

Human Rights and Security Interests: *Suresh v. Canada* and its Uncertain Legacy

By: John Terry

The Supreme Court of Canada is rightly praised worldwide for its jurisprudence respecting the protection of individual rights. Its constitutional work, particularly in the area of equality rights, has been described recently by the distinguished American legal scholar Owen Fiss as "profound and inspiring," providing "Americans with a standard by which to measure the work of our own Supreme Court."¹ But in *Suresh v. Canada*, the Court's 2002 seminal decision examining the tensions between human rights and national security, the Court compromised its robust commitment to individual rights. The leeway given to government in that decision has provided room for government, as in the case of Maher Arar, to unduly emphasize uncertain national security interests to the detriment of the protection of fundamental human rights.

Manickavasagam Suresh was a Convention refugee² from Sri Lanka who was allegedly a member and fundraiser of the Liberation Tigers of Tamil Eelam. Because of that status, the Minister of Citizenship and Immigration concluded that Suresh was a danger to the security of Canada and ordered him deported to Sri Lanka. Suresh sought judicial review of that decision. He argued among other things that there were substantial grounds to believe he would be tortured if he were deported. He contended that his deportation would violate his rights under the *Charter of Rights and Freedoms* (the "Charter") as well as the prohibition against torture under the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (the "Torture Convention"). The matter reached the Supreme Court of Canada in May 2001.

The Court allowed Suresh's appeal... but made disquieting statements that raised questions about its level of commitment to the protection of international human rights.

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Judges' benches in main courtroom, the Supreme Court of Canada - Philippe Landreville

I acted as counsel for the United Nations High Commissioner for Refugees (UNHCR) as an intervenor in the *Suresh* appeal. Prior to that appeal, the UNHCR was one of the few institutions considering the appropriate balance between human rights and national security issues. In particular, the UNHCR had been considering how to appropriately balance three international treaty provisions:

- (a) Article 33(1) of the *Convention Relating to the Status of Refugees* (the "Refugee Convention"), which prohibits state parties from returning a refugee to a territory where his life or freedom is threatened;
- (b) Article 33(2) of the *Refugee Convention*, which creates an exception to Article 33(1) where there are reasonable grounds for regarding the refugee in question as "a danger to the security of the country in which he is;" and
- (c) Article 3(1) of the *Torture Convention*, which states that no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subject to torture.

The UNHCR's position in *Suresh* was that international law prohibited the return of a refugee where there are substantial grounds to believe the refugee will be subject

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to torture. The UNHCR also argued that even where there are no substantial grounds to believe a refugee will be subject to torture, return can only be justified under Article 33(2) of the Refugee Convention if there is a very serious threat to the security of the country of refuge that is proportional to the risk faced by the refugee on return.³

Suresh's appeal to the Supreme Court of Canada was heard in May 2001. But the Court's decision was not released until January 2002.

September 11, 2001 occurred between those two dates. This event profoundly changed worldwide thinking about how national security and human rights should be balanced. The Court allowed Suresh's appeal and held that he was entitled to a new deportation hearing. But the Court made disquieting statements that raised questions about its level of commitment to the protection of international human rights.

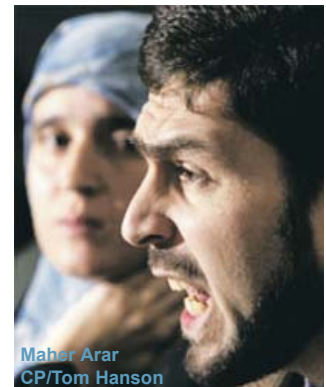
As described above, Article 3(1) of the Torture Convention prohibits the return of individuals to a state where there is a substantial risk of torture. The Court rightly concluded that "international law rejects deportation to torture, even where national security interests are at stake" and that this norm "best informs the content of the principles of fundamental justice under s. 7 of the Charter."⁴ However, in applying the constitutional right to security under s. 7 of the Charter and considering the reasonable limits provision of s. 1 of the Charter,⁵ the Court went on to state that "in exceptional circumstances, deportation to face torture might be justified" and that "the ambit of an exceptional discretion to deport to torture, if any, must await future cases."⁶ The Court also stated that courts should apply "a broad and flexible approach to national security and...a deferential standard of judicial review" with respect to national security considerations.⁷

The Supreme Court of Canada's decision would have been very different if the events of 9/11 had not occurred before it was released. They cast a shadow over the Court's reasons. Like other public policy decisions made by governments following 9/11, the Court's analysis in *Suresh* was skewed by the Court's concerns respecting international terrorism. Viewed three years later, the Court's statements that "national security" should be broadly defined and that deportation to face torture may be justified in "exceptional circumstances"

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The Court's statements that "national security" should be broadly defined and that deportation to face torture may be justified in "exceptional circumstances" stand out as stark invitations to government to engage in the kind of decisions that led to the deportation of Maher Arar.

In 1999, the Supreme Court of Israel - faced with the question of whether "shaking" and similar techniques could be used to interrogate suspected terrorists - concluded that they could not. The Court justified its decision on the basis that "[t]his is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it."⁸ A decision like that of the Israeli court, in a country where terrorist activities are a constant threat, should be a beacon to all the world's courts. As the Torture Convention makes clear, the prohibition against torture is absolute; deportation to torture can never be justified. The next time the Supreme Court hears a case on human rights and national security issues, it should use the opportunity to eliminate the compromises that make the *Suresh* decision a blemish on the Court's strong record of protecting human rights. ■



Notes:

1. Owen Fiss, "Speak, Canada, Speak: A Convocation Address to the Class of 2004", University of Toronto Faculty of Law, 7 June 2004.
2. A Convention refugee is a person who is outside of their country of nationality or habitual residence and who is unable or unwilling to return to that country because of a well-founded fear of persecution for reasons of race, religion, political opinion, nationality or membership in a particular social group.
3. The factum was subsequently published by the UNHCR in "Factum of the UNHCR in the *Suresh* Appeal," *International Journal of Refugee Law*, Vol. 14, 2002.
4. *Suresh v. Canada* (M.C.I.), [2002] 1 S.C.R. 3 at 45 [hereafter "*Suresh*"].
5. Section 1 of the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
6. *Suresh* at 46-47.
7. *Ibid* at 49.
8. H.C. 6536/95, *Hat'im Abu Zayda v. Israel General Security Service*, 38 I.L.M. 1471 (1999) at 1488 (para. 39).