

Jaballah, Re, 2005 FC 399 (CanLII)

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[Reflex Record](#) (noteup and cited decisions)

DES-4-01

2005 FC 399

IN THE MATTER OF a certificate pursuant to section 40.1 of the *Immigration Act*, R.S.C., 1985, c. I-2, now deemed to be under subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

AND IN THE MATTER OF the referral of that certificate to the Federal Court of Canada;

AND IN THE MATTER OF Mahmoud Jaballah

Indexed as: Jaballah (Re) (F.C.)

Federal Court, MacKay D.J.--Toronto, August 16, 2004; Halifax, March 22, 2005.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Judicial review of lawfulness of Minister's delegate's decision refusing Immigration and Refugee Protection Act, s. 112 protection application on basis Mr. Jaballah posing extraordinary danger to security of Canada -- Record before delegate including Canadian Security Intelligence Service security intelligence report, public summary statements, CSIS officer's testimony, but not reference documents, appendices footnoted in report, statements -- Without these documents, appendices, delegate could not make independent, proper assessment of threat to Canada's security -- Delegate could not rely on Court's earlier determination Ministers' certificate reasonable as that determination struck by F.C.A. -- Delegate not adequately defining, explaining danger to Canada as required under Act, s. 113(d)(ii) -- Delegate's assessment of exceptional circumstances justifying deportation to torture making no reference to circumstances facing Canada as a nation, warranting exception from Canadian Charter of Rights and Freedoms, s. 7 protection -- No reference to balancing of fundamental rights, s. 1 exception -- Failure to consider such factors relevant to determination Mr. Jaballah a danger error in law -- Decision not adequately taking into account best interests of Mr. Jaballah's children, as required under Act, s. 25 -- Application allowed.

This was an application for judicial review of the lawfulness of a decision by the Minister's delegate refusing Mr. Jaballah's application for protection under section 112 of the *Immigration and Refugee Protection Act*. Mr. Jaballah is a foreign national against whom a certificate was issued by the Ministers on the basis that he is inadmissible to Canada on grounds of security. The matter was referred to the Federal Court for a determination of the reasonableness of the certificate, and the proceedings were suspended to permit the Minister of Citizenship and Immigration to decide Mr. Jaballah's application for protection. The Minister's delegate refused this application, concluding that Mr. Jaballah poses an extraordinary danger to the security of Canada that outweighs the acknowledged risk to him of torture, death, or cruel and unusual punishment if returned to Egypt. At issue was the lawfulness of the delegate's assessment under subparagraph 113(d)(ii) of the Act that the application for protection be refused because of the danger that Mr. Jaballah constitutes to the security of Canada.

Held, the application should be allowed.

The record before the Minister's delegate included the Canadian Security Intelligence Service's (CSIS) security intelligence report (SIR), public summary statements based on that report, and testimony in public by a CSIS officer. The reference documents or appendices footnoted in the report and the summaries were not provided to the delegate. In *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, the Court noted that a conclusion with respect to danger to the security of Canada requires evidence of a serious threat to national security, and without the confidential reference appendices to the SIR that set out the detailed information relied upon by CSIS, the delegate could not make an independent and proper assessment of the degree of threat to Canada's security. Although in that case the Court was dealing with a decision made pursuant to subsection 115(2) of the Act applicable to Convention refugees (who already qualify as persons in need of protection), whereas here the Court was dealing with a decision made pursuant to subparagraph 113(d)(ii) with respect to an application for protection by a foreign national, the essence of the decisions required in both cases is the same. As in *Mahjoub*, the process in this case was inadequate to support an independent assessment by the Minister's delegate of the danger Mr. Jaballah poses to the security of Canada. While there may be evidence that supports the conclusion of the delegate, the Court would usurp the statutory decision maker's responsibility if it were to assume that a similar outcome is inevitable if there is reconsideration of the application for protection.

The delegate's decision relied in part on this Court's earlier determination that the Ministers' certificate was reasonable. As this determination was struck down by the F.C.A., it cannot be a finding to support the delegate's decision. Also, any determination that the Ministers' certificate is reasonable is not, in itself, a finding that Mr. Jaballah constitutes a danger to the security of Canada.

The delegate did not make an adequate assessment of the danger Mr. Jaballah constitutes to the security of Canada. The assessment of the Ministers' certificate as reasonable, and a review of the factors (such as Mr. Jaballah's membership in Al Jihad, a terrorist organization) upon which the certificate indicated security grounds (i.e. paragraphs 34(1)(b), (c), (f) of the Act) for concluding Mr. Jaballah is inadmissible to Canada, does not adequately define and explain the danger to Canada as required under subparagraph 113(d)(ii).

In assessing "exceptional circumstances" that would justify Mr. Jaballah's deportation to face torture, the Minister's delegate made no reference to circumstances facing Canada or its security, other than the conclusion that it is endangered by Mr. Jaballah's presence in Canada. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the S.C.C. referred to "exceptional circumstances" in terms of "natural disasters, the outbreak of war, epidemics and the like", and to cases where the exceptional circumstances referred to appear to concern those facing Canada as a nation. In the present case, the Minister's delegate made no reference to such circumstances that would warrant exception from the protection of section 7 of the *Canadian Charter of Rights and Freedoms*, either in the balancing of fundamental rights or in the examination of evidence to support an exception based on section 1 of the Charter. The delegate's assessment of the danger posed by Mr. Jaballah also failed to consider the limits on his freedom should he remain in Canada. The delegate thus erred in law.

