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Charkaoui (Re) (F.C.) v. Charkaoui (Re) (F.C.), 2003 FC 1419 (CanLII)

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Reflex Record (noteup and cited decisions)

DES-3-03

2003 FC 1419

IN THE MATTER OF a certificate and its referral under subsection 77(1) and sections 78 to 80 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA)

IN THE MATTER OF the warrant for the arrest and detention and the review of the reasons for continued detention pursuant to subsections 82(1), 83(1) and 83(3) of the IRPA

IN THE MATTER OF the constitutional validity of sections 33, 76 to 85 of the IRPA

AND IN THE MATTER OF Mr. Adil Charkaoui

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

Federal Court, Noël J.--Montréal, October 8, 9 and 21; Ottawa, December 5, 2003.

Citizenship and Immigration -- Exclusion and Removal -- Removal of Permanent Residents -- Application contesting validity of Immigration and Refugee Protection Act (IRPA), ss. 33, 77 to 85 establishing procedure for determining whether permanent resident danger to national security, safety of any person -- Applicant found by Minister of Citizenship and Immigration, Solicitor General to be engaged in terrorism as member of Usama bin Laden network -- Ordered detained -- Designated judge responsible for determining whether certificate reasonable, detention should be continued, having jurisdiction to decide constitutional questions -- Procedure strikes fair balance between right of State to protect national security, right of permanent resident to be adequately informed of allegations against him to be able to defend self -- In light of interests at stake, procedure under Act consistent with principles of fundamental justice protected by Charter, s. 7.

Federal Court Jurisdiction -- Whether judge designated under Immigration and Refugee Protection Act (IRPA) has jurisdiction to decide constitutional questions -- In addition to full jurisdiction of Federal Court judge, designated judges having jurisdiction specifically granted to them under IRPA, s. 76 et seq. -- To be court of competent jurisdiction, court must have jurisdiction over person concerned, subject-matter, power to order remedy sought -- IRPA giving designated judge full jurisdiction over person concerned, subject-matter -- Rule of construction in IRPA, s. 3(3)(d) equivalent to express grant of power to order remedy -- Judge hearing case must consider"all matters" under IRPA, s. 78(c) -- IRPA, ss. 3(3), 78(c) expressly conferring on designated judges power to decide constitutional questions.

Constitutional Law -- Charter of Rights -- Life, Liberty and Security -- Whether IRPA, ss. 33, 76 to 85 violate

principles of fundamental justice referred to in Charter, s. 7 -- Principles must be assessed in light of legislative context, purposes of impugned legislation, rights of parties -- Designated judge assuming independent, objective role that takes into account opposing interests of state, person concerned -- Having access to all information on which Ministers' decisions based -- Procedure established by IRPA, ss. 76 to 85 takes existence of opposing interests into consideration, complies with principles of fundamental justice referred to in Charter, s. 7.

Judges and Courts -- Role of designated judge under IRPA, ss. 36, 76 to 85 -- Designated judge validating Ministers' decisions as to certificate of inadmissibility, detention -- By conferring review responsibility on designated judge, Parliament expressly recognizing independence of judiciary -- Role assigned to designated judge not creating reasonable apprehension of bias, not compromising independence, impartiality of judiciary -- Protection of national security warranting use of standards other than preponderance of evidence -- "Reasonableness" of certificate,"reasonable grounds to believe" appropriate standards of proof given importance of interests at stake -- IRPA, ss. 80(3), 81 preventing appeal, judicial review of decision of designated judge with respect to certificate -- Not contravening Constitution Act 1867, s. 96.

Constitutional Law -- Charter of Rights -- Equality Rights -- Applicant alleging unequal treatment contrary to Charter, s. 15, Canadian Bill of Rights, s. 1(b) -- Distinction between procedure leading to finding of inadmissibility by reason of danger to national security, safety of any person and procedure leading to finding of inadmissibility for other reasons -- Comparison group permanent residents threatened with inadmissibility based on protected and those threatened with inadmissibility based on unprotected information -- Two procedures not giving rise to unequal treatment -- Furthermore unclear which enumerated grounds in s. 15 invoked -- IRPA, ss. 77, 80, 81, 82, 83, 85 not contravening rights guaranteed by Charter, s. 15, Canadian Bill of Rights, s. 1(b).

Construction of Statutes -- Rule of construction enacted in IRPA, s. 3(3)(d) express grant of power to order remedy -- Ordinary reading of IRPA, s. 78(c) in light of modern approach to statutory interpretation leading to broad interpretation of provision -- Judge hearing case must consider "all matters" relevant to case -- Ss. 3(3), 78(c) expressly conferring on designated judge power to decide constitutional questions -- Parliament's implied intent including as unspoken assumption power to grant remedy sought.

International Law -- International Covenant on Civil and Political Rights, Arts. 12(3), 13 endorsing paramountcy of national security -- Allusion to in camera proceedings in Art. 14 not reflecting concern for protection of national security included in Arts. 12, 13 -- Concern must therefore be implied by wording of Art. 14 -- Immigration and Refugee Protection Act, ss. 33, 77, 80, 81, 82, 83, 85 not contravening principles recognized in Covenant, Arts. 12 to 14.

This was an application contesting the constitutional validity of sections 33 and 77 to 85 of the *Immigration and Refugee Protection Act* (IRPA) which establish a procedure for determining whether a permanent resident is a danger to national security or the safety of any person. This procedure seeks to satisfy two opposing interests: the interest of the state in protecting national security, and the interest of the individual (Mr. Charkaoui) in being able to assert, in his defence, all the rights normally available to him. A certificate stating that Charkaoui is inadmissible was signed by the Minister of Citizenship and Immigration and the Solicitor General (the Ministers) on May 16, 2003, and subsequently filed with the Federal Court. The Ministers believed that Charkaoui is a member of the Usama bin Laden network, an organization that is carrying out terrorist acts, and consequently that he is a danger to national security. On the same day, the Ministers signed a warrant for Charkaoui's arrest under subsection 82(1) of the Act; the arrest warrant was executed on May 21, 2003 and Charkaoui has been in detention ever since. After examining the protected information tendered in support of the certificate and the arrest warrant, the Federal Court concluded that, for reasons of national security, the hearing should be held in the absence of Charkaoui and his counsel. On July 15, 2003, the Court ordered, pursuant to subsection 83(3) of the IRPA, that the detention be continued until the designated judge rendered another decision under subsection 83(2) as to whether detention should be continued. A notice of constitutional questions was served on the Attorney General of Canada and his provincial counterparts. Counsel for Charkaoui contested the validity of sections 33 and 77 to 85 of the IRPA on the basis that they violate provisions such as sections 7, 9, 10, 15 and paragraph 11(*e*) of the Charter, section 96 of the *Constitution Act, 1867* (the BNA Act) and sections 1 and 2 of the *Canadian Bill of Rights*. This application raised two main issues: (1) whether the designated judge responsible for determining whether the certificate was reasonable and whether detention should be continued has jurisdiction to decide constitutional questions? and (2) if so, what are the answers to the 40 constitutional questions set out by counsel for Charkaoui?

Held, the application should be dismissed.

(1) The Ministers submitted that the jurisdiction of designated judges is so limited that they cannot decide constitutional questions concerning the IRPA. In *Mills v. The Queen*, the Supreme Court of Canada analysed the three-pronged test of a court with requisite jurisdiction to decide constitutional questions. The court must have jurisdiction over the parties, the subject-matter and to order the remedy sought. Under paragraph 78(*c*) of the IRPA, a designated judge now has the power to deal with "all matters" resulting from the consideration of the certificate; this express power did not exist in the former *Immigration Act*. Both the former Act and the IRPA provide that determinations regarding a certificate cannot be appealed. However, the IRPA adds that if a certificate is confirmed to be reasonable, it becomes a removal order, and also may not be appealed. The reason for designating certain Federal Court judges is to limit access to protected information and thereby protect activities involving Canada's national security and the means by which information regarding national security is obtained. 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. They meet the test to be a "court of competent jurisdiction" to decide constitutional questions. First, the IRPA gives the designated judge full jurisdiction over the person concerned. Second, it grants jurisdiction over the subject-matter to the designated judge in an equally express manner. And third, concerning the power to order the remedy sought, the Supreme Court of Canada has said that if no provision specifically grants the power to decide Charter questions, one must determine whether Parliament implicitly intended to make such a grant. The rule of construction enacted by Parliament in paragraph 3(3)(*d*) of the IRPA, which "ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*" is equivalent to an express grant of the power to order a remedy.

An ordinary reading of the English and French versions of paragraph 78(*c*) of the IRPA in light of the modern approach to statutory interpretation leads to a broad interpretation of that provision. Therefore, a judge hearing the case must consider "all matters" relevant to the case. Subsection 3(3) and paragraph 78(*c*) of the IRPA can be interpreted as expressly conferring on the designated judge the power to decide constitutional questions. Only a designated judge has the jurisdiction to decide whether the certificate and the basis for detention are reasonable. Even if the IRPA did not disclose Parliament's express intent to confer the power to grant the remedy sought, Parliament's implied intent, as gleaned from the role given to designated judges under sections 76 to 85 of the IRPA, includes as an unspoken assumption the power to grant the remedy sought.

(2) Before answering the constitutional questions, it was necessary to situate the concepts of the legal status of a permanent resident and of national security in the context of immigration law. The Charter itself distinguishes between the rights of Canadian citizens and those of permanent residents. Unlike a Canadian citizen, a permanent resident does not have the unqualified right to enter and leave Canada or even to remain here. Given the distinction that the Charter draws between citizens and non-citizens, Parliament is entitled to enact a policy establishing rules that a permanent resident must follow in order to be able to enter and remain in Canada. It has provided for situations that prevent a permanent resident from being able to remain in Canada. On the other hand, Parliament forces the designated judge to balance two fundamental but completely opposing interests: the safeguarding of protected information for reasons of national security, and disclosing enough information to enable the permanent resident to defend himself. The right of a permanent resident to be informed of the circumstances giving rise to the certificate issued against him is a fundamental right.

The many questions and arguments presented by Charkaoui's counsel were regrouped into specific issues, all related to the Charter, the *Canadian Bill of Rights* and the IRPA. The first and most important issue concerned the fundamental rights set out in section 7 of the Charter and section 1 of the *Canadian Bill of Rights*. It was submitted that sections 33 and 76 to 85 of the IRPA run afoul of the principles of fundamental justice for three reasons. The first reason related to the procedure under the IRPA for determining the reasonableness of the certificate and continued detention. Through the procedure established by sections 77, 78 and 82 of the IRPA, Parliament has called on a member of the judiciary, the designated judge, to assume an independent and objective role that takes the opposing interests into account. Designated judges are the cornerstones of the review procedure because they have a twofold obligation: to protect criminal or national security intelligence and to provide the person concerned with a summary of the evidence that reasonably discloses the circumstances giving rise to the certificate and the warrant that resulted in his detention. 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. They decide which evidence can be disclosed to the person concerned and provide a summary which enables the person

concerned to be reasonably informed of the circumstances giving rise to the signing of the certificate, the issuance of the warant of arrest and detention. Such summary must not disclose anything which would be injurious to national security. Procedure established by sections 76 to 85 of the IRPA takes the existence of opposing interests into consideration and strikes an acceptable balance between those interests. The fact that a designated judge is involved in striking this balance adds credibility to the procedure and ensures objectivity in achieving the result. That procedure complies with the principles of fundamental justice referred to in section 7 of the Charter.

The second reason proposed was that the designated judge is not independent and impartial because the role assigned to him violates the right of a fair trial. Parliament opted for a procedure that begins with a decision made by two Ministers who are of the opinion that the person concerned should be inadmissible on one or more grounds contemplated in sections 34 to 42 of the IRPA. The designated judge either validates or invalidates the certificate seeking inadmissibility as well as the decision regarding detention. The fact that the decision regarding the inadmissibility of the person concerned is made by the Ministers, not the judiciary, does not imperil the independence of the designated judge. Parliament clearly chose to give the Ministers the responsibility to decide whether the certificate and the arrest warrant with detention are necessary, and to give the designated judge the responsibility to review such decisions. By conferring this responsibility on the designated judge, Parliament expressly recognized the independence of the judiciary. The role assigned to the designated judge under sections 33 and 76 to 85 of the IRPA does not create a reasonable apprehension of bias and complies with the principles of fundamental justice, section 7 of the Charter and sections 1 and 2 of the *Canadian Bill of Rights*. The provisions of the IRPA that govern this type of hearing, involving national security, do not compromise the independence and impartiality of the judiciary.

The third reason advanced was that the independence of the judiciary is undermined because, instead of a preponderance of evidence standard, the applicable standards are the "reasonableness" of the certificate and the "reasonable grounds to believe" leading to continued detention. Parliament has chosen standards other than the preponderance of evidence because this is what national security demands. In this case, the security of Canada, the safety of its citizens and the protection of its democratic system are at stake. The state must therefore use extraordinary methods of protection and inquiry. National security is such an important interest that its protection warrants the use of standards other than the preponderance of evidence. These standards 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. When the designated judge applies the "reasonableness" and "reasonable grounds to believe" standards to a situation involving a permanent resident and national security, the judge is deciding the matter and is making a determination on the reasonableness of the certificate and the continued detention based on a review of the evidence.

The second main constitutional argument was that detention under sections 82, 83 and 85 of the IRPA violates sections 7, 9, 10, 12 and 15 and paragraph 11(*e*) of the Charter. This case did not pertain to criminal law, but involved immigration law, where the Court must take into account the objectives contemplated by Parliament and the undertakings made by the permanent resident when he decided to settle in Canada. This was not a case of punitive detention but rather, a preventive detention which may, upon application, be reviewed and set aside by the designated judge with or without conditions. The system of preventive detention established by Parliament in the IRPA in regard to persons concerned who, in the opinion of the Ministers, represent a danger to national security or to the safety of any person, is consistent with the spirit of the Charter; sections 82, 83 and 85 of the IRPA are not in breach of one or more Charter rights.

The third constitutional argument was that the IRPA procedure denied Charkaoui the right to equal treatment guaranteed by Charter, section 15 in so far as he was denied the right to have his rights defined by a fair trial before an independent and impartial tribunal, unlike citizens and other immigrants. The procedure under section 77 *et seq.* of the IRPA is fair because it balances opposing interests and the very role of the designated judge makes that judge an independent and impartial tribunal. That procedure applies to situations in which the rationale for inadmissibility is based on security or criminal intelligence. The procedure described in section 44 *et seq.* of the IRPA applies to situations in which a permanent resident is threatened with inadmissibility for reasons other than constituting a danger to national security or the safety of any person, and in which the evidence is not ascertained to be security or criminal intelligence. To find out whether this distinction contravenes the equality of treatment guaranteed by section 15 of the Charter, one must determine what is the comparison group and which of the enumerated grounds in section 15 is at issue. The groups being compared are permanent residents threatened with

inadmissibility for reasons based on protected information and permanent residents threatened with inadmissibility for reasons not based on protected information. Charkaoui's counsel have not indicated which of the enumerated grounds in section 15 of the Charter is at the origin of the alleged unequal treatment. Sections 77, 80, 81, 82, 83 and 85 of the IRPA do not contravene the rights guaranteed by section 15 of the Charter or by paragraph 1(*b*) of the *Canadian Bill of Rights*.

The fourth constitutional argument was that paragraph 34(1)(*f*) and subsection 83(3) of the IRPA are vague, overly broad and discriminatory in scope. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada stated that a vague law may be unconstitutional because it fails to give those who might come within the ambit of the provision fair notice of the consequences of their conduct or because it fails to adequately limit law enforcement discretion. In that case, the Court defined what is meant by a "danger to the security of Canada" and did not find that this concept reproduced in subsection 83(3) of the IRPA is vague. The definition given by the Court could be used in a detention and inadmissibility context. Likewise, the Court did not find that the notion of "member" was vague or overbroad. Therefore, the expressions "danger to the national security of Canada" and "members", referred to in subsection 83(3) and paragraph 34(1)(*d*) of the IRPA, are not vague or overbroad.

The fifth constitutional argument was that subsection 80(3) and section 81 of the IRPA, which provide that the decision of the designated judge with respect to the certificate and its consequences may not be appealed or judicially reviewed, conflict with section 96 of the BNA Act. The prohibition of appeals from the removal order was included in the IRPA in order to ensure rapidity after the determination as to the reasonableness of the certificate. The Federal Court is a superior court and, as such, it cannot be characterized as an administrative tribunal subject to the supervision and review of a superior court. Subsection 80(3) and section 84 of the IRPA do not contravene section 96 of the BNA Act.

