Jaballah, Re, 2006 FC 1230 (CanLII)

Date: 2006-10-16
Docket: DES-04-01
URL: http://www.canlii.org/en/ca/fct/doc/2006/2006fc1230/2006fc1230.html

---

Date: 20061016
Docket: DES-04-01
Citation: 2006 FC 1230

BETWEEN:

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

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

AND IN THE MATTER OF Mahmoud JABALLAH,

REASONS FOR ORDER AND DETERMINATIONS

MACKAY D.J.

1. Introduction

[1] These are reasons for an order now issued arising from my review of a security certificate dated August 13, 2001, stating that the respondent, Mahmoud Es Sayyid Jaballah, a foreign national, is inadmissible to Canada on security grounds. That certificate set out the joint opinion of the Minister of Citizenship and Immigration (MCI) and the then Solicitor General of Canada that Mr. Jaballah is inadmissible.

[2] The order now issued sets out my determinations. The first is that the Ministers' security certificate is reasonable within s.-s. 80(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 as amended (IRPA). Reasons for that are set out in Parts 2 to 9. The second, for reasons set out in Part 10, is that the discretion of the MCI in removing him from Canada, in relying on the security certificate as a removal order, is limited, and he may not be deported to any country where there is a serious risk to his life or of torture or cruel and unusual treatment.

[3] The following headings with initial paragraph numbers for discussion of each, may assist in providing an overview of these reasons:

[4] The most recent chronology of events and decisions in this proceeding is found in Appendix A to the decision *Re Jaballah* 2006 FC 346 (CanLII), 2006 FC 346, [2006] F.C.J. No. 404 (QL) (March 16, 2006), as supplemented by items listed as 18 to 23 in Annex A to these Reasons. That Annex lists decisions or other proceedings, in this and related cases concerning the two security certificates concerning Mr. Jaballah and his detention under them. The Annex gives an overview of the proceedings, the details of which I do not review in these reasons unless they are significant for the issue of the reasonableness of the Ministers' certificate.

[5] These proceedings have been prolonged and, since the certificate issued, Mr. Jaballah has been detained in custody pursuant to paragraph 40.1(7)(b) of the *Immigration Act*, R.S.C. 1985, c. I-2 as amended (the 1985 Act) and s-ss. 82(2) and 83(3) of the IRPA.

[6] Throughout the proceedings counsel and the Court have dealt with basic issues that concern the relations between a foreign national, Mr. Jaballah, and the state, Canada, in light of fundamental principles of justice and the *Canadian Charter of Rights and Freedoms*. Those issues are to be resolved, recognizing the roles of Parliament, the Executive and the Courts in our democracy, as matters of immigration law, balancing Mr. Jaballah's claims to remain in Canada and the Government of Canada's claim and responsibility to determine who among foreign nationals may be admitted to this country.

2. The legislative regime and the Ministers' concerns

[7] The certificate, issued under s. 40.1 of the 1985 Act which then governed this proceeding, was referred to this Court for a determination whether the certificate is reasonable under para. 40.1(4)(d) of the 1985 Act, now s-ss. 77(1) and 80(1) of IRPA. Since then the Solicitor General of Canada has been succeeded in office by the Minister of Public Safety and Emergency Preparedness. That Minister and the Minister of Citizenship and Immigration are referred to herein as "the Ministers". Since then also, the 1985 Act has been repealed and replaced on June 28, 2002 by IRPA, which provides by s. 190 that

190. Every application, proceeding or matter under the former Act that is pending or in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.	**190.** La présente loi s'applique, dès l'entrée en vigueur du présent article, aux demandes et procédures présentées ou instruites, ainsi qu'aux autres questions soulevées, dans le cadre de l'ancienne loi avant son entrée en vigueur et pour lesquelles aucune décision n'a été prise.

[8] Provisions of IRPA relevant in this proceeding are reproduced in Annex B, with notations to comparable provisions of the 1985 Act where that seems appropriate. The Court's role under IRPA in considering the Ministers' certificate is set out in Division 9 of that Act, in ss. 76 to 87. The primary role of the judge designated

to consider the certificate is set out in s.80 of IRPA.

80. (1) The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision on the application for protection, if any, is lawfully made.	**80.** (1) Le juge décide du caractère raisonnable du certificat et, le cas échéant, de la légalité de la décision du ministre, compte tenu des renseignements et autres éléments de preuve dont il dispose.
(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.	(2) Il annule le certificat dont il ne peut conclure qu'il est raisonnable; si l'annulation ne vise que la décision du ministre il suspend l'affaire pour permettre au ministre de statuer sur celle-ci.
(3) The determination of the judge is final and may not be appealed or judicially reviewed.	(3) La décision du juge est définitive et n'est pas susceptible d'appel ou de contrôle judiciaire.

[9] In the course of these proceedings I have previously determined that the decision, made September 23, 2005, on behalf of the Minister of Citizenship and Immigration to refuse Mr. Jaballah's application for protection under IRPA, was lawful pursuant to s-s. 80(1) (see: *Re Jaballah*, 2006 FC 346 (CanLII), 2006 FC 346, March 16, 2006). These reasons concern the other issue to be determined under s-s. 80(1) of IRPA, whether the certificate of the Ministers is reasonable.

[10] The certificate before the Court is the second one issued by the Ministers in respect to Mr. Jaballah on similar grounds. The first one dated March 31, 1999, was referred to this Court and considered by my colleague, Mr. Justice Cullen. He determined, on November 2, 1999, that the certificate before him was unreasonable and it was quashed (see *(Canada) Minister of Citizenship and Immigration* v. *Jaballah,* [1999] F.C.J. No. 1681 (TD) (QL) (hereinafter "Jaballah No.1"). Thereupon Mr. Jaballah, who had been detained after the certificate was issued, was released from detention.

[11] Less than two years later, on August 13, 2001, the second certificate, now before this Court, was issued. It sets out the Ministers' conclusion that Mr. Jaballah is inadmissible to Canada on security grounds, as a person described in paragraphs 19(1)(e)(ii), 19(1)(e)(iv)(B), 19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(1)(f)(iii)(B) of the 1985 Act. The summary information statement dated August 14, 2001 disclosed to him on August 22, sets out that the grounds for that conclusion, there described as the belief of "the Service" (i.e. the Canadian Security Intelligence Service), are that Mahmoud Jaballah:

1. will, while in Canada, engage in or instigate the subversion by force of the government of Egypt (see sub para. 34(1)(b) IRPA);

2. is a member of the Al Jihad (AJ), an organization that there are reasonable grounds to believe will engage in or instigate the subversion by force of the government of Egypt, and will engage in terrorism (see sub para. 34(1)(f) IRPA);

3. is and was a member of the AJ, an organization that there are reasonable grounds to believe is, or was engaged in terrorism (see sub para. 34(1)(f) IRPA); and

4. has engaged in terrorism (see sub para. 34(1)(c) IRPA).

The references here to paragraphs of s-s. 34(1) are to provisions of IRPA, comparable to those in the 1985 Act, within which, in my opinion, the specified grounds are included as security grounds for determining inadmissibility to Canada.

[12] The factual bases alleged by the Ministers' case concerning Mr. Jaballah, drawn from the summary statements and elaborating information and evidence, in my opinion, may be described thus.

1. He is believed to be a member of a terrorist organization, the Egyptian terrorist group Al Jihad, an organization
   a. with a history of violent activities in Egypt, intended to overthrow the government there, and in terrorist activities abroad;
   b. that is closely associated with Al Qaida in Osama Bin Laden's network, seeking to rid middle east countries of western influence and to attack western societies.
   c. In turn, Al Qaida activities, including terrorist attacks in Pakistan, East Africa, Yemen, New York, Bali, and attacks emulating its operations when undertaken by others in Madrid, in London, and recently under investigation in Toronto and London, leave little doubt that international terrorism, whether directly fostered by Al Qaida or emulating it, presents a major threat to society, particularly in Western countries. At least two statements issued by Al Qaida leaders have indicated that Canada is a country of interest for terrorist attack.
   d. Both the Egyptian Al Jihad and Al Qaida have been designated, by P.C. SOR/2002-284 of July 23, 2002, issued by the Governor General in Council pursuant to s-s. 83.05(1) of the *Criminal Code* as amended by S.C. 2001, c.41, s.4, as entities about which "there are reasonable grounds to believe, have knowingly carried out, attempted to carry out, participated in or facilitated terrorist activity…"

2. He is believed to have engaged in terrorism, in Egypt, and subsequently, including serving to relay communications between AJ cells, particularly those engaged on August 7, 1998 in the bombing of United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Telephone numbers associated with Mr. Jaballah in Canada are believed to have been linked to Islamic extremists, in this country and abroad.

3. He is believed to have followed "a travel pattern consistent with the profile of an Islamic Mujahedin extremist - one who left Egypt to fight in Afghanistan, trained in Yemen, and may have fought in Chechnya". In the 1990's Yemen and Azerbaijan were known havens and training bases for Islamic terrorists. Moreover, it is believed that he spent a period of time in Afghanistan. He cannot readily return to Egypt without facing the prospect of further prosecution, detention, or worse treatment.

4. He has been associated with numerous known, senior participants in AJ and in other terrorist or Al Qaida activities, including persons in Canada and abroad.

[13] There is no dispute about the activities of the AJ and Al Qaida. Not all of the above allegations are directly relevant to the key issues here. In the course of argument on the merits of the certificate, counsel for the Ministers, responding to a query from opposing counsel, specified that the Ministers in this case were not relying upon, or seeking to establish, "subversion". I understand that to mean that the Crown does not seek to establish the allegations that Mr. Jaballah "will … engage in or instigate the subversion by force of the government of Egypt" (the first of the Service's alleged beliefs), or that the Al Jihad (AJ) "will engage in or instigate the subversion by force of the government of Egypt" (part of the second of the Service's alleged beliefs).

[14] With this modification, statutory concerns of the Ministers, are simplified to these:
A. that Mr. Jaballah is and was a member of the Al Jihad (AJ), an organization that there are reasonable grounds to believe is or was or will engage in terrorism, matters which fall within subparagraph

34(1)(f) of IRPA; and

B. that Mr. Jaballah has engaged in terrorism, a matter within subparagraph 34(1)(c) of IRPA.

[15] I return to these allegations and the suggested statutory security grounds for inadmissibility later in these Reasons before dealing with the reasonableness of the certificate.

