

**AHMAD ZAOU, A VICTIM OF 9/11:
IMPACT OF THE TERRORIST ATTACKS IN THE UNITED
STATES ON NEW ZEALAND REFUGEE POLICIES**

NAJIB LAFRAIE¹
University of Otago

The terrorist attacks on the Twin Towers and the Pentagon on 11 September 2001 were watersheds in the international relations and domestic policies of various states in many respects. Their impact on Western countries' immigration and refugee policies may be less spectacular than the 'war on terror', the attack on Afghanistan and the invasion of Iraq; nonetheless, they have caused enormous suffering to countless people. As demonstrated by the Australian government's treatment of the 'Tampa refugees' in the month preceding the 9/11 events,² many countries had already begun adopting tough policies and harsh measures towards asylum seekers, labelled as 'illegal immigrants'. The terrorist attacks in the United States provided justification and public support for such policies, leading to even tougher and harsher ones, and encouraged many others to follow suit. This has often resulted in widespread abuses of the human rights of migrants and refugees—particularly Muslims.

New Zealand has had a bright history of providing shelter and refuge to people fleeing persecution and maltreatment in their home countries. New Zealand has also had an excellent record in respect of human rights and commitment to international treaties and conventions. A particular Algerian asylum seeker's case, however, calls both New Zealand's refugee policies and human rights commitments into question. Ahmad Zaoui, who was

¹ Najib Lafraie (najib.lafraie@stonebow.otago.ac.nz) is a Lecturer in Political Studies at Otago University.

² In August 2001, the Norwegian cargo ship, *Tampa*, rescued 433 mostly Afghan refugees whose Indonesian boat had been sinking on its way to Australia. The Australian government ignored the suffering of the refugees as well as the risk to their lives and refused to allow them to land on its soil. It used military force to repulse the ship from its territorial waters. Finally the crisis was 'resolved' when New Zealand agreed to admit the most vulnerable of the refugees and the rest were taken to Nauru Island. For an account of the John Howard government's treatment of the *Tampa* refugees see Mark and Wilkinson (2003).

elected to the Algerian parliament in the early 1990s, reached New Zealand in December 2002. He had spent the previous decade fleeing the Algerian regime's persecution; but had failed to find hospitality in France, Belgium and Switzerland. He did not feel safe and secure in his last abode, Malaysia, either. Well aware of New Zealand's reputation, he expected better treatment and a new lease of life in that country. What he got instead, however, was worse than that of all his past experience. He was taken from the airport to a police detention centre and then to a maximum security prison, where he spent two years—ten months of it in solitary confinement—without any charges or trial. His initial application for asylum was rejected by the Refugee Status Branch. By the time that decision was overruled by the Refugee Status Appeals Authority, Zaoui was deemed to be a risk to New Zealand security and excluded from the protection provided by international refugee laws. Despite serious concerns regarding the reliability of the allegations on which the Security Risk Certificate was based, the government refused to lift the Certificate and grant Zaoui refugee status.

Ahmad Zaoui's case is important for Muslims in New Zealand for several reasons. Zaoui is a Muslim; and although his unfair treatment and suffering has generated a wave of sympathy among all those concerned with justice and human rights, it has been particularly felt by Muslims around the country. It is also important for the large number of Muslims among the asylum seekers in recent years—a number which is increasing due to the continuing instability of the 'Muslim world'. It can also be seen as an expression of growing Islamophobia in the West in the wake of the 9/11 terrorist attacks. The legal dictum that 'a person is presumed innocent unless proved guilty' seems to have changed for Muslims to being presumed guilty unless proved innocent. Zaoui's case is a prime example of this.

Is Ahmad Zaoui's case a symptom of a larger problem or an unfortunate aberration? This essay aims to search for an answer to this question. After providing the historical background of New Zealand's humanitarian refugee policies and a picture of other countries' post-9/11 refugee and migrant policies, this essay looks at the impact of 9/11 on New Zealand's refugee policies and its implications for Muslims. First the Ahmad Zaoui case will be examined, and then changes in laws and regulations resulting from the 9/11 terrorist attacks will be reviewed. In order to assess the practical impacts of the changes, relevant data on refugee and asylum seekers will be analysed.

New Zealand's Humanitarian Policies Towards Refugees

'New Zealand is one of just a dozen countries world-wide with an established refugee resettlement program. Its annual quota of 750 places puts New

Zealand's intake, on a per capita basis, on a par with Canada's' (UNHCR 2000:182). Thus is New Zealand described by the official international refugee agency, the United Nations High Commission for Refugees. In addition to the quota refugees, a system established in 1987, New Zealand admits a number of 'spontaneous refugees'—asylum seekers who are already in the country or those applying for asylum upon reaching New Zealand ports. Although the quota system and spontaneous refugee admission are rather recent phenomena, the history of welcoming refugees in New Zealand extends back over more than half a century.

Immigrants to New Zealand in the nineteenth century and the first decades of the twentieth century certainly included some who could be defined as 'refugees', because of their fleeing from Europe 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.³ The first large-scale influx of official refugees, however, happened in November 1944 when a group of Polish refugees, including 775 orphans and 82 adults, reached New Zealand and were admitted for resettlement. This was followed by more than 4500 World War II refugees from Europe between 1947 and 1952, and more than a thousand refugees from Hungary from 1956 to 1958. More important was the humanitarian gesture towards 'handicapped refugees' in the late 1950s and early 1960s, making New Zealand the first country in the world to accept such refugees (Binzegger 1980).

