

HANXIAO LI

**NON-REFOULEMENT AND NATIONAL SECURITY: A
COMPARATIVE STUDY OF UK, CANADA AND NEW
ZEALAND**

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I Introduction

*“International law generally rejects deportation to torture, even where national security interests are at stake.”*¹

There had been a fierce debate when Hassan Ahmed Shaqlane, a Somalian refugee who was sentenced to an 8-year prison term for rape and kidnapping, won his appeal against deportation, upheld by the Deportation Review Tribunal.² Controversy arose again when Al Baiiaty, an Iraqi resettlement refugee was convicted of sexual violation by rape for the fourth time. With the Court of Appeal’s noting that Mr Al Baiiaty poses a serious risk to the community³, the then Minister of Immigration called for a report on the deportation issues raised by the case.⁴

Deportation to torture may deprive a refugee of the right to liberty, security and perhaps life⁵, which is against many states’ domestic laws and international instruments such as the International Covenant on Civil and Political Rights⁶ and the Convention against Torture⁷. It has been said that even if Article 33 of the Convention relating to the Status of Refugees does not categorically reject deportation to torture on its face, it should not be used to deny rights that other legal instruments make available to everyone.⁸ It is highly questionable, however, under this broad obligation, if a refugee poses a significant threat to the protecting country’s national security, what action can a state take to protect its own national security and its own people. Are provision in the Refugee Convention, the ICCPR and the CAT absolute, binding and non derogable? If so, can a state derogate from its international obligation to refrain from refouling a refugee to potential torture to protect its national security? On what grounds then, can a state derogate from it?

This paper will consider these questions. By doing so, this paper will first outline the international obligations, provided by the Refugee Convention, the ICCPR and the CAT, what is an international norm and states’ derogation rights in these provisions. The paper then looks at the courts in Canada, the United Kingdom and New Zealand’s approach in *Suresh*, *EN*⁹ and

¹ *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 at [75].

² (10 September 2003) 611 NZPD 8523.

³ *R v Al Baiiaty* [2005] NZCA 120/05. See New Zealand Press Association “Iraqi Refugee Loses Rape Appeal” The New Zealand Herald (online ed, Auckland, 18 October 2005). See also Rodger Haines “National Security and Non-refoulement in New Zealand: Commentary on *Zaoui v Attorney-General* (No 2)” in Jane McAdam (ed) *Forced Migration, Human Rights and Security, Studies in International Law* (Hart Publishing, Oxford, 2008) 133 at 134.

⁴ Angela Gregory “Rapist Faces Expulsion from NZ” The New Zealand Herald (online ed, Auckland, 19 November 2004).

⁵ *Ibid* n 1 at [5].

⁶ International Covenant on Civil and Political Rights (opened for signature December 16 1966, entered into force 23 March 1976).

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

⁸ *Above* n1 at [70].

⁹ *EN (Serbia) v Secretary of State for the Home Department & Anor* [2009] EWCA Civ 630.

*Zaoui*¹⁰ when deporting a person who poses threat to national security can lead to torture and arbitrarily deprivation of life and the deportation potentially violates an international obligation or a state's constitution. The paper will explain their approaches in relation to the different positions of their international obligations. The paper submits its concerns for some specific provisions in the Refugee Convention and the issues in exercising the absolute rights provided by the ICCPR and the CAT, as well as the ECHR. The paper finally submits its preferable approach after observing states' practice and comparative study of the three approaches.

II Provisions, International Norm and Derogation

This paper will first examine the relevant provisions in the CAT, the ICCPR and the Refugee Convention.

Article 3 of the CAT prohibits signatories from returning a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Article 7 of the ICCPR reads "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..."

Article 33 of the Refugee Convention prohibits contracting states from returning a refugee to where his life or freedom could be threatened, with exception that this provision excludes a person that is subjected to a danger to the security of the country and constituting a danger to the community of that country, where he is or has been convicted by a final judgment of a particularly serious crime.

In addition to Article 33, Article 1 (F) of the Refugee Convention has even excluded unworthy persons from protection of the convention,

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

¹⁰ *Zaoui v Attorney-General* (No.2) [2006] NZLR 289.

None of the provisions above is subject to reservations. It is apparent that the Refugee Convention has left the door open for states expelling refugees to torture, provided the exception is satisfied. By contrast, provisions provided by Article 3 of the CAT and Article 7 of the ICCPR are final, with no exception at all and they are not subject to derogation of contracting states. While the Refugee Convention excludes persons who have committed serious crimes from its protections, the ICCPR and the CAT protect everyone's rights. Therefore, there are definitely contradictions of protection in the Refugee Convention comparing to the ICCPR and the CAT. Protections in the Refugee Convention are definitely narrower.