3. Immigration circumstances of Mr. Jaballah

[16] Mr. Jaballah and his family arrived in Canada in May 1996. The family originated in Egypt where Mr. Jaballah, his wife and his three older children are citizens. The family left Egypt in July 1991 for Saudi Arabia on a religious pilgrimage. They did not return to their home because of concern about the treatment by Egyptian authorities of Mr. Jaballah, who claims he had faced recurring arrests and detention seven times, solely because he was a devout Muslim fundamentalist. He was tortured on some occasions, and so was his wife, who had also been detained on a few of those occasions and once was so mistreated that she is said to have had a miscarriage. After three months in Saudi Arabia the family moved to Peshawar, Pakistan, in 1991. There both Mr. Jaballah and his wife obtained teaching positions, she in a school operated under the Saudi embassy, a school where Mr. Jaballah later taught for a year after serving first as a teacher and then as the principal at a school in Peshawar run by the International Islamic Relief Organization.

[17] In August 1994, concerned that Egyptians and other Arab nationals would be returned to their own countries from Pakistan, Mr. Jaballah says that he travelled alone, using a false Iraqi passport, to Yemen where he remained for a year. When he had not been able to obtain regular employment in his teaching profession, Mr. Jaballah says that, using the same passport, he moved on to Azerbaijan. There he remained for about eight months, without success in finding regular employment. He claims he supported himself in Yemen and in Azerbaijan mainly from savings arising from his teaching in Pakistan for three years.

[18] Meanwhile his family had remained in Peshawar, including a fourth child who had been born there. His wife continued to teach and to support the family on her earnings. In March 1996 he returned to Pakistan, and with his family moved to Azerbaijan, using a false Saudi Arabian passport, and thence, he and his family travelled to Turkey, on to Germany, and finally to Canada. After arriving in Toronto in May 1996 he claimed Convention refugee status for himself, his wife and four children. Since their arrival in Canada two other children have been born to Mr. Jaballah and his wife.

[19] On March 4, 1999, the Convention Refugee Determination Division of the Immigration and Refugee Board (the "CRDD") decided that Mr. Jaballah and his family born abroad were not Convention refugees. That decision was then the subject of a successful application for leave and for judicial review which set aside the negative CRDD decision on September 28, 2000, after the first security certificate had been issued and quashed. The refugee claim was referred back for reconsideration by a differently constituted panel (see: *Jaballah* v. *Canada (Minister of Citizenship and Immigration)*, 2000 F.C.J. No. 1577, (2000) 196 F.T.R. 175).

[20] Rehearing of Mr. Jaballah's refugee claim by the CRDD was scheduled for August 16, 2001, the day after Mr. Jaballah was arrested under the second security certificate. That hearing was adjourned. The refugee claim was subsequently dismissed so far as Mr. Jaballah was concerned, but on April 9, 2003 so far as it concerned his wife and four children born abroad the claim was allowed. Thus, while Mr. Jaballah remains a foreign national, his wife and four children (born abroad) are Convention refugees, and the two youngest children are Canadians.

4. Particular features of these proceedings

[21] Before the decision on the refugee claim, when the second security certificate was issued in mid-August 2001 and referred to this Court, I was designated to hear the matter, pursuant to then s-s. 40.1(4) of the 1985 Act, now ss. 76 and 77 of IRPA. As earlier noted, since August 15, 2001 Mr. Jaballah has been detained, first for six weeks or so at Millhaven, a federal penitentiary, then until April 24, 2006 at Toronto West Detention Centre, a maximum security provincial remand centre, and since late April 2006 he has been at a newly established Immigration Detention Centre at Kingston.

[22] At all Court hearings when he was at the Toronto Centre, and thereafter when he testified, Mr. Jaballah was present in the Court. On two occasions, June 28 and September 11-14, 2006 he attended hearings for observation purposes, as he elected, by audio visual link, from the courtroom in Toronto to the Immigration Detention Centre at Kingston. Those occasions were without witnesses, for the purpose of receiving submissions of counsel for the parties.

[23] The proceedings arising from the 2001 certificate have gone through three phases, somewhat overlapping in time but differing in purposes. From August 2001 to May 2003, the initial phase concerned the reasonableness of the certificate. Then, after Mr. Jaballah declined to respond to the information before the Ministers, the certificate was found to be reasonable, a decision set aside by the Court of Appeal in July 2004. The second phase, from October 2003 to March 2006 concerned primarily applications by Mr. Jaballah for release from detention, and reviews of decisions on behalf of the M.C.I. refusing Mr. Jaballah's application for protection. The third phase, from February to September 2006, has been concerned to complete testimony and argument regarding the reasonableness of the Ministers' security certificate, and to consider a number of preliminary interlocutory motions raised on behalf of Mr. Jaballah which were heard from February to June, 2006.

5. Information and evidence before the Court, and efforts to ensure disclosure

[24] The opinion certified by the Ministers is based in part upon "information", defined in s.76 of IRPA as meaning "security or criminal intelligence information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of either of them", and in part upon evidence or other sorts of information in the normal sense, including testimony and documents submitted by or on behalf of Mr. Jaballah or the Ministers. For purposes of these Reasons I use the word "information" to refer to information as defined in the Act, and I use the word "evidence" to relate to documents and testimony submitted by the parties on the public record of this case. Much if not all of the information of a security or criminal intelligence nature has remained in the Court as a confidential record, not released to Mr. Jaballah or his counsel. I note that by Direction dated February 13, 2002, the record in *Jaballah No. 1,* concerning the first security certificate, was admitted as evidence in these proceedings, though any information then held in confidence remained so. Further, the records from his applications for refugee status and for protection were before the Court in the exercise of its review responsibility.

[25] Six volumes of evidence underlying the Ministers' opinion were filed in the public record and were released to Mr. Jaballah in August 2001, together with a summary statement in accord with paragraph 78(h) of IRPA, intended to reasonably inform him of circumstances giving rise to the certificate. Neither the information disclosed nor the summary statement included anything that in my opinion, if disclosed, would be injurious to national security or to the safety of any person (as required by para. 78(h) IRPA).

[26] The summary statement issued in August 2001 was supplemented and amended in various ways. By Direction of February 5, 2002 the Court identified "new" evidence not available to the Ministers before November 2, 1999 when *Jaballah No. 1* was decided, that had been released to Mr. Jaballah in August 2001. A statement comparing summaries released to him in the 1999 certificate case and in this case was also provided to him then. This followed upon testimony concerning the perspective on what information was "new", which was the principal subject of the examination and cross-examination of Mike, a CSIS officer, at public hearings in December 2001. Later, a supplementary summary statement, dated November 18, 2003, was issued, as approved by the Court, in relation to Mr. Jaballah's first application for release from detention.

[27] In the course of hearings concerning his second application for release, in September 2005, Mr. Jaballah testified for the first time in proceedings arising from the second certificate. In his cross-examination, documents produced as exhibits by counsel for the Ministers, in particular certain records of long distance telephone calls and charges, were added to the public record. Further, at various hearings counsel for Mr. Jaballah and for the Ministers introduced additional documents to the public record. A second CSIS officer testified on behalf of the Ministers in September 2005, in hearings in relation to Mr. Jaballah's second application for release from detention and then, as had been the case when Mike testified in December 2001, a number of documents were also introduced through his examination.

[28] There was in evidence before me, the testimony of Mr. Jaballah and his wife in September 2005 in relation

to his application for release and the affidavits and testimony of persons in support of Mr. Jaballah at public hearings in regard to his two applications to be released from detention in 2003 and 2005, including willing bonds persons if he were to be released. Both Mr. Jaballah and his wife testified in response to the Ministers' certificate and summaries, after leave was granted at his request, and their testimony was heard in May and in July 2006.

[29] Finally, the summary statement of August 2001 and that of November 2003 were amended on two occasions, in November 2005 and in June 2006 following separate reviews by the Court of the confidential information that had not been disclosed to Mr. Jaballah. The amendments introduced, while not extensive, ensured that with the passage of time any information that could be disclosed, was. Only information which if disclosed would, in my opinion under paragraph 78(h) of IRPA, be injurious to national security or the safety of persons, despite the passage of time, remained in the Court's confidential file.

[30] Thus the volume of information and evidence before the Court is significant. Much of the information and evidence added since August 2001 concerns updates or perspectives on the information and evidence that was before the Ministers at the time they certified their opinion. Not all of the information and evidence in the record is relevant to the reasonableness of the security certificate. The essence of that opinion is set out in the summary statement of August 2001 as modified by the summary of November 2003 and again by Order of June 8, 2006. The modifications include updating information, mainly about persons named in the first summary statement, and their whereabouts and activities after August 2001. Events in the world since the certificate issued in August 2001 have changed. There is heightened concern about international terrorism in much of the western world since the tragedies in New York and Washington on September 11, 2001. Some background events, not dealing directly with Mr. Jaballah, are the subjects of documents, testimony and argument submitted to the Court by the parties, and the Court recognizes widely known developments on the basis of judicial notice, but not in respect of matters relating directly to Mr. Jaballah.

6. Acceptance or variation of certain findings of the Court in its 2003 decision

[31] Certain of the Court's determinations in its 2003 decision *Re Jaballah*, 2003 FCT 240 (CanLII), 2003 FCT 240, 2003 FCT 640 (CanLII), [2003] 4 F.C. 345, [2003] F.C.J. No. 822 (T.D.)(QL) warrant brief comment before I turn to consider the evidence and argument on matters of concern underlying the Ministers' security certificate. While the 2003 determination that the certificate was reasonable was set aside by the Court of Appeal (*Re Jaballah*, 2004 FCA 257 (CanLII), 2004 FCA 257, [2004] F.C.J. No. 1199 (C.A.)(QL), other determinations in the 2003 decision with some significance for this decision, were accepted by the parties and the Court. I set those out briefly here, noting whether the determination was accepted by the parties, or accepted as varied by the Court, with reference to paragraphs in the 2003 decision, or to relevant directions by the Court.

[32] These are the determinations of note.

(1) The Court accepts that in security certificate proceedings the principles of *res judicata* or abuse of process would preclude upholding a second security certificate with respect to a person, when a first certificate has been found to be unreasonable and is quashed, unless the second certificate is based upon new information and evidence, known only after the decision on the first. (2003 decision, paras. 72 to 74) (Accepted by parties.) The primary implication of this for this case is that matters dealt with in *Jaballah No. 1* are not subject to review or reconsideration in this proceeding unless there is new evidence. In *Jaballah No. 1* in 1999 Cullen J. found Mr. Jaballah to be a credible witness, a general finding I do not question, but that does not preclude my finding, on new information and evidence, that his testimony in regard to certain matters is not credible.

(2) The Court sets out the test for assessing whether information and evidence underlying the second certificate is new. (2003 decision, paras. 75 to 80) (Accepted by parties.)

