Suresh v. Canada (Minister of Citizenship and Immigration) (C.A.), 2000 CanLII 17101 (F.C.A.)

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A-415-99

Manickavasagam Suresh (*Appellant*)

v.

The Minister of Citizenship and Immigration and **The Attorney General of Canada** (*Respondents*)

Indexed as: Sureshv. Canada (Minister of Citizenship and Immigration) (C.A.)

Court of Appeal, Décary, Linden and Robertson JJ.A. "Toronto, October 4 and 5, 1999; Ottawa, January 18, 2000.

Citizenship and Immigration " Exclusion and removal " Removal of refugees " Appellant, Tamil of Sri Lanka, recognized as Convention refugee by IRB, applying for landing under Immigration Act " Certificate issued by Solicitor General, MCI alleging applicant inadmissible under Act, s. 19 as fundraiser for terrorist organization " Minister issuing danger opinion under Act, s. 53(1)(b) " S. 53(1)(b) contrary to Charter, s. 7 but saved by s. 1.

International law " Appellant, Convention refugee facing removal to country where may be tortured, arguing right under international law to be secure against torture absolute, binding on Canada " Whether prohibition against refoulement of Convention refugees non-derogable right " Prohibition against torture restricted to conduct over which state has control " No conflict between three international conventions applicable herein " Refoulement of Convention refugee posing security risk to Canada not contravening any international Convention ratified by Canada.

Constitutional law " Charter of Rights " Fundamental freedoms " Appellant submitting Immigration Act, s. 19(1)(e), (f) infringes right to freedom of expression, association " Expression involving violence outside protected sphere " Terrorism unacceptable means of attempting to effect political change " LTTE engaging in indiscriminate killing, torture of innocent civilians amounting to crimes against humanity " Fundraising in pursuit of terrorist violence not protected expression.

Constitutional law " Charter of Rights " Life, liberty and security " Refoulement of person to country where may be tortured engaging right to security of person under Charter, s. 7 " Whether deportation contrary to principles of fundamental justice in substantive, procedural sense " Deprivation of security of person breach of s. 7 only if not in accordance with principles of fundamental justice " Minister must assess risk of torture, balance competing interests under Charter, s. 7, principles of fundamental justice " Case law reviewed " Law exposing person to risk of torture breach of principles of fundamental justice.

Constitutional law " Charter of Rights " Limitation clause " Immigration Act, s. 53(1)(b) infringing Charter, s. 7, whether saved under s. 1 " Oakes test applied " Objectives of Act, s. 53(1)(b) sufficiently important to warrant

overriding constitutional right " Rational connection between objective, means " Minimal impairment requirement met " Salutary effects of legislation outweighing deleterious effects " Charter not movable barrier lowered to permit entry of terrorists, raised to prevent removal " S. 53(1)(b) saved under Charter, s. 1.

Administrative law " Judicial review " Certiorari " Appellant seeking to set aside Minister's decision to issue danger opinion letter under Immigration Act, s. 53(1)(b) " Constitutional standard of review whether deportation to face torture sufficiently shocks national conscience " No breach of implied limitations governing exercise of discretionary decision-making power " Minister not acting in bad faith, in "capricious" or "vexatious manner" " State's interests outweighing those of appellant " Canadian conscience not shocked by Minister's decision.

This was an appeal from a Trial Division decision dismissing an application for judicial review with respect to an "opinion letter" issued by the Minister of Citizenship and Immigration under paragraph 53(1)(*b*) of the *Immigration Act* that the appellant posed "a danger to the security of Canada". The appellant is a Tamil and citizen of Sri Lanka who, after entering Canada, was recognized as a Convention refugee. Shortly after, he applied for landing in Canada but, before his application was finalized, a certificate was issued jointly by the Solicitor General of Canada and the Minister of Citizenship and Immigration alleging that the appellant was a person inadmissible under section 19 of the *Immigration Act* , being a member of the Liberation Tigers of Tamil Eelam (LTTE), an organization alleged to engage in terrorism within the Indian subcontinent. Based on that certificate, the Minister issued an opinion letter saying that the appellant posed a danger to the security of Canada. McKeown J. dismissed an application for judicial review of the Minister's decision. Four main issues were raised on appeal: (1) whether under international law there is a non-derogable right against *refoulement* to a country where the person being returned will be at risk of torture; (2) whether paragraphs 19(1)(*e*) and (*f*) of the *Immigration Act* violate paragraph 2(*b*) or (*d*) of the Charter; (3) whether paragraph 53(1)(*b*) of the *Immigration Act* is contrary to section 7 of the Charter in that it deprives an individual of the right to security of the person and (4) the standard of review with respect to the Minister's decision to issue the opinion letter.

Held, the appeal should be dismissed.

(1) The right under international law to be secure against torture is neither absolute nor binding on Canada. The prohibition against torture is restricted to conduct over which a state has control. The *International Covenant on Civil and Political Rights* does not purport to deal with the issue of *refoulement*, let alone the question as to whether a prohibition against *refoulement* of Convention refugees is a non-derogable right. There is no conflict between the three international conventions which Canada has ratified, namely the *United Nations Convention Relating to the Status of Refugees*, the *Convention Against Torture* and the *International Covenant on Civil and Political Rights*. There is no express principle of non-derogation in respect of the prohibition against *refoulement* to a country which exposes a person to a risk of torture, but rather a recognition under the *Convention Against Torture* that the prohibition is "without prejudice" to the provisions of any other international instrument which relates to extradition or expulsion. Accepting that the *United Nations Convention Relating to the Status of Refugess* expressly permits derogation from the prohibition against *refoulement*, it is permissible for a state to rid itself of those who pose a security risk without being in breach of its international obligations. Principles of customary international law may be recognized and applied in Canadian courts as part of the domestic law, only in so far as they do not conflict with it. The alleged peremptory norm conflicts with Canada's domestic law as evidenced by paragraph 53(1)(*b*) of the *Immigration Act*. In the circumstances, the domestic legislation prevails.

(2) A twofold test has been articulated by the Supreme Court of Canada for determining whether there is a violation of the right to freedom of expression. It must be determined first whether the conduct in question falls within the sphere of protected expression, second whether the purpose or effect of the legislation is to restrict freedom of expression. Expression involving violence falls outside the protected sphere. Terrorism is an unacceptable means of attempting to effect political change. No one has an inherent right to engage in terrorism in the pursuit of self-determination. There was sufficient and conclusive evidence that the LTTE engages in indiscriminate killing and torture of innocent civilians amounting to what are classified under international law as "crimes against humanity". Direct attacks by violent means on the physical liberty and integrity of another person is not protected by paragraph 2(*b*) of the Charter. There can be no protection for expression which is communicated through physical violence directed at an innocent civilan population. As violent forms of expression do not receive constitutional protection, neither can fundraising in aid of terrorism. Those who freely choose to raise funds used to sustain terrorist organizations bear the same guilt and responsibility as those who

actually carry out the terrorist acts. Fundraising in the pursuit of terrorist violence must by necessity fall outside the sphere of protected expression.

(3) It is common ground that *refoulement* of a person to a country where that person may be tortured engages the right to "security of the person" under section 7 of the Charter. Section 7 has both a "procedural" and "substantive" component. With respect to procedural due process, the appellant raised four issues. First, it was said that the Minister's decision under paragraph 53(1)(*b*) of the *Immigration Act* involves a subjective decision-making process, while section 7 of the Charter requires an objective one. Second, the Minister was not acting impartially when rendering her decision in that she was acting as both "prosecutor and judge". Third, the appellant was denied an oral hearing before the Minister. Fourth, he was entitled to but did not receive written reasons from the Minister and, correlatively, the memorandum submitted to the Minister did not constitute adequate reasons. None of these objections was sustainable.

With respect to the issue of substantive due process, it was first submitted that the phrase "danger to the security of Canada" found in paragraph 53(1)(*b*) of the Act and the word "terrorism" in section 19 are void for vagueness. A law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. The *Immigration Act* neither expressly defines nor sets out any criteria by which to gauge the precise meaning of the term "danger to the security of Canada". What presents a danger to the security of Canada is informed by the provisions of the *Immigration Act* and the *Canadian Security Intelligence Service Act*, the purpose of which is to exclude from Canada persons who are or were members of a terrorist organization and who may engage in nefarious activities either in Canada or abroad using Canada as a base. The fact that the term "danger to the security of Canada" is not a precise concept does not mean that it is incapable of rational application or that the Minister has an unfettered discretion when deciding to issue an opinion letter under paragraph 53(1)(*b*). The term "terrorism" is not inherently ambiguous such that its meaning cannot be arrived at through legal analysis. The appellant also argued that the absence of statutory duty on the Minister to consider whether *refoulement* would expose a person to a risk of torture and, if so, to weigh whether the state's interest outweighs the individual's right not to be exposed to a risk of torture is contrary to the principles of fundamental justice. Paragraph 53(1)(*b*) does not expressly require this balancing. The Supreme Court of Canada has accepted, in recent cases, that a statute may not expressly require a balancing of state *versus* private interests. In cases where the right to security of a person is engaged by the application of a statutory provision, such as paragraph 53(1)(*b*) of the *Immigration Act*, it is section 7 of the Charter and the principles of fundamental justice that dictate the Minister must assess the risk of torture and, if necessary, balance competing interests. Therefore, it is irrelevant that the impugned legislation fails to make express provision for a balancing of interests. It was also submitted, with respect to the issue of substantive due process, that the deportation of a person to a country where there is a risk of torture constitutes a breach of the principles of fundamental justice. A deprivation of security of the person is a breach of section 7 only if it is not in accordance with the "principles of fundamental justice". It is clear that the imposition of deportation to face possible torture contravenes basic and intuitive notions of what is just and fair and that torture is an unacceptable means for extracting information or meeting out punisment. That brings into issue whether it is permissible for a court to balance the state's interest in deporting suspected terrorists against their right to be secure against torture when determining the constitutional validity of paragraph 53(1)(*b*) of the Act under section 7 of the Charter. In *Kindler v. Canada (Minister of Justice)*, a majority of the Supreme Court of Canada implicitly accepted that it is permissible to effect a balancing of interests when deciding whether an extradition law infringes a principle of fundamental justice. It was said that the appropriate test for determining whether an extradition law offends section 7 of the Charter is whether the imposition of the penalty by the foreign state "sufficiently shocks" the Canadian conscience. A law which exposes a person to a risk of torture must be accepted as being contrary to basic tenets governing our legal system and, therefore a breach of the principles of fundamental justice. The real issue was whether the legislation in question is saved under section 1 of the Charter.

The analytical framework for evaluating the constitutional validity of legislation under section 1 of the Charter was set out in *The Queen v. Oakes*. First, the objective of the legislation must be pressing, substantial and of sufficient importance to warrant overriding a constitutionally protected right. The basis for the enactment of the section dealing with the exclusion, inadmissibility and removal of terrorists is found in paragraphs 3(*g*), (*i*) and (*j*) of the Act. There was evidence that Canada has become a haven for terrorist organizations. The objectives underscoring paragraph 53(1)(*b*) of the Act are aimed at ensuring Canadian security and are sufficiently important to warrant overriding a constitutional right. Second, there is a rational connection between the objective of preventing terrorists from living in Canada and the means chosen to address that effect. Third, the minimal impairment

requirement was also met in that the legislation does no more than is reasonably necessary to achieve its goal. Section 52 of the Act is sufficiently flexible to enable the Minister to permit a person who is subject to a deportation order to seek admission to a country other than the one giving rise to the risk of torture. The requirement of minimal impairment is satisfied to the extent that deportation to a country where there is a risk of torture is a decision of last resort. Finally, there must be proportionality between the salutary effects of the legislation and its deleterious effects. The benefits of the legislation in question are self-evident in that it promotes the security of Canadians while undermining the ability of terrorists to operate offshore and to seek political goals through actions which qualify as crimes against humanity. The deleterious effects of the legislation are also obvious. However, the salutary effects outweigh the deleterious effects on those who face *refoulement* and the risk of torture. This is one instance in which the collective rights of the majority significantly outweigh the right of a few to be secure against the potential of personal harm. Paragraph 53(1)(*b*) of the Act infringes section 7 of the Charter but is saved under section 1. The Charter has been effective in lowering the barriers facing those who seek refuge in this country and for reasons which are compatible with Canada's humanitarian tradition. However, it is not a movable barrier which can be lowered to facilitate admission to Canada and then raised to prevent removal. A law which permits *refoulement* of suspected terrorists and exposes them to the risk of torture would not violate most Canadians' sense of justice.

(4) The Minister's decision to issue the opinion letter was subject to judicial scrutiny by reference to the constitutional standard of review and the administrative law standard. The constitutional standard of review, as set out by the Supreme Court in *Kindler*, is whether deportation to face torture in the circumstances of this case sufficiently shocks the national conscience. Under that standard, a person such as the appellant must establish that there are substantial reasons for believing he would be exposed to the risk of torture. As to the administrative standard of review, all discretionary powers must be exercised "according to law" and, therefore, their exercise by administrative officers are subject to certain implied limitations. All powers granted by Parliament to the executive are fettered only to the extent necessary to ensure that basic tenets of the law are observed. In *Baker v. Canada (Minister of Citizenship and Immigration)* , the Supreme Court of Canada adopted the "pragmatic and functional approach" that had been developed with respect to the review of decisions of expert tribunals. The application of that approach to determine the proper standard of review embraces a spectrum of three possible standards: correctness, reasonableness *simpliciter* and patent unreasonableness. Under this spectrum, there was no basis for setting aside the Minister's decision to declare the appellant a danger to the security of Canada. While the Motions Judge held that the proper standard of review is reasonableness, this Court refrained from selecting any one of these standards. The questions which remained were whether there were substantial grounds for believing that the appellant will face the risk of torture while in detention upon being returned to Sri Lanka and what is the requisite degree of risk of torture envisaged by the "substantial grounds" test. The risk of torture must be "personal and present". Where a serious risk of torture would arise on *refoulement* , the Minister must balance the state's interests with those whose personal security is threatened. The memorandum submitted to the Minister was sufficiently detailed for the Court to conclude that there was no breach of any of the implied limitations governing the exercise of a discretionary decision-making power. Nor was there any allegation that the Minister acted in bad faith or could be said to have exercised her discretion in a "capricious" or "vexatious" manner. None of the determinations leading up to the final decision to issue the opinion letter and declare the appellant a danger to the security of Canada warranted the Court's intervention. The state's interests outweighed those of the appellant in the sense that the Canadian conscience was not shocked by the Minister's decision. It is more likely that public confidence in the refugee system and support for the Charter would be seriously undermined if the appellant were entitled to remain in Canada.

statutes and regulations judicially considered

Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. "1189 (Supp. II 1996).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 2, 6, 7, 11(*e*), 12.

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 52.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36, Arts. 1, 2, 3, 16.

Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, Art. 3.

Criminal Code, R.S.C., 1985, c. C-46 , s. 515(10)(*b*).

Extradition Act, R.S.C., 1985, c. E-23 , s. 25.

Federal Court Act, R.S.C., 1985, c. F-7 , s. 18.1(4) (as enacted by S.C. 1990, c. 8, s. 5).

Federal Court Rules, 1998, SOR/98-106, rr. 369, 394(1), 398.

Immigration Act, R.S.C., 1985, c. I-2 , ss. 3(*g*),(*i*),(*j*), 19 (as am. by S.C. 1992, c. 49, s. 11), 40.1(1) (as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31), (3) (as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4), (6) (as enacted *idem*), (7) (as enacted *idem*; S.C. 1992, c. 49, s. 31), 52(1) (as am. *idem*, s. 42), (2), (3), (4) (as enacted by R.S.C., 1985 (3rd Supp.), c. 30, s. 7), 53(1)(*a*) (as am. by S.C. 1992, c. 49, s. 43), (*b*) (as am. *idem*), 83(1) (as am. *idem*, s. 73).

International Covenant on Civil and Political Rights, December 19, 1966, [1976] Can. T.S. No. 47, Arts. 4, 7.

Narcotic Control Act, R.S.C. 1970, c. N-1 , s. 5(2).

Supreme Court Act, R.S.C., 1985, c. S-26 , s. 65.1 (as enacted by S.C. 1990, c. 8, s. 40; 1994, c. 44, s. 101).

Treaty on Extradition between the Government of Canada and the Government of the United States of America, December 3, 1971, [1976] Can. T.S. No. 3, Art. 6.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Arts. 32, 33.

cases judicially considered

applied:

Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193 (S.C.C.); 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 11 Admin. L.R. (3d) 1; 43 Imm. L.R. (2d) 117; 226 N.R. 201; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (S.C.C.), [1989] 1 S.C.R. 927; (1989), 58 D.L.R. (4th) 577; 25 C.P.R. (3d) 417; 94 N.R. 167; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (S.C.C.), [1990] 1 S.C.R. 1123; [1990] 4 W.W.R. 481; (1990), 68 Man. R. (2d) 1; 56 C.C.C. (3d) 65; 77 C.R. (3d) 1; 109 N.R. 81; *Kindler v. Canada (Minister of Justice)*, 1991 CanLII 78 (S.C.C.), [1991] 2 S.C.R. 779; (1991), 84 D.L.R. (4th) 438; 67 C.C.C. (3d) 1; 8 C.R. (4th) 1; 129 N.R. 81; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (S.C.C.), [1992] 2 S.C.R. 606; (1992), 114 N.S.R. (2d) 91; 93 D.L.R. (4th) 36; 313 A.P.R. 91; 74 C.C.C. (3d) 289; 43 C.P.R. (3d) 1; 15 C.R. (4th) 1; 10 C.R.R. (2d) 34; 139 N.R. 241; *The Queen v. Oakes*, 1986 CanLII 46 (S.C.C.), [1986] 1 S.C.R. 103; (1986), 26 D.L.R. (4th) 200; 24 C.C.C. (3d) 321; 50 C.R. (3d) 1; 19 C.R.R. 308; 65 N.R. 87; 14 O.A.C. 335.

considered:

Suresh, Re (1997), 140 F.T.R. 88; 40 Imm. L.R. (2d) 247 (F.C.T.D.); *Chahal v. the United Kingdom*, Eur. Court HR, Reports of Judgments and Decisions 1996-V; *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (S.C.C.), [1992] 1 S.C.R. 711; (1992), 90 D.L.R. (4th) 289; 2 Admin. L.R. (2d) 125; 72 C.C.C. (3d) 214; 8 C.R.R. (2d) 234; 16 Imm. L.R. (2d) 1; 135 N.R. 161*; R. v. Morales*, 1992 CanLII 53 (S.C.C.), [1992] 3 S.C.R. 711; (1992), 77 C.C.C. (3d) 91; 17 C.R. (4th) 74; 12 C.R.R. (2d) 31; 144 N.R. 176; 51 Q.A.C. 161; *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (S.C.C.), [1992] 3 S.C.R. 631; (1992), 97 D.L.R. (4th) 577; 9 Admin. L.R. (2d) 1; 77 C.C.C. (3d) 65; 17 C.R. (4th) 161; 12 C.R.R. (2d) 77; 144 N.R. 327; 59 O.A.C. 241; *R. v. Swain*, 1991 CanLII 104 (S.C.C.), [1991] 1 S.C.R. 933; (1991), 75 O.R. (2d) 388; 71 D.L.R. (4th) 551; 63 C.C.C. (3d) 481; 5 C.R. (4th) 253; 3 C.R.R. (2d) 1; 125 N.R. 1; 47 O.A.C. 81; *Godbout v. Longueuil (City)*, 1997 CanLII 335 (S.C.C.), [1997] 3 S.C.R. 844; (1997), 152 D.L.R. (4th) 577; 43 M.P.L.R. (2d) 1; 219 N.R. 1*; Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (S.C.C.), [1994] 3 S.C.R. 835; (1994), 120 D.L.R. (4th) 12; 94 C.C.C. (3d) 289; 34 C.R. (4th) 269; 25 C.R.R. (2d) 1; 175 N.R. 1; 76 O.A.C. 81; *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (S.C.C.), [1998] 1 S.C.R. 877; (1998), 38 O.R. (3d) 735; 159 D.L.R. (4th) 385; 226 N.R. 1; 109 O.A.C. 201.

