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**NATIONAL SECURITY AND NON-REFOULEMENT:
RECENT NEW ZEALAND DEVELOPMENTS**

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INTRODUCTION

[1] The New Zealand refugee determination system was given a formal structure in 1991.² Since then both the Refugee Status Branch of the New Zealand Immigration Service and the Refugee Status Appeals Authority have accumulated substantial experience in the application of the Inclusion and Exclusion provisions of the refugee definition contained in Article 1A(2) of the Convention relating to the Status of Refugees 1951 and the Protocol relating to the Status of Refugees, 1967 (“the Refugee Convention”).³

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²See generally Rodger Haines, “International Law and Refugees in New Zealand” [1999] NZ Law Review 119.

³New Zealand acceded to the Refugee Convention on 30 June 1960 and subject to a reservation entered concerning Article 24(2), it entered into force for New Zealand on 28 September 1960. See Ministry of Foreign Affairs and Trade, *New Zealand Consolidated Treaty List as at 31 December 1996 Part I (Multilateral Treaties)*, (Wellington, Ministry of Foreign Affairs and Trade, May 1997) p 183.

[2] The Executive has remained largely aloof from refugee determination though it did, with judicial encouragement, belatedly place the refugee determination system on a statutory footing in 1999.⁴

[3] The picture, until recent times, has been of a two-tier administrative system making refugee determinations which the Executive has accepted. The Crown has never challenged a decision of the Refugee Status Appeals Authority by way of judicial review.

[4] The disengagement by the Executive from refugee issues is about to change. In recent times the Minister of Immigration and his officials have been required to address difficult cases which bring into focus the exceptions to the non-refoulement obligation, those exceptions being contained in Article 33 of the Convention, paragraph (2) of which specifically provides that the benefit of the non-refoulement obligation in paragraph (1) may not be claimed:

- (a) By a refugee who there are reasonable grounds for regarding as a danger to the security of the country in which he or she is; or

New Zealand acceded to the Protocol on 6 August 1973 and it entered into force for New Zealand on the same day. See further Ministry of Foreign Affairs and Trade, *New Zealand Consolidated Treaty List as at 31 December 1996 Part I (Multilateral Treaties)*, (Wellington, Ministry of Foreign Affairs and Trade, May 1997) p 244.

⁴ *Butler v Attorney-General* [1999] NZAR 205, 218-220 (Richardson P, Henry, Keith, Tipping & Williams JJ); *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291, 294 (Henry, Keith & Blanchard JJ). See the Immigration Amendment Act 1999, s 40. The new Part 6A came into force on 1 October 1999: Immigration Amendment Act 1999, s 1(3). These provisions are to be read with the Immigration (Refugee Processing) Regulations 1999 (SR1999/285).

- (b) Who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country:

Article 33. - Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

[5] The particular cases include:

- (a) An Algerian national, recognised as a refugee by the Refugee Status Appeals Authority, but in respect of whom the Director of Security has issued a security risk certificate under Part 4A of the Immigration Act 1987.
- (b) An Iraqi resettlement refugee sentenced to nine years in prison for the rape of two Auckland women and for the assault with intent to rape a third. Two months after he was released, he attacked his fourth victim.⁵ On the latest charges, having been found guilty of sexual violation by rape, detaining a woman without her consent with intent to have sexual intercourse and assault he was sentenced to preventive detention, the court ordering that he serve at least seven years of the preventative detention sentence. An appeal to the Court of Appeal against both conviction and sentence was unsuccessful,⁶ the Court noting at [48]:

⁵ NZPA, "Refugee rapist attacks for fourth time" *NZ Herald*, Thursday, November 18, 2004, p A5.

⁶ *R v Al Baiaty* (CA120/05, 17 October 2005, Glazebrook, Ronald Young & Doogue JJ); NZPA, "Iraqi refugee loses rape appeal" *NZ Herald*, Tuesday, October 18, 2005, p A7.

The gravity of Mr Al Baiaty's offending was at a high level. It involved a brutal and sustained attack upon a young woman, with a degree of premeditation. As to public protection, Mr Al Baiaty clearly poses a serious risk to the community. He has been assessed as presenting a high risk of re-offending and has not addressed the causes of his offending. Nor does he appear prepared to do so in the future. Further, he continues to deny the offending against this complainant.

