ABBY WARD

**EXCLUDING UNDESERVING CLAIMANTS: NEW
ZEALAND'S INTERPRETATION OF ART 1F(C)
REFUGEE CONVENTION**

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

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CONTENTS

I	INTRODUCTION.....	4
II	PRINCIPLES OF INTERPRETATION.....	5
A	Principles of Interpretation.....	5
B	Vienna Convention on the Law of Treaties.....	6
C	Object and Purposes.....	7
D	Subsequent practice.....	9
IV	ACTS “CONTRARY TO PURPOSES AND PRINCIPLES OF THE UNITED NATIONS”.....	13
A	Wide approach.....	14
	1 <i>Refugee Appeal 2338/94</i>	
	2 <i>Puspanathan v Canada</i> minority	
B	Narrow approach.....	19
	1 <i>Pushpanathan v Canada</i> majority	
C	UNHCR approach.....	22
	1 <i>Al Sirri v Secretary of State for the Home Department</i> and <i>DD v Secretary of State for the Home Department</i>	
V	CONCLUSION.....	31
VI	BIBLIOGRAPHY.....	33
VII	APPENDIX 1.....	38

ABSTRACT

This paper reviews New Zealand judicial interpretation of the “acts contrary to the purposes and principles of the United Nations” as stated in art 1F(c) Refugee Convention, in the light of subsequent foreign jurisprudence. Article 1F excludes claimants from gaining refugee status under the Convention if there are “serious reasons for considering” they have committed a proscribed act. The ambiguous ambit of art 1F(c) had attracted little jurisprudence before the New Zealand authority’s 1995 decision in *Refugee Appeal 2338/94*. However, art 1F(c) jurisprudence has significantly increased in the face of new global issues such as terrorism, and an expanding United Nations mandate. This paper aims to aid future New Zealand courts in art 1F(c) cases, by assessing *Refugee Appeal 2338/94* in light of the Canadian Supreme Court decision in *Pushpanathan v Canada* and the United Kingdom Supreme Court decision in *Al Sirri and DD v Secretary of State for the Home Department*.

Keywords: Refugee Convention, art 1F(c), exclusion, United Nations, UNHCR.

I Introduction

The circumstances in which a state can refuse to recognise a *bona fide* refugee claim under the Convention relating to the Status of Refugees 1951 (“the Convention”) has been the subject of contention since the Convention’s inception. Article 1F Refugee Convention obliges states to exclude otherwise eligible claimants from refugee status where there are “serious reasons for considering” that:¹

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

The provision seeks to safeguard the humanitarian integrity of the asylum system by limiting refugee status to “deserving” claimants and ensuring that the Convention is not employed to escape legitimate prosecution.² Moreover, the article is a pragmatic reflection of state parties’ unwillingness to adopt a convention without reserving rights to refuse undesirable asylum-seekers.³ The difficulty in defining the exact parameters of “undeserving” claimants has produced competing interpretations of art 1F.

This tension is particularly apparent in the context of art 1F(c). This provision justifies the exclusion of an individual where there are “serious reasons for considering” that the claimant is “guilty of acts contrary to the purposes and principles of the United Nations.” The article’s ambiguous phrasing renders the provision conducive to international debate, which has not yet produced an internationally accepted definition.⁴ While art 1F(c)

¹ Convention relating to the Status of Refugees 189 UNTS 150 (signed 28 July 1951, entered into force 22 April 1954), art 1F.

² United Nations High Commissioner for Refugees, Guidelines on International Protection: *Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* HCR/GIP/03/05 (4 September 2003) at [2].

³ James Hathaway *The Law of Refugee Status* (Butterworths Canada Ltd, 1991) at 214.

⁴ Geoff Gilbert “Current issues in the application of the exclusion clauses” (paper presented for the 50th Anniversary of the 1951 Convention Relating to the Status of Refugees, January 2002).

jurisprudence was sparse immediately following the adoption of the Refugee Convention, the article's ambit has been increasingly tested in the face of contemporary global issues such as terrorism.⁵ Nevertheless, New Zealand art 1F(c) jurisprudence is confined to a single case, namely *Refugee Appeal 2338/94*.⁶

This paper aims to inform future decision-making by New Zealand courts in art 1F(c) cases by reviewing the approach adopted in *Refugee Appeal 2338/94*. The first section examines methods of interpreting the Convention. The second part reviews New Zealand's interpretation of art 1F(c) "acts contrary to the purposes and principles of the United Nations" in light of subsequent jurisprudence in the Canadian Supreme Court case of *Pushpanathan v Canada* and the United Kingdom Supreme Court case of *Al Sirri and DD v Secretary of State for the Home Department*.⁷ Finally, the paper considers which approach should be adopted by the New Zealand courts in future cases. Additional issues exist in the context of art 1F(c), but are beyond the scope of this paper.⁸

II Interpreting the Refugee Convention

A Principles of Interpretation

While domestic statutes are generally governed by the Interpretation Act 1999, legislation incorporating the Convention into New Zealand law must be interpreted in accordance with international legal principles. Section 129(1) of the Immigration Act ("the Act") states that a claimant is entitled to refugee status "if he or she is a refugee within the meaning of the Refugee Convention."⁹ Section 127(2)(b) of the Act requires decision-makers to act in accordance with New Zealand's international obligations under the

⁵ Satvinder Singh Juss "Terrorism and the Exclusion of Refugee Status in the UK" (2012) 17 J Conflict & Sec L 465 at 465; James C Hathaway and Colin J Harvey "Framing Refugee Protection in the New World Disorder" (2001) 34 Corn ILJ 257 at 258-260.

⁶ *Refugee Appeal 2338/94* RSAA Auckland, 30 November 1995, BO Nicholson and V Shaw.

⁷ *Refugee Appeal 2338/94*, above n 6; *Pushpanathan v Canada* [1998] SCR 982 (SCC); *Al Sirri v Secretary of State for the Home Department and DD v Secretary of State for the Home Department* [2012] UKSC 54.

⁸ For example, whether art 1F(c) should be confined to non-state actors or the level of individual culpability required to fall within (c). For a comprehensive overview. For further reading, see Michael Kingsley Nyinah "Exclusion under article 1F: some reflections on Context, Principles and Practice" (2000) 12 IJRL 295.

⁹ Immigration Act 2009, s 129(1).

Refugee Convention when exercising powers under the Act.¹⁰ Moreover, the Convention is reproduced in sch 1 of the Act. These provisions signal that the Convention is directly incorporated into New Zealand law, unqualified by domestic statute. On the contrary, some Refugee Convention signatories have qualified Convention wording with domestic statutory provisions, a point which will be discussed later.

The requirement to invoke international legal principles when interpreting domestic provisions which implement international conventions is affirmed by the Court of Appeal in *Tamil X v Refugee Status Appeals Authority*, citing Lord Steyn in *R v Secretary of State ex parte Adan*.¹¹ Lord Steyn held that only one “true” interpretation of an international treaty exists, namely an autonomous international interpretation “untrammelled by notions of... national legal culture”.¹²

As the New Zealand Immigration Act defers interpretation to the international sphere, New Zealand courts are free to search for a “true autonomous and international meaning”¹³ of the Refugee Convention, unrestricted by domestic legislative qualifications. However, the legitimate authority from which to obtain such a meaning remains the subject of debate, as there is no universally endorsed specialist international body charged with providing interpretative guidance for the Refugee Convention.¹⁴

B Vienna Convention on the Law of Treaties 1969

The scope of legitimate authority for interpreting international instruments is outlined in the Vienna Convention of the Law of Treaties 1969 (“VCLT”). As subsequent international instruments are generally enacted subject to pre-existing international law, the VCLT would normally be inapplicable to the earlier-created Refugee Convention.¹⁵ However, the VCLT is regarded as an authoritative statement of pre-existing customary

¹⁰ Immigration Act 2009, s 127(2)(b), Rodger Haines QC “The domestic application of international human rights standards in New Zealand” (Spring Seminar Series, University of Auckland, 2004).

¹¹ *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73.
at [74]-[75].

¹² *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477 (HL) at 605.

¹³ At 605.

¹⁴ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [56].