Since most of the signatories of the CAT and the ICCPR have ratified the Refugee Convention, it is interesting to see what each signatory of all these three conventions would do when such contradictions occur. Especially when a person poses substantial threat to a state, and that state is a signatory of the ICCPR and the CAT, how will the state approach an issue where derogation is prohibited?

Not only derogation is prohibited when a specific provision states so, no derogation is permitted under a peremptory norm, which was defined in Article 53 of the Vienna Convention on the Law of Treaties¹¹,

A Norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Provisions that are incorporated into domestic law, too, are binding for state parties. Bearing these provisions in mind, this paper will now turn to the practice of the courts, to analyse each of their approaches.

III Canada

A Suresh

The Court in *Suresh* has examined conditions for deportation in the Immigration Act¹² whether or not constitutional. In doing so, the Court looked at the Charter¹³, the Immigration Act and the international norms.

¹¹ Vienna Convention on Law and Treaties (opened for signature on 23 May 1969, came into force 27 January 1980).

¹² Immigration Act 1995.

¹³ The Canadian Charter of Rights and Freedom 1982.

Section 53 of the Immigration Act does not prohibit deporting a person to a country where the person's life or freedom would be threatened. Section 7 of the Charter, however, guarantees everyone's right to life, liberty and security of the person and the right not to be deprived thereof *except* in accordance with the principles of fundamental justice. Therefore, the only question is whether the deportation to torture is in compliance with the principles of fundamental justice. If so, Section 53 of the Immigration Act is unconstitutional, ie deportation to torture is unconstitutional.

The Court stated that the relevant principles of fundamental justice are determined by a contextual approach that 'take[s] into account the nature of the decision to be made'¹⁴. "The approach is essentially one of balancing...balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance¹⁵". In this case, to carry a balancing test on deportation to torture, a variety of factors including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada should be considered.¹⁶ The Court decided that the government must be queried whether the response of the government is reasonable, and proportionate to its interests in relation to the threat.¹⁷

As for determining whether or not deportation to torture in general violates the fundamental justice, the Court looked in the Canadian perspective and international norm perspective.

The Court first concluded that torture in Canada is unjust¹⁸. While in Canadian jurisprudence, extraditing a person to face torture would be inconsistent with fundamental justice, as Section 7 is concerned not only with the act of extraditing, but also the potential outcome of extradition, refouling a person should be applied with the same principle, the guarantee of fundamental justice applies even to deprivation of life, liberty or security.¹⁹

Where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be affected by someone else's hand.²⁰

¹⁴ Above n1 at [45].

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid at [47].

¹⁸ Ibid at [49]-[52].

¹⁹ Ibid at [53]-[55].

²⁰ Ibid at [54].

Therefore, deporting a person to torture violates fundamental justice from Canadian perspective.²¹ However, Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed in Canada.²² The appropriate approach for deciding a specific case is balancing test.²³

When examining fundamental justice within the international law perspective, the Court noted that Canada's compliance with international obligations is not binding unless they have been incorporated into Canadian law by enactment.²⁴ The Court recognised prohibition on torture is an international norm as first, it is prohibited in a great number of multilateral instruments²⁵; second, states' practice has never legalised torture or recognised torture in their involvement²⁶; third, it has been reached to a consensus by a number of international authorities that prohibition on torture is an established *jus cogens*²⁷. Therefore, it cannot be easily derogated.

The Court has noticed the clear contradiction from the ICCPR, the CAT and the Refugee Convention. The Court has also stated that the contradiction should not to be read to be weakened, rather the provisions in the CAT, without an explicit provision against derogation together with the "without prejudice" wording, do not suggest the CAT is subjected to be derogated.²⁸ Moreover, with the advice sent from the Committee against Torture and the relevant case law, the better view concluded by the Court is that international norm prohibits deportation to torture, even where national security interests are at stake.²⁹

Therefore, the Court concluded at this point that both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests.³⁰ Fundamental justice in Section 7 of the Charter will be violated in both Canadian and international perspective if deporting a person to torture.³¹ For determining each individual case, the Minister of Immigration is obliged to carry a balancing test in accordance with the constitution.³² The Court referred to Lord Hoffmann in *Rehman* and Lord Slynn of Hadley to reinstate the importance of weighing the importance of national security and the serious outcome of deportation for the deportee.³³ The Court further concluded that the Immigration Act leaves open the possibility of deportation to torture; the

²¹ Ibid at [56]-[57].

²² Ibid at [58].

²³ Ibid.

²⁴ Ibid at [60]-[61].

