

# Charkaoui v. Canada (Minister of Citizenship and Immigration), 2004 FCA 421 (CanLII)

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

A-603-03

2004 FCA 421

**Adil Charkaoui** (*Appellant*)

v.

**The Minister of Citizenship and Immigration and the Solicitor General of Canada** (*Respondents*)

Indexed as: Charkaoui (Re) (F.C.A.)

Federal Court of Appeal, Richard C.J., Décary and Létourneau J.J.A. -- Ottawa, November 8 and December 10, 2004.

*Citizenship and Immigration -- Exclusion and Removal -- Removal of Permanent Residents -- Appeal from Federal Court decision dismissing application to have Immigration and Refugee Protection Act (IRPA), ss. 33, 77 to 85 declared unconstitutional -- Appellant suspected member of terrorist organization -- Arrested, detained under IRPA, s. 82 -- Respondent Ministers referring security certificate to Federal Court, attesting appellant inadmissible on security grounds under IRPA, ss. 33, 34, 77 -- Ministers asking designated judge to determine whether certificate reasonable -- Permanent resident status revocable on grounds of inadmissibility under IRPA, ss. 33 to 46 -- "Reasonable grounds" standard requiring more than suspicions, subjective belief on part of person relying on them -- Must be real, serious possibility injurious facts alluded to in ss. 34 to 37 would occur -- Detention of permanent resident awaiting determination of reasonableness of security certificate not unjustified measure where proof of danger to national security.*

*Federal Court Jurisdiction -- Whether designated Judge has jurisdiction to examine constitutional questions raised in judicial examination under IRPA, ss. 76 to 85 -- Case law under former Immigration Act reviewed -- IRPA, ss. 3(3)(d), 78(c) not altering jurisdiction of designated judge, not attributive of new jurisdiction -- "Designated judge" not second-rank judge invested with fewer powers than non-designated judge -- General expertise as judge enhanced, not diminished, by specialization as designated judge -- Parliament intending Court, at highest level, would hear, determine questions related to national security -- Decision on constitutional validity of IRPA related to jurisdiction of Court, not reasonableness of certificate -- Separate, divisible judicial act, therefore appealable -- Court also having jurisdiction to hear constitutional challenges of statutory provisions in context of judicial review proceeding -- Designated Judge had jurisdiction to determine constitutional questions put before him, did not commit reviewable error by doing so in context of motion.*

*Constitutional Law -- Charter of Rights -- Life, Liberty and Security -- Appellant arguing IRPA, ss. 77, 78 contravene rights under Charter with respect to fair trial before independent, impartial tribunal -- Cumulative impact of many factors considered -- Procedure by which designated judge reviews reasonableness of security certificate not contravening Charter, s. 7 -- Individual right to liberty, security of person can only be exercised within institutional framework, social order that commands respect, respected -- Notions of "reasonable grounds", "danger to the security of Canada" not vague, overly broad -- Provisions relating to preventive detention of*

*appellant while awaiting determination on reasonableness of security certificate meeting requirements of Charter, Canadian Bill of Rights.*

*Judges and Courts -- Jurisdiction of designated Judge, appropriate procedure under IRPA, ss. 76 to 85 -- Under former Immigration Act, delegated judge assigned two specific mandates: to examine reasonableness of certificate, to order release -- IRPA, s. 80 giving designated judge third mandate: to determine whether Minister's decision on application for protection, filed under s. 112(1), "lawfully" made -- Limiting judge's role to verifying reasonableness of security certificate not new -- Process of judicial review of decisions by government, federal agencies limited to verifying legality of decisions, not compromising independence, impartiality of court -- Designated judge having pro-active role in ensuring fairness -- Designated judge, not Ministers, determining need to withhold information from party named in certificate -- Thus, role of judiciary as interpreter of law, defender of Constitution, unchanged -- Judicial independence from government influence, other sources, including public opinion, constitutional right of every individual in Canada -- Strict duty on counsel to advance all information in its possession, both favourable, unfavourable.*

This was an appeal from a Federal Court decision dismissing an application to have sections 33 and 77 to 85 of the *Immigration and Refugee Protection Act* (IRPA) declared unconstitutional. The appellant, a permanent resident of Canada since 1995, was arrested and detained in May 2003, pursuant to a security certificate referred to the Federal Court in accordance with section 77 of that Act. The security certificate, signed by the Minister of Citizenship and Immigration and the Solicitor General of Canada, attested that the appellant was inadmissible on security grounds within the meaning of sections 33, 34 and 77 of the IRPA. They had reasonable grounds to believe that the appellant is a member of the terrorist organization of Usama bin Laden and that he was engaged in terrorist activities. By referring a security certificate to the Federal Court, the respondents asked a designated judge to hold a hearing to determine whether the certificate was reasonable. The designated Judge concluded that the request that he hold a hearing *ex parte* and *in camera* was justified by reason of national security. As required by paragraphs 78(g) and (h) of the IRPA, he provided the appellant with some information, the disclosure of which would not be injurious to national security or to the safety of any person. The appellant was given the opportunity to call witnesses and file affidavit evidence. Because of the possibility of fluctuations in national security matters and the discovery of new information, the designated Judge adopted a policy of ongoing disclosure of evidence and information to the appellant. The two main issues were: (1) whether the designated Judge had jurisdiction to examine constitutional questions raised in the context of a judicial examination under sections 76 to 85 of the IRPA; and (2) whether sections 77 and 78 of the IRPA contravene the rights under the [Canadian Charter of Rights and Freedoms](#) (Charter) with respect to a fair trial before an independent and impartial tribunal when, for example, the designated judge must determine the "reasonableness" of the security certificate issued by the ministers and not the merits of the case.

*Held*, the appeal should be dismissed.

*Per* Décaré and Létourneau JJ.A.: (1) As to the first issue, the case law under the former *Immigration Act* established that the designated judge did not have jurisdiction to decide constitutional questions in the context of examining the reasonableness of the certificate, but that he had such jurisdiction in examining the reasons for detention. The situation has evolved under the IRPA. The designated Judge in this case rightly noted that in the absence of any express attribution of jurisdiction, the Court may, because of the function it performs and the structure, powers and processes conferred on it by Parliament, have implicitly been given jurisdiction to grant the Charter relief that is sought. He concluded that the IRPA implicitly gave the designated judge the jurisdiction that was not assigned to him by the former Act. In reaching this conclusion, he relied primarily on paragraph 3(3)(d) of the IRPA, which provides that "This Act is to be construed and applied in a manner that . . . ensures that decisions taken under this Act are consistent with the [Canadian Charter of Rights and Freedoms](#)", and the English text of paragraph 78(c) of the IRPA, which states that the judge "shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit". But these provisions do not alter the jurisdiction of the designated judge for the purposes herein. Paragraph 3(3)(d) is a routine provision and is not attributive of any new jurisdiction. The English text of paragraph 78(c) does not confer any new jurisdiction, either. It simply means that the designated judge hears the matter, which includes the ancillary questions of proof and procedure, informally and expeditiously, and confirms that section 78 is addressed to procedure and not jurisdiction.

The concept of "designated judge" has been distorted by the case law. Parliament's intention was not to make the "designated judge" a second-rank judge invested with fewer powers than a non-designated judge, but to ensure the presence of judges who are sufficiently informed to hear matters pertaining to national security. It is an added value, for a judge of the Federal Court, to be a designated judge, and his general expertise as a judge is enhanced,

not diminished, by his specialization as a designated judge. Moreover, the expression "designated judge" is misleading in that it disguises the fact that the judge is a representative of the Chief Justice and that it is the Court, not the judge, that renders the decision. Parliament intended, therefore, that it would be the Court, at its highest level moreover, that would hear and determine questions related to national security. Since the Supreme Court of Canada recognized the right of appeal in a revocation of citizenship context in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, the Federal Court of Appeal has recognized the right of appeal from other types of decisions made in the context of a reference. If it is agreed that the designated judge may, in the exercise of the powers conferred by sections 80 and 83 of the IRPA, make some decisions that are subject to appeal, there should be no further question as to his jurisdiction to make them. A decision on the constitutional validity of the IRPA has to do with the jurisdiction of the Court, not the reasonableness of the certificate. It constitutes a separate and divisible judicial act and is consequently appealable. As to legislative changes, the delegated judge was assigned two specific mandates under the former Act: to examine the reasonableness of the certificate and to order, in the circumstances described in subsection 40.1(9), the release. Section 80 of the IRPA gives the designated judge a third mandate: to determine whether the Minister's decision, on an application for protection filed under subsection 112(1), is "lawfully" made. If lawfulness is the issue, it is a question of law, which includes constitutional questions. If a designated judge now has explicit jurisdiction to decide constitutional questions in the exercise of one of the three mandates conferred on him by the IRPA, it is not unreasonable to think that Parliament, by implication, intended that he also have this jurisdiction in the exercise of the other two.

As to whether the designated judge may decide constitutional questions by way of a motion instead of by way of an action or an application for judicial review, it was noted that the review of the reasons for detention is conducted in the general context of the application for judicial review of the reasonableness of the certificate that the Ministers must refer to the Federal Court under subsection 77(1). It is the Ministers, therefore, and not the permanent resident, who bring the matter before the Court. This is a *sui generis* proceeding. Therefore it is governed by the rules applicable to actions: rule 169 of the *Federal Court Rules, 1998*. The Court also has jurisdiction to hear constitutional challenges of statutory provisions in the context of a judicial review proceeding. It would be contrary to the interests of justice to force litigants to undertake parallel proceedings based on a single decision. In challenging his detention, the appellant was simply pleading in his defence that some provisions of the IRPA are unconstitutional. Logically, this defence ought to be arguable by a motion within the framework of the original proceeding without the need to initiate a parallel proceeding or to open a new file. This motion is an independent and distinct proceeding that, by its nature and effects, escapes the rules of procedure established for the original proceeding and for the presentation of ordinary motions. In some ways, it is a mini-trial within a trial which can, as in this case, take the form of an ordinary motion. The designated Judge had jurisdiction to determine the constitutional questions that were put before him and he did not commit any reviewable error by doing so in the context of a motion.

(2) The appellant invoked the cumulative effect of a number of factors which would deprive him of the the right to a fair and equitable hearing by an impartial and independent tribunal.

First, the appellant said that the decision that led to his inadmissibility was taken by the executive and not by a judge. There is nothing unlawful, still less abnormal, in a decision of public interest being taken by a minister of the government who is responsible for enforcing the statute under which that decision was made. As legislators or as members of the executive, it is the elected parliamentarians, representatives of the population, who are vested with the power to manage and administer the public interest and security. The independence of the judiciary has not been violated by Parliament empowering the Ministers to make a decision regarding the admissibility of a permanent resident on grounds of security and by its subjecting this decision to review by a designated judge. This complaint of the appellant was without merit, unfounded and consequently of no effect.

Second, it was said that the judge's role is improperly and unjustly limited to verifying the reasonableness of the security certificate when he should be assessing its merits. There is nothing novel or exceptional in Parliament's approach: the entire process of judicial review of decisions by government or federal agencies is limited to verifying the legality of these decisions, that is, verifying their compliance with the law. Where a decision is not in compliance, the matter must be sent back for redetermination, this time in compliance with the dictates of the law. This process does not compromise the independence and impartiality of the court or tribunal. In discussing the burden and standard of proof applicable to the exercise of the inadmissibility, arrest and continued detention powers, the designated Judge was saying that the evidence need not establish with certainty, or beyond a reasonable doubt, the existence of the facts that were put before him. Paragraph 78(j) of the IRPA gives the designated judge the power to receive evidence and consequently, the power to assess its truthfulness, reliability and credibility. That is what, in this case, the designated Judge understood about the duties assigned to him; it is what he clearly stated and described and it is precisely the exercise in which he engaged. The

unconstitutionality alleged by the appellant in this regard had no factual basis or legal foundation.

The appellant also argued that the decision of the designated judge was made on the basis of secret evidence to which he did not have access, that he did not obtain a summary of the information that was not disclosed to him, and that there was no means for him to test the validity and credibility of this information and thus to refute it. These three factors, which were discussed together, raised the question: does the special process established by Parliament to determine whether the executive's denial of access to Canada of a permanent resident, his arrest and detention are justified, comply with the principles of fundamental justice? While some evidence that is not disclosed to the appellant may be used by the designated judge in making his decision, generally, the evidence will be comprised of various elements most of which will have been disclosed or given to the person covered by the security certificate, either in whole or in the form of a summary that will allow him to gain reasonable knowledge of the content, nature and scope of the evidence. Throughout the process, the designated judge plays a pro-active role in the interest of ensuring fairness. In the exercise of this role, the judge has the power to order that documents be turned over, obliterating only those passages that, for example, might reveal the identity of a source or compromise its security or endanger national security. While it is harder for the appellant to test the validity and credibility of the information that is not disclosed to him, the fact is that he is assisted in this task by the designated Judge who has the heavy responsibility of maintaining a balance between the parties and accordingly, respect for the principles of fundamental justice. In *Sogi v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal held that as long as the availability of judicial review provides the appellant with an opportunity to have a Federal Court judge decide the propriety of keeping the information confidential, the IRPA procedure must also be found to be in accordance with the principles of fundamental justice. In the present case, the appellant had that opportunity since the request for review of the protected information was brought before a judge of the Federal Court following the referral of the security certificate in accordance with section 77 of the IRPA. He contended that the decisions in *Ahani v. Canada (Minister of Citizenship and Immigration)* (upholding the constitutional validity of *Immigration Act*, section 40.1) and *Sogi* do not apply to the facts in the instant case because he is a permanent resident while, in those two decisions, it was aliens requesting refugee status. The answer to this argument was twofold. First, permanent resident status is revocable on grounds of inadmissibility under sections 33 to 46 of the IRPA. A permanent resident has no absolute right to remain in Canada and this status, by itself, cannot allow him access to information that might compromise national security. Second, the right of access to information that could be harmful to national security by a person who, on reasonable grounds, is believed to have engaged, be engaging or intending to engage in terrorist activities does not depend on that person's legal status. To accept the appellant's position that national security cannot justify any derogations from the rules governing adversarial proceedings would be reading into the Constitution of Canada an abandonment by the community as a whole of its right to survival in the name of a blind absolutism of the individual rights enshrined in that Constitution. The individual right to liberty and the security of the person can only be exercised within an institutional framework or social order that commands respect and is respected. The appellant's arguments based on those factors did not have a cumulative impact that would enable the Court to conclude that the process established by Parliament is constitutionally invalid.

