Charkaoui v. Canada (Minister of Citizenship and Immigration) (F.C.A.), 2003 FCA 407 (CanLII)

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Docket: A-349-03
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Reflex Record (noteup and cited decisions)

A-349-03

2003 FCA 407

Adil Charkaoui (*Appellant*)

v.

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

Indexed as: Charkaouiv. Canada (Minister of Citizenship and Immigration) (F.C.A.)

Federal Court of Appeal, Décary, Létourneau and Nadon JJ.A.--Ottawa, October 31, 2003.

Citizenship and Immigration -- Immigration Practice -- Motion to strike out notice of appeal from order for continued detention made by Federal Court judge under Immigration and Refugee Protection Act, s. 83 -- Respondent ministers issuing certificate appellant inadmissible on grounds of national security -- Also issued, executed warrant for arrest, detention of appellant under Act, s. 82(1) -- Close relationship between certificate attesting inadmissibility, detention -- S. 80(3) precluding appeal from determination of reasonableness of inadmissibility certificate -- No such provision with respect to continued detention decision -- Inconceivable Parliament intending to not allow determination of danger to national security by way of appeal in proceeding so closely related to proceeding in which such review permitted -- Right of appeal from detention decision also incompatible with ongoing review mechanism in Act, s. 83 -- Motion allowed, Décary J.A. dissenting.

Construction of Statutes -- Whether right of appeal in relation to order for continued detention under Immigration and Refugee Protection Act, s. 83 -- At issue interpretation of statutory provisions enacted by Parliament to ensure Canada's security, to protect it from terrorism -- Federal Courts Act, s. 27(1)(c) conferring right of appeal from interlocutory ruling by Federal Court judge -- S. 80(3) expressly precluding appeal from decision on reasonableness of inadmissibility certificate -- No such provision with respect to continued detention decision -- Statutory interpretation based neither solely on Federal Courts Act, s. 27(1)(c) nor on Parliament's failure to expressly state no right of appeal from decision in relation to detention -- Close relationship between certificate attesting inadmissibility, detention important factor in search of Parliament's intention -- Inconceivable Parliament intended to create duality of concurrent remedies -- Parliament not contemplating appeal from decision on detention, Décary J.A. dissenting.

This was a motion to strike out a notice of appeal in relation to an order for continued detention made by a Federal Court judge under section 83 of the *Immigration and Refugee Protection Act*. On May 16, 2003, the respondent ministers issued a certificate under subsection 77(1) of the Act, stating that the appellant was inadmissible on

grounds of security because he was a member of the terrorist network of Osama Bin Laden. On the same day, the respondent ministers availed themselves of the provisions of subsection 82(1) of the Act to issue a warrant for the arrest and detention of the appellant in regard to whom there were "reasonable grounds to believe that he is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal". The appellant has been detained since May 21, 2003. As required by subsection 83(1) of the Act, Noël J. commenced a review of the reasons for the continued detention no later than 48 hours after the beginning of the detention. On July 15, 2003, he continued the detention "until the designated judge rules again in regard to the continuation of detention under subsection 83(2) of the Act". The appellant filed a notice of appeal of that decision. The Deputy Attorney General of Canada, on behalf of the two respondent ministers, filed a motion in writing in which he argued there is no right of appeal of the order for continued detention. It was submitted that, since subsection 80(3) expressly precludes an appeal from the substantive decision on the reasonableness of the certificate, there cannot be a right of appeal from the interlocutory and ancillary order for continued detention. At issue was the interaction between these new provisions and paragraph 27(1)(*c*) of the *Federal Court's Act* which confers, in a general way, a right of appeal from an interlocutory ruling by a Federal Court judge. More specifically, the issue was whether there is a right of appeal in relation to an order for continued detention under section 83 of the *Immigration and Refugee Protection Act*.

Held (Décary J.A. dissenting), the motion should be allowed.

Per Létourneau J.A. (Nadon J.A. concurring): This litigation had to do with the interpretation of statutory provisions enacted by Parliament to ensure Canada's security and protect it, among other things, from terrorism. The issue was essentially one of seeking and crystallizing Parliament's intention in enacting sections 82 and 83 in relation to detention and its review. That intention could not be based solely on the language of *Federal Courts Act*, paragraph 27(1)(*c*). Similarly, this statutory interpretation could not be based solely on Parliament's failure to state expressly that there is no right of appeal from a decision in relation to detention. The issue in dispute, the appellant's detention, is closely connected with the main issue, the inadmissibility cited against the appellant. Such connection is clear from both the reasons in support of each case and the common objective sought by them. With one exception, the reasons for detention and inadmissibility are identical, that is the protection of Canada's security. But when the purpose of detention is also to ensure the appearance of the person who is the subject of the certificate, the detention order is ancillary to and necessarily connected with the main issue posed by the certificate, which is the fear for the security of Canada. Subsection 83(2) which links detention and its review to adjudication on the certificate was also proof of a close relationship between the certificate attesting inadmissibility and the detention. That relationship is an important factor in the search for Parliament's intention.

Subsection 80(3) of the Act provides that the determination of the judge on whether the certificate is reasonable is "final and may not be appealed or judicially reviewed". By adding these words, Parliament clearly limited the general appeal jurisdiction of this Court, which it failed to do in sections 82 and 83 concerning detention. However, this did not mean that the decision on detention is liable to appeal on judicial review. Under section 80 of the Act, the designated judge must determine whether the certificate is reasonable. He must also, on the issue of detention, verify whether the minister had reasonable grounds to fear for national security because of the danger posed by the appellant. In either case, he must verify the reasonableness of the fear for national security. It is inconceivable that Parliament intended that the determination of the issue of dangerousness to national security in the context of the analysis of the certificate could not be reviewed on appeal, but that the same issue, if determined by the same judge in the context of a review of the detention, could be reviewed on appeal. To allow an appeal in the context of the review of detention is to allow a person subject to inadmissibility to do indirectly what that person cannot do directly because of the prohibition in subsection 80(2) of the Act.

Furthermore, a decision by the Court of Appeal on the dangerousness of the person detained or the reasonableness of the fears for national security places the designated judge in an impossible situation when the time comes to determine the validity of the certificate. There would be nothing further to decide if the Court of Appeal had already concluded, in the context of detention, that the person being held does not constitute a danger to Canada. The Court of Appeal would then be usurping functions exclusively assigned by Parliament to the designated judge. Recognizing a right of appeal on the issue of detention would also contravene Parliament's intention in relation to the taking and the handling of the evidence and would allow such evidence to go beyond the designated judge and end up before the Court of Appeal. This was another indicator that Parliament did not contemplate any appeal from a decision on detention.

A right of appeal from the detention decision is also incompatible with the ongoing review mechanism adopted by Parliament. Given the prejudicial nature of the power of arrest and detention *vis-a-vis* the right to liberty and security of the person, Parliament opted for a smooth, flexible, efficient and inexpensive mechanism which is consistent with its intention, expressed in paragraph 78(*c*) of the Act, that the designated judge shall proceed informally and expeditiously. A conclusion that Parliament intended to maintain a long and costly appeal process, would disregard its intention. The right of appeal to the Federal Court of Appeal under the Act is either non-existent or strictly controlled. It was not Parliament's intention, in connection with the question of detention, to create a duality of concurrent remedies, review and appeal, which multiply the proceedings and render the system dysfunctional. It was not Parliament's intention either to punctuate and break-up, through uncontrolled and repeated appeals, the continuity of this process of review of the detention by a designated judge.