²⁵ Ibid at [62].

²⁶ Ibid at [63].

²⁷ Ibid at [64].

²⁸ Ibid at [71]-[72].

²⁹ Ibid at [73]- [75].

³⁰ Ibid at [76].

³¹ Ibid.

³² Ibid at [77].

³³ Ibid.

Minister should *generally* decline to deport a refugee if there is a substantial risk of torture.³⁴ The Court clarified further that this finding, however, does not exclude the possibility to deport a person to torture in exceptional circumstances as an outcome of balancing test or as under provisions in Section 1 of the Charter where exceptional conditions justify violation of fundamental justice stated in Section 7 of the Charter.³⁵

Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under S[ection] 7 of the Charter generally precludes deportation to torture when applied on a case by case basis. We may predict that it will rarely be stuck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.³⁶

That said, deporting a person to torture as a consequence of balancing test or under exceptional circumstances in Section 1 of the Charter, Section 53 of the Immigration act is constitutional. The issue in this case is not the legislation, but the Minister's obligation to exercise the discretion in Section 53 according to the constitution. It is the Minister's obligation to weight relevant factors in compliance with the constitution, to decide whether or not a person should be refouled.

B Conclusion

Canada's approach in refoulement, as indicated in *Suresh*, is an examination on its domestic law in compliance with its constitution, specifically the fundamental justice. The Court in *Suresh* has examined fundamental justice in both domestic law and international law, with recognition that prohibition on torture is jus cogens. The Court has noted that Canada is not bound by the provisions stated in the CAT, where lies the most stringent rules on non refoulement. However, fundamental justice, as valued by its constitution must be complied. In deciding whether or not fundamental justice will be violated in deporting a person to torture, the Court has concluded that both Canadian law and international norm prohibits deportation to torture. However, in deciding a specific case, a balancing test must be carried by the Minister, with the constitution in mind. Generally when balancing Canada's interest and the consequence of deporting a person to torture, it will be disproportionate for the Minister to confirm a deportation order. However, in circumstances where balancing test is carried and the risk the person in question imposes to

³⁴ Ibid.

³⁵ Ibid at [78].

³⁶ Ibid.

Canada weighs more than the consequence of deporting the person, or the exceptional circumstances in Section 1 of the Charter is met, Canada can deport a person even if there are substantial grounds to believe the person might be subject to torture on return.

After *Suresh*, similar issue arises in *Ahani*³⁷, the Court in *Ahani* applied the analytical framework set out in *Suresh* and concluded that in the case of *Ahani*, where the proper principles and relevant factors were taken into account by the Minister, the decision of deporting Ahani should not be found unreasonable.³⁸ Moreover, a reviewing court should not reweigh the factors or interfere merely because it would have come to a different conclusion.³⁹ The Court found the Parliament intended to grant the Minister a broad discretion in issuing a deportation order; it should only be reviewable where the Minister makes a patently unreasonable decision.⁴⁰ That is to say, in Canada, a court should not intervene with the Minister's decision, if it was not made arbitrarily or in bad faith, cannot be supported on the evidence, or did not take into account the appropriate factors. The Minister has broad discretion carrying balancing test and issuing deportation order based on the outcome.

IV The United Kingdom

A EN

The Court of Appeal of the United Kingdom has made some interesting findings in *EN*, when considering the reasonableness and lawfulness of Section 72 of the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004⁴¹.

Under Section 72 of the Nationality, Immigration and Asylum Act 2002, persons who are convicted of offences and sentenced to a term of imprisonment of at least 2 years should be presumed to have been convicted by a particular serious crime and to constitute a danger to the community for the purposes of Article 32(2) of the Refugee Convention. In addition, the Nationality, Immigration and Asylum Act 2002(Specification of Particularly Serious Crimes) Order 2004, made under Section 72(4)(a)-a person is convicted of an offence specified by order of the Secretary of State, specifies a large number of criminal offences that should be presumed

³⁷ *Ahani v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 72.

³⁸ *Ibid* at [22].

³⁹ *Ibid* at [16].

⁴⁰ *Ibid*.

⁴¹ Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 (UK).

as particular serious crime for the purpose of Article 33(2) of the Refugee Convention, irrespective of the sentence imposed by the court.

In *EN*, appeals by EN and KC were heard together. EN was convicted and sentenced to 12 months' detention in a young offender's institution for burglary and 2 months for the offence of possessing an offensive weapon. The Secretary of State sought his deportation, as his criminal conviction would be conducive to public good under the Immigration Act 1971.⁴²

KC was a mandate refugee and was convicted of wounding with intent to do grievous bodily harm and sentenced to community punishment and rehabilitation order.⁴³ His breaking the terms of his community rehabilitation order resulted in him receiving a three year prison sentence. In addition to that, KC was also convicted of possession of a bladed article and sentenced for two months imprisonment.⁴⁴ His further application for asylum was refused and he was served with a deportation order.⁴⁵

Both parties challenged the deportation order and the term of "particular serious crime".

