S.C.C. File No. 31597

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

B E T W E E N:

ADIL CHARKAOUI

Appellant

- and –

MINISTER OF CITIZENSHIP AND IMMIGRATION and SOLICITOR GENERAL OF CANADA

Respondents

- and –

THE CANADIAN BAR ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), BARREAU DU QUEBEC, AMNESTY INTERNATIONAL, ASSOCIATION DES AVOCATS DE LA DEFENSE DE MONTREAL, ATTORNEY GENERAL OF ONTARIO AND ASSOCIATION QUEBECOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION

Interveners

FACTUM OF THE INTERVENER, CANADIAN BAR ASSOCIATION

OVERVIEW

1. This Appeal raises the question of whether or not the disclosure obligations in a criminal context also apply to the security certificate regime under the *Immigration and Refugee Protection Act (IRPA)*. The Federal Court of Appeal (FCA) concluded that because immigration proceedings are administrative, *Stinchcombe* obligations of disclosure do not apply. The Canadian Bar Association (CBA) has intervened to make submissions on this issue. The CBA urges this Court to reject the formalistic approach of the FCA and to conclude that the consequences are determinative of the government's obligations rather than the formal characterization of the procedure.
2. The CBA makes four submissions. First, as held by this Court in *Charkaoui,* section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) is engaged in the security certificate procedure and therefore the government must comply with the principles of fundamental justice, including the right to a fair hearing. Second, the right to a fair hearing,

requires, in this context, full disclosure to the named person of *all* relevant evidence, except that protected on national security grounds. Third, the necessary corollary of this disclosure obligation is that security intelligence agencies that gather intelligence used as "evidence" in the certificate procedure must take steps to preserve it so as to not undermine the effectiveness of their disclosure obligations. Fourth, the government has not provided any justification under section 1 of the *Charter* that would warrant a departure from these requirements.

PART I –FACTS

3. The Appellant, Adil Charkaoui, was the subject of a security certificate under the *Immigration and Refugee Protection Act* (IRPA). He was detained pursuant to that certificate. Intelligence information was provided to the Federal Court, along with other evidence. A permanent resident subject to a certificate must have a detention review within 48 hours and on a regular basis thereafter. These proceedings arose in the context of a detention review of the Appellant.
4. During the detention review it was revealed that the Minister had inadvertently failed to disclose a document and had destroyed notes (and destroyed or misplaced recordings, if made) of interviews with the Appellant by agents of the Canadian Security Intelligence Service (CSIS). The Appellant argued that his section 7 *Charter* right was violated because the evidence was destroyed and because the Minister had breached the duty to disclose in a timely fashion. The Federal Court ruled that there was no breach of section 7 and any injustice and unfairness could be cured through an adjournment. The Federal Court of Appeal upheld the decision, noting that the duty to disclose in administrative proceedings is different from that of a criminal context. The Court found no breach of section 7.

The CBA

5. The CBA is the national voice of the legal profession in Canada. It was formed in 1896 and incorporated by an Act of Parliament in 1921. It represents approximately 37,000 lawyers, jurists, academics and law students in every Province and Territory of Canada. The CBA has intervened in this appeal, with leave, in accordance with its *Public Intervention Policy*, which provides that the CBA will apply to intervene in an appeal before the Supreme Court

where the issue involved is "a matter of compelling public interest" or "a matter of special significance to the legal profession."

PART II – ISSUES

6. Is section 7 of the *Canadian Charter of Rights and Freedoms* engaged by the process at issue?
7. If section 7 of the *Charter* is engaged, was the conduct of the Minister consistent with the principles of fundamental justice? More specifically, was there a duty on the part of the Minister to provide full and complete disclosure to the Appellant of all relevant evidence that could be disclosed to him , subject only to claims of national security confidentiality?
8. Given the duty to disclose, is CSIS under a duty to ensure the proper preservation of all evidence and information that might be used in a proceeding triggering section 7 of the *Charter*?
9. Has section 7 of the *Charter* been breached and is that breach saved by section 1?

