Mahjoub v. Canada (Minister of Citizenship and Immigration), 2005 FC 156 (CanLII)

Date: 2005-01-31
Docket: IMM-6880-04
Parallel citations: (2005), 261 F.T.R. 95
URL: http://www.canlii.org/en/ca/fct/doc/2005/2005fc156/2005fc156.html

IMM-6880-04

2005 FC 156

Mohamed Zeki Mahjoub (*Applicant*)

v.

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

Indexed as: Mahjoub v. Canada (Minister of Citizenship and Immigration) (F.C.)

Federal Court, Dawson J.--Toronto, December 17, 2004; Ottawa, January 31, 2005.

Citizenship and Immigration -- Exclusion and Removal -- Removal of Refugees -- Judicial review of decision by Minister's delegate applicant be refouled to Egypt -- Security certificate found reasonable -- Applicant said to be member of terrorist group, Vanguards of Conquest, which seeks to overthrow by force Egyptian Government -- Whether delegate erred in concluding existence of "exceptional circumstances" justifying refoulement to torture -- Applicant relying on Charter, international law -- Application granted, matter remitted for redetermination -- S.C.C.'s teaching in Suresh v. Canada (Minister of Citizenship and Immigration) considered -- Delegate relied on F.C. Judge's decision at certificate reasonableness hearing, public summary of security intelligence report -- Delegate suspicious of applicant's employment by Usama bin Laden -- Found applicant substantial danger to Canadian security -- Found applicant might well suffer human rights abuses if refouled -- Doubted Egyptian government could be trusted as to assurances given in diplomatic notes -- Considered applicant's continued detention not an option -- Delegate's decision turned on facts, reversed only if patently unreasonable -- As only CSIS narrative before delegate, unable to conduct independent assessment of threat risk -- Issue different than that before F.C. Judge at certificate reasonableness hearing, at which truth of facts not at issue -- Delegate disobeyed S.C.C. teaching in Suresh -- Delegate must give reasons for rejecting significant evidence -- Must consider whether individual's ability to participate in clandestine activities has been neutralized -- Should consider alternatives to refoulement -- Request for amicus curiae rejected -- Constitutional issues not dealt with in absence of proper evidentiary record.

This was an application for judicial review of the Minister's delegate's decision to remove a Convention refugee to Egypt although he would there be at substantial risk of ill-treatment and human rights abuses. The Solicitor General of Canada and the Minister of Citizenship and Immigration (the Ministers) had each signed a security certificate, evincing their opinion that applicant belonged to an inadmissible class. It was their belief that he will instigate the subversion by force of the Egyptian government and is a member of the Vanguards of Conquest (VOC), an Al Jihad (AJ) faction which engages in terrorism. Nadon J. found the certificate reasonable. The delegate noted that, in *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada

had "endorsed" a procedure for balancing the danger presented by the individual against the risk to him if deported. The delegate took into consideration the determination of Nadon J. and the public summary of the security intelligence report, which suggested that applicant is a high-ranking member of VOC, an Islamic terrorist organization. The delegate found this report persuasive. She also noted that, contrary to applicant's submission that he had never even been charged with an offence anywhere, according to Amnesty International, he had been charged in Egypt of belonging to an armed group and sentenced *in absentia*. Furthermore, CSIS reported that he was indicted by Egypt's Higher Military Court, convicted and sentenced *in absentia* to 15 years for establishing terrorist training camps in foreign countries. She considered the applicant's submission that he was the victim of false accusations due to his religious beliefs but found no reason to deviate from Nadon's conclusion. The delegate noted the applicant's admission that he had been employed by Usama bin Laden although he denied knowledge of any terrorist agenda. In the end, she was convinced that the applicant did present a substantial danger to Canadian security as a senior member of an organization responsible for attacks on military, diplomatic and civilian targets around the world. Finally, the delegate pointed out that Usama bin Laden has identified Canada as an Al-Qaida target.

On the other side of the balancing exercise, the delegate considered whether there were "substantial grounds" to support applicant's assertion that he will be at risk if returned to Egypt. She found credible reports that, while not officially sanctioned by government, torture is sometimes carried out at Egyptian detention centres by state security force members. An Amnesty International bulletin advised that, in Egypt, suspected members of armed Islamic groups are frequently tortured. The delegate concluded that, should applicant be refouled, he would be taken into custody to stand trial and might suffer human rights abuses within a short time of detention. She doubted that the Egyptian government would honour assurances given in the form of diplomatic notes that, if returned, applicant would be dealt with in accordance with constitutional and human rights laws. That said, the delegate concluded that applicant poses an extraordinary danger to Canada and so was caught by Act, paragraph 115(2)(*b*). Because of comments by the Federal Court of Appeal in *Ahani v. Canada (Minister of Citizenship and Immigration)* about indefinite duration of custody, continued detention was not an option.

The Ministers applied, under Act, section 87, for an order authorizing, on national security grounds, the non-disclosure to applicant and his counsel of the information considered by the Minister's delegate. This was supported by a confidential affidavit and upon the affiant's examination by the Court, it was disclosed that the confidential information did not contain the entire, original security intelligence report supporting issuance of the security certificate. All it contained was the CSIS conclusions and beliefs concerning applicant. Not before the Court were confidential documents referred to in footnotes. The Ministers' section 87 application was, however, granted.

Applicant's position was that the Minister's delegate erred in concluding that there existed "exceptional circumstances" such as to justify his refoulement to a place where he would be subjected to cruel, unusual treatment, contrary to Charter, section 12. He also relied on the section 15 guarantee of equality in that his removal was based upon his non-citizenship. Applicant further argued that, under international law, return to torture is prohibited.

Held, the application should be allowed and the matter remitted for redetermination by another delegate.