Finally, it was argued that sections 33, 77, 80, 81, 82, 83 and 85 of the IRPA contravene Article 14(1) of the *International Covenant on Civil and Political Rights* which provides that all persons shall be equal before the courts and tribunals. A straightforward reading of Article 14(1) of the Covenant shows that some sections of the IRPA are not consistent with this provision. However, the procedure established in the IRPA reflects the search for and articulation of a balance between two opposing interests, individual rights (human rights) and collective rights (national security). Articles 12(3) and 13 of the Covenant endorse the paramountcy of the national security. The allusion to *in camera* proceedings in Article 14 does not reflect the concern for the protection of national security included in Articles 12 and 13; the concern must therefore, in practical terms, be implied by the wording of Article 14. Sections 33, 77, 80, 81, 82, 83 and 85 of the IRPA do not contravene the principles recognized in Articles 12 to 14 of the Covenant.

statutes and regulations judicially

considered

Access to Information Act, R.S.C., 1985, c. A-1 , s. 52 (as am. by S.C. 2002, c. 8, s. 112).

An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown, 1688, 1 Will. & Mary, Sess. 2, c. 2 (U.K.) (Bill of Rights).

Canada Evidence Act, R.S.C., 1985, c. C-5 , ss. 38 (as am. by S.C. 2001, c. 41, s. 43), 38.01 (as enacted *idem*), 38.02 (as enacted *idem*), 38.03 (as enacted *idem*), 38.031 (as enacted *idem*), 38.04 (as enacted *idem*), 38.05 (as enacted *idem*), 38.06 (as enacted *idem*), 38.07 (as enacted *idem*), 38.08 (as enacted *idem*), 38.09 (as enacted *idem*), 38.1 (as enacted *idem*), 38.11 (as enacted *idem*), 38.12 (as enacted *idem*), 38.13 (as enacted *idem*), 38.131 (as enacted *idem*), 38.14 (as enacted *idem*), 38.15 (as enacted *idem*).

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. 6(1),(2), 7, 9, 10, 11(*e*), 12, 15, 24(1).

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23 , ss. 2 (as am. by S.C. 2001, c. 41, s. 89), 21.

Charities Registration (Security Information) Act, S.C. 2001, c. 41, s. 3 "judge".

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], ss. 96, 101.

Criminal Code, R.S.C., 1985, c. C-46 , ss. 83.05(11) (as enacted by S.C. 2001, c. 41, s. 5), 462.48(9) (as enacted by R.S.C., 1985 (4th Supp.), c. 42, s. 2).

Federal Courts Act, R.S.C., 1985, c. F-7 ss.1 (as am. by S.C. 2002, c. 8, s. 14), 3 (as am. *idem*, s. 16), 27 (as am. by R.S.C., 1985 (4th Supp.), c. 51, s. 11; S.C. 1990, c. 8, s. 7; 1993, c. 27, s. 214; 2002, c. 8, s. 34), 57 (as am. *idem*, s. 54).

Federal Court Rules, 1998, SOR/98-106, rr. 69, 151, 152.

Immigration Act, R.S.C., 1985, c. I-2 , ss. 3(*f*) (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 2), 19 (as am. by S.C. 1992, c. 49, s. 11), 38.1 (as enacted *idem*, s. 28), 39 (as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 6; S.C. 1992, c. 49, s. 29; 1997, c. 22, s. 4), 40(1) (as am. by S.C. 1997, c. 22, s. 6), 40.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31), 53(1) (as am. by S.C. 1992, c. 49, s. 43), 70 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 18; S.C. 1992, c. 49, s. 65; 1995, c. 15, s. 13).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(1)(*h*),(3)(*d*),(*f*), 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 46(1)(*c*), 76, 77 (as am. by S.C. 2002, c. 8, s. 194), 78, 79 (as am. *idem*), 80, 81, 82, 83, 84, 85, 86.

International Covenant on Civil and Political Rights, December 19, 1966, [1976] Can. T.S. No. 47, Art. 9, 10, 11, 12, 13, 14.

Official Secrets Act, R.S.C., 1985, c. O-5.

Privacy Act, R.S.C., 1985, c. P-21 , s. 51(1),(2).

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2001, c. 17 (as am. by S.C. 2001, c. 41, s. 48), s. 60.1(8) (as enacted *idem*, s. 72), (9) (as enacted *idem*).

Supreme Court Act, R.S.C., 1985, c. S-26 , s. 40(1) (as am. by S.C. 1990, c. 8, s. 37).

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

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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; *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.

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Mills v. The Queen, 1986 CanLII 17 (S.C.C.), [1986] 1 S.C.R. 863; (1986), 29 D.L.R. (4th) 161; 26 C.C.C. (3d) 481; 52 C.R. (3d) 1; 21 C.R.R. 76; 67 N.R. 241; 16 O.A.C. 81; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII), [2002] 1 S.C.R. 84; (2002), 208 D.L.R. (4th) 107; 37 Admin. L.R. (3d) 252; 18 Imm. L.R. (3d) 93; 280 N.R. 268; *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669; (1995), 32 C.P.R. (2d) 95; 100 F.T.R. 261 (T.D.); *Ahani v. Canada* reflex, (1996), 37 C.R.R. (2d) 181; 201 N.R. 233 (F.C.A.).

distinguished:

Crevier v. Attorney General of Quebec et al., 1981 CanLII 30 (S.C.C.), [1981] 2 S.C.R. 220; (1981), 127 D.L.R. (3d) 1; 38 N.R. 541; *Attorney General (Que.) et al. v. Farrah*, [1978] 2 S.C.R. 638; (1978), 86 D.L.R. (3d) 161; 21 N.R. 595.

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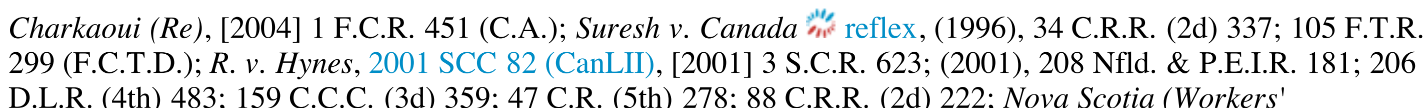

Charkaoui (Re), [2004] 1 F.C.R. 451 (C.A.); *Suresh v. Canada* reflex, (1996), 34 C.R.R. (2d) 337; 105 F.T.R. 299 (F.C.T.D.); *R. v. Hynes*, 2001 SCC 82 (CanLII), [2001] 3 S.C.R. 623; (2001), 208 Nfld. & P.E.I.R. 181; 206 D.L.R. (4th) 483; 159 C.C.C. (3d) 359; 47 C.R. (5th) 278; 88 C.R.R. (2d) 222; *Nova 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; *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.); *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2004] 1 F.C.R. 528 (F.C.A.); *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; *Attorney General of Canada v. Jolly*, [1975] F.C. 216; (1975), 54 D.L.R. (3d) 277; 7 N.R. 271 (C.A.); *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (F.C.A.), [2001] 2 F.C. 297; (2000), 195 D.L.R. (4th) 422; 265 N.R. 121 (C.A.); *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.).

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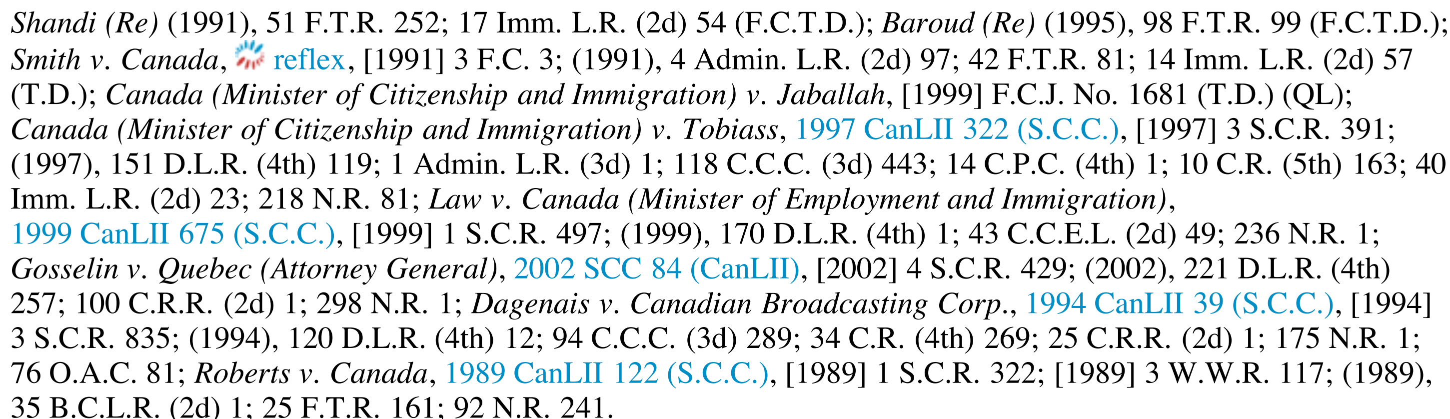

Shandi (Re) (1991), 51 F.T.R. 252; 17 Imm. L.R. (2d) 54 (F.C.T.D.); *Baroud (Re)* (1995), 98 F.T.R. 99 (F.C.T.D.); *Smith v. Canada*, reflex, [1991] 3 F.C. 3; (1991), 4 Admin. L.R. (2d) 97; 42 F.T.R. 81; 14 Imm. L.R. (2d) 57 (T.D.); *Canada (Minister of Citizenship and Immigration) v. Jaballah*, [1999] F.C.J. No. 1681 (T.D.) (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; *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (S.C.C.), [1999] 1 S.C.R. 497; (1999), 170 D.L.R. (4th) 1; 43 C.C.E.L. (2d) 49; 236 N.R. 1; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 S.C.R. 429; (2002), 221 D.L.R. (4th) 257; 100 C.R.R. (2d) 1; 298 N.R. 1; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (S.C.C.), [1994] 3 S.C.R. 835; (1994), 120 D.L.R. (4th) 12; 94 C.C.C. (3d) 289; 34 C.R. (4th) 269; 25 C.R.R. (2d) 1; 175 N.R. 1; 76 O.A.C. 81; *Roberts v. Canada*, 1989 CanLII 122 (S.C.C.), [1989] 1 S.C.R. 322; [1989] 3 W.W.R. 117; (1989), 35 B.C.L.R. (2d) 1; 25 F.T.R. 161; 92 N.R. 241.

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APPLICATION contesting the constitutional validity of sections 33 and 77 to 85 of the *Immigration and Refugee Protection Act* which establish a procedure for determining whether a permanent resident is a danger to national security or the safety of any person. Application dismissed.

appearances:

Johanne Doyon and *Julius H. Grey* for Adil Charkaoui.

J. Daniel Roussy for the Solicitor General of Canada.

Luc J. C. Cadieux and *Daniel Latulippe* for the Minister of Citizenship and Immigration.

solicitors of record:

Doyon, Guertin, Montbriand & Plamondon, Montréal and *Grey, Casgrain*, Montréal, for Adil Charkaoui.

Deputy Attorney General of Canada for the Solicitor General of Canada and the Minister of Citizenship and Immigration.

The following is the English version of the reasons for order and order rendered by

Noël J.:

I. INTRODUCTION

[1]Through a multitude of constitutional questions, Mr. Adil Charkaoui (Mr. Charkaoui) is contesting the validity of several provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) which establish a procedure for determining whether a permanent resident is a danger to national security or the safety of any person. To the extent possible, this procedure seeks to satisfy two opposing interests: the interest of the state in protecting national security, and the interest of the individual (the person concerned) in being able to assert, in his defence, all the rights normally available to him. Specifically, Charkaoui's application contests the constitutional validity of sections 33 and 77 [as am. by S.C. 2002, c. 8, s. 194; s. 78 (as am. *idem*)] to 85 of the IRPA on the basis that they violate sections 7, 9, 10, 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] (the Charter); 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]] (the BNA Act); sections 1 and 2 of the *Canadian Bill of Rights*, R.S.C., 1985, Appendix III (the *Canadian Bill of Rights*); the common law; the U.K. Bill of Rights (1688), *An Act declaring the Rights and Liberties of the Subject and settling the Succession of the Crown, 1688*, (1 Will. & Mary, Sess. 2, c. 2 (U.K.)) (the Bill of Rights); Article 14(1) of the *International Covenant on Civil and Political Rights*, 19 December 1966, [1976] Can. T.S. No. 47, Arts 9-14 (the Covenant) and Article 10 of the *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN GAOR, December 10, 1948 (the Universal Declaration).

[2]In addition, Mr. Charkaoui submits that subsection 80(3) of the IRPA violates section 96 of the BNA Act because the decision of the Chief Justice or his designate (designated judge) as to the reasonableness of the 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" (subsection 77(1) of the IRPA) may not be appealed or judicially reviewed. Moreover, according to Mr. Charkaoui, the fact that the designated judge, under paragraph 78(*e*) of the IRPA, presides over the hearing in the presence of counsel for the Minister of Citizenship and Immigration and the Solicitor General of Canada (the Ministers) but in the absence of the person concerned and his counsel, could create an appearance of bias, whether or not such bias actually exists. This appearance of bias would undermine the independence and impartiality of the judiciary--concepts that section 96 of the BNA Act protects.

[3]Counsel for the Ministers, for their part, submit that the designated judge responsible for determining whether the detention is reasonable and whether it should be continued does not have the jurisdiction needed to decide constitutional questions.

[4]At the hearing held on September 9, 2003, I brought to the attention of counsel in attendance that Mr. Charkaoui was proceeding by way of application rather than by way of statement of claim to pose the questions set out in paragraphs 1 and 2. However, none of the parties made any comments regarding this manner of proceeding and no objection was made in this regard.

II. BACKGROUND

[5]One of the IRPA's objectives is to maintain (in French, "*garantir*") the security of Canadian society (paragraph 3(1)(*h*) of the IRPA). One method that Parliament has given the Ministers to accomplish this objective is to sign a certificate that renders the person concerned inadmissible to Canada (subsection 77(1) of the IRPA). The signing of this certificate is a ministerial power that cannot be delegated. The certificate must be signed by the Minister of Citizenship and Immigration and by the Solicitor General, after which it is filed with the Federal Court of Canada.

[6]In the case at bar, a certificate stating that Mr. Charkaoui is inadmissible was signed by the Ministers on May 16, 2003, and subsequently filed with the Federal Court. The Ministers believe that Mr. Charkaoui has been and continues to be a member of the Usama bin Laden network, an organization that has carried out, is carrying out or will carry out terrorist acts; that in this capacity the respondent has engaged in, is engaging in or will engage in

terrorism; and consequently that the respondent has been, is or will be a danger to national security (paragraphs 34(1)(*c*), (*d*) and (*f*) of the IRPA).

[7]Another method created by Parliament to maintain the security of Canadian society is the signing of an arrest warrant by the Ministers. The signing of this warrant is also a non-delegated ministerial power. In order to sign such a warrant, both Ministers must have reasonable grounds to believe that the person concerned is a danger to national security or the safety of any person or is unlikely to appear at a proceeding or for removal. The Ministers signed a warrant for Mr. Charkaoui's arrest on May 16, 2003 (subsection 82(1) of the IRPA). The arrest warrant was executed on May 21, 2003, and Mr. Charkaoui has been in detention ever since.

[8]Counsel for the Ministers requested that I hold a hearing, in the absence of Mr. Charkaoui and his counsel, as to the reasonableness of the certificate and as to whether detention should be continued. After examining the protected information tendered in support of the certificate and the arrest warrant, I concluded that, for reasons of national security, the hearing should indeed be held in the absence of Mr. Charkaoui and his counsel (paragraphs 78(*d*) and (*e*) of the IRPA). Knowing that it was important Mr. Charkaoui be "reasonably informed" of the circumstances giving rise to the certificate, the arrest warrant as well as his continued detention, I identified the information the disclosure of which would not be injurious to national security or the safety of any person, and that information was given to counsel for Mr. Charkaoui on May 26, 2003 (paragraph 78(*g*) of the IRPA).

[9]I was prepared, as were counsel for the Ministers, to hold the hearing on continued detention shortly after May 26, 2003. However, counsel for Mr. Charkaoui asked that the hearing be held on July 2 and 3, 2003, so that they could prepare adequately.

[10]At the hearing in early July 2003, the Ministers and Mr. Charkaoui called certain witnesses and provided further affidavit testimony. In days that followed, I held a hearing in the absence of Mr. Charkaoui and his counsel for reasons of national security. I had notified Mr. Charkaoui and his counsel of this hearing, and they objected to it.

