Court File Nos. 30762, 30929, 31178

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

BETWEEN:

ADIL CHARKAOUI

Appellant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

AND BETWEEN:

HASSAN ALMREI

Appellant

And

MINISTER OF CITIZENSHIP AND IMMIGRATION,
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

AND BETWEEN:

MOHAMMED HARKAT

Appellant

And

MINISTER OF CITIZENSHIP AND IMMIGRATION,
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS,
ATTORNEY-GENERAL OF CANADA

Respondents

And

CANADIAN CIVIL LIBERTIES ASSOCIATION, *et al.*

Interveners

FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to R. 42 of the Rules of the *Supreme Court of Canada*)

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CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I – THE FACTS

1. The CCLA takes no position on the facts in this case.

PART II – QUESTION IN ISSUE

2. The CCLA respectfully submits that the following issues arise in this appeal:

A) Whether the lack of any appeal from the decision of a Federal Court judge on the reasonableness of a security certificate, as set out in s. 80(3) of the *Immigration and Refugee Protection Act ("IRPA")*, is a violation of s. 7 of the Charter;

B) Whether the provisions governing judicial consideration of a security certificate, as set out in ss. 76 to 85 of *IRPA*, should be read so as to require the appointment of a special, security-cleared advocate, thereby increasing the due process and natural justice rights of the subjects of security certificates; and

C) Whether vague grounds of inadmissibility should militate towards greater procedural fairness.

PART III – ARGUMENT

A. Introduction: Civil Liberties and the War on Terrorism

3. The cases before the Court raise fundamental questions about the constitutional validity of provisions of the *Immigration and Refugee Protection Act* ("IRPA") and what is colloquially known as the "national security certificate regime" included in the IRPA. The rule of law and the necessity for the judiciary to uphold that law in times of crisis has been tested time and again, in both Canada and other Western democracies, and these cases represent the ongoing tension between national security and the fundamental principles of liberty and due process of law in a free and democratic society.

4. During the Second World War, Lord Atkin of the House of Lords held that the laws are to be defined in the same manner in times of war and peace, when he commented:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges...stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law.[1]

5. The same sentiment has been echoed recently at the House of Lords by Lord Hoffman, when that Court struck down the provisions of the *Anti-Terrorism, Crime and Security Act, 2001* permitting indefinite detention. Lord Hoffman stated:

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said what happened in Madrid, hideous crime as it was, threatened the life of the nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.[2]

6. Hind-sight has often shown that measures taken by government to limit individual liberty and civil liberties in the name of national security have gone further than was necessary. A well-known example is the war-time internment of Japanese-Canadians and Japanese-Americans. The 1944 decision of the United States Supreme Court in *U.S.A. v. Korematsu*[3] is a well known example. In 1984, Justice Patel of the District Court overturned the conviction and noted the infamous nature that the original case now represents:

> As historical precedent it stands as a constant reminder that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive, and judicial, must be prepared to

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[1] *Liversidge v. Anderson* [1942] AC 206, 244 *per* Atkin, L.J.

[2] *A(FC) and other (FC) v. Secretary of State for the Home Department; X(FC) and another (FC) v. Secretary of State for the Home Department*, [2004] UK HL 56 at 52 *per* Hoffman, L.J. [Almrei Appellant's Authorities at 79]

[3] *Korematsu v. United States* (1944), 323 U.S. 214.

> exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[4]

7. Countries that fight to preserve democratic ideals and institutions even in the face of imminent terrorist threats understand that there are benefits to enduring this struggle. No country understands this better then Israel, a democratic nation that has faced both conventional and non-conventional threats since its inception. President Barak of that nation's Supreme Court understood the value in defending the rule of law in the face of terror when he stated:

> This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.[5]

8. When creating a regime that is devoted to national security, democratic governments must nonetheless endeavor to create and maintain a fair balance between the societal interest in safety and security, and the societal interest in promoting civil liberties and due process rights. In doing so, the rule of law must triumph over policy. Some of the missing protections are purportedly in an effort to speed up the detainees' removal from Canada. Former Prime Minister John Diefenbaker said this of an effort to increasing efficiency in the justice system:

> "Assembly-line justice is a contradiction in terms. Those who would place a premium on efficiency in the courts unwittingly open the doors to dictatorship."[6]

B. The Structure of *IRPA*'s "Security Certificate" Regime

9. Sections 76-85 of the *Immigration and Refugee Protection Act* set out a process whereby non-citizens in Canada can be detained and deported on the grounds that they pose a threat to the

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[4] *Korematsu v. U.S.* 584 F. Supp. 1406, 16 Fed. R. Evid. Serv. 1231 (N.D.Cal. Apr 19, 1984) at 14. The Canadian Supreme Court made a similar war-time ruling on the internment that now, in the *Charter* era, would not likely pass constitutional muster, see: *Reference Re: Persons of Japanese Race*, [1946] S.C.R. 248.

[5] *Re: Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 at para 7 per Iacobucci and Arbour, JJ. [*Re: s. 83.28*]. This passage has also been cited by the House of Lords in *A (FC) and others (FC) v. Secretary of State for the Home Department*, [2005] UK HL 71 *per* Lord Carswell at para 150 [Almrei Appellant's Authorities at 80].

[6] John G. Diefenbaker, quoted by Arthur Maloney in *Professional Competence and the Law, Dalhousie Continuing Legal Education Series*, No. 21, Leon E. Trakman, ed. (Halifax: Dalhousie University, 1981), 167 at 173.

security of Canada. This process is commenced when the Minister signs "a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80".[7]

10. Individuals named in a security certificate are subject to deportation. All three of the applicants in this case have resisted this deportation, not only because they do not believe that an adequate case has been made out against them, but also because they allege they will face inhumane treatment and torture in their countries of origin. If they resist deportation on this ground, they may be forced to endure untold years of solitary confinement here in Canada. Even if lowering the standards of evidence, impairing the ability to cross-examine witnesses, denying the right to attend portions of the hearing, preventing the access to evidence, and denying the right of appeal were arguably acceptable each by itself, they become unquestionably impermissible when viewed together. It is submitted that the convergence of multiple attacks to due process rights that creates a regime that is manifestly and impermissibly unfair. Professor Hamish Stewart summarized the regime in this way:

> The signing of a security certificate sets in motion a process that deprives a person of liberty and threatens him or her with deportation, subject to few of the safeguards that Canadian law typically requires when a person's liberty interests are threatened.[8]

C. Lack of Right to Appeal

11. Once a judge has ruled that a given security certificate is or is not reasonable, section 80(3) of *IRPA* states that "the determination of the judge is final and may not be appealed or judicially reviewed". One of the most glaring defects is the prohibition against appealing the designated judge's decision on whether or not the security certificate is reasonable. The lack of appeal, in conjunction with a low standard of review and no opportunity to make full answer and defence, defines this statutory scheme that provides for serious consequences to an impugned person: detention,[9] deportation,[10] and, possibly, deportation to torture.[11] The imposition of such serious

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[7] *Immigration and Refugee Protection Act,* 2001, c. 27, s. 77(1) [*IRPA*].