¹⁵ Rodger Haines QC, above n 10.

law, and has been recognised by New Zealand courts as applying to the Refugee Convention.¹⁶

Article 31(1) VCLT requires that international instruments be interpreted “in good faith” adopting the ordinary meaning of provisions within their context, and in light of their object and purpose.¹⁷ The “purpose” of a provision can be ascertained from its preamble, annexes, and related instruments in connection with the conclusion of the treaty which has been accepted by all signatories.¹⁸ According to art 31(3), other relevant materials for interpretation include subsequent agreements or practice relating to interpretation which has been endorsed by the parties, and other applicable rules of international law.¹⁹ Where ambiguity persists after an art 31 exercise, the interpreter may examine the *travaux préparatoires* and the circumstances of the treaty’s conclusion.²⁰

1 Article 31(1) VCLT and the Refugee Convention

(a) Object and purpose of the Refugee Convention

The Refugee Convention evolved in response to the limited capacity of United Nations (“UN”) agencies to cope with the proliferation of refugees proceeding World War II.²¹ Between July 1947 and December 1950, the UN-mandated International Refugee Office was charged with assisting over 1.5 million asylum seekers.²² The preamble of the Convention establishes its human rights character, affirming state parties’ commitment to the provision of fundamental human rights without discrimination.²³ New Zealand courts have approved commentator James Hathaway’s formulation of the Convention object,

¹⁶ Rodger Haines QC, above n 10.

¹⁷ Vienna Convention on the Law of Treaties 1155 UNTS 331 (signed 23 May 1969, entered into force 27 January 1980), art 31(1).

¹⁸ Article 31(2).

¹⁹ Article 31(3).

²⁰ Article 32.

²¹ Guy Goodwin Gill “Convention Relating to the Status of Refugees” (2008) Audiovisual Library of International Law <<http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>>.

²² United Nations “United Nations Yearbook 1951” (2013) UNHCR <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4e1ee76b0&query=+drafting%20+notes>>.

²³ Convention relating to the Status of Refugees, preamble.

stating that the treaty is concerned with activities which “deny human dignity in any key way”.²⁴

(b) Object and purpose of art 1F Refugee Convention

Article 1F seeks to safeguard the humanitarian integrity of the Convention, by denying refugee status to those who have flouted international humanitarian law within their home territories.²⁵ The article also preserves the integrity of the asylum system by ensuring that it is not used as a shield for fugitives seeking to avoid legitimate prosecution.²⁶ Finally, the provision gives states discretion to refuse “undesirable” refugees, reflecting a pragmatic political admission without which states would have unlikely acceded to the Convention.²⁷

(c) Implications for the interpretation of art 1F(c)

As indicated above, art 1F is integral in safeguarding the integrity of the asylum system and its underlying humanitarian principles. It ensures that the system is not invoked in a counterproductive manner by sheltering those who have undermined such principles within their home states. According to the United Nations High Commissioner for Refugees (“UNHCR”), art 1F(c) is specifically designed to give effect to these aims by ensuring that the “persecutors” from which claimants seek protection are not granted asylum under the Convention.²⁸ Given the centrality of art 1F’s utility to the overall humanitarian objective of the Convention, the UNHCR encourages states to apply the article “scrupulously”.²⁹ Nevertheless, the UNHCR argues that the provision’s general wording and the serious consequences facing an individual refused refugee protection require that decision-makers apply art 1F with caution.³⁰

²⁴ *Refugee Appeal 71427/99* RSAA Auckland, 16 August 2000, RPG Haines and L Tremewan at [50].

²⁵ United Nations High Commissioner for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* HCR/GIP/03/05 (4 September 2003) at [3].

²⁶ At [3].

²⁷ James C Hathaway *Reconceiving International Refugee Law* (Martinus Nijhoff Publishers, Netherlands, 1997) at 214.

²⁸ United Nations High Commissioner for Refugees “Note on the Exclusion Clauses”(30 May 1997) UNHCR <<http://www.unhcr.org/3ae68cf68.html>> at [3].

²⁹ United Nations High Commissioner for Refugees “Statement on Article 1F Refugee Convention” (July 2009) Refworld <<http://www.refworld.org/docid/4a5de2992.html>> at 6.

³⁰ At 6.

However, the extent to which “serious consequences” arise from exclusion under art 1F varies according to an individual’s circumstances. While a state is precluded from granting refugee status to a claimant who fulfills art 1F criteria, this does not automatically trigger an individual’s refoulement, and the state is not prevented from granting other forms of protection.³¹ A claimant can invoke alternative international legal protection, such as the absolute prohibition on refoulement under art 3 of the Convention Against Torture (“CAT”).³² Moreover, *Al Sirri and DD* concern claimants who have been granted a right to remain in the host country, and who are merely litigating their right to the additional benefits conferred under the Refugee Convention.³³ Such benefits include a right to “public relief and assistance” and “elementary education” equivalent to that of a national.³⁴

The extent to which the level of adverse consequences facing an unsuccessful claimant has been material to the courts’ decisions in *Al Sirri and DD* is unclear. Nevertheless, one must read these cases in light of the individual circumstances of the claimant. Moreover, the UNHCR’s claim that “serious consequences” necessitates a restrictive approach to art 1F(c) can be contested. Nevertheless, due to the potential for serious consequences of exclusion in some circumstances, the bulk of international jurisprudence has accepted the necessity for restrictive construction of the art 1F subclauses.³⁵

2 Article 31(3)(b) VCLT and the Refugee Convention

Article 31(3)(b) provides opportunity for treaty interpretation to evolve with the changing global context by allowing states to take into account “subsequent practice in the application of the treaty which establishes agreement of the parties.”³⁶ The exact parameters of this phrase remain unclear.³⁷ Traditional interpretations of art 31(3)(b) have confined its scope to “concordant, common and consistent” series of acts

³¹ United Nations High Commissioner for Refugees, above n 25, at [5].

³² Convention Against Torture and Other Cruel Inhuman or Degrading Treatment 1465 UNTS 85 (signed 10 December 1983, entered into force 26 June 1987), art 3.

³³ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [1].

³⁴ Convention relating to the Status of Refugees, arts 22, 23.

³⁵ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [16].

³⁶ Campbell McLachlan “The Evolution of Treaty Obligations in International Law” in Georg Nolte (ed) *Treaties and Subsequent Practice* (Oxford University Press, United Kingdom, 2013) at 69.

³⁷ Campbell McLachlan, above n 36, at 69.

establishing a pattern of interpretation among the parties.³⁸ However, in the context of large multilateral agreements such as the Refugee Convention, to which 146 states are party, such a consensus is difficult to obtain.³⁹ Moreover, the body of practice generated by contemporary treaties has expanded beyond state parties to external bodies, such as non-governmental organisations and technical treaty bodies.⁴⁰

The House of Lords in *A v Home Secretary* utilised such extrinsic materials in determining the scope of art 15 of the Convention Against Torture.⁴¹ In defining art 15, the court cited bodies external to the Convention parties, such as specialist committees established under the CAT and the International Covenant on Civil and Political Rights (“ICCPR”).⁴² While Bingham LJ noted that such sources were non-binding on UK courts, the court adopted its views in the absence of contrary binding authority.⁴³ Reference to these materials reversed the Court of Appeal’s decision based on older international law.⁴⁴ According to commentator Campbell McLachlan, specialist treaty bodies’ opinions would not normally be regarded as representing “agreement of the parties” under art 31(3)(b).⁴⁵ However, the provision of interpretative guidance is mandated to the organisation through the treaty provisions establishing these bodies, that are central to their existence.⁴⁶ Therefore, McLachlan argues that *A v Home Security* suggests that art 31(3)(b) should be liberally construed to include external sources.⁴⁷

(a) UNHCR guidelines

The contested legal status of the UNHCR guidelines can be considered in light of *A v Home Secretary*. Under art 35 of the Refugee Convention, contracting states undertook to “facilitate” the UNHCR’s duty of “supervising the application of provisions of this

³⁸ At 76.

³⁹ 146 states have signed the 1967 Protocol to the 1951 Convention. United Nations Treaty Collection “Protocol relating to the Status of Refugees” 2013 United Nations <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtidsg_no=V-5&chapter=5&lang=en#Participants>; Campbell McLachlan, above n 36, at 71.

⁴⁰ Campbell McLachlan, above n 36, at 76.

⁴¹ *A v Home Security* [2004] UKHL 56, [2005] 2 AC 68.

⁴² At [35], [43]-[44].

⁴³ At [45].

⁴⁴ Campbell McLachlan, above n 36, at 76.

⁴⁵ At 76.

⁴⁶ At 76.

⁴⁷ At 76.

