Sogi v. Canada (Minister of Citizenship and Immigration) (F.C.), 2003 FC 1429 (CanLII)

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Reflex Record (noteup and cited decisions)

IMM-5125-02

2003 FC 1429

Bachan Singh Sogi (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

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

Federal Court, MacKay J.--Toronto, May 8; Ottawa, December 8, 2003.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Judicial review of IRB decision applicant inadmissible on security grounds -- Detained as suspected member of terrorist organization Babbar Khalsa International (BKI) -- At in camera hearing, non-disclosure to applicant of certain information ordered as injurious to national security -- Applicant admitted to use of several different names whilst travelling in various countries -- Denied refugee status in England -- Deportation from Canada ordered -- Identity was basic issue at admissibility hearing -- Whether applicant person referred to in Times of India newspaper article as BKI member on way from Britain to India to kill political leaders -- Applicant arguing unfairness of process as unable to respond to protected information -- At judicial review, Court not receiving secret information other than that before Board member -- Protected information found relevant, disclosure injurious to national security -- Application denied -- Appropriate review standards discussed -- Applicant arguing Baker v. Canada (Minister of Citizenship and Immigration) requiring giving of reasons for hearing officer's decision -- Baker distinguished -- No error by officer who acted in accordance with IRPA, s. 78 -- Only Minister can determine whether information he relies on shall be released -- Disclosure part of fair process but Parliament having opted to limit it for sake of national security -- Whether adequate reasons given why conflicting evidence preferred to that adduced by applicant -- Factual finding applicant having terrorist connections not patently unreasonable -- Explanation of why relief not available under Charter, s. 7.

Constitutional Law -- Charter of Rights -- Life, Liberty and Security -- Judicial review of decision applicant inadmissible to Canada on security grounds -- Minister's argument: no imminent risk of removal to country where torture employed as no removal pending pre-removal risk assessment, further ministerial decision, both subject to judicial review -- But, continued detention, loss of psychological integrity due to branding as terrorist sufficient to engage Charter, s. 7 unless these deprivations consistent with fundamental justice principles -- Similar process held in Ahani v. Canada not to contravene Charter -- Differences in processes considered -- Differences not such

as to dictate result different from that in Ahani case -- Question to be certified as to application of s. 7 to circumstances herein.

This was an application for the judicial review of an Immigration and Refugee Board decision that applicant was inadmissible on security grounds.

Following a report to the Minister that applicant, a foreign national in Canada, was inadmissible, the case was referred to the Immigration Division for an admissibility hearing. Applicant was arrested and his continued detention was ordered at a review. Classified security information was provided at an *in camera, ex parte* hearing and it was ordered that some of this information would not be disclosed to applicant as to do so would be injurious to national security. At the continuation of the hearing, it was admitted that the Babbar Khalsa International (BKI) is an organization that has or will engage in terrorist acts but denied that applicant was a BKI member. He also admitted to having used several different names whilst travelling in various countries. He had been denied refugee status in England. Apparently, he had been excluded from the United Kingdom on the ground of involvement in international terrorist activities. The hearing officer's conclusion, on a balance of probabilities, was that applicant is a BKI member and thus a person described in IRPA, paragraph 34(1)(*f*) as inadmissible on security grounds. Applicant's deportation was ordered.

The basic issue at the admissibility hearing had been identity. Was this "Bachan Singh Sogi" the person known as "Gurnam Singh, alias Piare" referred to in a June 9, 2001 *Times of India* article as a BKI member on his way from Britain to India for the purpose of assassinating prominent political leaders?

At this Federal Court hearing, a preliminary issue was raised by the Minister's IRPA, section 87 application for the non-disclosure of the protected information. Applicant stressed the basic unfairness of a process whereby information was relied upon which, since it was not disclosed to him, he could not respond to. His position was that, if the Court found the information not relevant, it should say so. That would leave it up to the Minister to decide whether the information would be disclosed or withdrawn. It was further urged that no additional information could be furnished *in camera* since, upon judicial review, the Court is to consider only the evidence that had been before the original decision-maker.

The Court then sat *in camera*, at which time the non-disclosed information relied upon at the admissibility hearing was considered. No other information was introduced. Public hearings resumed and the order sought by the Minister was granted. Yet another *in camera, ex parte* hearing was held, this one for the purpose of explaining the sources and significance of the information that had not been disclosed. No additional information was provided. The protected information, found to be relevant, was added to the Court file, but separately sealed, to be opened only by the judge designated under the IRPA. It was confirmed that the protected information was relevant and that its disclosure would be injurious to national security so that, under subsection 87(2) and IRPA paragraphs 78(*e*), (*h*) and (*j*), while it would be taken into account by the Court, it would be revealed neither to applicant nor to his lawyer.

The grounds for judicial review argued were that the tribunal erred by: (1) not giving adequate reasons for concluding that the secret evidence was admissible and relevant and failing to give adequate disclosure; (2) ignoring relevant documentary evidence; (3) making a patently unreasonable finding as to credibility and (4) violating fundamental justice as guaranteed by Charter, section 7.

Held, the application should be dismissed.

