Court File: 30929

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

B E T W E E N :

HASSAN ALMREI

Appellant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION
and **THE SOLICITOR GENERAL OF CANADA**

Respondents

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PART I - STATEMENT OF FACTS

A. Overview:

1. This appeal raises fundamental issues about the means the state may use to protect its security. The appellant Hassan Almrei has been detained for more than five years, most of this time in solitary confinement, because he is possibly a threat to Canada's security and has been unable to prove on a balance of probabilities that he is not a danger to the security of Canada or the safety of any person. He maintains that the law which effects his detention violates his fundamental rights. Paraphrasing the words of Justice Warren of the U.S. Supreme Court, he submits: "the phrase ['national security'] cannot be invoked as a talismanic incantation to support any exercise of [state] power which can be brought within its ambit. Even [national security] does not remove constitutional limitations safeguarding essential liberties."[1]

2. The appellant – a Muslim, a Syrian Arab and a Convention refugee – is the subject of a security certificate, alleging him to be a threat to Canada's security. He appeals to this Court by leave from the judgment of the Federal Court of Appeal dated February 8, 2005, dismissing his appeal from the decision of Blanchard J. of the Federal Court dated March 19, 2004, which denied his application for release pursuant to s.84(2) of the *Immigration and Refugee Protection Act* (*IRPA*). He submits the Court of Appeal has sanctioned a process which breaches the principles of fundamental justice and fails to give due regard to the duration and conditions of his detention, which are cruel and unusual.

B. Appellant's Background and Processing History:

3. The appellant was born on January 1, 1974 in Syria. He grew up in Saudi Arabia, without permanent status, after his father fled Syria in 1980 because of his association with the Muslim

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[1] *United States v Robel*, 389 U.S. 258: Justice Warren's exact qoute is "However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. Even the war power does not remove constitutional limitations safeguarding essential liberties." The concerns about the infringement of rights in the name of national security is well articulated in "Cutting Down Trees: Law Making Under the Shadow of Great Calamities", Oren Gross, *The Security of Freedom, Essays on Canada's Anti-Terrorism Bill*, Daniels, R.J., Macklem, P., & Roach, K.U. of T. Press, 2001, p. 39-61

Brotherhood. As a youth, the appellant traveled to Afghanistan at a time when mosques in the Middle East were calling on young Muslims to contribute to the jihad to remove the Soviet Union, and the Afghani government it backed, from power. Between 1990 and 1996 or 1997, he spent time in Pakistan and Afghanistan, traveling briefly to Yemen and Tajikestan as well.

Appeal Record, Vol. II, Almrei Declaration, p. 201-207

4. The appellant left Saudi Arabia because, as a youth who had participated in the Afghani jihad, he feared persecution there.[2] He came to Canada in January, 1999 and sought refugee protection. He was recognized as such by the Refugee Division on June 2, 2000, after an oral hearing.

Appeal Record, Vol. II, Almrei Declaration, p. 207-209; Vol. XIV, Refugee Decision, p. 2509

5. After September 11, 2001, the appellant was interviewed by agents of the Canadian Security Intelligence Service (CSIS or the 'Service'). By his own later admission (see below), the appellant misled the officers on several points. On October 19, 2001, he was detained on a security certificate, signed by the Minister of Citizenship and Immigration (the 'Minister') and the Solicitor General on October 16, 2001.

Appeal Record, Vol. II, Almrei Declaration, p. 200-201, 209-212

6. The certificate was based on a secret Security Intelligence Report (SIR) prepared by CSIS. On November 23, 2001, the Federal Court upheld the certificate as reasonable, concluding that secret evidence supported the view that the appellant was a member of an international network which supported the Islamic extremist ideals of Osama Bin Laden and that he was involved in a forgery ring with international connections that produced false documents.

Solicitor General v Almrei, [2001] F.C.J. No. 1772 (T.D.)

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[2] Although Saudi Arabia encouraged youth to participate in the Afghani jihad, even subsidizing their travel to that country, it later viewed those returning as security threats. *Reference: Appeal Record,* Vol. I, Reasons for Order, Blanchard J., Mar. 19, 2004, paras. 66-69, p. 43-45 The appellant did not advise the Refugee Division of all of his travels at his hearing, nor did he explain that his problems in Saudi Arabia stemmed from his participation in the Afghani jihad. *Appeal Record,* Vol. II,, p. 202-03, 207-09

7. The appellant was ordered deported on February11, 2002. As he had not been removed from Canada within 120 days thereafter, on September 23, 2002, he applied for release pursuant to s.84(2) of the *IRPA* (which had recently come into force).

Appeal Record, Vol. II, Release Motion, p. 143; Vol. XV, Removal Order, p. 2748

8. On January 13, 2003, a delegate of the Minister decided that the appellant should be deported to Syria because of the threat he posed to Canada's security. The appellant applied to review this decision in the Federal Court and to stay his removal in the interim. The Minister undertook not to remove the appellant. On April 23, 2003, the Minister consented to the judicial review on the basis that serious errors had been made. The decision was set aside and the matter remitted to the Minister for reconsideration. The appellant's release application continued on June 24 and 25, 2003.

Appeal Record, Vol. I, FCA Reasons, Létourneau J.A., para. 13, p. 83-84

9. On October 23, 2003, the Minister's Delegate again determined under s.115(2) of the *IRPA* that Mr. Almrei should be *refouled* to Syria because he posed a threat to Canada's security. The appellant again sought to review this decision and to stay his deportation. Blanchard J. granted a stay on November 27, 2003. The open hearing on judicial review took place on November 16 and 17, 2004. *In camera* proceedings in the absence of the appellant and his counsel also took place. On March 11, 2005, Blanchard J. set aside the decision on the basis of serious errors in the delegate's analysis. The matter was remitted to the Minister for reconsideration again.

Appeal Record, Vol. I, FC Reasons, Blanchard J., para. 19-22, p. 19
Almrei v. M.C.I., [2003] F.C.J. No. 1790
Almrei v M.C.I., [2005] F.C.J. No. 437

10. The appellant's application for release continued in November 2003 and January 2004[3]. A key issue was the delay in reaching a new decision on *refoulement* to Syria following the first successful judicial review application. The Ministers presented evidence, summarized in Blanchard J.'s reasons, explaining the delays. The Ministers also presented evidence in open court through the

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[3] The appellant's counsel objected to the delays between sittings and sought an earlier date. See *Appeal Record,* Vol. XVI, Counsel's Correspondence, p. 3001-3007

testimony of a CSIS officer, "J.P.", as to the danger the appellant was said to pose to Canada's security. As Blanchard J. summarized the evidence, CSIS's

> main concerns about Mr. Almrei were his military training and his ability to forge documents. J.P. commented that Mr. Almrei's profile compared with the profile of Al Qaeda members, and indicated that there were 'sufficient elements of a profile' in this case. J.P. also commented on the possibility that Mr. Almrei would participate in Al Qaeda operations in the future. He stated that, although he might now be compromised for some operations, it was still possible that others involved in the network would think it worth the risk to contact him, depending on the particulars of the operation.

The court also heard secret evidence, over the appellant's objection.

Appeal Book, Vol, I, FC Reasons, Blanchard J., paras. 80-81, p. 47-48

11. The appellant testified and presented a written declaration. At his request, the court held a *voir dire* and determined that some of his evidence should not be public. In his public statements, the appellant indicated that he had travelled to Afghanistan five times between 1990 and 1996 or 1997 during the anti-Communist jihad. He had learned to use an AK 47 assault rifle but maintained that he was an *imam*, not a fighter. He obtained some money from *Al Haramin*, a registered Saudi charity, to fund a girl's school in Khunduz. During the times he was in Saudi Arabia, he was a student and later earned income selling oud, perfume and honey. He travelled on false passports (including when he arrived in Canada) because he could not obtain a Syrian passport. He denied being part of an international forgery ring, but admitted he had helped Nabil Al Marabh obtain a false Canadian passport through a man in Montreal.[4] He explained that he had not disclosed his whole history to the Refugee Division because he could not prove it and that he had not disclosed it to the CSIS agents who interviewed him because he met with them immediately after September 11th and was afraid to admit these facts.

Appeal Record, Vol. I, FC Reasons, Blanchard J., para. 64-65, p. 40-41; Vol. II, Almrei Declaration, p. 200-214

12. The appellant also testified about the conditions of his detention at the Toronto West Detention

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[4] Al Marabh, a Syrian and a Muslim, was detained in the US on suspected Al Qaeda ties, but faced no charges. He was deported from the US as an illegal. *Appeal Record,* Vol. XV, p. 2815-2851

Centre since his arrest. Blanchard J. summarized some of this evidence:

> [Mr. Almrei] indicated that he continues to be held in solitary confinement in a nine by twelve foot cell with a mattress, a sink, a toilet and two lights, one of which is on 24 hours per day. Mr. Almrei has no pillow or towel. He is permitted to go outside only every few days for a few minutes at a time, but is not given boots or a coat to wear outside in the winter. He is permitted to shower only every few days, and he has no contact with anyone except guards. Mr. Almrei has the Koran and is permitted some other reading materials, but educational programs are not made available to him, and visits and phone calls are restricted.
> *Appeal Book,* Vol. I, FC Reasons, Blanchard J., para. 63, p. 40

13. The appellant testified that the conditions of his detention have been so poor that he undertook two hunger strikes – the first, to be released from solitary confinement; the second, to obtain shoes and adequate heat in his cell. He brought two applications for *habeas corpus* in the Ontario Superior Court of Justice. He was removed from solitary confinement in November 2002 but was returned after five days for his own protection after an altercation with other prisoners. On the *habeas corpus* application, Gans J. ordered that the appellant be provided shoes. The heating also improved.

Almrei v. A.G. Canada, [2003] O.J. No. 5198 (S.C.J.)

14. Peter Dietrich of the Canada Border Services Agency (CBSA) testified that there was an informal, "ad hoc" arrangement between federal immigration and Ontario correctional officials for the use of provincial detention facilities for some immigration detainees. The choice of institution is left to officials with the Ontario Ministry of Public Safety and Security. The only facilities for holding immigration detainees deemed to pose a security threat are short-term remand centres. The province is responsible for the conditions of detention there. Frank Geswaldo, the Security Manager at the West Detention Centre, testified about the operation and conditions of the facility. He explained that the appellant's continued detention in solitary confinement was necessary for his own protection: "In a situation like Almrei who is very high-profile, being in the newspapers, on the radio and TV, there is a potential for him to be harmed in the general population." Blanchard J. found this evidence credible and trustworthy.

Appeal Record, Vol. I, FC Reasons, Blanchard J., para. 70-71, 79, p. 43-47; Vol. IV, Dietrich Testimony, p. 255, 259-266, 268-270; Vol. IV, Geswaldo Testimony, p. 553, 555-572

15. The appellant has no family here and had little time to establish roots before being detained. Nevertheless, his friend Hassan Ahmed; Dr. Aly Hindy, *imam* of the Salaheddin Mosque and a Director of the Canadian Islamic Congress (Toronto); Dr. Diana Ralph, a social work professor; and Matthew Behrens and Frank Sholler, both community activists, testified to his character and their willingness to post bonds and ensure his compliance with terms of release. The appellant proposed conditions which, he believed, would control any threat he was said to pose. Dr. Ralph offered her home to him. Blanchard J. found that

> most of the sureties have not known Mr. Almrei for very long, and indeed all of them have only come to know him since his incarceration. I have no reason to doubt their honesty and integrity as law abiding citizens. Despite their best efforts and intentions, I have not been satisfied that the posting of cash sureties would address the danger I believe would be posed by Mr. Almrei's release.
> *Appeal Record,* Vol. I, FC Reasons, Blanchard J., para. 72-78, 128, 131, p. 44-47, 67-68

16. Dr. El Helbawy, the United Kingdom spokesperson for the Muslim Brotherhood from 1995 to 1997 and a Muslim educator, and Dr. El Fadl, a Yale law professor who has written extensively on Islamic and human rights issues, provided background information on behalf of the appellant. In Dr. El Fadl's opinion, the appellant did not fit the standard profile of persons linked to Al Qaeda. Blanchard J. indicated that he

> had no reason not to accept the evidence of Dr. El Fadl and Dr. El Helbawy in regards to the role of volunteers in the jihad, the involvement of particular individuals in that conflict, and the difficulties suffered by Arab youth when they tried to return home from Afghanistan. Whether or not the applicant fits a particular profile is something that must be decided on a weighing of all of the evidence.
> *Appeal Record*, Vol. I, FC Reasons, Blanchard J., paras. 66-69, p. 41-43

17. Blanchard J. determined that the appellant had not met the test for release under s.84(2) of the *IRPA*. He was "unable to find that Mr. Almrei will not be removed from Canada within a reasonable time" and concluded that the appellant had not shown, on a balance of probabilities, that his release from detention will not pose a danger to national security or to the safety of any person. Considering both the public and the secret evidence, Blanchard J. was

> satisfied that, should Mr. Almrei be released, there is a strong likelihood that he will resume his activities and become re-acquainted with his connections in the forgery ring and those Arab-Afghans connected to the Osama Bin Laden network. Having regard to the nature of the

> threat posed, I have not been satisfied by Mr. Almrei that the proposed, or similar conditions, would be effective to ensure that his release would not pose a danger to national security or to the safety of any person.

Blanchard J. determined that while the conditions of detention "are certainly not ideal", continued detention did not breach the appellant's *Charter* rights. These conclusions were upheld by the Court of Appeal.

Appeal Record, Vol. I, FC Reasons, Blanchard J., para. 95, 96, 130, p. 54 and 68

10 18. The appellant remains at the West Detention Centre,[5] awaiting a third decision on *refoulement.*

PART II - QUESTIONS IN ISSUE

19. The Chief Justice has stated the following Constitutional Questions:

> 1. Do ss. 82(2) and 84(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, infringe s. 7 of the Canadian *Charter of Rights and Freedoms*?
>
> 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian *Charter of Rights and Freedoms*?

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> 3. Do ss. 82(2) and 84(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, infringe s. 12 of the Canadian *Charter of Rights and Freedoms*?
>
> 4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian *Charter of Rights and Freedoms*?

20. In addition, if this Court determines that the legislation does conform with *Charter* norms, the appellant raises further issues relating to the test for release and the hearing under s.84(2) –
30 specifically, the reverse onus; the authority to conduct an *ex parte, in camera* hearing; the determination of whether removal can occur within a reasonable time; and the relevance of the conditions of detention.

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[5] In early 2006 Mr. Almrei was put in protective custody with Mr. Jaballah and Mr. Mahjoub.

PART III - ARGUMENT

A. Statutory Scheme:

21. Non-citizens who are identified as threats to Canada's security may be subject to enforcement proceedings under the *IRPA* to secure their removal from Canada. The normal method for securing removal is for an immigration officer to write a report alleging that there are reasonable grounds to believe that a non-citizen is inadmissible on grounds of security, violating human rights, serious criminality or organized criminality. The report is then referred to an Immigration member of the Immigration and Refugee Board (IRB) for an admissibility hearing. Since the *IRPA* came into force in June, 2002, that tribunal has the authority to receive evidence from the Minister on an *ex parte* basis without disclosing it to the person concerned.[6] If detained, the non-citizen is entitled to regular reviews (every 30 days). A decision to detain may be judicially reviewed in the Federal Court, as may a decision on admissibility.

Immigration & Refugee Protection Act, s. 33-37, 44, 86, 72(1)

22. Alternatively, removal may be effected through the security certificate process. This process, in one form or another, has been in place since the establishment of the CSIS and the Security Intelligence Review Committee (SIRC) in 1984. Originally, the Minister of Employment and Immigration and the Solicitor General would submit a report on a non-citizen for review by the SIRC. The SIRC investigated the grounds in the report and provided the non-citizen with a statement summarizing the information to "enable the person to be as fully informed as possible of the circumstances giving rise to the report." The SIRC would hold a hearing *in camera* and *ex parte* to assess the government's case in respect of information which could not be disclosed for reasons of national security. The non-citizen was given an opportunity at an oral hearing to answer the allegations, including cross- examination of Service witnesses on the basis of redacted transcripts

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[6] Section 86 of the *IRPA* permits the Minister to apply to present evidence *in camera* and *ex parte* before the Immigration Division at an admissibility hearing and before the Immigration Appeal Division at an appeal, for eg. where a permanent resident has appealed from a removal order to the IAD on equitable grounds, or where a Canadian or permanent resident sponsor appeals from the refusal of a visa officer to land a sponsored member of the family class. Section 87 of the *IRPA* permits the Minister to apply to the Federal Court to receive evidence *in camera* and *ex parte*, for eg. where a person, refused a visa, seeks judicial review.

of their testimony in the secret hearing. The SIRC had its own counsel and there was independent counsel to ensure that the interests of the non-citizen were represented in the secret hearing. Detention was not mandatory, nor automatic.