Another factor invoked by the appellant was that the standard of evidence adopted by Parliament to justify the issuance of a security certificate is too minimal, since it is enough to have reasonable grounds to believe that the acts described in section 34 have occurred, are occurring or may occur. The "reasonable grounds" test is generally the standard used for the institution of prosecutions for blameworthy acts and for the exercise of preventive or investigative powers. This standard requires more than suspicions, and more than a mere subjective belief on the part of the person relying on them. The existence of reasonable grounds must be established objectively, that is, a reasonable person, placed in similar circumstances and with the same facts, would arrive at the same belief. According to the case law, the "reasonable grounds" standard, applied to past or current wrongful acts, is not too minimal or weak a standard. It is sufficient. The designated Judge was right in finding that there ought to be a serious possibility that the facts might occur and that this serious possibility should be assessed on the basis of reliable, credible evidence. In the case at bar, there must be a real and serious possibility that the injurious facts alluded to in sections 34 to 37 would occur. When the notion of "possibility" is defined and circumscribed in that way, and its existence is to be assessed on the basis of reasonable grounds, the statutory standard adopted for preventive intervention to protect national security is not unreasonable or in breach of the principles of fundamental justice. As to the argument that the notions of "reasonable grounds" and "danger to the security of Canada" are vague and overly broad, the Supreme Court of Canada has characterized the reasonable grounds standard as "an important protection" and defined its parameters.

In regard to the notion of "danger to the security of Canada", the Supreme Court of Canada has held that it is not unconstitutionally vague, that it is difficult to define and that the expression must be given a fair, large and liberal interpretation in accordance with international norms. The decision on the reasonableness of the security

certificate issued by the Ministers is the product of a judicial decision made by an impartial and independent judge, at the conclusion of a process that meets the minimum standards of fundamental justice. The appellant's argument based on the consequences of inadmissibility and the absence of a right of appeal from the judge's decision has no impact on the lawfulness of the process surrounding the referral of the certificate and its review in the Federal Court.

The detention of a permanent resident awaiting the determination of the reasonableness of the security certificate issued against him is not an unjustified measure where there is proof of a danger to national security or that he might not appear at the proceedings taken against him. The protection of national security is not a caprice. It is a necessity for the purpose of protecting the social order which allows the exercise and development of the individual rights conferred by the Constitution. This necessity to protect national security can justify derogations from the system or process that normally prevails. The process established for the review of protected information fulfills the minimum requirements of the principles of fundamental justice.

As to other related issues raised in this appeal, the provisions relating to the preventive detention of the appellant while awaiting the determination on the reasonableness of the security certificate meet the requirements of the Charter and the *Canadian Bill of Rights*. The grounds for the detention are serious and limited. They have a close and direct relationship to the objectives of the IRPA, the obligation to ensure the protection of national security and the right of the Parliament of Canada to control the access to and sojourn in Canada of permanent residents. There was also the question of whether the absence of a right of appeal or judicial review of the decisions concerning the reasonableness of the certificate breaches section 96 of the *Constitution Act, 1867*. It is trite law that the right of appeal is a statutory right and that it does not exist absent the appropriate statutory provision. Constitutionally, it is beyond question that Parliament has the power to grant or withhold a right of appeal in immigration matters. Finally, there was no merit in the appellant's argument that the judicial examination procedure under section 77 *et seq.* of the IRPA contravenes the provision of the *International Covenant on Civil and Political Rights*, the *Universal Declaration of Human Rights*, and the *Convention for the Protection of Human Rights and Fundamental Freedoms*. In terms of equality before the courts and tribunals, procedural fairness, judicial independence and impartiality of the courts, the Charter is not outdone by any of the three cited international instruments. It confers rights and guarantees that are for all practical purposes identical. The judicial examination procedure under section 77 *et seq.* is in compliance with it. The same may be said, therefore, in relation to the three international instruments.

*Per* Richard C.J.: Canada has a legitimate and compelling interest in protecting national security. The task of the law is to find ways to maintain national security without unduly sacrificing individual liberties. In order to meet this challenge, Parliament has included provisions in the *Immigration and Refugee Protection Act* which require judicial consideration of the reasonableness of the certificate issued by the Ministers and the protection of information whose disclosure would be injurious to national security or to the safety of any person. Although the initial decision to withhold confidential information is made by the Ministers, this decision thereafter falls under the purview of the designated judge, including the determination of what information is to be placed in the summary given to the person named in the security certificate. It is the designated judge who determines the need to withhold information from the party named in the certificate, not the Ministers. Thus, the role of the judiciary as interpreter of the law and defender of the Constitution remains unchanged. Judicial independence from both government influence and other sources, including public opinion, is a constitutional right of every individual in Canada. By ensuring that decisions regarding the withholding of evidence and information are made by the designated judge and not by the Ministers, the Act endeavours to grant protection to the rights of the party named in the certificate while maintaining national security.

It is also important to focus on the duty of counsel appearing on behalf of the Ministers in an *ex parte* proceeding under section 78 of the Act. Counsel is under a duty of utmost good faith in the representations made to the judge. No relevant information may be withheld. The principle of full and frank disclosure in *ex parte* proceedings is a fundamental principle of justice that has been recognized by the Supreme Court. Counsel has a strict duty to put forward all the information in its possession, both favourable and adverse, regardless of whether counsel believes it is relevant. It is then up to the designated judge to decide whether or not the evidence is material.

statutes and regulations judicially

considered

*An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown*, 1689, 1 Will. &

Mary, Sess. 2, c. 2 (U.K.).

*Canadian Bill of Rights*, R.S.C., 1985, Appendix III, ss. 1, 2.

*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, 9, 10, 11(e), 15.

*Citizenship Act*, R.S.C., 1985, c. C-29, s. 18(1), (3).

*Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], s. 96.

*Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221, Arts. 6(1), 13.

*Criminal Code*, R.S.C., 1985, c. C-46, ss. 487 (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 68; S.C. 1994, c. 44, s. 36; 1997, c. 18, s. 41; c. 23, s. 12; 1999, c. 5, s. 16), 495 (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 75), 506, 507(4), 512 (as am. *idem*, s. 82; S.C. 1997, c. 18, s. 58), 524(1), 525(5), 679(6), 778.

*Federal Court Act*, R.S.C., 1985, c. F-7, s. 18.4 (as enacted by S.C. 1990, c. 8, s. 5).

*Federal Court Rules*, C.R.C., c. 663, RR. 900-920.

*Federal Court Rules*, SOR/98-106 (as am. by SOR/2004-283, s. 2), rr. 61, 69.

*Immigration Act*, R.S.C., 1985, c. I-2, s. 40.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31).

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 3(3)(f), 33, 34, 35, 36, 37, 58(1)(a), 76 "information", "judge" (as am. by S.C. 2002, c. 8, s. 194), 77 (as am. *idem*), 78, 79 (as am. *idem*), 80, 81, 82, 83, 84, 85, 101(2)(b), 112, 113(d)(i),(ii), 115(2)(a),(b), 121(2).

*Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 244(b), 246, 248.

*International Covenant on Civil and Political Rights*, December 19, 1966, [1976] Can. T.S. No. 47, Arts. 12, 13, 14.

*Special Immigration Appeals Commission Act 1997* (U.K.), 1997, c. 68, s. 6.

*Special Immigration Appeals Commission (Procedure) Rules 2003*, S.I. 2003/1034, ss. 34, 35, 36.


*Universal Declaration of Human Rights*, GA Res. 217 A (III), UN GAOR, December 10, 1948, Art. 10.


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applied:

*Canada (Minister of Citizenship and Immigration) v. Tobias*, 1997 CanLII 322 (S.C.C.), [1997] 3 S.C.R. 391; (1997), 151 D.L.R. (4th) 119; 1 Admin. L.R. (3d) 1; 118 C.C.C. (3d) 443; 14 C.P.C. (4th) 1; 10 C.R. (5th) 163; 40 Imm. L.R. (2d) 23; 218 N.R. 81; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 (CanLII), [2003] 2 S.C.R. 504; (2003), 231 D.L.R. (4th) 385; 4 Admin. L.R. (4th) 1; 28 C.C.E.L. (3d) 1; 310 N.R. 22; 2003 SCC 54; *Gwala v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 9349 (F.C.A.), [1999] 3 F.C. 404; (1999), 68 C.R.R. (2d) 48; 157 F.T.R. 161; 3 Imm. L.R. (3d) 26; 242 N.R. 173 (C.A.); *Moktari v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 9385 (F.C.A.), [2000] 2 F.C. 341; (1999), 70 C.R.R. (2d) 133; 12 Imm. L.R. (3d) 12; 250 N.R. 385 (C.A.); *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.); *Kiarelddeen v. Ashcroft*, 273 F.3d 542 (3rd Cir. 2001); *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (S.C.C.), [1992] 1 S.C.R. 711; (1992), 90 D.L.R. (4th) 289; 2 Admin. L.R. (2d) 125; 72 C.C.C. (3d) 214; 8 C.R.R. (2d) 234; 16 Imm. L.R. (2d) 1; 135 N.R. 161.

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*Charkaoui (Re)*, 2003 FCA 407 (CanLII), [2004] 1 F.C.R. 451; (2003), 236 D.L.R. (4th) 91; 315 N.R. 1; 2003 FCA 407; *Charkaoui (Re)*, 2003 FC 882 (CanLII), [2004] 1 F.C.R. 528; (2003), 237 F.T.R. 143; 2003 FC 882; *Baroud (Re)* (1995), 98 F.T.R. 99 (F.C.T.D.); *Suresh v. Canada*  reflex, (1996), 34 C.R.R. (2d) 337; 105 F.T.R. 299 (F.C.T.D.); *Singh v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9065 (F.C.), [1998] 3 F.C. 616; (1998), 149 F.T.R. 49; 47 Imm. L.R. (2d) 68 (T.D.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9083 (F.C.A.), [1998] 4 F.C. 192; (1998), 55 C.R.R. (2d) 157; 47 Imm. L.R. (2d) 1; 229 N.R. 240 (C.A.); *Minister of Indian Affairs and Northern Development v. Ranville et al.*, [1982] 2 S.C.R. 518; (1982), 139 D.L.R. (3d) 1; [1983] 1 C.N.L.R. 12; 44 N.R. 616; [1983] R.D.J. 16; *Canada (Minister of Citizenship*

*and Immigration v. Obodzinsky*, 2002 FCA 518 (CanLII), [2003] 2 F.C. 657; (2002), 224 D.L.R. (4th) 158; 26 Imm. L.R. (3d) 1; 305 N.R. 238; 2002 FCA 518; *Narvey v. Canada (Minister of Citizenship and Immigration)* (1999), 235 N.R. 305 (F.C.A.); *Zündel (Re)*, 2004 FCA 394 (CanLII), 2004 FCA 394; [2004] F.C.J. No. 1982 (QL); *Canada (Attorney General) v. Ribic* 2003 FCA 246 (CanLII), (2003), 185 C.C.C. (3d) 129; 320 N.R. 275 (F.C.A.); leave to appeal to S.C.C. denied; *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 413; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (CanLII), [2002] 4 S.C.R. 3; (2002), 219 D.L.R. (4th) 385; 49 Admin. L.R. (3d) 1; 22 C.P.R. (4th) 289; 7 C.R. (6th) 88; 99 C.R.R. (2d) 324; 295 N.R. 353; 2002 SCC 75; *Sogi v. Canada (Minister of Citizenship and Immigration)* (2004), 36 Imm. L.R. (3d) 1; 322 N.R. 2 (F.C.A.); leave to appeal to S.C.C. denied, [2004] S.C.C.A. No. 354 (QL); *Kiareldeen v. Reno*, 71 F. Supp.2d 402 (D.N.J.1999); *Kiareldeen v. Reno*, 92 F. Supp.2d 403 (D.N.J. 2000); *Ahani v. Canada*  reflex, (1996), 37 C.R.R. (2d) 181; 201 N.R. 233 (F.C.A.); leave to appeal to S.C.C. denied, [1997] 2 S.C.R. v; *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Maaouia v. France* (39652/98), [2000] ECHR 453 (5 October 2000).

referred to:

*R. v. Hynes*, 2001 SCC 82 (CanLII), [2001] 3 S.C.R. 623; (2001), 208 Nfld. & P.E.I.R. 181; 206 D.L.R. (4th) 483; 159 C.C.C. (3d) 359; 47 C.R. (5th) 278; 88 C.R.R. (2d) 222; 278 N.R. 299; 2001 SCC 82; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 6328 (F.C.A.), [1997] 1 F.C. 828; (1997), 142 D.L.R. (4th) 270; 208 N.R. 21 (C.A.); *Canada (Minister of Citizenship and Immigration) v. Dueck* 2002 FCA 20 (CanLII), (2002), 23 Imm. L.R. (3d) 1; 286 N.R. 358; 2002 FCA 20; *Canada (Minister of Citizenship and Immigration) v. Fast*, 2002 FCA 292 (CanLII), 2002 FCA 292; [2002] F.C.J. No. 1036 (QL); *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; *R. v. Lyttle*, 2004 SCC 5 (CanLII), [2004] 1 S.C.R. 193; (2004), 235 D.L.R. (4th) 244; 180 C.C.C. (3d) 476; 17 C.R. (6th) 1; 316 N.R. 52; 184 O.A.C. 1; 2004 SCC 5; *R. v. Storrey*, 1990 CanLII 125 (S.C.C.), [1990] 1 S.C.R. 241; (1990), 53 C.C.C. (3d) 316; 75 C.R. (3d) 1; 47 C.R.R. 210; 105 N.R. 81; 37 O.A.C. 161; *R. v. G. (B.)*, 1999 CanLII 690 (S.C.C.), [1999] 2 S.C.R. 475; (1999), 174 D.L.R. (4th) 301; 135 C.C.C. (3d) 303; 24 C.R. (5th) 266; 63 C.R.R. (2d) 272; 240 N.R. 260; *R. v. Lippé*, 1990 CanLII 18 (S.C.C.), [1991] 2 S.C.R. 114; (1991), 64 C.C.C. (3d) 513; 5 C.R.R. (2d) 31; 5 M.P.L.R. (2d) 113; 128 N.R. 1; 39 Q.A.C. 241.

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Canada. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. *Second Report: Freedom and Security under the Law*, Vol. 1, Ottawa: Supply and Services Canada, 1981.

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APPEAL from a Federal Court decision (2003 FC 1419 (CanLII), [2004] 3 F.C.R. 32; (2003), 253 F.T.R. 22; 38 Imm. L.R. (3d) 56; 2003 FC 1419) dismissing an application by the appellant to have sections 33 and 77 to 85 of the *Immigration and Refugee Protection Act* declared unconstitutional. Appeal dismissed.

appearances:

*Johanne Doyon* for appellant.

*Daniel Latulippe, J. Daniel Roussy* and *J. C. Luc Cadieux* for respondents.

solicitors of record:

*Doyon, Morin*, Montréal, for appellant.

*Deputy Attorney General of Canada* for respondents.