The Court examined whether the Refugee Convention has been incorporated into English law. Citing the decision in *R v Asfaw*⁴⁶, where it referred to decision in *R v Immigration Officer at Prague Airport*⁴⁷,

It is plain from these authorities that the British regime for handling applications for asylum has been closely assimilated to the Convention model. But it is also plain that the Convention as a whole has never been formally incorporated or given effect in domestic law... The giving effect in domestic law to international obligation is primarily a matter for the legislature. It is for Parliament to determine the extent to which those obligations are to be incorporated domestically. That determination having been made, it is the duty of the courts to give effect to it.

The Court found the Refugee Convention does not have the force of statute under domestic law.⁴⁸

The Court then looked at the Nationality, Immigration and Asylum Act 2002 (Specification of Particularity Serious Crime) Order 2004. The Court noted that the 2004 Order listed a large number of offences as offences to which Section 72(4)(2) applies, irrespective of the sentence

⁴² Above n9 at [10]- [12].

⁴³ Ibid at [24].

⁴⁴ Ibid at [25].

⁴⁵ Ibid at [26].

⁴⁶ *R v Asfaw* [2008] 1 AC 1061 at [29].

⁴⁷ *R (European Roman Rights Centre & Ors) v Immigration Officer at Prague Airport & Anor* [2005] 2 AC 1.

⁴⁸ Above n9 at [59].

imposed.⁴⁹ To the Court, the list does not only list offences that can be reasonably regarded as particularly serious crimes, for example, offences unlawfully and maliciously doing an act, intending or conspiring to cause an explosion likely to endanger life or cause serious injury to property, but also many offences that cannot be regarded as particularly serious crimes sensibly.⁵⁰ The Court has specified few offences as examples: theft, with no qualification as to the nature or value of the item or items stolen; entering a building as a trespasser, intending to steal, inflict or attempt to inflict grievous bodily harm or rape, which can include someone entering a building without permission intending to steal a milk bottle; an offence of destroying or damaging, without lawful excuse, another's property intending to destroy or damage or being reckless as to that, which can include someone scratching the paintwork of another person's car.⁵¹

The Court has noted, however, the power given by Section 72(4)(a) is restricted to offences that the Secretary of State could sensibly consider its seriousness in its statutory presumptions.⁵² Therefore, the Court concluded that the Secretary of State misunderstood the extent and purpose of the statutory power when formulating the list of offences to the Order, and she exceeded the statutory in doing so. Therefore, the 2004 Order is unlawful.⁵³

The Court found a tribunal cannot quash delegated legislation.⁵⁴ Further, the Court pointed out that Article 33 allows a state to refoule a refugee if its requirements are met.⁵⁵ It is the European Convention on Human Rights⁵⁶ that precludes refoulement if there is a risk of torture on return.⁵⁷

Historically, European Court of Human Right has upheld *Chahal*' complaint in *Chahal v The United Kingdom*⁵⁸ in 1996, before the United Kingdom incorporated European Convention on Human Rights into its Human Rights Act 1998⁵⁹, which came into effect in 2000. In *Chahal v the United Kingdom*, the complainant claimed that his deportation to his home country would result in a substantial risk of torture, which would make his deportation a violation of Article 3 of the European Convention on Human rights, where torture is prohibited.

The ECtHR noted that the deportation order against the complainant was made on the ground that he imposed risk to national security. In the submission of the United Kingdom, the

⁴⁹ Ibid at [81].

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid at [82].

⁵³ Ibid at [83].

⁵⁴ Ibid at [87].

⁵⁵ Ibid at [98].

⁵⁶ European Convention on Human Rights 213 UNTS 221(opened for signature 04 November 1950, entered into force 03 September 1953).

⁵⁷ Above n9 at [98].

⁵⁸ *Chahal v The United Kingdom* (1996) 23 EHRR 413 (ECHR).