PART III – ARGUMENT

ISSUE 1: Section 7 is Indisputably Engaged by the Case at Bar

10. Given the decision of this Court in the first *Charkaoui* appeal, there can be no dispute that section 7 of the *Charter* is engaged in this case. In that appeal, this Court held that the serious potential consequences to Mr. Charkaoui, including the possible return to torture, engaged section 7.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7.
Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, [*"Charkaoui"*] at paras. 17 and 18.

ISSUE 2: Fundamental Justice Requires Robust Disclosure in this Case

A. The principles of fundamental justice do not depend on a formalistic distinction between "administrative" and "criminal" proceedings but instead are determined by the entire context of the proceedings

11. The lower courts' application of a strict criminal/administrative distinction in this case is an error in law. In the decision under appeal, the Federal Court of Appeal asserts that this Court "has warned against blurring criminal law standards with those of administrative law": *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, ["*Charkaoui* (Federal Court of Appeal)"], citing *Blencoe v. British Columbia (Human Rights Commission)*.

Because the Appellant's case was designated as "administrative" the FCA refused to apply principles on disclosure established by this Court in cases such as *R. v. Carosella* and *R. v. O'Connor*. Put another way, it treats the undefined distinction between criminal and administrative law as producing categorically different disclosure standards. According to the FCA disclosure rules are to be pigeon-holed according to the nature of the proceeding, whether criminal or administrative.

Charkaoui v. Canada (Minister of Citizenship and Immigration), 2006 FCA 206 at para. 22.
Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307.
R. v. Carosella, [1997] 1 S.C.R. 80.
R. v. O'Connor, [1995] 4 S.C.R. 411.

12. However, the material passage in *Blencoe* upon which the FCA relied focused on whether the rights in section 11(d) were also protected by section 7. Since section 11 is triggered where a person is "charged with an offence," whether these rights were duplicated in section 7 so as to apply an administrative proceeding was squarely at issue. On this point, this Court warned that "[w]e should not blur concepts which under our *Charter* are clearly distinct." There is, however, no such blurring in this case. At issue is *not* whether section 7 encompasses a section 11(d) right, but instead whether section 7 imposes disclosure obligations on the government. As the first *Charkaoui* decision of this Court established, the right to a fair hearing protected by section 7 requires that the Appellant know and be able to meet the case against him. Disclosure is the *sine qua non* of the ability to know the case, and ultimately of the fair hearing right.

Blencoe, supra , [2000] 2 S.C.R. 307 at para. 88;
Charkaoui, supra, at para. 29.
Canadian Charter of Rights and Freedoms, supra, s. 11.

13. The question of the sort of disclosure owed to the Appellant in this case cannot, therefore, be decided by a simple invocation of an (undefined) distinction between criminal and administrative proceedings. As this Court found in *Suresh*: "What is required by the duty of fairness — and therefore the principles of fundamental justice — is that the issue at hand be decided in the context of the statute involved and the rights affected."

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 at para. 115.
See also, *Secretary of State v. MB* [2007] UKHL 46 at para. 17.
See also *May v. Ferndale Institution*, 2005 SCC 82 at para. 94.
Charkaoui, supra at paras. 19-20.

14. The factors to consider in assessing the context affecting procedural entitlement include:

> (1) the nature of the decision made and the procedures followed in making it, that is, 'the closeness of the administrative process to the judicial process'; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself.

Suresh, supra at para. 115.
Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.
Quebec (AG) v. Canada (National Energy Board), [1994] S.C.J. No. 13.
Nicholson v. Haldimand-Norfolk Regional Police Commissioners, [1979] 1 S.C.R. 311.
Knight v. Indian Head School Board, [1990] 1 S.C.R. 653.

B. The context of these proceedings requires a very high degree of procedural fairness

15. Case law supports the contention that the duty of fairness, including the duty of impartiality owed even in regular, non-security certificate immigration matters "falls at the high end of the continuum of procedural fairness."