[8] Hamish Stewart, "Federal Court Reasoning in Charkaoui Troubling", *The Lawyers Weekly* (October 21, 2005) 10.

[9] *IRPA*, *supra* note 1 at s.82.

consequences without the assurances of effective due process protections does not accord with the principles of fundamental justice.

12. This Court has often noted that an inquiry under Section 7 is a contextual one.[12] "The most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned."[13] In a sense, the requirements of fundamental justice are on a sliding scale: "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated."[14] This Court has recognized that:

> Deportation from Canada engages serious personal, financial and emotional consequences. It follows that this factor militates in favour of heightened procedural protections.[15]

13. Indeed, heightened procedural protections are especially important when deportation occurs after a period of detention and carries with it the life-long stigma of being a "terrorist" or "security threat", as will likely occur as a result of the security certificate process.

14. In the Court of Appeal, Appellant Charkaoui attempted to argue that the lack of an appeal violated Section 7 of the *Charter*, but the Court summarily dismissed this claim because "[i]t is trite law that the right of appeal is a statutory right and that it does not exist absent the appropriate statutory provision."[16] This echoes the common sentiment in Canadian law that "there is no right of appeal on any matter unless provided by the relevant legislation."[17]

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[10] *IRPA*, *supra* note 1 at s.81.

[11] *Suresh v. Canada (Minister of Citizenship and Immigration),* (2002) 1 S.C.R. 3 at para. 78 [*Suresh*] [Almrei Appellant's Authorities at 23].

[12] *Canada (Minister of Employment and Immigration) v. Chiarelli*, (1992) 1 S.C.R. 711, at para. 45 [*Chiarelli*] [Harkat Respondent's Authorities at 12]; *Suresh*, *supra* at para. 45; *Singh v. Canada (Minister of Employment and Immigration),* (1985) 1 S.C.R. 177, at para, 12 [*Singh*] [Almrei Appellant's Authorities at 69].

[13] *Singh*, *supra* at para. 103, *per* Beetz J.

[14] *Baker v. Canada (Minister of Citizenship and Immigration),* (1999) 2 S.C.R. 817, at para. 25 [*Baker*] (applying administrative law "duty of fairness" test) [Almrei Respondent's Authorities at 4]; *Suresh*, *supra* at para. 114 (applying "duty of fairness" analysis to Section 7 analysis).

[15] *Suresh*, *supra* at para.118.

[16] *Charkaoui (Re)*, (2004) F.C.J. No. 2060 (C.A.), at para. 135.

[17] *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 779 at para.15. *See also*, Wayne Gorman, "Is There a Right of Appeal From an Order Made Pursuant to Section 741.2 of the Criminal Code?", (1994) 58 Sask. L. Rev.

15. As a matter of statutory interpretation, this is, of course, true; there is no "free-floating" right to appeal a judgment in the absence of a statutory right. The question in the case at bar however, is whether the absence of appeal is a violation of the principles of fundamental justice when done in the context of a statutory scheme (security certificates) that is otherwise devoid of other due process protections and replete with encroachments on the liberty and security interests of an impugned person.[18] Indeed, the suggestion that, in certain circumstances, the principles of fundamental justice could require a right to appeal, where one is not legislated is not novel and has support in logic and precedent.

16. For example, in the well-known *Chiarelli* case, this Court was asked to determine whether the *Charter* principles of fundamental justice required that certain persons facing deportation on the grounds of "serious criminality" must be allowed a right to appeal on compassionate or humanitarian grounds.[19] After noting that such persons had already been convicted of a crime and sentenced to a term of five years or more,[20] the Court pointed out that appeals based on questions of fact or mixed law and fact were still available.[21] In the context of such a statutory scheme, the Court declared that "[t]hese [existing] rights of appeal offer ample protection to an individual from an erroneous decision by the adjudicator."[22]

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139 at 150 ("At common law appeals did not exist. Appeals are creatures of statute. Unless a statutory right of appeal clearly exists, a court of appeal cannot create one.").

[18] *Baker*, *supra* at para. 24 ("Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted").

[19] *Chiarelli*, *supra* at para. 35. *See generally*, John A. Dent, "No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation", (2002) 27 Queen's L.J. 749 at 771 ("While the Court stated conclusively [in *Chiarelli*] that section 7 does not mandate the provision of a compassionate appeal from a decision which comports with the principles of fundamental justice, it did not directly address the question of whether section 7 requires any right of appeal from such a decision.").

[20] *Chiarelli*, *supra* at para. 1.

[21] *Ibid.* at para. 37.

[22] *Ibid.* at para. 39. A recent related case, *Medovarski v. Canada (Minister of Citizenship and Immigration)*, (2005) S.C.J. No. 31, dealt with a transitional provision of *IRPA* that eliminated appeals for persons facing deportation for "serious criminality" (convicted and sentenced to at least two years in prison). Although this Court found the lack of appeal rights consistent with the *Charter*, it noted that "[p]rovisions allowing judicial review mitigate the finality of these provisions, as do appeals under humanitarian and compassionate grounds and pre-removal risk assessments." *Id.* at para. 11. [Almrei Respondent's Authorities at 18] In comparison, the decision by the designated judge that a security certificate is reasonable acts as a removal order and there are no mechanisms in place to mitigate the finality of that decision.

17. However, *Chiarelli* involved individuals who had already had a full criminal trial and the robust due process protections that accompany it along with a "true" appeal from the finding of "serious criminality" (the predicate to deportation). The holding and rationale of *Chiarelli* demonstrates that the principles of fundamental justice could demand the right to appeal where individuals faced serious deprivations of their liberty and security but had no other avenuess of appeal or significant due process protections.

