IN THE COURT OF APPEAL OF NEW ZEALAND

CA20/04

	BETWEEN	THE ATTORNEY-GENERAL Appellant
	AND	AHMED ZAOUI First Respondent
	AND	THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY Second Respondent
	AND	THE HUMAN RIGHTS COMMISSION Intervener

Hearing: 10-11 May 2004

Coram: Anderson P
Glazebrook J
William Young J

Appearances: T Arnold QC, K L Clark and A S Butler for Appellant
R E Harrison QC and D A Manning for First Respondent
W M Wilson QC and J M Mallon for Second Respondent
(not present, by leave)
R M Hesketh and S R Bell for Intervener

Judgment: 1 October 2004

JUDGMENTS OF THE COURT

Judgments

ANDERSON P

[1] Mr Zaoui is an Algerian National who entered New Zealand in December 2002 and claimed refugee status. The Refugee Status Appeals Authority upheld that claim in August 2003 in consequence of which Mr Zaoui has the benefit of the provisions of the Convention relating to the Status of Refugees 1951, to which New Zealand is a party. Notwithstanding, Mr Zaoui is embroiled with a formal process, instigated by the Director of Security, who holds office under the New Zealand Security Intelligence Act 1969, which could lead to his expulsion from New Zealand. Aspects of that process have been the subject of judicial review proceedings in the High Court. The comprehensive judgment of Williams J on the review is reported, *Zaoui v Attorney-General* [2004] 2 NZLR 339. I have also had the advantage of reading in draft the detailed and learned reasons for judgment of Glazebrook J on the present appeal. I think it appropriate, therefore, to confine my reasons for judgment to an overview and an expression of concurrence with Glazebrook J's reasons and conclusions.

[2] Article 33 of the Refugee Convention provides as follows:

> 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 judgment of a particularly serious crime, constitutes a danger to the community of that country.

[3] Article 33 of the Refugee Convention is recognised by s 129X of the Immigration Act 1987 in the following terms:

> (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 refugee status claimant, immigration officers must have regard to the provisions of this Part and of the Refugee Convention.

[4] The constraints on expulsion or return could be weakened in practice by a Contracting State unless it has a fair and formal procedure for determining whether, in any particular case, a refugee is deprived of protection by virtue of art 33.2. As a general proposition, for a system to be fair, it would have to recognise and apply the ordinary principles of natural justice which in New Zealand are affirmed by s 27 of the New Zealand Bill of Rights Act 1990 ('BORA'). A fundamental aspect of natural justice is the right to know, and to be accorded the opportunity of being heard in respect of, matters which might be considered in the course of a decision affecting a person's rights or interests. But it may sometimes be the case that the Contracting State's grounds for regarding a refugee as a danger to the security of that country are based on classified information, the disclosure of which, to others including the refugee facing refoulement, may compromise the source of the information or State security operations. This can produce a conflict between the refugee's rights to natural justice and the State's interest in its own security. In New Zealand there is a legislative mechanism intended to bring a measure of reconciliation between the conflicting rights and interests. This is provided in Part IVA of the Immigration Act 1987.

[5] The object of Part IVA, which is not restricted to refugees but applies generally to persons who may be liable to be prevented entry to or expelled from New Zealand is set out in s 114A in the following terms:

> The object of this Part is to -
>
> (a) Recognise that the New Zealand Security Intelligence Service holds classified security information that is relevant to the administration of this Act; and
>
> (b) Recognise that such classified security information should continue to be protected in any use of it under this Act or in any proceedings which relate to such use; and
>
> (c) Recognise that the public interest requires nevertheless that such information be used for the purposes of this Act, but equally that fairness requires some protection for the rights of any individual affected by it; and
>
> (d) Establish that the balance between the public interest and the individual's rights is best achieved by allowing an independent person of high judicial standing to consider the information and approve its proposed use; and

(e) Recognise that the significance of the information in question in a security sense is such that its approved use should mean that no further avenues are available to the individual under this Act and that removal or deportation, as the case may require, can normally proceed immediately; and thus

(f) Ensure that persons covered by this Act who pose a security risk can where necessary be effectively and quickly detained and removed or deported from New Zealand.

[6] The whole of Part IVA is appended to this judgment but it is convenient to summarise it at this point.

[7] The Minister of Immigration may be provided by the Director of Security with a security risk certificate in terms of s 114D(1) of the Immigration Act. The purpose of such certificate is to provide the Minister with information in light of which a decision may be made which could lead to the deportation or removal of a person from New Zealand. The process envisages the possession by the Director of classified security information which categorises the subject of the certificate in terms of stated security criteria. "Classified security information" is defined by s 114B in terms of a threat to the security, public order or public interest posed by an individual and in terms also of security reasons why such information cannot be disclosed to the individual or others. Relevant security criteria are defined in s 114C. Of particular relevance to Mr Zaoui is s 114C(6) which provides:

> 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.

[8] One of the important issues in this case is whether and if so to what extent international law is imported by or colours the meaning or connotations of s 114C(6) because of the reference to the Refugee Convention.

[9] The Minister may rely on a security risk certificate, initially as a preliminary decision and later as a final decision, with the ultimate consequence that immigration proceedings before Tribunals or Courts are bound to be dismissed and the subject of a certificate expelled. After the preliminary decision by the Minister and before any final Ministerial decision, the subject may apply for a review of the Director's decision to make a security risk certificate. Such review is carried out by the Inspector-General of Intelligence and Security, who holds office pursuant to the Inspector-General of Intelligence and Security Act 1996 ('I-G Act').

[10] The function of the Inspector-General on a review, prescribed by s 114I(4), is to determine whether -

> (a) The information that led to the making of the certificate included information that was properly regarded as classified security information; and
>
> (b) That information is credible, having regard to the source or sources of the information and its nature, and is relevant to any security criterion; and
>
> (c) When a relevant security criterion is applied to the person in light of that information, the person in question is properly covered by that criterion –
>
> and thus whether the certificate was properly made or not.

[11] If the Inspector-General decides that the security risk certificate was properly made, the Minister must make a final decision within three working days whether to rely on it. Such a decision leads to the ending of immigration related litigation and to the expulsion of a person as mentioned. But if the Inspector-General decides that the certificate was not properly made, the person who sought the review must be released from custody immediately and normal immigration processes resumed.

[12] In the present case the Director issued a security risk certificate in relation to Mr Zaoui on 20 March 2003. Three days later the Minister made a preliminary decision to rely on the certificate and issued a notice to that effect. Mr Zaoui immediately applied to the Inspector-General for a review. In memoranda dated 16 September 2003 and 7 October 2003 the Director, by counsel, informed Mr Zaoui's legal advisers and the Inspector-General of certain legal and factual matters on which the security risk certificate relied. Counsel for the Director and for

Mr Zaoui exchanged memoranda relating to the procedure which they considered the Inspector-General should follow in undertaking this wholly unprecedented review of a security risk certificate. On 6 October 2003 the Inspector-General, who was then the Honourable Laurence Greig and since 8 June 2004 has been the Honourable Paul Neazor, issued what has been termed an interlocutory decision indicating he had decided, amongst other things, that the Director did not have to provide Mr Zaoui with a summary of the classified security information and, further, that general issues of international jurisprudence were "beside the point".

[13] Mr Zaoui's response to the Director's indication of how he would conduct the review was an application to the High Court for judicial review. Whilst I think it is questionable whether the so-called "interlocutory decision" is, per se, a statutory decision in terms of the Judicature Amendment Act 1972, it nevertheless evidences a proposed exercise by the Inspector-General of his own statutory power of review. Therefore, it is envisaged by s 4(1) of the Judicature Amendment Act and unless judicial review is legally precluded, as counsel for the Attorney-General contends, this Court may appropriately examine and pass upon the issues raised in this appeal.

[14] In the High Court Williams J held that the Director must provide Mr Zaoui with a summary of the allegations against him, provided that information does not breach the definition of "classified security information" which "cannot be divulged". He said that the right of a person charged – or subject to a certificate, to know at least the outline of the allegations and the basis on which they are made, was a fundamental tenet of natural justice and should be implemented in Mr Zaoui's case as far as is possible, consistent with the definition of "classified security information".

[15] Neither the Crown nor Mr Zaoui have appealed against that part of the judgment of Williams J. This appeal has been brought by the Crown to determine whether the Inspector-General is amenable to judicial review at all in relation to his duties and powers in respect of a review of a security risk certificate. The Attorney-General submits, by counsel, that judicial review is precluded, as a matter of inference from the statutory scheme and because of the constraints on review specified in s 19(9) I-G Act and imported by s 114I(6)(b) Immigration Act. The

submission, if correct, would prevent the Court from reviewing the Inspector-General even for error of law.

[16] The bold submission that the High Court's supervisory jurisdiction in respect of the exercise of any statutory power, on the grounds of error of law, can be excluded at all, let alone by inference, is essentially untenable. Even before the affirmation of rights by s 27(2) BORA the Courts were vigilant to protect their responsibility to determine what the law is and to ensure that decision-makers acted lawfully and stayed within the limits of the powers entrusted to them by Parliament. That the High Court must regard as impliedly excluded its supervision in respect of any statutory power, to ensure its lawful exercise, let alone a power as relevant to personal liberty as the Inspector-General's power of review, is a proposition I refuse to accept. As to s19(9) I-G Act, this does not preclude review for lack of jurisdiction, which the Courts interpret as including any material error of law.

[17] Counsel for the Attorney-General further submitted that even if the Court had jurisdiction to review, the present intervention was premature because the Inspector-General may ultimately decide that the certificate was not properly made and, in any event, there is a right of appeal from the decision of the Inspector-General, on point of law, pursuant to s 114P.

[18] A particular submission for the Attorney-General, albeit not annexed to a ground of appeal, is that the function of the Inspector-General was to consider whether there were reasonable grounds for the Director to be satisfied that the information is classified security information and that the relevant security criteria are met. In my opinion s 114I(4) of the Immigration Act makes it plain that the Inspector-General is to come to his own view about the nature, credibility and relevance of information said to be classified, and to his own view as to whether a person in question is properly covered by a relevant security criterion. The Inspector-General's review is not in the nature of that type of judicial review which examines another person's decision for rationality. It is a process of independent assessment by the Inspector-General.

[19] Notwithstanding that right of appeal, I am satisfied it is apt to review the Inspector-General's process en route to an appealable determination. It is the case that, as a generalisation, the Courts are diffident about intervening by way of judicial review before a matter is ripe for an available appeal. But an exception must be admitted where the whole process en route to the appealable decision may miscarry, with grave consequences, unless judicial guidance is obtained. There are compelling arguments for intervention in this case where a review by the Inspector-General is entirely unprecedented, where the subject's liberty and convention rights are potentially jeopardised and where the individual must join issue with one hand tied behind his back by an assertion of the existence of classified security information.

[20] I would dismiss the Attorney-General's appeal.

[21] There is a cross-appeal on behalf of Mr Zaoui in two respects. The first relates to a finding by Williams J, as part of his ultimate reasoning, to the effect that the Inspector-General's errors had been contributed to by suggestions on behalf of Mr Zaoui as to the procedure to be followed. Mr Zaoui's counsel are understandably troubled by what seems a criticism of them and by the implication such a conclusion may have in relation to costs issues in due course. But, with respect, that is a matter insufficiently related to questions of relief in this appeal for the Court to take issue with the Judge.

[22] The core of the cross appeal is, and was appropriately dealt with as such in counsel's submissions, Williams J's findings summarised by the conclusion that:

> It is for the Inspector-General to decide what relevance and weight he accords the international human rights instruments and international human rights jurisprudence.

[23] The Attorney-General takes issue with that finding on the grounds that it envisages the Inspector-General going beyond his prescribed function and undertaking the responsibility, which is the Minister's alone, of deciding, not whether the security risk certificate was properly made, but whether an expulsion should occur by relying on it. Mr Zaoui, on the other hand, takes issue in terms amounting to the proposition that Williams J's finding did not go far enough in merely leaving the possibility, complained of by the Attorney-General, as an option.

In Mr Zaoui's submission the Inspector-General is obliged to consider whether there is a country where Mr Zaoui would be safe from the possibility of torture or death, and to take account of that in deciding whether to confirm the certificate. In my opinion, the finding is wrong, not because it did not go far enough but because international jurisprudence does not prescribe the Inspector-General's function; it colours the meaning or connotations of the prescription of his function as it relates to s 114C(6). The Inspector-General is bound by the correct interpretation of the prescription. The Attorney-General and Mr Zaoui may aptly take issue with Williams J's conclusion, but in each case their reasons are, in my view, off the point.

[24] In that respect I am entirely in agreement with the reasons given by Glazebrook J and with the conclusions she sets out at para [169].

[25] I have no doubt that the specific reference to the Refugee Convention in s 114C of the Act and in particular, for present purposes, subs (6), imports the international jurisprudence in respect of the Convention. Not only is it unthinkable that the legislature intended New Zealand's State obligations in relation to the Convention to be read down by implication, the subsection expressly stipulates for the terms of the Convention itself to inform the issue whether "there are reasonable grounds for regarding the person as a danger to the security of New Zealand". The legislature obviously intended that the Convention was to be honoured, not derogated from or ignored. Such honouring required it to be given effect consistent with international law. As the international jurisprudence expatiated by Glazebrook J shows, "danger to the security of New Zealand" has connotations of substantial threat and harm, a real connection between the individual and the threat and the necessity for an appreciable alleviation of the danger to be effected by deportation. I would allow the cross-appeal on this issue.

Result

[26] The appeal by the Attorney-General is dismissed and the cross-appeal by Mr Zaoui is allowed. There will be declarations on the cross-appeal in the terms expressed in Glazebrook J's conclusions at [169] (c)(d) and (e), and Mr Zaoui will have costs in the sum of $12,000 together with disbursements including the

reasonable travelling and accommodation expenses of two counsel. The question of the costs of the Intervener is reserved. The form of the declarations is:

> (1) Whether there are reasonable grounds for regarding the person as a danger to the security of New Zealand must be decided in terms of art 33.2 of the Refugee Convention. This follows from the explicit reference to the Refugee Convention in s 114C(6)(a) and requires the Inspector-General to consider whether there are reasonable grounds for regarding Mr Zaoui as a danger to the security of New Zealand in light of New Zealand's obligations under that Convention.
>
> (2) The security criteria in s 114C(6)(a) will be met only if there are objectively reasonable grounds based on credible evidence that Mr Zaoui constitutes a danger to the security of New Zealand of such seriousness that it would justify sending a person back to persecution. The threshold is high and must involve a danger of substantial threatened harm to the security of New Zealand.
>
> (3) There must be a real connection between Mr Zaoui himself and the prospective or current danger to national security with an appreciable alleviation of that danger capable of being achieved through his deportation.

GLAZEBROOK J

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Introduction

[27] Mr Zaoui is an Algerian national who has been recognised as a refugee in New Zealand. He is the subject of a security risk certificate issued by the Director of the New Zealand Security Intelligence Service (SIS). The Inspector-General of Intelligence and Security, by statute a retired High Court Judge, is reviewing the issue of that certificate. If it is confirmed, it could lead to Mr Zaoui's deportation from New Zealand.

[28] This appeal concerns the extent of the review function. The Crown contends that the focus of the Inspector-General's review is solely on issues of security. International human rights instruments and jurisprudence are not relevant, although they will be taken into account by the Minister of Immigration when deciding on the appropriate action to take if the certificate is confirmed. Mr Zaoui contends that the Inspector-General is required to weigh Mr Zaoui's human rights (and in particular his right not to be exposed to a real risk of death or torture) against the security interests of New Zealand when deciding whether the security risk certificate was properly made.

[29] There is a threshold issue raised by the Crown. It contends that judicial review cuts across the scheme of the legislation and that the proper course is for Mr Zaoui to wait for the Inspector-General's review to be completed and then, if the certificate is confirmed, seek leave to appeal to this Court on a point of law.

Statutory framework

[30] For ease of reference the main legislative provisions and the relevant international conventions referred to are set out in Appendix 1 to this judgment. Where texts and articles are referred to, the full reference is given only at the first citation and subsequently by author surname.

[31] The Immigration Act 1987 (the Act) was amended in 1999 in two relevant ways. The first, introducing a new Part VIA, provided a statutory basis for refugee status determination and related appeals and was designed to clarify the interface

between the Act and the United Nations Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967 (the Refugee Convention). Before these amendments, New Zealand implemented its obligations under the Refugee Convention through administrative and quasi-judicial processes. Under the Act, every claim to refugee status is determined by a refugee status officer, an official designated as such by the Chief Executive of the Department of Labour. There is then a right of appeal to an independent body, the Refugee Status Appeal Authority (RSAA). Mr Zaoui was granted refugee status by the RSAA on 1 August 2003.

[32] Under s 129X (contained in Part VIA of the Act), there is an absolute prohibition on the removal or deportation of refugees or refugee status claimants unless the provisions of art 32.1 or art 33.2 of the Refugee Convention allow the removal or deportation. Article 32 applies only to refugees (and probably refugee status claimants) who are lawfully in New Zealand - see the discussion in Gunnel Stenberg *Non-Expulsion and Non-Refoulement: The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees* (IUSTUS FÖRLAG, 1989) at 87-96 and 121–130.

[33] Mr Zaoui has not been granted a permit to enter New Zealand even though he is a recognised refugee. The relevant article therefore appears to be art 33, which provides as follows:

> (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 judgment of a particularly serious crime, constitutes a danger to the community of that country.

[34] The prohibition on refoulement, contained in art 33.1 of the Refugee Convention, is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all States, which arise when States follow certain practices generally and consistently out of a sense of legal

obligation. Thus it would normally be considered to form part of New Zealand law in any event – see Ian Brownlie *Principles of Public International Law* (6ed, Oxford, 2003) at 6-8 and 41-44. The New Zealand Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) at 24 makes the same point, although, for a note of caution, see Treasa Dunworth, "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2 NZJPIL at 7. For the question of whether the prohibition on refoulement is a principle of customary international law see also Guy Goodwin-Gill, *The Refugee in International Law* (2ed, 1996) at 143 and Sir Elihu Lauterpacht QC and Daniel Bethlehem, "The scope and content of the principle of non-refoulement: Opinion" in Feller, Türk and Nicholson, *Refugee Protection in International Law : UNHCR's Global Consultations on International Protection* (Cambridge, 2003) at para 216. I record here that this volume, to which I refer extensively in the course of the judgment, consists of papers and conclusions that were an outcome of the Global Consultations on International Protection, organised by the United Nations High Commissioner for Refugees (UNHCR) in 2000-2002 to reinvigorate the international refugee protection regime. They are a result of a series of expert roundtables that were held in 2001 as part of the Global Consultations.