Given that this case turned on its facts, the Court must adopt a deferential approach and reverse the delegate's decision only if patently unreasonable as made arbitrarily, in bad faith, disregarding appropriate considerations or unsupported by the evidence. While, in *Suresh*, the Supreme Court left open for some future case a determination of the "ambit of an exceptional discretion to deport to torture, if any", certain principles were articulated. In an application of the principles established in *Suresh* to the matter at bar, the decisive issue was the delegate's conclusion that the danger posed by applicant met the exceptional circumstances test. Thus, the court's inquiry should be directed to whether there is evidence which supports the delegate's finding of danger to Canadian security. The delegate's conclusion was not supported by the evidence and so her decision had, in its entirety, to be set aside. She could not have properly balanced the competing interests in the absence of a proper foundation for her decision as to the danger posed by applicant. All she had to go on was the narrative prepared by CSIS; she was therefore in no position to conduct an independent assessment of the threat risk. Furthermore, the conclusions of CSIS and Nadon J. upon which the delegate relied were not directed primarily at assessing the national security risk that applicant may present. In reviewing the reasonableness of a security certificate, at issue is whether there

are "reasonable grounds to believe" certain facts and not the truth of those facts. The delegate contravened the Supreme Court's teaching in *Suresh* when she conflated a finding that applicant was a person described in section 19 of the former Act with a finding that he was a danger to Canadian security. The discretion conferred by Act, subsection 115(2) cannot be exercised absent evidence upon which it can be concluded that the person concerned poses a danger to the security of Canada. Reliance may not be placed on the fact that the individual is one described in what is now subsection 34(1) of the Act. That does not mean that all of the original security intelligence information has to be reviewed, but the delegate must consider and weigh all of the evidence submitted and decide whether it is reliable. Reasons must be given for rejecting significant evidence. The danger posed must be articulated before the competing interests are weighed. Alternatives to refoulement--such as deportation to a third country or continued detention--should be considered.

Applicant's request for the appointment of an *amicus curiae* to serve when applicant and his counsel are excluded was rejected for the reasons given by the Federal Court in *Harkat (Re)*. Such an appointment was unnecessary and would have been contrary to Parliament's intent.

The constitutional issues raised by applicant were not dealt with. While the Supreme Court of Canada has left open the question of whether deportation to torture can ever be justified, there are powerful *indicia* that this is fundamentally unacceptable and shocks the Canadian conscience. Upon redetermination, a decision in applicant's favour may be given. If not favourable, there would then be a proper evidentiary record to support a determination of the constitutional issues. It was most important that there exist evidence to inform the assessment of exceptional circumstances and the danger said to be posed to our society.

statutes and regulations judicially

considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 7, 12, 15.

Immigration Act, R.S.C., 1985, c. I-2 , s. 19(1)(*e*) (as am. by S.C. 1992, c. 49, s. 11), (*f*) (as am. *idem*).
Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 34(1), 78, 87, 115.

cases judicially considered

applied:

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1; 2002 SCC 1; *Harkat (Re)*, 2004 FC 1717 (CanLII), [2005] 2 F.C.R. 416; 2004 FC 1717.

considered:

Canada (Minister of Citizenship and Immigration) v. Mahjoub, 2001 FCT 1095 (CanLII), [2001] 4 F.C. 644; (2001), 212 F.T.R. 42; 2001 FCT 1095; *Ahani v. Canada (Minister of Citizenship and Immigration)* 2000 CanLII 15800 (F.C.A.), (2000), 24 Admin. L.R. (3d) 171; 77 C.R.R. (2d) 144; 7 Imm. L.R. (3d) 1; 261 N.R. 40 (F.C.A.).

referred to:

Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), 1995 CanLII 86 (S.C.C.), [1995] 2 S.C.R. 97; (1995), 124 D.L.R. (4th) 129; 31 Admin. L.R. (2d) 261; 39 C.R. (4th) 141; 180 N.R. 1; *R. v. Mills*, 1999 CanLII 637 (S.C.C.), [1999] 3 S.C.R. 668; (1999), 244 A.R. 201; 180 D.L.R. (4th) 1; [2000] 2 W.W.R. 180; 75 Alta. L.R. (3d) 1; 139 C.C.C. (3d) 321; 28 C.R. (5th) 207; 69 C.R.R. (2d) 1; 248 N.R. 101.

APPLICATION for judicial review of decision by Minister's delegate that Convention refugee be refouled to Egypt, even though there was a substantial risk of him being subjected to torture. Application granted, matter remitted for redetermination.

appearances:

John R. Norris and *Barbara L. Jackman* for applicant.

Mielka Visnic and *Donald A. MacIntosh* for respondents.

solicitors of record:

Ruby & Edwardh, Toronto, and *Jackman & Associates*, Toronto, for applicant.

Deputy Attorney General of Canada for respondents.

The following are the reasons for order rendered in English by

[1]Dawson J.: Mr. Mohamed Zeki Mahjoub is an Egyptian national who came to Canada in December 1995. In October 1996, he was found to be a Convention refugee.

[2]In the spring of 2000, the Solicitor General of Canada and the Minister of Citizenship and Immigration (together the Ministers) each signed a security certificate, evincing their opinion that Mr. Mahjoub is a member of the inadmissible classes of persons described in subparagraph 19(1)(*e*)(ii) [as am. by S.C. 1992, c. 49, s. 11], clauses 19(1)(*e*)(iv)(B) [as am. *idem*] and 19(1)(*e*)(iv)(C) [as am. *idem*], subparagraph 19(1)(*f*)(ii) [as am. *idem*] and clause 19(1)(*f*)(iii)(B) [as am. *idem*] of the then *Immigration Act*, R.S.C., 1985, c. I-2 (former Act). Such opinion was certified by the Ministers to have been based upon a security intelligence report received and considered by them. That security intelligence report, in turn, expressed the belief of the Canadian Security Intelligence Service (CSIS or the Service) that Mr. Mahjoub was a member of the inadmissible classes referred to above, and set out the grounds upon which CSIS relied in order to form the belief that Mr. Mahjoub:

(a) will, while in Canada, engage in, or instigate, the subversion by force of the Government of Egypt;

(b) is a member of the Vanguards of Conquest (VOC), a faction of Al Jihad (AJ). The VOC is 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;

(c) is, and was, a member of the VOC, which is an organization that there are reasonable grounds to believe is, or was, engaged in terrorism; and

(d) has engaged in terrorism.