⁵⁹ Human Rights Act 1998 (UK).

provisions in Article 3 are not absolute in cases of refoulement. The Government based this submission on the possibility of implied limitations as recognised in *Soering*,⁶⁰

Article 3 makes no provision for exceptions and no derogation... The question remains whether the extradition of a fugitive to another State where he could be subjected or be likely to be subjected to torture... What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case. Furthermore, inherent in the whole of the convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights... Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

The Court noted that the danger a person posed to national security of the contracting state was a factor to be weighted in the balance when considering the issues under Article 3.⁶¹ The Court stated that when there existed a substantial risk of deportation to torture, which was the case of *Chahal*, the danger to national security could weigh heavily in the balance to be struck between protecting the interest of the individual and the whole community.⁶² The Court agreed with the Complainant's argument that in any case, considerations on national security could not justify deporting a person to torture.⁶³ The prohibition of torture provided by Article 3 is equally absolute in refoulement cases.⁶⁴ Therefore, deportation to torture is a violation of Article 3 of the ECHR, even when national security is concerned. Prohibition on torture provided in Article 3 of the ECHR is absolute and non derogable.

The decision in *Chahal* has a long lasting effect on the use of deportation in the UK. However, since the 7/7 bombings, the UK's government has announced a renewed determination to use deportation as a counter-terrorism measure.⁶⁵ In the Observation in *Ramzy v the Netherlands*⁶⁶, the governments, including the UK government, has asked the Court in *Ramzy* to consider that⁶⁷,

⁶⁰ *Soering v the United Kingdom* (1989) 11 EHRR 439 (ECHR) at [88].

⁶¹ *Ibid* at [76].

⁶² *Ibid*.

⁶³ *Ibid* at [77].

⁶⁴ *Ibid* at [80].

⁶⁵ Deportation on Grounds of National Security (2007) Justice <www.justice.org.uk>.

⁶⁶ *Ramzy v the Netherlands* (2005) (Application No 25424/05) (ECHR).

⁶⁷ Observation of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom Intervening in Application No 25424/05 *Ramzy v the Netherlands*. (2005).

whether recognising the increased and major threat posed by international terrorism, it is appropriate or justified to maintain the principle that in the situation outlined above there is only a single relevant issue, namely whether or not substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to treatment contrary to Article 3 in the receiving state. On that basis, it can never be appropriate even to take into account as relevant the fact, nature or degree of the national security threat posed by an individual... The particular difficulty encountered by contracting states is caused both by the absolute nature of the prohibition against removal and by the relatively low threshold of risk that needs to be demonstrated before it arises.

The governments suggest that no challenge is to be made to the absolute nature of Article 3.⁶⁸ However, the context of removal involves assessment of risk of torture, and needs to afford proper weight to the fundamental rights of the citizens of contracting states who are threatened by terrorism.⁶⁹ National security considerations should not simply be dismissed as irrelevant in this context, whether or not a removal of a person is a violation of Article 3.⁷⁰ The governments concluded by suggesting the ECtHR reconsider and change the approach and principles set out in *Chahal*, that prohibition on torture is absolute even when a person poses a threat to national security.⁷¹

Despite the UK's intervention in *Ramzy*, Article 3 is still not subjected to derogation to date. The UK government has signed Memorandum of Understanding with Jordan and Libya, under which the government seeks to deport persons in questions to these countries with guaranteeing them diplomatic assurances. It is highly questionable, though, whether diplomatic assurances are effective in minimising the risk of torture and whether or not this Memorandum of Understanding is a violation of human rights protected by many international instruments and ECHR.

It is certain, however, refouling a refugee to torture is a violation of ECHR.

B Conclusion

The UK's approach in refoulement is based on its domestic law. The Secretary of State needs to consider the seriousness of each case sensibly given its statutory presumption is ultra vires. The Secretary of State needs to understand its power and the extent of the statutory when making a decision of issuing a deportation order.

⁶⁸ Ibid at [3].

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid at [37].

If deporting a person when the requirements in Article 33(2) of the Refugee Convention are met, it will still be a violation of Article 3 of ECHR if there is a substantial ground for believing there will be torture on return. Unlike Canada, the UK is bound by the absolute provisions of ECHR. The United Kingdom cannot deport a person to torture when a serious risk of torture is established.

V New Zealand

A Zaoui

In Immigration Act 1987⁷², based on part of which Zaoui was considered, Section 72 gives provisions on procedure of deporting a person threatening national security,

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

Issues raised in *Zaoui* have similarities with *Suresh*, yet the approach taken by the Supreme Court of New Zealand is much different.

The Court first examined the balancing test from the meaning of Article 33(2) of the Refugee Convention. Noting that New Zealand directly incorporated the Refugee Convention in the then Section 114C(6)(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”, the Court first considered the question whether the exception stated in Article 33(2) set a bar to permit states deporting refugees on itself, or it incorporates balancing test.⁷³ In doing so, the Court considered the wordings of Article 33 of the Refugee Convention, other provisions of the Refugee Convention, international law, other states’ practice and the drafting history.