18. Consider, then, the predicament in which security certificate detainees find themselves: they have one, and only one, chance to convince a judge that the evidence used against them (which they may not have seen) could not be the basis for even a "reasonable" belief that they are a threat to the security of Canada. If the designated judge finds that the certificate is reasonable, this finding is final, cannot be appealed, and acts as an immediate removal order leading to imminent deportation.[23] When the government imposes such a serious consequence without adequate safeguards - such as the right to appeal - it violates the principles of fundamental justice guaranteed in Section 7 of the Charter:

> Section 7 of the *Charter* requires that 'principles of fundamental justice' be observed before anyone is deprived of life, liberty, or security of the person. It is doubtful that a system which denied litigants the right to have the determinations of trial courts affecting such matters reviewed by at least one level of appellate tribunal could be said to satisfy the requirement of 'fundamental justice.'[24]

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[23] *See IRPA* s. 81(b) ("If a certificate is determined to be reasonable . . . (b) it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing"). The Court of Appeal below suggests that, whether or not fair to the security certificate detainee, the risk of an erroneous trial court decision is shared by both the detainee and the government, since neither is allowed to appeal the reasonableness decision. *See* Charkaoui (Re), (2004])F.C.J. No. 2060 at para. 136 (F.C.A) (stating that "the appellant and the respondents alike can rejoice or lament this fact depending on the decision that is made"). This "equality of risk" between the detainee and the government is more apparent than real, as the government may simply issue a second security certificate against the detainee if the designated judge finds that the first one was unreasonable. *Compare* Canada (Minister of Citizenship) v. Jaballah, [1999] F.C.J. No. 1681 (T.D.) (quashing first security certificate against detainee as unreasonable) *with* Jaballah (Re), [2003] 4 F.C. 345 (T.D.) (determining that second security certificate against detainee was reasonable) [Almrei Appellant's Authorities at 16]. In effect, the government gets at least two bites at the proverbial apple if it can show it has continued to investigate the detainee and is willing and able to adduce new evidence.

[24] Dale Gibson, "The Crumbling Pyramid: Constitutional Appeal Rights in Canada", 38 U.N.B. L.J. 1, 8-9 (1989).

In the words of the Saskatchewan Court of Appeal, "[t]he idea of appeal from a final order is just too well-founded to be denied, particularly in a fundamental rights context."[25]

19. The severity of consequences to the individual affected is not the only relevant consideration under Section 7: "in assessing whether a procedure accords with fundamental justice, it may be necessary to balance competing interests of the state and the individual."[26] As noted by the designated judge below, "[n]ational security is essential for the preservation of our democratic society."[27] However, there is simply no reason to believe that denying security certificate detainees the right to appeal the designated judge's reasonableness finding is needed to protect this legitimate governmental interest. Indeed, the only reason given in the House of Commons for including the privative clause was that "serious criminals who pose security risks to Canada can be removed more quickly."[28]

20. Appellate review is one of the hall-marks of a fair judicial system. The importance of having an appellate court review the judge at first instance was aptly captured by Lord Justice Charles Bowen, when he stated, "If no appeal were possible...this would not be a desirable country to live in..."[29] The parallel legislation in the United States, United Kingdom, and New Zealand all allow for appeals. Interlocutory appeals are allowed from the American Alien Terrorist Removal Court ("ARTC") to the U.S. Court of Appeals, and may be followed by a petition to the Supreme Court for a *writ of certiorari*. All such appeals are to be on an expedited basis.[30] In the U.K., an appeal lies from a final order of the Special Immigration Appeals Commission on a question of law to the appropriate appeal court.[31] Even in New Zealand, where the regime does not contemplate a hearing in front of a judge, there is a right of appeal to the Court of Appeal on a point of law.[32]

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[25] *R. v. Daniels*, (1991) 65 C.C.C. (3d) 366 (Sask. C.A.) at 371, quoting from *R. v. Beare* (1987), 34 C.C.C. (3d) 193 *per* Cameron, J.A. (Sask. C.A.). *See also, R. v. Monasterios*, (1991) 66 C.C.C. (3d) 572 (Qc. C.A.) (finding right to appeal exists from final order).

[26] *Chiarelli, supra* at para. 47.

[27] *Charkaoui (Re)*, [2003] F.C.J. No. 1816, at para. 70.

[28] Honourable Elinor Caplan, Minister of Citizenship and Immigration, *quoted* in *ibid.* at para. 173.

[29] *The Queen v. Justices of County of London* (1893), L.R. 2 Q.B. 492.

[30] U.S. Code, Title 8, Chapter 12, subchapter 1535.

[31] *Special Immigration Appeals Commission Act*, 1997 at s. 7 [Harkat Respondent's Authorities at 79]

[32] *Attorney-General v. Ahmed Zaoui & Ors*, [2005] N.Z.S.C. 38 at para 57 [Harkat Respondent's Authorities at 73].

21. It is impossible to understand how immediate deportation would make Canada safer than continued detention or extensive monitoring while an appeal is underway. When the designated judge below released Appellant Charkaoui on bail with stringent conditions, he noted that "if a danger was imminent, it goes without saying it has been neutralized as a result"[33] of the lengthy detention. The error-correcting function of the appeals process provides a significant degree of procedural fairness to a person named in a security certificate while having a negligible impact on national security. In the context of a system that denies other procedural safeguards, Parliament's decision to include a privative clause in Section 80(3) of *IRPA* violates the principles of fundamental justice guaranteed by the *Charter*.

D. The Need for Special Advocates

22. When liberty is at stake, the principles of fundamental justice generally require that impugned persons have a right to counsel, and that they know the case which they must meet. By completely denying the right to counsel at *in camera* hearings, the security certificate procedure violates procedural fairness and natural justice. Because a "special advocate"[34] system would pose no significant threat to the security of sensitive information, the refusal to permit security-cleared special advocates is arbitrary and thus fundamentally unjust in violation of s. 7 of the *Charter*.

i) The principles of fundamental justice generally require the right to counsel and knowledge of the case which one has to meet

23. Although the principles of fundamental justice may vary according to context, the Supreme Court of Canada held in *Lyons* that "[i]t is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness".[35]

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[33] *Charkaoui (Re)*, [2005] 3 F.C.R. 389 at para. 68 [Harkat Respondent's Authorities at 11].

[34] Special advocates would be a security cleared lawyers who would represent the interests of, if not take instructions from, impugned persons.

[35] *R. v. Lyons,* [1987] 2 S.C.R. 309 at 361 [*Lyons*] [emphasis added] [Harkat Respondent's Authorities at 41].