The then Minister of Immigration, with specific reference to Article 33(2) called for a report on the deportation issues raised by the case, acknowledging that no precedent existed for such action in New Zealand.⁷

- (c) Two Iranian nationals convicted on drug smuggling charges and presently serving sentences of imprisonment of seven and a half years and nine years, have both been recognised as refugees.⁸ It is reported that Iranian criminals in New Zealand have become a major problem for drug enforcement authorities, one report alleging that 42% of the 35kg of imported crystal methamphetamine seized in the twelve months to March 2005 was due to a loose association known by Customs and Police as the "Iranian network".⁹

[6] It is in the context of these difficult cases that both the Executive and the Courts are now accumulating experience in the application of Article 33(2). To date the provision has never been invoked.¹⁰

[7] The intentionally limited obligation to which States party have bound themselves under the Refugee Convention has brought into focus other treaty obligations assumed by New Zealand under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 ("the Convention against

⁷ Angela Gregory, "Rapist faces expulsion from NZ" *NZ Herald*, Friday, November 19, 2004, p A4.

⁸ Bill Taylor, "Immigration offers no answers on jailed man" *NZ Herald*, Saturday, 19 November 2005, p A10.

⁹ Fiona Barber, "Ice Age: The Iranian Meth Smugglers", *North & South*, December 2005, p 52.

¹⁰ Phil Taylor, "Jailed Iranians face deportation", *NZ Herald*, Saturday December 10, 2005, p A16.

Torture”), Article 3 of which contains a discrete non-refoulement obligation:¹¹

Article 3

1. No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

It is to be seen that the non-refoulement obligation under this Treaty is not qualified by the restrictions found in Article 33 of the Refugee Convention. Nor does the Convention against Torture contain any exclusion provision in relating to those in respect to whom there are serious reasons for considering that he or she has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations.

[8] Also relevant are Articles 6 and 7 of the International Covenant on Civil and Political Rights, 1966 (“the ICCPR”) which safeguard the right to life and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment:¹²

Article 6

¹¹New Zealand signed the Convention on 14 January 1986 and it entered into force for New Zealand on 9 January 1990. See further Ministry of Foreign Affairs and Trade, *New Zealand Consolidated Treaty List as at 31 December 1996 Part I (Multilateral Treaties)*, (Wellington, Ministry of Foreign Affairs and Trade, May 1997) pp 324 and 325. On ratification New Zealand made a reservation regarding the awarding of compensation to torture victims referred to in Article 14, made declarations, pursuant to Article 21(1) and Article 22(1) respectively, recognising the competence of the Committee against Torture and lodged objections to a Declaration and Reservations made respectively by two countries.

¹²New Zealand ratified the Covenant on 28 December 1978 and it entered into force for New Zealand on 28 March 1979. See further Ministry of Foreign Affairs and Trade, *New Zealand Consolidated Treaty List as at 31 December 1996 Part I (Multilateral Treaties)*, (Wellington, Ministry of Foreign Affairs and Trade, May 1997) p 242.

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. ...

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his pre-consent to medical or scientific experimentation.

[9] The recent judgment of the Supreme Court of New Zealand in *Attorney-General v Zaoui* [2005] NZSC 38 (21 June 2005) (Elias CJ, Gault, Keith, Blanchard & Eichelbaum JJ) potentially advances New Zealand domestic law on these forms of complimentary protection. But the judgment does not address the difficult question of why those who abuse human rights receive a greater degree of protection against non-refoulement than those who are victims of human rights violations.

[10] To understand *Attorney-General v Zaoui*, the statutory context for refugee determination must be briefly outlined.

THE STATUTORY CONTEXT

Domestic incorporation of the Refugee Convention

[11] As mentioned, the New Zealand refugee status determination procedures were placed on a statutory footing by the Immigration Amendment Act 1999.¹³

[12] The effect of ss 129C and 129D is that for the purposes of determining refugee status, refugee status officers (at first instance) and the Refugee Status Appeals Authority (on appeal) must act in a manner consistent with New Zealand's obligations under the Refugee Convention:

¹³The new part 6A of the Immigration Act 1987 came into force on 1 October 1999. See the Immigration Amendment Act 1999, s 1(3). The context of the statutory amendments is reviewed in Rodger Haines, "International Law and Refugees in New Zealand" [1999] NZ Law Review 119.

