Refugees, Security and Human Rights: Working out the Balance

By
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Part A Introduction

In the global climate post September 11, where concerns about the preservation of national security have been heightened, New Zealand courts have increasingly been required to engage with the tension that arises between the need to ensure the protection of the security of New Zealand and those living in New Zealand with the need to protect the human rights of those seeking entry to New Zealand. The difficulty that arises in reconciling these conflicting interests is one that is well acknowledged in academic literature.[2]

This paper examines the way in which the following issues have been dealt with by the New Zealand courts: the use of classified information in decision-making; the conflict that arises between the right of the state to protect its security and the right of individuals to be free from arbitrary detention and the balancing of the protection of New Zealand's security with the obligation of *non-refoulement* and the protection accorded to individuals under international instruments. The effect that the New Zealand jurisprudence in these areas has had on the new Immigration Act 2009 (the 2009 Act) will also be examined.

Immigration Act 2009

Before exploring these issues, it is instructive to traverse briefly the legislative history of the 2009 Act, which came into force in New Zealand on 16 November 2009. The stated aim of the Act is to ensure that immigration is managed in a way that balances the national interest,

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[2] See, for example, Guy S Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford, 2007) at 1-5, James C Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) at 6.

as determined by the Crown, and the rights of individuals.[3] Thus, the inherent tension that exists between the right of the state to protect its borders and the need to protect fundamental human rights is clearly acknowledged in New Zealand's new immigration legislation.

The path to the 2009 Act began in March 2005 when the Department of Labour was directed by Cabinet to begin a review of the Immigration Act 1987 (the 1987 Act). The stated terms of reference for this review were to: ensure that New Zealand's interests were protected and advanced; ensure compliance with international obligations; and establish fair, firm and fast decision-making processes.[4] A discussion paper was released in April 2006, and the Immigration Bill 2007 was subsequently introduced.

The Bill was referred to the Transport and Industrial Relations Committee (the Committee) on 16 August 2007. The Committee received and considered 90 submissions from interested groups and individuals and heard 61 oral submissions, which included holding hearings in Auckland. Advice was also received from the Department of Labour. After substantial amendments were recommended by the Select Committee, the 2009 Act was passed.[5]

The Case of Mr Ahmed Zaoui

As the substantial litigation involving Mr Zaoui will be a focus of this paper, it is also useful at this point to examine the background underlying these proceedings.

Mr Zaoui is an Algerian national. In 1991, Mr Zaoui and the political party of which he was a member were successful in the first round of elections for the Algerian Parliament. However, following the establishment of military rule in 1993, Mr Zaoui fled Algeria. Mr Zaoui arrived in New Zealand on 4 December 2002 without a valid passport and claimed refugee status.

[3] Immigration Act 2009, s 3.
[4] See generally, Rodger Haines QC "Sovereignty Under Challenge - the New Protection Regime in the Immigration Bill 2007" [2009] NZ L Rev 149 at 166.
[5] The 2009 Act has not yet come into force. Pursuant to s 2, the Act will come into force on a date to be appointed by the Governor-General by Order in Council. It is expected that the provisions will come into force in late 2010. Until then the provisions of the Immigration Act 1987 apply.

Mr Zaoui's claim for refugee status prevented his removal from New Zealand until his refugee status was determined, subject to the provisions related to national security.[6] On 30 January 2003, a refugee status officer declined his application for refugee status. Mr Zaoui immediately appealed against that decision to the Refugee Status Appeal Authority and, in a decision made on 1 August 2003, the Authority held that Mr Zaoui was a refugee within the meaning of art 1A(2) of the Refugee Convention and granted him refugee status.[7]

Before the appeal was heard on 20 March 2003, however, the Director of Security (the Director)[8] had provided a security risk certificate to the Minister of Immigration under the relevant statutory provisions of the 1987 Act.[9] The Director, in issuing the certificate, had relied on classified security information that was available to him indicating that Mr Zaoui was a threat to national security.[10] The Minister made a preliminary decision to rely upon the certificate.

Pursuant to the statutory procedure provided within the 1987 Act, Mr Zaoui sought a review of the Director's certificate from the Inspector-General of Intelligence and Security (the Inspector-General).[11] Pursuant to the statutory procedures in place at the time, the function of

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[6] Under 114Q of the 1987 Act, no person who was a refugee status claimant could be removed or deported from New Zealand until the refugee status of that person had been determined. However, this was subject to s 129X (1) of the Act which provided that a refugee claimaint could be removed or deported from New Zealand if the provisions of Article 32.1 or Article 33.2 of the Refugee Convention allowed the removal or deportation.

[7] *Refugee Appeal No 74540* 1 August 2003. The Refugee Status Appeal Authority is an independent quasi-judicial review body established in 1991 to determine appeals from decisions of the Refugee Status Branch of Immigration New Zealand, declining refugee status. The Authority was initially established in 1991 under the prerogative powers of the Executive (Cabinet) of the New Zealand Government. The Authority was later given statutory basis pursuant to the Immigration Amendment Act 1999, which came into force on 1 October 1999

[8] Section 5 of the New Zealand Security Intelligence Service Act 1969 establishes the role of the Director of Security, who controls the New Zealand Security Intelligence Service (SIS). The SIS is a government agency that operates as a civilian intelligence and security organisation. Its threefold roles are: to investigate threats to security and to work with other agencies within Government, so that the intelligence it collects is actioned and threats which have been identified are disrupted; to collect foreign intelligence; and to provide a range of protective security advice and services to Government.

[9] The purpose of the security-risk certificate was to state that an individual's continued presence in New Zealand would constitute a threat to national security. Section 114D of the 1987 Act outlined the grounds under which such a certificate could be issued.

[10] In a memorandum dated 16 September 2003 the Director provided the following summary of grounds for the security risk certificate: Mr Zaoui's Belgian and French criminal convictions; the repeated decisions of the Belgian tribunals/courts to decline Mr Zaoui refugee status; the decision of the Swiss Executive to expel Mr Zaoui from Switzerland; classified security information providing background to those decisions; classified security information relating to the period after Mr Zaoui left Switzerland; classified security information being reports on materials in Mr Zaoui's possession on arrival and interviews conducted with him in New Zealand; and classified security information being an evaluation of the above material.

[11] Ibid, s 114I. The Inspector-General of Intelligence and Security's role includes enquiring into: any matter relating to the SIS's compliance with its legal obligations the propriety of its actions, and complaints about the Service. Under s 5 of the Inspector-General of Intelligence and Security Act 1969 it is provided that the

the Inspector-General on such a review was to determine whether: the information that led to the making of the certificate was properly regarded as classified security information; the information was credible; and whether the person in question was properly covered by the criteria.[12]

The Inspector-General[13] issued an interlocutory decision on 15 October 2003 concerning the manner in which he proposed to conduct his review of the security risk certificate. This led Mr Zaoui to bring an application for judicial review of that interlocutory decision.[14]

Another set of proceedings relating to Mr Zaoui concerned his detention and whether or not he was entitled to bail.[15] On 6 December 2002, a warrant of commitment had been issued under the 1987 Act [16] (the 1987 Act) and Mr Zaoui had been placed in maximum security at Paremoremo prison. These proceedings eventually led to Mr Zaoui being granted bail by the Supreme Court,[17] pending the review of the security risk certificate.