Per Décary J.A. (dissenting): There is an appeal to the Federal Court of Appeal only in those cases expressly provided by the Act. Subsection 27(1) of the *Federal Courts Act* gives the Federal Court of Appeal a general right of appeal in regard to, for example, final judgments and interlocutory judgments of the Federal Court. Parliament can limit or eliminate this general right of appeal, which it has expressly done in some specific instances. But Parliament did not think fit to expressly exclude an order for continued detention made under section 83 of the Act from the general principle that an appeal lies to the Federal Court of Appeal from a final or interlocutory decision by a Federal Court judge. Thus, if there is an exception to the general principle of a right of appeal, it can only be by interpretation or inference. This interpretation or inference must nevertheless flow naturally from the language of the statute in question, and must support a finding that Parliament has clearly presumed or intended, even if it did not say so explicitly, that there is no right of appeal. The statutory provisions at issue do not support a finding that Parliament, by inference or interpretation, eliminated the right of appeal from orders for continued detention. Parliament was especially selective and specific, in the newly enacted Act, when it decided to eliminate or limit the right of appeal to the Federal Court of Appeal. The two procedures herein, albeit parallel, originated in two distinct ministerial acts: the issuance of a certificate of inadmissibility and the issuance of a warrant of arrest. Each has its own life, each has distinct purposes and each leads to an independent decision. The decision on detention is not a decision ancillary to the decision on the certificate and consequently is not an interlocutory decision subject, in respect of the right of appeal, to the same fate as the main decision on the certificate. The decision on the continued detention is a substantive ruling on the appellant's right to remain at liberty and this right is completely distinct from his right to remain in Canada. That decision did not affect in any way the inquiry conducted in relation to the certificate or the decision forthcoming upon that inquiry. In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, the Supreme Court of Canada held that the power to order the continued detention "does not flow by necessary implication from the power to decide if" the certificate is reasonable. That order is a final judgment or, at the very outside, an interlocutory judgment that is unrelated to the ultimate order that will be made in relation to the reasonableness of the certificate. In either case, the elimination of the right of appeal, in subsection 80(3), cannot apply. However, continued detention is not entered for reasons which are completely unrelated to the reasonableness of the certificate. The reasons may be similar where security is at stake, but the objective sought, in one case, is long-term and in the other, short-term. The issuance of the certificate is based on the past actions of the interested party while the arrest warrant is based on the current danger he represents. That the same actions may be cited in either proceeding do not prevent the objective sought from being distinct.

To repeat the expression used in *Tobiass*, the power to order the continued detention and the power to declare the certificate of inadmissibility reasonable are "separate, divisible" judicial acts. The continued detention is not "related" to the reasonableness of the certificate which will be determined irrespective of whether the interested party is in detention. The argument of the respondent ministers based on subsection 83(2), which guarantees an automatic review and allows a discretionary review of the detention, was ill-founded since it confused appeal and review and assumed that once the continued detention is ordered, the interested party can have no remedy other than review. The respondent ministers were asking the Court to add to Division 9 of the Act a provision that is simply not there and that would have the effect of establishing a dependency between the order on the certificate and the order on continued detention that does not exist. The order for continued detention made on July 15, 2003 may be appealed.

statutes and regulations judicially

considered

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

Courts Administration Service Act, S.C. 2002, c. 8.

Criminal Code, R.S.C., 1985, c. C-46 , ss. 520 (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 86; S.C. 1999, c. 3, s. 31), 521 (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 87; S.C. 1999, c. 3, s. 32).

Federal Court Rules, C.R.C., c. 663, RR. 5, 450 (as am. by SOR/90-846 , s. 15), 451 (as am. *idem*), 452 (as am. *idem*), 453 (as am. *idem*), 454 (as am. *idem*), 455 (as am. *idem*), 461 (as am. *idem*), 477, 900-920, 1714, 1715.

Federal Court Rules, 1998, SOR/98-106, rr. 216, 369.

Federal Courts Act, R.S.C., 1985, c. F-7 (as am. by S.C. 2002, c. 8, s. 1), ss. 2(1) "final judgment", 27(1)(*c*) (as am. *idem*, s. 34), 46 (as am. by S.C. 1990, c. 8, s. 14; 1992, c. 1, s. 68), 52(*a*) (as am. by S.C. 2002, c. 8, s. 50).

Immigration Act, R.S.C., 1985, c. I-2 , ss. 82.2 (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 19; S.C. 1992, c. 49, s. 73), 103 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 27; S.C. 1992, c. 49, s. 94; 1995, c. 15, s. 19).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(1)(*h*),(*i*), 34, 54, 55, 57, 58, 62, 63(2),(3), 64(1), 72, 74(*d*), 75(2), 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 105(4).

cases judicially considered

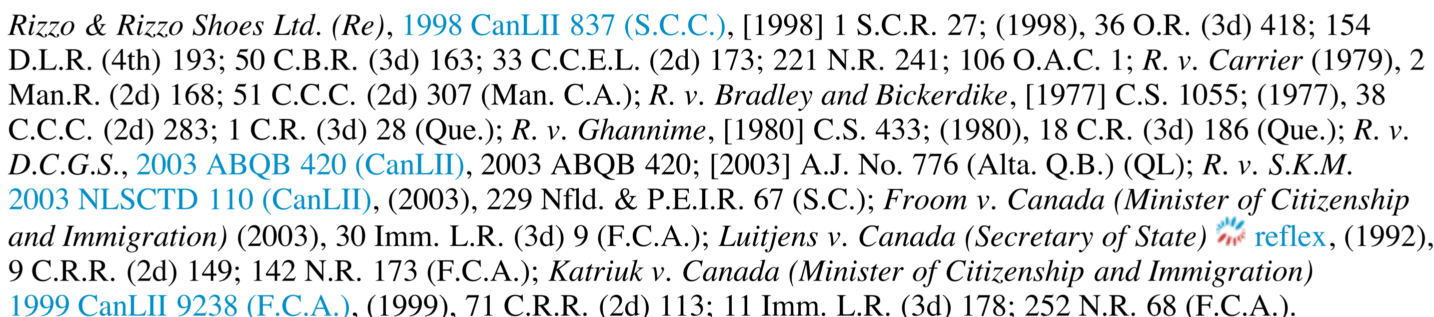
distinguished:

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 (C.A.).

considered:

Lai v. Canada (Minister of Citizenship and Immigration) (2001), 15 Imm. L.R. (3d) 161; 273 N.R. 264 (F.C.A.); *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 882 (CanLII), 2003 FC 882; [2003] F.C.J. No. 1119 (F.C.) (QL); *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 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.

referred to:



Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27; (1998), 36 O.R. (3d) 418; 154 D.L.R. (4th) 193; 50 C.B.R. (3d) 163; 33 C.C.E.L. (2d) 173; 221 N.R. 241; 106 O.A.C. 1; *R. v. Carrier* (1979), 2 Man.R. (2d) 168; 51 C.C.C. (2d) 307 (Man. C.A.); *R. v. Bradley and Bickerdike*, [1977] C.S. 1055; (1977), 38 C.C.C. (2d) 283; 1 C.R. (3d) 28 (Que.); *R. v. Ghannime*, [1980] C.S. 433; (1980), 18 C.R. (3d) 186 (Que.); *R. v. D.C.G.S.*, 2003 ABQB 420 (CanLII), 2003 ABQB 420; [2003] A.J. No. 776 (Alta. Q.B.) (QL); *R. v. S.K.M.* 2003 NLSCTD 110 (CanLII), (2003), 229 Nfld. & P.E.I.R. 67 (S.C.); *Froom v. Canada (Minister of Citizenship and Immigration)* (2003), 30 Imm. L.R. (3d) 9 (F.C.A.); *Luitjens v. Canada (Secretary of State)* reflex, (1992), 9 C.R.R. (2d) 149; 142 N.R. 173 (F.C.A.); *Katriuk v. Canada (Minister of Citizenship and Immigration)* 1999 CanLII 9238 (F.C.A.), (1999), 71 C.R.R. (2d) 113; 11 Imm. L.R. (3d) 178; 252 N.R. 68 (F.C.A.).

authors cited

Cournoyer, Guy and Gilles Ouimet. *Code criminel annoté 2004*, Cowansville: Éditions Yvon Blais, 2003.

MOTION to strike out notice of appeal in relation to an order for continued detention made by a Federal Court judge under section 83 of the *Immigration and Refugee Protection Act*. Motion allowed.

written representations by:

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

[1]Létourneau J.A.: I have had the benefit of reading the reasons of my colleague Mr. Justice Déca ry. Unfortunately, I am unable to subscribe to them or to the conclusion to which they lead.

[2]I will confine myself to listing some of the principal facts, avoiding inasmuch as possible the duplication of those related by my colleague.

Facts and relevant statutory provisions

[3]I reproduce at this point some of the relevant sections of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) in order to facilitate access thereto and consultation for a fuller understanding of these reasons:

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.

. . .

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--Trial Division, 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 Court 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).

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.

[4]This litigation has to do with the interpretation of statutory provisions enacted by Parliament to ensure Canada's security and protect it , *inter alia*, from terrorism. At issue is the interaction of paragraph 27(1)(*c*) [as am. by S.C. 2002, c. 8, s. 34] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [as am. *idem*, s. 1], with these new provisions. Paragraph 27(1)(*c*) confers, in a general way, a right of appeal from an interlocutory ruling by a judge of the Federal Court.

[5]As my colleague has already stated, at paragraphs 2 and 3 of his reasons, the respondent ministers issued a certificate stating that the appellant is inadmissible on grounds of security: subsection 77(1) of the Act. More specifically, the respondent ministers allege that the appellant constitutes a danger to the security of Canada because he is a member of the terrorist network of Osama Bin Laden and that, alone or as a member of that organization, he has engaged, is engaging or will engage in terrorism: paragraphs 34(1)(*c*), (*d*) and (*f*) of the Act.

[6]From this perspective, and consecutively to the intended security objective, the ministers availed themselves of subsection 82(1) of the Act. They issued a warrant for the arrest and detention of the appellant. The reason cited, based on reasonable grounds, is clear and precise: the appellant constitutes a danger to national security or to the security of others persons or, knowing that he is being prosecuted, is unlikely to appear for the proceeding taken against him or the removal that will follow if the certificate in relation to inadmissibility is declared valid.

[7]Thus it is already evident, in this case, that there is a significant linkage between the reasons for the detention of the appellant and the reasons on which inadmissibility is based as attested by the certificate issued by the ministers under section 77 of the Act. I will return to this question in greater detail a little later in my reasons.

No right of appeal from the decision of the designated judge reviewing the reasons for detention of the appellant

[8]The issue is essentially one of seeking and crystallizing Parliament's intention in enacting sections 82 and 83 in relation to detention and its review. This search must be conducted in light of the other provisions of Division 9, which contains sections 82 and 83, and the objective sought both by this D ivision and by the Act. Parliament's intention cannot be based solely on the language of paragraph 27(1)(*c*) of the *Federal Courts Act*: see *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27, at paragraph 21. Similarly, this statutory interpretation cannot be based solely on Parliament's failure to state expressly that there is no right of appeal from a decision in relation to detention.

(a) Existence of a close connection between the certificate attesting inadmissibility and the detention

[9]I think it is necessary, from the outset, to distinguish this case from *Canada (Minister of Citizenship and Immigration) v. Obodzinsky*, 2002 FCA 518 (CanLII), [2003] 2 F.C. 657 (C.A.). In *Obodzinsky*, the issue was the interpretation and application of a rule of procedure of the Federal Court that had no relationship to the main issue, which was to determine whether citizenship had been obtained as the result of misrepresentations or fraudulent schemes. In the case at bar, the issue in dispute, that is, the appellant's detention, is closely and intimately connected with the main issue, the inadmissibility that is cited against the appellant.

[10]In the first place, this connection between detention and inadmissibility is clear from both the reasons in support in each case and the common objective sought by each. With one exception, the reasons for detention and inadmissibility are identical. Furthermore, both the inadmissibility and the detention of the appellant have as their common denominator the protection of Canada's security. And this is one of the key objectives of the Act, as Parliament has stated in paragraphs 3(1)(*h*) and (*i*) under the heading "Objectives and Application". Paragraph 3(1)(*h*) states that the objective of the Act is "to protect t he health and safety of Canadians and to maintain the security of Canadian society", while paragraph 3(1)(*i*) says the objective is "to promote international justice and security by . . . denying access to Canadian territory to persons who are . . . securit y risks".

[11]In the case at bar, the inadmissibility certificate was issued by the ministers because the appellant represented a risk to Canada's security due to his membership in a terrorist organization or because he has engaged, is engag ing or will engage in terrorism. In other words, the reason for inadmissibility is the fear for security; the reasons for the fear for security are the appellant's membership in a terrorist organization and the possibility that terrorist acts will be engag ed in by him or by the organization of which he is a member: see the certificate issued pursuant to subsection 77(1) of the Act.

[12]Now, it is apparent from the warrant of arrest and detention, as it is in regard to the inadmissibility, that the fear for security is the fundamental and primary reason for the issuance of this warrant and the order of detention it contains. It is true that detention may also be ordered for an additional reason, to ensure that the person subject to the warrant does not evade the proceeding or removal order. But it is obvious that in such cases, i.e. when the purpose of detention is also to ensure the appearance of the person who is the subject of the certificate, the detention order is ancillary to and necessarily connected with the main issue posed by the certificate, which is the fear for the security of Canada. It is a necessary complement to the certificate.

[13]Proof of the close relationship between the detention and the inadmissibility attested by the certificate is likewise indicated by subsection 83(2) of the Act. Parliament there links detention and its review to the adjudication on the certificate. The clause stipulates that "until a determination is made [on the certificate]", the person who is being detained must be brought back before a judge at least once in the six-month period following each preceding review of the reasons for the detention.

(b) Importance and meaning of the existence of the connection between the certificate attesting inadmissibility and the detention

[14]The existence of a close relationship between the certificate attesting inadmissibility and the detention proves to be an important factor in the search for Parliament's intention.