[35] The Executive Committee of the UNHCR, indeed, in 1982, in *General Conclusion on International Protection* No 25 (XXXIII) 1982 at para (b), went so far as to observe that the principle of non-refoulement was progressively acquiring the character of a peremptory rule of international law or *jus cogens***,** the rules of international law that are accepted and recognised by the international community of States as a whole as rules from which no derogation is permissible - see Jean Allain "The *jus cogens* Nature of *non-refoulement*" (2002) 13 Int Jnl Refugee Law 533 at 534 and 539 and art 53 of the Vienna Convention on the Law of Treaties. For an explanation of the role and status of the Executive Committee see *Attorney-General v E* (judgment of Thomas J at para [94]) and *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (judgment of McGrath J at para [100]).

[36] Section 129X(1), however, appears wider than the art 33.1 prohibition on refoulement. This is because art 33.1 only prohibits expulsion or return to a country where the refugee's life or freedom would be threatened for a Convention reason,

either directly or indirectly, which is usually interpreted as covering all situations where the refugee risks any type of persecution for a Convention reason – see the commentary on art 33 of Professor Atle Grahl-Madsen in *Commentary on the Refugee Convention, Articles 2-11, 13-37* (1963; re-published by the Division of International Protection of the UNHCR, 1997) at para (4) and also Stenberg at 209 and 217-219 and James C Hathaway *The Law of Refugee Status* (Butterworths, 1991) at 6-11. I record here that Professor Grahl-Madsen's commentary, which is also referred to extensively in this judgment, was written during the eighteen months he spent as a Special Consultant in the office of the UNHCR. It is considered a seminal study on the Refugee Convention - see Lauterpacht and Bethlehem at para 125 and the *Foreword* to the reissue of Professor Grahl-Madsen's commentary.

[37] The effect of s 129X(1) seems to be that deportation or removal from New Zealand, even to a safe third country, is only allowed in the case of a refugee or refugee status claimant if art 32.1 or art 33.2 applies, that is, in the latter case, if there are reasonable grounds for considering the refugee or refugee status claimant a danger to the security of New Zealand or a danger to the community, having been convicted of a particularly serious crime. Article 33.2 is discussed in more detail later.

[38] In the case of art 32.1, expulsion of a refugee lawfully in New Zealand can only occur on grounds of national security or public order. For an analysis of the requirements of art 32 and the meaning of national security see Stenberg at 165-170. Stenberg considers that the term "security of the country" in art 33.2 is a more restrictive one than the term "national security" in art 32.1, which in itself must be interpreted restrictively – see 220-221 and see also Geoff Gilbert "Current Issues in the application of the exclusion clauses" in Feller, Türk and Nicholson 425, at 457-462. Grahl-Madsen, however, equates the two terms – at para 8 of the commentary on art 33.

[39] The second relevant amendment to the Act was the introduction of special procedures in cases involving security concerns through a new Part IVA of the Act. It is this part that is primarily at issue in this case. In the Explanatory Note to the Immigration Amendment Bill 1998, it was explained (at i) that one of the principal

objects of the Bill was to "establish a special security regime to protect sensitive security information that is relevant to immigration matters." The more detailed explanation said (at iii) that such special procedures were necessary to allow the information to be used without being disclosed, while protecting the rights of the individual through a process of independent scrutiny. The relevant passage is set out in full as follows:

> The immigration decision-making process and fairness generally require that the individual concerned has access to any information held about them. This requirement sometimes stops the New Zealand Security Intelligence Service from providing classified security information on an immigration application or decision even though that information may have a direct bearing on the matter. The Bill therefore establishes a special security process to allow for such classified security information to be considered in immigration decisions without putting the classified nature of that information at risk, while ensuring that the rights of the individual are protected through a process of independent scrutiny.

[40] The Select Committee report on the Bill recommended that the right of the person, who is the subject of a security certificate, to be heard should be referred to expressly in Part IVA, even though the legislation already allowed for that by inclusion of provisions from the Inspector-General's own Act (at vii).

[41] Section 114A sets out the objects of Part IVA. It recognises that the public interest requires that classified security information be able to be used in coming to decisions under the Act but that nevertheless such information should be protected from disclosure. Individual rights are catered for by providing for an independent person of high judicial standing to consider the classified security information and "approve its proposed use". The section provides that the use of the information should mean that no further avenues are available to the individual under the Act and that removal or deportation, as the case may require, could normally proceed immediately, allowing for the effective and quick removal of those posing a security risk.

[42] Classified security information is defined under s 114B(1) as information about the threat to security, public order or public interest posed by an identifiable individual which is held by the SIS and which, in the opinion of the Director, cannot be divulged to the individual in question or to other persons because two criteria are

met, as set out in paras (a) and (b) of the definition. Para (a) of the definition covers three situations: where the information might lead to disclosure of information, assistance or operational methods available to the SIS, where it is information about particular operations that have been undertaken by the SIS and where it has been provided to the SIS by the Government of any country or an agency of such a Government and the agency or Government does not consent to its disclosure.

[43] Para (b) covers four situations: where the disclosure of the information would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand, where it would prejudice the entrusting of information to the Government of New Zealand by any other Government or agency of such Government or by an international organisation, where it would prejudice the maintenance of the law, including the prevention, investigation and detection of offences and the right to a fair trial, and finally where it would endanger the safety of any person.

[44] Under s 114D, the Director of Security can provide a Security Risk Certificate to the Minister of Immigration where he or she holds classified security information that the Director is satisfied –

> a) Relates to an identifiable individual who is not a New Zealand citizen and is a person about whom decisions are to be, or can be, made under this Act; and
>
> b) Is credible, having regard to the source or sources of the information and its nature, and is relevant to the relevant security criterion; and
>
> c) Would mean, when applying a relevant security criterion to the situation of that person in light of that information, that the person meets the criterion.

[45] Section 114C sets out the relevant security criteria. Where a refugee or refugee status claimant is concerned at least one of the security criterion set out in s 114C(3) or (4) must be met, together with one or more of those set out in s 114C(5) and (6). The criteria relied on by the Director with regard to Mr Zaoui are that he constitutes a threat to national security in terms of s 72 of the Act (s 114C(4)(a)) and that there are reasonable grounds for regarding him as a danger to the security of New Zealand in terms of art 33.2 of the Refugee Convention - see s 114C(6)(a) of

the Act. There is no reliance on s 73 of the Act dealing with suspected terrorists – see s 114C(4)(b). Nor is there an allegation that Mr Zaoui is a danger to the community of New Zealand, having been convicted by a final judgment of a particularly serious crime in terms of s 114C(6)(b) of the Act.

[46] Under s 114G(1), the Minister is empowered to make a preliminary decision to rely on a security risk certificate and then must give a notice to that effect to the chief executive of the Department of Labour. All immigration processes, apart from refugee status determination proceedings, then immediately cease. The individual must be served with a copy of the notice and information relating to the security risk certificate and be notified of the right to apply for review of that certificate. Section 114Q provides that no person who is a refugee status claimant may be removed or deported from New Zealand until the refugee status of that person has been finally determined under Part VIA of the Act. Where the Minister does rely on a security risk certificate he or she is not obliged to give reasons for any decisions made in reliance on the certificate – see s 114F(2)(a). There is also no express obligation on the Director to give reasons for providing a security certificate, beyond identifying the relevant security criteria – see s 114D(2). The Director may be called by the Minister to give an oral briefing on the contents of the certificate but the content of the oral briefing is to be determined by the Director and may not be recorded or divulged by the Minister (s 114E).

[47] The procedure for the review of a security risk certificate is set out in s 114I. It is undertaken by the Inspector-General of Intelligence and Security, who must by statute be a retired High Court Judge. Under s 114I(4) of the Act, the function of the Inspector-General on a review is set out as being to determine whether:

> a) The information that led to the making of the certificate included information that was properly regarded as classified security information; and
>
> b) That information is credible, having regard to the source or sources of the information and its nature, and is relevant to any security criterion; and
>
> c) When a relevant security criterion is applied to the person in light of that information, the person in question is properly covered by the criterion –
>
> and thus whether the certificate was properly made or not.

[48] In conducting the review, the Inspector-General may, under s 114I(5), take into account any relevant information, including information that is not classified security information. He or she has all the powers conferred on him or her by the Inspector-General of Intelligence and Security Act 1996 (I-G Act) and the procedural provisions of that Act, with certain exceptions and with any necessary modifications, apply to the review – see s 114I(6). I note in particular that s 19(5) allows the Inspector-General to receive any evidence as he or she thinks fit, whether admissible in a Court of law or not and that s 19(8) of the I-G Act allows the Inspector-General to regulate his or her procedure in such a manner as he or she thinks fit, subject to the provisions of the I-G Act. I also note the powers in s 23 to require the production of documents and to summon and examine on oath any person the Inspector-General considers has relevant information.

[49] Under s 114H, a person who seeks a review under s 114I may be represented, whether by counsel or otherwise, in his or her dealings with the Inspector-General, must be given access, to the extent provided by the Privacy Act 1993, to any information about him or her other than the classified security information and may make written submissions to the Inspector-General about the matter, whether or not he or she also wishes to be heard pursuant to s 19(4) of the I-G Act. Section 19(4) provides:

> **19 Proceedings of Inspector-General**
>
> (4) The Inspector-General shall permit the complainant to be heard, and to be represented by counsel or any other person, and to have other persons testify to the complainant's record, reliability, and character.

[50] The decision of the Inspector-General as to whether the certificate is properly made or not must be accompanied by reasons, except to the extent that the giving of reasons would be likely to prejudice the interests that Part IVA seeks to protect in relation to the classified security information – see s 114J(4). Under s 114P the person can, by leave of this Court, appeal on a point of law against the Inspector-General's decision.

[51] If the security risk certificate is held not to have been properly made, then s 114J(2) requires that the person must be released from custody immediately and

the normal immigration procedures will then recommence. If the certificate is confirmed, however, the Minister is required under s 114K(1) to make a final decision within three working days whether to rely on the confirmed certificate and therefore to set in motion the deportation or removal procedures – see s 114K(4)(b). This applies unless the person is protected from removal or deportation by s 114Q or s 129X – see s 114K(4)(c). The Minister is not obliged to give any reasons for the decision – see s 114K(7). Section 114K(6) provides that, where s 114K applies, the person who is the subject of the certificate has no further right of appeal or review under the Act. The Minister does, however, have the power under s 114N to revoke a decision to rely on the certificate or, where a certificate has been confirmed by the Inspector-General, to decide nevertheless that the relevant security criterion should not be applied to the person.

Background facts

[52] Mr Zaoui arrived in New Zealand on 4 December 2002 via Vietnam and the Republic of Korea (the latter transit only) and sought refugee status. His application was declined by the refugee status branch of the Immigration Service on 30 January 2003 but, as noted above, granted by the RSAA on 1 August 2003.

[53] On 20 March 2003, the Director issued a security risk certificate to the Minister. In a memorandum dated 16 September 2003 counsel for the Director of Security indicated that the security risk certificate relied on para (c) of the definition of "security" in s 2(1) of the New Zealand Security Intelligence Service Act (SIS Act) relating to the protection of New Zealand from activities within or related to New Zealand that:

> (i) Are influenced by any foreign organisation or any foreign person; and
>
> (ii) Are clandestine or deceptive, or threaten the safety of any persons; and
>
> (iii) Impact adversely on New Zealand's international well-being or economic well-being.

[54] In a subsequent memorandum of 7 October 2003, the Director clarified the position by confirming that he did not rely on any adverse impacts on New Zealand's economic well-being. More significantly, I observe that the Director did not rely on paras (a) or (d) of the definition of security in the SIS Act, meaning presumably that he had no apprehension that Mr Zaoui was or would be involved in espionage or terrorism. This is confirmed by the fact that s 73 of the Act is not relied upon as being a relevant security criterion.

[55] In the memorandum of 16 September the Director also provided the following summary of grounds for the security risk certificate:

> 3.1 Mr Zaoui's Belgium and French criminal convictions;
>
> 3.2 the repeated decisions of the Belgium tribunals/courts to decline Mr Zaoui refugee status;
>
> 3.3 the decision of the Swiss Executive to expel Mr Zaoui from Switzerland;
>
> 3.4 classified security information providing background to those decisions;
>
> 3.5 classified security information relating to the period after Mr Zaoui left Switzerland;
>
> 3.6 classified security information being reports on materials in Mr Zaoui's possession on arrival and interviews conducted with him in New Zealand;
>
> 3.7 classified security information being an evaluation of the above material (in paragraphs 3.1 to 3.6 above).

[56] The Director has confirmed in his affidavit of 12 November 2003 at paras 25 and 26 that the SIS concerns about Mr Zaoui do not relate to his activities in Algeria and that the SIS has had no contact with the Algerian authorities about Mr Zaoui. The SIS has only been concerned with Mr Zaoui's activities since he has left Algeria.

[57] The Minister made a preliminary decision to rely on the Director's certificate on 23 March 2003 and issued a notice to that effect. Mr Zaoui received that notice on 27 March 2003 and immediately applied to the Inspector-General for a review in terms of s 114I of the Act.

[58] As this is the first time that a security risk certificate has been issued under Part IVA of the Act and consequently the first review by the then Inspector-General, there were various memoranda filed by counsel for Mr Zaoui and by counsel for the Director on the procedure that should be followed in the review. This led to the then Inspector-General, the Honourable Laurence Greig, issuing an interlocutory decision on 6 October 2003 and it is certain aspects of that decision that are the subject of this appeal. On 8 June 2004 the Honourable Paul Neazor became the new Inspector-General.

Interlocutory decision of the then Inspector-General

[59] There are two main aspects of the interlocutory decision of the Honourable Laurence Greig, the then Inspector-General, that were the subject of review proceedings in the High Court.

[60] The first issue was whether the Director is required to provide a summary of the classified security information to Mr Zaoui. The Inspector-General said that he was not – see para 35 of his decision quoted at para [65] below. Williams J held that he was and the Crown has not appealed against that ruling. The other aspect of the interlocutory decision, which is the subject of the Crown appeal and Mr Zaoui's cross-appeal, is the extent, if any, to which the Inspector-General is required to have regard to international human rights instruments and standards.

[61] On the latter topic, the Inspector-General rejected Mr Zaoui's submission that the cases of *Suresh v Canada (Minister of Citizenship & Immigration)* [2002] 1 SCR 3 and *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 should be taken into account. In the Inspector-General's view, those cases are not relevant as they were concerned with deportation while, in this case, the deportation decision is for the Minister. The focus of the Director, and thus the Inspector-General's role, is, in his view, limited to the question of whether there are reasonable grounds for regarding Mr Zaoui as posing a security danger to New Zealand. He said:

> [18]…The decision at this stage is the propriety of the security certificate. The credibility of the information and its appropriate classification and its application to the person in question. Of course deportation or removal is the underlying result and reason for the certificate but the decision on that is for the Minister. The Director's decision and consideration is focused on the security questions, the threat or danger to security of New Zealand. The IGIS [Inspector-General] is equally limited to that focus. This is even clearer in a case like the present when the applicant has been declared to have a refugee status which at once imposes on the Minister the considerations of the various international conventions as to refoulement and its limitations.

[62] Later, he reiterated his view that general issues of international human rights law were not relevant to his review. He said:

> [28] As I have already indicated my view is that the general issues of international jurisprudence are beside the point. My review is as to the propriety of the certificate by an examination of the credibility of the relevant classified information and its application to the appropriate criterion as relevant to the applicant. The deportation issue is for the Minister. I am bound to protect the security matters and thus debar the applicant from being aware of them.

[63] The Inspector-General accepted that the matter involved a serious question with possible grave consequences to Mr Zaoui and thus that it required a careful scrutiny of the material that was before the Director and all the material put forward by Mr Zaoui. He continued:

> [19]…That scrutiny is not limited to the date of the certificate. It must follow from the use of the present tense in reference to the credibility of the material and its application to the Applicant that a review must take into account at least information that the applicant may bring forward. Indeed the fact that he is given the opportunity to be heard and call evidence in his support reinforces that continuing scrutiny. It would be vain if the opportunity to give evidence had both [presumably the Inspector-General instead meant 'no'] real meaning or effect on the review performance.
>
> [20] Moreover the Director has a continuing obligation to keep under consideration his certificate since he has the right or duty to withdraw it. And the IGIS as well as the Director has the right to take into account evidence or information that would not be admissible in Court.

[64] He said, however, that the classified security information could not be provided to Mr Zaoui and that this was an area where the ordinary rights of fairness did not apply:

> [21] That said what is classified information as defined which was taken into account cannot be disclosed to the applicant or any body. The IGIS

> [Inspector-General] is entitled to receive it and to question the Director and has officers as to its credibility and application to the applicant but this is an area where the Bill of Right [sic] BORA and the ordinary right of fairness do not apply. The reason as recognised in this legislation by the objects and the procedure under the IGIS Act is that disclosure would jeopardise the operations of the intelligence service and the security of New Zealand as a whole.
>
> [22] The classified information as defined and as recognised and acknowledged by the IGIS will not be disclosed to the applicant or his Counsel. They will not have any opportunity to make representations about it. The IGIS will review it and giving it consideration will weigh it with the other information which is known to the applicant and which he furnishes to the IGIS.

[65] The Inspector-General said that he had completed the examination of the classified security information relied upon and was satisfied that it was appropriately claimed as classified, although his decision as to whether it was credible would wait until he had heard from Mr Zaoui. He said that no further details of that classified security information would be disclosed to Mr Zaoui. He also said that he was satisfied that the Director had been correct to adopt the definition of security in the SIS Act:

> [32] I have examined the files of the Director and have considered and perused the documents and other information that the director has relied upon in making his certificate. I have interviewed him and inquired from him the status of the information as to its classification his reliance on it and the reasoning he adopted in reaching his view that there was a threat to and a danger to security. It may be noted that as Inspector-General since 1996 I have had occasion to consider the classification of information and the principles of security and the meaning that this term has for the intelligence agencies and for New Zealand as a whole. I accept that the Director was correct to adopt the definition of security in the NZ Security Intelligence Service Act 1969.
>
> [35] I am satisfied that the information that led to the making of the certificate included information which is properly regarded as classified security information as defined in the Act. The nature of that information cannot and will not be disclosed to the applicant or his advisors. Nor is it appropriate to divulge any other information about that classified material.