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APPEAL from a Trial Division decision ((1999), 50 Imm. L.R. (2d) 183) dismissing an application for judicial review with respect to an "opinion letter" issued by the Minister of Citizenship and Immigration under paragraph 53(1)(*b*) of the *Immigration Act* in which it was said that the appellant posed "a danger to the security of Canada". Appeal dismissed.

appearances:

Barbara L. Jackman, Lorne Waldman and *Ronald P. Poulton* for appellant.

Cheryl D.E. Mitchell and *Neeta Logsetty* for respondents.

solicitors of record:

Jackman, Waldman & Associates, Toronto, for appellant.

Deputy Attorney General of Canada for respondents.

The following are the reasons for judgment rendered in English by

Robertson J.A.:

I. INTRODUCTION

[1]This is an appeal from a judgment of the Trial Division [(1999), 50 Imm. L.R. (2d) 183] dismissing an application for judicial review with respect to an "opinion letter" issued by the Minister of Citizenship and Immigration, under paragraph 53(1)(*b*) of the *Immigration Act* [R.S.C., 1985, c. I-2 (as am. by S.C. 1992, c. 49, s. 43)], in which she expresses the view that the appellant poses "a danger to the security of Canada". This finding enables the Minister to return (*refouler*) the appellant, a Convention refugee, to the very country from which he sought refuge and despite the fact that "*refoulement*" may expose the appellant to a risk of torture.

[2]Broadly stated, the issue raised on this appeal is whether it is contrary to the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] to deport a person to a country in circumstances where there are substantial grounds for believing that *refoulement* would expose that person to the risk of torture. Counsel for the appellant portray their client as a Convention refugee who fled Sri Lanka and who, because of his involvement in the struggle for Tamil independence through his fund raising activities here in Canada, is about to be deported to the country in which the torture of Tamil supporters by Government authorities is a documented fact. In contrast, counsel for the Minister portrays the appellant as a bogus refugee claimant, who as a member of a Tamil terrorist organization, gained admittance to Canada by deceit for the purpose of raising money for that organization. Within this context it is argued that the Minister was justified in declaring the appellant a danger to the security of Canada. Consequently, it is argued that the Government is entitled to deport him to the only country that will accept him"Sri Lanka. Counsel for the appellant responds by raising no less than 11 issues, including a number of constitutional challenges to section 19 [as am. by S.C. 1992, c. 49, s. 11] and paragraph 53(1)(*b*) of the *Immigration Act* under sections 2, 7 and 12 of the Charter.

[3]In the reasons that follow I conclude that various provisions of section 19 of the *Immigration Act* do not contravene section 2 of the Charter. I also conclude that while paragraph 53(1)(*b*) of the *Immigration Act* does not contravene section 12 of the Charter it does infringe section 7, but is saved under section 1. Therefore, it is permissible in defined circumstances to deport a suspected terrorist to a country even though, in the words of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, [1987] Can. T.S. No. 36, there are substantial grounds for believing that *refoulement* would expose that person to a risk of torture. I pause here to emphasize that throughout these reasons when I speak of the "risk of torture", I am referring to the standard set out in this international Convention.

[4]Moreover, I conclude that *refoulement* of Convention refugees who pose a security risk to Canada accords with all three of the international Conventions which bear on the issues raised in this appeal and which have been ratified by Canada; namely the Convention Against Torture, the *International Covenant on Civil and Political*

Rights, December 19, 1966, [1976] Can. T.S. No. 47 and the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can T.S. No. 6. This leaves for consideration whether the Minister's decision to issue the opinion letter can be set aside having regard to the two distinct standards of review applicable to this case. The constitutional standard addresses whether the Minister's decision to *refouler* the appellant contravenes section 7 of the Charter. It is common ground that section 7 is engaged only if the person to be deported can establish that *refoulement* would expose him or her to the risk of torture. The administrative standard invites consideration of the Supreme Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817. That decision sets out the analytical framework for reviewing the exercise of administrative discretion, including decisions made by the executive arm of government. Ultimately, I conclude that there is no valid basis for setting aside the Minister's decision under either of the two standards.

II. LEGISLATION

Immigration Act

[ss. 40.1(1) (as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31), (3) (as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4), (6) (as enacted *idem*), (7) (as enacted *idem*; S.C. 1992, c. 49, s. 31), 52(1) (as am. *idem*, s. 42), (4) (as enacted by R.S.C., 1985 (3rd Supp.), c. 30, s. 7), 53(1) (as am. by S.C. 1992, c. 49, s. 43)]

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

(i) will engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(ii) will, while in Canada, engage in or instigate the subversion by force of any government,

(iii) will engage in terrorism, or

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

(A) engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(B) engage in or instigate the subversion by force of any government, or

(C) engage in terrorism;

(*f*) persons who there are reasonable grounds to believe

(i) have engaged in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(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

(A) acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, or

(B) terrorism,

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

(*g*) persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence;

. . .

40.1 (1) Notwithstanding anything in this Act, where the Minister and the Solicitor General of Canada are of the

opinion, based on security or criminal intelligence reports received and considered by them, that a person, other than a Canadian citizen or permanent resident, is a person described in subparagraph 19(1)(*c*.1)(ii), paragraph 19(1)(*c*.2),(*d*), (*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) or subparagraph 19(2)(*a*.1)(ii), they may sign and file a certificate to that effect with an immigration officer, a senior immigration officer or an adjudicator.

. . .

(7) Where a certificate has been reviewed by the Federal Court pursuant to subsection (4) and has not been quashed pursuant to paragraph (4)(*d*),

(*a*) the certificate is conclusive proof that the person named in the certificate is a person described in subparagraph 19(1)(*c*.1)(ii), paragraph 19(1)(*c*.2), (*d*), (*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) or subparagraph 19(2)(*a*.1)(ii);

. . .

52. (1) Unless otherwise directed by the Minister, a person against whom an exclusion order or a deportation order is made may be allowed to leave Canada voluntarily and to select the country for which that person wishes to depart.

(2) Where a person is not allowed to leave Canada voluntarily and to select the country for which he wishes to depart pursuant to subsection (1), that person shall, subject to subsection (3), be removed from Canada to

(*a*) the country from which that person came to Canada;

(*b*) the country in which that person last permanently resided before he came to Canada;

(*c*) the country of which that person is a national or citizen; or

(*d*) the country of that person's birth.

(3) Where a person is to be removed from Canada and no country referred to in subsection (2) is willing to receive him, the person, with the approval of the Minister, or the Minister, may select any other country that is willing to receive that person within a reasonable time as the country to which that person shall be removed.

(4) Notwithstanding subsections (1) and (2), where a removal order is made against a person described in paragraph 19(1)(*j*), the person shall be removed from Canada to a country selected by the Minister that is willing to receive the person.

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

(*a*) the person is a member of an inadmissible class described in paragraph 19(1)(*c*) or subparagraph 19(1)(*c*.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada; or

(*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.

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.

. . .

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

. . .

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.

. . .

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

III. FACTS

[5]The appellant, Manickavasagam Suresh, was born on October 21, 1955. He is a Tamil and citizen of Sri Lanka who entered Canada on October 5, 1990 and was recognized as a Convention refugee by the Refugee Division of the Immigration and Refugee Board on April 11, 1991. In the summer of 1991, the appellant applied for landing in Canada under the provisions of the *Immigration Act* which permit recognized Convention refugees to apply for permanent residence status. His application was not finalized because of a certificate issued jointly by the Solicitor General of Canada and the Minister of Citizenship and Immigration alleging that he is inadmissible to Canada on security grounds. During his time in Canada, until his detention on October 18, 1995, the appellant worked with the World Tamil Movement (WTM), eventually, as its fund raising co-ordinator. He also acted as a co-ordinator for the Federation of Associations of Canadian Tamils (FACT).

[6]The certificate signed by the Solicitor General of Canada on August 1, 1995, and by the Minister of Citizenship and Immigration on September 11, 1995, under section 40.1 of the *Immigration Act*, was filed with the Federal Court of Canada on October 17, 1995. The certificate alleged that the appellant was a person described in three of the inadmissible classes found within section 19 of the *Immigration Act*:

" clause 19(1)(*e*)(iv)(C), persons who there are reasonable grounds to believe are members of an organization that there are reasonable grounds to believe will engage in terrorism;

" subparagraph 19(1)(*f*)(ii), persons who there are reasonable grounds to believe have engaged in terrorism; and

" clause 19(1)(*f*)(iii)(B), persons who there are reasonable grounds to believe are or were members of an organization that there are reasonable grounds to believe is or was engaged in terrorism.

[7]The certificate was based on the opinion of the Canadian Security Intelligence Service (CSIS) which advised the responsible Ministers that there were reasonable grounds to believe that the appellant is a member of the Liberation Tigers of Tamil Eelam (LTTE), an organization alleged to engage in terrorism within the Indian subcontinent. CSIS alleged that the LTTE operates in Canada, under the auspices of a front organization, the WTM, for the purpose of fundraising, propaganda and procurement of material. The appellant was alleged to be a high-ranking member of the LTTE in contact with the international leadership of the LTTE; to have collected funds on behalf of the LTTE in North America; and to have procured materials, some of which may have military application.

[8]Pursuant to subsection 40.1(3) [as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4] of the *Immigration Act*, the certificate is referred to the Federal Court where a trial judge is designated to conduct hearings into the reasonableness of the certificate. On August 29, 1997, and after 50 days of hearings, Justice Teitelbaum held that

the issuance of the certificate was "reasonable". Specifically, Justice Teitelbaum found that: (1) from an early age the appellant was and continues to be a member of the LTTE achieving status as part of its executive; (2) the WTM is part of the LTTE or at least an organization that supports the activities of the LTTE; (3) the appellant obtained refugee status "by wilful misrepresentation of facts" and lacks credibility; and (4) there are reasonable grounds to believe the LTTE has engaged in terrorist acts. These conclusions are derived from the following passages of Justice Teitelbaum's reasons [(1997), 140 F.T.R. 88 (F.C.T.D.), at paragraphs 20-24 and 33, pages 99, 101-102]:

The evidence before me was that when Suresh became involved with the LTTE no oath was required to establish membership in the organization. I am also satisfied that there were reasonable grounds to believe that Suresh was and is a member as he, from the time of his being very young, partook in LTTE activities, such as, posting of posters, collecting food and then, becoming part of the LTTE executive and finally, at the request of the LTTE, travelled to various countries, including Canada, to head the World Tamil Movement which, it can reasonably be concluded, is part of the LTTE organization or is, at the very least, an organization that strongly supports the activities of the LTTE.

I am satisfied that one can reasonably conclude that an individual is a "member" of an organization if one devotes one's full time to the organization or almost one's full time, if one is associated with members of the organization and if one collects funds for the organization. This is the case of Suresh. He is known to the leadership of the LTTE and has continual contacts with them. Whether he took an oath administered by the LTTE or not or whether he carries with him a cyanide tablet is immaterial. An oath may be required today for a person who joins the LTTE for the purposes of "fighting" for the LTTE with guns and ammunition but one can still be considered a member without taking an oath or carrying on his or her person a cyanide tablet.

Membership cannot and should not be narrowly interpreted when it involves the issue of Canada's national security. Membership also does not only refer to persons who have engaged or who might engage in terrorist activities.

With regard to this issue of membership, I cannot but totally agree with the statement of the Crown found on page 18 of their written submissions:

"Mr. Suresh's denial of membership is not persuasive in light of all the evidence and information including the nature of his activities in support of the organization and his own admission of his close association with the LTTE. He has been a dedicated and trusted member, in the leadership position with the LTTE."

Credibility of Suresh

After listening to Suresh and after reviewing certain documents put before me, I can only conclude that Suresh lacks total credibility. I believe I need say no more than that I am satisfied that Suresh obtained his refugee status in Canada "by wilful misrepresentation of facts" aggravated by the fact that he lied under oath before the Immigration and Refugee Board, swearing that the information contained in his Personal Information Form (PIF) was all accurate (see Exhibit C-25). In reviewing the written documentation submitted by Suresh in order to obtain his refugee status. I am convinced that little, if anything, written by Suresh was true.

. . .

I could go on and on. I am satisfied that there are reasonable grounds to believe the LTTE to have committed "terrorist acts" no matter how one would define "terrorism" or a "terrorist act".

[9]Pursuant to subsection 40.1(6) [as enacted *idem*] of the *Immigration Act* there is neither a right of review nor appeal from Justice Teitelbaum's decision. Subsequently, the appellant was made the subject of a deportation inquiry. On September 17, 1997, an adjudicator ordered the appellant deported from Canada on the grounds that he is a person described in clauses 19(1)(*e*)(iv)(C) and 19(1)(*f*)(iii)(B) of the Act. The adjudicator, however, did not find that the appellant was a person described in subparagraph 19(1)(*f*)(ii)"a finding apparently being contested by the Minister in other proceedings.

[9_.]En vertu du paragraphe 40.1(6) [édicté, *idem*] de la *Loi sur l'immigration*, la décision du juge Teitelbaum ne peut faire l'objet ni d'une demande de contrôle judiciaire ni d'un appel. Par la suite, l'appelant a fait l'objet d'une enquête aux fins de son expulsion. Le 17 septembre 1997, un arbitre a ordonné que l'appelant soit expulsé du Canada parce qu'il était une personne décrite dans les divisions 19(1)*e*)(iv)(C) et 19(1)*f*)(iii)(B) de la Loi. L'arbitre a toutefois conclu que l'appelant n'appartenait pas à la catégorie des personnes décrites dans le sous-alinéa 19(1)*f*)(ii)"il semble que le ministre conteste cette conclusion dans une autre instance.

[10]On September 17, 1997, the appellant was given notice that the Minister was considering issuing a paragraph 53(1)(*b*) opinion that the appellant was a danger to the security of Canada. As noted at the outset, the effect of that opinion letter is to permit the government to deport a person who has been earlier declared a Convention refugee to the country from which he or she had sought refuge. In recommending the issuance of this opinion, Donald Gauthier, an analyst with the Case Management Branch of the Department of Citizenship and Immigration, stated that the appellant's high profile in Canada would "likely" mitigate any harsh sanctions taken against him by authorities in Sri Lanka. However, he further acknowledged that there is a risk to the appellant on his return to Sri Lanka, but that that risk was counterbalanced by the serious terrorist activities to which he was a party.

[11]On January 6, 1998, the Minister of Citizenship and Immigration accepted Mr. Gauthier's recommendations by rendering a decision pursuant to paragraph 53(1)(*b*) of the Act that the appellant poses a danger to the security of Canada. An application for leave and judicial review was commenced on January 14, 1999. On June 28, 1999 [written reasons dated June 11, 1999], McKeown J. dismissed the application for judicial review.

IV. MOTIONS JUDGE'S DECISION

[12]McKeown J. held that the Minister's decision to issue an opinion pursuant to paragraph 53(1)(*b*) that the appellant constitutes a danger to the security of Canada was reasonably open to her based on the available evidence. The procedural fairness requirements inherent in section 7 of the Charter had been met. The appellant had notice of the materials before the Minister and an adequate opportunity to respond to the issues raised; an oral hearing was not required, and the nature of the decision did not require "an independent, impartial maker." In considering the constitutionality of paragraph 53(1)(*b*) of the *Immigration Act*, McKeown J. was satisfied that the balancing undertaken by the Minister weighing the risk of returning a Convention refugee to Sri Lanka against the danger that the appellant poses to Canadian security satisfied the requirements of fundamental justice. To the extent that the Convention Against Torture informs the content of the principles of fundamental justice, McKeown J. held that the appellant failed to establish that there are substantial grounds for believing he would be tortured upon his return to Sri Lanka as is required by that international Convention to which Canada is a signatory. In the opinion of McKeown J., the appellant's deportation would not "shock the conscience" of Canadians.

[13]McKeown J. further found that in acting as fundraiser in support of a terrorist organization, the appellant had not engaged in any activity that qualifies as expression under paragrpah 2(*b*) of the Charter. Paragraphs 19(1)(*e*) and (*f*) and 53(1)(*b*) of the *Immigration Act*, therefore, were held not to have the effect of violating his right to freedom of expression. The same analysis was used to reject the alleged infringement of the appellant's right to freedom of association pursuant to paragraph 2(*d*) of the Charter: the right to associate with a group that exists to commit acts of violence is not protected. Finally, McKeown J. held that the expression "danger to the security of Canada" is not unconstitutionally vague. In dismissing the appellant's application for judicial review, McKeown J. certified the following questions of general importance pursuant to subsection 83(1) [as am. by S.C. 1992, c. 49, s. 73] of the Act:

1. Do ss. 19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(10)(f)(iii)(B) of the *Immigration Act* infringe freedoms guaranteed under subsection 2(b) and 2(d) of the *Charter* and if they do, is that demonstrably justified in a free and democratic society within s.1 of the *Charter*?

2. Does ss. 53(1)(b) of the *Immigration Act* infringe section 7 of the *Charter* and if it does, is that demonstrably justifiable in a free and democratic society within s. 1 of the *Charter*?

3. Are the principles of fairness at common law and the principles of fundamental justice under s.7 of the *Charter* met by the present administrative process for the determination by the Minister under section 53(1) of the *Immigration Act* of whether in her opinion a person constitutes a danger to the security of Canada, given that the Court has read into this subsection a determination by the Minister of the risk of torture a person may face if

removed to a particular country?

4. Is it contrary to the *Charter* to deport a Convention refugee from Canada to his or her country of origin if that person is the subject of a s. 40.1 security certificate, the reasonableness of which has been upheld, is a person described under ss. 19(1)(e) and (f) of the *Immigration Act* and has been found by the Minister of Citizenship and Immigration, pursuant to ss. 53(1)(b) of the Act, to be a danger to the security of Canada?

V. ISSUES

[14]In light of the Supreme Court's decision in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982, it is no longer necessary for this Court to restrict itself to the certified questions. This latitude is especially important in cases such as this, where the appellant has seized on several issues not directly encompassed by those questions. In the circumstances, it is helpful to reorganize the issues in a manner which reflects the wide-ranging arguments advanced by the appellant during the three days allotted for oral argument. This appeal can be broken down into four "major" issues, some of which can be broken down into sub-issues.

[15]The first issue is whether under international law there is a non-derogable right against *refoulement* to a country where the person being returned will be at risk of torture. If so, then it remains to be decided whether this non-derogable right has become a peremptory norm of *jus cogens* and therefore, binding on Canada, notwithstanding the provisions of the *Immigration Act*.

[16]The second issue is whether paragraphs 19(1)(*e*) and (*f*) of the *Immigration Act* violate paragraph 2(*b*) or (*d*) of the Charter. The former provisions deal with membership in a terrorist group. The latter outline the rights to freedom of expression and association, respectively.

[17]The third issue is whether paragraph 53(1)(*b*) of the *Immigration Act* is contrary to section 7 of the Charter in that it deprives an individual of the right to security of the person contrary to the principles of fundamental justice. Section 7 has both a "procedural" and "substantive" component, each of which must be addressed separately.