Convention.”⁴⁸ The UK Supreme Court stated that the UNHCR’s opinion should be afforded “considerable weight” given this obligation, while accepting that they do not bind signatories.⁴⁹ Moreover, commentator Satvinder Singh Juss argues that the UNHCR is a “well-qualified” organisation whose opinions should be given significant consideration in the absence of an international judicial body charged with interpretation.⁵⁰ The New Zealand Court of Appeal in *Attorney General v E* held that the UNHCR guidelines could be employed as extrinsic interpretative aids in ascertaining the meaning of the purpose of the Convention under art 31 of the VCLT, but went on to consider that such aids did not constitute binding authority.⁵¹

However, the New Zealand High Court in *X & Y v Refugee Status Appeals Authority* declined to follow UNHCR guidelines which ran contrary to the Convention purpose and House of Lords authority.⁵² Moreover, the Refugee Status Appeals Authority departed from UNHCR guidelines on proportionality in *Refugee Appeal 75692*, deeming them “unpersuasive” in light of academic criticism.⁵³ The Authority held that although the UNHCR guidelines may be of assistance “on occasion” their origin is “problematical” and their content often contested.⁵⁴ The Authority preferred to obtain the Convention’s meaning from art 31 VCLT.⁵⁵

In addition, some commentators are skeptical of the UNHCR guidelines. Hathaway and Harvey highlight the inconsistent reasoning employed by the organisation in promoting considerations of security under art 1F, a position subsequently challenged by courts.⁵⁶ Hathaway argues that the UNHCR’s increasing involvement in the provision of refugee services renders it unable to independently supervise the global scheme, as it is no longer at “arms-length” from the Convention.⁵⁷ Moreover, the UNHCR’s reliance on individual state funding undermines the organisation’s political autonomy, despite its statutory

⁴⁸ Convention relating to the Status of Refugees, art 35. Also stated in the preamble to the Convention.

⁴⁹ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [36]; citing *R v Asfaw* [2008] UKHL 31 at [13].

⁵⁰ James C Hathaway “Who Should Watch over Refugee Law?” (2002) 14 *Forced Migration Review* 23 at 25.

⁵¹ *Attorney General v E* [2000] 3 NZLR 257 (CA) at [90]-[92].

⁵² *X & Y v Refugee Status Appeals Authority* HC Auckland CIV-2006-404-4213, 17 December 2007 at [16].

⁵³ *Refugee Appeal 75692* RSAA Auckland, 3 March 2006, RPG Haines QC and PJ Andrews at [70].

⁵⁴ At [71].

⁵⁵ At [72].

⁵⁶ James C Hathaway and Colin J Harvey, above n 5, at 259.

⁵⁷ James C Hathaway “Who Should Watch over Refugee Law?,” above n 50, at 25.

imperative of political neutrality.⁵⁸ Hathaway also challenges the UK court's assumption that art 35 imports an obligation on states to afford "considerable weight" to UNHCR publications, arguing that states are the ultimate Convention arbiters and are not precluded by art 35 from establishing an alternative international body charged with interpretation duties.⁵⁹

Nevertheless, following *A v Home Secretary*, UNHCR guidelines can arguably be invoked under art 31(3)(b). The UNHCR could be viewed as analogous to the external bodies cited in *A v Home Secretary*, such as the Committee Against Torture and the Human Rights Committee (which operate under the CAT and ICCPR respectively). As under art 35 Refugee Convention, these bodies' parent conventions confer supervision duties which the signatories have agreed to respect.⁶⁰ However, the UNHCR has significantly less supervisory powers than its ICCPR and CAT counterparts. State parties to the ICCPR and CAT are bound to submit periodic reports to the committees, unlike the UNHCR. The committees also have the power to issue adjudication on states' compliance.⁶¹ Moreover, the Human Rights Committee and the Committee Against Torture have a more limited mandate than the UNHCR, confined to monitoring states' implementation.⁶² This ensures that the bodies can effectively supervise the treaty implementation at "arms-length".

Therefore, as Hathaway contends, the UNHCR is significantly less authoritative than its ICCPR and CAT counterparts.⁶³ As a result, it is unlikely that the UNHCR would be afforded equivalent weight under art 32(2)(b) to the bodies referenced in *A v Home Secretary*. Nonetheless, if *A v Home Secretary* is construed as standing for the proposition that a variety of extrinsic materials may be permissible under art 31(2)(b), it is arguable that the UNHCR materials can be legitimately employed. Alternatively, the

⁵⁸ At 26; United Nations High Commissioner for Refugees "Statute of the Office of the United Nations High Commissioner for Refugees" (2013) Refworld < <http://www.unhcr.org/3b66c39e1.html> > at 6.

⁵⁹ James C Hathaway, above n 50, at 24.

⁶⁰ International Covenant on Civil and Political Rights 999 UNTS 179 (signed 16 December 1966, entered into force 20 March 1976), art 40(4); Convention Against Torture, arts 21, 22.

⁶¹ International Covenant on Civil and Political Rights, art 40(4); Convention Against Torture, arts 21, 22.

⁶² Officer for the High Commissioner for Human Rights "Convention Against Torture" (2013) United Nations Human Rights < <http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx> >; Officer for the High Commissioner for Human Rights "Human Rights Committee" (2013) United Nations Human Rights < <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> >; United Nations High Commissioner for Refugees, above n 58.

⁶³ James C Hathaway, above n 50, at 24.

New Zealand Court of Appeal has endorsed their citation in determining the object and purpose of the Convention under art 31(1).⁶⁴ Nevertheless, the issues of reliability and political independence cited by Hathaway remain.

(b) Overseas Case Law

In addition to the relevant material listed in the VCLT, the Court of Appeal in *Tamil X* held that foreign case law is relevant to the interpretation of the Refugee Convention insofar as it reflects the “true, autonomous and international meaning” of the Convention.⁶⁵ Thus, failure of foreign courts to adhere to international principles of interpretation outlined in the VCLT may limit the case’s authority. Similarly, domestic qualifications on the incorporation of the Refugee Convention may prevent a court from arriving at an “international” meaning.

As Canadian legislation directly incorporates art 1F(c) into the Immigration Act 1985 in a similar manner to New Zealand, Canadian courts are able to adopt an “international” definition for Convention provisions without domestic limitations.⁶⁶ In contrast, several domestic and European legislative provisions restrict the ability of UK courts to apply a “true, autonomous and international” meaning to the Refugee Convention. Therefore, UK case law must be viewed in light of its legislative context. This is further discussed below in the analysis of *Al Sirri and DD*.

III Meaning of “acts contrary to the purposes and principles of the United Nations”

A Introduction

This section will evaluate competing judicial interpretations of “acts contrary to the purposes and principles of the United Nations” with reference to the principles of interpretation discussed above. As the paper aims to inform decision-making in the New

⁶⁴ *Attorney General v E* [2000] 3 NZLR 257 (CA) at [90]-[92].

⁶⁵ *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73 at [74]-[75].

⁶⁶ *Pushpanathan v Canada*, above n 7, at [95].

Zealand context, the section will first examine the existing New Zealand authority, and compare this approach to successive decisions from Canada and the United Kingdom.

B Wide approach

1 New Zealand: Refugee Appeal 2338/94

(a) Facts

The Refugee Status Appeals Authority considers the scope of “acts contrary to the principles and purposes of the United Nations” in *Refugee Appeal 2338/94*. This case concerns an Indian national who applied for refugee status after serving a ten year prison sentence for serious drug trafficking in New Zealand.

(b) Decision

The Authority considers the UNHCR and academics’ recommendations that the general and ambiguous language of art 1F(c) requires courts to adopt a restrictive interpretation to avoid interpretative abuse.⁶⁷ Such a restrictive interpretation would confine art 1F(c) to the purposes and principles outlined in the preamble, and arts 1 and 2 of the UN Charter.⁶⁸

The preamble to the Charter states that the UN seeks to affirm commitment to various principles, such as fundamental human rights and equal rights of women and men. The “purposes” listed in art 1 consist of maintaining international security, developing friendly international relations, co-operating to solve international problems and promoting respect for human rights and fundamental freedoms. In addition, the “principles” covered in art 2 include sovereign equality of nations and the peaceful settlement of disputes.⁶⁹

However, the Authority rejects the confinement of art 1F(c) to the UN Charter, instead adopting the wide “contemporary” definition formulated in the Canadian case of

⁶⁷ *Refugee Appeal 2338/94*, above n 6.

⁶⁸ *Refugee Appeal 2338/94*, above n 6.

⁶⁹ Charter of the United Nations 1 UNTS XVI (signed 24 October 1945, entered into force 24 October 1945). See appendix 1 for a full list.