[3]Appendix A to these reasons sets out the subparagraphs and clauses of the former Act referred to above.

[4]The security certificate issued by the Ministers was found to be reasonable by Mr. Justice Nadon, then a judge of this Court. See: *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 2001 FCT 1095 (CanLII), [2001] 4 F.C. 644 (T.D.).

[5]By a decision dated July 22, 2004, a delegate of the Minister of Citizenship and Immigration (Minister) decided that Mr. Mahjoub should be removed to Egypt, pursuant to paragraph 115(2)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), notwithstanding that Mr. Mahjoub "could be at substantial risk of ill-treatment and human rights abuses such that it would preclude his removal based on section 115(1) of the Act".

[6]Mr. Mahjoub brings this application for judicial review of that decision.

APPLICABLE LEGISLATION

[7]Subsection 115(1) of the Act generally prohibits the government from returning ("refouler") a protected person, including a Convention refugee, to a country where he or she would be at risk of persecution or torture or cruel or unusual treatment or punishment. Subsection 115(2) of the Act sets out certain exceptions to that general principle. At issue in this case is the provision which renders the general protective provision inapplicable to a person who is

inadmissible on grounds of security if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of a danger posed to the security of Canada.

[8]Section 115 of the Act is as follows:

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 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

(2) Subsection (1) does not apply in the case of a person

(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(*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.

(3) A person, after a determination under paragraph 101(1)(*e*) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.

THE ISSUES

[9]Mr. Mahjoub frames the issues to be decided in this application to be:

1. Did the Minister's delegate err in law in ignoring or misinterpreting evidence?

2. Did the Minister's delegate err in law in concluding that there were "exceptional circumstances" to justify Mr. Mahjoub's "refoulement" to Egypt? More specifically, Mr. Mahjoub argues that:

(i) "exceptional circumstances" equate to "exceptional conditions". At common law, in the context of the division of powers, that concept has been limited to "extreme crises" and that threshold has not been met in this case.

(ii) a return to torture or other form of cruel treatment or punishment would breach the principles of fundamental justice guaranteed by section 7 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], and Canada does not face circumstances which would permit the state to justify an infringement of section 7 of the Charter.

(iii) returning Mr. Mahjoub to Egypt would subject him to cruel and unusual treatment, so as to violate the guarantee contained in section 12 of the Charter.

(iv) Mr. Mahjoub's removal to torture would violate his right to equality protected by section 15 of the Charter because such removal is premised on the fact that he is not a Canadian citizen.

(v) international law prohibits both torture and return to torture, and under international law, no exceptional circumstances exist that would allow for derogation from the fundamental prohibition against return to torture.

THE DECISION OF THE MINISTER'S DELEGATE

[10]In my view, this application turns upon its facts, and specifically upon the reasons for the delegate's decision and the nature of the record before the delegate. I will, therefore, review in some detail the reasons given by the delegate for her decision.

[11]The Minister's delegate, in her lengthy written decision, began by reviewing the circumstances concerning Mr. Mahjoub's arrival in Canada, the determination that he was a Convention refugee, the issuance of the security

certificate, the conclusion of this Court that the security certificate was reasonable, the making of a deportation order against Mr. Mahjoub, and the notification to Mr. Mahjoub that the Department of Citizenship and Immigration intended to seek the opinion of the Minister as to whether Mr. Mahjoub should not be allowed to remain in Canada on the basis that he constitutes a danger to Canada's security.

[12]After setting out section 115 of the Act, the Minister's delegate observed that, in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, the Supreme Court of Canada "endorsed" a procedure for making a determination under what is now subsection 115(2) of the Act. Such procedure was said to require the Minister to balance the danger posed by the person named in the security certificate against the risk to that person if removed from Canada. The Minister's delegate then turned to this balancing exercise.

1. Danger to the security of Canada

[13]The Minister's delegate began by stating "I have completed a thorough review of the evidence before me in the case of Mr. Mahjoub in order to determine whether or not he poses a danger to the security of Canada pursuant to Section 115(2) of the Act". She then considered the nature of the VOC and the AJ.

(i) The VOC and the AJ

[14]The delegate considered Mr. Justice Nadon's decision on the reasonableness of the certificate, noting his statement [at paragraph 48] that "I am satisfied that there are reasonable grounds to believe that the AJ and the VOC have engaged in terrorism, and that there are reasonable grounds to believe that the respondent was and is a member of one or more of these organizations". The delegate also reviewed the public summary of the security intelligence report which described the various activities and terrorist attacks with which the AJ and the VOC have been linked since 1987. The delegate noted that Mr. Mahjoub did not present any evidence or submissions that the AJ or VOC were not organizations that engage in, or had engaged in, terrorism.

[15]On this basis, the delegate concluded that there are reasonable grounds to believe the AJ and the VOC are organizations that have engaged in, and continue to engage in, terrorism.

(ii) Mr. Mahjoub's involvement with the VOC and the AJ

[16]The delegate took note of the fact that, during his security certificate hearing in 2000, Mr. Mahjoub denied having any involvement with the AJ or the VOC, and that he had repeated this denial. The delegate observed that Mr. Mahjoub offered no additional evidence to support this claim.

[17]The delegate referred to the public, Federal Court summary of the security intelligence report where, at paragraph 43, it stated:

The Service has concluded that Mohamed Zeki MAHJOUB is a high-ranking member of the Islamic terrorist organization VOC, a faction of the AJ, and has engaged in terrorism. The Service further concludes that MAHJOUB is far more involved and important to the AJ/VOC than he has admitted to Canadian authorities. As a member of the Shura Council, MAHJOUB will normally participate in the decision-making process of the VOC and therefore be responsible for authorizing all terrorist operations carried out by the VOC along with the other Shura Council members.