24. In *Singh,* Wilson J. held for the plurality that procedural fairness, and thus the principles of fundamental justice, requires procedures to "provide an adequate opportunity for a … claimant to state his case and know the case he has to meet".[36] In that case, the Court found that a system of immigration hearings breached the principles of fundamental justice precisely because of characteristics which mirror the current security certificate procedure. Wilson J. held:

> The applicant is entitled to submit whatever relevant material he wishes to the Board but he still faces the hurdle of having to establish to the Board that on the balance of probabilities the Minister was wrong. Moreover, he must do this without any knowledge of the Minister's case beyond the rudimentary reasons which the Minister has decided to give him in rejecting his claim. It is this aspect of the procedures set out in the Act which I find impossible to reconcile with the requirements of "fundamental justice" as set out in s. 7 of the *Charter*.[37]

Likewise, the Supreme Court of Canada held in *Ruby* that:

> [a]s a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position… The exclusion of the appellant from portions of the government's submissions is an exceptional departure from this general rule. The appellant operates in an informational deficit when trying to challenge the legitimacy of the exemptions claimed by the government.[38]

25. Although this general rule "does tolerate some exceptions", such a fundamental principle cannot tolerate exceptions that are unnecessary or unrelated to the achievement of the government's objectives. Furthermore, the exception carved out in *Ruby* does not apply to the present case. The Court in *Ruby* took pains to point out that it only assumed that *ex parte* hearings were constitutional because the appellant had not challenged their constitutionality. Moreover, the Court allowed an "exceptional departure" from the general rules of fairness in that case because the appellant's challenge, if successful, would have threatened the security of information by requiring the government to disclose sensitive information to impugned persons. In the present case, a provision for special advocates would pose no such danger, as sensitive information would be disclosed only to security-cleared lawyers who could not share the information unless authorized to do so. The danger contemplated in *Ruby,* which was used to justify the admitted derogation from general rules of fairness in that case, is not involved in the proposed special advocate system. As such, while the

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[36] *Singh, supra* at para. 58.

[37] *Singh, supra* at para. 61 [emphasis added].

[38] *Ruby v. Canada (Solicitor General),* [2002] 4 S.C.R. 3 at para. 40 [*Ruby*] [emphasis added] [Harkat Respondent's Authorities at 57].

rules of fairness may tolerate some exceptional departures, they do not tolerate a complete ban on representation by such counsel at *in camera* security certificate hearings.

ii) Ex parte proceedings without special advocates are not procedurally fair

26. By allowing for secret evidence and failing to allow the impugned person to be represented by any counsel at *in camera* hearings, the current system violates the general principle that impugned persons have a right to counsel and a right to know the evidence against them when their liberty is at stake. The few procedural safeguards that remain, including judicial oversight, are not sufficient to ensure procedural fairness. In the adversarial system which lies at the foundation of the common law, judicial oversight is not an effective substitute for the representation of counsel. This is especially so when one party is stripped of the right to counsel and the opposing party is not.

iii) The Adversarial System breaks down where both parties are not represented by counsel

27. The adversarial system has been hailed as both the symbol and protector of our freedom in the Anglo-American legal tradition. This system is an essential aspect of due process. Lon Fuller has written many texts on this subject and explains this importance eloquently. In explaining why it is necessary to passionately defend the accused who is "known" to be guilty he describes the great importance of this system:

> The lawyer appearing on behalf of an accused person is not present in court merely to represent his client. He represents a vital interest of society itself, he plays an essential role in one of the fundamental processes of an ordered community.[39]

This statement can be said to apply to situations other then criminal trials. It is is submitted that whenever a person's fundamental rights are to be determined by a Court, society has an interest in seeing that such a hearing is fair and that procedural fairness is afforded.

28. Lon Fuller, a renowned American legal theorist is a thoughtful and articulate proponent of the view that the integrity of the adjudicative process depends upon the adversary presentation of issues before a neutral tribunal and thus, on the participation of partisan advocates. He is a complete

[39] Lon Fuller, "The Adversary System," in *Talks on American Law*, Harold J. Berman, ed. (New York: Vintage Books, 1961) at 41.

subscriber to the "fight theory" as the best tool to arrive at the truth of a matter. In the following passage he explains the function of the advocate:

> The judge and jury must, then, be excluded from any partisan role. At the same time, a fair trial requires that each side of the controversy be carefully considered and be given its full weight and value. But before a judge can gauge the full force of an argument, it must be presented to him with partisan zeal by one not subject to the restraints of judicial office. The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation.
>
> This is the function of the advocate. His task is not to decide but to persuade. He is not expected to present the case in a colorless and detached manner, but in such a way that it will appear in that aspect most favorable to his client. He is not like a jeweler who slowly turns a diamond in the light so that each of its facets may in turn be revealed. Instead the advocate holds the jewel steadily, as it were, so as to throw into bold relief a single aspect of it. It is the task of the advocate to help the judge and jury see the case as it appears to interested eyes, in the aspect it assumes when viewed from that corner of life into which fate has cast his client.[40]

29. Fuller believes that truth is best obtained through the adversarial system. When the traditional adversarial roles break down and the pursuit of truth is attempted through official inquiry, "failure generally attends the attempt to dispense with the distinct roles traditionally implied in adjudication."[41] The search for truth is subverted in a nonadversarial investigatory (or inquisitorial) procedure by a "natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known."[42] He explains:

> What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it…[W]hat starts as preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.
>
> An adversary presentation seems the only effective means for combating this natural human tendency…The arguments of counsel hold the case, as it were, between two opposing interpretations of it. While the proper classifications of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.[43]

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[40] *Ibid.* at pp. 35-36.

[41] Lon Fuller, "The Forms and Limits on Adjudication" (1978) 92 Harv. L. R. 353 at 383, *see generally* pp. 382-385

[42] *Ibid.*

[43] Lon Fuller and John D. Randall, "Professional Responsibility: Report of the Joint Conference" (1958) 44 *American Bar Association Journal* 1159 at 1160, and Fuller (1978), *supra* at 383.

30. Precisely because they bear the heavy responsibility of maintaining a balance between the parties, judges are ill-placed to advocate on behalf of the impugned person. The government, conversely, is represented at all times by counsel who is apprised of all the facts and allegations, and whose role is to advance the strongest possible case on the government's behalf. This creates an obvious inherent imbalance, wherein one party is represented by a partisan advocate and the other is represented only by the trier of fact, who must by definition remain neutral. No matter how fair, able, and apprised of the facts the judge may be, this imbalance in representation threatens the fairness and efficacy of the hearing. It also requires judges to simultaneously act as advocate and neutral arbiter, eroding the separation of duties which lies at the heart of the common law adversarial system.

iv) Judicial independence is compromised without both parties being present and represented by counsel

31. In *Re: Application under s. 83.28 of the Criminal Code*[44], this Court undertook a thorough analysis of the issue of judicial independence under the investigatory hearing regime established by the *Anti-terrorism Act, 2001*. Five judges of the Court concluded that judicial independence was not compromised in this case. However, there are important differences between the two regimes. As stated by Justice Iacobucci for the majority, "the concern about the judicial investigatory hearing stems largely from its being held *in camera*."[45]

32. The regime under the IRPA is not only *in camera*, but more significantly *ex parte*. Further, the judge at the investigatory hearing regime does not make any determination upon the evidence presented, the hearing is only for an investigatory purpose. Here, in the regime contemplated under the IRPA, evidence is tendered against the named person without any opportunity to challenge it. That evidence can be used to make the final determination against that person.