(3) New and partly new information, available after November 2, 1999 when the first security certificate relating to Mr. Jaballah was quashed, is identified (2003 decision, paras. 81 to 89). (Accepted by parties.) Subsequently, new information and evidence, including testimony and documents of Mr. Jaballah, his wife and supporters, and on behalf of the Ministers, was received in applications for his release from detention and in his submissions in 2006 against the concerns of the Ministers' and their certificate.

(4) A variation from factors stated in the 2003 decision was an erroneous reference in the reasons in 2003 to testimony of a CSIS officer as a source for the finding abroad of an address for Mr. Jaballah's post office box in Toronto. This was corrected by Order dated July 14, 2006. (Accepted as varied by the Court.)

(5) Another variation, in the summary statement dated August 14, 2001, is an amendment, approved by the Court's Order dated November 22, 2005, which clearly states the belief that "Mr. Jaballah served as a communications relay between AJ cells on August 7, 1998, the day of the bombing of United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania." That belief remained in issue, but the amendment is clearly a variation from my 2003 comment at para. 49, that "There is no reference to these perceived communication links in the summary of the Ministers' case…", [i.e. links between Al Jihad/Al Qaida cells, particularly in or about August 1998 when the United States embassies in east Africa were targets of lethal car bombs on the same day]. In that decision I added that diagrams showing links between Mr. Jaballah in Toronto and certain known Al Qaida operatives or centres) were of no weight in evidence. That was accepted in closing submissions by counsel for the Ministers who acknowledged that the diagrams, introduced in evidence through testimony of Mike, a CSIS officer, were only used as illustrations of his oral evidence. I add that the status of the diagrams has no bearing on the issue of whether Mr. Jaballah served as a communications link between AJ cells.

(6) The decision of a PRRA officer, dated August 15, 2002, resulting from preliminary consideration of Mr. Jaballah's application for protection, i.e. that there were substantial grounds for belief that, if removed from Canada to his native Egypt, Mr. Jaballah would face a risk of torture, and a risk to his life or of cruel and unusual treatment or punishment, was deemed by the 2003 decision (at paras. 20, 22) to be the report of the Minister (MCI) in relation to the risk facing Mr. Jaballah if he were returned to Egypt. That determination was not set aside by the Court of Appeal in its 2004 decision (*supra*, at para. 23). By this Court's Order of July 7, 2005 that determination (of 2003) remained effective for purposes of reconsideration of the application for protection by the MCI as a stage in consideration of the reasonableness of the certificate. (Accepted by parties, although initially counsel for the Ministers urged that all aspects of this Court's 2003 determination were effectively set aside by the 2004 decision of the Court of Appeal, a submission not accepted by this Court.)

(7) Mr. Jaballah's opportunity to be heard regarding his inadmissibility, an opportunity assured by para. 78(i) of IRPA, but which he declined to exercise in 2003, was provided in these proceedings in 2006 in reconsidering the Ministers' certificate. It was utilized by Mr. Jaballah, after leave was sought and granted for him to testify or to adduce evidence. He and his wife testified in May and July 2006, and argument on his behalf concerning the reasonableness of the certificate was heard in September 2006. In my opinion, he had a full opportunity, as provided by para. 78(i) of IRPA, to respond to the Ministers' decision that he is inadmissible to Canada. I believe that opinion is accepted by counsel for the parties.

[33] The final variation in proceedings since the 2003 decision concerns the Court's role in dealing with constitutional issues arising in these proceedings. Some issues of that nature were raised by then counsel for Mr. Jaballah in the initial phase in 2001. In the 2003 decision (para. 44) I wrote:

> … I indicated that constitutional issues raised, so far as they were similar to those raised before Mr. Justice Nadon in *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, (2001), 199 F.T.R. 190, 13 Imm. L.R. (3d) 33, if argued herein, would be dealt with as Nadon J. had done, unless this Court could be persuaded that he was clearly wrong. That included his determination that a judge considering a certificate issued under s. 40.1 of the 1985 Act has no authority to consider arguments about the constitutionality of that statutory provision, which has been found not to infringe ss. 7, 9, or subsection 10(c) of the *Canadian Charter of Rights and Freedoms* or paragraph 2(e) of the *Canadian Bill of Rights* (see: *Ahani* v. *Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669, appeal dismissed (1996), 201 N.R. 233 (F.C.A.), leave to appeal refused, [1996] S.C.C.A. No. 496, [1997] 2 S.C.R. p. v.). While there was no further argument of constitutional issues before me, I note for the record that they were raised.

[34] The law on this matter was reconsidered by my colleague Justice Simon Noël in *Re Charkaoui*, 2003 FC 1419 (CanLII), [2004] 3 F.C.R. 32, 2003 FC 1419, appeal dismissed, 2004 FCA 421 (CanLII), 2004 FCA 421, 247 D.L.R. (4th) 405, [2004] F.C.J. No. 2060 (F.C.A.)(QL). In that case the learned judge dismissed an application for a declaration that ss. 77 through 83 of IRPA were unconstitutional. He held, and was subsequently supported by the Court of Appeal, that as a designated judge he had jurisdiction to dispose of the issues, constitutional or otherwise, arising in the context of an application for review of the reasons for detention of a

permanent resident held under a ministerial warrant issued in proceedings concerning a security certificate, and he further held that the questioned provisions of IRPA were not unconstitutional.

[35] Decisions of the Court of Appeal, in *Charkaoui*, in *Almrei* and in *Harkat*, all dealing with constitutional issues in certificate cases were appealed to the Supreme Court of Canada and heard in mid-June 2006. The appeals have not yet been determined; and counsel for Mr. Jaballah in this case reserved certain constitutional questions, said to arise here, for possible later resolution depending upon the Supreme Court of Canada's decisions. That reservation was acceptable to counsel for the Ministers and to the Court.

[36] The constitutional questions stated by counsel for Mr. Jaballah, considered under reserve in this matter, as set out by counsel's letter of September 20, 2006, are the following:

A. The statutory regime for the issuance of a security certificate and for the determination of its reasonableness set out in s. 77 to 81 of the *Immigration & Refugee Protection Act* does not comply with the principles of fundamental justice in accordance with s. 7 of the *Charter of Rights and Freedoms*, including because:

i- the substance of the case against the person is presented by the Ministers on an *ex parte* and *in camera* and breaches the requirement that a person be entitled to know the case against her and be given a fair opportunity to respond, in particular in an instance where liberty is infringed at the instance of the state and the person put at risk of removal to torture;

ii- the absence of counsel for the person concerned, or even an independent *amicus* in the secret part of the hearing compromises the independent and impartiality of the designated judge such that it does not comply with the principles of fundamental justice;

iii- the 'reasonable grounds' standard is such a low threshold as to render any defence to the allegations that are known virtually illusory.

B. The statutory regime for the issuance of a security certificate and for the determination of its reasonableness, coupled with the mandatory and indefinite detention, set out in s. 77 to 85 of the Immigration & Refugee Protection Act contravene the equality rights of the applicant under s. 15 of the Charter in that they are applied only to non-citizens and in that this applicant has been subjected to them on the basis of racial religious profiling.

I note for the record my opinion that there is no evidence or information in this case, apart from critical comment on certificate cases generally, that Mr. Jaballah has been subject to the application of ss. 77 to 85 of the IRPA "on the basis of racial religious profiling".

7. Review of the evidence and information for the Ministers' concerns

[37] There is no question about the terrorist activities of the Egyptian Al-Jihad (AJ) or Al Qaida, as appears from widely available public sources provided to the Court. Moreover, interrelations between the two organizations have become more closely integrated at least internationally, and the leadership of the AJ in recent years has played a major role within the Al Qaida network. Dr. Ayman Al Zawaheri, and other senior leaders of the AJ, have played leadership roles within Al Qaida. Al Zawaheri for example, has been Osama Bin Laden's principal spokesperson and apparent second in command in recent years.

[38] Counsel for Mr. Jaballah suggested there is no current evidence that the AJ still exists, but that is irrelevant when the evidence is that it did exist in the 1980s and 1990s, years when Mr. Jaballah was active. In any event, both organizations continue to be designated in Canada, by P.C. S0R/2002-284, dated July 23, 2002, pursuant to ss. 83.05(1) of the *Criminal Code* as amended by S.C. 2001, c.41, s.4, as entities that there are reasonable grounds to believe, have knowingly carried out, attempted to carry out, participated in or facilitated terrorist activity.

[39] The only question for this Court, concerning the AJ or Al Qaida, is whether there are reasonable grounds to believe that Mr. Jaballah is, or was a member of either one, or of any terrorist organization. He has consistently denied this. Yet, there is evidence and information upon which, in my opinion, a reasonable observer would find grounds to believe that he was, or is a member of a terrorist group, and of the AJ.

[40] The first evidence of this nature, new to the Ministers since the decision in Jaballah No.1 in early November 1999, is an Interpol notice concerning a fugitive wanted for prosecution in Egypt. The person named is Mahmoud Said, also known as Mahoumoud Al Sayed Gaballah Said. The notice bears a picture and fingerprints from 1989. In the 2003 decision, I described the notice thus:

> An Interpol notice, published July 13, 1999, which reached CSIS, acting for the Solicitor General, only on November 29, 1999, concerning an individual identified as Mahmoud Said, also known as Mahoumoud Al Sayed Gaballah Said, who was wanted by the Government of Egypt under a warrant alleging that he was a member of a terrorist organization responsible for planning and logistics, the supply of weapons and explosives to, and the escape of, active terrorists. In August 2000 CSIS was provided with a certified comparison by an RCMP expert, of fingerprints taken in 1996 by Immigration Canada on his arrival in Canada of Mahmoud Es-Sayyid Jaballah, the respondent, and prints provided by the Government of Egypt to Interpol for its July 1999 notice. That certified comparison indicates that both sets of fingerprints are those of the same person. Absent any explanation, the clear inference is that Mr. Jaballah is the person whose fingerprints were circulated with the Interpol notice and further, that Mr. Jaballah is the person subject to a warrant for arrest in Egypt.

[41] The description in the notice of the fugitive is not apt for reference to Mr. Jaballah in some respects. The date of birth is different from that claimed by Mr. Jaballah, the faculty from which the fugitive graduated at the University of Zagazig is said to be Arts whereas Mr. Jaballah claims to have graduated from the Faculty of Biology, but the occupation given for the fugitive is “teacher”, the same as Mr. Jaballah’s. There is also an unexplained anomaly in passport numbers stated in the notice.

[42] Despite these differences, I find that the person intended by the Interpol notice is the respondent, Mahmoud Jaballah. In testimony in 2006, he acknowledged the picture on the notice is of him though he denies involvement in alleged terrorism activities, and he has no explanation for the certificate of the R.C.M.P. fingerprint expert that the fingerprints displayed in the notice are the same as fingerprints taken from Mr. Jaballah on his arrival in Canada in 1996.

