

BETWEEN                      **THE ATTORNEY-GENERAL**

Appellant

AND                              **AHMED ZAQUI**

First Respondent

AND                              **INSPECTOR-GENERAL OF  
INTELLIGENCE                      AND  
SECURITY**

Second Respondent

AND                              **HUMAN                              RIGHTS  
COMMISSIONER**

Intervenor

Hearing    3 February 2005

Coram      Elias CJ  
              Keith J

Counsel    T Arnold QC, K L Clark and A S Butler for Appellant  
              R E Harrison QC and D Manning for Respondent

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**APPLICATION FOR LEAVE TO APPEAL**

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2.13 pm

Arnold     I appear with Ms Clark and Mr Butler in support of the application Your  
              Honours.

Elias CJ Mr Arnold.

Harrison If Your Honours please, I appear with my learned friend Ms Manning to oppose.

Elias CJ Yes thank you Mr Harrison. Yes well we've read of course the arguments submitted. I think we'd be assisted Mr Arnold if you could confirm if I'm right in this assumption that you're not seeking leave to appeal the first Declaration made by the Court in its formal order. It wasn't entirely clear from the Submissions.

Arnold No, no. Your Honour's correct, the first Declaration at paragraph [26] is not the focus of the appeal. The focus of the appeal is on Declarations 2 and 3, both of which come out of the proportionality analysis that was accepted.

Elias CJ Yes, yes. So if we're minded to grant leave, the questions for the Court can simply be whether the Court of Appeal was correct in the second and third Declarations.

Arnold Yes although I have looked again at a point, the formulation of the points of law that were put in the Submissions. I've reformulated them in a way which in my submission highlights precisely what the issues are from the Crown's perspective.

Elias CJ Oh well that would be helpful to hear you on that then thank you.

Arnold I'll just hand up these.

Keith J So in the third one, let me just come to the second level of counts or purported to be.

Arnold Yes. Because it is obviously an important element of the overall context. Your Honours I don't want to traverse the arguments again, but.

Elias CJ I just wonder, just looking at it, my initial reaction Mr Arnold is that it may be better to stick with the Declarations. I can understand why you will probably develop the argument along these lines and I think it is a helpful way to argue the matter. But I'm not sure that it doesn't refine matters more than they perhaps should be at this stage to come down to these propositions.

Arnold Well I'm happy to accept Your Honours' view on that. From my perspective it would mean the arguments which the Crown wishes to make can be made through an examination of the validity of the second two Declarations.

Elias CJ Yes.

Arnold And so that's simply my concern. And from the Court's point of view, it has a sense of the confines of the case.

Elias CJ Yes.

Arnold Which obviously support it.

Elias CJ Yes, well we're anxious really in these leave hearings not to convert them into a sort of case stated procedure Mr Arnold.

Arnold Yes.

Elias CJ With all the straight-jacket implications of that. And really the purpose of the Rules is to make sure that off the planet arguments don't suddenly arise at the hearing. But I can see how you will develop the argument with these propositions and I think they're extremely helpful but I wonder whether you might consider whether you would be able sufficiently to advance them if the grounds are confined to whether the Court of Appeal was correct in the second and third Declarations.

Arnold Well my initial reaction Your Honour is that we will be able to but I'll take the opportunity at this time to confer.

Elias CJ Yes. Yes thank you.

Arnold Yes I think the answer Your Honour is that we could, the Crown would be able to address the points which it sees as being in issue through the vehicle of those two Declarations in considering whether they are properly made.

Elias CJ Yes, yes thank you.

Arnold Your Honours, I don't want to rehearse the arguments but I really just want to take a moment to explain the context and why it is that the Crown sees the Declarations as being problematic. May I first of all make a preliminary point and that is to some extent this case illustrates the difficulty of dealing with issues in a sense in the abstract.

Elias CJ Yes.

Arnold Without a factual finding. And Your Honours will be aware from the Judgment that the Crown took the point early on that this judicial review wasn't available but even if it was, it was really premature because in a sense there was a lack of focus without the factual context to give rise to the issues. And I think in retrospect there is something in the point that because the issues have been argued at a level of generality, there has been in a sense an element of confusion of points about what precisely is being talked about. Because the argument originally was about what has been described as the human rights dimension. And that dimension,

as Your Honours will see from the Judgment, was quite a broad one. The argument was that the Inspector General, and necessarily the Director, because they're considering the same issues, were obliged to take into account the full range of international obligations in terms of Article 7 of the ICCPR, the Convention Against Torture, the Refugee Convention and in addition, s.9 of BORA, the prohibition against cruel and unusual treatment.

And in conducting, making the decision to make the Certificate and conducting the review, each of them, the Director and the Inspector General, were obliged to look to the question of what might happen to Mr Zaoui. What countries were available to which he might be sent and all of that should inform the analysis which they undertook. Now the Crown's position was no, those sorts of issues didn't arise at this stage, that is the decision-making by the Director or the Inspector General; they arose at the point that the Minister, once the Certificate was confirmed, had to decide what to do.

And so from the Crown's perspective it was accepted that yes there are international obligations which impinge on this. But they were things that ultimately the Minister had to weigh up and make a decision about.

Elias CJ Mr Arnold, I am not sure that I fully understand. I understand your argument about a country to which a refugee might be deported. And that that is a decision that falls to the Minister at a later stage. And in making that determination he would be bound by New Zealand's international obligations. But you run that in with the determination to deport. And on my reading of the statute, the Certificate is sufficient determination for the purposes of the Minister. The Minister, although he has an override, he can not accept the Certificate, he is justified under the statute in adopting it. Well, in not derogating from it.