Thamothatampillai v the Minister of Employment and Immigration.⁷⁰ The Authority holds that an ordinary reading of art 1F(c) does not support a restrictive interpretation, as art 1F(c) contains no express qualifications on the scope of its application unlike its 1F counterparts.⁷¹ Acts listed under art 1F(a) are limited to those found in “international instruments drawn up to make provision for such crimes”, and art 1F(b) is confined to crimes committed “outside the country of refuge prior to [the claimant’s] admission to that country as a refugee”.⁷² Moreover, the Authority cites an academic’s claim that the *travaux preparatoires* do not reveal intentions for art 1F(c) to be interpreted narrowly.⁷³

Therefore, the Authority holds that an ordinary reading of art 1F(c) would extend beyond the UN Charter to cover “contemporary” UN concerns.⁷⁴ Such contemporary concerns include the fight against narcotics, in which 19 UN organisations have been engaged.⁷⁵

However, the Authority argues that the appellant’s claim would also fail if art 1F(c) acts were confined to the UN Charter, as the fight against narcotics also falls within the Charter’s sphere.⁷⁶

2 Canada: *Pushpanathan v Canada* minority

The Canadian Supreme Court case of *Pushpanathan* was decided under analogous facts and domestic statutory context to *Refugee Appeal 2338/94*, and is therefore highly applicable in evaluating New Zealand’s interpretation of art 1F(c).⁷⁷ The appellant applied for refugee status to avoid deportation from Canada after being convicted for trafficking heroin and serving a ten year prison sentence in Canada.⁷⁸

The dissenting judgment in *Pushpanathan* adopts a wide approach to art 1F(c) similar to the approach in *Refugee Appeal 2338/94*. In line with the New Zealand Authority’s approach, Cory J argues that the provision should be construed in the light of expanding

⁷⁰ *Refugee Appeal 2338/94*, above n 6.

⁷¹ *Refugee Appeal 2338/94*, above n 6.

⁷² *Refugee Appeal 2338/94*, above n 6.

⁷³ *Refugee Appeal 2338/94*, above n 6.

⁷⁴ *Refugee Appeal 2338/94*, above n 6.

⁷⁵ *Refugee Appeal 2338/94*, above n 6.

⁷⁶ *Refugee Appeal 2338/94*, above n 6.

⁷⁷ *Pushpanathan v Canada*, above n 7, at [1]; Immigration Act RSC 1985 c 1-2, s 2(1).

⁷⁸ *Pushpanathan v Canada*, above n 7, at [2]-[4].

UN activities, and therefore will not necessarily be restricted to the purposes and principles contained within the UN Charter.⁷⁹ While not every UN initiative will justify exclusion, activities which have attracted intense and continuing UN activity should be included under art 1F(c), as this renders them sufficiently connected to the fundamental goals of the UN.⁸⁰

According to Cory J, narcotics trafficking has been the subject of sufficient UN efforts to fall within art 1F(c). UN anti-narcotic pursuits have included over a dozen multilateral instruments, three UN bodies, and United Nations General Assembly (“UNGA”) resolutions declaring drug trafficking to be a threat to “the health and wellbeing of mankind” and “the stability of nations.”⁸¹ Therefore, in accordance with *Refugee Appeal 2338/94*, the minority contends that the claimant’s extensive involvement in drug trafficking brings him within art 1F(c).

3 Critique of wide approach in 2338/94 and Pushpanathan

(a) Distinction between arts 1F and 33(2)

As the claimants in both cases could fall within art 33(2), the courts arguably expand art 1F(c) beyond its intended scope. Article 33(2) permits states to deport a refugee where there are “reasonable grounds” for believing the person is a “danger to the security” of the host country or “having been convicted of a particularly serious crime, constitutes a danger to the community of that country.”⁸²

There are several notable differences between art 33(2) and the art 1F clauses. First, the provisions serve distinct purposes, obliging decision-makers to consider different factors in assessing whether it applies to an individual. Article 1F seeks to protect the humanitarian integrity of the refugee regime by ascribing refugee status based on whether a claimant’s past actions merit his or her protection. Therefore, considerations of the effect of a claimant’s presence on the host state in the future are irrelevant.⁸³ In contrast,

⁷⁹ At [128].

⁸⁰ At [125].

⁸¹ At [107]-[120].

⁸² Convention relating to the Status of Refugees, art 33(2).

⁸³ United Nations High Commissioner for Refugees, above n 29, at 8.

art 33(2) seeks to safeguard the security of the host country, and therefore assesses the individual's potential danger to the host state.⁸⁴

Second, art 1F and art 33(2) cause different legal consequences for an individual. Article 1F forms part of the definition of a "refugee" within the Convention, and therefore renders an individual unable to qualify as a "refugee" under the Convention if the clause is invoked.⁸⁵ While the decision-maker is precluded from granting refugee benefits, an individual is not necessarily to be deported, and the state may provide alternative protection for the claimant.⁸⁶ In contrast, art 33(2) triggers the individual's automatic deportation from the country of refuge, although they remain a "refugee" within the Convention.⁸⁷ However, the New Zealand courts held in *Zaoui v Attorney-General* that art 33(2) must be exercised in accordance with New Zealand's obligations under the CAT and the ICCPR. A decision-maker is therefore precluded from invoking art 33(2) where the individual is at risk of suffering torture or arbitrary deprivation of life.⁸⁸ Therefore, the practical impacts of these distinct legal implications are not often evident, especially in the light of the Supreme Court's decision in *Zaoui*. Under both articles, it is likely that the state will attempt to return the individual to their home country, unless prevented by international obligations under alternative instruments.

A third differentiating factor is the threshold of proof required for each provision to be satisfied. Under art 1F, the decision maker must find "serious reasons for considering" that a claimant has committed a proscribed act. On the other hand, art 33(2) requires that the individual has been convicted by the "final judgment" of a court. This suggests that art 33(2) has a higher threshold of proof. While New Zealand courts have attempted to avoid comparing "serious reasons" to domestic standards of proof, the courts have accepted that the threshold is lower than the criminal standard of "beyond reasonable doubt".⁸⁹ On the contrary, a "final judgment" as required under art 33(2) obligates the Crown to have proved "beyond reasonable doubt" that a claimant carried out the alleged act.⁹⁰

⁸⁴ At 8.

⁸⁵ At 8.

⁸⁶ At 8.

⁸⁷ At 8.

⁸⁸ *Attorney v Zaoui* [2005] NZSC 38, [2006] 1 NZLR 289.

⁸⁹ *Attorney General v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 at [39].

⁹⁰ Geoff Gilbert, above n 4.

In the light of the above arguments, the majority in *Pushpanathan* considers that the facts of the case are designed to fall under art 33(2), and therefore should not also be covered by art 1F.⁹¹ Accommodating art 33(2) “particularly serious” crimes within art 1F(c) would undermine art 1F(b)’s restriction for analogous acts, which limits them to outside the country of refuge and prior to admission as a refugee. Commentator Michael Kingsley Nyinah agrees that art 1F(c) should not be invoked where a more specific provision such as art 33(2) would suffice, as this avoids attributing overly expansive meaning to art 1F(c), and which could lead to over-zealous exclusions of claimants.⁹² Therefore, the fact situations of *Refugee Appeal 2338/94* and *Pushpanathan* are more appropriately covered by art 33(2).

(b) Consideration of claimant’s danger to host state

In addition, the *Pushpanathan* minority’s argument can be criticised for misconstruing the purpose of art 1F(c). Cory J’s analysis dedicates much discussion to the detrimental effects of the narcotics industry on Canadian society, concluding that Canada should not be “burdened” with a refugee who “has demonstrated his danger to Canadian society”.⁹³ As discussed above, such considerations suggest that minority has incorrectly characterised the purpose of art 1F(c), under which an individual’s potential risk to host country security is irrelevant.⁹⁴ Despite acknowledging that consideration of an individual’s danger to a host state falls exclusively within the ambit of art 33(2),⁹⁵ the minority appears to invoke these considerations in justifying the place of narcotics trafficking within art 1F(c). However, the Canadian impacts of drug trafficking merely support Cory J’s discussion of the UN initiatives, and are not central to the rationale justifying their inclusion within art 1F(c). Nevertheless, their discussion gives reason to doubt the extent of the dissenting judges’ understanding of the provision.

(c) *Travaux préparatoires*

Refugee Appeal 2338/94 arguably mischaracterises the *travaux préparatoires*. The Authority justifies a wide formulation of art 1F(c) partly due to the absence of contrary

⁹¹ *Pushpanathan v Canada*, above n 7, at [75].

⁹² Michael Kingsley Nyinah above n 5, at 309.