Immigration Act, 1978, (as am'd, S.C.) 1983-84, C. 21, S. 80), s. 39, 40

23. In 1992, the Act was amended to provide that reports on non-citizens who were not permanent residents and who were suspected of presenting a threat to Canada's security, would be sent to a designated judge of the Federal Court. Detention at this point became automatic and mandatory with the filing of a certificate. Permanent resident security cases continued to be heard by the SIRC until the implementation of the *IRPA* in June, 2002. Detention of permanent residents was not automatic or mandatory under the process in place to 2002.

Immigration Act, 1978, (as am'd S.C. 1992, s. 31), s. 39, 40, 40.1

24. Under the process in place since June 2002, the Minister and the Solicitor General sign a certificate stating that there are reasonable grounds to believe a non-citizen to be inadmissible on grounds of security. Once filed in Federal Court, a warrant may issue for the detention of a permanent resident, who, if detained, is entitled to a detention review before a designated judge within 48 hours and at least every 6 months thereafter. For all other non-citizens – 'foreign nationals' – detention is mandatory and release is not possible until either the certificate is quashed, or it is found reasonable and 120 days have passed since this decision and the person remains in Canada.[7]

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[7] It can be a long time before a detainee may apply for release. Under the old Act, the 120 days ran from the time that a removal order was issued. Under the *IRPA*, the 120 days runs from the time that the certificate is upheld as this decision is a deportation order. The time lines for a number of the cases, including the appellant's, indicate: ***Ahani*** *v Solicitor General*, [1999] F.C.J. No. 310, detained June, 1993, security certificate upheld April 17, 1998, deportation order issued April 28, 1998, release eligibility August 26, 1998 - **5 years, 2 mos**; ***Almrei*** *v Solicitor General*, [2004] F.C.J. No. 509 detained October 19, 2001; security certificate upheld November 23, 2001, deportation order issued February 11, 2002, release eligibility, June 8, 2002, **8 mos**; ***Baroud*** *v Solicitor General,* [1996] F.C.J. No.4 ; detained June 6, 1994, security certificate upheld, May 31, 1995, deportation order issued June 13, 1995, release eligibility October 12, 1995 - **1 year, 4 mos**; ***Harkat*** *v Solicitor General*, [2005] F.C.J. No. 2149, detained December 10, 2002, security certificate upheld March 22, 2005, release eligibility July 20, 2005 - **2 years, 3 mos**; ***Jaballah*** *v Solicitor General,* [2003] 4 F.C. 345; [2003] F.C.J. No. 822: detained August 15, 2001, security certificate upheld May 23, 2003, release eligibility September 20, 2003 - **2 years, 1 mo**; ***Mahjoub*** *v Solicitor General,* [2003] F.C.J. No. 1183, detained June 27, 2000, security certificate upheld October 5, 2001, deportation order issued

A detainee may apply to the Minister for release to permit their departure from Canada.

Immigration & Refugee Protection Act, ss. 82-84

25. On the review of the certificate, the designated judge is mandated solely to determine if the certificate is reasonable on the basis of the evidence and information available to the Court. The Ministers have the burden of establishing the case. The Court is to provide the non-citizen with a summary of the case against her to enable her to be reasonably informed of it (in contrast to the original requirement, that the person be as fully informed as possible) and to permit her a reasonable opportunity to be heard. Not all of the case need be disclosed. Evidence or information will be withheld entirely where disclosure would be injurious to national security or to the safety of persons. In the case at bar, the disclosure to the appellant consisted of the public summary, news articles and selective information taken from his computer.[8]

Solicitor General et al v Smith, [1991] 3 F.C. 3; [1991] F.C.J. No. 212 (T.D.), para. 53
Appeal Record, Vol. X, Summary, p. 1809-1850; Ref. Books, Vol. X-XV, p. 1851-2812

26. The Ministers present their case *ex parte* and *in camera* in the absence of counsel for the detainee. In contrast to the former procedures before the SIRC, there is no counsel for the court or independent counsel present and disclosure is severely curtailed. The non-citizen has an opportunity to reply to the disclosed allegations, but has no right to examine the government's witnesses or in any other meaningful way test the reliability of the state's evidence. The nature and sources of the evidence are not normally disclosed. There are no rules of evidence. The Court may receive and consider any appropriate evidence.

Immigration & Refugee Protection Act, s. 78
Harkat v Solicitor General, [2003] F.C.J. No. 400, para. 6-13

27. Where the certificate is upheld by the designated judge, it is conclusive proof that the person

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March 25, 2002, release eligibility July 23, 2002- **2 yrs, 1 mo**; ***Suresh v Solicitor General***, [1998] F.C.J. No. 385, detained October 18, 1995 , security certificate upheld August 29, 1997, deportation order issued September 17, 1997, release eligibility January 15, 1998 - **2 years, 3 mos**.

[8] Evidence was led through Matthew Behrens, who accessed Mr. Almrei's computer, about his Internet hits. *Appeal Record,* Vol. XVI, Almrei's Internet Files, p. 2852-2898; BBC Images, p. 2904-2916

is inadmissible on the grounds alleged. The decision may not be appealed or reviewed

Immigration & Refugee Protection Act, s. 80, 81

28. When a foreign national applies for release from detention, the hearing before the designated judge mirrors the certificate hearing: the Ministers present their case *ex parte* and *in camera*, disclosure is limited for reasons of national security, a summary of the case is provided, and the person is given the opportunity to present her case for release.

Immigration & Refugee Protection Act, s. 84(2)

29. The statutory test for release is set out in s. 84(2) of the Act:

> 84 (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.

30. The Federal Court of Appeal in *Ahani* and in the appellant's case has determined that the onus is on the foreign national to establish that her release is warranted, notwithstanding that she does not know the full case or the nature and substance of the evidence. The Court interpreted the first part of the release test – that removal will not occur within a reasonable time – as not permitting consideration of time the person may actually remain in Canada because she has exercised her right of access to a court of competent jurisdiction to seek a remedy under the *Charter* and an interim stay against removal has been issued. In the Court's view, once a certificate is upheld, the Minister may remove the person and if the Minister has made a decision to do so, removal can occur within a reasonable time.

Ahani v M.C.I., [2000] F.C.J. No. 1114 (C.A.), para. 9-15
Appeal Record, Vol. I, FCA Reasons, Létourneau J.A., para. 52-57, p. 102-105

B) Question 1: Do ss. 82(2) and 84(2) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, infringe s. 7 of the Canadian Charter of Rights and Freedoms?

1) Section 7 Engagement: The Threshold Question

31. It is submitted that the appellant's liberty and security of the person interests are engaged by the security certificate process and the process for seeking release from detention. The two procedures are integrally related, in that the application for release from detention is not available

until after the designated judge has determined that the security certificate is reasonable, and this finding is one of the factors considered in the application for release from detention. [9]

32. Liberty, in the classic sense of freedom from physical restraint – is engaged. For the appellant, detention was mandatory and automatic on issuance of the certificate. Solely on the basis of the certificate, the appellant has been deprived of his liberty for more than four years and is at risk of continued deprivation for the foreseeable future. The appellant's security of the person interest is also engaged. He is a Convention refugee. He now faces removal to a country where he fears persecution. As this Court recognized in *Singh v M.E.I.*, it is the threat of removal to a country where persecution is feared that engages a security of the person interest.[10] The appellant has a well founded fear of torture if forcibly sent to Syria. The abhorrent nature of torture was recently well-articulated by the UK House of Lords in *A (F.C.) V Secretary of State for the Home Department.* The appellant's security of the person interest is also engaged by the serious and profound physical and psychological impact of his detention to date and its continuation.

Immigration & Refugee Protection Act, s. 82(2)(, 84(2)
A (F.C.) V Sec. of State for the Home Department, [2005] UKHL 71, para.11-13,30-53,64-69
R v Swain , [1991] 1 S.C.R. 933; [1991] S.C.J. No. 32, para. 122
Singh v M.E.I. [1985] 1 S.C.R. 177; [1985] S.C.J. No. 11, para. 47
NB (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46; [1999] S.C.J. No. 47, para. 56-61
Re Application under S. 83.28 of the Criminal Code, [2004] S.C.J. No. 40, para. 75-76
Ngyuen v M.E.I. [1993] 1 F.C. 696; [1993] F.C.J. No. 47 (.C.A.), para. 17
Grewal v M.E.I., [1992] 1 F.C. 581 (C.A.), para. 9-12

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[9] This is apparent in the reasoning of designated judges in the detention cases: see *Almrei v Solicitor General,* [2005] F.C.J. No. 213(C.A.), para. 48, 51-52; *Almrei v Solicitor General,* [2004] F.C.J. No. 509 (T.D.), para. 35; *Almrei v Solicitor General,* [2005] F.C.J. No. 1994 (T.D.), para. 429; *Ahani v Solicitor General,* [1999] F.C.J. No. 310 (T.D.), para. 22; *Ahani v Solicitor General,* [2000] F.C.J. No. 1114 (C.A.), para. 11-13; *Baroud v Solicitor General,* [1996] F.C.J. No. 4 (T.D.), para. 25-26; *Mahjoub v Solicitor General,* [2003] F.C.J. No. 1183 (T.D.), para. 22; *Mahjoub v Solicitor General,* [2005] F.C.J. No. 1948 (T.D.), para. 48; *Suresh v Solicitor General,* [1998] F.C.J. No. 385 (T.D.), para. 9-10; *Harkat v Solicitor General,* [2005] F.C.J. No. 2149 (T.D.), para. 20 (10-11)

[10] The country to which the appellants in *Singh* would be removed had not been selected when the case came on for appeal, yet this Court considered that the process might lead to removal to a country where persecution was feared. The Solicitor General has already made two decisions, quashed on judicial review, to *refoule* Mr. Almrei to Syria. He is awaiting another decision.

2) Principles of Fundamental Justice

33. The principles of fundamental justice are to be discerned by reference to Canada's common law tradition, its international obligations, and other fundamental rights in the *Charter*. Taking these sources into account, it is submitted that there are three significant principles of fundamental justice at issue here: (1) detention cannot be arbitrary; (2) detention cannot be indeterminate; and (3) detention cannot be maintained without a fair hearing.

Reference Re s. 94(2) of the Motor Vehicle Act (B.C.) (1985), 23 C.C.C. 289, p. 301-02

a) The Arbitrariness of the Appellant's Detention

34. Section 9 of the *Charter* provides that 'everyone has the right not to be arbitrarily detained'. As this Court recognized in the *Motor Vehicle Reference* case: "Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice."

Reference Re s. 94(2) of the Motor Vehicle Act (B.C.) (1985), 23 C.C.C., p. 301-02
R v Swain , [1991] 1 S.C.R. 933; [1991] S.C.J. No. 32, para. 128

35. The characterization of a detention as arbitrary has been the subject of judicial and juristic comment. Detention is "arbitrary" where a person is detained without individual consideration of the need to detain. As well, as the Working Group on Arbitrary Detention has noted, a detention which is discriminatory or is grounded in a person's religion and personal beliefs and opinions is also arbitrary. It is submitted that the appellant's detention is arbitrary because it was effected without regard to his personal circumstances and is premised on discrimination.

R v Swain , [1991] 1 S.C.R. 933; [1991] S.C.J. No. 32, para. 128-131
UN Working Group on Arbitrary Detention, Fact Sheet No. 26, para. IV. A & B
Report of the Working Group on Arbitrary Detention, Visit to Canada, E/CN.4/2006/7/Add.2 5 December 2005, para. 84-86, 91, 92(d)
Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990).
Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

36. The appellant's detention was mandatory and automatic on filing the certificate. The statute makes no provision for timely access to bail. While the process against him began with a

determination by two Ministers of the Crown that he was possibly a threat to national security, upon this bare allegation the appellant's detention is mandatory, with no regard to his individual circumstances. To paraphrase this Court in *Swain*, one "cannot imagine a detention being ordered on a more arbitrary basis."

Suresh v M.C.I., [2002] S.C.J. No. 3, para. 83-84
R v Swain , [1991] 1 S.C.R. 933; [1991] S.C.J. No. 32, para. 130-131
R. v. Governor of Durham Prison, Ex p. Hardial Singh [1984] 1 W.L.R. 704
Tan te Lam v. Superintendent of Tai A Chau Detention Centre [1997] A.C. 97, para. 15-19
Zadvydas v. Davis, 533 U.S. 678 (2001); 2001 U.S. LEXIS 4912, p. 17
Clark v. Martinez, 543 U.S. ___ (2005); 2005 U.S. LEXIS 627, p. 9
Zaoui v. A.G., (SC CIV 12/2004) (Nov. 25, Dec. 9, 2004) (N.Z.S.C.), at para. 66

37. It is submitted that consideration of whether a detention is arbitrary also requires the Court to be cognizant of the marginalized and vulnerable position of non-citizens, their lack of political power, and the very real danger of their demonization, as has occurred and continues to occur today.[11] The right to equality, entrenched in s. 15 of the *Charter*, reflects a fundamental Canadian value which informs the interpretation of other human rights in the *Charter*. Detention can not comply with the principles of fundamental justice if it is grounded in discrimination.

Andrews v. Law Society of B.C., [1989] 1 SCR 143; [1989] S.C.J. No. 6, para. 48-49
Lavoie v. Canada, [2002] 1 S.C.R. 769, at para. 45

38. Under s. 15 of the *Charter*, every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination, including that based on race, national or ethnic origin and religion. It is submitted that detention of foreign nationals on certificates is arbitrary because it discriminates. Others about whom there may be similar security concerns are not treated the same:

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[11] Canada's history of racism and stereotyping of non-citizens is well-documented. See, for example, The Immigrant's Handbook, A Critical Guide, Black Rose Books, Montreal, 1981, Ch. 1 "History of Immigration Laws and Policy", p. 16-51; Canadian Council for Refugees, www.web.net/~ccr/fronteng.htm. Other books document specific incidents, for eg. None is Too Many, Canada and the Jews of Europe 1933-1948, Irving Abella & Harold Troper, Lester & Orpen Dennys, 1983.There are many new articles about the profiling and stereotyping of Muslims and Arabs, a class to which the appellant belongs. See for eg. Choudhry, Sujit, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter", The Security of Freedom, Essays on Canada's Anti-Terrorism Bill, Daniels, R.J., Macklem, P., & Roach, K.U. of T. Press, 2001, p. 39-61

(i) Non-citizens believed inadmissible on security grounds, whose cases are processed through an admissibility hearing commenced under s. 44 of the *IRPA*, if detained, have an immediate detention review and regular monthly reviews under s. 57 of the *IRPA*;
(ii) Non-citizen permanent residents, subject to security certificates, are eligible for an immediate detention review and regular reviews thereafter under s. 83 of the *IRPA*; and
(iii) Canadian citizens, perceived to be a threat to Canada's security or the safety of persons are not detained without a hearing. Where not facing criminal charges, but believed to be a security threat, citizens may be subject to judicial controls through a recognizance imposed by a court for a twelve month period.[12] These controls may be imposed on citizens and non-citizens alike. No citizen could be detained indeterminately on the opinion of two Ministers that she may possibly be a terrorist or a member of a terrorist organization.

A (FC) and others (FC) v. Secretary of State for the Home Department, [2004] UKHL 56
UN Working Group on Arbitrary Detention, Fact Sheet No. 26, at para. IV. A & B
Report of the Working Group on Arbitrary Detention, Visit to Canada, E/CN.4/2006/7/Add.2 5 December 2005, at para. 84-86, 91, 92(d)

39. It is submitted that the appellant falls within the profile of those most at risk of having their rights violated in a post 9/11 world. He is Muslim, Arab, young and unmarried. He travelled to Afghanistan, as a teenager and young adult, to participate in the anti-communist jihad. He travelled on false passports.[13] He falls within a class of persons suspected by CSIS of being or supporting terrorists. Based on the appellant having 'sufficient elements of the profile', CSIS believes the

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[12] *Criminal Code,* s. 83.3. It is only where the person refuses to enter into a recognizance or fails to comply with conditions imposed that a court may effect detention for 12 months. These provisions (ss. 83.01-83.33, *Criminal Code,* R.S.C. 1985, C. C-46) have been used twice since implementation: once to receive evidence in an investigative hearing (defence counsel were present), *Re Application under S. 83.28 of the Criminal Code,* [2004] S.C.J. No. 40: and once to detain a Canadian on criminal security related charges. Another Canadian faces extradition to the US on terrorism related charges. Section 83.3 has not been used, although there are Canadians believed to be linked to Al Qaeda. *See Report of the Working Group on Arbitrary Detention, Visit to Canada,* E/CN.4/2006/7/Add.2, 5 Dec. 2005, at para. 31

[13] The appellant is a Convention refugee. The Minister has not sought to revoke this. It is self-evident in the character of a refugee that the person's relationship with her state has broken down. Refugees often are not able to obtain valid passports. *See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status,* Geneva, Sept. 1979, at para. 99, 120

appellant would participate in Al Qaeda operations in the future.