Eventually, the review of the security risk certificate by the Inspector-General was begun but it did not reach a conclusion. Part way through the Inspector-General's hearing, the security risk certificate was withdrawn as a result of a settlement reached between the parties.[18]

Inspector-General shall be appointed by the Governor-General on the recommendation of the Prime Minister following consultation with the Leader of the Opposition and that no person shall be appointed as the Inspector-General unless that person has previously held office as a judge of the High Court of New Zealand.

[12] Ibid, s 114I(4). Note, under s 163 of the 2009 Act, the Minister has the power to certify that a person constitutes a threat or risk to security. Once this certification has been made the Governor-General may, by Order in Council, order the deportation from New Zealand of that person. Review proceedings are able to be brought in respect of a statutory power of decision arising out of or under the Act (s 247).

[13] Proceedings were brought against the Inspector-General alleging apparent bias after statements given to the media regarding the case. The High Court held that there was a real possibility of apparent bias against Mr Zaoui when undertaking the review of the Director's decision: *Zaoui v Greig* HC AK CIV-2994-404-317, 31 March 2004. The then Inspector-General resigned after this decision and was replaced by another Inspector-General.

[14] The decisions relating to that judicial review issue were as follows: *Zaoui v Attorney*-General [2004] 2 NZLR 339 (HC) *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA), *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC).

[15] The various proceedings relating to Mr Zaoui's detention have been reported at *Zaoui v Attorney-General* [2005] 1 NZLR 666 (HC), *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) and (SC).

[16] Immigration Act 1987, s 128(7).

[17] The New Zealand Supreme Court was established in 2004 as New Zealand's highest appellate Court pursuant to the enactment of the Supreme Court Act 2003. The Supreme Court replaced the Privy Council as New Zealand's Court of final appeal. Below it, in descending order, are the Court of Appeal, the High Court and the District Court.

[18] The undertakings that Mr Zaoui provided to the Director of Security, that led to the withdrawal of the security risk certificate, are recorded at http://www.stuff.co.nz/stuff/asset/Undertakings.pdf.

Part B The Use of Classified Information in Immigration Decision-Making

The issue as to the correct balance between the right to due process and the protection of national security, including the use of classified information in immigration decision-making, is often acknowledged to be vexed.[19] Significantly, this was of major importance in the Zaoui case and a pivotal aspect of discussion throughout the legislative history of the 2009 Act.

The Statutory Context

The 1987 Act had been amended in 1999 to introduce statutory provisions for refugee determinations and also to add procedures relating to the protection of national security.[20] One aspect of the 1999 amendments was to allow secret classified security information[21] held by the SIS to be used to determine security risk in immigration matters and lead to the issuing of security risk certificates without disclosing that information to the affected person.[22] Prior to its insertion, decision-makers in New Zealand were not able to withhold information held about non-citizens as deported persons had the right to access all information held about them.[23] Concerns that this requirement could impede intelligence-gathering operations and sources led to the 1999 amendment.

As noted above, a security risk certificate had been issued against Mr Zaoui near the beginning of 2003. In Mr Zaoui's case there were two relevant provisions that had been relied upon to justify the issue of the certificate. These were that Mr Zoaui was a threat to national

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[19] Lani Inverarity "Immigration Bill 2007: Special Advocates and the Right to be Heard" (2009) 40 VUWLR 472 at 482, John Ip "The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill" [2009] NZ L Rev 207 at 207-208, Doug Tennant, "Classified Information" [2008] Immigration Practitioners Bulletin 9 at 10.

[20] For a fuller discussion see Susan Glazebrook "To the Lighthouse: Judicial Review and Immigration in New Zealand" Courts of New Zealand at 45 http://www.courtsofnz.govt.nz/from/speeches-and-papers; Social Science Research Network http://ssrn.com/abstract=1418249. This paper also has a detailed discussion of the Zaoui litigation and of the role the courts have taken in immigration matters.

[21] Section 114B of the 1987 Act defined "classified security information" to include information as to a threat to security posed by an individual which was held by the SIS and, in the opinion of the director, could not be divulged because it might identify the source or provide details of the operational methods of the service and would prejudice the security of New Zealand or the entrusting of information in confidence by another government.

[22] Immigration Act 1987, s 114 D.

[23] See, for example, *Daganaysi v Minister of Immigration* [1980] 2 NZLR 130 (CA). See generally Inverarity above n 19 at 472.

security in terms of s 72 of the 1987 Act[24] and that there were reasonable grounds for regarding him as a danger to the security of New Zealand in terms of Article 33.2 of the Refugee Convention. [25]

In the preliminary interlocutory procedural decision referred to above, the Inspector-General had stated that his role in the review was to consider Mr Zaoui's security risk rather than any international human rights obligations, and that Mr Zaoui had no right to a summary of allegations underlying the certificate because classified security information could not be divulged to him. Judicial review proceedings[26] were brought with regard to this interlocutory decision.

The security risk certificate and classified information

The Inspector-General's stance that Mr Zaoui was not entitled to a summary of the allegations that led to issuing of the certificate provided clear due process and natural justice concerns. Mr Zaoui on judicial review sought declarations that the Inspector-General's ruling was unlawful, ultra vires and in breach inter alia of the right to justice under s 27(1) of the New Zealand Bill of Rights Act 1990 (the New Zealand Bill of Rights).

In the High Court, Williams J acknowledged the importance of Mr Zaoui's right to natural justice through holding that the relevant statutory provisions did not debar the provision to Mr Zaoui of a summary of allegations against which the certificate had been made.[27] It was emphasised by Williams J that the right of a person subject to a certificate to know at least the outline of the allegations against them and the basis on which they were made was one of the most fundamental tenets of natural justice and should be implemented as far as was consistent

[24] Immigration Act, s 114C(4)(a). Section 72 provided that where the Minister certified that the continued presence in New Zealand of any person named in the certificate constituted a threat to national security, the Governor-General could, by Order in Council, order the deportation from New Zealand of that person.
[25] Ibid, s 114C(5)(a). Article 33.2 of the Refugee Convention provides the exception to the general obligation of non-refoulement provided within the Convention. Article 33. 1 provides that no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. However art 33.2 provides that 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 judgment of a particularly serious crime, constitutes a danger to the community of that country.
[26] See above n 14.
[27] *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC).

with the definition of "classified security information".[28] These recommendations were complied with and were not challenged on appeal.[29] The judicial recognition of the importance of the right to natural justice provides a vivid illustration of the need for an adequate balance between the competing interests of national security and human rights to be struck.

