

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002
SCC 1

Manickavasagam Suresh

Appellant

v.

**The Minister of Citizenship and Immigration and
the Attorney General of Canada**

Respondents

and

**The United Nations High Commissioner for Refugees,
Amnesty International,
the Canadian Arab Federation,
the Canadian Council for Refugees,
the Federation of Associations of Canadian Tamils,
the Centre for Constitutional Rights,
the Canadian Bar Association and
the Canadian Council of Churches**

Interveners

Indexed as: Suresh v. Canada (Minister of Citizenship and Immigration)

Neutral citation: 2002 SCC 1.

File No.: 27790.

2001: May 22; 2002: January 11.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major,
Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the federal court of appeal

Constitutional law — Charter of Rights — Fundamental justice — Immigration — Deportation — Risk of torture — Whether deportation of refugee facing risk of torture contrary to principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Constitutional law — Charter of Rights — Fundamental justice — Vagueness — Whether terms “danger to the security of Canada” and “terrorism” in deportation provisions of immigration legislation unconstitutionally vague — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1), 53(1)(b).

Constitutional law — Charter of Rights — Freedom of expression — Freedom of association — Whether deportation for membership in terrorist organization infringes freedom of association and freedom of expression — Canadian Charter of Rights and Freedoms, ss. 2(b), 2(d) — Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1), 53(1)(b).

Constitutional law — Charter of Rights — Fundamental justice — Procedural safeguards — Immigration — Convention refugee facing risk of torture if deported — Whether procedural safeguards provided to Convention refugee satisfy requirements of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Administrative law — Judicial review — Ministerial decisions — Standard of review — Immigration — Deportation — Approach to be taken in reviewing decisions of Minister of Citizenship and Immigration on whether refugee’s

presence constitutes danger to security of Canada and whether refugee faces substantial risk of torture upon deportation — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

The appellant is a Convention refugee from Sri Lanka who has applied for landed immigrant status. In 1995, the Canadian government detained him and commenced deportation proceedings on security grounds, based on the opinion of the Canadian Security Intelligence Service that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam, an organization alleged to be engaged in terrorist activity in Sri Lanka, and whose members are also subject to torture in Sri Lanka. The Federal Court, Trial Division upheld as reasonable the deportation certificate under s. 40.1 of the *Immigration Act* and, following a deportation hearing, an adjudicator held that the appellant should be deported. The Minister of Citizenship and Immigration, after notifying the appellant that she was considering issuing an opinion declaring him to be a danger to the security of Canada under s. 53(1)(b) of the Act, issued such an opinion on the basis of an immigration officer's memorandum and concluded that he should be deported. Although the appellant had presented written submissions and documentary evidence to the Minister, he had not been provided with a copy of the immigration officer's memorandum, nor was he provided with an opportunity to respond to it orally or in writing. The appellant applied for judicial review, alleging that: (1) the Minister's decision was unreasonable; (2) the procedures under the Act were unfair; and (3) the Act infringed ss. 7, 2(b) and 2(d) of the *Canadian Charter of Rights and Freedoms*. The application for judicial review was dismissed on all grounds. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed. The appellant is entitled to a new deportation hearing. The impugned legislation is constitutional.

Deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by s. 7 of the *Charter*. Section 7 applies to torture inflicted abroad if there is a sufficient causal connection with Canadian government acts. In determining whether this deprivation is in accordance with the principles of fundamental justice, Canada's interest in combating terrorism must be balanced against the refugee's interest in not being deported to torture.

Canadian law and international norms reject deportation to torture. Canadian law views torture as inconsistent with fundamental justice. The *Charter* affirms Canada's opposition to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. Torture has as its end the denial of a person's humanity; this lies outside the legitimate domain of a criminal justice system. The prohibition of torture is also an emerging peremptory norm of international law which cannot be easily derogated from. The Canadian rejection of torture is reflected in the international conventions which Canada has ratified. Deportation to torture is prohibited by both the *International Covenant on Civil and Political Rights* and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. Article 33 of the *Convention Relating to the Status of Refugees*, which on its face does not categorically reject deportation to torture, should not be used to deny rights that other legal instruments make available to everyone. International law generally rejects deportation to torture, even where national security interests are at stake.

In exercising the discretion conferred by s. 53(1)(b) of the *Immigration Act*, the Minister must conform to the principles of fundamental justice under s. 7. Insofar as the Act leaves open the possibility of deportation to torture (a possibility which is not here excluded), the Minister should generally decline to deport refugees

where on the evidence there is a substantial risk of torture. Applying these principles, s. 53(1)(b) does not violate s. 7 of the *Charter*.

The terms “danger to the security of Canada” and “terrorism” are not unconstitutionally vague. The term “danger to the security of Canada” in deportation legislation must be given a fair, large and liberal interpretation in accordance with international norms. 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, 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”, grounded on objectively reasonable suspicion based on evidence, and involving substantial threatened harm. Properly defined, the term “danger to the security of Canada” gives those who might come within the ambit of s. 53 fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion. While there is no authoritative definition of the term “terrorism” as found in s. 19 of the *Immigration Act*, it is sufficiently settled to permit legal adjudication. Following the *International Convention for the Suppression of the Financing of Terrorism*, “terrorism” in s. 19 of the Act includes any act intended to cause death or bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its very nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.

Section 19 of the *Immigration Act*, defining the class of persons who may be deported because they constitute a danger to the security of Canada, as incorporated into s. 53 of the Act, does not breach the appellant’s constitutional rights of free expression and association. The Minister’s discretion to deport under s. 53 is confined

to persons who pose a threat to the security of Canada and have been engaged in violence or activities directed at violence. Expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter under the *Charter*. Provided that the Minister exercises her discretion in accordance with the Act, the guarantees of free expression and free association are not violated.

Section 7 of the *Charter* does not require the Minister to conduct a full oral hearing or judicial process. However, a refugee facing deportation to torture under s. 53(1)(b) must be informed of the case to be met. Subject to privilege and other valid reasons for reduced disclosure, the material on which the Minister bases her decision must be provided to the refugee. The refugee must be provided with an opportunity to respond in writing to the case presented to the Minister, and to challenge the Minister's information. The refugee is entitled to present evidence and make submissions on: whether his or her continued presence in Canada will be detrimental to Canada under s. 19 of the Act; the risk of torture upon return; and the value of assurances of non-torture by foreign governments. The Minister must provide written reasons for her decision dealing with all relevant issues. These procedural protections apply where the refugee has met the threshold of establishing a *prima facie* case that there may be a risk of torture upon deportation. The appellant has met this threshold. Since he was denied the required procedural safeguards and the denial cannot be justified under s. 1 of the *Charter*, the case is remanded to the Minister for reconsideration.

Although it is unnecessary in this case to review the Minister's decisions on deportation, where such a review is necessary the reviewing court should generally adopt a deferential approach to the Minister's decision on whether a refugee's presence constitutes a danger to the security of Canada. This discretionary decision

may only be set aside if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. Likewise, the Minister's decision on whether a refugee faces a substantial risk of torture upon deportation should be overturned only if it is not supported on the evidence or fails to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.

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R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

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Convention on the Physical Protection of Nuclear Material, 18 I.L.M. 1419.

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Criminal Code, R.S.C. 1985, c. C-46, s. 269.1.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Art. 3.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Can. T.S. 1965 No. 20, p. 25, Art. 3.

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Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Can. T.S. 1965 No. 20, p. 163, Art. 3.

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APPEAL from a judgment of the Federal Court of Appeal, [2000] 2 F.C. 592, 183 D.L.R. (4th) 629, 252 N.R. 1, 18 Admin. L.R. (3d) 159, 5 Imm. L.R. (3d) 1, [2000] F.C.J. No. 5 (QL), upholding a judgment of the Trial Division (1999), 173 F.T.R. 1, 50 Imm. L.R. (2d) 183, 65 C.R.R. (3d) 344, [1999] F.C.J. No. 865 (QL).
Appeal allowed.

Barbara Jackman and Ronald Poulton, for the appellant.

Urszula Kaczmarczyk and Cheryl D. Mitchell, for the respondents.

John Terry and Jennifer A. Orange, for the intervener the United Nations High Commissioner for Refugees.

Written submissions only by *Michael F. Battista* and *Michael Bossin*, for the intervener Amnesty International.

Audrey Macklin, for the intervener the Canadian Arab Federation.

Jack C. Martin and *Sharryn J. Aiken*, for the intervener the Canadian Council for Refugees.

Written submissions only by *Jamie Cameron*, for the intervener the Federation of Associations of Canadian Tamils.

Written submissions only by *David Cole*, for the intervener the Centre for Constitutional Rights.

David Matas, for the intervener the Canadian Bar Association.

Written submissions only by *Marlys Edwardh* and *Breese Davies*, for the intervener the Canadian Council of Churches.

The following is the judgment delivered by

1 THE COURT — In this appeal we hold that Suresh is entitled to a new deportation hearing under the *Immigration Act*, R.S.C. 1985, c. I-2. Suresh came to Canada from Sri Lanka in 1990. He was recognized as a Convention refugee in 1991 and applied for landed immigrant status. In 1995 the government detained him and started proceedings to deport him to Sri Lanka on grounds he was a member and fundraiser for the Liberation Tigers of Tamil Eelam (“LTTE”), an organization alleged to engage in terrorist activity in Sri Lanka. Suresh challenged the order for his deportation on various grounds of substance and procedure. In these reasons we examine the *Immigration Act* and the *Canadian Charter of Rights and Freedoms*, and find that deportation to face torture is generally unconstitutional and that some of the procedures followed in Suresh’s case did not meet the required constitutional standards. We therefore conclude that Suresh is entitled to a new hearing.