The ultimate issue was one of mixed fact and law and so the relevant standard of review was reasonableness *simpliciter*. But the decision on the identity issue was a matter of fact, to be reviewed according to the patent unreasonableness standard. That these were the appropriate review standards herein resulted from the Court's application of the usual pragmatic, functional assessment of the relevant statutory provisions. When it comes to decisions on issues regarding the assessment of security intelligence, the comparative expertise of a designated judge warrants a review standard of correctness.

Applicant cited the Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration)* in arguing that it was mandatory that the hearing officer have given reasons for his decision that the secret information was relevant to the identity issue. But the Court distinguished the situation here from that in

Baker which related to a final decision on a humanitarian and compassionate application. The decision impugned herein was an interlocutory procedural one on the relevance of evidence. Were the Court to conclude that the information was irrelevant or that it was patently unreasonable to conclude that disclosure would be harmful to national security, the Court's statutory duty would be to return it to the Minister and to not take it into account: Act, paragraph 78(*f*). But it could not be concluded that the hearing officer had erred either in his relevance assessment or in his non-disclosure decision. He had acted in accordance with IRPA, section 78. Only the Minister can determine that the information relied upon by him shall be released. While disclosure is an element of fair process, Parliament chose to limit disclosure by imposing a requirement that the confidentiality of information be ensured where disclosure would be injurious to national security or to the safety of any person.

Sogi complained that, while his documentary evidence was referred to, it was rejected without explanation contrary to the Trial Division's holding in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*. There was no question that the hearing officer's decision would have been clearer had it explicitly stated that Sogi's documentary evidence was rejected and indicated why the conflicting evidence was preferred. But it did refer to Sogi's admitted use of aliases as well as letters from the British Home Office as grounds for the conclusion that Sogi was not to be believed in denying his use of the names Gurnam or Piare Singh. The decision went on to mention the CSIS report and concluded that applicant was indeed the person referred to in the Home Office letters. The finding of fact, that applicant was identified as having terrorist connections, was not patently unreasonable.

Turning to the Charter, section 7, the Minister submitted that in so far as applicant's claim rested upon an imminent risk of removal to a country where he might be subject to torture, it was premature in that the impugned decision did not create an imminent risk of removal. Removal has to await a further ministerial decision following a pre-removal risk assessment, both of which decisions could be subject to judicial review. Actually, applicant's claim was based not on the imminent risk of torture but on the deprivation of liberty by the continuation of his detention. That, together with being branded as one involved with terrorism would result in a loss of psychological integrity. That was sufficient to engage Charter, section 7. On the other hand, loss of the opportunity to have his refugee claim entertained and the fact that a removal order has been issued do not bring section 7 into play. But the continuing detention--even though mitigated by periodic reviews under section 57--along with the psychological distress of being labelled a terrorist, would deprive applicant of the Charter guaranteed right to security of the person unless these deprivations are consistent with fundamental justice principles.

It has been held that the somewhat similar process under sections 77 and 78, comparable to section 40.1 of the former *Immigration Act*, does not contravene the Charter. That process is, however, said to differ from that here at issue in two respects: manner of initiation and persons by whom the security information is reviewed. The major differences are: initial consideration of information by two ministers rather than one and review by a Federal Court judge as opposed to by an Immigration Division member who, prior to June 2002, would not have had experience in considering information said to constitute security intelligence and in balancing the interests of the state against those of the individual. One further difference is that, under the section 77 process, the decision of the designated judge as to reasonableness of the Ministers' certificate is final while, under the process at issue herein, the hearing officer's decision is subject to judicial review. The differences introduced by the process under subsection 44(2) and sections 86 and 87 do not contravene the principles of fundamental justice.

Counsel were given a brief time within which to formulate a question for certification regarding the application of Charter, section 7 to the circumstances of this case.

statutes and regulations judicially

considered

Anti-terrorism Act, S.C. 2001, c. 41, s. 4.

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], s. 7.

Criminal Code, R.S.C., 1985, c. C-46.

Federal Courts Act, R.S.C., 1985, c. F-7 ss.1 (as am. by S.C. 2002, c. 8, s. 14), 18.1 (as enacted by S.C. 1990, c.

8, s. 5).

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

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 34(1)(*c*),(*f*), 44, 55, 57, 67, 74(*d*), 77 (as am. by S.C. 2002, c. 8, s. 194), 78, 80(3), 86, 87.

Privacy Act, R.S.C., 1985, c. P-21.

