CAIT VERITY HOLLYWOOD

THE NON-REFOULEMENT OF SAMSUDEEN: NATIONAL SECURITY VERSUS THE RIGHTS OF PROTECTED PERSONS

Submitted for the LLB (Honours) Degree

Faculty of Law
Victoria University of Wellington

2022

Abstract

This paper considers whether New Zealand's immigration laws should be reformed to facilitate the deportation of protected persons in the interests of national security. I examine protected persons' rights using the case of Samsudeen: the perpetrator of a terrorist attack in Auckland, New Zealand in September 2021. Samsudeen's circumstances provided a public exposition of how the Immigration Act 2009 allows for the rights of protected persons – specifically, non-refoulement in recognition of New Zealand's international obligations under the Convention against Torture and the International Covenant on Civil and Political Rights – to override Immigration New Zealand's powers to deport non-citizens who pose a national security threat to New Zealand. Samsudeen was a convention refugee, who suffered from major depressive disorder and post-traumatic stress disorder from sustained exposure to politically-motivated violence in Sri Lanka. He was granted refugee status in New Zealand and placed in the community without any mental health or resettlement support. Thus, he turned to Islamic faith and formed extreme ideologies, which led to his criminalisation for disseminating objectionable material. He spent four years in custody on remand and received no rehabilitation programmes to support his deradicalisation. When released on bail, he validated the fears of those who detained him – embarking on an act of terrorism. I critique the New Zealand Government's express intentions to securitise its immigration landscape in light of Samsudeen's attack. The intersection of socio-economic factors, inherent in New Zealand's domestic asylum and criminal justice processes impacted his pathway to terrorism. Given the weak nexus between immigration and terrorism, the securitisation of immigration law to deport security threats which are exacerbated domestically is unjustified. Acknowledging the Government's intention to reform the law in any case, I rebuke the possibility of a national security exception to non-refoulement and critique the potential reliance on diplomatic assurances to deport protected persons to places in which they would otherwise be subject to severe human rights violations.

Keywords: *protected persons, national security, terrorism, immigration, Samsudeen, deportation, Convention against Torture, Civil and Political Rights*

Word count

The text of this paper (excluding abstract, table of contents, non-substantive footnotes, and bibliography) comprises **14,975** words.

Table of Contents

I Introduction

> We have given refugee status to an individual, because of a claimed threat he was under - and yet he has posed a significant threat to fellow New Zealanders… that is an intolerable tension for any country to be under, and it does call for us to examine our laws.[1]

Andrew Little conceded this intolerable tension to the House of Representatives four days after the New Lynn terror attack of 3 September 2021.[2] Ahamed Aathill Mohamed Samsudeen (Samsudeen) was identified as the violent extremist responsible for the terror attack which involved him injuring eight supermarket shoppers with a knife he took from a display.[3] Minutes after the attack, he was shot and killed by the police.[4]

Samsudeen was a Sri Lankan national of Tamil ethnicity and Muslim religion.[5] He was born into political conflict. His father was a retired school principal who was involved with community organisations and had standing with local politicians.[6] During the civil war that dismantled his government, Samsudeen's father faced threats from the insurgent armed group asking him to hide their weapons at his old school.[7] His father refused, and the armed group responded by throwing grenades into the family home.[8] As Samsudeen grew up, he was kidnapped, threatened at gunpoint, and violently attacked by the armed group as a result of his father's political resistance.[9] At 22 years old, whilst his family remained in hiding, Samsudeen fled to New Zealand and sought asylum as a refugee.[10]

---

[1] (5 September 2021) 754 NZPD (Terrorist Attack – LynnMall, Andrew Little).
[2] Minister responsible for the Government Communications Security Bureau and the New Zealand Security Intelligence Service.
[3] "LynnMall attack: Four women and three men among victims" *Radio New Zealand* (online ed, New Zealand, 4 September 2021); "Man who tackled terrorist identified as eighth victim of attack" *Radio New Zealand* (online ed, New Zealand, 14 September 2021).
[4] Praveen Menon "Police in New Zealand kill "extremist" who stabbed six in supermarket" *Reuters* (online ed, Asia-Pacific, 3 September 2021).
[5] *Samsudeen* [2013] NZIPT 800347 at [1] [*Samsudeen*].
[6] At [5].
[7] At [5].
[8] At [5].
[9] At [13], [50].
[10] At [17].

The Immigration and Protection Tribunal (the Tribunal) recognised him as a refugee.[11] The Tribunal acknowledged his struggles with major depression and post-traumatic stress disorder.[12] He was described as destitute.[13] Yet, as an asylum seeker, no resettlement support was offered to him.[14] He was isolated and turned to Islamic faith, of an extreme sort – the sort which sounded alarms to New Zealand officials. He was criminalised for the dissemination of objectionable material and labelled as a terrorist.[15] He spent four years in custody, on remand, not eligible for rehabilitation to reform his behaviour, nor guided release to integrate him into a community.[16] Eventually, while on bail, Samsudeen embarked on an act of terrorism at LynnMall of New Lynn, Auckland, attacking seven supermarket shoppers with a knife he took from the shelf.

Outrage erupted in the community that provided him refuge. The Government launched an inter-agency review into the terror attack to examine Samsudeen's treatment by the Police, Corrections, and Intelligence and Security Services (the Review).[17] The Review excludes any scrutiny of immigration-related decisions. In dissatisfaction, commentators suggested that the Review will leave fundamental questions unanswered, "how was this guy still in the country and how was he allowed to be out in the community?".[18] Why Samsudeen could not be detained by Immigration New Zealand and deported caused widespread confusion amongst politicians and the media.[19] The Government responded by indicating that a "full sweep" of immigration law reform is necessary to address the

[11] At [77].
[12] At [42]-[48].
[13] Gill Bonnett "One year on: Questions remain on anniversary of LynnMall attack by Ahamed Samsudeen" *Radio New Zealand* (online ed, New Zealand, 3 September 2022).
[14] Jehan Casinader "The makings of a terrorist – and the people who tried to help him" *Stuff NZ* (online ed, New Zealand, 11 September 2021).
[15] Sarah Robson "Timeline leading to terrorist's attack in New Lynn" *Radio New Zealand* (online ed, New Zealand, 5 September 2021).
[16] Casinader, above n 14.
[17] Katie Todd "LynnMall stabbings: Review into risk terrorist posed launched" *Radio New Zealand* (online ed, New Zealand, 16 September 2021).
[18] "Scepticism as Government watchdogs launch review into LynnMall terror attack" *Radio New Zealand* (online ed, New Zealand, 17 September 2021); Gill Bonnett "LynnMall attack: National, charities critical of gaps in terrorist inquiry" *Radio New Zealand* (online ed, New Zealand, 18 September 2021).
[19] (5 September 2021) 754 NZPD (Terrorist Attack – LynnMall, David Seymour); Judith Collins "Why wasn't terrorist subject to sections 163 and 164?" (6 September 2021) The National Party https://www.national.org.nz/why-wasnt-terrorist-subject-to-sections-163-and-164.

framework that protected Samsudeen from deportation.[20] The new Immigration Minister, Michael Wood was briefed that Immigration NZ's workstream included considering how the Immigration Act 2009 could be amended to deport non-citizens who are a known risk to public safety.[21] Thus, policy discussions are active and immigration reform is on the horizon.

In this paper, I explore why Samsudeen could not be deported and how he was allowed to remain in the country from an immigration perspective. A key tension emerges, between the rights of protected persons and the perceived need to use immigration laws to deport national security risks. Samsudeen was a protected person. Whilst he presented a security threat, at law he was protected from the prospect of deportation to his home country, in which he would otherwise be subject to severe human rights violations. This protection against refoulement at international law is expressly codified in New Zealand's domestic immigration laws. It places a substantial constraint on the State's prerogative to expel from New Zealand, any non-citizen who poses a security risk to the community. This tension came to a head in September last year, when Samsudeen committed an act of terrorism, creating a public exposition of how our immigration legislation is *not equipped* to deal with terrorists.[22]

In Part II, I set out Samsudeen's history as a refugee and the criminal offending which led officials to regard him as a security threat. Samsudeen spent the greater part of four years in custody for the dissemination of objectionable material. Each time he was released, the Police would lay new charges in an attempt to keep him behind bars. As officials were running out of avenues to detain him, Immigration NZ launched a review of his claim to refugee status – the basis of his permanent residency.[23] Immigration NZ determined that there were grounds to revoke Samsudeen's refugee status, however, its legal mandate to detain and deport Samsudeen was qualified by complementary protection. In Part III, I then explore the framework of complementary protection deriving from the Convention

[20] Giles Dexter "LynnMall terror attack: Government to look at Immigration Act after terrorist fabricated refugee appeal" *Radio New Zealand* (online ed, New Zealand, 5 September 2021); Eva Corlett "New Zealand stabbings: new law to close loophole to pass in September, says Ardern" *The Guardian* (online ed, New Zealand, 6 September 2021).
[21] Gill Bonnett "LynnMall attack: A year on, ministers eye on law change on deportation" *Radio New Zealand* (online ed, New Zealand, 31 August 2022).
[22] Emphasis added.
[23] Rt Hon Jacinda Ardern "Prime Minister's update on the 3 September Auckland terrorist attack" (4 September 2021) [PM Update].

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[24] and the International Covenant on Civil and Political Rights (ICCPR),[25] with a particular focus on the benefit of non-refoulement. Immigration NZ's domestic mandate under the Immigration Act 2009, as constrained by New Zealand's CAT and ICCPR obligations creates an irreconcilable tension between the interests of national security and the rights of protected persons. At present, the balance favours the latter. In Samsudeen's case, the Government was bound to protect the same individual whom it needed to protect New Zealanders from.

In Part IV, I critique the fundamental premise underpinning movements to reform our immigration law to facilitate the deportation of protected persons. I contextualise possible reform by exploring the securitisation of migration generally, as a theme frequently used to justify arbitrary and discriminatory immigration policies, drawing on some recent examples. I note how the incorporation of the complementary protection regime in the Immigration Act 2009 places a substantial constraint on New Zealand's territorial and decision-making sovereignty, and thus, largely goes against the trend of securitisation by prioritising the non-refoulement of protected persons notwithstanding national security concerns. However, recent events of localised terrorism have rendered New Zealand's immigration law ripe for reactive reform following the trend of securitisation. The spotlight on immigration reform is partly fuelled by the fact that the recent amendments to the Terrorism Suppression Act 2002 would not have made any practical difference in Samsudeen's case. I caution, that the focus on immigration legislation may be unjustified given the more predominant drivers of terrorism; in-country socio-economic factors. The intersection of socio-political alienation and economic deprivation, inherent in both New Zealand's asylum process and criminal justice process contributed to Samsudeen's radicalisation. Thus, amendments to equip our laws to facilitate the deportation of threats we have created, at the expense of non-refoulement, should be closely scrutinised.

Acknowledging the political drive to legislate away the intolerable tension, in any case, I float how the legislature may respond in Part V. I suggest that it is not open to the legislature to carve out a national security exception to non-refoulement, drawing on the

[24] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) [CAT].
[25] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

international condemnation of the Canadian Supreme Court case of *Suresh v Canada (Minister of Citizenship and Immigration) (Suresh)*.[26] I critique the possibility of the legislature seeking and relying upon diplomatic assurances to facilitate the deportation of protected persons who constitute a security risk. Whilst this pathway may have opened following the recent Supreme Court decision of *Minister of Justice v Kim*, and would enable the legislature to, at least superficially, adhere to our non-refoulement obligations, complexities in this context will limit their utility.[27]

I conclude that the tension highlighted by Samsudeen is not easily reconciled. Immigration reform to facilitate the deportation of protected persons is unjustified, notwithstanding the terror attack that shook the lives of eight New Zealanders last year. As the international framework makes clear, New Zealand has absolute obligations towards protected persons. If an individual like Samsudeen would be tortured, arbitrarily killed, or subject to cruel and inhuman treatment in their home country, New Zealand should not be permitted to deport them to that atrocity. This is especially so, where the individual has resided in New Zealand for a substantial period before perpetuating any violence here, and the subsequent violence was cultivated by domestic circumstances. It is almost certain that the way in which New Zealand resettled Samsudeen as an asylum seeker, and criminalised Samsudeen as an offender, contributed to the social alienation that reinforced his pathway to radicalisation. Despite public perceptions that terrorism is brought to New Zealand by external actors, it is time to look inward and evaluate just *how* we provide refuge and rehabilitation for those demonstrating radicalised behaviour.[28] Reactively legislating in response to Samsudeen's attack, and the further securitisation of an area of law – immigration – which is not responsible for the threat of terrorism, cannot be justified.

II Framing Samsudeen

Samsudeen was a refugee. He was also a criminal offender. This section details the circumstances which founded Samsudeen's claim to refugee status, and his subsequent

[26] *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].
[27] *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 [*Minister of Justice v Kim*].
[28] Emphasis added.

criminal offending which set him apart from the 'good refugee'.[29] The intersection of these characteristics led officials to consider him a security threat to New Zealand. Unlike an ordinary citizen, it was expected that Samsudeen could and should be deported.

A A Refugee

Samsudeen was a Sri Lankan national of Tamil ethnicity and Muslim religion, who travelled to New Zealand on a student visa in October 2011. In his application for a student visa to study toward a diploma in electronics and telecommunications, Samsudeen wrote "Since I was a child, my ambition is becoming an engineer and to serve the society as much as I can".[30] He was described as "an obedient and loyal student who bears a good moral character" by the Hindu College where Samsudeen studied for seven years in Columbo, Sri Lanka. Six months after arriving in New Zealand, Samsudeen withdrew from his course of study and sought asylum.[31]

The Refugee Convention requires states to offer protection and rights to individuals claiming refugee status and to not punish individuals who cross the border unlawfully to seek asylum.[32] New Zealand ratified the Convention in 1960[33] and the 1967 Protocol thereto in 1973.[34] It was domestically incorporated in the 1999 amendment to the Immigration Act 1987. Under s 129 of the Immigration Act 2009, a person must be recognised as a refugee if they meet the definition of a refugee under the Refugee Convention, where:[35]

---

[29] For a discussion of the concept of the "good refugee" see Heidi Hetz "The Concept of the 'Good Refugee' in Cambodian and Hazara Refugee Narratives and Self-Representation" (2022) 35(2) Journal of Refugee Studies 874 at 876-877.

[30] Bonnett, above n 13.

[31] PM Update, above n 23.

