

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

**LUIS ALBERTO HERNANDEZ FEBLES**

APPELLANT

-and-

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

RESPONDENT

-and-

**AMNESTY INTERNATIONAL, CANADIAN ASSOCIATION OF REFUGEE LAWYERS,  
CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN COUNCIL FOR REFUGEES,  
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

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## PART I – OVERVIEW

1. At issue in the present appeal is the interpretation of Article 1F(b) of the *United Nations Convention relating to the Status of Refugees* (“*Refugee Convention*”), incorporated into Canadian law by section 98 of the *Immigration and Refugee Protection Act* (“*IRPA*”). Taking into account the applicable interpretive sources, Amnesty International submits that the purpose of Article 1F(b) is to ensure that the *Refugee Convention* cannot be exploited by serious criminals to avoid prosecution. Thus, Article 1F(b) is not concerned with individuals who are not fugitives from justice.

## PART II – QUESTIONS IN ISSUE

**A. What is the appropriate standard of review?**

**B. What is the proper scope of Article 1F (b) of the *Refugee Convention*?**

## PART III – ARGUMENT

### **A. The Appropriate Standard of Review is Correctness**

2. Pursuant to this Court’s decision in *Dunsmuir v New Brunswick*, no standard of review analysis is required when “the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.”<sup>1</sup> This Court’s jurisprudence clearly establishes that the appropriate standard of review in this case is correctness.

3. In *Pushpanathan*, this Court held that the correctness standard applied to “determinations of law by the [Immigration and Refugee] Board”<sup>2</sup> (“IRB”), and in particular, that the correctness standard applied to the IRB’s interpretation of Article 1F(c) of the *Refugee Convention*.<sup>3</sup> In *Ezokola*,<sup>4</sup> this Court judicially reviewed the Refugee Protection Division (“RPD”)’s interpretation of Article 1F(a) of the *Refugee Convention*. Although the standard of review was not expressly addressed, it is evident from this Court’s reasons that it applied a correctness standard: this Court engaged in a wholly independent interpretation of Article 1F(a), without referring to the reasons given by the RPD in its analysis.<sup>5</sup> These two decisions clearly establish that correctness is the appropriate standard of review for the RPD’s interpretations of the *Refugee Convention* provisions incorporated into Canadian law.

4. Moreover, the need to promote consistency among interpretations of an international

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<sup>1</sup> 2008 SCC 9, [2008] 1 SCR 190 at para 62 [*Dunsmuir*]; see also *Northrop Grumman Overseas Services Corp v Canada (Attorney General)*, 2009 SCC 50, [2009] 3 SCR 309 at para 10.

<sup>2</sup> *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 50 [*Pushpanathan*].

<sup>3</sup> *Ibid* at para 42.

<sup>4</sup> *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*].

<sup>5</sup> The reasons of the RPD were only discussed in the judicial history section of this Court’s decision.

convention such as the *Refugee Convention* provides a strong justification for applying a correctness standard in this case. As the Supreme Court of the United Kingdom has recently affirmed in an Article 1F(c) exclusion case, “[i]n principle, there can be only one true interpretation of a treaty” and therefore, “[i]t cannot be the case that individual Member States are free to adopt their own definitions.”<sup>6</sup> These applicable principles of treaty interpretation are fundamentally at odds with the underlying rationale for reasonableness review – which is “the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute.”<sup>7</sup>

## **B. Article 1F(b) is Not Concerned With Persons Who Are Not Fugitives From Justice**

### **1. The Rules of International Treaty Interpretation Require a Purposive Interpretation of the *Refugee Convention* and of Article 1F(b)**

5. This Court must interpret Article 1F(b) in accordance with Canada’s international obligations under the *Refugee Convention*, as determined pursuant to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (“*Vienna Convention*”).<sup>8</sup> This approach flows from the unequivocal legislative intent expressed through the direct incorporation of Article 1F(b) into Canadian law through s. 98 of the *IRPA*. It also flows from the express direction in the *IRPA* that the *IRPA*’s purpose is to fulfill Canada’s international obligations with respect to refugees<sup>9</sup> and that the *IRPA* is to be construed and applied in a manner which complies with Canada’s international obligations.<sup>10</sup>

6. Amnesty International submits that a literal and acontextual approach to the *Refugee Convention* does not comply with Articles 31 and 32 of the *Vienna Convention*,<sup>11</sup> particularly as those provisions have been interpreted by this Court in *Pushpanathan*. Rather, a robust understanding of the objects and purposes of the *Refugee Convention* in general and of Article 1F(b) in particular is essential to the proper interpretation of Article 1F(b).<sup>12</sup> When interpreting Article 1F(c) in *Pushpanathan*, this Court stated: “[t]he starting point of the interpretative exercise is, first, to define the purpose of the Convention as a whole, and, second, the purpose and place of Article 1F(c) within that scheme.”<sup>13</sup>

<sup>6</sup> *Al-Sirri v Secretary of State for the Home Department*, [2012] UKSC 54 at para 36 [*Al-Sirri*]; see also *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164 at para 4.