Accordingly, the steps taken in the High Court can be seen to have signalled recognition that the 1987 Act had to be supplemented with adequate procedural safeguards to deal with one of its stated objects which was to ensure the protection for the rights of any individual affected by the use of classified security information.[30]

Classified Information under the 2009 Act

The measures taken to ameliorate concerns about the failure of the 1987 to provide explicit recognition of due process rights during the Zaoui proceedings have now been reflected in the 2009 Act. Throughout the progression of the legislation, clear emphasis was placed on the fact that the use of classified information in immigration decision-making would be subject to safeguards that ensured the successful protection of human rights.

In particular, at Select Committee stage a number of changes were recommended to ensure that greater weight was given to natural justice within the proposed legislation including reducing the scope of the proposed definition of classified information, removing the ability to use classified information in decision-making where the information referred to matters that would have a "significant impact on New Zealand's international reputation" and providing that prejudicial information could only be used in decision-making if a summary of allegations was provided to the affected individual.[31] The proposed provision regarding the

[28] Ibid at [172].
[29] Note, there was some discussion in the Court of Appeal of this issue, see *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 at [71]-[80] per Glazebrook J. There it was noted that it was incumbent on the Director to provide as much information as possible (without risking the disclosure of the actual classified information) on why the information is classified, the content of the information and why it is considered credible. This is to enable the person to make submissions and provide evidence with the benefit of as much information as possible. It was also stressed that in order for information to be classified it must meet the statutory criteria (which included that disclosure would prejudice New Zealand's security).
[30] Immigration Act 1987, s 114A(c).
[31] Immigration Bill (132-1) (Select Committee report) at 5-7.

requirement to provide a summary of allegations to an affected individual clearly reflected the approach taken by Williams J in the High Court in the Zaoui proceedings.

Under the 2009 Act disclosure of classified information is restricted to the Immigration and Protection Tribunal,[32] (the Tribunal) a court or a special advocate, and the 2009 Act explicitly provides that the use of classified information must be balanced. Neither the Tribunal nor any court may, however, require or compel the disclosure of classified information in any proceedings under the Act.[33] However, one of safeguards embodied within the Act is the explicit provision that classified information must be provided in a manner that does not mislead and that any information favourable to the affected person must also be provided.[34]

However, while the Committee's attempts to ensure that greater weight was given to natural justice have been incorporated into the new legislation, [35] concern has been expressed that there has been a significant extension of the definition of classified information from the 1987 Act to the 2009 Act. For instance, it has been noted that, while the number of agencies that were able to certify information as classified has been restricted following the Committee's recommendations, there has still been a significant extension from the previous definition under the 1987 Act which only covered information that was held by the SIS.[36] The argument has also been made that there is significant scope for an expansive interpretation to be accorded to the s 7(1) definition as significant discretion is granted to the chief executives of the relevant agencies in their determination as to whether information should be deemed to be classified. [37]

[32] Under the 2009 Act an Immigration and Protection Tribunal has been established to deal with a wide variety of immigration and refugee appeals and determinations. This single tribunal replaces the Refugee Status Appeals Authority and a number of other bodies that operated under the 1987 Act.
[33] Immigration Act s 35(3). Note, however, this obligation is subject to the fact that the Tribunal must be given access to classified information that is the subject of an appeal to the Tribunal (s 241(1)) and the Tribunal and the courts must be given access to classified information that is relied on in making a decision that is appealed or is the subject of review proceedings under the 2009 Act (s 259(1)).
[34] Ibid, s 36.
[35] Now under s 7(1) of the Act information can only be deemed classified by a chief executive of one of the 14 relevant agencies defined by the Act. While s 33 provides that classified information may be relied on in making decisions or determining proceedings under the Act if the Minister determines that the classified information relates to "matters of security or criminal conduct", thus there is no reference to matters that would impact upon New Zealand's international reputation in the Act. The requirement for a summary of the allegations arising from the classified information is provided for in s 38(2).
[36] Ip above n 19 at 226.
[37] Ibid.

Concern has also been expressed about the extension of the use of classified information to a wide variety of situations. As noted by Tennant, while under the 1987 Act classified information could only be used to determine whether the use of a security risk certificate could be justified, under the 2009 Act classified information is able to be used in a wider variety of situations, such as in visa determinations and the assessment as to whether an individual should be recognised as a refugee or protected person under the 2009 Act.[38]

The Use of Special Advocates

Action was also taken to ensure Mr Zaoui's right to natural justice was fairly represented in the course of the eventual hearing of the review of the security risk certificate by the Inspector-General.[39] Under the statutory powers granted to the Inspector-General,[40] the Inspector-General appointed two special advocates entrusted with the task of representing Mr Zaoui's interests in relation to the classified information that was relied upon by the Director.[41] The special advocates were able to view the SIS material that had not been disclosed to Mr Zaoui and make challenges to that material in closed proceedings. However, the special advocates were unable to communicate with Mr Zaoui about the content of the classified information nor receive instructions regarding the information.[42]

Because the security risk certificate was withdrawn, the effectiveness of the special advocate function has not yet been tested within the New Zealand context. Nevertheless, a significant consequence of the Zaoui litigation has been the introduction of provisions relating to special advocates into the 2009 Act. In that Act, a special advocate is defined to be a lawyer who has been recognised as a special advocate by an agency designated for that purpose by the Prime Minister.[43] The role of the special advocate is to represent a person who is the subject of a decision made involving classified information or proceedings involving classified information.[44] Thus, in a situation where a prejudicial decision is made against an individual

[38] Tennant above n 19 at 9.
[39] As noted above, this hearing commenced but was not completed in light of the withdrawl of Mr Zaoui's security risk certificate. See above n 18.
[40] Inspector-General of Intelligence and Security 1996, s 19.
[41] Ip above n 19 at 217.
[42] Inverarity above n 19 at 473.
[43] Immigration Act 2009, s 264(1).
[44] Ibid s 263(1).

in reliance on classified information, the individual must be informed, if appeal rights exist, of his or her right to a special advocate.[45]

Following the Select Committee's recommendations that a special advocate should be able to lodge or commence any proceedings, the 2009 Act now explicitly provides that a special advocate, in carrying out his or her role may lodge or commence proceedings on behalf of the person, make oral submissions and cross-examine witnesses at any closed hearing and make written submissions to the Tribunal and the Court as the case may be.[46]

There are a number of restrictions placed on the special advocate's ability to communicate with the affected person under the 2009 Act. The special advocate may communicate with the affected person on an unlimited basis until the special advocate has been provided with access to the classified information concerned. After this point the special advocate must keep confidential and not disclose classified information, except as expressly provided under the Act.[47] In order to communicate with the represented person, the special advocate must submit a written communication to the Tribunal or the court (as appropriate) for approval and for forwarding to the represented person. While a number of submissions opposed restricting communication in this manner, the Select Committee advocated retention of this limitation, as it was viewed as necessary to prevent classified information from being inadvertently leaked.[48] Significantly, the Tribunal or court is granted the power to decline to forward the communication or amend the communication.[49] Thus, both the Tribunal and the courts are granted a fundamental role in facilitating the communication that is able to occur between an affected person and his or her special advocate.