The delegate was required, pursuant to *Baker v. Canada (Minister of Citizenship and Immigration)* as well as section 25 of the Act, to consider humanitarian and compassionate circumstances relating to Mr. Jaballah's family. The delegate's consideration of these circumstances made no direct reference to the implications for Mr. Jaballah's family from his removal to face torture or death. As such, the decision did not adequately take into account the best interests of Mr. Jaballah's children as required under section 25.

For these reasons, the decision of the Minister's delegate to refuse the application for protection was not lawfully made and was set aside. No decision was made with respect to the reasonableness of the Ministers' certificate pending a decision by the Minister or his delegate on reconsideration of the application for protection.

statutes and regulations judicially

considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 7.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36, Art. 1.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18.1(4) (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27).

Immigration Act, R.S.C., 1985, c. I-2.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(3)(f), 25, 34(1)(b),(c),(f), 77 (as am. by S.C. 2002, c. 8, s. 194), 78, 79 (as am. *idem*), 80, 112, 113(d)(ii), 115(2).

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 172.

International Covenant on Civil and Political Rights, December 19, 1966, [1976] Can. T.S. No. 47.

Regulations Establishing a List of Entities, SOR/2002-284.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6.

cases judicially considered

applied:

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1; 2002 SCC 1; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 156 (CanLII), [2005] 3 F.C.R. 334; 2005 FC 156; *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 355 (CanLII), 2005 FC 355; [2005] F.C.J. No. 437 (QL).

considered:

Jaballah (Re), 2004 FCA 257 (CanLII), [2005] 1 F.C.R. 560; (2004), 242 D.L.R. (4th) 490; 38 Imm. L.R. (3d) 157; 325 N.R. 90; 2004 FCA 257; *Jaballah (Re)*, 2003 FCT 640 (CanLII), [2003] 4 F.C. 345; (2003), 28 Imm. L.R. (3d) 216; 2003 FCT 640; *Sogi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 853 (CanLII), [2005] 3 F.C.R. 517; (2004), 254 F.T.R. 129; 2004 FC 853; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (S.C.C.), [1985] 2 S.C.R. 486; (1985), 24 D.L.R. (4th) 536; [1986] 1 W.W.R. 481; 69 B.C.L.R. 145; 23 C.C.C. (3d) 289; 48 C.R. (3d) 289; 18 C.R.R. 30; 36 M.V.R. 240; 63 N.R. 266; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46; (1999), 216 N.B.R. (2d) 25; 177 D.L.R. (4th) 124; 26 C.R. (5th) 203; 244 N.R. 276; 50 R.F.L. (4th) 63.

referred to:

Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board, 1994 CanLII 114 (S.C.C.), [1994] 1 S.C.R. 202; (1994), 115 Nfld. & P.E.I.R. 334; 111 D.L.R. (4th) 1; 21 Admin. L.R. (2d) 248; 163 N.R. 27; *Vézina v. Canada (Minister of National Revenue -- M.N.R.)*, 2003 FCA 67 (CanLII), 2003 FCA 67; [2003] F.C.J. No. 201 (C.A.); *Cartier v. Canada (Attorney General)*, 2002 FCA 384 (CanLII), [2003] 2 F.C. 317; (2002), 2 Admin. L.R. (4th) 247; 300 N.R. 362; 2002 FCA 384.

APPLICATION for judicial review of the lawfulness of a decision of a Minister's delegate refusing Mr. Jaballah's application for protection made pursuant to section 112 of the *Immigration and Refugee Protection Act*.
Application allowed.

appearances:

Donald A. MacIntosh and Negar Hashemi for applicant Ministers.

Barbara L. Jackman and John R. Norris for Mahmoud Jaballah.

solicitors of record:

Deputy Attorney General of Canada for applicant Ministers.

Barbara L. Jackman and Ruby & Edwardh, Toronto, for Mahmoud Jaballah.

The following are the reasons for order rendered in English by

[1]MacKay D.J.: The Court resumed proceedings, pursuant to subsection 79(2) [as am. by S.C. 2002, c. 8, s. 194] and section 80 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act or IRPA), following the decision of the Federal Court of Appeal in Court file A-287-03 dated July 13, 2004 ([2005] 1 F.C.R. 560).

[2]That decision, on a cross-appeal by Mr. Jaballah, set aside this Court's earlier determination (2003 FCT 640 (CanLII), [2003] 4 F.C. 345 (T.D.), dated May 23, 2003), whereby I found reasonable a certificate dated August 13, 2001, issued jointly by the applicant Ministers, of their opinion that Mr. Jaballah is inadmissible to Canada on specified grounds related to national security.

[3]The decision of the Court of Appeal referred the matter for reconsideration by a designated Judge, as provided by IRPA, together with consideration of the lawfulness of the decision on behalf of the Minister of Citizenship and Immigration (the MCI), dated December 30, 2003, in relation to Mr. Jaballah's application for protection under section 112 of the Act. The latter decision, made under subparagraph 113(d)(ii), refused the application on the basis that despite the assessment that Mr. Jaballah is at substantial risk of death or torture if he is returned to his own country, Egypt, the extraordinary danger he poses to national security of Canada requires that he not be allowed to remain in and that he be removed from this country. No country other than Egypt was suggested as a potential destination if Mr. Jaballah were to be removed from Canada.