[18]With respect to procedural due process, the appellant raises no less than four sub-issues in attacking the Minister's decision. Specifically, this Court must review challenges concerning the: (1) the failure of the *Immigration Act* to provide for an objective assessment of the risk of torture; (2) the lack of an impartial decision maker; (3) the failure of the Minister to allow for an oral hearing prior to rendering her decision; and (4) the failure to provide adequate written reasons for the Minister's decision.

[19]With respect to the issue of substantive due process there are six sub-issues: (1) is the term "danger to the security of Canada" found in paragraph 53(1)(*b*) and the term "terrorism" used in section 19 of the *Immigration Act* void on the ground of vagueness and, therefore, contrary to the principles of fundamental justice?; (2) does paragraph 53(1)(*b*) of the *Immigration Act* contravene section 7 of the Charter because it fails to expressly require the Minister to assess the risk of torture upon *refoulement* and, if necessary, to effect a balancing of state and individual interests?; (3) does deportation of a person to a country where there is a risk of torture constitute a breach of the principles of fundamental justice?; (4) in determining whether there has been a breach of the principles of fundamental justice under section 7 of the Charter is it permissible to balance state interests with individual rights or must balancing occur under the section 1 analysis; (5) if paragraph 53(1)(*b*) breaches the principles of fundamental justice is the provision saved under section 1 of the Charter?; and (6) if the breach is not saved does the Trial Division possess the jurisdiction to grant declaratory relief with respect to the constitutional validity of legislation in an application for judicial review?

[20]Assuming paragraph 53(1)(*b*) and the relevant subsections of section 19 do not offend the Charter, the fourth major issue relates to the standard of review with respect to the Minister's decision to issue the opinion letter, thereby depriving the appellant of his conditional right not to be "refouled" to a country which exposes him to the risk of torture. To complicate matters further there are two standards of review applicable to this case, a fact which requires immediate explanation.

[21]Even if the legislation in question were found to be constitutionally valid, this Court must determine whether, on the facts of the present case, the Minister's decision to declare the appellant a danger to the security of Canada

contravenes section 7 of the Charter. This additional ground for setting aside the Minister's decision is best illustrated by the Supreme Court's jurisprudence dealing with the extradition of fugitives to countries where the death penalty exists. As the law presently stands the courts have the right to overturn extradition decisions, which are an executive function of the federal Minister of Justice, if extradition would violate a fugitive's right to fundamental justice. However, there is one significant difference between the extradition and *refoulement* cases which must be acknowledged. With respect to the latter cases, the application of the constitutional standard of review arises only if the appellant is able to establish that he faces a "serious" risk of torture if "refouled" to Sri Lanka. If he fails to do so then his security interests under section 7 are not engaged; see discussion *infra* , paragraph 77. At the same time, it is common ground that the Minister's decision is subject to judicial review in accordance with administrative law principles. Those principles dictate that this Court must determine the appropriate standard of review and apply that standard in accordance with the directions laid down by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra*.

VI. ISSUE No. 1: NON-DEROGABLE RIGHT

AGAINST *REFOULEMENT*

[22]The appellant's first argument turns on the application of international human rights conventions which Canada has ratified. He argues that under the relevant conventions the right to be secure against torture is a non-derogable right and that the prohibition against returning a person to a country where there is a risk of torture has become *jus cogens,* that is an international peremptory norm binding all states such that derogation is impermissible. While this argument does not go to the constitutional validity of paragraph 53(1)(*b*) of the *Immigration Act*, but rather its inapplicability, I acknowledge that international conventions on human rights may inform our understanding of what qualifies as a fundamental principle of justice: see *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (S.C.C.), [1989] 1 S.C.R. 1038. Nonetheless, I cannot accept the appellant's argument that the right under international law to be secure against torture is absolute and binding on Canada.

[23]The appellant's argument begins with the premise that deportation to a country where a risk of torture exists contravenes Canada's international obligations outlined in Articles 4 and 7 of the *International Covenant on Civil and Political Rights*. Those provisions read as follows:

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 and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

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

. . .

Article 7

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

[24]In summary, Article 4, paragraph 1 permits a state to derogate from any obligation contained in the Covenant in times of a national emergency to the extent necessary and provided that any measures taken are not inconsistent with other obligations under international law. Article 7 provides that no one is to be subjected to torture. Article 4, paragraph 2 dictates that the right of derogation outlined in Article 4, paragraph 1 does not apply to Article 7. Therefore, under this international Covenant there is a non-derogable obligation on a state to refrain from subjecting persons to torture. What is clear is that the prohibition against torture is restricted to conduct over which a state has control. The Covenant simply does not address the possibility of torture arising from *refoulement*. With one exception, comments published by the United Nations Human Rights Committee, which monitors compliance

with this international Covenant, affirm this interpretation. Paragraphs 3, 7, 8 and 9 of those comments are worthy of replication:

General Comment No. 20

3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

. . .

7. Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

8. The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end. [Emphasis added.]

[25]The above comments reinforce the belief that the *International Covenant on Civil and Political Rights* seeks to impose a positive duty on states to ensure that effective checks and balances are integrated into their criminal and administrative justice systems to minimize the risk that state actors will act in an arbitrary or heavy-handed manner when dealing with persons suspected of committing any kind of offence. Specifically, this international Covenant requests that state parties describe measures they have taken to prevent acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction. The geographic qualifier suggests that the Covenant is targeting the internal, domestic policies of states; it does not expressly capture situations where a state may decide to expel an individual to the country from which he came. The fact that paragraph 9 of the Comments to the Covenant contradicts this view does not detract from the clear wording of Articles 4 and 7 when read contextually. In conclusion, the *International Covenant on Civil and Political Rights* does not even purport to deal with the issue of *refoulement* let alone address the question as to whether a prohibition against *refoulement* of Convention refugees is a non-derogable right.

[26]I turn now to the Convention Against Torture. Article 3, paragraph 1 contains the prohibition against *refoulement* which exposes a person to a risk of torture. Article 1 defines torture while Articles 2 and 16 set out a state's obligations more fully. Those Articles read as follows:

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, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not 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.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

. . .

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

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. [Underlining added.]

[27]It is clear from Article 3, paragraph 1 of the Convention Against Torture that the prohibition against torture extends to the act of *refoulement* to a country in circumstances where there are "substantial grounds" for believing that the deportee would be at risk of torture. But it does not follow from that Article that there is an express non-derogable right against *refoulement* even in cases where the "substantial grounds" test can be satisfied. Certainly, Article 2 cannot be invoked as providing for such an express right. Article 2, paragraph 1 provides that a state shall take appropriate measures to prevent acts of torture "in any territory under its jurisdiction." Article 2, paragraph 2 goes on to provide for no derogation even in times of national emergency such as a civil war. What is significant is that this non-derogable right does not extend to Article 3 which deals with the possibility of *refoulement* to face torture. Furthermore, Article 16, paragraph 2 contradicts the belief that there may be no derogation from the prohibition against *refoulement* if it would lead to the risk of torture. That Article provides that the provisions of the Convention "are without prejudice to the provisions of any other international instrument . . . which relates to extradition or expulsion." This qualification is extremely significant once it is recognized that there is another international Convention which expressly authorizes *refoulement* of convention refugees for reasons of national security. This authorization is set out in Articles 32 and 33 of the 1951 *United Nations Convention Relating to the Status of Refugees* which Canada has also ratified. Those Articles read as follows:

Article 32

. . .

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

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

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

Article 33

. . .

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

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

[28]In my view, there is no conflict between the three international conventions which Canada has ratified, namely the *United Nations Convention Relating to the Status of Refugees,* the Convention Against Torture and the *International Covenant on Civil and Political Rights*. With respect to the latter two documents, the principle of non-derogation applies only to acts of torture that might be carried out in any territory within a state's jurisdiction. There is no express principle of non-derogation in respect of the prohibition against *refoulement* to a country which exposes a person to a risk of torture, but rather a recognition under the Convention Against Torture that the prohibition is "without prejudice" to the provisions of any other international instrument which relates to extradition or expulsion. Thus, the Convention Against Torture neither contradicts nor overtakes the earlier Convention, the *United Nations Convention Relating to the Status of Refugees*. As would be expected, these three conventions complement one another. Accepting that the *United Nations Convention Relating to the Status of Refugees* expressly permits derogation from the prohibition against *refoulement*, it is permissible for a state to rid itself of those who pose a security risk without being in breach of its international obligations. The appellant cites only one case, a decision of the European Court of Human Rights, in support of his argument.

[29]The appellant invokes *Chahal v. the United Kingdom*, Eur. Court HR, File: 70/1995/576/662 [Reports of Judgments and Decisions 1996-V], November 15, 1996 in support of a non-derogable right against *refoulement* under international law. In that case the European Court of Human Rights held that the decision of England's Secretary of State to deport a Sikh separatist to India for national security reasons violated Article 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* [213 U.N.T.S. 221]. Article 3 of that Convention states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 15, paragraph 2 provides that there can be no derogation from Article 3 even in times of national emergency. (These Articles are similar to those outlined earlier in regard to the *International Covenant on Civil and Political Rights* .) The majority of the European Court, 12 of 19 judges, applied its earlier jurisprudence which held that Article 3 was absolute and could admit of no exceptions. As to the apparent conflict with Article 33 of the *United Nations Convention Relating to the Status of Refugees* the European Court concluded that the protection afforded by Article 3 of the European Convention is "wider". With great respect, and as a matter of pure interpretation, I disagree. It is one matter to read a few words into an international document to eliminate ambiguity or avoid an absurd result. It is quite another to read into the same document an entire article or two which gener

[30]Leaving aside the *Chahal* decision, I would like to pursue an alternative position. Even if my interpretation of the Convention Against Torture were found to be in error, such that it does provide for a non-derogable right against *refoulement*, it is my opinion that the appellant's argument must fail for another reason. Let me explain.

[31]The appellant maintains that customary international law can become part of domestic law by absorption into the common law and that the prohibition against torture is part of customary international law as found in the Convention Against Torture and the *International Covenant on Civil and Political Rights*. The appellant also argues that the non-derogable nature of these conventions has achieved the status of *jus cogens* under customary international law. A norm of *jus cogens* is a peremptory norm which is considered to be necessary for the continued existence and operation of the international legal system. Before a customary norm of international law can become a peremptory norm there must be a further recognition by the international community, as a whole, that this is a norm from which no derogation is permitted. In support of its argument that the prohibition against torture has become a norm of *jus cogens*, the appellant cites the decision of the House of Lords in *Pinochet Ugarte, Re*, [1999] H.L.J. No. 12 (QL), March 24, 1999. If this argument were accepted then it follows that even if a person were considered a danger to the security of Canada, the Minister is necessarily restrained from "refouling" that person to a country in circumstances where there are substantial grounds for believing that *refoulement* would expose that person to the risk of torture. In my opinion, however, there is no merit to the appellant's submission.

[32]While principles of customary international law may be recognized and applied in Canadian courts as part of the domestic law, this is true only in so far as those principles do not conflict with domestic law. As it happens the alleged peremptory norm conflicts with Canada's domestic law as evidenced by paragraph 53(1)(*b*) of the *Immigration Act*, which itself is a replication of Article 33 of the *United Nations Convention Relating to the Status of Refugees*. In the circumstances, the domestic legislation prevails. The decision of the European Court of Human Rights in *Chahal* does not undermine this conclusion.

[33]It is true that England has adopted legislation which permits the Secretary of State to deport persons who pose a threat to the security of that country in the same way that Canada has adopted paragraph 53(1)(*b*) of the *Immigration Act*. But it is also true that England has agreed to be bound by decisions rendered by the European Court of Human Rights which in turn is empowered to review decisions of the Secretary of State in accordance with the *Convention for the Protection of Human Rights and Fundamental Freedom*. Thus, *Chahal*, does not support the proposition that an international Convention can override domestic legislation.

VII. ISSUE No. 2: SECTION 2"

FREEDOM OF EXPRESSION

AND ASSOCIATION

[34]The appellant submits that both paragraphs 19(1)(*e*) and (*f*) of the *Immigration Act* contravene paragraphs 2(*b*) and (*d*) of the Charter respectively and, therefore, are of no force and effect pursuant to subsection 52(1) of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. It is argued that these two provisions of the *Immigration Act* infringe the appellant's right to freedom of expression and association. If the appellant's argument were to succeed it follows that he could not be deported on the ground that he is inadmissible under section 19 of the *Immigration Act*. The proper constitutional remedy would be to strike the offending provisions. It will be recalled that clause 19(1)(*e*)(iv)(C) renders a person inadmissible to Canada if there are reasonable grounds to believe the person is a member of an organization that will engage in terrorism. Subparagraph 19(1)(*f*)(ii) renders persons inadmissible in circumstances where there are reasonable grounds to believe that they have engaged in terrorism. Clause 19(1)(*f*)(iii)(B) renders inadmissible persons who are or were members of an organization that is or was engaged in terrorism. Once again the standard of proof is limited to reasonable grounds for believing such.

[35]In *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (S.C.C.), [1989] 1 S.C.R. 927 the Supreme Court articulated a twofold test for determining whether there is a violation of the right to freedom of expression. The first part of the test seeks to determine whether the conduct in question falls within the sphere of protected expression. The second aspect determines if the purpose or effect of the legislation is to restrict freedom of expression. With respect to the first test, the Supreme Court has also held that not all expression is protected.

Expression involving violence falls outside the protected sphere. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (S.C.C.), [1990] 1 S.C.R. 1123, at page 1186 Justice Lamer expressed the view that expression which takes the form of "direct attacks by violent means on the physical liberty and integrity of another person" is not protected by paragraph 2(*b*) of the Charter. In my view, this is precisely the form of expression that the appellant now argues should be protected. The appellant contends, however, that the jurisprudence does not indicate whether violent expression in the context of the pursuit of self-determination and equality by a minority ethnic group is protected under section 2 of the Charter. Furthermore, it is submitted that under international law the exercise of force in accordance with the rules of war in pursuit of the right of self-determination is permissible.

[36]No one questions the right to use force in seeking political independence so long as the struggle is between two combatants. Nor does any one question the fact that the LTTE claims to represent the Tamil minority and is pursuing the right of self-determination and an independent homeland in the northern part of Sri Lanka. Finally, no one is disputing that the struggle for Tamil independence is being waged by a minority against the Sinhalese majority, represented by the governing party. What is questioned is the means by which the political ends are being sought. Clearly, there are various avenues by which citizens can oppose their presiding government and, certainly, not all governments are equally receptive to criticism. However, a line separating acceptable means of protest from unacceptable means must be drawn somewhere. In my view terrorism is an unacceptable means of attempting to effect political change. Nowhere in the jurisprudence is there support for the proposition that one has an inherent right to engage in terrorism in the pursuit of self-determination. For this reason alone the appellant's argument must fail.

[37]Counsel for the appellant has persistently ignored the unequivocal documentary evidence of the atrocities perpetuated by the LTTE against the civilian population in Sri Lanka. Moreover, such forms of political expression have been directed, not only against those comprising the Sinhalese majority, but as well at Tamils who are not sympathetic to the LTTE. In effect, counsel for the appellant refuses to accept that the LTTE is a terrorist organization. This is a matter I would like to lay to rest even though it represents a collateral attack on Justice Teitelbaum's findings made in the section 40.1 application.

[38]It is unnecessary to review all of the 140 alleged incidents of terrorism raised before Justice Teitelbaum. It is sufficient to reproduce three paragraphs [paragraphs 30-32, page 101] from his reasons which contradict the appellant's submission:

I do not intend to list the incidents the LTTE is said to have committed. One need only refer to Appendix "B" where some 140 incidents are mentioned starting with the alleged LTTE's assassination of Alfred Duraippah, the pro-government mayor of Jaffna on July 27, 1975 to the incident on September 10, 1995 when the LTTE is alleged to have killed seven soldiers who, it is alleged, were part of a road clearing patrol.

Witnesses called by Suresh denied most of these incidents as being "terrorist" in nature as, it is alleged, the LTTE can be considered freedom fighters, and therefore have the "right" to shoot at soldiers or persons who do not support the LTTE and their aims.

With respect, I disagree. Even if it were so, the LTTE's assassination of the mayor of Jaffna on July 27, 1975 solely on the basis of his pro-government leaning is to me an act that one may consider "terrorist" in nature. The execution of a police constable on February 14, 1977 gives rise to a reasonable conclusion that a "terrorist act" has taken place. The shooting of a member of Parliament, who later died, is a "terrorist act". The blowing up of a civilian aircraft is a "terrorist act". Attacks on civilians are as I have said "terrorist acts" whether the attack is on a fishing village or on farms. The May 16, 1985 LTTE attack and massacre where 138 to 146 civilians at Anuradhapura in Sri Lanka were killed can be considered a "terrorist act".

[39]McKeown J. in his reasons for judgment [at paragraphs 31-33, pages 198-199] also refers to evidence which qualifies as evidence of terrorist acts committed by the LTTE:

The applicant made submissions before the Minister and before Teitelbaum J. that the LTTE is a movement fighting for self-determination. However, the documentary evidence submitted by the applicant himself suggested otherwise. It referred to the LTTE being involved in the biggest bomb attack in Colombo in 1996, in which explosives were driven into the Central Bank, killing "some 100 persons" and injuring over 1,200.

In the U.S. Department of State "Sri Lanka Country Report on Human Rights Practices for 1996" (hereinafter "U.S.D.O.S. Report"), submitted by the applicant, there is reference to the LTTE killing 14 Sinhalese villagers in the Puttalam district and murdering 11 Sinhalese travellers in an ambush on a bus in the Ampara district. The materials submitted by the applicant also stated that the LTTE was "reported to have conducted executions of suspected government informers, and have engaged in massacres and retaliatory killings of Sinhalese and Muslim villagers, torture and mistreatment of prisoners, forced conscription of children, and kidnapping". The LTTE engages in intimidation by way of lamppost killings.

The LTTE denies the people under its authority the right to change their government. It does not tolerate freedom of expression. It does not respect academic freedom. Tamils who do not support the LTTE are subjected to human rights abuses.

[40]In short, there is sufficient and conclusive evidence that the LTTE engages in indiscriminate killing and torture of innocent civilians amounting to what are classified under international law as "crimes against humanity". I hasten to add that this was firmly established by this Court as early as 1994 in *Sivakumar v. Canada (Minister of Employment and Immigration)* , 1993 CanLII 3012 (F.C.A.), [1994] 1 F.C. 433 (C.A.). Such acts are not protected under paragrpah 2(*b*) of the Charter. To repeat what was said in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra*: "direct attacks by violent means on the physical liberty and integrity of another person" is not protected expression. There can be no protection for expression which is communicated through physical violence directed at an innocent civilian population.

[41]At this point, I wish to highlight what I consider to be a disturbing aspect of the appellant's argument, albeit one which arises by necessary implication. The underlying belief that the LTTE is not a terrorist organization calls into question the veracity of numerous refugee claims that have been made in Canada over the past decade by those who have fled Sri Lanka. As a general observation, it can be said that Tamils who have fled that country have claimed refugee status on one of two grounds. Either they have claimed persecution at the hands of Sri Lankan authorities or that the state is unable to protect them from persecution inflicted by the LTTE. More often than not the persecution suffered by Tamils at the hands of the LTTE arises because of a refusal of young Tamil males to join that terrorist organization. Other members of the Tamil community are subject to similar treatment for failing to render other forms of assistance. To maintain that the LTTE is not a terrorist organization undermines the credibility of those who gained admission to this country on those bases and, correlatively, their right to claim landed immigrant status and, ultimately, Canadian citizenship.