[18]The delegate indicated that, after reviewing the security intelligence report "and the evidence it presents in support of their [*sic*] conclusion that Mr. Mahjoub is a high-ranking member of the VOC", she found the report persuasive.

[19]The delegate noted that Mr. Mahjoub had submitted that he had never been charged or convicted of any offence anywhere in the world. However, she considered information from Amnesty International indicating that Mr. Mahjoub was charged in Egypt as being a member of an armed group and sentenced *in absentia* in April 1999. She observed that the Service had also reported that Mr. Mahjoub was indicted by Egypt's Higher Military Court and found guilty and sentenced *in absentia* to 15 years of imprisonment for inciting violent operations in Egypt and setting up training camps in foreign states with a view to carrying out terrorist operations. Based on this

information, the delegate concluded that Mr. Mahjoub had been charged with an offence in Egypt, specifically related to terrorist activities.

[20]The delegate considered Mr. Mahjoub's submission that he was a victim of false accusations and persecution because of his religious beliefs. However, the delegate saw no reason to reach a different conclusion from Justice Nadon that there are reasonable grounds to believe that Mr. Mahjoub is a member of a terrorist organization, and that he poses a danger to the security of Canada.

(iii) Links to terrorist figures and organizations

[21]The delegate went on to note that she had reviewed information that further linked Mr. Mahjoub to terrorist organizations and personnel, in particular Usama bin Laden, Mubarak Al-Duri, Al-Zawaheri, and the Khadr family. The delegate cited part of paragraph 43 of the public summary of the security intelligence report as follows:

The Service's information demonstrates that the vast preponderance of MAHJOUB's contacts are with individuals associated with the international Islamic terrorist milieu, especially individuals linked to the AJ/VOC. The Service also believes that the degree of MAHJOUB's dedication to the cause, and MAHJOUB's support for the AJ/VOC's terrorist agenda, is such that he would resort to violence and would direct others to resort to violence if he was ordered to do so by leaders such as Osama bin Laden, AJ leader, Tharwat Salah Shihatah, and VOC leader, Ahmad Hassan Agiza.

[22]The delegate noted that, by his own statements, Mr. Mahjoub had confirmed his links with Usama bin Laden and the Khadr family. In an affidavit filed in the Federal Court, Mr. Mahjoub had stated that he was employed by Usama bin Laden, had met with bin Laden on several occasions, and that his supervisor was Mubarak Al-Duri. Mr. Mahjoub's affidavit explained that he was a mere employee of Usama bin Laden and was unaware of any terrorist agenda. However, the delegate noted the fact that Mr. Mahjoub had no experience, yet was hired by bin Laden to supervise a project that covered one million acres with 4,000 employees under his supervision, at a rate of pay of $1,500 U.S. per month, when the average wage in Sudan was $150 U.S. per month. This was said by the delegate to suggest that Mr. Mahjoub's relationship with bin Laden was more significant. As well, while initially denying that he had any knowledge of Mr. Ahmed Saeed Khadr, Mr. Mahjoub had resided with the in-laws of Mr. Khadr when he first arrived in Canada, and later admitted that he knew Mr. Khadr.

[23]The delegate stated that she arrived at a similar conclusion to Justice Nadon that Mr. Mahjoub's explanation regarding his relationship with Usama bin Laden and Mubarak Al-Duri did not explain his true connection with these individuals. The delegate noted that she had no reason not to follow Justice Nadon's conclusion that Mr. Mahjoub's explanations were attempts to conceal any links to persons or organizations which have engaged, or will engage, in terrorism.

(iv) Conclusion with respect to danger to the security of Canada

[24]The delegate stated that, "[o]n review of the totality of the evidence", it was her opinion that Mr. Mahjoub poses a substantial danger to the security of Canada. She stated that Mr. Mahjoub "is [a] senior member of the AJ and the VOC", which explicitly advocate violence as a means to establish an Islamic state and have been involved in attacks on military, diplomatic and civilian targets around the world. The delegate also noted that the AJ and the VOC have direct links to Usama bin Laden and Al-Qaida. Public documents reveal that Usama bin Laden has named Canada as a legitimate Al-Qaida target. The CSIS investigation concluded that AJ and VOC activities in Canada are in support of the organizations' objective of creating an Islamic state by force.

2. Risk to Mr. Mahjoub if returned to Egypt

[25]The delegate then turned to the other half of the balancing exercise. She stated that she had considered evidence of the type referred to by the Supreme Court of Canada in the following quote from *Suresh* [at paragraph 39]:

The threshold question here is in large part a fact-driven inquiry. It requires consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be

tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. It may also involve a reassessment of the refugee's initial claim and a determination of whether a third country is willing to accept the refugee.

[26]The delegate referred to Mr. Mahjoub's claim that he will be tortured if returned to Egypt and noted that there must be "substantial grounds" for risk. The delegate then considered the following factors.

(i) Human rights record in Egypt

[27]The U.S. Department of State, Amnesty International, and Human Rights Watch have reported that, while not officially sanctioned by the government, some members of the state security forces in Egypt continue to commit human rights violations, including torture in detention centres throughout the country. The delegate accepted these reports as being credible as they related to the general situation regarding human rights violations in Egypt. The delegate also accepted as credible statutory declarations provided by Amnesty International and an expert in Islamic law, which declarations provided evidence of human rights abuses against individuals alleged to be members of armed Islamic groups.

(ii) Personal risk faced by Mr. Mahjoub

[28]Mr. Mahjoub submitted that he would be tortured and killed if returned to Egypt. The delegate considered Mr. Mahjoub's Personal Information Form in which he stated that he had previously been tortured in Egypt because he was a suspected member of the Muslim Brotherhood. In earlier submissions, Mr. Mahjoub had asserted that other alleged members of armed Islamic groups who are returned to Egypt are tortured and sentenced to death, so that he too would be tortured and killed.