Even though a number of Chinese orphans were admitted as refugees by New Zealand in 1962, New Zealand's intake of refugees, as well as that of immigrants in general, was primarily restricted to white Europeans until the 1970s. Changes in people's opinion and attitude led to changes in government policies.⁴ Several hundred South Asians fleeing persecution in Uganda were accepted as refugees in the early 1970s. They were followed by thousands of Kampuchians, Vietnamese and Laotians reaching New Zealand in the second half of 1970s and subsequent decades (Binzegger 1980; Haines 2005:Table 51). As for spontaneous refugees, the number of such applicants was very small until the mid-1980s. It reached 330 in 1989 and peaked to 1200 in 1991, as a result of a large number of nationals from the People's Republic of China, who resided in New Zealand at the time, seeking asylum following the 1989 Tiananmen Square massacre (Haines 1995:40-41). It has remained rather high ever since. However, the number

³ Part of the definition of 'refugee' in the 1951 *Convention Relating to the Status of Refugees* (1 A (2)). Available online: <http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3b66c2aa10>.

⁴ Professor W.T. Roy has been quoted as writing in 1970: 'There exists now a body of opinion, where once there was none, that opposes and counterbalances the orthodox and conservative view. All of this simply adds up to the likelihood that New Zealand immigration policy is going to be reappraised' (Binzegger 1980:55).

of applications approved, except for in certain years, has been very small (Haines 2005:Table 3).

The first refugees from the Middle East reached New Zealand in the late 1970s and the mid to late 1980s. However, they were mainly non-Muslims—Baha'is and Christian Assyrians, fleeing persecution and war in Iran and Iraq. The first Muslims admitted as quota refugees was a group of ninety-four Somalis in 1992. They were also the first African refugees to New Zealand (Te Ara 2005). By 2005 the number of Somali refugees had reached over 1700. Iraqis, numbering over 2500, form the largest refugee group from a Muslim country—although a considerable portion of this group would be Christian Iraqis. Afghans, coming mostly after the year 2001, form the third largest group of Muslim refugees with over 1150 (Haines 2005:Table 51). Afghanistan was also among the top three countries with the highest number of refugee status applications approved by the Refugee Status Branch (RSB) in the years 1998-1999, 1999-2000 and 2001-2002. Somalia, Iraq and some other predominantly Muslim countries have also been among the top five such countries since 1992-1993 (Haines 2005:Table 6).

World-Wide Impact of 9/11 on Refugees

The events of 9/11 put to the test the true commitment of people and governments of Western countries to universal human rights. Refugees and asylum seekers are 'aliens' by definition, and aliens have always been the most vulnerable to abuse and persecution—especially at times of crisis. In an atmosphere where 'suspected' citizens are not immune to maltreatment, there is little hope for aliens' human rights to be respected. Unfortunately, this is what has happened to thousands of refugees around the world, including in Western countries, in the aftermath of the terrorist attacks on American cities. A UNHCR document published in September 2002 notes:

Over the last year, asylum-seekers and refugees in many countries throughout the world faced increasingly frequent attack, arrest, abduction, mass round-up and detention, deportation, and even murder, including of children. Such incidents seriously undermined the safety of refugees and contributed in some instances to the broader problem of secondary onward movement, since protection in the host country could not or could no longer be assured. (UNHCR 2002, quoted in Türk 2003:115)

The situation has been worst in the United States. To be sure, abuses of human rights and restrictions of civil liberties have not been limited to

refugees. As David Cole, professor of law at George Town University and a civil liberties campaigner, mentions (2003:18):

[W]ith the exception to the right to bear arms, one would be hard-pressed to name a constitutional liberty that the Bush administration has not overridden in the name of protecting our freedom. Privacy has given way to secret searches without probable cause, FBI spying on religious services, and ‘Total Information Awareness’. The effort to stem funding for terrorists has resurrected guilt by association and official blacklists prepared in secret. Physical liberty and habeas corpus survives only until the president decides someone is an enemy combatant. Assets have been frozen without notice, without a hearing, without any violation of law, and on the basis of secret evidence. Equal protection has fallen prey to ethnic profiling. Conversations with a lawyer may be monitored without a warrant or denied altogether when the military finds that they might impair the persuasiveness of its incommunicado interrogation methods. The right to a public hearing upon arrest exists only at the attorney general’s sufferance. And the right to know what our government is doing has been overridden because in order to keep al Qaeda ignorant, the government says it must keep all of us in the dark as well.

Since publication of Cole’s book, many more violations of the United States constitution by the administration have come to light—including ‘rendition’ of suspects to countries where torture is prevalent, establishment of secret prisons in third countries, and the National Security Agency’s eavesdropping and spying on American citizens.⁵ Refugees and immigrants, especially Muslims, have borne the brunt of such violations. In addition to suffering these restrictions to their civil liberties, one author identifies at least six measures by the Bush administration affecting refugees and asylum seekers in particular. ‘These include reduction in refugee admission, the criminal prosecution of asylum seekers, the blanket detention of Haitians, ... “preventive” arrests, closed deportation proceedings, and “call-in” registration programs’ (Kerwin 2005:749).⁶

Abuses of human rights in the name of ‘war on terror’ are not limited to the United States. European countries and other industrialised nations, considered champions of human rights for their advocacy of universal human rights and civil liberties, have also come under strong criticism for new laws

⁵ For examples of news stories on each of the measures, see respectively: Jehl and Johnston (2005); Priest (2005); and Goldenberg (2005).