<sup>7</sup> *Dunsmuir*, *supra* note 1 at para 41.

<sup>8</sup> *Pushpanathan*, *supra* note 2 at paras 51-53; See also Appellant Factum at para 84; Respondent Factum at para 36.

<sup>9</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27 s 3(2)(b) [*IRPA*].

<sup>10</sup> *Ibid*, s 3(3)(f).

<sup>11</sup> James C Hathaway & Colin J Harvey, “Framing Refugee Protection in the New World Disorder” (2001) 34 Cornell International LJ 257 at 261, citing *Adan v Home Secretary*, [1999] 1 AC 293 at 305 (Lloyd of Berwick, LJ) and “*Applicant A*” v *Minister for Immigration & Ethnic Affairs* (1997), 190 CLR 225 at 231 (Aust) (Brennan CJ).

<sup>12</sup> Article 31(1) of the *Vienna Convention* provides: “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose” (emphasis added); *Pushpanathan*, *supra* note 2 at para 55; *Ezokola*, *supra* note 4 at para 31.

<sup>13</sup> *Pushpanathan*, *supra* note 2 at para 56.

7. Moreover, in the context of statutory interpretation, this Court has affirmed that “where the plain and ordinary meaning of a portion of the statutory language would defeat the legislative purpose [...], an interpretation consistent with the legislative intent which goes against the literal meaning of the statute must be adopted.”<sup>14</sup>

## 2. The Purpose of the *Refugee Convention* as a Whole is to Protect Human Rights

### a) *Given that the Purpose of the Refugee Convention is to Protect Fundamental Human Rights, Exceptions to its Guarantees must be Interpreted Narrowly*

8. The interpretation of Article 1F exclusions “must reflect th[e] overarching and clear human rights object and purpose” of the *Refugee Convention*.<sup>15</sup> As this Court held in *Pushpanathan* and *Ward*, the following passage from the Preamble shows that the purpose of the *Refugee Convention* is to protect fundamental human rights:<sup>16</sup>

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

9. The Preamble’s express reference to the Universal Declaration of Human Rights (“*UDHR*”) as a founding consideration for the *Refugee Convention* is also instructive. Article 14(1) of the *UDHR* affirms the fundamental human “right to seek and to enjoy in other countries asylum from persecution”<sup>17</sup> – from which Article 14(2) (the precursor to Article 1F of the *Refugee Convention*) is the only exception.

10. As exceptions to basic human rights guarantees, the Article 1F exclusions “must always be interpreted restrictively and should be used with great caution.”<sup>18</sup> As this Court affirmed in *Pushpanathan*: “[t]he *a priori* denial of the fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the Convention.”<sup>19</sup>

11. The consequence of exclusion under Article 1F is extremely serious:<sup>20</sup> it leads to the denial of the basic right of asylum from persecution and the entire array of rights attached to refugee status, and also creates the potential of being transferred to a risk of grave human rights violations. Exclusion must therefore always be treated as an exceptional and limited measure.

<sup>14</sup> *R v Egger*, [1993] 2 SCR 451 at 476.

<sup>15</sup> *Ezokola*, *supra* note 4 at para 32; *Pushpanathan*, *supra* note 2 at para 57.

<sup>16</sup> *Ibid* at para 56; *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1 at 733 [*Ward*].

<sup>17</sup> *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810 (1948), 71 (emphasis added).

<sup>18</sup> UNHCR, “Background Note on the Application of the Exclusion Clauses: Article 1(F) of the 1951 Convention Relating to the Status of Refugees,” 4 September 2003 at para 4 [Background Note]; *Al-Sirri*, *supra* note 6 at paras 16, 75; *Ezokola*, *supra* note 4 at para 35.

<sup>19</sup> *Pushpanathan*, *supra* note 2 at para 74 (emphasis added).

<sup>20</sup> Background Note, *supra* note 18 at para 4.

***b) Interpretations of the Refugee Convention that Would Narrow the Scope of and Protection Provided by Prior Instruments Should be Avoided***

12. The Preamble to the *Refugee Convention* provides the following:

CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement (emphasis added)

13. In this way, the *Refugee Convention* is the culmination of previous international agreements aimed at conferring protections upon refugees. Furthermore, this passage from the Preamble shows that the purpose of the *Refugee Convention* was to extend the scope of and protection accorded by those previous instruments. Given this purpose, interpretations of the *Refugee Convention* that would narrow the scope of and protection accorded by previous instruments relating to refugees should be avoided as inconsistent with this purpose.

14. As Professor Atle Grahl-Madsen explains, the various prior international instruments relating to the status of refugees restricted the serious criminality exclusion to fugitives from justice and sought to ensure coherence with extradition law.<sup>21</sup>

15. None of these prior instruments would have excluded a person who had served their sentence for a serious crime. Absent some indication that such an expansion of the exclusion (and consequent restriction on access to refugee protection) was intended, Article 1F(b) of the *Refugee Convention* should similarly be interpreted as not applying to a person who has served their sentence.