[43] For our purposes, the notice is significant in two other respects. The fugitive (Mr. Jaballah) is wanted in Egypt on a charge of membership in a terrorist organization under Egyptian criminal law no. 58/1937. For that offence, upon conviction, the maximum penalty possible is said to be the death penalty. By further Interpol notice dated 24/3/2003, received in Canada later in 2003, Egyptian authorities acknowledge that is the maximum possible penalty, but it is said “the maximum probable penalty is hard labour for life”.

[44] For Mr. Jaballah, counsel urged that no weight should be given by the Court to the Interpol notice, or if any were given, it should simply be taken as confirmation that the Government of Egypt was continuing to harass the respondent. Further, in view of the reputation of Egyptian authorities for use of torture to obtain information, the Court should ignore the notice unless it were satisfied that it had the evidence on which the Egyptian charge was based and that the evidence in support of the charge was not drawn by torture from an unwilling witness. That, it seems to me, comes close to a standard of proof beyond a reasonable doubt, a higher standard of proof than the reasonable grounds basis, which is here applicable.

[45] The evidence before the Ministers includes the Interpol notice. It cannot be ignored. In my opinion, it is evidence that supports, as reasonable, a conclusion that Mr. Jaballah is wanted for his membership, in earlier times, in a terrorist organization. It seems clear that by the authorities in his own country he is considered to be a terrorist, involved in a terrorist organization.

[46] The second aspect of the evidence and information supporting the Ministers' decision as reasonable, is the picture that emerges from Mr. Jaballah's contacts with a number of persons in this country and abroad who are known or believed to be or to have been associated with terrorist activities or organizations. Those contacts support the view of the Ministers that Mr. Jaballah was in communication with leading figures in the AJ-Al Qaida network, in a way that only a person of reasonably senior status among them could have been.

[47] Those contacts I summarize below. First, I acknowledge, as counsel for Mr. Jaballah argued, that there may be little in common among the persons of concern, except, in my view, their shared belief and involvement, reported in the public evidence and supported by undisclosed information, in terrorist activities to achieve political and religious goals. I acknowledge that attention to ties to these people may provide a narrow perspective about Mr. Jaballah, for the persons named are not the only persons with whom he has been associated. Yet his contacts with this collection of persons are of concern to the Ministers because of the perceived involvement of these persons in terrorist activities.

[48] This belief in Mr. Jaballah's contacts with others known to be involved with terrorist activities is reasonably supported, in the absence of any satisfactory explanation, by the numerous telephone calls made from and charged to Mr. Jaballah's telephone. With reference to evidence adduced in cross-examination, in considering his 2005 application for release from detention, the Court commented (see *Re Jaballah*, 2006 FC 115 (CanLII), 2006 FC 115, at paras. 54-56):

> ¶ 54 I have no doubt about Mr. Jaballah's deep interest in being with and supporting his family. Yet his credibility about other matters leaves much to be desired. In cross-examination, he first stated that he could not remember whether he had contacted anyone in Pakistan after he had come to Canada, he had not contacted anyone in Yemen after leaving there where he only knew one person he had worked with, and later after leaving Azerbaijan in 1995 he had left no friends behind and had no communication with persons in either country after coming to Canada. Later he was asked about telephone company records, then produced, which indicated a number of calls to all three countries, including 72 to Yemen and 47 calls to Azerbaijan from his Canadian telephone, mainly in 1996 and 1997. He then acknowledged that some of the recorded calls were his, or perhaps his wife's. While some recorded calls were so brief, a minute or so, they might have indicated inability to complete a call, as he suggested, numerous longer calls that he appeared to acknowledge as his, were not satisfactorily explained.
>
> ¶ 55 Again, there are telephone records of some 75 calls from his telephone to London England, mainly to the International Office for Defence of the Egyptian People, believed to be an office with an operational link for Al Qaeda. These calls he admitted making when he was seeking advice or assistance for his refugee claim, to support his application to review his failed refugee claim. Yet many calls recorded in 1996 and early 1997 were made before Mr. Jaballah's application for refugee status was heard, and, in my opinion, these were not satisfactorily explained. Nor was there any satisfactory explanation of more than 20 calls billed by Bell Canada to Mr. Jaballah's phone number from June 4 to 6, 1996, soon after his arrival in Canada, made to the United Kingdom, Yemen, Azerbaijan and Pakistan.
>
> ¶ 56 Other testimony about his lack of communication with certain others in this country after his arrival here, was cast into doubt by records of calls from his telephone to Montreal, to Winnipeg and to Edmonton, in each centre to phone numbers of persons suspected by C.S.I.S. of links to international terrorist activity. As for travels within Canada he first said he had only visited Montreal, to arrange automobile insurance at a lower premium than he could arrange in Toronto, and to Niagara Falls and London. Later when asked specifically about other centres he had visited, he acknowledged that he had driven to St. Catherine's, and also to Winnipeg to visit a particular person, described by him as not really a friend, who had been of assistance to him and his family on their arrival in Canada. His contact with another

person, then living in Alberta, one since charged with terrorist funding activities by prosecutors in the United States, was said to have been casual, and initiated by the person in Alberta whom Jaballah claims he really did not know. Yet there were numerous phone calls recorded from Jaballah's Toronto number to Edmonton and to Leduc where his acquaintance was then based. These calls were not satisfactorily explained.

[49] I turn to a summary of my conclusions about the contacts of Mr. Jaballah with persons of concern to the Ministers who it is believed were involved with terrorist activities, and to the role he is perceived to have played as a link in communications between cells, and leaders of AJ and Al Qaida related operations.

[50] First, these are contacts alleged with persons in Canada who were of concern to the Ministers because of the ties of those persons to terrorist activities and organizations. Mr. Jaballah acknowledged contact with each of these persons, but without knowledge on his part of their terrorist activities and on his part, solely for innocent purposes. The persons of concern in Canada were these.

Ahmed Said Khadr, a Canadian, active in Afghanistan and Pakistan, as well as in Canada, with his Canadian based relief agency, Human Concern International. Since this case began in 2001 Mr. Khadr is believed to have become a senior member of Bin Laden's group and was killed in a battle with Al Qaida forces in Afghanistan or Pakistan. While Mr. Jaballah acknowledges meeting Khadr, a well-known member of the Muslim community, at a Mosque in Toronto, only after Jaballah came to this country, there is some information provided to the Ministers of the contact between the two men commencing before that in Peshawar, where both worked for different relief agencies.

Hassan Farhat, who is believed to have held a key position within Ansar-al-Islam, commanding a fighting unit of some 80 guerrillas and a six person cell of suicide bombers. The organization is among those listed, as are AJ and Al Qaida, under P.C. SOR/2002-284 as amended, as one for which these are reasonable grounds to believe that it is engaged in terrorism. Mr. Jaballah claims to have met Farhat at a Mosque in Toronto, shortly after his arrival in May 1996, when he was seeking help in getting his family settled. Farhat introduced him to one who served as an interpreter and assisted in preparation of his refugee claim. Farhat also helped him find accommodation for his family. Farhat left Toronto about 4 months after Jaballah arrived there, and later that fall or early winter, though he professes they were not really friends, Mr. Jaballah drove with his young son and two other men to Winnipeg to see a then – ailing Farhat. Later, after Farhat had moved to Montreal, Mr. Jaballah and his wife visited him there.

Mohammed Zeki Mahjoub, (a.k.a. Mahmoud Shaker), a permanent resident in Canada, a leading figure in the Vanguards of Conquest faction of the AJ, another listed entity in SOR/2002-284 as amended, who was the subject of a security certificate by the Ministers which was upheld as reasonable in 2000. Mr. Jaballah admits to having met Mahjoub once only before they were detained together in 2001. That first meeting, a social one, was brief, at the home of Mr. Khadr's mother-in-law in Toronto where both the wives of Messrs. Jaballah and Mahjoub had gone for a social visit. When he was arrested in 2000, Mr. Mahjoub had a paper containing the name Ahmed Jaballah and the Toronto telephone number of the respondent, Mahmoud Jaballah, father of a son Ahmed then in his mid-teens. Mr. Jaballah often gave his name as "Abu Ahmed" (i.e. father of Ahmed) following Egyptian custom as he described it. There is no explanation why Mr. Mahjoub would record the telephone number of Ahmed; then a teenager; the likely explanation is that the number was intended to be, as it was, the number of Mahmoud Jaballah.

Kassem Daher, a Canadian citizen, from Lebanon, who by the mid 1990's was a

successful businessman in Alberta, where he is believed to have raised funds and purchased arms for a Lebanese terrorist faction linked to Al Qaida. He has been indicted, as one who funds international terror, in the United States, and he was, at least for a time, held in detention in Lebanon after he left Alberta. Numerous telephone calls from Jaballah's Toronto telephone to Daher's numbers in Alberta were unexplained except that Mr. Jaballah claimed to be seeking information on possibly moving to Alberta. There is information before the Ministers confirming contact by Mr. Jaballah with Daher from soon after the former came to Canada and Mr. Jaballah acknowledges meeting him in Toronto a month or two after he arrived in Canada.

Mustafa Mohammed Krer, a Canadian, who is believed to be a former leader of the Libyan Islamic Fighting Group in Canada. Mr. Jaballah acknowledges meeting him in Toronto and visiting Krer in Montreal where he assisted Jaballah to arrange automobile insurance. There is information before the Ministers of contact between the two men on a number of occasions.

[51] There were also contacts alleged with persons of concern outside Canada, including the following.

Thirwat Salah Shehata, an Egyptian, one of the leaders of AJ, closely involved with Dr. Ayman Al-Zawaheri in operations, not only of AJ but of Al Qaida also. Mr. Jaballah acknowledges he retained Shehata, a lawyer, to represent him in his difficulties with Egyptian authorities in the 1980's and until he left for Saudi Arabia in the late spring of 1991. Shehata's involvement with AJ, or Al Qaida, or in terrorist activities, is said by Mr. Jaballah to be unknown to him, though he is not surprised that Shehata may be wanted by Egyptian authorities for his earlier activity as a lawyer representing opponents of the regime. Information available to the Ministers supports a conclusion that the contacts between Messrs. Jaballah and Shehata were more frequent and more recent than Mr. Jaballah has acknowledged.

Ahmed Sulamah Mabruk, once thought to be the third ranked leader of AJ, with whom it is believed Mr. Jaballah had regular contact prior to Mabruk's detention in Baku, Azerbaijan in September 1998. Information available to the Ministers supports the belief that Mabruk was a regular contact of Mr. Jaballah.