Do special advocates adequately address the balance?

Commentators appear to be in agreement that the introduction of the special advocate into New Zealand's immigration legislation does go some way to ensuring that adequate safeguards against the potential abuse of the use of classified information are put in place.[50] However, questions have been raised as to the general effectiveness of special advocates in

[45] Ibid, s 39.
[46] Immigration Act 2009, s 263(2).
[47] Ibid, s 263(6).
[48] Above n 31 at 11.
[49] Immigration Act 2009, s 267(7).
[50] See generally, Tennant above n 19 at 11, Iverarity above n 19 at 471.

facilitating the protection of human rights. As outlined by Inverarity, the provision within the 2009 Act enabling a special advocate to have unlimited communication with the affected person may have limited utility in light of the fact that the parties at that stage are ignorant of the core government case.[51] Moreover, concerns have been raised that the restriction on communication also precludes information sharing between special advocates that could diminish their capacity to ascertain any inconsistent use of classified material between cases.[52]

With regard to the statutory restrictions placed on the communications between the special advocate and the affected person, Ip argues that such provisions will significantly impair communications between special advocates and those whose interests they represent, thereby rendering it more difficult for special advocates to mitigate the unfairness that is inherent in the non-disclosure of classified information.[53] The true effectiveness of the special advocate function in light of these criticisms and restrictions remains to be tested.

Part C Detention

The right to be free from arbitrary detention is another fundamental human right that must be balanced with the need to protect national security. It is thus unsurprising that the tension between the right of the state to detain and the rights of individuals has been at issue within the New Zealand context.

Attorney-General v Refugee Council of New Zealand Inc

A significant case relating to the detention of refugee claimants was *Attorney-General v Refugee Council of New Zealand Inc*.[54] One of the pivotal issues in the proceedings was the lawfulness of an operational instruction released by the Crown in response to the events of September 11 2001. The aim of the instruction was to guide immigration officers in the

[51] Ibid at 481.
[52] Craig Forcese and Lorne Waldman "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (Study commissioned by the Canadian Centre for Intelligence and Security Studies, Ottawa, 2007) cited in Inverarity ibid.
[53] Ip above n 19 at 228.
[54] [2003] 2 NZLR 577 (CA)

exercise of their discretion under s 128(5) of the Act, which dealt with the power of immigration officers to detain non-citizens.[55]

The case arose against the background of the fact that, between 19 September 2001 (the date the instruction was issued) and 31 January 2002, 94 per cent of the 221 persons claiming refugee status had been refused a permit and detained. Most of claimants had been detained in the Mangere Detention Centre which was operated as an administrative, as opposed to a penal, detention centre. To an extent the centre operated as an open detention facility, as persons could be granted permission to leave the centre and return at stipulated times. Residents could also reside in family groups. They were expected to observe the rules of the centre but a statement of residents' rights, including the right to legal advice, was provided to the detainees.[56]

Contents of the Operational Instruction

In order to examine the reasoning of the Court of Appeal in the case, it is necessary briefly to explore the contents of the operational instruction that was the focus of the proceedings. The instruction was divided into two parts. The first part was general but stated that care must be exercised before invocation of the detention power. It then set out a number of reasons for caution, including that those whose claim for refugee status is genuine will already have a well-founded fear of persecution and a consequent entitlement to protection. For those persons, detention, even for a short period, would be traumatic. There was a reference to art 31 of the Refugee Convention and the UNHCR guidelines on detention and the fact that it is generally accepted that detention of refugee status claimants should only occur where necessary. There was also reference to the fact that claimants, who wish to prepare a claim and pursue any rights of appeal, could be held in custody for a not inconsiderable period of time.

[55] Section 128 covered actions that were to be taken with regard to persons who arrived in New Zealand and who did not receive a permit. Section 128(5) provided that on the request of an immigration officer to a member of the police, any person to whom this section applied had to be be detained by a member of the police and placed in custody pending that person's departure from New Zealand on the first available craft.
[56] See Appendix A and B of *Attorney-General v Refugee Council of New Zealand Inc* above n 54.

It then stated that detention of a refugee status claimant could, however, be justified particularly where interests of national security or public order and safety arose and that any decision would depend upon a close assessment of all the factors relating to the arrival:

> "These [factors] may include the extent to which that person is able to provide accurate and reliable information as to their identity, the apparent strength or weakness of their claim and the extent to which there are identified risks to public health, safety, security and order. An assessment of risk to public safety, security, and order will need to take account of the prevailing security situation, both in New Zealand and globally."

The instruction also stated that whether detention was justified would also depend upon the type of detention envisaged as there was a distinction in the guidelines between detention in a prison environment and accommodation at an open centre (the Mangere Centre) with some restrictions on freedom of movement. The instruction then set out factors that would assist in deciding whether or not in a particular case detention was justified and the type of detention. It set out such criteria under two headings – a heading related to possible detention in a penal institution (reserved for cases where there were public order or particular security concerns) and detention at the Mangere centre. At the end, it reiterated that all cases depend upon an individual assessment of circumstances.

Judicial Examination of the Validity of the Operational Instruction

In the High Court, Baragwanath J had found the operational instruction to be unlawful as being inconsistent with the Refugee Convention and directed to the place where the detention should take place rather than to whether there should be any detention at all, thus constituting an improper fetter on the statutory obligations of immigration officers at the border.[57]

In the Court of Appeal, three separate judgments were delivered by the full Court. It was held unanimously that the operational instruction was not unlawful. Tipping J, delivering a joint judgment with Anderson and Blanchard JJ, rejected the proposition that the wording of the instruction could lead addressees of the instruction to think that the only issue was where the detention should be, as opposed to whether, detention should take place.[58] With regard to the relationship between the relevant provisions of the Refugee Convention, Tipping J saw

[57] *Refugee Council of New Zealand Inc v Attorney-General (No 2)* [2002] NZAR 769 (HC).
[58] *Attorney-General v Refugee Council of New Zealand* above n 54 at [26].

nothing in the operational instruction that could be seen to conflict with arts 31 and 33 of the convention.[59]