[4]This matter was assigned to me for consideration as a designated judge under IRPA. The Court ordered, as suggested by the Court of Appeal, adjournment of a scheduled hearing of Mr. Jaballah's application (Court file IMM-184-04) for judicial review of the lawfulness of the decision on his application for protection. With co-operation of counsel, including new counsel for Mr. Jaballah, submissions on the lawfulness of the decision, which refused his application for protection were heard in Toronto on August 16, 2004 pursuant to section 80 of the Act. A number of issues were then raised on behalf of Mr. Jaballah, and in February 2005 a further issue, concerning the record before the Minister's delegate and the conclusions reached on that record, was raised on his behalf and dealt with by written submissions.

[5]These are the reasons for my finding that the decision on behalf of the Minister, on the application for protection by Mr. Jaballah, was not lawfully made, and for my order, now filed, quashing that decision and suspending these proceedings in accord with subsection 80(2) of IRPA, to allow the Minister to make a new decision on the application for protection.

The Background

[6]These proceedings have an unusual history. It is summarized in the 2004 judgment of Mr. Justice Rothstein for the Court of Appeal, particularly at his paragraphs 5, 33, 36 and 37, and greater detail may be found in this Court's 2003 decision. It is unnecessary that the background be reviewed here in detail.

[7]I do note that by its decision the Court of Appeal also dismissed an appeal by the respondent Ministers to set aside this Court's decision to treat as a decision of the MCI one made in August 2002, by a pre-removal risk assessment (PRRA) officer, that there are substantial grounds for believing that Mr. Jaballah faces a risk of death or torture if he were returned to Egypt, his country of citizenship. That assessment of risk was accepted, with some apparent reluctance, by the Minister's delegate who determined on December 30, 2003 that Mr. Jaballah's application for protection should be refused.

[8]The latter decision was communicated to Mr. Jaballah early in 2004, and directly to this Court in this proceeding early in August 2004, though notice of the refusal, but not the decision itself, was given to the Court early in 2004. For the record I note that a copy of the decision was included in the application record filed on behalf of Mr. Jaballah in Court file IMM-184-04 whereby he sought judicial review of that decision.

[9]For purposes of the argument on August 16, 2004 in relation to the lawfulness of the refusal, both parties accepted that there is no longer any question that there is substantial risk of death or torture faced by Mr. Jaballah if he were returned to Egypt. Thus, the hearing concerned only the lawfulness of the decision to refuse the application for protection.

[10]In considering the certificate of the applicant Ministers and the decision on behalf of the MCI to refuse Mr. Jaballah's application for protection the Court acts pursuant to the decision of the Court of Appeal, and to the provisions of IRPA. Section 77 [as am. by S.C. 2002, c. 8, s. 194] authorizes the Ministers to sign a certificate that a foreign national, as is Mr. Jaballah, is inadmissible to Canada on grounds of security and to refer that certificate to the Federal Court for a determination, under section 80, of the reasonableness of the certificate. The process to be followed by the judge designated to consider the matter is set out in sections 78-80. In accord with those provisions, I had earlier suspended these proceedings to permit the MCI to decide the application for protection by Mr. Jaballah. My subsequent determination to resume the proceedings, while not directly overturned by the decision of the Court of Appeal, was effectively in suspense pending the decision of the MCI on the application for protection and thereafter while the matter was before the Court of Appeal.

[11]By its order the lawfulness of the refusal decision is now to be considered in accord with subsection 79(2) and section 80 of the IRPA. Those sections provide:

79. . . .

(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*.

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

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

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

[12]Writing for the Court of Appeal in this case, at paragraphs 28, 29, Mr. Justice Rothstein commented, *inter alia*, upon the process provided by sections 79 and 80, as follows:

As I read the relevant provisions, they preclude a resumption of the security certificate proceedings without the judge having received notice of a protection decision. Under subsection 79(2), the resumed proceedings must involve consideration of both the certificate and the protection decision. Under subsection 80(1), there are two determinations to be made by the designated Judge: (1) whether the certificate is reasonable; and (2) whether the protection decision is lawfully made.

. . . this interpretation of subsections 79(2) and 80(1) is supported by the procedure in subsection 80(2). Under subsection 80(2), if the judge finds that a protection decision is not lawfully made, the proceedings in respect of the security certificate are to be suspended until the MCI makes a new decision on the application for protection. In other words, once an application for protection is made the designated Judge cannot decide the reasonableness of the security certificate until he determines that the MCI has made a lawful protection decision.

[13]In accord with the statutory process my first task in this resumed proceeding is to review the lawfulness of the decision on behalf of the MCI in regard to the application for protection made by Mr. Jaballah, taking into account the grounds referred to in subsection 18.1(4) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)], i.e. the statutory grounds for considering an application for judicial review.

[14]In reviewing the decision to refuse the application for protection, the Court accepts that Mr. Jaballah faces a risk of torture within the meaning of Article 1 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [December 10, 1984, [1987] Can. T.S. No. 36] or a risk to his life or a risk of cruel and unusual punishment. Here the remaining issue concerns the delegate's assessment under subparagraph 113(d)(ii) of IRPA that:

113 (d) . . .

(ii) the application should be refused . . . because of the danger that the applicant constitutes to the security of Canada.