Adel Abdel Al Bari and Ibrahim Eidarous, Egyptians, leaders of AJ cell in London England in the 1990's, since then held in detention and released and detained again on extradition proceedings initiated in the United States for involvement in communicating advance warnings and subsequent claims for credit concerning bombings of U.S. Embassies in Nairobi, Kenya and Dar Es Salaam, Tanzania, in August 1998 with losses of hundreds of lives. Both have been indicted in the United States and both are wanted in Egypt for terrorist activities. Both were operating from the International Office for the Defence of Egyptian People in London, believed to be a front for the AJ, with links to Al Qaida, and the latter network is believed to have been responsible for the embassy bombings in East Africa. Eidarous reportedly was in Baku, Azerbaijan to establish AJ operations there at the time Mr. Jaballah was there, and he was sent thence to London to head up AJ operations in England. Al Bari was responsible for the London office (I.O.D.E.P.). Mr. Jaballah acknowledges contact with Al Bari by telephone commencing in March 1997 when he was seeking information in support of his refugee claim in Canada, and contact also with Eidarous, about possible arrangements to start a business in Canada selling clothing and other products from the middle east.

Mr. Jaballah does not acknowledge that he was in contact with Al Bari at the I.O.D.E.P. in London in June 1996, soon after he had arrived in Canada, nor does he acknowledge contact made by telephone with Azerbaijan and Yemen at that time, or with those places and London on or about August 7, 1998 the day of the bombings

> of American Embassies in East Africa. Information provided to the Ministers supports the conclusion that Mr. Jaballah communicated with senior AJ representatives in London from soon after his arrival in Toronto.

[52] There is also the allegation by the Summary Statement of the Ministers dated August 14, 2001 as amended that Mr. Jaballah is believed to have served as a communications link between AJ cells on August 7, 1998, the day of the bombing of U.S. embassies in East Africa. That is echoed in the decision of the Minister's delegate dated September 23, 2005 at page 6) in rejecting Mr. Jaballah's application for protection in the following terms:

> … In the reasons in the application for protection decision rendered on 30 December 1993, [i.e., the first decision on that application], E.A. Arnott refers to evidence of Mr. Jaballah's active participation from within Canada in the bombings in 1998 of the American Embassies in Kenya and Tanzania. I have independently examined this evidence and find it compelling.

[53] There is information available to the Ministers that reports communications between Mr. Jaballah and telephone contacts, believed to be AJ cells or members, in Azerbaijan, in Yemen and in London on or about August 7, 1998. There is also information available to them about the same contacts over time, commencing before and continuing after that date.

[54] The public evidence by documents adduced and by the testimony of Mike in December 2001, includes reference to the operating procedures and techniques of AJ, by clandestine methods, with careful attention to internal security and by relatively small cells operating largely independently, with only a few persons knowing how contact is to be made. Observers believe that comparatively few senior leaders of the AJ or Al Qaida would communicate with a variety of cells of AJ or other operatives engaged in terrorist plots and activities.

[55] Absent any satisfactory explanation for telephone calls, known on the public record, and reflected in the information available to the Ministers', the inference from Mr. Jaballah's contacts with AJ cells and senior leaders in London, Azerbaijan and Yemen is that he was a senior communicator within the AJ network, including communications on or about August 7, 1998, when U.S. embassies were bombed in East Africa with losses of hundred of civilians in Nairobi and in Dar Es Salaam.

[56] Finally, I turn to a few general issues raised in relation to the evidence and information before the Court.

[57] For the Ministers, it is urged that on review of the evidence of Mr. Jaballah, in interviews with CSIS officers prior to the first certificate, before the I.R.B., in this Court in 1999, and in these proceedings, Mr. Jaballah has been inconsistent and not credible. That is in direct contrast with the finding of Cullen J. when the first security certificate was quashed, that in the 1999 proceedings Mr. Jaballah was generally credible. I do not question that determination and I am not disposed to find that his evidence generally is not credible. Indeed, much of what the Court knows of his background and activities is drawn from his evidence. At the same time, I do not accept his evidence in certain respects.

[58] In some matters, the testimony of Mr. Jaballah was evasive. His responses to questions were not always direct and when confronted by contradictory evidence his story would vary. Thus, his evidence of not knowing anyone he would telephone in Pakistan, or Yemen or Azerbaijan, after he came to Canada, was varied but without reasonable explanation when he was confronted with records of telephone calls made from his telephone on numerous occasions. Similarly, his travels within Canada were limited, but the limitations were varied when he was asked about travels to Winnipeg and Montreal. On another matter initially he had said he borrowed a cell phone after arriving in Canada so that he could be reached by his wife in case of any emergency. When pressed, he acknowledged that he had kept the cell phone for some time and had freely used it and given the number as his own to a number of people.

[59] There were respects in which his evidence was simply not credible, in my opinion. For example, his professed ignorance of activities in, or in respect to, Afghanistan in the years he was in Peshawar can

only be feigned, for that was a major city in Pakistan near the Afghan border, and his work there is said to have included educating orphans and other children, presumably of Arab origin. His evidence that a post office box he had rented in Toronto was not used I do not accept in the face of testimony of Mike, on behalf of CSIS, supported by information available to the Ministers, that mail for Mr. Jaballah had been received at that box. More significant for the Ministers' opinion is the failure of his testimony to explain adequately the numerous telephone calls to Yemen and Azerbaijan after he arrived in Canada. His failure to remember anyone in those countries except one former fellow worker in Yemen to whom calls were made, is not credible. Similarly, his failure to explain calls to London, Azerbaijan and Yemen shortly after his arrival in Toronto in 1996, belies his explanation for London calls at least, that they were made at or after his first hearing of his refugee claim in 1997, and his explanation that he first learned of the London office of the International Office for the Defence of Egyptian People from the internet after he had arrived in Canada is not credible.

[60] In light of my conclusions, in one other respect I find that he was not a credible witness, that is, in his denials of any involvement in terrorist activities or as a member of a terrorist organization.

[61] In addition to credibility concerns, for the Ministers it is also urged that their conclusions about Mr. Jaballah are supported by inferences drawn from his travel before coming to Canada. In the summary statement of August 14, 2001, as later amended, it is stated (para. 5(a)):

> The service believes JABALLAH's travel pattern was consistent with the profile of an Islamic Mujahedine extremist – one who left Egypt to fight in Afghanistan, trained in Yemen, may have fought in Chechnya, and cannot return to Egypt.

[62] I decline to accept this as providing any support to the Ministers' position. What some or many others may have done in travels in the mid-East in the early 1990's is not supportive of the Ministers' opinions about his terrorist background and membership in a terrorist organization. There is no information at all about any involvement of Mr. Jaballah in any way in Chechnya. The belief that he spent time in Afghanistan has consistently been denied by him, a denial accepted by Cullen J. in 1999. The only new information since that decision is general in nature, without specifics of where, when, with whom or for what purpose he is believed to have been in Afghanistan. The quality of the new information is less than desirable, in my opinion. In any event, absent any evidence of when Mr. Jaballah is believed to have been in Afghanistan, and what he may then have done, the allegation that he may have gone there is not supported.

[63] In another respect, apparent differences in Mr. Jaballah's story told at different times, and differences with the testimony of his wife, about when he returned to Pakistan from Yemen or Azerbaijan in the period 1994-96 are not significant or supportive of the Ministers' conclusions. The differences do lead me to conclude that Mr. Jaballah was not credible in his evidence that he returned to Pakistan only in March 1996 before soon leaving with his family for Canada. Yet his failure to be credible in this matter does not, without more, support the Ministers' opinion. Differences in his evidence and that of his wife about his travel to Winnipeg from Toronto in 1996, and in some other aspects, do not in my view add support to the Ministers' case.

8. Statutory security grounds for inadmissibility

[64] In discussion of the legislative regime here applicable (see paras. 11 and 14 above) brief reference was made to certain provisions of s-s. 34(1) of IRPA concerning inadmissibility to Canada of a permanent resident or foreign national on security grounds. The Act also provides by s. 33 that ss. 34 to 37 are to be interpreted so that "the facts that constitute inadmissibility … include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur."

[65] The words "reasonable grounds to believe" are also used in para. 34(1)(f) and a similar phrase, "believed on reasonable grounds to be", in para. 37(1)(a), which refer to membership in an organization believed to be engaged, in espionage, subversion or terrorism [34 (1)(f)] or in organized criminality [37

(1)(a)]. It is well settled that while these words create a relatively low evidentiary threshold they do require more than mere suspicion or subjective belief. The threshold does not require proof on a balance of probabilities; rather it connotes a degree of probability, i.e. a *bona fide* belief in a serious possibility, based on credible evidence (See *Re Harkat*, 2005 FC 393 (CanLII), 2005 FC 393, [2005] F.C.J. No. 481 (QL); *Chiau* v. *Canada (Minister of Citizenship and Immigration)* 2000 CanLII 16793 (F.C.A.), [2001] 2 F.C. 297 (F.C.A.); *Thanaratnam* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FCA 122 (CanLII), 2005 FCA 122, 45 Imm. L.R. (3d) 1 (F.C.A.).

[66] In considering the material before the Court para. 78 (j) of IRPA provides that the designated judge, in determining whether the certificate is reasonable, may receive into evidence anything that in her or his opinion is appropriate even if it is inadmissible in a court of law and may base the decision on that evidence.

[67] Other settled principles concerning the grounds set out in s-s. 34(1), for inadmissibility on security grounds, are these.

1. If more than one ground of inadmissibility is certified, each is to be read disjunctively and if one is established the certificate is to be determined to be reasonable. (See *Harkat*, *supra*, at para. 43, *Zundel* (Re), 2005 FC 295 (CanLII), 2005 FC 295, [2005] F.C.J. No. 314 (QL), at paras. 16, 17).
2. "Terrorism" includes any act intended to cause death or serious injury to a civilian or a non-combatant in armed conflict when the purpose of the act, by its nature or context, is to intimidate a population or to compel a government or international organization to do or abstain from any act. (*Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3 at para. 98.)
3. The term "member" of an organization referred to in relation to security grounds is to be given an unrestricted and broad interpretation (see *Harkat*, *supra* at para. 45). As Rothstein J. stated in *Canada (Minister of Citizenship and Immigration)* v. *Singh*, [1998] F.C.J. No. 1147 (T.D.)(QL) at para. 52 with reference to the grounds of inadmissibility referring to membership in a terrorist organization as set out in s. 19 of the *Immigration Act* then applicable, a comment I accept by analogy to the same words used in paragraph 34(1)(f) of IRPA.