2 The appeal requires us to consider a number of issues: the standard to be applied in reviewing a ministerial decision to deport; whether the *Charter* precludes deportation to a country where the refugee faces torture or death; whether deportation on the basis of mere membership in an alleged terrorist organization unjustifiably infringes the *Charter* rights of free expression and free association; whether “terrorism” and “danger to the security of Canada” are unconstitutionally vague; and whether the deportation scheme contains adequate procedural safeguards to ensure that refugees are not expelled to a risk of torture or death.

3 The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and

fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.

4 On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society — liberty, the rule of law, and the principles of fundamental justice — values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament’s challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.

5 We conclude that to deport a refugee to face a substantial risk of torture would generally violate s. 7 of the *Charter*. The Minister of Citizenship and Immigration must exercise her discretion to deport under the *Immigration Act* accordingly. Properly applied, the legislation conforms to the *Charter*. We reject the arguments that the terms “danger to the security of Canada” and “terrorism” are unconstitutionally vague and that ss. 19 and 53(1)(b) of the Act violate the *Charter* guarantees of free expression and free association, and conclude that the Act’s impugned procedures, properly followed, are constitutional. We believe these findings leave ample scope to Parliament to adopt new laws and devise new approaches to the pressing problem of terrorism.

6 Applying these conclusions, we find that the appellant Suresh made a *prima facie* case showing a substantial risk of torture if deported to Sri Lanka, and that his hearing did not provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death. This means that the case must be remanded

to the Minister for reconsideration. The immediate result is that Suresh will remain in Canada until his new hearing is complete. Parliament's scheme read in light of the Canadian Constitution requires no less.

I. Facts and Judicial Proceedings

7 The appellant, Manickavasagam Suresh, was born in 1955. He is a Sri Lankan citizen of Tamil descent. Suresh entered Canada in October 1990, and was recognized as a Convention refugee by the Refugee Division of the Immigration and Refugee Board in April 1991. Recognition as a Convention refugee has a number of legal consequences; the one most directly relevant to this appeal is that, under s. 53(1) of the *Immigration Act*, generally the government may not return (“*refouler*”) a Convention refugee “to a country where the person’s life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion”.

8 In the summer of 1991, the appellant applied for landed immigrant status in Canada. His application was not finalized because, in late 1995, the Solicitor General of Canada and the Minister of Citizenship and Immigration commenced proceedings to deport Suresh to Sri Lanka on security grounds.

9 The first step in the procedure was a certificate under s. 40.1 of the *Immigration Act* alleging that Suresh was inadmissible to Canada on security grounds. The Solicitor General and the Minister filed the certificate with the Federal Court of Canada on October 17, 1995, and Suresh was detained the following day.

10 The s. 40.1 certificate was based on the opinion of the Canadian Security Intelligence Service (“CSIS”) that Suresh is a member of the LTTE, an organization that, according to CSIS, is engaged in terrorist activity in Sri Lanka and functions in Canada under the auspices of the World Tamil Movement (“WTM”). LTTE supports the cause of Tamils in the ongoing Sri Lankan civil war. The struggle is a protracted and bitter one. The Tamils are in rebellion against the democratically elected government of Sri Lanka. Their grievances are deep-rooted, and atrocities appear to be commonplace on both sides. The conflict has its roots in measures taken by a past government which, in the view of the Tamil minority, deprived it of basic linguistic, cultural and political rights. Subsequent governments have made attempts to accommodate these grievances, find a political solution, and re-establish civilian controls on the security and defence establishments, but a solution has yet to be found.

11 Human rights reporting on the practices of the Sri Lanka security forces indicates that the use of torture is widespread, particularly against persons suspected of membership in the LTTE. In a report dated 2001, Amnesty International cites frequent incidents of torture by the police and army, including a report that five labourers arrested on suspicion of involvement with the LTTE were tortured by police. One of them died apparently as a result of the torture.

12 The s. 40.1 certificate was referred to the Federal Court for determination “whether the certificate filed by the Minister and the Solicitor General is reasonable on the basis of the evidence and information available” as required by s. 40.1(4)(d) — the second step in the deportation procedure. Pursuant to s. 40.1(5), the designated judge is entitled to receive and consider any evidence the judge “sees fit, whether or not the evidence or information is or would be admissible in a court of law”.

13 In August 1997, after 50 days of hearings, Teitelbaum J. upheld the s. 40.1 certificate, finding it “reasonable” under s. 40.1(4)(d) of the Act: (1997), 140 F.T.R. 88. Specifically, Teitelbaum J. found that: (1) Suresh had been a member of the LTTE since his youth and is now (or was at the time of Teitelbaum J.’s consideration) a member of the LTTE executive; (2) the WTM is part of the LTTE or at least an organization that supports the activities of the LTTE; (3) Suresh obtained refugee status “by wilful misrepresentation of facts” and lacks credibility; (4) there are reasonable grounds to believe the LTTE has committed terrorist acts; and (5) Tamils arrested by Sri Lankan authorities are badly mistreated and in a number of cases the mistreatment bordered on torture.

14 A deportation hearing followed — the third step in the deportation procedure. The adjudicator found no reasonable grounds to conclude Suresh was directly engaged in terrorism under s. 19(1)(f)(ii), but held that he should be deported on grounds of membership in a terrorist organization under ss. 19(1)(f)(iii)(B) and 19(1)(e)(iv)(C).

15 On the same day, September 17, 1997, the Minister took the fourth step in the deportation process, notifying Suresh that she was considering issuing an opinion declaring him to be a danger to the security of Canada under s. 53(1)(b) of the Act, which permits the Minister to deport a refugee on security grounds even where the refugee’s “life or freedom” would be threatened by the return. In response to the Minister’s notification, Suresh submitted written arguments and documentary evidence, including reports indicating the incidence of torture, disappearances, and killings of suspected members of LTTE.

16 Donald Gautier, an immigration officer for Citizenship and Immigration Canada, considered the submissions and recommended that the Minister issue an opinion under s. 53(1)(b) that Suresh constituted a danger to the security of Canada. Noting Suresh's links to LTTE, he stated that "[t]o allow Mr. Suresh to remain in this country and continue his activities runs counter to Canada's international commitments in the fight against terrorism". At the same time, Mr. Gautier acknowledged that Mr. Suresh "is not known to have personally committed any acts of violence either in Canada or Sri Lanka" and that his activities on Canadian soil were "non-violent" in nature. Gautier found that Suresh faced a risk on returning to Sri Lanka, but this was difficult to assess; might be tempered by his high profile; and was counterbalanced by Suresh's terrorist activities in Canada. He concluded that, "on balance, there are insufficient humanitarian and compassionate considerations present to warrant extraordinary consideration". Accordingly, on January 6, 1998, the Minister issued an opinion that Suresh constituted a danger to the security of Canada and should be deported pursuant to s. 53(1)(b). Suresh was not provided with a copy of Mr. Gautier's memorandum, nor was he provided an opportunity to respond to it orally or in writing. No reasons are required under s. 53(1)(b) of the *Immigration Act* and none were given.

17 Suresh applied to the Federal Court for judicial review, alleging that the Minister's decision was unreasonable; that the procedures under the Act, which did not require an oral hearing and independent decision-maker, were unfair; and that the Act unconstitutionally violated ss. 7 and 2 of the *Charter*. McKeown J. (1999), 65 C.R.R. (2d) 344, dismissed the application on all grounds. In his view, the Minister's decision was not unreasonable and the Act was constitutional.

18 On the s. 7 challenge, McKeown J. found that the Minister, weighing the risk of exposing Suresh to torture against the danger that Suresh posed to the security

of Canada, had satisfied the requirements of fundamental justice. McKeown J. acknowledged that the s. 7 *Charter* analysis should be informed by international law, and by the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36 (“CAT”), in particular. However, the CAT applies only where there are “substantial grounds” to believe that the person in question would be in danger of being tortured. Suresh had not met this test he held, in part because he had not submitted to the Minister a personal statement outlining why he believed he was at risk. McKeown J. concluded that the appellant’s expulsion would not “shock the conscience” of Canadians, the test for unconstitutionality under s. 7 of the *Charter*.

19 On the s. 2 challenge, McKeown J. found that Suresh’s activities as a fundraiser could not be considered “expression” under s. 2(b), since those activities were conducted in the service of a violent organization. He also found that Suresh’s activities were not protected under s. 2(d), since the association in question existed to commit acts of violence. As to Suresh’s vagueness arguments, McKeown J. held that neither the term “danger to the security of Canada” nor the term “terrorism” is unconstitutionally vague. Accordingly, McKeown J. dismissed the application.

20 Suresh appealed to the Federal Court of Appeal. It too dismissed his application. Robertson J.A., for the court, held that the right under international law to be free from torture was limited by a country’s right to expel those who pose a security risk: [2000] 2 F.C. 592. He held, at paras. 31-32, that the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (“*Refugee Convention*”), permits derogation from the prohibition against deportation to torture and that, in any event, Canadian statutory law supersedes customary international law. He agreed with McKeown J. that fundraising to support terrorist violence was not protected under s. 2.