[66] The Inspector-General also made some remarks as to the relevance of the decision of the RSAA granting Mr Zaoui refugee status as follows:

> [23] The information and evidence which the IGIS will take into account includes the decision of the RSAA. The actual decision as to the refugee status and the application of Article 1F is I believe binding on me. That is to say I accept that Mr Zaoui has the status of a refugee and that he is not a

> person to whom the Convention does not apply because the application of Article 1F. I am entitled to take into account and accept as evidence the findings of the RSAA which are part of the decision as to the status and the application of Article 1F. I am entitled to take into account other findings of the RSAA which might be described as obiter dicta but which it has given consideration after weighing the evidence before it. All this is subject to the caveat that the weight of that information as evidence is subject to the fact that the RSAA did not have either classified information before it and that it was not and did not have jurisdiction to considered [sic] and pronounce on the matters of threats or dangers to the security of the [sic] NZ: that is to say the application of Articles 32 and 33 of the Convention.
>
> [24] The reasons for the admission of the findings of the RSAA in my review include the fact that the review is made under the same Act and as part of the one amending act. The RSAA unlike any other authority is to continue its consideration when all other authorities and proceedings are to stop when a security certificate is given. That must give some precedence and special weight to the deliberations and findings of the RSAA. In any case its actual finding as to status is not subject to appeal and is the final word on that particular matter. I have read the RSAA decision and observe that it is a careful and thorough review and consideration of the material before it. It may be noted however that the material was not subject to any cross-examination or rebuttal. Indeed that is it seems the likely course of the hearing before me as to the evidence and submissions to be made by and on behalf of the applicant.

[67] The then Inspector-General's view that there would probably be no cross-examination of any of the witnesses called on Mr Zaoui's behalf was the subject of comment by Williams J in the High Court. He said:

> [94] …In essence, if the review proceeds as currently proposed, it seems the Inspector-General will have two bodies of information, each prepared without reference to or in ignorance of the contents of the other, unable to be measured or challenged by the other, and he is required on that material to determine whether the Certificate against Mr Zaoui was properly made.

[68] It is obviously for the Inspector-General to regulate his own procedure but I would not have thought that there was anything in the statutory scheme that would have ruled out cross-examination if the Inspector-General considered this the best way to test the evidence and was fair in all the circumstances (including the fact that Mr Zaoui has no access to the classified security information itself and therefore that any reciprocal cross-examination of the Director and other witnesses would necessarily be limited).

Decision of Williams J

[69] Mr Zaoui filed judicial review proceedings in the High Court challenging aspects of the interlocutory decision. The High Court judgment of Williams J is reported as *Zaoui v Attorney-General* [2004] 2 NZLR 339. As a preliminary point Williams J rejected the Crown's submission that the Court had no jurisdiction to review the Inspector-General's interlocutory decision. I examine this aspect of his decision in more detail below.

[70] On the first issue for the review, Williams J held that the Director should have been required to provide Mr Zaoui with a summary of the classified security information and as much information on the reasons the security risk certificate was issued as could be released without revealing the classified security information itself. He said:

> [91] And, while the Inspector-General's function in reviewing whether the Certificate was "properly made or not" is not an adversarial one in the traditional partisan sense, in evaluating the "classified security information" and its credibility and evaluating whether a "relevant security criterion" properly relates to Mr Zaoui, then, as fairness requires, up to the limit of the statutory bar on divulgment in s114B, he must be entitled to know what that "classified security information" is, why the Director regarded it as credible, why it was thought relevant to a security criterion, and what underlay the Director's conclusion that he was properly covered by a "relevant security criterion", that is to say why the Director concluded he constituted a threat to national security or a danger to the security of New Zealand in terms of Article 32.2 of the Refugee Convention. [Presumably the Judge meant art 33.2]….
>
> [106] …However, that "classified security information can be bowdlerised so as still to comply with the definition of "classified security information" that "cannot be divulged" but is still informative as the basis for the Certificate. That would appear to be indicated if not required by the "fairness" and "equally" requirements of s114A(c). Evidence suggested overseas jurisdictions achieve that objective in their summaries of "classified security information".
>
> [107] As far as it relates to Mr Zaoui the definition of "relevant security criteria" in s114C(4)(6) and the strong terms of s114F make clear that whether a Certificate has been properly issued in the sense of complying with an appropriate security criterion and the effect of the issue of such a Certificate is a serious matter for the individual named. The gravity of those matters may be taken as indicating that, to the extent permissible, Mr Zaoui should know what is raised against him in order to try to rebut it by material he is entitled to put before the Inspector-General and thus ensure the rigour of the process of deciding whether the Certificate was properly made. That is

> also supported by Mr Zaoui's entitlement to information and the other significant rights in s114H(2)….
>
> [110] Therefore, seeing s114I in the context of Part IVA particularly s114A, there is nothing to prevent Mr Zaoui receiving an appropriately worded summary of "classified security information" which affects him but which complies with the statutory prohibitions on disclosure, and nothing to say that natural justice has no application to him. Indeed, for the reasons discussed, the legislative indicia favour him, particularly in relation to the summary….
>
> [172] Therefore, all of the matters discussed in this judgment lead to the conclusion that :
>
> (a) s114I in combination s19 of the Inspector-General's Act do not debar:
>
> > (i) the provision to Mr Zaoui of a summary of the allegations against him which underlie the making of the Certificate provided that information does not breach the definition of "classified security information" which "cannot be divulged". BORA, natural justice, s114I and s19 of the Inspector-General's Act and Part IVA mandate the provision of such a summary consistent with overseas practice.
> >
> > (ii) the right of a person charged – or subject to a Certificate to know at least the outline of the allegations against them and the basis on which they are made is one of the most fundamental tenets of natural justice and should be implemented in Mr Zaoui's case as far as is possible consistent with the definition of "classified security information".

[71] Although these findings of Williams J were not the subject of this appeal, the Crown, in its submissions, said that the Director did not accept that he must supply a "bowdlerised" version of the classified security information, as that would compromise the security interests, which Part IVA seeks to protect. If the Crown took issue with that aspect of Williams J's ruling, then that should also have been the subject of appeal. It may be, however, that all that the Crown meant by its submission was that no information or summary can be provided to the extent that that would disclose the classified security information. If that was the submission, then it is undoubtedly correct.

[72] Having said that, as Williams J recognised, what Part IVA protects from disclosure is the classified security information itself. Given the major consequences that the confirmation of a security risk certificate can have for an individual, it is incumbent upon the Director to provide as much information as is possible, without risking the disclosure of the classified security information itself, as to why the

Director considers that the criteria set out in paras (a) and (b) in the definition of classified security information are met, as to the content of the classified security information and why it is considered to be credible and as to why the Director considers that the relevant security criteria are met. This is to enable the person to provide evidence and submissions to the Inspector-General on the review with the benefit of as much information as possible. This necessarily means that if, after his review of the material, the Inspector-General is of the opinion that a fuller summary should have been provided, then he must ensure that this is done.

[73] I also note that what is absolutely protected from disclosure is classified security information and not documents containing classified security information. It may thus be that, in some cases, what should be released is the document with the passages of classified security information deleted. This is a familiar process for the courts with interception warrants – see the discussion in *Garrow and Turkington's Criminal Law in New Zealand* at s 312H.1.

[74] It is trite, too, that, for information to be classified security information, it must satisfy both para (a) and para (b) of the definition. For example, it is not enough that the information might lead to identification of the operational methods available to the SIS, it must also prejudice the security or international relations of New Zealand or meet one of the other criteria in para (b) of the definition. It is not enough that a foreign Government or agency refuses consent to disclosure. Disclosure must also prejudice the entrusting of information to the Government of New Zealand or meet one of the other criteria in para (b). In that regard, absent evidence to the contrary, it would have to be assumed that the foreign Governments or agencies were acting reasonably. Therefore, if the information is of a type, for example, that those Governments or agencies would be required to disclose to Mr Zaoui in a similar judicial or quasi-judicial process in their own jurisdiction, then one would not have thought that disclosure in similar circumstances here would prejudice future information flows. The same applies if the information is classified only because of its immediate source rather than because of its content, as is suggested may often be the case in the affidavit of Mr Buchanan, sworn 30 October 2003 at para 15.

[75] The Inspector-General, in his interlocutory decision at [20] set out above at [63], suggested that the Director has a continuing obligation to keep his certificate under consideration. Without expressing any view on whether the Inspector-General is correct, I would comment that, if further classified security information came into the Director's hands and that information was provided to the Inspector-General, the Director would then be under a similar obligation with regard to that further information to provide a summary. I also comment that, even if such information was not to be passed to the Inspector-General, I would have thought a summary should still be provided if the further information could be used in giving advice to the Minister in the event that the security risk certificate was confirmed.

[76] I now move to an aspect of Williams J's decision that has caused concern to Mr Zaoui's counsel and which purported to form part of the cross-appeal. Williams J considered that the procedure for the review that had been suggested by Mr Zaoui's counsel had been causative of the Inspector-General's errors in his interlocutory decision. The procedure suggested by counsel for Mr Zaoui had the decision on whether the information was classified security information being made before hearing from Mr Zaoui. Williams J held that the Inspector-General is obliged to consider all information before coming to his decision on whether the certificate was properly made or not, including on whether the information was classified security information. While this is undoubtedly correct, it is understandable that Mr Zaoui's counsel wants the decision on whether the information was properly classified to be made (at least in a preliminary fashion) before all of Mr Zaoui's evidence is presented. This is because, if the decision of the Inspector-General is that the information is not classified security information, then it will be disclosed to Mr Zaoui. Mr Zaoui will then be able to direct his further evidence and submissions to that released information. The Inspector-General, in making his preliminary determination as to whether the information was properly regarded as classified security information, will of course have to consider any material put forward on behalf of Mr Zaoui on that subject. He will also be able to revise the decision if later evidence shows his preliminary assessment is erroneous.

[77] This brings me to another point, which is not the subject of appeal but on which the Crown again made submissions. The Crown submitted that the Inspector-

General's function on review is to consider whether or not there were reasonable grounds for the Director to be satisfied that the information is classified security information and that the relevant security criteria are met. If there were grounds upon which a reasonable Director would be satisfied that a criterion was met, the Crown's submission is that the Inspector-General may not substitute his own assessment for that of the Director's. This was not Williams J's view of the matter – see [86] – [90] of his decision.

[78] Lest silence be taken as acceptance of the Crown submission, I express the view that Williams J was correct and that the Crown contention must fail. Under s 114I(4)(a), the function of the Inspector-General is to determine whether the information was "properly" regarded as classified security information. It does not say that his function is to determine if it was "reasonably" so regarded. Equally, under s 114I(4)(b), the Inspector-General must determine whether the information is credible. Again it does not say the Inspector-General must determine whether it could be "reasonably" regarded as credible and the Crown did not in fact suggest that this could be a possible interpretation of this paragraph. Finally, in s 114I(4)(c), the term "properly" is again used in relation to whether the relevant security criteria are met. The overall test is whether the certificate was "properly" made or not. Again, the term "reasonably" is not used.

[79] This means that, if the Inspector-General comes to a different view from the Director, he is obliged to substitute his view for that of the Director. Even if the word "reasonably" had been used, it is by no means clear that this would have meant that the Crown submission would have succeeded. That the Inspector-General's review is a substantive review is appropriate, given that a confirmed certificate can lead to very serious consequences for an individual and that the individual in question has no access to the classified security information. This of course does not stop the Inspector-General treating, if he considers it appropriate, the Director's views with a degree of deference in recognition of the Director's security expertise. This may apply particularly to the question of whether information is properly classified, especially as the definition in the Act refers specifically to the opinion of the Director on that issue.

[80] It is significant too that, under s 114I(5), the Inspector-General may take into account any relevant information that does not itself meet the definition of classified security information. The Inspector-General is thus not restricted to the information taken into account by the Director. More importantly, the Inspector-General must also consider any relevant material provided by Mr Zaoui. This is information not available to the Director at the time of issuing the certificate, which by its nature will usually be issued on an ex parte basis. If there were no ability for the Inspector-General to substitute his own view for the Director's, Mr Zaoui's right to be heard would be rendered nugatory. That right, in itself, requires the Inspector-General's role to be wider than that contended for by the Crown. The obligation on the Inspector-General to give reasons in s 114J(4) and the right of appeal on points of law from the Inspector-General's decision in s 114P also support this view.

[81] I now arrive at the part of Williams J's decision that is the main subject of the Crown appeal and Mr Zaoui's cross-appeal. Williams J held that the Refugee Convention and other international human rights instruments were only peripherally relevant to the decision that the Inspector-General has to make. They were no doubt of clear relevance to the Minister's decision as to whether to deport Mr Zaoui or not, if the security risk certificate were upheld, but that was not the issue before the Court. The possible consequences to Mr Zaoui did mean, however, that the Inspector-General should subject the relevant security criteria to rigorous examination. Williams J said :

> [114] There can be no dispute that to the extent mandated by the statutory provisions, Mr Zaoui's position should be assessed conformably with the Refugee Convention. The difficulty he faces is the extent to which the statute, Part IVA in particular and s114I especially, limit the applicability of those instruments. The decision must be that though they inform construction of Mr Zaoui's rights and in particular the right not to be deported or refouled unless the Refugee Convention permits because he is protected from deportation under s129X, so far as Mr Zaoui is concerned, Part IVA and, in particular, s114I focus on a consideration as to whether the Certificate relating to Mr Zaoui was "properly" made in light of the information on which it was based and the material Mr Zaoui is entitled to place before the Inspector-General. The Refugee Convention is relevant but only of secondary relevance in those respects. The balance of the Act is of little assistance in this case as it deals with a number of distinct matters. …
>
> [139] Further protection for Mr Zaoui if his deportation is to be considered is the fact that "expulsion measures against a refugee should only be taken in very exceptional cases and after due consideration of all the circumstances"

> (UNHCR *Executive Committee Conclusion* No 7 1977 *"Expulsion"*), a stance strongly supported by leading texts in the area. They include Goodwin-Gill (*The Refugee in International Law*, 2nd ed 1996, p143) which says "the principle of non-refoulement has crystallized into a rule of customary international law, the core element of which is the prohibition of return in any *manner* whatsoever of refugees to countries where they may face persecution" (emphasis in original) and Lauterpacht and Bethlehem ("*The Scope and Content of the Principle of Non-refoulement"* in Feller Tűrk and Nicholson, *"Refugee Protection in International Law"* para 132, p125) who say "there is now an absolute prohibition on *refoulement* where there is a real risk that the person concerned may be subjected to torture or cruel, inhuman or degrading treatment or punishment" (see also paras 52, 53, p107 and their summary, para 144 p127-128). …
>
> [141] Those arguments are persuasive but this judicial review does not involve deportation. Such will only arise if the Certificate is confirmed, any appeal is dismissed and the Minister decides after taking the international human rights instruments and all other material into account, that Mr Zaoui should be deported because s129X does not protect him and Articles 32.1 and 33.2 permit his deportation. All that can be said at this stage is that all the matters discussed indicate that in deciding whether the Certificate was "properly made or not" the Inspector-General may consider it appropriate to subject the "relevant security criterion" aspect of his consideration to rigorous examination.

[82] Despite the finding that the decision of the Inspector-General was limited to deciding whether the certificate was properly made or not, Williams J held that the Inspector-General should have regard to international human rights instruments but the relevance and weight he accorded them was a matter for him. He said:

> [172] Therefore, all of the matters discussed in this judgment lead to the conclusion that :
>
> a) s114I in combination with s19 of the Inspector-General's Act do not debar: …
>
> (iii) Apart from the limitation that evidence called by Mr Zaoui – as opposed to evidence given by him – must relate to his "record, reliability and character", there is no statutory limitation on the evidence and submissions which he is entitled to put before the Inspector-General for consideration as part of the determination whether the Certificate was "properly made or not". That involves simultaneous consideration of material provided pursuant to the two statutory routes to that decision discussed in the judgment. Having regard to the history of this matter to date, it will undoubtedly involve reference to the international human rights instruments and international human rights jurisprudence.
>
> (iv) It is for the Inspector-General to decide what relevance and weight he accords the international human rights instruments and international human rights jurisprudence but having regard to the discussion on s114I, Part IVA, the balance of the Act, BORA in

> particular, the international human rights instruments and the international human rights jurisprudence, the comment by the Inspector-General (para [28]) that the "general issues of international jurisprudence are beside the point", cannot be a correct statement of the position.

[83] As an aside, I would comment that I would not see Mr Zaoui limited in the evidence he can call from other parties to evidence concerning his "record, reliability and character". Given the importance of the decision that the Inspector-General must make and the serious consequences for Mr Zaoui, it is vital that the Inspector-General make his decision based on all relevant evidence. Section 19(4) of the I-G Act would, therefore, be modified accordingly (see s 114I(6)(b) of the Act), a necessary modification to ensure that all relevant evidence is before the Inspector-General. This is not to suggest that all such evidence should necessarily be presented orally. In this regard, however, I note the powers of the Inspector-General, as set out in s 23(1) and (2) of the I-G Act, to require the production of documents and to summon and examine witnesses.

Events since Williams J's judgment

[84] As indicated above, after Williams J's judgment and, as a consequence of the decision of the High Court in *Zaoui v Greig* HC AK CIV-2004-404-000317, 31 March 2004 the then Inspector-General, the Honourable Laurence Greig, resigned. The new Inspector-General will of course not be bound by the previous Inspector-General's work, including the interlocutory judgment. Indeed, the new Inspector-General will have to recommence the review process. Despite this, it would be unsatisfactory if the new Inspector-General was left in a state of uncertainty as to whether or not the interlocutory decision of his predecessor was correct in law. I consider, therefore, that this appeal still has utility and neither of the parties sought to argue otherwise (subject obviously to the Crown's preliminary point relating to the unavailability of judicial review).