While reference was made by Tipping J to the fact that, following the issuing of the instruction, the proportion of refugee claimants detained at the border dramatically increased, he did not consider it appropriate to allow the decision on the lawfulness of the instruction itself to be coloured by its implementation. Tipping J emphasised that immigration officers could not ignore the risk to national security that must have occurred following the events of September 11, and a general trend following such an event would not be a satisfactory basis to decide whether the Immigration Service was or was not lawfully implementing its statutory powers under the permit.[60]

McGrath J was of the opinion that the starting point in considering the legality of the instruction had to be s 129X of the 1987 Act which required immigration officers to have regard to the terms of art 31.[61] McGrath J agreed that a fair reading of the whole operational instruction would not give the meaning or impression that it was only directed to the place of detention. In his view the availability of the Mangere Detention Centre was a relevant consideration that would justify a lawful detention in circumstances where officials would previously have been hesitant over whether to detain.[62] While the instruction was seen to have a precautionary theme, McGrath J stated that he was not able to detect any bias towards detention.[63]

In my judgment, I noted that the requirement in s 129X(2) to have regard to the Refugee Convention was not a formulation that excluded consideration of other factors. I emphasised that the right not to be subject to arbitrary detention is a fundamental human right and one affirmed by s 22 of the New Zealand Bill of Rights. I emphasised that any restrictions on liberty would need to be able to be justified and be no greater than necessary.[64] I agreed that, in the aftermath of September 11, a more cautious approach may have been warranted but this still required the taking into account of individual circumstances. Although I did suggest

[59] Ibid at [28].
[60] Ibid at [31].
[61] Ibid at [118].
[62] Ibid at [119].
[63] Ibid at [120].
[64] Ibid at [256].

some changes in wording to the instruction.[65] I also agreed that the instruction, properly interpreted, was lawful.[66]

However, I did note that the choice being made by immigration officers was a choice between release into the community with no restrictions at all and detention in an open centre. I was of the opinion that in times of heightened security consciousness this could create a bias towards detention. Thus, it was my opinion that many security concerns could be met by lesser restrictions on freedom of movement than provided at the Mangere centre, such as reporting or residence requirements. While I noted that the situation of detainees had been ameliorated and the options extended by the introduction of a statutory provision under the 1987 Act under which conditional release was made available, I was of the view that consideration should be given to a wider range of options.[67]

Although in the event the instruction was upheld, it seems tolerably clear from all of the judgments the Court of Appeal would have held the operational instruction to have been unlawful if it had contained a presumption of detention without consideration of individual circumstances and if it had conflicted with the obligations under the Refugee Convention.

Subsequent Developments

The Legislature also acted in response to the case. Prior to Baragwanath J's finding that the operational instruction was unlawful, he had issued an interim judgment holding that, although s 128(5) of the 1987 Act did create a power to detain claimants for refugee status, any person detained could apply to the District Court for bail under s 128A. As this was a possibility that had not been advanced by the plaintiffs it was necessary to defer a final judgment to allow the Crown to make submissions.[68] The Legislature acted quickly and a month after the delivery of Baragwanath J's interim judgment it introduced an amendment to the 1987 Act which allowed for conditional release of certain detainees, including refugee claimants.[69]

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[65] Ibid at [283].
[66] Ibid at [293].
[67] Ibid at [295].
[68] *Refugee Council of New Zealand Inc v Attorney-General (No 1)* [2002] NZAR 717 (HC).
[69] Immigration Amendment Act 2002, s 10

Following the Court of Appeal's judgment in *Refugee Council*, new Operational Instructions were released by the New Zealand Immigration Service, effective from 1 April 2004.[70] Significantly, alterations were made to the criteria set out for detaining individuals at the Mangere Detention Centre that reflected some of the suggestions for amendment in my judgment. For example, my suggestion that there should not be a presumption in favour of detention where identity is uncertain if no other factors suggest detention is necessary was incorporated into the new Operational Instruction, through ensuring that this factor was coupled with an assessment of the individual's potential danger to the community.[71]

Zaoui v Attorney-General

The case of Mr Zaoui also led to a judicial examination of the limits that should be placed on the ability to detain non-citizens under the 1987 Act. Upon arrival in New Zealand, Mr Zaoui spent more than 23 months in a maximum security prison.[72] He sought an order for his release on bail or an order of habeas corpus. The case eventually came before the Supreme Court where a key issue was whether the High Court had jurisdiction or power to order a detainee's release on bail from detention under a warrant issued because of concerns about national security.

As acknowledged by the Supreme Court, the case was one in which the tension between the protection of human rights and the protection of national security was clearly apparent. As was summarised by the Court:[73]

> This is a case where national security issues arise. It is also a case about the liberty of someone who has refugee status in New Zealand and who is entitled to the benefit of the Refugee Convention requirement that only such restrictions upon his liberty as are necessary should be imposed upon him. The applications fall to be considered against the background of concern for liberty recognised by the Bill of Rights Act and the common law. Accordingly the case raises significant matters of public interest which require careful balance.

Considering whether the security provision of the 1987 Act precluded the exercise of the High Court's inherent jurisdiction to grant bail, the Court emphasised that the interests of

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[70] The Operations Instructions are available at http://www.immigration.govt.nz/opsmanual/index.htm at A16.2 of the Operations Manual

[71] For a fuller discussion see Glazebrook above n 20 at 48.

[72] For the first ten months Mr Zaoui was held in conditions akin to solitary confinement in a high security prison, and was only transferred to less onerous conditions following representations from his lawyers.

[73] *Zaoui v Attorney-General* [2005] 1 NZLR 577 at [101].

national security should only outweigh the fundamental right to liberty in situations where the statute clearly required it. It was stated:[74]

> The inherent jurisdiction, by its very nature, protects the basic liberty of the individual to be free from detention, even if on a conditional basis. For such a jurisdiction to be taken away, clear statutory wording is required. Further, as McGrath J recognises, the presumption that legislation should if possible be interpreted consistently with New Zealand's obligations under international law is engaged here. Article 31(2) of the Refugee Convention requires contracting states not to apply to the movement of certain refugees restrictions other than those which are necessary. That provision – the application of which the Solicitor-General did not question – plainly contemplates that individuals who are detained should be entitled to challenge their detention. The Solicitor-General said that national security reasons could be one reason for detention. No doubt that is so, but such reasons have to be tested in the particular case. Security cannot provide a basis for a blanket exclusion of such cases. Again, strong statutory language is required to defeat that entitlement.