He also agreed that the *Immigration Act* procedures were adequate; in particular, no oral hearing was required to assess the risk of torture upon deportation. Finally, he agreed that neither the term “danger to the security of Canada” nor the term “terrorism” is unconstitutionally vague.

21 Robertson J.A. rejected Suresh’s argument that s. 53(1)(b) of the Act is unconstitutional insofar as it permits the Minister to expel a refugee to torture. He held that while deportation to torture violates s. 7’s guarantee of the right to life, liberty and security of the person, the violation was justified under s. 1. The objective of preventing Canada from becoming a haven for terrorist organizations was pressing and substantial and the deportation provision was a proportionate response to that objective bearing in mind the limitations on the power of deportation, its use as a measure of last resort and Canada’s international obligations to combat terrorism. Expulsion of a refugee who is a danger to the security of Canada would not violate the sense of justice or “shock the conscience” of most Canadians, notwithstanding that the refugee might face torture on return, because Canada would be neither the first nor the last link in the chain of causation leading to torture, but merely an involuntary intermediary.

22 Finally, Robertson J.A. rejected the alternate argument that s. 53(1)(b), if constitutional, violated Suresh’s s. 7 right to security in its application. The administrative decision to deport Suresh properly considered the risk Suresh posed to Canada, acknowledged the risk of torture Suresh would face upon return to Sri Lanka, noted factors that might reduce the risk, and held that on balance it was outweighed by Canada’s interest in its own security.

23 Suresh now appeals to this Court.

II. Relevant Constitutional and Statutory Provisions

24 *Canadian Charter of Rights and Freedoms*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

...

(d) freedom of association.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Immigration Act, R.S.C. 1985, c. I-2

19. (1) No person shall be granted admission who is a member of any of the following classes:

...

(e) persons who there are reasonable grounds to believe

...

(iv) are members of an organization that there are reasonable grounds to believe will

...

(C) engage in terrorism;

(f) persons who there are reasonable grounds to believe

...

- (ii) have engaged in terrorism, or
- (iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in

...

(B) terrorism,

except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;

53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

...

(b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada;

III. Issues

25

We propose to consider the issues in the following order:

1. What is the appropriate standard of review with respect to ministerial decisions under s. 53(1)(b) of the *Immigration Act*?
2. Are the conditions for deportation in the *Immigration Act* constitutional?
 - (a) Does the Act permit deportation to torture contrary to the *Charter*?

- (b) Are the terms “danger to the security of Canada” and “terrorism” unconstitutionally vague?

 - (c) Does deportation for membership in a terrorist organization unjustifiably violate the *Charter* guarantees of freedom of expression and freedom of association?
3. Are the procedures for deportation set out in the *Immigration Act* constitutionally valid?

 4. Examining Suresh’s case in light of the conclusions to the foregoing questions, should the Minister’s order be set aside and a new hearing ordered?

IV. Analysis

1. Standard of Review

26 This appeal involves a consideration of four types of issues: (1) constitutional review of the provisions of the *Immigration Act*; (2) whether Suresh’s presence in Canada constitutes a danger to national security; (3) whether Suresh faces a substantial risk of torture upon return to Sri Lanka; and (4) whether the procedures used by the Minister under the Act were adequate to protect Suresh’s constitutional rights.

27 The issues of the constitutionality of the deportation provisions of the *Immigration Act* do not involve review of ministerial decision-making. The fourth issue

of the adequacy of the procedures under the Act will be considered separately later in these reasons. At this point, our inquiry is into the standard of review to be applied to the second and third issues — the Minister’s decisions on whether Suresh poses a risk to the security of Canada and whether he faces a substantial risk of torture on deportation. The latter was characterized by Robertson J.A. as a constitutional decision and hence requires separate treatment. It is our view that the threshold question is factual, that is whether there is a substantial risk of torture if the appellant is sent back, although this inquiry is mandated by s. 7 of the *Charter*. The constitutional issue is whether it would shock the Canadian conscience to deport Suresh once a substantial risk of torture has been established. This is when s. 7 is engaged. Since we are ordering a new hearing on procedural grounds, we are not required in this appeal to review the Minister’s decisions on whether Suresh’s presence constitutes a danger to the security of Canada and whether he faces a substantial risk of torture on deportation. However, we offer the following comments to assist courts in future ministerial review.

28 The trial judge and the Court of Appeal rejected Suresh’s submission that the highest standard of review should apply to the determination of the rights of refugees. Robertson J.A., while inclined to apply a deferential standard of review to whether Suresh constituted a danger to the security of Canada, concluded that the decision could be maintained on any standard. Robertson J.A. went on to state (at paras. 131-36) that while the Act and the Constitution place constraints on the Minister’s exercise of her discretion, these do not extend to a judicially imposed obligation to give particular weight to particular factors. On the question of whether he would face a substantial risk of torture on return, a question that he viewed as constitutional rather than merely one of judicial review, Robertson J.A. did not determine the applicable standard of review, concluding that even on the stringent standard of correctness the Minister’s decision should be upheld.

29 The first question is what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada. We agree with Robertson J.A. that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.

30 This conclusion is mandated by *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, which reviewed the principles for determining the standard of review according to the functional and pragmatic approach. In *Pushpanathan*, the Court emphasized that the ultimate question is always what the legislature intended. One looks to the language of the statute as well as a number of factors to determine that intention. Here the language of the Act (the Minister must be "of the opinion" that the person constitutes a danger to the security of Canada) suggests a standard of deference. So, on the whole, do the factors to be considered: (1) the presence or absence of a clause negating the right of appeal; (2) the relative expertise of the decision-maker; (3) the purpose of the provision and the legislation generally; and (4) the nature of the question (*Pushpanathan, supra*, at paras. 29-38).

31 The first factor suggests that Parliament intended only a limited right of appeal. Although the Minister's s. 53(1)(b) opinion is not protected by a privative clause, it may only be appealed by leave of the Federal Court, Trial Division (s. 82.1(1)), and that leave decision may not itself be appealed (s. 82.2). The second factor, the relative expertise of the decision-maker, again favours deference. As stated

in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, “[t]he fact that the formal decision-maker is the Minister is a factor militating in favour of deference” (para. 59). The Minister, as noted by Lord Hoffmann in *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.), at para. 62, “has access to special information and expertise in . . . matters [of national security]”. The third factor — the purpose of the legislation — again favours deference. This purpose, as discussed in *Pushpanathan, supra*, at para. 73, is to permit a “humanitarian balance” of various interests — “the seriousness of the danger posed to Canadian society” on the one hand, and “the danger of persecution upon *refoulement*” on the other. Again, the Minister is in a superior position to a court in making this assessment. Finally, the nature of the case points to deference. The inquiry is highly fact-based and contextual. As in *Baker, supra*, at para. 61, the s. 53(1)(b) danger opinion “involves a considerable appreciation of the facts of that person’s case, and is not one which involves the application or interpretation of definitive legal rules”, suggesting it merits a wide degree of deference.

32 These factors suggest that Parliament intended to grant the Minister a broad discretion in issuing a s. 53(1)(b) opinion, reviewable only where the Minister makes a patently unreasonable decision. It is true that the question of whether a refugee constitutes a danger to the security of Canada relates to human rights and engages fundamental human interests. However, it is our view that a deferential standard of ministerial review will not prevent human rights issues from being fully addressed, provided proper procedural safeguards are in place and provided that any decision to deport meets the constitutional requirements of the *Charter*.

33 The House of Lords has taken the same view in *Rehman, supra*. Lord Hoffmann, following the events of September 11, 2001, added the following postscript to his speech (at para. 62):

I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove. [Emphasis added.]

34 It follows that the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion (see, for instance, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 607, where Iacobucci J. explained that a reviewing court should not disturb a decision based on a “broad discretion” unless the tribunal has “made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner”).

35 The Court’s recent decision in *Baker, supra*, did not depart from this view. Rather, it confirmed that the pragmatic and functional approach should be applied to all types of administrative decisions in recognition of the fact that a uniform approach to the determination of the proper standard of review is preferable, and that there may be special situations where even traditionally discretionary decisions will best be reviewed according to a standard other than the deferential standard which was universally applied in the past to ministerial decisions (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403).

36 The Court specified in *Baker, supra*, that a nuanced approach to determining the appropriate standard of review was necessary given the difficulty in rigidly classifying discretionary and non-discretionary decisions (paras. 54-55). The Court also made it clear in *Baker* that its approach “should not be seen as reducing the level of deference given to decisions of a highly discretionary nature” (para. 56) and, moreover, that any ministerial obligation to consider certain factors “gives the applicant no right to a particular outcome or to the application of a particular legal test” (para. 74). To the extent this Court reviewed the Minister’s discretion in that case, its decision was based on the ministerial delegate’s failure to comply with self-imposed ministerial guidelines, as reflected in the objectives of the Act, international treaty obligations and, most importantly, a set of published instructions to immigration officers.

37 The passages in *Baker* referring to the “weight” of particular factors (see paras. 68 and 73-75) must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors: see *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.); *Re Sheehan and Criminal Injuries Compensation Board* (1974), 52 D.L.R. (3d) 728 (Ont. C.A.); *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Dagg, supra*, at paras. 111-12, *per* La Forest J. (dissenting on other grounds).