> The provisions deal with subversion and terrorism. The context in immigration legislation is public safety and national security, the most serious concerns of government. It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not therefore easily identifiable. The Minister of Citizenship and Immigration may, if not detrimental to the national interest, exclude an individual from the operation of subparagraph 19(1)(f)(iii)(B). I think it is obvious that Parliament intended the term "member" to be given an unrestricted and broad interpretation …

[68] While the threshold for establishing facts on the basis of a reasonable ground to believe may be lower than the accepted criminal or civil law standards of proof, I am persuaded by counsel for Mr. Jaballah that the Supreme Court of Canada's decision in *Continental Insurance Co.* v. *Dalton Cartage Co*. has some significance for this case. Thus, whether facts alleged and established on the basis of the threshold of "a reasonable ground to believe" fall within the statutory provisions of s-s. 34(1) may depend on the quality and cogency of the evidence. The question for the Court is to assess whether that evidence, and the weight accorded to it, will lead to the conclusion that the requisite standard of proof is met to support a finding that the facts fall within the conduct prescribed by statute, bearing in mind any serious consequences Mr. Jaballah may face. Those consequences concern directly whether or not he may be admitted to Canada, and if he is not admissible the prospects he may face if he is required to be removed by the MCI.

[69] On review of the evidence and information available to the Ministers at the time their opinion was certified, and relevant evidence of later origin, subsequently filed in these proceedings after mid-August 2001, I find there is a reasonable basis for the opinion of the Ministers that Mr. Jaballah is inadmissible to

Canada, in respect to the particular grounds of s-s. 34(1) of IRPA that remain in issue, that is,

> that Mr. Jaballah was engaged in terrorist activities in Egypt in the 1980's, and after he left there in 1991 in international terrorist activities of the AJ and Al Qaida, particularly as a communicator between terrorist cells after he came to Canada; and further
>
> that Mr. Jaballah, by inference from the standing within AJ and other terrorist networks of the persons with whom he had contact after his arrival in Canada, was a member, with senior standing as a communicator among terrorist cells and persons of the AJ and of the Al Qaida network.

These facts are reasonably supported on the evidence in the public record and the information in the confidential record available to the Ministers, both of which have been considered by the Court. In my opinion, the information and evidence provide reasonable grounds to believe the factual bases for the opinion of the Ministers, and those facts fall within the conduct which precludes admissibility of a foreign national to Canada. The evidence and information clearly put Mr. Jaballah within the inadmissible classes set out by s-ss. 34(1)(c) and (f) of IRPA.

[70] Finally, I record another fact, that is, that counsel for the Ministers expressly noted that the Ministers have never suggested there is any evidence, either open or classified, that Mr. Jaballah has personally committed an act of violence. "It is our position that he participated as a communications link in relation to the East Africa bombings, so that it is arguable he did have a role in violent events to that extent". I agree that there is no evidence or information to support a conclusion that Mr. Jaballah personally committed an act of violence at any time.

9. The reasonableness of the security certificate

[71] In view of the conclusions I have reached on the evidence in the public record and the information in the confidential record and in light of the new information and evidence, not available to the Court in Jaballah No. 1, in 1999, an Order will issue with my determination that the security certificate of the Ministers, dated August 13, 2001 is reasonable. The certified opinion of the Ministers, now found reasonable, is that Mr. Jaballah is inadmissible to Canada as a person within paragraphs 34(1)(c) and 34(1)(f) of IRPA.

10. The duty and discretion to remove Mr. Jaballah from Canada

[72] When it is ordered that my determination is that the Minister's security certificate is reasonable, that may not be appealed or judicially reviewed (s-s. 80(3), IRPA), except, in accord with jurisprudence, on jurisdictional or on constitutional grounds. That determination is conclusive proof that Mr. Jaballah is inadmissible to Canada, and the order setting out the determination is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an inadmissibility hearing (paras. 81(a) and (b) of IRPA). As a removal order it comes into force on the day the order accompanying these reasons is filed (subpara. 49(1)(a) of IRPA). Unless the order is stayed it is enforceable, and Mr. Jaballah must leave Canada, or the Order is to be enforced by the MCI as soon as is reasonably practicable (s-s. 48(1) and (2) of IRPA).

[73] In recognition of these circumstances and of the decision of the Supreme Court of Canada in *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3 (QL), 2002 SCC 1, in closing submissions counsel for the Ministers requested that if the Court were to determine that the security certificate is reasonable in this case, it should also determine whether there is any legal limitation to the exercise of the Minister's discretion in removing Mr. Jaballah. In the ordinary course, it might be expected that he would be removed to Egypt as soon as travel arrangements could be made. Yet among the facts of this case, as found in 2002 by a pre-removal risk assessment officer on behalf of the MCI and accepted by this Court, if he were to be removed to Egypt there is serious risk that he would face torture, death or inhumane treatment. While it was earlier urged that this assessment might be subjected to review and some steps were apparently initiated to obtain assurances from the Government of Egypt that such a risk would not be met (see comments of Rothstein J.A. of the Court of

Appeal in its decision *Jaballah (Re)*, [2004] F.C.J. No. 1199 (QL) at para. 13), yet no other later determination or assessment on behalf of the Minister about the risk to Mr. Jaballah if he were to be deported to Egypt was brought to the attention of this Court.

[74] Counsel for Mr. Jaballah argued in closing submissions that if the Court held the certificate to be reasonable, it would be *functus*, without authority to consider this issue, since it had declined to consider the issue when urged to do so by that counsel at an earlier stage, in review of the decision on behalf of MCI concerning Mr. Jaballah's application for protection. While I did then decline to accept submissions of his counsel that Mr. Jaballah should not be deported to torture, in my view the question whether Mr. Jaballah would be removed to Egypt, was not then before me. Rather, the question then was whether or not the decision to refuse his application for protection based on the delegate's assessment, pursuant to subpara. 113(d)(ii) of IRPA, that the danger he constituted to the security of Canada if he remained outweighed the risk of torture or other harm to him if he were returned to Egypt. I was then concerned to determine the lawfulness of the decision on the application for protection. In my view, a decision of this Court that the protection decision was reasonable or unreasonable, did not constitute a decision to remove or not to remove Mr. Jaballah from Canada.

[75] Following conclusion of the hearings on September 14, 2006, the Court sought further written submissions from counsel for the parties with regard to advice if it were to proceed as requested by counsel for the Ministers, in resolution of the question presented. The question was described by that counsel as the "*Suresh* question", which I understand and made clear this understanding to them in requesting submissions, related to the possibility of limitations on the exercise of the Ministers' discretion with respect to removal of Mr. Jaballah from Canada if the certificate were found to be reasonable.

[76] In my view having determined the certificate is reasonable, knowing that the order setting out that determination becomes a removal order, aware of the implications of *Suresh* and the finding that Mr. Jaballah faces a serious risk of torture or worse if he were removed to Egypt, I find the circumstances now favour proceeding to resolve the issue whether in this case Mr. Jaballah can be removed by the Minister from Canada to Egypt, or any other place where he faces torture, or possible death or cruel and unusual punishment. This question has been well argued before this Court, since the first decision of the Minister's delegate in relation to the application for protection was reviewed in 2004-2005, again in 2005 in review of the second decision by the Minister's delegate, and in proceedings since. It is an issue in virtually all security certificate cases. Failure to determine that question earlier is said to be a matter now before the Court of Appeal, but if that is so it relates to the decision on review of the decision rejecting Mr. Jaballah's application for protection.

[77] I believe the circumstances arising with the finding that the security certificate is reasonable, in this case, constitute sufficient factual basis in light of the consequences under IRPA, for the Court to proceed to deal with the question raised.

[78] Counsel for the both parties suggested the Court might order a stay of any removal of Mr. Jaballah pending judicial determination of the issue now presented to me. That would only postpone a judicial decision. A decision now, though it may be raised on appeal may provide guidance for the MCI and ultimately a definite judicial or legislative response. I propose to deal with the issue now.

[79] In *Suresh* the issue was well canvassed in discussion by the Supreme Court of Canada. Among other comments the Court said (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3 (QL), 2002 SCC1, 208 D.L.R. (4th), 1 S.C.R. at paras. 76, 77 and 78):

> [76] The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to

> torture will generally violate the principles of fundamental justice protection by s. 7 of the *Charter*. […]
>
> [77] The Minister is obliged to exercise the discretion conferred upon her by the *Immigration Act* in accordance with the Constitution. This requires the Minister to balance the relevant factors in the case before her. […]
>
> In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the *Charter*. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.
>
> [78] We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. […] Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because art. 3 of the CAT [i.e., Convention Against Torture] directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.

[80] *Suresh*, thus far, has led to debate, whether it is within the discretion of the MCI to deport an inadmissible person to a country where there is a serious risk of torture. Mr. Justice Dennis O'Connor, as Commissioner, in his Report of the Events Relating to Maher Arar, Analysis and Recommendations, (2006) (Vol. 3) Part II pp. 51-52, wrote of the right to be free from torture as an absolute right. In his view, "The infliction of torture, for any purpose, is so fundamental a violation of human dignity, that it can never be legally justified." He makes reference to the Universal Declaration of Human Rights, to several international agreements, including the Convention against Torture, to which Canada is a party, and to the *Canadian Charter of Rights and Freedoms* as well as the *Criminal Code of Canada*, all of which confirm the absolute rejection of torture. Article 3 of the Convention Against Torture prohibits a state party from expelling, returning or extraditing a person to another state where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

[81] That prohibition is now widely recognized and accepted in many countries of the world, including those within the European Union. It is reflected in the judgment of the Supreme Court of Canada in *Suresh*. That judgment's reference to exceptional cases left open for future consideration cannot have been intended to leave many cases to be classed as exceptional. Rather, the general principle, as I read *Suresh*, is that deportation to a country where there is a substantial risk of torture would infringe an individual's rights, in this case Mr. Jaballah's rights, under s. 7 of the *Charter*, and, in my view, infringement generally would require that the exceptional case would have to be justified under s. 1.

[82] Here, no case has been argued that Mr. Jaballah's circumstances are exceptional, or that they could be so qualified under s.1 of the *Charter*. I have found the Ministers' certified opinion to be reasonable. By inference that opinion signifies that his continuing presence in Canada, without restraints, would constitute a danger to the security of the country. Yet there is no case argued that he has been personally involved in violence.

[83] I conclude that the facts of this case do not create an exceptional circumstance that would warrant Mr. Jaballah's deportation to face torture abroad.