[42]This is not a case where we are being asked to adjudicate on legislation which has the effect of preventing people from expressing their political views. Undoubtedly there are some who, as a matter of principle, support the LTTE's fight for self-determination in Sri Lanka and a right to pursue that goal through the use of physical force, including terrorist initiatives directed at Sri Lanka's civilian population. But it is one matter to espouse such a view and quite another to express those views by engaging in, or offering, direct support to a terrorist organization that is intent on achieving political ends by means antithetical to human rights norms. Alternatively expressed, one is entitled to debate whether as a matter of principle there is a right to shout fire in a theatre. It is quite another matter to actually do so and then claim criminal and civil immunity on the ground of freedom of expression. The same reasoning applies to those who choose to become active members of a terrorist organization.

[43]As violent forms of expression do not receive constitutional protection, neither can fundraising in aid of terrorism. It is true that there are no allegations of criminal activity against the appellant, nor allegations that he engaged in terrorism in Sri Lanka or was involved directly in the procurement and supply of weapons for the LTTE. However, activities which are undertaken in support of and in furtherance of terrorist activities constitute reprehensible conduct outside the protections offered by the Charter. In my view, those who freely choose to raise funds used to sustain terrorist organizations bear the same guilt and responsibility as those who actually carry out the terrorist acts. Persons who raise funds for the purchase of weapons, which they know will be used to kill civilians, are as blameworthy as those who actually pull the triggers. Clearly, freedom of association and expression are rights accorded those who seek political goals. But those rights do not enure to the benefit of those who seek to achieve political goals through means which undermine the very freedoms and values which the Charter seeks to promote. Contrary to the argument advanced by the appellant's counsel, the values underlying section 2 of the Charter, such as the pursuit of "truth", "social participation in the community" or "individual fulfilment", simply do not come into play in the present case.

[44]In summary, fundraising in the pursuit of terrorist violence must by necessity fall outside the sphere of protected expression. This conclusion is also fatal to the argument that those provisions of section 19 of the *Immigration Act* that render a person inadmissible to Canada because of membership in a terrorist organization violate an individual's right of free association. Those who express their beliefs through active participation with organizations engaged in terrorist activities can find no solace in paragraph 2(*d*) of the Charter.

[45]Counsel for the appellant seeks to undermine the above line of reasoning by asserting that Canadian law does not prevent Canadian citizens from engaging in fundraising to support a "political cause". I shall deal briefly with this argument if only for the sake of completeness. First, the type of activity under review does not qualify as "political". Second, accepting that there is no law preventing Canadian citizens from engaging in the same activities undertaken by the appellant, it does not follow that two wrongs make a right. Third, the reality may well be that until recently the problem had never presented itself in Canada. It is arguable that it was only when the threshold test for admittance to Canada as a Convention refugee was fixed at the lower end of the risk spectrum (something "more than a mere possibility" of persecution) that the problem of off-shore terrorist infiltration arose for Canadian immigration authorities and Canadian society generally. From a political perspective, Parliament has decided to deny admission to those who come within the inadmissible classes outlined in section 19 of the *Immigration Act* and, correlatively, the right to seek refugee status. In the event that safeguard fails, the alternative legislated solution is to deny Canadian citizenship to those who should not have been admitted in the first place and to initiate deportation proceedings. But the fact that there is a *lacunae* with respect to those who ultimately gain Canadian citizenship, and who become or remain active members of a terrorist organization, is not a ground for invalidating sections 19 and 53 of the *Immigration Act*. Fourth, the Supreme Court has recognized that even the Charter draws a distinction between the rights of citizens and non-citizens. Under section 6 only citizens are accorded the right "to enter, remain in and leave Canada". In *Chiarelli v. Canada (Minister of Employment and Immigration)* , 1992 CanLII 87 (S.C.C.), [1992] 1 S.C.R. 711, at pages 733-734 Justice Sopinka wrote:

[T]he distinction between citizens and non-citizens is recognized in the *Charter* . . . . only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1).

Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the *Immigration Act* . . . . The qualified nature of the rights of non-citizens to enter and remain in Canada is made clear by s. 4 of the Act [which] . . . . provides that permanent residents have a right to remain in Canada except where they fall within one of the classes in s. 27(1).

[46]In time, the federal government may feel compelled to adopt legislation which makes it an offence for Canadian citizens to contribute financial support to terrorist organizations. Money raised for such purposes and held in Canadian banks would be seized as is now done in the United States: see The *Antiterrorism and Effective Death Penalty Act of 1996*, 8 U.S.C. " 1189 (Supp. II 1996). However, the absence of similar legislation in Canada remains an irrelevant factor in the disposition of this appeal.

VIII. ISSUE No. 3: SECTION 7"THE RIGHT TO SECURITY OF THE PERSON

(A) Introduction

[47]Section 7 of the Charter provides, *inter alia*, that everyone has the right to security of the person and not to be deprived of that security except in accordance with the principles of fundamental justice. It is trite law that a statutory provision may be invalid if its purpose or effect is the infringement of an individual's security interest and that infringement is contrary to the principles of fundamental justice. These principles, in effect, serve to qualify an individual's right to security of the person. Thus, one may be deprived of his or her security if the basic "tenets" or "principles" of our legal system sanction or require it. While the identification of these substantive principles has been an ongoing judicial exercise, debate has also focussed on the procedural requirements mandated by the principles of fundamental justice under section 7.

[48]It is common ground that paragraph 53(1)(*b*) of the *Immigration Act* engages section 7 of the Charter. No one

quarrels with the assertion that *refoulement* of a person to country where the person may be tortured engages the right to "security of the person". The parties, however, disagree as to whether deportation in these circumstances is contrary to the principles of fundamental justice in both its substantive and procedural sense. I begin my analysis with the procedural challenges to the legislation and the Minister's decision.

(B) Procedural Due Process

[49]The appellant raises four grounds with respect to his argument that he was not accorded procedural due process under section 7 of the Charter: (1) the appellant is entitled to an objective decision making process, not a subjective one as presently exists; (2) the Minister acting under paragraph 53(1)(*b*) of the *Immigration Act* is not acting impartially; (3) the appellant was denied an oral hearing before the Minister; and (4) the appellant is entitled to but did not receive written reasons from the Minister and, correlatively the memorandum submitted to the Minister does not constitute adequate reasons. In my view, none of these objections is sustainable. I must point out, however, that issues one and two go to the constitutional validity of paragraph 53(1)(*b*) because they relate to defects or omissions in the legislation. Issues three and four, on the other hand, go the constitutional validity of the Minister's decision to declare the appellant a danger to the security of Canada having regard to the circumstances surrounding that decision. In effect the latter two challenges to the Minister's decision involve alleged breaches of the rules of natural justice.

(1) Subjective versus Objective Decision

[50]The appellant argues that the Minister's decision under paragraph 53(1)(*b*) of the *Immigration Act* involves a subjective decision-making process, while section 7 of the Charter requires an objective one. As I understand the argument, paragraph 53(1)(*b*) of the *Immigration Act* contravenes section 7 of the Charter because the Minister is entitled to exercise a discretion in deciding whether to issue the opinion letter. This discretionary power flows from the phrase "the Minister is of the opinion that the person constitutes a danger to the security of Canada". Apparently the appellant believes that the test must be a purely objective one. I can find no support for this proposition in the jurisprudence and, in any event, the argument is entirely misconceived. In effect the appellant is arguing that Parliament cannot validly legislate by conferring a discretionary decision-making power on the Minister to which a reviewing court must exercise the appropriate level of deference. However, even if the *Immigration Act* prescribed an objective test for assessing whether a person constitutes a danger to the security of Canada it could not be presumed that the standard on review would be, for example, one of correctness.

(2) Lack of Impartiality

[51]The appellant argues that the Minister was not acting impartially when rendering her decision under paragraph 53(1)(*b*) of the *Immigration Act* in that she was acting as both "prosecutor and judge". This argument stems from the fact that it is the Minister and the Solicitor General who signed a certificate to the effect that the appellant is a suspected terrorist and it is the Minister who makes a final determination as to whether the appellant constitutes a danger to the security of Canada. The facts, however, also reveal that the certificate was issued on the basis of information received from the Canadian Security Intelligence Service and that a judge of the Federal Court held that the issuance of the certificate was reasonable. These factors mitigate against the perception that the Minister's obligation to look after the security interests of Canadians conflicts with her duty to balance state interests with those of the appellant.

[52]Moreover, the fact that the Minister is required to engage in an exercise of balancing state interests with individual rights does not affect the impartiality of the decision maker. To hold otherwise would require the government to establish an independent tribunal for each decision making process. Both the Supreme Court and this Court have held that if overlapping functions are authorized by statute, the overlapping will not give rise to a reasonable apprehension of bias unless it can be demonstrated that the tribunal has acted outside of its statutory authority. The appellant has made no such argument, nor could he having regard to the facts: see generally *Old St. Boniface Resident Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (S.C.C.), [1990] 3 S.C.R. 1170, at page 1191; and *Brosseau v. Alberta Securities Commission*, 1989 CanLII 121 (S.C.C.), [1989] 1 S.C.R. 301, at pages 309-310.

(3) Oral Hearing

[53]I begin with two propositions. First, both section 7 of the Charter and the common law entitle the appellant to a fair hearing and not to the most favourable procedures imaginable. Second, the duty of procedural fairness is "eminently variable" and, hence, its content is case specific. With respect to the argument that the appellant was entitled to an oral hearing before the Minister one need only turn to the Supreme Court's decision in *Kindler v. Canada (Minister of Justice)* , 1991 CanLII 78 (S.C.C.), [1991] 2 S.C.R. 779. There, the appellant sought a personal interview and an opportunity to bring witnesses before the Minister of Justice who was to make a decision regarding his extradition to the United States and whether assurances should be sought with respect to the imposition of the death penalty. On this point the Supreme Court was unanimous in rejecting the need for an oral hearing under section 7 of the Charter. Written submissions were held to be sufficient to satisfy the requirements of fundamental justice having regard to the two stage process giving rise to the Minister's decision. The first, the judicial phase, encompasses the court proceedings which determine whether a factual and legal basis for extradition exists. If that process results in the issuance of warrant of committal then the second phase is activated. It is during this phase that Minister of Justice exercises his or her discretion in determining whether to issue a warrant of surrender.

[54]In the present case the appellant had a deportation hearing before an adjudicator and spent 50 days in a hearing before Justice Teitelbaum pursuant to section 40.1 of the *Immigration Act*. The appellant, however, takes exception to this line of reasoning on the ground that there has been no formal determination or assessment regarding the risk of torture upon *refoulement* to Sri Lanka. The question which remains is whether an oral hearing is necessary in order to carry out the required risk assessment. In my opinion it is not. Whether or not there are substantial reasons for believing that the appellant would be subject to a risk of torture upon his return to Sri Lanka can be answered without regard to his oral testimony. The issue does not turn on the appellant's credibility, nor is it dependent upon his subjective perceptions as to what may occur if "refouled" to Sri Lanka. (It will be recalled that Justice Teitlebaum found the appellant to lack credibility.) The issue, however, does turn on documentary evidence as to human rights violations in that country as they relate to the factual context under consideration.

(4) Written Reasons

[55]The appellant argues that according to the Supreme Court' decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817, he is entitled to written reasons, a requirement which is not satisfied by the memorandum prepared by Mr. Gauthier, an analyst with the Case Management Branch of the Department of Citizenship and Immigration. It was upon that memorandum that the Minister based her decision. It is the appellant's view that the recommendations prepared by a first level immigration official do not constitute adequate reasons for a decision ultimately made by the Minister. Counsel for the Minister does not dispute the proposition that written reasons are required but does dispute the argument that the memorandum prepared by Mr. Gauthier does not satisfy this requirement. In my view, there is no merit to the appellant's argument. If, as was held in *Baker, supra*, the scribbled notes of an immigration officer can be deemed written reasons then so too can the memorandum submitted to the Minister in the present case. That being said, I do accept that the adequacy of those reasons is a matter which can be properly raised on a judicial review application to the extent that those reasons do not reflect consideration of relevant factors: see discussion *infra* at paragraph 146 *et seq*. This leads me to the appellant's allegations that there has been a lack of substantive due process.

(C) Substantive Due Process

(1) Vagueness

[56]The appellant submits that the phrase "danger to the security of Canada" found in paragraph 53(1)(*b*) of the *Immigration Act* and the word "terrorism" employed in three of the inadmissible classes outlined in section 19 are void for vagueness. If either provision infringes the vagueness doctrine then it follows that the Minister is without jurisdiction to deport the appellant unless his status as a Convention refugee is revoked. In support of his vagueness argument, the appellant cites the Supreme Court's decision in *R. v. Nova Scotia Pharmaceutical Society* , 1992 CanLII 72 (S.C.C.), [1992] 2 S.C.R. 606. In that case, the Court accepted that a vague law could violate the principles of fundamental justice under section 7 of the Charter on two grounds: (1) that the law fails to give citizens fair notice of the consequences of their conduct, so that they may avoid liability and benefit from a full answer and defence should they be tried and (2) the law fails to adequately limit law enforcement discretion. At

page 643 Justice Gonthier wrote: "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate." He described "legal debate" as the process of reaching a conclusion as to the meaning of a word or phrase by reasoned analysis and applying legal criteria. Though the vagueness doctrine generally arises in the context of criminal-type proceedings, it is common ground that it is not confined to that area of the law.

[57]Though often argued, the vagueness doctrine has been only successfully invoked on one occasion. In *R. v. Morales*, 1992 CanLII 53 (S.C.C.), [1992] 3 S.C.R. 711, the Supreme Court was dealing with the constitutional validity of paragraph 515(10)(*b*) of the *Criminal Code* [R.S.C., 1985, c. C-46] which permitted the pre-trial detention of an accused on the ground that it was necessary "in the public interest or for the protection or safety of the public". That Court held the criterion of "public interest" unconstitutional under paragraph 11(*e*) of the Charter as being "too vague and imprecise".

[58]It is accepted law that a provision does not violate the doctrine of vagueness simply because it is subject to interpretation. To require absolute precision would be to create an impossible constitutional standard. Thus, the question is whether the courts can give intelligible meaning to the impugned provision. In *Morales*, the Supreme Court held that there was no workable meaning for the term "public interest" as it gave the courts an unrestricted latitude to define any circumstance as being sufficient to justify pre-trial detention and, therefore, no amount of judicial interpretation of the term would render the provision capable of providing guidance for legal debate. Chief Justice Lamer went on to hold that the vague provision could not be saved under section 1 of the Charter. He did, however, find the term "protection or safety of the public" to be constitutionally valid, a finding particularly relevant to this appeal. In my opinion, the term "danger to the security of Canada" found in paragraph 53(1)(*b*) of the *Immigration Act* is more closely aligned to the expression "public safety" than the term "public interest". In any event, I am of the opinion that the appellant's argument must fail for the following reasons.

[59]To begin, I must address whether the phrases in question provide an adequate basis for legal debate in the sense that one can arrive at a conclusion as to its meaning by reasoned analysis. The task of statutory interpretation is more often than not fraught with difficulties and for reasons which cannot always be traced to the doorstep of a legislative draftsperson. The present case is no exception, but that fact does not render the task of interpretation insurmountable. I turn first to the phrase "danger to the security of Canada" as that term is found in paragraph 53(1)(*b*) of the *Immigration Act*.

[60]I acknowledge that the *Immigration Act* neither expressly defines nor sets out any criteria by which to gauge the precise meaning of the term "danger to the security of Canada". But those factors alone do not mean that paragraph 53(1)(*b*) is so overly broad as to be unconstitutionally vague. In the absence of a statutory definition, the courts are required to supply the legal parameters as to a term's meaning by resorting to traditional and accepted judicial techniques including the common law, dictionaries or a contextual analysis of the legislation. It is only where those judicial tools are of no assistance that the vagueness doctrine prevails.

[61]Applying a contextual analysis, it is clear that what presents a danger to the security of Canada is informed by the provisions of the *Immigration Act* and the *Canadian Security Intelligence Service Act*, R.S.C., c. C-23. Generally stated, the purpose of this legislation is to exclude from Canada persons who are or were members of a terrorist organization and who may engage in nefarious activities either in Canada or abroad using Canada as a base. That terrorists acts have been committed in Canada is a matter of public record; e.g. Air India disaster. That terrorist organizations might use Canada as a base from which to operate is not simply a theoretical possibility as will be explained below; see discussion *infra*, paragraph 109. Moreover, the "security of Canada" cannot be limited to instances where the personal safety of Canadians is concerned. It should logically extend to instances where the integrity of Canada's international relations and obligations are affected. It must be acknowledged that only through the collective efforts of nations will the threat of terrorism be diminished. The efficacy of those collective efforts is undermined each time a nation provides terrorist organizations with a window of opportunity to operate off-shore and achieve indirectly what cannot be done as efficiently and effectively in the country targeted for terrorist attacks.

[62]In determining whether a person represents a threat to the security of Canada, the first step is to assess whether he or she falls within one of the inadmissible classes set out in section 19 of the *Immigration Act*. That is a threshold test. In the present case the appellant falls within the class of "suspected terrorist". I pause here to

emphasize the fact that, simply because a person falls within an inadmissible class, it does not follow that he or she represents a danger to Canadian security. If the law were otherwise, there would be no need for the Minister to issue an opinion letter under paragraph 53(1)(*b*). Assuming a person falls within an inadmissible class outlined in section 19, the next step is to determine whether such a person can be said to be a danger to the security of Canada.

[63]In my opinion, the answer to that question will depend on the individual's degree of association or complicity with a terrorist organization. For example, the Minister would have a difficult time sustaining an opinion letter issued under paragraph 53(1)(*b*), in circumstances where the person in question had been conscripted by force into the LTTE and after a brief period deserted that organization on the eve of his thirteenth birthday. Admittedly, this is an extreme example. One would not reasonably expect CSIS to recommend to the responsible Ministers that a section 40.1 certificate issue under the *Immigration Act* in such benign circumstances.

[64]The fact that the term "danger to the security of Canada" is not a precise concept does not mean that it is incapable of rational application. Nor does it mean that the Minister has an unfettered discretion when deciding to issue an opinion letter under paragraph 53(1)(*b*). More specifically, a determination as to what constitutes a "danger to the security of Canada" cannot be based "on nothing more than the individual whims or political biases of a particular Minister", as argued by counsel for the appellant.

[65]The appellant also contends that the term "terrorism" used throughout section 19 of the *Immigration Act* is so vague as to be unconstitutional. If that were so then paragraph 53(1)(*b*) would have to fall in so far as the latter is dependent on the former. In my respectful view this argument amounts to yet another collateral attack on Justice Teitelbaum's finding that the LTTE is a terrorist organization. I pause here to note that the United States Court of Appeals for the District of Columbia upheld the Secretary of State's designation of the LTTE as a terrorist organization on an application for judicial review: *Liberation Tigers of Tamil Eelam v. United States Department of State*, No. 97-1670 (D.C. Cir. June 25, 1999) [[1999] CADC"QL 156]. But in the eyes of the appellant if you cannot define terrorism, it necessarily follows that you cannot label an organization as terrorist in nature. Once again for the sake of completeness I shall deal with this argument.

[66]The appellant maintains that there is no international consensus as to the meaning of the term "terrorism". He also maintains that the United Nations has abandoned efforts to define terrorism in favour of creating conventions which proscribe specific and defined misconduct of a type which the international community believes requires an international response. Thus, in the appellant's opinion, this is evidence that the notion of terrorism is incapable of legal definition. I disagree.