[15]In subsection 80(3) of the Act, Parliament provided that the determination of the judge on whether the certificate is reasonable is "final and may not be appealed or judicially reviewed". By adding these words, it clearly limited the general appeal juris diction of this Court, which it unfortunately failed to do in sections 82 and 83 concerning detention. However, this does not mean that the decision on detention is liable to appeal or judicial review. This can be seen simply by examining, in the first place, the role the designated judge is required to perform in relation to the certificate and the detention.

[16]Under section 80 of the Act, the designated judge must determine whether the certificate is reasonable. He must, based on evidence, determine whether it was or was not reasonable for the ministers to fear for the security of Canada because of the risk posed by the appellant, and consequently whether it was or was not reasonable to file a certificate attesting inadmissibility. On the issue of detention, the designated judge must likewise verify whether or not the minister had reasonable grounds to fear for national security because of the danger posed by the appellant. In either case, he must verify the reasonableness of the fear for national security.

[17]It is inconceivable to me that Parliament intended that the determination of the issue of dangerousness to national security in the context of the analysis of the certificate could not be reviewed on appeal, but that the same issue, if determined by the same judge in the context of a review of the detention, could instead be reviewed on appeal. To allow an appeal in the context of the review of detention is to allow a person subject to inadmissibility to do indirectly what that person cannot do directly because of the prohibition in subsection 80(2) of the Act, that is, to review the reasonableness of the minister's fears for national security. In other words, it is to use the detention to obtain a review o f the validity of the reasons for the certificate although Parliament had no intention that those reasons should be reviewed by the Court of Appeal.

(c) Other incongruous consequences of a possible appeal from the decision of the designated judge on the issue of detention

[18]Over and above the fact that a right of appeal from the detention decision would allow doing indirectly what Parliament has prohibited doing directly, a decision by the Court of Appeal on the dangerousness of the person detained or the reasonableness of the fears for national security places the designated judge in an impossible

situation when the time comes for him to determine the validity of the certificate. To all intents and purposes, there is nothing further for him to decide if the Court of Appeal has already concluded, in the context of the detention, that the person being held does or does not constitute a danger to the security of Canada and that the minister's fears in this regard are or are not j ustified. The Court of Appeal is then usurping functions specifically and exclusively assigned by Parliament to the designated judge.

[19]Recognizing a right of appeal on the issue of detention would also contravene Parliament's intention in relation to the taking and the handling of the evidence. Indeed, it is clear from subsection 80(3) of the Act, which prohibits any appeal on the reasonableness of the certificate, that Parliament intended that the evidence concerning the dangerousness for national security, which is necessary in determining the reasonableness of the certificate, be taken and handled by the designated judge and go no further. However, to recognize a right of appeal on the issue of detention would allow such evidence to go beyond this framework and end up before the Court of Appeal. This poses a number of practical problems and raises some important questions for which Parliament has not provided any answer--which, in my opinion, indicates once again that Parliament did not co ntemplate any appeal from a decision on detention.

[20]In fact, as this case illustrates, the designated judge, when taking and handling the evidence, did hear from a number of witnesses for both the prosecution and the defence on the issue of the danger to security posed by the appellant. He not only heard these witnesses, he saw them. He assessed their credibility. What useful role can the Court of Appeal play in such a context, given the applicable standard of review in such situations? Worse still, how would it assess this evidence if there is no recording of the testimony? Will it then proceed with a hearing *de novo*, hear the witnesses, review the documentary evidence and assess the testimony in light of that evidence? It would then no longer be an appeal, strictly speaking, but rather a hybrid review comparable to the review under sections 520 [as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 86; S.C. 1999, c. 3, s. 31] and 521 [as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 87; S.C. 1999, c. 3, s. 32] of the *Criminal Code* [R.S.C., 1985, c. C-46] in which, as we can see in subsections 520(7) and 521(8), which confer such powers, the reviewing judge may accept new evidence and exhibits from the inmate and the prosecutor and--notwithstanding an i nitial expression of deference thereto--substitute his discretion for that of the judge below: Cournoyer and Ouimet, *Code criminel annoté 2004* (Cowansville: Éditions Yvon Blais, 2003), at pages 817 and 819; *R. v. Carrier* (1979), 2 Man. R. (2d) 168 (C.A.); *R. v. Bradley et Bickerdike*, [1977] C.S. 1055 (Que.) ; *R. v. Ghannime*, [1980] C.S. 433 (Que.); *R. v. D.C.G.S.*, 2003 ABQB 420 (CanLII), 2003 ABQB 420; [2003] A.J. No. 776 (Alta. Q.B.) (QL); *R. v. S.K.M.* (2003), 229 Nlfd. & P.E.I.R. 67 (S.C.). In the case before us, no section in the Act gives the Court of Appeal such powers.

[21]Determining the dangerousness of a detained person generally involves a question of fact. The question of whether this dangerousness is sufficient to warrant preventive detention, that is, detention while awaiting a decision on the main issue, is a question of mixed law and fact. Again, in view of the standard of review applicable on appeal to questions of mixed fact and law, I seriously question the practical necessity of a traditional right of appeal as appears to be contemplated in this case.

[22]A right of appeal from the detention decision is also demonstrably incompatible with the ongoing review mechanism selected and adopted by Parliament.

[23]When it granted a power of arrest and detention, Parliament was aware of the prejudicial nature of that power *vis-a-vis* the right to liberty and security of the person. It was also sensitive to the need to preclude and monitor abuses in such matters. Accordingly, it opted for a smooth, flexible, efficient and inexpensive mechanism. In short, Parliament opted for the antithesis of what a three-judge panel appeal mechanism would be.

[24]First, the detention must be reviewed within 48 hours following its commencement. Second, it must be reviewed again at least once within the six months following each preceding review, or as needed in accordance with the order of the designated judge. Third, this flexible and rapid mechanism is consistent with Parliament's intention, expressed in paragraph 78(*c*) of the Act, which states that the designated judge shall proceed informally and expeditiously. With respect, I think that any conclusion that Parliament intended to maintain, in juxtaposition with this efficient and rapid mechanism, a long and costly appeal process, is to disregard Parliament's intention. But there is more.

[25]In the first place, how informal will proceedings be before a three-judge panel in the Court of Appeal? And

can the designated judge proceed with a review while the person who is detained has an appeal pending in the Court of Appeal? If so, and if a new decision is handed down by the designated judge upholding the detention, this decision replaces the previous one and consequently the appeal becomes moot. The detained person must then initiate new appeal proceedings to contest the new decision. And this would happen after each review of the detention, such reviews, let us recall, being held as needed. The ongoing review can result in a cascade of futile appeals. If, at the conclusion of an appeal, the Court of Appeal upholds the continued detention of the appellant, this decision places the designated judge, who is nevertheless much more familiar with the file and its evolution during the appeal, in an undesirable position when he is required to review the detention in accordance with the requirements of the review procedure.

[26]Finally, a reading of subsection 55(1), sections 57, 58, subsections 63(2) and (3), 64(1), 72(1) and paragraph 74(*d*) of the Act adds to my conviction that Parliament excluded a right of appeal on the issue of detention:

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

. . .

