur. Ct. H.R. *Klass case*, judgment of 6 September 1978, A/28 at para. 42

Eur. Ct. H.R. *Winterwerp case*, judgment of 24 October 1979, A/33 at para. 37

2. The Danger Must Be Sufficient to Justify *Refoulement*

66. A "danger" under article 33(2) must be:

(a) a danger to the country of refuge, not the international community in general; and

(b) a very serious danger.

67. ***Danger to country of refuge.*** Article 31(1) of the *Vienna Convention* provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purposes." On a plain reading, article 33(2) requires that the refugee must be "a danger to the security of the country in which he is" [emphasis added].

Pushpanathan, supra at 1024, 1035

68. Article 33(2) makes no reference to the security of other countries or international security concerns generally.

69. To justify *refoulement* under article 33(2), the danger must therefore be a danger to the security of the country of refuge.

70. ***Very serious danger.*** To trigger the article 33(2) exception, the danger must be established to be very serious.

71. Atle Grahl-Madsen, a leading refugee law scholar, has stated with respect to article 33(2) that:

> ... the security of the country is invoked against acts of a rather serious nature endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.
>
> Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963) at 236

72. The *travaux préparatoires* make clear that the drafters were concerned only with significant threats to national security. The nature of the concerns that led to the inclusion of the threat to security provision are captured in the following statement by the United Kingdom representative:

> 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.
>
> *Refugee Convention, travaux préparatoires,* Respondent's Authorities, Vol. 2, Tab 18 at 96

73. Indeed, during the drafting process, the Danish delegate raised a question as to whether the "danger to security" test would be met by the creation of political tension in inter-state relations when the country of origin demanded the return of a refugee from the country of refuge. There was general agreement among the drafters that article 33(2) was not intended to have this effect.

> *Refugee Convention, travaux préparatoires,* Respondent's Authorities, Vol. 2, Tab 18 at 97-98
>
> *Weis, supra,* at 331, 332

3. *Refoulement* Must be Proportionate to the Danger

74. Even if it is established that there is a very serious danger to the country of refuge, *refoulement* under article 33(2) will not be justified unless the remedy of *refoulement* is proportionate to the threat. To demonstrate proportionality:

(a) there must be a rational connection between the removal of the refugee and the elimination of the danger;

(b) the *refoulement* must be the last possible resort to eliminate the danger; and

(c) the danger to the country of refuge must outweigh the risk to the refugee upon *refoulement.*

75. ***Rational connection***. In order to justify *refoulement* under article 33(2), there must be a rational connection between the means -- *refoulement* -- and the ends -- elimination of the danger to security. As Professor Grahl-Madsen has stated, the removal of a refugee must "have a salutary effect on those public goods." If *refoulement* will not have this "salutary effect," then it cannot be justified under article 33(2).

> Grahl-Madsen, *supra* at 200

76. To demonstrate this rational connection, a state must show that the refugee's presence or activities in the state is causing the danger to the security of the country of refuge. Dr. Josef Rohrböck, a European expert on international refugee law, commenting on article 33(2) and its incorporation into Austrian asylum law, states (unofficial translation from the German original):

> Article 33 of the Geneva Convention and paragraph 13(2) of the 1997 Asylum Law establish the condition that the foreigner poses a danger for the security of the Republic of Austria. This danger exists when the very existence of the state is

> threatened or the state risks severe consequences which affect its integrity. In particular, this is the case if there is the danger of a coup d'état or a revolution. In addition, it must be clear that the danger to the security of the state can be alleviated by the removal of the foreigner. [emphasis added]
>
> Rohrböck, *Das Bundesgesetz über die Gewährung von Asyl - Kommentar* (The Federal Asylum Law - a Commentary) (1999) at 279

77. ***Last Resort.*** *Refoulement* must also be the last possible resort for eliminating the danger to the security of the country of refuge. To send the refugee back into the hands of his or her persecutors must be the only available means to eliminate the danger to the security of the country. If there are less restrictive means available, such as prosecution in the country of refuge or removal to a third country, then *refoulement* cannot be justified under article 33(2).

78. As the United Kingdom delegate stated, in discussing the need for an exception such as article 33(2):

> ... the Government of the United Kingdom would always strive to avoid sending refugees to countries where their life or liberty might be endangered. ... If no other country was willing to receive such a delinquent, he would perforce have to be sent to the only territory which would admit him, and which was, in fact, the country where his life or liberty might be in danger. The Government would take care that such extreme measures were applied only in very rare instances" [emphasis added].
>
> *Refugee Convention, travaux préparatoires*, Respondent's Authorities, Vol. 2, Tab 18 at 23

79. As Walter Kälin, a European expert in international refugee law, has stated (unofficial translation from the German original):

> ...*refoulement* to the country of persecution is in any case not permissible, if a less serious measure such as expulsion to a third country, prosecution, imprisonment etc., would suffice to remove the threat to state security. State practice confirms this, since *refoulement* because of activities endangering the state is exceptionally rare.
>
> Kälin, *Grundriss des Asylverfahrens* (Guide to the Asylum Procedure), 1990 at 226-227

80. This approach was adopted by the European Court of Human Rights in *Tinnelly & Sons Ltd. v. The United Kingdom*. In that case, the United Kingdom relied on national security legislation to prevent Tinnelly & Sons, a company based in Northern Ireland, from obtaining certain construction contracts and also to prevent the Northern Ireland authorities from carrying out an investigation

respecting the awarding of those contracts. The Court held that the appropriate test in this case was to:

> ... assess whether there existed a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' rights of access to a court or tribunal.
>
> Eur. Ct. H.R. *Tinnelly & Sons Ltd. v. The United Kingdom*, judgment of 10 July 1998, 62/1997/846/1052-1053, at para. 76

81. ***Danger must outweigh risks of refoulement***. If article 33(2) were considered applicable, it could only be applied with due regard to the notion of proportionality. It is common ground between the parties that a balancing of interests is required under article 33(2). As the Minister of Citizenship and Immigration states at paragraph 59 of her factum:

> ... a reasonable exercise of Ministerial discretion only allows for the deportation of Convention refugees who endanger Canada's security where the threat to security outweighs their right to personal security.
>
> *Respondent's Factum*, at para. 59

82. The requirement for a balancing of interests is fully consistent with the *travaux préparatoires* of the *Refugee Convention* and the views of international refugee scholars.

> *Refugee Convention, travaux préparatoires*, Respondent's Authorities, Vol. 2, Tab 18 at 96
>
> Goodwin-Gill, *The Refugee in International Law, 2d ed.* (1996) at 139-140

83. In assessing this balance, the following factors, among others, must be considered:

(a) the seriousness of the danger to the security of the country;

(b) the imminence of the danger, how long it has existed and whether it is likely to continue in the future;

(c) the manner in which the activities or the presence of the refugee in the country of refuge causes the danger; and

(d) the risk of harm to the refugee upon *refoulement.*

84. Of these factors, given the human rights objectives of the *Refugee Convention*, the gravity of the risk faced by the refugee if *refouled* is the most important consideration.

PART IV - ORDER SOUGHT

85. UNHCR takes no position as to whether this appeal should be allowed or dismissed.

Date: March 8, 2001

ALL OF WHICH IS RESPECTFULLY SUBMITTED

_____
John Terry

_____
Jennifer A. Orange

Of counsel for the Intervenor
United Nations High Commissioner for Refugees

PART V - AUTHORITIES