[67]I accept that nations may be unable to reach a consensus as to an exact definition of terrorism. But this cannot be taken to mean that there is no common ground with respect to certain types of conduct. At the very least, I cannot conceive of anyone seriously challenging the belief that the killing of innocent civilians, that is crimes against humanity, does not constitute terrorism. As stated earlier, it is one matter for an organization to pursue political goals such as self-determination and quite another to pursue those goals through the use of violence directed at the civilian population. International human rights codes might not condemn deaths resulting from a civil war, that is to say as between two armed factions. But I know of no authority, international or otherwise, which condones the indiscriminate maiming and killing of innocent civilians. The materials presented to this Court are rife with examples of such terrorist acts committed by the LTTE, a matter addressed earlier in these reasons.

[68]Further, the Supreme Court states that one of the objectives of the vagueness doctrine is to ensure that individuals have adequate notice or an understanding that certain conduct is the subject of legal restrictions. Clearly, in the present case, the appellant"and ideally Canadians at large"should be taken to have fair notice that the direct or indirect support of violence aimed at innocent civilians, regardless of the ultimate objective, is simply unacceptable.

[69]In summary, I do not accept the submission that the term terrorism is inherently ambiguous such that its meaning cannot be arrived at through legal analysis. This is true even if the full meaning of that term, in all of its details, must be determined on an incremental basis. For a broad definition of "terrorism" see the *Antiterrorism and Effective Death Penalty Act of 1996* , 8 U.S.C. " 1189 (Supp. II 1996).

(2) No Statutory Obligation to Balance Interests

[70]The appellant's next argument hinges on the absence of a statutory duty on the Minister to consider whether *refoulement* would expose a person to a risk of torture and, if so, to weigh whether the state's interest outweighs the individual's right not to be exposed to a risk of torture. It is clear that paragraph 53(1)(*b*) of the *Immigration Act* does not expressly require this balancing. The appellant argues that that omission is contrary to the principles of fundamental justice. The Minister responds by observing that it is the principles of fundamental justice which mandate balancing on the part of the Minister. (Assuming the appellant's argument is valid and paragraph 53(1)(*b*) is not saved by section 1 of the Charter, it is arguable that the proper remedy is not to strike down that paragraph but to read in a balancing requirement which leads us back to where we started; an implied obligation to balance state interests with individual rights once a risk of torture is established.)

[71]The appellant cites the Supreme Court's decisions in *Kindler v. Canada (Minister of Justice), supra*; and *R. v. Smith (Edward Dewey)*, 1987 CanLII 64 (S.C.C.), [1987] 1 S.C.R. 1045, in support of his argument that paragraph 53(1)(*b*) is fatally flawed. In my respectful opinion, neither of those cases support the appellant's argument. Furthermore, there are two other decisions which, in my view, support the proposition that the principles of fundamental justice do not require a statutory source for the ministerial obligation to conduct a risk assessment and a balancing of interests. Rather that obligation is found in section 7 of the Charter itself.

[72]*Pushpanathan v. Canada (Minister of Citizenship and Immigration), supra* is one case which recognizes the implicit obligation of the Minister to assess risk arising from deportation and, if necessary, to balance the competing interests of the individual and the state under section 53 of the *Immigration Act*. In his reasons, Justice Bastarache states at page 1034 that paragraph 53(1)(*b*) requires a "weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon *refoulement*". Another relevant decision is *Idziak v. Canada (Minister of Justice)* , 1992 CanLII 51 (S.C.C.), [1992] 3 S.C.R. 631 where the Supreme Court dealt with a decision of the Minister of Justice to surrender a fugitive to another state which had initiated extradition proceedings. Writing for the majority, Justice Cory noted that the extradition process has two distinct phases, as noted earlier. The first, the judicial phase, encompasses the court proceedings which determine whether a factual and legal basis for extradition exists. If that process results in the issuance of a warrant of committal then the second phase is activated. It is during this phase that the Minister exercises his or her discretion in determining whether to issue a warrant of surrender. At page 658 Justice Cory described this phase of the decision-making process as "political" in nature and one in which "[t]he Minister must weigh the representations of the fugitive against Canada's international treaty obligations": see also *Canada v. Schmidt* , 1987 CanLII 48 (S.C.C.), [1987] 1 S.C.R. 500.

[73]I acknowledge there are substantive differences and similarities between the extradition and immigration processes for removing persons from Canada. However, the above cases make clear that the Supreme Court accepts that a statute may not expressly require a balancing of state *versus* private interests. In extradition law, the test for constitutionality turns on whether the Minister of Justice exercises his or her discretion in accordance with the principles of fundamental justice. The same applies when the Minister of Citizenship and Immigration renders her decision to deport suspected terrorists. Thus, in cases where the right to security of a person is engaged by the application of a statutory provision, such as paragraph 53(1)(*b*) of the *Immigration Act*, it is section 7 of the Charter and the principles of fundamental justice that dictate the Minister must assess the risk of torture and, if necessary, balance competing interests. Furthermore, the principles of administrative law also dictate that a decision maker, in the exercise of his or her discretion, must weigh all relevant factors even if they are not prescribed by statute. Therefore, it is irrelevant that the impugned legislation fails to make express provision for a balancing of interests.

[74]Turning to the two decisions invoked by the appellant in support of his argument that risk assessment and balancing must be prescribed by statute, namely *R. v. Smith (Edward Dewey), supra*, and *Kindler, supra*, I am of the opinion that neither case is of any assistance.

[75]In *R. v. Smith*, the Supreme Court considered whether subsection 5(2) of the *Narcotic Control Act* [R.S.C. 1970, c. N-1], which at that time imposed a minimum seven year sentence for importation of illegal drugs into Canada, contravened various sections of the Charter. The Court held that the subsection violated section 12 of the Charter (prohibiting cruel and unusual punishment) because of the possibility of a person being sentenced to seven

years in jail for importation of a single "joint". In arguing to save subsection 5(2) of the *Narcotic Control Act* under section 1 of the Charter, the Crown suggested that one could rely on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be contrary to the Charter. The Supreme Court rejected this argument on the basis of section 52 of the *Constitution Act, 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of any inconsistency. Thus, the courts are obligated to rule on the legality of a provision. The proper remedy is not to vest the Crown with a discretion to determine which prosecution would violate the Charter. Within this context, it is clear that *Smith* does not support the appellant's argument. The *Immigration Act* expressly grants the Minister the power to exercise her discretion in deciding whether a person constitutes a danger to the security of Canada. Either paragraph 53(1)(*b*) is constitutionally valid or it is not.

[76]The remaining case cited by the appellant in support of his argument is *Kindler, supra*. In my view this case does not support the argument advanced. This will become evident once that case is discussed in greater detail and at a more appropriate moment: see discussion *infra* at paragraph 91 *et seq*. I turn now to what I consider to be one of the more difficult issues raised by the appellant.

(3) *Refoulement* & Torture"Breach Of Principles of Fundamental Justice

[77]The appellant argues that as paragraph 53(1)(*b*) of the *Immigration Act* authorizes officials to return a Convention refugee to a country in which he or she faces a risk of torture it contravenes a principle of fundamental justice. That is to say, it infringes the fundamental principle of respect for human dignity, which envelops and informs Charter rights. It creates an "unacceptable situation" that would "shock the conscience" of "right-thinking Canadians" and one which constitutes an infringement of basic international human rights norms. Therefore, in the opinion of the appellant paragraph 53(1)(*b*) breaches section 7 of the Charter and is not saved by section 1. As to the proper constitutional remedy, the appellant asks that a proviso be read into paragraph 53(1)(*b*) to the effect that it is inapplicable in cases where it can be established that there are substantial grounds for believing that *refoulement* would expose a person to the risk of torture.

[78]The appellant also argues that if a provision or action offends the principles embodied within section 12 of the Charter then the breach of section 12 will be determinative of non-compliance with the principles of fundamental justice and an infringement of section 7. Section 12 provides that no one may be subjected to cruel and unusual punishment. The appellant submits that torture violates section 12 and, therefore, is a violation of section 7. The short answer to this argument is that there can be no violation of section 12 where the acts of torture are committed by another state. This flows from the Supreme Court's decision in *Kindler, supra* where it was held that a ministerial decision to extradite a convicted killer who was subject to the death penalty in the United States did not constitute a breach of section 12. The Charter's reach is confined to the legislative and executive acts of Canadian governments. At the same time the Supreme Court acknowledged that the values emanating from section 12 play a role in defining fundamental justice. In other words, it is relevant that torture would be considered cruel and unusual treatment or punishment if carried out by Canadian authorities.

[79]Any analysis under section 7 of the Charter must begin with an appreciation of what is meant by the term "fundamental justice". It will be recalled that a deprivation of security of the person is a breach of section 7 only if the deprivation is not in accordance with the "principles of fundamental justice". In *Re B.C. Motor Vehicle Act* , 1985 CanLII 81 (S.C.C.), [1985] 2 S.C.R. 486, the only definition of fundamental justice provided by the Supreme Court was the assertion that "the principles of fundamental justice are to be found in the basic tenets of the legal system" (at page 503). Professor Hogg posits that the subsequent cases have not succeeded in giving better definition to the basic tenets of the legal system and that, furthermore, there is little agreement among the judges of the Supreme Court as to what the basic tenets are or even the sources from which they might be derived: see Peter Hogg, *Constitutional Law of Canada* , Toronto: Carswell, loose-leaf ed., Vol. 2, at page 44-17.

[80]Whatever may be the precise boundaries of the term "fundamental justice", it is clear to me that the notion of deportation to face possible torture contravenes basic and intuitive notions of what is just or fair. I would have thought that torture is universally considered to be contrary to the concept of human dignity. Were it otherwise, it is difficult to appreciate why section 12 of the Charter would prohibit the imposition of cruel and unusual punishment. To the extent that international conventions can inform our understanding of the Charter, it is undeniable that Canada, as a matter of general principle, agrees with the proposition that torture is unacceptable

means for extracting information or for meeting out punishment. Otherwise the Canadian government would not have ratified the international Convention Against Torture.

[81]Returning to the appellant's principal argument, it seems to me that there are two ways in which to frame the question before this Court. One is advocated by the appellant and leads to the conclusion that paragraph 53(1)(*b*) of the *Immigration Act* contravenes the principles of fundamental justice under section 7 of the Charter. The appellant frames the issue in terms of whether a law which permits deportation to a country which exposes a person to the risk of torture conflicts with fundamental values underlying human rights legislation and international norms. In his view, it is not difficult to conclude that paragraph 53(1)(*b*) contravenes the principles of fundamental justice. The only real issue is whether that provision is saved by section 1 of the Charter. The other formulation is advocated by the Minister. It causes one to reflect further on the matter. The Minister frames the question in terms of whether it is contrary to the principles of fundamental justice to deport a suspected terrorist to the only country which will accept him, in circumstances where that person represents a danger to Canada's national security. When the question is cast in this manner the answer to the constitutional question is, in my view, not as self-evident. This is true even though the suspected terrorist may be exposed to a risk of torture.

[82]The manner in which one frames the question brings into issue whether it is permissible to take into account the state's interest when assessing whether there has been a breach of the principles of fundamental justice. In other words, is it permissible for a court to balance the state's interest in deporting suspected terrorists against their right to be secure against torture when determining the constitutional validity of paragraph 53(1)(*b*) of the *Immigration Act* under section 7 of the Charter. The alternative approach is to accept that legislation which exposes a person to the risk of torture contravenes section 7 in which case the burden would fall on the Attorney General to demonstrate that the legislation is saved under section 1. At this juncture it can be argued that the state's interest outweighs an individual's right not to be exposed to torture. In my opinion, a threshold issue in this case is whether balancing must occur under the section 7 as opposed to section 1 analysis.

[83]There is a difference of opinion in the Supreme Court regarding whether so-called "state" or "societal" interests should be considered in the section 7 analysis or under section 1. The traditional position is that there is an analytical distinction between the inquiry as to whether a rights violation has taken place and an inquiry as to whether the rights violation is justified under section 1 of the Charter. With great respect, I am not the first to recognize that the Supreme Court has not been consistent on whether the balancing of state interests with individual rights guaranteed by section 7 should take place within that section or under section 1 of the Charter: see generally Thomas J. Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995), 74 *Can. Bar Rev*. 446 and David Stratas, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada*, (Aurora, Ont.: Canada Law Book, 1998), Vol 1, at page 17-12.

[84]A reluctance to defer the weighing of state interests with individual rights until the section 1 analysis may be influenced by the understanding that the analysis required under section 1 is too rigorous. On the other hand, if balancing is required at the section 7 stage then it is necessary only to establish that there is a "substantial and pressing" objective underscoring paragraph 53(1)(*b*) of the *Immigration Act,* which objective outweighs a suspected terrorist's right not to be exposed to the risk of torture. This is so provided that deportation in the circumstances does not "shock the Canadian conscience". On the other hand, if balancing is deferred to the section 1 analysis then the full analytical framework laid down in *The Queen v. Oakes* , 1986 CanLII 46 (S.C.C.), [1986] 1 S.C.R. 103 comes into play, including, for example, the requirement to demonstrate "minimal impairment".

[85]Assuming that state interests are to be considered within the section 7 analysis, it is obvious that the Attorney General has the advantage of not having to meet the additional requirements imposed under the *Oakes* test. If the principles of fundamental justice embrace the understanding that there must be a balancing of state and individual interests then a person claiming an infringement of a section 7 right must prove three elements: (1) that section 7 is engaged; (2) that a principle of fundamental justice has been *prima facie* infringed; and (3) that the principle is not overridden by a valid state or communal interest. In short, the person challenging the legislation bears the onus of establishing that there is no "pressing and substantial" legislative objective which overrides the *prima facie* right which has been infringed. (As a practical matter, it is the Attorney General who inevitably argues that the state interest should prevail over an individual's right.)

[86]Chief Justice Lamer has consistently held that it is not appropriate for the Crown to limit a person's rights by

bringing societal interests into play in the principles of fundamental justice. Such interests are to be dealt with under section 1 of the Charter where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. For example in *R. v. Swain*, 1991 CanLII 104 (S.C.C.), [1991] 1 S.C.R. 933 his Lordship stated at page 977:

It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. In other words, it is my view that any balancing of societal interests against the individual right guaranteed by s. 7 should take place within the confines of s. 1 of the *Charter*. Accordingly, while I agree that it is a basic tenet of our legal system that a person who was insane at the time of the offence ought not to be convicted, I prefer to deal with this concern, in this case, under s. 1 of the *Charter*.

[87]On the other hand, Justice La Forest has been equally consistent in expressing the view that it is permissible to undertake a balancing of interests when considering whether state legislation or action violates the principles of fundamental justice. In *Godbout v. Longueuil (Ville)*, 1997 CanLII 335 (S.C.C.), [1997] 3 S.C.R. 844 he held, at pages 899-900:

But just as this Court has relied on specific principles or policies to guide its analysis in particular cases, it has also acknowledged that looking to "the principles of fundamental justice" often involves the more general endeavour of balancing the constitutional right of the individual claimant against the countervailing interests of the state. In other words, deciding whether the principles of fundamental justice have been respected in a particular case has been understood not only as requiring that the infringement at issue be evaluated in light of a specific principle pertinent to the case, but also as permitting a broader inquiry into whether the right to life, liberty or security of the person asserted by the individual can, in the circumstances, justifiably be violated given the interests or purposes sought to be advanced in doing so. To my mind, performing this balancing test in considering the fundamental justice aspect of s. 7 is both eminently sensible and perfectly consistent with the aim and import of that provision, since the notion that individual rights may, in some circumstances, be subordinated to substantial and compelling collective interests is itself a basic tenet of our legal system lying at or very near the core of our most deeply rooted juridical convictions. We need look no further than the *Charter* itself to be satisfied of this. Expressed in the language of s. 7, the notion of balancing individual rights against collective interests itself reflects what may rightfully be termed a "principle of fundamental justice" which, if respected, can serve as the basis for justifying the state's infringement of an otherwise sacrosanct constitutional right.

[88]If I understand Justice La Forest's position correctly, the reason why balancing must occur in section 7 is that if a limit on a section 7 right has been effected through a violation of the principles of fundamental justice the inquiry ends there. The limitation cannot be sustained under section 1 because a limitation on a section 7 right which breaches the principles of fundamental justice cannot be "reasonably" or "demonstrably justified" under section 1. Other members of the Supreme Court disagree (see generally Stratas, *supra* , at page 17:12).

[89]Putting aside the divergent views found in the Supreme Court jurisprudence, the one case which most closely parallels the present accepts that state interests may be examined during the section 7 analysis. That case is *Kindler, supra*, where the majority of the Supreme Court implicitly accepted that it is permissible to effect a balancing of interests when deciding whether an extradition law infringes a principle of fundamental justice: see also *Chiarelli, supra, Schmidt*, *supra*, and *Idziak, supra*.

[90]As one commentator has noted: "It may be that the [Supreme] Court as a whole is much more deferential to law enforcement and national security interests and that justices are willing to sacrifice a conceptually consistent approach to societal interests to remain on the right side of such decisions" (Singleton, *supra* , at page 471.)

[91]One cannot ignore the obvious parallels of the present case to the facts in *Kindler*. In that case the appellant, an American citizen, had been convicted of first degree murder in the United States, with the jury recommending the imposition of the death penalty. He escaped from prison and fled to Canada. Extradition proceedings were commenced and the application for committal was allowed by a superior court judge. The Minister of Justice ordered the appellant's extradition pursuant to section 25 of the *Extradition Act* [R.S.C., 1985, c. E-23] but, in doing so, declined to seek assurances from American authorities that the death penalty would not be imposed or if

imposed would not be carried out as is permitted under Article 6 of the extradition treaty existing between the two countries. [*Treaty on Extradition between the Government of Canada and the Government of the United States of America*, December 3, 1971, [1976] Can. T.S. No. 3].

[92]In determining whether the provision of the *Extradition Act* that permitted Canada to extradite Kindler without seeking assurances infringes section 7 or 12 of the Charter, Justice McLachlin (as she then was), writing for the majority (Justices L'Heureux-Dubé and Gonthier concurring), rejected outright the notion that section 12 of the Charter could be invoked in extraterritorial waters. She also cautioned courts not to be over zealous in their review of executive decisions in the extradition area. At page 849 she reasoned:

In recognition of the various and complex considerations which necessarily enter into the extradition process, this Court has developed a more cautious approach in the review of executive decisions in the extradition area, holding that judicial scrutiny should not be over-exacting. As the majority in *Schmidt* pointed out, the reviewing court must recognize that extradition involves interests and complexities with which judges may not be well equipped to deal (p. 523). The superior placement of the executive to assess and consider the competing interests involved in particular extradition cases suggests that courts should be especially careful before striking down provisions conferring discretion on the executive. Thus the court must be "extremely circumspect" to avoid undue interference with an area where the executive is well placed to make these sorts of decisions: *Schmidt* , at p. 523. It must, moreover, avoid extraterritorial application of the *Charter*: *Schmidt, supra.*

[93]Justice McLachlin [at pages 849-850] then proceeded to set out the appropriate test for determining whether section 25 of the *Extradition Act* or the Minister's decision to extradite Kindler without assurances offended section 7 of the Charter:

The test for whether an extradition law or action offends s. 7 of the *Charter* on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state "sufficiently shocks" the Canadian conscience: *Schmidt , per* La Forest J., at p. 522. The fugitive must establish that he or she faces "a situation that is simply unacceptable": *Allard , supra*, at p. 572. Thus the reviewing court must consider the offence for which the penalty may be prescribed, as well as the nature of the justice system in the requesting jurisdiction and the safeguards and guarantees it affords the fugitive. Other considerations such as comity and security within Canada may also be relevant to the decision to extradite and if so, on what conditions. At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offence and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations.