33. Justice LeBel (joined by Fish, J.) writing in dissent, found that the investigatory hearing violated the constitutional principle of judicial independence, "due to the manner in which this provision structures relations between the judiciary, the investigative arm of the police and the

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[44] *Re: s. 83.28, supra* at note 5.

[45] *Ibid.* at para. 91.

Crown, it will inevitably lead the abuses and irregularities described so elegantly by my colleague Binnie J."[46]

34. Lebel, J. focused on both dimensions of judicial independence – individual independence and institutional independence, and stressed that it is necessary that these two principles work together to ensure independence. He stated:

> ...it is important, indeed essential, that these two dimensions of judicial independence not be confused. Thus, although a judge may be independent in fact and act with the utmost impartiality, judicial independence will not exist if the court which he or she is a member is not independent of the other branches of government on an institutional level.[47]

Justice LeBel found that the judicial independence was compromised in the investigatory hearing regime because the public will perceive the judicial and executive branches as allies rather than separate branches of government.[48]

35. It is submitted that judicial independence is similarly compromised in the national security certificate regime. Under the IRPA, the judge will not be able to perform his or her function as neutral arbiter without the representations of counsel from both parties. This point was made by LeBel, J. at para 183:

> The judge presiding over the examination will undoubtedly not have access to the full record of the police investigation. It would therefore be easy for a Crown prosecutor to contend that a question is relevant or that its probative value outweighs its prejudicial effects. Without knowledge of the investigator's sources, framework and objectives, it will be virtually impossible for the judge to rule on such objections. Thus, the power to limit the scope of questions put to the person being examined could prove illusory.

36. It is submitted that the regime contemplated in the IRPA is fundamentally different than that in s. 83.28 of the *Criminal Code*. The lack of counsel at the IRPA hearing precludes the judge from receiving a balanced understanding of the evidence, properly tested by opposing counsel. While the judges may make their best effort to inquire into and challenge the government's case, this role is not what is contemplated by our adversarial system and the search for the truth is subverted.

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[46] *Ibid* at para. 169. Binnie, J. wrote a dissent and held that the prosecutor's use of the provision during a mid-trial stay was an abuse of process.

[47] *Ibid* at para. 174.

[48] *Ibid* at para 191.

v) Foreign experience with special advocates

37. The British experience with special advocates, while far from perfect, demonstrates that such representation can be reconciled with national security concerns. In addition, in at least one case, secret evidence was shown to be unreliable only after rigorous testing by special advocates.[49] The American regime also provides a right to security cleared attorneys in order to challenge classified information. The special attorney is also provided on an appeal where there is an issue with classified information.[50]

38. By denying access to special advocates, the Canadian system creates a greater risk that faulty or erroneous evidence will be used, and accepted, against impugned persons. To impose such a risk will always diminish procedural fairness. To do so unnecessarily must be fundamentally unjust. The use of special advocates would not only provide greater procedural fairness for the impugned person; it would also enhance the effectiveness of the truth-seeking function of the adjudicative process by reducing the risk that unchallenged and ultimately faulty evidence will be accepted. The state can have no legitimate interest in diminishing the truth-seeking efficacy of hearings. It is in no one's interest to construct a system which is less likely to arrive at the truth.

39. A system allowing for "special advocates", while imperfect, would help to redress this unfairness and reduce the impact of the derogation from the general principles of procedural fairness and fundamental justice. A "special advocate" system similar to that used in Britain would minimize the Canadian system's departure from the generally accepted norms of procedural fairness, natural justice, the right to counsel, the right of impugned persons to make full answer and defence, and the right to know the case one has to meet. Such a system would also enhance the truth-seeking capacity of security certificate hearings by reducing the likelihood that faulty evidence will be relied upon.

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[49] *Sec'y of State for the Home Dep't v. M*, EWCA Civ. 324, No. C2/2004/0516 (Eng. C.A. Mar. 18, 2004), at para. 12, 13, 34(ii). Lord Chief Justice Wolf, for the Court of Appeal stated at para 17, "From the material before us it is clear that [the special advocates] performed their role in a most commendable way and they certainly ensured all steps which a special advocate could take were taken on behalf of "M" [at Harkat Appellant's Authorities at 15]

[50] U.S.C. tit 8, Part 1534(F) and 1535(2).

E. Vague Grounds of Inadmissibility should militate towards greater procedural fairness

40. National security is a vitally important interest, especially in light of the dangers posed by terrorist threats. As a result, it is reasonable to have a process in place that will adequately safeguard Canadian society from danger, both at home and abroad. Nevertheless, the mere invocation of national security protocols should not lead to the erosion of procedural fairness rights. It need not be that national security and due process are at two ends of a spectrum and more of one leads to less of the other.

41. Under s. 80(1) of the *Immigration and Refugee Protection Act* (*IRPA*),[51] a security certificate will be upheld by the Federal Court if the certificate is reasonably based on the evidence and information available to the court.[52]

42. In making this assessment , the Federal Court has ruled[53] that the Minister does not need to prove that the person named in the certificate has actually engaged in any act, such as terrorism. It is sufficient to show that reasonable grounds exist to believe that the person is, *inter alia* a "danger to the security of Canada."[54] The security certificate regime outlined in *IRPA*, is, of course, an administrative procedure, developed in an immigration context, and is not on its face a criminal procedure. Nevertheless, it represents a significant infringement of a subject's liberty interests, and can result in deportation or imprisonment, or both. It can also expose subjects to the threat of inhumane treatment or torture in other countries.

43. As the UK House of Lords stated in its decision in *Khawaja v. Secretary of State for the Home Department*:

> Liberty is at stake: that is as the court recognized in *Bater v. Bater* [1951] p. 35 and in *Hornal v. Neuberger Products Ltd.*, [1957] 1 Q.B. 247, a grave matter. The reviewing court

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[51] *IRPA, supra,* s. 80(1).