[32] For example, without a valid passport or visa securing a right of entry; See also *Universal Declaration of Human Rights* GA Res 217A 3 (1948) [UDHR], art 14.

[33] Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [The Refugee Convention].

[34] The Protocol was adopted to widen the temporal and geographical scope of the Refugee Convention; Protocol Relating to the Status of Refugees 606 UNTS 267 (opened for signature 31 January 1967, entered into force 4 October 1967).

[35] Refugee Convention, art 1A; Non-refoulement, discussed below, applies to both "recognised" refugees *and* refugee claimants whose status has not yet been declared; Rebecca Wallace "The principle of non-refoulement in international refugee law" in Vincent Chetail and Céline Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014).

> owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In April 2012, Samsudeen's claim to refugee status was initially denied by a Refugee and Protection Officer who questioned his credibility.[36] On appeal to the Tribunal in 2013, Samsudeen provided further detailed accounts of persecution. Samsudeen believed that if he returned to Sri Lanka, he would be located and seriously harmed by Karuna, a former member group of the Tamil Tigers,[37] due to his father's political resistance.[38] During Samsudeen's upbringing, his father, a retired school principal, had refused to co-operate with the insurgent non-state armed group when they asked to hide weapons at his old school. His father refused, instead supporting the Sri Lankan Government during the civil war.[39] This political resistance caused Samsudeen and his family to be subjected to persecution: numerous physical attacks,[40] violent abductions,[41] and assaults while being held hostage.[42]

The Tribunal considered that Samsudeen's evidence was credible in light of written statements from his father and brother, who corroborated his account of living in fear of violence at the hands of Karuna.[43] The Tribunal also relied on a clinical psychologist's report which found that Samsudeen suffered from major depression and post-traumatic stress disorder. The psychologist attributed these mental illnesses to "exposure to trauma" and long term experiences of "living within the context of fear, multiple displacements

---

[36] Crown Law Office *Legal Advice – To MBIE Re Warrant of Commitment* (7 May 2021) [Crown Law Advice (7 May 2021)] at [10].
[37] The Liberation Tigers of Tamil Eelam [Tamil Tigers].
[38] At [20].
[39] *Samsudeen,* above n 5.
[40] *Samsudeen*, above n 5, at [13], [16].
[41] At [15]-[16].
[42] At [16].
[43] At [21]-[23].

and familial and social stress."[44] The Tribunal concluded that Samsudeen met the definition of a refugee and granted him permanent residency in December 2013.[45]

B A Criminal Offender

From 2016 to 2021, as a permanent resident refugee, Samsudeen was in and out of the criminal justice system. He was under the microscope of the Police, who hastily brought new charges against him each time he was permitted to leave custody. Despite the judicial ordering of rehabilitation, Samsudeen was repeatedly criminalised and held in custody on remand for the greater part of four years. As a remand prisoner, he was ineligible for rehabilitation programmes inside prison and prevented from being integrated into the community with the necessary guidance and support to reform his behaviour.[46]

What began with a Police warning in 2016, materialised in criminal charges in 2017 for his dissemination of objectionable material online; graphic videos depicting Islamist extremist violence.[47] He was also charged with failing to assist the Police in their exercise of a search power and using a document for pecuniary advantage.[48] During a 13-month period of custody pending trial for this first set of charges, Samsudeen was twice denied bail because he presented a risk of violent offending if bail were to be granted.[49] He subsequently pled guilty and was convicted in the High Court.[50] Justice Wylie granted Samsudeen bail with conditions pending sentencing, as it was undisputed that any sentence imposed would not exceed the 13-month period he already spent in custody.[51] Given that, Samsudeen's guilty plea, and the lack of charges alleging attempted violence, further restrictions on his liberty were considered unwarranted.[52] This attitude prevailed

---

[44] At [24]-[34].
[45] *Samsudeen*, above n 5.
[46] Prisoners on remand awaiting trial are outside the scope of rehabilitation programmes; Annalise Johnston "Beyond the Prison Gate: Reoffending and Reintegration in Aotearoa New Zealand" (The Salvation Army Social Policy and Parliamentary Unit, Policy Report, December 2016) at 29.
[47] Crown Law Advice (7 May 2021), above n 36, at [12].
[48] The Office of the Chief Justice *R v Samsudeen – Summary of court engagement* (5 September 2021) [*R v Samsudeen – Summary*].
[49] *R v Samsudeen* [2017] NZHC 3229; [2018] NZHC 1522.
[50] *R v Samsudeen – Summary*, above n 48.
[51] *R v Samsudeen* [2018] NZHC 1597 at [14].
[52] At [15].

at sentencing where Justice Wylie sentenced Samsudeen to one year of supervision with conditions.[53]

While on bail pending this sentencing hearing, however, Samsudeen faced a second set of charges, including possessing objectionable material (ISIS propaganda) and a knife in a public place without reasonable excuse.[54] Despite the supervision sentence resulting from the first set of charges, he remained in custody while his second trial was adjourned due to the COVID-19 Lockdown. At trial in May 2021, Samsudeen was convicted of the majority of the second set of charges,[55] but by that time he had been in custody for three years. Justice Fitzgerald considered that a custodial sentence could not be imposed in these circumstances and sentenced Samsudeen to one year of supervision with conditions relating to monitoring his online activity and engaging in rehabilitative assessments.[56] Despite this supervisory sentence, he remained in custody, again, due to further charges relating to alleged assaults in custody. He was granted bail pending trial for these charges in July 2021.[57] The Police independently decided to place him under intense surveillance.[58] In a matter of months, he would embark on an act of terrorism at LynnMall of New Lynn, Auckland, attacking seven supermarket shoppers with a knife.

I later return to discuss the intersection of Samsudeen's circumstances as a refugee and an offender, in the context of analysing the relationship between immigration and terrorism. It is apt to note here, that Samsudeen's pathway to terrorism did not operate in isolation from inadequacies in our asylum and criminal justice system. The same system that prosecuted Samsudeen for idealising terrorism, ultimately exasperated the socio-economic pressures that contributed to his radicalisation – and subsequent recourse to violence. These ideas are expanded on in Part IV.

---

[53] *R v Samsudeen* [2018] NZHC 2465.

[54] *R v Samsudeen – Summary*, above n 48.

[55] Samsudeen was convicted of two of the three possession of objectionable material charges and the charge of failing to assist a police officer's exercise a search power, but was found not guilty of possession of a knife in a public place and of the remaining charge of possession of objectionable material.

[56] *R v Samsudeen* [2021] NZHC 1669.

[57] Crown Law Advice (7 May 2021), above n 36, at [17]; *R v Samsudeen – Summary*, above n 48.

[58] PM Update, above n 23.

C A National Security Threat

As a refugee and an offender, officials considered that Samsudeen was a threat to national security. When the Police first arrested Samsudeen for the dissemination of objectionable material in 2017, they were intercepting his attempt to leave New Zealand. NZSIS advised the Director-General of Security that they suspected that Samsudeen intended to travel to Syria to fight alongside ISIS.[59] When Samsudeen was released on bail in 2018, NZSIS advised the Government that he presented a MEDIUM level threat — a terrorist attack was feasible and could well occur.[60] In the month preceding Samsudeen's attack, the Director-General of Security expressed long-term discomfort that the investigation was in a monitoring space[61] because it remained "a realistic possibility that [Samsudeen] would mobilise toward an unsophisticated act of ideologically motivated violence without prior warning".[62] Following the attack, the Prime Minister stated that the Police and NZSIS used "every tool available to them to protect innocent people from this individual".[63] The combination of Samsudeen's status as an offender and a refugee left the public scrutinising *why* immigration was not in the toolbox, especially given that officials were preparing for "the potential that these institutions may run out of legal avenues to detain him".[64]

Immigration NZ did, in fact, have Samsudeen under a microscope throughout the period of his criminal offending. They attempted to revoke his refugee status and deport him. During his 13-month period of custody on remand, the Refugee Status Branch of Immigration NZ began a review of Samsudeen's immigration status.[65] It sought to revoke his refugee status on the basis that it *may* have been improperly granted – that some of the documentation provided to the Tribunal in his initial refugee claim may have been forged

---

[59] Director-General of Security *Information provided to the PM and Ministers since* (4 September 2021) *2016* in Samsudeen documents for release 3 (Obtained under Official Information Act 1982 Request to New Zealand Security Intelligence Service) [NZSIS Release] at Table Entry dated 23/05/2017.

[60] At Table Entry dated 02/07/2018.

[61] At Table Entry dated 10/08/2021.

[62] At Table Entry dated 24/08/2021; See also Director-General of Security *Summary of SIR – Pathways to Mobilisation: Ahamed Aathill Mohamed Samsudeen* DMS6-15-1181 (17 August 2021) in Samsudeen documents for release 3 (Obtained under Official Information Act 1982 Request to New Zealand Security Intelligence Service).

[63] PM Update, above n 23.

[64] PM Update, above n 23.

[65] PM Update, above n 23.

or edited.[66] This compelled Immigration NZ to serve Samsudeen with a notice of intention to cancel his refugee status on the basis it may have been procured through fraud, forgery, or misleading representations.[67] He was simultaneously issued a deportation liability notice.[68] Samsudeen lodged an appeal to challenge the cancellation of his refugee status and his deportation liability in April 2019, in a plea to remain in New Zealand. A year prior, Samsudeen had requested for Immigration NZ to cancel his permanent residency in 2018, after a failed attempt to leave New Zealand in 2017. It appears that Samsudeen was unclear about whether he wanted to be in New Zealand or not and the reasons for these contradictory actions are unknown. Immigration NZ proceeded on the basis it was entitled to deport him, and therefore, detain him given the security situation, only to later be told this course of action was not open to it.

In May 2021, Crown Law advised Immigration NZ that Samsudeen's deportation liability arose on two grounds; upon the cancellation of his refugee status,[69] and by having committed an offence carrying a term of imprisonment of two years or more within five years of becoming a resident.[70] According to this advice, Samsudeen was liable for arrest and detention for up to 96 hours,[71] for the purpose of making a deportation order.[72] Immigration detention is only available for the limited purpose of facilitating deportation,[73] to ensure the safety and security of New Zealand where a person *who is liable for deportation* may constitute, or be suspected of constituting, a threat or risk to security.[74] However, Immigration NZ was barred from making a deportation order within the 96 hour timeframe because Samsudeen had a pending appeal against the cancellation of his refugee status and deportation liability. Consistent with the Refugee Convention,[75] Samsudeen was entitled to see through his right of appeal.[76] To detain Samsudeen for longer than 96 hours pending the issuance of a deportation order, Immigration NZ had to

[66] Emphasis added.
[67] Under s 146(1)(c) of the Immigration Act 2009; Crown Law Advice (7 May 2021), above n 36, at [17].
[68] At [18].
[69] Section 162; Crown Law Advice (7 May 2021), above n 36, at [18].
[70] Section 161; At [18].
[71] Section 309(1)(b).
[72] Section 310(d)(i).
[73] Section 308.
[74] Emphasis added; Section 307(1)(a)-(b).
[75] Above n 33, art 32(2).
[76] Sections 146(2)(b) and 162(2).

apply to the District Court for a Warrant of Commitment.[77] A Warrant of Commitment can authorise an individual's detention for up to 28 days where it has become apparent that for any reason, including because an appeal against deportation liability is pending, the person is unable to leave New Zealand.[78] Additionally, where an individual is suspected of constituting a risk or threat to security, Immigration NZ must refer the case to the Minister to determine whether to certify the individual as a security risk.[79] Where the Minister certifies that an individual constitutes a threat or risk to security, the District Court *must* issue a Warrant of Commitment, unless the individual's release would not be contrary to the public interest.[80]

In its May 2021 advice, Crown Law noted that there was a strong argument that the public interest justified a Warrant of Commitment given that Samsudeen was prima facie liable for deportation and posed a significant security risk.[81] Subsequently, Crown Law retracted its earlier advice, having determined that Samsudeen was a *protected person* under ss 130 and/or s 131 of the Immigration Act 2009,[82] and therefore, was not liable for deportation.[83] Immigration NZ could not properly apply for, and the District Court could not properly grant, a Warrant of Commitment under s 316 without a reasonable prospect that Samsudeen can or would be deported.[84] Immigration NZ's hands were tied, to the confusion and outrage of the public, and politicians who questioned to no avail:[85]

> How can the Government simultaneously hold the position that the person should not be a refugee, having stripped him of that right, and yet believe that he would qualify to be a protected person, and therefore not detain him on the basis that deportation would be unsuccessful?

---

[77] Section 316.
[78] Section 317(2)(c).
[79] Section 163; If the Minister has certifies that a person constitutes a risk to security, there is a further discretion for the Governor-General, acting on the advice of the Minister, to order their deportation.
[80] Section; 317(3). The District Court can also issue a Warrant of Commitment on its own accord, notwithstanding that the Minister has not certified the individual as a security threat under s 163, where it considers detainment in the public interest.
[81] Crown Law Advice (7 May 2021), above n 36.
[82] Emphasis added.
[83] Crown Law Office *Legal Advice – To MBIE Re Warrant of Commitment and Deportation* (8 July 2021) [Crown Law Advice (8 July 2021)].
[84] At [7]-[8].
[85] (5 September 2021) 754 NZPD (Terrorist Attack – LynnMall, David Seymour).

The answer to this question lies in the complementary protection regime of protected persons, which, as its name suggests broadly expands international protection to individuals regardless of their claim (or not) to refugee status. Regardless of Samsudeen's purportedly invalid claim to refugee status and his criminal offending, more significantly, he was a *protected person*.[86]

III The Protection of Samsudeen

Samsudeen was a protected person under the complementary protection regime that emerged through the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[87] and the International Covenant on Civil and Political Rights (ICCPR).[88] This is because if he were to have been deported from New Zealand to his home country of Sri Lanka, there were substantial grounds for considering he would have been personally subject to practices of torture, arbitrary deprivation of life or cruel treatment.

This section discusses the nature of complementary protection, as a "subsidiary safety net" to catch claimants like Samsudeen who may not be refugees but are, nevertheless, in need of international protection.[89] The international legal principle of non-refoulement is the golden thread of this area of law, which, as domestically incorporated, prevented Immigration NZ from deporting Samsudeen.

A major tension emerges between the interest in granting humanitarian protection to individuals fleeing severe human rights violations, with the interest in protecting New Zealanders from the potential harm caused *by those individuals*.[90] This tension is not easily reconciled. I examine how CAT and ICCPR complementary protection has been incorporated into our domestic legislation, and how it goes beyond that provided under the Refugee Convention, requiring states to protect individual interests even when national security may be at stake.