*The following is the English version of the reasons for judgment rendered by*

[1]Dé Cary and Létourneau J.J.A.: By an extensive 77-page decision, dated December 5, 2003, Mr. Justice Simon Noël of the Federal Court, sitting as a designated judge, dismissed the application by the appellant to have sections 33 and 77 to 85 [ss. 77 (as am. by S.C. 2002, c. 8, s. 194), 79 (as am. *idem*)] of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) declared unconstitutional [[2004] 3 F.C.R. 32 (F.C.)]. That

decision is now the subject of this appeal.\*

### Legislation

[2]We reproduce the statutory provisions that are relevant to the analysis of this appeal [s. 76 "judge" (as am. by S.C. 2002, c. 8, s. 194)]:

**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.

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

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

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

(c) engaging in terrorism;

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

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

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

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

Examination on Request by the Minister

and the Solicitor General of Canada

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

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

**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.

(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.

**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.

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

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

**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.

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

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

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

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

#### Detention

**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.

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

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

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

(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.

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

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

**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.

### Issues

[3]The appellant raised a plethora of constitutional questions before the designated Judge: in fact, no fewer than 40 questions. He alleged a breach of:

(a) sections 7, 9, 10 and 15 and paragraph 11(e) of the *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]] (Charter);

(b) section 96 of the *British North America Act*, now the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) [(as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]];

(c) sections 1 and 2 of the *Canadian Bill of Rights*, R.S.C., 1985, Appendix III (Bill of Rights);

(d) some common law rules;

(e) the Bill of Rights of the United Kingdom of 1689, the title of which is *An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown*, 1 Will. & Mary, Sess. 2, c. 2 (U.K.);

(f) paragraph 14(1) of the *International Covenant on Civil and Political Rights*, December 19, 1966, [1976] Can. T.S. No. 47 (Covenant); and

(g) Article 10 of the *Universal Declaration of Human Rights* of 1948 [GA Res. 217A (III), UN GAOR, December 10, 1948] (Universal Declaration).

[4]As experience shows, one who seeks too much risks losing everything. The appellant's position before the designated Judge, who had to request some particulars concerning the constitutional questions, was characterized by virtuous statements of general, rather unfocused principles, often irrespective of the possible relationship to the facts of the case, and without any genuine effort to strike a balance between divergent individual and collective interests. While the appellant primarily criticizes the designated Judge for focussing excessively on national security and thereby assigning undue weight to the interests of the collectivity, it is no exaggeration to say that the appellant's position completely ignores the issue of national security. Thus, for example, the appellant claims, in

the proceedings on the security certificate that was issued against him, a right of access to all the relevant information, including information that might be injurious to national security, and the right to be present and participate at all times in the hearings that concern him, even when evidence involving national security in regard to which he is considered a threat is being discussed. Hence his repeated constitutional attacks on a number of sections of the IRPA based on both national and international instruments protecting and promoting human rights.

[5]The appellant essentially repeated before us the arguments he raised before the designated Judge, often making do in his memorandum of fact and law with a reference to his submissions to the designated Judge.

[6]In an effort at synthesis, the respondents, like the designated Judge, grouped the position of the appellant and their own position around the following eight questions which, with one exception, we intend to analyse for the purpose of disposing of this appeal:

(1) Does the designated Judge have jurisdiction to examine the constitutional questions that are raised in the context of the judicial review procedure in sections 76 to 85 of the IRPA?

(2) Do sections 77 and 78 of the IRPA contravene the rights under the Charter with respect to a fair trial before an independent and impartial tribunal, when, for example, the designated judge must determine the "reasonableness" of the security certificate issued by the ministers and not the merits of the case?

(3) Does the judicial review procedure under sections 76 *et seq.* of the IRPA derogate from the appellant's status as a permanent resident and does it ensure equal treatment to all permanent residents declared inadmissible on security grounds?

(4) Are the IRPA provisions for detention of the person in question during the judicial review of the security certificate consistent with the Charter and the Bill of Rights?

(5) Are the expressions "reasonable grounds to believe" and "danger to the security of Canada" used in section 33 and subsection 34(1) of the IRPA vague, overly broad or discriminatory?

(6) Does the public nature of the ministers' security certificate that is referred to the Federal Court violate the Charter in so far as it would preclude a return of the person to his or her country of origin without risk?

(7) Does the absence of a right of appeal or judicial review of the decisions concerning the reasonableness of the certificate and, where applicable, the lawfulness of the Minister's decision in the context of the pre-removal risk assessment (section 112 of the IRPA) breach section 96 of the *Constitution Act, 1867*? and

(8) Does the judicial review procedure under sections 76 to 85 of the IRPA comply with Canada's international obligations, particularly in light of paragraph 3(3)(f) of the IRPA and the Covenant?

[7]At the hearing, the appellant's counsel stated that she was abandoning the ground of appeal found in question 6. This concerns the deprivation of the appellant's life and security resulting, so it is alleged, from the fact that the security certificate is made public through being referred to the Federal Court. We will not discuss that ground, therefore.

[8]By proceeding in this way from a plethora to a synthesis of the constitutional issues, we think that none of the appellant's contentions has been omitted. In fact, the hearing in this Court was addressed to these points grouped accordingly.

### Facts and proceedings

[9]The appellant, Adil Charkaoui, has been a permanent resident of Canada since 1995, awaiting his Canadian citizenship. On May 21, 2003, he was arrested and placed under detention. The arrest warrant was issued under section 82 of the IRPA, pursuant to a security certificate referred to the Federal Court that day in accordance with section 77 of that Act.

[10]The security certificate is signed by the Minister of Citizenship and Immigration and by the Solicitor General of Canada. It attests that the appellant is inadmissible on security grounds within the meaning of sections 33, 34 and 77 of the IRPA.

[11]The appellant has been detained since that date. The merits of his detention have been reviewed three times as

required by the principle of ongoing review contained in section 83 of the IRPA: concerning the ongoing nature of the review, see *Charkaoui (Re)*, [2004] 1 F.C.R. 451 (F.C.A.).

[12]Sparing the details, suffice it to say that the respondents have reasonable grounds to believe that the appellant is a member of the terrorist organization of Usama bin Laden and that he has engaged, is engaging or will engage in terrorist activities. By referring the security certificate to the Federal Court, the Ministers asked a designated judge of this Court to hold a hearing to determine whether the certificate is reasonable. Sections 76 to 81 of the IRPA describe the judicial process that follows and the powers and duties of the designated judge.

[13]After reviewing the materials provided by the Ministers, the designated Judge concluded that the request that he hold a hearing *ex parte* and *in camera* was justified by questions of national security. The hearing was therefore held in the absence of the appellant and his counsel pursuant to paragraphs 78(d) and (e) of the IRPA.

[14]Following this hearing, specifically on May 26, 2003, as required by paragraphs 78(g) and (h) of the IRPA, the designated Judge provided the appellant with some information, the disclosure of which would not be injurious to national security or to the safety of any person.

[15]A new hearing was held in early July 2003, at which the appellant called witnesses and filed affidavit evidence. A few days later, a new hearing was held in the absence of the appellant and his counsel. Needless to say, the latter objected to each of the hearings held in their absence.

[16]In an order dated July 15, 2003 [[2004] 1 F.C.R. 528 (F.C.)], the designated Judge informed the appellant of his concerns arising out of the review of the information he had received, in order to allow him to respond to it. To date, the appellant has not deigned to do so. More precisely, the designated Judge hoped to receive from the appellant clarifications concerning his contacts with certain individuals and information about his life in Morocco from 1992 to 1995 and in Canada from 1995 to 2000, including his trips. Finally, he urged the appellant to provide some particulars about his trip to Pakistan from February to July 1998.

[17]Because of the possibility of fluctuations in national security matters and the discovery of new information, the designated Judge adopted a policy of ongoing disclosure of evidence and information to the appellant. That is why, on July 17, 2003, he allowed some information that until then had been protected to be given to the appellant. This information informed the appellant that Abou Zubaida, considered a close collaborator of Usama bin Laden, had recognized him in a photograph and designated him as a person he had seen in Afghanistan in 1993 and in 1997-1998.

[18]On August 14, 2003, further protected information was given to the appellant with the authorization of the designated Judge. First of all, the photograph that Abou Zubaida had been shown for identification purposes was given to the appellant on July 17, 2003. Secondly, he was informed that Ahmed Ressay had also recognized him in two photos, adding that he had met him in Afghanistan in the summer of 1998 when the two were training in the same camp. Upon seeing the appellant's photograph, Mr. Ressay identified the appellant under the name of Zubeir Al-Maghrebi, just as Abou Zubaida had done one month previously.

[19]The appellant's application for a declaration of unconstitutionality first appeared in the context of an application for release made on July 2, 2003: see the Appeal Record, vol. 5, at page 913. A notice of constitutional questions under rule 69 of the *Federal Court Rules*, [SOR/98-106 (as am. by SOR/2004-283, s. 2)] was signed on September 17, 2003 and served on the parties concerned. The scope of the constitutional issues was somewhat expanded in this notice since sections 33, 84 and 85 [of the IRPA] were added to the list of those previously indicated, 77 to 83: see the Appeal Record, Vol. 6, at pages 1169 to 1174.

[20]It is therefore in the particular context of a motion relating to the detention that an expanded application for review of the constitutional validity of the process of determination of the reasonableness of the security certificate was submitted to the designated Judge.

### Analysis of the decision and the issues

1. Does the designated Judge have jurisdiction to examine constitutional questions raised in the context of a judicial examination under sections 76 to 85 of the IRPA?

### Jurisdiction of the designated Judge and the appropriate procedure

[21]The respondents contend that the Judge designated under section 76 of the IRPA, on a review of the reasons

for detention, does not have jurisdiction to determine the constitutional validity of certain provisions of the Act. They rely on the case law established under the former *Immigration Act*, R.S.C., 1985, c. I-2, as amended (the former Act), and argue that these precedents have survived the changes made by the new Act. They submit, in the alternative, that if the designated Judge had jurisdiction, he did not exercise it in accordance with the appropriate procedure. They are asking that we set aside the impugned decision and order that the matter be heard *de novo* by a different judge in the context of a distinct file that would take the form of an action for a declaration of constitutional invalidity.

[22]To appreciate more clearly the comparison with the former Act, it will be useful to reproduce the relevant provisions [s. 40.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31)]:

**40.1** (1) Notwithstanding anything in this Act, where the Minister and the Solicitor General of Canada are of the opinion, based on security or criminal intelligence reports received and considered by them, that a person, other than a Canadian citizen or permanent resident, is a person described in subparagraph 19(1)(c.1)(ii), paragraph 19(1)(c.2), (d), (e), (f), (g), (j), (k) or (l) or subparagraph 19(2)(a.1)(ii), they may sign and file a certificate to that effect with an immigration officer, a senior immigration officer or an adjudicator.

...

(3) Where a certificate referred to in subsection (1) is filed in accordance with that subsection, the Minister shall

(a) forthwith cause a copy of the certificate to be referred to the Federal Court for a determination as to whether the certificate should be quashed; and

(b) within three days after the certificate has been filed, cause a notice to be sent to the person named in the certificate informing the person that a certificate under this section has been filed and that following a reference to the Federal Court a deportation order may be made against the person.

(4) Where a certificate is referred to the Federal Court pursuant to subsection (3), the Chief Justice of that Court or a judge of that Court designated by the Chief Justice for the purposes of this section shall

(a) examine within seven days, *in camera*, the security or criminal intelligence reports considered by the Minister and the Solicitor General and hear any other evidence or information that may be presented by or on behalf of those Ministers and may, on the request of the Minister or the Solicitor General, hear all or part of such evidence or information in the absence of the person named in the certificate and any counsel representing the person where, in the opinion of the Chief Justice or the designated judge, as the case may be, the evidence or information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(b) provide the person named in the certificate with a statement summarizing such information available to the Chief Justice or the designated judge, as the case may be, as will enable the person to be reasonably informed of the circumstances giving rise to the issue of the certificate, having regard to whether, in the opinion of the Chief Justice or the designated judge, as the case may be, the information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(c) provide the person named in the certificate with a reasonable opportunity to be heard;

(d) determine whether the certificate filed by the Minister and the Solicitor General is reasonable on the basis of the evidence and information available to the Chief Justice or the designated judge, as the case may be, and, if found not to be reasonable, quash the certificate; and

(e) notify the Minister, the Solicitor General and the person named in the certificate of the determination made pursuant to paragraph (d).

...

(6) A determination under paragraph (4)(d) is not subject to appeal or review by any court.

(7) Where a certificate has been reviewed by the Federal Court pursuant to subsection (4) and has not been quashed pursuant to paragraph (4)(d),

(a) the certificate is conclusive proof that the person named in the certificate is a person described in subparagraph 19(1)(c.1)(ii), paragraph 19(1)(c.2), (d), (e), (f), (g), (j), (k) or (l) or subparagraph 19(2)(a.1)(ii); and

(b) the person named in the certificate shall, notwithstanding section 23 or 103 but subject to subsection (7.1), continue to be detained until the person is removed from Canada.

(7.1) The Minister may order the release of a person who is named in a certificate that is signed and filed in accordance with subsection (1) in order to permit the departure from Canada of the person, regardless of whether the Chief Justice or the designated judge has yet made the determination referred to in paragraph (4)(d).

(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days after the making of the removal order relating to that person, the person may apply to the Chief Justice of the Federal Court or to a judge of the Federal Court designated by the Chief Justice for the purposes of this section for an order under subsection (9).

(9) On an application referred to in subsection (8) the Chief Justice or the designated judge may, subject to such terms and conditions as the Chief Justice or designated judge deems appropriate, order that the person be released from detention if the Chief Justice or designated judge is satisfied that

(a) the person will not be removed from Canada within a reasonable time; and

(b) the person's release would not be injurious to national security or to the safety of persons.

(a) Jurisdiction

[23]The cases under the former Act established that the designated judge (then referred to as the delegated judge) did not have jurisdiction to decide constitutional questions in the context of examining the reasonableness of the certificate, but that he had such jurisdiction in examining the reasons for detention.

[24]In *Baroud (Re)* (1995), 98 F.T.R. 99 (F.C.T.D.), at paragraph 23, Denault J., who was the delegated Judge, found that his only role was not to


... determine whether the Minister and the Solicitor General were correct in their assessment of the evidence presented to them but rather, in accordance with paragraph 40.1(4)(d), [to] determine whether the security certificate is reasonable on the basis of the evidence and information available to me. . . .

He added:

I have an obligation to enforce the applicable legislation and, in the context of this hearing, it is not my role to determine whether the section in question is contrary to the rights and liberties guaranteed by the *Canadian Charter of Rights and Freedoms*.

On the latter point [at note 7], he noted that

The respondent has launched an action in this Court challenging the constitutional validity, applicability and operability of section 40.1 of the Act.