Quebec (AG), supra at paragraph 29.
Geza v. MCI, [2006] F.C.J. No. 477 at para. 53.
Baker, supra at para. 47.

16. This conclusion is enhanced by the particulars of the security certificate process. Of the above-enumerated factors, the first three are obviously engaged in this case, and each points towards a robust application of fundamental justice, including in the area of disclosure:

- The decision on security certificates and continued detention is clearly a judicial one, conducted by a Federal Court judge.
- As in *Suresh*, the statutory context creates an unorthodox procedure. In a security certificate case, the Appellant is already at profound disadvantage. Not only must he confront all the resources of the state, he must do so in a context where he is further disadvantaged because the heart of the state's case will not be disclosed to him and will be considered in a secret session from which he is excluded. This situation renders potent procedural protections in relation to information that may be disclosed all the more significant. All of the remaining procedural guarantees should be heightened in an effort to rectify the imbalance created by the secret hearings.

17. Most importantly, the consequences of the security certificate process are very grave to the Appellant. For these reasons, the CBA submits that in the security certificate procedure the principles of fundamental justice require a very high degree of procedural fairness that includes full disclosure.

C. Use of a "special advocate" does not dilute the need for robust procedural protections

18. In the aftermath of *Charkaoui,* the federal government has introduced Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate)*. If enacted, the Act will introduce a regime of special advocates in security certificate hearings to challenge the information and evidence presented in camera. However, the presence of this person cannot change the analysis supporting robust procedural protections. A special advocate can never adequately replace the role of a named person or their counsel in effectively challenging the state's evidence. This was recognized in October 2007 by the House of Lords in a case concerning "control orders" – constraints on the liberty of terrorism suspects short of full incarceration – where a majority of the House of Lords held that the presence of a special advocate does not diminish the obligation to provide a fair trial, and that the obligation would not be met,

> if a person entitled to a fair hearing, in a situation where an adverse decision could have severe consequences, were denied such knowledge, in whatever form, of what was said against him as was necessary to enable him, with or without a special advocate, effectively to challenge or rebut the case against him.

Secretary of State v. MB, [2007] UKHL 46 at paras. 34 & 35 per Lord Bingham of Cornwall.

D. Disclosure in this case must meet the standard applied in criminal cases

19. It is submitted that the government has a clear duty to make full and complete disclosure in security certificate cases. The duty to disclose should match that applied in criminal proceedings, namely, those guaranteed by *R. v. Stinchcombe,* and applied in such cases as *R. v. Carosella*.

Stinchcombe, [1991] 3. S.C.R. 325, at para. 29.
R. v. Carosella, *supra.*

20. *Carosella* establishes that in proving a section 7 violation, there is no onus upon an accused person to establish how destroyed evidence that should have been disclosed under the *Stinchcombe* principles might have been useful to their case. Rather, "if the destroyed material meets the threshold test for disclosure or production, the appellant's *Charter* rights were breached without the requirement of showing additional prejudice."

R. v. Carosella, *supra* at paras. 37 and 40.

21. Use of this criminal disclosure standard is dictated by the contextual factors of security certificate cases noted above. Most significant is the possible consequences flowing from the security certificate process – potentially indefinite detention or removal to persecution. These consequences *exceed* those typically or even legally possible under the *Criminal Code*. It would be absurd to guarantee *Stinchcombe* disclosure standards for the most banal criminal offence while guarding only a diminished disclosure obligation where individuals face the prospect of removal to torture (or worse).

*Suresh, supra, at paras.*49-52 and 72-75.
See also: *Siad v. Canada (Secretary of State),*[1996] F.C.J. No. 1575.
See also: *Nrecaj v. MEI* 1993 FCJ 699.
See also: *Khan v. MCI* 2002 FCJ 558.