Arnold The Minister has a choice to make. If the Inspector General confirms the Certificate, the Minister is not obliged to rely upon it. The Minister then, ... Dalziel, has a decision to make about whether to rely and what not, and what to do.

Elias CJ Yes but if he relies on it, then it is the assessment, that is the assessment that deportation is justified under the statute and in terms of the Refugee Convention. In your Submissions you really run together the two points. And I understand your argument about where a refugee might be deported to. Because that discretion remains, it's not something that is determined by the Certificate. But unless the Minister decides to override the Certificate, that is the determination that the refugee should be deported consistently with the Treaty, the Convention as I understand it.

Arnold What Your Honour is raising is if you like a more focused question. And the point in my making the observation about the way in which the case has become refined was to say at the outset that it had this very

broad focus. And from the Crown's perspective it was argued that that's not the way the statute works. And by and large the Court of Appeal has accepted that.

Instead a more refined question, and this was a question that the Crown did not address in detail before the Court of Appeal, but which really is now in focus before this Court, and that question is what precisely is the effect of the reference in s.114C(6) to Article 33.2 of the Refugee Convention. Now in the exchange with the Bench, I accepted that that reference means that there had to be a substantial or serious threat to national security. In other words, the Crown accepts the sort of **Suresh (Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3)** formulation, I think the full Court of Canada formulation in **Suresh**. But beyond that, we didn't go.

Now what the Majority of the Court of Appeal has done is to explore further what precisely the reference to Article 33.2 in that subsection brings in. And as you'll have seen, the Court says, through the mechanism of setting the threshold of threat, it brings in at least some of the considerations that my learned friends were arguing about in the broader context. And this comes in through the mechanism of proportionality. But when one looks at the way in which Justice Glazebrook has formulated the approach, it becomes apparent that it's simply unworkable in this sense – that it removes from the country the ability to take certain measures that I think anybody in international law would accept are appropriate in this context.

Now may I simply explain the point by asking Your Honours to take up the Judgment of the Court of Appeal and to turn to paragraph [154] through to [157]. Because through the mechanism of those paragraphs I'll explain the point in the way that I hope will illustrate the difficulty that the Crown sees with the approach.

Elias CJ      You accept that there's a determination which carries serious consequences and therefore seriousness enters in the scale of reasoning, reasonably available to the Inspector General?

Arnold        We'd accept that the threat to national security must be substantial, serious, that the formulation of the Supreme Court can ... And as the Inspector General said in the decision which is sought to be reviewed, he said I recognise this is a serious issue.

Elias CJ      If in proposition, if in Declaration 2 there hadn't been reference to justifying sending a person back to persecution, would you quarrel with it?

Arnold        That would depend on the supportive reasoning but probably not. If one took that out at least some of the problems that the Crown sees disappear. And if I could explain why.

Elias CJ Yes.

Arnold Because Your Honour with respect is getting to the heart of this problem. At paragraph [154], Her Honour Justice Glazebrook deals with the requirement of proportionality and makes the point that most commentators say that there is a requirement for proportionality. And what that means is explained at the bottom of the page in the extract from "*Lauterpacht and Bethlehem*". The requirement of proportionality will necessitate that consideration be given to factors such as the seriousness of the danger posed to the security of the country; the likelihood of that danger being realised and its imminence; whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned; the nature and seriousness of the risk to the individual from refoulement; and then (e) whether other avenues consistent with the prohibition of refoulement are available and could be followed, whether in the country of refuge, and I interpolate there, I think that's referring to the situation where the host country makes an arrangement with the country of refuge that the person will be returned subject to undertakings that they will not be persecuted in any way.

Elias CJ Yes.

Arnold Or, and continuing on, or by the removal of the individual concerned to a safe third country. So the point is then that the proportionality analysis according to these writers involves an assessment of all these factors. And so for example if the state can make arrangements for the protection of the refugee either by sending them to a safe third country or by making arrangements with the country of origin and ensure the protection of the person, then the idea is that a lower standard of threat will be acceptable.

That's what the proportionality or the weighing up involves. The seriousness of the threat against the seriousness of the risk to the person. The higher the risk to the person; the higher, the greater the threat must be. The more you can moderate the threat to the person, the more you're entitled to use the lower level of risk.

Keith J And then there's leaving no risk. I can't understand, you know, if the person's safe then it's not a terminal situation is it?

Arnold Not really. But I suppose there may nevertheless be an element of risk. How good are the undertakings? Will things change in the safer third country. One can never have absolute certainty in these things.

Keith J No, no, no. But at the moment if somebody is expelled to a safe country, it is safe or there's some arrangement made with the original country, the country of origin. I can't actually see quite what the weighing is in that case. Because.

Arnold Well it becomes a much easier assessment.

Keith J At least on the face of it without having read "*Lauterpacht and Bethlehem*" in context, I can't quite understand what you're saying really. But anyway that's a matter for later if we get to it.

Arnold So having gone then, in the next paragraph to talk about proportionality with account being taken of the nature of the consequences likely to befall a refugee on return, Justice Glazebrook goes on at paragraph [156] to say of course.

Elias CJ Sorry, we have no pens. It's alright I've got one.

Arnold Your Honour, Justice Glazebrook goes on to make the point that not all international commentators agree that proportionality is a part of the Article 33.2 assessment. And it is certainly the Crown's view, and the Crown will be making the argument, that proportionality is not a part of the assessment.