Appeal Book, Vol, I, Reasons for Order, Blanchard J., Mar. 19, 2004, paras. 80-81, p. 49-50

40. It is recognized that non-citizens have no right to remain in Canada. However, detention is a distinct issue from whether a person is removable from Canada at some indeterminate time in the future. The history of the appellant's case and of others subject to security certificates shows that detention may extend for years before release is considered, and even longer before a final decision is made as to removal from Canada. Given the risks often facing security certificate detainees if removed, this Court's reasoning in *Suresh* suggests that removal in many of these cases is far from a certainty.

Chiarelli v M.C.I., [1992] 1 S.C.R. 711
Suresh v M.C.I., [2002] S.C.J. No. 3, para. 78

b) Timely Review and Indeterminate Detention Under the *IRPA*

41. It is submitted that, apart from the execution of a lawful sentence of imprisonment, in Canada incarceration is an exceptional measure. In the criminal law context, the pre-trial detention of individuals charged with criminal offences is justified only on three possible grounds: to ensure their attendance in court; for the protection or safety of the public; or, in exceptional cases, to maintain confidence in the administration of justice (see *Criminal Code*, s.515(10)). In most circumstances, it is the state that bears the burden of demonstrating the detention is justified.

R. v. Hall, supra, at 325-33
R. v. Pearson, [1992] 3 S.C.R. 665 at 693-99
R. v. Morales, [1992] 3 S.C.R. 711 at 743-47

42. It is submitted that Canada cannot detain a person without providing a timely hearing to determine whether detention is justified. This is apparent in the rights entrenched in ss. 9 and 10 of the *Charter* and in the international conventions to which Canada is a party or which reflect fundamental international norms with which all states are expected to comply.[14] Indeed in Mr.

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[14] ***Universal Declaration Of Human Rights*** *(UDHR),* U.N. Doc A/810, Art. 8; ***International Covenant on Civil and Political Rights*** *(ICCPR),* 999 U.N.T.S. 171, Art. 9.4; ***American Declaration of the Rights and Duties of Man,*** *(ADRDM),* 1948, Art. XVIII, XXV. In Canada, *habeas corpus*, although entrenched in the *Charter* and considered a non-derogable international human right, is not available to non-

Jaballah's case, the Federal Court has concluded that detention without review is not justifiable under s. 15 of the *Charter*, as permanent residents have regular reviews, although the Court determined that there was no breach of s. 7 because the detention was not arbitrary.[15]

Jaballah v Solicitor General, [2006] F.C.J. No. 110, para. 73-81
R v Swain, [1991] 1 S.C.R. 933; [1991] S.C.J. No. 32, para. 132, 143
Reference Re S. 94(2) of the Motor Vehicle Act (BC),(1985),23 C.C.C. 289, p. 311

43. States may detain non-citizens when determining whether to admit them and to secure their removal from the country. However, non-citizens are human beings and are entitled to the same respect for their dignity. Democratic states generally do not permit detention of non-citizens without a prompt review of the need to detain and when the detention has exceeded a reasonable time, there is a presumption that non-citizens be released.

Baban v Australia, UNHRC Comm. No. 1014/2001 (2003), para. 7.2
C v Australia, UNHRC, Comm. No. 900/1999 (2002), para. 8.2
Ferrer-Mazorra v United States, IAComHR, Report No. 51/01, April 4, 2001
Slivenko v Latvia, EctHR, App. No. 48321/99, Oct. 9, 2003, para. 146
Zaoui v. AG, (SC CIV 12/2004) (N.Z.S.C.), para. 52, 100-101
Zadvydas v. Davis, 533 U.S. 678 (2001); 2001 U.S. LEXIS 4912, p. 17
Clark v. Martinez, 543 U.S. __ (2005); 2005 U.S. LEXIS 627, p. 7-8
*In Re Guantanamo Detainee Cases,*2005 U.S. Dist. LEXIS 1236 (D.C.), p. 20
Tan te Lam v. Superintendent of Tai A Chau Detention Centre, [1997] A.C. 97, para. 21
Saadi v Secretary of State for the Home Department, [2002] UKHL 41, para. 41
Takitota v A.G. Commonwealth of the Bahamas, [2004] BHSJ No. 81 (S.C.), para. 42

44. Canada is facing sustained and serious criticism from international human rights treaty bodies for its statutory scheme for the detention of persons subject to security certificates. The UN Working Group on Arbitrary Detention, the most recent of the international agencies to have criticized

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citizens. See *Baroud v The Queen,* [1995] O.J. No. 43, lv. Denied [1995] S.C.C.A. No. 111; *Jaballah v The Queen,* [2005] O.J. No. 3681; *Almrei v The Queen,* [2005] O.J. No. 5067 (S.C.J.).

[15] Mr. Jaballah's case is being processed under the *IRPA*, while Mr. Almrei's is under the previous *Immigration Act* provisions. As such, for Mr. Jaballah the *refoulement* decision must be made before the reasonableness of the security certificate is determined, leading to an even lengthier period of time without review of the need to detain. In Mr. Almrei's case, the delay is lengthy before an application for release may be made, but there is more delay after the security certificate is upheld as under the old process, the *refoulement* decision is then made and it may take years for a final decision to be made on removal.

Canada,[16] stated in its report:

> One of the most troubling aspects of the security certificate process is the delay with which non-citizens under a security certificate can challenge their detention. Article 9, paragraph 4, of the International Covenant on Civil and Political Rights requires that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added). The case of Mahmoud Jaballah, one of the four men currently detained under security certificates, illustrates how the process violates this fundamental principle. Mr. Jaballah has been detained without criminal charges for five years and been given the chance to challenge his detention only once.

Report of the Working Group on Arbitrary Detention, Visit to Canada, E/CN.4/2006/7/Add.2 5 December 2005, at para. 85, ftnt. 5

45. It is both an international human rights norm and a Canadian constitutional right for a detained person to have available a timely and effective review of the lawfulness of that person's detention. While s. 82(2) and 84(4) of the *IRPA* mandate detention, this is not 'lawful' in the substantive and constitutional sense of the term because it is effected without regard to the need to detain the person and, potentially for an extended period of time, is without judicial control.

46. National jurisdictions comparable to Canada as well as international human rights tribunals have recognized that detention pending removal on immigration grounds must be limited to such time as is reasonable to enable the removal process to be carried out, and that removal should follow promptly upon the making of the removal order. Detention pending removal must be subject to judicial review and a right to seek release if removal is not effected in a reasonable time. Where removal cannot occur (or is unlikely to occur within a reasonable time), alternatives to detention

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[16] Other agencies which have criticized Canada, in particular on the detention provisions of the security certificate scheme, include the UN Human Rights Committee in *Ahani v Canada,* Comm. No. 1051/2002; (see CCPR/C/80/D/1051/2002 (2004), at para. 10.2-10.3 where, as the UNWGAD noted, the UNHRC found Canada in violation of Article 9(4) of the *ICCPR* and in its *Concluding observations of the Human Rights Committee : Canada. 02/11/2005. CCPR/C/CAN/CO/5.*CCPR/C/CAN/CO/5, at para. 13-14; the Inter-American Commission on Human Rights, in its *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System,* Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev. (2000), at para. 146-150; and the admissibility decision in *Suresh v Canada,* Case 11.661, Report No. 7.02 (2002) Canadian NGO's have also levelled serious criticisms, see for eg. Canadian Council for Refugees: Brief to the House of Commons Sub Committee on Public Safety and National Security, Sept. 2005, p. 5-6; Amnesty International Canada, "Security Certificates - Time for Reform", Mar. 30, 2005

must be found. Any departure from these principles requires an express derogation by the legislature from guaranteed rights to liberty and security of the person – as occurred, for example, in the United Kingdom in 2001 (a measure later found by the House of Lords to be incompatible with the right to liberty and the protection against discrimination found in Articles 5 and 14, respectively, of the European Convention on Human Rights).

A (FC) and Others (FC) v. Secretary of State for the Home Department, [2004] UKHL 56
Tan Te Lam v. Super. of Tai A Chau Detention Centre, [1996] 4 All E.R. 256 at 265-66
Chahal v. United Kingdom, [1996] 23 E.H.R.R. 413 at para.113 (E.Ct.H.R.)
Zadvydas v. Davis, 533 U.S. 678 (2001), p. 17
Clark v. Martinez, 543 U.S. ___ (2005), p. 7-8
A. v. Australia, Comm. No. 560/1993 (30 April 1997) (UNHRC), para. 9.4
Ferrer-Mazorra v. United States, IAComHR, Report No. 51/01 (2001), paras. 211-13
Mohammed v Secretary of State for Home Department, [2002] EWHC 1530, para. 11

47. Parliament's recognition of the need to keep detention for immigration purposes within reasonable limits may explain the triggering event for an application for release under s.84(2) of the *IRPA* – namely, at least 120 days having elapsed from the decision upholding the security certificate without the individual having been removed from Canada. While a foreign national has no right to apply for release prior to this, Parliament has determined that release should be possible in the event that detention is prolonged more than four months after a removal order is issued. This reflects a recognition that the incarceration for even four months of someone who has been neither charged nor convicted of an offence is lengthy enough to raise the question of whether it should continue. It is submitted, however, that the analysis of s.84(2) adopted by the Federal Court of Appeal eviscerates the provision as a check against indeterminate detention.

48. In the view of the Federal Court of Appeal, s.84(2) is essentially future-oriented. That is, the governing question is whether, at the time the application for release is heard, the detainee is likely to be removed from Canada within a reasonable time thereafter. Given the allocation of the burden of proof on the detainee, if she cannot prove that this is unlikely to occur, the application for release must fail (regardless of whether the applicant poses a danger or not). On the view taken by the Court of Appeal, delay can never have become unreasonable prior to an application for release being heard, no matter how long that delay might have been. At most, prior delay can be relevant to the

credibility of claims that removal is now likely to occur in a reasonable time, or to how much further delay would be "reasonable". Similarly, the Court determined that the conditions of detention are essentially irrelevant, no matter how oppressive they may be, except insofar as they may inform the decision about how much additional delay would be reasonable.

Appeal Record, Vol, I, FCA Reasons Létourneau J.A., para. 79-82, 102-105

49. Further, the Court of Appeal has made detainees responsible for delays of removal caused by their pursuit of legal remedies, holding that detainees who pursue legal remedies cannot then complain that removal has not occurred within a reasonable time. The Court takes this view regardless of the merits of the detainee's legal objections to removal. Létourneau J.A. held: "In other words, where an applicant, *rightly or wrongly*, tries to prevent his removal from Canada and delay ensues as a result of his action, he cannot be heard to complain that his removal has not occurred within a reasonable time, unless the delay is unreasonable or inordinate and not attributable to him" (emphasis added).

Appeal Record, Vol. I, FCA Reasons, Létourneau J.A., paras. 54-57, p. 103-104

50. It is submitted that the latter determination is especially unfair to detainees. It must be taken as self-evident that any removal decision must be lawfully made – that is, it must be made in accordance with the principles and procedures set out in the *IRPA,* with the principles of natural justice, with the *Charter* and, to the extent that they have been incorporated into domestic law, with the governing principles of international law. A detainee facing removal is the only party who can seek legal redress when a removal decision is not made in accordance with the law. Indeed, the right to seek an appropriate and just remedy for a breach of the *Charter* is itself guaranteed by s.24(1) of the *Charter*. The right to seek an effective legal remedy for human rights violations is guaranteed by many human rights instruments to which Canada is a party (for eg., Art. 8 of the *Universal Declaration of Human Rights*, Art. 2.3 of the *ICCPR* and Art. 18 of the *American Declaration of the Rights and Duties of Man*.) This right becomes illusory, however, if a detainee may pursue it only at the expense of other rights (such as the rights to liberty and to security of the person). Yet, this is the necessary consequence of the Court of Appeal's decision.

Suresh v M.C.I., [2002] 1 S.C.R. 3; [2002] S.C.J. No. 3, para. 78-79

Immigration & Refugee Protection Act, s. 3(3)(f)

51. There may be cases where the equities appear to weigh against an applicant for release because he is the author of his own misfortune by prolonging the removal process and, therefore his own detention, by wilfully obstructing removal (e.g. by refusing to cooperate with the removal process) or by pursuing clearly unmeritorious legal proceedings. That, however, is not this case. The appellant has succeeded on two applications for judicial review of removal decisions. And looking to the future, it is at least an open question whether, under the *IRPA* and the *Charter*, Canada may ever deport an individual to a country where he or she faces a risk of torture. As the Court of Appeal itself recognized in the judgment below, the introduction of s.3(3)(f) in the new Act – which directs that the Act is to be construed in a manner that "complies with international human rights instruments to which Canada is signatory" – creates an internal contradiction in the Act because the absolute ban on removal to torture under the *International Covenant on Civil and Political Rights* and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (to both of which instruments Canada is signatory) is inconsistent with s.115(2) of the *IRPA*, which allows for removal to torture in some circumstances. The appellant is entitled, under the *Charter* and international human rights law, lawfully to resist removal to a place where, he maintains, he faces a serious risk of torture. It is manifestly unfair to deny him release on this basis, making him pay for pursing legal remedies to protect his fundamental human rights with a complete loss of liberty and serious violations of his security of the person.

Appeal Record, Vol. I, FCA Reasons, Létourneau J.A., paras. 119-23, p. 135-137

52. A strong analogy may be drawn between the appellant's case and legal challenges to the death penalty in Commonwealth jurisprudence. In *Pratt v. A-G for Jamaica*, the Privy Council held that prolonged delay in the carrying out of a sentence of death after that sentence had been passed could amount to inhuman punishment or treatment contrary to the Jamaican Constitution, requiring a commutation of the sentence to one of life imprisonment. The Board reached this conclusion irrespective of whether the delay was caused by the shortcomings of the state or the legitimate (and entirely understandable) resort of the accused to all available appellate procedures and petitions to international human rights bodies. It recognized, however, that if the delay was due entirely to the fault of the accused, such as an escape from custody or frivolous resort to legal procedures which

amounted to an abuse of process, the accused could not take advantage of the delay.

Pratt v. A-G for Jamaica, [1993] 4 All E.R. 769 at 786 (P.C.)
Guerra v. Baptiste, [1995] 4 All E.R. 583 at 591-94 (P.C.)

53. It is submitted that the right to seek judicial review of a *refoulement* decision, including the right to attempt to prevent a *Charter* or other human rights violation, and the right to seek an effective remedy for such violations if they have occurred, is part of the statutory process enacted by Parliament under the *IRPA*. If Parliament had intended that a person's removal ought to occur without her having taken lawful steps to protect herself from (e.g. removal to torture), then it would not have enacted s.115 of the *IRPA*, it would not have provided for a statutory judicial review mechanism, and it would not have left intact the jurisdiction of the Federal Court to grant stays against removal. Short of conduct amounting to an abuse of process, the pursuit of legal remedies ought not to count against an applicant for release in her effort to show that he is not likely to be removed within a reasonable time. Indeed, to suggest another analogy, the conclusion of the Court of Appeal is equivalent to holding in the criminal context that an accused cannot be heard to complain about pre-trial delay under s.11(b) of the *Charter* because his or her case could have been disposed of much more quickly if only he or she had pleaded guilty.

54. It is submitted further that even apart from the question of how responsibility for delay ought to be attributed, it is contrary to the very rationale of s.84(2) to ignore prior delay almost entirely, as the Court of Appeal does. Given the allocation of the burden of proof, it is too easy for the government to rebut the contention that removal is not imminent and, thereby, to prevent release on this ground alone, without any need to consider whether the applicant for release is a danger or not. The practical effect of the Court of Appeal's interpretation is to render the right to seek release illusory until a substantial period of time – typically years – has passed.