The Court emphasised that it was of prime importance that any powers of detention be approached in light of the fundamental right, long recognised under the common law, of liberty for all persons subject only to such limits as are imposed by law.[75] It was therefore stated that consideration of the provisions of Part 4A of the 1987 Act should proceed on the basis that there would be a jurisdiction to grant bail in a suitable case unless that was clearly excluded, expressly or by necessary implication, and it was acknowledged that Part 4A did not contain any such exclusion.[76]

While it was recognised by the Court that the practical difficulty in determining whether in a particular case bail should be granted would be very real where there was a security risk certificate based on classified security information, that was not seen as dictating a conclusion that the jurisdiction to grant bail must be inconsistent with detention ordered on the basis of a security risk certificate.

Because Mr Zaoui had been in custody for more than 23 months, it was considered that it would be oppressive to let the process be drawn out any more and that further delay should not be countenanced. In the circumstances the Court thus exercised the original jurisdiction of the High Court to grant bail before remitting the matter to the High Court for any continuing supervision.[77]

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[74] Ibid at [44].
[75] Ibid at [52].
[76] Ibid at [53].
[77] Ibid at [100].

The Supreme Court's approach in *Zaoui* signifies once again judicial acceptance that fundamental human rights should not be lightly overridden. While the Court was conscious of the need to ensure adequate protection of New Zealand's security, the emphasis that the right to be free from detention could only be outweighed through a clear statutory direction illustrates judicial acknowledgement of the importance of human rights within the immigration arena.

Legislative Response to the Detention Jurisprudence

The legislative response to the detention jurisprudence has been mixed. The stated aim of what became the 2009 Act was to establish more flexible and responsive detention provisions and to bring together in a single part all the provisions that deal with arrest and detention of persons who would be liable for turnaround or deportation or are suspected of constituting a threat or risk to security.[78] Significantly, the judicial recommendations regarding alternatives to detention found in the *Refugee Council* case are now reflected within the 2009 Act. However, while the decision of *Zaoui* demonstrated a judicial willingness to grant significant weight to human rights when considering the justifications for detention, the decision has not been greeted with legislative favour.

At the Select Committee stage, the concerns of several submitters that the stated purpose of Part 9 of the Bill, which covers the detention and monitoring provisions, did not mention human rights were acknowledged.[79] Submissions were also made that the monitoring and detention provisions should be aligned with New Zealand's national and international human rights framework.[80] However, the Select Committee did not act upon such submissions. The Committee emphasised that the detention provisions in the Bill had been developed to comply with the human right standards in the New Zealand Bill of Rights and thus no explicit reference to human rights within Part 9 was required. [81]

Significantly, the Committee expressed concern with the implications of the Supreme Court's decision in *Zaoui.* The Committee noted there could be instances where the courts, in considering a warrant of commitment application, could exercise their jurisdiction to grant

[78] Immigration Bill (132-1) (explanatory note) at 5.
[79] Above n 31 at 27.
[80] Ibid.
[81] Ibid.

bail to a non-citizen. Concern was raised by the Committee that this power could be used to undermine the specific provisions for immigration detention within the proposed legislation. Accordingly, the recommendation was made that clarification should be provided within the proposed legislation to emphasise that the Bill constituted a code for the immigration detention of non-citizens.[82]

To briefly summarise the Part 9 provisions, persons liable to arrest and detention are those who are liable for turnaround or deportation, persons who are suspected to be liable for deportation or turnaround and who fail to supply satisfactory evidence of their identity and persons who are suspected of constituting a threat or risk to security.[83] Immigration officers are granted the power to detain such a person for four hours,[84] while a constable has the right to place such a person in custody for up to 96 hours.[85]

However, an immigration officer, rather than causing such a person to be arrested or making an application for a warrant of commitment, now has the power to offer reporting and residence requirements as an alternative.[86] Conditions that can be agreed include that a person reside at a specified place; report to a specified place at specified periods or times in a specified manner or provide a guarantor who is responsible for ensuring the person complies with any requirements agreed under the section. The decision as to whether to offer or agree to residence or reporting requirements is stated to be a matter for the absolute discretion of the immigration officer.[87] Such provisions can be seen to indicate a legislative acknowledgement that viable alternatives to detention should be considered. It remains to be seen, however, whether such alternatives will be frequently utilised.

To continue detention of the person after the 96 hour period, an immigration officer may apply to a District Court Judge for a warrant of commitment (or a further warrant of commitment) authorising the person's detention for up to 28 days.[88] Significantly, a District Court Judge, when determining the application, has the ability to order the person's release from custody on conditions if he or she is not satisfied that detention is warranted

[82] Ibid at 28. This was implemented in s 308 of the 2009 Act.
[83] Immigration Act 2009, s 309.
[84] Ibid, s 312.
[85] Ibid, s 313.
[86] Ibid s 315.
[87] Ibid s 315(2).
[88] Ibid s 316.

(s 317(1)(b)(ii)).[89] Such conditions include the residing and reporting requirements discussed above. Special provision is made with regard to applications that are made on the basis that a person may be a threat to security. In this instance, if a District Court Judge is satisfied that the release of the person would not be contrary to the public interest, he or she must order that the person be released on conditions,[90] which can include a condition that the person not have access to specified communication devices or facilities or a condition that the person refrain from association with named individuals or organisations.[91]

If, upon a successful application for a further warrant of commitment, a person would be detained under consecutive warrants of commitment for a period of more than six months a further warrant of commitment can only be issued if the District Court Judge is satisfied that the person's deportation or departure is prevented by some action or inaction of the person and no exceptional circumstances exist that would warrant release.[92] If the Judge is not so satisfied he or she must order the person's release on conditions.[93]

Part D The obligation of *non-refoulement*

Not only did the Zaoui litigation illuminate the inherent tension between due process rights and the protection of national security, it also provided the New Zealand judiciary with the opportunity to examine the extent to which New Zealand's international obligations should be taken into account in decisions regarding deportation of those refugees who might be a security risk.

As mentioned above, a key focus of the Zaoui judicial review proceedings was the security risk certificate that had been issued against Mr Zaoui on the basis that there were reasonable grounds for regarding him as a danger to the security of the country in terms of art 33.2 of the

[89] Ibid s 317(1)(b)(ii).
[90] Ibid s 318.
[91] Ibid, s 318 (3).
[92] Ibid, s 323. Note, exceptional circumstances have been defined explicitly to exclude the period of time a person has been detained under Part 9 and the possibility that the person's deportation or departure may continue to be prevented by some action or inaction of the person: s 323(10). This has been a legislative response to the decision of *Chief Executive of Department of Labour v Yadegary* [2009] 2 NZLR 495 (CA), which held that the length of detention could fall within the scope of an "exceptional circumstance" under the 1987 Act. This case has not been subjected to substantive discussion in this paper in light of the fact that detainee in question was not a refugee but rather an Iranian overstayer whose actions had prevented his deportation to Iran. Mr Yadegary feared for his safety if he returned to Iran but it had been consistently held that his fears were groundless.
[93] Ibid.