---

[86] Emphasis added.
[87] CAT, above n 24.
[88] ICCPR, above n 25.
[89] *AC (Syria)* [2011] NZIPT at [39].
[90] Emphasis added.

A Complementary Protection and Non-Refoulement

There are two categories of international protection incorporated into the Immigration Act 2009: refugee status under the Refugee Convention; and protected person status under the CAT and the ICCPR. The Immigration Act 2009 indicates a hierarchy of protection, giving primacy to refugee status,[91] with protected person status to be considered in the alternative.[92] It was for this reason that upon finding that Samsudeen met the definition of a refugee under the Refugee Convention in 2013, the Tribunal did not have to consider whether Samsudeen constituted a protected person in the alternative.[93] Complementary protection only becomes relevant where refugee status is either unattainable or, as in Samsudeen's case, one's refugee status is revoked or cancelled.

Protected person status is provided for under ss 130 and 131 of the Immigration Act 2009 to recognise and implement New Zealand's human rights obligations under the CAT and the ICCPR.[94] These Conventions protect individuals like Samsudeen from being returned to torture, arbitrary deprivation of life or cruel treatment.

Section 130(1) incorporates the CAT's absolute prohibition against torture. Article 1 of the CAT defines torture as an act causing severe pain or suffering, whether physical or mental, that is intentionally inflicted on an individual at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, for the purpose of obtaining information or a confession, punishment, intimidation or coercion or any reason based on discrimination.[95] Whilst prima facie, the CAT appears to confine the prohibition on torture to state-actors, the phrase "other person acting in an official capacity" has been interpreted to include persons acting in a de facto official capacity, such as non-state actors exercising power comparable to legitimate

[91] Immigration Act 2009, s 129; Refugee status is recognised as having both operational and procedural primacy in *AC (Syria)*, above n 89, at [39].
[92] Doug Tennent, Katy Armstrong and Peter Moses *Immigration and Refugee Law in New Zealand* (3rd ed, LexisNexis, 2016) at 335.
[93] *Samsudeen,* above n 5, at [72]-[77].
[94] Sections 130-131.
[95] Article 2 of the CAT contains an exclusion for torture incidental to, or inherent in lawful sanctions. New Zealand's s 130 does not incorporate that exclusion; See *Belgium v Senegal* [2012] ICJ Rep 422 at [99] where the ICJ definitively held that the prohibition of torture has become jus cogens.

governments.[96] Exceptional circumstances such as war, the threat of war, internal political instability, or any other public emergency *may not* be invoked as a justification for torture.[97] Section 130(1) provides that protected person status *must* be granted to individuals where there are substantial grounds for believing that the individual would be in danger of being subject to torture if deported from New Zealand.[98] Recognition as a protected person also denotes that the individual is unable to access meaningful domestic protection from that risk, for instance where the perpetrator is a non-state actor.[99]

Section 131(1) ensures the protection of rights provided under the ICCPR. It states that protected person status *must* be granted to individuals where there are substantial grounds for believing that the individual would be subject to arbitrary deprivation of life or cruel treatment if they were to be deported from New Zealand.[100] Section 131(6) states that cruel treatment means cruel, inhuman, or degrading treatment or punishment. Cruel and inhuman treatment is treatment that would outrage standards of human decency, inflicted on vulnerable persons under the control of people in authority.[101] Degrading treatment is humiliation which is substantial and unjustified. The duration of the treatment, its physical effects, the age, sex, and the vulnerability of the victim may all be relevant context.[102]

---

[96] Robert McCorquodale and Rebecca La Forgia "Taking off the Blindfolds: Torture by Non-State Actors" (2001) 1(2) Human Rights Law Review 189 at 196; Committee against Torture, Communication No 120/1998, UN Doc CAT/C/22/D/120/1998 (1998) [*Elmi v Australia*]; Rachel Lord "The Liability of Non-State Actors for Torture in Violation of International Humanitarian Law: An assessment of the jurisprudence of the International Criminal Tribunal for the Former YugoSlavia" (2003) 4(1) Melbourne Journal of International Law 112 at 128.

[97] Article 2(2); Emphasis added.

[98] Emphasis added.

[99] Section 130(2).

[100] ICCPR, arts 6-7; Emphasis added.

[101] Cruel and inhuman treatment under s 9 of the New Zealand Bill of Rights Act 1990 [Bill of Rights Act] is interpreted to outrage standards of decency following the Canadian approach in *R v Smith (Edward Dewey)* [1987] 1 SCR 1045.

[102] *Indelicato v Italy* (2001) 35 EHRR 1330 (ECTHR) at [31]; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 365; But see s 131(5)(a) which excludes lawful sanctions, and s 131(5)(b) which excludes inadequate medical care; For discussion of the medical care qualification, see Tennent, Armstrong and Moses, above n 92, at 338; Manfred Nowak and Elizabeth McArthur *United Nations Convention Against Torture: A Commentary* (2nd ed, Oxford University Press, 2008) at 340-343.

The factual basis for Samsudeen's eligibility for protection under the CAT and/or ICCPR is redacted in the public release of Crown Law's advice to the Government.[103] By implication, the Crown considered there were substantial grounds for believing that Samsudeen would have been subjected to torture, arbitrary deprivation of life and/or cruel treatment if deported to Sri Lanka. The [redacted] factual grounds were described as such that "Immigration NZ would not be able to oppose such a finding".[104] Whilst Immigration NZ considered it had grounds to cancel Samsudeen's refugee status on the basis it may have been procured through fraud, forgery or misleading representations, his factual circumstances evidently warranted a conclusion that he required international protection from threats of serious harm in Sri Lanka.

The most significant thread of the international protection regime is non-refoulement. This principle operated to prevent Immigration NZ from being able to deport and detain Samsudeen because he was a protected person. It has a significant standing in the international legal framework and was explicitly incorporated into the Immigration Act 2009.

Non-refoulement is the principle that *no* refugee or protected person should be returned or forcibly expelled to the countries they fled in the event such refoulement would cause the individual to be subject to persecution, torture, arbitrary deprivation of life or cruel treatment. The principle of non-refoulement had its first seeds planted in art 33(1) of the Refugee Convention which provides:

> No contracting state shall expel or return ("refoule") 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 [Convention grounds].

The principle permeates various subsequent human rights instruments[105] and has come to be recognised as customary international law.[106] Under art 3 of the CAT "no state party shall expel, return ("refouler") or extradite a person to another state where there are

[103] Crown Law Advice (8 July 2021), above n 83, at [3]-[5].
[104] At [5].
[105] See for example, the United Nations *Declaration on Territorial Asylum* GA Res 2312 (1967), art 3.
[106] Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (online ed, Oxford University Press) at 1344.

substantial grounds for believing that he would be in danger of being subject to torture". Substantial grounds are to be determined by competent authorities taking 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".[107] The ICCPR itself does not explicitly prohibit non-refoulement. However, the Human Rights Committee (HRC) established by the ICCPR,[108] confirmed that the ICCPR entails a non-derogable obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm,[109] either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[110] The obligation of New Zealand to protect an individual from torture, arbitrary deprivation of life or cruel treatment, is triggered by the territorial jurisdiction over the individual claiming protection *in* New Zealand, irrespective of where the anticipated rights-breach may occur.[111]

The principle of non-refoulement, in the context of the prohibition on torture, which itself is considered *jus cogens*,[112] is non-derogable in international law. The European Court of Human Rights held that where there is a real risk of torture or cruel treatment, deportation, extradition, or removal to another state cannot be justified based on national security or public safety concerns.[113] This aligns with the CAT's wording that "no exceptional circumstances whatsoever" can be invoked as a justification for torture.[114] This includes a state of public emergency or an order from a public authority.[115] Thus, it has great significance internationally.

---

[107] Article 3(2).
[108] Article 28.
[109] Such as that contemplated by arts 6 and 7 of the ICCPR.
[110] *UN Human Rights Committee General comment no. 31 [80] The nature of the general legal obligation imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (29 March 2004) at [12].
[111] Emphasis added. For further discussion on the extraterritorial application of international human rights law, see Maria Teresa Gil-Bazo "Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship" (2015) 34(1) RSQ 11-42.
[112] The status of *jus cogens* denotes an international norm with a higher standing than that of ordinary customary rules or treaty law; Andrew Butler and Petra Butler *Laws of New Zealand* Torture or Cruel or Disproportionately Severe Punishment or Treatment (online ed) at 85; See *Belgium v Senegal*, above n 95, at [99].
[113] *Chahal v United Kingdom* (1996) 23 EHRR 413 (ECHR); see Butler and Butler, above n 112, at 90.
[114] Article 2(2).
[115] Article 2(2)-(3).

Accordingly, New Zealand has incorporated non-refoulement into the Immigration Act 2009. Section 164(4) provides that protected persons can be deported, but not to a place in respect of which their right to be free from torture, arbitrary deprivation of life or cruel treatment are at risk. This circumscribes Immigration NZ's ability to detain and deport individuals.

B Complementary Protection versus the National Security Interest

International laws are ordinarily incorporated in a way that succumbs to national interests. This is true regarding New Zealand's incorporation of the Refugee Convention. The same, however, cannot be said of non-refoulement under the complementary regime.

1 Limits of the refugee regime

The benefit of refugee protection does not extend to claimants who have committed certain offences prior to seeking refuge.[116] This is a key barrier to attaining refugee status under the Refugee Convention. Article 1F states that the Convention does not apply to an individual if there are serious reasons to consider that the individual claimant has committed a crime against peace, a war crime or a crime against humanity;[117] a serious non-political crime outside of the country of refuge;[118] or has been guilty of acts contrary to the purposes and principles of the United Nations.[119] This exclusion clause targets crimes of international concern, crimes of a common serious nature, or acts having a particular international character, to relieve states of the responsibility to grant refuge to claimants that are 'undeserving' of refugee protection.[120]

Article 1F is codified in the Immigration Act 2009 as a matter for determination by a Refugee and Protection Officer during a refugee status determination.[121] Article 1F does not denote a balancing of the claimant's conduct against the alleged fear of persecution.

---

[116] Article 1F.
[117] Article 1F(a).
[118] Article 1F(b).
[119] Article 1F(c).
[120] *UNHCR 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) [UNCHR Guidelines].
[121] Section 137(2)(a)-(c).

Once the conduct threshold is established the claimant is automatically excluded from refugee status.[122] The purpose and effect of art 1F are to exclude from protection, those who have abused the human rights of others[123] and to deprive those guilty of heinous acts of an opportunity to abuse the institution of asylum to avoid being held legally accountable.[124] Yet, exclusion from refugee status may open another door; protection under the protected persons regime.

The Refugee Convention also limits the application of non-refoulement in respect of recognised refugees who present a future security threat in the country providing refuge.[125] Under art 33(2), the benefit of non-refoulement does not extend to refugees whom the state may regard as a danger to the security of the country or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. In tandem, art 32(1) provides that contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order.[126] Articles 33(2) and 32(1) are incorporated into the Immigration Act 2009 under ss 129 and 164. Section 164(1) legislates a presumption against the refoulement of refugees and protected persons, save in respect of *refugees* where arts 32 and 33 allow for it.[127] Non-refoulement under the refugee regime is, therefore, not absolute. The same national security exceptions to non-refoulement do not exist in respect of protected persons.

2 The ambit of complementary protection

The non-refoulement obligation in respect of protected persons is absolute. Although the complementary protection regime under the CAT and the ICCPR was not incorporated into domestic immigration law until the Immigration Act 2009, the Supreme Court grappled with the principle of non-refoulement a few years prior in the case of *Zaoui v Attorney-General (No 2)* (*Zaoui (No 2)*).[128]

---

[122] *RDS v The Refugee Status Appeals Authority & the Minister of Immigration* [1998] CA262/97.
[123] *BN (Malaysia)* [2020] NZIPT 801684 at [192].
[124] *CK (China)* [2017] NZIPT 800775 at [420]-[421]; UNCHR Guidelines, above n 120.
[125] UNCHR Guidelines, above n 120, at [4].
[126] Article 32(2)-(3) requires that the expulsion of such a refugee be only in pursuance of a decision reached in accordance with due process of law.
[127] Sections 129(2) and 164(3).
[128] *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 [*Zaoui (No 2)*].

In *Zaoui (No 2)*, Mr Zaoui, an Algerian national, had been granted refugee status in New Zealand but was issued a security risk certificate on the grounds that he presented a danger to national security. Under s 72 of the Immigration Act 1987, if the Minister certified that Mr Zaoui's continued presence in New Zealand constituted a threat to national security, the Governor-General could, by Order in Council, order the deportation of Mr Zaoui from New Zealand. However, Mr Zaoui claimed that he would be subject to torture or arbitrary deprivation of life should he be deported to Algeria. This led to the Court's consideration of art 33(2) – the exception to New Zealand's non-refoulement obligation in respect of refugees.

The Court held that upon finding that a refugee presented a threat to national security, art 33(2) on its own terms, had the effect of excluding the individual from the benefit of non-refoulement. The Court rejected the proposition that art 33(2) had been amended by subsequent international instruments which prohibited the return of individuals to torture, but stated that the subsequent CAT and ICCPR had to be applied in a successive way.[129] Whilst there was overwhelming support for the proposition that the prohibition on torture is *jus cogens*, the Court rejected that non-refoulement to torture has acquired such status.[130] Nevertheless, the Court held that the Minister's right to deport an individual under s 72 of the Immigration Act 1987, ought to be interpreted consistently with the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).[131] The Bill of Rights Act embodied New Zealand's commitment to the ICCPR.[132] Echoing arts 6 and 7 of the ICCPR, the Bill of Rights Act provided that no person shall be arbitrarily deprived of life, or subject to torture or cruel, degrading or disproportionally severe treatment or punishment.[133] The Court considered that these rights applied universally, giving New Zealand obligations to protect individuals against foreseeable rights breaches in other

[129] At [50]. The Court was operating under the Refugee Convention only as the CAT and the ICCPR had not yet been incorporated into domestic law. Successive application should occur in light of art 3 of the CAT, and art 7 of the ICCPR, which categorically forbid a return to torture, overriding art 33(2) of the Refugee Convention which prima facie appears to allow a return to torture using a national security justification; *UN Human Rights Committee CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* UN Doc A/44/40 (10 March 1992); See David Jenkins "Rethinking *Suresh:* Refoulement to Torture under Canada's Charter of Rights and Freedoms" (2009) 47 Alberta L Rev 125 at 145.