**3. The Purpose of Article 1F Generally – and 1F(b) in Particular – is Not to Protect Society from Dangerous Refugees**

16. As was unambiguously affirmed in *Pushpanathan*, the structure of the *Refugee Convention* shows that the purpose of Article 1F is not to protect society from dangerous refugees. That purpose, while manifestly a concern of the *Refugee Convention*, is served by Article 33(2):

[...] the general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention.<sup>22</sup>

17. Indeed, for the purpose of this appeal, the only relevant holding of the European Court of

<sup>21</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol 1 (AW Sijthoff-Leyden: 1966) at 290 [*Grahl-Madsen*], referring to: Part II, paragraph 3, of Annex I to the International Refugee Organization Constitution, which excludes from the concern of the Organization “ordinary criminals who are extraditable by treaty;” Article 7(d) of the UNHCR Statute, which provides that the competence of the High Commissioner shall not extend to a person “in respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition;” and Article 14(2) of the *UDHR*, which sets forth that the right to seek and to enjoy asylum “may not be invoked in the case of prosecutions genuinely arising from non-political crimes.”

<sup>22</sup> *Pushpanathan*, *supra* note 2 at paras 58, 75.



Justice in *Bundesrepublik Deutschland v. B (C-57/09) and D (C-101/09)* is that present dangerousness is neither the purpose nor a relevant consideration in the application of Article 1F.<sup>23</sup> Since that case involved two claimants who were fugitives from justice, the Court’s general statements about the purposes of Article 1F(b) and (c) (which were not examined individually) are of limited assistance in this appeal.

#### **4. The Specific Purpose of Article 1F(b) is to Exclude Fugitives from Justice – and is Distinct from the Purpose of Article 1F(a) and (c)**

18. Article 1F serves the general purpose of excluding from refugee status persons who are considered “undeserving” of that status<sup>24</sup> or, under another formulation, protecting the integrity of the refugee protection system.<sup>25</sup> These concepts however are indeterminate and of little interpretive assistance; they must be understood with reference to the individual Article 1F categories of exclusion, which serve specific and distinct purposes.

19. In Articles 1F(a) and (c), these concepts must be understood with reference to the nature and gravity of the acts a person has committed. Articles 1F(a) and (c) “exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights” – 1F(a) targets such actions in a war setting and 1F(c) targets similar actions outside the context of war.<sup>26</sup> As this Court has held, these exclusions preserve the integrity of the refugee protection regime by preventing those who create refugees from themselves claiming refugee status.<sup>27</sup> Individuals who are “responsible for the persecution which creates refugees” are considered undeserving of refugee protection.<sup>28</sup>

20. In contrast, Article 1F(b) protects the integrity of the refugee system, not by excluding those who are the authors of persecution, but by excluding persons who are seeking to avoid prosecution for serious crimes.<sup>29</sup> Article 1F(b) identifies such persons as undeserving of refugee protection. As Professor Hathaway, a distinguished scholar whose analysis of refugee law has been relied upon by this

<sup>23</sup> *Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09)*, [2010] EUECJ C–101/09 at paras 100-101, 105.

<sup>24</sup> The Article 1F exclusions are often referred to – *en bloc* – as provisions dealing with “Persons considered not to be deserving of international protection” (United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, reedited, December 2011, HCR/1P/4/ENG/REV 3 at paras 146-147) or “Persons Not Deserving Protection” (James C Hathaway, *The Law of Refugee Status*, 2nd edition (Cambridge University Press, forthcoming in 2014) **Appellant’s Supplemental Book of Authorities** [Hathaway 2014]) title of chapter 7, see also Hathaway’s description of the exclusion clauses as a whole as provisions that “deem some persons who face the real chance of being persecuted nonetheless to be undeserving of international protection” at 1273.

<sup>25</sup> See *Ezokola*, *supra* note 4 at para 36.

<sup>26</sup> *Pushpanathan*, *supra* note 2 at para 64, see also para 63.

<sup>27</sup> *Ezokola*, *supra* note 4 at paras 34, 36.

<sup>28</sup> *Pushpanathan*, *supra* note 2 at para 63.

<sup>29</sup> Hathaway 2014, *supra* note 24 at 1295-1296; Paul Weis, “The Concept of the Refugee in International Law” (1960) 87 JDI 928 at 984-6; *Grahl-Madsen*, *supra* note 21 at 291-292.

Court on multiple occasions,<sup>30</sup> explains:

Jurisdiction rules normally prevent persons who commit serious common crimes abroad from being prosecuted and punished for those crimes in the receiving state. As such, admission to refugee status would amount effectively to “getting away with murder”, posing a clear risk to the integrity of the refugee system. But if the crime is minor, or if the person concerned has been tried and punished for the offense, no comparable concerns about systemic integrity arise – meaning that Art. 1(F) exclusion is not appropriate.<sup>31</sup>

21. As Professor Hathaway elucidates, the purpose of ensuring that serious criminals are not able to avoid prosecution and punishment for their crimes by claiming refugee protection is confined to Article 1F(b). In contrast, Articles 1F(a) and 1F(c), “exclude even persons who have been held legally accountable for their acts by prosecution and punishment for same.”<sup>32</sup>

***a) This Court has Approved of an Interpretation of Article 1F(b) Which Confines the Application of that Exclusion to Fugitives From Justice***

22. In both *Ward* and *Pushpanathan*, this Court approved of an interpretation of Article 1F(b) which restricts the application of that exclusion to persons avoiding prosecution.