Elias CJ Well is it proportionality? Because on one view proportionality is simply reasonableness by another name. And there's a requirement of reasonableness here. It's not so much the proportionality, it's whether if the weighing of the risk to the state and the risk of the individual is the correct approach isn't it?

Arnold Well that's what proportionality is referring to, the weighing of the threat against the likely harm to the individual depending on where that person goes.

Elias CJ There's an absolute prohibition under the Convention on sending someone to a place where they are at risk isn't there?

Arnold Well we've got to be clear about what Convention you're talking about. This is the Refugee Convention.

Elias CJ Yes.

Arnold The Refugee Convention certainly does commentate under Article 33.2 that somebody can be sent back to persecution. Your Honour's absolutely right, that under the Convention Against Torture no person can be refouled to torture as defined in that Convention and torture is defined in quite a broad way.

Elias CJ Yes.

Arnold And so there certainly is an issue as to how one takes account of that international obligation which exists for New Zealand. So Justice Glazebrook identifies what's involved in proportionality. Then says, I accept that not all of the international commentators agree that a balancing process of the type that I'm talking about is part of the Article

33.2 analysis and the Crown would wish to argue on appeal that it is not. And we'll be submitted there's pretty powerful authority on that point.

But then Justice Glazebrook goes on at [157] to really set out the proposition that then comes up in Declaration number 2. In my view there is a balancing in any decision under Article 33.2 and therefore with regard to 114C(6)(a). As discussed, it is built into the concept of danger to the security of the country that the danger to security posed by the individual must be serious enough to warrant sending a hypothetical person back to persecution. Balancing in this sense is the concern of the Inspector General. The weight of authority seems to favour an additional balancing of the consequences for the particular individual if removed or deported against the danger to security. Under the statutory scheme, as discussed above, this additional balancing would be for the Minister.

So the conclusion that Her Honour has reached, and which Justice Anderson supported, is that there's if you like a double balancing. The first balancing based on the notion of a hypothetical person being sent back to persecution.

Now, just as a preliminary observation about that. Your Honours will immediately see that creates a difficulty because if the nature of the persecution is relevant to the balancing exercise, what assumptions do you make about this hypothetical person? The notion of persecution under the Refugee Convention goes from one extreme, which would be death, as soon as you go back to the country you're executed, to another extreme where you would suffer some deprivation of a ... right. Perhaps the right to vote. And one would, if the proportionality analysis is correct, one would expect to take account of the nature of the persecution in assessing the degree of risk. But of course you can't do that here because you're talking about a hypothetical person going back to persecution. So the test itself for the Inspector General is with respect somewhat unhelpful. It's not easy to see how it would operate.

But let me go to a more fundamental problem and that goes to the point (e) in the extract that I quoted from the previous page. Because the effect of imposing this balancing requirement through the definition of threat to security of course is that you effectively preclude from the state the opportunity to explore the type of ... set out in point (e). In other words, if a person can only be defined as a threat to national security if the threat is sufficiently serious to justify sending them to persecution, the Government is never able, or not never, but will often be unable to take advantage of a safe third country or the option of negotiating a set of conditions with the country of refuge. Because the underlying assumption in terms of the threat to security is pitched at a much higher level. And what "*Lauterpacht*" is saying is if you can avail yourself of one of those other remedies, then the threat to national security that the individual poses does not have to be as high. If Your Honours can see, that element has been excluded because the Judgment.



- Elias CJ      Only if it's ethereal assessment, a stepped assessment.
- Arnold        But that's exactly what Her Honour Justice Glazebrook is saying it is. First of all you have to satisfy yourself that the person can be sent back to persecution. And we have to accept that there will be people who you could not justify sending back to persecution. But who you could quite properly send to a safe third country. Or you could send back to the country of origin subject to conditions. And the point I'm making Your Honours is this stepped analysis really precludes that latter option. Because it doesn't, the threat to national security won't exist because the threat to national security is, the Certificate, is going to be assessed on the basis that you're sending him to persecution. So how do you take account then of the fact that you're not ready to do that at all. You're going to arrange a safe third country. In theory that should justify a lower threat to national security. That's precluded. So as best I can, that's the real difficulty that emerges from this analysis. It really prevents the state from undertaking steps which are perfectly proper steps for it to undertake by setting the test of threat to national security so high as to justify sending to persecution.
- Elias CJ      But the state could address that in the context of the determination made by the Inspector General.
- Arnold        Well no they couldn't. That's the whole point.
- Elias CJ      I know on the reasoning in the Judgment but, and this ties back into the point I was exploring earlier with you about the sufficiency of the Certificate to justify deportation.
- Arnold        If those issues are going to come up in relation to the Inspector General's process, they must be part and parcel of the Director's process.
- Elias CJ      Yes, yes.
- Arnold        And the Court of Appeal accepted, and in my submission quite rightly, that the Director will be in no position to make an assessment about what might happen to this individual. In some cases he will. In some cases he may know from prior experience that a person, that arrangements can be made to send a particular person back to the country of origin subject to protections. Or he may know that there are safe third countries to which somebody may be sent. But in other cases, the Director would have no knowledge of that sort at all. And all the Director is looking at is, is there a security concern here. That's his job, that's his business. That's the question to be asked.
- Elias CJ      But there's two steps, and if you look at the Certificate that was actually granted in this case, it certifies both and the second is the Article 33 determination adopted into our statute. So in a way it's a mis noma to

refer to this as a Certificate, as if it's a Certificate of an assessment of fact. It's actually an assessment of the legal status under the Act. And the Minister is entitled to act on it.