Jaballah v Solicitor General, [2006] F.C.J. No. 110, para. 37
Mahjoub v Solicitor General, [2005] F.C.J. No. 1948 (T.D.), para. 10-11, 35
Almrei v Solicitor General, [2005] F.C.J. No. 1994 (T.D.), para. 177, 258, 265, 272

c) Fair Trial Norms

55. It is submitted that compliance with the principles of fundamental justice cannot be

accomplished merely by reading out the time limitation on the availability of a detention review, nor by reading in a requirement for regular detention reviews, because the release application process itself under the *IRPA* does not conform with the principles of fundamental justice. 'Fair trial norms' are both procedural and substantive and, where the consequences to the person are serious, they include: (1) an open, public hearing; (2) an opportunity to know the case against one and to answer it, which includes the right to challenge the evidence proffered against the person; (3) an effective right to counsel; (4) an appropriate burden and standard of proof commensurate with seriousness of consequences; and (5) an independent and impartial decision maker. It is submitted that the statutory process for release does not provide a single one of these safeguards.

Reference Re s. 94(2) of the Motor Vehicle Act (BC) (1985), 18 C.R.R. 30 (S.C.C.)

56. **Open, Public Hearing:** The hearing is not open and public, in that the Federal Court has read the provisions of s.78 into the s. 84(2) release process. These provisions permit the Court to receive secret evidence without disclosing it to the public or to the person concerned.

57. Section 78 of the *IRPA* sets out provisions governing the reasonableness review, including those which permit the receipt of secret information and *ex parte*, *in camera* proceedings. These provisions expressly apply, with modifications as required, to other proceedings under the *IRPA* (see ss. 83(2), 86(2), and 87(2)). Nowhere, however, is s.78 expressly incorporated into release proceedings under s.84(2) of *IRPA*.

Charkaoui v Solicitor General, [2004] F.C.J. No. 2060, para. 64-126

58. In the case at bar, the Court of Appeal concluded, as a matter of statutory interpretation, that the secrecy provisions contained in ss. 78(e) through (h) of *IRPA* are incorporated into s.84(2) proceedings despite the lack of statutory authorization. It is submitted that this interpretation is contrary to the principles of fundamental justice, including the principle that one whose liberty or security of the person is denied is entitled to a public open hearing, and, as addressed below, the right to know the case upon which that denial is based and to have a fair opportunity to answer it. A limitation on fundamental rights must be expressed by clear statutory language whose constitutionality it is the government's burden to establish, not read in by a court. Its omission from

legislation ought not to be excused as an "oversight" and rectified by reading in what Parliament has left out. As Lamer, J. stated in *Slaight Communications*, albeit in the context of the exercise of discretion: "... there is no doubt in my mind that [the Court] should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter." In this case, the legislation is not ambiguous at all.

Slaight Communications v Davidson, [1989] 1 S.C.R. 1038; [1989] S.C.J. No. 45, para. 87
Ruby v Solicitor General, [2002] 4 S.C.R. 3; [2002] S.C.J. No. 73, para. 53
Application under s. 83.28 of the Criminal Code (Re), [2004] S.C.J. No. 40, para. 35, 91
Vancouver Sun (Re), [2004] S.C.J. No. 41, para. 22-26
Toronto Stars Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188 para. 1
Sierra Club v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 para. 52, 81-84
Attorney General (Nova Scotia) v. MacIntyre, [1982] 1 S.C.R. 175 p. 6
Dagenais v. CBC, [1994] 3 S.C.R. 835, para. 73, 79
CBC v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 at paras. 71-75

59. **Opportunity to Know and Answer Case:** With the incorporation of s. 78(e) to (h) of *IRPA* into the release application process, the Minister may make a motion for the Court to consider evidence in secret. The Court is to review it and if it decides it should be released to the detainee, this cannot occur; instead, the Court must return the evidence to the Minister. The Court may summarize the information to enable the person to be reasonably informed, but cannot summarize any information the disclosure of which would be injurious to national security or the safety of any person. It is submitted that this process denies the detainee the opportunity to fully know the case and to answer it.

Ruby v Solicitor General, [2002] 4 S.C.R. 3; [2002] S.C.J. No. 73, at para. 40

60. The appellant takes issue with the incorporation of s. 78 into the s. 84(2) process, but if this Court determines that the Court of Appeal did not err in this respect, he maintains that the restrictions on disclosure *per se* breach the principles of fundamental justice. Evidence which is not disclosed ought not be received or considered by the decision maker. However, if the state is successful, yet again, in establishing that the protection of Canada's national security overrides the human rights of the individual, then it is the appellant's alternative position that the restrictions on disclosure are overly broad and fail to achieve an appropriate balance between the protection of

individual rights and the state's national security interests.

61. It is recognized that this Court has approved national security legislative provisions which restrict disclosure. It is submitted, however, that in the cases which have come before this Court, either the interests at stake have not been so fundamental (as in *Ruby*) or the disclosure has not been so restricted (as in *Chiarelli*, where an extensive summary of surveillance and a summary of interpretation of intercepted private communications relating to a particular murder, as well as a summary of the evidence given *ex parte* and *in camera* by RCMP officers was disclosed and the officers made available for cross examination).[17]

10 *Ruby v Solicitor General*, [2002] 4 S.C.R. 3; [2002] S.C.J. No. 73, at para. 39-41
MEI v Chiarelli, [1992] 1 S.C.R. 711; [1992] S.C.J. No. 27, at para. 6-7

62. In the appellant's case, the rights at issue are fundamental. He has lost his liberty for an extended period of time, faces a further indeterminate loss of liberty, and faces *refoulement* to torture. The consequences of a wrong decision are of a gravity and seriousness not otherwise sanctioned in Canada.

USA v Burns, [2001] 1 S.C.R. 283; [2001] S.C.J. No. 8, para. 132
Suresh v MCI, [2002] 1 S.C.R. 3; [2002] S.C.J. No. 3, para. 78
20 *A (FC) v Secretary of State for the Home Department*, [2005] UKHL 71, para. 11-13

63. In this context, disclosure of the case against the person in order to permit her the opportunity to test it and answer it, is of compelling importance. To the extent that the State has secret information and evidence, it must find a way to disclose this, and if it cannot, the Court should not consider it. The risk of error in such instances can mean subjection to torture and loss of life by extrajudicial means, as in this case, if the appellant is ultimately returned to Syria.[18]

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[17] Even in *Ahani v Solicitor General*, [1996] F.C.J. No. 937 (C.A.); Leave denied, [1996] S.C.C.A. No. 496 key information received from a foreign state, Italy, was disclosed.

[18] The kind of treatment which Mr. Almrei can expect to face can be referenced in *Appeal Book, Vol. II*, Statutory Declaration of Unnamed Deponent, Nov. 8, 2002, at p. 196; *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar*, Toope Report, www.ararcommission.ca/eng/ToopeReport_final.pdf ; *Amnesty International Canada:* "A Chronology of

64. Alternatively, if this Court determines that information can be considered by the Court without disclosing it to the detainee, it is submitted that the restrictions on disclosure are too broad. The appellant received a summary of the case and volumes of news articles and opinion reports. There was no disclosure of redacted reports or summaries from CSIS or other sources such as governments or inter-governmental agencies, like Interpol. This is because, under s. 78(e) through (f) of the *IRPA,* the Court cannot disclose information or evidence unless the government approves. There is no disclosure of redacted transcripts of testimony taken *ex parte* and *in camera*[19] and no right to examine state witnesses in the open hearing, unless the Court specifically authorizes this. The summary does not even disclosure the nature of the sources at a level of generality lacking identifying information (e.g. indicating if from a human source, a CSIS report or a foreign intelligence agency).[20]

65. In national security proceedings, the rule relating to public hearings has been effectively reversed. The rationale for this was set out by Addy J. in *Henrie v Canada*. The Court concluded that the principle of complete openness plays a secondary role where national security is involved. The Court distinguished disclosure of evidence obtained from criminal, as opposed to security investigations, noting criminal investigations were not long term and were done for the purpose of collecting evidence to use in a prosecution, while security investigations were long term and for the purpose of predicting future threats. The Court concluded an informed member of a group presenting a threat to Canada's security would be able

> to determine one or more of the following: (1) the duration, scope intensity and degree of success or of lack of success of an investigation; (2) the investigative techniques of the

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'Non-accountability': Efforts to Seek Answers and Accountability for Ahmad El Maati, Abdullah Almaalki, and Muayyed Nureddin, March 1, 2006, www.amnesty.ca/archives/resources/non_accountability_chron.pdf

[19] It is apparent from the undisclosed evidence and information in this case that the Court at the reasonableness hearing did not hear testimony; the evidence was not even tested. With the release application, the Court apparently heard some evidence, but it is not clear that the entire transcripts of this are available, *see Respondent's Motion to Seal In Camera, Ex Parte Evidence*.

[20] The nature of the source can be disclosed without breaching national security. *The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States*, W.W. Norton & Company, New York, contains many examples of such disclosure.

> service; (3) the typographic and teleprinter systems employed by CSIS; (4) internal security procedures; (5) the nature and content of other classified documents; and (6) the identities of service personnel or of other persons involved in an investigation.
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> *Henrie v Canada,* [1989] 2 F.C. 229; [1988] F.C.J. No. 965 (T.D.), at para. 18, 26-28, 30

66. These distinctions between criminal and intelligence investigations are not always valid. Criminal investigations can be long-term (e.g. into organized crime), just as there may be focused, short-term investigations of persons perceived to present a security threat. Evidence may be collected by the Service, or other agencies such as the RCMP, in order to found a removal proceeding, or even a prosecution under the anti-terrorism provisions of the *Criminal Code* and not to merely identify future threats. The protection of investigative techniques does not appear to be warranted, given that the kinds of techniques used are not secret.[21] In *R v Mentuck* this Court noted:

> The serious risk at issue here is that the efficacy of present and future police operations will be reduced by publication of these details. I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run. Criminals who are able to extrapolate from a newspaper story about one suspect that their own criminal involvement might well be a police operation are likely able to suspect police involvement based on their common sense perceptions or on similar situations depicted in popular films and books. While I accept that operations will be compromised if suspects learn that they are targets, I do not believe that media publication will seriously increase the rate of compromise. The media have reported the details of similar operations several times in the past, including this one.
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> *R v Mentuck,* [2003] 3 S.C.R. 442; [2003] S.C.J. No. 73, at para. 43

67. It is submitted that extreme restrictions on disclosure are not warranted, even for reasons of national security. Proceedings before the Security Intelligence Review Committee (SIRC), now only in respect of Canadian citizens and complaints made under s. 41 of the *CSIS Act*, are handled differently. Disclosure may include redacted materials, redacted transcripts of *in camera* and *ex parte* evidence of state witnesses, as well as summaries of such testimony, and the right to cross examine

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[21] In its Annual Reports, the SIRC sets out the techniques used by the Service. For eg. in its 1985-1986 Annual Report, SIRC noted in 1983 that 525 warrants for electronic surveillance, mail opening, and clandestine searches were issued; in 1985, 99 warrants were issued. The report goes on to outline arrangements with foreign powers for information sharing and speaks of concerns about the reliability of human sources. at p. 18-20, 28. In *Mentuck* (cited above) this Court noted that popular films and books depicted police operations; they also depict security ones.

Canadian officials on their testimony and statements given *in camera* and *ex parte*, although some answers may not be given in the open hearing. SIRC has independent counsel to ensure that the rights of the person are protected in that part of the proceeding where evidence is received on an *in camera* and *ex parte* basis..[22] There is no principled reason why the Federal Court, handling similar security matters, cannot provide the same disclosure as that provided by an administrative tribunal. It is submitted that the restrictions on disclosure of all evidence and information pursuant to s. 78(g) of the *IRPA* breaches the principles of fundamental justice, and has led to perverse results.[23]

Al Yamani v Solicitor General, [1996] 1 F.C. 174; [1995] F.C.J. No. 1453, at para. 14
R. v. Mentuck, supra, at paras. 41-47
R. v. O.N.E., [2001] 3 S.C.R. 478 at paras. 10-14
Sierra Club v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 at paras. 46-48, 50, 70-72
Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra, at para. 69
R. v. Garofoli, [1990] 2 S.C.R. 1421; [1990] S.C.J. No. 115, para. 77-79
Michaud v. Quebec (Attorney General), [1996] 3 S.C.R. 3 at paras. 46-55
Toronto Star Newspapers Ltd. v. Ontario, supra, at paras. 9, 34-42
US v Moussaoui, 365 F.3d 292; 2004 U.S. App. LEXIS 7987 (4th Cir.), p. 19, 21
Abdah v Bush, 2005 US Dist. LEXIS 4942 (DC)

68. Further, the overbreadth of the restrictions on disclosure is apparent in the failure to permit defence counsel to participate in the secret hearing process. There is no reason why counsel cannot be vetted for security clearance. If this requires additional counsel, or even an *amicus curiae* (as was done in the Arar Commission, for example), who can be cleared to access the materials, without disclosing them to the detainee, this is still preferable to no disclosure.[24] This would not absolve the

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[22] The SIRC process was copied by the UK after the ECHR judgement in *Chahal v UK*, (1996), 23 E.H.R.R. 413 which commented favourably on the Canadian process, erroneously identifying it as occurring in the Federal Court, when it was then actually the process before the SIRC.

[23] In Mr. Almrei's case, the Minister's delegate disclosed in the reasons given for *refouling* him to Syria, an alleged association between him and a named Canadian citizen, apparently of security concern, which had not been disclosed by the designated judge. Even though this was public, the Court refused to disclose it. Similarly, in *Baroud v MCI,* [1995] F.C.J. No. 829 Interpol telexes were disclosed in other proceedings, but the Court refused to disclose them in the reasonableness hearing.

[24] See for eg. 1985-1986 SIRC Annual Report, p. 68, which lists all the SIRC counsel at that time who attended a legal counsel conference hosted by SIRC, p. 68; see also *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar,* www.ararcommission.ca which lists Commission counsel and the Amicus Curiae.

respondents from having to provide the fullest possible disclosure to the detainee, but it would provide an additional and necessary measure of fairness when there is information or evidence which cannot be disclosed. This is a viable and fair manner of ensuring due process. The United Kingdom and the United States provide for it in one form or another.

In Re Guantanamo Detainee Cases, 2004 U.S. Dist. LEXIS 22525, para. 1-50
Application under s. 83.28 of the Criminal Code (Re), [2004] S.C.J. No. 40

69. **Effective Right to Counsel:** A meaningful role for defence counsel is an essential aspect of due process and a fair hearing given the legal and evidentiary complexity of the process and the grave consequences of a negative decision for the detainee. Where counsel's role is so limited as to be ineffective, this is a key factor pointing to the overall unfairness of the process.

Winters v Legal Services Society, [1999] 3 S.C.R. 160; [1999] S.C.J. No. 49, para. 34
N.B. (Minister of Health & Community Services v J.(G.), [1999] 3 S.C.R. 46; [1999] S.C.J. No. 47
Application under s. 83.28 of the Criminal Code (Re), [2004] S.C.J. No. 40, para. 44

70. It is submitted that the explicit bar on the participation of defence counsel in the secret hearing denies the detainee an effective right to counsel because the normal responsibilities of counsel in protecting the client's interests cannot be carried out. Counsel cannot review, test or call evidence in reply to the secret evidence. The provenance and reliability of the secret evidence cannot be ascertained. This is especially troubling in a case like the appellant's. With its links to Syria and Saudi Arabia (countries known to practice torture), there is an obvious concern for whether evidence supplied to CSIS was originally obtained through torture. Even evidence from states that respect international law may originally have come from countries that practice torture.

A (FC) and others (FC) v Secretary of State for the Home Department, [2005] UKHL 71

71. Further, the absolute bar to participation is overly broad. Lesser measures are available, such as permitting counsel to participate on an undertaking not to disclose, as occurred in the case which came before this Court to test the validity of s. 83.28 of the *Criminal Code*.

Application under s. 83.28 of the Criminal Code (Re), [2004] S.C.J. No. 40
In Re Guantanamo Detainee Cases, 2004 U.S. Dist. LEXIS 22525 (D.C.)
Baban v Australia, UNHRC Comm. No. 1014/2001(2003), para. 7.2

C v Australia, UNHRC, Comm. No. 900/1999 (2002), para. 8.2
Zaoui v. AG, (SC CIV 12/2004))(Nov. 25 & Dec. 9, 2004) (N.Z.S.C.), para. 100

72. **Burden of Proof:** The burden in the s. 84(2) process has been interpreted by the Court of Appeal to lie with the detained person, even in respect of the initial application for release. This is at odds with other detention reviews under the *IRPA*, where the burden of establishing and maintaining the need to detain rests with the state. There is no 'equality of arms' as detention is effected on the basis of possibility but can only be ended by the person establishing a probability that release would not present a danger to society and removal will not occur within a reasonable time. The reverse onus establishes a test for release which is illusory and unattainable, contrary to the principles of fundamental justice, given that the timing of removal is in the hands of the state and the evidence of the risk the person presents to the public or national security is in the hands of the state and not accessible to the detainee.