[94]Justice McLachlin also held that in determining whether extradition is "simply unacceptable" a judge must avoid imposing his or her own views on the matter and seek to objectively assess the attitudes of Canadians on the issue of whether deportation in the circumstances is shocking and fundamentally unacceptable to Canadian society.

[95]Applying the section 7 test to section 25 of the *Extradition Act*, Justice McLachlin restated the issue in terms of whether the return of a fugitive to face the death penalty in another jurisdiction offends the Canadian sense "of what is fair and right". The answer to this question turned on Canadian attitudes to the death penalty, extradition and the need to preserve an effective extradition policy and the need to deter American criminals fleeing to Canada as a "safe haven". With respect to the latter consideration, Justice McLachlin observed that it was dangerous to require mandatory assurances as Canada might become a safe haven for criminals in the United States. To require a law in which assurances were mandatory might prove too inflexible to permit the Government of Canada to deal with particular situations in a way which maintains the required comity with other nations.

[96]Justice McLachlin felt that flexibility was needed as opposed to the inflexible rule as argued by the appellant in *Kindler*. She also stressed the importance of maintaining effective extradition arrangements with other countries in a world where law enforcement is increasingly international in scope, a factor which supports the ministerial discretion preserved in section 25 of the *Extradition Act*. She found section 25 to be consistent with extradition practices, viewed historically, and in light of current conditions. In her view, there was no clear consensus in this country that the death penalty is morally abhorrent or absolutely unacceptable. Justice McLachlin accepted that in extradition cases involving a less egregious offence, the Canadian "fairness" might demand assurances against imposition or execution of the death penalty. However, in the case of brutal crimes such as those committed by

Kindler and by Ng in the companion case of *Reference Re Ng Extradition (Can.)* , 1991 CanLII 79 (S.C.C.), [1991] 2 S.C.R. 858, the fact that assurances had not been sought would not sufficiently shock the national conscience. Justice McLachlin ultimately held that section 25 of the *Extradition Act* was valid.

[97]In his concurring reasons, Justice La Forest (concurred in by L'Heureux-Dubé and Gonthier JJ.) deals only with the question of whether the Minister's decision to extradite the appellant without assurances that the death penalty would not be imposed contravened Kindler's rights under section 7. It is apparent to me that Justice La Forest's disagreement with Justice McLachlin lies in his rejection of the notion that the courts should assess "unacceptability" in terms of statistical measurements of approval or disapproval by the public at large. It is not evident from Justice La Forest's reasons why he did not deal with the constitutional validity of section 25 of the *Extradition Act* . The major thrust of his reasons are directed at the right and obligation of the Canadian government to keep criminals from entering Canada and to expel them by extradition. At pages 837 and 839 he concludes:

I therefore conclude that the decision to extradite the appellant without restrictions, which was taken with the view to deterring fugitives from seeking a safe haven in Canada to avoid the death penalty, was made in pursuit of a legitimate and, indeed, compelling social goal. Surrendering the appellant to the United States without restriction does not go beyond what is necessary to achieve that goal, for it is apparent that surrendering the appellant with the restriction that the death penalty would not be imposed would completely undermine the deterrent effect the government is seeking to achieve. As this Court has frequently noted, the social goal addressed is an important consideration in a s. 7 balancing; see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (S.C.C.), [1990] 1 S.C.R. 425, at p. 539, where the cases are reviewed.

. . .

For these reasons, then, I am of the opinion that surrendering the appellant unconditionally would not violate the principles of fundamental justice under the circumstances of this case. I reach this conclusion principally for two reasons. First, I believe that extradition of an individual who has been accused of the worst form of murder, to face capital prosecution in the United States, could not be said to shock the conscience of the Canadian people nor to be in violation of the standards of the international community. Second, I find that it is reasonable to believe that extradition in this case does not go beyond what is necessary to serve the legitimate social purpose of preventing Canada from becoming an attractive haven for fugitives.

[98]Ultimately, Justice La Forest concludes that extradition in the circumstances of the case did not go beyond what is necessary to prevent Canada from becoming an attractive haven for fugitives. As noted earlier, Justice La Forest declined to deal with the question of whether section 25 of the *Extradition Act* contravenes section 7 of the Charter, preferring to deal only with the constitutionality of the Minister's decision to issue a warrant of extradition.

[99]It is clear that the majority in *Kindler* favour a balancing approach when assessing whether a law or decision contravenes a principle of fundamental justice and that considerable deference is to be accorded the Minister's decision to extradite without assurances as to the death penalty. At the same time it would be misleading to ignore the fact that both Justices McLachlin and La Forest caution that extradition to a country where torture was practised would lead to another result. That being said, it must be recognized that neither Justices La Forest or McLachlin were asked to consider the fact that paragraph 53(1)(*b*) of the *Immigration Act* complies with all of Canada's international obligations outlined in the conventions discussed earlier. Against this background I will reproduce the relevant passages from the reasons offered by these two justices relating to torture. At page 832 Justice La Forest writes:

There 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.

[100]Justice La Forest, in considering whether there is a global sentiment on the use of the death penalty as a means of punishment, finds that while there are many international treaties on the death penalty, all fall short of actually prohibiting the use of the death penalty but not so with respect to torture. He continues at page 833:

This contrasts with the overwhelming universal condemnation that has been directed at practices such as genocide, slavery and torture; cf., for example, Articles 6 and 7 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 172.

[101]And at pages 835-836, Justice La Forest in finding that extraditing Kindler without assurances was in keeping with the valid purpose of ridding Canada of an undesirable alien, took some comfort in the fact that Kindler was being extradited rather than deported. He said:

. . . I would be concerned about encouraging a resort to deportation rather than extradition with its inbuilt protections geared to the criminal process.

In both cases, situations could arise where an order was unconstitutional. Apart from torture, the nature of the offence, the age or mental capacity of the accused . . . and other circumstances may constitutionally vitiate an order for surrender . . .

Thus the question with which we are presented here is whether it shocks the conscience to surrender individuals who have been charged with the worst sort of crimes to face capital prosecution in the United States. Absent proof of some mitigating circumstance, I do not think it does. This is especially true given that the failure to extradite without restrictions might lead to Canada becoming a more attractive destination for American fugitives in the future. It is also significant, as McLachlin J. notes, that the party requesting extradition in this case is the United States"a country with a criminal justice system that is, in many ways, similar to our own, and which provides substantial protections to the criminal defendant.

[102]Finally, at page 851 Justice McLachlin draws attention to the fact that different considerations would apply if extradition were to lead to torture:

When an accused person is to be tried in Canada there will be no conflict between our desire to see an accuse face justice, and our desire that the justice he or she faces conforms to the most exacting standards which have emerged from our judicial system. However, when a fugitive must face trial in the foreign jurisdiction if he or she is to face trial at all, the two desires may come into conflict. In some cases the social consensus may clearly favour one of these values above the other, and the resolution of the conflict will be straightforward. This would be the case if, for instance, the fugitive faced torture on return to his or her home country. In many cases, though, neither value will be able to claim absolute priority; rather, one will serve to temper the other. There may be less unfairness in requiring an accused to face a judicial process which may be less than perfect according to our standards, than in having him or her escape the judicial process entirely.

For this reason, in considering the attitude of Canadians toward the death penalty we must consider not only whether Canadians consider it unacceptable, but whether they consider it to be so absolutely unacceptable that it is better that a fugitive not face justice at all rather than face the death penalty.

[103]For the sake of completeness, a brief reference to the two dissenting opinions is warranted. In his dissenting opinion, Justice Cory (concurred in by Chief Justice Lamer) held that in the absence of the assurances outlined in Article 6 of the Extradition Treaty the surrender would contravene section 12 of the Charter and could not be justified under section 1. Justice Sopinka also dissented (concurred in by Chief Justice Lamer). He found that extradition without assurances did not infringe section 12 of the Charter but rather section 7 and that the infringement could not be saved under section 1. In the circumstances, he would have ordered that the Minister's decision be set aside until such time as assurances were obtained. Justice Sopinka opined that a breach of the principle of fundamental justice is not limited to situations which "shock the conscience" and that principles of fundamental justice are not limited by public opinion of the day. He held that the protections afforded by section 7 extend to individuals who face "unjust" situations even if not recognized as such by the majority. Justice Sopinka added that even if the Supreme Court's decision in *Schmidt , supra*, was intended to limit the circumstances that constitute a breach of the principles of fundamental justice, the extradition of the appellant without assurances shocked the conscience.

[104]Returning to the present case, it is apparent to me that even if it were permissible to balance state and individual interests at the section 7 stage of the Charter analysis then the *obiter* comments of Justices La Forest and McLachlin lead one to conclude that legislation which permits deportation of persons to countries where they

are exposed to a risk of torture would likely be considered contrary to the principles of fundamental justice. If that were so, then it would be necessary to decide whether the Attorney General is entitled to invoke and argue that paragraph 53(1)(*b*) of the *Immigration Act* is saved under section 1 of the Charter. According to Justice La Forest the answer to that question is "no".

[105]In my respectful opinion, it is preferable to follow the approach adopted by Chief Justice Lamer and effect a balancing of interests under section 1 of the Charter as opposed to section 7. A law which exposes a person to a risk of torture must be accepted as being contrary to basic tenets governing our legal system and, therefore, a breach of the principles of fundamental justice. The real issue is whether the legislation in question is saved under section 1. It is to that issue I now turn.

(4) Section 1 of the Charter

[106]The classic analytical framework for evaluating the constitutional validity of legislation under section 1 of the Charter was set out in *The Queen v. Oakes*, *supra*. Applied strictly, it places a significant burden on the Attorney General to establish that: (a) the legislation addresses a pressing and substantial objective; (b) a rational connection between the legislative measure and the objective is present; (c) the legislation impairs rights and freedoms as little as possible; and (d) a proportionality exists between the salutary and deleterious effects of the legislation. More often than not the third requirement represents the most difficult hurdle for the government. It requires the government to show that Parliament chose the least injurious legislative means of achieving its goal.

(a) Pressing and Substantial Objective

[107]The first question to be addressed is whether the objective which the provisions of the *Immigration Act* are intended to advance is of sufficient importance to warrant overriding a constitutionally protected right. The basis for the enactment of the section dealing with the exclusion, inadmissibility, and removal of terrorists and members of terrorist organizations is found in the objectives of the *Immigration Act* which are set out in paragraphs 3(*g*), (*i*) and (*j*) which read as follows:

3. . . .

(*g*) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;

. . .

(*i*) to maintain and protect the health, safety and good order of Canadian society; and

(*j*) to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity.

[108]According to Hansard [*House of Commons Debates*], the section 3 objectives were intended by Parliament to act "not a pious preamble but an integral part" of the legislation: March 10, 1977, at page 3863. The affidavit evidence of the Attorney General provides that in prescribing certain classes of persons as being inadmissible to Canada under section 19 of the *Immigration Act* the following objectives are being promoted: (1) to prevent the exposure of Canadians to security threats from non-Canadians; (2) to prevent Canada from being used as a safe base by international terrorist organizations; (3) to prevent the use of Canada by members of terrorist organizations who seek to carry on the following activities in support of terrorism:

(a) procurement and supply of logistical support for terrorist operations outside Canada;

(b) development and maintenance of the logistical support base necessary to commit terrorists acts in Canada;

(c) fundraising to pay for the cost of terrorist organizations;

(d) surveillance upon and the manipulation of *émigré* communities in Canada;

(e) the provision of a safe haven for other terrorists and also the facilitation of their transit to and from the United States; and

(f) the smuggling of immigrants into Canada and the carrying out of other illegal activities.

[109]In *Kindler, supra*, the majority of the Supreme Court maintained that to permit fugitives to remain in Canada because they may face the death penalty in a foreign jurisdiction would be to create a haven for such persons. The minority took the position that there was no evidence to support such a belief. In the present case there is evidence to support the belief that Canada has in fact become a haven for terrorist organizations. According to the evidence adduced by the Attorney General, most of the major international terrorist organizations have already established a presence in Canada. Presumably, this is due to the low threshold test for gaining admission to this country as a Convention refugee. According to the evidence submitted by CSIS to the Special Committee of the Senate on Security and Intelligence there are, with the exception of the United States, "more international terrorist groups active here than any other country in the world". (*Submission to the Special Committee of the Senate on Security and Intelligence* by Director Ward Elcock, June 24, 1998, Appeal Book, at page 544). At page 2 of its Report, the Special Committee stated (Appeal Book, at page 634):

Overall, Canada and Canadians are not a major target for terrorist attacks. Canada remains, however, a "venue of opportunity" for terrorist groups: a place where they may raise funds, purchase arms and conduct other activities to support their organizations and their terrorist activities elsewhere. Most of the major international terrorist organizations have a presence in Canada. Our geographic location also makes Canada a favourite conduit for terrorists wishing to enter the United States, which remains the principal target for terrorist attacks world-wide. In 1997, over one-third of all terrorist attacks were against United States targets.

[110]The Attorney General also argues that paragraph 53(1)(*b*) of the *Immigration Act* responds to Canada's international obligations to fight terrorism as part of a united international front, recognizing as did the Supreme Court in *Pushpanathan, supra*, at page 1030, paragraph 66, that terrorism is contrary to the purposes and principles of the United Nations. Equally important is the fact that the legislation seeks to balance the obligation of Canada to provide a refugee determination process which is fair and accessible and open to those in genuine need of protection but which also retains essential and overriding safeguards against those who threaten Canada's security and who seek to undermine the integrity and credibility of the refugee determination program: "[t]he last thing Canadians want is for their refugee determination system to be misused by terrorists and criminals": Hon. B. Bouchard (Minister of Employment and Immigration), Hansard, August 12, 1987 [*House of Commons Debates*].

[111]The Attorney General submits that paragraph 53(1)(*b*) of the *Immigration Act* is in harmony with immigration-related legislation in many democratic countries around the world, such as the United States, France, Belgium, Switzerland, Austria, Germany and the United Kingdom. Those nations also seek to block the admission of persons whose presence is a threat to national security or to the public good: see affidavit of T. Boeckner, Appeal Book, at pages 520-523. I hasten to add that paragraph 53(1)(*b*) does not conflict with Canada's international obligations under the *International Covenant on Civil and Political Rights*, the Convention Against Torture and the Convention Relating to the Status of Refugees.

[112]In my view, the objectives underscoring paragraph 53(1)(*b*) of the *Immigration Act* are aimed at ensuring Canadian security and are sufficiently important to warrant overriding a constitutional right. The objectives of the legislation relate to concerns which are pressing and substantial in a free and democratic society as they deal with the inadmissibility and removal of persons who undermine the safety and security of Canadians. These objectives are of sufficient importance to override a constitutional right in appropriate circumstances. This conclusion is all the more compelling once it is recognized that the problem which the legislation seeks to address is not a theoretical construct but a reality. To the extent that Canada is not already a haven for terrorists the government has a legitimate right to ensure that it does not become such.

(b) Rational Connection

[113]In addition to demonstrating that the impugned legislation furthers a substantial and pressing legislative objective, the Attorney General must establish that paragraph 53(1)(*b*) is rationally connected or related to the objectives of the legislation. This is the first part of the proportionality test. In this regard it must be remembered that the Charter itself distinguishes between the rights of Canadian citizens and those who have failed to obtain that legal status. Pursuant to subsection 6(1) only a Canadian citizen has a right to enter or remain in Canada. There is, in my view, a rational connection between the objective of preventing terrorists from living in Canada

and the means chosen to address that effect, namely a process for assessing whether there are reasonable grounds for alleging that a person is a member of a terrorist organization and a process for determining whether that person is a danger to the security of Canada.

(c) Minimal Impairment

[114]The second part of the proportionality test dictates that the legislation should impair "as little as reasonably possible" the right or freedom in question. The burden on the Attorney General is to demonstrate that the legislation does no more than is reasonably necessary to achieve the goal of the legislation. In my view this requirement is satisfied for several reasons. First, paragraph 53(1)(*b*) of the *Immigration Act* cannot be interpreted as authorizing the Minister to deport any one who she believes represents a danger to the security of Canada. It is only where the threat of that danger outweighs an individual's right to personal security that deportation is permitted. Second, deportation of persons declared to be Convention refugees is conditioned on a finding that such persons fall within an inadmissible class under section 19 of the *Immigration Act,* a finding which is subject to judicial review by a judge of the Federal Court. Third, the legislation does not exclude the right of the Court to review the Minister's exercise of her discretionary power to deport a Convention refugee. Aside from the application of the standard of review dictated by administrative law principles it is still open to argue that deportation would in the circumstances of a given case violate a person's right to fundamental justice. Fourth, the *Immigration Act* does not rule out the possibility of a person who is subject to a deportation order being removed to a country other than the one which the Convention refugee had fled. This possibility arises from section 52 of the Act which requires explanation.

[115]Section 52 of the *Immigration Act* provides that in cases where a deportation has issued following an inquiry held by an immigration officer a person may be allowed to leave Canada "voluntarily" and to select the country for which he or she wishes to go, unless the Minister directs otherwise. In the present case the Minister is not prepared to allow the appellant to leave Canada voluntarily for reasons which must be obvious to the parties. A person who is not permitted to leave Canada voluntarily will be removed to one of four destinations: (1) the country from which the person came to Canada; (2) the country in which the person last permanently resided before coming to Canada; (3) the country of which the person is a national or citizen; or (4) the country of that person's birth. If none of these countries is willing to receive a person then the Minister may select any other country that is willing to accept him or her. With the approval of the Minister the person may select (within a reasonable period of time) any country which is willing to grant admission.

[116]In summary, section 52 of the *Immigration Act* is sufficiently flexible to enable the Minister to permit a person who is subject to a deportation order to seek admission to a country other than the one giving rise to the risk of torture. Moreover, that section complies with Article 32, paragraph 2 of the 1951 *United Nations Convention Relating to the Status of Refugees* which has become part of our domestic law with the promulgation of the *Immigration Act*. Article 32, paragraph 2 of that Convention states that a Contracting state shall allow refugees a reasonable period of time to seek admission to a third country. In my opinion, before the Minister issues an opinion letter under paragraph 53(1)(*b*) the person who is the subject of that letter, such as the appellant, may seek refuge in a country other than the one which exposes him to the risk of torture. Thus, when section 52 and paragraph 53(1)(*b*) are looked at in tandem, as they must, it is clear that a danger opinion should issue in circumstances where the only country which will receive that person is the one in which the risk of torture arises. Before that opinion letter issues and if so requested the person to be deported must be given a reasonable opportunity to seek out another country of refuge. Accordingly, the requirement of minimal impairment is satisfied to the extent that deportation to a country where there is a risk of torture is a decision of last resort.

(d) Salutary and Deleterious Effects

[117]The final prong of the *Oakes* test dictates that there must be proportionality between the objective of the legislation and its deleterious effects. However, in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (S.C.C.), [1994] 3 S.C.R. 835, at page 889 the Supreme Court added a further requirement, namely whether there is "proportionality between the deleterious and the salutary effects of the measures" [underlining in original]. Subsequently in *Thomson Newspapers Co. v. Canada (Attorney General)* , 1998 CanLII 829 (S.C.C.), [1998] 1 S.C.R. 877, Justice Bastarache, writing for the majority held that the weighing of legislative objectives against the legislation's deleterious effects is effectively accomplished at the rational

connection and minimal impairment stages of the analysis. This leaves for consideration whether the salutary benefits of the legislation outweigh its deleterious effects.