[85] I also observe that the Director, after Williams J's decision, supplied Mr Zaoui with a document, dated 27 January 2004 and entitled "Summary of Allegations and Reasoning of the Director of Security in Making a Security Risk

Certificate about Mr Ahmed Zaoui". In that document, the Director refers to a video that Mr Zaoui had made during his journey overland from Malaysia via Thailand and Laos to Vietnam and to a point of security concern relating to the veracity of an answer Mr Zaoui gave in an interview with an Arabic-speaking SIS officer (although the question this related to was not disclosed). It also refers again to the Belgian and French convictions and the expulsion from Switzerland and classified security information relating to those issues. Finally, the Director gives a summary of the reasons for considering Mr Zaoui a security concern in terms of the limbs of the definition of security relied on by the Director. The document says:

> His reasoning is as follows, in the form of comment on each section of the definition. It is based both on the publicly known security-related European decisions and convictions and related unclassified information and on classified security information which cannot be divulged.
>
> - *"The protection of New Zealand from activities within or relating to New Zealand that-"*
>
> It is reasonable to suspect that if permitted to settle in New Zealand Mr Zaoui would in due course undertake, facilitate, promote or encourage activities like those of which he was convicted in Belgium and France and/or which the Swiss government decided endangered Switzerland's domestic and external security. His presence here would attract, both directly (people who wish to work with him) and indirectly (people encouraged to believe that New Zealand is a safe haven for people with his sort of record), other people likely to engage in activities of security concern.
>
> - *"Are influenced by any foreign organisation or any foreign person; and"*
>
> Mr Zaoui is a foreign person. He has a long record of involvement with foreign persons and foreign organisations, including leadership. There is good reason to believe that any future activities he may undertake will be influenced by other foreign persons and/or by foreign organisations.
>
> - *"Are clandestine or deceptive, or threaten the safety of any person; and"*
>
> The activities of which he was convicted in Belgium and France were clandestine or deceptive or threatened the safety of persons. The Swiss government believed that his activity in Switzerland "may lead to acts of violence, and even attacks, in Switzerland". Activities of this kind in New Zealand, by Mr Zaoui or by others attracted to New Zealand by his presence here, could threaten the safety of New Zealanders.
>
> - *"Impact adversely on New Zealand's international well-being"*
>
> As part of the international community it is New Zealand's responsibility to take its proper part in controlling, defeating and preventing activities of

> security concern, such as those of which Mr Zaoui has been convicted in Belgium and France and for which he was deported from Switzerland. Consistent with this, it is a government objective to ensure that New Zealand is neither the victim nor the source of acts of terrorism or other activities of security concern, and to prevent New Zealand from being or becoming a safe haven for people who have undertaken, or may be intending to undertake, such activities.
>
> If Mr Zaoui, with his public record, were allowed to settle here, that would indicate that New Zealand has a lower level of concern about security than other like-minded countries. That would impact adversely on New Zealand's reputation with such countries and thus on New Zealand's international well-being.
>
> If Mr Zaoui or other people attracted to New Zealand by his presence here, were to undertake, facilitate, promote or encourage activities of security concern, either in New Zealand or elsewhere from within New Zealand, the adverse impact on New Zealand's reputation and thus on its international well-being would be compounded.

Availability of judicial review

Williams J's decision

[86] The Crown argued in the High Court that s 19(9) of the I-G Act, as imported with necessary modifications into the Immigration Act by s 114I(6)(b), precluded judicial review on the grounds advanced by counsel for Mr Zaoui. Section 19(9) provides:

> Except on the ground of lack of jurisdiction, no proceeding, report or finding of the Inspector-General shall be challenged, reviewed, quashed or called into question in any court.

[87] After reviewing the authorities, Williams J said that courts usually approach privative clauses on the basis that Parliament did not intend decision-makers' findings to be immune from review if the decision has been reached on an incorrect legal basis, whether due to error of law, unfairness or unreasonableness. Therefore, if the Inspector-General's interlocutory decision was materially incorrect in any such sense, it will have been reached with "lack of jurisdiction" as the authorities define the phrase and accordingly s 19(9) will be inapplicable.

[88] The Crown had submitted that the statutory scheme in this case limited this principle. Approaching the Inspector-General's jurisdiction as a matter of statutory

interpretation, Williams J acknowledged that other parts of the Act placed specific restrictions on judicial review, but said none of these were applicable to this step in the decision-making. As regards the judicial status of the Inspector, he saw this more as a mark of the sensitivity of the material than as an indicator against review. He noted the appeal right given to Mr Zaoui, should the certificate be upheld, but said that this too was at a different stage of the process. Finally, the Judge acknowledged the force in the Crown's submission that Part IVA processes required expedition, but was of the opinion that, although judicial review might slow the process, it would be preferable for the process to proceed on the legally correct basis and thus avoid potential repetition.

[89] The Crown had also argued that a judicial review proceeding at an early stage of the Inspector-General's review was premature. Williams J held that there was no basis to conclude that the proceeding should not continue because it is not "ripe" for review. He pointed out that there is ample authority to the effect that in New Zealand interlocutory decisions made during the course of exercising or proposing to exercise statutory power are amenable to judicial review at that point and there is express statutory authority to that effect. In addition, it was sensible that there be such power as it lessens the chance of legal error undermining the final decision.

Crown submissions on appeal

[90] The Crown began by accepting that the concept of jurisdiction/jurisdictional error is elastic, but emphasised that the meaning, scope and effect of a particular privative clause has to be assessed against its statutory setting. The Crown pointed to four features of the statutory context that in its submission militate against allowing the broad review contended for by Mr Zaoui.

[91] First, the Crown pointed to Part IVA's emphasis on speed, and submitted that judicial review of procedural rulings is simply inconsistent with this emphasis. Secondly, the Crown argued that Part IVA definitively spells out the rights of the person affected and submitted that, by allowing broad judicial review, the court would be cutting across the clear process Parliament has laid down.

[92] Thirdly, it was said that the availability of an appeal to the Court of Appeal by leave under s 114P(1) provides sufficient curial supervision. This section allows a person named in a security risk certificate that is confirmed under s 114J to appeal, with leave, against the decision of the Inspector-General on the grounds that it is "erroneous in point of law." The Crown cited *Peters v Davison* [1999] 2 NZLR 164 as illustrating the breadth, and therefore the sufficiency, of the Court of Appeal's jurisdiction on an "error of law" basis. Thus, the Crown argued, s 19(9) is a jurisdictional demarcation clause, not a true privative clause. It does not extend the Inspector-General's jurisdiction to make conclusive his decisions on legal issues. Rather it ensures that a decision, which is erroneous in law, is addressed by way of appellate review rather than through the supervisory jurisdiction of the High Court. Further, in the Crown's submission, not only does the existence of a statutory appeal generally point against allowing a full review, but a full review at this stage would undermine the deliberate control of the leave requirement in s 114P(1).

[93] Fourthly, the Crown differed from Williams J's assessment of the significance of the Inspector-General's status as a former High Court Judge. The requirement of judicial status is, in its submission, a guarantee that the Inspector-General will be experienced in making objective determinations and the value of this as the primary safeguard has been expressly recognised by Parliament. Further, as the Inspector-General is the functional equivalent of a High Court Judge, the Crown submitted that appeal to the Court of Appeal is more appropriate than High Court supervision.

[94] The Crown also reprised its submissions on prematurity. It submitted that reviewing the Inspector-General's processes before he has completed his review will be futile if he ultimately determines that the certificate was not properly made, especially since the Director has no right of appeal. In addition, there is the prospect of serial reviews throughout the process. In the Crown's submission, the concerns about prematurity are reflected in the North American jurisprudence dealing with the doctrine of "ripeness" as described in the decision of the US Supreme Court in *Abbott Laboratories v Gardner* (1967) 387 US 136, 148-149. While accepting that the ripeness doctrine is not recognised as such in New Zealand, the principles underlying the doctrine are, it is submitted, analogous and useful to the case.

Mr Zaoui will have a meaningful opportunity to complain later, if the certificate is confirmed, through appeal.

Submissions for Mr Zaoui

[95] Mr Harrison QC, for Mr Zaoui, submitted that two main principles could be extracted from the privative clause authorities. The first is that, if Parliament wishes to oust the supervision of the High Court, it must do so using clear and express language and secondly that any "material error of law" will be considered a jurisdictional error and thus amenable to review in terms of s 19(9). The Inspector-General's errors, in Mr Harrison's submission, are all material errors of law.

[96] Mr Harrison essentially supported the reasoning of Williams J, but made three additional points. Arguing that the decision of this Court in *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 should be followed, Mr Harrison observed that s 19(9) was enacted in 1996, in full knowledge of the law laid down in that case, a point which is further strengthened by the fact that the expression in s 19(9) "except on the ground of lack of jurisdiction" is analogous to that considered in *Bulk Gas*.

[97] Mr Harrison acknowledged the importance of s 114P(1) but said that this supports the contention that the Inspector-General was intended to be subject to correction for errors of law. In Mr Harrison's submission, there are perverse consequences if s 114P(1) is meant to be in place of review rights. Section 114P(1) gives no right of appeal to the Crown and in any event an appeal is available only when a certificate has been confirmed. One implication of this would be, he submitted, that there would be no means for the Crown to restrain the Inspector-General if, for example, he had decided to provide what is clearly classified security information to a person named in a certificate. Accordingly, he submitted that s 114P(1) is inadequate unless supplemented by the right to review.

[98] Mr Harrison addressed the Crown's expedition argument by observing that the purpose of Part IVA is not as one-sided as the Crown suggests. The statutory injunction in s 114I(3) is to conduct the review with all *reasonable* speed and

diligence and several other sections in Part IVA evince an intention to balance the public interest with individual rights.

[99] Finally, Mr Harrison submitted that s 19(9), when read consistently with s 27(2) of the New Zealand Bill of Rights Act 1990 (BORA), as required by s 6 of that Act, compels a restrictive interpretation of its privative effect – see Joseph, *Constitutional and Administrative Law in New Zealand (*2ed 2001) at 766-9. He pointed out that the 1985 White Paper proposing a Bill of Rights for New Zealand ((1985) AJHR A6) commented in para 10.172 that:

> The provision [what is now s 27(2)], however, sets out and gives enhanced status to the basic constitutional right to go to court to challenge the legal validity of government actions. It should serve as a check to privative clauses in Acts purporting to restrict the power of judicial review.

[100] In terms of the Crown's prematurity arguments, Mr Harrison's submission is that it is not a principle of New Zealand law, or indeed English law, that a participant in a statutory process, which confers a right of appeal against its ultimate outcome, cannot utilise judicial review to challenge an adverse preliminary or procedural ruling. To the contrary the staring point, in his submission is that Mr Zaoui had a right to apply for judicial review under s 4(1) of the Judicature Amendment Act 1972. The section applies notwithstanding any right of appeal and to the proposed exercise of statutory powers. In addition, in this case Mr Zaoui has no present right of appeal. Mr Harrison does not, however, dispute that the error of law alleged must be material.

Discussion

[101] The approach to privative clauses is now well established in New Zealand. Subject to the statutory context, material errors of law are generally considered to be jurisdictional errors. The errors asserted here are material errors of law. The failure to provide a summary is an allegation of a denial of natural justice. The failure to have regard to international human rights instruments is an allegation that the former Inspector-General had fundamentally misconceived his task. I agree with Williams J that there is nothing in the statutory context that militates against the conclusion that review was intended to be available with regard to such errors, despite s 19(9) of the I-G Act.

[102] It is true that there is an emphasis on speed in the statutory scheme but allowing a review to proceed on a totally wrong basis would in the long run cause as many delays as allowing judicial review at this stage. It must be remembered that Mr Zaoui's case is the first under Part IVA and it is to be expected that future reviews would be able to be conducted with much more alacrity. Further, review is only available for material errors of law and this must lessen the prospect of serial reviews.

[103] I do not accept the Crown submission that Part IVA spells out the complete process to be followed and therefore excludes review. If the Crown submission were accepted, this would mean that, short of a lack of jurisdiction in the narrowest sense, review would not even be available if those processes were not followed and the rights accorded by the Act to the person affected not respected in the review process. In any event, in my view the statutory scheme is designed to protect individual rights as far as is possible without divulging the classified security information. This necessarily points to the conclusion that review is available.

[104] Like Williams J, I do not consider that the appeal right, which is not even a present appeal right, excludes judicial review. I accept Mr Harrison's submission that there is nothing in the New Zealand authorities to suggest that this is the case. There is also merit in his submission that the restrictive scope of possible appeal suggests that judicial review is available. His observation, accepted by the Crown, that the Crown itself is incapable of challenging on appeal decisions of the Inspector-General, even though those decisions may have grave implications for national security, is a cogent one. This result cannot have been intended. In addition, I do not see the availability of judicial review as cutting across the leave requirement. Review is only available for material errors of law and leave to appeal would almost certainly be granted if such errors were made by the Inspector-General in his review.

[105] The point about the status of the Inspector-General appears to be makeweight. Even current High Court Judges fulfilling functions other than as High Court Judges, such as heading commissions of inquiry, are amenable to review. Finally on this part of the argument, I accept Mr Harrison's submission that, in the absence of clear words to the contrary (and here all the indicia point the other way),

the combination of s 6 and s 27(2) of BORA would in any event require the Court to construe "lack of jurisdiction" as including material errors of law and hold, accordingly, that review is not barred by s 19(9).

[106] Turning now to the Crown's submission on prematurity, I accept Mr Harrison's submission that the blanket application of the ripeness doctrine contended for by the Crown is excluded by the Judicature Amendment Act. The English cases are of limited value in this regard as they are based on a regime where leave is required to bring judicial review proceedings. The North American cases are also of limited value, given the different nature of the review function – see the discussion of this in the judgment of Hammond J in *Thompson v Treaty of Waitangi Fisheries Commission* CA247/03, 15 June 2004, at paras [215] – [219].

[107] Although, as the Crown observed, the Court retains a discretion to deny review, this discretion should be exercised on the basis of the factors of individual cases. It cannot operate as a blanket exclusion of review in all Part IVA cases. In this case, the importance of the points at issue means that relief should not be denied on discretionary grounds.

Relevance of international human rights instruments

Division of function between the Minister and the Inspector-General

[108] In order to decide to what extent (if at all) the Inspector-General is required to consider the international human rights dimension, it is first necessary to analyse the Act to define the roles played by the various people with input into the process. The main issue for the appeal is the delineation of the limits of the roles of the Inspector-General and the Minister under Part IVA. To state the opposing submissions shortly, the Crown's position is that Williams J went too far in his finding of limited relevance for the human rights dimension, while, for Mr Zaoui, Williams J did not go far enough.

[109] The Crown submitted that it is not the Inspector-General's role to consider any questions relating to deportation, including considerations relating to the

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987) and other human rights instruments. The submission was that the Inspector-General, like the Director, is concerned solely with security questions and any questions as to deportation are for the Minister.

[110] Mr Harrison, for Mr Zaoui, submitted that, as the confirmation of the security risk certificate will lead to deportation, subject to the Minister's discretion not to rely on it, then the Inspector-General must, when deciding whether or not to confirm the certificate, consider whether there is a safe third country for Mr Zaoui to be sent to. If not, the Inspector-General must balance the risk to the security of New Zealand against the risk to Mr Zaoui of possible torture and death. If a safe third country cannot be found, then the Inspector-General should only confirm the certificate in exceptional circumstances, if at all. Mr Harrison pointed to the very short time frame of three working days for the Minister to decide whether to rely on the certificate, if it is confirmed by the Inspector-General. This, it was submitted, makes it even more important that the Inspector-General has taken into account New Zealand's international obligations.

[111] Mr Hesketh, for the Human Rights Commission, made similar submissions. He submitted that, while it is accepted that the law reserves certain powers to the Minister in relation to the security certificate, which may involve taking New Zealand's international commitments into account, this does not preclude the Inspector-General from taking them into account as well. I note that the Commission stressed that, in making its submissions, it did not seek to appear as advocate for Mr Zaoui but was carrying out its role of providing oversight of the implementation of international human rights instruments at the domestic level.

[112] Section 114I(4) provides that the Inspector-General's role is to decide whether the security risk certificate issued by the Director in relation to Mr Zaoui was properly made. It is only when that certificate is confirmed that any issue of deportation or removal can arise but it is clearly for the Minister to decide whether or not to rely on the certificate if it is confirmed on review. It is only in the event that the Minister decides to rely on the certificate that deportation or removal can follow – see s 114K. The division of functions under the legislation is, therefore, clear and

the Crown is correct in its submission that issues of deportation or removal are for the Minister and not for the Inspector-General.

[113] Mr Harrison submitted that it is wrong to argue that the Inspector-General's review is uninvolved in and with the potential deportation of Mr Zaoui since s 114A(d) lists, as one of the objects of Part IVA, the recognition that the balance between the public interest and the individual's rights is best achieved by the Inspector-General's role to "consider the information and approve its proposed use". Section 114A(e) then refers to the "approved use" of the information, an intended consequence of which is that removal or deportation can proceed immediately. The Inspector-General cannot lose sight of that reality. I consider, however, that "approved use" means the provision of the information to the Minister with the knowledge that the information is sufficient to justify deportation or removal but it does not involve the consideration of whether or not deportation or removal will take place. In other words, the certificate is an essential part of the Minister's information on which he or she must judge whether to remove or deport. It is not the decision on removal or deportation itself.

[114] The Solicitor-General, Mr Arnold QC, assured the Court that the current Minister accepts, as his predecessor did, that, in making any decision on whether to rely on the certificate, he must take into account BORA, New Zealand's international obligations under the international human rights instruments to which it is a party, including the Convention Against Torture, and customary international law. If the certificate is confirmed, it seems to me that the Minister must also ensure that he has sufficient information on the classified security information that has been held to be credible and the exact nature of the security risk involved. Such information will be necessary to enable him to make a fully informed decision on the deportation or removal question, even though I note that the Act contains no explicit provisions as to how this should occur.

[115] There is merit in Mr Harrison's submission that there is a very truncated timeframe for the Minister to decide whether or not to rely on the certificate. A three day timeframe would clearly often be insufficient for a proper consideration of the relevant human rights issues, including whether or not a third country is safe and

whether or not deportation to that country will lead to indirect refoulement. There is also no requirement for the Minister to give reasons, which limits any possibility of effective review (if indeed review is available). This cannot, however, operate to transfer what are clearly functions appropriately vested in the Minister to the Inspector-General. I accept the Crown submission, for example, that the Inspector-General would not have the expertise, the advice or the diplomatic channels to assess whether a third country is safe.

[116] In this case, the position is ameliorated somewhat as the Minister has indicated willingness to receive and consider any material that may be put forward by Mr Zaoui on these topics before the review process is completed, although there will be issues with the availability of funding for this. Section 7(1)(m) of the Legal Services Act 2000 provides legal aid only for the Inspector-General's review. No questions relating to funding or to the procedure that should be followed by the Minister and the considerations to be taken into account are, however, before us and, accordingly, I make no further comments on these topics.