Arnold No with respect. What the, with respect, Your Honour's right in this sense. What s.114(6) does is say you've got to pose a threat to national security. That's the first step.

Elias CJ Yes.

Arnold And second you have to be a danger to national security in terms of Article 33.2.

Elias CJ Yes.

Arnold And in my submission what that means is that you have to be a real or substantial threat to national security so it does add further to the threat to national security contained in the first requirement but it just says the level of threat has to be serious, substantial. So it is making that point, the Crown accepts that entirely. But that's quite different from saying that by referring to the Article and saying you must have a threat to national security of the type that Article 33.2 is talking about, to say that is one thing. But it doesn't mean that everything that the Minister might consider in ultimately deciding what to do with the individual becomes relevant to the Director and therefore to the Inspector General.

Elias CJ There is a provision in the Act, it's variously worded and I may have misread it in reading it quickly, but there is a provision in the Act which enables the Minister to act on the Certificate that this is within the, what's the term, the security requirement.

Arnold Yes, what the Act does, in fact I may have misled you earlier. Once the Certificate is confirmed, I'll just get the right version.

Elias CJ You see, subs (1) of 114C makes it quite clear that the decision is directed to whether someone who is a refugee, or has that status or is a claimant, should be deported. And it seemed to me that the Certificate deals with qualification for deportation under s.72. I may be wrong about that but I'd like you to point out if I am.

Keith J Well the Director has to say doesn't he that in his view the requirements of s.72 and Article 33.2 are satisfied?

Elias CJ Yes.

Keith J So he at that point is saying that the refugee deportation security criteria are satisfied with the combination of threat and danger to national security. So he makes that double.

Arnold I'm just trying to be a little careful about precisely what it is that he's satisfied about. What he has to be satisfied about is that in this case the person was a threat to national security in terms of s.72 and that there are reasonable grounds for regarding the person is a danger to the security of New Zealand in terms of the Article. The Crown utterly accepts that the term danger to the security of New Zealand in the **Suresh** sense involves a serious or substantial threat to security. And so there's a high level. The argument then is to what extent does the Director go beyond that into all these other questions. ... the Crown says the Director doesn't, and the Inspector General doesn't, it's up to the Minister. They do not have to go into this type of thing.

Elias CJ Well that's where I'm not sure because under s.114F, the Certificate, I'm just trying to find it, hopefully we can find it in the legislation, I've just made a note of it. But the.

Arnold Section 114F sets out the effect of the Certificate and the Minister may rely on it in making a decision under this Part. So the Minister can rely on the Certificate. But the Minister will have to consider the other international obligations that New Zealand's got. And for example, if under ... he can't, there's an absolute prohibition on sending somebody back to torture as defined, the Minister will have to take account of that.

Elias CJ Yes, well I think I understand that aspect of it but the assessment that the person falls within the exception provided by Article 33, it seems to be that the legislation says that that Certificate is sufficient for the Minister to then deport him. That there isn't a separate process and if that's right then it seems to me that the inquiry undertaken by both the Director and the Inspector General has to be informed by all the background. And you said that, you talked about a broad consideration. I would have thought that there are broader considerations. Bill of Rights Act considerations, not about personal security but about liberty and freedom of association and matters such as that. If this is sufficient justification for a deportation under the legislation, then it seems to me it's going to be very hard for you to contend that that isn't a responsibility of the Director and the Inspector General. Because it seems to me that the Minister simply can accept it, in which case he acts on it. And he's permitted to do that by the legislation. Or he can override it. But it's not the same thing as requiring him by the statute to turn his mind to these issues.

Arnold Yes.

Elias CJ I'm sorry but I took a while to get it.

Arnold No, no, thank you Your Honour. That helps me. I perhaps haven't been clear enough in stating what the Crown's position is on this.

Elias CJ Yes.

Arnold The Crown certainly says that in terms of Article 33.2, if somebody constitutes, meets the terms of Article 32 in terms of being a threat to national security, and I'll take you to the wording in a minute, there is no further proportionality analysis to be conducted by anyone, including the Minister.

Elias CJ Yes.

Arnold Because it's not required under international law. However that is not to say that there are not other human rights instruments and considerations that will not be relevant to this.

Elias CJ Yes.

Arnold They will be. So in that sense, yes Your Honour's right that the Director assesses the risk to national security. The Inspector General does a check on that and they say to the Minister there is this risk to national security. The Minister is entitled to, I accept, to say right we can deport you in terms of the way the statute works.

Elias CJ Yes.

Arnold But then all these other international instruments and obligations come into play which may effectively remove a number of those options.

Elias CJ But probably not the Refugee Convention. Because that's already been taken into the domestic statute and not the New Zealand Bill of Rights Act because that will have been part of the Inspector General's assessment.

Arnold Well the difficulty there I guess is.

Elias CJ I suppose then you're into the International Covenant on Civil and Political Rights.

Arnold Yes exactly, that's exactly the point. So that.

Keith J And the question whether the torture provision applies to actions outside New Zealand too I suppose. The Convention Against Torture plainly does. I mean that's the way it's written.

Arnold Yes.

Keith J But I don't know if there's any authorities on the application of s.9 beyond New Zealand.

Arnold The application of s.9 of the Bill of Rights Act.

Keith J Mm.

Arnold No, no that is an interesting question. But

Keith J There's a decision in the last little while in the UK I think isn't it about Iraq?