⁶ For another study of the effects of post-9/11 US policies on refugees and immigrants see Welch (2004).

introduced and new measures adopted. As early as September 2002, Amnesty International (2002a) expressed its deep concern ‘about serious human rights violations that have taken place as a consequence of the United Kingdom (UK) authorities’ response to the 11 September 2001 attacks in the United States of America’. It notes, in particular:

- detention of non-UK nationals for unspecified and potentially unlimited duration, without charge or trial, under the Anti-terrorism, Crime and Security Act 2001 (ATCSA); ...
- conditions of detention amounting to cruel, inhuman or degrading treatment in high security prisons in the UK of those detained under the ATCSA or under the Terrorism Act 2000 or on the basis of warrants for extradition to the USA;
- denial of the opportunity to challenge, in a fair procedure, any decision taken under the ATCSA which negatively affects people’s status or rights as recognized refugees or asylum-seekers in the UK;
- the UK authorities’ neglect of their obligation under domestic and international law to make representations to the US authorities to ensure that the human rights of their nationals currently detained, ... at the US naval base in Guantánamo Bay, Cuba, be respected.

By 2005, not only had these problems worsened, but new dimensions had been added to the abuses of refugees’ rights in the United Kingdom. ‘Amnesty International estimates that tens of thousands of people who have sought asylum have been detained solely under the country’s Immigration Act. Their detention is in many cases protracted, inappropriate, disproportionate and unlawful. For many people who have sought asylum in the UK, languishing in detention has led to mental illness, self-harm and even to people attempting to take their own lives’ (Amnesty International 2005a). As for new dimensions of abuse, in mid-2005, ‘the UK government ... announced sweeping new counter-terrorism measures that pose serious threats to human rights protection. Among these measures, the UK announced its intention to forcibly send terror suspects to countries where they risk torture or other ill-treatment’ (Amnesty International 2005b).

In addition to those of the United Kingdom and United States, Amnesty International has criticised the refugee policies of Italy, Spain, France, Germany, Austria, Belgium, Finland, Greece, Ireland, Lithuania, Malta and Switzerland (Amnesty International 2005c). Secret services of many of these countries have also been implicated in the United States ‘rendition’ activities (Henley and Norton-Taylor 2005). According to both Amnesty International and UNHCR, security concerns cannot justify abuses of human rights. ‘The dichotomy between security and human rights is a

false one. International human rights standards oblige states to take steps to give effect to the rights enshrined in the treaties, including protection of the public from violations by both state and non-state actors' (Amnesty International 2001). It is also important to note that 'the 1951 Convention [Relating to the Status of Refugees] and 1967 Protocol in no way restrict or prevent action against persons engaged in such terrorist acts and explicitly provide possibilities for action. These instruments do not offer protection to terrorists but rather offer possibilities for ensuring that terrorists are brought to justice and that serious security concerns can be addressed' (Türk 2003:118).⁷ Therefore, the challenge these countries face is to remain within the bounds of their international commitments, especially with regard to refugees, while taking measures to counter international terrorism—a challenge many countries have failed to meet.

Before turning to New Zealand, it is appropriate to have a brief look at Australia's refugee policies, which have also been subject to Amnesty International's criticism. Due to its large size and relatively small population, Australia has been able to accommodate a large number of refugees over many years. In the quarter-century after World War II, more than 350,000 refugees from Europe settled in Australia, and the number of Indochinese refugees in the country in the last three decades of the twentieth century reached over 185,000 (UNHCR 2000:181). In 2005, Australia's quota of UNHCR-referred refugees was 6000 places and the total humanitarian refugee programme included 13,000 places (UNHCR, 2005). Nonetheless, Australia has been strongly criticised by human rights organisations for its harsh treatment of asylum seekers in pre-and post-9/11 periods. Australia is the only Western country with a mandatory detention policy for all 'unauthorised arrivals', including asylum seekers (Edmund Rice Centre 2001; UNHCR 2000:182). The policy was introduced in the early 1990s in response to the influx of Indochinese 'boat people' and has been strictly enforced ever since (McMaster 2002). According to Amnesty International (2002a), the United Nations Human Rights Committee has found the mandatory detention of asylum seekers by Australia 'to be arbitrary and unlawful, in violation of international human rights obligations binding on Australia'. Moreover, 'Detaining children for up to five years, frequent rioting and self-harm by detainees are not acceptable by-products of refugee processing. ... There is also a growing body of evidence that prolonged detention of unspecified duration, particularly when people are already traumatised by past persecution and do not know what the future holds for them, can lead to serious, physical and psychological damage'.

⁷ For the significance of humanitarian values in the 'war against terror' see also Hieronymi and Jasson (2002).

Amnesty International and other human rights organisations have also criticised Australia's so called 'Pacific Solution' policy. The policy was adopted in the wake of the *Tampa* refugees crisis, when over 400 mostly Afghan refugees, who had been rescued by a Norwegian ship after their Indonesian boat had sunk, were refused entry onto Australian soil and instead were sent to the Pacific island of Nauru. The post-9/11 climate allowed the John Howard government to take a number of measures and enter into a number of agreements with small Pacific Island states to divert all approaching refugee boats to third countries in the Pacific. In Amnesty International Australia's view (2004), '[b]y refusing asylum seekers access to Australia's refugee determination system, Australia is contravening its international obligations. The UNHCR noted that, in light of the 1951 Refugee Convention and the practice over the last 50 years, Australia's new policy "is inappropriate and inconsistent with the edifice of asylum that's been built up over years"'. Amnesty International's other concerns include:

- access to law,
- physical and mental health of detainees,
- lack of independent monitoring and access,
- possibility of return to unsafe countries, and
- setting a precedent for other countries.

Impact of 9/11 On New Zealand Refugee Policies—The Case of Ahmad Zaoui

Amnesty International's campaign for human rights in New Zealand in recent years has focused on Ahmad Zaoui. Amnesty's motto in Zaoui's case is: 'Freedom or Fair Trial'. Unfortunately for Zaoui, he has achieved neither at the time of writing (February 2006) despite being in New Zealand for over three years.