M.C.I. v Thanabalasingham, [2004] F.C.J. No. 15 (C.A.), para. 14-16
Sahin v M.C.I., [1994] F.C.J. No. 1534 (T.D.), para. 23, 26, 30

73. Where this Court has upheld a reverse onus in a bail application, the measure was held to be constitutionally valid because it applied only in a narrow set of circumstances and under fixed standards and specific conditions. While today there may be few persons subject to security certificates, the broadness of the security inadmissibility grounds, unrelated to danger and established only on the basis of possibility, precludes a conclusion that the circumstances are narrow enough and subject to sufficient safeguards to withstand constitutional scrutiny.

R. v. Pearson, [1992] 3 S.C.R. 665 at 693-99
R. v. Morales, [1992] 3 S.C.R. 711 at 743-47

74. The appellant does not control the timing of his removal from Canada, notwithstanding the legal myth that the person concerned can leave anytime she wants.[25] The appellant cannot know

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[25] The House of Lords commented on this 'myth' in *A (FC) and others (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56. Lord Nicholls of Birkenhead stated at para. 81: "... With one exception all the individuals currently detained have been imprisoned now for three years and there is no prospect of imminent release. It is true that those detained may at any time walk away from their place of detention if they leave this country. Their prison, it is said, has only three walls. But this freedom is more

when the Minister will make a decision to remove him from Canada, or when this decision would be effected. The last decision to remove him was made in October, 2003. It was quashed on judicial review in March 2005. Another year has passed with no new decision.

75. The appellant does not know the case against him. With a reverse onus, the inherent unfairness of the process is compounded: no longer is the onus on the Ministers to establish through secret evidence that the non-citizen is a danger, but the non-citizen must establish that she is not a danger when she does not know and cannot test the evidence. The unfairness of imposing an onus while withholding access to the information necessary to meet it has been recognized by this Court.

10 *Carey v. Ontario*, [1986] 2 S.C.R. 637 at paras. 97-99
R. v. Mills, [1999] 3 S.C.R. 668 at para. 71
Toronto Star v Kenney, [1990] F.C.J. No. 140 (T.D.), at para. 50-52
Pacific Press (2) v M.E.I., [1991] F.C.J. No. 313 (C.A.), at para. 43

76. Further, in the context of detention reviews, the Inter-American Commission in *Ferrer-Mazorra v United States* indicated:

> The Commission also considers that the risk of arbitrariness posed by the Cuban Review Process is exacerbated by the fact that the onus falls squarely upon the detainee to justify why he or she should be released from detention, which onus becomes increasingly onerous the
20 longer the detainee is held in detention. The Commission has previously warned against procedures in which the burden upon a detainee to adduce new evidence of a change of circumstances renders the review process increasingly pro forma, such that continuation of his or her detention no longer justified as a security measure but effectively converted into a penalty imposed absent due process.
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> *Ferrer-Mazorra v United States,* IAComHR, Report No. 51/01, April 4, 2001, at para. 228

77. **Independent and Impartial Decision Maker:** This Court has recognized the importance of an independent and impartial judiciary. Judicial independence has been characterized as a
30 "residual right protected under s. 7" of the *Charter* and "the cornerstone of the common law duty of procedural fairness, which attaches to all judicial, quasi-judicial and administrative proceedings, and

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theoretical than real. This is demonstrated by the continuing presence in Belmarsh of most of those detained. They prefer to stay in prison rather than face the prospect of ill treatment in any country willing to admit them."

is an unwritten principle of the Constitution." This Court has indicated that "independence is the cornerstone, a necessary prerequisite, for judicial impartiality."

Re Application under S. 83.28 of the Criminal Code, [2004] S.C.J. No. 40, at para. 81, 82

78. It is submitted that the incorporation of the provisions of s. 78 of the *IRPA* into s.84(2) compromises judicial independence and impartiality. The judge is required to receive evidence in secret, determine how much of it may be summarized for the detainee to be able to be reasonably informed of the case against her, and render a decision on the basis of the secret as well as the public evidence. The judge is not the advocate for the detainee, yet the detainee has no counsel present to ensure that her rights are protected, nor is there an independent counsel or *amicus* present. Only counsel for the Ministers and their witnesses, if any, are present, pressing their own position before the Court.

79. While the Crown in the secret hearing may be presumed to conduct itself according to its proper role as an officer of the court, with a duty to act impartially in the public interest, both the public and the detainee must take this - and the impartiality and independence of the Court - on faith. Unlike the investigative hearing process under s. 83.28 of the *Criminal Code* considered recently by this Court and also unlike the process before the SIRC, the process before the designated judge is not investigative, but adjudicative. The investigation has already been done by the detainee's adversary. One difficulty is the fact that there is no apparent obligation on the part of CSIS officers to be objective in the presentation of the secret evidence, nor is it at all evident that such officers see their role as ensuring that exculpatory as well as inculpatory information and evidence is presented, much less obtained in the first place. The Crown, in turn, may only present as much of the secret evidence as the Service provides to it in the first place.

Re Application under S. 83.28 of the Criminal Code, [2004] S.C.J. No. 40, at para. 95, 98
Ruby v. Canada (Solicitor General), [2002] 4 S.C.R. 3 at paras. 25, 27

80. It is apparent from the disclosure in this case, that the evidence and information relied upon by the Ministers, in the overall sense, lacks objectivity and presents an imbalanced and biased view of the Service towards the appellant. While the appellant does not know what is contained in the

twelve volumes of evidence and information received by the Court, it can be assumed, based on the public disclosure, that evidence and information favourable to him has not been included, likely rooted in the lack of objectivity of the investigation by the Service in the first place. The focus of the Service is the prevention of terrorism, not the contextualization of an individual within his culture and times. This reinforces the need for independence and impartiality on the part of the Court, which cannot be accomplished under the present practices of the Court.

81. It is submitted that the reasoning of LeBel J. in *Re Application under S. 83.28 of the Criminal Code* is compelling in the context of the secret proceedings under consideration in this case. The institutional independence of the Court is seriously compromised here. The Court cannot be in a position to protect the interests of the detainee while at the same time fulfilling judicial functions, such as ruling on objections to questions (those very questions presumably put by the Court itself) and to the disclosure of evidence (again disclosure which the Court may consider warranted). The judge does not know the detainee's defence or any details of the investigation not put before it. Further, the judge is not presiding over and adjudicating a controversy between the parties, as one party is not present. It is submitted that a reasonable person, viewing the matter realistically and practically, and who is informed of the relevant statutory provisions and the practices of the Federal Court, would conclude that the judiciary is not independent and impartial.

Re Application under S. 83.28 of the Criminal Code, [2004] S.C.J. No. 40, at para. 172-192

82. Having regard to all of the foregoing, it is submitted that s.84(2) of the *IRPA*, as it is applied by the Federal Court, does not comply with the principles of fundamental justice under s. 7 of the *Charter*.

B) Question 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

83. Rights guaranteed by the *Charter* are subject under s.1 "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." It is submitted that the analysis under s.1 involves two separate components: the proposed limit must be prescribed by law

and, if it is, it must be reasonable and demonstrably justified in a free and democratic society. The onus is on the respondents to prove that, on a balance of probabilities, the infringement is justified under s.1.

84. This Honourable Court has held that s.7 violations are not easily saved under s.1. In *Re B.C. Motor Vehicle Act*, Lamer J. suggested that a violation of s.7 will be saved under s.1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like."McLachlin C.J. explained in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, that this is so for two reasons:

> First, the rights protected by s.7 – life, liberty, and security of the person – are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society.

It is submitted that no conditions obtain at the present time that could justify any or all of the violations of s.7 articulated above.

Re B.C. Motor Vehicle Act,[1985] 2 S.C.R. 486 at 518
N.B. (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46, para. 99
Suresh v. Canada (Minister of Citizenship and Immigration), *supra*, para. 78
R. v. Heywood, [1994] 3 S.C.R. 761 at 801-02

C) Question 3. Do ss. 82(2) and 84(2) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, infringe s. 12 of the Canadian Charter of Rights and Freedoms?

85. As described above, the appellant was detained in October, 2001 at the West Detention Centre, a remand facility intended for short-term stays pending criminal trial. It does not offer educational, occupational or recreational programs. The appellant is not serving sentence, and so no matter where detained he is not eligible to access such programs. He is serving 'dead time'. He was involuntarily detained in solitary confinement to November, 2002. He was released onto the general range after commencing an application for *habeas corpus*, but for his own safety was returned to solitary confinement a few days later, where he remained for the next three years. This can hardly be said to be a voluntary choice, the consequences of which he must bear. His testimony about the aggravations of his detention, including harassment, problems with practicing his religion, access to reading materials, securing the right to wear shoes, having adequate heat in the winter time, and

maintaining contacts with the outside world, was largely uncontradicted.[26] Superimposed on his continued detention is the very real threat that the Ministers will attempt to effect his removal to Syria, where he fears torture.[27]

Almrei v Canada A.G., [2003] O.J. No. 5198 (S.C.J.)
R v Kravchov, [2002] O.J. No. 2172 (O.C.J.), para. 11, 12
R v Wust, [2000] 1 S.C.R. 455; [2000] S.C.J. No. 19, para. 28

86. The Federal Court held that the appellant's continued detention under these conditions (like that of other security certificate detainees) is not cruel and unusual for various reasons: it is preventive detention, not meant as a punishment; the length of the detention is largely the detainee's own fault as it can be ended at any time by the person merely leaving for another country; and, the conditions are the same for other detainees. MacKay J. concluded in *Jaballah* that this:

> .... preventive measure is an aspect of the Canadian government's responsibility in regard to national security in respect of international terrorism and in enforcement of immigration requirements. Detention of that nature, under conditions applicable in regular institutions for detaining persons charged with criminal offences, and which does not include conditions excessive for general institutional security purposes, cannot be characterized as cruel and unusual treatment or punishment.

Almrei v Solicitor General, [2004] F.C.J. No. 509 (T.D.), para. 134-138
Almrei v Solicitor General, [2005] F.C.J. No. 213 (C.A.), para. 103-104, 111-114
Jaballah v Solicitor General, [2006] F.C.J. No. 110 (T.D.), para.65, 68-73
Mahjoub v Solicitor General, [2005] F.C.J. No. 1948 (T.D.), para. 33-35

87. In *R. v. Smith*, Lamer J. observed that it is "generally accepted in a society such as ours that the state has the power to impose a 'treatment or punishment' on an individual where it is necessary to do so to attain some legitimate end and where the requisite procedure has been followed." He added that the protection afforded by s.12 "governs the quality of the punishment and is concerned

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[26] The testimony of the security manager for the Toronto West Detention Centre corroborated much of Mr. Almrei's evidence. Mr. Geswaldo effectively recognized the inappropriateness of the remand centre for long term detainees. *Appeal Record*, Vol. IV, Geswaldo Testimony, p. 555-562

[27] Two decisions have already been made to *refoule* Mr. Almrei to Syria, both quashed by the Federal Court, as noted above in Part I. Mr. Almrei is awaiting a third decision on *refoulement* to Syria. The decisions have been made in the face of well publicized cases of Canadian citizens - Arar, El Maati, Almaalki and Nureddin - being subjected to torture in Syria on the basis of allegations that they supported Al Qaeda.

with the effect that the punishment may have on the person on whom it is imposed." The test for finding a violation of s. 12 was recently summarized by this Court in *R v Wiles.* :

> 4 This Court has dealt with s. 12 on many occasions and there is no controversy on the test that must be met. Treatment or punishment which is disproportionate or "merely excessive" is not "cruel and unusual": *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072. The treatment or punishment must be "so excessive as to outrage standards of decency": *Smith*, at p. 1072; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 499; *R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 724. The court must be satisfied that "the punishment imposed is *grossly* disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable": *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39, at para. 26 (emphasis in original).
> *R v Wiles*, [2005] S.C.J. No. 53, at para. 4

88. The court's inquiry is focussed on contextual factors, including not only the purpose of the treatment or punishment, but also its effects on the individual. The core idea that emerges from s.12 jurisprudence is that the treatment accorded to the person must not be inherently cruel or grossly disproportionate to the objectives served by the detention. The analytical process has been summarized by this Court as follows:

> 5 The court must first determine whether the treatment or punishment is grossly disproportionate for the individual offender having regard to all contextual factors. Relevant factors may include: the gravity of the offence, the personal characteristics of the offender, the particular circumstances of the case, the actual effect of the treatment or punishment on the individual, relevant penological goals and sentencing principles, the existence of valid alternatives to the treatment or punishment imposed, and a comparison of punishments imposed for other crimes in the same jurisdiction: see *Morrisey*, at paras. 27-28. If the treatment or punishment is grossly disproportionate for the individual offender in light of all relevant contextual factors, the court proceeds to determine whether the infringement can be justified under s. 1 of the *Charter*. If it is not disproportionate for the individual offender, the court must still consider whether the treatment or punishment is disproportionate having regard to reasonable hypotheticals. In *Goltz*, it was made clear that reasonable hypotheticals can not be "far-fetched or only marginally imaginable" (p. 515). They cannot be "remote or extreme examples" (p. 515). Rather they should consist of examples that "could commonly arise in day-to-day life" (p. 516).
> *R v Wiles*, [2005] S.C.J. No. 53, at para. 5
> *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1072 and 1074
> *R. v. Morrisey*, [2000] 2 S.C.R. 90 at 108-09, 114-15
> *Suresh v. M.C.I.*, [2002] 1 S.C.R. 3; [2002] S.C.J. No. 3, at paras. 50-51

89. The objectives served by the appellant's continued detention include the protection of Canada's security and the safety of persons and securing the removal of an inadmissible non-citizen.

Both objectives are valid, but the statutory scheme in establishing mandatory, indeterminate detention is grossly disproportionate and excessive in its impact on the person. This is compounded by the actual conditions under which the appellant is being detained and the ever-present threat of removal to torture and other intolerable treatment.

90. Detention to secure removal is not inherently cruel or repugnant, although preventive detention, in the absence of a criminal charge or conviction, is not usual outside of the context of securing the removal of a non-citizen from Canada. In the context of the statutory scheme, where the state need only be satisfied that the person is possibly a terrorist or member of a terrorist organization, broadly defined, where the Court need only be satisfied that this decision is reasonable, where the detention is mandatory and indeterminate, where the onus is on the person to establish that removal will not occur within a reasonable time, discounting any time that the person remains pursuant to a court order, and that she does not present a danger to the security of Canada or to the safety of any person, without having been provided with any of the evidence mounted against her, where there is no statutory or administrative program in place to address the needs of the person detained, including studies, work and recreation, where detention may be in conditions of solitary confinement for an indeterminate time, and where there exists an ongoing threat of *refoulement* to a country where persecution, torture or other forms of cruel treatment can be expected, extended detention becomes cruel and unusual by its excessive nature and disproportionate effect. The Canadian detention scheme, in the words of the Inter-American Commission cannot be "justified as a security measure but [is] effectively converted into a penalty imposed absent due process."

Ferrer-Mazorra v United States, IAComHR, Report No. 51/01, April 4, 2001, at para. 228
R v Lyons, [1987] 2 S.C.R. 309; [1987] S.C.J. No. 62
R v Downey, [1989] O.J. No. 436 (D.C.), p. 3-5
Trinidad & Tobago v Raghoonanan, [2003] O.J. No. 391 (C.A.)

91. The preventive nature of the detention does not change its character and impact on the person. While it may be said that the conditions are the same as for other detainees, those facing criminal trials are not generally detained for such lengthy periods of time, as trials must be held within a reasonable time, and time is not spent in solitary confinement unless for reasons of prison

discipline, and then only for fixed and generally short periods of time. For persons facing criminal trial, there is some certainty to their circumstances. A trial will be held and if found guilty a sentence will be imposed. In contrast, security certificate detainees face an uncertain time in detention. While proceedings ought not be unreasonably extended, there is no clear requirement, as there is in s. 11 of the *Charter*, to complete them in a timely fashion.