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

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

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

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

(*a*) they are a danger to the public;

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

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

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

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

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

. . .

63. . . .

(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

. . .

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

. . .

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

. . .

74. . . .

(*d*) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

[27]Where a person is arrested and detained as inadmissible under a warrant issued by an officer pursuant to section 55 of the Act, Parliament has also provided for ongoing review of this detention by the Immigration Division (the Division). At best, the Division's decision on the detention--and I carefully refrain from determining this question--could be the subject of judicial review under section 72, with the major inconveniences posed by ongoing review that I noted earlier. Such review by the Federal Court is not automatic, however. It cannot be done with out first obtaining leave.

[28]Similarly, there is no appeal from a judgment following judicial review unless a serious question of general importance is certified. As a matter of fact, in *Lai v. Canada (Minister of Citizenship and Immigration)* (2001), 15 Imm. L.R. (3d) 161 (F.C.A.), there was an appeal to the Federal Court of Appeal from the decision of the Federal Court concerning the minister's authority to order the detention of a person only because a question pertaining to detention was certified.

[29]In this case, the arrest and detention resulted from a warrant issued by the ministers. Parliament intended that this decision of the ministers would be reviewed by a judge of the Federal Court on an ongoing basis until the determination on the main issue. The need for judicial review is understandable: the ministers do not necessarily have all the evidence at the time they issue the warrant and an objective and impartial assessment of the reasonable grounds they cite is necessary. I have already explained the reasons that governed the choice of an ongoing review mechanism.

[30]A reading of the aforecited sections of the Act does not reveal any great symmetry in Parliament's treatment of the right of appeal or review of the decisions. But it does reveal one constant factor: the Division's decisions are not liable to appeal to the Federal Court of Appeal. Rather, they are subject to judicial review in the Federal Court, but the judicial review is its elf subject to a review procedure, an application for leave. There is no automatic appeal from the decision issued at the conclusion of a judicial review. Again, some review was provided, and it takes the form of a question certified by the Federal Court.

[31]In short, the right of appeal to the Federal Court of Appeal under the Act is either non-existent or strictly controlled. In these circumstances, it seems to me surprising, if not inconceivable, that Parliament could have intended to grant a right of appeal to the Federal Court of Appeal, without prior review, on the ancillary issue of the preventive detention when it granted no right of appeal on the much more fundamental issue of inadmissibility, the consequences of which are significant to the person contemplated by the prohibition: see subsections 64(1) and 80(3) of the Act.

Conclusion

[32]In conclusion, I do not think that in connection with the question of detention, Parliament intended a duality of concurrent remedies, review and appeal, which multiply the proceedings and render the system dysfunctional. I find it hard to believe that Parliament could have been so inconsistent in such a key area as the security of Canadians. I admit that sometimes it is much better to spell things out. No doubt it would have been preferable and simpler for Parliament to state expressly that there is no right of appeal of the decision on detention, instead of settling the issue by relying on the unpredictable process of interpretation through deductions or necessary inferences. Having said this, I am persuaded that, taking into account national security, which is an important and fundamental purpose of the Act, the need to proceed expeditiously and informally, the fact that both the review by judicial review and the decision rendered on a judicial review are subject to prior review, the denial of the right of appeal on the main issue of inadmissibility, the ancillary nature of the detention and the intrinsic nature of an ongoing review procedure, it was not Parliament's intention to punctuate and break up, through uncontrolled and repeated appe als, the continuity of this process of review of the detention by a designated judge.

[33]For these reasons, I would allow the motion to strike out the notice of appeal and I would dismiss the appeal for want of jurisdiction.

Nadon J.A.: I concur

* * *

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

[34]Décary J.A. (dissenting): At issue on this motion to strike is whether there is or is not a right of appeal in relation to an order for continued detention made by a judge of the Federal Court under section 83 of the *Immigration and Refugee Protection Act* (the Act), assented to November 1, 2001.

[35]On May 16, 2003, the respondent ministers availed themselves of the provisions of subsection 77(1) of the Act and filed a certificate in the Trial Division of the Federal Court stating that they were of the opinion [translation] "in light of security intelligence of which [they were] informed, that [the appellant], a permanent resident, is inadmissible for security reasons under paragraphs 34(1)(*c*), (*d*) and (*f*) of the *Immigration and Refugee Protection Act*". (On July 2, 2003, by Order in Council TR/2003-109, the *Courts Administration Service Act*, S.C. 2002, c. 8, s. 33 *et seq.*, came into force, and the *Federal Court Act* then became the *Federal Courts Act* and the Trial Division became the Federal Court.)

[36]On the same day, the respondent ministers availed themselves of the provisions of subsection 82(1) of the Act to issue a warrant for the arrest and detention of the appellant, in regard to whom there were [translation] "rea sonable grounds to believe that he is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal".

[37]This arrest warrant was executed on May 21, 2003, and the appellant has been held since that day.

[38]As required by subsection 83(1) of the Act, Mr. Justice Simon Noël, no later than 48 hours after the beginning of the detention, commenced "a review of the reasons for the continued detention". Following a hearing, Noël J., on July 15, 2003 [*Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 882 (CanLII), 2003 FC 882; [2003] F.C.J. No. 1119 (F.C.) (QL)], continued the detention [at paragraph 71] "until the designated judge rules again in regard to the continuation of deten tion under subsection 83(2) of the Act".

[39]On July 25, 2003, the appellant filed a notice of appeal of this decision.

[40]On September 6, 2003, the Deputy Attorney General of Canada, on behalf of the two respondent ministers, filed a motion in writing under rule 369 of the *Federal Court Rules, 1998* [SOR/98-106], in which he argued there is no right of appeal of the order for continued detention made July 15, 2003, and accordingly asked that the appeal be struck under paragraph 52(*a*) [as am. by S.C. 2002, c. 8, s. 50] of the *Federal Courts Act*.

[41]The appellant filed his motion record on September 17, 2003, and the respondents, their record in reply on September 23, 2003.

[42]It will be useful, before going further, to reproduce the most relevant provisions of the Act; to facilitate the

Division 6

Detention and Release

Immigration Division

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

Arrest and detention with warrant

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

. . .

Review of detention

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

. . .

Division 7

Right of Appeal

Competent jurisdiction

62. The Immigration Appeal Division is the competent Division of the Board with respect to appeals under this Division.

. . .

No appeal for inadmissibi-lity

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

. . .

Division 8

Judicial Review

Application for judicial review

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

Application

(2) The following provisions govern an application under subsection (1):

. . .

(*e*) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

. . .

Judicial review

74. Judicial review is subject to the following provisions:

. . .

(*d*) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

. . .

Inconsistencies

75. . . .

(2) In the event of an inconsistency between this Division and any provision of the *Federal Court Act*, this Division prevails to the extent of the inconsistency.

Division 9

Protection of Information

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

. . .

Referral of certificate

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

. . .

Judicial consideration

78. The following provisions govern the determination:

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

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

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

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

(*e*) on each request of the Minister or the 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.

Proceedings suspended

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

Proceedings resumed

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

Determination that certificate is reasonable

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

Determination that certificate is not reasonable

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

Determination not reviewable

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

Effect of determination--removal order

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

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

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

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

Detention

Detention of permanent resident

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

Mandatory de-tention

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

Review of decision for detention

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

Further reviews

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

Order for con-tinuation

(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.