Who is Ahmad Zaoui and how did he end up in a prison in New Zealand? Why has he spent such a long time in confinement without a trial? How has the 'war on terror' affected his fate? To find responses to these questions does not require extensive research. Amnesty's webpage on Zaoui, and another website published by a group of Zaoui supporters, provide excellent information.⁸ More important, however, is the text of the Refugee

⁸ The website is called: 'Free Ahmad Zaoui or give him a fair trial' and can be accessed at: <http://www.freezaoui.org.nz/>. The URL for Amnesty's webpage on Zaoui is: <http://www.amnesty.org.nz/web/pages/home.nsf/dd5cab6801f1723585256474005327c8/49267f2a580568c0cc256d9e007d7a06!OpenDocument>.

Status Appeals Authority's (RSAA) report and ruling, which has been published in the form of a book (RSAA 2005).⁹ This report is a tribute to RSAA for the thoroughness of its investigation and uncompromising adherence to the rule of law and principles of justice. The Authority certainly deserves the praise it won from the Minister of Immigration in May 2003, a few months before its ruling on Zaoui, after which the government's view seems to have changed: 'In the field of refugee law, the jurisprudence of our Refugee Status Appeal Authority is second to none ...' (RSAA 2005:8). What follows is mostly based on this document.¹⁰

Ahmad Zaoui was born to a religious family in a small town in Algeria in 1960, amidst the Algerian war of independence. After finishing high school in his home country, he went to Saudi Arabia for religious studies from 1980 to 1985, earning a BA. Upon his return to Algeria, he pursued a post-graduate degree in Islamic studies at the University of Algiers, and at the same time was engaged in teaching Arabic and Quranic studies at local mosques and schools. He completed his post-graduate degree in 1988 and started teaching *fiqh* (Islamic jurisprudence) at the University of Algiers and was also appointed as *imam* of a new mosque in a nearby city. If not for the political events of the early 1990s in Algeria, Zaoui would most probably still be teaching at a university and leading prayers in a mosque in Algeria.

The political conflict of the 1990s in Algeria provides the context for Zaoui's plight. Thus, the RSAA tries to grasp a clear and accurate picture of the events. At the heart of the issue is the success of the Islamic movement in national elections, followed by a coup and ruthless crackdown by the ruling elite which led to radicalisation of a portion of the movement, allegedly committing enormous atrocities against innocent people. One of the experts testifying to the Authority notes (RSAA 2005:33 [37]):

Political Islam in Algeria has a long and honourable history. ... [A]s popular discontent mounted with the Algerian experiment in political and economic development towards the end of the 1970s, the Islamist movement received ever-greater support, in part augmented by the relative leniency shown to it by successive governments. At the same time, its popularity was increased by the Arabization programme undertaken in the late 1970s and early 1980s to counter the persistence of French as the major language and culture for Algeria.¹¹

⁹ Another important book, building on the information provided in the report, is: Manning *et al.* (2004).

¹⁰ Only direct quotations will be referenced to the relevant paragraphs. Sources other than RSAA will also be cited.

¹¹ Quoted from an email by Professor George Joffé.

One such supporter of the Islamic movement was Ahmad Zaoui, although he did not devote much time to political activities and refused to use his official positions to promote his political views. He joined the largest Islamist party, Islamic Salvation Front (FIS), in June 1991 and was elected to its National Advisory Council in September of that year. According to the expert testifying to the RSAA (2005:34 [38]), ‘The FIS was ... something more than an Islamist party, although it was certainly concerned with political action. ... [I]t sought to create a movement that brought together as many members as possible, whatever their specific political platforms, and which, furthermore, challenged the claim of the FLN [the ruling National Liberation Front party] to embody the legitimate inheritance of the Algerian revolution’.

When the FIS won an overwhelming majority in the multi-party elections for the National Assembly in December 1991, the ruling elite and its foreign supporters found it difficult to see the Islamists forming a government. The crackdown on the Islamists that had started earlier already, intensified; the second stage of the parliamentary elections was cancelled; and the results of the first stage were announced null and void. Political leaders of the Islamic movement, as well as thousands of its supporters, were put behind bars and were subjected to increasingly harsh treatments. The regime’s abuses of human rights continued well into the twenty-first century. Zaoui, who was elected to the National Assembly as an FIS candidate, was imprisoned for a few days following his speech to a rally in January 1992, kept a low profile thereafter, and finally fled to Europe through Morocco in August 2003 after learning of his death sentence in absentia by an Algerian court. His odyssey in Europe was long and tragic. He did not stay at his point of entry, France, as he feared the close relationship between that country and the Algerian regime. His applications for asylum in Belgium and Switzerland were either declined or went unanswered. He spent nineteen months in jail in Belgium, had to live under appalling conditions with his wife and children, and was subjected to constant confinement and harassment. Finally the family was deported to the small African country of Burkina Faso, from where they went to Malaysia in January 2000. A little less than two years later, Zaoui left his family and flew to Auckland airport, hoping to find a safe refuge for himself and his family, after he had learned of contacts between the Algerian secret services and the Malaysian authorities.