Abbott v Canada, [1993] F.C.J. No. 673 (T.D.), para. 159
R v Daniels, [1990] S.J. No. 371 (Q.B.), p. 7-8
R v Alfs, [1974] O.J. No. 1046 (C.A.), para. 5-6
R. v. Morrisey, [2000] 2 S.C.R. 90; [2000] S.C.J. No. 39, para. 26-29
R v Shubley, [1990] 1 S.C.R. 3; [1990] S.C.J. No. 1, para. 6-8
Steele v Mountain Institution, [1990] 2 S.C.R. 1385; [1990] S.C.J. No. 111, para. 81-82
S v Niemand, [2001] S.A.J. No. 52 (SACC), para. 25-26
Wilson v Philippines, UNHRC Comm. No. 868/1999 (2003), par. 7.4
Basic Principles for the Treatment of Prisoners, G.A. res. 45/111 U.N. Doc. A/45/49 (1990).
Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, U.N. Doc. A/43/49 (1988).
Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, G.A. res. 40/144, U.N. Doc. A/40/53 (1985).
Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C,

92. Blaming the detainee for not leaving Canada, as noted above, ignores the reality for persons like the appellant, a national of Syria, who would be subjected to persecution in that country and claims a substantial risk of torture if *refouled* there. In practical terms there are no options for safe haven in a third country, given the Al Qaeda terrorist label attached to him by Canada. In its reasoning, the Federal Court has failed to take into account the reality of the appellant's circumstances. He is indefinitely detained under a statutory scheme which permits this. Further, the obligation, which the Federal Court has failed to recognize, is on the state to provide adequate conditions of detention, appropriate for its anticipated length. This has been recognized by Canadian criminal courts.

R v Miller, [1998] O.J. No. 3114 (OCGD)
R v Alfs, [1974] O.J. No. 1046 (S.C.), at para. 5
R v Hill, [1997] B.C.J. No. 1255 (C.A.), at para. 20
R v Downey, [1989] O.J. No. 436 (D.C.), p. 3-5

93. As noted above, indeterminate detention or that which exceeds a reasonable time is excessive

and may constitute cruel and inhumane treatment. It is recognized that detention may be lawful where effected to secure removal, but other state jurisdictions have been clear that this cannot extend for an unreasonable time.

Zadvydas v. Davis, 533 U.S. 678 (2001); 2001 U.S. LEXIS 4912, at p. 13
Clark v. Martinez, 543 U.S. __ (2005); 2005 U.S. LEXIS 627
In Re Guantanamo Detainee Cases, 2005 U.S. Dist. LEXIS 1236 (D.C.)
Takitota v AG Commonwealth of the Bahamas, [2004] BHSJ No. 81, at para. 38-42
S v Niemand, [2001] S.A.J. No. 52, at para. 26

94. International and regional treaty bodies in reports and judgements on complaints have equally been clear that detention cannot be indefinite and that where for the purpose of effecting deportation cannot be unreasonable in its length. Indefinite detention under close conditions, with uncertainty of grave future consequences, is presumptively cruel and unusual.

Slivenko v Latvia, EctHR, App. 48321/99, Oct. 9, 2003, para. 146
Ahani v Canada, Comm. No. 1051/2002; (CCPR/C/80/D/1051/2002 (2004)
Suresh v Canada, Case 11.661, Report No. 7.02 (2002)
Ferrer-Mazorra v United States, IAComHR, Report No. 51/01, April 4, 2001
Lizardo Cabrera v Dominican Republic, Case 10.832, Report No. 35/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 821 (1997)
Situation of Detainees at Guantanamo Bay, Report of the Rapporteurs, UN Commission on Human Rights, E/CN.4/2006/120, Feb. 15, 2006
France v Ouzgar, [2001] O.J. No. 5713 (S.C.J.)

95. Having regard to the foregoing, it is submitted that ss. 82(2) and 84(2) of the *IRPA*, as they have been applied to the appellant and others who are similarly situated, have resulted in cruel and unusual treatment contrary to s.12 of the *Charter*.

D) Question 4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

96. Since it is the *IRPA* that mandated the appellant's detention, and which prescribes the necessary pre-conditions for his release, these are clearly limits prescribed by law. While no law stipulates the place where the appellant is to be detained, his placement in a local detention centre was the result of a discretionary decision made pursuant to the authority to detain him and, as such, is also prescribed by law. On the other hand, if the individualized treatment of the appellant is not

in accordance with the enabling legislation, decisions in that regard are not limits prescribed by law and cannot be justified under s.1. If this Court finds that the only unjustifiable infringement of s.12 is the latter, the legislation may survive but the appellant would still be entitled to a remedy under s.24(1) of the *Charter*.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at para. 20
Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 at para. 22

97. At the second stage of the s.1 inquiry, two requirements must be satisfied for the law or actions under it to be upheld. First, the objective of the legislation must be pressing and substantial; in other words, the objective must be sufficiently important to justify overriding a constitutionally protected right or freedom. Second, the means chosen to attain this objective must be reasonable and demonstrably justifiable in a free and democratic society. This in turn requires that three criteria be satisfied: (1) there must be a rational connection between the limit and the objective; (2) the impairment of the right must be no more than is necessary to meet the objective; that is, the impairment must be minimal; and (3) there must be a proportionality between the deleterious and the salutary effects of the measure that limits the right or freedom protected by the *Charter*.

R. v. Oakes, [1986] 1 S.C.R. 103
Egan v. Canada, [1995] 2 S.C.R. 513 at para. 182

98. While the structure of the *Charter* makes a s.1 justification available for any violation of a guaranteed right, it is submitted that it is difficult to conceptualize how a s.12 violation could ever be upheld. Assuming for the sake of argument that the objective served by the impugned provisions of the *IRPA* is sufficiently important and that the violation is rationally connected to the pursuit of that objective, by definition, a s.12 violation will fail the proportionality test, since to have found a violation is to have found a gross disproportionality between the treatment and its objectives. This gross disproportionality also suggests that the minimal impairment requirement is not met, either. It may have been such considerations that led one leading constitutional scholar to observe: "It may simply be the failure of my imagination, but I find it difficult to accept that the right not to be subjected to any 'cruel and unusual treatment or punishment' could ever be justifiably limited. This may be an absolute right. Perhaps it is the only one."

Peter Hogg, *Constitutional Law of Canada (Loose-leaf Edition)*, page 35-45

PART IV - COSTS

99. By the terms of the Order granting the appellant leave to appeal, he is to receive his costs in any event of the cause. Given the exceptional public importance of the issues raised in this appeal, the appellant seeks these costs on a solicitor/client basis.

Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405 at paras. 86-87
Finney v. Barreau du Quebec, [2004] 2 S.C.R. 17 at para. 48

PART V - ORDER SOUGHT

100. The appellant respectfully requests that this Court strike down ss. 82(2) and 82(4) of the *Immigration and Refugee Protection Act* under s. 52 of the *Constitution Act*, 1982. These provisions, taken together, unjustifiably breach the principles of fundamental justice under s. 7 and subject the appellant and others to cruel and unusual treatment contrary to s. 12 of the *Charter*.

All of which is respectfully submitted at Toronto, this 20th day of March, 2006.

Barbara Jackman

Marie France Major

John Norris

Solicitors for the Appellant

Agent for the Appellant

PART VI - TABLE OF AUTHORITIES

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1.	Almrei v. A.G. Canada, [2003] O.J. No. 5198 (S.C.J.)	13, 85
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3.	Almrei v Solicitor General, [2005] F.C.J. No. 1994 (T.D.)	31, ftnt. 9, 54
4.	Solicitor General v Almrei, [2001] F.C.J. N0. 1772 (T.D.)	6
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5.	Ahani v Solicitor General, [1995] F.C.J. No. 1190, 3 F.C. 669 (T.D.)	61
6.	Ahani v Solicitor General, [1996] F.C.J. No. 937 (C.A.); Lv. denied, [1996] S.C.C.A. No. 496	61, ftnt. 17
7.	Ahani v Solicitor General, [1999] F.C.J. No. 310 (T.D.)	24, ftnt. 7, 31, ftnt.9
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11.	Baroud v Solicitor General, [1996] F.C.J. No.4 (T.D.)	24
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113. United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, U.N. Doc. E/CN.4/1985/4, Annex (1985). 42

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114. Amnesty International Canada: "A Chronology of 'Non-accountability': Efforts to Seek Answers and Accountability for Ahmad El Maati, Abdullah Almaalki, and Muayyed Nureddin, 2006, www.amnesty.ca/archives/resources/non_accountability_chron.pdf 63, ftnt. 18

115. Concluding observations of the Human Rights Committee : Canada. 02/11/2005. (CCPR/C/CAN/CO/5.CCPR/C/CAN/CO/5.) 44, ftnt. 16

116. Conclusions and Recommendations: Canada, UNCAT, CAT/CO/34/ CAN (2005) 44

117. General Comments, UNHRC, UN Doc. HRI\GEN\Rev.1: No. 18 (1994); No. 20 (1994); No. 21 (1994); No. 29 (2001) 44

118. OAS: Human Rights and Terrorism, AG/RES. 1906 (XXXII-0/02) (2002) 44

119. Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev. (2000) 44

120. Situation of Detainees at Guantanamo Bay, Report of the Rapporteurs, UN Commission on Human Rights, E/CN.4/2006/120 (2006) 94

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122. UN Working Group on Arbitrary Detention, Visit to Canada, E/CN.4/2006/7/Add.2 (2005) 35, 38, ftnt. 12,

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123. Canadian Council for Refugees: Brief to the House of Commons Sub Committee on Public Safety and National Security, Sept. 2005, p. 5-6 — 44, ftnt. 16

124. Choudhry, Sujit, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter", The Security of Freedom, Essays on Canada's Anti-Terrorism Bill, Daniels, R.J., Macklem, P., & Roach, K.U. of T. Press, 2001, p. 39-61 — 37, ftnt. 11

125. Gross, Oren, Cutting Down Trees: Law Making Under the Shadow of Great Calamities", The Security of Freedom, Essays on Canada's Anti-Terrorism Bill, Daniels, R.J., Macklem, P., & Roach, K. U. of T. Press, 2001, p. 39-61 — 1, ftnt. 1

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127. The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States, W.W. Norton & Company, New York, excerpts, Chapter 7, "The Attack Looms", p. 215-253; Footnotes to Ch. 7, p. 513-533 — 64, ftnt. 20

128. The Immigrant's Handbook, A Critical Guide, Black Rose Books, Montreal, 1981, Ch. 1 "History of Immigration Laws and Policy", p. 16-51 — 37, ftnt. 11

129. 1985- 1986 Annual Report, Security Intelligence Review Committee, p. 18-20, 28, 68 — 66, ftnt. 21

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130. Immigration & Refugee Protection Act, S.C. 2001, C. 27, ss. 33-37, 44, 54-61, 72, 76-87 — 21, 24, 27, 28,

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PART VII - LEGISLATIVE PROVISIONS

Immigration & Refugee Protection Act

S.C. 2001, Ch. 27

SS. 33-37, 44, 54-61, 72, 76-87

DIVISION 4
INADMISSIBILITY

Rules of interpretation

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

S.C. 2001, c. 27, s. 33, in force June 28, 2002 (SI/2002-97).

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).

Exception

(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.

S.C. 2001, c. 27, s. 34, in force June 28, 2002 (SI/2002-97).

Human or international rights violations

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

Exception

(2) Paragraphs (1)(b) and (c) do not apply in the case 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.

S.C. 2001, c. 27, s. 35, in force June 28, 2002 (SI/2002-97).

Serious criminality

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

Application

(3) The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

(e) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the Contraventions Act or an offence under the Young Offenders Act.

S.C. 2001, c. 27, s. 36, in force June 28, 2002 (SI/2002-97).

Organized criminality

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

Application

(2) The following provisions govern subsection (1):

(a) subsection (1) does not apply in the case 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; and

(b) paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

S.C. 2001, c. 27, s. 37, in force June 28, 2002 (SI/2002-97).

DIVISION 5
LOSS OF STATUS AND REMOVAL

Report on Inadmissibility

Preparation of report

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency

obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Conditions

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.

S.C. 2001, c. 27, s. 44, in force June 28, 2002 (SI/2002-97).

DIVISION 6
DETENTION AND RELEASE

Immigration Division

54. The Immigration Division is the competent Division of the Board with respect to the review of reasons for detention under this Division.

S.C. 2001, c. 27, s. 54, in force June 28, 2002 (SI/2002-97).

Arrest and detention with warrant

55. (1) An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

Arrest and detention without warrant

(2) An officer may, without a warrant, arrest and detain a foreign national, other than a protected person,

(a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or

(b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.

Detention on entry

(3) A permanent resident or a foreign national may, on entry into Canada, be detained if an officer

(a) considers it necessary to do so in order for the examination to be completed; or

(b) has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security or for violating human or international rights.

Notice

(4) If a permanent resident or a foreign national is taken into detention, an officer shall without delay give notice to the Immigration Division.

S.C. 2001, c. 27, s. 55, in force June 28, 2002 (SI/2002-97).

Release - officer

56. An officer may order the release from detention of a permanent resident or a foreign national before the first detention review by the Immigration Division if the officer is of the opinion that the reasons for the detention no longer exist. The officer may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer considers necessary.

S.C. 2001, c. 27, s. 56, in force June 28, 2002 (SI/2002-97).

Review of detention

57. (1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

Further review

(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.

Presence

(3) In a review under subsection (1) or (2), an officer shall bring the permanent resident or the foreign national before the Immigration Division or to a place specified by it.

S.C. 2001, c. 27, s. 57, in force June 28, 2002 (SI/2002-97).

Release - Immigration Division

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

(a) they are a danger to the public;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or

(d) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

Detention - Immigration Division

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

Conditions

(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.

S.C. 2001, c. 27, s. 58, in force June 28, 2002 (SI/2002-97).

Incarcerated foreign nationals

59. If a warrant for arrest and detention under this Act is issued with respect to a permanent resident or a foreign national who is detained under another Act of Parliament in an institution, the person in charge of the institution shall deliver the inmate to an officer at the end of the inmate's period of detention in the institution.

S.C. 2001, c. 27, s. 59, in force June 28, 2002 (SI/2002-97).

Minor children

60. For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.

S.C. 2001, c. 27, s. 60, in force June 28, 2002 (SI/2002-97).

Regulations

61. The regulations may provide for the application of this Division, and may include provisions respecting

(a) grounds for and conditions and criteria with respect to the release of persons from detention;

(b) factors to be considered by an officer or the Immigration Division; and

(c) special considerations that may apply in relation to the detention of minor children.

S.C. 2001, c. 27, s. 61, in force June 28, 2002 (SI/2002-97).

DIVISION 8
JUDICIAL REVIEW

Application for judicial review

72. (1) Judicial review by the Federal Court with respect to any matter - a decision, determination or order made, a measure taken or a question raised - under this Act is commenced by making an application for leave to the Court.

DIVISION 9
PROTECTION OF INFORMATION

Examination on Request by the Minister and the Solicitor General of Canada

Definitions

76. The definitions in this section apply in this Division.

"information"

"information" means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of either of them.

"judge"

"judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.

S.C. 2001, c. 27, s. 76, in force June 28, 2002 (SI/2002-97); S.C. 2002, c. 8, s. 194.

Referral of certificate

77. (1) The Minister and the Solicitor General of Canada 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.

Effect of referral

(2) When the certificate is referred, a proceeding under this Act respecting the person named in the certificate, other than an application under subsection 112(1), may not be commenced and, if commenced, must be adjourned, until the judge makes the determination.

S.C. 2001, c. 27, s. 77, in force June 28, 2002 (SI/2002-97); S.C. 2002, c. 8, s. 194.

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 Solicitor General of Canada 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 Solicitor General of Canada 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.

S.C. 2001, c. 27, s. 78, in force June 28, 2002 (SI/2002-97).

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).

Proceedings resumed

(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.

S.C. 2001, c. 27, s. 79, in force June 28, 2002 (SI/2002-97); S.C. 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.

Determination that certificate is not reasonable

(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.

Determination not reviewable

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

S.C. 2001, c. 27, s. 80, in force June 28, 2002 (SI/2002-97).

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).

S.C. 2001, c. 27, s. 81, in force June 28, 2002 (SI/2002-97).

Detention

Detention of permanent resident

82. (1) The Minister and the Solicitor General of Canada 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.

Mandatory detention

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

S.C. 2001, c. 27, s. 82, in force June 28, 2002 (SI/2002-97).

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.

Further reviews

(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.

Order for continuation

(3) A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.