[130] *Zaoui (No 2)*, above n 128, at [51].

[131] Section 6 requires domestic legislation to be interpreted in a manner consistent with the New Zealand Bill of Rights Act 1990 where possible.

[132] Long title (b).

[133] Sections 8 and 9.

countries. Interpreting s 72 consistently with the Bill of Rights Act, meant that an individual could not be deported to a substantial risk of torture or death *even if* they constitute a security threat to New Zealand.[134] This placed a substantial limitation on the ability of art 33(2) to facilitate the refoulement of refugees on national security grounds, where refoulement would subject the individual to a substantial risk of torture or death.[135] Some commentators argue that despite the Court's rejection that the principle of non-refoulement to torture was *jus cogens*, the decision indirectly implemented such a norm.[136]

The Immigration Act 2009 explicitly incorporates a separate complementary protection regime addressing non-refoulement. Therefore, a detour through the Bill of Rights Act is no longer necessary to protect individuals from refoulement to torture, arbitrary deprivation of life or cruel treatment.[137] Under s 164(4) protected persons *may* be deported, but *not* to a place in respect of which there are substantial grounds for believing that the person would be in danger of being subject to torture, arbitrary deprivation of life or cruel treatment.[138] This absolute protection against refoulement to such rights violations surpasses that afforded to refugees on the face of the Refugee Convention. Significantly, an individual may be denied refugee status (art 1F) or protection from refoulement (arts 32 and 33) based on characteristics (prior offending or future security risk) that the Refugee Convention deems undeserving of refuge, but resort to the complementary protection regime, in respect of which non-refoulement is absolute.

Whilst s 164(4) prevented Samsudeen from being deported, the Immigration Act 2009 does require the decision maker, a Refugee and Protection Officer or the Tribunal, to undertake an inquiry which mirrors the art 1F exclusion in the Refugee Convention.

---

[134] Emphasis added.

[135] For further discussion on the judges' reasoning see Justice Susan Glazebrook "Refugees, Security and Human Rights: Working out the Balance" (paper presented to Critical Issues in Regional Refugee Protection Conference, Sydney, February 2010).

[136] Lisa Yarwood "Zaoui and jus cogens" [2006] NZLJ 170 at 171, Christine Brickenstein "An Evaluation of the Zaoui Case" [2009] NZLJ 356 at 359.

[137] Zaoui calls into question the thrust of art 33(2) as it demonstrates that even refugees who have not had their status cancelled, may also be considered protected persons (i.e., simultaneously as opposed to in the alternative) to whom non-refoulement applies. However, given that judgment took a somewhat convoluted detour through the Bill of Rights Act, and prior to the Immigration Act 2009, which explicitly codifies a separate complementary protection regime, simultaneous recognition is unlikely to hold strong today.

[138] Emphasis added.

Under s 137(3) the Refugee and Protection Officer, or under s 198(1)(c) the Tribunal, must determine whether there are serious reasons for considering that the protected person claimant has (a) committed a crime against peace, a war crime, or a crime against humanity; or (b) committed a serious non-political crime outside New Zealand; or (c) been guilty of acts contrary to the purposes and principles of the United Nations. To avoid doubt, s 137(3) states that this inquiry must not be used as grounds to refuse a claim by the person concerned for recognition as a protected person and is relevant only if the person *is* recognised as a protected person.[139] The consequence of an answer in the affirmative is that the Minister must determine the immigration status of the protected person under ss 139 and 199.

Sections 137(3) and 198 amount to a departure from our international obligations under the CAT and the ICCPR, which call for no such inquiry. It attempts to safeguard against an all-inclusive complementary protection regime which compromises national security. The Sovereign right to control the border emerges as a last measure to limit the overreach of our international obligations and ensure that protected persons are not entirely immune from an inquiry into their past criminal or offending behaviour.

It is unclear whether Samsudeen's protected person status was formally assessed by Immigration NZ after receiving Crown Law's advice on 8 July and prior to the 3 September terror attack. Had they done so, it is doubtful that Samsudeen would have fallen within the scope of s 137(3) in any case. Section 137(3)(a) and (c) are directed at acts of the most egregious nature such as war crimes, crimes against humanity, or acts contrary to the purposes and principles of the United Nations.[140] As explained above, s 137(3) derives from art 1F of the Refugee Convention. The notion of "acts contrary to the purposes and principles of the United Nations" was intended to capture human rights violations of an "exceptional nature" though falling short of crimes against humanity. A UN delegate stated, "the provision was not aimed at the man-in-the-street, but at persons occupying Government posts, such as heads of states, ministers and high officials".[141] Whilst Samsudeen was guilty of various domestic offences in New Zealand such as

[139] Emphasis added.

[140] UNHCR Guidelines, above n 120, at 9.

[141] *UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003); *UNCHR Statement on Article 1F of the 1951 Convention* (July 2009) at [2.3.2].

knowingly distributing restricted material, it is safe to conclude that his offending did not fall within the ambit of s 137(3)(a) or (c).

There is also no evidence that Samsudeen could be properly regarded as having committed a serious non-political crime before entering New Zealand, to fall within s 137(3)(b). Article 1F was not considered by the Tribunal when it granted Samsudeen refugee status. The Tribunal explicitly referred to non-refoulement, noting that "[Samsudeen] cannot be deported from New Zealand, by virtue of section 129(2) of the Act (the exceptions to which do not apply)".[142] The statement that arts 32(1) and 33(3) did not apply, suggests that Samsudeen was not considered to present a risk or threat to national security at the time of his entry to New Zealand.

The question remains as to what options are open to the Minister when referred a case from a Refugee and Protection Officer or the Tribunal because the protected person's past behaviour includes an art 1F crime. The Immigration Policy is silent as to the issue of what kind of immigration status is likely to be granted to such individuals, and what are the relevant factors for the Minister to consider.[143] Some authors suggest that this ministerial discretion allows for the deportation of non-citizen protected persons in limited circumstances.[144] This is questionable in light of the obligation of non-refoulement, the golden thread of the protected person regime. My Official Information Act request to the Minister of Immigration revealed that since 2016 the Minister was deferred 12 decisions, in respect of persons guilty of certain acts under s 137(3).[145] Of these decisions made, eight were to grant a work visa, one was to grant a visitor visa, one was to grant permanent residency, and two were to decline to intervene.[146] These findings suggest that deportation is not a common practice if even considered at all.

---

[142] *Samsudeen*, above n 5, at [74].

[143] Rodger Haines "Sovereignty under Challenge - The New Protection Regime in the Immigration Bill 2007" (2009) NZ L Rev 149 at 184.

[144] Tennent, Armstrong and Moses, above n 92, at 344.

[145] Hon Michael Wood *Information regarding action under ss 139 and 199 of the Immigration Act 2009* (11 July 2022) (Obtained under Official Information Act 1982 Request to Minister of Immigration).

[146] The Minister refused to release information about decisions made prior to 2016 on the basis such release would require substantial collation, removing staff from their core duties, and that records were not available in an easily reportable format.

Similarly, the Immigration Act 2009 is silent as to the immigration status to be granted to recognised protected persons, but Immigration NZ's guidance to claimants states:[147]

> Recognition as a refugee or protected person means that you are allowed to stay in New Zealand and you may apply for a temporary entry class visa or a resident visa. Adults who are recognised as refugees or protected persons will first be granted work visas.

However, under s 16 of the Immigration Act 2009, no visa or entry permission may be granted, and no visa waiver may apply to, any person whom the Minister has reason to believe is likely to commit an offence in New Zealand that is punishable by imprisonment; or is or is likely to be a threat or risk to either; security, public order, or the public interest. Section 16 performs a similar function to deference to the Minister of past offending under s 137(3). It enables the Minister to undertake a prospective assessment of an individual's likelihood of future offending or security risk. Yet, like deference under s 137(3), the application of s 16 to protected persons puts the Minister in an undefined position of authority. Samsudeen may have been barred from exercising his right of lawful residence under s 16, yet as a protected person – he had a right *not to be refouled* under s 164.[148] This contradiction is compounded by the fact that non-refoulement in international law does not denote a right to lawful residence or social benefits.[149] This gap in the legislation defining courses of action open to the Minister may attract an amendment in light of Samsudeen's attack. However, it remains questionable whether any amendment should pave the way for the Minister to deport a protected person based on a security risk.

C In Summary

Samsudeen fell within the ambit of complementary protection on the basis he would have been subjected to torture, arbitrary deprivation of life and/or cruel treatment if deported to

---

[147] Immigration New Zealand *Claiming Refugee and Protection Status in New Zealand* (March 2021) at 13.

[148] Emphasis added.

[149] This can be contrasted with the Refugee Convention which requires states to ensure that refugees are afforded minimum rights, including rights of association (art 15), access to the courts (art 16), employment (art 17-18), education (art 17-19) and most importantly, a right to lawful residence (implicit in art 32 relating to non-expulsion, art 33 relating to non-refoulement and art 34 relating to naturalisation). There is no suggestion in the CAT, the ICCPR, nor the Immigration Act 2009, that such rights are guaranteed for protected persons; Hemme Battjes "Subsidiary protection and other forms of protection" in Vincent Chetail and Céline Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014) at 546-548.

Sri Lanka. Whilst Immigration NZ considered his refugee status may have been improperly obtained, the factual grounds founding his fears of persecution remained, warranting protection from severe human rights violations in Sri Lanka.

What's more, complementary protection has been incorporated in a way designed to override the national security interest. It goes beyond the protection afforded to refugees. Refugee status is only granted to persons fleeing the prescribed grounds of persecution, and to those of 'good character' – who have not committed certain crimes.[150] Further, the Refugee Convention anticipates the deportation of refugees who pose a threat to the national security of the country providing refuge.[151] However, non-refoulement in respect of persons otherwise eligible for complementary protection is broad and absolute.[152] There are no comparable national security safeguards. The position was expressly considered by the Supreme Court in *Zaoui (No 2)* before the CAT and the ICCPR had been explicitly incorporated into the Immigration Act 2009, and even then, non-refoulement was upheld using the Bill of Rights Act. Now, explicitly under s 164(4), protected persons may not be deported to risks of torture, arbitrary deprivation of life or cruel treatment.

The Immigration Act 2009 does operate to prevent such persons from being granted a visa under s 16 but is silent as to the consequence for the individual of attaining protected person status *and* falling within a s 16 category. The Minister's authority to determine the individual's immigration status is undefined, but it appears this discretion does not absolve New Zealand of its non-refoulement obligation.

This complex intersection of domestic immigration laws and our international obligations represents the key tension that came to fruition in the months preceding Samsudeen's attack. The obligation to grant humanitarian protection to individuals fleeing severe rights violations conflicts with, and overrides, the interest in protecting New Zealanders from harm posed by those individuals. We are yet to see progress on the promised "full sweep" of immigration law reforms that are still under consideration by the Government, now

[150] Article 1F.

[151] Articles 33(2) and 32(1).

[152] Unlike the Refugee Convention, complementary protection is not limited to prescribed convention grounds, for example, the threat of rights violations may be indiscriminate.

one year post Samsudeen's attack.[153] It is difficult to imagine what kind of immigration reform is practicable without breaching our non-refoulement obligations, where the individual has genuine and serious fears of torture, arbitrary deprivation of life, or cruel treatment in their home country. How will the Legislature balance these competing interests? Is a departure from non-refoulement on national security grounds justifiable?

IV Immigration Law as a Counter-Terrorism Measure

This part considers the broader context in which the Government is looking to reform our immigration law. I question why officials are resorting to immigration reform; and whether this direction is justified in light of Samsudeen's attack. This requires an exploration of how immigration law came to be conflated with issues of national security – securitisation – a theme used to justify and explain often arbitrary and racist immigration policies. I consider that caution is necessary in view of some historical examples of reactive legislating under the guise of national security concerns, specifically drawing upon the decision of *D v Minister of Immigration* and the impact of a previous Immigration NZ operational instruction.[154] In addressing *why* officials have turned to immigration reform nonetheless, it is necessary to recount the shortcomings of our counter-terrorism response. Recent amendments to the Terrorism Suppression Act 2002, even had they preceded Samsudeen's attack, would not have made any material difference in Samsudeen's case. Thus, immigration arose as the system alternatively responsible. However, the link between immigration and terrorism is overstated given multiple studies which suggest that in-country socio-economic factors are significantly more influential in cultivating terrorism than the fact of migration from overseas. I briefly consider how Samsudeen's circumstances as an asylum seeker and treatment by authorities as an asylum seeker and offender, rendered him exceptionally vulnerable to radicalisation, to condemn immigration reform in response to a non-immigration issue.

A Securitisation

I employ the term 'securitisation' to describe how migration in of itself is framed as a security issue – a theme used to justify and explain often arbitrary and discriminatory immigration policies. The securitisation of immigration law became politically unopposed across Western democracies following the terrorist attacks of 11 September

[153] Bonnett, above n 21; Dexter and Corlett, above n 20.

[154] *D v Minister of Immigration* [1991] 2 NZLR 673.

2001 (9/11).[155] Securitisation was, however, the central theme of most Western immigration policy agendas prior.[156] Immigration regulation is by nature an exercise of state sovereignty. States are increasingly concerned with controlling who enters their territory and on what terms they reside in the wake of globalisation. The concern is underscored by the fear of what would happen if our borders were in fact open.[157] According to Dauvergne, the discussion of open borders dissipated in the 1980s due to an unspoken quasi-consensus by Western policy-makers, that liberal democracies would be adversely impacted by an influx of immigrants from "poorer, sicker, browner regions of the world".[158]

The post-9/11 spotlight on global terrorism led to migrants being framed overtly as a threat to territorial integrity and national security, with an 'us' and 'them' dialogue marking most high-profile terrorist attacks.[159] The events provided states with a justification for reactive legislative measures to harden borders. These justifications were quickly reinforced by the 2004 Madrid train bombings,[160] and the 2005 London Attacks.[161] The United Nations High Commissioner for Refugees reported that in the year following 9/11, asylum seekers and refugees were increasingly subjected to attack, arrest, abduction, mass round-ups and detention and deportation.[162] New Zealand is not exempt from some of these practices. Two significant examples involve the Court of Appeal upholding immigration decisions (*D v Minister of Immigration*) and Immigration NZ

---

[155] At 82; See also Catherine Dauvergne "Security and Migration Law in the Less Brave New World" (2007) 16(4) Social and Legal Studies 533.