[52] *(Re) Baroud,* [1995] F.C.J. No. 829 (Fed. T.D.) at para. 5 [Almrei Appellant's Authorities at 11].

[53] *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.), at pages 225-226 – where, it should be noted, the Court was dealing with a previous version of a "security certificate-type regime" rooted in ss. 5, 22, and 26 of the *Immigration Act*, R.S.C. 1970, c. I-2

[54] *IRPA* s. 34(1)(d), see generally section 34 of the *IRPA* for ground of inadmissibility as a security threat.

> will therefore be required to be satisfied that facts required for the justification of the restraint put upon liberty do exist.[55]

44. Deportation creates a substantial infringement on the liberty of those subjected to it.[56] This infringement is exacerbated in those situations where there are additional risks of torture and death, as stated in *Suresh*:

> ...deportation to torture may deprive the refugee of liberty, security and perhaps life. The only question is whether this deportation to torture is in accordance with the principles of fundamental justice. If it is not, s. 7 is violated and...deportation to torture is unconstitutional.[57]

The grounds as set out in s. 34(1) of the IRPA for establishing the certificate as reasonable, are vague and ambiguous. A security assessment on such elusive grounds cannot suffice to authorize an outcome as intrusive as deportation without substantial procedural protections. In this regard, security cleared special advocates are essential because they would have the opportunity to test evidence and present arguments, thereby sparing judges from the untenable position that the current regime foists upon them.

F. The complete denial of a right of appeal and any right to counsel at *ex parte* security certificate hearings is arbitrary and fundamentally unjust

45. It is arbitrary, and thus fundamentally unjust, to limit s. 7 rights when doing so will bear little or no relation to the government's objective.[58] As Sopinka J. held in *Rodriguez,* "Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose."[59] Since a properly crafted special advocate procedure would not interfere with the government's objectives—it would pose no threat to security of information or to the effectiveness and efficiency of the proceedings, but would enhance the

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[55] *Khawaja v. Secretary of State for the Home Department*, [1983] 1 All E.R. 765 (H.L.) at 784.

[56] *Singh, supra.*

[57] *Suresh, supra* at para. 44.

[58] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519 [*Rodriguez*],*R. v. Morgentaler,* [1993] 3 S.C.R. 463, *Chaoulli v. Quebec (Attorney General),* [2005] 1 S.C.R. 791.

[59] *Rodriguez, supra* at para. 147.

fairness and truth-seeking element of the proceedings and thus better comport with the rights of the impugned person—the absence of a right to a special advocate must be fundamentally unjust.

46. The government's legitimate objective in holding *in camera* hearings is to preserve the security of information which is sensitive to national security. While it may be necessary to keep certain information from impugned persons, and thus to exclude them and their regular counsel from hearings where this information is presented, it is not necessary to deny the impugned person *any* right to representation at these hearings. Furthermore the legitimate objective of creating an efficient removal mechanism does not require a regime that affords little to no procedural fairness. Providing an appeal and/or security cleared counsel does not threaten security or necessarily create an inefficient process.

47. Paul Cavalluzzo, counsel to the Arar Inquiry, described his experience during a September 2005 press conference. He discussed how independent commission counsel were able to cross-examine government witnesses. These commission counsel had full access to government information and documents. He stated:

> As a lawyer I believe that the procedure we adopted might be a model for other areas of the law, such as national security cases which many Canadians believe is fundamentally unfair. Our procedure hopefully accomplished two values which underlie our legal system. First, in this kind of case, government evidence should be vigorously tested by independent counsel and not brought forward before a judge on an ex parte basis. Secondly, secret government evidence should be vigorously tested to ensure that it should not be disclosed to the public particularly when it is the government's actions or inactions under review. Transparency and openness should be the general rule.[60]

In addition, a properly designed special advocate system would not diminish the security of information. Representation by special advocates who are security-cleared by the government would pose no threat to the security of sensitive information. As Cavalluzzo stated:

> I don't understand why the government can't have appointed independent counsel...who could be called upon at any time...[T]his independent counsel would vigorously test not only the reliability of the government's evidence, but also whether that kind of evidence shouldn't be disclosed to the individual party whose liberty is at stake.[61]

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[60] *Press Conference held by Paul Cavalluzzo, counsel to the Arar inquiry,* September 14 2005

[61] *Ibid.*

48. As such, the denial of a right to representation by special advocates renders useless the right to counsel and the ability to know the case one must meet— generally required principles of procedural fairness and fundamental justice—and this denial does little or nothing to advance the government's interest in preserving the security of information. It is thus arbitrary and fundamentally unjust in violation of s. 7 of the *Charter*. To the extent that the current procedure does not allow for *any* representation by counsel at *in camera* proceedings—even by those who are security-cleared and pose no risk to the security of information—it violates the principles of fundamental justice contrary to s. 7 of the *Charter*. In analyzing this legislation, one should heed Justice Rosenberg's warning in the *Ahani* case:

> I think it would be a serious mistake for the courts to let obvious and deeply felt concerns about terrorism obscure the need to accord fundamental justice and respect for human rights to all individuals.[62]

G. The present system cannot be saved by s. 1 of the *Charter*

49. The infringed rights at issue here are not rationally connected to the goal of preserving the security of the nation. Thus, the security certificate system does not minimally impair the rights of impugned persons.

50. A properly designed system would pose no threat to the security of sensitive information. Therefore there is no rational connection between the goal of preserving security and the denial of rights such as appeal and representation by a special advocate. The current system is not a reasonable limit as conceived in s. 1 of the *Charter*, and fails the Minimal Impairment branch of the *Oakes* analysis.

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[62] *Ahani v. Canada (Attorney-General)* (2002), 58 O.R. (3d) 107 at para. 104, *per* Rosenberg, J.A..