23. In *Ward*, this Court noted that Professor Hathaway’s interpretation of Article 1F, which confines paragraph (b) to accused persons who are fugitives from prosecution, was “consistent with the views expressed in the *Travaux préparatoires*, regarding the need for congruence between the Convention and extradition law.”<sup>33</sup> Furthermore, in *Pushpanathan*, this Court affirmed:

It is quite clear that Article 1F(b) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status, but that this exclusion is limited to serious crimes committed before entry in the state of asylum.<sup>34</sup>

***b) Article 1F(b)’s Internal Limitations Support an Interpretation of Article 1F(b) Which Confines the Application of that Exclusion to Fugitives From Justice***

24. The carefully tailored language of Article 1F(b) is inconsistent with the purpose of excluding persons from refugee status exclusively based upon the nature and gravity of their past conduct.

25. Articles 1F(a) and (c) apply when there are serious reasons for considering that a person “has committed” or “has been guilty of” the acts described in those provisions. Article 1F(b), on the other hand, places limitations of both place and time on the acts that will trigger its application. Article 1F(b)

<sup>30</sup> In *Ward*, *supra* note 16 at 743; *Pushpanathan*, *supra* note 2 at paras 51, 61-62; *Németh v Canada (Justice)*, 2010 SCC 56 at paras 50, 100, 109.

<sup>31</sup> Hathaway 2014, *supra* note 24 at 1295.

<sup>32</sup> Hathaway 2014, *supra* note 24 at 1366, footnote 10.

<sup>33</sup> *Ward*, *supra* note 16 at 743; Professor Hathaway reiterates this interpretation of Article 1F(b) in his forthcoming second edition (Hathaway 2014, *supra* note 24 at 1366, footnote 10).

<sup>34</sup> *Pushpanathan*, *supra* note 2 at para 73.

applies only when there are serious reasons for considering that a person has committed a serious non-political crime both “outside the country of refuge” and “prior to his admission to that country as a refugee.”

26. As a result of these territorial and temporal restrictions on the application of Article 1F(b), a person who commits a serious crime in the country of eventual refuge prior to his admission as a refugee will not be subject to exclusion. Such a carve-out cannot be explained by the theory that Article 1F(b) is primarily concerned with excluding persons from refugee status based on the nature and gravity of their criminal conduct alone. A serious crime is just as serious when committed in the country of refuge as when committed in another country. Rather, the carve-out is explained by the true purpose of Article 1F(b), which is to prevent persons who have committed serious crimes from exploiting the refugee protection regime to evade criminal responsibility for their actions. If a person commits a serious crime in a country, prior to his admission to that country as a refugee, that person cannot use refugee status to shield himself from prosecution, because that same country has territorial jurisdiction over the offence.<sup>35</sup> In this way, the text of Article 1F(b) is tailored to reflect its distinct purpose.

27. Indeed, the facts in *Pushpanathan* illustrate this point. In that case, Article 1F(b) could not have applied because Pushpanathan had committed the acts of trafficking narcotics in Canada, even though he had not yet been recognized as a refugee at the time. The distinction between the geographical limitation contained in Article 1F(b) as compared to the absence of such a limitation in Article 1F(c) was expressly discussed by this Court in *Pushpanathan*.<sup>36</sup>

28. Conversely, Articles 1F(a) and (c) contain no such territorial or temporal restrictions. The absence of such restrictions reflects the distinct purpose of those exclusions: to exclude persons from refugee protection because they are the authors of persecution – not because they are evading prosecution. Accordingly, the application of the Article 1F(a) and (c) exclusions does not depend on the country of refuge’s lack of territorial jurisdiction over the offence.

29. Moreover, the reference to “serious non-political crime” in Article 1F(b) – language familiar to the extradition law context – further supports the view that the purpose of Article 1F(b) is to prevent fugitives from justice from abusing the refugee system to avoid criminal responsibility, which in turn promotes coherence between extradition and refugee law.

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<sup>35</sup> Hathaway 2014, *supra* note 24 at 1297.

<sup>36</sup> *Pushpanathan*, *supra* note 2 at para 58; see also paragraph 73, which explains that “Article 1F(b) identifies non-political crimes committed outside the country of refuge, while Article 33(2) addresses non-political crimes committed within the country of refuge.”