[156] Particularly so following the 1993 attacks on the World Trade Centre; See Idil Atak and FranÁois Crépeau "National security, terrorism and the securitization of migration" in Vincent Chetail and Céline Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014). See also Australia's treatment of Afghan refugees; J Olaf Kleist "Refugees between pasts and politics: sovereignty and memory in the Tampa crisis" in Klaus Neumann and Gwenda Tavan (eds) *Does History Matter? Making and debating citizenship, immigration and refugee policy in Australia and New Zealand* (ANU E Press, Canberra, 2009).

[157] Catherine Dauvergne "Irregular migration, state sovereignty and the rule of law" in Vincent Chetail and Céline Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014) at 76-79.

[158] At 83.

[159] Dauvergne, above n 155, at 87.

[160] Fernando Reinares *Al-Qaeda's Revenge: The 2004 Madrid Train Bombings* (Columbia University Press, 2016).

[161] Mark Phythian "Intelligence policy-making and the 7 July 2005 London bombings" (2005) Crime Law Soc Change 361.

[162] *UNHCR Agenda for Protection [Global Consultations on International Protection/General* UN Doc A/AC.96/965/Add.1 (26 June 2002).

operational instructions (*Attorney-General v Refugee Council of New Zealand Inc*), that, despite being squarely problematic in light of our international obligations, were considered justified by national security concerns.

Even before 9/11 the New Zealand Government and Judiciary were hyper-aware of the 'threat to security' posed by migrants. This attitude, coupled with the then government's neglect to incorporate the Refugee Convention into domestic legislation until 1999, was not inconsequential.[163] The 1991 case of *D v Minister of Immigration* represents a grave breach of New Zealand's non-refoulement obligations under the Refugee Convention, despite its ratification in 1960.[164] This case concerned individuals of Pakistani ethnicity and Muslim religion, who arrived in New Zealand without passports during the Gulf War. They were refused temporary entry permits and detained as unlawfully in the country.[165] They claimed refugee status, but the Police intervened on the grounds that they did not have a security clearance and fitted the "general profile" of terrorists. The Court of Appeal dismissed a challenge to the lawfulness of the Minister's direction that the refugee claimants be deported in the absence of passports or security clearance. The Court observed that because of the security risk "Government officers may have to at times send away, and perhaps back to persecution, persons who may have genuine reasons to fear persecution for their political beliefs".[166] Their claims to refugee status were left undetermined and they were deported despite there being no evidence that the claimants did in fact constitute a security risk or have any link to terrorism.[167] The Refugee Convention was only subsequently incorporated into domestic legislation by the Immigration Amendment Act 1999. Whilst this decision would not be justifiable under the Immigration Act 2009, *D v Minister of Immigration* is a significant historical example of how the then Government and Judiciary disregarded refugee claimants' rights to seek asylum, rights have their claims considered, and rights not to be refouled to persecution, all under the guise of national security.

---

[163] Immigration Amendment Act 1999, repealed under s 404 of the Immigration Act 2009.

[164] Above n 154; Also see Justice Susan Glazebrook "Protecting the Vulnerable in the Twenty-First Century: an International Perspective" (Paper presented at Shirley Smith conference, Wellington, 17 September 2014).

[165] Under s 128 of the Immigration Act 1987.

[166] *D v Minister of Immigration*, above n 154, at 676.

[167] Haines, above n 143, at 164.

One week after 9/11, Immigration NZ issued an Operational Instruction to guide immigration officers in exercising their discretion under s 128(5) of the Immigration Act 1987 to justifiably detain refugee claimants in a penal institution.[168] The Instruction provided various justifications for detention, such as where there was reason to suspect that the claimant has been convicted of a serious crime or may have facilitated or engaged in an act of terrorism. The Instruction cited art 31 of the Refugee Convention in providing that detention should occur only where necessary but added that immigration officers ought to "take account of the prevailing security situation, both in New Zealand and globally". Prior to the Instruction, only 5% of asylum seekers were detained based on a flight or security risk. This increased to 94% immediately after the Instruction was issued. Baragwanath J in the High Court found that the Instruction was unlawful and in breach of New Zealand's commitments under the Refugee Convention.[169] The Court of Appeal disagreed. It considered the Instruction to be lawful against the backdrop of the national security consciousness warranted by 9/11.[170] The Court held that it was not appropriate to allow a determination of the lawfulness of the Instruction to be coloured by its implementation,[171] because the Instruction itself was held not to denote any presumption towards detention.[172] Notwithstanding the Court of Appeal's finding, the Instruction examples a reactive migration policy embedded with security logic that facilitated Immigration NZ's systematic and arbitrary detention of those fleeing persecution.

It is in the context of these heightened security concerns that the Immigration Act 2009 was enacted. It is, therefore, momentous that the Legislature incorporated the complementary protection regime for protected persons under the Immigration Act 2009, thereby constraining their territorial and decision-making sovereignty given the absoluteness of non-refoulement. It was arguably a natural progression from the highly publicised, 2005 case of *Zaoui (No 2)* discussed above.[173] In that case, the Supreme Court

---

[168] New Zealand Immigration Service *Operational Instruction: Exercise of discretion pursuant to section 128(5) of the Immigration Act 1987 to detain persons who have claimed refugee status* (19 September 2021).

[169] *Refugee Council of New Zealand Inc v Attorney-General (No 2)* [2002] NZAR 769 (HC).

[170] *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA); Atak and Crépeau, above n 156, at 124; Glazebrook, above n 135, at 13-14.

[171] At [31] per Justice Tipping.

[172] Justice Glazebrook recognised that heightened security concerns may create a bias toward detention, and suggested variations to the Instruction which were subsequently implemented by Immigration NZ; At [295]; Glazebrook, above n 135, at 15.

[173] *Zaoui (No 2),* above n 128.

indicated a willingness to protect individuals from refoulement through the ICCPR protections enshrined in the Bill of Rights Act. It stood against the tide of securitised migration policy – in genuine recognition of our international obligations. However, recent events of localised terrorism have rendered New Zealand's immigration law landscape ripe for reforms following the trend of securitisation.

B Justifying an Immigration Response

The Government's movements towards immigration reform are justified less so by the existence of a significant link between immigration and terrorism, and more so by the political need to *do something* in response to Samsudeen's attack.

The most logical subject for law reform is counter-terrorism legislation. Naturally, the post-attack moral panic engendered public frustration towards the Government's slow progression of adequate counter-terrorism laws.[174] However, this discourse prevailed despite the acknowledgement that a faster progression of the Counter-Terrorism Legislation Bill 2021, which was partway through the legislative process at the time of Samsudeen's attack, would have made no material difference in Samsudeen's case.

In a political rush to reassure New Zealanders, the Bill passed its third reading just three weeks after Samsudeen's attack, receiving royal assent on 4 October 2021.[175] The Counter-Terrorism Legislation Act amends the Terrorism Suppression Act 2002 to criminalise the planning and preparation of a terrorist offence.[176] The new s 5A extends the definition of a "terrorist act" to include the planning or other preparations to carry out the act, whether it is carried out or not. Section 6B stipulates that a prosecutor must prove that the preparatory acts are done with the intent to cause death or serious bodily injury to one or more persons, for the purpose of advancing an ideological, political, or religious cause. I do not form a view on the general merit of the amendment, except to note that it

[174] "New Zealand counter-terrorism legislation outdated - law experts" *Radio New Zealand* (online ed, New Zealand, 4 September 2021); "Grant Robertson on counter-terror laws: 'It is important to get this right'" *Radio New Zealand* (online ed, New Zealand, 6 September 2021).
[175] (29 September 2021) NZPD 754 (Counter-Terrorism Legislation Bill, Third Reading).
[176] Section 6B(1).

would unlikely have empowered the Police or prosecutors to do anything differently in Samsudeen's circumstances.[177]

The Act still requires the "three pillars of a terrorist attack, in terms of motivation, intent, and purpose",[178] an evidential threshold which was not met in July 2021 when the Crown unsuccessfully sought to bring charges against Samsudeen for his acquisition of a hunting knife, under the Terrorism Suppression Act 2002.[179] In that case, Downs J dismissed the application to bring terrorism charges on the basis that Samsudeen's acquisition of a knife, even against the backdrop of his repeated dissemination of violent extremist material online, including expressions of support for terrorist attacks by the Islamic State, "does not readily admit an inference of an intention to induce terror in a civilian population".[180] Without the benefit of hindsight, it is questionable whether such charges would have succeeded under the additional preparatory offence inserted through s 5A and 6B of the amendment Act. This represents yet another example of reactive legislating to alleviate political scrutiny, albeit one that is not rationally applicable to the situation that the Legislature is being compelled to respond to.

There are inherent limitations to countering terrorism through legal frameworks generally. The spontaneity with which terrorist acts are often carried out makes them extremely difficult to foresee and prevent. The threshold for intent is a high one to cross in respect of preparatory acts. Following Samsudeen's attack, the Prime Minister, with an inkling of helplessness, stated:[181]

> If he had committed a criminal act that would have allowed him to be in prison, that's where he would have been. Unfortunately, he didn't ... instead he was being monitored constantly.

---

[177] "Laws "outdated and deficient" - Dr John Battersby" *Radio New Zealand* (online ed, New Zealand, 4 September 2021); "Professor Andrew Geddis on proposed terrorism law changes" *Radio New Zealand* (online ed, New Zealand, 4 September 2021).
[178] "Counter-terrorism bill passes third reading" *Radio New Zealand* (online ed, New Zealand, 30 September 2021).
[179] *R v Samsudeen* [2020] NZHC 1710.
[180] At [36].
[181] Menon, above n 4.

Given the inapplicability of the counter-terrorism amendments and the lack of criminal charges generally available to deal with Samsudeen, *immigration* arose as the alternative legal culprit for reform. Much was said of Samsudeen's status as a Sri Lankan national, as a refugee, and as an outsider. The media and public discourse mirrored that following the Christchurch Mosque attacks of 2019 which contained numerous references to the terrorist's identity as an Australian citizen. The Prime Minister assured New Zealand that "…the person who committed these acts was not from here. He was not raised here. He did not find his ideology here".[182] Similarly, Samsudeen's immigration status was repeatedly emphasised as part and parcel of his terrorism. This 'us' and 'them' rhetoric similarly imitates the legislative fallout of 9/11. It feeds a xenophobic rhetoric that migrants and refugees are inherently dangerous and amplifies public scrutiny of the immigration system.[183]

It is acknowledged that there is some correlation between migration and terrorism. Leikin and Brooke, in their study of 400 global jihadist terrorists, note that while most immigrants are not terrorists, most terrorists tend to be immigrants.[184] However, the nexus should not be overstated, as various studies undermine claims of causation. A 2017 empirical study of data from 20 OECD host countries and 183 countries of origin, over a thirty-year period, found little evidence that terrorism is systematically imported through immigration, even from countries where terrorist networks prevail.[185] Similarly, a 2019 analysis of migration data for 170 countries, from 1990 to 2015, found no significant correlation between increases in the share of immigrants from abroad and higher rates of terrorism.[186] This study controlled for host-country economic factors such as the quality of institutions, the rule of law, and equality in social and justice systems, which were

[182] (19 March 2019) 737 NZPD (Ministerial Statements – Mosque Terror Attacks Christchurch, Rt Hon Jacinda Ardern).

[183] Ilya Somin "Does the Threat of Terrorism Justify Migration Restrictions?" (30 March 2022) Verfassungsblog – On Matters Constitutional https://verfassungsblog.de/os5-migration-restrictions/.

[184] Robert Leiken and Steven Brooke "The Quantitative Analysis of Terrorism and Immigration: An Initial Exploration" (2006) 18(4) TPV 503 at 521. See also Vincenzo Bove and Tobias Böhmelt "Does Immigration Induce Terrorism" (2016) 78(2) JOP 572 at 588; Daniel Milton, Megan Spencer and Michael Findley "Radicalism of the Hopeless: Refugee Flows and Transnational Terrorism" (2013) 38(5) Int Interact 621 at 645.

[185] Axel Dreher, Martin Gassebner and Paul Schaudt "The effect of migration on terror: Made at home or imported from abroad?" (2020) 54(4) CJE 1703 at 1744.

[186] Andrew Foster, Benjamin Powell, Alex Nowrasteh and Michelangelo Langrave "Do immigrants import terrorism?" (2019) 166 J Econ Behav Organ 529.

recognised as otherwise having a critical impact on the threat of terrorism.[187] The results held true for individuals migrating from countries that were conflict-torn or with high levels of terrorist activity.[188] Both the 2017 and 2019 studies make clear that "fear-of-terrorism inspired restrictions on immigration, Muslim immigration, and immigration from conflict countries are misguided".[189] They suggest that immigration is not the driver of terrorism, despite equally valid findings that most terrorists do tend to be migrants.[190] The Government's focus on immigration reform, should, therefore, be treated with caution.

I am not suggesting that the threat of terrorism should be subject to complacency in the legislative arena.[191] However, the focus on immigration legislation is unjustified given the more predominant drivers of terrorism. Lacking in acknowledgement at a government level, was the intersection of aggravating socio-economic factors faced by Samsudeen and inherent in his involvement with the asylum and criminal justice process. These experiences likely rendered him vulnerable to radicalisation during the 10 years that he resided in New Zealand.[192]

C Social Alienation and Criminalisation

Socio-political alienation[193] and economic deprivation, such as discriminatory access to healthcare, jobs and education, are major drivers of radicalisation.[194] In particular, domestic approaches to the integration of migrants and refugees into local communities significantly impact the probability that they will become radicalised and turn to terrorism.[195]

---

[187] At 531.
[188] At 542.
[189] At 542.
[190] Leiken and Brooke, above n 184, at 521.
[191] This has arguably been the case as the threat of terrorism in the 21st century has naively been recognised as predominantly one of international concern; John Battersby and Rhys Ball "Christchurch in the context of New Zealand terrorism and right wing extremism" (2019) 14(3) JPICT 191.
[192] See generally, Milton, Spencer and Findley, above n 184, at 628.
[193] Alex Wilner and Claire-Jehanne Dubouloz Homegrown Terrorism and Transformative Learning: An Interdisciplinary Approach to Understanding Radicalization" (2010) 22(1) Glob Change Peace Secur 33 at 51.
[194] James Piazza "Poverty, Minority Economic Discrimination, and Domestic Terrorism" (2011) 48(3) J Peace Res 339 at 353.
[195] Dreher, Gassebner and Schaudt, above n 185, at 1709.