PART IV – COSTS SUBMISSIONS

52. The CCLA asks that no further order of costs be made against it.

PART V – ORDER SOUGHT

53. The intervener respectfully requests that this Court declare that ss. 78-84 of IRPA violate the principles of fundamental justice and should be declared of no force and effect. The intervener further respectfully requests an opportunity to present oral argument at the hearing of this appeal pursuant to Rule 59(2) of the Supreme Court Rules.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 23RD day of May, 2006

Edward L. Greenspan, Q.C.
GREENSPAN, WHITE
Counsel for the Intervener
Canadian Civil Liberties Association

PART VI – TABLE OF AUTHORITIES

A. Jurisprudence Previously Filed	Party's Materials	Cited at Paragraph
A(FC) and other (FC) v. Secretary of State for the Home Department; X(FC) and another (FC) v. Secretary of State for the Home Department, [2004] UK HL 56	Almrei Appellant	5
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B. Legislation Previously Filed	**Party's Materials**	**Paragraph cited at**
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Special Immigration Appeals Commission Act, 1997 (U.K.), ss. 7.	Harkat Respondent	20

C. Authorities Filed By Intervener - CCLA

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1.	*Ahani v. Canada (Attorney-General)* (2002), 58 O.R. (3d) 107 (C.A.)	48
2.	*Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.)	42
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7.	*R. v. Monasterios*, (1991) 66 C.C.C. (3d) 572 (Qc. C.A.)	18
8.	*R. v. Morgentaler,* [1993] 3 S.C.R. 463	45
9.	*Re: Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248	7, 31, 33, 34, 35
10.	*Reference Re: Persons of Japanese Race*, [1946] S.C.R. 248.	6

11.	*Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519	45

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13.	*Korematsu v. U.S.* 584 F. Supp. 1406, 16 Fed. R. Evid. Serv. 1231 (N.D.Cal. Apr 19, 1984)	6
14.	U.S.Code, Title 8, C. 12, subchapters 1534, 1535	20, 37

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15.	*Khawaja v. Secretary of State for the Home Department*, [1983] 1 All E.R. 765 (H.L.)	43
16.	*Liversidge v. Anderson* [1942] AC 206 (H.L.)	4
17.	*The Queen v. Justices of County of London* (1893), L.R. 2 Q.B. 492 (C.A.)	20

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18.	Dale Gibson, "The Crumbling Pyramid: Constitutional Appeal Rights in Canada", 38 U.N.B. L.J. 1, 8-9 (1989).	18
19.	Hamish Stewart, "Federal Court Reasoning in Charkaoui Troubling", *The Lawyers Weekly* (October 21, 2005) 10.	10
20.	John A. Dent, "No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation", (2002) 27 Queen's L.J. 749	16
21.	John G. Diefenbaker, quoted by Arthur Maloney in *Professional Competence and the Law, Dalhousie Continuing Legal Education Series*, No. 21, Leon E. Trakman, ed. (Halifax: Dalhousie University, 1981), 167	8
22.	Lon Fuller and John D. Randall, "Professional Responsibility: Report	29

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23.	Lon Fuller, "The Adversary System," in *Talks on American Law*, Harold J. Berman, ed. (New York: Vintage Books, 1961)	27, 28
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25.	*Paul Cavalluzzo, counsel to the Arar inquiry, Press Conference,* September 14 2005	47
26.	Wayne Gorman, "Is There a Right of Appeal From an Order Made Pursuant to Section 741.2 of the Criminal Code?", (1994) 58 Sask. L. Rev. 139	14

PART VII – STATUTES RELIED ON

***CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, Enacted as Schedule B to the *Canada Act* (U.K.) 1982, c. 11 ss. 1, 7**

1. 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.

* * *

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

***CHARTE CANADIENNE DES DROITS ET LIBERTÉS*, Édictée comme l'annexe B de la *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.), ss. 1, 7**

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

* * *

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

IMMIGRATION AND REFUGEE PROTECTION ACT, S.C. 2001, C.27, ss. 34, 77-84

Division 4 - Inadmissibility

Security

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(*b*) engaging in or instigating the subversion by force of any government;

(*c*) engaging in terrorism;

(*d*) being a danger to the security of Canada;

(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

Division 7 – Protection of Information

Referral of Certificate

77. (1) The Minister and the Minister of Public Safety and Emergency Preparedness shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80.

Judicial Consideration

78. The following provisions govern the determination:

(*a*) the judge shall hear the matter;

(*b*) the judge shall ensure the confidentiality of the information on which the certificate is based and of any other evidence that may be provided to the judge if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(*c*) the judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

(*d*) the judge shall examine the information and any other evidence in private within seven days after the referral of the certificate for determination;

(*e*) on each request of the Minister or the Minister of Public Safety and Emergency Preparedness made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(*f*) the information or evidence described in paragraph (*e*) shall be returned to the Minister and the Minister of Public Safety and Emergency Preparedness and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary;

(*g*) the information or evidence described in paragraph (*e*) shall not be included in the summary but may be considered by the judge in deciding whether the certificate is reasonable if the judge determines that the information or evidence is relevant but that its disclosure would be injurious to national security or to the safety of any person;

(*h*) the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed;

(*i*) the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility; and

(*j*) the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.

2001, c. 27, s. 78; 2005, c. 10, s. 34(E).

Proceedings Suspended

79. (1) On the request of the Minister, the permanent resident or the foreign national, a judge shall suspend a proceeding with respect to a certificate in order for the Minister to decide an application for protection made under subsection 112(1).

2) If a proceeding is suspended under subsection (1) and the application for protection is decided, the Minister shall give notice of the decision to the permanent resident or the foreign national and to the judge, the judge shall resume the proceeding and the judge shall review the lawfulness of the decision of the Minister, taking into account the grounds referred to in subsection 18.1(4) of the *Federal Courts Act*.

2001, c. 27, s. 79; 2002, c. 8, s. 194.

Determination that Certificate is Reasonable

80. (1) The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision on the application for protection, if any, is lawfully made.

2) The judge shall quash a certificate if the judge is of the opinion that it is not reasonable. If the judge does not quash the certificate but determines that the decision on the application for protection is not lawfully made, the judge shall quash the decision and suspend the proceeding to allow the Minister to make a decision on the application for protection.

3) The determination of the judge is final and may not be appealed or judicially reviewed.

Effect of Determination – Removal Order

81. If a certificate is determined to be reasonable under subsection 80(1),

(*a*) it is conclusive proof that the permanent resident or the foreign national named in it is inadmissible;

(*b*) it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing; and

(*c*) the person named in it may not apply for protection under subsection 112(1).

Detention of Permanent Resident

82. (1) The Minister and the Minister of Public Safety and Emergency Preparedness may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate described in subsection 77(1) if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.

(2) A foreign national who is named in a certificate described in subsection 77(1) shall be detained without the issue of a warrant.

2001, c. 27, s. 82; 2005, c. 10, s. 34.

Review of Decision for Detention

83. (1) Not later than 48 hours after the beginning of detention of a permanent resident under section 82, a judge shall commence a review of the reasons for the continued detention. Section 78 applies with respect to the review, with any modifications that the circumstances require.

(2) The permanent resident must, until a determination is made under subsection 80(1), be brought back before a judge at least once in the six-month period following each preceding review and at any other times that the judge may authorize.