S.C. 2001, c. 27, s. 83, in force June 28, 2002 (SI/2002-97).

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.

Judicial release

(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.

S.C. 2001, c. 27, s. 84, in force June 28, 2002 (SI/2002-97).

Inconsistency

85. In the case of an inconsistency between sections 82 to 84 and the provisions of Division 6, sections 82 to 84 prevail to the extent of the inconsistency.

S.C. 2001, c. 27, s. 85, in force June 28, 2002 (SI/2002-97).

Consideration During an Admissibility Hearing or an Immigration Appeal

Application for non-disclosure - Immigration Appeal Division

86. (1) The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, make an application for non-disclosure of information.

Procedure

(2) Section 78 applies to the determination of the application, with any modifications that the circumstances require, including that a reference to "judge" be read as a reference to the applicable Division of the Board.

S.C. 2001, c. 27, s. 86, in force June 28, 2002 (SI/2002-97).

Consideration During Judicial Review

Application for non-disclosure - Court

87. (1) The Minister may, in the course of a judicial review, make an application to the judge for the non-disclosure of any information with respect to information protected under subsection 86(1) or information considered under section 11, 112 or 115.

Procedure

(2) Section 78, except for the provisions relating to the obligation to provide a summary and the time limit referred to in paragraph 78(d), applies to the determination of the application, with any modifications that the circumstances require.

S.C. 2001, c. 27, s. 87, in force June 28, 2002 (SI/2002-97).

Loi sur l'immigration et la protection des réfugiés

L.C. 2001, Ch. 27

SS. 33-37, 44, 54-61, 72, 76-87

SECTION 4

INTERDICTIONS DE TERRITOIRE

Interprétation

33. Les faits - actes ou omissions - mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

Sécurité

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).

Exception

(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.

Atteinte aux droits humains ou internationaux

35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants:

a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;

b) occuper un poste de rang supérieur - au sens du règlement - au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des

violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre;

c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé - ou s'est engagé à imposer - des sanctions de concert avec cette organisation ou association.

30 ***Exception***

(2) Les faits visés aux alinéas (1)b) et c) 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 prééjudiciable à l'intérêt national.

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalitéé les faits suivants:

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, àà l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infractionàà une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

40 ***Criminalité***

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants:

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada,

constituerait une infraction à une loi fédérale punissable par mise en accusation;

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2):

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

50 b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou de réhabilitation - sauf cas de révocation ou de nullité - au titre de la Loi sur le casier judiciaire;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

e) l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ni sur une infraction à la Loi sur les jeunes contrevenants.

Activités de criminalité organisée

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants:

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

Application

(2) Les dispositions suivantes régissent l'application du paragraphe (1):

a) les faits visés 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;

b) les faits visés à l'alinéa (1)a) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

SECTION 5
PERTE DE STATUT ET RENVOI

Constat de l'interdiction de territoire

Rapport d'interdiction de territoire

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Conditions

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

SECTION 6
DÉTENTION ET MISE EN LIBERTÉ

Juridiction compétente

54. La Section de l'immigration est la section de la Commission chargée du contrôle visé à la présente section.

Arrestation sur mandat et détention

55. (1) L'agent peut lancer un mandat pour l'arrestation et la détention du résident permanent ou de l'étranger dont il a des motifs raisonnables de croire qu'il est interdit de territoire et qu'il constitue un danger pour la sécurité publique ou se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.

Arrestation sans mandat et détention

(2) L'agent peut, sans mandat, arrêter et détenir l'étranger qui n'est pas une personne protégée dans les cas suivants:

a) il a des motifs raisonnables de croire que celui-ci est interdit de territoire et constitue un danger pour la sécurité publique ou se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

b) l'identité de celui-ci ne lui a pas été prouvée dans le cadre d'une procédure prévue par la présente loi.

Détention à l'entrée

(3) L'agent peut détenir le résident permanent ou l'étranger, àà son entrée au Canada, dans les cas suivants:

a) il l'estime nécessaire afin que soit complété le contrôle;

b) il a des motifs raisonnables de soupçonner que celui-ci est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux.

Notification

(4) L'agent avise sans délai la section de la mise en détention d'un résident permanent ou d'un étranger.

Mise en liberté

56. L'agent peut mettre le résident permanent ou l'étranger en liberté avant le premier contrôle de la détention par la section s'il estime que les motifs de détention n'existent plus; il peut assortir la mise en liberté des conditions qu'il estime nécessaires, notamment la remise d'une garantie.

Contrôle de la détention

57. (1) La section contrôle les motifs justifiant le maintien en détention dans les quarante-huit heures suivant le début de celle-ci, ou dans les meilleurs délais par la suite.

Comparutions supplémentaires

(2) Par la suite, il y a un nouveau contrôle de ces motifs au moins une fois dans les sept jours suivant le premier contrôle, puis au moins tous les trente jours suivant le contrôle précédent.

Présence

(3) L'agent amèène le résident permanent ou l'étranger devant la section ou au lieu précisé par celle-ci.

Mise en liberté par la Section de l'immigration

58. (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants:

a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;

b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, àà l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux;

d) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger.

Mise en détention par la Section de l'immigration

(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.

Conditions

(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

Remise à l'agent

59. Le responsable de l'établissement où est détenu, au titre d'une autre loi, un résident permanent ou un étranger visé par un mandat délivré au titre de la présente loi est tenu de le remettre à l'agent à l'expiration de la période de détention.

Mineurs

60. Pour l'application de la présente section, et compte tenu des autres motifs et critères applicables, y compris l'intérêt supérieur de l'enfant, est affirméé le principe que la détention des mineurs doit n'être qu'une mesure de dernier recours.

Règlements

61. Les règlements régissent l'application de la présente section et portent notamment sur:

a) les conditions, motifs et critères relatifs à la mise en liberté;

b) les critèères dont l'agent et la section doivent tenir compte;

c) les éléments particuliers à prendre en compte pour la détention des mineurs.

SECTION 8
CONTRÔLE JUDICIAIRE

Demande d'autorisation

72. (1) Le contrôle judiciaire par la Cour fédéérale de toute mesure - décision, ordonnance, question ou affaire - prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

SECTION 9
EXAMEN DE RENSEIGNEMENTS À PROTÉGER

Examen à la demande du ministre et du soliciteur général

Définitions

76. Les définitions qui suivent s'appliquent à la présente section.

"juge"

"juge" Le juge en chef adjoint de la Cour fédérale ou le juge de la Section de première instance de cette juridiction désigné par celui-ci.

"renseignements"

"renseignements" Les renseignements en matière de sécurité ou de criminalité et ceux obtenus, sous le sceau du secret, de source canadienne ou du gouvernement d'un État étranger, d'une organisation internationale mise sur pied par des États ou de l'un de leurs organismes.

Dépôt du certificat

77. (1) Le ministre et le soliciteur général du Canada déposent à la Section de première instance de 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.

Effet du dépôt

(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).

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.

Suspension de l'affaire

79. (1) Le juge suspend l'affaire, àà 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).

Reprise de l'affaire

(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 la Cour fédérale.

30 ***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.

Annulation du certificat

(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.

Caractère définitif de la décision

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

Effet du certificat

40 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).

Détention

Arrestation et détention facultatives

82. (1) Le ministre et le soliciteur général du Canada 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.

Détention obligatoire

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

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.

Comparutions supplémentaires

(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.

Maintien en détention

(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.

Mise en liberté judiciaire

(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.

Incompatibilité

85. Les articles 82 à 84 l'emportent sur les dispositions incompatibles de la section 6.

Examen dans le cadre d'une enquête ou d'un appel en matière d'immigration

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Interdiction de divulgation

86. (1) Le ministre peut, dans le cadre de l'appel devant la Section d'appel de l'immigration, du contrôle de la détention ou de l'enquête demander l'interdiction de la divulgation des renseignements.

Application

(2) L'article 78 s'applique à l'examen de la demande, avec les adaptations nécessaires, la mention de juge valant mention de la section compétente de la Commission.

Examen dans le cadre du contrôle judiciaire

10 ***Interdiction de divulgation***

87. (1) Le ministre peut, dans le cadre d'un contrôle judiciaire, demander au juge d'interdire la divulgation de tout renseignement protégé au titre du paragraphe 86(1) ou pris en compte dans le cadre des articles 11, 112 ou 115.

Application

(2) L'article 78 s'applique à l'examen de la demande, avec les adaptations nécessaires, sauf quant à l'obligation de fournir un résumé et au délai.

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CRIMINAL CODE R.S.C. 1985, c. C-46

PART II.1
TERRORISM

Interpretation

Definitions

83.01 (1) The following definitions apply in this Part.

"Canadian"

"Canadian" means a Canadian citizen, a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act or a body corporate incorporated and continued under the laws of Canada or a province.

"entity"

"entity" means a person, group, trust, partnership or fund or an unincorporated association or organization.

"listed entity"

"listed entity" means an entity on a list established by the Governor in Council under section 83.05.

"terrorist activity"

"terrorist activity" means

(a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:

(i) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970,

(ii) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971,

(iii) the offences referred to in subsection 7(3) that implement the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in subsection 7(3.1) that implement the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in subsection 7(3.4) or (3.6) that implement the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on March 3, 1980,

(vi) the offences referred to in subsection 7(2) that implement the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988,

(viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988,

(ix) the offences referred to in subsection 7(3.72) that implement the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997, and

(x) the offences referred to in subsection 7(3.73) that implement the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999, or

(b) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

"terrorist group"

"terrorist group" means

(a) An entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(b) a listed entity,

and includes an association of such entities.

For greater certainty

(1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

Facilitation

(2) For the purposes of this Part, facilitation shall be construed in accordance with subsection 83.19(2).

Investigative Hearing

Definition of "judge"

83.28 (1) In this section and section 83.29, "judge" means a provincial court judge or a judge of a superior court of criminal jurisdiction.

Order for gathering evidence

(2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply ex parte to a judge for an order for the gathering of information.

Attorney General's consent

(3) A peace officer may make an application under subsection (2) only if the prior consent of the Attorney General was obtained.

Making of order

(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

(a) that there are reasonable grounds to believe that

(i) a terrorism offence has been committed, and

(ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or

(b) that

(i) there are reasonable grounds to believe that a terrorism offence will be committed,

(ii) There are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and

(iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

Contents of order

(5) An order made under subsection (4) may

(a) order the examination, on oath or not, of a person named in the order;

(b) order the person to attend at the place fixed by the judge, or by the judge designated under

paragraph (d), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;

(c) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;

(d) designate another judge as the judge before whom the examination is to take place; and

(e) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.

10 ***Execution of order***

(6) An order made under subsection (4) may be executed anywhere in Canada.

Variation of order

(7) The judge who made the order under subsection (4), or another judge of the same court, may vary its terms and conditions.

Obligation to answer questions and produce things

(8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non- disclosure of
20 information or to privilege.

Judge to rule

(9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.

No person excused from complying with subsection (8)

(10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

(a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132
30 or 136; and

(b) No evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under

section 132 or 136.

Right to counsel

(11) A person has the right to retain and instruct counsel at any stage of the proceedings.

Order for custody of thing

(12) The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any terrorism offence, shall order that the thing be given into the custody of the peace officer or someone acting on the peace officer's behalf.

S.C. 2001, c. 41, s. 4.

Arrest warrant

83.29 (1) The judge who made the order under subsection 83.28(4), or another judge of the same court, may issue a warrant for the arrest of the person named in the order if the judge is satisfied, on an information in writing and under oath, that the person

(a) is evading service of the order;

(b) is about to abscond; or

(c) did not attend the examination, or did not remain in attendance, as required by the order.

Execution of warrant

(2) A warrant issued under subsection (1) may be executed at any place in Canada by any peace officer having jurisdiction in that place.

Person to be brought before judge

(3) A peace officer who arrests a person in the execution of a warrant issued under subsection (1) shall, without delay, bring the person, or cause the person to be brought, before the judge who issued the warrant or another judge of the same court. The judge in question may, to ensure compliance with the order, order that the person be detained in custody or released on recognizance, with or without sureties.

S.C. 2001, c. 41, s. 4.

Recognizance with Conditions

Attorney General's consent required to lay information

83.3 (1) The consent of the Attorney General is required before a peace officer may lay an

information under subsection (2).

Terrorist activity

(2) Subject to subsection (1), a peace officer may lay an information before a provincial court judge if the peace officer

(a) believes on reasonable grounds that a terrorist activity will be carried out; and

(b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity.

Appearance

(3) A provincial court judge who receives an information under subsection (2) may cause the person to appear before the provincial court judge.

Arrest without warrant

(4) Notwithstanding subsections (2) and (3), if

(a) either

(i) the grounds for laying an information referred to in paragraphs (2)(a) and (b) exist but, by reason of exigent circumstances, it would be impracticable to lay an information under subsection (2), or

(ii) an information has been laid under subsection (2) and a summons has been issued, and

(b) The peace officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist activity,

the peace officer may arrest the person without warrant and cause the person to be detained in custody, to be taken before a provincial court judge in accordance with subsection (6).

Duty of peace officer

(5) If a peace officer arrests a person without warrant in the circumstance described in subparagraph (4)(a)(i), the peace officer shall, within the time prescribed by paragraph (6)(a) or (b),

(a) lay an information in accordance with subsection (2); or

(b) release the person.

When person to be taken before judge

(6) A person detained in custody shall be taken before a provincial court judge in accordance with the following rules:

(a) if a provincial court judge is available within a period of twenty-four hours after the person has been arrested, the person shall be taken before a provincial court judge without unreasonable delay and in any event within that period, and

(b) if a provincial court judge is not available within a period of twenty-four hours after the person has been arrested, the person shall be taken before a provincial court judge as soon as possible,

unless, at any time before the expiry of the time prescribed in paragraph (a) or (b) for taking the person before a provincial court judge, the peace officer, or an officer in charge within the meaning of Part XV, is satisfied that the person should be released from custody unconditionally, and so releases the person.

How person dealt with

(7) When a person is taken before a provincial court judge under subsection (6),

(a) if an information has not been laid under subsection (2), the judge shall order that the person be released; or

(b) if an information has been laid under subsection (2),

(i) the judge shall order that the person be released unless the peace officer who laid the information shows cause why the detention of the person in custody is justified on one or more of the following grounds:

(A) the detention is necessary to ensure the person's appearance before a provincial court judge in order to be dealt with in accordance with subsection (8),

(B) the detention is necessary for the protection or safety of the public, including any witness, having regard to all the circumstances including

(I) the likelihood that, if the person is released from custody, a terrorist activity will be carried out, and

(II) any substantial likelihood that the person will, if released from custody, interfere with the administration of justice, and

(C) any other just cause and, without limiting the generality of the foregoing, that the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the peace officer's grounds under subsection (2), and the gravity of any terrorist activity that may be carried out, and

(ii) the judge may adjourn the matter for a hearing under subsection (8) but, if the person is not released under subparagraph (i), the adjournment may not exceed forty-eight hours.

Hearing before judge

(8) The provincial court judge before whom the person appears pursuant to subsection (3)

(a) may, if satisfied by the evidence adduced that the peace officer has reasonable grounds for the suspicion, order that the person enter into a recognizance to keep the peace and be of good behaviour for any period that does not exceed twelve months and to comply with any other reasonable conditions prescribed in the recognizance, including the conditions set out in subsection (10), that the provincial court judge considers desirable for preventing the carrying out of a terrorist activity; and

(b) if the person was not released under subparagraph (7) (b)(i), shall order that the person be released, subject to the recognizance, if any, ordered under paragraph (a).

Refusal to enter into recognizance

(9) The provincial court judge may commit the person to prison for a term not exceeding twelve months if the person fails or refuses to enter into the recognizance.

Conditions - firearms

(10) Before making an order under paragraph (8)(a), the provincial court judge shall consider whether it is desirable, in the interests of the safety of the person or of any other person, to include as a condition of the recognizance that the person be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things, for any period specified in the recognizance, and where the provincial court judge decides that it is so desirable, the provincial court judge shall add such a condition to the recognizance.

Surrender, etc.

(11) If the provincial court judge adds a condition described in subsection (10) to a recognizance, the provincial court judge shall specify in the recognizance the manner and method by which

(a) the things referred to in that subsection that are in the possession of the person shall be surrendered, disposed of, detained, stored or dealt with; and

(b) the authorizations, licences and registration certificates held by the person shall be

surrendered.

Reasons

(12) If the provincial court judge does not add a condition described in subsection (10) to a recognizance, the provincial court judge shall include in the record a statement of the reasons for not adding the condition.