[118]The benefits of the legislation in question are self-evident. It enables the government to deport those who would not have been admitted to Canada had they told the truth in the first instance. It enables Canada to maintain that it is not a haven for terrorists (assuming it is not already one) and to live up to its international commitment to fight terrorism. The legislation promotes the security of Canadians while undermining the ability of terrorists to operate offshore and to shelter behind the mistaken belief that it is permissible to seek political goals through actions which qualify as crimes against humanity. The legislation also instills confidence in the Canadian public that its immigration laws are responsive to the plight of genuine refugees without prejudicing the ability of the government to effectively weed out those who are clearly inadmissible. Paragraph 53(1)(*b*) of the *Immigration Act* accords with the understanding that non-citizens do not enjoy an unfettered right to enter and remain in Canada. That understanding is premised on section 6 of the Charter which grants such rights to Canadian citizens only. By contrast, the deleterious effects of the legislation are obvious. In circumstances where the Minister is of the opinion that the state's interests outweigh those of an individual, *refoulement* will expose that person to the risk of torture. In effect, the Minister will be compelled to order *refoulement* where the seriousness of the "offences" for which a person is suspected of committing (e.g. crimes against humanity) leads to the conclusion that the risk to the security of Canada outweighs the risk of torture at the hands of a third party. In my view, the salutary effects of the legislation outweigh the deleterious effects on those who face *refoulement* and the risk of torture. This is one instance in which the collective rights of the majority significantly outweigh the right of a few to be secure against the potential of personal harm. In conclusion, I find that paragraph 53(1)(*b*) of the *Immigration Act* infringes section 7 of the Charter but is saved under section 1.

(5) Does paragraph 53(1)(*b*) Shock the Conscience?

[119]The above analysis does not deal with the test set down by the Supreme Court for assessing the constitutional validity of legislation which engages section 7 of the Charter, the so-called "shock the conscience" test. With great respect, I am unable to measure objectively how Canadians would respond to a law which permits deportation of suspected terrorists to the only country that will accept them and in circumstances where deportation gives rise to a risk of torture. I do sympathize with the view held by the late Justice Sopinka that the answer cannot be made dependent on the public opinion of the day. But as the law presently stands a court must opine, as best it can, what the Canadian view may be.

[120]There is little doubt that beginning with the Supreme Court's decision in *Singh et al. v. Minister of Employment and Immigration*, 1985 CanLII 65 (S.C.C.), [1985] 1 S.C.R. 177, the Charter has been effective in lowering the barriers facing those who seek refuge in this country and for reasons which are compatible with Canada's humanitarian tradition. However, the expectation that it would be equally effective as a barrier to prevent deportation of those who should not have been admitted in the first instance is simply unrealistic. The Charter is not a movable barrier which can be lowered to facilitate admission to Canada and then raised to prevent removal. The *Immigration Act* complies with all of Canada's obligations imposed under international law with respect to the deportation of those involved in the pursuit of terrorist objectives. Suspected terrorists cannot lay claim to an expectation that the Charter will protect them against *refoulement* simply because they have been successful in penetrating our borders. Those who are prepared to participate in political reform by way of terrorism freely accept the risks which flow from this form of expression, including death. It is not *refoulement* by the Canadian government which exposes persons to the risk of torture, rather it is the pursuit of political goals through terrorism which is the true *causa causans*. Canada is neither the first nor last link in the chain of causation giving rise to torture. The first link is the suspected terrorist. The last link is the country of *refoulement*. Canada is merely an involuntary intermediary.

[121]In my view, a law which permits *refoulement* of suspected terrorists and exposes them to the risk of torture would not violate most Canadians' sense of justice. Rather, public confidence in the refugee system and support for the Charter would be seriously undermined if a court were to hold otherwise. Undoubtedly, there will be those who disagree.

IX. ISSUE No. 4: ATTACKING THE

MINISTER'S DECISION

[122]The present case is problematic because of the overlap between Charter and administrative law principles as they relate to the proper standard of review of the Minister's decision to declare the appellant a danger to the security of Canada. Accepting that paragraph 53(1)(*b*) of the *Immigration Act* is constitutionally valid, it remains to be decided whether in the circumstances of the case the Minister's decision to issue the opinion letter infringes the appellant's right to security of the person under section 7 of the Charter. At the same time, the Minister's decision remains subject to judicial scrutiny by reference to the standard of review determined in accordance with the principles set out in the Supreme Court's decision in *Baker, supra*. While that decision introduces a number of ground-breaking developments in administrative law, the one that has immediate application is the extension of the "pragmatic and functional" approach to the review of administrative discretion exercised by the executive arm of government. Until *Baker* , that approach was limited to the review of decisions rendered by tribunals. I begin this part of my analysis with the constitutional standard of review.

(A) The Constitutional Standard of Review

[123]The constitutional standard of review is set out in the extradition cases such as *Kindler, supra* and can be reformulated for purposes of deciding this appeal in the following manner: would deportation to face torture in the circumstances of this case sufficiently shock the national conscience? Having regard to cases such as *Kindler, supra*, it is evident that there are two themes running throughout the majority reasons for judgment. One is that substantial deference is to be accorded the Minister of Justice in the exercise of her discretion. The other is that deference is not absolute and that the exercise of administrative discretion is to be guided by a number of relevant considerations. These facets of the *Kindler* decision bear repetition.

[124]It will be recalled that in *Kindler*, *supra*, the Supreme Court held that deference is owed to executive decisions made in regard to extradition and, therefore, "judicial scrutiny should not be over to exacting". In that case it was held that the Minister of Justice was "well placed to make these sorts of decisions" and that "[a] court must be `extremely circumspect' to avoid undue interference." At the same time, the Supreme Court indicated that it is permissible to look at the offence for which the death penalty could be invoked as well as the nature of the judicial system in the state seeking extradition of a fugitive and the safeguards and guarantees which that state offers. State comity and security within Canada were also held to be relevant considerations with the Minister of Justice being "accord[ed] due latitude" when balancing competing interests (*per* McLachlin J., at pages 849-850). Within these kinds of parameters, it is necessary to determine whether the Minister's decision "sufficiently shocks" the Canadian conscience. (All of these statements lead one to believe that "correctness" is not the proper standard of review.)

[125]I have already outlined the difficulty in applying a test framed in terms of shocking the conscience; guarded on one side by the concept of deference and on the other by the need to ensure that a decision does not outrage one's sense of human decency. Given the fact that *Kindler* predated the Supreme Court's seminal decisions in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 577; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (S.C.C.), [1997] 1 S.C.R. 748; *Pushpanathan*, *supra* and *Baker, supra*, one cannot help but wonder whether that Court's approach to the constitutional standard of review needs to be revisited. There is one more problem that must be acknowledged.

[126]It is accepted that under the constitutional standard of review it is the "fugitive" who bears the obligation of establishing that he or she faces "a situation that is simply unacceptable." It follows that persons such as the appellant must establish that there are substantial reasons for believing he or she would be exposed to the risk of torture. Otherwise, section 7 of the Charter is not engaged by the Minister's decision to return persons to the country from which they fled. The question which remains is whether the Motions Judge is entitled to weigh the evidence and arrive at his or her own conclusion, which in theory could contradict that reached by the Minister.

[127]I raise this issue now because the Motions Judge, McKeown J., held that the appellant had failed to establish that there were substantials grounds for believing that he would be exposed to the risk of torture if returned to Sri Lanka. This conclusion was arrived at in response to the appellant's argument that his section 7 rights would be infringed if "refouled" to that country. The appellant now argues that it is no business of a motions judge to make findings of fact on a judicial review application. The Minister counters with the argument that substantial deference should be accorded to the Motions Judge's finding of fact.

[128]I do not doubt that it may be necessary for a motions judge to make findings of fact, or mixed fact and law, on an application for judicial review where legislation is challenged under the Charter (e.g. whether a provision is saved under section 1). But in cases where the factual determination in question is already entrusted to the decision maker then the motions judge should refrain making a *de novo* finding of fact and focus on the proper standard of review. In my respectful view, the more fundamental issue, and one which can only be addressed by the Supreme Court, is whether there is a need for both a constitutional and administrative standard of review. In the reasons that follow it becomes evident that I favour only one standard. Moreover, I take the position that under the available "spectrum" of standards, there is no basis for setting aside the Minister's decision to declare the appellant a danger to the security of Canada.

(B) The Administrative Law Standard

[129]The Supreme Court has cautioned that it is inaccurate to speak of a rigid dichotomy between "discretionary" or "non-discretionary" decisions because most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making (e.g. with respect to available remedies): see *Baker* , *supra*, at page 854, paragraph 54. The type of discretionary decision I am focussing on is inevitably introduced by the term "in the opinion of the Minister" or "if the Minister is of the opinion". The expressions are relevant because they convey the clear intent on the part of Parliament that the decision maker's subjective appreciation of the evidence or facts is to be preferred to an objective standard of evaluation: see *Kelly v. Canada (Solicitor General)* reflex, (1992), 6 Admin L.R. (2d) 54 (F.C.T.D.), at page 58 *per* Strayer J. (as he then was), affd reflex, (1993), 13 Admin. L.R. (2d) 304 (F.C.A.).

[130]At first blush the Supreme Court's decision in *Baker, supra*, appears to introduce a fundamental change in the law governing judicial review of the exercise of administrative discretion. To appreciate the true significance of that case it is necessary to look at the law as it stood prior to that decision. In *Canada (Attorney General) v. Purcell*, 1995 CanLII 3558 (F.C.A.), [1996] 1 F.C. 644 (C.A.) I reviewed much of the jurisprudence of both this Court and the Supreme Court relating to judicial review with respect to the exercise of administrative discretion. I shall begin by summarizing what was said in *Purcell*: see generally *Calgary Power Ltd. and Halmrast v. Copithorne*, [1959] S.C.R. 24; *Swain et al. v. Dennison et al.*, [1967] S.C.R. 7; *Gana v. Canada (Minister of Manpower and Immigration)*, [1970] S.C.R. 699; *Nenn v. The Queen*, [1981] 1 S.C.R. 631; *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (S.C.C.), [1994] 1 S.C.R. 231; and *Everett v. Canada (Minister of Fisheries & Oceans)* reflex, (1994), 25 Admin. L.R. (2d) 112 (F.C.A.), *per* MacGuigan J.A., at page 120.

[131]The law does not recognize the concept of "unfettered discretion". All discretionary powers must be exercised "according to law" and, therefore, their exercise by administrative officers are subject to certain implied limitations. Those implied limitations are in addition to those which involve procedural deficiencies amounting to breaches of the fairness rules. The expression most often used in the Federal Court is that a discretion must be exercised "judicially". That term is taken to mean that if a decision were made in bad faith, that is for an improper purpose or motive, in a discriminatory manner, or the decision maker ignored a relevant factor or considered an irrelevant one, then the decision must be set aside. (Whether or not a factor is relevant may be in issue.) The same fate awaits a decision based on a mistaken principle of law or a misapprehension of the facts (as opposed to inferences drawn from accepted facts) or what is commonly referred to as a "palpable and overriding error". More recently, the Supreme Court held that where a tribunal is vested with a "broad discretion" a reviewing court should not disturb the exercise of that discretion unless that tribunal has "made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner"; *per* Iacobucci J. in *Pezim v. British Columbia (Superintendent of Brokers), supra*, at page 607. (*Quaere*: could this limitation be equated with the "patent unreasonableness" standard of review.)

[132]The common law limitations placed on the exercise of an administrative discretion exercised by executive members of government reflect the understanding that all powers granted by Parliament to the executive are fettered only to the extent necessary to ensure that basic tenets of the law are observed. But assuming that the decision maker has acted "judicially" the question remains whether the discretionary decision may be set aside on other grounds. Until *Baker* , *supra*, the jurisprudence of the Supreme Court, much of which is dated, resorted to the distinction between discretionary powers of an administrative nature and those required to be made on a "judicial or quasi-judicial" manner. A decision which fell within the former category was entitled to absolute

deference unless there was a breach of one of the implied limitations. Decisions which fell into the latter category could be reviewed on a standard of correctness; correctness meaning that the court could substitute its view for that of the decision maker, for example, by drawing inferences from accepted facts.

[133]While the distinction originally drawn between quasi-judicial and administrative acts has been laid to rest, courts continue to struggle with determining the proper standard of review in regard to discretionary decisions not tainted by a breach of an implied limitation. As a general proposition, it can be said that, in the absence of such a breach, courts were reluctant to set aside a discretionary decision. There were exceptions. For example, in *Purcell* this Court held that the opinion formed by the Unemployment Insurance Commission that Mr. Purcell had lied when applying for unemployment benefits was not immune from review on its merits in light of a statutory right of appeal to a Board of Referees, which according to Federal Court jurisprudence was a *de novo* right of appeal.

[134]At the same time, I am not aware of any case in which the Supreme Court has set aside a decision rendered by an executive member of the government in the absence of a breach of an implied limitation. Specifically, I know of no case where the Supreme Court has not accorded absolute deference to a discretionary decision rendered by a member of the executive once it is determined that there has been no breach of an implied limitation: see *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (S.C.C.), [1997] 2 S.C.R. 403, at page 452 *et seq*, *per* La Forest J. whose analysis on this point is agreed to by the majority; see also *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (S.C.C.), [1982] 2 S.C.R. 2, at pages 7-8 and *Glover v. Plasterer*, 1998 CanLII 6535 (BC C.A.), [1999] 2 W.W.R. 219 (B.C.C.A.).

[135]I pause here to note that the English jurisprudence no longer plays an important role in the development of Canadian administrative law. As a general proposition, English courts have not embraced the deference in regard to discretionary decisions exhibited by our Supreme Court in the last 20 years: see *Associated Provincial Picture Houses, Ld. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.).

[136]In summary, Canadian courts have not been prepared to assess a discretionary decision on its merits by weighing evidence, drawing inferences from accepted facts or reassessing evidence in light of relevant factors established at law. Above all, most courts assumed they did not possess the jurisdiction to set aside an executive decision simply because it did not agree with the way in which competing interests were balanced or evidence weighed. It may well be that the law underwent radical reform with the arrival of *Baker, supra*. But I am not confident that this is so. If the Supreme Court embarks on fundamental change in the law it usually states as much by expressly overruling its earlier precedents. Be that as it may, *Baker* cannot be ignored even if one of its critical holdings constitutes *obiter dictum*.

[137]In *Baker, supra*, the Supreme Court addressed the issue of the proper standard of review of a discretionary decision made by a member of the executive and adopted the "pragmatic and functional approach" that had been developed with respect to the review of decisions of expert tribunals: see *Pezim v. British Columbia (Superintendent of Brokers) , supra*; *Canada (Director of Investigation and Research) v. Southam Inc.*, *supra*, and *Pushpanathan, supra*.

[138]The application of the pragmatic and functional approach to determining the proper standard of review embraces one of three possible standards (the "spectrum"): correctness, reasonableness *simpliciter* and patent unreasonableness. In *Baker, supra*, the Minister of Citizenship and Immigration had refused to exercise her discretion, on humanitarian and compassionate grounds, to grant Mrs. Baker an exemption from the requirement that her application for permanent residence be made from outside Canada. Without the exemption Mrs. Baker was subject to removal from Canada. Mrs. Baker had left Jamaica and her four children and came to Canada on a visitor's visa which she overstayed by some 11 years. During this period, Mrs. Baker gave birth to four Canadian-born children.

[139]The Minister made her decision on the basis of a recommendation proffered by an immigration official who in turn had relied on the recommendation of another official whose handwritten notes were ultimately deemed to be the reasons for the Minister's decision. From those notes the Supreme Court was able to conclude that there was a reasonable apprehension of bias on the part of the first line immigration official, which bias was then imputed to the Minister. Though that finding was sufficient for purposes of deciding the appeal, the Supreme Court went on to consider two other issues. The first involved the proper standard of review. The second was whether the best interests of Mrs. Baker's Canadian-born children was a "primary" consideration when deciding to grant the

exemption on humanitarian and compassionate grounds and, if so, did the Minister take this factor into consideration or give it sufficient weight.

[140]As to the proper standard of review the Supreme Court concluded that it was one of "reasonableness" having regard to the following four factors: (1) the presence or absence of a privative clause; (2) the expertise of the decision maker; (3) the purpose of the provision and the Act as a whole; and (4) the nature of the problem (question of fact or law). According to *Southam , supra* an unreasonable decision is one "not supported by any reasons that can stand up to a somewhat probing examination." With respect to the reasonableness of the Minister's decision, the Supreme Court concluded that, as the reasons did not indicate that it was made in a manner that was "sensitive" to the interests of Mrs Baker's children, or that their interests were an "important factor" in arriving at a decision, it was an unreasonable exercise of Ministerial power.

[141]What is significant about *Baker, supra*, is that the Supreme Court did not conclude that the Minister's decision should be set aside on the ground that she failed to take into account a relevant consideration, namely the interests of Mrs. Baker's Canadian-born children. What *Baker, supra,* establishes is that if "insufficient" weight is given to a relevant consideration then the decision cannot stand. As the interests of the children had been "minimized", the Minister's exercise of her discretion was deemed "unreasonable". *Quaere* : How does a tribunal or administrative official respond to a direction to give more weight to one consideration? How does one determine whether sufficient weight is given to a factor without prejudging or directing the outcome of a decision? Does the expanded understanding of the "reasonableness" standard of review conflict with the standard imposed by Parliament under subsection 18.1(4) [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Court Act* [R.S.C., 1985, c. F-7] which outlines the statutory grounds for setting aside an administrative decision? Does the reasonableness standard applied in *Baker* conflict with that set out in *Southam, supra*?

[142]In the present case, the appellant argues that the correct standard of review is one of "correctness", but only in regard to the risk assessment undertaken by the Minister. (The appellant maintains that once the risk of torture is established he cannot be deported to Sri Lanka.) By correctness, the appellant means that this Court is in as good a position to weigh the documentary evidence relating to the risk of torture. The Minister, on the other hand, addressed each of the four factors outlined in *Baker* , *supra*, and *Pushpanathan, supra*, and argued that the proper standard is "reasonableness". Neither party articulated the difference between the two standards when applied to a discretionary decision. The Motions Judge held that the proper standard of review is reasonableness. As much as I incline to that standard of review, I respectfully refrain from selecting any one standard for several reasons.

[143]First, it is misleading to apply one standard of review to the Minister's decision. It must be recognized that the decision of the Minister to declare a person a danger to the security of Canada under paragraph 53(1)(*b*) of the *Immigration Act* involves an interplay between three discrete questions: (1) whether the person subject to *refoulement* is a *prima facie* risk to the security of Canada; (2) whether there are substantial reasons for believing that *refoulement* would expose that person to the risk of torture; and (3) assuming both questions are answered in the affirmative, whether an individual's right to be secure against torture should prevail over the state's interest in deporting those who otherwise represent a danger to the security of Canada. Thus, in strict legal theory, each of the determinations to be made by the Minister in arriving at a final decision could be subject to a different standard of review. This is a matter which the parties did not address.

[144]Second, it is my view that on the facts of the present case the outcome of this appeal is not dependent on identifying one or more proper standards of review. Even if the standard of review were correctness, with respect to each of the three discrete questions, I cannot say that I would have reached a decision different than that rendered by the Minister in the present case. Correlatively, I cannot find demonstrated error on the part of the Minister so as to conclude that her decision is an unreasonable one. There has been no breach of any of the implied limitations discussed above, nor can it be said that her decision is "clearly wrong" in the sense that it is affected by a palpable and overriding error. According to *Southam , supra*, at pages 776-779, the mere fact that a tribunal's decision is "wrong" is not a sufficient basis for setting it aside. At the same time, an unreasonable decision is described in that case as one "that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination." Both characterizations of the reasonableness standard were made in the context of a tribunal's ruling involving a question of mixed fact and law.