Why was Zaoui imprisoned in New Zealand? Before 11 September 2001, asylum seekers like Zaoui would ordinarily spend a few hours at the airport, and occasionally stay overnight at a police station, until the initial stage of their interviews with immigration officers was completed. Then they could enter New Zealand society, carry on with a ‘normal life’—even having the right to work—and wait for their cases to be decided by the immigration authorities. Unfortunately for Zaoui, the rules of the game had changed after

the terrorist attacks.¹² After Zaoui's interview with an immigration officer, conducted with the help of an interpreter, a customs officer at the airport concluded from 'an oral résumé of the appellant's refugee application ... [that he] met the parameters of the "terrorist" profiling' (RSAA 2005:261[930-931]). That decision, compounded by a misunderstanding by the officer during his 'chat' or interview with Zaoui in the absence of an interpreter, landed Zaoui first in a police station and then in a maximum security prison. Zaoui's appointed legal counsel filed an application with the Refugee Status Branch (RSB). Zaoui was interviewed by the RSB only once and was given the opportunity to comment on the resulting report. The application was declined on 30 January 2003, despite the RSB finding that 'the appellant had a well-founded fear of being persecuted in Algeria, in terms of Article 1A(2) of the Refugee Convention'. The reason for rejecting the application was that, according to the RSB, Zaoui 'was nevertheless excluded from the Convention by virtue of Article 1F(b), on the grounds that there were serious reasons for considering that he has committed serious terrorist or non-political crimes' (RSAA 2005:25[9]). The RSB's decision was overruled by the RSAA, who found Zaoui to be a genuine refugee protected by the international Refugee Convention, in August 2004. By that time, however, there was a new development in the Zaoui case which complicated the situation and gave the case an historical dimension.

According to the New Zealand Immigration Act 1987 (section 11 4D (1)c); (noted in Wolfsbauer 2005:61), 'Should an individual [not a New Zealand citizen] be found to constitute a threat to national security, the Director of Security ... is able to provide the Minister of Immigration with a security risk certificate'. Based on the New Zealand Security Intelligence Service Act 1969 (section 2 'Security'; noted in Wolfsbauer 2005):

This certificate may be issued when said individuals meet the following criteria:

- a) The individual has or intends to perform an act of espionage, sabotage, ... and subversion, whether or not the act would be committed in or directed from New Zealand;
- b) The individual is found to possess foreign capabilities, intentions or is capable of performing activities (within or relating to New Zealand) that will impact on New Zealand's international well-being or economic well-being;
- c) The individual's activities (that are within or relate to New Zealand)

¹² Discussed in the next section.

- i. Are influenced by any foreign organisation or any foreign person; and
- ii. Are clandestine or deceptive, or threaten the safety of any person; and
- iii. Impact adversely on New Zealand's international well-being or economic well-being.

Another criterion was added by a post-9/11 amendment: 'The individual intends to perform a terrorist act, or conducts activities which relate to the carrying out or facilitating of any terrorist act' (New Zealand Security Intelligence Service Act 1969, section 2(d) 'Security'; noted in Wolfsbauer 2005).

In March 2003 Ahmad Zaoui became the first, and so far the only, recipient of a Security Risk Certificate by the New Zealand Director of Security. Three days after the Certificate was issued, the Minister of Immigration made a preliminary decision to rely on it, an act which led to an application by Zaoui's counsel to the Inspector General of Intelligence and Security for a review of the Director's decision. Since the case was under consideration by the RSAA at the time, the review was delayed until the Authority had made its decision. When the RSAA ruled in favour of Zaoui, the process of review by the Inspector General began. The Inspector General's biased remarks in an interview with the *New Zealand Listener* magazine; the Director of Security's refusal to release the charges against Zaoui—or even a summary of the allegations; Zaoui's lingering in prison despite the RSAA's finding him a legitimate refugee; and the issue of Zaoui's human rights versus his risk to security led to a series of legal battles that lasted until June 2005. Most of the courts' rulings were in favour of Zaoui. The Inspector General, who had made the biased remarks, was disqualified from review and resigned; the Director of Security was forced to release a summary of allegations and reasoning against Zaoui; Zaoui was released from prison on bail into the care of a religious institution; and the Supreme Court ruled that the Minister of Immigration must take into consideration whether Zaoui would be in danger if deported from New Zealand—although it did not agree with Zaoui's counsel that the Inspector General should determine the existence of such a threat (Wolfsbauer 2005:163-164). At the time of writing (February 2006), the Inspector General has not completed his review and Zaoui's future still hangs in the balance.

The summary of allegations and reasoning against Zaoui issued by the Director of Security shows that, in his decision to issue a Security Risk Certificate, the Director relied heavily on court cases against Zaoui in France and Belgium; Belgium's refusal to grant him refugee status; and his deportation from Switzerland. Despite Prime Minister Helen Clark's criticism of RSAA for being 'cavalier' and relying 'on advice from Mr

Zaoui's side of the argument' with regard to the Belgian and French cases (see *Scoop* 2004c), the RSAA had thoroughly assessed those cases, as well as allegations against him in Algeria and Switzerland. It had devoted more than 400 paragraphs to them and had found them to be 'unsafe and ... not probative or reliable evidence of the appellant's involvement in a criminal association with intent to prepare acts of terrorism' (RSAA 2005:244[867]). Some other allegations by the Director—for example Zaoui's false passport, questions regarding the videotape of his journey in South-East Asia, and a concern regarding security derived from an SIS officer's interview with Zaoui—have also been convincingly dismissed by Zaoui's counsel.¹³ What remains uncertain is the nature and extent of the 'classified information' that the summary of allegations claims the SIS obtained during its enquiries. There may be some new and important information—only the Inspector General of Security and Intelligence, who is the sole person with the right to look into the details, can determine that. The summary, however, does nothing to allay the fear that the claim may be ill-founded. This is why Amnesty International considers the summary to be 'too little, too late, and again raising serious questions about the Government's handling of the case' (*Scoop* 2004a).