The Court stated that reading from the ordinary meaning of Article 33(1) and Article 33(2), the two provisions are not related in any proportionate or balancing way.⁷⁴ If Article 33(2) is satisfied, the prohibition of non refoulement in Article 33(1) is defeated. The Court noted that “while the law sometimes appear to require such weighing, such an interpretation is to be avoided unless is it plainly called for.”⁷⁵

⁷² Immigration Act 1987.

⁷³ Above n10 at [22].

⁷⁴ Ibid at [25]-[27].

⁷⁵ Ibid at [27].

The Court then looked at the context of Article 33 of the Refugee Convention. The Court took Article 1F as an example to state that the context of the Refugee Convention supports that no balancing test is required.⁷⁶ The Court referred to the judgment in *S v Refugee Status Appeals Authority*⁷⁷ for support that Article 1F is clear and unambiguous⁷⁸,

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.

The Court then turned to examine state practice and noted that the United Kingdom, the United States and Australia all rejected balancing test as an element of Article 33 of the Refugee Convention.⁷⁹ The Court examined the drafting history of the Refugee Convention and found no element of balance was suggested.⁸⁰ The Court then listed authorities that either rejected or made no reference to proportionality test.⁸¹ The Court mentioned the use of balancing test in *Suresh*, noting it has been criticised “since it contemplates derogations from absolute protection under international law”.⁸² On this point, the Court concluded that balancing test should be rejected.

The Court decided to adopt the test stated in *Suresh* that to comply with Article 33(2), the person in question must be believed 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 threat must be substantial.⁸³

The Court then analysed Article 33(2) with provisions in Article 3 of the CAT and Article 6 and Article 7 of the ICCPR. The Court decided that the Refugee Convention has not been amended by the ICCPR or the CAT.⁸⁴ While the prohibition on torture has been overwhelmingly supported as *jus cogens*, there is no support for the prohibition on refoulement to torture to be recognised as *jus cogens*.⁸⁵ Therefore, the Court stated Article 33(2) must be considered in its own terms.

⁷⁶ Ibid at [28]-[30].

⁷⁷ *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291.

⁷⁸ Ibid at [8].

⁷⁹ Above n10 at [31]-[32].

⁸⁰ Ibid at [36]-[38].

⁸¹ Ibid at [39]-[41].

⁸² Ibid at [40].

⁸³ Ibid at [45].

⁸⁴ Ibid at [47]-[50].

⁸⁵ Ibid at [51].

The Court noted, even if the provisions in Article 8 and Article 9 of the Bill of Rights have not addresses the issues on non reoulement directly, they have long been understood as applying to New Zealand if it is going to deport a person to torture.⁸⁶

Article 8 of the Bill of Rights states “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.

Article 9 protects the right not to be subjected to torture or cruel treatment, “everyone has the right not to be subjected to torture or cruel, degrading, or disproportionately server treatment or punishment.

Under Article 6 of the Bill of Rights, “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”, the Court decided that Section 72 shall be given a meaning consistent with the rights and freedom contained in the Bill of Rights, which includes the right not to be arbitrarily deprived of life and not to be subjected to torture, also the meaning should be in accordance with international law, both customary and treaty-based.⁸⁷ Since the Bill of Rights is an Act to affirm New Zealand’s commitment to the ICCPR, and Section 8 and Section 9 of the Bill of Rights closely tracks the Article 3 of the CAT, the interpretation and the practise of Section 72 of the then Immigration Act should be consistent with the ICCPR and the CAT as well.⁸⁸

Since the provisions in Article 8 and Article 9 of the Bill of Rights and the relevant provisions in the ICCPR and the CAT prohibit subjecting a person to torture, the Court concluded, based on its findings that deportation should be carried with prohibition on torture⁸⁹,

The Minister, in deciding whether to certify under Section 72 of the Immigration Act 1987 that the continued presence of a person constitutes threat to national security...in deciding whether to advise the Governor-General to order deportation under Section 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.

⁸⁶ Ibid at [79].

⁸⁷ Ibid at [90].

⁸⁸ Ibid.

⁸⁹ Ibid at [93].