[11]In a written decision dated July 15, 2003, *Charkaoui (Re*), [2004] 1 F.C.R. 451 (F.C.A.), I ordered, pursuant to subsection 83(3) of the IRPA, that the detention be continued until the designated judge rendered another decision under subsection 83(2) of the IRPA as to whether detention should be continued.

[12]While I took account, in that order, of my duty to protect information concerning national security, I also expressed certain concerns that stemmed from my review of the information with the intention to give Mr. Charkaoui and his lawyers the opportunity to respond.

[13]My concerns were and continue to be as follows: Mr. Charkaoui's contacts with certain individuals (see the summary of the information provided to Mr. Charkaoui in accordance with paragraph 78(*h*) of the IRPA on May 26, 2003); Mr. Charkaoui's life in Morocco from 1992 to 1995 and in Canada from 1995 to 2000, including his travels; and Mr. Charkaoui's trip to Pakistan from February to July 1998.

[14]As mentioned in the July 15, 2003 order (paragraphs 7 and 9 of *Charkaoui (Re)*), the designated judge must periodically review the protected information to determine whether additional information can be disclosed to the person concerned. Indeed, when national security is involved, the circumstances justifying non-disclosure may change.

[15]On July 17, 2003, after meeting the requisite conditions in such a situation, I authorized the disclosure of information that had been, until then, considered protected. The information was about the fact that Mr. Abou Zubaida, considered a close associate of Usama bin Laden, recognized Mr. Charkaoui in a photograph (he identified him as Zubeir Al-Maghrebi) as someone he had seen in Afghanistan in 1993 and in 1997-1998.

[16]On August 14, 2003, after meeting the requisite conditions in such a situation, I authorized the disclosure of information that had been, until then, considered protected. This time, the information was that, during interviews with the Canadian Security Intelligence Service (CSIS) in January 2002, Mr. Ahmed Ressam recognized Mr. Charkaoui in two photographs, identifying him as Zubeir Al-Maghrebi. Mr. Ressam added that he had met him in Afghanistan in the summer of 1998 while they were training at the same camp. The photograph presented to Mr. Abou Zubaida for the purposes of identification on July 17, 2003, was part of the evidence released to Mr.

Charkaoui during the August 14, 2003 disclosure.

[17]At the 2 and 3 July 2003 hearings, where the reasons for continued detention were reviewed, Mr. Charkaoui's lawyers reserved the right to raise constitutional questions concerning sections 33 and 76 to 85 of the IRPA.

[18]A notice of constitutional questions pursuant to section 57 [as am. by S.C. 2002, c. 8, s. 54] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1(as am. *idem*, s. 14)], and rule 69 of the *Federal Court Rules 1998*, SOR/98-106 (the Rules) was served on the Attorney General of Canada and his provincial counterparts. The hearing on these questions was held on October 8, 9 and 21, 2003, in the presence of Mr. Charkaoui, his counsel, and the Ministers' representatives and counsel.

III. ISSUES

Jurisdiction

1. Does the designated judge responsible for determining whether the certificate is reasonable and whether detention should be continued have jurisdiction to decide constitutional questions?

Constitutional questions

2. If the designated judge does have jurisdiction to decide constitutional questions, what are the answers to the 40 constitutional questions set out in Appendix I to this order?

For the reasons set out below, I will answer the first question in the affirmative and the second question in the negative. Consequently, the instant application will be dismissed.

[19]Because of the number and scope of the questions based on the Charter, the BNA Act, the *Canadian Bill of Rights*, the common law, the Bill of Rights, the Covenant and the Universal Declaration, and in order adequately to convey Mr. Charkaoui's position, I will reproduce the full text of the first part of paragraph 25 of the notice of constitutional question as submitted by his counsel on September 17, 2003:

[translation]

The person concerned alleges that the provisions of sections 33 and 77 to 85 of the IRPA are inoperative and/or *ultra vires* because, *inter alia*:

(a) they infringe the fundamental right to have one's rights defined by an independent and impartial tribunal--and not, as the IRPA provides, by the executive--notably by permitting detention based on the signing of a certificate, and by depriving the judge of the jurisdiction needed to decide on the merits of the measure, the rights of the concerned person and the certificate, all of which, in violation of section 96 of the Constitution, is done without providing for a right of appeal or judicial review;

(b) they infringe the right not to be deprived of release on reasonable bail and constitute cruel and unusual punishment are in breach of the rules of natural justice;

(c) they violate the independence of the judiciary and the appearance of impartiality required of judges;

(d) they allow for an *ex parte* procedure in which no one represents the interests of the person concerned and in which the opposing party is the only one to be represented;

(e) they allow for secret evidence without allowing for argument or participation of the person concerned and without revealing all the evidence and the nature of the undisclosed evidence or information, if any;

(f) the provisions are vague, overbroad and discriminatory; and

(g) they place the person in respect of whom the certificate was signed at risk of persecution or mistreatment or in danger of his life, and prevent him from being able to return safely to his country of origin,

in contravention of

(i) sections 7, 9, 10, 11(e), 12 and 15 of the Canadian Charter; the Canada Act 1982, Schedule B;

(ii) sections 1 and 2 of the Canadian Bill of Rights, 8-9 Elizabeth II, c. 44, R.S.C. 1985, App. III;

(iii) the common law;

(iv) the Constitution Act, 1867;

(v) the English Bill of Rights;

(vi) article 14(1) of the International Covenant on Civil and Political Rights;

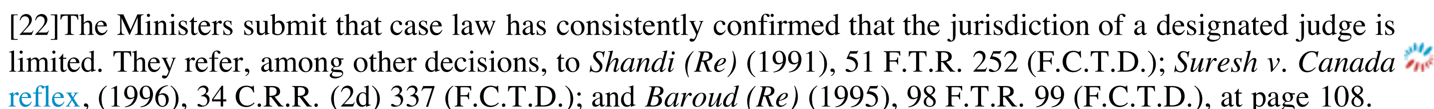
(vii) article 10 of the Universal Declaration of Human Rights.

[20]As this excerpt from the notice discloses, the scope of the challenge is so broad that I had to ask Mr. Charkaoui's counsel to draft precisely worded constitutional questions that tie the contested provisions to the arguments being made and the constitutional basis of those arguments. The purpose was to avoid losing sight of the heart of the matter and to respond to all the constitutional arguments raised. In order to avoid overburdening these reasons, the 40 constitutional questions as raised by Mr. Charkaoui's counsel have been set out in Appendix I to this order. An awareness of these questions should assist in understanding the analysis that follows.

(A) Does the designated judge responsible for determining whether the certificate is reasonable and whether detention should be continued have jurisdiction to decide constitutional questions?

[21]The Ministers submit that the jurisdiction of designated judges is so limited that they cannot decide constitutional questions concerning the IRPA, specifically sections 33, 34 and 76 to 86 of Division 9, which is entitled "Protection of Information."

[22]The Ministers submit that case law has consistently confirmed that the jurisdiction of a designated judge is limited. They refer, among other decisions, to *Shandi (Re)* (1991), 51 F.T.R. 252 (F.C.T.D.); *Suresh v. Canada* reflex, (1996), 34 C.R.R. (2d) 337 (F.C.T.D.); and *Baroud (Re)* (1995), 98 F.T.R. 99 (F.C.T.D.), at page 108.



[23]The conclusion that a designated judge has limited jurisdiction that does not encompass the determination of constitutional questions is based on *Mills v. The Queen*, 1986 CanLII 17 (S.C.C.), [1986] 1 S.C.R. 863, where the Supreme Court of Canada analysed the three-pronged test of a court with requisite jurisdiction to decide constitutional questions. The court must have jurisdiction over the parties, jurisdiction over the subject-matter and jurisdiction to order the remedy sought.

[24]In *Suresh, supra*, at paragraphs 4, 7, 8, 10 and 13, Cullen J. applied the three-part test for determining a court's jurisdiction to section 40.1 [as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31] *et seq*. of the *Immigration Act*, R.S.C., 1985, c. I-2 (the former Act). Cullen J. held that although designated judges clearly had jurisdiction over the parties and subject-matter, they did not have the power to grant a constitutional remedy:

. . . the designated judge must determine, based on the evidence presented to him or her, whether the Ministers' decision to issue the certificate is reasonable.

. . .

. . . reasonableness and constitutionality are distinct issues. . . . paragraph 40.1(4)(*d*) gives the designated judge jurisdiction only to consider the reasonableness of the certificate.

. . .

By expressly prohibiting further appeal or review, Parliament reinforced the notion that proceedings under section 40.1 of the *Immigration Act* are intended only to consider whether the Ministers' decision to issue the certificate is reasonable on the basis of the available evidence.

The applicant submits, however, that subsection 40.1(6) only prevents appeal or review of the merits of the designated judge's determination of the reasonableness of the certificate, but it does not prevent appeals on constitutional issues.

. . .

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.

[25]However, Cullen J. notes that if Parliament had stated that the designated judge had jurisdiction over the whole of the matter, the judge would have had the jurisdiction needed to decide constitutional questions [at paragraph 5]:

Provided that the designated judge has jurisdiction over the whole of the matter before him or her--the parties, the subject matter, and the remedy sought--he or she has jurisdiction to consider constitutional issues and grant constitutional remedies.

[26]The former Act has since been replaced by the IRPA and the Supreme Court of Canada has continued to develop the criteria for determining whether a court has jurisdiction to decide constitutional questions (*R. v. Hynes*, 2001 SCC 82 (CanLII), [2001] 3 S.C.R. 623; *Nova Scotia* (*Workers' Compensation Board*) *v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 (CanLII), [2003] 2 S.C.R. 504.

[27]Without exhaustively listing all the differences between the former Act and the IRPA, it would be helpful in my opinion to note certain differences that provide a good illustration of the evolution of the jurisdiction and powers of designated judges.

[28]The designated judge has jurisdiction to hear cases involving foreign nationals and permanent residents (subsection 77(1) of the IRPA). Under the former Act, the designated judge only had jurisdiction over foreign nationals and permanent residents coming under the authority of the Security Intelligence Review Committee (section 38.1 [as enacted by S.C. 1992, c. 49, s. 28] and subsections 40(1) [as am. by S.C. 1997, c. 22, s. 6] and 40.1(1) of the former Act).

[29]The designated judge now has jurisdiction to perform the following functions: assessing the reasonableness of the certificate (subsection 80(2) of the IRPA); commencing a review of the reasons for detention not later than 48 hours after the beginning of detention (subsection 83(1) of the IRPA); before making a determination on the certificate, reviewing, at least once in the six-month period following each preceding review, whether the person concerned should continue to be detained in light of whether he or she is a danger to national security or the safety of any person or whether he or she is unlikely to appear at a proceeding or for removal (subsection 83(3) of the IRPA); 120 days after the determination regarding the certificate, the designated judge may, on application, release the person, subject to certain terms and conditions, if satisfied that the release will not pose a danger to national security or the safety of any person (subsections 84(2) and 83(3) of the IRPA); and the designated judge also has the jurisdiction to review the lawfulness of an application for protection (subsections 79(1), 79(2) and 80(1) of the IRPA). The former Act only allowed the designated judge to decide on the reasonableness of the certificate and review the necessity of detention following the determination concerning the certificate (paragraph 40.1(4)(*d*) and subsection 40.1(8) of the former Act).

[30]Based on the English version of paragraph 78(*c*) of the IRPA, a designated judge now has the power to deal with "all matters" resulting from the consideration of the certificate (though the French version does employ the term "*l'affaire*"). This express power to deal with all matters related to the case simply did not exist in the former Act.

[31]Although a designated judge under the former Act would examine the information in support of the certificate within seven days of its signing (paragraph 40.1(4)(*a*) of the former Act), and section 78 of the IRPA still provides for this, the IRPA adds new requirements: the designated judge must consider the certificate informally and expeditiously (paragraph 78(*c*) of the IRPA) and must commence a review of the reasons for continued detention not later than 48 hours after the beginning of detention (subsection 83(1) of the IRPA). Thus, under the IRPA, the designated judge must examine the information and consider the certificate as well as the reasons for continued detention, and then promptly make a determination.

[32]The principle that the 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*" (paragraph 3(3)(*d*) of the IRPA) is another new element. While this principle of construction is self-evident, its express inclusion in the IRPA is particularly important to bear in mind when determining the jurisdiction of a designated judge. The principle was found in the former Act, but in a more limited form: it merely stated that standards for admission to Canada could not be discriminatory (paragraph 3(*f*) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 2] of the former Act).

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

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need

. . .

(*f*) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*;

Immigration and Refugee Protection Act, S.C. 2001, c. 27

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;

[33]Lastly, it is important that both the former Act and the IRPA provide that determinations regarding a certificate cannot be appealed (subsection 40.1(6) of the former Act and subsection 80(3) of the IRPA). However, the IRPA adds that if a certificate is confirmed to be reasonable, it becomes a removal order, and also may not be appealed (section 81 of the IRPA, as opposed to section 70 [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 18; S.C. 1992, c. 49, s. 65; 1995, c. 15, s. 13] of the former Act).

[34]Before analysing the provisions to determine whether the designated judge is, within the meaning of subsection 24(1) of the Charter, a court of competent jurisdiction to decide constitutional questions, the concept of designated judge should be circumscribed further.

[35]Interestingly, the concept was formulated 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 Commission). The Commission refers to the notion of "designated judge" in Part V of its 2nd report at paragraph 101 (vol. 1, page 556) where it considers the question of applications for warrants in connection with the *Official Secrets Act*, R.S.C., 1985, c. O-5, stating as follows:

In a system of responsible Cabinet government operating within the rule of law Ministers are responsible for the effective and proper execution of the powers lawfully available to government, but they do not have the final responsibility for determining what the law is. In our system of government this is normally the function of judges.

[36]At paragraphs 104 and 106 of Part V (vol. 1, pages 557-558), the Commission recommends as follows:

To ensure the availability of reasonably experienced judges to hear applications for warrants, we propose that five judges from the Trial Division of the Federal Court of Canada be designated by the Chief Justice of the Federal Court to hear applications.

. . .

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.

At paragraph 6 of Chapter 2 (vol. 2, page 882), the Commission addresses the question of external reviews and states as follows:

These two sets of recommendations clearly envisage a significant role for the Federal Court of Canada in decisions relating to national security. As we recommended earlier in Part V, this role would best be carried out by a nucleus of judges from the Appeal and Trial Divisions who would be specially designated for the purpose by the Chief Justice of the Court.

[37]Parliament has employed the designated judge concept in other statutes. Judges are designated to hear matters involving national security under the following provisions, among others: sections 2 [as am. by S.C. 2001, c. 41, s. 89] and 21 *et seq*. of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23, sections 38 [as am. *idem*, s. 43] to 38.15 [as enacted *idem*] of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, subsection 40.1(4) *et seq*. of the *Immigration Act*, R.S.C., 1985, c. I-2, and section 76 *et seq*. of the IRPA. 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.

[38]In my opinion, the reason for designating certain Federal Court judges is to limit access to protected information and thereby protect activities involving Canada's national security and the means by which information regarding national security is obtained.

[39]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.

[40]Based on the foregoing analysis of the origins and role of designated judges, it is incumbent on us to ask whether a designated judge is, within the meaning of subsection 24(1) of the Charter, a "court of competent jurisdiction" to decide constitutional questions.

[41]In order to be a court of competent jurisdiction, a court must have jurisdiction over the person concerned, jurisdiction over the subject-matter, and the power to order the remedy sought (*Mills v. The Queen*, *supra*, at page 863; *R. v. Hynes, supra*, at page 623).

[42]The IRPA gives the designated judge full jurisdiction over the person concerned: it confers upon that judge the power to make decisions about the person's future and the person's detention before and even after the determination regarding the certificate. The IRPA grants jurisdiction over the subject-matter to the designated judge in an equally express manner. Indeed, no judge who is not designated has the power to decide questions of national security.

[43]As for the power to order the remedy sought, the Supreme Court of Canada noted in *Hynes, supra*, at paragraph 27, that if no provision specifically grants the power to decide Charter questions, one must determine whether Parliament implicitly intended to make such a grant:

Absent express empowerment, this determination requires consideration of the <u>function</u> performed by the court or tribunal and the <u>structure</u>, powers and processes conferred on it by Parliament or the legislature. . . . Distilled to a

single statement, the test of power to grant the remedy sought can be stated as follows: is the court or tribunal suited to grant the remedy sought under s. 24 in light of its function and structure? [Emphasis in original.]