Samsudeen's radicalisation, subsequent to being granted refugee status in New Zealand, may be partially attributable to the lack of resettlement support offered to him as an asylum seeker and convention refugee. Immigration NZ excludes convention refugees from the New Zealand Refugee Resettlement Strategy causing them to miss out on the health, housing and educational opportunities otherwise afforded to quota refugees to assist in their resettlement and integration into the community.[196] Samsudeen was a convention refugee, as he did not travel to New Zealand through the quota, and thus missed out on this integral co-ordinated support.

When Samsudeen left his course of study to apply for asylum, the Auckland education provider refused him a refund and threatened to report him to immigration for breaching the terms of his student visa. He wrote to Immigration NZ explaining his plight. Whilst awaiting a refugee status determination, his immigration adviser described him as "destitute".[197] When the Tribunal first considered his claim in 2012, he was not considered to be a threat or risk to security. That hearing revealed Samsudeen's mental health struggles with major depression and post-traumatic stress disorder from sustained exposure to traumatic events in Sri Lanka. A clinical psychologist, Ms McFadden, advised the Tribunal that Samsudeen's "acute experience of trauma, separation from his family, ongoing fears for his parents' safety, the refugee claims process and the lack of certainty about his future" triggered severe symptoms of a major depressive episode.[198] She found Samsudeen had an "impaired sense of self-reference", exacerbated by his current social isolation and untreated post-traumatic stress disorder.[199] Despite this explicit finding before the Tribunal, there is no evidence of any mental health support being offered to Samsudeen during the asylum process, nor after the Tribunal granted him refugee status. For example, Refugees as Survivors, an organisation targeted towards providing mental health support to refugees, has no record of Samsudeen ever being referred to its service.[200]

---

[196] Chris Mahony, Jay Marlowe, Natalie Baird and Louise Humpage "Aspirational yet precarious: Compliance of New Zealand refugee settlement policy with international human rights obligations" (2017) 3(1) International Journal of Migration and Border Studies 5.

[197] Bonnett, above n 13.

[198] *Samsudeen*, above n 5, at [28].

[199] At [31].

[200] Casinader, above n 14.

Not only was Samsudeen isolated and suffering from mental illness, but he was also prevented from leaving New Zealand on his own accord in 2017. Whilst NZSIS suspected his departure was associated with joining overseas terrorist groups, there is no evidence that these suspicions were founded. He was subjected to criminalisation at every opportunity and labelled a terrorist. A criminologist and terrorism researcher suggests that this terrorist profile and labelling may have masked the root causes of his behaviour and impeded his chance of rehabilitation.[201]

An NZSIS briefing reveals that Corrections did not offer Samsudeen any rehabilitative programmes whilst he was in custody, nor did it attempt to mitigate the risk of his radicalisation. Instead, Corrections applied management strategies such as segregation in Paremoremo's special maximum-security prison unit.[202] This directly contradicts the literature which finds that policies segregating foreign-nationals in-country leads to further alienation and resistance, increasing the risk of recourse to terrorism, rather than reducing it.[203] To compound matters, recent Corrections disclosures have revealed that Samsudeen was also assaulted multiple times while in custody.[204]

Samsudeen had called upon Auckland defence barrister Aarif Rasheed for help in 2017. It was apparent to Rasheed that Samsudeen was extremely isolated and in need of human connection.[205] Rasheed considered that Samsudeen was particularly vulnerable to radicalisation due to being isolated from a formal religious tradition and aggrieved by political and social issues. Rasheed proposed a formal rehabilitation plan focusing on Islamic education and social connection, a plan that was ultimately endorsed and ordered by Justice Wylie in 2017, but never implemented by authorities, due to the Police laying fresh charges against Samsudeen to bring him back into custody. Rasheed publicly stated:[206]

> Our deradicalisation programme, which was part of his original sentence, would have required him to go on a journey with us, and get some perspective on what he had done… They could have monitored him in the community while we were doing

[201] Casinader, above n 14.
[202] Bonnett, above n 13; Casinader, above n 14.
[203] At 1708.
[204] Phil Pennington "Corrections documents reveal LynnMall attacker was assaulted twice in prison" *Radio New Zealand* (online ed, New Zealand, 23 May 2022).
[205] Casinader, above n 14.
[206] Casinader, above n 14.

> this. But before we could even begin, he was put behind bars again… It's almost impossible to convince someone that they're not under siege when the state keeps putting them in prison. It allowed him to remain in his delusion that he was crusading against the state.

An in-depth analysis of the systematic issues, present in asylum and criminal justice processes, affecting Samsudeen is beyond the scope of this paper. However, it is pertinent to note, that Samsudeen's radicalisation and security status matured during his 10 years spent *in* New Zealand.[207] Samsudeen's radicalisation was, therefore, somewhat attributable to the environment in which he sought asylum and was criminalised. In light of this, it is difficult to view immigration law amendments to facilitate deportation in such cases, at the expense of non-refoulement, as anything other than a deflection of responsibility.

D In Summary

As outlined earlier in this paper, Samsudeen's case demonstrates that our immigration framework is not equipped to deal with terrorists. However, legislative change amidst a heightened security consciousness may result in unnecessary departures from our moral and legal obligations to those fleeing severe harm (non-refoulement).

The Government's implicit motivation to legislate away non-refoulement in respect of protected persons is grounded less so in a rational link between immigration and terrorism, and more so, in attempts to reassert its sovereignty and politically reassure the public that it *is* responding to Samsudeen's attack.[208] This political reframing of terrorism as an immigration issue further perpetuates the public perception that migrants or refugees are inherently capable of terrorism, requiring a non-citizen-specific response. Yet, an immigration response would provide nothing more than a distraction from the failings of our domestic approach to countering terrorism. The harmful impacts of our inadequate resettlement support for refugees and asylum seekers and inadequate rehabilitation of offenders will continue to see marginalised individuals vulnerable to radicalisation.

---

[207] "LynnMall attacker 'brainwashed' by neighbours, mother says" *Radio New Zealand* (online ed, New Zealand, 5 September 2021); "LynnMall terrorist's family: 'We are heartbroken'" *Radio New Zealand* (online ed, New Zealand, 5 September 2021).

[208] Emphasis added.

Notwithstanding the above, the Government has made itself clear during the post-attack moral panic: our immigration system ought not to offer refuge and respite to those who present a threat of harm to New Zealanders.[209] The opposition immigration spokesperson considered our immigration laws to be the "biggest piece of the jigsaw" in reconciling the tension[210] between protected persons' rights and the need to protect the community from security threats.[211] The Government responded, assuring the House of Representatives and New Zealanders that a "full sweep" of immigration legislation will be conducted to address the framework which protected Samsudeen from deportation. Despite the weak nexus between immigration and terrorism discussed above, and the potentially harmful consequences of legislating reactively in response to an attack, counter-terrorism related reform remains on the immigration policy agenda.

V Pathways to deportation

This part briefly considers two possible pathways open to the Government to deport protected persons of national security concern. I sketch these options in general terms and note the complexities that each pathway provokes; however, a comprehensive evaluation or recommendations are considered beyond the scope of this paper.

First, I rebuke the possibility of carving out a national security exception to non-refoulement given the fallout of the Canadian case of *Suresh v Canada (Minister of Citizenship and Immigration) (Suresh)*.[212] This option would constitute a radical change to our immigration legislation, reversing our adherence to the CAT and the ICCPR in the Immigration Act 2009. I consider this is only open to the legislature at the expense of our international human rights obligations. Secondly, I critique an alternative possibility that the recent Supreme Court decision of *Minister of Justice v Kim* paves the way for the Government to seek and rely upon diplomatic assurances to deport protected persons. Whilst diplomatic assurances are endorsed by the Supreme Court in a way which, at least appears to, recognise our non-refoulement obligations, a host of complexities arise when applying them in the deportation context that may limit their application in this space.

[209] (5 September 2021) 754 NZPD (Terrorist Attack – LynnMall, Andrew Little).
[210] Bonnett, above n 18.
[211] (5 September 2021) 754 NZPD (Terrorist Attack – LynnMall, Judith Collins).
[212] *Suresh*, above n 26.

A A National Security Exception?

In the 2002 Canadian case of *Suresh* the Supreme Court of Canada departed from its international obligation of non-refoulement to torture on the basis of national security in circumstances similar to Samsudeen's. Manickavasagam Suresh was a refugee who fled Sri Lanka and applied for landed immigration status in Canada in 1991. In 1995, Canadian officials detained him with a view to deport him on the grounds they had reason to believe he was a member and fundraiser of the Tamil Tigers. Mr Suresh challenged the deportation order on various issues of substance and procedure, including that he should not be deported or refouled because he faced a substantial risk of being tortured in Sri Lanka.

The Court said that to deport a refugee to a substantial risk of torture would generally violate s 7 of the Canadian Charter of Rights and Freedoms (the Charter). Section 7 of the Charter affirms that "Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The issue arose as to whether s 53 of their Immigration Act, which *permits* deportation "to a country where the person's life or freedom would be threatened", was unconstitutional.[213] The Court framed the issue as follows:[214]

> Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture… Thus we must ask whether the Government's proposed response [deporting a refugee to torture] is reasonable in relation to the threat.

The Court endorsed a balancing approach, noting that whilst the "balance will usually come down against expelling a person to face torture elsewhere" deportation to face torture may be justified in exceptional circumstances.[215]

The decision has engendered widespread academic disapproval for its non-compliance with international law,[216] having carved out a national security exception plainly at odds

---

[213] Emphasis added.
[214] At [50].
[215] At 78.
[216] Obiora Chinedu Okafor and Pius Okoronkwo "Re-Configuring Non-Refoulement? The Suresh Decision, 'Security Relativism', and the International Human Rights Imperative" (2003) 15 IJRL 30; Jenkins, above n

with the CAT which categorically condemns derogations: "no exceptional circumstances whatsoever" can be invoked as a justification for torture.[217] The United Nations Committee against Torture recommended that Canada remove any security or criminal risk exception to the prohibition on refoulement to torture and unconditionally incorporate its absolute nature into domestic legislation.[218] In subsequent cases, the Committee against Torture and the Human Rights Committee reaffirm the absolutist position that non-refoulement is not subject to countervailing considerations.[219]

Our Supreme Court explicitly rejected the *Suresh* balancing test in *Zaoui (No 2)* for its contemplation of a derogation from absolute protections at international law, affirmed in the Bill of Rights Act at the time of deciding.[220] With the Immigration Act 2009 since incorporating provisions for the absolute non-refoulement of protected persons, it is difficult to comprehend a departure along the lines of *Suresh.* Such a move would undoubtedly go against the tide of international jurisprudence which strongly condemns Canada's approach. However, recent commentary from the Supreme Court in *Minister of Justice v Kim* alludes to a potential avenue for deporting protected persons in the name of national security without explicitly breaching our obligation of non-refoulement.

B Diplomatic Assurances

In *Minister of Justice v Kim,*[221] one of the issues before the Supreme Court was *in what circumstances is it possible to rely on assurances related to torture?* The question arose in the context of a judicial review brought by Mr Kim in 2016 against the then Minister of Justice's decision to surrender him to the People's Republic of China (China) to face trial for intentional homicide. A key issue was whether the Minister was entitled to rely

---

129; Matthew Lewans "Deference from Baker to Suresh and Beyond – Interpreting the Conflicting Signals" in David Dyzenhaus (ed), *The Unity of Public Law* (Oxford, Portland, 2004) at 22; Vijay Padmanabhan "To Transfer or not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement" (2011) 80 Fordham L Rev 73; James Hathaway and Colin Harvey, "Framing Refugee Protection in the New World Disorder" (2001) 34 Cornell Int'l LJ 257 at 290.

[217] Article 2(2).

[218] *Conclusions and Recommendations of the Committee against Torture* UN Doc CAT/C/CR/34/CAN (7 July 2005) at 3.

[219] *Committee against Torture Decision: Communication No 233/2003* UN Doc CAT/C/34/D/233/2003 (24 May 2005) [*Agiza v Sweden*]*; UN Human Rights Committee Decision: Communication No 1051/2002* UN Doc CCPR/C/80/D/1051/2002 (29 March 2004) [*Ahani v Canada*].

[220] *Zaoui (No 2)*, above n 128.

[221] *Minister of Justice v Kim*, above n 27.

upon diplomatic assurances in concluding there would be no substantial grounds (no "real risk") of Mr Kim being subject to torture if surrendered to China. This was the first case in which the Minister decided to surrender someone based on diplomatic assurances. This judicial review was, therefore, the first opportunity for the judiciary to comment on the bounds of such reliance in light of the obligation of non-refoulement.

The Human Rights Commission as intervenors argued that if there are substantial grounds for believing that the individual would be in danger of being subject to torture or ill-treatment in the requesting state, diplomatic assurances could not be used to circumvent the risk. The Commission referred to commentary from the mandate holder of the United Nations Special Rapporteurs on Torture who stated that, where there are substantial grounds for believing that a person would be in danger of being subject to torture, "diplomatic assurances, even in conjunction with post-return monitoring mechanisms, are inherently incapable of providing the required protection".[222] These arguments rest on an assumption that states cannot be expected to respect bilateral agreements, given the existence of a real risk of torture absent assurances, which in itself represents a breach of multilateral international custom.[223] In addition, states have every incentive to conceal torture and rights violations to preserve their positive international relations.[224] The Court was not convinced by these arguments and drew on decisions of the Committee against Torture which suggested that the Committee did not *rule out* the viability of diplomatic assurances.[225]

---

[222] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* UN Doc A/HRC/37/50 (23 November 2018) at [48].

[223]*Minister of Justice v Kim,* above n 27, at [81]; But see *Othman v United Kingdom* (2012) 55 EHRR 1 (ECHR) [*Othman*] in which, the European Court of Human Rights stated that the extent to which a state has failed to comply with its multilateral obligations is "at most, a factor in determining whether its bilateral assurances are sufficient" at [193]. The Supreme Court in *Minister of Justice v Kim* follows this aspect of *Othman* noting that "…to rule out diplomatic assurances where, without them, there would be a real risk of torture or where there is a systemic practice of torture comes close to a "Catch-22" proposition that, if you need to ask for assurances, you cannot rely on them. Such a paradox does not reflect the law", at [127].

[224] *Minister of Justice v Kim,* above n 27, at [82].