38 This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament’s task is to establish the criteria and

procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.

39 This brings us to the question of the standard of review of the Minister's decision on whether the refugee faces a substantial risk of torture upon deportation. This question is characterized as constitutional by Robertson J.A., to the extent that the Minister's decision to deport to torture must ultimately conform to s. 7 of the *Charter*: see *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, *per* La Forest J.; and *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 32. As mentioned earlier, whether there is a substantial risk of torture if Suresh is deported is a threshold question. The threshold question here is in large part a fact-driven inquiry. It requires consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. It may also involve a reassessment of the refugee's initial claim and a determination of whether a third country is willing to accept the refugee. Such issues are largely outside the realm of expertise of reviewing courts and possess a negligible legal dimension. We are accordingly of the view that the threshold finding of whether Suresh faces a substantial risk of torture, as an aspect of the larger s. 53(1)(b) opinion, attracts deference by the reviewing court to the Minister's decision. The court may not reweigh the factors considered by the Minister, but may intervene if the decision is not

supported by the evidence or fails to consider the appropriate factors. It must be recognized that the nature of the evidence required may be limited by the nature of the inquiry. This is consistent with the reasoning of this Court in *Kindler, supra*, at pp. 836-37, where considerable deference was shown to ministerial decisions involving similar considerations in the context of a constitutional revision, that is in the context of a decision where the s. 7 interest was engaged.

40 Before leaving the issue of standard of review, it is useful to underline the distinction between standard of review and the evidence required to establish particular facts in issue. For example, some authors suggest a lower evidentiary standard may govern decisions at entry (under ss. 2 and 19 of the Act) than applies to decisions to deport a landed Convention refugee under s. 53(1)(b): see J. C. Hathaway and C. J. Harvey “Framing Refugee Protection in the New World Disorder” (2001), 34 *Cornell Int’l L.J.* 257, at p. 288. This does not imply different standards of review. Different administrative decisions involve different factors, stemming from the statutory scheme and the particular issues raised. Yet the same standard of review may apply.

41 We conclude that in reviewing ministerial decisions to deport under the Act, courts must accord deference to those decisions. If the Minister has considered the correct factors, the courts should not reweigh them. Provided the s. 53(1)(b) decision is not patently unreasonable — unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures — it should be upheld. At the same time, the courts have an important role to play in ensuring that the Minister has considered the relevant factors and complied with the requirements of the Act and the Constitution.

2. Are the Conditions for Deportation in the *Immigration Act* Constitutional?

(a) *Does the Act Permit Deportation to Torture Contrary to the Charter?*

42 Suresh opposes his deportation to Sri Lanka on the ground, among others, that on return he faces a substantial risk of torture. McKeown J. found that Suresh had not shown that he personally would risk torture according to the “substantial grounds” test. His finding seems to conflict with that of the immigration officer who acknowledged “that there is a risk to Mr. Suresh on his return to Sri Lanka”, but concluded that “this is counterbalanced by the serious terrorist activities to which he is a party”. Acting on these findings, the Minister ordered Suresh deported.

43 Section 53 of the *Immigration Act* permits deportation “to a country where the person’s life or freedom would be threatened”. The question is whether such deportation violates s. 7 of the *Charter*. Torture is defined in Article 1 of the CAT as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials. A similar definition of torture may be found in s. 269.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

44 Section 7 of the *Charter* guarantees “[e]veryone . . . the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. It is conceded that “everyone” includes refugees and that deportation to torture may deprive a refugee of liberty, security and perhaps life. The only question is whether this deprivation is in accordance with the principles of fundamental justice. If it is not, s. 7 is violated and, barring justification of the violation under s. 1 of the *Charter*, deportation to torture is unconstitutional.

45 The principles of fundamental justice are to be found in “the basic tenets of our legal system”: *Burns, supra*, at para. 70. “They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system”: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. The relevant principles of fundamental justice are determined by a contextual approach that “takes into account the nature of the decision to be made”: *Kindler, supra*, at p. 848, *per* McLachlin J. (as she then was). The approach is essentially one of balancing. As we said in *Burns*, “[i]t is inherent in the . . . balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance” (para. 65). Deportation to torture, for example, requires us to consider a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country’s security, and the threat of terrorism to Canada. In contexts in which the most significant considerations are general ones, it is likely that the balance will be struck the same way in most cases. It would be impossible to say in advance, however, that the balance will necessarily be struck the same way in every case.

46 The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada’s international obligations and values as expressed in “[t]he various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms”: *Burns*, at paras. 79-81; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 348, *per* Dickson C.J. (dissenting); see also *Re B.C. Motor Vehicle Act, supra*, at p. 512; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1056-57; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 750; and *Baker, supra*.

47 Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada’s interest in combatting terrorism and the Convention refugee’s interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government’s proposed response is reasonable in relation to the threat. In the past, we have held that some responses are so extreme that they are *per se* disproportionate to any legitimate government interest: see *Burns, supra*. We must ask whether deporting a refugee to torture would be such a response.

48 With these thoughts in mind, we turn to the question of whether the government may, consistent with the principles of fundamental justice, expel a suspected terrorist to face torture elsewhere: first from the Canadian perspective; then from the perspective of the international norms that inform s. 7.

(i) *The Canadian Perspective*

49 The inquiry at this stage is whether, viewed from a Canadian perspective, returning a refugee to the risk of torture because of security concerns violates the principles of fundamental justice where the deportation is effected for reasons of national security. A variety of phrases have been used to describe conduct that would violate fundamental justice. The most frequent is conduct that would “‘shoc[k]’ the Canadian conscience” (see *Kindler, supra*, at p. 852, and *Burns, supra*, at para. 60). Without resorting to opinion polls, which may vary with the mood of the moment, is the conduct fundamentally unacceptable to our notions of fair practice and justice?

50 It can be confidently stated that Canadians do not accept torture as fair or compatible with justice. Torture finds no condonation in our *Criminal Code*; indeed the *Code* prohibits it (see, for example, s. 269.1). The Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture. Our courts ensure that confessions cannot be obtained by threats or force. The last vestiges of the death penalty were abolished in 1998 and Canada has not executed anyone since 1962: see *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35. In *Burns*, the then Minister of Justice, in his decision on the order to extradite the respondents Burns and Rafay, emphasized that “in Canada, Parliament has decided that capital punishment is not an appropriate penalty for crimes committed here, and I am firmly committed to that position” (para. 76). While we would hesitate to draw a direct equation between government policy or public opinion at any particular moment and the principles of fundamental justice, the fact that successive governments and Parliaments have refused to inflict torture and the death penalty surely reflects a fundamental Canadian belief about the appropriate limits of a criminal justice system.

51 When Canada adopted the *Charter* in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. A punishment is cruel and unusual if it “is so excessive as to outrage standards of decency”: see *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1072-73, *per* Lamer J. (as he then was). It must be so inherently repugnant that it could never be an appropriate punishment, however egregious the offence. Torture falls into this category. The prospect of torture induces fear and its consequences may be devastating, irreversible, indeed, fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end the denial of a person’s

humanity; this end is outside the legitimate domain of a criminal justice system: see, generally, E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985), at pp. 27-59. Torture is an instrument of terror and not of justice. As Lamer J. stated in *Smith, supra*, at pp. 1073-74, “some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment”. As such, torture is seen in Canada as fundamentally unjust.

52 We may thus conclude that Canadians reject government-sanctioned torture in the domestic context. However, this appeal focuses on the prospect of Canada expelling a person to face torture in another country. This raises the question whether s. 7 is implicated at all. On one theory, our inquiry need be concerned only with the Minister’s act of deporting and not with the possible consequences that the expelled refugee may face upon arriving in the destination country. If our s. 7 analysis is confined to what occurs on Canadian soil as a necessary and immediate result of the Minister’s decision, torture does not enter the picture. If, on the other hand, our analysis must take into account what may happen to the refugee in the destination country, we surely cannot ignore the possibility of grievous consequences such as torture and death, if a risk of those consequences is established.

53 We discussed this issue at some length in *Burns, supra*. In that case, the United States sought the extradition of two Canadian citizens to face aggravated first degree murder charges in the state of Washington. The respondents Burns and Rafay contested the extradition on the grounds that the Minister of Justice had not sought assurances that the death penalty would not be imposed. We rejected the respondents’ argument that extradition in such circumstances would violate their s. 12 right not to be subjected to cruel and unusual treatment or punishment, finding that the nexus

between the extradition order and the mere possibility of capital punishment was too remote to engage s. 12. We agreed, however, with the respondents' argument under s. 7, writing that "[s]ection 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition" (para. 60 (emphasis in original)). We cited, in particular, *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at p. 522, in which La Forest J. recognized that "in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances". In that case, La Forest J. referred specifically to the possibility that a country seeking extradition might torture the accused on return.

54 While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in *Burns* should not apply with equal force here. In *Burns*, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than *refoulement*. Rather, the governing principle was a general one — namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.

55 We therefore disagree with the Federal Court of Appeal's suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an "involuntary

intermediary” (para. 120). Without Canada’s action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question, as there is in this case, of whether there is a sufficient connection between Canada’s action and the deprivation of life, liberty, or security.