[44]In my opinion, the rule of construction that Parliament enacted in paragraph 3(3)(*d*) of the IRPA, which "ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*," is equivalent to an express grant of the power to order a remedy. Is it not the role of a designated judge, under the Charter, to ensure that ministerial decisions are not only taken in accordance with the IRPA, but also in accordance with the Charter? Moreover, in paragraph 78(*c*) of the IRPA, Parliament clearly specifies that the designated judge "shall deal with all matters. [Underlining added.]" In my opinion, this decision-making power covers all questions arising out of a matter, including Charter questions.

[45]It is impossible to analyse the designated judge's jurisdiction without interpreting paragraph 78(*c*) of the IRPA. It can be seen that the words "all matters" are included in the English version, but not in the French:

78. . . .

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

78. [. . .]

c) *il [le juge qui entend l'affaire] procède, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et selon la procédure expéditive*;

[46]In *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII), [2002] 1 S.C.R. 84, at paragraph 27, the Supreme Court of Canada states that it has held numerous times that the modern approach to interpretation must be preferred; this is the approach articulated by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at page 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire content and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In addition, in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at page 225, and P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pages 323-324 and 349, the following is stated:

The Canadian constitution imposes certain requirements respecting bilingual legislation. Some constitutional texts . . . also have two official versions. The interpreter must take into consideration the fact that the two versions, in English and in French, are equally authoritative.

. . .

Unless otherwise provided, differences between two official versions of the same enactment are reconciled by educing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained.

. . .

Bilingual drafting can sometimes lead to a lack of harmony between the two linguistic versions, but these two versions, hypothetically, are the grounding of only one rule and thus there is no antinomy.

. . .

Any interpretation permitting reconciliation is to be favoured, because it is assumed this better reflects the work of a rational legislature.

An ordinary reading of the English and French versions of paragraph 78(*c*) of the IRPA in light of the modern

approach to statutory interpretation leads to a broad interpretation of paragraph 78(*c*). I therefore conclude that a judge hearing the case must consider "all matters" relevant to the case.

[47]In fact, section 78 and subsection 79(1) of the IRPA favour such an interpretation. Indeed, the French version employs the term "*l'affaire*" in both provisions. "*L'affaire*" refers to the assessment of the reasonableness of the certificate or the continued detention. Thus, the other "*affaires*" include questions of law and procedure. Consequently, subsection 3(3) and paragraph 78(*c*) of the IRPA can be interpreted as expressly conferring on the designated judge the power to decide constitutional questions. Only a designated judge has the jurisdiction to decide whether the certificate and the basis for detention are reasonable. The way in which the designated judge assumes this role is entirely up to him or her. The important thing is that the designated judge protect the information that can be injurious to national security all the while ensuring that the person concerned is reasonably informed of the circumstances giving rise to the certificate and the detention. I am therefore of the opinion that the IRPA gives the designated judge jurisdiction over the person concerned and the subject-matter as well as the power to order a remedy.

[48]At this stage, I return to the concepts of express and implied intent discussed in *Hynes, supra*. Even if the IRPA did not disclose Parliament's express intent to confer the power to grant the remedy sought--and I have found that it does--it is my opinion that Parliament's implied intent, as gleaned from the role given to designated judges under sections 76 to 85 of the IRPA, includes as an unspoken assumption the power to grant the remedy sought.

[49]Well before the IRPA came into force, McDonald J.A. of the Federal Court of Appeal stated in *obiter* that an appellate court should not substitute itself for a trial court in regard to Charter issues because a designated judge is in the best situation to rule on such issues. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9083 (F.C.A.), [1998] 4 F.C. 192 (C.A.), at paragraph 8, he states:

Clearly a designated judge hearing a subsection 40.1(8) application is in the best position to rule on any Charter issues. Indeed, a designated judge is compelled to consider whether an order he or she makes has any constitutional implications. If the designated judge decides in the first instance that *prima facie* a Charter right might be infringed by the terms of an order, he is in the best position, after hearing all the evidence, to determine whether, given security concerns, the terms of the order can be upheld under section 1 of the Charter. In doing so he may have to consider whether the application of Charter requirements to an order made under subsection 40.1(9) involved a determination of the "constitutional applicability" of that subsection, thus giving rise to the notice requirements of section 57 of the *Federal Court Act* [R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 19)]. This matter was not argued before us.

[50]I would even say that designated judges are in the ideal position to rule on constitutional questions arising from sections 76 to 85 of the IRPA because they have all the relevant information as well as all the special powers associated with the jurisdiction in question.

[51]The issue in *Hynes, supra*, was whether a justice in a preliminary inquiry under the *Criminal Code*, R.S.C., 1985, c. C-46, could decide constitutional questions. By a majority, the Supreme Court answered in the negative, just as it had in *Mills, supra*. The majority came to this conclusion because they were of the opinion that the trial judge was better situated than a preliminary inquiry justice, a trial being the ideal place to decide such questions (*Hynes, supra*, at paragraph 40). In the case at bar, the designated judge's role is much closer to that of a trial judge than that of a preliminary inquiry justice. A designated judge and a trial judge both have jurisdiction over the entire matter as well as its outcome.

[52]The position that a designated judge is a court of competent jurisdiction to decide constitutional questions also prevents a duplication of procedures that would require more time and generate additional costs for taxpayers. Undeniably, conferring jurisdiction over Charter questions to another judge of the Court, whether designated or otherwise, could create the need for a new procedure and cause additional delays. This concern was raised by Gonthier J. of the Supreme Court of Canada in *Nova Scotia* (*Workers' Compensation Board*) *v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, *supra*, at paragraph 29:

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 . . . .

[53]In addition to mentioning that additional delays are not in the interest of taxpayers, I note that Parliament has specified that the designated judge must proceed expeditiously. In entrusting the task of deciding Charter questions to the designated judge, Parliament is ensuring that the time spent at first instance is as short as possible while enabling the judge to perform a careful assessment of the reasonableness of the certificate and a diligent review of the reasons for detention.

[54]Some might argue that the impossibility of appealing decisions regarding a certificate limits the jurisdiction of the designated judge with regard to constitutional questions because it means that decisions on constitutional questions are without appeal. I cannot accept such an argument. In my view, a judgment that pertains to Charter questions and is rendered in a proceeding under sections 76 to 85 of the IRPA is not a determination on the certificate or the continued detention. Its subject-matter is completely different from the subject-matter of a determination on the certificate or on continued detention. It must therefore be addressed separately. Moreover, a judgment pertaining to Charter questions does not pertain directly to the information that forms the basis of a determination on the certificate or the continued detention.

[55]In light of the nature of the questions raised in the case at bar and the fact the hearing leading to a determination as to the reasonableness of the certificate has not yet been held, it is my view that the questions to be decided are close to questions of law, which are dealt with in subsection 27(1) of the *Federal Courts Act*.

[56]Consequently, it is my view that the judgment of a designated judge deciding constitutional questions can be appealed under section 27 [as am. by R.S.C., 1985 (4th Supp.), c. 51, s. 11; S.C. 1990, c. 8, s. 7; 1993, c. 27, s. 214; 2002, c. 8, s. 34] of the *Federal Courts Act*. If this is not the case, although I believe it is, subsection 40(1) [as am. by S.C. 1990, c. 8, s. 37] of the *Supreme Court Act*, R.S.C., 1985, c. S-26, remains available. It provides:

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

[57]Before coming to my final conclusion, I note that in *Martin, supra*, at paragraph 31, Gonthier J. discusses the right to appeal from the decisions of administrative tribunals, and notes that their decisions regarding constitutional questions remain subject to review by a superior court:

Third, administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard: see *Cuddy Chicks, supra*, at p. 17. An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court.

It would be unthinkable that a decision of a designated superior court judge concerning constitutional questions would be without appeal. If, due to Charter considerations, a right of appeal or judicial review lies from a decision of an administrative tribunal, I fail to see why no appeal would lie from an order of a designated judge.

[58]In essence, I find that a designated judge has the jurisdiction needed to decide constitutional questions. Being a Federal Court judge, a designated judge has all the powers associated with that office to which are added the powers conferred on designated judges. In my opinion, subsection 3(3) and paragraph 78(*c*) of the IRPA expressly entrust designated judges with the task of deciding constitutional questions. And even if Parliament had not expressly entrusted this task to designated judges (although I believe that it has) I am of the opinion, having regard to the concepts of express and implied intent discussed in *Hynes*, *supra*, that given the reason for designating judges and the special powers granted to them sections 76 to 85 of the IRPA impliedly create this duty.

(B) If a designated judge does have the jurisdiction to decide constitutional questions, what are the answers to the 40 constitutional questions set out in Appendix I to this order?

[59]Before considering the arguments associated with the 40 constitutional questions that Mr. Charkaoui's counsel raised, I believe it is important to situate the concept of the legal status of a permanent resident and the concept of national security properly in the context of immigration law. Once this backdrop has been set in place, it will be easier to understand the submissions and their analysis, most notably where the principles of fundamental justice and the rights guaranteed by the Charter are concerned. After this, I will summarize and then analyse the parties' arguments.

1. The legal status of a permanent resident

[60]First of all, it is important to note that the Charter itself distinguishes between the rights of Canadian citizens and the rights of permanent residents. Specifically, contrary to a Canadian citizen, a permanent resident does not have the unqualified right to enter and leave Canada or even to remain here. However, a permanent resident does have the right to move within Canada and to take up residence and gain a livelihood in any province (subsections 6(1) and 6(2) of the Charter).

[61]The Charter rights of permanent residents are discussed in other terms in subsection 27(1) of the IRPA:

27. (1) A permanent resident of Canada has the right to enter and remain in Canada, subject to the provisions of this Act.

[62]Consequently, given the distinction that the Charter draws between citizens and non-citizens, Parliament is entitled to enact a policy establishing rules that a permanent resident must follow in order to be able to enter and remain in Canada. Sopinka J. recognized this 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.

[63]Just recently, the Supreme Court of Canada recognized in *Chieu, supra*, at paragraph 46, that Parliament is entitled to enact legislation establishing conditions that non-citizens must meet in order to enter and remain in Canada. However, the Court specified that a permanent resident has more rights than other non-citizens but fewer rights than a Canadian citizen [at paragraph 59]:

In fact, the Act treats citizens differently from permanent residents, who in turn are treated differently from Convention refugees, who are treated differently from individuals holding visas and from illegal residents. It is an important aspect of the statutory scheme that these different categories of individuals are treated differently, with appropriate adjustments to the varying rights and contexts of individuals in these groups. I need only point out that permanent residents have rights under both the *Charter* and the Act that other non-citizens do not, including mobility rights under s. 6(2) of the *Charter* and the right to sponsor individuals to come to Canada under s. 6(2) of the Act.

[64]As we have seen, the IRPA establishes conditions that permit a permanent resident to enter and remain in Canada. In particular, sections 33 *et seq*. of the IRPA provide that a permanent resident can be declared inadmissible if there are reasonable grounds to believe the following facts, among others, have occurred: the permanent resident is a danger to the security of Canada (section 34); he has participated directly in war crimes or crimes against humanity or was a senior official in a government that committed war crimes or crimes against humanity (section 35); he has been convicted of an offence punishable by a term of imprisonment of at least 10 years or for which a term of imprisonment of more than six months was imposed (section 36); he has been the member of an organization that has engaged in or is engaging in organized crime (section 37); or he made misrepresentations on his application for immigration or was sponsored by a person who made misrepresentations about him (section 40 of the IRPA).

[65]If one of these determinations is made in respect of a permanent resident, he loses his status when the removal order made against him comes into force (paragraph 46(1)(*c*) of the IRPA).

[66]In the case at bar, it was the Ministers' determination that Mr. Charkaoui is a danger to national security because he is a member of the Usama bin Laden terrorist network, and that he engaged or will engage in terrorism alone or as a part of that organization (paragraphs 34(1)(*c*),(*d*) and (*f*) of the IRPA).

[67]The Ministers therefore filed a certificate stating that Mr. Charkaoui should be declared inadmissible on grounds of security (subsection 77(1) of the IRPA). If the designated judge confirms that the certificate is reasonable, it is a removal order that may not be appealed against (section 81 of the IRPA).

[68]In short, Parliament has provided for situations that prevent a permanent resident from being able to remain in Canada. If the permanent resident is not in any of these situations, he may remain in Canada. If he is, the ultimate consequence may be removal.

2. <u>National security</u>

[69]Since the certificate referred to in subsection 77(1) of the IRPA is necessarily based on national security or criminal intelligence or on information obtained in confidence (hereinafter "protected information"), Parliament has established a procedure that allows the information to be protected while giving the permanent resident the right to be reasonably informed of the circumstances giving rise to the certificate (paragraphs 78(*b*) and (*h*) of the IRPA). In this way, Parliament forces the designated judge to balance two fundamental but completely opposing interests: the safeguarding of protected information for reasons of national security, and disclosing enough information to enable the permanent resident to defend himself.

[70]National security is essential for the preservation of our democratic society. We live in an era when threats to our democracy frequently come from unconventional acts that cannot be detected by unsophisticated investigations or traditional means. The methods used to obtain protected information must not be revealed. Indeed, the protection of our democratic society demands continuous efforts and cannot be guaranteed merely by conducting one-time investigations. In *Chiarelli, supra*, at pages 744-745, Sopinka J. confirms that the state is fully justified in seeking to protect its investigations:

However, the state also has a considerable interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources. The need for confidentiality in national security cases was emphasized by Lord Denning in *R. v. Secretary of State for the Home Department, ex parte Hosenball*, [1977] 3 All E.R. 452 (C.A.), at p. 460:

The information supplied to the Home Secretary by the Security Service is, and must be, highly confidential. The public interest in the security of the realm is so great that the sources of information must not be disclosed, nor should the nature of the information itself be disclosed, if there is any risk that it would lead to the sources being discovered. The reason is because, in this very secretive field, our enemies might try to eliminate the source of information.

[71]At the same time, the right of a permanent resident to be informed of the circumstances giving rise to the certificate issued against him is a fundamental right. A permanent resident must be reasonably informed of the reasons for which the Ministers have determined that he is a danger to national security. This is essential to ensuring that the person concerned has the opportunity to defend himself against the allegations made against him.

3. <u>Summary of the parties' arguments</u>

[72]Given the scope of the legal arguments, I believe it is helpful to summarize the parties' submissions. We will examine them in greater detail thereafter.

[73]Mr. Charkaoui's counsel submit that the procedure that Parliament has established for assessing the reasonableness of the certificate and the continued detention, a process that seeks to strike a balance between the state's interest in protecting security, and the concerned person's interest in knowing the allegations against him as well as the documents on which those allegations are based, violates the principles of fundamental justice.

According to them, the role of the designated judge, the exclusion of information on grounds of national security, the hearings held in the absence of the person concerned and his counsel, as well as the standards of "reasonableness" for the certificate and "reasonable grounds to believe" that a danger to national security exists, are clearly in breach of the principles of fundamental justice protected by the Charter, the *Canadian Bill of Rights*, the Universal Declaration and the Covenant. They believe that this type of procedure is irreconcilable with fundamental rights.

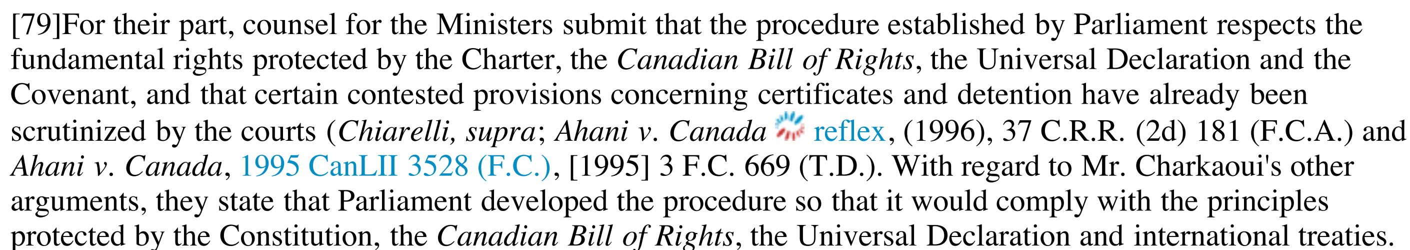
[74]Mr. Charkaoui's counsel submit that the detention that follows the Ministers' signing of an arrest warrant is an unacceptable procedure because it is ordered through a ministerial not a judiciary decision, and because the review of continued detention is not done by an independent or impartial tribunal. In their submission, this type of detention is in breach of sections 7, 9 and 12 and paragraph 11(*e*) of the Charter and section 2 of the *Canadian Bill of Rights*.