[117] The division of functions between the Inspector-General and the Minister also appears to fit in with Professor Grahl-Madsen's comments in para 4 of his commentary on art 32 of the Refugee Convention, where he says that it is clear that the authorities are free to decide that the expulsion of a refugee is justified because of considerations of national security or public order, that is to say that the removal of a refugee would have a salutary effect on those public goods, without having to consider whether it is possible to send him or her out of the country, either to another country of refuge or to the country of origin. It is only after the expulsion has been decided upon that it is necessary to deal with the question of where to send the refugee concerned. As indicated above, it is the latter issue that is the concern of the Minister, the former that of the Inspector-General.

Relevance of the Refugee Convention to the review

[118] This is not, however, the end of the matter as it is still necessary to consider whether, despite the limits of the Inspector-General's functions under Part IVA of the Act, international human rights instruments are nevertheless relevant. The Crown

submitted that international human rights instruments, including the Refugee Convention, are irrelevant to the Inspector-General's task, which is limited to considering security questions.

[119] Mr Harrison submitted, on the other hand, that international human rights instruments are of primary relevance. In his submission, the inclusion of the wording of a key provision of the Refugee Convention, art 33.2, in both of the relevant s 114C criteria must be treated as having the effect of a deliberate importation into Part IVA of New Zealand's overall obligations under art 33, as interpreted at international law. It necessarily follows that any assessment by the Inspector-General in the course of a security risk certificate review of the question whether Mr Zaoui is properly covered by the s 114C(6)(a) criterion must be undertaken and judged against a standard of compliance with art 33 as a whole. In particular, art 33.2 of the Refugee Convention requires a balancing of the seriousness of the risk to national security with the possible consequences to Mr Zaoui of confirming the security risk certificate. The greater the consequences to Mr Zaoui, the higher the risk to national security must be.

[120] Mr Hesketh's submission was in essence the same. He submitted that it should not be possible to invoke a provision (art 33.2) to exclude a person from protection to which they are otherwise entitled without first evaluating the context within which that protection arises.

[121] One of the matters to be decided by the Inspector-General is whether Mr Zaoui meets the security criteria relied upon by the Director. In Mr Zaoui's case, the Director considered that, under s 114C(6)(a), there are reasonable grounds for regarding Mr Zaoui as a danger to the security of New Zealand in terms of art 33.2 of the Refugee Convention and that he also, under s 114C(4)(a), constitutes a threat to national security in terms of s 72 of the Act.

[122] For a person, like Mr Zaoui, who is recognised as a refugee in New Zealand, there is little practical difference between the s 114C(4) and (6) criteria, given the prohibition in s 129X(1) on the removal or deportation of a person who is a refugee or refugee status claimant unless the provisions of art 32.1 or art 33.2 of the

Refugee Convention allow the removal or deportation. The relevant refugee deportation security criteria also require a combination of at least one criterion from each of s 114C(4) and s 114C(6). This must effectively limit the concept of a threat to national security under s 72, in the case of a refugee or refugee status claimant, to matters that would allow deportation under art 32.1 or art 33.2 of the Refugee Convention. This means that Mr Zaoui cannot be deported unless there are reasonable grounds for regarding him as a danger to the security of New Zealand in terms of art 33.2, that being the s 114C(6) criterion relied on by the Director.

[123] The explicit reference to the Refugee Convention in s 114C(6) must mean that whether there are reasonable grounds for regarding Mr Zaoui a danger to the security of New Zealand has to be considered in light of New Zealand's obligations under that Convention. It is difficult to conceive of a more direct way of importing these considerations into the statute. The Crown's submission that the Inspector-General is not required to consider the Refugee Convention is clearly untenable. The statute explicitly requires him to do so.

[124] This means that the Inspector-General's view that international human rights obligations are "beside the point" is incorrect, at least insofar as art 33.2 of the Refugee Convention is concerned. It also means that the Inspector-General's view that the Director was correct to rely on the definition of security in the SIS Act was wrong, at least insofar as that definition does not coincide with the manner in which the term is used in the Refugee Convention, as brought into New Zealand law by s 114C(6). I comment that the purpose of the SIS Act definition of security is to define the powers of the Security Intelligence Service and its Director. It would not be expected that such powers would be defined too restrictively as that would unduly constrain their activities. As will become clear from the analysis below, the definition of security in the SIS Act serves quite a different purpose from the term as used in the Refugee Convention.

[125] Equally, Williams J's comments on the relevance of the Refugee Convention at [114] of his judgment (quoted at [81] above), and the view expressed at [172](iv) (quoted at [82] above) that it is for the Inspector-General to decide what relevance and weight he accords international human rights instruments and international

human rights jurisprudence, cannot be correct, at least insofar as it extends to art 33.2 of the Refugee Convention.

[126] The primary focus must, however, be on the statutory wording, including the reference to art 32.2 of the Refugee Convention. While, as discussed above, the division of functions between the Inspector-General and the Minister means that it is for the Minister to consider the relevant human rights issues that relate to the question of deportation or removal, other international human rights instruments and jurisprudence and BORA may well be relevant to the Inspector-General's review. I note, for example, that there is a presumption that, so far as its wording allows, legislation should be read consistently with New Zealand's international obligations - see *New Zealand Airline Pilots' Association v Attorney-General* [1997] 3 NZLR 269, at 289 and the discussion in J F Burrows *Statute Law in New Zealand* (3ed, 2003) at 341-343. In addition, there is the explicit instruction in s 6 of BORA requiring an interpretation that is consistent with BORA where possible – see Paul Rishworth *The New Zealand Bill of Rights Act* (OUP, 2003) at chapter 4. It is not possible at this stage, however, to assess the extent to which they should be taken into account. I agree, therefore, with Williams J's assessment that the relevance of, and the weight to be attached to, those other instruments and BORA will be a matter for the Inspector-General to assess in the course of his review.

What does the Refugee Convention require?

[127] It is now necessary to consider the meaning of the phrase "reasonable grounds for regarding [a person] as a danger to the security of New Zealand". As stated above, it is clear from the use of the qualifying words, "in terms of article 33.2 of the Refugee Convention", that the meaning of the phrase is designed to conform to the meaning it bears under the Refugee Convention.

[128] Article 31.1 of the Vienna Convention on the Law of Treaties, (1155 UNT 331 entered into force 27 January 1980), requires treaties to be interpreted in good faith in accordance with the ordinary meaning of the words as seen in their context and in the light of the treaty's object and purpose. Context, under art 31.2, means the

treaty as a whole, including its preamble and annexes as well as any agreements or instruments made by the parties in connection with the treaty.

[129] This approach to interpretation is effectively the same as New Zealand's approach to the interpretation of statutes as set out in s 5 of the Interpretation Act 1999, even though the reference to context recommended by the Law Commission was taken out of that section before its enactment (*A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, 1990) paras 66-72). The deletion of the word "context" was because of a concern that such a reference may have brought in too wide a range of material. Even without a reference to context, however, it is clear that words in a statute should, as appropriate, be read in the context of the statute as a whole - see the discussion in Burrows, 155-167.

[130] Under the Vienna Convention, art 31.3, any subsequent agreement as to interpretation of the treaty and subsequent State practice can affect the interpretation of treaties. Relevant rules of international law applicable in the relations between the parties must be taken into account. It is also acceptable, under art 32, to have recourse to the *travaux préparatoires* (preparatory work for the treaty) as a means of interpretation, although Lauterpacht and Bethlehem, at para 47, suggest that with older treaties, such as the Refugee Convention, the preparatory work may be of more limited assistance, given the passage of time and subsequent developments in international law. These principles have no direct counterpart in New Zealand's Interpretation Act but see the discussion by Burrows at 168-199, 243-252 and 273 about reference to extrinsic materials, in particular the use of the legislative history as an aid to interpretation, the presumption as to conformity with international obligations discussed above, the statutory directions as to Bill of Rights consistent interpretations in s 6 of BORA and the principle of interpretation set out in s 6 of the Interpretation Act that enactments apply to circumstances as they arise.

[131] If there was, nevertheless, a divergence between the interpretation of a provision under domestic principles and that under the Vienna Convention, then it would be a matter of statutory interpretation to determine whether the domestic or international interpretation was meant to prevail. In this case, the statute clearly points to the international interpretation principles applying because of the direct

reference to the Refugee Convention but I do not consider that, in fact in this case, any questions of differences between domestic and international interpretation principles arise.

[132] The starting point for the interpretation of the phrase, "reasonable grounds for regarding [a person] as a danger to the security of New Zealand, in terms of Article 33.2 of the Refugee Convention" must be the words themselves, as seen in the context of the Refugee Convention and in light of its object and purpose, which is clearly of a humanitarian character. As pointed out by Lauterpacht and Bethlehem, at paras 49 and 50, the humanitarian purpose emerges quite clearly from the preamble to the Convention and also from its origin in the work of the Ad Hoc Committee on Statelessness. See also the discussion of the genesis of the Refugee Convention in Nehemiah Robinson *Convention Relating to the Status of Stateless Persons: Its History and Interpretation* (1955, Reprinted by the Division of International Protection of the UNHCR, 1997). It is also, they consider, clear from the very definition of the term refugee in art 1A(2) of the Convention and the protection afforded to refugees by articles 31-33.

[133] Using the methodology set out above, the meaning of the first part of the phrase, that requiring "reasonable grounds", is self-evident. It means that the State concerned cannot act either arbitrarily or capriciously and that it must specifically address the question of whether there is a future risk and the conclusion on the matter must be supported by evidence. The Courts in New Zealand, in the context of the issue of search warrants, have also emphasised the evidential requirement: see *R v Sanders* [1994] 3 NZLR 450. In Part IVA, the requirement that the Director of Security hold classified security information that is credible (s 114D) and the role of the Inspector-General on review in determining whether such information was properly regarded as classified security information and was credible (s 114I) necessarily requires an evidential foundation, even if the evidence would not be admissible in a court.

[134] Although the legislation in issue did not use the words, "reasonable grounds", the Canadian Supreme Court in *Suresh v Canada (Minister of Citizenship & Immigration)* [2002] 1 SCR 3 at para [90] said, of the power under the Canadian

Immigration Act for the Minister to issue a certificate that a person constitutes a danger to the security of Canada, that the grounds for the issue of that certificate had to be objectively reasonable and based on evidence. See also on this point *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, at [22] per Lord Slynn, [29] per Lord Steyn, [56] per Lord Hoffman and [65] per Lord Hutton and Lauterpacht and Bethlehem at para 168.

[135] The next issue is the meaning of the term "danger to the security of New Zealand". It is clear from the *travaux préparatoires* for the Refugee Convention that there was intended to be a margin of appreciation for States in the interpretation of that phrase: see Grahl-Madsen at para 6 of his commentary on art 33. Indeed, one would expect that views on security could well differ between States, depending on the particular circumstances of those States. This Court has emphasised the many differing uses of the phrase "security of New Zealand" in a large number of different statutory contexts: see *Choudry v Attorney-General* [1999] 2 NZLR 582, 594-595. Views as to what would constitute a danger to national security can also legitimately change over time. Nevertheless, the phrase "danger to the security of New Zealand" must be interpreted in good faith in accordance with the purpose of the Convention and the wording of the provision, including the use of the word "danger", which can be seen as a strong word, connoting the risk of exposure to harm (*Oxford English Dictionary*, 2ed, 1989). In my view, the potential harm involved must be serious.

[136] The Refugee Convention is designed to protect refugees from persecution and the non-refoulement obligation is central to this function. It is non-derogable in terms of art 42.1 and, as discussed above at para [34] has become part of customary international law. The importance of the non-refoulement obligation is recognised in the Act by its importation into s 129X and the references to art 33 in Part IVA itself (s 114C(5)(a) and (b), s 114C(6)(a) and (b), and s 114K(4)(b) and (c) and s 114Q). Against this background, it is clear that the art 33.2 exception must be interpreted restrictively. In my view, this means that the danger to security must be serious enough to justify frustrating the whole purpose of the Refugee Convention by sending a person back to persecution.

[137] This view is supported by the authorities. Grahl-Madsen (at para 5 of his commentary on art 33) points out that art 33.2 was introduced during the deliberations of the Conference of Plenipotentiaries (as convened by the General Assembly to consider a draft convention that had been prepared under the auspices of the Economic and Social Council by the Ad Hoc Committee on Statelessness and Related Problems - see Lauterpacht and Bethlehem at 98-99 and Robinson at 2). It resulted from an amendment proposed jointly by the delegates of France and the United Kingdom. Before then the principle of non-refoulement in the draft treaty had been expressed in absolute terms, as it had been in the 1933 Convention (The Convention of 28 October 1933 relating to the International Status of Refugees, 159 LoNTS 199). It was not, however, intended to be a wide exception. Grahl-Madsen comments, in para 7 of his commentary on art 33.2, that the United Kingdom delegate stressed that "the authors of the joint amendment had sought to restrict its scope, so as not to prejudice the efficacy of the article as a whole". See also Stenberg at 219-221.

[138] Lauterpacht and Bethlehem, too, consider that the exception must be viewed restrictively and that the danger to the security of the country in contemplation in art 33(2) must be taken to be very serious danger, rather than danger of some lesser order. They point to the humanitarian character of the Convention and to the importance of the protections afforded to refugees by arts 31 to 33 of the Refugee Convention. They note (at para 51) that the prohibition on refoulement in art 33 holds a special place in the Convention, being one of the articles where no reservation is possible (see art 42.1). They consider that the prohibition on refoulement embodies the humanitarian essence of the Convention and point out that it was reaffirmed in art VII(1) of the 1967 Protocol and that it has been emphasised on a number of occasions both by the Executive Committee and by the United Nations General Assembly (see for example A/RES/51/75, 12 February 1997). As already noted, the Executive Committee has even gone so far as to observe that the principle of non-refoulement is acquiring the character of a peremptory rule of international law – see Conclusion No 25 (XXXIII) 1982 at para (b).

[139] The Expert Roundtable organised by the UNHCR and the Lauterpacht Research Centre for International Law, University of Cambridge, on 9-10 July 2001

concluded, after consideration of the Lauterpacht and Bethlehem paper, that art 33.2 must be interpreted very restrictively, subject to due process safeguards and as a measure of last resort – see Feller, Türk and Nicholson at 179. This last resort requirement can be contrasted with the view expressed by Grahl-Madsen at para 7 of his commentary on art 33 that, if there is a serious danger to the security of the country, it is immaterial for the application of the provision whether the State may safeguard its interests by measures other than expulsion. However, he also suggested that refugees should perhaps be given fair warning and a chance to amend their ways before expulsion to a country of persecution is seriously considered.

[140] In the context of the Canadian Immigration Act, the Canadian Supreme Court saw a danger to the security of Canada, as requiring substantial threatened harm. It said (at para 90):

> 90 A person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

[141] It is also important to remember that the term used is “security”. Concerns about New Zealand’s reputation can be taken into account only if they impinge to such a serious extent on national security that they could fairly be said to constitute a danger to national security. In this regard it must be stressed that the granting of refugee status cannot be seen as an unfriendly act, either on the part of the State where there is a risk of persecution or by any other State - see Grahl-Madsen (at para (7) of his commentary on art 33) and Stenberg at 167. The same must apply to a State fulfilling its obligations under art 33.

[142] I observe here too the prospective nature of the danger in this context. In other words it is concerned with danger to the security of New Zealand in the present or the future, not the past, although past conduct may well be relevant in the assessment of whether a refugee is a danger to New Zealand now or in the future- see Grahl-Madsen in para 7 of his commentary on art 33 and Lauterpacht and Bethlehem at para 164.

[143] The next question is whether the danger to the security of New Zealand must be of a direct nature or whether it can include indirect threats of harm to New Zealand. Despite the lack of a definition and the margin of appreciation accorded to States, Grahl-Madsen considered the meaning of security of the country in art 33.2 to be clear. He says in para 8 of his commentary on art 33:

> The meaning of this term is rather clear. If a person is engaged in activities aiming at facilitating the conquest of the country where he is staying or a part of the country, by another State, he is threatening the security of the former country. The same applies if he works for the overthrow of the Government of his country of residence by force or other illegal means (e.g. falsification of election results, coercion of voters, etc), or if he engages in activities which are directed against a foreign Government, which as a result threatens the Government of the country of residence with repercussions of a serious nature. Espionage, sabotage of military installations and terrorist activities are among acts which customarily are labelled as threats to the national security.
>
> Generally speaking, the notion of "national security" or "the security of the country" is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned.

[144] Lauterpacht and Bethlehem, at para 165, endorse Grahl-Madsen's approach of requiring the security of the country of refuge to be in danger and not that of other countries. They say that this is evident from the clear words, as well as fitting in with the humanitarian policy of the Convention:

> 165. Also evident on its face, the exception addresses circumstances in which there is a prospect of danger to the security of the country of refuge. It does not address circumstances in which there is a possibility of danger to the security of other countries or to the international community more generally. While there is nothing in the 1951 Convention which limits a State from taking measures to control activity within its territory or persons subject to its jurisdiction that may pose a danger to the security of other States or of the international community, they cannot do so, in the case of refugees or asylum seekers, by way of *refoulement*. The exceptions in Article 33(2) evidently amount to a compromise between the danger to a refugee from *refoulement* and the danger to the security of his or her country of refuge from their conduct. A broadening of the scope of the exception to allow a country of refuge to remove a refugee to a territory of risk on grounds of possible danger to other countries or to the international community would, in our view, be inconsistent with the nature of this compromise and with the humanitarian and fundamental character of the prohibition of *refoulement*.

[145] In *Rehman*, Lord Slynn rejected the idea that the danger to security contemplated must be direct. Terrorist activity in another State could, in his view,

suffice as long as there was a real possibility of an adverse effect on the United Kingdom. Lord Steyn, Lord Hoffman and Lord Hutton made similar remarks and Lord Clyde agreed with Lord Hoffman. Lord Slynn said:

> [15] It seems to me that Mr Rehman is entitled to say that 'the interests of national security' cannot be used to justify any reason the Secretary of State has for wishing to deport an individual from the United Kingdom. There must be some possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported. But I do not accept that this risk has to be the result of 'a direct threat' to the United Kingdom as Mr Kadri has argued. Nor do I accept that the interests of national security are limited to action by an individual which can be said to be 'targeted at' the United Kingdom, its system of government or its people as the commission considered. The commission [the Special Immigration Appeals Commission] agreed ([1999] INLR 517 at 528) that this limitation is not to be taken literally since they accepted that such targeting –
>
> > 'includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the UK which affect the security of the UK or of its nationals.'
>
> [16] I accept as far as it goes a statement by Professor Grahl-Madsen in *The Status of Refugees in International Law* (1966):
>
> > 'A person may be said to offend against national security if he engages in activities directed at the overthrow by external or internal force or other illegal means of the government of the country concerned or in activities which are directed against a foreign government which as a result threaten the former government with intervention of a serious nature.'
>
> That was adopted by the commission but I for my part do not accept that these are the only examples of action which makes it in the interests of national security to deport a person. It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to

> be direct or immediate. Whether there is such a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made.