22. Even in *less* dramatic contexts, the courts have held that disclosure obligations in the criminal law context apply. Thus the FCA has held that *Stinchcombe* was of direct application in administrative procedures concerning bankruptcy. At issue in *Sheriff* was the alleged misconduct of several trustees in bankruptcy. Noting that the trustees' reputation was at stake, the Federal Court of Appeal held that this interest was tantamount to the "innocence at stake" referred to by this Court in *May*. The *Stinchcombe* doctrine therefore applied in full form.

Sheriff v. Canada, 2006 FCA 139 at para. 25 *et seq*. (FCA).

ISSUE 3: CSIS has an obligation to preserve evidence

23. The related issue in this appeal is the *extent* to which there was a breach of the duty to disclose as a result of the destruction of notes by CSIS and the extent to which CSIS is required to preserve information that might be relevant to a security certificate claim.

A. Nothing in CSIS's mandate precludes an obligation to preserve evidence

24. The primary role of CSIS is to act as an intelligence information *gathering* organization. Indeed, the *CSIS Act* provides that CSIS's role is to gather information and to conserve only that information in the matter it deems appropriate. The Respondents rely on s. 12 of the *CSIS Act ,* R.S.C. 1985, c. C-23, to argue that the CSIS was under no duty to preserve and disclose the interview notes once the summary of the interview was written, as that provision only requires retention of information and intelligence where "strictly necessary." The CBA respectfully submits that the Respondents were indeed under a duty to preserve and disclose interview notes and that the Respondents' analysis of s. 12 of the *CSIS Act* is untenable. As the FCA correctly concluded, the reference to "strictly necessary" in s. 12 of the *CSIS Act* pertains to CSIS's authority to collect information and intelligence. The section is silent on the question of analysis and retention.

Charkaoui (Federal Court of Appeal), *supra* at para. 29.
Canadian Security Intelligence Services Act, R.S.C. 1985, c. C-23, s. 12

B. The obligation to preserve evidence exists irrespective of the agency tasked with the evidence gathering function

25. In light of the severe implications of decisions to issue a security certificate on the named person's liberty and security interests, the CBA submits that these cases constitutionally require a full evidentiary record based on reliable, credible and complete evidence, and the right to test evidence through cross-examination to ensure it is reliable and credible. Where information or intelligence is relied on as *evidence* in issuing a security certificate, the principles of fundamental justice require that evidence be subject to the usual requirements for preservation and disclosure.

26. Section 76 of *IRPA* contemplates that intelligence information provided by CSIS may be used as evidence. This intelligence information, together with other evidence, is put before the Ministers and subsequently before a Federal Court judge. The information becomes *evidence* when used in the context of the Federal Court section 76 proceeding. Indeed, *IRPA* provides for relaxed rules of evidence in the proceeding and allows admission of "evidence" that would not normally meet the evidentiary threshold in a criminal or civil proceeding.

Immigration and Refugee Protection Act, 2001, c. 27, s. 76.

27. It is submitted, therefore, that in those procedures where intelligence information is used as evidence, the usual requirements that apply to police agencies to preserve evidence should apply to CSIS. This is a necessary corollary of the constitutional duty to disclose. If the Government of Canada is under a duty to disclose *all* relevant evidence, the Government and its agent CSIS must preserve *all* information that might potentially become evidence. Given the clear intent of *IRPA* to allow for admission of intelligence information as evidence, CSIS agents gathering intelligence information that may subsequently be used in the context of a security certificate process must ensure that the evidence is properly preserved.

28. It is submitted that there is no reason to differentiate between the police and CSIS because of some idealized division of labour between these bodies. Indeed courts have refused to do so in the criminal context (*R. v. Malik*; *R. v. Malik and Bagri*). The requirements of fundamental justice – in this case, disclosure – hinge on the peril government action presents to the life, liberty and security of the Appellant. Section 32 of the *Charter* applies to the Government of Canada, with no special dispensation to intelligence or other agencies. The right to a fair trial does not depend on how the government partitions the evidence-gathering process between agencies. To "stovepipe" constitutional obligations according to the mandate of different agencies would invite the government to circumvent these obligations by assigning: gathering evidence to the agency to which the fewest constitutional obligations attach.