[225] The Committee against Torture strongly condemned the practice of relying on diplomatic assurances describing them as "contrary to the principle of non-refoulement" in *General Comment No 1 (2017) on the implementation of article 3 of the Convention in the context of article 22: Draft prepared by the Committee* UN Doc CAT/C/60/R.2 (2 February 2017) at [20]. Contracting States in response to the draft, quickly defended the position that diplomatic assurances can be an effective tool and are not "inherently contrary" to the principle of non-refoulement, a view to which New Zealand provided support, submitting that the draft comment did not reflect the reality that the practice of seeking diplomatic assurances is well

The Court did not rule upon the propriety of diplomatic assurances in a general sense. It noted that a determination on a case by case basis is necessary, [226] endorsing the Human Rights Committee's approach in *Alzery v Sweden*.[227] In that case, the Committee regarded the existence of diplomatic assurances and ancillary enforcement mechanisms as "factual elements relevant to the overall determination of whether, in fact, a real risk of the proscribed ill-treatment exists".[228] Accordingly, the Supreme Court held:[229]

> Thus, it is possible for a Minister considering extradition to accept assurances in relation to a person at high risk of torture and a state where torture is systemic, provided the assurances are sufficiently comprehensive, there is adequate monitoring and there is a sufficient basis for concluding that the assurances will be complied with.

The Court considered three inter-related questions, in discussing when diplomatic assurances can be relied upon:[230]

> (a) the risk to the individual, considered in light of their particular characteristics and situation, and the general human rights situation in the receiving country;
>
> (b) the quality of assurances offered and whether, if honoured, they would adequately mitigate the risk to the individual; and
>
> (c) whether the assurances will be honoured.

Where a risk assessment under (a) reveals that there is a persistence of torture in the receiving country, adequate mitigation under (b) requires "specific assurances as well as a

---

established internationally; *Joint Observations of Canada, Denmark, the United Kingdom and the United States of America on Paragraphs 19-20 of the Committee Against Torture's Draft General Comment No 1 (2017) on Implementation of Article 3 in the Context of Article 22* (31 March 2017); *Observations of New Zealand on the Committee Against Torture's draft revised General Comment No 1 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22* (24 March 2017) at [3].

[226] *Minister of Justice v Kim*, above n 27, at [111] following *Othman*, above n 223.

[227] *Human Rights Committee Views: Communication No 1416/2005* UN Doc CCPR/C/88/D/1416/2005 (10 November 2006).

[228] At [11.3].

[229] *Minister of Justice v Kim*, above n 27, at [128].

[230] At [132] and [437].

robust monitoring regime" to supplement any general assurance given by the receiving country that the individual will not be tortured.[231] In terms of (c) the receiving country's motivation to honour the assurance is a significant consideration, among other matters such as the existence of monitoring mechanisms which are enforceable by a central authority with the requisite mandate to bind the state and control local authorities in the country.[232] If each element of the test is satisfied, the Government would be entitled to conclude that there are *no substantial grounds* (no real risk) that the individual would be in danger of being subject to an act of torture by the receiving country.[233]

It is questionable whether the Supreme Court afforded enough attention to the principle enunciated by the Committee against Torture that diplomatic assurances should not be employed as a loophole to undermine non-refoulement whether there are substantial grounds for believing that he or she would be in danger of being subject to torture in that state.[234] By using assurances as a factor in the risk assessment, the real risk could be negated by a diplomatic assurance, even when the country systematically practises torture or violates human rights. *Minister of Justice v Kim* arguably paves the way for diplomatic assurances to be sought and relied upon by the Government in a way that *appears* to respect non-refoulement in the individual case, despite every clue that the real risk remains.[235]

The Court's attitude towards diplomatic assurances is likely to have general application in the context of non-refoulement, and thus could be employed in this context of deporting protected persons.[236] The Law Commission in 2016 found no significant differences between the operation of the principle of non-refoulement in the refugee and

[231] At [215]
[232] At [445].
[233] At [264] and [446]; Emphasis added.
[234] *Committee against Torture General comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* UN Doc CAT/C/GC/4 (4 September 2018) at [20].
[235] A complaint regarding the decision has been filed with the United Nations Human Rights Committee; See Wellington higher courts reporter "UN claim filed in bid to stop murder accused's extradition to China" *Stuff NZ* (online ed, Wellington, 7 June 2022); For further discussion of the decision, see Sophie Harrison "Note: The Difficulties of Extradition From New Zealand to China: Minister of Justice v Kyung Yup Kim" (2022) 1(1) Transnational Criminal Law Review 69.
[236] The CAT, ICCPR and Refugee Convention make no distinction between deportation and extradition in their respective prohibitions on refoulement.

protected person context and its application to extradition proceedings.[237] However, there are some key factors differentiating extradition from deportation that may operate to significantly limit the application of diplomatic assurances here.

Minister of Justice v Kim was decided in the context of the Extradition Act 1999 which is predicated on the ability to seek assurances.[238] The nature of extradition means that assurances are sought by New Zealand, *in response* to another state's request for the extradition of an individual, in that state's interests. Quite distinctly, in the context of the deportation of a refugee or protected person, New Zealand would be seeking an assurance from another state, to deport an individual in furtherance of New Zealand's national interests. This immediately calls into question the other state's incentive to provide assurances in the first place, as they have not requested the return of the individual. That incentive will be further weakened by the purpose of the deportation in this context – where the individual sought to be deported poses a security threat to New Zealand, and could present a comparable risk to the recipient/assuring state.

Further questions arise where the risk of torture is not attributable to the assuring state itself but rather to a non-state actor. The state does have a positive obligation to prevent and criminalise acts of torture committed under its jurisdiction,[239] and thus it may be incentivised to provide assurances, by the need to assert its compliance with the CAT for international standing or diplomatic purposes. In these circumstances, the likelihood of diplomatic assurances adequately mitigating the risk to the individual will require sufficient evidence of a robust monitoring system; including evidence of the state having influence or control over the non-state actor. This is unlikely to be present where the state itself is in political tension or conflict with the non-state actor.

In Samsudeen's circumstances, Sri Lanka was not actively pursuing Samsudeen's repatriation, nor was the State *directly* responsible for the risk of torture posed by Karuna,

[237] Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at 86-87. To this end, the Law Commission proposed a draft Extradition Bill prohibiting extradition orders in circumstances giving rise to our non-refoulement obligations attending to recommendations in *UNHCR Guidance Note on Extradition and International Refugee Protection* (April 2008) at [39]. Notably, the Law Commission's recommendations have not materialised in legislative improvements to the extradition framework it described as "complex and convoluted"; see Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) at [1.7].

[238] At [115].

[239] CAT, art 2(1).

or the remnants of the Tamil Tigers generally. It did have a positive obligation to prevent Samsudeen's subjection to torture by these non-state actors though, and for the sake of positive diplomatic relations with New Zealand, it may have wished to provide assurances to this effect. Following *Minister of Justice v Kim*, New Zealand would need to investigate the State's capacity to adequately mitigate the risk of torture, as well as its motivations to honour the assurance. Yet, in finding that Samsudeen was a protected person, New Zealand by implication concluded that he was not able to access meaningful domestic protection from the danger of being subject to torture in Sri Lanka.[240] Therefore, the Sri Lanka would not only have to be motivated to *provide* the assurance to facilitate the return of Samsudeen on the grounds he was harmful to New Zealand, but evidence *something more* by way of effective domestic protection before New Zealand can rely upon the assurance.[241] Generally, this may be a significant task for the recipient/assuring state, and one which requires them to assume responsibilities in respect of the individual, in *New Zealand's* national interests, rather than its own.

Thus, the ability to seek diplomatic assurances from a state, in respect of a threat posed by a non-state actor, and the sufficiency of those diplomatic assurances, raises a host of ancillary questions such as the State's motivations to provide assurances, and their capacity to enforce them in this context. Whilst *Minister of Justice v Kim* may have normalised the use of diplomatic assurances as a way to negate a risk of torture, and thus, could provide the Government with a diplomatic pathway of apparent compliance with its non-refoulement obligations whilst deporting protected persons, they may nevertheless be of limited use.

VI Conclusions

Samsudeen's terrorism was multifaceted. His actions as a terrorist cannot be divorced from his tumultuous past. As a child, he was a victim of politically motivated violence. He fled from this violence as a refugee. He was undisputedly traumatised by the physical and psychological abuse that marked his upbringing. This was accepted by the Tribunal in the course of granting him refuge in New Zealand. Yet he was placed in the community without mental health support. As a convention refugee, he was refused the housing, social, education and working benefits otherwise afforded to quota refugees.

[240] Immigration Act 2009, s 130(2).
[241] Emphasis added.

This saw him alienated both socially and culturally. He turned to Islamic faith and formed extreme ideologies. In commitment to these ideologies, he fostered behaviours which led to his criminalisation. NZSIS labelled him as a terrorist threat, and the Police laid a series of moderate criminal charges against him. Officials considered it appropriate to detain him on remand for approximately four years, instead of responding to the obvious markers of his pathway to radicalisation with rehabilitative efforts. Upon his sudden release into the community – Samsudeen would validate the fears of those who detained him, by embarking on an act of terrorism.

The events raise an abundance of questions. Many of these await answers from the Government's coordinated Review concerning the Police's, Corrections' and NZSIS' treatment of Samsudeen. I sought to provide clarity in respect of the *immigration framework* that prevented Samsudeen from being deported to his home country of Sri Lanka.[242] Why Samsudeen was still in the country was a question raised by many commentators, including the media and politicians, who exuded confusion, yet the Government's Review is set up to exclude any discussion of immigration-related decision-making. I dove into that discussion, setting out the domestic immigration framework which incorporates our international obligations under the CAT and the ICCPR. Even before the CAT and the ICCPR's incorporation into the Immigration Act 2009, the Supreme Court in *Zaoui (No 2)* upheld non-refoulement through the Bill of Rights Act. Now, explicitly under s 164(4), protected persons *may not* be deported to risks of torture, arbitrary deprivation of life or cruel treatment. These obligations grounded our protection of Samsudeen, as an individual who would be at risk of severe human rights violations if he were to be deported. Non-refoulement, as internationally endorsed and domestically legislated, allows the rights of protected persons to trump the interests of national security. Beyond the refugee regime which is limited to persons fleeing persecution on prescribed grounds, and to those of 'good character', complementary protection prohibiting refoulement is broad and *absolute.* The Minister does retain discretion, under s 137(3) to determine the immigration status of protected persons. However, practice suggests that deportation is not an option in light of non-refoulement.

[242] Emphasis added.

Having outlined the legal framework at play, I consider the Government's express intentions to reform our immigration law to facilitate the deportation of protected persons as a counter-terrorism measure. The terror attack of 3 September 2021, saw eight innocent New Zealanders harmed in a public space, despite the culprit being widely identified by officials as a possible threat. This created a public exposition of the tension between protected persons' rights, which hold steadfast, despite the existence of national security concerns. The Government is at a crossroads between adherence to its human rights obligations to those fleeing international persecution, and protecting the public safety of its population.

I place the Government's motivations for reform in the context of securitisation generally and note how amendments to the Terrorism Suppression Act 2021 were not sufficient to silence the political scrutiny and moral panic following Samsudeen's attack. I critique the trajectory of reactive law-making in response to terrorism, and the securitisation of an area of law – immigration – which is not responsible for threats ultimately cultivated on domestic soil. Despite the public perception that terrorism is an issue primarily of international concern brought to New Zealand by external actors, we must look inward and evaluate *how* we provide refuge and respite. At present, we do not adequately integrate, support and rehabilitate those we accept through our borders, and whom we recognise as having fled atrocities overseas. Efforts to deport persons based on their radicalisation or security risk, for which we have arguably laid the foundations, is a deflection of responsibility – with the result that they will continue their radicalised behaviour overseas, and be knowingly subject to intolerable atrocities themselves. If we were to bolster our resettlement support for asylum seekers and improve our provision of rehabilitation and deradicalization support to protected persons who we deem a terrorist threat, it is possible that this tension between their rights and national security would dissolve. However, with sights set on immigration reform, the opportunity to effectively counter terrorism may be missed.

The question remains as to what the Government will do. I suggest that it is unlikely that New Zealand will follow Canada by explicitly carving out a national security exception to non-refoulement. This movement by the Canadian Supreme Court in *Suresh* attracted international condemnation, and thus it would be a radical position to adopt. I pose that our recent Supreme Court decision of *Minister of Justice v Kim* may pave way for the Government to rely upon diplomatic assurances to 'negate', otherwise present and

systematic, practices of torture. This may be a politically desirable immigration response to deport protected persons who trigger national security concerns. Diplomatic assurances, following this decision, provide the Government with an opportunity to appear to reconcile the national security interest with the individual rights of protected persons, whilst maintaining apparent adherence to New Zealand's CAT and ICCPR obligations. However, there are inherent complexities in applying diplomatic assurances in this context, which would significantly limit their application to the rare circumstances where the recipient/assuring state is both motivated to provide the assurance to facilitate the individual's return, and is capable of enforcing those assurances – against the fact that the individual's protection was prima facie premised on a lack of meaningful domestic protection.

It will be interesting to see how the Government actions its promises, and how much weight it will accord to non-refoulement as a pillar of international human rights law. I remain hopeful that the atrocity which ensued in September 2021, and the absolutist confines of non-refoulement will force the legislature to re-evaluate any changes to New Zealand's immigration legislation, and rather, take an introspective approach to the deeper drivers of radicalisation exacerbated by our criminal justice and asylum processes.

BIBLIOGRAPHY

A CASES

1 New Zealand

AC (Syria) [2011] NZIPT.

Attorney-General v Refugee Council of New Zealand Inc [2003] 2 NZLR 577 (CA).

BN (Malaysia) [2020] NZIPT 801684.

CK (China) [2017] NZIPT 800775.

D v Minister of Immigration [1991] 2 NZLR 673.

Minister of Justice v Kim [2021] NZSC 57, [2021] 1 NZLR 338.

R v Samsudeen [2017] NZHC 3229.

R v Samsudeen [2018] NZHC 1522.

R v Samsudeen [2018] NZHC 1597.

R v Samsudeen [2018] NZHC 2465.

R v Samsudeen [2020] NZHC 1710.

R v Samsudeen [2021] NZHC 1669.

RDS v The Refugee Status Appeals Authority & the Minister of Immigration [1998] CA262/97.

Refugee Council of New Zealand Inc v Attorney-General (No 2) [2002] NZAR 769 (HC).

Samsudeen [2013] NZIPT 800347.

Zaoui v Attorney-General (No 2) [2005] NZSC 38, [2006] 1 NZLR 289.