When it comes to justifying the issuance of a Security Risk Certificate against Zaoui in terms of New Zealand law, the summary of allegations and reasoning refers to definition (c) of 'security' in the New Zealand Security Intelligence Service Act 1969, noted earlier. Each item of the definition is discussed separately; over and over again referring to Zaoui's background and his cases in Belgium, France and Switzerland. On his adverse impact on New Zealand's international well-being, the summary notes (Manning *et al.* 2004:103):

As part of the international community it is New Zealand's responsibility to take its proper part in controlling, defeating and preventing activities of security concern, as those of which Mr Zaoui has been convicted in Belgium and France and for which he was deported from Switzerland. Consistent with this, it is a government objective to ensure that New Zealand is neither the victim nor the source of acts of terrorism or other activities of security concern, and to prevent New Zealand from being or becoming a safe haven for people who have undertaken, or may be intending to undertake, such activities.

¹³ '20 February 2004: Statement by Ahmad Zaoui's Lawyer Deborah Manning on Release of Summary of Accusations' (Manning *et al.* 2004:101-103).

If Mr Zaoui, with his public record, were allowed to settle here, that would indicate that New Zealand has a lower level of concern about security than other like-minded countries. That would impact adversely on New Zealand's reputation with such countries and thus on New Zealand's international well-being.

It is important to note that despite references to terrorism in the summary of allegations and reasoning, Zaoui was not accused of being a terrorist.¹⁴ Neither was he accused of intending to perform espionage or subversion, the criteria contained in definition (a) of the Security Intelligence Service Act. By relying on definition (c), according to a commentator (Wolfsbauer 2005:72), the Director of Security based the Security Risk Certificate on vague and ambiguous criteria:

[Definition (c)] does not allow the public to understand and assess the government's actions; for Ahmad Zaoui, the media and the public are effectively left in the dark as to what context the definition is being applied, what he is suspected of doing, why, with whom, and what the outcomes of actions would be.

The last point of the summary of allegations and reasoning has also been subjected to strong criticism. In a 'Submission to the Prime Minister', Zaoui's lawyers contend, 'The Director of Security is effectively here saying that New Zealand should be prepared to breach its obligations under New Zealand law and also at international law, simply in order to avoid being labelled "a soft touch"' (Scoop 2004b). The New Zealand Green Party spokesperson for intelligence issues also makes a similar point: 'Statements that Mr Zaoui's presence would confirm New Zealand's status as a "soft touch" reinforce our fears that diplomatic interests are being put ahead of human rights. The government seems unwilling to embarrass authorities in France, Belgium and Switzerland by accepting a person unjustly framed in those countries' (Locke 2004).

The role of media in implicating Ahmad Zaoui in terrorism seems to have been crucial. Soon after Zaoui was put in prison, *The New Zealand Herald*—New Zealand's largest daily newspaper—ran a news report entitled 'Terrorist alert as traveller detained'. It began with the statement that, 'A man is being held in the most secure unit of Auckland's maximum-security prison while authorities try to establish if he is an internationally wanted terrorist'. It went on to claim that, 'Zaoui's group was blamed for massacres of civilians in Algeria. ... Last year, media reports from Vancouver linked Zaoui to Osama bin Laden's secret army in South-East Asia' (*The New*

¹⁴ This point was confirmed by the government during Question Time in Parliament; see 'Questions for Oral Answers: Questions for Ministers', Thursday 13 May 2004, Clerk Parliament website: <http://uncorrectedtranscripts.clerk.govt.nz/Documents/20040513.htm>.

Zealand Herald 2002). The allegation in *The Herald* the next day was much more direct: ‘The name Ahmed Zaoui is linked to terrorist cells that have carried out bombings, beheadings and throat slitting from Algeria to France’ (Masters 2002). A concern with the impact of such news reports, the publication of which continued until the eve of the release of the RSAA’s decision, on public opinion prompted the RSAA (2005:268-274[954-976]) to deal with them in some detail. It also warned that, ‘It is a criminal offence ... to disclose information relating to a refugee claim, even to the point of disclosing the existence of the claim itself’ (RSAA:28 [24]). It was only after the RSAA’s ruling in favour of Zaoui, which found him innocent of all the charges, that other media outlets—such as the *New Zealand Listener*, *Scoop* and TVNZ—tried to correct the impression created by *The Herald*. *The Herald* itself, however, decided to question the RSAA’s decision through a series of supposedly investigative reports, repeating the earlier allegations against Zaoui and criticising the RSAA report for ‘airily rejecting their [French and Belgian courts’] findings and their procedures and taking Zaoui’s word on the injustices he had seemingly endured. ... Its commendably long but lamentably shallow decision speaks volumes for how this public body failed in its duty’ (*The New Zealand Herald*, 2004; quoted in Wolfsbauer 2005:121).¹⁵ Soon after that, however, *The Herald* admitted its mistakes by noting that:

In a post-September 11 climate, the terrorist story had, as they say, legs. Media organisations including *the Herald* pursued it vigorously. It’s now clear that many of the earlier stories got it hopelessly wrong—a consequence of using unsubstantiated internet-based reports.¹⁶

Impact of 9/11 on New Zealand Refugee Policies—Changes in Laws and Procedures

Zaoui’s detention and imprisonment seem to have been the result of a new Operational Instruction issued by the New Zealand Immigration Service on 19 September 2001, a week after the terrorist attacks in the United States. The document ‘directed immigration officers, “in deciding whether or not in a particular case detention [of a refugee status claimant] is justified, and the type of detention justified”, to be guided by various factors stated under two

¹⁵ For a critique of *The Herald*’s five-part series on Zaoui in April 2004, see ‘Media Bias Display Conservative Agenda’, in Manning *et al.* (2004:106-116).