Arnold I'm not aware of the decision. But because it simply reflects Article 7 of the ICCPR in one way or another I think one gets there. So to come back to Your Honour's point about the proportionality analysis, I wouldn't want there to be any misunderstanding of the Crown's position. The Crown's position is that yes there must be a serious threat to national security. It accepts the **Suresh** analysis. But once that's established, proportionality has nothing to do with it. And it's not part of the definition of threat to national security to undertake a proportionality analysis. Which is what the Court of Appeal has tried to bring in.

Keith J There's a real danger in this hearing going too widely, but are you going to talk about paragraph [158] of Justice Glazebrook's Judgment at all? Because it bears on what you were just talking about I think. Where ... .. talking about an absolute. And in fact is that based on the Torture Convention is it?

Arnold Well I've tended to assume that it is.

Keith J Mm.

Arnold But I haven't explored that particular paragraph in great detail. But that's what I assumed it was talking about. There certainly is something in the writing which as you know there are arguments that a number of the values enshrined in these Conventions have really been incorporated in what one might call customary international law.

Keith J Yes.

Arnold You don't really need to rely on the Conventions.

Keith J Mm.

Arnold But I think there is some academic support for the idea that the content of that customary international law is growing over time, things get built up on it. So that may have something to do with that. But I.

Keith J But it's certainly the wording of the Torture Convention isn't it? As well as the wording of the ICCPR provision.

Arnold So about this analysis Your Honours, the Crown really is making four points. First it's, as I've attempted to show, if one takes those paragraphs and analyses them within the context of the sort of situation I've been describing, their effect is really to limit the opportunity for the Crown to deal with security risks in ways other than by sending people

back to persecution. And it limits the capacity to do that because it builds into the definition of the threat to security a requirement that it's high enough to send somebody back to persecution.

The second point I make is that this analysis is based on the work of academic writers and commentators but they are not agreed about it and in my submission when one explores the writing in detail, one can see that disagreement. And it's a perfectly proper issue for this Court to consider. And in the little handout that we've put in, I've included in there an Article by "*Hathaway and Harvey*" where they reject the proportionality approach at pages 294 and 5 of the Article. We've also included an Article by "*Gilbert*" who is a supporter of the proportionality approach. And that Article is interesting for two reasons. First he supports a proportionality approach not only in relation to Article 33.2 but also in relation to Article 1(f). Now if I could just remind Your Honours, Article 1(f) says that the provisions of the Refugee Convention shall not apply to any person with respect to whom there are serious reasons for considering that he's committed a crime against peace, a war crime and so on, committed a serious non-political crime outside the country of refuge or has been guilty of acts contrary to the purposes and principles of the United Nations.

Now the very same argument that that involves, a proportionality assessment, has been made by academics and in various courts. And the argument has been that one has to weigh up the seriousness of the crime against the threat that the person faces if they're denied refugee status and sent back to the country of origin. Now the Court of Appeal in **S (S v The Refugee Status Appeal Authority** [1998] 2 NZLR 291) protected the proportionality analysis and Your Honour Justice Keith may remember the decision, Your Honour was part of it. But the Court there went quite carefully through Article 1(f) and said proportionality is not part of it. All one has to do is establish that a person has done ... enumerated things, committed a crime against peace or war crime, committed a serious non-political crime, been guilty of acts contrary to ..., if you establish that, that's the end of it. The person is not a refugee. There is nothing in Article 1(f) to suggest that there must be some further weighing.

Now when one looks at Article 33.2, the language is very similar because Article 33.2 dealing at this stage with an admitted refugee, says the benefit of the present provision, that's Article 33.1, the ... provision, may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgement of a particularly serious crime constitutes a danger to the community of that country. Now a proportionality analysis, taking that second look, a proportionality analysis of the sort that Justice Glazebrook accepts would suggest that a final judgment of a particularly serious crime, and where the person constitutes a danger to the community on the basis of that, will be assessed and weighed against the threat that the person faces

if they were refoiled. So you get precisely the situation that the Court of Appeal warned against in the **S** case and precisely the same conduct may be sufficient to justify refolement in one case but not in another. Nothing to do with the inherent quality of the conduct. But everything to do with other factors, that is how the person might be received in whichever country they're going to.

Keith J Has that Article 1, proportionality argument, been tried out somewhere?

Arnold Yes, and rejected. The US Supreme Court has considered and rejected it. Other courts have as well. And indeed the "*Hathaway*" Article does deal with some of that. If I can just give you the page reference Your Honour. "*Hathaway*" argues that, yes at page 274-5, you'll see there a reference to the decision of the Supreme Court of the United States on the balancing test. The other reference, if Your Honours wanted it, I could hand up a copy of the decision, is **S v The Refugee Status Appeal Authority** which is recorded at [1998] 2 NZLR 291. And the Court goes through there and in that case goes through in some detail the proportionality arguments and rejects them. And the Crown's argument will be that those arguments have equal weight and validity in the context of Article 33.2. Now the Court does make the point at the conclusion of its Judgment, and this is at page 299, that the Torture Convention is a separate matter and that the refolement provision in Article 33 of the Refugee Convention is a separate matter. So it's not necessarily the case that the same approach will apply. The Crown will argue it is. But self-evident in my submission that is a point to which this Court should turn its attention because the Court of Appeal didn't consider it at all. Now I'm not being critical in that. It just didn't because of the nature of the way in which the issue arose.

Keith J The Torture Convention is a different case because it's just a flat prohibition for which there's no room for.

Arnold No.

Keith J I think what we're anxious here about may come up later I suppose. Not today. But we're anxious here about how we got to the torture provisions. It's not referred to in the legislation anywhere is it?