2 Canada

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

R v Smith (Edward Dewey) [1987] 1 SCR 1045.

3 European Court of Human Rights

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

Indelicato v Italy (2001) 35 EHRR 1330 (ECHR).

Othman v United Kingdom (2012) 55 EHRR 1 (ECHR).

4 International Court of Justice

Belgium v Senegal [2012] ICJ Rep 422.

5 United Nations Committees

Committee against Torture Decision: Communication No 233/2003 UN Doc CAT/C/34/D/233/2003 (24 May 2005*) [Agiza v Sweden]*.

UN Human Rights Committee Decision: Communication No 1051/2002 UN Doc CCPR/C/80/D/1051/2002 (29 March 2004) [*Ahani v Canada*].

Committee against Torture, Communication No 120/1998, UN Doc CAT/C/22/D/120/1998 (1998) [*Elmi v Australia*].

C LEGISLATION

Bill of Rights Act 1990.

Immigration Act 1987.

Immigration Act 2009.

Immigration Amendment Act 1999.

D TREATIES

Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention].

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

Declaration on Territorial Asylum GA Res 2312 (1967).

International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR]

Universal Declaration of Human Rights GA Res 217A 3 (1948) [UDHR].

Protocol Relating to the Status of Refugees 606 UNTS 267 (opened for signature 31 January 1967, entered into force 4 October 1967).

E UNITED NATIONS MATERIALS

Committee against Torture General Comment No 1 (2017) on the implementation of article 3 of the Convention in the context of article 22: Draft prepared by the Committee UN Doc CAT/C/60/R.2 (2 February 2017).

Committee against Torture General comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 UN Doc CAT/C/GC/4 (4 September 2018).

Conclusions and Recommendations of the Committee against Torture UN Doc CAT/C/CR/34/CAN (7 July 2005).

Human Rights Committee CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) UN Doc A/44/40 (10 March 1992).

Human Rights Committee General Comment No. 31 [80] The nature of the general legal obligation imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add.13 (29 March 2004).

Human Rights Committee Views: Communication No 1416/2005 UN Doc CCPR/C/88/D/1416/2005 (10 November 2006).

Joint Observations of Canada, Denmark, the United Kingdom and the United States of America on Paragraphs 19-20 of the Committee Against Torture's Draft General Comment No 1 (2017) on Implementation of Article 3 in the Context of Article 22 (31 March 2017).

Observations of New Zealand on the Committee Against Torture's draft revised General Comment No 1 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22 (24 March 2017).

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment UN Doc A/HRC/37/50 (23 November 2018).

UNCHR Statement on Article 1F of the 1951 Convention (July 2009).

UNHCR Agenda for Protection [Global Consultations on International Protection/General UN Doc A/AC.96/965/Add.1 (26 June 2002).

UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (4 September 2003).

UNHCR Guidance Note on Extradition and International Refugee Protection (April 2008).

UNHCR 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).

F OFFICIAL PAPERS AND REPORTS

Annalise Johnston "Beyond the Prison Gate: Reoffending and Reintegration in Aotearoa New Zealand" (The Salvation Army Social Policy and Parliamentary Unit, Policy Report, December 2016).

Crown Law Office *Legal Advice – To MBIE Re Warrant of Commitment* (7 May 2021).

Crown Law Office *Legal Advice – To MBIE Re Warrant of Commitment and Deportation* (8 July 2021).

Director-General of Security *Information provided to the PM and Ministers since 2016* (4 September 2021) in Samsudeen documents for release 3 (Obtained under Official Information Act 1982 Request to New Zealand Security Intelligence Service).

Director-General of Security *Summary of SIR – Pathways to Mobilisation: Ahamed Aathill Mohamed Samsudeen* DMS6-15-1181 (17 August 2021) in Samsudeen documents for release 3 (Obtained under Official Information Act 1982 Request to New Zealand Security Intelligence Service).

Hon Michael Wood *Information regarding action under ss 139 and 199 of the Immigration Act 2009* (11 July 2022) (Obtained under Official Information Act 1982 Request to Minister of Immigration).

Immigration New Zealand *Claiming Refugee and Protection Status in New Zealand* (March 2021).

Immigration New Zealand *Operational Instruction: Exercise of discretion pursuant to section 128(5) of the Immigration Act 1987 to detain persons who have claimed refugee status* (19 September 2021).

Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016).

Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014).

The Office of the Chief Justice *R v Samsudeen – Summary of court engagement* (5 September 2021).

G HANSARD

(19 March 2019) 737 NZPD (Ministerial Statements – Mosque Terror Attacks Christchurch, Rt Hon Jacinda Ardern).

(5 September 2021) 754 NZPD (Terrorist Attack – LynnMall, Andrew Little).

(5 September 2021) 754 NZPD (Terrorist Attack – LynnMall, David Seymour).

(29 September 2021) NZPD 754 (Counter-Terrorism Legislation Bill, Third Reading).

H SPEECHES AND CONFERENCE PAPERS

Justice Susan Glazebrook "Protecting the Vulnerable in the Twenty-First Century: an International Perspective" (Paper presented to Shirley Smith conference, Wellington, 17 September 2014).

Justice Susan Glazebrook "Refugees, Security and Human Rights: Working out the Balance" (Paper presented to "Critical Issues in Regional Refugee Protection Conference", Sydney, February 2010).

Rt Hon Jacinda Ardern "Prime Minister's update on the 3 September Auckland terrorist attack" (4 September 2021).

I JOURNAL ARTICLES

Alex Wilner and Claire-Jehanne Dubouloz Homegrown Terrorism and Transformative Learning: An Interdisciplinary Approach to Understanding Radicalization" (2010) 22(1) Glob Change Peace Secur 33.

Andrew Foster, Benjamin Powell, Alex Nowrasteh and Michelangelo Langrave "Do immigrants import terrorism?" (2019) 166 J Econ Behav Organ 529.

Axel Dreher, Martin Gassebner and Paul Schaudt "The effect of migration on terror: Made at home or imported from abroad?" (2020) 54(4) CJE 1703.

Catherine Dauvergne "Security and Migration Law in the Less Brave New World" (2007) 16(4) Social and Legal Studies 533.

Chris Mahony, Jay Marlowe, Natalie Baird and Louise Humpage "Aspirational yet precarious: Compliance of New Zealand refugee settlement policy with international human rights obligations" (2017) 3(1) International Journal of Migration and Border Studies 5.

Christine Brickenstein "An Evaluation of the Zaoui Case" [2009] NZLJ 356.

Daniel Milton, Megan Spencer and Michael Findley "Radicalism of the Hopeless: Refugee Flows and Transnational Terrorism" (2013) 38(5) Int Interact 621.

David Jenkins "Rethinking *Suresh:* Refoulement to Torture under Canada's Charter of Rights and Freedoms" (2009) 47 Alberta L Rev 125.

Heidi Hetz "The Concept of the 'Good Refugee' in Cambodian and Hazara Refugee Narratives and Self-Representation" (2022) 35(2) Journal of Refugee Studies 874.

James Hathaway and Colin Harvey, "Framing Refugee Protection in the New World Disorder" (2001) 34 Cornell Int'l LJ 257.

James Piazza "Poverty, Minority Economic Discrimination, and Domestic Terrorism" (2011) 48(3) J Peace Res 339.

Jan-Phillip Graf and Spyridoula Katsoni "The Evolution of Non-Refoulement: From Negative to Positive Obligations" (2021) 4 JILPAC 148.

John Battersby and Rhys Ball "Christchurch in the context of New Zealand terrorism and right wing extremism" (2019) 14(3) JPICT 191.

Lisa Yarwood "Zaoui and jus cogens" [2006] NZLJ 170.

Maria Teresa Gil-Bazo "Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship" (2015) 34(1) RSQ 11-42.

Mark Phythian "Intelligence, policy-making and the 7 July 2005 London bombings" (2005) Crime Law Soc Change 361.

Obiora Chinedu Okafor and Pius Okoronkwo "Re-Configuring Non-Refoulement? The Suresh Decision, 'Security Relativism', and the International Human Rights Imperative" (2003) 15 IJRL 30.

Rachel Lord "The Liability of Non-State Actors for Torture in Violation of International Humanitarian Law: An assessment of the jurisprudence of the International Criminal Tribunal for the Former YugoSlavia" (2003) 4(1) Melbourne Journal of International Law 112.

Robert Leiken and Steven Brooke "The Quantitative Analysis of Terrorism and Immigration: An Initial Exploration" (2006) 18(4) TPV 503.

Robert McCorquodale and Rebecca La Forgia "Taking off the Blindfolds: Torture by Non-State Actors" (2001) 1(2) Human Rights Law Review 189.

Rodger Haines "Sovereignty under Challenge - The New Protection Regime in the Immigration Bill 2007" (2009) NZ L Rev 149.

Sophie Harrison "Note: The Difficulties of Extradition From New Zealand to China: Minister of Justice v Kyung Yup Kim" (2022) 1(1) Transnational Criminal Law Review 69.

Vijay Padmanabhan "To Transfer or not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement" (2011) 80 Fordham L Rev 73.

Vincenzo Bove and Tobias Böhmelt "Does Immigration Induce Terrorism" (2016) 78(2) JOP 572.

J ONLINE COMMENTARIES AND LOOSELEAF TEXTS

Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (online ed, Oxford University Press).

Andrew Butler and Petra Butler *Laws of New Zealand* Torture or Cruel or Disproportionately Severe Punishment or Treatment (online ed).

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

Doug Tennent, Katy Armstrong and Peter Moses *Immigration and Refugee Law in New Zealand* (3rd ed, LexisNexis, 2016)

Fernando Reinares *Al-Qaeda's Revenge: The 2004 Madrid Train Bombings* (Columbia University Press, 2016).

Manfred Nowak and Elizabeth McArthur *United Nations Convention Against Torture: A Commentary* (2nd ed, Oxford University Press, 2008).

K CHAPTERS/ESSAYS IN BOOKS

Catherine Dauvergne "Irregular migration, state sovereignty and the rule of law" in Vincent Chetail and Céline Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014).

Hemme Battjes "Subsidiary protection and other forms of protection" in Vincent Chetail and Céline Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014).

J Olaf Kleist "Refugees between pasts and politics: sovereignty and memory in the Tampa crisis" in Klaus Neumann and Gwenda Tavan (eds) *Does History Matter? Making and debating citizenship, immigration and refugee policy in Australia and New Zealand* (ANU E Press, Canberra, 2009).

Maarten den Heijer "Refoulement" in André Nollkaemper and Ilias Plakokefalos (eds) *The Practice of Shared Responsibility in International Law* (Cambridge University Press, Cambridge, 2017).

Matthew Lewans "Deference from Baker to Suresh and Beyond – Interpreting the Conflicting Signals" in David Dyzenhaus (ed), *The Unity of Public Law* (Oxford, Portland, 2004).

Rebecca Wallace "The principle of non-refoulement in international refugee law" in Vincent Chetail and Céline Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014).

L INTERNET MATERIALS

Ilya Somin "Does the Threat of Terrorism Justify Migration Restrictions?" (30 March 2022) Verfassungsblog – On Matters Constitutional https://verfassungsblog.de/os5-migration-restrictions/.

Judith Collins "Why wasn't terrorist subject to sections 163 and 164?" (6 September 2021) The National Party https://www.national.org.nz/why-wasnt-terrorist-subject-to-sections-163-and-164.

M NEWSPAPER ARTICLES

"Counter-terrorism bill passes third reading" *Radio New Zealand* (online ed, New Zealand, 30 September 2021).

"Grant Robertson on counter-terror laws: 'It is important to get this right'" *Radio New Zealand* (online ed, New Zealand, 6 September 2021).

"Laws "outdated and deficient" - Dr John Battersby" *Radio New Zealand* (online ed, New Zealand, 4 September 2021).

"LynnMall attack: Four women and three men among victims" *Radio New Zealand* (online ed, New Zealand, 4 September 2021).

"LynnMall attacker 'brainwashed' by neighbours, mother says" *Radio New Zealand* (online ed, New Zealand, 5 September 2021).

"LynnMall terrorist's family: 'We are heartbroken'" *Radio New Zealand* (online ed, New Zealand, 5 September 2021).

"Man who tackled terrorist identified as eighth victim of attack" *Radio New Zealand* (online ed, New Zealand, 14 September 2021).

"New Zealand counter-terrorism legislation outdated - law experts" *Radio New Zealand* (online ed, New Zealand, 4 September 2021).

"Professor Andrew Geddis on proposed terrorism law changes" *Radio New Zealand* (online ed, New Zealand, 4 September 2021).

"Scepticism as Government watchdogs launch review into LynnMall terror attack" *Radio New Zealand* (online ed, New Zealand, 17 September 2021).

Eva Corlett "New Zealand stabbings: new law to close loophole to pass in September, says Ardern" *The Guardian* (online ed, New Zealand, 6 September 2021).

Giles Dexter "LynnMall terror attack: Government to look at Immigration Act after terrorist fabricated refugee appeal" *Radio New Zealand* (online ed, New Zealand, 5 September 2021).

Gill Bonnett "One year on: Questions remain on anniversary of LynnMall attack by Ahamed Samsudeen" *Radio New Zealand* (online ed, New Zealand, 3 September 2022).

Gill Bonnett "LynnMall attack: A year on, ministers eye on law change on deportation" *Radio New Zealand* (online ed, New Zealand, 31 August 2022).

Gill Bonnett "LynnMall attack: National, charities critical of gaps in terrorist inquiry" *Radio New Zealand* (online ed, New Zealand, 18 September 2021).

Jehan Casinader "The makings of a terrorist – and the people who tried to help him" *Stuff NZ* (online ed, New Zealand, 11 September 2021).

Katie Todd "LynnMall stabbings: Review into risk terrorist posed launched" *Radio New Zealand* (online ed, New Zealand, 16 September 2021).

Phil Pennington "Corrections documents reveal LynnMall attacker was assaulted twice in prison" *Radio New Zealand* (online ed, New Zealand, 23 May 2022).

Praveen Menon "Police in New Zealand kill "extremist" who stabbed six in supermarket" *Reuters* (online ed, Asia-Pacific, 3 September 2021).

Sarah Robson "Timeline leading to terrorist's attack in New Lynn" *Radio New Zealand* (online ed, New Zealand, 5 September 2021).

Wellington higher courts reporter "UN claim filed in bid to stop murder accused's extradition to China" *Stuff NZ* (online ed, Wellington, 7 June 2022).