[15]As section 172 of the IRPA Regulations [*Immigration and Refugee Protection Regulations*, SOR/2002-227] provides, the process for that determination in a case like this is that:

172. (1) Before making a decision to allow or reject the application of an applicant described in subsection 112(3) of the Act, the Minister shall consider the assessments referred to in subsection (2) and any written response of the applicant to the assessments that is received within 15 days after the applicant is given the assessments.

(2) The following assessments shall be given to the applicant:

(a) a written assessment on the basis of the factors set out in section 97 of the Act; and

(b) a written assessment on the basis of the factors set out in subparagraph 113(d)(i) or (ii) of the Act, as the case may be.

[16]The first of the assessments required by section 172 is of the risk facing the applicant if he were returned to his country, a matter not here in issue. The second assessment in this case requires a determination that the applicant constitutes a danger to the security of Canada, a danger which on balance outweighs the risk of torture or death facing the applicant if he were returned.

[17]In this case the assessments of risk to Mr. Jaballah and of danger to national security of Canada were sent to Mr. Jaballah's counsel on September 19, 2003. There was no responding submission from Mr. Jaballah, though counsel had made submissions on his behalf in his original application for protection. In the absence of further submissions made under subsection 172(1) of the Regulations the Minister's delegate rendered the decision of December 30, 2003, refusing the application.

The decision in question

[18]Here the Minister's delegate, after review of the background, including the risk to Mr. Jaballah if he were returned to Egypt, as determined by the PRRA officer, concluded that Mr. Jaballah poses an extraordinary danger to the security of Canada that outweighs the risk to him and that his application for protection should be refused. This conclusion was said to be based on the information before the decision-maker, both that provided to Mr. Jaballah and the classified information not provided to him, and the determination in my decision of May 23, 2003 that the Ministers' certificate is reasonable in certifying that Mr. Jaballah is inadmissible to Canada on security grounds, pursuant to paragraphs 34(1)(b), (c) and (f) of IRPA. Those grounds, specified for the Minister's opinion that Mr. Jaballah is inadmissible, are because he is believed to be:

34. (1) . . .

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

(c) engaging in terrorism;

. . .

(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).

[19]The delegate concluded that the information provided clearly indicated Mr. Jaballah's membership in a terrorist organization, his continuing close contact, communications and association with members of the leadership of the Egyptian Al Jihad (the "AJ"). That organization has been considered for some time, and was declared by the Government of Canada in July 2002 (SOR/2002-284), to be a terrorist organization. The AJ is believed to be associated with Al-Qaida, and to continue to espouse terrorism and violence.

[20]The Minister's delegate then sought to "determine whether the danger Mr. Jaballah poses to the security of Canada outweighs the risk he faces on return". The decision noted:

. . . I have taken into consideration all the information provided to Mr. Jaballah and his submissions, as well as the classified information that could not be released to Mr. Jaballah. I consider the classified information very compelling, and have given it considerable weight in my balancing decision.

That comment repeats a reference in relation to review of the risk of Mr. Jaballah, earlier in the decision, that:

I have also reviewed the classified material on this case and I have taken it into consideration when making my determination.

[21]In the decision and reasons of the Minister's delegate the conclusion of danger to the security of Canada is restated thus:

I have already stated my conclusion that Mr Jaballah possesses [*sic*] a significant and substantial danger to the security of Canada. He has been actively involved with an organization whose stated aim is to use violence against Egypt, the United States and other countries. Their violent acts have been directed against military, government, diplomatic and civilian targets. I conclude that Mr Jaballah's presence in Canada increases the risk that Canada and its neighbour will become the target of new attacks. Even if he is not directly involved in the attack, his presence in Canada will contribute to the co-ordination and communication aspects of the attack, as well as the recruitment of new members to this terrorist organization.

[22]The decision then refers to the words of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, and incorporates the following passages from that Court's decision [at paragraphs 76-78]:

. . . barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*. To paraphrase Lord Hoffmann in *Rehman, supra*, at para. 54, states must find some other way of ensuring national security.

The Minister is obliged to exercise the discretion conferred upon her by the *Immigration Act* in accordance with the Constitution. This requires the Minister to balance the relevant factors in the case before her. As stated in *Rehman, supra*, at para. 56 *per* Lord Hoffmann:

The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation *seriatim* and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgement, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.

[A reference to the comments of Lord Slynn of Hadley in the Supreme Court's decision as quoted is here omitted.]

In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the *Charter*. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.

We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under section 1.

We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. (A violation of s. 7 will be saved by s. 1 'only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like': see *Re B.C. Motor Vehicle Act, supra*, at p. 518; and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46, at para. 99.)

[23]For the record I note two aspects of the quotations from the Supreme Court's decision in *Suresh* by the

Minister's delegate. First, no doubt simply by clerical error, the decision quotes as a separate unnumbered paragraph before paragraph 78 as quoted above, the first sentence of that paragraph 78. The effect may be to give undue emphasis to the Supreme Court's acknowledgement that the possibility is not excluded, in exceptional circumstances, of deportation to face torture. In addition, by commencing the quotation from the Supreme Court decision near the end of its paragraph 76 the Minister's delegate omitted words which, in my view, provide context for the passages quoted. The words omitted are these:

The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categorical. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, . . . [here continues the words quoted by the Minister's delegate from paras. 76, 77 and 78 of the Supreme Court's decision].