Release

84. (1) The Minister may, on application by a permanent resident or a foreign national, order their release from detention to permit their departure from Canada.

(2) A judge may, on application by a foreign national who has not been removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable, order the foreign national's release from detention, under terms and conditions that the judge considers appropriate, if satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person.

***LOI SUR L'IMMIGRATION ET LA PROTECTION DES RÉFUGIÉS*, 2001, ch. 27, ss. 34, 77-84**

Section 4 – Interdictions de Territoire

Sécuritié

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*).

(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

Section 9 - Examen de Renseignements à Protéger

Dépôt du certificat

77. (1) Le ministre et le ministre de la Sécurité publique et de la Protection civile déposent à la Cour fédérale le certificat attestant qu'un résident permanent ou qu'un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée pour qu'il en soit disposé au titre de l'article 80.

(2) Il ne peut être procédé à aucune instance visant le résident permanent ou l'étranger au titre de la présente loi tant qu'il n'a pas été statué sur le certificat; n'est pas visée la demande de protection prévue au paragraphe 112(1).

2001, ch. 27, art. 77; 2002, ch. 8, art. 194; 2005, ch. 10, art. 34.

Examen judiciaire

78. Les règles suivantes s'appliquent à l'affaire :

a) le juge entend l'affaire;

b) le juge est tenu de garantir la confidentialité des renseignements justifiant le certificat et des autres éléments de preuve qui pourraient lui être communiqués et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

c) il procède, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et selon la procédure expéditive;

d) il examine, dans les sept jours suivant le dépôt du certificat et à huis clos, les renseignements et autres éléments de preuve;

e) à chaque demande d'un ministre, il examine, en l'absence du résident permanent ou de l'étranger et de son conseil, tout ou partie des renseignements ou autres éléments de preuve dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

f) ces renseignements ou éléments de preuve doivent être remis aux ministres et ne peuvent servir de fondement à l'affaire soit si le juge décide qu'ils ne sont pas pertinents ou, l'étant, devraient faire partie du résumé, soit en cas de retrait de la demande;

g) si le juge décide qu'ils sont pertinents, mais que leur divulgation porterait atteinte à la sécurité nationale ou à celle d'autrui, ils ne peuvent faire partie du résumé, mais peuvent servir de fondement à l'affaire;

h) le juge fournit au résident permanent ou à l'étranger, afin de lui permettre d'être suffisamment informé des circonstances ayant donné lieu au certificat, un résumé de la preuve ne comportant aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

i) il donne au résident permanent ou à l'étranger la possibilité d'être entendu sur l'interdiction de territoire le visant;

j) il peut recevoir et admettre en preuve tout élément qu'il estime utile — même inadmissible en justice — et peut fonder sa décision sur celui-ci.

2001, ch. 27, art. 78; 2005, ch. 10, art. 34(A).

Suspension de l'affaire

79. (1) Le juge suspend l'affaire, à la demande du résident permanent, de l'étranger ou du ministre, pour permettre à ce dernier de disposer d'une demande de protection visée au paragraphe 112(1).

(2) Le ministre notifie sa décision sur la demande de protection au résident permanent ou à l'étranger et au juge, lequel reprend l'affaire et contrôle la légalité de la décision, compte tenu des motifs visés au paragraphe 18.1(4) de la *Loi sur les Cours fédérales*.

2001, ch. 27, art. 79; 2002, ch. 8, art. 194.

Décision

80. (1) Le juge décide du caractère raisonnable du certificat et, le cas échéant, de la légalité de la décision du ministre, compte tenu des renseignements et autres éléments de preuve dont il dispose

(2) Il annule le certificat dont il ne peut conclure qu'il est raisonnable; si l'annulation ne vise que la décision du ministre il suspend l'affaire pour permettre au ministre de statuer sur celle-ci.

(3) La décision du juge est définitive et n'est pas susceptible d'appel ou de contrôle judiciaire.

Effet du certificat

81. Le certificat jugé raisonnable fait foi de l'interdiction de territoire et constitue une mesure de renvoi en vigueur et sans appel, sans qu'il soit nécessaire de procéder au contrôle ou à l'enquête; la personne visée ne peut dès lors demander la protection au titre du paragraphe 112(1).

Arrestation et détention facultatives

82. (1) Le ministre et le ministre de la Sécurité publique et de la Protection civile peuvent lancer un mandat pour l'arrestation et la mise en détention du résident permanent visé au certificat dont ils ont des motifs raisonnables de croire qu'il constitue un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.

(2) L'étranger nommé au certificat est mis en détention sans nécessité de mandat.

2001, ch. 27, art. 82; 2005, ch. 10, art. 34.

Contrôle des motifs de la détention

83. (1) Dans les quarante-huit heures suivant le début de la détention du résident permanent, le juge entreprend le contrôle des motifs justifiant le maintien en détention, l'article 78 s'appliquant, avec les adaptations nécessaires, au contrôle.

(2) Tant qu'il n'est pas statué sur le certificat, l'intéressé comparaît au moins une fois dans les six mois suivant chaque contrôle, ou sur autorisation du juge.

(3) L'intéressé est maintenu en détention sur preuve qu'il constitue toujours un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.

Mise en liberté

84. (1) Le ministre peut, sur demande, mettre le résident permanent ou l'étranger en liberté s'il veut quitter le Canada.

(2) Sur demande de l'étranger dont la mesure de renvoi n'a pas été exécutée dans les cent vingt jours suivant la décision sur le certificat, le juge peut, aux conditions qu'il estime indiquées, le mettre en liberté sur preuve que la mesure ne sera pas exécutée dans un délai raisonnable et que la mise en liberté ne constituera pas un danger pour la sécurité nationale ou la sécurité d'autrui.

CHARKAOUI, ADIL Appellant	**AND**	**THE MINISTER OF CITIZENSHIP AND IMMIGRATION, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS** Respondents	**AND**	**CANADIAN CIVIL LIBERTIES ASSOCIATION, *et al.*** Interveners
ALMREI, HASSAN Appellant	**AND**	**THE MINISTER OF CITIZENSHIP AND IMMIGRATION, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS** Respondents	**AND**	**CANADIAN CIVIL LIBERTIES ASSOCIATION, *et al.*** Interveners
HARKAT, MOHAMMED Appellant	**AND**	**THE MINISTER OF CITIZENSHIP AND IMMIGRATION, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, ATTORNEY-GENERAL OF CANADA** Respondents	**AND**	**CANADIAN CIVIL LIBERTIES ASSOCIATION, *et al.*** Interveners

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

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