Arnold Yes. Yes, there are some real oddities in this

Keith J Yes.

Arnold I'm the first to admit Your Honour.

Elias CJ **Pio.**

Keith J Well we referred to the Torture Convention in an admissibility case. Because it's got a, ... confession ... being admissible under the Torture Convention. And that's refolement so.

Arnold Yes, so just to recap, the arguments are, the proportionality test and the way that it's been expounded in the Judgment and carried through into the Declarations made in my submission are unworkable and far too stringent in the sense of removing options from the state. Secondly there's the international dispute about it in any event. Thirdly the Court of Appeal at least in relation to the *S* case said there's no proportionality analysis and it really does need to be explored as to why the reasons that carried the day there do not apply here.

And the final point I make is that at least so far as the United Kingdom Government is concerned, it's seems pretty clear that there is no proportionality requirement. And I refer in this context to s.34 of their Anti-Terrorism Crime and Security Act 2001 where they specifically say the approach to the application of 1(f) and 33.2 doesn't involve a proportionality analysis. Now I read that as an avoidance of our type of provision. We're simply saying that they do not regard that analysis as a requirement of the international Conventions to which the United Kingdom Government is a party. And you will find a little bit more support for that. In the second handout I've included the "*Gilbert*" one (*G Gilbert "Current Issues in the Application of the Exclusion Clauses"* and "*Summary Conclusions : Exclusion for Refugee Status*", *Feller, Turk & Nicholson (eds), Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003, 435-485). As I say.

Elias CJ I don't think we have the second handout.

Arnold I'm sorry. Second tab.

Elias CJ I was simply going to say that the *Gilbert* article does support a proportionality analysis both in Article 1(f) and Article 33.2 but what is interesting about is it records at the end of the article a record of a round table organised by the United Nations High Commissioner for Refugees on the operation of the Convention. And if you look at p.481, paragraph 12 you'll see there that there was a good deal of ... of argument about proportionality and balancing in the context of Article 1(f). And you'll see there that there's a general move against introducing such a concept in Article 1(f). The question of how it worked in Article 33 was left over for a further discussion. Enough to say that there has been a further discussion but no resolution at all of the issue. So I'm simply making the point that the State's practice is not consistent with the academic commentary that argues for proportionality.

Now for those reasons Your Honours, in the Crown's submission this case clearly merits the attention of this Court. It involves issues that have meaning to the final courts of appeal in the United Kingdom and the United States and Canada. And it clearly is the case in my submission that these are issues which deserve the consideration of this Court.



Unless Your Honours have further questions, that's all I wanted to say.

Elias CJ No, thank you Mr Arnold.

Arnold Thank you Your Honours.

3.08 pm

Harrison If I could just have a moment.

Elias CJ Yes.

Harrison Yes Your Honours. There are I submit two issues. The first is whether leave should be granted at all. And the proposed Respondent continues his opposition to the grant of leave for the reasons outlined in our Submissions. Secondly, if leave is to be granted, what legal issue? Because we're only talking about legal issues which should be the subject of the grant of leave.

Those two issues tend to run together. My overall submission is that the major criticism of the Court of Appeal Judgement which the Crown advances which seems to be the introduction of a requirement for proportionality, has this fundamental problem that it is not in fact by any means clear that the Court, the Majority in the Judgment of Justice Glazebrook, introduced a requirement of proportionality as such. And that requires a reading of the passages from the Judgment ending with paragraph [157] that my learned friend took you through and I have addressed the point in our Written Submissions. The position I submit is that as regards proportionality itself, the Judgment merely discusses the academic writing on either side.

The critical passage in the Judgment is at paragraph [157] which has to be read as a whole and in context. Her Honour there says, in my view there is a balancing in any decision under Article 33.2. And I omit words which I'll come back to. Then she goes on to say, the weight of authority seems to favour an additional balancing of the consequences for the particular individual if removed or deported against the danger to security. Under the statutory scheme as discussed above, this additional balancing would be for the Minister. So when we come to the middle of that passage and the test must be serious enough to warrant sending a hypothetical person back to persecution, all that that is is an emphasising of the seriousness of the decision and the stringency of the test. It is merely another way of putting the, I submit, unarguable proposition that Article 33.2 removes a very important and critical right under Article 33.1 which the refugee would otherwise have.

And that this is the correct interpretation of [157] is confirmed by other passages in the Judgment which Your Honours may recall I referred to

and footnoted in paragraph 11 of our Submissions where it is repeatedly said it is the Minister's role.

Now we argued before the Court of Appeal the proportionality and that the consequences for Mr Zaoui personally were part of the equation. The Court of Appeal rejected that and of course I'm torn here because in many ways I'd be happier to have another crack at it. But I do make the point that the whole thrust of my learned friend's submissions is based with the greatest respect on a misreading of the Judgment where he claims that proportionality was something that was accepted by the Majority as distinct from simply being part of the discussion.

Now this comes down to a question of whether in this quite unique case where the process has already been going on for almost two years and where there is the personal dimension - Mr Zaoui is now on bail of course - his wife and family are in limbo and he is in limbo awaiting his fate - whether the Court should grant leave, in a case such as this. Now my submission is that merely tinkering with or elucidating the reasoning of the Majority, if that is all that the thrust of the Crown argument amounts to, is not a sufficient reason to grant leave.

Keith J        How is the Inspector General, Mr Harrison, going to read the Judgment? When we've got you two very learned gentlemen saying it can be read either way?