Release

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

Judicial release

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

Inconsistency

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

Consideration During an Admissibility Hearing or an Immigration Appeal

Application for non-disclosure--Immigration Appeal Division

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

Procedure

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

Consideration During Judicial Review

Application for non-disclosure--Court

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

Procedure

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

I will also refer to subsections 18(1) and (3) of the *Citizenship Act* [R.S.C., 1985, c. C-29]:

Notice to person in respect of revocation

18. (1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is to be made and

(*a*) that person does not, within thirty days after the day on which the notice is sent, request that the Minister refer the case to the Court; or

(*b*) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

. . .

Decision final

(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.

and section 27 [as am. by S.C. 2002, c. 8, s. 34] of the *Federal Courts Act*:

jurisdiction of federal court of

appeal

Appeals from the Federal Court

27. (1) An appeal lies to the Federal Court of Appeal from any of the following decisions of the Federal Court:

(*a*) a final judgment;

. . .

(*c*) an interlocutory judgment; or

[43]The respondents argue, essentially, that since there is no appeal under subsection 80(3) of the Act from the substantive decision on the reasonableness of the certificate, there cannot be a right of appeal either from the interlocutory and ancillary order, which they say is the order for continued detention. They rely on the judgment by the Supreme Court of Canada in *Canada (Minister of citizenship and Immigration) v. Tobiass*,

1997 CanLII 322 (S.C.C.), [1997] 3 S.C.R. 391, in which the Court held that some interlocutory judgments made in the context of a referral under subsection 18(1) of the *Citizenship Act* were no more subject to an appeal than the final judgment on the referral.

[44]The respondents also argue that the appellant's right under subsection 83(2) of the Act to appear "at least once in the six-month period following each preceding review", or at any other time that the judge may authorize, is an indication of Parliament's intention to limit the power of intervention of the Federal Court of Appeal in detent ion matters. In the case at bar, a new appearance by the appellant is scheduled to be held on January 12, 2004, if the Federal Court has not at that point issued its decision on the certificate.

[45]It is trite law that there is an appeal to the Federal Court of Appeal only in those cases expressly provided by the Act (*Tobiass, supra*, at page 412). In subsection 27(1) of the *Federal Courts Act*, Parliament chose to give the Federal Court of Appeal a general right of appeal in regard to, for example, final judgments and interlocutory judgments of the Federal Court.

[46]It is also trite law that Parliament can limit or eliminate this general right of appeal (*Tobiass*, *supra*, at page 413), which it has expressly done in some specific instances. Among these exceptions, under the *Immigration and Protection of Refugees Act*, are the decision on the reasonableness of the certificate of inadmissibility for security reasons issued under section 77 of that Act, which may not be appealed (subsection 80(3)); a judgment pursuant to judicial review of any measure taken by the Federal Court in the context of that Act, which may be appealed only if the judge certifies that a serious question of general importance is involved (paragraph 74(*d*)); a judgment on an application for leave for judicial review or any interlocutory judgment in relation to it, from which no appeal lies (paragraph 72(2)(*e*)); and the decision that is deemed to be a rejection of a claim for refugee protection of a person liable to extradition, which likewise "may not be appealed, and is not subject to judicial review except to the extent that a judicial review of the order of surrender is provided for under the *Extradition Act*" (subsection 105(4)).

[47]Among these exceptions is also, under the *Citizenship Act*, the decision of a judge of the Federal Court on the loss of citizenship in case of fraud, which may not be appealed "notwithstanding any other Act of Parliament" (subsection 18(3)). It was this sub section that was at issue in *Tobiass*.

[48]In the situation that concerns us, an order for continued detention made by a judge of the Federal Court under section 83 of the Act, Parliament did not think fit to exclude it, at least expressly, from the general principle that an appeal lies to the Federal Court of Appeal from a final or interlocutory decision by a judge of the Federal Court. Thus, if there is some exception to the general principle of a right of appeal, it can only be by interpretation or inference. That, basically, is the argument of the respondent ministers, for whom the exception under subsection 80(3) of the Act in relation to decisions on the reasonableness of the certificate implicitly covers decisions on the detention.

[49]I am prepared to acknowledge that can be an exception to the general principle of the right of appeal by interpretation or inference. But in my opinion this interpretation or inference must nevertheless flow naturally from the language of the statute in question, which is to say that one must be able to find that Parliament has clearly presumed or intended, even if it did not say so explicitly, that there was not or is not any right of appeal. In making this statement, I base myself on the fact that Parliament has, over the years, refined its formulations. For example, paragraph 72(2)(*e*) of the *Immigration and Refugee Protection Act* refers expressly to "an interlocutory judgment", which section 82.2 [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 19; S.C. 1992, c. 49, s. 73] of the *Immigration Act* [R.S.C., 1985, c. I-2] did not do (see *Froom v. Canada (Minister of Citizenship and Immigration)* (2003) 30 Imm. L.R. (3d) 1 (F.C.A.).

[50]For the following reasons, I have concluded that the statutory provisions at issue do not support a finding that Parliament, by inference or interpretation, eliminated the right of appeal from orders for continued detention.

[51]The provisions covering the certificate of inadmissibility (sections 77-81) and the provisions covering the warrant of arrest (sections 82-85) are in the same division of the Act, Division 9. Parliament, it seems to me, was especially selective and specific, in this newly enacted Act, when the time came to eliminate or limit the right of appeal to the Federal Court of Appeal. As I said earlier, it did so in four places and I think it is significant that in Division 9 Parliament did consider the question of the right of appeal when it established the procedure for judicial

review of the certificate and that it did not address this question when, three sections later, it established the procedure pertaining to review of the reasons for detention.

[52]The two procedures, albeit parallel, originate in two distinct ministerial acts: the issuance of a certificate of inadmissibility and the issuance of a warrant of arrest. Each has its own life, each has distinct purposes and each leads to an independent decision. In my opinion, the respondent ministers are wrong to think that the decision on detention is a decision ancillary to the decision on the certificate and consequently is an interlocutory decision that would be subject, in respect of the right of appeal, to the same fate as the main decision, the decision on the certificate. Subsection 2(1) of the *Federal Courts Act* defines the "final judgment" as a decision that "determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding". In the case at bar, there is no doubt that the decision on the continued detention is a substantive ruling on the a ppellant's right to remain at liberty and that this right is completely distinct from the appellant's right to remain in Canada. Furthermore, the decision on detention does not affect in any way the inquiry conducted in relation to the certificate or the d ecision forthcoming upon that inquiry; there is nothing ancillary or interlocutory about it in relation to the latter.

[53]The existence of a right of appeal from the order for continued detention is an extension of what Parliament has itself recognized, elsewhere in the Act, in respect of the orders for continued detention issued by some immigration officers for security reasons.