¹⁶ Barton (2004). ‘Prisoner of a Legal Catch-22’. *The New Zealand Herald*, 8 August. Quoted in Wolfsbauer (2005:124).

specific headings' (Human Rights First 2002).¹⁷ Conviction for various serious crimes, or a suspicion that such a conviction existed, as well as a suspicion that the claimant may have facilitated or engaged in acts of terrorism, were among the factors under the first heading and warranted the commitment of the person in a penal institution. Under the second heading, the factors that qualified the claimant for commitment as a resident of the Mangere Accommodation Centre were identified. The new Operational Instruction led to a substantial increase in the number of asylum seekers in detention. 'Prior to September 19, 2001, only 5% of refugee claimants were detained and of those all were deemed to be flight or security risk [under New Zealand laws]. ... As a result of the instruction, 94% of the asylum seekers who entered the country after it went into effect were reportedly detained' (Human Rights First 2002). This policy of widespread detention of asylum seekers was deemed a violation of their human rights by humanitarian NGOs; was criticised by the United Nations Human Rights Committee; and prompted the Refugee Council of New Zealand and the Human Rights Foundation to challenge the Operational Instruction in court. The High Court ruled in July 2002 that the Instruction was unlawful and in breach of the Refugee Convention (Human Rights First 2002). In April 2003, however, 'the Court of Appeal overturned the High Court's decision and ruled that, under certain circumstances, the Immigration Service has the power to detain refugee status claimants on their arrival in the country' (United States Bureau of Democracy, Human Rights, and Labor 2004). In September 2003, Parliament made the situation worse for asylum seekers by passing legislation that gave judges 'the authority to order the continued detention of illegal immigrants in cases where the immigrants' own actions were preventing their deportation' (United States Bureau of Democracy, Human Rights, and Labor 2004). Although the New Zealand detainees have not been subjected to the harsh treatments prevalent in some other countries, 'the fact that asylum seekers are being detained alongside those with criminal charges' has prompted criticism of the policy by the United Nations Committee Against Torture (Manning 2005). The policy has also been criticised for 'inadequate procedural safeguards while refugee claimants are detained' (Manning 2005).

Changes in laws and regulations regarding detention were not the only post-9/11 changes affecting the refugees. Amendments to the Immigration Act 1987, granting extra powers to the Immigration Service, put the protection of asylum seekers' human rights in jeopardy and made the United Nations Human Rights Committee express its worry about their 'negative'

¹⁷ Such policies of general detention of asylum seekers had been imposed in the past; for example during and in the aftermath of the first Gulf War in the early 1990s (see Haines 1995:32-34).

impact ‘and about the possible expulsion of some people who may be genuine refugees’ (Human Rights First 2002). There were some positive changes as well, though. In the wake of the RSAA report on the Zaoui case, ‘a protocol [was] agreed between Customs and the Immigration Service that meant passengers with incomplete travel papers or those seeking asylum would now be dealt with by one agency first and then the other, rather than being passed between each’ (Taylor 2004). The most important law ensuing from the 9/11 events, however, was the Terrorism Suppression Act 2002.¹⁸ Compared to other anti-terrorism laws passed by various countries around the world, it is a relatively measured one, balancing security concerns with issues of human rights and international obligations (see Smith 2003).¹⁹ The law does not mention refugees or asylum seekers as such, but it certainly has implications for them. The most criticised provision of the law has been the power it grants the Prime Minister to ‘designate an entity as a terrorist entity’ (New Zealand Terrorism Suppression Act 2002, Part II, sections 20-24). This is a considerable improvement on the original draft of the law, which would have granted that power to the Director of Security (Kelsey 2002). Nonetheless, the fact that it blurs the line between the judiciary and the executive, and empowers a politician with something that needs to be decided by a court, as well as the fact that the Prime Minister can rely on classified security information, have raised concerns about its potential misuse in violation of the human rights of entities so designated (see Peace Movement Aotearoa 2002; and Human Rights Commission, New Zealand 2001). As a commentary notes, ‘Being designated a terrorist “entity” will have a serious impact on anyone—but may literally be a matter of life and death for people applying for asylum here. There is no provision in the Bill for the protection of asylum seekers falsely or vindictively designated “terrorist” by oppressive governments or their agencies; nor for the protection of refugees or migrants already settled against such allegations’ (Peace Movement Aotearoa 2002). This chilling verdict needs to be balanced by noting that the designated entity has the right to challenge the Prime Minister’s decision in a court of law and, unlike in the cases involving a Security Risk Certificate, the court has the right to receive and hear the classified security information concerned—although it can do so in the absence of the designated entity and legal counsel representing the entity, if the judge deems it proper (New Zealand Terrorism Suppression Act 2002, Part II, sections 36-41).²⁰

¹⁸ Accessible at ‘Public Access to Legislation Project’ website:

http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes.

¹⁹ For a review of the anti-terrorist laws of a number of other countries, see also Bascombe (2004).

²⁰ This has led some observers to rightly note that, by being the recipient of a Security Risk Certificate, Zaoui has ‘less rights than a terrorist’. See, for example, Wolfsbauer (2005:135).