[29]The delegate took into account an Amnesty International bulletin relating to Mr. Mahjoub which stated that suspected members of armed Islamic opposition groups are frequently tortured. The bulletin referred to individuals who were sentenced *in absentia* by the Supreme Military Court for being members of an armed Islamic group, and noted two members of this group who were returned to Egypt from Sweden were held for more than a month in *incommunicado* detention.

[30]On the issue of the risk faced by Mr. Mahjoub, the delegate concluded:

I accept that Mr. Mahjoub was charged with being a member of an armed Islamic group and sentenced *in absentia* by the Supreme Military Court in April 1999 as reported by Amnesty International and noted above. By this sentencing, Egyptian authorities have made it clear that they believe that Mr. Mahjoub is a member of a terrorist organization who poses a serious danger to their security. I believe that Mr. Mahjoub will be taken into custody upon his return to Egypt to stand trial for cases in which he is accused of acts leading to threats against Egyptian security. In consideration of the reports regarding human rights violations in Egypt towards members of the VOC and AJ, it is my opinion that on the balance of probabilities, Mr. Mahjoub could suffer ill-treatment and human rights abuses soon after he is detained.

(iii) Assurances received from the Arab Republic of Egypt

[31]The delegate noted that the Canadian government had received assurances from Egypt that Mr. Mahjoub would be accorded his constitutional rights if returned to Egypt. These assurances took the form of diplomatic notes received by the Canadian government on three separate occasions. In them, Egyptian officials confirmed that Mr. Mahjoub, if returned to Egypt, would be treated in full conformity with constitutional and human rights laws.

[32]Mr. Mahjoub had argued that these assurances would not be respected, and submitted general reports concerning human rights abuses in Egypt, as well as reports from Amnesty International, Human Rights Watch, and an expert in Islamic law. The reports documented the experience of other Egyptians accused of similar terrorist activities who were sent back to Egypt from other countries and who, notwithstanding assurances, were subjected to alleged human rights abuses, ill-treatment and *incommunicado* detention.

[33]The delegate reviewed the reports and concluded that they presented a credible basis for calling into question the extent to which the Egyptian government would honour its assurances.

(iv) Conclusion with respect to the risk faced by Mr. Mahjoub

[34]The delegate concluded that she believed that Mr. Mahjoub would be taken into custody upon his return to Egypt to stand trial for cases in which he is accused of acts leading to threats against Egyptian security. Because Mr. Mahjoub is believed to be a member of the AJ and charged with acts of terrorism in Egypt, and considering the evidence of human rights abuses in that country, the delegate concluded that, on a balance of probabilities, Mr. Mahjoub could suffer ill-treatment and human rights abuses soon after he is detained.

3. Weighing the risk to Mr. Mahjoub against the danger to Canada

[35]The Minister's delegate concluded that Mr. Mahjoub could be at substantial risk of ill-treatment and human rights abuses such that would preclude his removal based on subsection 115(1) of the Act. However, it was her opinion that Mr. Mahjoub should not be allowed to remain in Canada because he is a danger to the security of Canada so as to fall within the provisions of paragraph 115(2)(*b*) of the Act. This was based upon her conclusion that Mr. Mahjoub poses an extraordinary danger to Canada because he is a senior member of the AJ and VOC and as such would normally participate in authorizing terrorist operations. The delegate rejected continued detention as an option because of comments made by the Federal Court of Appeal in *Ahani v. Canada (Minister of Citizenship and Immigration)* 2000 CanLII 15800 (F.C.A.), (2000), 24 Admin. L.R. (3d) 171, at paragraph 14 that "custody cannot . . . be of indefinite duration, at least not without good reason". The delegate did not consider whether the avoidance of torture would constitute good reason. Any form of release was viewed as risking "Mr. Mahjoub being available to further a potential terrorist threat".

[36]Before leaving the delegate's decision, I note for completeness that the delegate did not have before her, and did not consider, the Court's reasons given with respect to Mr. Mahjoub's detention review. As well, the delegate did refer to the best interests of Mr. Mahjoub's Canadian children. That consideration is not relevant to the view I take of this application and, therefore, I do not describe her reasons on that issue in any detail.

THE TRIBUNAL RECORD AND THE MINISTERS' SECTION 87 APPLICATION

[37]The Director of Security Review of Citizenship and Immigration Canada filed in Court certified copies of the tribunal record, containing all of the open-source material considered by the Minister's delegate. The Ministers then applied, pursuant to section 87 of the Act, for an order authorizing the non-disclosure to Mr. Mahjoub and his counsel of the information considered by the Minister's delegate where the disclosure of such information would be injurious to national security or to the safety of any person (confidential information). Sections 87 and 78 of the Act (to which section 87 refers) are contained in Appendix B to these reasons.

[38]The Ministers' section 87 application was supported by both a public and a confidential affidavit. In the confidential affidavit, the affiant set out the basis for his view that disclosure of the confidential information would be injurious to national security or to the safety of any person. All parties filed public motion records that set out their written submissions with respect to the section 87 application.

[39]On November 26, 2004, the Court heard the public submissions of counsel for the parties and then, in the absence of Mr. Mahjoub and his counsel, heard the submissions of counsel for the Ministers based upon the confidential record.

[40]Thereafter, on December 2, 2004, the Court examined the affiant of the confidential affidavit in the absence of Mr. Mahjoub and his counsel. The examination was directed to confirming the content of the confidential information before the Minister's delegate and to probing the confidential evidence that disclosure of the confidential information would be injurious to national security or to the safety of any person. During the course of the Court's examination of the affiant, it was disclosed that the confidential information did not consist of the entire, original security intelligence report that supported the issuance of the security certificate. Rather, the delegate had before her only the narrative portion of the security intelligence report that set out the Service's conclusions and beliefs concerning Mr. Mahjoub and which contains numerous footnotes that reference other confidential documents. Not before the delegate, and therefore not before the Court on this application for judicial review, were the confidential documents referred to in the footnotes which are contained in confidential appendices to the security intelligence report. Those documents set out the detailed information that the Service

relied upon to come to its conclusions and beliefs.