[146] The Canadian Supreme Court in *Suresh* took a similar approach. The Court considered (at para 87) that, in light of current conditions, support of terrorism abroad could have adverse repercussions on Canada's security, meaning that it could, depending on the circumstances, constitute an indirect danger to the security of Canada. It elaborated at para 88:

> 88 First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them in the terrorist activity. Second, terrorism itself is a worldwide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered. Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism. These considerations lead us to conclude that to insist on direct proof of a specific threat to Canada as the test for "danger to the security of Canada" is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security.

[147] The word "security" obviously encompasses the concepts discussed by Grahl-Madsen but I would incline to support the extension favoured by the House of Lords and the Canadian Supreme Court, as long as the indirect danger can sensibly be related to New Zealand. It must also meet the other requirements discussed above. If the danger cannot be sensibly related to New Zealand then it would not accord with the statutory wording – see on this topic the comments of Lord Slynn quoted above at para [145] and those of James C Hathaway and Colin J Harvey "Framing Refugee Protection in the New World Disorder" (2001) 34 Cornell Int LJ 257 at 290-291. For the exposition of a cautionary approach in assessing this danger see Obiora Chinedu Okafor and Pius Lekwuwa Okoronkwo in "Re-configuring *Non-refoulement*? The *Suresh* Decision, 'Security Relativism', and the International Human Rights Imperative" (2003) 15 Int Jnl Refugee Law 30, 38.

[148] The wording of the provision also requires the person him or herself to constitute a danger to national security. This clearly implies that there must be some element of causation. It was found by the RSAA (but without the benefit of the

classified security information) that all Mr Zaoui has ever done is to advocate the return of democracy in Algeria by peaceful means (see paras [543]-[545], [681], [795], and [980]). If that is the case, and absent evidence to the contrary, it would have to be assumed that he would be unlikely to advocate anything different in the future. It would, in such a situation, be difficult to imagine a legitimate process of reasoning that would find Mr Zaoui as causative of the actions of those who may in the future commit terrorist acts.

[149] Grahl-Madsen says (at para (5) of his commentary on art 32) that, as a general rule, it is the acts and behaviour of the refugee in his or her country of refuge, and not the public image of his or her personality, which may justify expulsion under art 32. These comments would appear to me also to be relevant to art 33.2, particularly because Mr Zaoui is a recognised refugee. The RSAA found that Mr Zaoui's adverse reputation had arisen, at least in part, from false information disseminated by Algeria (see paras [967] – [976]). To the extent that this is the case, he cannot reasonably be considered as responsible for his reputation and thus any possible adverse effect arising from that reputation cannot be seen as caused by him.

[150] Lauterpacht and Bethlehem agree that what is to be assessed is the danger posed by the individual in question. At para 176 they state that there must be a real connection between the individual in question, the prospective danger to the security of the country of refugee and a significant alleviation of that danger consequent upon the refoulement of that individual. If the removal of the individual would not achieve this end, the refoulement would not be justifiable. See also the comments of Grahl-Madsen on this topic at para (4) of his commentary on art 32.

[151] It is also important that the interpretation of the term "danger to the security of the country" takes account of a person's rights to freedom of association and expression as guaranteed in ss 17 and 14 of BORA. Obviously, under the Terrorism Suppression Act, the right to freedom of association will not extend to knowing participation in a terrorist group to enhance the ability of the group to carry out or participate in terrorist acts (s 13) but s 5(5) of that Act makes it very clear that merely engaging in any protest, advocacy or dissent is not in itself sufficient to engage the definition of act of terrorism.

[152] Gilbert even suggests (at 459-460) that freedom of expression should extend to support of armed opposition groups in the country of origin, leaving the refugee protected by the guarantee of non-refoulement. Okafor and Okoronkwo make a similar point (at 39). They say that there is no necessary linkage between the conduct of terrorist activities in a foreign country and the generation of a real risk to national security. This issue does not need to be explored further, however, given that the Director, in Mr Zaoui's case, does not rely on s 73 of the Act. Nor does he rely on para (d) of the definition of security in the SIS Act.

[153] The final issue is whether there is a sliding scale of seriousness of the risk to national security, depending on the possible consequences for a particular refugee of refoulement. If this were the case, then the Inspector-General would, if he confirms the certificate, be required to identify the actual level of risk to national security posed by Mr Zaoui over and above the minimum required to uphold the certificate, even if it is the Minister who must conduct the actual balancing exercise in terms of the principles discussed above. It is likely, however, that the Inspector-General should do this in any event in his decision on the review as the information would be necessary for the Minister to make a fully informed decision as to whether or not to rely on the certificate. The point is therefore largely academic.

[154] Most commentators say that there is a requirement of proportionality, basing this view on the general principle of proportionality in international law and on the comments of the United Kingdom delegate when promoting the addition of what became art 33.2. He said that States would have to "decide whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay" – see Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 16th mtg, UN Doc A/CONF.2/sr16 at 8 (1951) (statement of Mr Hoare of the United Kingdom) the Grahl-Madsen commentary on art 33, para 7 and Dr Paul Weis (ed) *The Refugee Convention, 1951* (1995, Cambridge University Press) at 342. Lauterpacht and Bethlehem consider the requirement for proportionality at para 178 where they say:

> 178. The requirement of proportionality will necessitate that consideration be given to factors such as:

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

b) the likelihood of that danger being realized and its imminence;

c) whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned;

d) the nature and seriousness of the risk to the individual from *refoulement*;

e) whether other avenues consistent with the prohibition of *refoulement* are available and could be followed, whether in the country of refuge or by the removal of the individual concerned to a safe third country.

[155] Professor Goodwin-Gill, in his text at 139-140, considers that principles of natural justice and due processes of law require something more than mere mechanical application of the exception. In his view, the application of art 33.2 ought always to involve the question of proportionality, with account taken of the nature of the consequences likely to befall the refugee on return. Gilbert also considers that there should be balancing of the refugee's fear of persecution against the danger he or she represents to the security of the country – see 462. He points out too that the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (HCR/IP/4 ENG/REV.1, reedited 1992) at para 156 assumes that such balancing is part of the art 33.2 process. I note that this approach was taken by the House of Lords in *Rehman* – see the remarks (with which Lord Steyn, Lord Clyde and Lord Hutton agreed) of Lord Slynn at para 16 and Lord Hoffman at para 56.

[156] Hathaway and Harvey disagree - at 294-296. Once the required standard is met, in their view, there is no need for any additional balancing. The required standards are, however, stringent. The concept of danger to the security of a country must be narrowly confined such that it would always, because of its seriousness, trump purely individuated risks. To require extra balancing risks lowering the standard. They say at 295:

> Moreover, while advocacy of a proportionality test before applying Article 33(2) is superficially humane, it may work in practice against a liberal view of the duty to protect refugees. Because of the implicit premise that some individuated forms of harm could be more compelling than national security or danger to the host community, a proportionality test risks trivializing the significance of the latter two concepts.

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

[158] It is worth finishing this topic with a discussion of deportation or removal to death or torture. Lauterpacht and Bethlehem consider that there is no ability at all, whether for reasons of national security or otherwise, to send a person back to direct or indirect danger of torture, death or cruel, inhuman or degrading treatment or punishment – see paras 154 and 218. This view was endorsed by the Expert Roundtable, which stated that, in cases of torture, there are no exceptions to the prohibition against refoulement – see Feller, Türk and Nicholson at 179. This was also the view taken by the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413, paras 101-104.

[159] The Canadian Supreme Court in *Suresh* took a somewhat different view. Despite the protections in the Canadian Charter of Rights and Freedoms and despite holding that it is likely that the prohibition on torture is a peremptory norm of international law (see paras 62-65), the Court held that, even though torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, including security interests, it could not rule out deportation to torture in exceptional cases. However, the Court commented that the balance would rarely be struck in favour of deportation where there is a serious risk of torture – see paras 76-78 of that decision. This decision has been subject to criticism in David Dyzenhaus (ed) *The Unity of Public Law* (Hart, 2004) by David Mullan "Deference from Baker to Suresh and Beyond – Interpreting the Conflicting Signals" 21, 44-46 and Jutta Brunnee and Stephen J Toope "A Hesitant Embrace: Baker and the Application of International Law by the Canadian Courts 357, 379-380. See also Okafor and Okoronkwo at 43-46 who consider that the Supreme Court moved from

an absolute condemnation of torture to a relativist condoning of the practice based on the desire to secure Canada from threats to its security, in their view a seriously flawed attitude that it is said should be rejected on the same basis as that of the rejection of the proposition, by a majority of Canadians, that criminals ought to be denied human rights protections.

[160] The question of whether or not there is in New Zealand an absolute prohibition on removal or deportation to torture and death, however, was not before us. It is the Minister who will decide where to send Mr Zaoui if he decides to rely on a confirmed certificate and, as indicated earlier, we are not faced with the question of what considerations the Minister must take into account. It would appear, in any event, from what the Solicitor-General said to this Court, that the Minister accepts that, before he decides to rely on a confirmed certificate, he needs to find a safe third country to send Mr Zaoui.

Role of the RSAA

[161] The other body having a role in the process related to Mr Zaoui has been the RSAA. As indicated above, the issuing of a security risk certificate stops all immigration related processes, apart from those to determine whether or not a person has refugee status. That decision, by statute, rests with the refugee status officers and, on appeal, with the RSAA. The Inspector-General, as he recognised in his interlocutory decision, is bound by the finding of the RSAA as to Mr Zaoui's status as a refugee, despite it being reached without access to the classified security information.

[162] An integral part of the refugee status decision-making process is to decide whether, despite a finding that the person has a well-founded fear of persecution, the exclusion criteria in the Refugee Convention apply. In Mr Zaoui's case, the exclusion criteria that had possible relevance were those contained in art 1F. Article 1F precludes a person from being granted refugee status where there are serious reasons for considering that:

> (a) He has committed a crime against peace, or 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 refugee 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.

[163] The RSAA concluded (at para [981] of its decision) that there were no serious reasons for considering that Mr Zaoui had committed crimes against humanity or serious non-political crimes and that he was, therefore, not excluded from the protection of the Refugee Convention. In particular, at [980], the RSAA, as indicated above, said that there is no evidence for considering that Mr Zaoui has committed acts of terrorism or that he is a member, let alone a leader, of the Algerian Groupe Islamique Armé (GIA) (which I note was automatically designated as a terrorist entity at the time of the enactment of the Terrorism Suppression Act following its inclusion in the United Nations list of terrorist organisations) or any other armed group. Terrorist acts (in the sense that they are defined in s 5(1) of the Terrorism Suppression Act 2002) would generally be encompassed within the term "serious non-political crime" and would therefore act as a bar to refugee status pursuant to art 1F - see the discussion in the Advisory Council of Jurists to the Asia-Pacific Forum of National Human Rights Institutions *Reference on the Rule of Law in Combating Terrorism* (May 2004) at 68 and the International Bar Association *International Terrorism: Legal Challenges and Responses – A Report by the International Bar Association's Task Force on International Terrorism* (2003) at 66-69.

[164] I note also that Security Council Resolution 1373 (S/RES/1373 (2001) *Threats to international peace and security caused by terrorist act*s), at para 3(f) requires States to ensure that refugee status is not granted to terrorists. That resolution also, however, required that measures taken for that purpose must conform with the relevant provisions of national and international law, including international standards of human rights. More recently, in S/RES/1456 (2003) *High-level meeting of the Security Council: Combating Terrorism*, the Security Council reiterated the obligations of States in combating terrorism to ensure that such

measures accord with international human rights, refugee and humanitarian law, as did the Bali Ministerial Regional Meeting on Counter Terrorism held on 5 February 2004. I observe again, however, that the Director did not in any event rely on para (d) of the definition of security in the SIS Act in Mr Zaoui's case. Nor did he rely on s 73 of the Act.

[165] In coming to its conclusion on art 1F, the RSAA examined in detail, and rejected as providing grounds for exclusion, Mr Zaoui's Algerian convictions, the decisions declining him refugee status in Belgium, the Belgian and French convictions, the deportation from Switzerland, non-classified information provided by the SIS, newspaper reports linking Mr Zaoui to the GIA in Algeria and other armed groups and an alleged admission as to membership by Mr Zaoui on arrival in New Zealand. It will be noted that many of these matters are relied upon by the Director as justifying the issuing of the security risk certificate.

[166] In his interlocutory decision, the then Inspector-General said that he considered himself bound by the RSAA decision on art 1F – see para [66] above. This is true in one sense in that the Inspector-General has no power to remove refugee status from Mr Zaoui. On the other hand, the RSAA did not have access to the classified security information in coming to its decision on art 1F. In addition, the decision of the Inspector-General on art 33.2 is different from that of the RSAA. Art 1F is concerned with past acts. Art 33.2 is only concerned with past acts to the extent that they may serve as an indication of the behaviour one may expect from the refugee in the future. The danger that the refugee constitutes must be a present or future danger – see the discussion above at para [142].

[167] I note here that the danger involved is not a present or future danger that a person may commit a crime as that can be dealt with by the ordinary criminal law. There is an added dimension. The anticipated crime must cause the person to be a danger to the security of New Zealand in the sense discussed above or a danger to the community. Grahl-Madsen makes this point when talking about the type of crimes which could constitute a danger to the community. See the discussion by Grahl-Madsen in para 10 of his commentary on art 33, Gilbert at 462 and Weis at

342. The point is equally applicable to the first limb regarding danger to the security of New Zealand.

[168] It would not be acceptable to allow the security risk certificate process to be used as a back door method of challenging the RSAA grant of refugee status to Mr Zaoui. The art 33.2 criteria must be met. Although Stenberg (at 225-226) considers that the two articles have the same standard of restrictiveness, this view is not widely held. Lauterpacht and Bethlehem, at para 147, see the threshold for refoulement under art 33.2 as being higher than that for refusal of refugee status under art 1F (and the standard under art 1F is in itself high: see Gilbert at 470). Indeed, they say that, if the conduct of a refugee is insufficiently grave to exclude him or her from the protection of the Refugee Convention by operation of art 1F, it is unlikely to satisfy the higher threshold in art 33.2. Hathaway and Harvey (at 320) agree that there is a higher threshold in art 33.2 but take a narrower view of the scope of art 1F than was taken by the RSAA, although the view of art 1F taken by the RSAA appears to be the one more generally held – see for example Gilbert, at 447-8.

Conclusion

[169] In summary, I conclude as follows:

a) Judicial review is available.

b) It is the role of the Minister to decide on questions of removal or deportation. This means that any evidence as to the risk of indirect refoulement to torture or persecution should be addressed to the Minister. Such evidence is not relevant to the Inspector-General's review.

c) Whether there are reasonable grounds for regarding the person as a danger to the security of New Zealand must be decided in terms of art 33.2 of the Refugee Convention. This follows from the explicit reference to the Refugee Convention in s 114C(6)(a) and requires the Inspector-General to consider whether there are reasonable grounds

for regarding Mr Zaoui as a danger to the security of New Zealand in light of New Zealand's obligations under that Convention.

d) The security criteria in s 114C(6)(a) will be met only if there are objectively reasonable grounds based on credible evidence that Mr Zaoui constitutes a danger to the security of New Zealand of such seriousness that it would justify sending a person back to persecution. The threshold is high and must involve a danger of substantial threatened harm to the security of New Zealand.

e) There must be a real connection between Mr Zaoui himself and the prospective or current danger to national security with an appreciable alleviation of that danger capable of being achieved through his deportation.

[170] I would dismiss the Crown appeal and allow Mr Zaoui's cross-appeal, to the extent set out above.

WILLIAM YOUNG J

Introduction

[171] I am in accord with the conclusions Glazebrook J expressed in para [169](a), (b) and (c) of the judgment which she has prepared. Accordingly I would dismiss the appeal and allow the cross-appeal to the extent specified in para [169](c).

The issues

[172] The main issues on this appeal are narrow:

(a) Was the interlocutory decision of the Inspector-General subject to judicial review?

(b) To what extent, if any, are international jurisprudence and human rights considerations (to which I will usually refer as "human rights considerations") relevant to the task of the Inspector-General?

[173] I will deal with each of these issues in turn.

Was the interlocutory decision of the Inspector-General subject to judicial review?

A preliminary comment

[174] The Solicitor-General challenges the judgment of Williams J on the threshold issue of the availability of judicial review. In this respect he repeated arguments advanced to and rejected by Williams J who then went on to decide the substantive issues presented by the case. Further, the Director has, in any event, complied (or purported to comply) with Williams J's judgment in that he has supplied Mr Zaoui with a document dated 27 January 2004 entitled "Summary of Allegations and Reasoning of Director of Security in Making a Security Risk Certificate About Mr Zaoui".

[175] This provides an inauspicious context for consideration of the Solicitor-General's arguments. If we were to hold that the judicial review proceedings were premature or not available at all, where would that leave the substantive conclusions of Williams J? The Solicitor-General would say that those conclusions would then be of no legal effect and this is no doubt so. But they would remain on the record as the considered conclusions of a High Court Judge and thus highly influential in respect of the processes to be conducted by the Inspector-General. A threshold justiciability argument which has been rejected at first instance is not a prime candidate for appellate review if there has already been a substantive determination of the case involving declaratory relief.

The arguments advanced by the Solicitor-General

[176] The Solicitor-General advanced two arguments:

(a) The processes of the Inspector-General are not subject to review at all.

(b) Alternatively, the present review proceedings are premature.

[177] The detailed submissions advanced by the parties in relation to these arguments are surveyed in the judgment prepared by Glazebrook J and there is no point in me repeating them in any detail.

Is judicial review available in respect of decisions of the Inspector-General?

[178] The Solicitor-General's argument in part turned on s 19(9) of the Inspector-General of Intelligence and Security Act 1996 and in part on the overall statutory scheme under Part 4A of the Immigration Act which he contended was inconsistent with the availability of judicial review proceedings.