129C. Refugee status to be determined under this Part -

(1) Every person in New Zealand who seeks to be recognised as a refugee in New Zealand under the Refugee Convention is to have that claim determined in accordance with this Part.

(2) Every question as to whether a person in New Zealand should continue to be recognised as a refugee in New Zealand under the Refugee Convention is to be determined in accordance with this Part.

129D. Refugee Convention to apply -

(1) In carrying out their functions under this Part, refugee status officers and the Refugee Status Appeals Authority are to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention.

(2) The text of the Refugee Convention is set out in the Sixth Schedule.

[13] In practical terms this means that **within the refugee determination context**, the Refugee Convention has been domesticated.

Outside the refugee determination context, however, incorporation has been limited to Articles 32 and 33 of the Refugee Convention. See s 129X of the Act:

129X. Prohibition on removal or deportation of refugee or refugee status claimant -

(1) No person who has been recognised as a refugee in New Zealand or is a refugee status claimant may be removed or deported from New Zealand under this Act, unless the provisions of Article 32.1 or Article 33.2 of the Refugee Convention allow the removal or deportation.

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

In the context of refugees, security and deportation, s 114C(6)(a) provides:

(6) The relevant refugee deportation security criteria are a combination of any 1 or more of the criteria listed in subsection (4) as relevant deportation security criteria, taken together with either or both of the following criteria:

(a) That there are reasonable grounds for regarding the person as a danger to the security of New Zealand, in terms of Article 33.2 of the Refugee Convention:

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

[14] In *Attorney-General v Refugee Council of New Zealand Inc* McGrath J, while describing the 1999 provisions as giving the Refugee Convention legislative effect and incorporating it into New Zealand's domestic law, nevertheless drew attention to the fact that s 129X(1) makes a distinction between direct and indirect implementation¹⁴:

... it is not surprising that in incorporating the refugee convention into New Zealand legislation Parliament used a formula giving some but not all of its provisions the force of law. The expression of a duty under domestic law as being to have regard to a treaty duty can reflect a perception that the international obligation is an inappropriate standard in itself for more direct implementation.

National security and terrorists

[15] In the past forty years New Zealand has had only two statutes regulating immigration: The Immigration Act 1964 and (twenty three years later) the Immigration Act 1987. The latter statute is now eighteen years of age. The first substantive statutory provisions addressing national security were introduced by the Immigration Amendment Act 1978, s 7. Under the (then) new Part IV the Minister of Immigration was given new powers to deal with national security and terrorism cases:

- (a) In national security cases, the Governor-General, by Order in Council had power to order a person to leave New Zealand where the Minister of Immigration certified that the continued presence in New Zealand of that person constituted a threat to national security.
- (b) The Minister could order a person to leave New Zealand where there was reason to believe that the individual was a terrorist, had engaged in an act of

terrorism or would engage in any act of terrorism.

[16] These 1978 provisions were largely brought forward into Part 3 of the Immigration Act 1987 by ss 72 and 73 respectively.

[17] National security cases are clearly envisaged as being at the most serious end of the scale, removal being preconditioned by an Order in Council, no less. By contrast, suspected terrorists have a statutory right of appeal to the High Court against the making of a deportation order. The appeal right conferred by s 81 of the Act envisages a de novo review by the High Court on both the facts and the law. Section 81(3) provides:

(3) On any appeal under this section, the High Court may confirm or quash the deportation order, as it thinks fit.

[18] These provisions address removal. To prevent the entry to New Zealand of threats to national security or suspected terrorists, s 7(1)(e), (f), (g), (h) and (i) prescribe that such persons are not eligible for a permit and they may be detained and summarily expelled on arrival in New Zealand pursuant to s 128 of the Act. This turnaround power has lately been surrounded by safeguards where a claim to refugee status is made. See s 128A, 128AA-128AD and 128B.

[19] Only belatedly has the New Zealand Parliament addressed its mind in any detailed way to the use of classified security information in cases involving security concerns. The Immigration Amendment Act 1999, s 35 introduced a new Part 4A setting out an elaborate mechanism for the use of classified security information.

[20] These new procedures were described in the following terms in *Attorney-General v Zaoui* at [9]:

¹⁴ *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 at [93], [97] & [103] (CA) (McGrath J).