[84] This does not mean that he may not be deported. The MCI has a responsibility to deport him, as soon as may be reasonably done if he does not leave Canada voluntarily (s-s. 48(2) of the IRPA). But

deportation to Egypt or to any country where and so long as there is a substantial risk that he would be tortured or worse would violate his rights as a human being, guaranteed by s. 7 of the *Charter*. The MCI may not exercise discretion in a manner that would violate Mr. Jaballah's rights under the *Charter*. The Minister has significant discretion under IRPA and if that is not sufficient it may be amended by regulatory or legislative change. Under the Act now he may discharge his responsibility by deporting Mr. Jaballah to a country where he does not face the prospect of torture. If that proves impossible in a reasonable time, then if conditions should change, so that the substantial risk of torture if he is returned to his own country can be judged to have been essentially eliminated, he may then be deported to his own country or another which is now perceived to present to him a substantial risk of torture, or worse.

[85] I conclude that in the circumstances of this case the Minister, in reliance on the security certificate, now found to be reasonable, as a removal order, may not exercise discretion to remove Mr. Jaballah to any country where and when there is a substantial risk that he would face torture or death or cruel and unusual punishment.

[86] In my opinion, that limitation is consistent, not merely with the decision in *Suresh* but also with Canada's international obligations, with Canadian jurisprudence in regard to extradition to a jurisdiction where the death penalty is still imposed. and with Canadian values as reflected in the *Criminal Code*'s provisions concerning torture and in the *Charter of Rights*, particularly ss. 7 and 12.

[87] The Order now issued, sets out my determinations:

1. that the Ministers' security certificate, dated August 13, 2001 determining that Mr. Jaballah, a foreign national, is inadmissible to Canada, is reasonable within s-s. 80(1) of IRPA, and
2. that if Mr. Jaballah does not voluntarily depart from Canada, in the exercise of his responsibility and discretion to remove him in reliance on the security certificate, now found to be reasonable, the Minister of Citizenship and Immigration may not remove him to any country where and when there is a substantial risk that he would face torture, death, or cruel and unusual treatment.

"W. Andrew MacKay"
Deputy Judge

Ottawa, Ontario
October 16, 2006

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-04-01
STYLE OF CAUSE:	IN THE MATTER of a certificate pursuant to Section 40.1 of the *Immigration Act*, R.S.C. 1985, c. I-2, now deemed to be under s-s. 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27; AND IN THE MATTER of the referral of that certificate to the Federal Court of Canada; AND IN THE MATTER of Mahmoud Jaballah
PLACE OF HEARING:	Toronto, Ontario

DATE OF HEARING: September 11 to 14, 2006

REASONS FOR ORDER: MACKAY D.J.

DATED: October 16, 2006

APPEARANCES:

Mr. Donald MacIntosh Mr. David Tyndale Ms. Mielka Visnic Mr. Robert Batt Ms. Marthe Beaulieu	FOR THE APPLICANT
Ms. Barbara Jackman Mr. John Norris	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
Jackman & Associates Toronto, Ontario	
Ruby, Edwardh Toronto, Ontario	FOR THE RESPONDENTS

(The latest chronology of events of significance in these proceedings appears in Appendix A of the decision listed as number 17 in the following list)

#	**This Case (file DES-04-01) ("Jaballah No. 2") Decisions of MacKay J.**	**Related Cases and Events**
1		*Canada (Minister of Citizenship and Immigration v. Jaballah (DES-6-99), [1999] F.C.J. No. 1681 (T.D.) (QL), (November 2, 1999) (Cullen J.), ("Jaballah No. 1").* The Court quashes security certifcate issued on March 31, 1999.
2		*Jaballah v. Canada (M.C.I.) (IMM-1828-99), 2000 FCT 1577, [2000] F.C.J. No. 1577, (2000) 196 F.T.R. 175 (October 6, 2001) (Hansen J.)* Judicial review- quashes negative CRDD decision on refugee claim (Hansen, J.).
3		*Security Certificate dated August 13, 2001 issued,* Jaballah detained, and proceedings commence.

4	***Re Jaballah,*** 2001 FCT 1287 (CanLII), ***2001 FCT 1287, [2001] F.C.J. No. 1748 (T.D.) (QL) (November 23, 2001)*** The Court dismisses Mr. Jaballah's application to stay proceedings and quashes subpoenas served on Ministers.	
5		Mr. Jaballah applies to M.C.I. to be found a person in need of protection, s.112 , IRPA (July 1, 2002)
	The Court orders proceeding be suspended (s-s. 79(1) IRPA) (July, 2002)	
6	***Re Jaballah,*** 2002 FCT 1046 (CanLII), ***2002 FCT 1046,*** 2002 FCT 1046 (CanLII), ***[2002] F.C.J. No. 1385 (T.D.), [2003] 3 F.C. 85, (2002) 224 F.T.R. 20 (QL) (October 8, 2002)*** The Court dismisses motion by Mr. Jaballah, inter alia for release from detention.	
7		*Decision of CRDD- (April 9, 2003)* On reconsideration of application for refugee status, CRDD rejects claim by Jaballah but allows claim on behalf of his wife and their four children born abroad who accompanied parents to Canada.
8	***Re Jaballah,*** 2003 FCT 640 (CanLII), ***2003 FCT 640,*** 2003 FCT 640 (CanLII), ***[2003] F.C.J. No. 822 (QL), [2003] 4 F.C. 345, (May 23, 2003)*** The Court finds abuse of process by failure to decide Mr. Jaballah's application for protection; Court resumed proceedings, found security certificate reasonable in absence of any response by Mr. Jaballah to the Ministers' certificate and information. (Appealed)	
9		*Decision on behalf of M.C.I. (December 30, 2003)* Denies application for protection.
10	***Re Jaballah, 2004 FCT 299, [2004] F.C.J. No. 420, (2004) 247 F.T.R. 68 (QL) (Februrary 27, 2004).*** Court dismisses Mr. Jaballah's application, under s-s. 84(2) IRPA, for release from detention. (Appealed)	
11		*Re Jaballah,* 2004 FCA 257 (CanLII), *2004 FCA 257,* 2004 FCA 257 (CanLII), *[2004] F.C.J. No. 1199 (C.A.), [2005] 1 F.C.R. 560, (2004) 242 D.L.R. (4th) 490 (QL) (July 13, 2004)(i.e., appeal of decision #8, supra)* Court of Appeal upholds finding of abuse, but allows appeal, sets aside finding that security certificate is reasonable, referring the matter for reconsideration by a designated judge. (Rothstein J.A.)
12	***Re Jaballah,*** 2005 FC 399 (CanLII), ***2005 FC 399, [2005] F.C.J. No. 500, [2005] 4 F.C.R. 359 , (2005) 261 F.T.R. 35 (March 22, 2005)*** *Decision on behalf of M.C.I., to refuse*	

	Jaballah's application for protection, is set aside as unlawful and the application is referred for reconsideration . Proceedings again suspended.	
13		*Jaballah v. A.G. Canada, A.G. Ontario et. al., M-77-05, 2005,08,22 (Ont. S.C.J.),* 2005 CanLII 30315 (ON S.C.), *(2005) 258 D.L.R. (4th) 161, [2005] O.J. No. 3681 (August 22, 2005)* Ontario Supreme Court stays proceedings on application for habeas corpus by Mr. Jaballah, pending consideration of possible release by Federal Court. Thereupon application made to this Court.
14		*Decision on behalf of M.C.I. (September 23, 2005).* Again, denies application for protection.
15	***Re Jaballah,*** 2006 FC 115 (CanLII), ***2006 FC 115, [2006] F.C.J. No. 110 (QL) (February 1, 2006)*** Court dismisses application for release from detention, after recognizing in special circumstances of this case, a constitutional remedy under the Charter of Rights, s-ss. 15(1) and 24(1) to seek release, but Court finds that application is unsuccessful under s-s. 83(3) of IRPA.	
16	***Re Jaballah,*** 2006 FC 180 (CanLII), ***2006 FC 180, [2006] F.C.J. No. 227 (QL) (February 10, 2006)*** Court dismisses application by Mr. Jaballah that designated judge recuse himself from the case.	
17	***Re Jaballah,*** 2006 FC 346 (CanLII), ***2006 FC 346, [2006] F.C.J. No. 404 (QL) (March 16, 2006)*** Court, having resumed proceedings re certificate, on review finds second decision on behalf of the M.C.I. (dated September 23, 2005), in rejecting Mr. Jaballah's application for protection, is lawful (s-s. 80(1) IRPA). (Appealed)	
18	***Re Jaballah,*** 2006 FC 1058 (CanLII), ***2006 FC 1058. Certificate attaching transcript of Reasons (Order May 2, 2006, Reasons May 8, 2006)*** Court dismisses motion to postpone hearings (testimony and argument) on reasonableness of security certificate of August 2001 pending decision of Supreme Court of Canada in other security certificate cases, to be argued in mid-June 2006. (Appealed)	
19		*Jaballah v. Canada (MCI),* 2006 FCA 179 (CanLII), *2006 FCA 179, [2006] F.C.J. No. 747 (C.A.)(QL) (May 12, 2006)(i.e. appeal of decision #18, supra).* Application to Court of Appeal to stay proceedings concerning sercurity certificate pending consideration of Appeal, dismissed on behalf of that Court (Linden, J.A.)

20	***Re Jaballah (August 18, 2006)*** Order limiting use or derivative use of any testimony of Mr. Jaballah given in relation to the reasonableness of the security certificate in May and July 2006.	
21	***Re Jaballah,*** 2006 FC 1010 (CanLII), ***2006 FC 1010 (August 23, 2006)*** Reasons for dismissal, by Order of June 30, 2006, motion by Mr. Jaballah for reconsideration of decisions: not to postpone hearings concerning security certificate, and not to appoint special counsel or amicus curiaeto represent Mr. Jaballah's interests in testing confidential information before the Court, even in in camera hearings in absence of Mr. Jaballah or his counsel.	
22	***Re Jaballah, 2006 FC ____ (October __, 2006)*** The Court determines the Ministers' certificate is reasonable (s-s. 80(1) of IRPA), and further that discretion to remove Mr. Jaballah from Canada is limited.	
23	***Re Jaballah, 2006 FC ___. September 18, 2006, the Court (Layden-Stevenson J) commenced hearing an application by Mr. Jaballah for release from detention.***	

NOTE: The styles of cause of the decisions in Jaballah No.2 are cited in this table as Re Jaballah

Reasons for Order and Determination
Dated 20061013
File No. DES-04-01

Exerpts from the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, as amended.