[24]The conclusion reached by the Supreme Court is restated at paragraph 129 of its decision, as follows:

We conclude that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the *Charter's* s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss. 7 or 1 of the *Charter*.

While those words concern deportation of a refugee, they are equally apt, in my view, to the deportation of a foreign national, since in this country every individual has the benefit of the Charter's [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] section 7 guarantee.

[25]After quoting portions of the Supreme Court's decision in *Suresh*, the Minister's delegate stated, in weighing the risk to Mr. Jaballah, if he be deported, and the danger to Canadian security if he remains in Canada:

I believe that the exceptional circumstances envisioned by the Supreme Court clearly apply in this case. The weight given to the danger posed by Mr. Jaballah must outweigh the risk to Mr. Jaballah in my deliberation.

Mr. Jaballah poses a direct and exceptional threat to Canada. Based on my review of the record, I am satisfied that Mr. Jaballah is an active member of the organization Al Jihad that, in the pursuit of its aims, has deliberately caused devastating loss of life. I believe that Al Jihad has significant links to Al Qaida. Among other things, Al Jihad has been linked to terrorist bombings in Pakistan, Kenya, Tanzania and Yemen, which have targeted citizens of Egypt and the United States, but which have also indiscriminately killed and injured many others. Hundreds of people have been killed and thousands injured in these terrorist attacks. I am satisfied that Mr. Jaballah has personally played a significant role in the East Africa bombings. He has been linked to specific actions of this organization, and has been in ongoing contact with the highest level of the organizational leadership before and after his arrival in Canada. Mahjoub, who is the subject of a security certificate that has already been found reasonable, was found to have Jaballah's telephone number on his person when detained. Since his arrival in Canada, Jaballah has continued to actively participate in the activities of this organization, specially in the area of communication, and in the recruitment of new members. He has maintained contact with like-minded individuals in Canada. Al Jihad and Al Qaida continue to attack military, diplomatic and civilian targets around the world. There is a real and significant threat to Canada and her allies. The majority of countries with which Canada works at the United Nations and in other multinational forums oppose these organizations, their aims, their methods and their actions. Mr. Jaballah's continued presence in Canada threatens the lives of Canadians and their allies.

The extraordinary danger Mr. Jaballah poses to the security of Canada requires that he not be allowed to remain in Canada, despite the risk to him of returning to Egypt.

[26]Following that conclusion, the Minister's delegate then turned to consider "limited submissions", made for Mr. Jaballah in his application for protection, concerning potential separation of Mr. Jaballah's family if he were deported to Egypt, including reference by his then counsel to *Baker*, (i.e., *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817) and to section 25 of the IRPA. The latter provision requires the Minister, upon request of a foreign national who is inadmissible to Canada, to

examine the circumstances and determine whether to grant exemption from provisions of the Act on the basis of humanitarian and compassionate considerations, taking into account the best interests of a child directly affected.

[27]The decision acknowledges that Mr. Jaballah and his wife have six children, two of whom were born in Canada, one in Pakistan and three in Egypt, but it makes no reference to the refugee status of Mr. Jaballah's wife and their four children born outside Canada. The delegate then concluded:

While it is true that the Canadian born children can remain in Canada as of right, it is also true that they could accompany their parents and siblings when they leave Canada. I cannot therefore conclude that the deportation of Mr. Jaballah would necessarily result in the separation of the family. Mr. Jaballah has been detained apart from his children for some time; I cannot therefore conclude that Mr. Jaballah's removal from Canada would deprive his children of his emotional and financial support any more than his current detention has. I see no reason to depart from my conclusion that Jaballah should not be allowed to remain in Canada, given the security concern that Mr. Jaballah represents to Canadians.

[28]The decision in question then concludes with the delegate's opinion, "pursuant to paragraph 113(d) of the *Immigration and Refugee Protection Act*, that the application for protection should be refused on the basis of danger to security of Canada."

Issues Raised

[29]In written and oral submissions, seeking to have set aside the decision rejecting the application for protection, Mr. Jaballah raises the following issues: whether the Minister's delegate erred in concluding:

(i) that Mr. Jaballah's circumstances are exceptional, sufficient to justify his deportation to torture even though that would violate Mr. Jaballah's rights, under section 7 of the Charter in a manner not saved by section 1, and contrary to Canada's obligations under international and domestic law which, it is urged, preclude deportation to torture in any case;

(ii) that the circumstances considered by the Minister's delegate do not support the conclusion that the danger to national security of Canada outweighs the risk of torture or death facing Mr. Jaballah if he were deported, and the decision ignored relevant factors; and

(iii) unreasonably, in that the best interests of Mr. Jaballah's children would not be adversely affected by his deportation, any more than the current circumstances, with him in detention, now do, a conclusion which, it is urged, ignores relevant factors.

(iv) Finally, a fourth issue, raised in January 2005 before my decision was filed in this matter, concerns submissions on behalf of Mr. Jaballah that the danger finding, i.e. that he is a danger to the national security of Canada, which outweighs the risk of torture he faces if returned to Egypt, was not lawfully made by the Minister's delegate in view of reliance placed on classified information, in this case a security intelligence report (SIR), a CSIS (Canadian Security Intelligence Service) document available to the decision-maker but without documents upon which that report was based. Neither the report nor its reference documents were provided to Mr. Jaballah.