[75]Mr. Charkaoui's counsel also submit that the procedure Parliament has chosen treats the person concerned differently from other persons. They argue that the procedure violates section 15 of the Charter and paragraph 1(*b*) of the *Canadian Bill of Rights*.

[76]In addition, Mr. Charkaoui's counsel submit that certain provisions of the IRPA are vague and overbroad, that the procedure creates a risk to the person concerned if he returns to his country of origin, and that it does not respect Canada's international treaty commitments.

[77]Lastly, Mr. Charkaoui submits, through his counsel, that the provision barring appeals from a determination as to the reasonableness of the certificate contravenes section 96 of the BNA Act.

[78]Although the written submissions of Mr. Charkaoui's counsel refer to the *Canadian Bill of Rights*, the Universal Declaration, the common law, the BNA Act and the English Bill of Rights, their oral arguments focussed on certain provisions of the Charter and, to a lesser degree, section 96 of the BNA Act as well as Article 14(*r*) of the Covenant.



[79]For their part, counsel for the Ministers submit that the procedure established by Parliament respects the fundamental rights protected by the Charter, the *Canadian Bill of Rights*, the Universal Declaration and the Covenant, and that certain contested provisions concerning certificates and detention have already been scrutinized by the courts (*Chiarelli, supra*; *Ahani v. Canada* reflex, (1996), 37 C.R.R. (2d) 181 (F.C.A.) and *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669 (T.D.). With regard to Mr. Charkaoui's other arguments, they state that Parliament developed the procedure so that it would comply with the principles protected by the Constitution, the *Canadian Bill of Rights*, the Universal Declaration and international treaties.

4. Structure of the analysis

[80]I now propose to analyse the constitutional arguments of Mr. Charkaoui's counsel based on the following outline:

(i) Fundamental rights: section 7 of the Charter, section 1 of the *Canadian Bill of Rights* and sections 33 and 76 to 85 of the IRPA

- Principles of fundamental justice

- Is the designated judge independent and/or impartial?

- "Reasonableness" and "reasonable grounds to believe": appropriate standards of proof.

(ii) Detention: sections 7, 9 and 12 and paragraph 11(*e*) of the Charter, section 2 of the *Canadian Bill of Rights* and sections 33 and 76 to 85 of the IRPA

(iii) Equal treatment: section 15 of the Charter, paragraph 1(*b*) of the *Canadian Bill of Rights* and sections 33 and 76 to 85 of the IRPA

(iv) Vague, overbroad and discriminatory nature of certain provisions: paragraph 34(1)(*f*) and subsection 83(3) of the IRPA

(v) Creation of risks to the person concerned: sections 7, 12 and 15 of the Charter and section 77 of the IRPA

(vi) Impossibility of appealing: section 96 of the BNA Act, subsection 80(3) and section 81 of the IRPA

(vii) Compliance with international obligations: subsection 14(1) of the Covenant and sections 33, 77, 80, 81, 82, 83 and 85 of the IRPA

[81]In my opinion, this analytical structure makes it possible to answer the many questions and arguments presented by Mr. Charkaoui's counsel.

(i) Fundamental rights: section 7 of the Charter, section 1 of the *Canadian Bill of Rights* and sections 33 and 76 to 85 of the IRPA

[82]Section 7 of the Charter provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Paragraph 1(*a*) of the *Canadian Bill of Rights* provides for:

1. . . .

(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

[83]Mr. Charkaoui states that sections 33 and 76 to 85 of the IRPA run afoul of the principles of fundamental justice referred to in section 7 of the Charter because:

(a) the procedure under the IRPA for determining the reasonableness of the certificate and continued detention contravene the principles of fundamental justice;

(b) the role that the IRPA confers on the designated judge undermines the independence of that judge or at least creates an appearance of bias;

(c) the designated judge, and not the Ministers, should be the one to decide whether the person concerned should be detained or not; consequently, the standard of proof under which the designated judge must only assess the reasonableness of the certificate and may only continue detention if there are "reasonable grounds to believe that he is a danger to national security or the safety of any person or is unlikely to appear at a proceeding or for removal" (subsections 82(1) and 83(3) of the IRPA) contravenes the principles of fundamental justice because the standard does not permit the designated judge to rule on the merits of the matter.

Principles of fundamental justice

The principles of fundamental justice in light of *Chiarelli* and *Suresh*

[84]In applying the principles of fundamental justice, including the rules of natural justice and procedural fairness, one must take account of the interests at stake and the circumstances as a whole. Indeed, as Sopinka J. stated in *Chiarelli, supra*, at pages 743-744:

The scope of principles of fundamental justice will vary with the context and the interests at stake.

. . .

Similarly, the rules of natural justice and the concept of procedural fairness, which may inform principles of fundamental justice in a particular context, are not fixed standards.

. . . [i]n assessing whether a procedure accords with fundamental justice, it may be necessary to balance competing interests of the state and the individual.

[85]Conceptually, the principles of fundamental justice, referred to in section 7 of the Charter, must be assessed in light of the legislative context, the purposes of the impugned legislation and the rights of the parties. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, at paragraph 45, the Supreme Court of Canada discussed how the principles of fundamental justice under section 7 of the Charter are applied:

The principles of fundamental justice are to be found in "the basic tenets of our legal system": *Burns*, *supra*, at para. 70. "They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system": *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (S.C.C.), [1985] 2 S.C.R. 486, at p. 503. The relevant principles of fundamental justice are determined by a contextual approach that "takes into account the nature of the decision to be made": *Kindler, supra*, at p. 848, *per* McLachlin J. (as she then was). The approach is essentially one of balancing. As we said in *Burns*, "[i]t is inherent in the . . . balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance."

[86]The decisions challenged in the case at bar were made by two Ministers in the federal Cabinet, specifically the Minister of Citizenship and Immigration and the Solicitor General of Canada. The former is responsible for the administration of immigration and citizenship legislation, and the latter is responsible, before Parliament, for CSIS and the Royal Canadian Mounted Police.

[87]The Ministers' first decision states that Mr. Charkaoui, a permanent resident, must be inadmissible on grounds of security (subsection 77(1) of the IRPA). The second decision pertains to the warrant of arrest and states that the Ministers are of the opinion that Mr. Charkaoui is a danger to national security or to the safety of a person or that he is unlikely to appear at a proceeding (subsection 82(1) of the IRPA).

[88]These two decisions are administrative in nature. They are based on information that the Ministers consider secret and which cannot be disclosed to anyone except where authorized. The term "information" is defined in section 76 of the IRPA.

[89]The decisions have major consequences for Mr. Charkaoui and his family because they put their future in Canada in serious doubt along with any citizenship application they may have made.

[90]In *Suresh, supra*, at paragraph 115, the Court specifies the factors to be used in determining the content of the principles of fundamental justice as they apply to a decision or statute:

What is required by the duty of fairness--and therefore the principles of fundamental justice--is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker, supra,* at para. 21; *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (S.C.C.), [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (S.C.C.), [1990] 3 S.C.R. 1170, *per* Sopinka J. More specifically, deciding what procedural protections must be provided involves a consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker, supra*, at paras. 23-27. This is not to say that other factors or considerations may not be involved.

[91]To this list I would add (6) the legitimate nature of the interests at stake; (7) the persons or entities responsible for making the decision; and (8) Parliament's objective, which is to ensure a fair and equitable procedure that takes the circumstances into account.

[92]As far as the third factor in *Suresh* is concerned, the determination regarding the certificate is of great significance to Mr. Charkaoui and has far-reaching consequences for him. As no undertakings were made to Mr. Charkaoui concerning the procedure to be followed, the fourth factor does not apply.

[93]The first factor in *Suresh* is the nature of the decisions. The decisions in issue are administrative ministerial decisions. They were based on protected information, and Mr. Charkaoui had no access to the decision-making process at any meeting, any hearing or otherwise. At this first stage, it is hard to imagine how the Ministers could disclose the protected information to the person concerned in order to enable him to respond in some way. Parliament has decided to proceed by way of an administrative ministerial decision.

[94]However, after the Ministers make the decision to sign the certificate and issue an arrest warrant, the certificate is filed in the Federal Court (subsection 77(1) of the IRPA), and then the designated judge ascertains whether the certificate is reasonable, and periodically reviews whether detention should continue based on the test set out in section 78 of the IRPA. Thus, Parliament has provided for an automatic review of ministerial decisions.

[95]Having addressed the first, second, third and fourth factors in *Suresh, supra*, along with the sixth factor, which I have added, it remains to consider the fifth factor in *Suresh*, as well as the seventh and eighth factors, which I have added. This requires that we examine the procedure that Parliament has established in sections 77, 78 and 82 of the IRPA and determine whether it complies with the principles of fundamental justice.

Does the procedure in the IRPA comply with the principles of fundamental justice?

[96]In view of the fact that opposing interests are at play, does the procedure established by sections 77, 78 and 82 of the IRPA for determining whether the certificate is reasonable and whether detention should continue to comply with the principles of fundamental justice referred to in section 7 of the Charter?

[97]Let us begin by describing the procedure that Parliament has established in relation to the certificate and to detention. As far as the certificate is concerned, the designated judge examines the evidence submitted by the Ministers, determines which evidence is protected for national security reasons, gives the permanent resident a summary of the evidence so that he may be reasonably informed, gives him the opportunity to be heard, and then determines whether the certificate is reasonable (section 78 of the IRPA). As far as the permanent resident's continued detention is concerned, if a warrant has been issued, the designated judge, following the same steps involved in analysing the certificate, reviews the reasons for the continued detention and determines whether the permanent resident continues to be a danger to national security or the safety of any person or whether he is unlikely to appear at a proceeding or for removal. A designated judge must, at least once in the six-month period following each preceding review or at any other time upon request, determine whether detention is still justified. On application by the person concerned, within 120 days after the certificate is confirmed to be reasonable, the designated judge reviews the need for continued detention in light of certain factors (sections 82, 83 and 78 of the IRPA).

[98]Let us now see how the procedure established by Parliament balances the interests of the state and those of the person concerned. Parliament has called on a member of the judiciary, the designated judge, to assume an independent and objective role that takes the opposing interests into account. Parliament has provided that the designated judge must "ensure" the confidentiality of the protected information for reasons of national security (paragraph 78(*b*) of the IRPA) while reasonably informing the permanent resident of the circumstances justifying the certificate and the detention (paragraph 78(*h*) of the IRPA); this discretion must be exercised with skill and finesse. Parliament gives the permanent resident an opportunity to be represented and heard when the reasonableness of the certificate and continued detention are assessed, as well as an opportunity to testify and make representations. Parliament has established a procedure for reviewing detention periodically; this procedure gives the person concerned the right to be represented, to be heard, to testify and to make representations. In exchange, Parliament requires that the designated judge ensure the confidentiality of the information protected for national security reasons. This is why the designated judge may hold hearings in the absence of the permanent resident and his representatives and disclose only such facts and information that are not injurious to national security. At the request of a party, Parliament authorizes the designated judge to admit evidence that would otherwise be inadmissible and to base his decision on that evidence. Parliament has stated that the certificate cannot be appealed, and that the designated judge must apply a reasonableness standard, not a preponderance of evidence standard, in reviewing the certificate and the reasons for the continued detention (*Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2004] 1 F.C.R. 528 (F.C.A.)).

[99]In order to maintain procedural objectivity while taking account of the state's legitimate interest in protecting security or criminal intelligence information and the right of the person concerned to contest the certificate and

detention with a full knowledge of the case, Parliament has empowered a designated judge of the Federal Court to examine and assess ministerial decisions.

[100]In my opinion, designated judges are the cornerstone of the review procedure because they have a twofold obligation: to protect criminal or national security intelligence; and to provide the person concerned with a summary of the evidence that reasonably discloses the circumstances giving rise to the certificate and the warrant that resulted in his detention. This constitutes the balance between the opposing interests.

[101]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. The designated judge can even examine additional information if counsel for the Ministers submit any (paragraph 78(*j*) of the IRPA). The Ministers' representatives are even under a duty to inform the designated judge of any facts that could be prejudicial to the Ministers' case. In *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (CanLII), [2002] 4 S.C.R. 3, Arbour J. notes that the duty of disclosure is much greater when Parliament has authorized hearings in the absence of a party [at paragraph 47]:

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.

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.

[102]After the person concerned receives the summary in question and other relevant documents, the designated judge holds one or more hearings where the person concerned is given the opportunity to be heard. The hearing can pertain to the reasonableness of the certificate, the continued detention or both. At the hearing, the Ministers and the person concerned have the opportunity to call witnesses, submit documentary evidence and make oral as well as written submissions.

[103]In *Chiarelli, supra*, the Supreme Court of Canada considered the procedure established by section 39 [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 6; S.C. 1992, c. 49, s. 29; 1997, c. 22, s. 4] of the former Act, a procedure similar in many respects to the one described above. Under that procedure, the Security Intelligence Review Committee had to investigate ministerial reports that concluded a permanent resident was dangerous. Writing for the Court, Sopinka J. wrote as follows at pages 743-746:

Similarly, the rules of natural justice and the concept of procedural fairness, which may inform principles of fundamental justice in a particular context, are not fixed standards . . . .

. . . it may be necessary to balance competing interests of the state and the individual:

What these practices have sought to achieve is a just accommodation between the interests of the individual and those of the state, both of which factors play a part in assessing whether a particular law violates the principles of fundamental justice. . . .

In the context of hearings conducted by the Review Committee pursuant to a joint report, an individual has an interest in a fair procedure. . . . However, the state also has a considerable interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources.

. . .

The *CSIS Act* and Review Committee Rules recognize the competing individual and state interests and attempt to find a reasonable balance between them. The Rules expressly direct that the Committee's discretion be exercised with regard to this balancing of interests.

In this case the respondent was first provided with the "Statement of Circumstances giving rise to the making of a Report by the Solicitor General of Canada and the Minister of Employment and Immigration to the Security Intelligence Review Committee". . . . In my view, these various documents gave the respondent sufficient information to know the substance of the allegations against him, and to be able to respond.

The respondent was also given the opportunity to respond, by calling his own witnesses . . . .

[104]In my opinion, the procedure established by sections 76 to 85 of the IRPA takes the existence of opposing interests into consideration and strikes an acceptable balance between those interests. The fact that a designated judge is involved in striking this balance adds credibility to the procedure and ensures objectivity in achieving the result.

[105]In *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669 (T.D.), at page 694, McGillis J. comes to the following conclusion with regard to the system established by the former Act, in which the designated judge would determine whether a certificate concerning a refugee was reasonable (section 40.1 of the former Act), and which is therefore similar to the system in issue:

I have concluded that, in enacting section 40.1 of the *Immigration Act*, Parliament developed a procedure in which it attempted to strike a reasonable balance between the competing interests of the individual and the state. In particular, Parliament placed the responsibility of reviewing the reasonableness of the ministerial certificate on an independent member of the judiciary and accorded him the power to examine the security or criminal intelligence reports, to hear evidence, to give disclosure with a view to permitting the person to be "reasonably informed", and to provide the person with a "reasonable opportunity to be heard." In my opinion, the contextual analysis confirms that the principles of fundamental justice have been respected in the procedure devised by Parliament in section 40.1 of the *Immigration Act*.

[106]*Ruby, supra*, involved national security, a hearing conducted in the absence of the person concerned and his counsel in accordance with subsection 51(2) of the *Privacy Act*, R.S.C., 1985, c. P-21, and section 7 of the Charter. Arbour J. upheld this type of hearing at paragraph 51 of the decision:

In this case, given the statutory framework, the narrow basis of the appellant's constitutional challenge and the significant and exceptional state and social interest in the protection of information involved, I find that the mandatory *ex parte* and *in camera* provisions do not fall below the level of fairness required by s. 7.

[107]I have come to the same conclusion. The procedure established by sections 76 to 85 of the IRPA complies with the principles of fundamental justice referred to in section 7 of the Charter.

Is the designated judge independent and/or impartial?

[108]In addition to submitting that sections 76 to 85 of the IRPA do not comply with the principles of fundamental justice guaranteed by section 7 of the Charter, Mr. Charkaoui's counsel argue that the designated judge is not independent and impartial because the role assigned to the designated judge violates the right to a fair trial.

[109]Mr. Charkaoui's counsel reason as follows. It is the Ministers, not the designated judge, who issue the decision rendering the person concerned inadmissible. The designated judge merely reviews that decision and, rather than applying the preponderance of evidence standard, the designated judge must apply the reasonableness standard when reviewing the certificate (subsections 80(1) and (2) of the IRPA) and the "reasonable grounds to believe" standard when reviewing the continued detention (section 33 and subsection 82(1) of the IRPA). In addition, the functions of the designated judge give rise to bias or at least the appearance of bias: the designated judge conducts hearings in the presence of the Ministers' representatives but in the absence of the person concerned and his representatives; does not disclose the security or criminal intelligence, but reasonably informs the person concerned; and then makes a final decision that takes the protected information into account.