B Conclusion

The New Zealand Court rejected practicing balancing test, with reasons that proportionality test was not called by the Refugee Convention, and it was rejected by many authorities. The Court further denied that non refoulement is jus cogens as it was not supported overwhelming as the principle of prohibition on torture. The Court decided to interpret Article 33(2) of the Refugee Convention on its own terms. Moreover, since Article 6 of the Bill of Rights requires if a meaning can be given to an enactment and that meaning is consistent the rights and freedoms provisions contained in the Bill of Rights, then that meaning should be given in preference. The Court therefore stated that Section 72, provisions on deportation should be interpreted and practiced in consistency with the prohibition on arbitrarily deprivation of life and torture provided by the Bill of Rights. Moreover, since the Bill of Rights is to affirm New Zealand's commitment to the ICCPR, and that Section 8 and Section 9 of the Bill of Rights are in track with Article 3 of the CAT, Section 72 should be interpreted and practiced in accordance with the ICCPR and the CAT as well.

The Court noted that the obligations for state parties not to subject a person to torture are absolute. The Court noted that New Zealand has incorporated the Article 33(2) of the Refugee Convention to its then Immigration Act. However, the Court did not specify the connections between the ICCPR and the CAT with New Zealand. This paper proposes that either the affirmation for the ICCPR by the Bill of Rights or the similar provisions on the prohibition on torture is sufficient enough to interpret that New Zealand has officially incorporated these two international instruments by enactment. Therefore, it is questionable, whether or not the ICCPR and the CAT is binding to the New Zealand courts. Clearly in *Zaoui*, the Court bound itself to these obligations to affirm New Zealand's commitment to international obligations.

As for balancing test, to cite Lord Bingham in *Brown v Stott*⁹⁰ on the limits to implying obligations into a human rights treaty such as the ECHR⁹¹,

In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. *This does not mean that nothing can be implied into the Convention.*

Similarly, as House of Lords observed in *Adan v Home Secretary*⁹²,

⁹⁰ *Brown v Stott* [2003] 1 AC 681.

⁹¹ *Ibid* at 703.

Inevitably, the final text will have been the product of a long period of negotiation and compromise...It follows that one is more likely to arrive at the true construction of [the Refugee Convention] by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concerning exclusively on the language. A broad approach is what is needed rather than a narrow linguistic approach.

Surely the Refugee Convention, on its plain terms, does not require balancing test. This does not mean, though, balancing test is not applicable when interpreting the Refugee Convention. The UNHCR Handbook suggested⁹³,

If a person has well-founded fear of very serious persecutions, eg, persecutions endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the appellant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.

We should bear in mind, though, in UNHCR's position, Article 1(f) and Article 33(2) are for state parties' interests in barring fugitives. This paper will turn to discuss this later.

Many countries do not agree with the UNHCR's balancing approach mainly on the grounds that public interest should not be the ground to justify a potential serious crime during balancing test. "The claimant to whom the exclusion clause applies is ex hypothesi in danger of persecution; the crime which he has committed to by definition "serious"...It is not the public interest that this country should become a safe haven for mass bombers."⁹⁴

The Court in *Zaoui*, clearly, rejected balancing test not on this ground. It then becomes problematic, this paper suggests, when the Court adopted the test in *Suresh* judging qualification for Article 33(2) on the ground that the person in question must be believed on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds the threat must be substantial.

⁹² *Adan v Home Secretary* [1999] 1 AC 293, 305[1998] at [54].

⁹³ UNHCR's Handbook on Procedure and Criteria for Determining Refugee Status. Available at <www.hrea.org>. at [156].

⁹⁴ *Gil v Canada* (Minister of Employment and Immigration) [1995] 1 FC 508, 534-35.

This paper submits, without balancing test, it is not easy to decide the seriousness of the threat, when the threat is out of the scope from what is described and implied by Article 1(F) of the Refugee Convention. It is more problematic, when the Court chose to bind itself by the international obligations on prohibition on torture, provided by the ICCPR and the CAT, then the relevant provisions in the Refugee Convention becomes either useless or unnecessarily widen. Because if a court decides to practice provisions stated in the ICCPR and the CAT, even if a person who is deemed as unworthy of being protected as a refugee under Article 1(F) of the Refugee Convention or a person who is deemed as applicable for states to refoule as he poses danger to a state's national security, the person will not be either striped of refugee status or refused of protection. In this case, the Refugee Convention's effect on a state party becomes powerless. The relevant provisions will become unwillingly widen by a state party's practice as well. Provided the Court in *Zaoui* found that the Refugee Convention has not been amended by the ICCPR and the CAT, its practice in dealing with contradiction of international obligations seems inconsistent with its findings.

More importantly, as the Court noted, Article 33(2) of the Refugee Convention has been incorporated into the then Immigration Act, the Court's finding violated its own domestic law, in some sense, by finding the obligations in the ICCPR and the CAT absolute. The Court has also introduced the absolute non refoulement obligation in *Zaoui*, which is potentially problematic for future case practice.