⁹³ *Pushpanathan v Canada*, above n 7, at [154].

⁹⁴ *Pushpanathan v Canada*, above n 7, at [58]; James C Hathaway and Colin J Harvey, above n 5, at 257.

⁹⁵ At [75].

evidence in the *travaux préparatoires*.⁹⁶ However, commentators have highlighted several drafters' concerns that the general phrasing of the provision would be abused by states.⁹⁷

C Narrow approach

1 Pushpanathan majority

In contrast, the majority in *Pushpanathan* applies a restrictive interpretation of “acts contrary to the purposes and principles of the UN” in accordance with the bulk of international commentary.⁹⁸ The court examines the drafters' intentions in the *travaux préparatoires*, concluding that the delegates intended to ascribe art 1F(c) with a narrower meaning than the purposes and principles articulated in the UN Charter.⁹⁹ According to the court, the drafters intended art 1F(c) to cover crimes against humanity in a non-war context, as they were concerned that such crimes would not fall under art 1F(a).¹⁰⁰ During the drafting debate, the French delegation argued that the relevant international instrument for interpreting art 1F(a), the London Charter of the International Military Tribunal, applied only to crimes against humanity in wartime.¹⁰¹ Thus, several delegates originally concerned with the general phrasing of art 1F(c) were convinced that its wording would be narrowly interpreted as confined to such acts.¹⁰²

The majority cites Hathaway in defining the overarching purpose of the Convention, holding that it is concerned with activities which “deny human dignity in any key way,” namely sustained and systemic violations of human rights.¹⁰³ The human rights character of the Convention is affirmed in the Canadian Immigration Act, which refers to the “humanitarian tradition” of the refugee scheme.¹⁰⁴

⁹⁶ *Refugee Appeal 2338/94*, above n 6.

⁹⁷ *Pushpanathan v Canada*, above n 7, at [62]; United Nations High Commissioner for Refugees, above n 29, at 13.

⁹⁸ For example: Michael Kingsley Nyinah, above n 5, at 297; Edward Kwakwa “Article 1F(c): Acts contrary to the purposes and principles of the United Nations” 12 *IJRL* 79 at 82.

⁹⁹ *Pushpanathan v Canada*, above n 7, at [62].

¹⁰⁰ At [59]-[60].

¹⁰¹ At [59].

¹⁰² At [60].

¹⁰³ At [63].

¹⁰⁴ *Pushpanathan v Canada*, above n 7, at [57].

In the light of *travaux préparatoires* and the purpose of the Convention, the majority claim that “purposes and principles” in art 1F(c) should be given a narrower meaning than one which would be inferred from the UN Charter.¹⁰⁵ Article 1F(c) was designed to exclude individuals only where they are responsible for serious, sustained or systemic violations of fundamental human rights in a non-war setting.¹⁰⁶ Acts falling under art 1F(c) must be acknowledged by widely accepted international agreement or explicit UN declarations reflecting a reasonable consensus of the international community as contrary to UN purposes and principles. Alternatively, courts may identify art 1F(c) acts where they constitute a sufficiently serious and sustained violations of fundamental human rights as to amount to persecution.¹⁰⁷

The court holds that drug trafficking has not attracted an explicit UN statement, nor widely accepted international agreement that it is contrary to UN purposes and principles.¹⁰⁸ Drug trafficking does not violate any core human right or form “part of the corpus of fundamental human rights”, and therefore cannot be viewed as a serious, sustained or systematic violation of human rights.¹⁰⁹ Therefore, the majority declines to exclude the claimant under art 1F(c), and instead insists that the Minister may still invoke art 33(2) in order to deport the individual.¹¹⁰

2 Critique of narrow approach in *Pushpanathan*

(a) Overly narrow construction of art 1F(c)

It is arguable that the majority’s formulation of art 1F(c) excludes acts which would fall under art 1F(c) in a “common sense” interpretation. The court in *Al Sirri and DD* criticises the *Pushpanathan* majority’s approach to interpretation of art 1F(c) as overly restrictive.¹¹¹ The facts of DD, where the claimant was involved in armed combat against the UN-mandated International Security Assistance Force (“ISAF”), would not fall within the scope of the Canadian Supreme Court’s definition of art 1F(c), as it has not been

¹⁰⁵ At [62].

¹⁰⁶ At [64].

¹⁰⁷ At [65].

¹⁰⁸ At [69].

¹⁰⁹ At [72].

¹¹⁰ At [75].

¹¹¹ At [67].

explicitly identified as contrary to the purposes and principles of the UN, nor does it constitute a serious, sustained or systemic violation of fundamental human rights.¹¹² Nevertheless, both parties in *DD* accepted that a “common sense” interpretation of art 1F(c) would include attacks against UN-mandated forces.¹¹³

Similarly, the minority in *Pushpanathan* claim that the majority’s requirement for a “serious and sustained violation of human rights” is an unnecessary and arbitrary limitation on art 1F(c). The minority highlights that the preservation of human rights is merely one of the purposes and principles articulated in the UN Charter, and the majority’s formulation precludes consideration of the other principles.¹¹⁴

This suggests that the Canadian attempt to give effect to the original drafters’ intentions by narrowing the scope of art 1F(c) beyond the purposes and principles of the UN Charter is overly narrow, and runs counter to a “common sense” interpretation of the clause.

(b) Use of UN declarations in defining art 1F(c) acts

Second, Hathaway and Harvey challenge the majority’s claim that a UN declaration representing a reasonable consensus of the international community can be “considered determinative” of an art 1F(c) act. The majority uses several UNGA Resolutions as examples of such declarations.¹¹⁵ Hathaway and Harvey argue that non-binding resolutions should not be able to “determinatively” alter the content of art 1F(c) Refugee Convention.¹¹⁶ The court cites UNGA Resolution 51/210, which designates terrorism as contrary to UN purposes and principles.¹¹⁷ Hathaway and Harvey argue that this declaration is overly broad, and leaves art 1F(c) open to abuse by state parties in the absence of an internationally-accepted definition of the concept.¹¹⁸

¹¹² *Pushpanathan v Canada*, above n 7, at [67].

¹¹³ At [67].

¹¹⁴ At [127].

¹¹⁵ At [66].

¹¹⁶ James C Hathaway and Colin J Harvey, above n 5, at 271-272.

¹¹⁷ *Pushpanathan v Canada*, above n 7, at [66].

¹¹⁸ James C Hathaway and Colin J Harvey, above n 5, at 271-272.

D UNHCR approach

1 UK: *Al Sirri and DD v Secretary of State for the Home Department*

The UK Supreme Court case of *Al Sirri and DD* concerns two separate asylum claims under art 1F(c). In *Al Sirri*, the court examined the extent to which terrorist activities can be considered contrary to the purposes and principles of the UN, in the light of the claimant's alleged involvement in terrorist organisations.¹¹⁹ *DD* considered whether participating in armed combat against a UN-mandated force was sufficient to warrant exclusion under art 1F(c), as the appellant had fought against the ISAF in Afghanistan.¹²⁰

(a) Factual analogies with *Pushpanathan* and *Refugee Appeal 2338/94*

The ability to directly compare *Al Sirri and DD* with *Refugee Appeal 2338/94* and *Pushpanathan* is somewhat constrained by factual differences between the cases. The appellants in *Al Sirri and DD* were not at risk of deportation as they had satisfied alternative protection grounds, namely a substantial risk of torture under art 3 Convention Against Torture.¹²¹ The case merely concerned the appellants' entitlement to additional benefits conferred by virtue of refugee status.¹²² Therefore, exclusion from refugee status under art 1F would not confer the "serious consequence" of refoulement on the appellants, unlike in *Refugee Appeal 2338/94* and *Pushpanathan*. This factor may have encouraged the UK Supreme Court to adopt a more liberal interpretation of art 1F(c), as the UNHCR's insistence on a "restrictive" interpretation is premised on such "serious consequences" arising from art 1F exclusion.¹²³

(b) UK Statutory context

The UK courts are constrained in their ability pursue a "true, autonomous and international" interpretation of the Refugee Convention by the domestic statutory

¹¹⁹ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [2].

¹²⁰ At [2].

¹²¹ At [2].

¹²² See discussion under interpretation section.