[25]In *Suresh v. Canada*  reflex, (1996), 34 C.R.R. (2d) 337 (F.C.T.D.), Cullen J., who was not the delegated judge, was hearing a motion for recognition of the delegated judge's jurisdiction to hear submissions on the constitutional validity of the former Act. He dismissed the motion and concluded, at paragraphs 13-14:

While accepting the principles set out in the above-notes cases, the applicant's argument is based on the assumption that the designated judge is a "court of competent jurisdiction" to hear Charter arguments. If the designated judge has no jurisdiction to hear Charter arguments, then the lack of an appeal is irrelevant. In my view, the lack of appeal is premised on an assumption that the designated judge does not have such jurisdiction. It is a further indication that Parliament intended that the designated judge only consider whether the certificate is reasonable on the basis of the available evidence. Questions of Charter infringement demand a much higher standard of proof and are incompatible with merely an assessment of reasonableness.

In summary, the clear language of section 40.1 of the *Immigration Act* is incompatible with extensive Charter review and it is my conclusion that the designated judge in the review of a certificate does not have jurisdiction to

consider arguments and grant remedies pursuant to subsection 24(1) *Canadian Charter of Rights and Freedoms* and subsection 52(1) of the *Constitution Act, 1982*.

[26]In *Singh v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9065 (F.C.), [1998] 3 F.C. 616 (T.D.), Rothstein J. (as he then was), who was not the delegated judge, on an application for judicial review brought simultaneously with the application for review of the certificate, had before him an application for interim relief that would result in the applicant's release from custody. The Judge notes, at paragraph 7 of his reasons, that it was because of the lack of jurisdiction of the delegated judge that the applicant claimed he had to bring a distinct application for judicial review in order to obtain a review of the constitutional issues. Having dismissed the application for interim relief on the ground that the balance of inconvenience weighed in favour of the Ministers, Rothstein J. refrained from deciding the issues of jurisdiction and procedure that were before him. However at paragraph 9, he expressed the following opinion, in *obiter*:

Initially, I would have thought that a constitutional challenge to legislation would have to be brought by action as was done in *Ahani, supra*. However, in this case the applicant also challenges the constitutionality of the Ministers' certificate. In addition, I note the *dicta* of Bastarache J. in the recent Supreme Court of Canada decision in *Canada (Canadian Human Rights Commission) v. Canadian Liberty Net*, [1998] S.C.J. No. 31 (QL) in which he makes reference to an originating notice of motion for a free-standing injunction. This question of procedure entails significant analysis and on this application the arguments were not fully developed. Further, the parties did not deal with the application, if any, of *Canadian Liberty Net, supra*. Given my decision to dismiss the application for interim relief on the basis of balance of inconvenience favouring the Ministers, such extensive analysis is unnecessary. I shall assume the present proceeding to be a valid one for bringing this request for interim relief before the Court.

Incidentally, he refused to decide whether, assuming that the constitutionality issue necessarily had to be brought in the Federal Court in the form of an action, he could order pursuant to section 18.4 [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Court Act* [R.S.C., 1985, c. F-7] that the application for judicial review that was before him could be brought as if it were an action.

[27]In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9083 (F.C.A.), [1998] 4 F.C. 192 (C.A.) (an appeal unrelated to the decision of Cullen J.), this Court considered whether the delegated judge, in the review of the reasons for detention, had jurisdiction to determine constitutional issues. Pursuant to subsection 40.1(9) of the former Act, the delegated judge had ordered the release of Suresh subject to certain conditions. The specific question before the Court of Appeal was "whether a designated judge . . . has jurisdiction to hear any constitutional issues that arise from an order made by that judge pursuant to subsection 40.1(9)" (at paragraph 1). Suresh argued that certain conditions imposed by the delegated judge contravened freedom of expression and association under the Charter.

[28]McDonald J.A., on behalf of the Court, said, at paragraph 9, he was

. . . convinced that there is nothing in the Act limiting a designated judge on jurisdictional grounds from considering constitutional issues on a subsection 40.1(8) application.

and added that

The cases cited by the appellant [*Baroud, Suresh and Singh*] as standing for the proposition that constitutional issues can not be considered are, in any event, easily distinguished on their facts.

[29]McDonald J.A. then went on to distinguish the *Baroud* and *Suresh* cases on their facts, noting, at paragraph 11, that because in *Suresh*:

. . . paragraph 40.1(4)(d) of the Act only gave the designated judge jurisdiction to consider the reasonableness of the certificate, constitutional arguments could not be entertained.

He added, at paragraphs 12 and 13:

I would note that a prominent factor giving rise to Cullen J.'s decision in *Suresh* was that subsection 40.1(6) [as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4] of the Act sets out that a determination under paragraph 40.1(4)(d) is not subject to appeal or review by any court. There is no such corresponding limit pertaining to subsection 40.1(8) of the Act. Further, both *Suresh* and *Baroud* were concerned with attacking the constitutionality of an entire section of the Act (for instance, in *Suresh*, clauses 19(1)(e)(iv)(C) and 19(1)(f)(iii)(B)) whereas in the case

at bar, we are concerned only with the constitutionality of the terms of an order made by the designated judge. These cases are, therefore, distinguishable on the ground that they arose under a different section of the Act which limits any right of appeal and on the ground that they were concerned with entirely different issues.

Thus, I find that a designated judge under subsection 40.1(8) of the Act has jurisdiction to entertain Charter arguments with respect to the constitutionality of the terms of any order made under subsection 40.1(9) of the Act. Indeed, a designated judge is compelled to consider the constitutionality of any order he or she makes pursuant to this subsection. Unlike a proceeding under subsection 40.1(4) he has the remedy available: namely, the appropriate wording of the release conditions. [Footnote omitted.]

[30]This Court therefore concluded, in *Suresh*, in *obiter*, that the delegated judge had jurisdiction to decide constitutional issues in the context of his review of the reasons for detention, but it based this conclusion largely on the fact that the decision of the delegated judge in this regard was appealable.

[31]What is the situation under the IRPA?

[32]In *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2004] 1 F.C.R. 451 (F.C.A.), this Court held that the designated judge's decision on review of the reasons for detention was not subject to appeal under the new Act. It follows that the jurisdiction of the designated judge can no longer be justified by McDonald J.A.'s *obiter dictum* in *Suresh*. The solution must be found elsewhere.

[33]The designated Judge in this case (Mr. Justice Simon Noël) rightly notes that in the absence of any express attribution of jurisdiction, the Court may, because of the particular function it performs and the structure, powers and processes conferred on it by Parliament, have implicitly been given jurisdiction to grant the Charter relief that is sought (see *R. v. Hynes*, 2001 SCC 82 (CanLII), [2001] 3 S.C.R. 623, at page 641).

[34]Noël J. concluded that the IRPA implicitly gave the designated judge the jurisdiction that was not assigned to him by the former Act. In reaching this conclusion, he relies primarily on paragraph 3(3)(d) of the IRPA, which provides that "This Act is to be construed and applied in a manner that . . . ensures that decisions taken under this Act are consistent with the *Canadian Charter*", and the English text of paragraph 78(c) of the IRPA, which states that the judge "shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit".

[35]With respect, we do not think that these provisions alter the jurisdiction of the designated judge for the purposes that concern us here. Paragraph 3(3)(d) is a routine provision that applies to everyone who is required by the Act to make decisions, whether it is a visa officer, the Immigration Division, the Refugee Protection Division, the Minister, the designated judge, a judge sitting on judicial review or the Federal Court of Appeal. This paragraph is not attributive of any new jurisdiction.

[36]The English text of paragraph 78(c) does not confer any new jurisdiction, either. It is addressed to the form of the hearing, and nothing more. The French text is clear. In regard to the English text, we acknowledge that the use of the words "determination", in the introductory clause of section 78, and "matter" in paragraph 78(a), to express the word "*affaire*" that is used throughout the French text, and the use of the words "all matters" in the English text of paragraph 78(c), which have no equivalent in the French text, are not the happiest choices, but in our opinion there is no doubt what they mean: the designated judge hears the matter--which includes the ancillary questions of proof and procedure--informally and expeditiously.

[37]We note as well that the English text of paragraph (c) uses the word "deal", which is rendered by "*procède*" in the French text, and this in our view confirms that section 78 is addressed to procedure and not jurisdiction. It is further on, in sections 80 and 83, that the jurisdiction of the designated judge is established.

[38]Finally, the type of informal procedure contemplated by paragraph 78(c) is incompatible with the type of procedure that would allow a Court to decide constitutional issues.

[39]However, we reach the same conclusion as Noël J., but by a somewhat different route. Our reasons are related to the concept of designated judge, the recent recognition of the jurisdiction of a designated judge to make certain decisions that are subject to appeal, and to some legislative changes.

[40]First, a word about the concept of "designated judge" that Noël J. rightly refurbished. This concept, we think, has been distorted by the case law, mainly out of the mistaken belief--to which we will return--that once it is said that the judge's final decision is not appealable, he can have no decision-making powers other than those closely

associated with the limited mandate conferred on him as designated judge. When we go back to the origin of the concept, as Noël J. did at paragraphs 35 and 36 of his reasons, we find that Parliament's intention was not to make the "designated judge" a second-rank judge invested with fewer powers than a non-designated judge, but to ensure the presence of judges who are sufficiently informed to hear matters pertaining to national security. The designated judge's specialization has meant, over the years, that his expertise as a generalist judge has been put on the "back burner", which is an error: it is an added value, for a judge of the Federal Court, to be a designated judge, and his general expertise as a judge is enhanced, not diminished, by his specialization as a designated judge. As Noël J. notes, at paragraphs 37 and 39 of his reasons,

It should be emphasized that the designation procedure established by these provisions is not intended to limit the judge's powers. Indeed, the designated judge exercises the ordinary functions of a puisne judge. Only the circumstances in which the judge is carrying out the functions are exceptional, in the sense that they involve national security.

...

To summarize, in addition to the full jurisdiction of a Federal Court judge, designated judges have the jurisdiction specifically granted to them under section 76 *et seq.* of the IRPA. Thus, when hearing immigration matters, designated judges do not lose their status of Federal Court judge; they retain all their powers, and also have the powers that result from being a designated judge.

[41]Moreover, the expression "designated judge" is misleading in that it disguises the fact that the judge is a representative of the Chief Justice (see section 76) and the fact that, in effect, it is the Court, and not the judge, that renders the decision. As subsection 77(1) says, the Ministers refer the certificate to the Federal Court "which shall make a determination under section 80" (our underlining). Parliament intended, therefore, that it would be the Court, at its highest level moreover, that would hear and determine questions related to national security.

[42]By restoring to the designated judge his "letters patent of nobility", Noël J. and this Court are simply returning to what was said by Mr. Justice Dickson [as he then was] in *Minister of Indian Affairs and Northern Development v. Ranville et al.*, [1982] 2 S.C.R. 518, at page 527, a case in which the Supreme Court of Canada reversed itself and removed the concept of "*persona designata*" from the legal lexicon:

... I would declare that whenever a statutory power is conferred upon a s. 96 [of the BNA Act] judge or officer of a court, the power should be deemed exercisable in an official capacity as representing the court, unless there is express provision to the contrary.

[43]Next, a word about the power now given to a designated judge to make certain decisions that are subject to appeal. One of the premises of Denault, Cullen JJ. and McDonald J.A. in the aforementioned cases was that a delegated judge could make only the final decision that he had a specific mandate to make, i.e. the one dealing with the reasonableness of the certificate. It was in fact common at the time to limit the delegated judge's jurisdiction and to say that since his decision concerning the certificate was without appeal, he could not make any other decision that itself was subject to appeal.

[44]This approach was likely explained by the analogy that was made with the case law dealing with revocation of citizenship. Under subsection 18(1) of the *Citizenship Act*, R.S.C., 1985, c. C-29, the Federal Court had to determine whether there had been fraud, false representation or knowing concealment of material circumstances when a person was admitted to Canada, and the Court's decision, under subsection 18(3), was final and not subject to appeal. Under Rule 900 *et seq.* of the *Federal Court Rules* then in force [C.R.C., c. 663], which set out a special procedure on citizenship appeals, the Court's practice was to designate a judge, referred to as a reference judge, to hear the appeal.

[45]This narrow interpretation of the reference judge's jurisdiction proved to be mistaken, as time went by. It was the Supreme Court of Canada's 1997 judgment in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (S.C.C.), [1997] 3 S.C.R. 391, that initiated a more realistic interpretation of subsection 18(3) of the *Citizenship Act*. A motion to stay the proceedings had been presented to a judge other than the reference judge. The motion was allowed and the proceedings were stayed. The Minister appealed the decision to the Federal Court of Appeal [1997 CanLII 6328 (F.C.A.), [1997] 1 F.C. 828], but Tobiass' counsel asked that the appeal be set aside for lack of jurisdiction. In their opinion, subsection 18(3) of the *Citizenship Act* immunized the decision staying the proceedings from any appeal. The Court of Appeal, in the majority, dismissed the motion and attorned to its jurisdiction. The Supreme Court of Canada upheld the existence of the right of appeal in these words, at paragraphs 51, 57, 58 and 66:

This conclusion flows from the wording of s. 18. Section 18(1) refers to a very particular kind of decision: a decision as to whether a person "has obtained, retained, renounced or resumed citizenship" by false pretences. However, a stay of proceedings is entered for reasons which are completely unrelated to the circumstances surrounding the obtaining, retaining, renouncing or resuming of citizenship. Indeed, a decision to order (or not to order) a stay of proceedings is different from the type of determination that the Court is called upon to make under subsection 18(1).

...

However, whether s. 18(1) is interpreted narrowly as encompassing only the ultimate decision as to whether citizenship was obtained by false pretences, or more broadly to include the interlocutory decisions made in the context of a s. 18(1) hearing which are related to this determination, it is apparent that it does not encompass an order granting or denying a stay of proceedings.

Unlike interlocutory decisions, a stay of proceedings will not be made in order to more efficiently determine the ultimate question of whether citizenship was obtained by false pretences. An order staying proceedings is therefore not related to this ultimate decision.

...

The power to order a stay does not flow by necessary implication from the power to decide if citizenship was obtained by false pretences, set out at s. 18(1). Rather, it is a power which not only has its source in a different statutory provision (s. 50 of the *Federal Court Act*) but is also unrelated to the power set out at s. 18(1). To borrow the words of Lamer C.J. in *Hinse*, it is a "separate, divisible judicial act" (p. 626).

[46] Since *Tobiass*, this Court has recognized the right of appeal from other types of decisions made in the context of a reference. For example, in *Canada (Minister of Citizenship and Immigration) v. Obodzinsky*, [2002 FCA 518 \(CanLII\)](#), [2003] 2 F.C. 657 (C.A.), the Court, at paragraphs 35 and 37, held that a judgment on the possibility of proceeding by summary judgment was appealable:

When one looks at the purpose and objective of subsections 18(1) and (3), it seems to me that the decision from which there can be no appeal is the one made by the judge hearing the entire matter, who determines in light of all the facts whether there was a fraudulent act. In the case at bar, the decision by the Motions Judge is not a decision made on the issue before the reference judge, namely a decision on whether there was a fraudulent act.

...