The practical impact of the post-9/11 changes in laws and regulations has been a substantial drop in the number of asylum seekers reaching New Zealand ports, but the total number of refugees admitted has not been affected negatively. Actually, the number of quota refugees has increased slightly. The annual average for quota refugees admitted to New Zealand was about 680 between 1990/91 and 2000/2001. It increased to 730 for the years 2001/02 to 2004/05. The increase in the number of Muslim quota refugees has been more substantial. The annual average for 1990/91 to 2000/01 came to about 375; while that for 2001/02 to 2004/05 amounted to about 480 (Haines 2005:Table 51).²¹ On the other hand, the annual average number of those applying for refugee status after having reached airports decreased from 226 for 1991 to 2000/01, to 177 for the years 2001/02 to 2004/05. The number had peaked at 342 in 1998/99, and had remained close to 300 for 1999/2000 to 2000/01. It decreased to less than 250 for 2001/02 and 2002/03; reached 133 in 2003/04; and declined further to only 88 in 2004/05 (Haines 2005:Table 1). Similarly, the number of refugee status applications submitted to the Refugee Status Branch dropped from the peak of 2019 in 1998/99 to only 399 in 2004/05 (Haines 2005:Table 2). Moreover, the number of people refused entry into New Zealand and turned around at airports increased from an annual average of 618 for 1991 to 2000/01, to 753 for the years 2001/02 to 2004/05 (Haines 2005:Table 52). These figures clearly indicate the impact of tough detention policies. Interestingly, however, the percentage of applications approved by the RSB shows an increase for the post-9/11 period. The annual average was 14.76 per cent for 1992/93 to 2000/01; but it increased to 18.57 per cent for 2001/02 to 2004/05 (Haines 2005:Table 3). Neither do Muslims seem to be a particular target of the RSB or airport authorities. As noted earlier, several predominantly Muslim countries have been among five countries with the highest number of refugee status applications approved by the RSB for the post-9/11 as well as pre-9/11 periods (Haines 2005:Table 6).²² Moreover, in both those periods, Muslims form a small minority of the persons refused entry into New Zealand and turned around at airports, except for Indonesians and Malaysians, who are not expected to include many genuine asylum seekers (Haines 2005:Table 53).

²¹The exact number of Muslim refugees may differ somewhat because the figures noted are based on an educated estimate for countries from which both Muslim and non-Muslim refugees have been admitted.

²²It should be noted, however, that there are complaints about profiling of Muslims at airports. As the Green MP Keith Locke puts it, 'They [immigration officials] are interrogating New Zealanders whose only "crime" is to have a Muslim sounding name—or maybe to have visited an Islamic country'. See *Scoop* (2005); also Eaton (2006).

Conclusion

New Zealand is a conscientious member of the international community with a long tradition of commitment to its international obligations, respect for human rights, and hospitality to refugees and asylum seekers. The government seemed conscious of the test it faced in the post-9/11 climate. Foreign Minister Phil Goff, who was also Minister of Justice at the time, is quoted as saying in September 2003, 'In combating terrorism ... we should avoid undermining the very values we are seeking to uphold. The fight against terrorism should not become an excuse to justify actions that do not conform to international standards of humanity' (Amnesty International 2004). This confirms an observation by Ahmad Zaoui's lawyers that, 'while New Zealand as a State has the right, and indeed the obligation, to ensure the security of those present in its territory, it does not have an unlimited discretion in terms of how it goes about this. The international instruments that New Zealand has ratified establish the *minimum* rights that people within its jurisdiction can expect to be afforded' (Manning and McLeod 2004).

Overall, the New Zealand government seems to have avoided the pitfalls of the 'war on terror', and to have successfully balanced legitimate concerns regarding the security of the country and its citizens with what New Zealand's 'well-deserved reputation for promoting human rights and civil liberties' entails.²³ The government has not resorted to harsh and inhumane treatment of its citizens or foreigners in the name of 'war on terror'. The changes in laws and regulations have been mostly well-thought out and in accordance with New Zealand's international commitments. The 'war on terror' has not negatively impacted on the refugee intake, even from among the group that seems to be the special target of the 'war', that is, the Muslims.

The policy of widespread detention of asylum seekers adopted in the wake of 9/11, however, puts a black spot on the New Zealand government's record. A particularly disturbing outcome of that policy has been the Ahmad Zaoui case, which demonstrates the vulnerability of the refugee determination process to political pressure. Ostensibly the government has remained within the law in first detaining Zaoui and then refusing to grant him the refugee status that the RSAA believes he deserves. As the successful court cases by Zaoui's legal team demonstrate, though, the government has tried all along to use ambiguities and loopholes in New Zealand laws to deny Zaoui hospitality in New Zealand. There are also other indications that in Zaoui's case the Labour government has departed from the fair-mindedness it aspires to. Prime Minister Helen Clark's public criticism of the RSAA decision is one such indicator (*Scoop* 2004c). Moreover, 'A series of foreign affairs documents obtained in May 2004 under the Official Information Act

²³Quoted praise noted in Manning and McLeod (2004).

by Scoop Media revealed that the New Zealand government solicited a critical response from France, Belgium and Switzerland inviting the countries to issue counter-criticism of ... RSAA' (Manning *et al.* 2004:26). The clearest indication of unfairness, however, is the fact that Zaoui spent two years in prison—ten months in solitary confinement—in spite of being declared a genuine refugee by the RSAA, and while the government had the authority to lift the Security Risk Certificate against him, release him on bail, or move him to the Mangere Refugee Centre. After more than three years in New Zealand, he is still not completely free and is separated from his family. The concern shown with New Zealand's international reputation, in the summary of allegations and reasoning against Zaoui, indicates that the government's decisions were influenced by the post-9/11 political climate.

The general policy of widespread detention of asylum seekers in New Zealand in recent years has clearly been an outcome of the post-9/11 political climate as well. As the figures show, the policy has been successful in deterring a large number of potential asylum seekers from coming to New Zealand. It may seem desirable given public unease about 'illegal immigrants' in general, and the fear of terrorists entering the country in that disguise in particular. The question is, however, whether the pain and suffering inflicted by 'detention' for long periods of time on people whose whole lives are full of agony and torment can really be justified by that uneasiness and fear. Equally important is the question of the fate of genuine asylum seekers who are deterred from coming to New Zealand. At a time when turmoil continues in many Muslim countries and dictatorships thrive, deterring Muslim asylum seekers will mean forcing them back to the folds of violence and torture. Is this really what New Zealanders want to happen?²⁴

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²⁴ Of course New Zealand cannot be expected to accommodate a large number of asylum seekers, but it can set an example for other countries to follow.

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