VI Conclusion

It is clear on examining practices by the United Kingdom, Canada and New Zealand on deporting a refugee back to potential torture, the international obligation on prohibition on torture is absolute. Each state's approach is different so are their obligations.

The United Kingdom as a member state of the Refugee Convention, the ICCPR, the CAT and more importantly, the ECHR, has to bind the prohibition on torture rule as it has incorporated the ECHR into its domestic law. No derogation is allowed in Article 3 of the ECHR and no reservation is allowed. Therefore, the United Kingdom cannot refoule a person back to his home country if there is a risk that person facing torture or arbitrarily deprivation of life in return.

Canada, as a member state of the Refugee Convention, the ICCPR and the CAR, decided to derogate from the absolute prohibition on torture provided by the ICCPR and the CAT, with the Court in *Suresh*'s finding that international obligations are not binding unless Canada has incorporated it into its legislation. Returning a person to torture is lawful as long as it is in accordance with the constitution, notwithstanding a breach or a potential breach of the ICCPR and the CAT.

New Zealand, as a member state of the three conventions above as well as Canada, decided not to practice its then domestic law which has incorporated the Refugee Convention, but to practice

its absolute obligation provided in the ICCPR and the CAT, which mirrors the Bill of Rights, where the rights and freedoms contained in it are not absolute but may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

That said, derogation is not permitted in jus cogens. However, in this paper's observation, a state can be able to derogate from a jus cogens if the jus cogens is not enacted by its legislation.

The paper now will turn to discuss the issues in the provisions of the Refugee Convention and the absolute obligation provided by the ICCPR, the CAT and similarly the UCHR.

This paper has addressed that Article 1(F) of the Refugee Convention is to bar the entry of refugee status, as persons who have committed particular serious crimes that the Refugee Convention refuses to protect. That said, the crimes against humanity now includes a large numbers of crimes⁹⁵, but the listed crimes are only crimes against humanity if "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"⁹⁶, defined to mean "a course of conduct involving the multiple commissions of acts ... against any civilian population, pursuant to or in furtherance of a state or organisational policy to commit such attack"⁹⁷. In which case, Article 1(F) bars fairly small amount of dangerous fugitives.

The problem is, the ICCPR and the CAT, as well as the ECHR protects everyone, even if a person committed a crime against humanity he still shall be protected from torture and arbitrarily deprivation of life. This paper is not suggesting that persons who are serious criminals should not be protected from torture or arbitrarily deprivation of life, rather this paper submits that persons from the protecting states' rights should be considered as well. The governments including the United Kingdom have submitted in their observations in *Ramzy*, that it is important in considering the rights of the citizens of the contracting state to have regard to the nature of the threat currently posed by terrorism.⁹⁸ It suggested that it needs to be clearly recognised that rights provided by the ECHR represent a significant extension of the provisions of the Refugee Convention.⁹⁹ Moreover, the governments stated the difficulties created by the judgment in *Chahal*¹⁰⁰,

The majority's judgment in *Chahal* creates real difficulties for contracting states in the context of protecting their citizens effectively against the threat of terrorism... If that

⁹⁵ International Criminal Court <www.icc-cpi.int>.

⁹⁶ Ibid.

⁹⁷ Ibid. See James James C Hathaway and Colin J Harvey "Framing Refugee Protection in the New World Disorder" 258 (2001) 34 Cornell International Law Journal at 265-266.

⁹⁸ Above n 87 at [7].

⁹⁹ Ibid at [9].

¹⁰⁰ Ibid at [11].

judgment is accepted as currently understood, in a case in which substantial grounds are shown for believing that there is a real risk of ill-treatment in a receiving state, it is not possible to remove a person believed to threaten the contracting state and its citizens through terrorism...

The Governments then submitted that in the context of deporting a person who poses a national security risk, the threat posed by the person whose removal is being considered can and should be a relevant factor to be weighed against the possibility and nature of torture and arbitrarily deprivation of life.¹⁰¹ “National security considerations can have an impact on the threshold to be overcome by a person who is to be removed.¹⁰²”

The submission has common with Canada’s approach in *Suresh*. This paper concludes, therefore, courts should be careful when deciding to bind themselves in absolute rights provided in international instruments, if they have not been incorporated into their domestic laws. In situations when derogations are prohibited, for the sake of states’ security and protection of its citizen, states can derogate from obligations, again when they have not been incorporated by their legislations.

This paper also submits, with comparison of approaches on practicing non refoulement in the United Kingdom, Canada and New Zealand, and with reasons submitted by the governments above, balancing test is the most reasonable approach when deciding whether or not returning a person to potential danger.

¹⁰¹ Ibid at [22].

¹⁰² Ibid at.

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