R. v. Malik [2004] B.C.J. No. 842.
R. v. Malik and Bagri 2005 BCSC 350.

ISSUE 4: Section 7 is breached in this case and that breach is not saved by section 1

29. The Federal Court of Appeal failed to apply *R. v. Carosella,* and found no *per se* violation of section 7 resulting from the destruction of the interview notes because of the artificial distinction it drew between criminal and administrative law. It also misconstrued the decision in *Blencoe* by asserting that "the right to relief because of a breach of a section 7 *Charter* interest depends on the existence of evidence establishing a prejudice resulting from that breach": *Charkaoui* (Federal Court of Appeal). *Blencoe* requires a causal relationship between a *government* action and the section 7 interest. Here, section 7 has been triggered by government action in the security certificate process. The principles of fundamental

justice therefore attach to this procedure. There is no supplemental requirement that the violation of fundamental justice itself must cause prejudice before this Court will offer relief.

Charkaoui (Federal Court of Appeal), *supra* at para. 30.
Blencoe, supra.

30. The CBA submits that these infringements are not saved by section 1. This Court has held that a violation of section 7 is rarely justifiable under section 1: *Charkaoui, supra* at para. 66. Unlike the first *Charkaoui* appeal, the present case has no countervailing imperative – national security secrecy – that weighs against the fair trial interest. The destruction of notes was either the result of inadvertence (as characterized by the Federal Court of Appeal) or the mechanical application of a policy preventing accumulation of information on individuals not subject to suspicion. Protecting privacy interests is a worthy objective. However, that protection might be provided by policy or law limiting retrieval of the information to circumstances where disclosure obligations are triggered (as in this case), rather than outright, permanent destruction. Destruction of notes cannot constitute a "minimal impairment" of the section 7 disclosure right.

Charkaoui, supra at para. 66.

31. Therefore it is submitted that in this case there has been a clear breach of the principles of fundamental justice, which is not saved by section 1.

PART IV- ORDER SOUGHT

32. In light of the above, it is respectfully submitted that this Court grant an order declaring the non-preservation and non-disclosure of security intelligence and information used as *evidence* as unconstitutional.

All of which is respectfully submitted at Toronto this 11th day of January by

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PART V - LIST OF AUTHORITIES

Legislation

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 1, 7, 11.

Canadian Security Intelligence Services Act, R.S.C. 1985, c. C-23, s. 12.

Immigration and Refugee Protection Act, 2001, c. 27, s. 76.

Caselaw

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para. 47.

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307 at para. 88.

Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350 at paras. 17-20, 22, 29, 66.

Charkaoui v. Canada (Minister of Citizenship and Immigration), 2006 FCA 206 at paras. 29, 30.

Geza v. MCI, [2006] F.C.J. No. 477 at para. 53.

Khan v. MCI 2002 FCJ 558.

Knight v. Indian Head School Board, [1990] 1 S.C.R. 653.

May v. Ferndale Institution, 2005 SCC 82 at para. 94.

Nicholson v. Haldimand-Norfolk Regional Police Commissioners, [1979] 1 S.C.R. 311.

Nrecaj v. MEI 1993 FCJ 699.

Quebec (AG) v. Canada (National Energy Board), [1994] S.C.J. No. 13 at para. 29.

R. v. Carosella, [1997] 1 S.C.R. 80 at para. 37 and 40.

R. v. Malik [2004] B.C.J. No. 842.

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R. v. O'Connor, [1995] 4 S.C.R. 411.

R. v. Stinchcombe, [1991] 3. S.C.R. 325 at para. 29.

Secretary of State v. MB [2007] UKHL 46 at paras. 17, 34 and 35.

Sheriff v. Canada, 2006 FCA 139 at paras. 25 et seq.

Siad v. Canada (Secretary of State), [1996] F.C.J. No. 1575.

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 at paras. 49-52, 72-75, 115.