***c) The Drafting History Supports an Interpretation of Article 1F(b) Which Confines the Application of that Exclusion to Fugitives From Justice***

30. The drafting history of the *Refugee Convention* is a significant interpretive tool, which has been used by this Court “as a means of understanding the objects and purposes of the Convention as a whole, and the particular provisions being interpreted.”<sup>37</sup> It may indicate that the signatories to the *Refugee Convention* “wished to ascribe a special meaning to the words” of its provisions.<sup>38</sup>

31. The drafting history confirms that Article 1F(b) serves only the limited purpose of preventing individuals who have committed serious crimes from misusing refugee status to avoid criminal responsibility for their actions.<sup>39</sup>

***(i) Article 14(2) of the UDHR as the Starting Point for Article 1F(b)***

32. First, it is clear from the *travaux préparatoires* that Article 14(2) of the *UDHR* was the starting point for discussions around the provision that would ultimately become Article 1F(b).<sup>40</sup> Article 14 of the *UDHR* provides:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. (emphasis added)

33. The Article 14(2) *UDHR* exception is therefore restricted to fugitives from justice.

34. Throughout the meetings of the Conference of Plenipotentiaries, the serious criminality exclusion was discussed with reference to Article 14(2) of the *UDHR*.<sup>41</sup> The delegates considered various issues that might arise from the language in Article 14(2) and considered how it might be refined and clarified to address those issues.<sup>42</sup> Article 14(2) remained the touchstone for the serious criminality exclusion through the last debates on that exclusion during the 29th Meeting of the Conference of Plenipotentiaries, on July 19, 1951.

35. During that meeting, the purpose of Article 14(2) of the *UDHR* was expressly articulated by the representative of the United Kingdom as “to apply to persons who were fugitives from prosecution in

<sup>37</sup> *Ibid* at para 55, referring to *Ward*, *supra* note 16.

<sup>38</sup> *Ibid*.

<sup>39</sup> Hathaway 2014, *supra* note 24 at 1292.

<sup>40</sup> *Ibid* at 1293; Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers With a Criminal Background in International and Domestic Law* (Dordrecht, Netherlands, Republic of Letter, 2012) at 52, 55; Alex Takkenberg and Christopher C Tahbaz, *The Collected Travaux préparatoires of the 1951 Geneva Convention relating to the Status of Refugees*, Vol. III (Amsterdam: Dutch Refugee Council, 1990) at 159 [Takkenberg & Tahbaz], which reproduces UN Doc. A/CONF.2/1 (March 12, 1951) at 5.

<sup>41</sup> *Ibid* at 429-435, 491-499, which reproduces UN Doc. A/CONF.2/SR.24 (Jul. 17, 1951) at 4-16 [24<sup>th</sup> Meeting] and UN Doc. A/CONF.2/SR.29 (July 19, 1951) at 11-27 [29<sup>th</sup> Meeting].

<sup>42</sup> Hathaway 2014, *supra* note 24 at 1294-1295.

another country for non-political crimes, and the effect would seem to be that the provisions of article 14 would not override specific extradition obligations.”<sup>43</sup> However, due to concerns that Article 14(2) of the *UDHR* might exclude from refugee protection persons who had committed only minor crimes, the qualification “serious” was added to the expression “non-political crimes.”<sup>44</sup> Similarly, the delegates agreed to restrict the scope of Article 14(2) to crimes committed outside the country of refuge and prior to entry into the territory of the receiving country.<sup>45</sup>

36. Significantly, it was never suggested during those negotiations that the scope of the Article 14(2) exception should be dramatically expanded so that the *Refugee Convention* would exclude from the definition of a refugee any person who had ever committed a serious crime regardless of whether that person could be subject to a “genuine prosecution [...] arising from non-political crimes.” The inference to be drawn is that it never occurred to the drafters – and that they therefore could not have intended – that the Article 14(2) exception would be expanded in this way.

(ii) *Ensuring Congruence between the Refugee Convention and Extradition Law*

37. Second, the wording of Article 1F(b) – which restricts the exclusion to serious crimes committed “outside the country of refuge prior to his admission to that country as a refugee” – was adopted following expressions of concern by various delegates that the *Refugee Convention* should be coherent with extradition law.<sup>46</sup> At the same time, however, a number of delegates identified difficulties with making express reference to extradition treaties.<sup>47</sup> Accordingly, the concern to ensure coherence with extradition law was addressed, not by having the exclusion depend on the idiosyncrasies of domestic extradition practice, but by focusing the exclusion on serious criminals who were seeking to exploit the refugee system to escape criminal responsibility.

38. Thus, while Article 1F(b) allows for coherence between refugee protection and extradition law,

<sup>43</sup> 29<sup>th</sup> Meeting, *supra* note 41, Statement of Mr. Hoare of the United Kingdom at 14.

<sup>44</sup> 24<sup>th</sup> Meeting, *supra* note 41, Statement of Mr. Hoare of the United Kingdom at 8-9; 29<sup>th</sup> Meeting, *supra* note 41, Statements of Mr. Hoare of the United Kingdom, Baron von Boetzelaer of the Netherlands, Mr. Rochefort of France and Mr. Božović of Yugoslavia at 12, 14, 20.

<sup>45</sup> 29<sup>th</sup> Meeting, *supra* note 41, Statements of Mr. Herment of Belgium, Baron von Boetzelaer of the Netherlands, Mr. Chance of Canada, Mr. Božović of Yugoslavia and subsequent vote at 25-26.