[30]After careful consideration of the issues discussed, I decline to determine important constitutional questions arising with the first issue, since this stage of these proceedings can be resolved, pursuant to subsection 80(2) of the Act, on other grounds. Hereinafter, I comment briefly on the applicable standard of review, and I deal with the fourth issue raised as a preliminary procedural issue concerning the record before the Minister's delegate and the manner in which it was considered. I turn then to the second and third issues outlined above. My determination of those last three issues provide the reasons for my disposition of this application. I do suggest however, clearly as *obiter dicta*, considerations that may be borne in mind in reconsideration of Mr. Jaballah's application for protection.

The standard of review

[31]For the Ministers it is urged that the standard of review of the determination that a person constitutes a danger to the security of Canada is patent unreasonableness, in reliance upon the Supreme Court's decision in *Suresh*, at

paragraphs 29, 32-34. I agree that standard is applicable where the determination questioned is, in the main, a factual matter, supported by the evidence before the decision maker. In *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 334 (F.C.), Madam Justice Dawson commented [at paragraph 42]:

Both the decision whether Mr. Mahjoub constitutes a danger to the security of Canada and the decision whether Mr. Mahjoub faces a substantial risk of torture if deported to Egypt are in large part fact-driven inquiries. As such, the Court must adopt a deferential approach to these questions, and intervene to set aside the delegate's decision only if patently unreasonable. This means that, in order for the Court to intervene, it must be satisfied that the decision was made arbitrarily, or in bad faith, or without regard to the appropriate factors, or the decision cannot be supported on the evidence. The Court is not to re-weigh the factors considered or interfere simply because the Court would have reached a different conclusion. See: *Suresh*, at paragraphs 29 and 39.

[32]In this case, however, much of the argument of the applicant concerns alleged errors of law made in reaching the conclusions, errors of the sort suggested by Madam Justice Dawson as a basis for the Court's intervention. To the extent those have significance the standard of review is correctness. The standard applicable will depend on the issue in question, as subsection 18.1(4) of the *Federal Courts Act*, here applicable, provides.

The record before the delegate and its treatment

[33]Late in these proceedings in February 2005 the Court received submissions on behalf of Mr. Jaballah and the applicant Ministers concerning the record, i.e. the information, before the Minister's delegate and the manner in which that was considered. The circumstances here were said to be similar to those found wanting in *Mahjoub*, by Madam Justice Dawson. In that case she commented [at paragraphs 48-49]:

Turning to my reasons for this conclusion, first, *Suresh* makes it clear that a conclusion with respect to "danger to the security of Canada" requires evidence of a serious threat to national security. While the delegate referred to the security intelligence report and "the evidence it presents", there was only the narrative prepared by CSIS before the decision-maker. She lacked the confidential reference appendices to the security intelligence report that set out the detailed information relied upon by CSIS. Without that information, the delegate could make no independent and proper assessment of the degree to which Mr. Mahjoub poses a threat to Canada's security.

Second, to the extent that the delegate relied upon the opinion or conclusions of CSIS and Mr. Justice Nadon, neither the security intelligence report prepared by CSIS, nor the decision of Justice Nadon, were directed primarily to assessing the nature or extent of the risk to national security posed by Mr. Mahjoub. Neither was directed to assessing the seriousness of the danger to Canadian security that Mr. Mahjoub may present.

[34]In this case, it became clear that the record before the delegate included the SIR, i.e. the narrative report by CSIS of its grounds for believing Mr. Jaballah is inadmissible to Canada, without the reference documents or appendices footnoted in that report. Included in the record also were the public summary statements of August 14, 2001 and February 5, 2002 based on the SIR and testimony in public by a CSIS officer, released as public documents to Mr. Jaballah by order of this Court in earlier proceedings concerning the reasonableness of the Ministers' certificate. I note that any reference documents or appendices footnoted in those summaries were apparently not provided to the Minister's delegate even though copies of those documents had been provided to Mr. Jaballah's counsel on August 14, 2001.

[35]The decision in *Mahjoub* has since been followed in respect of the same evidentiary issue by Mr. Justice Blanchard in *Almrei v. Canada (Minister of Citizenship and Immigration)* (2005), 262 F.T.R. 7 (F.C.) (see paragraphs 14 and 86).

[36]I note that in the *Mahjoub* and *Almrei* decisions the Courts concerned were dealing with decisions made pursuant to subsection 115(2) of the IRPA applicable to Convention refugees as both Messrs. Mahjoub and Almrei were, and thus they were already qualified as persons in need of protection under IRPA. Here the decision in question was made pursuant to subparagraph 113(d)(ii) of IRPA for consideration of an application for protection by a foreign national, as Mr. Jaballah is. While the two provisions relate to differently qualified persons, the essence of the decisions required in both cases is the same, in my opinion. Failures in proper process under subsection 115(2) have equal significance for the process under subparagraph 113(d)(ii). I agree with Mr. Jaballah's argument that the process in *Mahjoub* and *Almrei* was found inadequate to support an independent

assessment by the Minister's delegate of the danger the person in question posed to the security of Canada. So the similar process in this case would be inadequate to support an independent assessment.