¹²³ United Nations High Commissioner for Refugees "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (January 1992) Refworld <<http://www.refworld.org/docid/3ae6b3314.html>>.

context.¹²⁴ Despite the court's statement that the proper interpretation of art 1F(c) should be devoid of domestic legal influence,¹²⁵ the court is nevertheless bound by a European Council asylum Directive intended to provide interpretative guidance to EU members.¹²⁶

Unlike in New Zealand, the Refugee Convention is not directly incorporated into UK law. Nevertheless, art 1F is incorporated into UK domestic law through the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ("the Regulations").¹²⁷ However, as these Regulations were introduced to implement Qualification Directive 2004/83/EC ("the Directive"), they adopt the modifications of art 1F contained with the Directive.

While the Directive was not intended to alter EU states' obligations under the Refugee Convention, but to merely provide interpretative guidance, the Directive's treatment of art 1F(c) somewhat constrains states' interpretative autonomy.¹²⁸ Article 12(2)(c) of the Qualification Directive states that art 1F(c) acts are found in the preamble and arts 1 and 2 of the UN Charter.¹²⁹ This article is binding on UK courts through its inclusion in the Regulations.¹³⁰ Moreover, recital 22 encourages states to define "acts contrary to the purposes and principles of the UN" as those articulated in the aforementioned sections of the UN Charter, and "among others" United Nations Security Council ("UNSC") resolutions concerning terrorism.¹³¹ Recital 22 is not binding on EU members.¹³²

Moreover, the UK parliament has enacted additional statutory directions for art 1F(c) interpretation. Section 54 Immigration, Asylum and Nationality Act 2006 ("IANA") obliges courts to include "terrorism" as defined in s 1 Terrorism Act 2000 within the scope of art 1F(c).¹³³ Section 1 Terrorism Act 2000 defines terrorism as encompassing certain actions or threats designed to influence governmental organisations or intimidate

¹²⁴ *R v Secretary of State for the Home Department, ex parte Adan*, above n 12, at 605.

¹²⁵ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [36].

¹²⁶ Hugo Storey "EU Qualification Directive: A Brave New World?" (2008) 20 *IJRL* 1 at 10.

¹²⁷ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [6].

¹²⁸ Hugo Storey, above n 126, at 10.

¹²⁹ At [5].

¹³⁰ At [4], [6].

¹³¹ At [4].

¹³² Carl Gardner "EU primary, secondary and tertiary legislation" (2013) *Insite Law* <<http://www.insitelawmagazine.com/eulawch3.htm>>.

¹³³ At [4]-[5].

the public in pursuance of a political, religious, racial or ideological cause.¹³⁴ This definition clearly includes acts of domestic terrorism which have no international repercussions.¹³⁵

However, the court in *Al Sirri and DD* holds that s 54 IANA must be read down to comply with art 12(2)(c) Directive.¹³⁶ As art 12(2)(c) states that UN instruments are the appropriate source for ascertaining art 1F(c) acts, domestic provisions, to the extent that they conflict with the UN provisions, cannot be used to interpret art 1F(c). Therefore, s 54 IANA does not restrict the court's interpretation beyond the EU Directive.¹³⁷

(c) Implications of Qualification Directive 2004/83/EC for art 1F(c) interpretation

The Directive appears to exclude the wide interpretative approach adopted by the Authority in *Refugee Appeal 2338/94* and the minority in *Pushpanathan*, as art 12(2)(c) limits art 1F(c) acts to the those articulated in the UN Charter. However, recital 22 also includes UNSC resolutions on terrorism “among others”, indicating that art 1F(c) acts be extended beyond the Charter. Under this formulation, there may be scope for European courts to refer to extraneous instruments, such as those cited by the New Zealand Authority and the *Pushpanathan* minority, depending on the meaning ascribed to “among others”.

Furthermore, the restrictive interpretation advocated by the *Pushpanathan* majority is arguably precluded by the Directive. The *Pushpanathan* majority insists that the original drafters intended art 1F(c) to have a narrower meaning than one “naturally inferred” from the UN Charter.¹³⁸ However, art 12(2)(c) Qualification Directive equates art 1F(c) acts with those outlined in the purposes and principles of the Charter, and stretches its sphere beyond the purposes and principles contained within the Charter under recital 22. The possible effect of the Directive on the court's reasoning in *Al Sirri and DD* will be considered in later discussion.

¹³⁴ Terrorism Act 2000 (UK) 48 & 49 Eliz II c 11, s 1.

¹³⁵ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [8].

¹³⁶ At [36].

¹³⁷ At [36]

¹³⁸ *Pushpanathan v Canada*, above n 7, at [62].

(d) Decision in *Al Sirri*

The court in *Al Sirri* considers the extent to which acts of terrorism fall within the ambit of art 1F(c), as the appellant was accused of involvement in organisations linked to terrorism.

The Crown argued that any act of terrorism meeting the definition of s 1 Terrorism Act falls within the ambit of art 1F(c). The Crown invoked recital 22 of the Directive in support of this proposition, which echoes UNSC Resolution 1373 in declaring that acts of terrorism are contrary to the purposes and principles of the UN.¹³⁹ The Crown highlighted that s 54 IANA obliges the court to apply the domestic meaning to terrorism when considering terrorist acts within art 1F(c).¹⁴⁰

Counsel for *Al Sirri* contended that acts of terrorism must have a significant impact on international peace and security in order to fall within art 1F(c).¹⁴¹ First, counsel cited UNHCR guidelines stating that art 1F(c) acts must be “capable of affecting international peace, security and peaceful relations between states.”¹⁴² Second, counsel referenced the European Court of Justice case of *Bundesrepublik Deutschland v B and D*. The court in *B and D* affirmed that terrorist acts could fall within both arts 1F(b) and (c).¹⁴³ According to the appellant, *B and D* also drew a distinction between domestic and international terrorist acts, holding that the former was covered under art 1F(b), whereas only the latter could fall within art 1F(c).¹⁴⁴ However, the Supreme court in *Al Sirri* acknowledge that this distinction was not explicitly drawn by the court in *B and D*, and was not central to the decision.¹⁴⁵

Nevertheless, the court rejects the Crown’s proposal to apply the domestic definition of terrorism to the Refugee Convention for several reasons. First, recourse to domestic definitions undermines fundamental principles of international legal interpretation, as the employment of domestic legislation detracts from the search for an autonomous

¹³⁹ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [34].

¹⁴⁰ At [7].

¹⁴¹ At [30].

¹⁴² At [31].

¹⁴³ At [33]; Joined Cases C-57/09 and C-101/09 [2011] Imm AR 190 *Bundesrepublik Deutschland v B and D* at [81].

¹⁴⁴ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [35].

¹⁴⁵ At [34].

international meaning.¹⁴⁶ Moreover, s 54 IANA, which states that terrorist acts falling within the domestic definition of terrorism are included under art 1F(c), must be read down in light of art 12(2)(c) Qualification Directive 2004/EC/83, thereby precluding any application of a domestic terrorism definition.¹⁴⁷ In this way, the court is able to disregard the confines of domestic statute within the context of a terrorism definition, and search for an “international meaning” of terrorism.

Nevertheless, the Supreme Court acknowledges that no internationally-accepted formulation of terrorism yet exists.¹⁴⁸ This absence of international consensus prompts the court to adopt a “cautious and restrictive” approach to the scope of art 1F(c) outlined by the UNHCR.¹⁴⁹ Moreover, the court justifies reliance on the UNHCR guidelines by virtue of art 35 Refugee Convention, which requires states to “facilitate” the UNHCR’s Convention supervision duties.¹⁵⁰ Thus, *Al Sirri* endorses the UNHCR Handbook’s formulation:¹⁵¹

Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.

(e) *DD* decision

The Supreme Court also considers the application of art 1F(c) in the context of *DD*’s factual situation. The appellant in *DD* had fought against the ISAF in Afghanistan. While the operation was led by the North Atlantic Treaty Organisation (“NATO”), successive UNSC resolutions endorsed the force and acknowledged the mission’s importance in maintaining international peace and security.¹⁵²

¹⁴⁶ At [36].

¹⁴⁷ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [36].

¹⁴⁸ At [37].

¹⁴⁹ At [38].

¹⁵⁰ At [38].

¹⁵¹ At [38].

¹⁵² At [50]-[58]

Counsel for *DD* contended that such an act could not be labelled contrary to UN purposes and principles as it had not be so declared by the UNSC, unlike acts of terrorism.¹⁵³ The court rejects this formulation as unsupported by authority and contrary to a “common sense” reading of art 1F(c), which would encompass armed combat against a UN-mandated force.¹⁵⁴ Instead, the court extends the UNHCR’s formulation to all acts falling under art 1F(c).¹⁵⁵

2 Critique of approach in *Al Sirri and DD*

The Supreme Court’s case in *Al Sirri and DD* can be questioned for the following reasons.