<sup>46</sup> 24<sup>th</sup> Meeting, *supra* note 41, Statements of Mr. Herment of Belgium, Mr. van Heuven Goedhart of the UNHCR, Baron von Boetzelaer of the Netherlands at 9-12.

<sup>47</sup> Mr. Robinson of Israel noted that “the matter involved intricate legal considerations; there might be some danger in making reference to bilateral agreements specifically dealing with extradition to the exclusion of other bilateral agreements which might also be affected by the provisions of the convention” (*ibid* at 12); Mr. Larsen of Denmark (the President) pointed out the serious difficulties with extraditing a person who had committed a crime of no great consequence to the very government that was likely to persecute him and also noted that the practice of some states to perform extraditions without having concluded actual extradition treaties would have to be taken into account (*ibid* at 12-13); Mr. Hoare of the United Kingdom affirmed that the matter was delicate because “a request for extradition might be made by a country from whose persecution the person in question had fled” and ultimately preferred that no mention of extradition be made under the *Refugee Convention* (*ibid* at 10; 29<sup>th</sup> Meeting, *supra* note 41 at 15).

it does not entail “an automatic, mechanical linkage between amenability to extradition and exclusion.”<sup>48</sup> It is for this reason that Article 1F(b) does not depend for its application on the existence of an applicable bilateral extradition treaty.<sup>49</sup> It is also for this reason that “seriousness” – for the purpose of Article 1F(b) – is not equivalent to the degree of seriousness required to justify extradition. The drafters clearly intended that “not all extraditable crime should be adjudged ‘serious’ for the purposes of exclusion under Article 1F(b)”<sup>50</sup> – but that only an especially serious subset of extraditable crimes was intended to justify exclusion under this provision.<sup>51</sup> Indeed, a significantly higher seriousness threshold for Article 1F(b) is required because exclusion from refugee protection – unlike extradition – will always entail the denial of fundamental human rights protections. It is this “humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concern of states to sanction criminal activity on the other”<sup>52</sup> that the high seriousness requirement in Article 1F(b) serves to achieve.


#### PART IV – SUBMISSIONS ON COSTS

39. Amnesty International does not seek costs and asks that no costs be awarded against it.

#### PART V – REQUEST FOR ORAL ARGUMENT

40. Amnesty International seeks leave to make oral submissions not exceeding 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th day of March, 2014 BY:

  
**Jennifer Klinck**   **Perri Ravon**   **Justin Dubois**   **Michael Sabet**  
 Solicitors for the Intervener, Amnesty International.

<sup>48</sup> Hathaway 2014, *supra* note 24 at 1302.

<sup>49</sup> This avoids the absurd result suggested by the Federal Court of Appeal in *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 FC 761 at para 67.

<sup>50</sup> Hathaway 2014, *supra* note 24 at 1302.

<sup>51</sup> *Ibid* at 1304, citing 29<sup>th</sup> Meeting, *supra* note 41, Statement of Mr. Herment of Belgium at 24; see also Hathaway 2014, *supra* note 24 at 1293, 1301-1302 and 1322-1323

<sup>52</sup> *Pushpanathan*, *supra* note 2 at para 73.

## PART VI – TABLE OF AUTHORITIES

### A. Case Law

Decisions	Paragraph cited
<i>Al-Sirri v Secretary of State for the Home Department</i> , [2012] UKSC 54	4, 10
<i>Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09)</i> , [2010] EUECJ C–101	17
<i>Canada (Attorney General) v Ward</i> , [1993] 2 SCR 689, 103 DLR (4th)	8, 20, 22, 23, 30
<i>Dunsmuir v New Brunswick</i> , 2008 SCC 9, [2008] 1 SCR 190	2, 4
<i>Ezokola v Canada (Citizenship and Immigration)</i> , 2013 SCC 40	3, 6, 8, 10, 18
<i>Jayasekara v Canada (Minister of Citizenship and Immigration)</i> , 2008 FCA 404, [2009] 4 FCR 164	4
<i>Németh v Canada (Justice)</i> , 2010 SCC 56	20
<i>Northrop Grumman Overseas Services Corp v Canada (Attorney General)</i> , 2009 SCC 50, [2009] 3 SCR 309	2
<i>Pushpanathan v Canada (Minister of Citizenship and Immigration)</i> , [1998] 1 SCR 982	3, 6, 8, 10, 16, 19, 20, 22, 23, 27, 30, 28
<i>R v Egger</i> , [1993] 2 SCR 451	7
<i>Zrig v Canada (Minister of Citizenship and Immigration)</i> , 2003 FCA 178, [2003] 3 FC 761	38

### B. United Nations and UNHCR Documents

Title	Paragraph cited
<i>Background Note on the Application of the Exclusion Clauses: Article 1(F) of the 1951 Convention Relating to the Status of Refugees</i> , 4 September 2003	10
<i>Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-Fourth Meeting</i> , A/CONF.2/SR.24, reproduced in Alex Takkenberg & Christopher C Tahbaz, <i>The Collected Travaux préparatoires of the 1951 Geneva Convention relating to the Status of Refugees</i> , Vol. III (Amsterdam: Dutch Refugee Council, 1990)	35, 37
<i>Conference of Plenipotentiaries on the Status of Refugees and Stateless</i>	35