[145]Moreover, the appellant has not argued that the Minister failed to place sufficient weight, for example, on the

personal risk of harm to which the appellant will be exposed if "refouled" to Sri Lanka. Finally, I do not believe that there is any legal basis for holding the Minister's decision to be patently unreasonable in the sense that the "[t]he defect is apparent on the face of the tribunal's reasons". (It is to be noted that prior to *Southam* , *supra*, the notion of patent unreasonableness was framed in terms of an "irrational" interpretation or decision, a determination which can be made only after taking a "hard look" at the decision under review.)

[146]In my opinion, more is gained by focussing on the scope of the Minister's decision and the relevant considerations. Within that framework one is better equipped to take a "hard look" for demonstrated and reversible error on the part of the Minister. As will become evident, it is only against this background that one is able to evaluate the Minister's decision against any one of the three standards of review.

(C) The Scope of the Decision and Relevant Considerations

[147]It will be recalled that paragraph 53(1)(*b*) of the *Immigration Act* provides that the prohibition against *refoulement* of a Convention refugee is not applicable if that person is found to fall within an inadmissible class prescribed by section 19 and the "Minister is of the opinion that the person constitutes a danger to the security of Canada." It will also be recalled that the parties are agreed that in addressing that issue the Minister is obligated to assess the risk of torture facing the appellant upon his return to Sri Lanka. Specifically, it is agreed that the Minister must determine whether "there are substantial grounds for believing that he would be in danger of being subjected to torture". This is the same threshold test set out in Article 3 of the international Convention Against Torture to which Canada is a signatory. If, however, the person to be "refouled" is unable to establish that there are substantial reasons for believing that he or she is exposed to a risk of torture then section 7 of the Charter is not engaged and the Minister need only be concerned with whether the person constitutes a danger to the security of Canada. As is obvious, a determination as to whether a person constitutes a security risk bears no relationship to whether that person would be exposed to the risk of torture upon *refoulement* . Thus, a third finding may be required if the Minister determines that *refoulement* raises the risk of torture and the person would otherwise constitute a danger to the security of Canada. The Minister must now balance the security risk against the personal risk of torture. If the latter outweighs the former then the Minister must refrain from issuing an opinion letter under paragraph 53(1)(*b*).

[148]As noted earlier in these reasons, it should not be difficult for the Minister to conclude that a suspected terrorist is a danger to the security of Canada having regard to the initial source of the allegations (intelligence reports prepared by CSIS) and the fact that a Federal Court judge has made a finding that the allegations are reasonable. (See paragraph 63, *supra*, which outlines an example of a perverse danger ruling.) The truly problematic question relates to whether persons such as the appellant are able to establish that there are "substantial" reasons for believing that *refoulement* would expose them to a risk of torture.

[149]A person cannot meet the onus of establishing that there are substantial grounds for believing that *refoulement* would expose that person to the risk of torture by resting their case on the fact that they had been declared a Convention refugee. This is true for two obvious reasons. First, risk assessment must be carried out as of the date the Minister informs the appellant that consideration is being given to the issuance of an opinion letter under paragraph 53(1)(*b*) of the *Immigration Act*. What is relevant are the conditions which presently exist in the country to which the person is to be "refouled", not those which existed at the time refugee status was granted. The possibility of a change in country conditions is well recognized in the jurisprudence. Second, the risk of torture may not be related to the grounds outlined in the refugee claim. The present case is illustrative of this point.

[150]In seeking refugee status in Canada, the appellant claimed persecution at the hands of the LTTE and the inability of the Sri Lankan government to provide him with adequate protection. The fact that the appellant has been a member of the LTTE since his youth led Justice Teitelbaum to conclude that refugee status had been obtained by "wilful misrepresentations". Thus, the risk of torture must stem from current facts. It is a matter of public knowledge that upon the appellant's return to Sri Lanka he will be detained by Government authorities for the reason that the appellant is believed to be an integral member of the LTTE responsible for offshore fundraising on its behalf. The question which remains is whether there are substantial grounds for believing that the appellant faces the risk of torture while in detention. At the same time, a more basic question must be addressed: what is the requisite degree of risk of torture envisaged by the "substantial grounds" test?

[151]It is generally acknowledged that the risk of torture must be assessed on grounds that go beyond "mere theory" or "suspicion" but something less than "highly probable". The risk or danger of torture must be "personal and present". This is the approach adopted by the European Court of Human Rights in *Chahal , supra*, discussed earlier and by the United Nations Committee Against Torture: see *General Comment on the Implementation of Article 3 in the Context of Article 22 of the Convention against Torture*, U.N. Doc. CAT/CIXX/Misc.1 (1997), paragraphs 6 and 7.

[152]If we reject the two extreme threshold tests, "mere possibility" and "highly probable", we are left with the intermediate standard framed in terms of a "balance of probabilities". That threshold can be conveniently recast by asking whether *refoulement* will expose a person to a "serious" risk of torture.

[153]Inevitably any risk assessment is measured according to the available documentary evidence relating to country conditions. In the words of Article 3, paragraph 2 of the Convention Against Torture, the documentary evidence should seek to establish the extent to which there is a "consistent pattern of gross, flagrant or mass violations of human rights." While evidence of general country conditions is informative, it is not a sufficient ground for holding that a person faces a serious risk of torture if *refoulement* were to occur. What is required is evidence that supports the argument that the individual concerned would be personally at risk. For example, in the present case any documentary evidence pertaining to the treatment by Sri Lankan authorities of persons suspected of being members of the LTTE is of significance, as is evidence relating to the existence of a properly functioning legal system which is capable of monitoring or addressing violations of human rights norms. Finally, it follows that the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of facing a serious risk of torture.

[154]Having regard to *Kindler, supra*, it might be asked whether the Minister of Citizenship and Immigration should be under an obligation to obtain, or at least seek, assurances that a person who is to be "refouled" will not be subjected to torture. While that issue was not raised on this appeal, it is common knowledge that the Minister did obtain written assurances from the Sri Lankan government that the appellant's rights would be respected: see *Suresh v. Canada (Minister of Citizenship and Immigration)* , 1999 CanLII 8393 (F.C.A.), [1999] 4 F.C. 206 (C.A.), *per* Robertson J.A. I presume the issue of assurances was not pursued because they were obtained after the Minister had issued the opinion letter declaring the appellant to be a danger to the security of Canada. In any event, it is evident that even if assurances against mistreatment are given by a state, they cannot be viewed as a guarantee of his or her safety. This was the situation in *Chahal, supra*. In the present case, it is not the sincerity of the assurances given by the Sri Lankan government which is questioned but rather its ability to control the actions of its security forces. Thus, any analogy to the Supreme Court's decision in *Kindler*, *supra*, is misplaced. The extradition treaty between Canada and the United States makes express provision for the right of a country to seek and obtain assurances against the imposition of the death penalty.

[155]Assuming that a person is able to establish that *refoulement* will give rise to a serious risk of torture, it remains to be determined whether a third country is willing to accept that person. As discussed earlier, the Minister is obligated to assist a person who is actively seeking a third country of refuge if such assistance is requested. If a third country is willing to accept the person then section 7 of the Charter is not engaged. In cases where a person does not seek out refuge in a third country, or where no other country is willing to accept that person, and where a serious risk of torture would arise on *refoulement*, the Minister must balance the interests of the state with those whose personal security is threatened. In any one case, it is a matter of personal judgment whether the risk of harm outweighs the interests of Canada. The degree of complicity and the nature of the acts alleged to have been committed by the person subject to deportation will have to be weighed against the possible risk of harm if *refoulement* occurs. Having regard to decisions such as *Kindler, supra*, one would expect that the level of deference owed this executive decision would be considerable. Under the "reasonableness" standard it would have to be shown that the Minister's decision is "clearly wrong".

(D) Application to Facts

[156]Of critical significance to the outcome of this case are the facts leading up to the decision of the Minister to issue an opinion letter under paragraph 53(1)(*b*) of the *Immigration Act*. On September 17, 1997, the same day the deportation order was made, the appellant was given notice that the Minister was considering the option of declaring the appellant a danger to the security of Canada. In the notice to the appellant, the Minister states that

before making a decision under paragraph 53(1)(*b*) she will undertake to balance the risk which he presents to the Canadian public with the risk of harm to the appellant if "refouled". The relevant portion of the letter reads as follows:

However, before such a decision is made the Minister will assess the risk that you represent for the Canadian public and the possible risks to which you will be exposed if you are returned to the country from which you came to Canada, your country of permanent residence, your country of nationality or your country of birth.

[157]The notice also informed the appellant of his opportunity to present written argument and submit documentary evidence he deemed relevant stating that "[y]ou may wish to relate your submission to the threat on your life or freedoms that could result in your removal from Canada". The deadline for receipt of submissions was 15 days from the receipt of the notice. Counsel for the appellant made extensive written submissions to the Minister on October 1, 1997 (15 pages) together with approximately 150 pages of documentary evidence relating to country conditions in Sri Lanka, specifically those detailing human rights abuses against Tamils including torture and killings. Also included in those submissions was an argument (acknowledgement) by counsel for the appellant that a refugee must be given sufficient time to "locate a safe third country" (Appeal Book, at page 356). As well, counsel argued that under international law a person could not be "refouled" to face the risk of torture, citing the Convention Against Torture. Specifically, counsel argued that the Minister would have to make a separate finding with respect to the risk of torture if the appellant were "refouled" to Sri Lanka (see Appeal Book, at pages 355-358). Counsel also argued that the appellant was not a danger to the security of Canada because his activities were neither criminal nor "violent in nature" (Appeal Book, at page 358). Counsel submitted that "Mr. Suresh would not be safe and be subjected to torture and other forms of cruel, inhuman or degrading treatment in Sri Lanka" (Appeal Book, at page 359). Finally, counsel for the appellant asked that the Minister delay her decision until the release of Justice Teitelbaum's reasons upholding the issuance of the section 40.1 certificate on the ground of reasonableness. (Justice Teitelbaum had rendered judgment from the bench with reasons to follow.) At the same time, counsel assured the Minister that the appellant's family, as well as others, were making efforts to find him a safe third country (see Appeal Book, at page 364).

[158]The documentary evidence submitted by the appellant to the Minister detailed human rights violations committed by Sri Lanka's government-controlled security forces. Included was a U.S. Department of State Report, *Country Reports on Human Rights Practices for 1996*: South Asia: Sri Lanka which stated that "[m]embers of the security forces continued to torture and mistreat detainees and other prisoners, both male and female, particularly during interrogation". That document identified most torture victims as "Tamils suspected of being LTTE insurgent collaborators" (see Appeal Book, at page 366 *et seq.*). That document also states that Sri Lanka has a long-standing parliamentary democracy with an active multi-party system and an independent judiciary. Also noted in that document is the fact that Sri Lanka is a signatory to the *International Convention on Civil and Political Rights* and that the Government has arrested and convicted 14 soldiers on 101 counts of murder in 1996. As well, the International Committee of the Red Cross has unhindered access to detention centres, police stations and army camps.

[159]Following the release of Justice Teitelbaum's reasons upholding the reasonableness of the section 40.1 certificate, counsel for the appellant made additional submissions on December 3, 1997. Those submissions consisted of representations that Justice Teitelbaum had defined the term "membership" in section 19 of the *Immigration Act* too broadly and that the conduct of the appellant in his capacity as coordinator of the WTM was not unlawful. With respect to the risk of torture, counsel for the appellant argued that, by identifying the appellant as a member of the "executive" of the LTTE and making that information public, Justice Teitelbaum effectively enhanced the appellant's exposure to the risk of torture.

[160]On December 18, 1997, David Gauthier, an analyst with the Case Management Branch of the Department of Citizenship and Immigration, provided the Minister with an eight-page memorandum, together with all of the appellant's submissions and other relevant documents. That memorandum offered a summary of the appellant's submissions and recommended that the Minister issue an opinion letter under paragraph 53(1)(*b*) of the *Immigration Act* declaring the appellant to be a danger to the security of Canada.

[161]In my opinion, Mr. Gauthier's memorandum clearly addresses the three issues that had to be ultimately addressed by the Minister: (1) whether the appellant's involvement with a terrorist organization warranted

classification as a danger to the security of Canada; (2) whether he would be exposed to a risk of torture if "refouled" to Sri Lanka; and (3) whether Canada's security interests outweighed the interests of the appellant. Equally significant is the fact that Mr. Gauthier was alive to the possibility of the appellant being "refouled" to a third country. The following passage from Mr. Gauthier's memorandum bears out these views (Appeal Book, at page 324):

A review of this case reveals that, on balance, there are insufficient humanitarian and compassionate considerations present to warrant extraordinary consideration. It is difficult, however, to assess the treatment reserved for Mr. Suresh upon his return to Sri Lanka. Given his high profile in the Canadian Tamil Community and international media, we feel that this will likely mitigate any harsh sanctions taken against him by Sri Lankan authorities. Furthermore, while we acknowledge that there is a risk to Mr. Suresh on his return to Sri Lanka, this is counterbalanced by the serious terrorist activities to which he is a party, committed while abusing Canada's protection and freedoms.

However, given the non-violent nature of his activities on Canadian territory, every effort will be undertaken to ensure that he is removed to a third country if possible. In the event that no other jurisdiction is willing to accommodate Mr. Suresh, CIC officials will undertake his removal to Sri Lanka.

[162]The appellant argues that Mr. Gauthier did not make an express finding with respect to the risk of torture but only with respect to the possibility of the appellant being imprisoned. With respect, this argument has no merit. It was the appellant who raised the risk of torture issue and submitted documentary evidence in support of the belief that the appellant would be exposed to the risk of torture if "refouled" to Sri Lanka. The above passage leads me to conclude that Mr. Gauthier appreciated fully the risk of the appellant being detained and subjected to torture because of his involvement with the LTTE, but that the likelihood of him being subjected to torture was reduced because of the "high profile" of this case both in Canada and Sri Lanka. In other words, Mr. Gauthier accepted that *refoulement* to Sri Lanka would give rise to a risk of torture but that the chances of that risk materializing were diminished having regard to the international publicity surrounding the appellant's case. (Recall that written assurances from the Sri Lankan government did not materialize until after the Minister had rendered her opinion under paragraph 53(1)(*b*) of the *Immigration Act*.) It is also evident that Mr. Gauthier went on to make an alternative and compatible finding. He states that even if the risk of torture is real the state's interest in returning the appellant to Sri Lanka outweighs his right to be secure against torture. In other words, it is apparent to me that Mr. Gauthier did not believe that the appellant would be exposed to a "serious" risk of torture if returned to Sri Lanka but that if he were Canada's security interests outweighed the risk of harm to him. The question which remains is whether there is any valid basis for interfering with the Minister's decision.

[163]Applying the administrative law standard of review, it is proper to ask whether the Minister (Mr. Gauthier) acted in bad faith, ignored a relevant factor, considered an irrelevant one or based her decision on a misapprehension of the facts. The memorandum submitted to the Minister by Mr. Gauthier is sufficiently detailed to allow a reader to conclude that there was no breach of any of the implied limitations governing the exercise of a discretionary decision-making power. For example, Mr. Gauthier was sensitive to the possibility that the appellant would need time to search for refuge in a third country. Nor was there any allegation that the Minister or Mr. Gauthier acted in bad faith. Finally, the appellant has not argued that there was a breach of natural justice or fairness in the decision-making process. (Before the Motions judge, the appellant argued unsuccessfully that information contained in the memorandum was not known to him at the time of his submissions. This issue was not pursued on appeal and in any event the argument is not borne out by the appellant's submissions to the Minister.) Hence, it remains to be decided whether there are any residual grounds on which the Minister's decision may be set aside.

[164]In oral argument, counsel for the appellant characterized Mr. Gauthier's assessment of risk as being "perverse" but failed to explain the factual underpinnings of the argument. In my view, none of the determinations leading up to the final decision to issue the opinion letter and declare the appellant a danger to the security of Canada warrants intervention by this Court. Even if I were to agree with the appellant that the proper standard of review is one of "correctness", in the sense that a court is empowered to engage in a *de novo* weighing of interests, I cannot say that I would have arrived at a decision contrary to the one rendered by the Minister. If the standard is one of "reasonableness", I cannot say that the Minister's decision to declare the appellant a danger to the security of Canada is "clearly wrong" or in the language of *Baker* , *supra*, that the Minister failed to give

sufficient weight to a relevant factor. It follows that the Minister cannot be said to have exercised her discretion in a "capricious" or "vexatious" manner.

[165]Turning now to the constitutional standard of review of the Minister's exercise of her discretion, the test articulated by the Supreme Court may be recast as follows: would the deportation of the appellant to Sri Lanka in the circumstances of this case violate the principles of fundamental justice such that it could be said that the proposed governmental action would shock the conscience of the Canadian people? If the standard of review were held to be correctness, then in my opinion it is of significance that Sri Lanka is still a member of the Commonwealth and a democratic state with an independent judiciary. The fact that the appellant's case has attracted national and international attention, as well as that of the Sri Lankan government, undermines the chances of torture being inflicted on the appellant if detained on his return to Sri Lanka. These factors, when balanced against the appellant's degree of involvement with a terrorist organization, lead one to conclude that the state interests outweigh those of the appellant in the sense that the Canadian conscience is not shocked by the Minister's decision. It is more likely that public confidence in the refugee system and support for the *Canadian Charter of Rights and Freedoms* would be seriously undermined if the appellant were entitled to remain in Canada. He is the one who must take responsibility for the fact that he gained admission to this country by deceit and freely performed an indispensable role in the fight for Tamil independence through terrorism. It was the appellant's choice to pursue that goal, not the Canadian people.

X. CONCLUSION

[166]I would dismiss the appeal with costs. Anticipating that the Court might reach this conclusion, counsel for the appellant asked that the Court delay entering formal judgment in order to give the appellant time in which to file a motion to stay the execution of the deportation order pending an application for leave to appeal to the Supreme Court.

[167]Counsel for the respondent, in a letter dated October 15, 1999, informed the Court that the Minister of Citizenship and Immigration would not agree to defer removal of the appellant, in the event the appeal is dismissed, so as to enable the appellant to file a leave application with the Supreme Court and a motion for a stay with this Court. Counsel also drew this Court's attention to the policy of the Minister of Citizenship and Immigration not to remove a person while a filed motion for a stay of removal is under consideration by a court.

[168]In my view, it would not be in the interests of justice to allow the Minister to deport the appellant to Sri Lanka without him having had the benefit of knowing whether the Supreme Court is prepared to grant leave. Accordingly, the appellant is at liberty to move for formal judgment pursuant to subsection 394(1) [of the *Federal Court Rules, 1998*, SOR/98-106] within seven days from the date of these reasons (see *Weatherall v. Canada (Attorney General)*, reflex, [1988] 1 F.C. 369 (T.D.), at page 417). This will give the appellant an opportunity to file in this Court, as allowed by section 65.1 [as enacted by S.C. 1990, c. 8, s. 40; 1994, c. 44, s. 101] of the *Supreme Court Act* [R.S.C., 1985, c. S-26] and pursuant to rules 369 and 398 of the *Federal Court Rules, 1998*, a motion, albeit technically premature, for a stay of proceedings, which motion would be disposed of by a judge of this Court as soon as the formal judgment is entered in the within appeal. Notwithstanding the foregoing, formal judgment will be entered by the Court, on motion or of its own initiative, at the latest, 20 days from the date of these reasons.

Décary J.A.: I agree.

Linden J.A.: I agree.