[37]The applicant Ministers here urge, as they appear to have urged in *Almrei* (at paragraph 89) that in this case the record before the Minister's delegate contains overwhelming evidence that would have supported the delegate's assessment that Mr. Jaballah constitutes a danger to the security of Canada. It is urged that in the exercise of judicial discretion in this review the Court can disregard an error where the delegate, properly instructed, would inevitably come to a similar decision if the matter were referred for reconsideration. Cases cited in support of that submission include *Mobile Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (S.C.C.), [1994] 1 S.C.R. 202, at page 228 and a number of decisions of the Court of Appeal, most recently *Vézina v. Canada (Minister of National Revenue--M.N.R.)*, 2003 FCA 67 (CanLII), 2003 FCA 67, at paragraph 7; and *Cartier v. Canada (Attorney General)*, 2002 FCA 384 (CanLII), [2003] 2 F.C. 317 (C.A.), at paragraphs 30-36.

[38]I am not persuaded the circumstances of this case warrant prediction of an inevitable similar outcome if this matter be referred for reconsideration. While there may be evidence that supports the conclusion of the delegate, the Court would usurp the statutory decision maker's responsibility if it were to assume that a similar outcome is inevitable if there is reconsideration of the application for protection. Here the ultimate issues are basically factual and the determination of those must be left to the Minister or his delegate.

[39]The circumstances of this case relating to the record and its consideration by the Minister's delegate, are not materially different from those in *Mahjoub* and *Almrei*. As a matter of judicial consistency and comity, I follow the decisions in those cases on this ground.

The indeterminate weight given to factors not properly considered

[40]That conclusion is supported by my difficulty in assessing the weight and significance of two factors relied upon for the delegate's decision. Those factors are this Court's earlier determination that the Ministers' certificate is reasonable, and the reliance on the SIR without the reference or appendix documents on which it was based. Whatever the weight assigned to these, it now appears to have been misplaced.

[41]In assessing the danger Mr. Jaballah presents to the security of Canada the decision relies in part upon this Court's earlier determination that the Ministers' certificate is reasonable as conclusive proof Mr. Jaballah is inadmissible on security grounds. At the time that statement was apt, but it is no longer so. Though that determination may again be made, my original decision was struck down by the Court of Appeal. It is true that the appeal decision was after the delegate's decision here in question, but quashing my determination means that it cannot now be a finding to support the delegate's decision. Moreover, as the decisions in *Mahjoub* and *Almrei* make clear, any determination that the Ministers' certificate is reasonable is not, in itself, a finding that Mr. Jaballah constitutes a danger to the security of Canada.

[42]The second factor is the weight assigned to the classified information considered by the delegate who refers to it as "very compelling" and gives considerable weight to it particularly in balancing the risk facing Mr. Jaballah and the danger his presence in Canada creates for national security. As earlier noted that classified information was a SIR, a CSIS summary of information available to it and to the Ministers, but only the narrative report without its reference or appendix documents was provided to the delegate. I note that in this case, in earlier proceedings concerning the certificate Mr. Jaballah presented no evidence to contradict the evidence on the public record, available to him, of new events and circumstances of concern to the Ministers since their first certificate was quashed. The evidence of new circumstances was provided by the public summary and reference documents released August 14, 2001, the testimony in public of a CSIS officer, and by the supplementary summary statement issued by directions of this Court on February 5, 2002. The Minister's delegate might have relied on the public record in this case, but the decision indicates otherwise. In review of the decision it is not now possible, or appropriate, for the Court to ignore the delegate's acknowledged reliance on information other than that in the public record, which information was not original source documents.

[43]Under subparagraph 113(d)(ii), applicable in Mr. Jaballah's case, the basis of refusal is to be "because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada." Only the latter was assessed by the delegate and no assessment is made of the nature and

severity of acts by Mr. Jaballah. In my opinion, there is not any adequate assessment of the danger he constitutes to Canadian security. In the words of Madam Justice Simpson in *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 517 (F.C.), at paragraph 20, where a similar assessment was made "These conclusions may well be accurate but, in *Suresh*, the Supreme Court of Canada made it clear that, before deciding to return a refugee to torture, there must be evidence of a serious threat to national security. . . the Deportation Decision does not adequately define and explain the Threat." Similarly, here the assessment of the Ministers' certificate as reasonable, and review of factors upon which the certificate indicated grounds for concluding Mr. Jaballah is inadmissible to Canada, does not adequately define and explain the danger to Canada.

Relevant circumstances ignored

[44]In assessing "exceptional circumstances" that would justify Mr. Jaballah's deportation to face torture, the decision of the Minister's delegate relies upon the terrorist activities of the AJ and its link to Al Qaida, and Mr. Jaballah's association with some AJ activities and some leaders of AJ, to reach the conclusion that his presence in Canada constitutes an extraordinary danger to the security of Canada. There is no reference to circumstances facing Canada or its security, other than the conclusion that it is endangered by Mr. Jaballah's presence in Canada.

[45]In *Suresh*, at paragraph 78, the Supreme Court referred to exceptional circumstances to be established as a ground for justifying deportation to face torture, in terms of "natural disasters, the outbreak of war, epidemics and the like", and the Court referred to its decisions in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (S.C.C.), [1985] 2 S.C.R. 486, at page 518, and in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46, at paragraph 90. The former deals with exceptional circumstances warranting criminal legislation in assessing federal legislative capacity under the distribution of powers between provinces and the federal government. The latter case refers to special circumstances justifying, under section 1 of the Charter, action which otherwise would violate section 7. In both those cases the exceptional circumstances referred to are not those directly related only to the person of concern, rather the circumstances referred to appear to concern those facing Canada as a nation. In this case, the Minister's delegate makes no reference to such circumstances except as the reader may infer, that Mr. Jaballah presents a continuing danger to national security. While I agree that *Suresh* should not be read as limiting exceptional conditions to those suggested as illustrations, the decision here in issue fails to assess conditions facing Canada as a nation that would warrant exception from section 7 protection, either in the balancing of fundamental rights or in the examination of evidence to support an exception based on section 1 of the Charter.