*Persons: Summary Record of the Twenty-Ninth Meeting, A/CONF.2/SR.29*, reproduced in Alex Takkenberg & Christopher C Tahbaz, *The Collected Travaux préparatoires of the 1951 Geneva Convention relating to the Status of Refugees*, Vol. III (Amsterdam: Dutch Refugee Council, 1990)

*Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, reedited, December 2011, HCR/1P/4/ENG/REV 3 18

*Text of the Draft Convention and the Draft Protocol to be Considered by the Conference*, A/CONF.2/12 March 1951, reproduced in Alex Takkenberg & Christopher C Tahbaz, *The Collected Travaux préparatoires of the 1951 Geneva Convention relating to the Status of Refugees*, Vol. III (Amsterdam: Dutch Refugee Council, 1990) 32

*Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810 (1948), 71 8, 9

### **C. Legislation and Treaties**

<b>Title</b>	<b>Paragraph cited</b>
<i>Immigration and Refugee Protection Act</i> , SC 2001, c 27	1, 5
<i>United Nations Convention Relating to the Status of Refugees</i> , July 28 1951, [1969] Can TS No 6	1, 3, 4, 5, 6, 8, 9, 10, 12, 13, 15, 16, 23, 30, 36, 37
<i>Vienna Convention on the Law of Treaties</i> , May 23 1969, [1980] Can TS No 37	5, 6

### **D. Doctrine**

<b>Title</b>	<b>Paragraph cited</b>
Atle Grahl-Madsen, <i>The Status of Refugees in International Law</i> , Vol 1 (AW Sijthoff-Leyden: 1966) at 290	14, 20
James C Hathaway & Colin J Harvey, “Framing Refugee Protection in the New World Disorder” (2001) 34 Cornell International LJ 257 at 261	11
James C Hathaway, <i>The Law of Refugee Status</i> , 2 <sup>nd</sup> edition (Cambridge University Press, forthcoming in 2014), see <b>Appellant’s Supplemental Book of Authorities</b>	18, 20, 21, 23, 26, 31, 34, 38
Joseph Rikhof, <i>The Criminal Refugee: The Treatment of Asylum Seekers With a Criminal Background in International and Domestic Law</i>	32



(Dordrecht, Netherlands, Republic of Letter: 2012)

Paul Weis, “The Concept of the Refugee in International Law” (1960) 20  
87 JDI 928 at 984–6

## PART VII – STATUTORY PROVISIONS AND INTERNATIONAL INSTRUMENTS

<b><i>Immigration and Refugee Protection Act, SC 2001, c 27</i></b>	<b><i>Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27</i></b>
<p>Objectives — refugees</p> <p><b>3(2)</b> The objectives of this Act with respect to refugees are</p> <p>(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;</p>	<p>Objet relatif aux réfugiés</p> <p><b>3(2)</b> S'agissant des réfugiés, la présente loi a pour objet :</p> <p>b) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;</p>
<p>Application</p> <p><b>3(3)</b> This Act is to be construed and applied in a manner that</p> <p>(f) complies with international human rights instruments to which Canada is signatory.</p>	<p>Interprétation et mise en oeuvre</p> <p><b>3(3)</b> L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :</p> <p>f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.</p>
<p>Exclusion — Refugee Convention</p> <p><b>98.</b> A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.</p>	<p>Exclusion par application de la Convention sur les réfugiés</p> <p><b>98.</b> La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.</p>

<b><i>United Nations Convention Relating to the Status of Refugees, July 28 1951, [1969] Can TS No 6</i></b>	<b><i>Convention des Nations Unies relative au statut des réfugiés, 28 juillet 1951, [1969] Can TS No 6</i></b>
<p><b>Preamble</b></p> <p>The high contracting parties,</p> <p>CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,</p> <p>CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure</p>	<p><b>Préambule</b></p> <p>LES HAUTES PARTIES CONTRACTANTES,</p> <p>CONSIDÉRANT que la Charte des Nations Unies et la Déclaration universelle des droits de l'homme approuvée le 10 décembre 1948 par l'Assemblée générale ont affirmé ce principe que les êtres humains, sans distinction, doivent jouir des droits de l'homme et des libertés fondamentales,</p> <p>CONSIDÉRANT que l'Organisation des Nations Unies a, à plusieurs reprises, manifesté la</p>