56 While this Court has never directly addressed the issue of whether deportation to torture would be inconsistent with fundamental justice, we have indicated on several occasions that extraditing a person to face torture would be inconsistent with fundamental justice. As we mentioned above, in *Schmidt, supra*, La Forest J. noted that s. 7 is concerned not only with the immediate consequences of an extradition order but also with “the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country” (p. 522). La Forest J. went on to specifically identify the possibility that the requesting country might torture the accused and then to state that “[s]ituations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7” (p. 522).

57 A similar view was expressed by McLachlin J. in *Kindler, supra*. In that case, McLachlin J. wrote that in some instances the “social consensus” as to whether extradition would violate fundamental justice would be clear. “This would be the case if, for instance, the fugitive faced torture on return to his or her home country” (p. 851). Concurring, La Forest J. wrote, similarly, that “[t]here are, of course, situations where the punishment imposed following surrender — torture, for example — would be so

outrageous to the values of the Canadian community that the surrender would be unacceptable” (p. 832).

58 Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state’s genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada’s constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere.

(ii) *The International Perspective*

59 We have examined the argument that from the perspective of Canadian law to deport a Convention refugee to torture violates the principles of fundamental justice. However, that does not end the inquiry. The provisions of the *Immigration Act* dealing with deportation must be considered in their international context: *Pushpanathan, supra*. Similarly, the principles of fundamental justice expressed in s. 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect. A complete understanding of the Act and the *Charter* requires consideration of the international perspective.

60 International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.

61 It has been submitted by the intervener, Amnesty International, that the absolute prohibition on torture is a peremptory norm of customary international law, or *jus cogens*. Articles 53 and 64 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, provide that existing or new peremptory norms prevail over treaties. Article 53 defines a peremptory norm as

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.

This raises the question of whether the prohibition on torture is a peremptory norm. Peremptory norms develop over time and by general consensus of the international community. This is the difficulty in interpreting international law; it is often impossible to pinpoint when a norm is generally accepted and to identify who makes up the international community. As noted by L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988), at pp. 723-24:

The clarification of the notion of *jus cogens* in international law is advancing, but is still far from being completed.

On the other hand, the international community of States has been *inactive in stating expressly* which norms it recognizes as peremptory in the present-day international law. In the opinion of the present writer, this inactivity, and the consequent uncertainty as to which norms are peremptory, constitute at present *the main problem of the viability of jus cogens*. [Emphasis in original.]

62 In the case at bar, there are three compelling indicia that the prohibition of torture is a peremptory norm. First, there is the great number of multilateral instruments that explicitly prohibit torture: see *Geneva Convention Relative to the Treatment of Prisoners of War* (1949), Can. T.S. 1965 No. 20, p. 84, Article 3; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1949), Can. T.S. 1965 No. 20, p. 25, Article 3; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1949), Can. T.S. 1965 No. 20, p. 55, Article 3; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1949), Can. T.S. 1965 No. 20, p. 163, Article 3; *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc. A/810, at 71 (1948), Article 5; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 3452 (XXX), UN Doc. A/10034 (1975); *International Covenant on Civil and Political Rights* (1966), Can. T.S. 1976 No. 47 (“ICCPR”), Article 7; *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), 213 U.N.T.S. 221, Article 3; *American Convention on Human Rights* (1969), 1144 U.N.T.S. 123, Article 5; *African Charter on Human and Peoples’ Rights* (1981), 21 I.L.M. 58, Article 5; *Universal Islamic Declaration of Human Rights* (1981), 9:2 *The Muslim World League Journal* 25, Article VII.

63 Second, Amnesty International submitted that no state has ever legalized torture or admitted to its deliberate practice and that governments accused of practising

torture regularly deny their involvement, placing responsibility on individual state agents or groups outside the government's control. Therefore, it argues that the weight of these domestic practices is further evidence of a universal acceptance of the prohibition on torture. Counsel for the respondents, while not conceding this point, did not refer this Court to any evidence of state practice to contradict this submission. However, it is noted in most academic writings that most, if not all states have officially prohibited the use of torture as part of their administrative practices, see : Hannikainen, *supra*, at p. 503.

64 Last, a number of international authorities state that the prohibition on torture is an established peremptory norm: see Hannikainen, *supra*, at p. 509; M. N. Shaw, *International Law* (4th ed. 1997), at pp. 203-4; *Prosecutor v. Furundzija*, 38 I.L.M. 317 (1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, No. IT-95-17/1-T, December 10, 1998); *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827 (H.L.). Others do not explicitly set it out as a peremptory norm; however, they do generally accept that the protection of human rights or humanitarian rights is a peremptory norm: see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at p. 515, and C. Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (1998), at sections 251, 1394 and 1396.

65 Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from.

With this in mind, we now turn to the interpretation of the conflicting instruments at issue in this case.

66 Deportation to torture is prohibited by both the ICCPR, which Canada ratified in 1976, and the CAT, which Canada ratified in 1987. The relevant provisions of the ICCPR read:

ARTICLE 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

ARTICLE 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . .

While the provisions of the ICCPR do not themselves specifically address the permissibility of a state's expelling a person to face torture elsewhere, *General Comment 20* to the ICCPR makes clear that Article 7 is intended to cover that scenario, explaining that “. . . States parties must not expose individuals to the danger of torture . . . upon return to another country by way of their extradition, expulsion or refoulement” (para. 9).

67 We do not share Robertson J.A.'s view that *General Comment 20* should be disregarded because it “contradicts” the clear language of Article 7. In our view, there is no contradiction between the two provisions. *General Comment 20* does not

run counter to Article 7; rather, it explains it. Nothing would prevent a state from adhering both to Article 7 and to *General Comment 20*, and *General Comment 20* does not detract from rights preserved or provided by Article 7. The clear import of the ICCPR, read together with the *General Comment 20*, is to foreclose a state from expelling a person to face torture elsewhere.

68 The CAT takes the same stand. The relevant provisions of that document read:

ARTICLE 1

1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

ARTICLE 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever . . . may be invoked as a justification of torture.

ARTICLE 3

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. [Emphasis added.]

ARTICLE 16

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

The CAT's import is clear: a state is not to expel a person to face torture, which includes both the physical and mental infliction of pain and suffering, elsewhere.

69 Robertson J.A., however, held that the CAT's clear proscription of deportation to torture must defer to Article 33(2) of the *Refugee Convention*, which permits a country to return (*refouler*) a refugee who is a danger to the country's security. The relevant provisions of the *Refugee Convention* state:

ARTICLE 33

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 or 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.

70 Article 33 of the *Refugee Convention* appears on its face to stand in opposition to the categorical rejection of deportation to torture in the CAT. Robertson J.A., faced with this apparent contradiction, attempted to read the two conventions in a way that minimized the contradiction, holding that the anti-deportation provisions of the CAT were not binding, but derogable.

71 We are not convinced that the contradiction can be resolved in this way. It is not apparent to us that the clear prohibitions on torture in the CAT were intended to be derogable. First, the absence of an express prohibition against derogation in Article 3 of the CAT together with the “without prejudice” language of Article 16 do not seem to permit derogation. Nor does it follow from the assertion in Article 2(2) of CAT that “[n]o exceptional circumstances . . . may be invoked as a justification of torture”, that the absence of such a clause in the Article 3 *refoulement* provision permits acts leading to torture in exceptional circumstances. Moreover, the history of Article 16 of the CAT suggests that it was intended to leave the door open to other legal instruments providing greater protection, not to serve as the means for reducing protection. During the deliberations of the Working Group that drafted the CAT, Article 16 was characterized as a “saving clause affirming the continued validity of other instruments prohibiting punishments or cruel, inhuman, or degrading treatment”: Convention against Torture, travaux préparatoires, UN Doc. E/CN.4/1408, at p. 66. This undermines the suggestion that Article 16 can be used as a means of narrowing the scope of protection that the CAT was intended to provide.

72 In our view, the prohibition in the ICCPR and the CAT on returning a refugee to face a risk of torture reflects the prevailing international norm. Article 33 of the *Refugee Convention* protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the *Refugee Convention* itself expresses a “profound concern for refugees” and its principal purpose is to “assure refugees the widest possible exercise of . . . fundamental rights and freedoms” (Preamble). This negates the suggestion that the provisions of the *Refugee Convention* should be used to deny rights that other legal instruments make universally available to everyone.

73 Recognition of the dominant status of the CAT in international law is consistent with the position taken by the UN Committee against Torture, which has applied Article 3(1) even to individuals who have terrorist associations. (The CAT provides for the creation of a Committee against Torture to monitor compliance with the treaty: see CAT, Part II, Articles 17-24.) More particularly, the Committee against Torture has advised that Canada should “[c]omply fully with article 3(1) . . . whether or not the individual is a serious criminal or security risk”: see Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Canada*, UN Doc. CAT/C/XXV/Concl.4, at para. 6(a).

74 Finally, we note that the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combatting terrorism and protecting national security: H.C. 6536/95, *Hat’ m Abu Zayda v. Israel General Security Service*, 38 I.L.M. 1471 (1999); *Rehman*, *supra*, at para. 54, *per* Lord Hoffmann.

75 We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*.

(iii) *Application to Section 53(1)(b) of the Immigration Act*

76 The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categorical. Indeed, both

domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*. To paraphrase Lord Hoffmann in *Rehman, supra*, at para. 54, states must find some other way of ensuring national security.