[41]This fact was communicated to counsel by the Court's order of December 3, 2004. By such order, the Court also confirmed that credible evidence had satisfied the Court that disclosure of any portion of the confidential information not already summarized and provided to Mr. Mahjoub would be injurious to the national security of Canada or to the safety of any person. Accordingly, the Ministers' section 87 application was allowed.

ANALYSIS

(i) Standard of review

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

(ii) Principles governing the exercise of discretion

[43]Given that the Court is obliged to determine whether the Minister's delegate exercised her decision-making power within the constraints imposed by the Act and the Constitution, it is helpful to review the principles enunciated by the Supreme Court in *Suresh*. While at paragraph 78 of its reasons, the Court left for future cases the determination of the "ambit of an exceptional discretion to deport to torture, if any", the Court did articulate the following principles:

- Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment that would be unconstitutional if imposed directly by Canada on Canadian soil. The approach is one of balancing competing interests. Whether there is a real possibility of an adverse effect on Canada if the individual remained in Canada must be weighed and balanced against the possible injustice to the individual if deported;

- the better view of international law is that it rejects deportation to torture, even where national security interests are at stake;

- both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to the 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 that are guaranteed by section 7 of the Charter;

- one of the factors to be evaluated by the decision maker is the degree of probability of prejudice to national security;

- reference, in section 19 of the former Act, to membership in a terrorist movement should not be conflated with "danger to the security of Canada". The phrase "danger to the security of Canada" must mean something more than a person described in section 19 of the former Act;

- subject to that qualification [at paragraph 85], a "fair, large and liberal interpretation in accordance with international norms must be accorded to `danger to the security of Canada' in deportation legislation". The determination of what constitutes a "danger to the security of Canada" is highly fact-based and political in a general sense. Where [at paragraph 85] "the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada", the Minister's decision should not be interfered with;

- to return a refugee to torture requires evidence of a serious threat to national security. The threat must be grounded on objectively reasonable suspicion based on evidence.

(iii) Application of these principles to this application

[44]In view of the delegate's acceptance of Mr. Mahjoub's submission that he would be taken into custody upon his return to Egypt, and her conclusion that Mr. Mahjoub could suffer ill-treatment and human rights abuses soon after that detention, the decisive issue is the delegate's further conclusion that the danger posed by Mr. Mahjoub to Canada is such as to meet the test of exceptional circumstances referred to by the Supreme Court in *Suresh*.

[45]Assuming, without deciding, that there is some ambit of an exceptional discretion to deport to torture, the Court's inquiry is therefore properly directed to whether there is evidence that reasonably supports the delegate's finding of danger to the security of Canada.

[46]In this regard, the delegate's decision with respect to the danger posed by Mr. Mahjoub was based upon the following:

- Justice Nadon concluded that there are reasonable grounds to believe that the AJ and the VOC have engaged in terrorism and there are reasonable grounds to believe that Mr. Mahjoub was, and is, a member of one or more of these organizations.

- CSIS concluded that the VOC and the AJ have engaged in terrorism.

- CSIS concluded that Mr. Mahjoub is a high-ranking member of the VOC, which is a faction of the AJ.

- the delegate found persuasive the security intelligence report "and the evidence it presents" in support of CSIS' conclusion that Mr. Mahjoub is a high-ranking member of the VOC.

- Mr. Mahjoub was charged with an offence in Egypt relating to terrorist activities.

- CSIS concluded that Mr. Mahjoub has significant contacts with terrorist figures and organizations and Mr. Mahjoub confirmed some association with Usama bin Laden and the Khadr family. The delegate believed these relationships were more significant than Mr. Mahjoub admitted.

- Justice Nadon concluded, and she agreed, that Mr. Mahjoub attempted to conceal his links to persons or organizations which have engaged or will engage in terrorism.

[47]For the following reasons, I have concluded that the delegate's conclusion as to the danger posed by Mr. Mahjoub, premised as it was on the above-listed factors, was not supported on the evidence before the decision maker. As a result, such decision was patently unreasonable. It follows that the entire decision must be set aside because, without a proper foundation for the decision as to the danger said to be posed by Mr. Mahjoub, the delegate could not properly balance the competing interests.

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

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

[50]The security intelligence report is, as noted above, a narrative statement of the Service's grounds to believe that Mr. Mahjoub was a person who is a member of the inadmissible classes of person described in the subparagraphs and clauses of subsection 19(1) of the former Act listed in paragraph 2 above. The Ministers have certified their belief, based upon the security intelligence report as a whole, including the reference documents, that Mr. Mahjoub is a person described in those subparagraphs and clauses of the former Act. Such certification was then referred to this Court for determination of the reasonableness of the security certificate. It was in that context that Mr. Justice Nadon made his findings and determined the security certificate to be reasonable.

[51]As for Justice Nadon's findings, when reviewing the reasonableness of a security certificate, at issue is whether there are "reasonable grounds to believe" certain facts. The issue is not whether those facts are true. Thus, at paragraphs 18 and 19 of his decision as to the reasonableness of the security certificate Mr. Justice Nadon wrote:

In *Attorney General of Canada v. Jolly* [1975] F.C. 216 (C.A.), Thurlow J.A. (as he then was), explains the burden resting upon the Minister with regard to the expression "reasonable grounds to believe", in the following terms, at pages 225 and 226:

> But where the fact to be ascertained on the evidence is whether there are reasonable grounds for such a belief, rather than the existence of the fact itself, it seems to me that to require proof of the fact itself and proceed to determine whether it has been established is to demand the proof of a different fact from that required to be ascertained. It seems to me that the use by the statute of the expression "reasonable grounds for believing" implies that the fact itself need not be established and that evidence which falls short of proving the subversive character of the organization [page 657] will be sufficient if it is enough to show reasonable grounds for believing that the organization is one that advocates subversion by force, etc. In a close case the failure to observe this distinction and to resolve the precise question dictated by the statutory wording can account for a difference in the result of an inquiry or an appeal.