<p>refugees the widest possible exercise of these fundamental rights and freedoms,</p> <p>CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement,</p> <p>CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,</p> <p>EXPRESSING the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,</p> <p>NOTING that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,</p> <p>HAVE AGREED as follows:</p>	<p>profonde sollicitude qu'elle éprouve pour les réfugiés et qu'elle s'est préoccupée d'assurer à ceux-ci l'exercice le plus large possible des droits de l'homme et des libertés fondamentales,</p> <p>CONSIDÉRANT qu'il est désirable de réviser et de codifier les accords internationaux antérieurs relatifs au statut des réfugiés et d'étendre l'application de ces instruments et la protection qu'ils constituent pour les réfugiés au moyen d'un nouvel accord,</p> <p>CONSIDÉRANT qu'il peut résulter de l'octroi du droit d'asile des charges exceptionnellement lourdes pour certains pays et que la solution satisfaisante des problèmes dont l'Organisation des Nations Unies a reconnu la portée et le caractère internationaux, ne saurait, dans cette hypothèse, être obtenue sans une solidarité internationale,</p> <p>EXPRIMANT le voeu que tous les Etats, reconnaissant le caractère social et humanitaire du problème des réfugiés, fassent tout ce qui est en leur pouvoir pour éviter que ce problème ne devienne une cause de tension entre Etats,</p> <p>PRENANT ACTE de ce que le Haut Commissaire des Nations Unies pour les réfugiés a pour tâche de veiller à l'application des conventions internationales qui assurent la protection des réfugiés, et reconnaissant que la coordination effective des mesures prises pour résoudre ce problème dépendra de la coopération des Etats avec le Haut Commissaire,</p> <p>SONT CONVENUES des dispositions ci-après :</p>
<p><b>1 F.</b> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:</p> <p>(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;</p> <p>(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;</p> <p>(c) he has been guilty of acts contrary to the</p>	<p><b>1 F.</b> Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :</p> <p>a) qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;</p> <p>b) qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiées ;</p> <p>c) qu'elles se sont rendues coupables</p>

purposes and principles of the United Nations.	d'agissements contraires aux buts et aux principes des Nations Unies.
<p><b>PROHIBITION OF EXPULSION OR RETURN (“REFOULEMENT”)</b></p> <p><b>33(1)</b> No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.</p> <p><b>(2)</b> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.</p>	<p><b>DÉFENSE D’EXPULSION ET DE REFOULEMENT</b></p> <p><b>33(1)</b> Aucun des Etats Contractants n’expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques</p> <p><b>(2)</b> Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu’il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l’objet d’une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.</p>

<i><b>Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/810 (1948), 71</b></i>	<i><b>Déclaration universelle des droits de l’homme, GA Res 217 A (III), UN Doc A/810 (1948), 71</b></i>
<p><b>Article 14</b></p> <p>(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.</p> <p>(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.</p>	<p><b>Article 14</b></p> <p>(1) Devant la persécution, toute personne a le droit de chercher asile et de bénéficier de l'asile en d'autres pays.</p> <p>(2) Ce droit ne peut être invoqué dans le cas de poursuites réellement fondées sur un crime de droit commun ou sur des agissements contraires aux buts et aux principes des Nations Unies.</p>

<i><b>Vienna Convention on the Law of Treaties, May 23 1969, [1980] Can TS No 37</b></i>	<i><b>Convention de Vienne sur le droit des traités, 23 mai, 1969, [1980] Can TS No 37</b></i>
<p><b>Article 31: General rule of interpretation</b></p> <p>1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.</p> <p>2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and</p>	<p><b>Article 31 : Règle générale d’interprétation</b></p> <p>1. Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but.</p> <p>2. Aux fins de l’interprétation d’un traité, le contexte comprend, outre le texte, préambule et</p>

<p>annexes:</p> <p>(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;</p> <p>(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.</p> <p>3. There shall be taken into account, together with the context:</p> <p>(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;</p> <p>(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;</p> <p>(c) any relevant rules of international law applicable in the relations between the parties.</p> <p>4. A special meaning shall be given to a term if it is established that the parties so intended.</p>	<p>annexes inclus:</p> <p>(a) tout accord ayant rapport au traité et qui est intervenu entre toutes les parties à l'occasion de la conclusion du traité;</p> <p>(b) tout instrument établi par une ou plusieurs parties à l'occasion de la conclusion du traité et accepté par les autres parties en tant qu'instrument ayant rapport au traité.</p> <p>3. Il sera tenu compte, en même temps que du contexte:</p> <p>(a) de tout accord ultérieur intervenu entre les parties au sujet de l'interprétation du traité ou de l'application de ses dispositions;</p> <p>(b) de toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité;</p> <p>(c) de toute règle pertinente de droit international applicable dans les relations entre les parties.</p> <p>4. Un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties.</p>
<p><b>Article 32: Supplementary means of interpretation</b></p> <p>Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:</p> <p>(a) leaves the meaning ambiguous or obscure; or</p> <p>(b) leads to a result which is manifestly absurd or unreasonable.</p>	<p><b>Article 32 : Moyens complémentaires d'interprétation</b></p> <p>Il peut être fait appel à des moyens complémentaires d'interprétation, et notamment aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu, en vue, soit de confirmer le sens résultant de l'application de l'art. 31, soit de déterminer le sens lorsque l'interprétation donnée conformément à l'art. 31:</p> <p>a) laisse le sens ambigu ou obscur; ou</p> <p>b) conduit à un résultat qui est manifestement absurde ou déraisonnable.</p>