(a) Dismissal of the narrow interpretation in *Pushpanathan*

Hale and Dyson LJ’s dismissal of the majority’s approach in *Pushpanathan* does not fully engage with the Canadian Supreme Court’s reasoning. The court in *Al Sirri and DD* argues that *Pushpanathan* concerned a considerably different fact scenario to that of *DD*, leading the Canadian court to adopt an overly-restrictive interpretation of art 1F(c) which excluded “common sense” interpretations of UN purposes and principles such as armed combat against a UN-mandated force.¹⁵⁶

However, this argument does not fully engage with the majority’s rationale for adopting a restrictive interpretation. The *Pushpanathan* majority place much weight on the *travaux préparatoires* in applying a narrow meaning to art 1F(c), arguing that the drafters intended to ascribe a special meaning to art 1F(c).¹⁵⁷ According to art 32 VCLT, the *travaux préparatoires* can guide courts where the meaning of a phrase remains ambiguous following an art 31 exercise. Despite the legitimate foundation of the majority’s argument on the VCLT rules, the court in *Al Sirri and DD* fails to address their rationale by examining the *travaux préparatoires*. Therefore, the court does not engage with the basic premise of the *Pushpanathan* majority’s argument.¹⁵⁸

¹⁵³ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [66].

¹⁵⁴ At [66]-[67].

¹⁵⁵ At [66].

¹⁵⁶ At [67].

¹⁵⁷ *Pushpanathan v Canada*, above n 7, at [62].

¹⁵⁸ Vienna Convention on the Law of Treaties, art 32.

Such an omission is likely based on the court's obligation to apply the Qualification Directive, which precludes the court from adopting the narrow interpretation as proposed by the *Pushpanathan* majority, as discussed above. Nevertheless, the court fails to sufficiently address the *Pushpanathan* argument or acknowledge that the phrasing of the Qualification Directive restricts their analysis.

(b) UNHCR guidelines application to art 1F(c) acts

(i) Use of UNHCR guidelines in art 1F(c) interpretation

As explored in the interpretation section discussion, the authority of the UNHCR materials in a VCLT interpretation exercise remains unclear. The court in *Al Sirri and DD* argues that the guidelines should be afforded "considerable weight" in light of the signatories' obligation to facilitate the UNHCR's supervision duties.¹⁵⁹ However, commentators have questioned the scope of states' art 35 obligation, and the ability of the UNHCR to fulfill its art 35 mandate apolitically.¹⁶⁰ On the other hand, one could argue that the UNHCR materials fall under art 31(3)(b) "subsequent practice" based on a liberal construction of the House of Lords decision in *A v Home Secretary*.¹⁶¹ Nevertheless, the court in *Al Sirri and DD* does not attempt to justify its reliance on UNHCR materials, thereby giving cause to question whether such an approach accords with the VCLT.

(ii) Formulation of UNHCR guidelines as a general rule for art 1F(c)

In addition to concerns about the authority of UNHCR guidelines, the Supreme Court's justifications for extending the UNHCR approach beyond the context of terrorism can be queried. *Al Sirri and DD* initially justifies adopting the UNHCR's "cautious and restrictive approach" in the context of terrorism, due to the absence of an internationally-accepted definition for terrorism.¹⁶² Therefore, the court authorises its application in the context in *Al Sirri*.¹⁶³ Nevertheless, in analysing DD's situation, the court proceeds to formulate the UNHCR approach as a general test applying to all acts under art 1F(c), including the case of DD. The court argues that such a test is a "principled" construction

¹⁵⁹ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [38].

¹⁶⁰ James C Hathaway, above n 50, at 25.

¹⁶¹ See above discussion under interpretation section.

¹⁶² *Al Sirri v Secretary of State for the Home Department*, above n 7, at [36]-[38].

¹⁶³ At [38].

of art 1F(c) and gives effect to their art 35 obligation to facilitate the supervisory duty of the UNHCR.¹⁶⁴

However, the application of the UNHCR approach to all art 1F(c) acts arguably goes against the court's obligations to apply art 12(2)(c) Qualification Directive. Article 12(2)(c) directs EU members to apply art 1F(c) where the claimant has been guilty of acts contrary to UN purposes and principles "...set out in the preamble and articles 1 and 2 of the Charter of the United Nations".¹⁶⁵ Where acts falling within this domain already have an internationally-accepted definition, it would appear contrary to the obligation of the Directive to deny their inclusion within art 1F(c) if they fail to meet the additional UNHCR Handbook test.

Evidently, *Al Sirri and DD*'s framing of the UNHCR guidelines as a general rule for art 1F(c) is problematic, both in relation to weight given to the guidelines and the adoption of an overly stringent test which appears to go against the Qualification Directive.

(c) Including acts of terrorism under art 1F(c)

One could criticise *Al Sirri and DD*'s decision to endorse the inclusion of acts of international terrorism within art 1F(c) in light of academic commentary. While recital 22 encourages EU members to extend art 1F(c) to acts, methods and practices of terrorism, the provision is not binding on the UK Supreme Court.¹⁶⁶ Commentators have questioned that the applicability of acts of terrorism to art 1F(c) for several reasons. The European Council on Refugees and Exiles ("ECRE") argues that terrorist acts are likely to be adequately covered by arts 1F(a), 1F(b) and 33(2) of the Refugee Convention. Indeed, the UK courts have accepted that terrorist acts can fall under 1F(b)'s "serious non-political" crimes, in spite of an alleged political motive.¹⁶⁷ According to the ECRE, coverage of such acts under art 1F(c) would give the article an unnecessarily expansive ambit.¹⁶⁸

¹⁶⁴ At [66].

¹⁶⁵ Directive 2004/EC/83 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, art 12(2)(c).

¹⁶⁶ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [4], Carl Gardner, above n 132.

¹⁶⁷ *Al Sirri v Secretary of State for the Home Department*, above n 7, at [32]-[33].

¹⁶⁸ European Council on Refugees and Exiles "Position on Exclusion from Refugee Status"(2004) 16 IJRL 257 at 258-260.

In addition, academics argue that employment of the concept of terrorism should be entirely avoided within the context of art 1F in the absence of an internationally-accepted definition of the concept. The scholars contend that terrorism is a political and emotive concept which should not be given independent recognition under 1F, as sufficiently serious acts of terrorism are already provided for under the existing meaning of art 1F.¹⁶⁹ The absence of an internationally endorsed definition of the term gives states the ability to apply the concept arbitrarily.¹⁷⁰ The commentators contend that the enquiry should not be centered on whether an act is terrorist in nature, but rather whether an act falls within the Convention wording of art 1F.¹⁷¹

Moreover, *Al Sirri and DD*'s inclusion of terrorism within art 1F(c) is derived from UNSC declarations, which are not necessarily the appropriate source for art 1F(c) direction. The court refers to UNSC Resolution 1373, and its reproduction in recital 22 of the Directive, in justifying the necessity to include terrorism under art 1F(c).¹⁷² However, the legitimacy of UN declarations in defining art 1F(c) acts has been questioned by Hathaway and Harvey.

The authors criticise the majority in *Pushpanathan* for endorsing widely-accepted UN UNGA declarations as "determinative" of art 1F(c) acts.¹⁷³ The commentators argue that non-binding UNGA resolutions should not be considered authority in stipulating the scope of a Refugee Convention article.¹⁷⁴ Similarly, one could argue that UNSC resolutions are ill-qualified to direct the content of art 1F(c). While such declarations are binding on UN member states, the resolutions are not necessarily representative of the international community, as the UNSC includes only 15 member states.¹⁷⁵ Moreover, the constitution of the UNSC is weighted toward its five permanent members, who have a continual presence on the UNSC and the power of veto. As a result, there is no guarantee that UNSC resolutions represent a general agreement of the international community. Indeed, Hathaway and Harvey instead endorse the definition of art 1F(c) acts with

¹⁶⁹ Satvinder Singh Juss, above n 5, at 468; James C Hathaway and Colin J Harvey, above n 5, at 269, United Nations High Commissioner for Refugees, above n 29, at 8.

¹⁷⁰ James C Hathaway and Colin J Harvey, above n 5, at 269.

¹⁷¹ Satvinder Singh Juss, above n 5, at 474-475.

¹⁷² *Al Sirri v Secretary of State for the Home Department*, above n 7, at [37].

¹⁷³ James C Hathaway and Colin J Harvey, above n 5, at 271-272.

¹⁷⁴ At 271-272.