Refugee Convention. Mr Zaoui, on the other hand, said that there was a real possibility of torture or loss of life if he was returned to Algeria. This required the courts to engage with the parameters of the exception to the fundamental obligation of *non-refoulement* encompassed within the Refugee Convention and the Convention's relationship to other human rights instruments and in particular for the Convention Against Torture (the CAT). [94]

The Meaning of Article 33 (2).

The exception provided by art 33.2 to the art 33.1 obligation of *non-refoulement* has generated significant academic discussion post September 11 in light of concerns held by commentators that the judiciary will lean towards an expansive interpretation of the exception in a manner that defeats the rights of refugees.[95] The New Zealand courts had the opportunity during the Zaoui judicial review proceedings to explore the correct interpretation of this pivotal article of the Refugee Convention.

In the Court of Appeal, Anderson P and I held that the art 33.2 assessment required a balancing of the seriousness of the risk to national security with the possible consequences to Mr Zaoui of confirming the risk certificate.[96] We concluded that the security criteria in s 144C(6) of the Immigration Act would be met only if there were objectively reasonable grounds, based on credible evidence, that Mr Zaoui constituted a danger to the security of New Zealand of such seriousness that it would justify sending a person back to persecution.[97] We also took the view that there must be a real connection between Mr Zaoui and the identified danger and that an appreciable alleviation of that danger must be capable of being achieved through deportation.[98]

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[94] Convention Against Torture and and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987).
[95] Volker Turk "Forced Migration and Security" (2003) 15 Int'l J. Refugee L. 113 at 116, Alice Farmer "Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that threaten Refugee Protection" (2003) 23 Geo. Immigr. L.J 1 at 3.
[96] *Zaoui v Attorney-General (No 2)* above n 29 at [25] per Anderson P and at [112]-[117] per Glazebrook J.
[97] It must be noted that it was always, however, accepted on the part of the Crown that Mr Zaoui could not be sent back to Algeria if he was likely to be subjected to torture in breach of CAT. This meant that the issue before the courts was always who was to decide on the issue of torture and how (procedurally) and when that was to be done and implicitly whether there would be room for court review of any decision adverse to Mr Zaoui.
[98] *Zaoui v Attorney-General (No 2)* above n 29 at [26] per Anderson P and at [169] per Glazebrook J.

The Supreme Court did not accept that a proportionality or balancing exercise was encompassed within the art 33.2 analysis. Rather, the Court held that a sequential reading of the obligations of art 33.1 and art 33.2 was required.[99] Acknowledging that the competing interests encompassed within art 33 were "very difficult to relate" to one another, the Court considered that any form of balancing was best avoided within the art 33.2 analysis.[100] The Court preferred to hold that any threat to national security had to be serious but, if there was such a serious threat, then art 33.2 applied and the non-refoulement obligation in art 33.1 did not apply.[101]

The relationship between art 33.2 and the Convention Against Torture

The Supreme Court in *Zaoui* was also required to deal with the (new) argument that, because the obligation of *non-refoulement* to face torture was *jus cogens,* the Refugee Convention had been modified so that art 33.2 would be overridden in cases where there would be threat of torture on return.

This argument was rejected by the Supreme Court. It held that art 33.2 of the Refugee Convention had not been amended by the later international instruments of the International Covenant of Civil and Political Rights[102] (the ICCPR) and the CAT.[103] It placed emphasis on the fact that only art 33.2 that had been incorporated into New Zealand law pursuant to Part 4A of the 1987 Act.[104] The Supreme Court rejected the proposition that the prohibition on *refoulement* to torture had the status of *jus cogens.* While it was accepted that there was strong support for the proposition that the prohibition on torture was itself *jus cogens*, it was held that no support could be found from state practice, judicial decisions or commentaries for the proposition that the prohibition on *refoulement* to torture had *jus cogens* status.[105]

[99] *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 at [25].
[100] Ibid at [27].
[101] Ibid at [45].
[102] (Opened for signature 16 December 1966, entered into force 23 March 1976)
[103] *Zaoui v Attorney-General (No 2)* above n 99 at [50].
[104] Ibid.
[105] Ibid at [51].

Refoulement to torture or arbitrary loss of life

Both the Supreme Court and the Court of Appeal rejected the proposition that it was the role of the Inspector-General to do other than decide on the validity of the security risk certificate and thus whether or not Mr Zaoui constituted a threat to national security.[106] Thus, it was not the role of the Inspector-General to decide whether Mr Zaoui's concerns about torture were justified.

The Crown, however, did accept that it was obliged to comply with New Zealand's relevant international obligations under arts 6(1)[107] and 7[108] of the ICCPR and art 3 of the CAT[109] to protect Mr Zaoui from return to threats of torture or the arbitrary taking of life. Against the background of the Crown's concession that it was obliged to act in accordance with New Zealand's relevant international obligations, the Supreme Court grappled with the question as to the way in which under New Zealand law such obligations could be met.[110] As Haines notes, the Court's consideration of the protection that could be afforded to Mr Zaoui in circumstances outside of the Refugee Convention raised for the first time the issue of complementary protection in New Zealand's highest court.[111]

In determining the question as to how New Zealand's obligations under international instruments could be complied with in the decision-making process, reliance was placed by the Court on the obligation under s 6 of the New Zealand Bill of Rights to give the 1987 Act a meaning that was consistent with the rights and freedoms contained within the New Zealand Bill of Rights.[112] Accordingly, the Court reasoned that the right to deport a person considered to be a security risk had to be interpreted and read consistently with the provisions

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[106] *Zaoui v Attorney-General (No 2)* above n 29 at [24] per Anderson P [169](b) per Glazebrook J and at [171] per William Young J; *Zaoui v Attorney-General (No 2)* above n 99 at [73].
[107] Article 6(1) of the ICCPR provides that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
[108] Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
[109] Article 3 of the CAT provides that 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.
[110] *Zaoui (No 2)* above n 99 at [77].
[111] Rodger Haines QC "National Security and Non-Refoulement in New Zealand: Commentary on *Zaoui v Attorney-General* (No 2)" in J McAdam (ed) *Forced Migration, Human Rights and Security* (Hart Publishing, 2008, Oxford) at 75.
[112] *Zaoui (No 2)* above n 99 at [90].

of ss 8 and 9 of the New Zealand Bill of Rights (which closely relate to arts 6 and 7 of the ICCPR).