I further consider that a decision on the scope and requirements of the summary judgment proceeding is similar to a decision ordering a stay of proceedings, and this is not covered by the appeal prohibition contained in subsection 18(3): see *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997 CanLII 322 \(S.C.C.\)](#), [1997] 3 S.C.R. 391, at paragraph 57. Both decisions are procedural in nature. One, the stay of proceedings, is designed to terminate proceedings, and the other, the summary judgment procedure, either to terminate or to shorten proceedings by terminating a part of them. At no time, however, does a decision on the validity of recourse to either of these procedural vehicles affect or impinge on the matter being heard by the Trial Division under subsection 18(1), namely a determination of whether the respondent has obtained entry to Canada by fraud or false representation.

[47] Mr. Justice Marc Noël, in *Narvey v. Canada (Minister of Citizenship and Immigration)* (1999), 235 N.R. 305 (F.C.A.), has held that a decision on a judge's bias was not covered by subsection 18(3) of the *Citizenship Act* and was appealable. (See also the decisions of Stone J.A. in *Canada (Minister of Citizenship and Immigration) v. Dueck* (2002), 23 Imm. L.R. (3d) 1 (F.C.A.) and Isaac J.A. [as he then was] in *Canada (Minister of Citizenship and Immigration) v. Fast*, [2002 FCA 292 \(CanLII\)](#), 2002 FCA 292; [2002] F.C.J. No. 1036 (QL), who query the scope of subsection 18(3).) This Court, in *Zündel (Re)*, [2004 FCA 394 \(CanLII\)](#), 2004 FCA 394; [2004] F.C.J. No. 1982 (QL), has recently decided that a decision pertaining to the partiality of the judge was subject to appeal notwithstanding subsection 80(3) of the IRPA.

[48] If it is agreed that the designated judge may, in the exercise of the powers conferred by sections 80 and 83 of the IRPA, make some decisions that are subject to appeal, then there should be no further question as to his jurisdiction to make them. It seems obvious to us that a decision on the constitutional validity of the IRPA has to do with the jurisdiction of the Court and not the reasonableness of the certificate, that it constitutes a separate,

divisible judicial act, to repeat the words of the Court in *Tobiass*, and that it is consequently appealable.

[49] Finally, a word on the legislative changes. Under the former Act, the delegated judge was assigned two specific mandates: to examine the reasonableness of the certificate, and to order, in the circumstances described in subsection 40.1(9), the release. The IRPA gives the designated judge a third mandate: to determine whether the Minister's decision, on an application for protection filed under subsection 112(1), is "lawfully" made. This additional mandate is found in section 80, the same section that gives the designated judge the mandate to examine the reasonableness of the certificate. If lawfulness is the issue, it is a question of law, and as the Supreme Court of Canada tells us, questions of law include constitutional questions (*Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board v. Laseur*, 2003 SCC 54 (CanLII), [2003] 2 S.C.R. 504, at paragraph 40):

In cases where the empowering legislation contains an express grant of jurisdiction to decide questions of law, there is no need to go beyond the language of the statute. An express grant of authority to consider or decide questions of law arising under a legislative provision is presumed to extend to determining the constitutional validity of that provision.

[50] If a designated judge now has explicit jurisdiction to decide constitutional questions in the exercise of one of the three mandates conferred on him by the IRPA, it is not unreasonable to think that Parliament, by implication, intended that he also have this jurisdiction in the exercise of the other two.

(b) Procedure

[51] Still to be determined is whether the designated judge may decide constitutional questions by way of a motion instead of by way of an action or an application for judicial review.

[52] Noël J. was careful, in this case, to dissociate the motion on the constitutional validity of the IRPA from the judicial review of the reasons for detention. He held a distinct, independent, formal hearing under the procedural rules that are generally applicable. The argument in Court and the reasons he gave steered clear of the specific facts of the *Charkaoui* case. The questions that were argued were questions of law and they were decided on the basis of a record that the parties considered complete. It was by choice and not for lack of procedural options that the Ministers filed no evidence pertaining to justification under section 1 of the Charter.

[53] It should be noted, in relation to the procedure followed, that the review of the reasons for detention is conducted in the general context of the application for judicial review of the reasonableness of the certificate that the Ministers must refer to the Federal Court under subsection 77(1). It is the Ministers, therefore, and not the permanent resident, who bring the matter before the Court. This is a *sui generis* proceeding. It is not one of the initiating proceedings covered in rule 61 of the *Federal Court Rules, 1998*: it is not an action, an application for judicial review or an appeal. In such a case, rule 169 tells us, the proceeding is governed by the rules applicable to actions, in so far, of course, as those rules are compatible with those set out in section 78 of the IRPA. Rule 169 cites, by way of example, references under section 18 of the *Citizenship Act*. It could have cited, as a further example, applications made under section 76 *et seq.* of the IRPA.

[54] There was for a long time a passionate debate in this Court over the appropriate procedure for challenging the constitutionality of a statute. The decision of Rothstein J. in *Singh*, is one such illustration. While there was no dispute that an action was an appropriate vehicle, there was no consensus as to whether an application for judicial review might be as well, which meant that counsel, as in *Singh*, had to show some imagination. The debate was definitively decided in *Gwala v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 9349 (F.C.A.), [1999] 3 F.C. 404 (C.A.) and in *Moktari v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 9385 (F.C.A.), [2000] 2 F.C. 341 (C.A.): the Court also has jurisdiction to hear constitutional challenges of statutory provisions in the context of a judicial review proceeding.

[55] We refer to that debate and to its ultimate resolution in order to illustrate how far we have come, in this Court, from that procedural era which aroused the ire of litigants, counsel and judges alike. Although they were made in the context of a judicial review proceeding, we think the following remarks by Mr. Justice Robertson, at paragraph 6 of his reasons in *Moktari*, likewise apply in an action, and thus, through the operation of rule 169, to the judicial examination provided in the IRPA:

We hasten to add that while the 1992 amendments to the *Federal Court Act* were aimed at effecting significant changes in the law governing judicial review in this Court, it is equally obvious that to permit parallel proceedings arising from a single decision would diminish the capacity of this Court to dispense justice in an expedient and

efficient manner. The confusion over whether declaratory relief is available in judicial review proceedings has caused some litigants to initiate a judicial review application in this Court and then commence an action, for example, in the superior court of a province for the purpose of challenging the constitutional validity of the applicable legislation: the complexities of the situation are outlined fully in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8393 (F.C.A.), [1999] 4 F.C. 206 (C.A.). In our view the right to seek and obtain declaratory relief in judicial review proceedings is as much a matter of statutory interpretation as it is a matter of practical necessity especially in the field of immigration law. One need only look at the thousands of judicial review applications processed by the Trial Division of this Court in any one year to appreciate that the initiation of parallel but unnecessary proceedings can only work against the best interests of justice.

[56]Also relevant are these remarks by Mr. Justice Gonthier in *Nova Scotia (Workers' Compensation Board)*, at paragraphs 28 and 29, although they were made in the context of the debate over the jurisdiction of administrative tribunals to decide constitutional issues:

First, and most importantly, the Constitution is, under s. 52(1) of the *Constitution Act, 1982*, "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state. Obviously, it cannot be the case that every government official has to consider and decide for herself the constitutional validity of every provision she is called upon to apply. If, however, she is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision. This is because the consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.

From this principle of constitutional supremacy also flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts: see *Douglas College, supra* [*Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (S.C.C.), [1990] 3 S.C.R. 570], at pp. 603-4. In La Forest J.'s words, "there cannot be a Constitution for arbitrators and another for the courts" (*Douglas College, supra*, at p. 597).

[57]Paraphrasing Robertson J.A. and Gonthier J., we say that it would work against the best interests of justice to force litigants to undertake parallel proceedings based on a single decision, *a fortiori* when such proceedings are brought in the same Court. Such is the principle that must now guide us when, as in the case at bar, one party, the respondents, argues that the other party, the appellant, should have brought a parallel proceeding in the Federal Court.

[58]It seems obvious to us, in this case, that the respondents' submission must be rejected. It is the Ministers who brought the originating proceeding, the application for judicial examination, and the appellant, in challenging his detention, is simply pleading in his defence that some provisions of the IRPA are unconstitutional. Logically, this defence ought to be arguable by a motion within the framework of the original proceeding without the need to initiate a parallel proceeding or to open a new file.

[59]This motion, while it is presented in the context of the original proceeding, is an independent and distinct proceeding that, by its nature and its effects, escapes the rules of procedure established for the original proceeding and the rules of procedure established for the presentation of ordinary motions. Clearly, this cannot amount to deciding informally whether a statutory provision is or is not constitutional, and both the parties and the Judge are entitled to require the application of the ordinary rules of evidence and adjudication. In some ways, it is a mini-trial within a trial, and this mini-trial can, as in this case, take the form of an ordinary motion.

[60]The parties might have proceeded otherwise and before another judge. Since the procedure they adopted by mutual agreement has not adversely affected anyone, has enabled the parties to present all the evidence they considered necessary, and has helped to resolve on the merits and in complete equity the issue that was before the Court, it is in the best interests of justice that this Court respect the choice of the parties. It would be downright

ridiculous, in the circumstances, to set aside the decision that was given and to order that the same debate be resumed in the same Court and possibly in this Federal Court of Appeal merely because a new file should have been opened and a parallel procedure taken.

[61]The respondents propose, essentially, that the procedure be the one taken in *Ahani* and *Baroud*: while the designated Judge considers informally and expeditiously the reasonableness of the certificate and the reasons for detention, another judge of the Court, in the context of an action, should consider the constitutional questions raised by the individual concerned. This is still a possible procedure, but in itself it is not perfect. It entails a duplication of proceedings and will not necessarily result in any real saving of time since, as happened in *Ahani*, the execution of the removal order was stayed by the Minister until final judgment was rendered on the constitutional questions. The procedure taken in the case at bar, subject of course to the acquiescence of the parties and the Judge, has reduced the paperwork and the costs, facilitated the hearing of the constitutional arguments (since the Judge need not be apprised of the factual basis of the case or the requirements peculiar to national security cases), and let the Federal Court of Appeal itself decide whether it was necessary to stay the review of the reasons for detention pending the appeal, which it has agreed to do in this case but to which it might not have agreed.

[62]We conclude, then, that the designated Judge had jurisdiction to determine the constitutional questions that were put before him and that he did not commit any reviewable error, in the circumstances, by doing so in the context of a motion.

2. Do sections 77 and 78 of the IRPA contravene the rights under the Charter with respect to a fair trial before an independent and impartial tribunal, when, for example, the designated judge must determine the "reasonableness" of the security certificate issued by the ministers and not the merits of the case?

[63]This question raised by the appellant warrants special attention. His complaint is directed at the entire process Parliament has established for determining whether he constitutes a danger to national security and whether his detention is justified in the circumstances. He cites the cumulative effect of the following factors which, he says, deprive him of the right to a fair and equitable hearing by an impartial and independent tribunal:

(a) the decision that leads to his inadmissibility is taken by the executive authority and not by a judge;

(b) the Judge's role is improperly and unjustly limited to verifying the reasonableness of the security certificate when he should be assessing its merits;

(c) the decision of the designated Judge is made on the basis of secret evidence to which the appellant does not have access;

(d) he does not obtain a summary of the information that is not disclosed to him;

(e) there is no means for him to test the validity and credibility of this information and thus it is difficult if not impossible for him to refute it;

(f) the standard of evidence adopted by Parliament to justify the issuance of a security certificate is too minimal, since it is enough to have reasonable grounds to believe that the acts described in section 34 have occurred, are occurring or may occur when this standard should have been more stringent and require that the acts be proved according to the standard of the balance of probabilities;

(g) under paragraph 78(j), the designated judge may admit and base his decision on any evidence that he considers useful, even if it is inadmissible at trial;

(h) the notions of "reasonable grounds" and "danger to the security of Canada" are vague and overly broad;

(i) the decision of the designated Judge has far-reaching implications for a permanent resident like the appellant, who will be deported from the territory, when this decision is final and without appeal; and

(j) the appellant is deprived of the right to be released on bail.

Factors to be considered and their cumulative impact

[64]It is appropriate to analyse each of the allegations relating to these factors and their cumulative impact.

(a) the decision that leads to inadmissibility is taken by the executive and not by a judge

[65]It is undeniable that the initial inadmissibility decision is made by the executive, as are thousands of other decisions made by government ministers, but that decision is subject to the intervention of the judiciary as is often the case for the decisions of federal agencies or a multitude of ministerial or governmental decisions. So there is nothing unlawful, still less abnormal, in a decision of public interest being taken by a minister of the government who is responsible for enforcing the statute under which that decision is made.

[66]In fact, as legislators or as members of the executive, it is the elected parliamentarians, representatives of the population, who are vested with the power to manage and administer the public interest and security. The reason is quite simple, as Lord Hoffmann stated in *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.), at page 895, cited with approval by the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, at paragraph 33, as well as by this Court in *Canada (Attorney General) v. Ribic* 2003 FCA 246 (CanLII), (2003), 185 C.C.C. (3d) 129, at paragraph 18, leave to appeal to the Supreme Court of Canada denied, October 22, 2003. Speaking of the events of September 11 in New York and Washington, Lord Hoffmann wrote [at page 897]:

They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

[67]Like the designated Judge, we do not see "how the independence of the judiciary has been violated by Parliament empowering the Ministers to make a decision regarding the admissibility of a permanent resident on grounds of security, and by its subjecting this decision to review by a designated Judge": see the decision of the designated Judge, paragraph 115.

[68]This complaint of the appellant is in our view absolutely without merit, unfounded and consequently of no effect.

(b) the judge's role is improperly and unjustly limited to verifying the reasonableness of the security certificate when he should be assessing its merits

[69]Once again, there is nothing novel or exceptional in Parliament's approach: the entire process of judicial review of decisions by government or federal agencies is limited to verifying the legality of these decisions, that is, verifying their compliance with the law. This does not entail an analysis of the merits or appropriateness of such decisions nor does it give the court or tribunal the power to make the decision that it considers best. If the decision was made in compliance with the law, the court or tribunal must respect it even though it would have preferred some other decision. Where it is not in compliance, the matter must be sent back for redetermination, this time in compliance with the dictates of the law. We are unable to see how this process compromises the independence and impartiality of the court or tribunal.

[70]Parliament has chosen, in the interests of opportuneness, responsibility and accountability, not to give the designated judge the duty and the power to rule on the actual merits of a security certificate. Bearing in mind what Lord Hoffmann said in *Rehman*, we do not doubt either the lawfulness or the wisdom of this choice.