¹⁷⁵ United Nations Security Council "The Security Council" (2013) United Nations <<http://www.un.org/en/sc/>>.

reference to widely subscribed international conventions on human rights and criminal law.¹⁷⁶ Moreover, as recital 22 is not applicable in the New Zealand context, the courts will be less inclined to give effect to UNSC Resolution 1373 by including terrorism under art 1F(c).

IV Conclusion: New Zealand's approach to art 1F(c)

New Zealand's treatment of art 1F(c), outlined in *Refugee Appeal 2338/94*, has been widely discredited by the Canadian majority in *Pushpanathan*, the UK courts in *Al Sirri and DD* and academic commentators. The New Zealand approach endorses an overly-wide formulation of art 1F(c) which goes against its statutory context and the intentions of the drafters in the *travaux préparatoires*. Such a case is more appropriately dealt with under art 33(2) Refugee Convention.

On the other hand, the restrictive interpretation endorsed by the Canadian majority in *Pushpanathan* is overly narrow, as it confines UN "purposes and principles" to violations of human rights. This excludes consideration of other principles outlined in the UN Charter, and therefore goes against a "common sense" interpretation of art 1F(c).

Moreover, the reasoning in the UK Supreme court case of *Al Sirri and DD* is problematic. The court fails to justify the legitimacy of invoking the UNHCR guidelines in a VCLT interpretation exercise. Moreover, the extension of the UNHCR guidelines beyond terrorism, to concepts with settled international definitions, could conflict with the court's obligations under art 12(2)(c) Qualification Directive. In addition, the concept of terrorism arguably should not be independently included under art 1F(c), due to its inherently political nature. Nevertheless, the English courts' obligation to apply Qualification Directive 2004/EC/83 somewhat explains these shortcomings. As no such interpretative directions constrain New Zealand decision-makers, New Zealand courts have reason to diverge from the UK Supreme Court's approach.

In light of these findings, this paper advises New Zealand courts in future cases to depart from the approach articulated in *Refugee Appeal 2338/94*. Moreover, the courts should undertake a thorough application of arts 31 and 32 VCLT, and review whether the UNHCR guidelines should be given weight in light of the above discussion. Finally, this

¹⁷⁶ James C Hathaway and Colin J Harvey, above n 5, at 272.

paper would discourage New Zealand courts from including “acts of terrorism” as a discrete concept under art 1F(c), as such an approach will cause considerable ambiguity, and is not adequately supported by authority.

Word count: The text of this paper is exactly 8,000 (excludes footnotes).

V Bibliography

A Primary Sources

1 International Treaties

Charter of the United Nations 1 UNTS XVI (signed 24 October 1945, entered into force 24 October 1945).

Convention relating to the Status of Refugees 189 UNTS 150 (signed 28 July 1951, entered into force 22 April 1954).

Convention Against Torture and Other Cruel Inhuman or Degrading Treatment 1465 UNTS 85 (signed 10 December 1983, entered into force 26 June 1987).

International Covenant on Civil and Political Rights 999 UNTS 179 (signed 16 December 1966, entered into force 20 March 1976).

Vienna Convention on the Law of Treaties 1155 UNTS 331 (signed 23 May 1969, entered into force 27 January 1980).

3 Case Law

A v Home Security [2004] UKHL 56, [2005] 2 AC 68.

Al Sirri v Secretary of State for the Home Department and DD v Secretary of State for the Home Department [2012] UKSC 54.

Attorney General v E [2000] 3 NZLR 257 (CA).

Attorney General v Tamil X [2010] NZSC 107, [2011]1 NZLR 721.

Attorney v Zaoui [2005] NZSC 38, [2006] 1 NZLR 289.

Joined Cases C-57/09 and C-101/09 [2011] Imm AR 190 *Bundesrepublik Deutschland v B and D*.

Pushpanathan v Canada [1998] SCR 982 (SCC).

R v Asfaw [2008] UKHL 31.

R v Immigration Officer at Prague Airport ex parte Roma Rights Centre [2004] UKHL 55.

R v Secretary of State for the Home Department, ex parte Adan [2001] 2 AC 477 (HL).

Refugee Appeal 2338/94 RSAA Auckland, 30 November 1995, BO Nicholson and V Shaw.

Refugee Appeal 71427/99 RSAA Auckland, 16 August 2000, RPG Haines and L Tremewan.

Refugee Appeal 75692 RSAA Auckland, 3 March 2006, RPG Haines QC and PJ Andrews.

Tamil X v Refugee Status Appeals Authority [2009] NZCA 488, [2010] 2 NZLR 73.

4 *Legislation*

Directive 2004/EC/83 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

Immigration Act 2009

Immigration, Asylum and Nationality Act 2006 (UK).

Immigration Act RSC 1985 c 1-2, s 2(1).

Terrorism Act 2000 (UK) 48 & 49 Eliz II c 11.

B Secondary Materials

1 Texts

James C Hathaway *The Law of Refugee Status* (Butterworths Limited, Canada, 1991).

James C Hathaway *Reconceiving International Refugee Law* (Martinus Nijhoff Publishers, Netherlands, 1997).

2 Journal Articles, Essays and Seminars

Campbell McLachlan “The Evolution of Treaty Obligations in International Law” in Georg Nolte (ed) *Treaties and Subsequent Practice* (Oxford University Press, United Kingdom, 2013).

Carl Gardner “EU primary, secondary and tertiary legislation” (2013) Insite Law <<http://www.insitelawmagazine.com/eulawch3.htm>>.

Georg Nolte (ed) *Treaties and Subsequent Practice* (Oxford University Press, United Kingdom, 2013).

Edward Kwakwa “Article 1F(c): Acts contrary to the purposes and principles of the United Nations” 12 IJRL 79.

European Council on Refugees and Exiles “Position on Exclusion from Refugee Status”(2004) 16 IJRL 257.

Geoff Gilbert “Current issues in the application of the exclusion clauses” (paper presented for the 50th Anniversary of the 1951 Convention Relating to the Status of Refugees, January 2002).

Guy Goodwin Gill “Convention Relating to the Status of Refugees” (2008) Audiovisual Library of International Law <<http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>>.

Helene Lambert “The EU Asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and international law” (2006) 55 ICLQ 161.

Hugo Storey “EU Qualification Directive: A brave new world?” (2008) 20 IJRL 1.

James C Hathaway and Colin J Harvey “Framing Refugee Protection in the New World Disorder” (2001) 34 Corn ILJ 257.

James C Hathaway “Who Should Watch over Refugee Law?” (2002) 14 Forced Migration Review 23.

Matthew Zagor “Persecutor or persecuted: exclusion under article 1F(a) and 1F(b) of the Refugees Convention” (2000) UNSWJ 164.

Michael Kingsley Nyinah “Exclusion under article 1F: some reflections on Context, Principles and Practice” (2000) 12 IJRL 295.

Monette Zard “Exclusion, terrorism and the Refugee Convention” (2002) 13 FMR 32.

Officer for the High Commissioner for Human Rights “Convention Against Torture” (2013) United Nations Human Rights <<http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx>>.

Officer for the High Commissioner for Human Rights “Human Rights Committee” (2013) United Nations Human Rights <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>>.

Rodger Haines QC “The domestic application of international human rights standards in New Zealand” (Spring Seminar Series, University of Auckland, 2004).

Satvinder Singh Juss “Terrorism and the Exclusion of Refugee Status in the UK” (2012) 17 J Conflict & Sec L 465.

3 *United Nations Documents*

United Nations High Commissioner for Refugees *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* HCR/GIP/03/05 (4 September 2003).

United Nations High Commissioner for Refugees “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (January 1992) Refworld <<http://www.refworld.org/docid/3ae6b3314.html>>.

United Nations High Commissioner for Refugees “Note on the Exclusion Clauses”(30 May 1997) UNHCR <<http://www.unhcr.org/3ae68cf68.html>>.

United Nations High Commissioner for Refugees “Statement on Article 1F Refugee Convention” (July 2009) Refworld <<http://www.refworld.org/docid/4a5de2992.html>>.

United Nations High Commissioner for Refugees “Statute of the Office of the United Nations High Commissioner for Refugees” (2013) Refworld <<http://www.unhcr.org/3b66c39e1.html>>.

United Nations Security Council “The Security Council” (2013) United Nations <<http://www.un.org/en/sc/>>.

United Nations “United Nations Yearbook 1951” (2013) UNHCR <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4e1ee76b0&query=+drafting%20+notes>>.

VI Appendix 1: Relevant UN Charter provisions

A Preamble:

WE THE PEOPLES OF THE UNITED NATIONS
DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS
Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

B Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and

- international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

C Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any

state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.