[110]As mentioned, Parliament has opted for a procedure that begins with a decision made by two Ministers who are of the opinion that the person concerned should be inadmissible on one or more grounds contemplated in sections 34 to 42 of the IRPA. Once the certificate is filed in the Federal Court, the designated judge becomes involved and commences the review of the ministerial decision. As long as the designated judge has not ruled on the reasonableness of the certificate, the person concerned cannot be made inadmissible, with all the consequences inadmissibility entails (subsection 77(2) and section 81 of the IRPA). In summary, the ministerial decision concerning the certificate is of no effect unless and until the designated judge validates it.

[111]As for the decision regarding detention, which we will revisit later in greater detail, the designated judge intervenes to review the detention no later than 48 hours after it began (subsection 83(1) of the IRPA); the designated judge reassesses the need for continued detention at least every six months and at any time upon request (subsection 83(2) of the IRPA) and gives the person concerned an opportunity to be heard (subsection 83(1) and section 78 of the IRPA). The role of designated judge is decisive, just as it was with regard to the certificate seeking inadmissibility, since the judge either validates or invalidates the detention.

[112]It is true that the decision regarding the inadmissibility of the person concerned is made by the Ministers, not the judiciary, but I do not believe that this imperils the independence of the designated judge. The executive and the judiciary each play a specific role, which Parliament has defined well.

[113]In the areas of security and immigration, no one is better placed than the executive, specifically the Minister of Citizenship and Immigration and the Solicitor General of Canada, to make decisions resulting in inadmissibility. Nevertheless, the judiciary plays a decisive role at every stage in the process, and it is the judiciary that affirms or sets aside the certificate. By way of example, *Smith v. Canada*, reflex, [1991] 3 F.C. 3 (T.D.) and *Canada (Minister of Citizenship and Immigration) v. Jaballah*, [1999] F.C.J. No. 1681 (T.D.) (QL) are two decisions in which Cullen J. set aside certificates signed by the Minister under the former Act.

[114]In *Suresh, supra*, at paragraph 38, the Court examined the standard applicable to the review of a ministerial decision:

This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament's task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution.

[115]In drafting section 33 and sections 76 to 85 of the IRPA as it did, Parliament has clearly chosen to give the Ministers the responsibility to decide whether the certificate and the arrest warrant with detention are necessary, and to give the designated judge the responsibility to review such decisions. I 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. In my opinion, by conferring this responsibility on the designated judge, Parliament is expressly recognizing the independence of the judiciary.

[116]Mr. Charkaoui's counsel further submit that the designated judge is not impartial. On the one hand, the designated judge presides over a hearing in the presence of the Ministers' representatives but in the absence of the person concerned and his representatives; the judge does not disclose the information that is considered protected, and issues only a summary reasonably informing the person concerned of the circumstances giving rise to the certificate and the continued detention. On the other hand, the designated judge, in making his decision, considers all of the evidence, including information that is not disclosed to the person concerned. Counsel contend that this situation cannot be reconciled with the principles of fundamental justice protected by section 7 of the Charter. They rely, *inter alia*, on the decision in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (S.C.C.), [1997] 3 S.C.R. 391.

[117]While I have already addressed the following points, I believe it is important to mention them again. This is a matter of national importance and the issues it raises include the protection of national security. To protect national security, and ensure that the decisions and the process leading up to them are legitimate, Parliament has

called on the judiciary. It has done so in order to ensure that the security and criminal intelligence information is protected, and that the person concerned is sufficiently informed and has the opportunity to be heard.

[118]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." (*Charkaoui, supra*, at paragraph 44, my order dated July 15, 2003, concerning the warrant of arrest, the detention and the review of the reasons for continued detention pursuant to subsections 82(1), 83(1) and 83(3) of the IRPA.)

[119]An informed observer could not conclude that the tasks described above cause the designated judge to be biased. On the contrary, given the opposing interests at stake, the role of the designated judge is essential for the person concerned. Without the involvement of the designated judge, a person concerned could find himself in a much worse situation than the one the IRPA contemplates. Are more appropriate procedures truly conceivable?

[120]Clearly, the state will always protect its security and the instruments required for such protection. Persons concerned will not have access to security and criminal intelligence, but the state will pursue and attempt by all legitimate means at its disposal to eliminate the threat posed by persons concerned who are strongly linked to dangers to national security (subsection 34(1) of the IRPA). What is the appropriate balance between these opposing interests? Does the answer not reside in the designated judge's role as the cornerstone of the procedure established by Parliament?

[121]The role of the designated judge cannot give rise to bias in favour of the state. The judge's involvement in the decision regarding the certificate and the continued detention addresses, to a considerable extent, the interests of the person concerned.

[122]I am therefore of the opinion that the role assigned to the designated judge under sections 33 and 76 to 85 of the IRPA does not create a reasonable apprehension of bias. This is what McGillis J. said on the subject in *Ahani*, *supra*, at page 696:

Counsel for the plaintiff further submitted that the nature of the process created by section 40.1 of the *Immigration Act* creates a reasonable apprehension of bias on the part of the designated judge who conducts the *in camera* hearing. I cannot accept this submission. In my opinion, nothing in the procedure prescribed in section 40.1 of the *Immigration Act* raises a reasonable apprehension of bias on the part of the designated judge. To the extent that the submission of counsel for the plaintiff is founded on the assertion that the participation of a designated judge in an *in camera* hearing compromises his impartiality, I note that in *Chiarelli v. Canada (Minister of Employment and Immigration), supra*, the Supreme Court of Canada held that the Security Intelligence Review Committee Rules, which permitted the discretionary exclusion of one or more parties during evidence or representations, did not violate the principles of fundamental justice.

In the case at bar, the role of the designated judge described in section 78 of the IRPA complies with the principles of fundamental justice, section 7 of the Charter, and sections 1 and 2 of the *Canadian Bill of Rights*.

[123]Before concluding the analysis on this point, it would be helpful to distinguish the facts of this case from those discussed in *Tobiass, supra*. Here, the designated judge is not acting on his own initiative in the absence of any procedure under the IRPA. He must ensure that the hearing conducted in the absence of the person concerned, and of his counsel, complies with the IRPA. Under section 78 of the IRPA, a judge, in acceding to the Ministers' request for a hearing, must give counsel for the person concerned enough information to enable counsel to state

their position. Based on my analysis of *Tobiass, supra*, I have concluded that the structure of the proceedings under the IRPA has no "air of impropriety" but rather, is an exceptional measure that Parliament has expressly established in order to strike a fair balance between the protection of Canada's national security and the protection of the rights of the person concerned. Thus, in my opinion, a reasonable and informed observer would conclude that the provisions of the IRPA that govern this type of hearing, involving national security, do not compromise the independence and impartiality of the judiciary.

"Reasonableness" and "reasonable grounds to believe": appropriate standards of proof?

[124]Mr. Charkaoui's counsel contend that the independence of the judiciary is undermined because, instead of a preponderance of evidence standard, the applicable standards are the "reasonableness" of the certificate and the "reasonable grounds to believe" leading to continued detention (section 33 and subsections 82(1), 80(1) and 80(2) of the IRPA). Counsel submit that these standards tie the designated judge's hands by preventing a ruling on the merits of the matter.

[125]With respect, I believe that a designated judge assessing the reasonableness of a certificate or the necessity of continued detention could well be in a more advantageous position than the Ministers are in when they make the initial decisions. In addition to examining the information that the Ministers had when they made their decisions, the designated judge has access to any other evidence (paragraphs 78(*d*) and 78(*e*) of the IRPA), can hear and see witnesses called by the Ministers and the person concerned, can examine additional documentation that might even be unfavourable to the Ministers' case (*Ruby, supra*) and can hear each party's arguments at the hearing. At the request of a party, the designated judge can even receive into evidence anything he believes is appropriate, even if normally inadmissible, and may base the decision on that evidence (paragraph 78(*j*) of the IRPA). In short, depending on the evidence tendered, a designated judge may be in a better position than the Ministers were in when they made their decisions.

[126]Parliament has chosen standards other than the preponderance of evidence standard because this is what national security demands. Cases involving national security must be approached differently from others. In this case, the security of Canada, the safety of its citizens and the protection of its democratic system are at stake. The state must therefore use extraordinary methods of protection and inquiry, as illustrated by the schemes established by the *Canadian Security Intelligence Service Act* and other statutes. Situations and entities that pose a threat to national security are often difficult to detect and are designed to strike where society is most vulnerable. Attacks against national security can have tragic consequences. People who pose a danger to national security are often on a "mission" for which they are prepared to die. They are difficult to identify and their borderless networks are often difficult to infiltrate. They strike when least expected. Where national security is involved, we must do everything possible to avert catastrophe. The emphasis must be on prevention. After all, the security of the state and the public are at stake. Once certain acts are perpetrated, it could be too late. In my opinion, national security is such an important interest that its protection warrants the use of standards other than the preponderance of evidence standard. Having said this, we will see that the "reasonableness" and "reasonable grounds to believe" standards comport requirements that come close to the preponderance of evidence standard.

[127]The "reasonable grounds to believe" standard, as it applies to immigration matters, was defined by the Federal Court of Appeal in *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.), at pages 225-226:

But where the fact to be ascertained on the evidence is whether there are reasonable grounds for such a belief, rather than the existence of the fact itself, it seems to me that to require proof of the fact itself and proceed to determine whether it has been established is to demand the proof of a different fact from that required to be ascertained. It seems to me that the use by the statute of the expression "reasonable grounds for believing" implies that the fact itself need not be established and that evidence which falls short of proving the subversive character of the organization will be sufficient if it is enough to show reasonable grounds for believing that the organization is one that advocates subversion by force, etc. In a close case the failure to observe this distinction and to resolve the precise question dictated by the statutory wording can account for a difference in the result of an inquiry or an appeal.

[128]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. 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. In *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (F.C.A.), [2001] 2 F.C. 297 (C.A.), at paragraph 60, the standards contemplated in the IRPA are compared to the preponderance of evidence standard:

As for whether there were "reasonable grounds" for the officer's belief, I agree with the Trial Judge's definition of "reasonable grounds" (*supra*, at paragraph 27, page 658) as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes "a *bona fide* belief in a serious possibility based on credible evidence." See *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.).

[129]Although the British approach to national security and its associated standard of review differ somewhat from that of Canada's Parliament, it is interesting to note that both Britain's Parliament and courts question the applicable standard. In *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.), Lord Steyn writes as follows at paragraph 29:

Counsel for the appellant submitted that the civil standard of proof is applicable to the Secretary of State and to the Commission. This argument necessarily involves the proposition that even if the Secretary of State is fully entitled to be satisfied on the materials before him that the person concerned may be a real threat to national security, the Secretary of State may not deport him. That cannot be right. The task of the Secretary of State is to evaluate risks in respect of the interests of national security. Lord Woolf expressed the point with precision as follows, at p. 1254, para. 44:

"in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a danger to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion. Here it is important to remember that the individual is still subject to immigration control. He is not in the same position as a British citizen. He has not been charged with a specific criminal offence. It is the danger which he constitutes to national security which is to be balanced against his own personal interests."

The dynamics of the role of the Secretary of State, charged with the power and duty to consider deportation on grounds of national security, irresistibly supports this analysis.

[130]The "global approach" suggested by Lord Woolf and cited with approval by Lord Steyn is close to the "reasonableness" and "reasonable grounds to believe" standards in the immigration context. This lends further support to the application of those two standards.

[131]Contrary to what Mr. Charkaoui's counsel submitted, I am of the opinion that when the designated judge applies the "reasonableness" and "reasonable grounds to believe" standards to a situation involving a permanent resident and national security, the judge is deciding the matter and is making a determination on the reasonableness of the certificate and the continued detention based on a review of the evidence.

[132]To summarize, in exercising the functions that Parliament has entrusted to them, designated judges are in compliance with the principle of judicial independence. I do not see how such functions could violate the principles of fundamental justice referred to in section 7 of the Charter.

(ii) Detention: sections 7, 9 and 12 and paragraph 11(*e*) of the Charter, section 2 of the *Canadian Bill of Rights* and sections 33 and 76 to 85 of the IRPA

[133]Mr. Charkaoui's counsel argue that detention under sections 82, 83 and 85 of the IRPA violates sections 7, 9, 10, 12 and 15 and paragraph 11(*e*) of the Charter for the following reasons. First, the person concerned is not tried by an independent and impartial tribunal. Second, the procedure that is followed is in breach of the principles of fundamental justice. Third, the warrant of arrest is issued by the Ministers while it should be issued by the

judiciary. Fourth, the continuation of the detention is based on the "reasonable grounds to believe" standard and not on the preponderance of evidence. Fifth, the person concerned has no right to be released. Finally, the person concerned is not held for just cause.

[134]I have already ruled on the first four points. To summarize, I held that the designated judge is an independent and impartial tribunal, that the procedure under sections 76 to 85 of the IRPA is consistent with the principles of fundamental justice, that an arrest warrant issued by the Ministers is acceptable in light of the respective objectives and roles of the executive and the judiciary established by Parliament, that the "reasonableness" and "reasonable grounds to believe" standards in subsections 82(1) and 83(1) of the IRPA are justified, given the need to protect national security and to comply with the objectives of the IRPA, and that the principles contained in sections 7 and 12 of the Charter have been complied with by Parliament. Only the last two points remain to be analysed.

[135]I begin the analysis of these two points by again drawing attention to certain observations and certain principles that are reflected in the IRPA. First, the Charter itself establishes a distinction between Canadian citizens and permanent residents. Second, the IRPA concedes certain rights to permanent residents. Third, a permanent resident's sojourn in Canada is conditional on his not committing any acts or omissions that could lead to inadmissibility on such grounds as security, violations of human or international rights, or serious criminality (section 34 *et seq.* of the IRPA). Fourth, Parliament's objective is to guarantee the security of Canadians and prohibit entry to persons who constitute a danger to security (paragraphs 3(1)(*h*) and (*i*) of the IRPA). Fifth, it is clear that Parliament wishes to protect national security while allowing a permanent resident who is associated with a danger to national security or to the safety of any person the possibility to be heard and to be sufficiently informed of what is alleged against him that he may respond to it. Sixth, the purpose of the arrest warrant and the continued detention is to monitor the danger to national security or the safety of any person and to ensure that the person concerned will not fail to appear at a proceeding or for removal. Continued detention is however subject to review every six months or at any other time authorized by the designated judge. Seventh, the designated judge can order the release of the person concerned and accompany such release with conditions such as the posting of a guarantee (section 85 and Division 6 of the IRPA).

[136]In the first place, with regard to detention, I would like to point out that this case does not pertain to the criminal law and that the standards applicable to that area of law are simply not relevant here. This matter involves immigration law, where we must take into account the objectives contemplated by Parliament and the undertakings made by the permanent resident when he decided to come and settle in Canada. This is not a case of punitive detention but rather, a preventive detention which may, upon application, be reviewed and set aside by the designated judge with or without conditions. Under subsections 40.1(7.1) and 40.1(8) of the former Act, the detention was automatic and not reviewable as long as no ruling had been made on the reasonableness of the certificate. It was subsequently provided that the detention could be reconsidered on the application of the person concerned, 120 days after the decision on the reasonableness of the certificate.

[137]In *Ahani, supra*, the Federal Court of Appeal comments, at page 184, on the context in which a refugee was detained under section 40.1 of the former Act:

As to the second proposition, we are of the view that the section 40.1 context is, in no way, akin to a criminal context. In a criminal law context, we have an individual charged with breaking the criminal law of the land who faces punishment if the state succeeds in overcoming his presumption of innocence. In a section 40.1 context, we have an alien who may lose the qualified right to stay in Canada that he gained by being given refugee status, but whose liberty will not then be otherwise impeded. The principles and policies underlining both contexts are obviously totally different, and the standards of procedural safeguards required to satisfy the *Charter* must necessarily differ. It is true that the filing of the certificate has the immediate unfortunate effect of leading to the arrest and detention of the person concerned, a fate normally reserved to criminals, and this is, no doubt, the most sensitive aspect of the scheme. It must not be forgotten, however, that this detention is not imposed as a punishment, nor is its sole function to assure the presence of the person. Rather, it is principally a means of providing preventive protection to the Canadian public. And, in view of the test for the issuance of the certificate, that is to say the reasoned opinion of two ministers based on security information; in view of the fact that the scheme provides for the obligatory judicial scrutiny of the reasonableness of those opinions within an acceptably short period of time; in view, also, of the possibility given to the detained to put an end to the detention at any time by agreeing to leave the country; and in view, finally, of the type of prohibited class of individuals there are

reasons to believe we are dealing with, that is to say individuals somehow associated with terrorism, it appears to us, as it appeared to the learned trial judge, that such preventive detention is not arbitrary, nor excessive.