Then, at pages 228 and 229, he adds the following:

> Subsection 5(*l*) does not prescribe a standard of proof but a test to be applied for determining admissibility of an alien to Canada, and the question to be decided was whether there were reasonable grounds for believing, etc., and not the fact itself of advocating subversion by force, etc. No doubt one way of showing that there are no reasonable grounds for believing a fact is to show that the fact itself does not exist. But even when *prima facie* evidence negativing the fact itself had been given by the respondent there did not arise an onus on the Minister to do more than show that there were reasonable grounds for believing in the existence of the fact. In short as applied to this case it seems to me that even after *prima facie* evidence negativing the fact had been given it was only necessary for the Minister to lead evidence to show the existence of reasonable grounds for believing the fact and it was not necessary for him to go further and establish the fact itself of the subversive character of the organization. This, in the circumstances of this case, in my opinion, invalidates the Board's decision.

I am of the view that in determining whether the Minister and the Solicitor General have proved that there are reasonable grounds to believe that a person is a person described in subparagraph 19(1)(*c*.1)(ii), paragraph 19(1)(*c*.2), (*d*), (*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) or subparagraph 19(2)(*a*.1)(ii), the applicable standard is that of the balance of probability. In *Canada (Minister of Citizenship and Immigration) v. Singh* (1998), 151 F.T.R. 101 (F.C.T.D.), Rothstein J. (as he then was) makes the following remarks at paragraphs 2-3, with which I agree entirely:

> In section 40.1 proceedings, determinations involving paragraphs 19(1)(*e*) and (*f*) require proof of the existence of "reasonable grounds to believe certain facts" as opposed to the existence of the facts themselves. Where there are reasonable grounds to believe that a person is a member of an organization, there must also be reasonable grounds to believe that the organization is engaged in subversion or terrorism. See *Farahi-Mahdavieh* (1993), 63 F.T.R. 120 (T.D.), at paras. 11 and 12. Proof of reasonable grounds to believe requires that the evidence demonstrates an objective basis for the reasonable grounds. See *R. v. Zeolkowski*, 1989 CanLII 72 (S.C.C.), [1989] 1 S.C.R. 1378, at p. 1385.
>
> The standard of proof is proof on a balance of probabilities. See *Farahi-Mahdavieh*, supra, and *Al Yamani v. Canada* (1995), 103 F.T.R. 105 (T.D.), at paras. 64 and 65. [Underlining added.]

[52]In the result, Justice Nadon considered the existence of reasonable grounds for the Ministers' belief and made no decision as to the nature or extent of the risk Mr. Mahjoub poses to Canada's security.

[53]By failing to have before her any of the underlying detailed information that may have enabled the delegate to assess the danger Mr. Mahjoub may pose to national security, and by instead relying upon: (i) the grounds put forth by CSIS in the security intelligence report to support its view that Mr. Mahjoub was a person described in subsection 19(1) of the former Act*;* and (ii) Mr. Justice Nadon's conclusion that the security certificate was

reasonable, the Minister's delegate conflated a finding that Mr. Mahjoub was a person described in section 19 of the former Act with a finding that he was a danger to the security of Canada. This is contrary to the express statement of the Supreme Court of Canada in *Suresh* that "danger to the security of Canada" means something more than that a person is described in subsection 19(1) of the former Act.

[54]Given the principles enunciated by the Supreme Court in *Suresh*, I conclude that anyone exercising discretion under subsection 115(2) of the Act must have evidence before him or her that allows the decision maker to conclude that the person concerned poses a danger to the security of Canada. The decision maker cannot rely simply upon the fact that the person is described in what is now subsection 34(1) of the Act. The decision maker must carefully analyse all of the relevant evidence before him or her. I do not suggest that all of the original security intelligence information is to be reviewed. The delegate must consider all of the evidence before him or her relating to the danger posed to Canada's security, and weigh the factors which go to the reliability of that information. For example: does the source of the evidence have any personal interest in the outcome; what has been the reliability of any other information provided by the source; is the information corroborated?

[55]Conflicting evidence relating to danger must be weighed and reasons given for rejecting evidence of significance. The effect of the passage of time, and the effect of the person's apprehension and detention, should be considered so that not just the person's past actions but their future behaviour may be assessed. It may be, for example, that the fact of apprehension and disclosure of a person's associations or activities will neutralize their future ability to conduct clandestine activities. At the end, after considering these and other relevant factors, the nature of the danger posed by the person concerned should be articulated. By articulating the nature of the danger posed, the decision maker may, at the final stage of the analysis, properly balance the competing interests. For example, the decision maker would be able to weigh against the nature of the danger posed alternatives to refoulement, such as return to a third country, or, as Mr. Mahjoub suggested, continued detention.

[56]In short, the decision maker must have before him or her cogent evidence upon which to assess and then articulate the danger the person concerned poses to the security of Canada. Once such danger has been determined it must be weighed and balanced against the possible injustice to the person concerned if deported.

[57]This is not to say that the decision maker must repeat or duplicate the exercise performed by the designated judge who considered the reasonableness of the security certificate. They are different decisions. A person exercising discretion under subsection 115(2) of the Act must consider the relevant evidence before the decision maker and then apply that evidence to the test articulated by the Supreme Court in *Suresh*.

[58]Before leaving this issue, I have noted that the delegate also relied upon the fact that Mr. Mahjoub had been charged with an offence in Egypt, her disbelief of Mr. Mahjoub's explanation concerning his relationship with Usama bin Laden and the Khadr family and her conclusion that Mr. Mahjoub attempted to conceal his links with terrorists. Those findings alone do not support the delegate's conclusion as to the nature of the threat posed by Mr. Mahjoub to Canada's security.

(iv) The request for the appointment of an *amicus curiae*

[59]In the written submissions relating to the section 87 application, filed on Mr. Mahjoub's behalf at the hearing of such application, Mr. Mahjoub sought the appointment of an *amicus curiae* to be present when Mr. Mahjoub and his counsel were not. No formal motion was brought, nor was any evidentiary basis provided for this request. The request was argued on the basis that "the legislation does not preclude the presence of [an] independent counsel to ensure that the person concerned's interests are protected. In the absence of a bar on the participation of independent counsel, or an *amicus curiae*, one should be present to ensure that Mr. Mahjoub's interests are protected in the secret proceeding".