[71]Counsel for the appellant also argued, relying on *Rehman*, and *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 413, that this limited role of the designated judge was unconstitutional. Her argument is that in England, in contrast to the power of the designated judge in this country, the Immigration Appeals Commission may review, in fact and in law, the decision of the Secretary of State that, in the interests of national security, the expulsion of a person suspected of terrorist activities would serve the public interest. This power was granted following the decision of the European Court of Human Rights in the *Chahal* case, in which the Court held that the system, established under British domestic law, did not give a person whose rights under the *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221, the European Convention on Human Rights (Convention) had been breached by a representative of the State an effective remedy for their recognition and enforcement, as required by Article 13 of the Convention. Counsel for the appellant argues that the

designated judge does not have the power to assess the truthfulness of the facts that are put before him and that this is the conclusion he himself reached. She cites in support of her contention the sentence we have underlined in the following four lines, which are found at the beginning of paragraph 128 of the decision:

These standards do not require that the designated judge seek proof of the existence of the facts. Rather, they require that the judge analyse the evidence as a whole and determine whether it provides reasonable grounds to believe there are reasons justifying the inadmissibility, arrest warrant and continued detention. [Emphasis added.]

[72]The appellant's interpretation of this sentence is both incorrect and unfair to the designated Judge, who did his utmost to delimit and define clearly his role.

[73]First of all, this passage of the designated Judge's reasons, which the appellant sets apart from its context, forms part of the discussion of the burden and standard of proof applicable to the exercise of the three powers referred to above, the inadmissibility, arrest and continued detention. When read and replaced in its context, as it must be, it becomes evident that, by these words, the designated Judge is saying that the evidence need not establish with certainty, or beyond a reasonable doubt, the existence of these facts. The sentence that follows the one on which the appellant rests his argument shows this clearly:

While the preponderance of the evidence is not the standard, there must nevertheless be a serious possibility that the facts exist based on reliable, credible evidence.

[74]But even more probative evidence of the lack of merit in this contention of the appellant is found in paragraph 118 of the decision, in which the designated Judge gives a definition of his role that is overlooked by the appellant:

In order to carry out this role properly, the designated judge must have thorough knowledge of the case. This enables the designated judge to distinguish between the information that can be disclosed and the information that cannot. The designated judge must prepare a summary that excludes protected information, but enables the person concerned to be reasonably informed both during the hearing and when the information is reviewed in his and his representatives' absence. The designated judge "must nevertheless be curious, concerned by what is advanced, and maintain a sceptical attitude with the objective of conducting a critical review of the facts. He must verify the human, technical and documentary sources, their reliability and the truth of what they may relate. To the degree possible, the information must come from more than one source and must not be subject to an imprecise interpretation. Moreover, the designated judge may examine witnesses who can shed light on the protected information and documents. Where necessary, he may question their interpretation of the facts and verify whether there are not other possible interpretations that might tend to favour the respondent. In a word, the designated judge must seriously test the protected documentation and information. This is a demanding role, which must be fully performed given the interests at stake." [Emphasis added.]

Paragraph 78(j) of the IRPA gives the designated judge the power to receive evidence and consequently the power to assess its truthfulness, reliability and credibility. That is what, in this case, the designated Judge understood about the duties assigned to him; it is what he clearly stated and described and it is precisely the exercise in which he engaged. We are satisfied that the unconstitutionality alleged by the appellant in this regard has no factual basis or legal foundation.

- (c) the decision of the designated judge is made on the basis of secret evidence to which the appellant does not have access
- (d) the appellant does not obtain a summary of the information that is not disclosed to him
- (e) there is no means for the appellant to test the validity and credibility of this information and thus it is difficult if not impossible for him to refute it

[75]These three factors are related, and to avoid tedious and unnecessary repetition we will discuss them together. They are, in fact, at the heart of this particular problem posed by the need to protect national security while respecting the principles of fundamental justice where there is an infringement of someone's right to life or security. They derogate in a significant way from the adversarial process normally adhered to in criminal and civil matters. They raise--properly in this context--the following question: does the special process established by Parliament to determine whether the executive's denial of access to Canada of a permanent resident, his arrest and his detention are justified, comply with the principles of fundamental justice?

[76]Before examining the appellant's submissions on this question, it is necessary to qualify somewhat the factors

as stated.

[77]It is true that some evidence that is not disclosed to the appellant may be used by the designated judge in making his decision and perhaps, in some extreme cases, which is not the situation here, it might serve as the sole basis for that decision. Generally speaking, however, the evidence will be comprised of various elements most of which will have been disclosed or given to the person covered by the security certificate, either in whole or in the form of a summary that will allow him to gain reasonable knowledge of the content, nature and scope of the evidence.

[78]It is also true that the appellant does not obtain a summary of the evidence or aspects of the evidence the disclosure of which would be injurious to national security. But this truth should not be taken in the absolute, still less in the abstract. It is manifested in a procedural framework that includes a number of steps and guarantees. In other words, the lack of a summary should be resituated and gauged in its context, and in particular the context of judicial examination by a designated judge.

[79]Indeed, over and above the guarantees that the designated Judge mentions and discusses in paragraph 97 *et seq.* of his decision, let us note that the obligation he has to disclose evidence is ongoing since the appellant is entitled, under paragraph 78(h), to be reasonably informed of the circumstances giving rise to the security certificate. Moreover, as the designated Judge mentions, citing the following extract from the judgment of the Supreme Court of Canada in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (CanLII), [2002] 4 S.C.R. 3, at paragraph 47, the government's duty must be performed with impartiality and honesty, and it requires that evidence that is adverse to its interest must be disclosed:

As mentioned before, when making *ex parte* submissions to the reviewing court, the government institution is under a duty to act in utmost good faith and must make full, fair and candid disclosure of the facts, including those that may be adverse to its interest.

[80]Furthermore, throughout the process, the designated judge plays a pro-active role in the interest of ensuring fairness. At paragraph 101 of his decision, he wrote:

In order to carry out this difficult task, the designated judge has access to all the information on which the Ministers' decisions are based, without exception. . . .

Designated judges preside over hearings and hear the Minister's witnesses. They examine witnesses themselves as the need arises. They examine the documents carefully to determine which information is related to security and which information is not. In order to do so, they examine, among other things, the sources of the information, the way in which it was obtained, the reliability of the sources and the method used, and whether it is possible to corroborate the information by other means. Designated judges take account of the fact that the information was obtained in confidence from a source in Canada or a foreign source, or that the information is already in the public domain. They ask the Ministers' representatives about the quality of the investigation and inquire into whether the events can be interpreted differently. They decide which information can be disclosed to the person concerned and provide a summary of the evidence containing nothing which would, if disclosed, be injurious to national security or to the safety of any person. The summary must enable the person concerned to be reasonably informed of the circumstances giving rise to the signing of the certificate, the issuance of the warrant of arrest and the detention. [Emphasis added.]

[81]In the exercise of his role, and in order to maximize the disclosure of information and compliance with the principles of fundamental justice, the judge has the power to order that documents be turned over, obliterating only those passages that, for example, might reveal the identity of a source or compromise its security or endanger national security. Some documents may be severed for the purposes of release to the affected individual. The judge may order that all or part of the information be included in the summary given to this individual and the Minister is always free to withdraw this information from the proceedings in order to maintain its confidentiality: see *Sogi v. Canada (Minister of Citizenship and Immigration)* (2004), 36 Imm. L.R. (3d) 1 (F.C.A.), at paragraph 53; leave to appeal to the Supreme Court of Canada denied, November 18, 2004, [2004] S.C.C.A. No. 354.

[82]Finally, while there is no denying that it is harder for the appellant to test the validity and credibility of the information that is not disclosed to him, the fact is that he is assisted in this task by the designated Judge who has the heavy responsibility of maintaining a balance between the parties and accordingly respect for the principles of fundamental justice. It should also be kept in mind that the appellant has the right to testify and call witnesses to refute the allegations and the evidence against him.

[83]These preliminary remarks lead us to the examination of the appellant's submissions concerning the failure to comply with the principles of fundamental justice.

[84]As mentioned at the very outset of these reasons, the appellant contends that the protection of national security does not justify any derogation from the normal process that is followed in the courts. His memorandum of facts and law contains a number of excerpts from decisions of the European Court of Human Rights and European courts. These decisions were made in the context of criminal, civil or disciplinary proceedings. We will reproduce just four of them to illustrate our comments. They are found at paragraphs 54, 57, 61 and 62 of the memorandum:

*Voisine v. France*, February 8, 2000, paragraph 30, European Court of Human Rights

[translation] The right to an adversarial proceeding within the meaning of article 6 § 1, as interpreted by the cases, implies in principle the right of the parties to a trial to have disclosed and to discuss any evidence or observation presented to the judge, even if by an independent magistrate, for the purpose of influencing his decision.

*Nideröst-Huber v. Switzerland*, February 18, 1997, paragraph 24, European Court of Human Rights

[translation] The notion of a fair trial also implies in principle the right for a party in a proceeding to examine any evidence or observation presented to the judge and to discuss it.

*Kostovski* No. 10/1988/154/208, October 25, 1989, paragraph 41, European Court of Human Rights

[translation] The evidence must in principle be produced to the accused in a public hearing for an adversarial debate.

*Delta* No. 26/1989/186/246, November 20, 1990, paragraph 36, European Court of Human Rights

[translation] The evidence must normally be produced to the accused in a public hearing, for an adversarial debate. [Emphasis added.]

It can be seen from these excerpts, through the use of the words "in principle" or "normally", that the obligation to disclose evidence is not erected as an absolute principle. It applies to normal situations. But the threat of terrorism or a threat to national security does not represent or reflect a situation of normality, at least not in our country. The decisions to which the appellant refers us are, therefore, not of great assistance to him, all the more in that we are not in the context of a trial, and the procedure pertaining to the determination of the reasonableness of the security certificate does not result in a civil sentence or a criminal conviction. These decisions, in fact, simply pose the question in relation to abnormal situations without answering it, while indicating that there is a time and a place for derogation.

[85]The appellant also called in aid the decision in *Kiareldeen v. Ashcroft*, 273 F.3d 542 (3rd Cir. 2001). A reading of this decision reveals that, in the context of a proceeding to deport the appellant for terrorist activities, in this case his involvement in the 1993 bombing of the World Trade Center, a New Jersey District Court, hearing a *habeas corpus* petition, found that the U.S. authorities had not provided sufficient evidence to justify removal from the country [*sub nom. Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999)]. A major portion of the evidence consisted of summaries of confidential information originating from the Federal Bureau of Investigation (FBI), which had refused to turn over the information itself. The District Court stated categorically that the government's reliance on secret evidence was a breach of due process. It also criticized the government for not believing in the sufficiency of its evidence since it had not laid any criminal charge. It said that in its opinion the statutory provision, which denied aliens facing deportation the right of access to information concerning national security, was unconstitutional in the circumstances in which it was applied in that case. The government was then ordered to pay the fees and costs of the applicant's attorney.

[86]The government appealed the District Court decision on the merits of the *habeas corpus* and obtained a stay of execution. Some time later, it desisted from this appeal, but it filed another appeal against the order to pay the attorney fees and costs [*sub nom. Kiareldeen v. Reno*, 92 F. Supp. 2d 403 (D.N.J. 2000)]. It was this order only that was before the Court of Appeals for the Third Circuit and the Court was very careful to explain that it was not ruling on the merits of the District Court decision, thereby leaving that question open for future determination: see pages 6 and 12 of the decision.

[87]To adjudicate on the question of fees and costs, the Court of Appeals had to determine whether the government was justified in bringing deportation proceedings against the appellant. It allowed the appeal. First, the Court held that Mr. Kiareldeen had been given enough information to defend himself in the proceedings taken against him, the proof being that he had triumphed in the District Court, which had ordered his release.

[88]Second, the Court rejected Mr. Kiareldeen's argument that his right to due process had been breached by the fact that hearsay evidence had been admitted when it had not been established that the persons at the origin of the hearsay could be called to testify. At page 549, the Court wrote: "the simple response to this contention is that hearsay evidence is, in fact, admissible in removal proceedings."


[89]Discussing the confidentiality of the information and the refusal to disclose it, and the criticism of the government for its unwillingness to lay criminal charges, the Court of Appeals wrote, at pages 552-553:

That the FBI would be unwilling to compromise national security by revealing its undercover sources, is both understandable and comforting. That a court would then choose to criticize the FBI for being unwilling to risk undermining its covert operations against terrorists is somewhat unnerving.

The district court also criticized the government for its apparent unwillingness to also bring criminal charges against Kiareldeen. It stated that "even the government does not find its own allegations sufficiently serious to commence criminal proceedings".

This statement illustrates both a simplistic and entirely uninformed view of the processes by which the Justice Department investigates and deals with suspected terrorists within our borders. It completely disregards the often complex determinations involved in releasing confidential counter-terrorism intelligence into the public arena through its introduction into both administrative hearings and court proceedings. Such a criticism implies that the government may only utilize information against an individual in a civil context, such as in deportation procedures, if it also intends to commence criminal proceedings against that same individual. Such a fettering of the Executive Branch has no support in either case law or statute. [Emphasis added.]

In light of these remarks by the Court of Appeals, we do not think the District Court's decision, on which the appellant relies, has the moral authority he attributes to it.

[90]In *Ahani v. Canada (Minister of Citizenship and Immigration)*  reflex, (1996), 37 C.R.R. (2d) 181 (F.C.A.), leave to appeal to the Supreme Court of Canada denied, [1997] 2 S.C.R. v, this Court upheld the constitutional validity of section 40.1 of the former *Immigration Act*. These provisions have been reproduced almost integrally, *mutatis mutandis*, in the IRPA. And they have also undergone and successfully passed the test of constitutionality under section 7 of the Charter.

[91]Indeed, in *Sogi v. Canada (Minister of Citizenship and Immigration)*, the appellant, a citizen of India, applied for refugee status. The Immigration and Refugee Board declared him inadmissible on the ground that he was a member of a terrorist organization. Certain information that could be injurious to national security was not disclosed to the appellant. In attacking the decision he alleged that the procedure adhered to was in breach of the principles of fundamental justice guaranteed by section 7 of the Charter.

[92]Assuming without deciding that section 7 of the Charter applied, and comparing the new provisions with the old ones, our colleague Mr. Justice Rothstein found that the procedure in the new Act was appreciably the same and that the principles identified in *Ahani*, applied. Consequently, the process of the IRPA met the standards of fundamental justice.

[93]The appellant contends that the decisions in *Ahani* and *Sogi*, do not apply to the facts in the instant case because the appellant is a permanent resident while, in the two previous decisions, it was aliens requesting refugee status. He adds that in *Ahani*, the application and implications of international law were not raised, while paragraph 3(3)(f) of the IRPA now requires compliance with the international instruments that Canada has signed:

3. . . .

(3) This Act is to be construed and applied in a manner that

. . .

(d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*,

including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

...

(f) complies with international human rights instruments to which Canada is signatory.

Finally, still in relation to the *Ahani* case, he argues that the legal context was distinct and quite different under the former Act, when the decision did not amount to a removal order and there was a judicial review procedure.