Variance of conditions

(13) The provincial court judge may, on application of the peace officer, the Attorney General or the person, vary the conditions fixed in the recognizance.

Other provisions to apply

(14) Subsections 810(4) and (5) apply, with any modifications that the circumstances require, to proceedings under this section.

S.C. 2001, c. 41, s. 4.

Code criminel. S.R., ch. C-34, art. 1.

83.01 (1) Les définitions qui suivent s'appliquent à la présente partie.

« activité terroriste »

a) Soit un acte —— action ou omission, commise au Canada ou à l'étranger —— qui, au Canada, constitue une des infractions suivantes :

(i) les infractions visées au paragraphe 7(2) et mettant en oeuvre la Convention pour la répression de la capture illicite d'aéronefs, signée à La Haye le 16 décembre 1970,

(ii) les infractions visées au paragraphe 7(2) et mettant en oeuvre la Convention pour la répression d'actes illicites dirigés contre la sécuritéé de l''aviation civile, signée à Montréal le 23 septembre 1971,

(iii) les infractions visées au paragraphe 7(3) et mettant en oeuvre la Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques, adoptée par l'Assemblée générale des Nations Unies le 14 décembre 1973,

(iv) les infractions visées au paragraphe 7(3.1) et mettant en oeuvre la Convention internationale contre la prise d'otages, adoptée par l'Assemblée générale des Nations Unies le 17 décembre 1979,

(v) les infractions visées aux paragraphes 7(3.4) ou (3.6) et mettant en oeuvre la Convention sur la protection physique des matières nucléaires, conclue à New York et Vienne le 3 mars 1980,

(vi) les infractions visées au paragraphe 7(2) et mettant en oeuvre le Protocole pour la répression des actes illicites de violence dans les aéroports servant à l'aviation civile internationale, complémentaire à la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, signé àà Montréal le 24 février 1988,

(vii) les infractions visées au paragraphe 7(2.1) et mettant en oeuvre la Convention pour la répression d''actes illicites contre la sécurité de la navigation maritime, conclue à Rome le 10 mars 1988,

(viii) les infractions visées aux paragraphes 7(2.1) ou (2.2) et mettant en oeuvre le Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental, conclu à Rome le 10 mars 1988,

(ix) les infractions visées au paragraphe 7(3.72) et mettant en oeuvre la Convention internationale pour la répression des attentats terroristes à l'explosif, adoptée par l'Assemblée générale des Nations Unies le 15 décembre 1997,

(x) les infractions visées au paragraphe 7(3.73) et mettant en oeuvre la Convention internationale pour la répression du financement du terrorisme, adoptée par l''Assemblée générale des Nations Unies le 9 décembre 1999;

b) soit un acte —— action ou omission, commise au Canada ou à l'étranger :

(i) d'une part, commis à la fois :

(A) au nom —— exclusivement ou non —— d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,

(B) en vue —— exclusivement ou non —— d'intimider tout ou partie de la population quant à sa sécurité, entre autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à accomplir un acte ou à s'en abstenir, que la personne, la population, le gouvernement ou l'organisation soit ou non au Canada,

(ii) d'autre part, qui intentionnellement, selon le cas :

(A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,

(B) met en danger la vie d'une personne,

(C) compromet gravement la santé ou la sécurité de tout ou partie de la population,

(D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en résultera,

(E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C).

Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu que sont exclus de la présente définition l'acte —— action ou omission —— commis au cours d''un conflit armé et conforme, au moment et au lieu de la perpétration, au droit international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international.

« Canadien »

« Canadien » Citoyen canadien, résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés ou personne morale constituée ou prorogée sous le régime d'une loi fédérale ou provinciale.

« entité »

«entité » Personne, groupe, fiducie, société de personnes ou fonds, ou organisation ou association non dotée de la personnalité morale.

« entité inscrite »

« entité inscrite » Entité inscrite sur la liste établie par le gouverneur en conseil en vertu de l'article 83.05.

«groupe terroriste »

a) Soit une entité dont l'un des objets ou l'une des activités est de se livrer à des activités terroristes ou de les faciliter;

b) soit une entité inscrite.

Est assimilé à un groupe terroriste un groupe ou une association formé de groupes terroristes au sens de la présente définition.

Interprétation

(1.1) Il est entendu que l'expression d'une pensée, d'une croyance ou d'une opinion de nature politique, religieuse ou idéologique n'est visée à l'alinéa b) de la définition de « activité terroriste » au paragraphe (1) que si elle constitue un acte —— action ou omission —— répondant aux critères de cet alinéa.

Facilitation

(2) Pour l'application de la présente partie, faciliter s'interprèète en conformité avec le paragraphe 83.19(2).

2001, ch. 41, art. 4 et 126.

Investigation

Définition de «juge»

83.28 (1) Au présent article et à l'article 83.29, « juge » s'entend d'un juge de la cour provinciale ou d'un juge d'une cour supéérieure de juridiction criminelle.

Demande de collecte de renseignements

(2) Sous réserve du paragraphe (3), l'agent de la paix peut, pour la conduite d'une enquête relative à une infraction de terrorisme, demander à un juge, en l'absence de toute autre partie, de rendre une ordonnance autorisant la recherche de renseignements.

Consentement du procureur général

(3) L'agent de la paix ne peut présenter la demande que s'il a obtenu le consentement préalable du procureur général.

Ordonnance d'obtention d'éléments de preuve

(4) Saisi de la demande, le juge peut rendre l'ordonnance s'il est convaincu que le consentement du

procureur général a été obtenu en conformité avec le paragraphe (3) et :

a) ou bien il existe des motifs raisonnables de croire, à la fois :

(i) qu'une infraction de terrorisme a été commise,

(ii) que des renseignements relatifs à l'infraction ou susceptibles de révéler le lieu où se trouve un individu que l'agent de la paix soupçonne de l'avoir commise sont susceptibles d'être obtenus en vertu de l'ordonnance;

b) ou bien sont réunis les éléments suivants :

(i) il existe des motifs raisonnables de croire qu'une infraction de terrorisme sera commise,

(ii) il existe des motifs raisonnables de croire qu'une personne a des renseignements directs et pertinents relatifs à une infraction de terrorisme visée au sous-alinéa (i) ou de nature à révéler le lieu où se trouve l'individu que l'agent de la paix soupçonne d'être susceptible de commettre une telle infraction de terrorisme,

(iii) des efforts raisonnables ont été déployés pour obtenir les renseignements visés au sous-alinéa (ii) de la personne qui y est visée.

Modalités de l'ordonnance

(5) L'ordonnance peut contenir les dispositions suivantes :

a) l'ordre de procéder à l'interrogatoire, sous serment ou non, d'une personne désignée;

b) l'ordre à cette personne de se présenter au lieu que le juge ou le juge désigné au titre de l'alinéa d) fixe pour l'interrogatoire et de demeurer présente jusqu'à ce qu'elle soit libérée par le juge qui préside;

c) l'ordre à cette personne d'apporter avec elle toute chose qu'elle a en sa possession ou à sa disposition afin de la remettre au juge qui préside;

d) la désignation d''un autre juge pour présider l'interrogatoire;

e) les modalités que le juge estime indiquées, notamment quant à la protection des droits de la personne que l'ordonnance vise ou de ceux des tiers, ou quant à la protection de toute investigation en cours.

Exécution

(6) L'ordonnance peut être exécutée en tout lieu au Canada.

Modifications

(7) Le juge qui a rendu l'ordonnance ou un autre juge du même tribunal peut modifier les conditions de celle-ci.

Refus d'obtempérer

(8) La personne visée par l'ordonnance répond aux questions qui lui sont posées par le procureur général ou son représentant, et remet au juge qui préside les choses exigées par l'ordonnance, mais peut refuser de le faire dans la mesure où la réponse aux questions ou la remise de choses révélerait des renseignements protégés par le droit applicable en matière de divulgation ou de privilèges.

Effet non suspensif

(9) Le juge qui préside statue sur toute objection ou question concernant le refus de répondre à une question ou de lui remettre une chose.

Nul n'est dispensé de se conformer à l'ordonnance

(10) Nul n'est dispensé de répondre aux questions ou de produire une chose aux termes du paragraphe (8) pour la raison que la réponse ou la chose remise peut tendre à l'incriminer ou à l'exposer à quelque procédure ou pénalité, mais :

a) la réponse donnée ou la chose remise aux termes du paragraphe (8) ne peut être utilisée ou admise contre lui dans le cadre de poursuites criminelles, sauf en ce qui concerne les poursuites prévues aux articles 132 ou 136;

b) aucune preuve provenant de la preuve obtenue de la personne ne peut être utilisée ou admise contre elle dans le cadre de poursuites criminelles, sauf en ce qui concerne les poursuites prévues aux articles 132 ou 136.

Droit à un avocat

(11) Toute personne a le droit d'engager un avocat et de lui donner des instructions en tout état de cause.

Garde des choses remises

(12) Si le juge qui préside est convaincu qu''une chose remise pendant l'interrogatoire est susceptible d'être utile à l'enquête relative à une infraction de terrorisme, il peut ordonner que cette chose soit confiée à la garde de l'agent de la paix ou à une personne qui agit pour son compte.

2001, ch. 41, art. 4.

Mandat d'attestation

83.29 (1) Le juge qui a rendu l'ordonnance au titre du paragraphe 83.28(4) ou un autre juge du même tribunal peut délivrer un mandat autorisant l'arrestation de la personne visée par l'ordonnance à la suite d'une dénonciation écrite faite sous serment, s'il est convaincu :

a) soit qu'elle se soustrait à la signification de l'ordonnance;

b) soit qu'elle est sur le point de s'esquiver;

c) soit qu'elle ne s'est pas présentée ou n'est pas demeurée présente en conformité avec l'ordonnance.

Exécution

(2) Le mandat d'arrestation peut être exécuté en tout lieu au Canada par tout agent de la paix qui a compétence en ce lieu.

Ordonnance

(3) L'agent de la paix qui arrête une personne en exécution du mandat la conduit ou la fait conduire immédiatement devant le juge qui a délivré le mandat ou un autre juge du même tribunal; le juge peut alors, afin de faciliter l'exécution de l'ordonnance, ordonner que cette personne soit mise sous garde ou libérée sur engagement, avec ou sans caution.

2001, ch. 41, art. 4.

Engagement assorti de conditions

Consentement du procureur général

83.3 (1) Le dépôt d'une dénonciation au titre du paragraphe (2) est subordonné au consentement préalable du procureur général.

Activité terroriste

(2) Sous réserve du paragraphe (1), l'agent de la paix peut déposer une dénonciation devant un juge de la cour provinciale si, à la fois :

a) il a des motifs raisonnables de croire qu'une activité terroriste sera mise à exécution;

b) il a des motifs raisonnables de soupçonner que l'imposition, à une personne, d'un engagement assorti de conditions ou son arrestation est nécessaire pour éviter la mise à exécution de l'activité terroriste.

Comparution

(3) Le juge qui reçoit la dénonciation peut faire comparaître la personne devant lui.

Arrestation sans mandat

(4) Par dérogation aux paragraphes (2) et (3), l'agent de la paix, s'il a des motifs raisonnables de soupçonner que la mise sous garde de la personne est nécessaire afin de l'empêcher de mettre à exécution une activité terroriste, peut, sans mandat, arrêter la personne et la faire mettre sous garde

en vue de la conduire devant un juge de la cour provinciale en conformité avec le paragraphe (6) dans l'un ou l'autre des cas suivants :

a) l'urgence de la situation rend difficilement réalisable le dépôt d'une dénonciation au titre du paragraphe (2) et les motifs visés aux aliéées (2)a) et b) sont réunis;

b) une dénonciation a été déposée au titre du paragraphe (2) et une sommation décernée.

Obligation de l'agent de la paix

(5) Si, dans le cas visé à l'alinéa (4)a), l'agent de la paix arrête une personne sans mandat, il dépose une dénonciation au titre du paragraphe (2) au plus tard dans le délai prévu aux alinéas (6)a) ou b), ou met la personne en liberté.

Règles de la construction

(6) La personne mise sous garde est conduite devant un juge de la cour provinciale selon les règles ci-après, à moins que, à un moment quelconque avant l'expiration du délai prévu aux alinéas a) ou b), l'agent de la paix ou le fonctionnaire responsable, au sens de la partie XV, étant convaincu qu'elle devrait être mise en liberté inconditionnellement, ne la mette ainsi en liberté :

a) si un juge de la cour provinciale est disponible dans un délai de vingt-quatre heures après l'arrestation, elle est conduite devant un juge de ce tribunal sans retard injustifié et, à tout le moins, dans ce délai;

b) si un juge de la cour provinciale n'est pas disponible dans un délai de vingt-quatre heures après l'arrestation, elle est conduite devant un juge de ce tribunal le plus tôt possible.

Traitement de la personne

(7) Dans le cas où la personne est conduite devant le juge au titre du paragraphe (6) :

a) si aucune dénonciation n'a été déposée au titre du paragraphe (2), le juge ordonne qu'elle soit mise en liberté;

b) si une dénonciation a été déposée au titre du paragraphe (2) :

(i) le juge ordonne que la personne soit mise en liberté, sauf si l'agent de la paix qui a déposé la dénonciation fait valoir que sa mise sous garde est justifiée pour un des motifs suivants :

(A) sa détention est nécessaire pour assurer sa comparution devant un juge de la cour provinciale conformément au paragraphe (8),

(B) sa détention est nécessaire pour la protection ou la sécurité du public, notamment celle d'un témoin, eu égard aux circonstances, y compris :

(I) la probabilité que, si la personne est mise en liberté, une activité terroriste sera mise à exécution,

(II) toute probabilité marquée que la personne, si elle est mise en liberté, nuira à l'administration de

la justice,

(C) il est démontré une autre juste cause et, sans préjudice de ce qui précède, que sa détention est nécessaire pour ne pas miner la confiance du public envers l'administration de la justice, compte tenu de toutes les circonstances, notamment le fait que les motifs de l'agent de la paix au titre du paragraphe (2) paraissent fondés, et la gravité de toute activité terroriste qui peut être mise à exécution,

(ii) le juge peut ajourner la comparution prévue au paragraphe (8) mais, si la personne n'est pas mise en liberté, l'ajournement ne peut excéder quarante-huit heures.

Comparution devant le juge

(8) Le juge devant lequel la personne comparaît au titre du paragraphe (3) :

a) peut, s'il est convaincu par la preuve apportée que les soupçons de l'agent de la paix sont fondés sur des motifs raisonnables, ordonner que la personne contracte l'engagement de ne pas troubler l'ordre public et d'observer une bonne conduite pour une période maximale de douze mois, ainsi que de se conformer aux autres conditions raisonnables énoncées dans l'engagement, y compris celle visée au paragraphe (10), que le juge estime souhaitables pour prévenir la mise à exécution d'une activité terroriste;

b) si la personne n'a pas été mise en liberté au titre du sous-alinéa (7)b)(i), ordonne qu'elle soit mise en liberté, sous réserve, le cas échéant, de l'engagement imposé conformément à l'alinéa a).

Refus de contracter un engagement

(9) Le juge peut infliger à la personne qui omet ou refuse de contracter l'engagement une peine de prison maximale de douze mois.

Conditions : armes à feu

(10) Le juge qui, en vertu de l'alinéa (8)a), rend une ordonnance doit, s'il estime qu'il est souhaitable pour la sécurité de la personne, ou pour celle d'autrui, de lui interdire d'avoir en sa possession une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions, des munitions prohibées ou des substances explosives, ordonner que la personne contracte l'engagement de n'avoir aucun des objets visés en sa possession pour la période indiquée dans l'engagement.

Remise

(11) Le cas échéant, l'ordonnance prévoit la façon de remettre, de détenir ou d'entreposer les objets visés au paragraphe (10) qui sont en la possession de la personne, ou d'en disposer, et de remettre les autorisations, permis et certificats d'enregistrement dont la personne est titulaire.

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Motifs

(12) Le juge, s'il n'assortit pas l'ordonnance d'une condition prévue au paragraphe (10), est tenu de donner ses motifs, qui sont consignés au dossier de l'instance.

Modification des conditions

(13) Le juge peut, sur demande de l'agent de la paix, du procureur général ou de la personne, modifier les conditions fixées dans l'engagement.

Autres dispositions applicables

(14) Les paragraphes 810(4) et (5) s'appliquent, avec les adaptations nécessaires, aux procédures engagées en vertu du présent article.

10 2001, ch. 41, art. 4.

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