77 The Minister is obliged to exercise the discretion conferred upon her by the *Immigration Act* in accordance with the Constitution. This requires the Minister to balance the relevant factors in the case before her. As stated in *Rehman, supra*, at para. 56, *per* Lord Hoffmann:

The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.

Similarly, Lord Slynn of Hadley stated, at para. 16:

Whether there is . . . a real possibility [of an adverse effect on the U.K. even if it is not direct or immediate] is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to th[e] individual if a deportation order is made.

In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the *Charter*. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.

78 We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. (A violation of s. 7 will be saved by s. 1 “only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like”: see *Re B.C. Motor Vehicle Act*, *supra*, at p. 518; and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 99.) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.

79 In these circumstances, s. 53(1)(b) does not violate s. 7 of the *Charter*. What is at issue is not the legislation, but the Minister’s obligation to exercise the discretion s. 53 confers in a constitutional manner.

(b) *Are the Terms “Danger to the Security of Canada” and “Terrorism” Unconstitutionally Vague?*

(i) *“Danger to the Security of Canada”*

80 In order to deny the benefit of s. 53(1) to a person seeking its protection, the Minister must certify that the person constitutes a “danger to the security of Canada”. Suresh argues that this phrase is unconstitutionally vague.

81 A vague law may be unconstitutional for either of two reasons: (1) because it fails to give those who might come within the ambit of the provision fair notice of the consequences of their conduct; or (2) because it fails to adequately limit law enforcement discretion: see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. In the same case, this Court held that “a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate” (p. 643).

82 Robertson J.A. found that the phrase “danger to the security of Canada”, which is not defined in the *Immigration Act*, is not unconstitutionally vague (paras. 56-64). He conceded that the phrase was imprecise but reasoned that whether a person poses a danger to the security of Canada could be determined by “the individual’s degree of association or complicity with a terrorist organization” (para. 63). The government similarly argues that the phrase is not unconstitutionally vague; it contends that the phrase “refer[s] to the possibility that someone’s presence is harmful to national security in terms of the inadmissible classes” listed in s. 19 and referred to in s. 53. It suggests that the phrase can be “interpreted in the light of international law as a whole” and submits that the security of Canada is dependent on the security of other countries. On this interpretation, it need not be shown that the person’s presence in Canada poses a risk here. All that need be shown is that deportation may have a result that, viewed generally, enhances the security of Canada.

83 We agree with the government and Robertson J.A. that the phrase “danger to the security of Canada” is not unconstitutionally vague. However, we do not interpret the phrase exactly as he or the government suggests. We would not conflate s. 19’s reference to membership in a terrorist movement with “danger to the security of Canada”. While the two may be related, “danger to the security of Canada”, in our view, must mean something more than just “person described in s. 19”.

84 We would also, contrary to the government’s submission, distinguish “danger to the security of Canada” from “danger to the public”, although we recognize that the two phrases may overlap. The latter phrase clearly is intended to address threats to individuals in Canada, but its application is restricted by requiring that any individual who is declared to be a “danger to the public” have been convicted of a serious offence: *Immigration Act*, s. 53(1)(a), (c), and (d). The government’s suggested reading of “danger to the security of Canada” effectively does an end-run around the requirement in Article 33(2) of the *Refugee Convention* that no one may be returned (*refoulé*) as a danger to the community of the country unless he has first been convicted by a final judgment of a particularly serious crime.

85 Subject to these qualifications, we accept that a fair, large and liberal interpretation in accordance with international norms must be accorded to “danger to the security of Canada” in deportation legislation. We recognize that “danger to the security of Canada” is difficult to define. We also accept that the determination of what constitutes a “danger to the security of Canada” is highly fact-based and political in a general sense. All this suggests a broad and flexible approach to national security and, as discussed above, a deferential standard of judicial review. Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister’s decision.

86 The question arises whether the Minister must present direct evidence of a specific danger to the security of Canada. It has been argued that under international law the state must prove a connection between the terrorist activity and the security of the deporting country: Hathaway and Harvey, *supra*, at pp. 289-90. It has also been suggested that the *travaux préparatoires* to the *Refugee Convention* indicate that threats to the security of another state were not intended to qualify as a danger sufficient to permit *refoulement* to torture. Threats to the security of another state were arguably not intended to come within the term, nor were general concerns about terrorism intended to be sufficient: see *Refugee Convention, travaux préparatoires*, UN Doc. A/CONF.2/SR.16, at p. 8 (“Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency”); see A. Grahl-Madsen, *Commentary on the Refugee Convention, 1951* (1997), at p. 236 (“[T]he 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”).

87 Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved, we believe courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada’s security: see *Rehman, supra, per* Lord Slynn of Hadley, at paras. 16-17. International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid.

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.

89 While the phrase "danger to the security of Canada" must be interpreted flexibly, and while courts need not insist on direct proof that the danger targets Canada specifically, the fact remains that to return (*refouler*) a refugee under s. 53(1)(b) to torture requires evidence of a serious threat to national security. To suggest that something less than serious threats founded on evidence would suffice to deport a refugee to torture would be to condone unconstitutional application of the *Immigration Act*. Insofar as possible, statutes must be interpreted to conform to the Constitution. This supports the conclusion that while "danger to the security of Canada" must be given a fair, large and liberal interpretation, it nevertheless demands proof of a potentially serious threat.

90 These considerations lead us to conclude that 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.

91 This definition of “danger to the security of Canada” does not mean that Canada is unable to deport those who pose a risk to individual Canadians, but not the country. A different provision, the “danger to the public” provision, allows the government to deport those who pose no danger to the security of the country *per se* — those who pose a danger to Canadians, as opposed to a danger to Canada — provided they have committed a serious crime. Moreover, if a refugee is wanted for crimes in a country that will not torture him or her on return, the government may be free to extradite him or her to face those charges, whether or not he or she has committed crimes in Canada.

92 We are satisfied that the term “danger to the security of Canada”, defined as here suggested, gives those who might come within the ambit of the provision fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion. We hold, therefore, that the term is not unconstitutionally vague.

(ii) “*Terrorism*”

93 The term “terrorism” is found in s. 19 of the *Immigration Act*, dealing with denial of refugee status upon arrival in Canada. The Minister interpreted s. 19 as applying to terrorist acts post-admission and relied on alleged terrorist associations in Canada in seeking Suresh’s deportation under s. 53(1)(b), which refers to a class of persons falling under s. 19. We do not in these reasons seek to define terrorism

exhaustively — a notoriously difficult endeavour — but content ourselves with finding that the term provides a sufficient basis for adjudication and hence is not unconstitutionally vague. We share the view of Robertson J.A. that the term is not inherently ambiguous “even if the full meaning . . . must be determined on an incremental basis” (para. 69).

94

One searches in vain for an authoritative definition of “terrorism”. The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, “the term is open to politicized manipulation, conjecture, and polemical interpretation”: factum of the intervener Canadian Arab Federation (“CAF”), at para. 8; see also W. R. Farrell, *The U.S. Government Response to Terrorism: In Search of an Effective Strategy* (1982), at p. 6 (“The term [terrorism] is somewhat ‘Humpty Dumpty’ — anything we choose it to be”); O. Schachter, “The Extraterritorial Use of Force Against Terrorist Bases” (1989), 11 *Houston J. Int’l L.* 309, at p. 309 (“[n]o single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty”); G. Levitt, “Is ‘Terrorism’ Worth Defining?” (1986), 13 *Ohio N.U. L. Rev.* 97, at p. 97 (“The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail”); C. C. Joyner, “Offshore Maritime Terrorism: International Implications and the Legal Response” (1983), 36 *Naval War C. Rev.* 16, at p. 20 (terrorism’s “exact status under international law remains open to conjecture and polemical interpretation”); and J. B. Bell, *A Time of Terror: How Democratic Societies Respond to Revolutionary Violence* (1978), at p. x (“The very word [terrorism] becomes a litmus test for dearly held beliefs, so that a brief conversation on terrorist matters with almost anyone reveals a special world view, an interpretation of the nature of man, and a glimpse into a desired future.”)

95 Even amongst those who agree on the definition of the term, there is considerable disagreement as to whom the term should be attached: see, e.g., I. M. Porras, “On Terrorism: Reflections on Violence and the Outlaw” (1994), *Utah L. Rev.* 119, at p. 124 (noting the general view that “terrorism” is poorly defined but stating that “[w]ith ‘terrorism’ . . . everyone means the same thing. What changes is not the meaning of the word, but rather the groups and activities that each person would include or exclude from the list”); D. Kash, “Abductions of Terrorists in International Airspace and on the High Seas” (1993), 8 *Fla. J. Int’l L.* 65, at p. 72 (“[A]n act that one state considers terrorism, another may consider as a valid exercise of resistance”). Perhaps the most striking example of the politicized nature of the term is that Nelson Mandela’s African National Congress was, during the apartheid era, routinely labelled a terrorist organization, not only by the South African government but by much of the international community.