[94] Apart from the fact that the appellant is a permanent resident, the other differences he notes were in our opinion considered and rejected either explicitly or implicitly by Mr. Justice MacKay of the Federal Court and by this Court, which upheld his decision: see *Sogi*, at paragraphs 16 to 19, 24 and 39. We should not lose sight of the issue in dispute, in this case. It is not inappropriate to repeat it: Does the procedure by which a designated judge of the Federal Court reviews the reasonableness of a security certificate contravene section 7 of the Charter in that it allows some confidential information, which is not disclosed to the appellant on grounds of national security, to be seen, analysed and considered by the judge in making his decision?

[95] In *Sogi*, the problem was even more delicate since it involved a determination of the validity of this process when the decision concerning the confidentiality of the information is taken by a member of the Immigration and Refugee Board. This Court has ruled that this procedure fulfills the principles of fundamental justice inasmuch as a complainant could have a judge of the Federal Court determine the merits or lack thereof of maintaining the confidentiality of the information that could be harmful to national security. At paragraphs 24 and 25, Rothstein J.A. expresses the Court's opinion in these words:

The procedure under the former Act which required a Federal Court judge to make the initial and only decision regarding non-disclosure was found in *Ahani* to be in accordance with fundamental justice. As long as the availability of judicial review provides the appellant with an opportunity to have a Federal Court judge decide the propriety of keeping the information confidential, the IRPA procedure must also be found to be in accordance with the principles of fundamental justice.

The question is whether the appellant has that opportunity.

In the present case, the appellant had this opportunity since the request for review of the protected information was brought before a judge of the Federal Court following the referral of the security certificate in accordance with section 77 of the IRPA.

[96] There remains the question of the appellant's permanent resident status and therefore the fact that he is not an alien seeking entry to Canada. In our humble submission, the answer to this argument is twofold.

[97] Firstly, permanent resident status is revocable on grounds of inadmissibility under sections 33-46 of the IRPA. A permanent resident has no absolute right to remain in Canada and this status, by itself, cannot allow him access to information that might compromise national security. That this right is not absolute and may be revoked without such revocation violating the Constitution was confirmed by the Supreme Court of Canada in *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (S.C.C.), [1992] 1 S.C.R. 711, at pages 733-734:

The distinction between citizens and non-citizens is recognized in the *Charter*. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1).

Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada.

In this regard, his status does not differ from that of a person who is turned back at the border or who requests political asylum and obtains temporary residence status.

[98] Secondly, the right of access to information that could be harmful to national security by a person who, on reasonable grounds, is believed to have engaged, be engaging or intending to engage in terrorist activities does not depend on that person's legal status. In *Ribic*, Mr. Ribic was a Canadian citizen facing criminal charges. Had he been allowed access to confidential information that could be injurious to national security instead of denied such

access, as was the case, the risk to national security would have not have been any less present, less genuine or less serious because he was a Canadian citizen. In other words, whether the hat worn by a person is that of Canadian citizen, permanent resident, temporary resident or mere visitor, his inability to access information that might jeopardize or is jeopardizing national security depends on his deeds and on the State's need to protect itself from attacks on or breaches of its security or the safety of the individuals who make up that state, irrespective of their legal or social status.

[99]The appellant refers us to the decision of the Supreme Court of Canada in *R. v. Lyttle*, 2004 SCC 5 (CanLII), [2004] 1 S.C.R. 193, in which the Court reaffirmed the right of an accused in a criminal trial to cross-examine a prosecution witness. Again, this is a statement of principle in a criminal case which, as we saw in the *Ribic* case, must be qualified when national security is at issue. Whatever the case, the Supreme Court in *Ruby*, acknowledged, at paragraphs 39, 40 and 44, that the notion of procedural fairness and the rules of natural justice are principles of fundamental justice, but that the parameters of fairness depend on the context of the particular case. For example, the exclusion of a party during the hearing of certain arguments by the State was recognized as an exceptional albeit permissible derogation from the general rule that the right of a party to a fair hearing includes the right to know the evidence of the adverse party in order to answer anything that is detrimental to one's case.

[100]If we were to accept the appellant's position that national security cannot justify any derogations from the rules governing adversarial proceedings we would be reading into the Constitution of Canada an abandonment by the community as a whole of its right to survival in the name of a blind absolutism of the individual rights enshrined in that Constitution. We fail to discern any legislative intention along those lines, quite the contrary. We adopt the words of the Court of Appeals for the Third Circuit in *Kiareldeen v. Ashcroft*, at page 556:

Few interests can be more compelling than a nation's need to ensure its own security. It is well to remember that freedom as we know it has been suppressed in many countries. Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning.

The individual right to liberty and the security of the person can only be exercised within an institutional framework or social order that commands respect and is respected. It no longer has much meaning or scope when, collectively, the society charged with ensuring its protection has lost its own right to liberty and security as a result of terrorist activities that it was powerless to prevent or eradicate owing to this individual right that it was to protect and intended to protect. The choice, as Justice Jackson said in *Terminiello v. Chicago*, 337 U.S. 1 (1949), at page 37, "is not between order and liberty. It is between liberty with order and anarchy without either."

[101]Parliament weighed the interests at stake, those of the litigant and those of the community. It made a choice that recognizes the right to collective security while prescribing a procedure in which a judge, endowed with the necessary independence and impartiality, decides whether the disclosure of information or evidence would be injurious to national security or to the safety of any person. The appellant's arguments based on factors (c), (d) and (e) do not, in our opinion, have a cumulative impact that would enable us to conclude that the process established by Parliament is constitutionally invalid.

(f) the standard of evidence adopted by Parliament to justify the issuance of a security certificate is too minimal, since it is enough to have reasonable grounds to believe that the acts described in section 34 have occurred, are occurring or may occur when this standard should have been more stringent and require that the acts be proved according to the standard of the balance of probabilities

[102]The "reasonable grounds" test is generally the standard used for the institution of prosecutions for blameworthy acts and for the exercise of preventive or investigative powers. For example, a police officer's power of arrest, an application for a search warrant and the issuance of the warrant by a justice must be based on reasonable grounds (see sections 487 [as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 68; S.C. 1994, c. 44, s. 36; 1997, c. 18, s. 41; c. 23, s. 12; 1999, c. 5, s. 16], 495 [as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 75], 507(4), 512 [as am. *idem*, s. 82; S.C. 1997, c. 18, s. 58], 524(1), 525(5) and 679(6) of the *Criminal Code* [R.S.C., 1985, c. C-46]). In the case of preventive action, the police officer must have reasonable grounds to believe that a person is about to commit an indictable offence or to breach his or her promise to appear and that it is in the public interest to carry out an arrest. This applies as well to an information accusing an individual of having committed an indictable or other offence (sections 506 and 778 of the *Criminal Code*).

[103]The "reasonable grounds" standard requires more than suspicions. It also requires more than a mere

subjective belief on the part of the person relying on them. The existence of reasonable grounds must be established objectively, that is, that a reasonable person placed in similar circumstances would have believed that reasonable grounds existed, in the case of an arrest, to make the arrest: *R. v. Storrey*, 1990 CanLII 125 (S.C.C.), [1990] 1 S.C.R. 241, at page 250.

[104]This "reasonable grounds" standard has been characterized as an "important protection" without which "even the most democratic society could all too easily fall prey to the abuses and excesses of a police state": at page 249. Yet, the Supreme Court of Canada writes, "society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest", at pages 249 and 250.

[105]In the case at bar, inadmissibility must be based, under section 33 of the IRPA, on the Minister's reasonable grounds to believe that the acts or omissions referred to in sections 34 to 37 have occurred, are occurring or, if preventive considerations are involved, may occur. It is necessary, therefore, that a reasonable person, placed in similar circumstances and with the same facts, would arrive at the same belief. Thus, according to the cases, the "reasonable grounds" standard, applied to past or current wrongful acts, is not too minimal or weak a standard. It is sufficient.

[106]As to the preventive aspect, facts that might occur, the standard may *prima facie* seem too weak and consequently inadequate for the protection of individual rights since it is combined with a possibility, and not a probability, that the facts will occur. While it is true that the occurrence of the facts is stated in terms of possibility, the designated Judge was right in finding that there ought to be a serious possibility that these facts might occur and that this serious possibility should be assessed on the basis of reliable, credible evidence: see paragraph 128 of his decision.

[107]In fact, the situation in this case resembles that found in *Suresh*, in which the Supreme Court of Canada had to analyse the concept of "danger to the security of Canada". At paragraph 88 of the decision, the Court concludes that there "must be a real and serious possibility of adverse effect to Canada". In the case at bar, we are of the opinion that there must be a real and serious possibility that the injurious facts alluded to in sections 34 to 37 would occur. When the notion of "possibility" is defined and circumscribed in this way, and its existence is to be assessed on the basis of reasonable grounds, we do not think that the statutory standard adopted for preventive intervention to protect national security is unreasonable or in breach of the principles of fundamental justice.

(g) under paragraph 78(j), the designated judge may admit, and base his decision on, any evidence that he considers useful, even if it is inadmissible at trial

[108]This argument by the appellant no doubt refers primarily, albeit not exclusively, to the admissibility of hearsay evidence. In itself, there is nothing objectionable in this, in this context, since the designated judge, well versed in this kind of evidence, has the power and the duty to assess its credibility and probative value. We note as well that this possibility of adducing evidence that would be inadmissible at trial is also available to the applicant and that on this point there is an equality of weapons and treatment. This factor, in our view, has little if any impact on procedural fairness, even if such impact is essentially and exclusively adverse to the appellant.

(h) the notions of "reasonable grounds" and "danger to the security of Canada" are vague and overly broad

[109]The appellant's argument on this point is without merit. As mentioned previously, the Supreme Court of Canada has already characterized the reasonable grounds standard as "an important protection" and defined its parameters. In regard to the notion of "danger to the security of Canada", the Court held that it is not unconstitutionally vague, that it is difficult to define and that the expression must be given a fair, large and liberal interpretation in accordance with international norms: see *Suresh*, at paragraphs 82, 83 and 85.

(i) the decision of the designated Judge has far-reaching implications for a permanent resident like the appellant, who will be deported from the territory, when this decision is final and without appeal

[110]The inadmissibility that is provided and authorized by the IRPA, which results in removal from the country, may prove to have far-reaching implications for the person to whom it applies. But the validity of the process leading to removal is not gauged solely by the importance of the consequence that results from it. The fact is that the decision on the reasonableness of the security certificate issued by the Ministers is the product of a judicial decision made by an impartial and independent judge, at the conclusion of a process that meets the minimum

standards of fundamental justice. The absence of one or more rights of appeal does not affect the constitutional validity of the process established by Parliament.

[111]Furthermore, the Ministers remains free to act or not to act on the inadmissibility. In fact, the Ministers may change their mind if the permanent resident satisfies them that his presence in Canada would not be detrimental to the national interest: see subsection 34(2) of the IRPA.

[112]Similarly, an application for protection may be made to the Minister of Citizenship and Immigration under section 112 of the IRPA and the lawfulness of the Minister's decision on such an application is also reviewable by a designated judge: see section 80 of the IRPA.

[113]Thus there are safety valves and mechanisms that ensure an independent, fair determination by a judge of the facts and the law on which inadmissibility and a rejection of an application for protection are based. The appellant's argument based on the consequences of inadmissibility and the absence of a right of appeal from the judge's decision has no impact on the lawfulness of the process surrounding the referral of the certificate and its review in the Federal Court.

(j) the appellant is deprived of the right to be released on bail

[114]Under subsection 83(3) of the IRPA, the designated judge shall order the continued detention of a permanent resident who continues to be a danger to national security or to the safety of any person through the actions injurious to security that are listed in section 34. The permanent resident shall also remain in detention if the designated judge is satisfied that he is unlikely to appear at a proceeding or for removal. There is nothing surprising about this preventive measure given the gravity of the alleged or anticipated actions.

[115]Counsel for the appellant objects to the unfairness of this mandatory detention when, she says, the Immigration Division must, where there are reasons for detention, consider the existence of alternatives to detention and the possibility of using them. She bases her objection on paragraph 58(1)(a) of the IRPA, which is found in Division 6, and on paragraph 244(b) and sections 246 and 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, June 11, 2002 (the Regulations), which were adopted for the implementation of Division 6 of the IRPA governing detention and release.

[116]It is unnecessary to reproduce these sections in order to understand the issues. They refer to the danger that the arrested and detained person constitutes to the public and they identify the appropriate factors to be considered for the purposes of determining whether they apply to this person.

[117]The least that can be said is that the language of these sections lack vigor. The words "danger to the public" are sometimes rendered in French by "*danger pour le public*" (danger to the public) and sometimes by "*danger pour la sécurité publique*" (danger to public security or safety). Section 246 of the Regulations, which is an attempt to list the factors to be considered in applying the notion of public danger, refers to a number of provisions in the IRPA: paragraph 101(2)(b), subparagraph 113(d)(i) or (ii), paragraph 115(2)(a) or (b) and subsection 121(2). Most of these provisions deal with serious crime and organized crime in the context of the public danger they pose. One would therefore be inclined, if not justified, to think that all of these provisions contemplate the usual threat to the public presented by traditional crime. But then section 246 of the Regulations and subparagraph 113(d)(ii) and paragraph 115(2)(b) of the IRPA, still in the context of applying the notion of public danger, require that danger to the security of Canada be considered. Yet section 34 of the IRPA, which serves as the basis for the mandatory detention under subsection 83(3) because the detained person is a danger to national security or the safety of any person (hence the public), provides in paragraph (d) that a person may be inadmissible if he or she is a danger to the security of Canada and, under subsection (2), admitted if his or her presence in Canada would not be detrimental to the national interest.

[118]In short, there is in these provisions an overlapping and entanglement of the notions of public danger, danger to public safety or security, danger to the security of Canada, danger to national security, detriment to the national interest and danger to the safety of any person: a veritable abstract work of art in which everyone can see or discover what they wish.

[119]In this context, the submission by counsel for the appellant that the Immigration Division may use alternatives to detention for a person who constitutes a danger to the security of Canada, as in the case of paragraph 34(d), while the designated judge cannot, is certainly not unreasonable. Section 85 of the IRPA, in fact, states that sections 82 to 84, including subsection 83(3) which makes the detention mandatory, prevail to the extent

of any inconsistency with Division 6 and accordingly with the Regulations thereunder.

[120]But that does not mean, however, that the process that occurs before the designated judge in relation to the determination of the reasonableness of the certificate is unconstitutional. It is still necessary to establish discrimination under section 15 of the Charter, which was not done in this proceeding. Furthermore, the difference in treatment is explained by the fact that the Immigration Division is confronted with many situations or circumstances, of varying gravity, in which it must decide between continued detention and release, with or without conditions. On the other hand, the situation is necessarily a serious one when, under section 77, two government Ministers launch the inadmissibility process through a certificate on grounds of security, serious criminality, organized criminality or violation of human or international rights and refer it to the Federal Court. It is not unreasonable, therefore, that Parliament would enact different measures reflecting some distinct situations and purposes. Finally, the lack of discretion of the designated judge when there is a danger to national security or the safety of any person may be justified by the nature of the activities contemplated in section 34 of the IRPA, including terrorist activities.