Harrison       Yes, I accept that there is that issue. That's why I really return to the traditional ratio deci dendi approach of saying, well what are the actual holdings in my submission. But I accept that there is some validity in that and no doubt there would be debate about the implications of the Judgment. There might with the greatest respect be similar debate about the meaning and what is to be taken from a Supreme Court Judgment.

Keith J        Sure. Mm.

Elias CJ       ... the Justice Young thought that there was, that matters had been taken further in the Majority Judgment than simply emphasising that this was a serious decision and there was a high threshold.

Harrison       Well that's not quite how I read His Honour. I don't read him as suggesting that the Majority go too far.

Elias CJ       He accepts that the words must be interpreted in the light of the Convention and the understanding. So there's a high threshold before you displace a general provision on his Judgment. But he certainly considered that the Majority went further.

Harrison       Well they discussed further. I don't read his Judgment as saying they are going too far. But rather they are dealing with things that I am not comfortable myself dealing with.

Elias CJ Well he says he doesn't want to express a concluded view on it.

Harrison Yes.

Elias CJ And he doesn't go along with the formulation for that reason. So.

Harrison Yes, yes I accept that.

Elias CJ According to you, Justice Keith's proposition, if the Judgment is ambiguous, surely that's a reason for granting leave.

Harrison Yes, my submission is that it isn't actually ambiguous and merely outlining the differing views of academic writers, which is the lead-up to paragraph [157], is not remotely an acceptance that a test of proportionality applies. And as I say, I'm quite happy to leave the Crown to argue in support of that proposition.

Keith J But the very first line of [157] uses the word balancing doesn't it? And that suggests doesn't it something that the Solicitor's hand's going up and down, you've got two sides to the scales. Whereas if you're reading the reference to persecution as absolute, then it's a constant isn't it?

Elias CJ Yes.

Keith J And it's your point about being hypothetical too, a hypothetical person, that's, is there a real risk ... of persecution and if it's not a matter of weighing, it's then a question isn't it of seeing whether this is a sufficiently serious threat or danger to national security?

Harrison Yes, well as I've said, given the opportunity, and ...the Court grants leave I will argue that that's precisely the sort of balancing the actual ... circumstances and consequences against the perceived risk. By my point in defence of the Court of Appeal is that that is not what they're saying. In that paragraph the balancing is built into the concept of danger to the security of the country and that it be serious enough to warrant sending the hypothetical person. That is always so because we're talking about Article 33.1 which is the protection against refoulement. And one can sufficiently explain the Judgment that way. But at the end of the day, as I say, I just make that point.

Elias CJ Yes.

Keith J Yes, sure.

Harrison And probably don't need to pursue it further. As regards the scope of the appeal if leave is granted, I heard my learned friend say that he was content to have leave limited to the Court of Appeal's second and third propositions. But if we can go to the third proposition which is at paragraph [26] of the President's Judgment. That is, there must be a real connection between Mr Zaoui himself and the prospective or current

danger to national security with an appreciable alleviation of that danger etc. That's nothing to do with this proportionality issue. And I did not hear, I have not seen in the Submissions nor heard from my learned friend one reason why that proposition is either challenged or capable of challenge.

Elias CJ There's quite an interesting difference in wording and it may be that the international case law answers it. But there's an interesting difference in wording between the exercise in making the assessment under s.72 and then under 114. Because the danger under s.72 arises from the presence in New Zealand, there's a requirement there. Whereas under the Convention, I'm not sure that that is a requirement. In other words you might certainly in terms of, I think I'm right in how it's expressed in 114C(6). In other words it's just on a textual assessment it's possible that a country might be able to refuse to accept someone not because his presence in New Zealand causes a particular risk and therefore his removal from New Zealand wouldn't alleviate the risk, but because in himself outside New Zealand he's a threat to the security of New Zealand.

Harrison Well the ... case. Well, but Justice Glazebrook I think follows the **Randman** (?) case it is where the House of Lords have said ... 11 September 2001 that it doesn't have to be a threat to the host country as such in the sense of a direct impact on that country. It can be a threat to the security interest which might be a threat to a security partner.

Elias CJ My point really Mr Harrison is that that looks like what might be quite a contentious proposition. I know it's picked up from one of the academic writings, but it seems to have just been, it may not have been argued particularly but it looks quite startling to say that the way you mesh all of this is whether deportation will lead to an appreciable alleviation of danger.

Harrison Well the point I was in the course of making was that for Mr Zaoui I have never sought to disagree with the **Rehman (R v Secretary of State for the Home Dept, ex p. Rehman** [2003] 1 AC 153) approach that it doesn't have to be a direct impact on New Zealand.

Elias CJ Yes.

Harrison Directly endangering New Zealand in some physical or other sense. And if you take proposition 3 there, and read it in the light of what the Court of Appeal also accepted, the **Randman** point, the first part of it, there must be a real connection, seems unarguable. And the proposition that you've actually got to be alleviating the danger through deportation would seem to flow from that. I have not heard, my point is, I have not heard the Crown give any reason why that is a false conclusion or indeed indicate that it actually quarrels with it. And in the absence of some reason why that is wrong, if leave is to be granted, it should be limited to the second finding of the Court.

Elias CJ Well the way this matter has come before the Court is unusual. Normally one wouldn't expect to have these sort of matters dealt with in the abstract through an interlocutory appellate process. We're now faced with a determination of the Court of Appeal which would necessarily have to be on that basis. Surely it's a reason why the Court, this Court, should accept the appeal that the risk of, the language should be looked at carefully.