[179] Interestingly, s 19(9) is in terms which are essentially the same as the privative clause considered in *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129. Parliament must therefore have intended that the words "except on the ground of lack of jurisdiction" would be construed in light of the approach taken by this Court in the *Bulk Gas Users* case and, earlier, by the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. This particular form of privative clause is therefore a legislative indication that judicial review on grounds of lack of jurisdiction (in the *Anisminic* sense) is available.

[180] Section 114H(4) of the Immigration Act excludes, in unequivocal terms, the possibility of judicial review of either a certificate or the Director's decision to make a certificate. In that context, the absence of any similar provision in relation to proceedings before the Inspector-General seems to me to be highly significant.

[181] Further, the directions of the New Zealand Bill of Rights Act 1990 and in particular, those expressed in s 6 and 27(2) point strongly in favour of the approach argued on behalf of Mr Zaoui.

[182] For the reasons which I have given and the other considerations referred to by both Anderson P and Glazebrook J in the judgments they have prepared, I am satisfied that the proceedings of the Inspector-General under Part 4A of the Immigration Act are generally amenable to judicial review.

Were the present review proceedings premature?

[183] I accept that prematurity considerations may provide a discretionary ground for declining review.

[184] The Crown has not challenged that part of the judgment of Williams J which was addressed to natural justice considerations. In any event, a prematurity argument would be of little substantive merit in this context. The Inspector-General intended to conduct his review on a basis which Williams J has held - and the Crown now appears to accept – was not going to comply with the rules of natural justice. It does not seem to me to have been premature of Mr Zaoui to seek relief in relation to what was proposed.

[185] I do, however, have some sympathy for the arguments advanced by the Solicitor-General. It is not possible to foresee all respects in which human rights considerations may become relevant to the inquiry to be conducted by the new Inspector-General. In that context, I see a need for caution in terms of reaching definitive conclusions as to the extent to which such considerations are relevant. I also share the Solicitor-General's uneasiness about the possibility of a series of challenges to interlocutory decisions of the Inspector-General which may have the consequence that the existing process is further delayed.

[186] That said, the Inspector-General did say that he regarded "general issues of international jurisprudence" as "beside the point" - an approach which has been specifically addressed by Williams J and, in part, found to be incorrect. If we were

to hold that the review proceedings were premature, the conclusions of Williams J would necessarily be influential in the way in which the new Inspector-General might be expected to conduct his inquiry (a point already made, see para [175] above). Further, as will become apparent:

(a) There are some aspects to the process which are obviously significantly affected by human rights considerations.

(b) There are some human rights considerations which counsel for Mr Zaoui wishes to deploy in the course of the inquiry but which are not relevant.

Given the importance of these issues to the structure and scope of the inquiry to be conducted by the Inspector-General, I see no harm, and indeed much good, in addressing them at this stage in the process.

[187] For those reasons I do not see Mr Zaoui's proceedings as premature.

The fate of the appeal

[188] Accordingly I agree that the appeal by the Attorney-General should be dismissed.

The relevance of human rights considerations

The approach of the former Inspector-General

[189] In his interlocutory decision of 6 October 2003 which has given rise to these proceedings, the former Inspector-General was addressing, inter alia, an argument from the Director that the human rights instruments relied on by Mr Zaoui were irrelevant (see para [14] of the decision) and also whether the Human Rights Commission should be permitted to participate in the process. The Inspector-General accepted that he had was required to deal with "a serious question with possible grave consequences to Mr Zaoui". But he did not see international conventions relating to refoulement as relevant to his task, as opposed

to that of the Minister. Likewise, in the context of the possible role of the Human Rights Commission, he considered that "general issues of international jurisprudence are beside the point".

[190] It is unclear to me whether the former Inspector-General had in mind the extent to which the legislation invoked the language of, and obligations under, the Refugee Convention. This point was dealt with explicitly in the written submissions advanced to him by Mr Harrison but is not specifically addressed in his decision.

The approach of Williams J

[191] The relevant passages from the judgment of Williams J are set out in the judgment prepared by Glazebrook J. There is no need for me to repeat them all. It is sufficient to record that Williams J saw human rights considerations as being primarily relevant in terms of the Minister's function should the certificate be confirmed. However, Williams J concluded that human rights considerations dictated that the Inspector-General subject the certificate to "rigorous examination" (see para [141] of his judgment). As well, he considered at para [172] of his judgment:

> … the determination whether the Certificate was "properly made or not" … will undoubtedly involve reference to the international human rights instruments and international human rights jurisprudence.

Accordingly he concluded, in the same paragraph of his judgment that:

> It is for the Inspector-General to decide what relevance and weight he accords the international human rights instruments and international human rights jurisprudence but having regard to the discussion on s114I, Part IVA, the balance of the Act, BoRA in particular, the international human rights instruments and the international human rights jurisprudence, the comment by the Inspector-General (para [28]) that the "general issues of international jurisprudence are beside the point", cannot be a correct statement of the position.

The competing arguments

[192] The Crown contends that Williams J went too far. Mr Zaoui argues that he did not go far enough.

[193] The arguments both ways are discussed at length in the judgment of Glazebrook J.

Evaluation

[194] Section 114C(6) specifically refers to and incorporates art 33.2 of the Refugee Convention. Also of relevance is s 129X(1) which precludes the deportation of Mr Zaoui unless art 33.2 is satisfied. International jurisprudence as to the meaning and effect of art 33.2 is therefore obviously relevant.

[195] I also agree that human rights arguments directed to the question whether Mr Zaoui should be deported in the event that the Inspector-General upholds the security certificate are for the Minister. On this aspect of the case I agree with the approach of the former Inspector-General, the views of Williams J in the High Court and the conclusions expressed by Glazebrook J in the judgment which she has prepared.

[196] In her judgment, Glazebrook J has discussed in considerable detail the respects in which she considers that human rights considerations (but particularly the international jurisprudence) influence or control the interpretation to be placed on art 33.2 of the Refugee Convention and the way it must be applied by the Inspector-General. I would prefer to express no definitive conclusions on these points, as they were not the subject of elaborate argument on both sides. This is the only aspect of the case on which I differ from Anderson P and Glazebrook J. I will, however, identify some issues which have arisen, or may in the future arise, in respect of which I regard human rights considerations as relevant.

[197] Article 33 of the Refugee Convention, at least if construed literally, would permit the deportation of Mr Zaoui if:

> … there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is [ie New Zealand]… .

It does not permit his deportation on the basis that:

> there are reasonable grounds for concluding that there are reasonable grounds for regarding him as a danger to the security of New Zealand.

Yet this is essentially what the Crown asserted when it argued that the scope of the Inspector-General's review was simply to determine whether there was a reasonable basis for the Director's certificate. So for this, as well as the reasons given by Anderson P and Glazebrook J in the judgments which they have prepared, I am satisfied that the Inspector-General's review involves a substantive reconsideration of the merits of the certificate given by the Director.

[198] The words "reasonable grounds for regarding" might not, in themselves, suggest a particularly exacting standard to be satisfied before refoulement is permissible under art 33. I am, however, firmly of the view that these words must be interpreted so as to ensure that New Zealand conforms to its obligations under the Refugee Convention and thus in light of the international understanding of what they mean (or imply).

[199] Likewise the concept of "danger to the security of" New Zealand requires an interpretation which is consistent with New Zealand's obligations under the Refugee Convention and, in respect of this question, international understanding as to the scope of art 33.2 necessarily comes into play.

Conclusion

[200] I am not sure that the approach which I favour differs in substance from that taken by Williams J in the High Court. His conclusions, however, were expressed in reasonably general terms whereas I would prefer to be explicit as to the respects in which human rights considerations will necessarily be directly relevant to the exercise the Inspector-General must carry out. So I favour allowing the cross-appeal but only to the extent contemplated by Glazebrook J in para [169](c) of her judgment.

APPENDIX

A: IMMIGRATION ACT 1987

2 Interpretation

(1) In this Act, unless the context otherwise requires,—
act of terrorism means—

> (a) Any act that involves the taking of human life, or threatening to take human life, or the wilful or reckless endangering of human life, carried out for the purpose of furthering an ideological aim; or
>
> (b) Any act involving any explosive or incendiary device causing or likely to cause the destruction of, or serious damage to, any premises, building, installation, vehicle, or property of a kind referred to in any of sections 298 to 304, except subsection (3) of section 298, of the Crimes Act 1961 [causing disease or sickness in animals and contaminating food, crops, water, or other products] , carried out for the purpose of furthering an ideological aim; or
>
> (c) Any act that constitutes, or that would, if committed in New Zealand, constitute, a crime against section 79 of the Crimes Act 1961 [sabotage], carried out for the purpose of furthering an ideological aim; or
>
> (d) Any act that constitutes, or that would, if committed in New Zealand, constitute, an offence against any of the provisions of the Aviation Crimes Act 1972 [hijacking and crimes relating to damage or destruction of aircraft and international airports] or the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980 [serious crimes such as murder, offences of violence and kidnapping committed against persons, for example diplomats, who are entitled to special protection from attack] or the Maritime Crimes Act 1999 or against section 7(1) or section 8(1) of the Terrorism Suppression Act 2002;

and includes the planning of any such act:

Part III—Deportation of persons threatening national security and suspected terrorists

72 Persons threatening national security

Where the Minister certifies that the continued presence in New Zealand of any person named 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.

73 Suspected terrorists

(1) The Minister may, by order signed by the Minister, order the deportation from New Zealand of any person where the Minister has reason to believe—

(a) That the person is a member of or adheres to any organisation or group of persons that has engaged in, or has claimed responsibility for, an act of terrorism in New Zealand; or

(b) That the person has engaged in, or claimed responsibility for, an act of terrorism in New Zealand; or

(c) That the person—

(i) Is a member of or adheres to any organisation or group of persons that has engaged in, or has claimed responsibility for, an act of terrorism outside New Zealand; or

(ii) Has engaged in, or claimed responsibility for, an act of terrorism outside New Zealand—

and that, by reason thereof, or for any other reason, that person's continued presence in New Zealand constitutes a threat to public safety; or

(d) That the person will, if permitted to remain in New Zealand, engage in, or facilitate the commission of, any act of terrorism.

(2) The Minister may at any time revoke a deportation order made under this section.

Part IVA—Special procedures in cases involving security concerns

114A Object of Part

The object of this Part is to—

(a) Recognise that the New Zealand Security Intelligence Service holds classified security information that is relevant to the administration of this Act; and

(b) Recognise that such classified security information should continue to be protected in any use of it under this Act or in any proceedings which relate to such use; and

(c) Recognise that the public interest requires nevertheless that such information be used for the purposes of this Act, but equally that fairness requires some protection for the rights of any individual affected by it; and

(d) Establish that the balance between the public interest and the individual's rights is best achieved by allowing an independent person of high judicial standing to consider the information and approve its proposed use; and

(e) Recognise that the significance of the information in question in a security sense is such that its approved use should mean that no further avenues are available to the individual under this Act and that removal or deportation, as the case may require, can normally proceed immediately; and thus

(f) Ensure that persons covered by this Act who pose a security risk can where necessary be effectively and quickly detained and removed or deported from New Zealand.

114B Definitions

(1) In this Part, unless the context otherwise requires,—
certificate, or security risk certificate, means a certificate made under section 114D:
classified security information means information about the threat to security, public order, or public interest posed by an identifiable individual which is held by the New Zealand Security Intelligence Service, being information which, in the opinion of the Director, cannot be divulged to the individual in question or to other persons because both—

(a) The information—

(i) Might lead to the identification of, or provide details of, the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the New Zealand Security Intelligence Service; or

(ii) Is about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the Service or of another intelligence and security agency (as defined in section 2 of the Intelligence and Security Committee Act 1996); or

(iii) Has been provided to the New Zealand Security Intelligence Service by the government of any other country or by an agency of such a government, and is information that cannot be disclosed by the Service because the government or agency by which that information has been provided will not consent to the disclosure; and

(b) Disclosure of the information would be likely—

(i) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or

(ii) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country or any agency of such a government, or by any international organisation; or

(iii) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

(iv) To endanger the safety of any person:

Director, or Director of Security, means the Director of Security within the meaning of the New Zealand Security Intelligence Service Act 1969:

Inspector-General means the Inspector-General of Intelligence and Security established and appointed under the Inspector-General of Intelligence and Security Act 1996, and, in any case where the Inspector-General is not available, within a time that will ensure that any review is completed with all reasonable speed, to review a decision of the Director of Security, includes a person appointed under subsection (2) to act as Inspector-General:

relevant security criterion, or security criterion, has the meaning given by section 114C.

(2) The Governor-General, on the recommendation of the Prime Minister following consultation with the Leader of the Opposition, may appoint a person who has previously held office as a Judge of the High Court of New Zealand to act as Inspector-General in any case where the Inspector-General is not available, within a time that will ensure that any review is completed with all reasonable speed, to review a decision of the Director of Security under this Part.

(3) The fact that a person appointed under subsection (2) exercises or performs any function or power of the Inspector-General under this Part is conclusive evidence of the authority of the person to do so, and no person may in any proceedings question whether the occasion requiring or authorising the person to exercise or perform the function or power has arisen or has ceased.

114C Relevant security criteria

(1) For the purposes of this Part, relevant security criterion means any of the following, as the case may require: …

(d) A relevant refugee removal security criterion within the meaning of subsection (5), where a decision is to be taken as to whether a person in New Zealand who is a refugee status claimant or refugee—

(i) Who holds a temporary permit should have that permit revoked and a removal order served; or

(ii) Who holds a limited purpose permit should have that permit revoked and a removal order served; or

(iii) Who is in New Zealand unlawfully should be served with a removal order:

(e) A relevant refugee deportation security criterion within the meaning of subsection (6), where a decision is to be taken as to whether a person in New Zealand who is a refugee status claimant or refugee—

(i) Who holds a temporary permit or a limited purpose permit or a residence permit should be deported; or

(ii) Who is exempt under this Act from the requirement to hold a permit should be deported; or

(iii) Who is in New Zealand unlawfully should be deported….

(3) The relevant removal security criteria are any of the criteria set out in section 7(1)(e), (f), (g)(i), and (h) (which relate to terrorism and danger to security or public order).

(4) The relevant deportation security criteria are as follows:

(a) That the person constitutes a threat to national security in terms of section 72:

(b) Any of the criteria set out in section 73(1) (which relates to suspected terrorists).

(5) The relevant refugee removal security criteria are a combination of any 1 or more of the criteria listed in subsection (3) as relevant removal 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.

(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.

(7) More than 1 relevant security criterion may be applicable at the same time to a particular person, but nothing in this section requires more than 1 relevant security criterion to be applied under this Part in any particular case (except to the extent that

subsections (5) and (6) require a combination of criteria in relation to refugees and refugee status claimants).

114D Director of Security may provide Minister with security risk certificate

(1) If the Director of Security holds classified security information that the Director is satisfied—

(a) Relates to an identifiable individual who is not a New Zealand citizen and about whom decisions are to be, or can be, made under this Act; and

(b) Is credible, having regard to the source or sources of the information and its nature, and is relevant to the relevant security criterion; and

(c) Would mean, when applying a relevant security criterion to the situation of that person in light of that information, that the person meets the criterion,—

the Director may provide a security risk certificate to the Minister to that effect.

(2) A certificate must be in writing and must clearly identify the relevant security criterion or criteria that it relates to.

(3) In making a decision under subsection (1) the Director may take into account any relevant information that does not itself meet the definition of classified security information.

(4) For the purposes of applying this section and this Part, any reference to the belief or opinion of the Minister in the wording of a particular security criterion is to be read as including an alternative reference to the belief or opinion of the Director.]

114E Minister may require oral briefing from Director on contents of certificate

(1) On receipt of a security risk certificate the Minister may call for an oral briefing from the Director on the contents of the certificate.

(2) The content of the oral briefing is to be determined by the Director, and may not be recorded by the Minister or on the Minister's behalf.

(3) The Minister must not divulge the contents of the briefing to any other person, and may not be called to give evidence in any court or tribunal in relation to anything coming to the Minister's knowledge as a result of the briefing.]

114F Effect of certificate

(1) The existence of a security risk certificate is evidence of sufficient grounds for the conclusion or matter certified, subject only to a decision of the Inspector-General on a review conducted under section 114I, and the Minister may rely on the

certificate when making a decision under this Part whether or not the Minister receives an oral briefing under section 114E.

(2) Where the Minister does rely on a certificate,—

(a) The Minister is not obliged to give reasons for any decision made in reliance on the certificate, and section 23 of the Official Information Act 1982 does not apply; and

(b) The Minister may not be compelled in any proceedings to provide those reasons or any information relating to them or to any briefing under section 114E, other than the information contained in the certificate itself.

114G Effect where Minister makes preliminary decision to rely on certificate

(1) If the Minister makes a preliminary decision to rely on a security risk certificate in relation to an individual, the Minister must give a notice to that effect to the chief executive of the Department of Labour.

(2) The effect of the giving of a notice under subsection (1) in the case of a person who is not in New Zealand is—

(a) To require the processing of any application or other matter in relation to the named individual by a visa officer or immigration officer that is currently under way to be suspended, despite any other requirement of this Act; and

(b) To require the chief executive to immediately ensure that the processing is in fact stopped; and

(c) To require any matter under this Act in relation to the named individual that is proceeding in an Authority, [the Board,] the Tribunal, the District Court, or the High Court to be suspended, notwithstanding anything in this Act or any other enactment or rule of law; and

(d) To require the chief executive to send to the person a copy of the notice and to notify the person of the matters specified in subparagraphs (i) to (v) of subsection (4)(d).

(3) The effect of the giving of a notice under subsection (1) in the case of a person who is in New Zealand is—

(a) To require the processing of any application or other matter in relation to the named individual by an immigration officer that is currently underway to be suspended, notwithstanding any other requirement of this Act; and

(b) To require any matter under this Act in relation to the named individual that is proceeding in an Authority (other than the Refugee Status Appeals Authority), [the Board,] the Tribunal, the District Court, or the High Court to be suspended, notwithstanding anything in this Act or any other enactment or rule of law; and

(c) To require the detention of the named individual by a member of the Police under subsection (5).