[121]Whatever the case, the detention of a permanent resident awaiting the determination of the reasonableness of the security certificate issued against him is not an unjustified measure where there is proof of a danger to national security or that he might not appear at the proceedings taken against him.

[122]To conclude on this second question raised on appeal, the protection of national security is not a caprice. It is a necessity for the purpose of protecting the social order which allows the exercise and development of the individual rights conferred by the Constitution, which we rightly cherish. We are satisfied that this necessity to protect national security can justify derogations from the system or process that normally prevails. We are also satisfied that the process established for the review of protected information, by which the Chief Justice of the Federal Court, or a judge he designates, examines the denial of access to that information, fulfills the minimum requirements of the principles of fundamental justice.

[123]Counsel for the appellant suggested during the hearing of the appeal that the process should provide recourse to a special counsel with a right of access to the protected information who could assist the designated judge in the performance of his duties or assist the permanent resident's counsel who is unable to access that information. This special counsel would be able to cross-examine witnesses and thus to test more fully the reliability and credibility of the evidence submitted. We understood that she was expressing before us a desire for reform. We note that in *Ribic*, after an agreement between the parties and with the consent of the Attorney General of Canada, a special counsel was appointed with access to the protected information. He assisted Mr. Ribic's counsel, participated in the private and *in camera* hearings in his place and asked the witnesses the questions which the latter wished to have clarified.

[124]There is no doubt that the system, as it exists, complicates the task of the designated judge who must, in the absence of an applicant and his counsel, concern himself with the latter's interests in order to give equal treatment to the parties before him. Nothing precludes the executive or legislative authorities from granting more than the minimum guarantees under the Charter in order to satisfy the principles of fundamental justice. As Mr. Justice Bastarache says, "The Charter sets out minimum standards to which the common law and statute law must conform. It does not preclude the common law and statute law from offering additional protection": *R. v. G. (B.)*, 1999 CanLII 690 (S.C.C.), [1999] 2 S.C.R. 475, at paragraph 83; see also *R. v. Lippé*, 1990 CanLII 18 (S.C.C.), [1991] 2 S.C.R. 114, at page 142, where Chief Justice Lamer notes that the Constitution does not always guarantee the "ideal" situation.

[125]For example, the British Parliament, in section 6 of its legislation, the *Special Immigration Appeals Commission Act 1997* [(U.K.), 1997, c. 68], provides for the possible appointment by the Attorney General of a person to represent the interests of an appellant in proceedings before the Special Immigration Appeals Commission when he and his attorneys are excluded. Subsection 6(4) provides that a person thus appointed, chosen from among the specialized immigration Bar and Queen's Counsel and possessing the necessary security clearance, shall not be responsible to the person whose interests he or she is appointed to represent. But once this special advocate has examined the evidence or the confidential information, he is no longer free to contact the appellant or his counsel. He may do so only in accordance with directions from the Secretary of State, in order to avoid any disclosure of confidential information, even by inadvertence: see sections 34 to 36, *Special Immigration Appeals Commission (Procedure) Rules 2003* [S.I. 2003/1034].

[126]We have briefly alluded to the procedure that exists in England for two reasons: first, to note its existence, and second, to point out that its establishment would involve costs and would necessitate an analysis and a choice

as to the role that the specially appointed person should be able to play. It seems apparent to us that the appropriateness of setting up such a mechanism and its establishment, with all that this implies, pertains more to the legislative or regulatory power than it does to the judiciary. Moreover, in the report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police [*Second Report: Freedom and Security under the Law*] (the MacDonald Commission), to which the designated Judge refers at paragraph 35 of his decision, the Commission examined the question and did not consider this procedure to be appropriate for our system at that time. At Volume I, page 586, paragraph 104, the Commission wrote:

Hearings before a judge in our proposed system would be *ex parte* proceedings. . . . Submissions have been made to us that the proceedings should be made more adversarial by providing for the appointment of an officer to serve as 'a friend of the court'. This officer would appear before the judge and point out possible weaknesses or inadequacies in applications. While we think such a proposal has considerable merit and have considered it carefully, we have concluded that, on balance, it would not be advisable to adopt such a mechanism. The adversarial element afforded by such a procedure might be rather artificial and would make the process of approving applications unduly complex. Further, we think that an experienced judge is capable of giving adequate consideration to all relevant aspects of an application without the assistance of an adversarial procedure.

Parliament chose to follow this recommendation of the MacDonald Commission, which fulfills the minimum guarantees of the principles of fundamental justice. It is Parliament's role, not ours, to reconsider it if appropriate.

[127] We turn now to consideration of the third question raised by the appeal.

(3) Does the judicial examination procedure under section 76 *et seq.* of the IRPA derogate from the appellant's status as a permanent resident and does it ensure equal treatment to all permanent residents declared inadmissible on security grounds?

[128] We replied in part to this question earlier when we were analysing the factors under question No. 2. It is sufficient to reiterate that the status of permanent resident is constitutionally revocable and that in this regard the grounds for revocation are the same for all permanent residents: see *Chiarelli*. We also concluded that the judicial examination procedure under section 76 *et seq.* of the IRPA does not adversely affect that status.

[129] As to the question of the equality of treatment of permanent residents who are declared inadmissible on security grounds, there is in the record, apart from the allegations, no proof of discrimination within the meaning of section 15 of the Charter.

(4) Are the IRPA provisions for detention of the person in question during the judicial examination of the security certificate consistent with the Charter and the Bill of Rights?

[130] We are satisfied that the provisions relating to the preventive detention of the appellant while awaiting the determination on the reasonableness of the security certificate meet the requirements of the Charter and the Bill of Rights. The grounds for the detention are serious and limited. They have a close and direct relationship to the objectives of the IRPA, the obligation to ensure the protection of national security and the right of the Parliament of Canada to control the access to and sojourn in Canada of permanent residents.

[131] Furthermore, the procedure for ongoing review of the detention that Parliament has provided means that the appellant's right to release is under constant supervision and judicial protection, to ensure that it is not unlawfully or unjustly breached.

[132] Finally, as mentioned previously, the detention of a permanent resident pursuant to a security certificate is not an unjustified and unconstitutional measure when the evidence discloses that he might be a danger to national security or the safety of any person or that he might thwart the pursuit of justice by avoiding the proceedings taken against him.

(5) Are the expressions "reasonable grounds to believe" and "danger to the security of Canada" used in section 33 and subsection 34(1) of the IRPA vague, overly broad or discriminatory?

[133] We have already answered this question in the negative, at paragraphs 102 to 107.

(6) Does the public nature of the Ministers' security certificate that is referred to the Federal Court violate the Charter in so far as it would preclude a return of the person to his or her country of origin without risk?

[134]This ground of appeal was abandoned by the appellant.

(7) Does the absence of a right of appeal or judicial review of the decisions concerning the reasonableness of the certificate and, where applicable, the lawfulness of the Minister's decision in the context of the pre-removal risk assessment (section 112 of the IRPA) breach section 96 of the *Constitution Act, 1867*?

[135]There was no need to hear from the respondents on this question. It is trite law that the right of appeal is a statutory right and that it does not exist absent the appropriate statutory provision. Constitutionally, it is beyond question that Parliament has the power to grant or withhold a right of appeal in immigration matters.

[136]As to the "harm" factor that appears to underlie this complaint, it should not be forgotten that the absence of any right of appeal or judicial review applies to both parties to the proceeding; the appellant and the respondents alike can rejoice or lament this fact depending on the decision that is made.

(8) Does the judicial examination procedure under sections 76 to 85 of the IRPA comply with Canada's international obligations, particularly in light of paragraph 3(3)(f) of the IRPA and the Covenant?

[137]Paragraph 3(3)(f) of the IRPA requires that the Act be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. The appellant cites in support the provisions of the Covenant, the Universal Declaration and the European Convention on Human Rights and alleges that the judicial examination procedure under section 77 *et seq.* of the IRPA contravenes them. There is no merit in this argument of the appellant.

[138]It should be mentioned that the Universal Declaration, which is a resolution of the General Assembly of the United Nations, is of no binding effect, although it plays an important role in customary international law. However, as stated earlier, Canada is a signatory to the Covenant, an instrument which in some ways serves to spell out the major principles set out in the Universal Declaration. As for the Convention, its role is a limited one in our domestic law. But in so far as its provisions are similar to those of the Covenant and our Charter, its interpretation by the European tribunals offers us an additional and relevant perspective, to be sure.

[139]Generally speaking, the provisions of the Covenant allow for the right to equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal (Article 14). Articles 12 and 13 include the right to liberty of movement within the territory by a person who is lawfully there and the right for an alien facing expulsion to oppose it and be allowed to submit the reasons against his expulsion. But the Covenant's provisions also allow for derogations in the case of an emergency which threatens the life of the nation or a threat to national security, derogations that it is not necessary to analyse here in the absence of any evidence of a breach of articles 13 and 14.

[140]In fact, the United Nations Human Rights Committee, in its Communication No. 1051/2002 [*Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*], confirmed the compliance of the judicial review procedure in section 77 of the IRPA with the provisions of the Covenant. At paragraph 10.5, the Committee makes the following observations in relation to an application from Mr. Ahani, who had unsuccessfully challenged the procedure in the Federal Court:

As to the claims under articles 6, 7, 13 and 14, with respect to the process and the fact of the author's expulsion, the Committee observes, at the initial stage of the process, that at the Federal Court's "reasonableness" hearing on the security certification the author was provided by the Court with a summary redacted for security concerns reasonably informing him of the claims made against him. The Committee notes that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved, the Committee is not persuaded that this process was unfair to the author. Nor, recalling its limited role in the assessment of facts and evidence, does the Committee discern on the record any elements of bad faith, abuse of power or other arbitrariness which would vitiate the Federal Court's assessment of the reasonableness of the certificate asserting the author's involvement in a terrorist organization. The Committee also observes that the Covenant does not, as of right, provide for a right of appeal beyond criminal cases to all determinations made by a court. Accordingly, the Committee need not determine whether the initial arrest and certification proceedings in question fell within the scope of articles 13 (as a decision pursuant to which an alien lawfully present is expelled) or 14 (as a determination of rights and obligations in a suit at law), as in any event the author has not made out a violation of the requirements of those

articles in the manner the Federal Court's "reasonableness" hearing was conducted. [Emphasis added.]

[141]Article 10 of the Universal Declaration and Article 6, paragraph 1 of the Convention confer rights similar to those in Article 14 of the Covenant.

[142]In terms of equality before the courts and tribunals, procedural fairness, judicial independence and the impartiality of the courts, our Charter is not outdone by any of these three international instruments. It confers rights and guarantees that are for all practical purposes identical. We indicated earlier that the judicial examination procedure under section 77 *et seq.* is in compliance with it. The same may be said, therefore, in relation to the three international instruments.

[143]Moreover, the European Court of Human Rights, in a decision dated October 5, 2000, *Maaouia v. France* (39652/98), [2000] ECHR 453, ruled that Article 6 of the Convention does not apply to exclusion orders. It is a "special preventive measure for the purposes of immigration control" that is often taken by administrative authorities: see paragraph 39 of the decision. As the Court states, at paragraph 40, "decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention."

### Conclusion

[144]The designated Judge had jurisdiction to hear and determine the constitutional questions raised by the appellant within the context of the inadmissibility proceedings taken against him. But the appellant has been unable to demonstrate that the procedure for reviewing the reasonableness of the security certificate issued against him, and for reviewing the reasons for the continuing detention as well as the procedure for reviewing protected information under section 76 *et seq.* of the IRPA, do not meet the requirements of the Charter and the three international instruments to which he referred. Accordingly, we are of the opinion that the conclusions of the designated Judge must be upheld and that the appeal should be dismissed with costs.

\* \* \*

The following is the English version of the reasons for judgment rendered by

[145]Richard C.J.: I concur with the very thorough reasons and conclusion of my colleagues, Justices Décaré and Létourneau. This appeal raises important issues regarding the role of the courts in national security matters as well as the role of counsel representing the federal government in such matters.

[146]One of the objectives of the *Immigration and Refugee Protection Act* (IRPA) is to protect the security of Canadian society. It contains inadmissibility provisions for criminals, persons who constitute security threats, and those who have violated human rights.

[147]My colleagues have analysed in detail the provisions of the Act which concern inadmissibility based on these grounds and the requirement for judicial consideration of the certificate issued by the Ministers 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.

[148]I wish to underline the importance of the role of the judiciary as well as the role of counsel appearing on behalf of the Ministers in such proceedings.

[149]Canada has a legitimate and compelling interest in protecting national security. The challenge confronting the government is how best to achieve an equilibrium between the dictates of national security and civil rights. The task of the law is to find ways to maintain national security without unduly sacrificing individual liberties. In order to meet this challenge, Parliament has included provisions in the Act which require judicial consideration of the reasonableness of the certificate issued by the Ministers and the protection of information whose disclosure would be injurious to national security or to the safety of any person.

[150]Although the initial decision to withhold confidential information is made by the Ministers, this decision thereafter falls under the purview of the designated judge, including the determination of what information is to be placed in the summary given to the person named in the security certificate. The designated judge must also provide this person with the opportunity to be heard. If, in the designated judge's reasoned opinion, the withholding of the confidential information is not justified, the judge may order that the material be disclosed.

[151]It is therefore the designated judge who determines the need to withhold information from the party named in the certificate, not the Ministers. Thus, the role of the judiciary as interpreter of the law and defender of the Constitution remains unchanged.

[152]Judicial independence from both government influence and from other sources, including public opinion, is a constitutional right of every individual in Canada. It is the right to know that all legal questions brought before the courts will be resolved impartially and according to the law, without extraneous influence and intervention. By ensuring that decisions regarding the withholding of evidence and information are made by the designated judge and not by the Ministers, the Act endeavours to grant protection to the rights of the party named in the certificate while maintaining national security.

[153]I also wish to focus on the duty of counsel appearing on behalf of the Ministers in an *ex parte* proceeding under section 78 of the Act. I agree with my colleagues that counsel is under a duty of utmost good faith in the representations made to the judge. No relevant information may be withheld. The principle of full and frank disclosure in *ex parte* proceedings is a fundamental principle of justice that has been recognized by the Supreme Court: *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (CanLII), [2002] 4 S.C.R. 3, at paragraph 27.

[154]Applying this principle to proceedings under section 78 of the Act results in an obligation on counsel for the Ministers to put before the designated judge not only the protected evidence that serves to incriminate the subject of the security certificate, but also any and all information that could serve to exculpate that person. Counsel has a strict duty to put forward all the information in its possession, both favourable and adverse, regardless of whether counsel believes it is relevant. It is then up to the designated judge to decide whether or not the evidence is material.

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