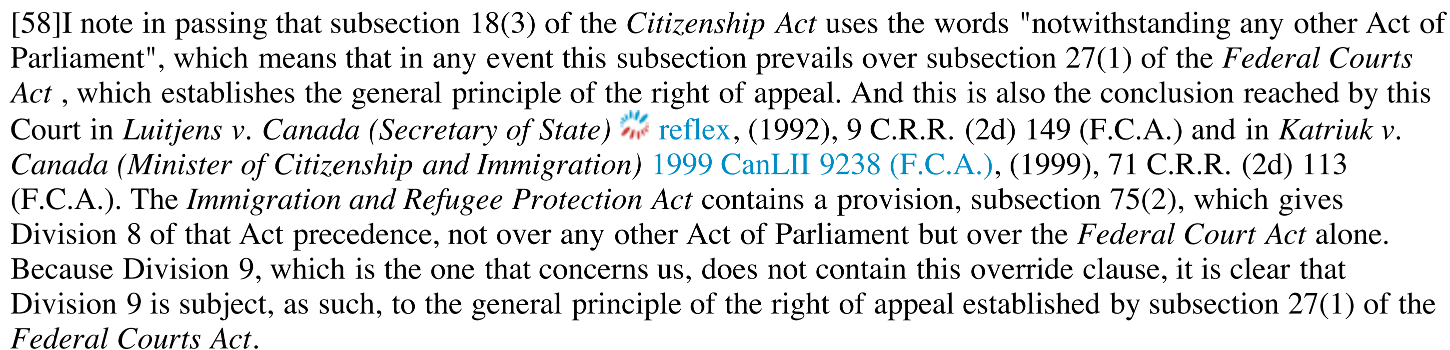
[54]Indeed, through the combined operation of sections 57 and 58 (which are in Division 6 of the Act, devoted to the detention on an order of an immigration officer, and which replaced section 103 [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 27: S.C. 1992, c. 49, s. 94; 1995, c. 15, s. 19] of the *Immigration Act*) and sections 72 and 74 (which are in Division 8 of the Act devoted to judicial review), the decision by the Immigration Division in relation to review of a detention ordered by an officer for security reasons is at some point subject, upon leave, to judicial review in the Federal Court. Thus, in *Lai v. Canada (Minister of Citizenship and Immigration)* (2001), 15 Imm. L.R. (3d) 161 (F.C.A.), a warrant of arrest had been issued by a senior immigration officer under subsection 103(1) of the *Immigration Act*. The person detained had been taken before an adjudicator under subsection 103(6) for review of the reasons for the continued detention. The adjudicator upheld the detention. An application for judicial review of the adjudicator's decision was filed and the Federal Court decision, on a certified question, was appealed to the Federal Court of Appeal. The latter agreed to hear the appeal even though--as is inevitable given the prescribed periods for review of the reasons for detention--the decision in question was now moot.

[55]Under sections 82 to 85 of the *Immigration and Refugee Protection Act*, the same procedure is generally followed, with this difference, for the purposes of concern to us, that the arrest warrant is issued by the respondent ministers instead of by a senior immigration officer, and the review of the reasons for detention is conducted by a judge of the Federal Court instead of the Immigration Division. Since it would be incongruous to subject the decision of a Federal Court judge to judicial review, an appeal procedure is provided for challenging that decision. So, logically speaking, it is not at all surprising that the decision of a Federal Court judge on a review of the reasons for continued detention by the two respondent ministers is liable to appeal in the Federal Court of Appeal. A perfect symmetry would require that the right of appeal to the Federal Court of Appeal be subject to certification of the question or to an application for leave to appeal.

[56]It is unclear to me why Parliament, which allows one level of review when it is the decision of an immigration officer, would not allow it, without saying so expressly, when it is the decision of a judge. It means the same thing in the end--deprivation of liberty--and the least that can be said is that this outcome is important for the person concerned. It is interesting to note that Parliament, while prohibiting any right of appeal to the Immigration Appeal Division by an inadmissible person (subsection 64(1)), has nevertheless allowed that person direct access to the Federal Court to apply for review of a decision for continued detention made in respect of that person by an officer under subsection 57(1). It would have been so simple for Parliament, if such had been its intention, to insert in Division 9 a provision analogous to subsection 64(1) in Division 6. And it is not as if Parliament had inadvertently ignored Division 6, since it goes on to say, in section 85 that "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."

[57]Contrary to the respondents' submission, the conclusion I reach is supported by the decision in *Tobiass* ,

supra. That case involved, *inter alia*, a determination as to whether subsection 18(3) of the *Citizenship Act*--which provides that the decision of the Federal Court judge on loss of citizenship in case of fraud is not liable to appeal, notwithstanding any other Act of Parliament--applied to an order t o stay proceedings made in relation to the review undertaken by a judge of that Court. The Supreme Court held that subsection 18(3) of the *Citizenship Act* did not block the right of appeal.



[58]I note in passing that subsection 18(3) of the *Citizenship Act* uses the words "notwithstanding any other Act of Parliament", which means that in any event this subsection prevails over subsection 27(1) of the *Federal Courts Act* , which establishes the general principle of the right of appeal. And this is also the conclusion reached by this Court in *Luitjens v. Canada (Secretary of State)* reflex, (1992), 9 C.R.R. (2d) 149 (F.C.A.) and in *Katriuk v. Canada (Minister of Citizenship and Immigration)* 1999 CanLII 9238 (F.C.A.), (1999), 71 C.R.R. (2d) 113 (F.C.A.). The *Immigration and Refugee Protection Act* contains a provision, subsection 75(2), which gives Division 8 of that Act precedence, not over any other Act of Parliament but over the *Federal Court Act* alone. Because Division 9, which is the one that concerns us, does not contain this override clause, it is clear that Division 9 is subject, as such, to the general principle of the right of appeal established by subsection 27(1) of the *Federal Courts Act*.

[59]*Tobiass, supra*, did not decide the issue of whether the elimination of the right of appeal from a final order entailed the elimination of the right of appeal from an interlocutory order, for the simple reason that it never considered the order to stay proceedings as an interlocutory order. What the Supreme Court did decide is that the stay of proceedings "is entered for reasons which are completely unrelated to . . . the obtaining . . . of citizenship" (at page 413), that it "is different from the type of determination tha t the Court is called upon to make under subsection 18(1)" (at page 413), that it "is most definitely a `final judgment' . . . . [that] has the effect of permanently bringing the proceedings to an end" (at page 413), that it "is a decision made under s. 50 of the *Federal Court Act* and not under s. 18(1) of the *Citizenship Act*" (at page 413) and that the power to order the continued detention "does not flow by necessary implication from the power to decide if" the certificate is reasonable (at page 418).

[60]The Court added, in *obiter*, the following paragraphs (at pages 414-415):

Although the issue does not arise here, there is a great deal of force to the argument that s. 18(1) of the *Citizenship Act* encompasses not only the ultimate decision as to whether citizenship was obtained by false pretences, but also those decisions made during the course of a s. 18 reference which are related to this determination. This would encompass all the interlocutory decisions which the court is empowered to make in the context of a s. 18 reference (see, for instance, s. 46 of the *Federal Court Act* and Rules 5, 450-455, 461, 477, 900-920, 1714 and 1715 of the *Federal Court Rules*, C.R.C., c. 663). This interpretation of s. 18(1) was adopted by the Federal Court of Appeal in *Luitjens, supra*, where it was held that interlocutory decisions made in the context of s. 18(1) reference are decisions made "under" s. 18(1). It is not necessary for the purpose of this decision to determine whether this conclusion should be varied. That should only be done in an appeal where the issue arises from the facts.