[138]Although that judgment concerned refugees, the comments on detention are just as applicable to permanent residents.

[139]Furthermore, the IRPA provides that review of the reasons leading to the detention will begin within 48 hours following the detention and be held at least once every six months or at any time upon authorization of the designated judge, and that release is possible subject to certain guarantees.

[140]For all of these reasons, the system of preventive detention established by Parliament in the IRPA in regard to persons concerned who, in the opinion of the Ministers, represent a danger to national security or to the safety of any person, appear to me to be consistent with the spirit of the Charter, and I do not see how sections 82, 83 and 85 of the IRPA could be in breach of one or more Charter rights. The review of the detention within 48 hours, the further review, and the possibility of conditional release likewise support this conclusion. Finally, the fact that the judge must proceed expeditiously and that his decision may not be appealed is, in some cases, clearly to the advantage of the person concerned. Indeed, after a prompt hearing at the outcome of which the certificate is declared unreasonable and therefore invalid, the person concerned will be released automatically and definitively.

(iii) Equal treatment: section 15 of the Charter, paragraph 1(*b*) of the *Canadian Bill of Rights* and sections 33, 77, 80, 81, 82, 83 and 85 of the IRPA

[141]In addition to the arguments pertaining to the principles of fundamental justice, the independence and impartiality of the tribunal, and detention, Mr. Charkaoui's counsel state that sections 77, 80, 81, 82, 83 and 85 of the IRPA contravene the rights guaranteed by section 15 of the Charter "insofar as [the IRPA] denies the individual the right to have his rights defined by a fair trial before an independent and impartial tribunal, as opposed to the treatment of citizens and other immigrants who have the right, for example, to appear before the Immigration Division, which independently disposes of the Minister's section 44 IRPA report" (paragraph 9 of Mr. Charkaoui's memorandum dated October 17, 2002).

[142]Section 15 of the Charter, to which I will refer, provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Paragraph 1(*b*) of the *Canadian Bill of Rights* provides:

1. . . .

(*b*) the right of the individual to equality before the law and the protection of the law;

[143]I have already partially answered this argument when I found that the procedure under section 77 *et seq*. of the IRPA is fair because it balances opposing interests and that the very role of the designated judge makes that judge an independent and impartial tribunal. In the following paragraphs, I will analyse the argument of equal treatment before the law by comparing the procedure leading to a finding of inadmissibility by reason of a danger to national security or to the safety of any person with the procedure leading to a finding of inadmissibility for other reasons.

[144]Parliament has established two different procedures by which permanent residents can refute the reasons for inadmissibility. The procedure described in section 77 *et seq*. of the IRPA, which we have abundantly discussed, applies to situations in which the rationale for inadmissibility is based on security or criminal intelligence. The procedure described in section 44 *et seq*. of the IRPA applies to situations in which a permanent resident is threatened with inadmissibility for reasons other than constituting a danger to national security or the safety of any person, and in which the evidence is not ascertained to be security or criminal intelligence. In such cases, the Immigration Division of the Immigration and Refugee Board conducts an inquiry after the filing of a detailed report that has been disclosed to the permanent resident.

[145]Thus, Parliament has stated that the appropriate procedure may not be the same in all cases and that the choice of procedure must turn on the reasons for inadmissibility and the nature of the information on which it is based.

[146]Does this distinction contravene the equality of treatment guaranteed by section 15 of the Charter? To answer this question, one must ask oneself (1) what is the comparison group, and (2) which of the enumerated grounds in section 15 is at issue (*Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (S.C.C.), [1999] 1 S.C.R. 497).

[147]In relation to the comparison group, Mr. Charkaoui's counsel use the words "citizens and other immigrants" in their memorandum without any further explanation as to what comparison group they are referring to. No affidavit was filed to support the premise of this submission.

[148]Between which groups is there a purported inequality in violation of section 15 of the Charter? Is it between permanent residents threatened with inadmissibility for reasons based on protected information and permanent residents threatened with inadmissibility for reasons not based on protected information? Mr. Charkaoui's counsel remained silent on the matter. I am personally unable to conceive of other comparison groups and therefore assume, without deciding, that those are the groups being compared. The fact is that I understand very well why the inquiry and review procedure preceding the final determination on the inadmissibility of permanent residents differs according to whether the reasons for inadmissibility are based on protected or unprotected information, and I do not see how the two procedures could give rise to unequal treatment.

[149]Furthermore Mr. Charkaoui's counsel have not indicated which of the enumerated grounds in section 15 of the Charter is at the origin of the alleged unequal treatment. I myself am hard pressed to find even one (*Gosselin v. Québec (Attorney General*), 2002 SCC 84 (CanLII), [2002] 4 S.C.R. 429). A party making such an allegation must necessarily indicate the ground or grounds on which the unequal treatment is based (*Law, supra*, at paragraph 58).

[150]In addition to the absence of any comparison group or specific ground, I note that Canadian legislation provides for a distinct scheme which applies to all Canadians when protected information is at stake. The following statutes illustrate this: *Canadian Security Intelligence Service Act*, sections 2 and 21 *et seq.*; *Canada Evidence Act*, sections 38 and 38.15; *Access to Information Act*, R.S.C., 1985, c. A-1, section 52 [as am. by S.C. 2002, c. 8, s. 112]; *Charities Registration (Security Information) Act*, S.C. 2001, c. 41, section 3 (definition of "judge"); *Criminal Code*, R.S.C., 1985, c. C-46, subsections 83.05(11) [as enacted by S.C. 2001, c. 41, s. 5] and 462.48(9) [as enacted by R.S.C., 1985 (4th Supp.), c. 42, s. 2]; *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 [as am. by S.C. 2001, c. 41, s. 48], subsections 60.1(8) [as enacted *idem*, s. 72] and (9) [as enacted *idem*]; and *Privacy Act*, R.S.C., 1985, c. P-21, subsection 51(1).

[151]If, where protected information is at issue, Parliament has provided a distinct procedure that applies to all Canadians, why could it not do as much with regard to permanent residents?

[152]After considering the argument as it was presented to me, I can only conclude that sections 77, 80, 81, 82, 83 and 85 of the IRPA do not contravene the rights guaranteed by section 15 of the Charter or the rights guaranteed by paragraph 1(*b*) of the *Canadian Bill of Rights*.

(iv) Vague, overbroad and discriminatory nature of certain provisions: paragraph 34(1)(*f*) and subsection 83(3) of the IRPA

[153]Mr. Charkaoui's counsel made a brief submission to me that paragraph 34(1)(*f*) and subsection 83(3) of the IRPA are vague, overly broad and discriminatory in scope.

[154]In order accurately to reflect Mr. Charkaoui's position on this point (see questions 6 and 28 in the appendix), I quote an excerpt from the submissions of counsel at paragraph 79 of their memorandum of June 26, 2003 and at paragraph 25 *et seq.* of their memorandum of October 7, 2003:

[translation]

79. It is also alleged that the detention and inadmissibility alleged in the certificate on the basis of a danger to national security is an overly broad and imprecise standard (infrapaginal note no. 31 in the memorandum signed by Ms. Doyon and received by fax June 26, 2003):

(31) *R. v. Morales* 1992 CanLII 53 (S.C.C.), (1992), 77 C.C.C. (3d) 91 (SCC); *R. v. Heywood*, 1994 CanLII 34 (S.C.C.), [1994] 3 S.C.R. 761; *Nova Scotia Pharmaceutical, supra*; In this regard, *Suresh* is not applicable since it interpreted the expression "danger to national security" solely in the context of deportation and not the detention or inadmissibility of a permanent resident;

25. In fact, as *Suresh* indicates, the Supreme Court was of the opinion that Parliament could not have intended that innocent persons who contribute to or become members of terrorist groups would be subject to inadmissibility (para. 100). We add that Parliament could not have intended that they be jailed, either.

26. However, the IRPA allows this by reason of the lack of jurisdiction that the Federal Court has over the certificate under the IRPA, the excessive reach of the provisions of sections 33 and 82-83.

27. As the designated judges in these cases have repeatedly emphasized, the Federal Court, which has to determine whether the certificate is reasonable, does not determine the merits of the allegation. It does not decide whether or not the Minister was mistaken in his evaluation.

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 theapplication 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.

28. This being the case, depriving a person of all of his rights on the basis of a reasonable certificate rather than on the merits is overly broad, as is the standard of proof under section 33 of the IRPA and detention on the basis of reasonable standards.

[155]I have already replied to a number of these arguments. Consequently, I need only analyze the issue of the vagueness of the terms "danger to security" and "member."

[156]In *Suresh, supra*, at paragraph 81, the Supreme Court of Canada states the reasons why a provision may be declared unconstitutional for vagueness:

A vague law may be unconstitutional for either of two reasons: (1) because it fails to give those who might come within the ambit of the provision fair notice of the consequences of their conduct; or (2) because it fails to adequately limit law enforcement discretion: see *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (S.C.C.), [1992] 2 S.C.R. 606. In the same case, this Court held that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (p. 643).

[157]At paragraph 90 of that judgment, the Court defines what is meant by a "danger to the security of Canada":

These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

[158]Mr. Charkaoui's counsel argue that although the Supreme Court of Canada defined "danger to national security" in *Suresh, supra*, at paragraph 90, the concept is still vague in the case at bar since *Suresh* dealt with deportation, not detention and inadmissibility, and the definition in *Suresh* is therefore inapplicable in this case.

[159]I note, first, that the Supreme Court of Canada did not find that the concept of "danger to the security of Canada", a concept reproduced in subsection 83(3) of the IRPA, is vague. Second, I simply do not understand why this definition could not be used in a detention and inadmissibility context. Although the definition set out in the

Suresh decision pertained to subsection 53(1) [as am. by S.C. 1992, c. 49, s. 43] of the former Act, the provision covered a ministerial certificate stating that the person concerned was a "danger to the security of Canada". Thus, this was the same situation as the one covered in subsection 83(3) and paragraph 34(1)(*d*) of the IRPA.

[160]The other aspect of this argument is the reference to *Suresh* with regard to the conclusion concerning the notion of "member", referred to in section 19 [as am. *idem*, s. 11] of the former Act and in paragraph 34(1)(*f*) of the IRPA (*Suresh, supra*, at paragraph 110). Counsel did not develop this argument in any further detail. I note that the Supreme Court of Canada did not find that the notion of "member" was vague or overbroad. The Court simply interpreted the concept so as to ensure that a person who, in complete innocence, made some contribution to a terrorist organization, would not be declared inadmissible. I think this clarification can be used in interpreting paragraph 34(1)(*f*) of the IRPA.

[161]In conclusion, in light of the arguments as they were presented to me, and for the foregoing reasons, I do not think the expressions "danger to the national security of Canada" and "members", referred to in subsection 83(3) and paragraph 34(1)(*d*) of the IRPA, are vague or overbroad.

(v) Creation of risks to the person concerned: sections 7, 12 and 15 of the Charter and section 77 of the IRPA

[162]Another argument, discussed only very briefly by Mr. Charkaoui's counsel, was formulated as follows (Notice of Constitutional Question, September 17, 2003, paragraph 25(*g*)):

[translation] They put the person subject to such certificates at risk of persecution, mistreatment or threats to his life and prevent a safe return of that person to his country of origin.

[163]At my request, Mr. Charkaoui's counsel explained their question as follows:

[translation] Does section 77 of the IRPA contravene the rights guaranteed by sections 7, 12 and 15 insofar as it allows the statement of the two ministers alleging that the person is a terrorist to be published forthwith, simply by the filing of the certificate in the Federal Court, thereby harming the person's reputation and preventing that person from returning to his country of origin if that country is known for violating human rights, because of risks of torture or of mistreatment or reprisals, contrary to the treatment received by other immigrants?

[164]As presented, the argument is hypothetical. I was not given any affidavit in support of this argument or any evidence that the country of origin violates human rights or that there is a risk of torture, mistreatment or reprisals in regard to the person concerned (Mr. Charkaoui). Moreover, the person concerned may at any time file an application for protection, that is, request a pre-removal risk assessment (section 79 of the IRPA). The fact that such an application may be brought does not dispose of the argument, but I think this option must be mentioned in order to facilitate the understanding of the immigration process.

[165]Furthermore, this argument that the return of the person concerned to his country of origin would subject this person to risks of torture, mistreatment or reprisals raises some issues of great importance, including public access to our courts as well as freedom of the press and other means of communication. These are fundamental issues, and the Supreme Court of Canada has already addressed them in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (S.C.C.), [1994] 3 S.C.R. 835.

[166]In any event, no motion was filed under rules 151 and 152 of the Rules to request that some materials be treated as confidential. Moreover, although the Court sat for more than five days, no motion was filed to request that hearings be held *in camera*.

[167]For the reasons listed above, I will make no further comment about this submission.

(vi) Impossibility of appealing: section 96 of the BNA Act and subsection 80(3) and section 81 of the IRPA

[168] Subsection 80(3) and section 81 of the IRPA provide that the decision of the designated judge in regard to the certificate and its consequences may not be appealed or judicially reviewed.

[169]Mr. Charkaoui's counsel argue that these provisions conflict with section 96 of the BNA Act, which provides:

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts of each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[170]They argue that in view of the limited role of the designated judge, which is quite different from the role of a court of appeal or of a judge on judicial review, subsection 80(3) and section 81 of the IRPA violate section 96 of the BNA Act. They cite in support of their statements *Crevier v. Attorney General of Quebec et al.*, 1981 CanLII 30 (S.C.C.), [1981] 2 S.C.R. 220; and *Attorney General (Que.) et al. v. Farrah*, [1978] 2 S.C.R. 638.

[171]On October 31, 2003, the Federal Court of Appeal handed down its decision in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2004] 1 F.C.R. 528. On behalf of the majority (Décary J.A. dissenting), Létourneau J.A. held that there is no appeal either from decisions concerning the certificate, or from decisions concerning continued detention. One of the reasons cited in support of this conclusion is that there is a close relationship between the certificate of inadmissibility and the detention, i.e. the protected information.

[172]Interestingly, the prohibition of appeals in section 81 of the IRPA existed previously in subsection 40.1(6) of the former Act, albeit with a more limited scope.

[173]The prohibition of appeals from the removal order was included in the IRPA in order to ensure rapidity after the determination as to the reasonableness of the certificate. During the hearings of the House of Commons committee examining Bill C-11 (which became the IRPA), the Honourable Elinor Caplan, then Minister of Citizenship of Immigration, told the committee:

It will exclude serious criminals and security risks from the appeal process at the Immigration Appeal Division of the Immigration and Refugee Board, so that criminals, people smugglers, traffickers, serious criminals who pose security risks to Canada, can be removed more quickly.

[174]Before proceeding with the analysis, it is important to note that the Federal Court is a superior court (section 3 [as am. by S.C. 2002, c. 8, s. 16] of the *Federal Courts Act*) created by Parliament under section 101 of the BNA Act. The Federal Court has the jurisdiction that Parliament grants to it (*Roberts v. Canada*, 1989 CanLII 122 (S.C.C.), [1989] 1 S.C.R. 322, at page 331).

[175]In *Ahani*, (T.D.) *supra*, at pages 698-699, McGillis J. answers the argument that the impossibility of appealing the decision of a designated judge violates section 7 and paragraph 10(*c*) of the Charter:

The question of rights of appeal was the subject of comment by the Supreme Court of Canada in *Kourtessis v. M.N.R.*, 1993 CanLII 137 (S.C.C.), [1993] 2 S.C.R. 53. In discussing rights of appeal, La Forest J. stated as follows, at pages 69-70:

Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided by the relevant legislature.

. . .

The procedure created by Parliament in section 40.1 of the *Immigration Act* constitutes the mechanism for reviewing the decision made by the two ministers. I am satisfied, on the basis of the principles enunciated in *Kourtessis v. M.N.R., supra*, that the principles of fundamental justice do not require the provision of a further right of appeal or review. Furthermore, in expressly prohibiting a further appeal or review, Parliament reinforced the notion that proceedings under section 40.1 of the *Immigration Act* are expeditious in nature.