		Comparable Provision of 1985 Act
DIVISION 9 PROTECTION OF INFORMATION	SECTION 9 EXAMEN DE RENSEIGNEMENTS À PROTÉGER	
Examination on Request by the Minister and the Solicitor General of Canada	Examen à la demande du ministre et du ministre de la Sécurité publique et de la Protection civile	
76. The definitions in this section apply in this Division. “information” means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, from the government of a	76. Les définitions qui suivent s’appliquent à la présente section. « juge » Le juge en chef de la Cour fédérale ou le juge de cette juridiction désigné par celui-ci. « renseignements » Les	None

foreign state, from an international organization of states or from an institution of either of them.
"judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.
2001, c. 27, s. 76; 2002, c. 8, s. 194.

renseignements en matière de sécurité ou de criminalité et ceux obtenus, sous le sceau du secret, de source canadienne ou du gouvernement d'un État étranger, d'une organisation internationale mise sur pied par des États ou de l'un de leurs organismes.
2001, ch. 27, art. 76; 2002, ch. 8, art. 194.

s-s. 40.1(4)

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

77. (1) Le ministre et le ministre de la Sécurité publique et de la Protection civile déposent à la Cour fédérale le certificat attestant qu'un résident permanent ou qu'un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée pour qu'il en soit disposé au titre de l'article 80.

s-s. 40.1(1)

(2) When the certificate is referred, a proceeding under this Act respecting the person named in the certificate, other than an application under subsection 112(1), may not be commenced and, if commenced, must be adjourned, until the judge makes the determination.
2001, c. 27, s. 77; 2002, c. 8, s. 194; 2005, c. 10, s. 34.

(2) Il ne peut être procédé à aucune instance visant le résident permanent ou l'étranger au titre de la présente loi tant qu'il n'a pas été statué sur le certificat; n'est pas visée la demande de protection prévue au paragraphe 112(1).
2001, ch. 27, art. 77; 2002, ch. 8, art. 194; 2005, ch. 10, art. 34.

s-s. 40.1(2)

78. The following provisions govern the determination:

78. Les règles suivantes s'appliquent à l'affaire :

(a) the judge shall hear the matter;

a) le juge entend l'affaire;

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

b) le juge est tenu de garantir la confidentialité des renseignements justifiant le certificat et des autres éléments de preuve qui pourraient lui être communiqués et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

s-s. 40.1(4), 40.1(5)

s-s. 40.1(4)

(c) the judge shall deal with

all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;	c) il 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;	s-s. 40.1(4)
(d) the judge shall examine the information and any other evidence in private within seven days after the referral of the certificate for determination;	d) il examine, dans les sept jours suivant le dépôt du certificat et à huis clos, les renseignements et autres éléments de preuve;	s-s. 40.1(4)
(e) on each request of the Minister or the Minister of Public Safety and Emergency Preparedness made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;	e) à chaque demande d'un ministre, il examine, en l'absence du résident permanent ou de l'étranger et de son conseil, tout ou partie des renseignements ou autres éléments de preuve dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;	None
(f) the information or evidence described in paragraph (e) shall be returned to the Minister and the Minister of Public Safety and Emergency Preparedness and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary;	f) ces renseignements ou éléments de preuve doivent être remis aux ministres et ne peuvent servir de fondement à l'affaire soit si le juge décide qu'ils ne sont pas pertinents ou, l'étant, devraient faire partie du résumé, soit en cas de retrait de la demande;	paragraph 40.1(5.1)(c)
(g) the information or evidence described in paragraph (e) shall not be included in the summary but may be considered by the judge in deciding whether the certificate is reasonable if the judge determines that the information or evidence is relevant but that its disclosure would be injurious to national security or to the safety of any person;	g) si le juge décide qu'ils sont pertinents, mais que leur divulgation porterait atteinte à la sécurité nationale ou à celle d'autrui, ils ne peuvent faire partie du résumé, mais peuvent servir de fondement à l'affaire;	paragraph 40.1(5.1)(d)
(h) the judge shall provide	h) le juge fournit au résident permanent ou à l'étranger,	

the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed;	afin de lui permettre d'être suffisamment informé des circonstances ayant donné lieu au certificat, un résumé de la preuve ne comportant aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;	Paragraph 40.1(4)(b)
(i) the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility; and	i) il donne au résident permanent ou à l'étranger la possibilité d'être entendu sur l'interdiction de territoire le visant;	
(j) the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.	j) il peut recevoir et admettre en preuve tout élément qu'il estime utile — même inadmissible en justice — et peut fonder sa décision sur celui-ci.	s. 40.1
2001, c. 27, s. 78; 2005, c. 10, s. 34(E).	2001, ch. 27, art. 78; 2005, ch. 10, art. 34(A).	s-s. 40.1(5)
79. (1) On the request of the Minister, the permanent resident or the foreign national, a judge shall suspend a proceeding with respect to a certificate in order for the Minister to decide an application for protection made under subsection 112(1).	79. (1) Le juge suspend l'affaire, à la demande du résident permanent, de l'étranger ou du ministre, pour permettre à ce dernier de disposer d'une demande de protection visée au paragraphe 112(1).	None
(2) If a proceeding is suspended under subsection (1) and the application for protection is decided, the Minister shall give notice of the decision to the permanent resident or the foreign national and to the judge, the judge shall resume the proceeding and the judge shall review the lawfulness of the decision of the Minister, taking into account the grounds referred to in subsection 18.1(4) of the Federal Courts Act.	(2) Le ministre notifie sa décision sur la demande de protection au résident permanent ou à l'étranger et au juge, lequel reprend l'affaire et contrôle la légalité de la décision, compte tenu des motifs visés au paragraphe 18.1(4) de la Loi sur les Cours fédérales.	None
2001, c. 27, s. 79; 2002, c. 8, s. 194.	2001, ch. 27, art. 79; 2002, ch. 8, art. 194.	
80. (1) The judge shall, on	80. (1) Le juge décide du caractère raisonnable du certificat et, le cas échéant, de la légalité de la décision	

the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision on the application for protection, if any, is lawfully made. (2) The judge shall quash a certificate if the judge is of the opinion that it is not reasonable. If the judge does not quash the certificate but determines that the decision on the application for protection is not lawfully made, the judge shall quash the decision and suspend the proceeding to allow the Minister to make a decision on the application for protection (3) The determination of the judge is final and may not be appealed or judicially reviewed.	du ministre, compte tenu des renseignements et autres éléments de preuve dont il dispose. (2) Il annule le certificat dont il ne peut conclure qu'il est raisonnable; si l'annulation ne vise que la décision du ministre il suspend l'affaire pour permettre au ministre de statuer sur celle-ci. (3) La décision du juge est définitive et n'est pas susceptible d'appel ou de contrôle judiciaire.	paragraph 40.1(4)(d) paragraph 40.1(4)(d)
81. If a certificate is determined to be reasonable under subsection 80(1), (a) it is conclusive proof that the permanent resident or the foreign national named in it is inadmissible; (b) it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing; and (c) the person named in it may not apply for protection under subsection 112(1).	81. Le certificat jugé raisonnable fait foi de l'interdiction de territoire et constitue une mesure de renvoi en vigueur et sans appel, sans qu'il soit nécessaire de procéder au contrôle ou à l'enquête; la personne visée ne peut dès lors demander la protection au titre du paragraphe 112(1).	None s-s. 40.1(7)
Detention 82. (1) … (2) A foreign national who is named in a certificate described in subsection 77(1) shall be detained without the issue of a warrant. 2001, c. 27, s. 82; 2005, c. 10, s. 34.	Détention 82. (1) … (2) L'étranger nommé au certificat est mis en détention sans nécessité de mandat. 2001, ch. 27, art. 82; 2005, ch. 10, art. 34.	s. 40 s. 40
83. (1) …	83. (1) … (2) Tant qu'il n'est pas statué sur le certificat, l'intéressé comparaît au moins une fois dans les six mois suivant	paragraph 40.1(7)(b)

(2) The permanent resident must, until a determination is made under subsection 80(1), be brought back before a judge at least once in the six-month period following each preceding review and at any other times that the judge may authorize. (3) A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.… 84. (1) … (2) A judge may, on application by a foreign national who has not been removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable, order the foreign national's release from detention, under terms and conditions that the judge considers appropriate, if satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person.	chaque contrôle, ou sur autorisation du juge. (3) L'intéressé est maintenu en détention sur preuve qu'il constitue toujours un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi. … 84. (1) … (2) Sur demande de l'étranger dont la mesure de renvoi n'a pas été exécutée dans les cent vingt jours suivant la décision sur le certificat, le juge peut, aux conditions qu'il estime indiquées, le mettre en liberté sur preuve que la mesure ne sera pas exécutée dans un délai raisonnable et que la mise en liberté ne constituera pas un danger pour la sécurité nationale ou la sécurité d'autrui.	s-s. 40.1(8), (9)

Grounds of inadmissibility opinion

A. Cited by the Ministers' certificate, August 13, 2001.

Immigration Act, 1985 as amended

Inadmissible persons 19. (1) No person shall be granted admission who is a member of any of the following classes: (a) … (b) … (c) … (d) ... (e) persons who there are	Personnes non admissibles 19. (1) Les personnes suivantes appartiennent à une catégorie non admissible : a) … b) … c) ... d) … e) celles dont il y a des motifs raisonnables de croire qu'elles

reasonable grounds to believe (i) … (ii) will, while in Canada, engage in or instigate the subversion by force of any government,	: (i) … (ii) soit, pendant leur séjour au Canada, travailleront ou inciteront au renversement d'un gouvernement par la force,
(iii) … (iv) are members of an organization that there are reasonable grounds to believe will (A) … (B) engage in or instigate the subversion by force of any government, or (C) engage in terrorism;	(iii) … (iv) soit sont membres d'une organisation dont il y a des mo tifs raisonnables de croire qu'elle : (A) … (B) soit travaillera ou incitera au renversement d'un gouvernement par la force, (C) soit commettra des actes de terrorisme;
(f) persons who there are reasonable grounds to believe	f) celles dont il y a des motifs raisonnables de croire qu'elles : (i) …
(ii) have engaged in terrorism, or (iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in	(ii) soit se sont livrées à des actes de terrorisme, (iii) soit sont ou ont été membres d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée :
(A) acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, or	(A) soit à des actes d'espionnage ou de subversion contre des institutions démocratiques, au sens où cette expression s'entend au Canada,
(B) terrorism, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;	(B) soit à des actes de terrorisme, le présent alinéa ne visant toutefois pas les personnes qui convainquent le ministre que leur admission ne serait nullement préjudiciable à l'intérêt national;

B. Security grounds under IRPA, s. 33 and s-s. 34(1)

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs

which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

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

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

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

(c) engaging in terrorism;

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

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

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

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

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

(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

THE PRINCIPLE OF NON-REFOULEMENT

115.(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of

115.(1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des

persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
(2) Subsection (1) does not apply in the case of a person …	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire : …
(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada. …	*b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada. …