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

[21] In short, where the Director of Security has provided the Minister of Immigration with a security risk certificate the person affected may seek a review of the Director's decision. That review is carried out by the Inspector-General of Intelligence and Security (a retired Judge of the High Court) with a right of appeal to the Court of Appeal on a point of law. The provisions are silent as to whether the review conducted by the Inspector-General is confined to the decision to provide a security risk certificate or whether the function of the Inspector-General is to also enquire into the broader human rights issues raised by the particular case.

THE ISSUES BEFORE THE SUPREME COURT IN *ATTORNEY-GENERAL V ZAOU*

The function of the Inspector-General

[22] The Supreme Court held at [73] that in carrying out his function under Part 4A of the Immigration Act 1987 the Inspector-General is concerned only to determine whether the relevant security criteria are satisfied. He is not to determine whether the individual in question is subject to a threat which would or might prevent his removal from New Zealand.

The proportionality issue

[23] In the particular statutory context, the Supreme Court was also required to address the meaning of Article 33(2) and in particular whether it contains an element of “proportionality” or weighing and balancing. In the Court of Appeal it had been held that the Inspector-General was required to assess the possible consequences for the refugee of deportation or removal and to weigh those consequences against the extent of the danger to the security of New Zealand. The Supreme Court at [22] framed the issue in the following terms:

Accordingly, we consider (a) whether the national security limit placed by article 33.2 on the bar on deportation stated in para (1) sets a single standard which, if satisfied, operates by itself as an exception to the bar or (b) whether it requires or permits consideration of the dangers to the individual by reference to the human rights law beyond the express terms of article 33.2, and whether, as a result, it incorporates some element of proportionality or balancing. We consider this question in the first place in terms of the position under international law and in particular under article 33.2, leaving until the next part of these reasons the role under the Immigration Act of the various decisionmakers, especially the Inspector-General of Security. We are able to do this because article 33.2 is directly incorporated into the law of New Zealand by s 114C(6)(a).

[24] In reversing the Court of Appeal on this point and holding that Article 33(2) requires no proportionality or weighing and balancing the Supreme Court had regard to:

- (a) Article 33 is in two distinct parts. Each part is distinct and according to their ordinary meaning, the two provisions operate in sequence. They are not related in any proportionate or balancing way. The second, if satisfied in its own terms, defeats the prohibition in the first. See [25].
- (b) This **sequential reading** is reinforced by a consideration of what the proportionality or sliding scale proposition would require. The decision-maker would have to measure against one another two matters which are very difficult to relate: the level of threat to the life or liberty of an individual, on the one

side, and, on the other, the level of reasonably perceived danger to the security of the State. See [27].

- (c) The sequential reading is supported by the operation of Article 1F(b). In *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291, 297 (CA) the Court of Appeal had rejected an argument that the gravity of the crime is to be weighed against the gravity of the possible persecution:

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

- (d) State practice did not support the principle of proportionality, nor did the drafting history.

[25] The conclusion arrived at by the Supreme Court on the meaning of Article 33(2) is summarised at [42]:

We accordingly conclude that the judgment or assessment to be made under article 33.2 is to be made in its own terms, by reference to danger to the security, in this case, of New Zealand, and without any balancing or weighing or proportional reference to the matter dealt with in article 33.1, the threat, were Mr Zaoui to be expelled or returned, to his life or freedom on the proscribed grounds or the more specific rights protected by the New Zealand Bill of Rights Act 1990 read with the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Paragraph (2) of article 33 of the Refugee Convention states a single standard.

The test for *reasonable grounds for regarding as a danger to security*

[26] The second issue addressed by the Supreme Court is the meaning of the phrase in Article 33(2):

... a refugee whom there are reasonable grounds for regarding as a danger to the security

of the country in which he is....

[27] After emphasizing at [44] that the wording and drafting history of Article 33 and its very subject matter indicated that the Executive has a broad power of appreciation of the relevant facts and considerations, the Supreme Court at [45] adopted essentially the test stated by the Supreme Court of Canada in *Suresh*¹⁵. The Court in *Attorney-General v Zaoui* advanced the following formulation:

To come within Article 33(2) the person in question must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial.