96 We are not persuaded, however, that the term “terrorism” is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated *International Convention for the Suppression of the Financing of Terrorism*, GA Res. 54/109, December 9, 1999, approaches the definitional problem in two ways. First, it employs a functional definition in Article 2(1)(a), defining “terrorism” as “[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”. The annex lists nine treaties that are commonly viewed as relating to terrorist acts, such as the *Convention for the Suppression of the Unlawful Seizure of Aircraft*, Can. T.S. 1972 No. 23, the *Convention on the Physical Protection of Nuclear Material*, 18 I.L.M. 1419, and the *International Convention for the Suppression of Terrorist Bombings*, 37 I.L.M. 249. Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2(1)(b) defines “terrorism” as:

Any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

97 In its submission to this Court, the CAF argued that this Court should adopt a functional definition of terrorism, rather than a stipulative one. The argument is that defining terrorism by reference to specific acts of violence (e.g. “hijacking, hostage taking and terrorist bombing”) would minimize politicization of the term (CAF factum, at paras. 11-14). It is true that the functional approach has received strong support from international law scholars and state representatives — support that is evidenced by the numerous international legal instruments that eschew stipulative definitions in favour of prohibitions on specific acts of violence. While we are not unaware of the danger that the term “terrorism” may be manipulated, we are not persuaded that it is necessary or advisable to altogether eschew a stipulative definition of the term in favour of a list that may change over time and that may in the end necessitate distinguishing some (proscribed) acts from other (non-proscribed) acts by reliance on a term like “terrorism”. (We note that the CAF, in listing acts, at para. 11, that might be prohibited under a functional definition, lists “terrorist bombing” — a category that clearly would not avoid the necessity of defining “terrorism”.)

98 In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that “terrorism” in s. 19 of the Act includes any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to

abstain from doing any act”. This definition catches the essence of what the world understands by “terrorism”. Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.

(iii) *Conclusion*

99 We conclude that the terms “danger to the security of Canada” and “terrorism” are not unconstitutionally vague. Applying them to the facts found in this case, they would *prima facie* permit the deportation of Suresh provided the Minister certifies him to be a substantial danger to Canada and provided he is found to be engaged in terrorism or a member of a terrorist organization as set out in s. 19(1)(e) and (f) of the *Immigration Act*.

(c) *Does Deportation for Membership in a Terrorist Organization Unjustifiably Violate the Charter Guarantees of Freedom of Expression and Freedom of Association?*

100 Suresh argues that the Minister’s issuance of the certificate under s. 40.1 of the *Immigration Act* and the order declaring him a danger to the security of Canada under s. 53(1)(b) on the ground that he was a member of the LTTE violate his *Charter* rights of free expression and free association and cannot be justified. He points out that he has not been involved in actual terrorist activity in Canada, but merely in fund-raising and support activities that may, in some part, contribute to the civil war efforts of Tamils in Sri Lanka. He also points out that it is not a criminal offence to belong to such an organization and that the government seeks to deport him for something that

Canadian citizens may lawfully do without sanction. He suggests that inclusion of mere membership in an organization that has been or will be involved in acts of terrorism unjustifiably limits the freedom of Convention refugees to express their views on dissident movements outside the country, as well as their freedom to associate with other people in Canada who come from similar backgrounds. He points out that the alleged terrorist organizations he was found to have been a member of are engaged in many positive endeavours to improve the lives of people in Canada and are not involved in violence here.

101 The government, for its part, argues that support of organizations that have engaged in or may assist terrorism is not constitutionally protected expression or association. It argues that constitutional rights cannot be extended to inflict harm on others. This is so, in the government's submission, even though many of the activities of the organization may be laudable. Accordingly, it says, ss. 2(b) and 2(d) of the *Charter* do not apply.

102 Section 19 of the *Immigration Act* applies to the entry of refugees into Canada. The *Refugee Convention*, and following it the *Immigration Act*, distinguish between the power of a state to refuse entry to a refugee, and its power to deport or "refouler" the refugee once the refugee is established in the country as a Convention refugee. The powers of a state to refuse entry are broader than to deport. The broader powers to refuse entry are based *inter alia* on the need to prevent criminals escaping justice in their own country from entering into Canada. No doubt the natural desire of states to reject unsuitable persons who by their conduct have put themselves "beyond the pale" also is a factor. See, generally, Hathaway and Harvey, *supra*.

103 The main purport of s. 19(1) is to permit Canada to refuse entry to persons who are or have been engaged in terrorism or who are or have been members of terrorist organizations. However, the *Immigration Act* uses s. 19(1) in a second and different way. It uses it in s. 53(1), the deportation section, to define the class of Convention refugees who may be deported because they constitute a danger to the security of Canada. Thus a Convention refugee like Suresh may be deported if he comes within a class of persons defined in s. 19(1) and constitutes a danger to the security of Canada.

104 At this point, an ambiguity in the combination of ss. 53 and 19 arises. Is the class of persons designated by the reference to s. 19 those persons who at entry were or had been associated with terrorist acts or members of terrorist organizations? Or was Parliament's intention to include those who after entry committed terrorist acts or were members of terrorist organizations? The Minister interprets s. 19, as incorporated into s. 53, as including conduct of refugees after entry.

105 We do not find it necessary to resolve this ambiguity, as in our opinion on either interpretation, s. 19 as incorporated into s. 53 does not breach the rights of free expression and association guaranteed by ss. 2(b) and 2(d) of the *Charter*. If s. 19, as used in s. 53, is interpreted as referring only to conduct prior to the point of entry, no constitutional problem arises. On the other hand, if it is interpreted as referring to post-entry conduct, we are satisfied that the conduct caught by the section, interpreted properly by the Minister, fails to attract constitutional protection because it would be conduct associated with violent activity.

106 Section 53, as discussed earlier in connection with deportation to face torture, requires the Minister to balance a variety of factors relating on the one hand to

concerns of national security, and to fair process to the Convention refugee on the other. In balancing these factors, the Minister must exercise her discretion in conformity with the values of the *Charter*.

107 It is established that s. 2 of the *Charter* does not protect expressive or associational activities that constitute violence: *Keegstra, supra*. This Court has, it is true, given a broad interpretation to freedom of expression, extending it, for example, to hate speech and perhaps even threats of violence: *Keegstra; R. v. Zundel*, [1992] 2 S.C.R. 731. At the same time, the Court has made plain that the restriction of such expression may be justified under s. 1 of the *Charter*: see *Keegstra*, at pp. 732-33. The effect of s. 2(b) and the justification analysis under s. 1 of the *Charter* suggest that expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter in the guarantees of the *Charter*.

108 The Minister's discretion to deport under s. 53 of the *Immigration Act* is confined, on any interpretation of the section, to persons who have been engaged in terrorism or are members of terrorist organizations, and who also pose a threat to the security of Canada. Persons associated with terrorism or terrorist organizations — the focus of this argument — are, on the approach to terrorism suggested above, persons who are or have been associated with things directed at violence, if not violence itself. It follows that so long as the Minister exercises her discretion in accordance with the Act, there will be no ss. 2(b) or (d) *Charter* violation.

109 Suresh argues that s. 19 is so broadly drafted that it has the potential to catch persons who are members of or participate in the activities of a terrorist organization in ignorance of its terrorist activities. He points out that many organizations alleged to support terrorism also support humanitarian aid both in Canada

and abroad. Indeed, he argues that this is so of the LTTE, the association to which he is alleged to belong. While it seems clear on the evidence that Suresh was not ignorant of the LTTE's terrorist activities, he argues that it may be otherwise for others who were members or contributed to its activities. Thus without knowingly advocating terrorism and violence, they may be found to be part of the organization and hence subject to deportation. This, he argues, would clearly violate ss. 2(b) and 2(d) of the *Charter*.

110 We believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to the national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.

111 It follows that the appellant has not established that s. 53's reference to s. 19 unjustifiably violates his *Charter* rights of freedom of expression and freedom of association. Moreover, since there is no s. 2 violation, there is no basis to interfere with the s. 40.1 certificate that was issued in October 1995.

112 This brings us to Suresh’s final argument, that the process by which the Minister assessed the risk of torture he faces should he be returned to Sri Lanka was flawed and violated his constitutional rights by unjustly exposing him to the risk of torture.

3. Are the Procedures for Deportation Set Out in the *Immigration Act* Constitutionally Valid?

113 This appeal requires us to determine the procedural protections to which an individual is entitled under s. 7 of the *Charter*. In doing so, we find it helpful to consider the common law approach to procedural fairness articulated by L’Heureux-Dubé J. in *Baker, supra*. In elaborating what is required by way of procedural protection under s. 7 of the *Charter* in cases of this kind, we wish to emphasize that our proposals should be applied in a manner sensitive to the context of specific factual situations. What is important are the basic principles underlying these procedural protections. The principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in *Baker*, are the same principles underlying that duty. As Professor Hogg has said, “The common law rules [of procedural fairness] are in fact basic tenets of the legal system, and they have evolved in response to the same values and objectives as s. 7”: see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.) vol. 2, at para. 44.20. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 212-13, Wilson J. recognized that the principles of fundamental justice demand, at a minimum, compliance with the common law requirements of procedural fairness. Section 7 protects substantive as well as procedural rights: *Re B.C. Motor Vehicle Act, supra*. Insofar as procedural rights are concerned, the common law doctrine summarized in *Baker, supra*, properly recognizes the ingredients of fundamental justice.

114 We therefore find it appropriate to look to the factors discussed in *Baker* in determining not only whether the common law duty of fairness has been met, but also in deciding whether the safeguards provided satisfy the demands of s. 7. In saying this, we emphasize that, as is the case for the substantive aspects of s. 7 in connection with deportation to torture, we look to the common law factors not as an end in themselves, but to inform the s. 7 procedural analysis. At the end of the day, the common law is not constitutionalized; it is used to inform the constitutional principles that apply to this case.