[176]This statement by McGillis J., that Parliament intended the procedure to be expeditious, applies to the IRPA and was confirmed by the above-cited comments of the former Minister, Ms. Caplan during the review of the Bill that led to the enactment of the IRPA.

[177]Mr. Charkaoui's counsel use the judgments in *Crevier* and *Farrah, supra*, to support their argument. In doing so, they liken the Federal Court to an administrative tribunal (like the Professions Tribunal in *Crevier* and the

Transport Tribunal in *Farrah*). But these decisions are not relevant to the case at bar. The Federal Court is a superior court (sections 96 and 101 of the BNA Act). As such, it cannot be characterized as an administrative tribunal subject to the supervision and review of a superior court.

[178]I am therefore of the opinion that subsection 80(3) and section 84 of the IRPA do not contravene section 96 of the BNA Act.

(vii) Compliance with international obligations: Article 14(1) of the Covenant and sections 33, 77, 80, 81, 82, 83 and 85 of the IRPA

[179]Mr. Charkaoui's counsel state that sections 33, 77, 80, 81, 82, 83 and 85 of the IRPA contravene Article 14(1) of the Covenant:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

[180]Paragraph 3(3)(*f*) of the IRPA states that "[t]his Act is to be construed and applied in a manner that . . . complies with international human rights instruments to which Canada is signatory." The Covenant is one such international instrument to which Canada is a signatory.

[181]A straightforward reading of Article 14(1) of the Covenant shows that some sections of the IRPA are not consistent with this provision. However, as we noted previously, the procedure established in the IRPA reflects the search for and articulation of a balance between two opposing interests, individual rights (human rights) and collective rights (national security). However, Articles 12(3) and 13 of the Covenant endorse the paramountcy of national security:

Article 12

. . .

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

. . .

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority. [Emphasis added.]

[182]Article 14(1) of the Covenant alludes to the use of *in camera* proceedings during all or part of a trial. Where the national security interest is at stake, *in camera* proceedings exclude the public but not the parties. How can we attend to the preservation of national security if protected information is disclosed in the presence of the parties? How can the national security interest explicitly recognized in Articles 12 and 13 of the Covenant be reconciled with the notion of *in camera* proceedings in Article 14 of the same Covenant? Article 13 even appears to

acknowledge the possibility that an alien may be excluded from the hearing if there are compelling reasons of national security. Hence, we must determine the intent of the drafter and it is clear that they sought to protect national security.

[183]My conclusion, after interpreting Articles 12, 13 and 14 of the Covenant, is that the allusion to *in camera* proceedings in Article 14 in no way reflects the concern for the protection of national security included in Articles 12 and 13 and that the concern must therefore, in practical terms, be implied by the wording of Article 14.

[184]For the above reasons, I find that sections 33, 77, 80, 81, 82, 83 and 85 of the IRPA do not contravene the principles recognized in Articles 12 to 14 of the Covenant.

IV SUMMARY AND CONCLUSION

[185]Before concluding, I think it is useful to summarize the main points of this decision. First, the designated judge is the appropriate entity to hear and determine constitutional questions. Second, Parliament has established a procedure that strikes a fair balance between two opposing interests, that is, the right of the State to protect national security and the right of the permanent resident to be sufficiently informed of the allegations against him to be able to defend himself. Third, in light of the interests at stake, the procedure is consistent with the principles of fundamental justice protected by section 7 of the Charter. Designated judges assume their role independently and impartially and constitute the cornerstone of the procedure since they are the ones who must secure a balance between the two opposing interests. Fourth, in view of the need to protect national security, the "reasonableness" and "reasonable grounds to believe" evidentiary standards are justified; in their application, however, these standards come closer to the standard of the preponderance of evidence. Fifth, the detention is preventive, not punitive, and is for the purpose of protecting the security of Canadians; it is not an exception to the rights protected by the Charter. Sixth, the impossibility of appealing the decisions of the designated judge concerning the certificate and the continued detention does not contravene section 96 of the BNA Act. Finally, the procedure prescribed in the IRPA complies with Articles 12, 13 and 14(1) of the Covenant.

[186]Mr. Charkaoui's counsel pleaded the Charter more than the *Canadian Bill of Rights*, the Universal Declaration and the other documents. I have therefore analysed the Charter arguments. However, I did take into consideration what I considered to be the other arguments and I find that the conclusion is the same as the one I reach concerning the Charter.

[187]All things considered, I reply in the negative to each of the questions presented by Mr. Charkaoui (see Appendix I) for the reasons contained herein, and I find that sections 33 and 76 to 85 of the IRPA do not contravene the Charter, sections 1 and 2 of the *Canadian Bill of Rights*, the common law rules, the BNA Act, the Bill of Rights, Article 14(1) of the Covenant or Article 10 of the Universal Declaration.

ORDER

THE COURT ORDERS THAT:

Mr. Charkaoui's motion be dismissed.

APPENDIX I

<u>Section 33 of the IRPA</u>[1]

<u>Lack of jurisdiction on the merits</u>

1. Does section 33 of the IRPA contravene the rights guaranteed by **section 7** of the *Charter* insofar as it does not allow the decision-maker to determine the justification for inadmissibility, thereby breaching the fundamental right to a fair trial before an independent tribunal with full jurisdiction?
2. Does section 33 of the IRPA contravene the rights guaranteed by **section 12** of the *Charter* insofar as it does not allow the decision-maker to determine the justification for inadmissibility although it allows a permanent resident of Canada to be removed on this basis?

3. Does section 33 of the IRPA contravene the rights guaranteed by **section 15** of the *Charter* insofar as it does not allow the decision-maker to determine the justification for inadmissibility in the same way as it would be determined in any civil matter?

4. Does section 33 of the IRPA contravene the rights guaranteed by article 14 of the **International Covenant** in view of section 3(*d*) and (*f*) of the IRPA insofar as it does not allow the decision-maker to determine the justification for inadmissibility, thereby violating the right to a fair trial before a body with full jurisdiction?

5. Does section 33 of the IRPA contravene sections 1 and 2 of the *Canadian Bill of Rights*?

Overbreadth of section 33 of the IRPA

6. Is section 33 of the IRPA overbroad in that it allows a finding of inadmissibility and the loss of rights of a permanent resident of Canada absent any actual inadmissibility?

Section 77 of the IRPA

Right to a fair trial in order to have one's rights defined by an independent and impartial tribunal

7. Does **section 77** of the IRPA contravene the rights guaranteed by **section 7** of the *Charter* insofar as it denies the individual the right to have his rights defined by a fair trial before an independent and impartial tribunal, by allowing these rights to be defined by the executive and in violation of the independence of the judiciary?

8. Does section 77 of the IRPA contravene the rights guaranteed by **section 12** of the *Charter* by denying the aforesaid fundamental right to the individual in question while depriving him of the rights of a permanent resident of Canada?

9. Does section 77 of the IRPA contravene the rights guaranteed by **section 15** of the *Charter* insofar as it denies the individual the right to have his rights defined by a fair trial before an independent and impartial tribunal, as opposed to the treatment of citizens and other immigrants who have the right, for example, to appear before the Immigration Division, which independently disposes of the allegations made in the Minister's section 44 IRPA report?

10. Does section 77 of the IRPA contravene the rights guaranteed by article 14 of the **International Covenant** in view of section 3(*d*) and (*f*) of the IRPA insofar as it does not provide that the rights will be defined by an independent tribunal to determine the justification for the inadmissibility?

11. Does section 77 of the IRPA contravene sections 1 and 2 of the ***Canadian Bill of Rights***,

Lack of jurisdiction on the merits

12. (A) to (e) The same questions 1 to 6 but section 77, adding to the questions "and depriving him of the right to commence any other proceedings, unlike other immigrants";

Creation of risks

13. Does section 77 of the IRPA contravene the rights guaranteed by sections 7, 12 and 15 insofar as it allows the statement of the two ministers alleging that the person is a terrorist to be published forthwith, simply by the filing of the certificate in the Federal Court, thereby harming the person's reputation and preventing that person from returning to his country of origin if that country is known for violating human rights, or because of a risk of torture or mistreatment or reprisals, contrary to the treatment received by other immigrants?

Section 78 of the IRPA

14. Do some or all of the following sections of the **Immigration and Refugee Protection Act (IRPA)** violate sections 7 and/or 15 of the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights:

78(*b*), 78(d), 78(*e*), 78(f), 78(*g*), 78(*h*), 78 (*j*)

15. Do sections 78, 80 and 81 of the **IRPA** violate sections 7 and 15 of the **Canadian Charter of Rights and**

Freedoms by:

(a) allowing the loss of a right as important as permanent residence, which was previously protected under s. 15 of the *Charter* in the Andrews decision;

(b) allowing this loss on the basis of evidence that is not disclosed to the person in question or his counsel;

(c) allowing the introduction of such evidence in sessions to which the person in question and his counsel do not have access;

(d) allowing this evidence, which might be undisclosed and introduced in sessions that are *ex parte*, to be unlawful or inadmissible (s. 78(*j*));

(e) allowing the status to be removed solely on the basis of the "reasonableness" of the certificate without requiring evidence of the danger to Canada, at least on a balance of probabilities; and

(f) denying any right of appeal or judicial review?

16. Does section 78 of the **IRPA** violate the fundamental principle of the independence of the judiciary by authorizing hearings without the presence of the person affected and decisions based on evidence that is not disclosed to the person affected, and by placing the judge in the irreconcilable position of having to determine both the final result and what information is to be provided to the accused to help him defend himself?

17. Can legislation that authorizes precisely what the *Tobias* [*sic*] decision prohibited be consistent with the independence and dignity of the courts?

Sections 80-81 of the IRPA

Lack of jurisdiction on the merits and lack of a fair trial

18. Do sections 80 and 81 of the IRPA contravene the rights guaranteed by **section 7** of the *Charter* insofar as they allow the judge to determine only the reasonableness of the certificate, but not the justification for the certificate or the inadmissibility?

19. Do sections 80 and 81 of the IRPA contravene the rights guaranteed by **section 12** of the *Charter* insofar as they do not allow the judge to determine the justification for the certificate and the inadmissibility, thereby possibly depriving the permanent resident of his rights without a fair trial before an independent tribunal?

20. Do sections 80 and 81 of the IRPA contravene the rights guaranteed by **section 15** of the *Charter* insofar as they deny the person in question, contrary to other immigrants and citizens, of the right to have their rights defined in a fair trial by an independent and impartial tribunal before being declared inadmissible and a removal order being issued?

21. Do sections 80 and 81 of the IRPA contravene the rights guaranteed by the **International Covenant** insofar as they deny the person the right to have his rights defined in a fair trial by an independent and impartial tribunal, having full jurisdiction on the justification or merits, before being declared inadmissible and a removal order being issued?

22. Do sections 80 and 81 of the IRPA contravene sections 1 and 2 of the ***Canadian Bill of Rights***?

23. Do sections 80(3) and 81(*b*) of the **IRPA** violate s. 96 of the **BNA Act** by eliminating any appeal or judicial review notwithstanding the decision in **Crevier v. A.G. Que.**?

Sections 82, 83 and 85 of the IRPA

Detention without access to a fair trial

24. Do sections 82, 83 and 85 of the IRPA contravene the rights guaranteed by sections 7, 9, 10, 11, 12 and 15 of the *Charter*, article 14 of the *International Covenant, sections 1 and 2 of the Bill of Rights, and the English Bill of Rights* by allowing the arrest and continued detention of a person in order to subject him to a process that

denies his fundamental rights, such as the right to have his rights defined in a fair trial by an independent and impartial tribunal having jurisdiction to decide on the merits?

Warrant of detention by the Ministers and not by the judiciary

25. Do sections 82 and 85 of the IRPA contravene the rights guaranteed by **sections 7, 12 and 15** of the *Charter* insofar as they allow ministers--as opposed to the judiciary--to issue a warrant of arrest and detention of a person and contravene the independence of the judiciary?

Detention on the basis of reasonable grounds to believe

26. Do sections 82, 83 and 85 of the IRPA contravene the rights guaranteed by **sections 7 and 12** of the *Charter* insofar as they allow the detention, by ministers, of a person subject to a certificate on the basis of reasonable grounds to believe and with review of the grounds on the same basis, and not on the basis of the balance of probabilities?

27. Do sections 82, 83 and 85 of the IRPA contravene the rights guaranteed by **section 15** of the *Charter* insofar as they allow for detention (by ministers, and not by the judiciary, of a person subject to a certificate) on the basis of reasonable grounds to believe and with review of the grounds on the same basis, and not on the basis of the balance of probabilities as in the other cases covered in the IRPA or in criminal matters?

28. Do sections 82 and 85 of the IRPA contravene the rights guaranteed by the **International Covenant** insofar as they allow the detention, by ministers and not by the judiciary, of a person subject to a certificate on the basis of reasonable grounds to believe and with review of the grounds on the same basis?

Overbreadth / vagueness of sections 82 and 83 to 85 of the IRPA

29. Are sections **82, 83 to 85** of the IRPA vague and overbroad and do they contravene the rights guaranteed by sections 7, 12 and 15 by virtue of the fact that they allow the ministers to arrest and detain persons (and the court in regard to detention) who are neither a danger nor inadmissible, owing to the formulation of unnecessarily broad and vague provisions (on the basis of reasonable grounds to believe that they are a danger to national security), unlike citizens and other immigrants who are not subject to a certificate and who do not undergo the same treatment?

Sections 83 and 85 of the IRPA

Lack of jurisdiction on the merits

30. Do **sections 83 and 85** of the IRPA contravene the rights guaranteed by **section 7** of the *Charter* insofar as they do not allow the judge to determine the merits of the allegation of danger and limit him to reviewing the reasons for detention according to the standard of reasonable grounds to believe that the person is a danger?

31. Do sections 83 and 85 of the IRPA contravene the rights guaranteed by **section 12** of the *Charter* insofar as they do not allow the judge to determine the merits of the allegation of danger, and permit a deprivation of liberty on this basis?

32. Do sections 83 and 85 of the IRPA contravene the rights guaranteed by **section 15** of the *Charter* insofar as they do not allow the decision-maker to determine the merits of the question of danger as they would be determined in a civil or criminal matter?

33. Do sections 83 and 85 of the IRPA contravene the rights guaranteed by article 14 of the **International Covenant** in view of sections 3(d) and (f) of the IRPA insofar as they do not allow the decision-maker to determine the merits of the allegation of danger and other detention issues?

34. Are sections 83 and 85 of the IRPA in breach of sections 1 and 2 of the Canadian Bill of Rights?

Ex parte procedure, secret evidence and appearance of bias

35. Does section 83 of the IRPA contravene the rights guaranteed by sections 7 and 12 of the *Charter* by

allowing detention on the basis of an *ex parte* procedure, without a representative of the interests of the person in question but with the representatives of the adverse party alone, without disclosure of all the evidence and before a court that cannot safeguard thereby its independence and impartiality or the requisite appearance of independence and impartiality?

Inequality of treatment

36. Do sections 83 and 85 of the IRPA contravene the rights guaranteed by sections 7, 12 and 15 of the *Charter* insofar as the review of the reasons for detention is conducted on the basis of reasonable grounds to believe and not on the basis of whether or not the person constitutes a danger on the balance of probabilities, unlike the treatment received by other immigrants under the Act?

37. Do sections 82, 83 and 85 of the IRPA contravene the rights guaranteed by sections 7, 12 and 15 of the *Charter* insofar as these sections do not provide the same frequency of review of detention, unlike the treatment received by other immigrants under the Act?

Denial of the right to release on reasonable bail

38. Do sections 82, 83 and 85 of the IRPA contravene the rights guaranteed by sections 7, 12 and 15 of the *Charter* (*Canadian Bill of Rights* and *English Bill of Rights*) for the aforesaid reasons of lack of full jurisdiction, overbreadth and discrimination, thereby denying the fundamental right to a release on reasonable bail?

39. Do sections 82, 83 and 85 of the IRPA contravene the rights guaranteed by sections 7, 12 and 15 (*Canadian Bill of Rights* and *English Bill of Rights*) for the aforesaid reasons, thereby failing to constitute just cause to deny the right not to be deprived of release without just cause?

40. Do sections 82, 83 and 85 of the IRPA contravene the rights guaranteed by sections 7, 12 and 15 (*Canadian Bill of Rights* and *English Bill of Rights*) by not allowing for the consideration of alternative solutions and alternatives to detention "based on reasonable grounds to believe that"?

[1] I include Ms. Doyon's questions as submitted and Mr. Grey's questions, except where there is duplication.

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