(4) On receipt of a notice under subsection (1) in respect of a person who is in New Zealand, the chief executive must—

(a) Immediately ensure that the processing of any application or other matter in relation to the named individual by an immigration officer that is currently underway is stopped; and

(b) Not accept for processing any application or other matter in relation to the named individual (other than applications or matters relating to refugee status); and

(c) If appropriate, immediately advise an Authority, [the Board,] the Tribunal, the District Court, or the High Court, in the prescribed manner, that any proceedings or matter under this Act in relation to the named individual are to be stopped in accordance with subsection (2); and

(d) Arrange for a member of the Police to as soon as is practicable personally serve on the person concerned a copy of the notice, along with written information stating—

(i) That the Director of Security has made a security risk certificate in relation to the person; and

(ii) That the Minister has made a preliminary decision to rely on the certificate; and

(iii) The relevant security criterion or criteria that the certificate relates to; and

(iv) The potential effect of the certificate; and

(v) The rights of the person under section 114H (including the right to be heard by the Inspector-General under section 19(4) of the Inspector-General of Intelligence and Security Act 1996), and the time within which the right to a review must be exercised.

(5) Where a member of the Police serves a notice on a person under subsection (4), that member or any other member of the Police must arrest the person without warrant and place the person in custody.

(6) A person arrested under subsection (5) must be brought before a District Court Judge as soon as possible, and may in no case be detained for more than 48 hours unless, within that period, a Judge issues a warrant of commitment under section 114O for the continued detention of the person in custody.]

114H Rights of person in respect of whom security risk certificate given and relied on

(1) A person on whom a Ministerial notice is served under section 114G(4)(d) or who receives notification under section 114G(2)(d) may, under section 114I, seek a review by the Inspector-General of Intelligence and Security of the decision of the Director of Security to make the security risk certificate.

(2) A person who seeks a review under section 114I may—

(a) Be represented, whether by counsel or otherwise, in his or her dealings with the Inspector-General; and

(b) Have access, to the extent provided by the Privacy Act 1993, to any information about the person other than the classified security information; and

(c) Make written submissions to the Inspector-General about the matter, whether or not the person also wishes to be heard under section 19(4) of the Inspector-General of Intelligence and Security Act 1996 (as applied by section 114I(6) of this Act).

(3) No action may be taken to remove or deport the person on whom a notice served under section 114G(4)(d) remains in force unless and until section 114K applies in respect of the person.

(4) No review proceedings may be brought in any court in respect of the certificate or the Director's decision to make the certificate.]

114I Review of certificate

(1) A person on whom a Ministerial notice is served under section 114G(4)(d) may, within 5 days of its service, apply in the prescribed manner for a review of the decision to make the security risk certificate upon which the notice is based.

(2) A person to whom a Ministerial notice is notified under section 114G(2)(d) may, within 28 days of the notification, apply in the prescribed manner for a review of the decision to make the security risk certificate upon which the notice is based.

(3) The review is to be conducted by the Inspector-General of Intelligence and Security with all reasonable speed and diligence.

(4) The function of the Inspector-General on a review is to determine whether—

(a) The information that led to the making of the certificate included information that was properly regarded as classified security information; and

(b) That information is credible, having regard to the source or sources of the information and its nature, and is relevant to any security criterion; and

(c) When a relevant security criterion is applied to the person in light of that information, the person in question is properly covered by that criterion—

and thus whether the certificate was properly made or not.

(5) In carrying out a review, the Inspector-General may take into account any relevant information that does not itself meet the definition of classified security information.

(6) For the purposes of a review under this section—

(a) The Inspector-General has all the powers conferred on him or her by the Inspector-General of Intelligence and Security Act 1996; and

(b) Sections 13, 19 (except subsections (1)(b) and (2)), 20, 21, 22, 23, 24, 26, 28, and 29 of that Act, with any necessary modifications, apply to the review; and

(c) The chief executive of the Department of Labour must provide the Inspector-General with any file relating to the appellant, and any other relevant information, that is held by the chief executive.

(7) For the purposes of a review under this section, the chief executive of the Department of Labour must, as soon as practicable after finding out that the review is lodged, notify to the Inspector-General the name and contact details of an officer of the Department of Labour who may accept service on behalf of the chief executive of notices and matters relating to the review.]

114J Result of review

(1) If on a review under section 114I the Inspector-General decides that the security risk certificate was properly made, the consequences set out in section 114K apply following notification of the decision to the person who sought the review.

(2) If the Inspector-General decides that the certificate was not properly made, the person who sought the review must be released from custody immediately, and normal immigration processes must resume in accordance with section 114L following notification of the decision to the person who sought the review.

(3) As soon as possible after reaching a decision on the review, the Inspector-General must notify the decision—

(a) To the person who sought the review, by way of personal service in the case of a person in New Zealand; and

(b) To the Minister; and

(c) By personal service to the chief executive of the Department of Labour or to such other officer of the Department of Labour as the chief executive has notified to the Director-General { sic ? Inspector-General }

under section 114I(7) as a person who can accept service on behalf of the chief executive; and

(d) To the Director of Security.

(4) The decision of the Inspector-General must be accompanied by reasons, except to the extent that the giving of reasons would itself be likely to prejudice the interests that this Part seeks to protect in relation to the classified security information.

(5) The Inspector-General may make recommendations in relation to the payment of costs or expenses of the person who has sought the review.]

114K Effect of confirmation of certificate, or failure to seek review

(1) Where—

(a) A security risk certificate has been confirmed under section 114J(1); or

(b) The certificate is confirmed to the extent that no review has been applied for under section 114I within 5 days (or 28 days, in the case of a person who is not in New Zealand) after the serving of a Ministerial notice under section 114G(2)(d) or (4)(d),—

the Minister must make a final decision within 3 working days whether to rely on the confirmed certificate and accordingly to direct the chief executive in writing to act in reliance on the certificate under subsection (3).

(2) In making a final decision under subsection (1) the Minister may seek information from other sources and may consider matters other than the contents of the certificate.

(3) On receipt of a direction from the Minister under subsection (1) to rely on the confirmed certificate, the chief executive must ensure that—

(a) Where the person's case was before the Tribunal, an Authority, [the Board,] the District Court, or High Court before the certificate was made, the relevant body is immediately notified in the prescribed manner of the Inspector-General's determination or the failure to seek review, so that it can dismiss the matter in reliance on this section; or

(b) In any other case, an appropriate decision is made in reliance on the relevant security criterion as soon as practicable.

(4) In either event, the chief executive must ensure that—

(a) Any visa or permit that the person still holds is cancelled or revoked, without further authority than this section, and in such case the cancellation or revocation takes effect immediately and without any right of appeal or review; and

(b) If a removal order or deportation order is not already in existence, an appropriate person who may make such an order makes the relevant order immediately without further authority than this section, and the person is removed or deported, unless protected from removal or deportation under section 114Q or section 129X; and

(c) In the case of a person who is protected from removal or deportation by section 129X, the person is released from custody and is given an appropriate temporary permit.

(5) On receipt of the appropriate notification under subsection (3)(a) by the Tribunal, Authority, [Board,] District Court, or High Court considering the matter, the proceedings in question immediately lapse, and are to be treated as having been dismissed.

(6) Where this section applies, the person who is the subject of the certificate has no further right of appeal or review under this Act.

(7) The Minister is not obliged to give reasons for his or her decision to give a direction under this section, and section 23 of the Official Information Act 1982 does not apply in respect of the decision.]

114L Resumption of normal immigration processes where certificate not confirmed on review, or certificate or Ministerial notice withdrawn

(1) This section applies in respect of a person named in a Ministerial notice given under section 114G if—

(a) The Inspector-General has given notice under section 114J that the certificate was not properly made; or

(b) The certificate is withdrawn under section 114M; or

(c) The Ministerial notice is withdrawn under section 114N, or the Minister decides under that section that the relevant security criterion should not be applied to the person in question, or decides under section 114N to revoke his or her decision to rely on the confirmed certificate; or

(d) The Minister fails to make a final decision in respect of the certificate within the period of 3 working days referred to in section 114K(1).

(2) Where this section applies, the chief executive must ensure that—

(a) The person is released from custody immediately; and

(b) Any immigration processing or appeal that was stopped in reliance on section 114G immediately recommences; and

(c) The person is advised, if any application or other matter had not been accepted for processing in reliance on section 114G(4)(b), that the application or matter will now be accepted for processing; and

(d) Where the person's case was before the Tribunal, an Authority, [the Board,] the District Court, or High Court before the certificate was made, the relevant body is immediately notified in the prescribed manner of the failure to confirm the certificate or the withdrawal of the certificate or Ministerial notice or other relevant Ministerial decision, so that it can resume consideration of the matter that was before it.

(3) Where any proceedings have lapsed under section 114K(5) by reason of notification under section 114K(3)(a) of the Minister's decision to rely on a confirmed security risk certificate,—

(a) Those proceedings will nevertheless be treated as not having lapsed if notification of a revocation of that decision is received by the relevant Tribunal, Authority, [the Board,] or Court under subsection (2)(d) of this section; and

(b) Those proceedings continue accordingly from the time of notification of the revocation, with any time limits relating to the proceedings extended by the period of any lapse under section 114K(5).

(4) Where any immigration processing or appeal recommences under subsection (2)(b), or commences as a result of advice given under subsection (2)(c), the officer or body concerned is not to take into account the fact that the provisions of this Part had been applied to the person.

114M Withdrawal of security risk certificate by Director

(1) Nothing in this Part prevents the Director from withdrawing a certificate in relation to any person at any time by notifying the Minister accordingly.

(2) If the Minister has already relied on the certificate, the Minister must immediately inform the chief executive of the Department of Labour of the withdrawal.

(3) If the Director withdraws a certificate, section 114L then applies.

114N Minister may withdraw notice, or decline to use certificate

(1) Nothing in this Part prevents the Minister from—

(a) Withdrawing a notice given under section 114G at any time by notifying the chief executive of the Department of Labour accordingly; or

(b) Where a security risk certificate has been confirmed by the Inspector-General, deciding nevertheless that the relevant security criterion should not be applied to the person in question, and notifying the chief executive accordingly; or

(c) Revoking a decision under section 114K to rely on the confirmed certificate, and notifying the chief executive accordingly.

(2) On any notification to the chief executive under subsection (1), section 114L then applies….

114P Appeal on point of law from decision of Inspector-General

(1) If the person named in a security risk certificate that is confirmed by the Inspector-General under section 114J is dissatisfied with the decision of the Inspector-General as being erroneous in point of law, the person may, with the leave of the Court of Appeal, appeal to the Court of Appeal.

(2) Any such appeal must be brought—

> (a) In the case of a person who is in New Zealand at the time of notification, within 3 working days of being notified of the Inspector-General's decision under section 114J(3)(a):
>
> (b) In the case of a person who is not in New Zealand at the time of notification, within 28 days of being notified of the Inspector-General's decision.

(3) The Court of Appeal may, at any time on or before determining the appeal, or determining whether or not to grant leave to appeal, give such directions and make such orders as it thinks appropriate in the circumstances of the case.

(4) Subject to this section and this Part, section 66 of the Judicature Act 1908, and any rules of Court, apply with any necessary modifications to an appeal under this section as if it were an appeal from a determination of the High Court.

114Q Prohibition on removal or deportation of refugee status claimant

Despite anything in this Part, no person who is a refugee status claimant may be removed or deported from New Zealand until the refugee status of that person has been finally determined under Part 6A.

Part VIA—Refugee determinations

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 refugee status claimant, immigration officers must have regard to the provisions of this Part and of the Refugee Convention.

B: INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY ACT 1996

19. Proceedings of Inspector-General

(1) The Inspector-General, on commencing an inquiry,—

(a) Shall notify the chief executive of the relevant intelligence and security agency of both the commencement of the inquiry and the nature of the inquiry; and …

(3) If the inquiry relates to a complaint, the Inspector-General may require the complainant to give on oath any information relating to the complaint, and may for that purpose administer an oath to the complainant.

(4) The Inspector-General shall permit the complainant to be heard, and to be represented by counsel or any other person, and to have other persons testify to the complainant's record, reliability, and character.

(5) In accordance with the foregoing provisions of this section, the Inspector-General may receive such evidence as the Inspector-General thinks fit, whether admissible in a Court of law or not.

(6) Every inquiry by the Inspector-General shall be conducted in private.

(7) If at any time during the course of an inquiry it appears to the Inspector-General that there may be sufficient grounds for making any report or recommendation that may adversely affect an intelligence and security agency, or any employee of an intelligence and security agency, or any other person, the Inspector-General shall give to that intelligence and security agency, employee, or person an opportunity to be heard.

(8) Subject to the provisions of this Act, the Inspector-General shall regulate his or her procedure in such a manner as the Inspector-General thinks fit.

(9) Except on the ground of lack of jurisdiction, no proceeding, report, or finding of the Inspector-General shall be challenged, reviewed, quashed, or called in question in any Court.

23 Powers of Inspector-General in relation to inquiries

(1) The Inspector-General may require any person who, in the Inspector-General's opinion, is able to give information relating to any matter to which an inquiry relates to furnish such information, and to produce such documents or things in the possession or under the control of that person, as in the opinion of the Inspector-General are relevant to the subject-matter of the inquiry.

(2) The Inspector-General may summon and examine on oath any person who in the opinion of the Inspector-General is able to give any information relating to any

matter to which an inquiry relates, and may for the purpose administer an oath to any person so summoned.

(3) Every such examination by the Inspector-General shall be deemed to be a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury).

(4) Subject to subsection (5) of this section, every person who appears as a witness before the Inspector-General shall have the same privileges in relation to the giving of information, the answering of questions, and the production of documents and papers and things as witnesses have in Courts of law.

C: NEW ZEALAND SECURITY INTELLIGENCE SERVICE ACT 1969

2 Interpretation

Security means—

(a) The protection of New Zealand from acts of espionage, sabotage, and subversion, whether or not they are directed from or intended to be committed within New Zealand:

(b) The identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand's international well-being or economic well-being:

(c) The protection of New Zealand from activities within or relating to New Zealand that—

(i) Are influenced by any foreign organisation or any foreign person; and

(ii) Are clandestine or deceptive, or threaten the safety of any person; and

(iii) Impact adversely on New Zealand's international well-being or economic well-being:

(d) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act

terrorist act has the same meaning as in section 5(1) of the Terrorism Suppression Act 2002

4 Functions Of New Zealand Security Intelligence Service

(1) Subject to the control of the Minister, the functions of the New Zealand Security Intelligence Service shall be—

(a) To obtain, correlate, and evaluate intelligence relevant to security, and to communicate any such intelligence to such persons, and in such manner, as the Director considers to be in the interests of security:

(b) To advise Ministers of the Crown, where the Director is satisfied that it is necessary or desirable to do so, in respect of matters relevant to security, so far as those matters relate to Departments or branches of the State Services of which they are in charge:

(ba) To advise any of the following persons on protective measures that are directly or indirectly relevant to security:

(i) Ministers of the Crown or Government departments:

(ii) Public authorities:

(iii) Any person who, in the opinion of the Director, should receive the advice:

(bb) To conduct inquiries into whether particular individuals should be granted security clearances, and to make appropriate recommendations based on those inquiries:

(bc) To make recommendations in respect of matters to be decided under the Citizenship Act 1977 or the Immigration Act 1987, to the extent that those matters are relevant to security:

D. TERRORISM SUPPRESSION ACT 2002

5 Terrorist act defined

(1) An act is a terrorist act for the purposes of this Act if—

(a) the act falls within subsection (2); or

(b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or

(c) the act is a terrorist act in armed conflict (as defined in section 4(1)).

(2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:

(a) to induce terror in a civilian population; or

(b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.

(3) The outcomes referred to in subsection (2) are—

(a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):

(b) a serious risk to the health or safety of a population:

(c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):

(d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:

(e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

(4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—

(a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or

(b) intends to cause an outcome specified in subsection (3).

13 Participating in terrorist groups

(1) A person commits an offence who participates in a group or organisation for the purpose stated in subsection (2), knowing that the group or organisation is—

(a) an entity that is for the time being designated under this Act as a terrorist entity; or

(b) an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts.

(2) The purpose referred to in subsection (1) is to enhance the ability of any entity (being an entity of the kind referred to in subsection (1)(a) or (b)) to carry out, or to participate in the carrying out of, 1 or more terrorist acts.

(3) A person who commits an offence against subsection (1) is liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

22 Final designation as terrorist or associated entity

(1) The Prime Minister may designate an entity [a person, group, trust, partnership, or fund, or an unincorporated association or organisation] as a terrorist entity under this section if the Prime Minister believes on reasonable grounds that the entity has knowingly carried out [planning or other preparations to carry out the act, whether it is actually carried out or not, a credible threat to carry out the act, whether it is actually carried out or not, an attempt or the carrying out of the act], or has knowingly participated in the carrying out of, 1 or more terrorist acts.

(2) On or after designating an entity as a terrorist entity under this Act, the Prime Minister may designate 1 or more other entities as an associated entity under this section.

(3) The Prime Minister may exercise the power given by subsection (2) only if the Prime Minister believes on reasonable grounds that the other entity—

(a) is knowingly facilitating the carrying out of 1 or more terrorist acts by, or with the participation of, the terrorist entity (for example, by financing those acts, in full or in part); or

(b) is acting on behalf of, or at the direction of,—

(i) the terrorist entity, knowing that the terrorist entity has done what is referred to in subsection (1); or

(ii) an entity designated as an associated entity under subsection (2) and paragraph (a), knowing that the associated entity is doing what is referred to in paragraph (a); or

(c) is an entity (other than an individual) that is wholly owned or effectively controlled, directly or indirectly, by the terrorist entity, or by an entity designated under subsection (2) and paragraph (a) or paragraph (b).

(4) Before designating an entity as a terrorist or associated entity under this section, the Prime Minister must consult with the Attorney-General about the proposed designation.

E: CONVENTION RELATING TO THE STATUS OF REFUGEES 189 UNTS 150, entered into force 22 April 1954

PREAMBLE

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have

affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement.

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation.

Expressing the wish that all States, recognising the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognising that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.

Have agreed as follows:

CHAPTER 1 – GENERAL PROVISIONS

Article 1 – Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(i) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation;

(ii) Decisions of non-eligibility taken by the International Refugee Organisation during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(iii) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the

country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

(iv) In the case of a person who has more than on nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national. …

F. 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.

Article 32 – Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

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 judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 42 – Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

F: VIENNA CONVENTION ON THE LAW OF TREATIES 1155 UNT 5331 entered into force 27 January 1980

Article 31 General rule of interpretation

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 53 Treaties conflicting with a peremptory norm of general international law *(jus cogens)*

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized 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.

Article 64 Emergence of a new peremptory norm of general international law *(jus cogens)*

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Solicitors:
Crown Law Office, Wellington for Appellant
McLeod & Associates, Auckland for First Respondent
Bell Gully, Wellington for Second Respondent