Whether Article 33(2) amended by later human rights instruments

[28] One of the arguments advanced before the Supreme Court was that Article 33(2) of the Refugee Convention had been amended by Article 3(1) of the Convention against Torture and by Article 6(1) and (7) of the ICCPR. The submission was that the exceptions to the non-refoulement obligation permitted by Article 33(2) are overridden in the case where torture is threatened. The Supreme Court rejected this argument at [50], observing that Article 33(2) of the Refugee Convention has not been amended by the later ICCPR and Convention against Torture provisions:

- (a) Rather, they have to be applied in a successive way;
- (b) In any event it is only Article 33(2) of the Refugee Convention that is incorporated into New Zealand law by Part 4A of the Immigration Act 1987.

Whether the prohibition on refoulement to torture a peremptory norm

[29] A final argument was that the prohibition on refoulement to torture has the status

¹⁵ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

of a peremptory norm or *ius cogens*. As to this, the Supreme Court held at [51] that while there is overwhelming support for the proposition that the prohibition on torture **itself** is *ius cogens*, there is no support in the state practice, judicial decisions or commentaries to which the Court were referred for the proposition that the prohibition on **refoulement** to torture has that status.

The conclusion reached by the Supreme Court

[30] The Court concluded at [52]:

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

COMPLEMENTARY PROTECTION

[31] Having held that it was not the role of the Inspector-General of Intelligence and Security, on a review under Part 4A of the Immigration Act 1987, to assess the possible consequences of the deportation or removal from New Zealand of a recognised refugee and having held that Article 33(2) did permit expulsion notwithstanding return to a risk of being persecuted, the Supreme Court examined the international obligations assumed by New Zealand under both the ICCPR and the Convention against Torture to determine whether a person, lawfully expellable from New Zealand under the Refugee Convention, was nevertheless protected from return to his or her own country.

The Crown concession

[32] In this regard a significant concession had been made by the Crown. It expressly accepted that it is obliged to act in conformity with New Zealand's obligations under

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Articles 6(1) and 7 of the ICCPR and Article 3 of the Convention against Torture. See [75] and [76] of the judgment:

[75] The result of the two rulings we have already made is that it is not for the Inspector-General to address the existence of any threat to Mr Zaoui were the Government to act to remove him from New Zealand. But the Government, through the Solicitor-General, accepts that it is obliged to comply with the relevant international obligations protecting Mr Zaoui from return to threats of torture or the arbitrary taking of life....

[76] ... the Crown accepts in particular that it is obliged to act in conformity with New Zealand's obligations under Articles 6(1) and 7 of the ICCPR and Article 3 of the Convention against Torture....

[33] This brought the Supreme Court to the remaining issue which, at [77] was formulated in the following terms:

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

The issue of extra-territoriality

[34] The Supreme Court noted that neither the ICCPR and CAT provisions nor ss 8 and 9 of the New Zealand Bill of Rights Act 1990 (which mirror the ICCPR provisions) **expressly** apply to actions taken outside New Zealand by other governments in breach of the rights therein stated. But at [79] the Court drew on the jurisprudence of the European Court of Human Rights, particularly *Soering v United Kingdom* (1989) 11 EHRR 439 (E Ct HR) paras 90 & 91. It observed that Article 6(1) and 7 of the ICCPR have long been understood as applying to actions of a State party if that State proposes to take action, say by way of deportation or extradition, where substantial grounds have been shown for believing that the person as a consequence faces a real risk of being subjected to torture or the arbitrary taking of life. The focus is not on the responsibility of the State to which the person may be sent. Rather, it is on the obligation of the State considering whether to remove the person to respect the substantive rights in issue.

Translation of international treaty obligations into domestic law

[35] Addressing the translation of international treaty obligations into New Zealand domestic law the Court referred to the New Zealand Bill of Rights Act 1990, the long title of which states that it is:

An act -

(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

[36] Sections 8 and 9 of the New Zealand Bill of Rights Act 1990 address the right to life and security of the person:

8. Right not to be deprived of life—

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. Right not to be subjected to torture or cruel treatment—

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

[37] While s 4 of the Act provides that no enactment is to be held to be impliedly repealed or revoked or to be in any way invalid or ineffective by reason only that the provision is inconsistent with any provision of the Bill of Rights, an interpretation consistent with the Bill of Rights is to be preferred.¹⁶ Section 6 of the Act provides:

¹⁶The text of s 4 provides as follows:

4. Other enactments not affected—

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

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6. Interpretation consistent with Bill of Rights to be preferred—

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.¹⁷

[38] At [90] and [91] the Court referred to s 6 of the Bill of Rights, noting that the power to expel on national security grounds must be given a meaning, if it can be, consistent with the rights and freedoms contained within the Bill of Rights Act. The Court concluded at [91] that it could as there was nothing to **prevent** the Minister of Immigration or Cabinet having regard to the obligations under Articles 6(1) and 7 of the ICCPR and Article 3 of the Convention against Torture:

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

[39] The Court accordingly came to the conclusion at [93] that:

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

(b) Decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

¹⁷ Paul Rishworth “Interpreting Enactments: Sections 4, 5 and 6” in Rishworth, Huscroft, Optican & Mahomey, *The New Zealand Bill of Rights* (Oxford, 2003) 116.

OBSERVATIONS

[40] The holdings of the New Zealand Supreme Court on Article 33(1) and (2) clearly have a significance beyond New Zealand, relating as they do to an international human rights convention to which there are presently 146 State Parties.

[41] The holdings in relation to complementary protection are, however, of more limited application, addressing as they do the domestic application in New Zealand of unincorporated treaties. This is an issue which has proved problematical in common law jurisdictions. In general terms, in the absence of direct incorporation by statute, administrative law has been suggested, with varied success, to be an alternative, if indirect route. In Australia the choice made in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA) was to rely on the concept of legitimate expectation. That is, a person who is the subject of a decision by the Executive had a legitimate expectation that the Executive would act in conformity with the international obligations to which Australia was a State party. Necessarily, the High Court accepted that that expectation could be displaced by “statutory or executive indications to the contrary”. Predictably this was answered by an “Executive indication of the contrary” in the form of the *Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch - International Treaties and the High Court decision in Teoh* (10 May 1995). In New Zealand the suggested approach has been to treat unincorporated international obligations as mandatory relevant considerations to be taken into account by the decision-maker. See *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); but it is an issue which has been left open by the Court of Appeal in the subsequent decisions of *Puli’uvea v Removal Review Authority* (1996) 14 FRNZ 322 (CA), *Puli’uvea v Removal Review Authority* [1996] 3 NZLR 538 (CA) and *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA).

[42] The possibly innovative feature of *Attorney-General v Zaoui* is the use of the New Zealand Bill of Rights Act to ensure consistency with international treaty obligations. This was an option available to the Supreme Court only because the Bill of Rights contains domestic analogues to the Article 6 and 7 obligations under the ICCPR. It is through this aperture of domestic human rights legislation, the Supreme Court has suggested, that the ICCPR and Convention against Torture obligations enter decision-making under the Immigration Act 1987.

[43] The implications of this approach have yet to be worked out. It raises for the first time, in an acute form, the whole issue of complementary protection. That is, the protection from refoulement of those who are either excluded from the Refugee Convention by Articles 1D, 1E and 1F of the Refugee Convention or those who, having been recognised as refugees, no longer have the protection of the Refugee Convention by virtue of the operation of Article 33(2). In its somewhat abbreviated treatment of the topic the Supreme Court judgment does not address the hard issues raised by a complementary protection regime of this nature. In particular, protection under the Refugee Convention is given only to those who are the victims, or potential victims, of human rights abuses. Those who themselves have abused human rights or committed serious non-political crimes are excluded from the protection regime. Similarly, Article 33(2) is designed to ensure that the obligation of a State party to protect a refugee is not an obligation to protect at all costs. The State is entitled to expel an individual where there are reasonable grounds for regarding that person as a danger to the security of the country or a danger to the community of that country. The consequence of the Supreme Court decision in *Attorney-General v Zaoui* is that New Zealand now has an obligation to protect from expulsion or return:

- (a) Any person with respect to whom there are serious reasons for considering that:
 - (i) He or she has committed a crime against peace, a war crime or a crime

against humanity;

- (ii) He or she has committed a serious non-political crime outside the country of refuge;
 - (iii) He or she has been guilty of acts contrary to the purpose and principles of the United Nations.
- (b) Any person with respect to whom there are reasonable grounds for regarding him or her as a danger to the security of the country;
- (c) Any person who, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of that country.