Harrison If it is arguably legally incorrect.

Elias CJ Well I understood the Solicitor-General to be saying that he thought the third proposition was incorrect when I put it to him. If you want to hear in what respect he thinks it's incorrect I've made a suggestion to you about how it might be arguable or debatable and I've indicated it looks startling at first sight. Do you really want to take time to find out why?

Harrison Well in light of Your Honour's indication that it's a startling proposition obviously.

Elias CJ There may well, it may well be a complete answer to my startle.

Harrison Yes. Well I mean perhaps I can come away with a shred of my argument at least intact by submitting that there are two propositions within 3. The real connection proposition seems to me to be totally unexceptionable, with respect. Your Honour has expressed a startlement about the appreciable alleviation proposition. We need to narrow the points down so that we only get an arguable point and one indeed that the proposed Appellant is actually intending to put.

Elias CJ Well that encapsulates, the Declaration 2, encapsulates a requirement of balance.

Keith J And then 3's a sort of specific of that isn't it? On one side the danger and on the other side appreciable alleviation.

Harrison Well I won't push it further if Your Honours see those two propositions as interrelated then I would concede those points. Any leave would apply to both, otherwise, as the Chief Justice said, we don't want an artificial constrained argument.

Elias CJ Well perhaps I should ask the Solicitor-General whether he is intending to challenge the third Declaration and I think it is the case Mr Arnold that you didn't elaborate on that argument.

Arnold Well, no Your Honour's quite right. First, yes we do intend to challenge it. No, I didn't elaborate on it and the reason for that is that it is, if I take you back to paragraph 144 of the extract from "*Lauterpacht and Bethlehem*" that I read out, that consideration is part of the proportionality analysis. And it's that analysis that I'm objecting to.

Elias CJ Yes.

Arnold If you look at point number 3, whether the danger to the security of the country would be eliminated or significantly alleviated either ... individual concerned. So the third Declaration is part and parcel of a proportionality analysis.

Elias CJ Yes.

Arnold And in my submission it introduces into the language of Article 33.2 a range of new considerations. And it's that that the Crown objects to.

Elias CJ Yes, thank you Mr Arnold. Mr Harrison, I should also have asked you whether you prefer the Solicitor-General's reformulation of the primary questions of law?

Harrison Whether I prefer it?

Elias CJ Yes.

Harrison To simply.

Elias CJ Whether you would find it more helpful?

Harrison No, no. I would not find it more helpful. I would think that the most focused approach is simply if the Court is minded to grant leave in relation to the second and third findings or Declarations of the Majority.

Elias CJ Yes.

Keith J Given the combination that we have of abstractness and generality and the difficulties of interpretation it's preferable isn't it to keep to the text under appeal or the Declaration under appeal and then the Inspector General we hope will have a clearer sense of what the task is.

Harrison Yes. I have nothing further.

Elias CJ Yes Mr Harrison I should have asked you about timing. We will grant leave. We think the matters raised are matters of public importance, the interpretation of the legislation, the tasks for the Inspector General and the Director and indeed the importance of the particular case itself and we think it would be unsatisfactory to leave matters as they are without hearing it. So we'll grant leave but we're not minded, we want to expedite this matter. So I want to discuss with you dates for hearing. Because I'm minded to timetable it and what I have in mind is a suggestion that each of you have two weeks. The Solicitor-General's Submissions to come in in two weeks, yours two weeks later. And then I would like to identify while you're here a date for the hearing of the appeal. And it would be suitable for the Court for it to be in early

March. That's 8, 9, 10 or 11 March are all available dates. If that's too difficult we can consider dates in April. But I would hope that Counsel can agree that this is a case which should be expedited.

Harrison Yes, well personally Your Honour I have great difficulty in March, particularly the first half I have in fact a double booked lengthy High Court fixture from about the 8<sup>th</sup> I think it is. So that in order to do the appeal then I would be jettisoning fixtures. I would prefer the April date.

Elias CJ Yes.

Harrison And speaking for ourselves, we would prefer to have three weeks rather than two weeks for the exchange of Submissions. Now that Mr Zaoui is on bail, while we are quite ... keen to get the matter concluded, there isn't quite the urgency that there would have been had he still been in custody.

Elias CJ Yes. Well then there's a fixture in the week beginning 4 April.

Harrison Yes. Perhaps if you could just hear from my learned friend while I dive for my diary.

Elias CJ Yes. Well the dates I've identified are 5-8 April or 12-15 April.

Arnold Your Honour, from my point of view, I would certainly be able to do one of those dates in April. I haven't got my diary with me. I know I've got a matter in the Court of Appeal in April, I'm just not sure what the date is. But one of those periods would be fine. Could I suggest Your Honour perhaps we could check dates and confirm a date and then just work back from there in terms of the filing of Submissions and I'm perfectly happy with three weeks and the Court would want them to be filed what 10 days in advance or something.

Elias CJ Yes.

Arnold We will work back from there and suggest something.

Elias CJ Yes.

Harrison The April dates would suit us.

Elias CJ Either the 5<sup>th</sup> or the 12<sup>th</sup>?

Harrison Yes either Your Honour.

Elias CJ Either, alright then Mr Arnold if you can confer perhaps with Mr Harrison when you check your diary. But the Court could hear it in four days from 5, I'm not suggesting you need four days, from 5 April or 12

April. And if you could confirm with the Court and then we'll put out a Minute accordingly.

Arnold Thank you Your Honour.

Elias CJ Thank you Counsel.

Court adjourns 3.35 pm