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. [Emphasis in original.]

[61]The Court, without expressly questioning the judgment of this Court in *Luitjens, supra*, suggests thereby that this judgment might have to be modified in so far as it indicates, and it underlines this, that only interlocutory judgments "related" to "the ultimate question of whether citizenship was obtained by false pretences" are immune from appeal. Its thinking is that a judgment made "in order to more efficiently determine the ultimate question of whether citizenship was obtained by false pretences" is an interlocutory judgment related to the ultimate decision. I note in this regard that the examples of interlocutory judgments cited by the Court a t page 416, namely, section 46 [as am. by S.C. 1990, c. 8, s. 14; 1992, c. 1, s. 68] of the *Federal Court Act* and Rules 5, 450-455 [as am. by

SOR/90-846 , s. 15], 461 [as am. *idem*], 477, 900-920, 1714 and 1715 of the old *Federal Court Rules* [C.R.C., c. 663], are all addressed to questions of practice and procedure in this Court.

[62]If I apply the comments of the Supreme Court in *Tobiass, supra*, to the instant case, I readily conclude from them that the order for continued detention is a final judgment or, at the very outside, an interlocutory judgment that is unrelated to the ultimate order that will be made in relation to the reasonableness of the certificate. In either case, the elimination of the right of appeal, in subsection 80(3), cannot apply, for the following reasons:

1. The impugned order, unlike the one at issue in *Tobiass*, is not addressed in any way to the review of the certificate previously undertaken by Noël J. It is an order made in relation to a quite different proceeding.

2. The impugned order is final, in that the appellant's right to liberty is henceforth compromised. It is possible that, following the further review provided by subsection 83(2), this right will be restored to him, but his detention, while it may not be permanent, is nevertheless definitive for the time being. I will return to this subsection later.

3. Subsection 80(3) of the Act refers to [*Tobiass*, at paragraph 51] a very particular kind of decision, a decision on the reasonableness of the certificate of inadmissibility.

4. The impugned order [*Tobiass*, at paragraph 51] "is different from the type of determination that the Court is called upon to make under" subsection 80(1).

5. The continued detention is not in any way ordered [*Tobiass*, at paragraph 58] "in order to more efficiently determine the ultimate question of whether" the certificate is reasonable.

6. The power to order the continued detention [*Tobiass*, at paragraph 66] "does not flow by necessary implication from the power" to review the certificate.

[63]That being said, it cannot be said that continued detention [*Tobiass*, at paragraph 51] "is entered for reasons which are completely unrelated to" the reasonableness of the certificate. In fact, the certificate, according to subse ction 77(1), is issued "on grounds of security, violating human or international rights, serious criminality or organized criminality", while the detention is ordered, according to subsection 82(1), if the respondent ministers "have reasonable grounds to b elieve that the [interested party] is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal". The reasons may of course be similar where security is at stake, but the objective sought, in one c ase, is long-term and in the other, short-term, and the issuance of the certificate is essentially based on the past actions of the interested party while the arrest warrant is essentially based on the current danger he represents. Moreover, the certificate cannot be issued on the ground that the interested party might not appear at a proceeding or for removal. That the same actions may be cited in either proceeding do not prevent the objective sought from being distinct. Both proceedings are governed by the same rules of procedure (section 78), precisely because similar questions of fact are likely to be invoked. These same rules apply as well to other proceedings in which security questions are raised (see subsections 86(2) and 87(2)) and these other proceedings are unrelated to the one in subsection 80(1).

[64]In short, to repeat the expression used in *Tobiass, supra*, at page 418, the power to order the continued detention and the power to declare the certificate of inadmissibility reasonable are "separate, divisible" judicial acts. The continued detention is not "related" to the reasonableness of the certificate, which will be determined irrespective of whether or not the interested party is in detention. The only connection, in practice, between the two proceedings is that the warrant of arrest will no longer be effective if the certificate is set aside. It is the decision on the certificate that affects the decision on the detention, and not the converse.

[65]The only attractive argument cited by the two respondent ministers is the one based on subsection 83(2) of the Act, which guarantees an automatic review and allows a discretionary review of the detention. Since Parliament provided an automatic review of detention, they argue, a right of appeal would conflict with this review mechanism that was expressly put in place and deprive subsection 83(2), which provides that the interested party shall be brought back "until a determination is made" on the certificate , of any effect.

[66]The weakness of this argument, in my opinion, is that it confuses appeal and review and assumes that once the continued detention is ordered, the interested party can have no remedy other than review since he must remain in

detention until a determination is made on the certificate. But if there is an appeal and if the appeal is allowed, there is no further detention and the review mechanism established by section 83 is then no more necessary than it is when no arrest warrant was issued. The argument, in other words, rests on the premise that there is no right of appeal, when it is the merit of that premise that is at issue.

[67]The interpretation proposed by the respondent ministers also leads to the rather undesirable result (especially when there is a deprivation of an individual's liberty) that if the judge, in making his order on continued detention, relies for example on irrelevant considerations, the interested party would have no opportunity to have t he decision corrected by the Federal Court of Appeal. A review of his detention, automatically or by application, might then be of very little assistance.

[68]Whatever the case, this argument, even if it had merit, would in my opinion not suffice to tip the balance in favour of an implied suppression of the right of appeal, so decisive are the arguments that I have advanced above. The respondent ministers are asking the Court to add to Division 9 a provision that is simply not there and that would have the effect of establishing a dependency between the order on the certificate and the order on continued detention that does not exist.

[69]I conclude, therefore, that the order for continued detention made on July 15, 2003, may be appealed.

[70]This conclusion, in its *ratio*, is similar to the conclusion recently reached by this Court in *Canada (Minister of Citizenship and Immigration) v. Obodzinsky*, 2002 FCA 518 (CanLII), [2003] 2 F.C. 657 (C.A.). When determining that the summary judgment procedure under rule 216 of the *Federal Court Rules, 1998* was not a final judgment not liable to appeal within the meaning of subsection 18(3) of the *Citizenship Act*, Létourneau J.A., on behalf of the Court, wrote as follows (at paragraphs 36-37):

The decision of the Motions Judge in the case at bar, whether that decision is described as a summary judgment, a declaratory judgment or a judgment striking out allegations, is and remains a decision interpreting the scope and requirements of the Court's rules of procedure. I feel quite certain that subsection 18(3) of the Act does not cover a decision interpreting the scope of rule 216 on obtaining a summary judgment. A decision on the procedural requirements imposed by rule 216 is a decision of a procedural nature, which bears no resemblance to the nature and content of the determination that must be made under subsection 18(1) of the Act, a determination that is essentially factual in nature: on the nature of the determination, see *Luitjens v. Canada (Secretary of State)* reflex, (1992), 9 C.R.R. (2d) 149 (F.C.A.), leave to appeal to the Supreme Court of Canada denied (1992),10 C.R.R. (2d) 284 (S.C.C.). In other words, I feel certain that by adopting subsection 18(3) of the Act, Parliament did not intend that a summary judgment that might be made as a consequence of erroneous interpretation or application of the Court's rules of procedure not be subject to appeal.

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.

[71]The application to strike out the notice of appeal for want of jurisdiction should be dismissed with costs.

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