115 What is required by the duty of fairness — and therefore the principles of fundamental justice — is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker, supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J. More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, “the closeness of the administrative process to the judicial process”; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker, supra*, at paras. 23-27. This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker, supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.

116 The nature of the decision to deport bears some resemblance to judicial proceedings. While the decision is of a serious nature and made by an individual on the basis of evaluating and weighing risks, it is also a decision to which discretion must attach. The Minister must evaluate not only the past actions of and present dangers to an individual under her consideration pursuant to s. 53, but also the future behaviour of that individual. We conclude that the nature of the decision militates neither in favour of particularly strong, nor particularly weak, procedural safeguards.

117 The nature of the statutory scheme suggests the need for strong procedural safeguards. While the procedures set up under s. 40.1 of the *Immigration Act* are extensive and aim to ensure that certificates under that section are issued fairly and allow for meaningful participation by the person involved, there is a disturbing lack of parity between these protections and the lack of protections under s. 53(1)(b). In the latter case, there is no provision for a hearing, no requirement of written or oral reasons, no right of appeal — no procedures at all, in fact. As L’Heureux-Dubé J. stated in *Baker, supra*, “[g]reater procedural protections . . . will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted” (para. 24). This is particularly so where, as here, Parliament elsewhere in the Act has constructed fair and systematic procedures for similar measures.

118 The third factor requires us to consider the importance of the right affected. As discussed above, the appellant’s interest in remaining in Canada is highly significant, not only because of his status as a Convention refugee, but also because of the risk of torture he may face on return to Sri Lanka as a member of the LTTE. The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of

fundamental justice under s. 7 of the *Charter*. Deportation from Canada engages serious personal, financial and emotional consequences. It follows that this factor militates in favour of heightened procedural protections under s. 53(1)(b). Where, as here, a person subject to a s. 53(1)(b) opinion may be subjected to torture, this factor requires even more substantial protections.

119 As discussed above, Article 3 of the CAT, which explicitly prohibits the deportation of persons to states where there are “substantial grounds” for believing that the person would be “in danger of being subjected to torture”, informs s. 7 of the *Charter*. It is only reasonable that the same executive that bound itself to the CAT intends to act in accordance with the CAT’s plain meaning. Given Canada’s commitment to the CAT, we find that the appellant had the right to procedural safeguards, at the s. 53(1)(b) stage of the proceedings. More particularly, the phrase “substantial grounds” raises a duty to afford an opportunity to demonstrate and defend those grounds.

120 The final factor we consider is the choice of procedures made by the agency. In this case, the Minister is free under the terms of the statute to choose whatever procedures she wishes in making a s. 53(1)(b) decision. As noted above, the Minister must be allowed considerable discretion in evaluating future risk and security concerns. This factor also suggests a degree of deference to the Minister’s choice of procedures since Parliament has signaled the difficulty of the decision by leaving to the Minister the choice of how best to make it. At the same time, this need for deference must be reconciled with the elevated level of procedural protections mandated by the serious situation of refugees like Suresh, who if deported may face torture and violations of human rights in which Canada can neither constitutionally, nor under its international treaty obligations, be complicit.

121 Weighing these factors together with all the circumstances, we are of the opinion that the procedural protections required by s. 7 in this case do not extend to the level of requiring the Minister to conduct a full oral hearing or a complete judicial process. However, they require more than the procedure required by the Act under s. 53(1)(b) — that is, none — and they require more than Suresh received.

122 We find that a person facing deportation to torture under s. 53(1)(b) must be informed of the case to be met. Subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents, this means that the material on which the Minister is basing her decision must be provided to the individual, including memoranda such as Mr. Gautier’s recommendation to the Minister. Furthermore, fundamental justice requires that an opportunity be provided to respond to the case presented to the Minister. While the Minister accepted written submissions from the appellant in this case, in the absence of access to the material she was receiving from her staff and on which she based much of her decision, Suresh and his counsel had no knowledge of which factors they specifically needed to address, nor any chance to correct any factual inaccuracies or mischaracterizations. Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him or her. The Minister must then consider these submissions along with the submissions made by the Minister’s staff.

123 Not only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise. Thus the refugee should be permitted to present evidence pursuant to s. 19 of the Act showing that his or her continued presence in Canada will

not be detrimental to Canada, notwithstanding evidence of association with a terrorist organization. The same applies to the risk of torture on return. Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances.

124 It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.

125 In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces. In addition, it must be remembered that before becoming a Convention refugee, the individual involved must establish a well-founded fear of persecution (although not necessarily torture) if deported.

126 The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to

believe that the individual who is the subject of a s. 53(1)(b) declaration will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. The reasons must also articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act. In addition, the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion, such as the memorandum of Mr. Gautier. Mr. Gautier's report, explaining to the Minister the position of Citizenship and Immigration Canada, is more like a prosecutor's brief than a statement of reasons for a decision.

127 These procedural protections need not be invoked in every case, as not every case of deportation of a Convention refugee under s. 53(1)(b) will involve risk to an individual's fundamental right to be protected from torture or similar abuses. It is for the refugee to establish a threshold showing that a risk of torture or similar abuse exists before the Minister is obliged to consider fully the possibility. This showing need not be proof of the risk of torture to that person, but the individual must make out a *prima facie* case that there may be a risk of torture upon deportation. If the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information, issue responsive written reasons. This is the minimum required to meet the duty of fairness and fulfill the requirements of fundamental justice under s. 7 of the *Charter*.

128 The Minister argues that even if the procedures used violated Suresh's s. 7 rights, that violation is justified as a reasonable limit under s. 1 of the *Charter*. Despite

the legitimate purpose of s. 53(1)(b) of the *Immigration Act* in striking a balance between the need to fulfil Canada's commitments with respect to refugees and the maintenance of the safety and good order of Canadian society, the lack of basic procedural protections provided to Suresh cannot be justified by s. 1 in our view. Valid objectives do not, without more, suffice to justify limitations on rights. The limitations must be connected to the objective and be proportional. Here the connection is lacking. A valid purpose for excepting some Convention refugees from the protection of s. 53(1) of the Act does not justify the failure of the Minister to provide fair procedures where this exception involves a risk of torture upon deportation. Nor do the alleged fundraising activities of Suresh rise to the level of exceptional conditions contemplated by Lamer J. in *Re B.C. Motor Vehicle Act, supra*. Consequently, the issuance of a s. 53(1)(b) opinion relating to him without the procedural protections mandated by s. 7 is not justified under s. 1.

4. Should the Minister's Order Be Set Aside and a New Hearing Ordered?

129

We conclude that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the *Charter's* s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss. 7 or 1 of the *Charter*. We reject the argument that the terms "danger to the security of Canada" and "terrorism" are unconstitutionally vague. We also reject the argument that s. 53, by its reference to s. 19, unconstitutionally violates the *Charter* guarantees of freedom of expression and association. Finally, we conclude that the procedures for deportation under the *Immigration Act*, when applied in accordance with the safeguards outlined in these reasons, are constitutional.

130 Applying these conclusions in the instant case, we find that Suresh made a *prima facie* showing that he might be tortured on return if expelled to Sri Lanka. Accordingly, he should have been provided with the procedural safeguards necessary to protect his s. 7 right not to be expelled to torture. He was not provided the required safeguards. We therefore remand the case to the Minister for reconsideration in accordance with the procedures set out in these reasons.

V. Conclusion

131 The appeal is allowed with costs throughout on a party and party basis. The constitutional questions are answered as follows:

1. Does s. 53(1)(b) of the *Immigration Act*, R.S.C. 1985, c. I-2, offend s. 7 of the *Canadian Charter of Rights and Freedoms* to the extent that it does not prohibit the Minister of Citizenship and Immigration from removing a person from Canada to a country where the person may face a risk of torture?

Answer: No.

2. If the answer to question 1 is in the affirmative, is s. 53(1)(b) of the *Immigration Act* a reasonable limit within the meaning of s. 1 of the *Charter* on the rights of a person who may face a risk of torture if removed to a particular country?

Answer: It is not necessary to answer this question.

3. Do ss. 19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(1)(f)(iii)(B) of the *Immigration Act* infringe the freedoms guaranteed under ss. 2(b) and 2(d) of the *Charter*?

Answer: Section 19(1) of the *Immigration Act*, as incorporated by s. 53(1), does not infringe ss. 2(b) and 2(d) of the *Charter*.

4. If the answer to question 3 is in the affirmative, are ss. 19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(1)(f)(iii)(B) of the *Immigration Act* a reasonable limit on the rights of a person within the meaning of s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

5. Is the term “danger to the security of Canada” found in s. 53(1)(b) of the *Immigration Act* and/or the term “terrorism” found in s. 19(1)(e) and (f) of the *Immigration Act* void for vagueness and therefore contrary to the principles of fundamental justice under s. 7 of the *Charter*?

Answer: No.

6. If the answer to question 5 is in the affirmative, are ss. 53(1)(b) and/or s. 19(1)(e) and (f) of the *Immigration Act* a reasonable limit on the rights of a person within the meaning of s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

Appeal allowed with costs.

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