[46]The conclusion that Mr. Jaballah constitutes a danger to Canada appears based on the assumption that Mr. Jaballah's continued presence in Canada would be without supervision or restraint. In fact, since 1999 he has spent more than four years in detention, some, if not all of that, in solitary confinement, during which he has presumably had no contact with AJ, or with anyone other than persons permitted by his keepers. During the limited periods he was free from physical restraint he was not free from observation or interviews by Canadian authorities. Those or any other circumstances limiting his freedom in this country are not considered at all in assessing the danger he poses to the security of Canada.

[47]In my view, it was an error in law to fail to consider certain factors relevant to a determination that Mr. Jaballah constitutes a danger, that is a potentially serious threat, to Canadian security (see *Suresh*, at paragraphs 88-91).

Mr. Jaballah's family

[48]Consideration of humanitarian and compassionate circumstances of Mr. Jaballah's family was requested by his counsel, albeit with minimal supporting submissions. Yet it was required in accord with *Baker* and with section 25 of IRPA. Whether humanitarian and compassionate consideration of his family circumstances was appropriate here was assumed. Yet, consideration here given made no direct reference to implications for the family from Mr. Jaballah's removal to face torture or death. It made no reference to the status of Mr. Jaballah's wife and their four children born abroad, as refugee claimants in Canada, information that would have been available to the Minister or the Minister's delegate from immigration files. There was no consideration that one of those children, born in Pakistan, may have no status in Egypt.

[49]In my view the consideration here given was not that specifically required under section 25 of "the best

interests of a child directly affected." Whatever their status in Canada, simply to conclude, as the decision does, that Mr. Jaballah's "proposed deportation from Canada would not deprive his children of his emotional and financial support any more than his current detention has", implicitly ignores the substantial risk of death or torture facing Mr. Jaballah if he be deported to Egypt, and the effect that may be expected to have upon his family members, including children born in Canada or in Pakistan. Those were matters not assessed or referred to by the decision.

[50]Simply put the decision, in my opinion, does not adequately take into account the best interests of any of Mr. Jaballah's children, who would be directly affected by a decision that he is, or is not, a person in need of protection at this time.

Summation and conclusion

[51]I consider the Minister's delegate erred in law by undue reliance on certain matters, i.e., my earlier decision that the Minister's certified opinion is reasonable, a decision quashed by the Court of Appeal, and the weight given to a summary secret narrative report (not released to Mr. Jaballah) without access for the delegate to the reference documents on which it is based. Further, by failing to describe the danger to Canada's security that Mr. Jaballah is said to represent, by failing to consider as a factor the effect of his continued restraint in one form or another while he remains in Canada, and by failing to consider adequately the best interests of his children, the Minister's delegate erred.

[52]In this case I find that the decision maker erred in law within subsection 18.1(4) of the *Federal Courts Act*, or to express it differently, that the ultimate decision to refuse the application for protection was patently unreasonable based upon a finding of facts made without appropriate regard to the all of the evidence and circumstances of the case.

[53]I appreciate that the Minister or his delegate have a difficult task. If it is to be lawful within subsection 79(2) the decision on the application for protection must be made in accord with the law, and the reasons to support the decision must be articulated, both in assessing the danger that Mr. Jaballah's presence in Canada constitutes to our national security, and in seeking to balance the danger so identified and the threat to Mr. Jaballah that his deportation to torture would create.

[54]I have not here dealt with the arguments of the parties concerning the implications of Canada's obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) in light of the enactment of IRPA. A general discussion of the Refugee Convention [*United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6] and the *International Covenant on Civil and Political Rights* [December 19, 1966, [1976] Can. T.S. No. 47], and of the possible recognition of a prohibition against deportation to torture as a peremptory norm of international law, is found in the Supreme Court's decision in *Suresh*, at paragraphs 59-75. The issues were discussed at some length in this case, and briefly referred to by my colleagues, Dawson J. in *Mahjoub*, at paragraphs 64-65 and Blanchard J. in *Almrei*, at paragraphs 97-102, both clearly as *dicta*.

[55]While Mr. Jaballah's submissions are not without merit, I am not satisfied that the matter was fully argued before me, particularly in light of the chronology of decisions, by the Supreme Court in *Suresh* (concerning the previous *Immigration Act* [R.S.C., 1985, c. I-2]), the enactment by Parliament and coming into force of IRPA and the full implications of Parliament's inclusion of paragraph 3(3)(f) of the IRPA that "[t]his Act is to be construed and applied in a manner that . . . (f) complies with international human rights instruments to which Canada is signatory."

[56]In my opinion, for the reasons set out, the decision of the Minister's delegate to refuse the application for protection was not lawfully made and is now set aside by separate order. I do not make any decision with respect to the reasonableness of the certificate of the Ministers at this time. In accord with subsection 80(2) of the IRPA, I suspend further consideration of that matter, pending a decision by the Minister or his delegate on reconsideration of the application for protection.

by  for the  Federation of Law Societies of Canada