The Supreme Court thus held that, if there would be substantial grounds for believing that, as a result of the deportation, the individual in question would be in danger of being arbitrarily deprived of life or of being subjected to torture, a Minister could not set the deportation procedure into train on that basis that the continued presence of a person would constitute a threat to national security. This applied even if the threat to national security was made out in terms of s 72 and art 33.2 of the Refugee Convention. [113] The Supreme Court thus engrafted major procedural safeguards into the Act to ensure that any allegations of possible torture could be properly investigated.[114]

Consequences of the Supreme Court's decision

Unsurprisingly, the Supreme Court's decision in *Zaoui* has generated significant academic commentary in light of its engagement with the core issues surrounding the role of unincorporated treaties into domestic law[115] and the Court's willingness to examine the issue of complementary protection within New Zealand's domestic sphere. It has been argued that, despite the Supreme Court's refusal to recognise the prohibition on *refoulement* to torture as *jus cogens*, the judicial willingness to interpret s 72 of the 1987 Act in accordance with New Zealand's obligations under the CAT and the ICCPR indirectly implemented such a norm.[116]

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[113] Ibid at [91].

[114] Ibid at [93]. Although the context of the review was procedural in *Zaoui (No 2)* the Supreme Court effectively added both a procedural and substantive gloss on to the statute, leading commentators to suggest that the Court will play an "active role" in judicial review of these matters: Claudia Geiringer "Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (Lexis Nexis, Wellington, 2006) at 182. For further discussion see Glazebrook above n 20 at 31.

[115] Note, that New Zealand is a dualist system. Dualism is the theory that the spheres of domestic and international law are separate and that international law must be incorporated into domestic law before it can have effect within a State. Under a monist system the opposite is the case and international treaty law becomes national law at the time it is ratified by the State.

[116] Lisa Yarwood "Zaoui and jus cogens" [2006] NZLJ 170 at 171, Christine Brickenstein "An Evaluation of the Zaoui Case" [2009] NZLJ 356 at 359. It must be noted that Haines above n 111 at 82 criticises the decision for failing to address the point that those who have abused human rights are explicitly excluded from the refugee protection regime by Article 1F, and article 33(2) of the Refugee Convention should be seen to illustrate that the obligation of the state to protect a genuine refugee is not an obligation to protect him or her at all costs. He says that the implicit assertion that no matter how grave a danger to the community and no matter how grave a danger to the community an individual may be, the risk of that individual being subjected to arbitrary deprivation of life or torture trumps all other considerations is not a proposition that is self-evidently correct.

Whether or not this overstates the position, it cannot be denied the decision provides a clear illustration of the New Zealand judiciary actively seeking to ensure that an adequate balance between the protection of human rights and the protection of national security has been met and a willingness to recognise New Zealand's international obligations under the ICCPR and the CAT.[117]

Complementary Protection within the 2009 Act

The need to ensure that New Zealand complies with its international obligations under the new immigration legislation was recognised by the Hon David Cunliffe in the first reading of what became the 2009 Act. The Minister recognised that codifying New Zealand's existing immigration-related obligations under the Refugee Convention, the CAT and the ICCPR, would not only ensure that all claims for international protection would be assessed together but that such changes would strengthen New Zealand's already highly regarded refugee determination system and would reflect best standards internationally.[118]

Explicit reference to New Zealand's international obligations under these international instruments is now found in Part 5 of the 2009 Act which deals with refugee and protection status determinations. The stated objective of Part 5 is to provide a statutory basis for the system under which New Zealand determines to whom it has obligations under the Refugee Convention and to codify certain obligations under the CAT and the ICCPR, and determine to whom it has these obligations.[119]

Under the 2009 Act, a distinction is drawn between refugees and protected persons. The Act provides that a person must be recognised as a refugee if he or she is a refugee within the meaning of the Refugee Convention.[120] On the other hand, even a person who does not meet the definition of refugee must be recognised as a protected person under the Act if there are substantial grounds for believing he or she would be in danger of being subjected to torture

[117] For further discussion of instances where the New Zealand courts have recognised international obligations in the immigration context under unincorporated treaties see Glazebrook above n 20 at 16-25.
[118] (16 August 2007) 641 NZPD.
[119] Immigration Act 2009, s 124. Note, the provisions of this Part were strengthened during the enactment process.
[120] Ibid, s 129(1). Note, this was the position under the 1987 Act pursuant to the incorporation of the Refugee Convention under the Immigration Amendment Act 1999. For greater discussion see Glazebrook above n20 at 45.

(as defined in CAT) if deported from New Zealand. [121] Protected person status will also be granted to a person in New Zealand if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment in terms of the ICCPR if deported from New Zealand.[122]

Significantly, under the 2009 Act, no person who is recognised as a refugee or a protected person in New Zealand, or who is a claimant, may be deported.[123] However, exceptions to this broad *non-refoulement* obligation are provided within the Act.[124] A refugee or a claimant for recognition as a refugee may be deported but only if art 32.1 or 33 of the Refugee Convention allows the deportation of the person.[125] Similarly, a protected person may be deported to any place other than a place in respect of which there are substantial grounds for believing that the person would be in danger of being subjected to torture or arbitrary deprivation of life or cruel treatment.[126]

Part E Conclusion

The task of attempting to strike an adequate balance between the right of New Zealand to protect its borders and security and the protection of human rights is one that is inevitably plagued with difficulty.[127] What is certain, however, is the need to ensure that security

[121] Ibid, s130. Note, however, that, pursuant to s 130(2), a person must not be recognised as a protected person in New Zealand under the CAT if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence.
[122] Ibid, s 131. Note, however, that pursuant to s 131(2) a person must not be recognised as a protected person in New Zealand under the ICCPR if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence. Moreover, treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards. Further, the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.
[123] Immigration Act 2009, s 164(1).
[124] Note that under s 138(2) regardless of whether the grounds for recognition as a refugee or protected person have been met, the refugee and protection officer may refuse to recognise a person as a refugee or a protected person if he or she is satisfied that the person has the protection of another country or has been recognised as a refugee by another country and can be received back and protected there without risk of being returned to a country where he or she would be at risk of circumstances that would give rise to grounds for his or her recognition as a refugee or a protected person in New Zealand. For greater discussion see Haines above n 4.
[125] Ibid s 164(3).
[126] Ibid s 164(4).
[127] It is necessary of course to be cognisant of the fact that security is not divorced from human rights. Security of the person is a fundamental right in itself and consequently States have a duty to protect the security of those within their borders and also have other international obligations with regard to security more generally. The issue is probably better couched as one involving the balancing of the rights of the collective against the rights of the individual. There is also always, however, the need to overcome the temptation for it to become an exercise of accommodating the fears (as against the rights) of the collective at the expense of individual rights.

concerns, however legitimate, do not override the fundamental human rights that are enshrined within both New Zealand's domestic legislation and international instruments. It is thus promising that all branches of government in New Zealand appear cognisant of the fact that an appropriate balance between these conflicting interests must be achieved within the immigration sphere. The answer as to whether New Zealand's new legislation has struck the correct balance between such interests will doubtless be the subject of much debate. However, this should not detract from the fact that the New Zealand courts, and those charged with implementing the 2009 Act, must continually strive to ensure that a proper balancing exercise is undertaken.