[60]Counsel for Mr. Mahjoub advised that this request was precipitated by the recent request made in another proceeding by Mr. Harkat where Mr. Harkat sought the appointment of an *amicus curiae* in relation to proceedings to determine the reasonableness of a security certificate issued in respect of Mr. Harkat.

[61]For reasons to be delivered later, Mr. Mahjoub's request for the appointment of an *amicus curiae* was dismissed by the Court's order of December 3, 2004.

[62]As for the reasons for dismissing such request, in *Harkat (Re)*, [2005] 2 F.C.R. 416 (F.C.), I gave detailed reasons for dismissing Mr. Harkat's request. As more fully developed in those reasons, Mr. Mahjoub's request was dismissed because:

(i) such appointment was not necessary or required in order for the Court to exercise the jurisdiction conferred upon it by the Act;

(ii) such appointment was not necessary in order for the Court to be able to provide Mr. Mahjoub with a hearing that conformed to the requirements of fundamental justice;

(iii) such appointment would not be in accordance with Parliament's intent as expressed in the Act;

(iv) the request was made late in the proceeding and would result in further delay; and

(v) the procedure set out in the Act provides the designated judge with the power and flexibility required in order to assess properly both the section 87 application and the confidential information considered by the Minister's delegate.

(v) Conclusion and certification of a question

[63]For the reasons set out above, this application for judicial review will be allowed and the matter will be remitted for redetermination in accordance with these reasons by another delegate of the Minister. In view of that conclusion, I have not considered it advisable to deal with the constitutional issues raised by Mr. Mahjoub.

[64]I acknowledge an issue of importance has been raised which I do not decide: whether circumstances would ever justify deportation to face torture. The Supreme Court of Canada has left the issue open by not excluding the possibility that, in exceptional circumstances, such deportation may be justified, either as a consequence of the balancing process required by section 7 of the Charter or under section 1 of the Charter. There are, however, powerful *indicia* that deportation to face torture is conduct fundamentally unacceptable; conduct that shocks the Canadian conscience and therefore violates fundamental justice in a manner that cannot be justified under section 1 of the Charter. Those *indicia* were canvassed by the Supreme Court in *Suresh* and include: Canadian domestic law prohibits torture; section 12 of the Charter prohibits cruel and unusual treatment or punishment (reflecting that, within Canada, torture is seen to be so repugnant that it can never be an appropriate punishment); extraditing a person to face torture has been found to be inconsistent with fundamental justice; and, a strong argument exists that international law prohibits deportation to torture, even where national security interests are at stake.

[65]The Supreme Court has, however, cautioned that Charter issues should not be decided where it is not necessary to do so, and has stressed that Charter issues are to be decided on a proper evidentiary record. See, for example, *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, 1995 CanLII 86 (S.C.C.), [1995] 2 S.C.R. 97, at paragraphs 6 to 12 for authority that unnecessary issues of law should not be decided (particularly constitutional issues) and *R. v. Mills*, 1999 CanLII 637 (S.C.C.), [1999] 3 S.C.R. 668, at paragraph 38 for authority as to the importance of a proper factual foundation to support the determination of the constitutionality of legislative provisions. By remitting this matter for redetermination, it is possible that a decision will be made that is favourable to Mr. Mahjoub. If the result is not favourable to Mr. Mahjoub, then there will be a proper evidentiary record to support the determination of the constitutional issues. It is, in my view, particularly important that there be evidence to inform the assessment of exceptional circumstances and the danger said to be posed to our society, as contemplated by the Supreme Court in *Suresh*.

[66]Counsel requested the opportunity to review these reasons before making submissions about the certification of any serious question of general importance. Accordingly, counsel for the Ministers may serve and file correspondence proposing certification of a question within seven days of receipt of these reasons. Thereafter, counsel for Mr. Mahjoub will have five days from receipt of the Ministers' correspondence to serve and file a responsive submission. Any reply submission may be served and filed by counsel for the Ministers within three days of receipt of Mr. Mahjoub's submission.

[67]Following consideration of those submissions, an order will issue allowing the application for judicial review, remitting this matter for redetermination in accordance with these reasons by another delegate of the Minister, and

dealing with the issue of certification of a question.

APPENDIX A

Subparagraph 19(1)(*e*)(iii), clauses 19(1)(*e*)(iv)(B) and 19(1)(*e*)(iv)(C), subparagraph 19(1)(*f*)(ii) and clause 19(1)(*f*)(iii)(B) of the former Act*:*

19. (1) No person shall be granted admission who is a member of any of the following classes:

(*a*) persons, who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,

. . .

(*e*) persons who there are reasonable grounds to believe

(i) will engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(ii) will, while in Canada, engage in or instigate the subversion by force of any government,

(iii) will engage in terrorism, or

(iv) are members of an organization that there are reasonable grounds to believe will

(A) engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(B) engage in or instigate the subversion by force of any government, or

(C) engage in terrorism;

(*f*) persons who there are reasonable grounds to believe

(i) have engaged in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(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

(A) acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, or

(B) terrorism,

except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.

APPENDIX B

Sections 78 and 87 of the Act:

78. The following provisions govern the determination:

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

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

national security or to the safety of any person;

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

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

(*e*) on each request of the Minister or the Solicitor General of Canada made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(*f*) the information or evidence described in paragraph (*e*) shall be returned to the Minister and the Solicitor General of Canada and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary;

(*g*) the information or evidence described in paragraph (*e*) shall not be included in the summary but may be considered by the judge in deciding whether the certificate is reasonable if the judge determines that the information or evidence is relevant but that its disclosure would be injurious to national security or to the safety of any person;

(*h*) the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed;

(*i*) the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility; and

(*j*) the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.

. . .

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

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