Regulations Amending the Regulations Establishing a List of Entities, SOR/2003-235.

cases judicially considered

applied:

Ozdemir v. Canada (Minister of Citizenship and Immigration) (2001), 282 N.R. 394 (F.C.A.); *R. v. Beare; R. v. Higgins*, 1988 CanLII 126 (S.C.C.), [1988] 2 S.C.R. 387; (1988), 55 D.L.R. (4th) 481; [1989] 1 W.W.R. 97; 71 Sask. R. 1; 45 C.C.C. (3d) 57; 66 C.R. (3d) 97; 36 C.R.R. 90; 88 N.R. 205; *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669; (1995), 32 C.P.R. (2d) 95; 100 F.T.R. 261 (T.D.); affd 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; 262 N.R. 40 (F.C.A.); leave to appeal to S.C.C. refused [1997] 2 S.C.R. v.

distinguished:

Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22.

referred to:

Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration) (1998), 157 F.T.R. 35 (F.C.T.D.); *Singh et al. v. Minister of Employment and Immigration*, 1985 CanLII 65 (S.C.C.), [1985] 1 S.C.R. 177; (1985), 17 D.L.R. (4th) 422; 12 Admin. L.R. 137; 14 C.R.R. 13; 58 N.R. 1; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307; (2000), 190 D.L.R. (4th) 513; [2000] 10 W.W.R. 567; 81 B.C.L.R. (3d) 1; 3 C.C.E.L. (3d) 165; 77 C.R.R. (2d) 189; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (CanLII), [2002] 4 S.C.R. 3; (2002), 219 D.L.R. (4th) 385; 49 Admin. L.R. (3d) 1; 22 C.P.R. (4th) 289; 7 C.R. (6th) 88; 99 C.R.R. (2d) 324; 295 N.R. 353.

APPLICATION for judicial review of a determination by a member of the Immigration Division of the Immigration and Refugee Board that applicant is inadmissible to Canada on security grounds. Application dismissed.

appearances:

Lorne Waldman for applicant.

Ian Hicks and *Robert F. Batt* for respondent.

solicitors of record:

Waldman & Associates, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

[1]MacKay J.: This is an application for judicial review of a decision dated October 8, 2002, by a member of the Immigration Division of the Immigration and Refugee Board who determined that the applicant is inadmissible to Canada on security grounds. After full deliberation that application will be dismissed by order after an opportunity for submissions of counsel concerning any question to be certified for consideration by the Court of Appeal.

[2]The decision in question is referred to in the original application for leave and for judicial review as a determination that the applicant is not a Convention refugee, but it is the decision that he is inadmissible on security grounds that is here in issue. The grounds found are those described in paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), as amended, for "being a member of an organization", in this case Babbar Khalsa International (BKI), a Sikh extremist organization based in Lahore, Pakistan, "that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph" 34(1)(*c*) of IRPA, namely terrorism.

[3]In his decision, the hearing officer concluded "on a balance of probabilities that the `Gurnam Singh', alias `Piare', referred to in the Home Office letters, the `Gurnam Singh' referred to in the article from the Time [*sic*] of India, and the `Bachan Singh Sogi' who arrived in Toronto on May 8, 2001, and who is the subject of this hearing, are one and the same person". Those letters were written to one found to be excluded from the United Kingdom, and the article from the *Times of India* referred to a person, believed to create a danger, on grounds the person concerned was a terrorist.

[4]Further, he concluded that "Gurnam Singh and aliases (including Gurbashan Singh Sogi), is a member of the BKI, which . . . is uncontestedly an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism". Thus he is a person described in paragraph 34(1)(*f*) of IRPA, in that "there is reasonable ground to believe that he is a foreign national who is inadmissible on security grounds for 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 34(1)(*c*), namely engaging in terrorism".

[5]Upon so finding, the hearing officer ordered that Mr. Sogi be deported from Canada.

The Background

[6]On August 7, 2002, a delegate of the respondent Minister reported his opinion to the Minister that the applicant, a foreign national in Canada, is inadmissible to this country. In turn, the Minister signed a referral, pursuant to subsection 44(2) of IRPA, referring the case of the applicant, a refugee claimant, to the Immigration Division for an admissibility hearing. In this case, the referral is said to be to determine if Mr. Sogi is a person described in paragraph 34(1)(*f*) of the Act. As a result, on August 8, 2002, Mr. Bachan Singh Sogi was arrested and on August 12, 2002, a detention review was held when it was determined he should be kept in detention pending his admissibility hearing. The determination from that hearing, on October 8, 2002, as earlier noted, was that Mr. Sogi is inadmissible to Canada. Since August 2002 he has remained in detention.

[7]On August 15, 2002, the member presiding for the admissibility hearing heard an application, *in camera* and *ex parte*, in the absence of Mr. Sogi and his counsel, when, on behalf of the Minister, classified security information was presented with an application that it not be disclosed, pursuant to subsection 86(1) of IRPA. In accord with subsection 86(2) and paragraphs 78(*e*) and (*g*), the hearing officer determined that information was relevant and would be considered, but its disclosure would be injurious to national security or to the safety of any person. As a result, in accord with section 78, while some information from public sources was provided to the applicant, not all of the information relied upon by the Minister was disclosed to him or his counsel. A summary of information approved by the hearing officer and provided to the applicant pursuant to paragraph 78(*h*) of IRPA, was intended to enable him to be reasonably informed of the circumstances on which the Minister relied.

[8]The hearing continued on August 21, 2002, when counsel for the applicant admitted that Mr. Sogi is a foreign national who is neither a Canadian citizen nor a permanent resident. Further, the fact that BKI is an organization that there are reasonable grounds to believe engages, has engaged or will engage, in acts of terrorism referred to in paragraph 34(1)(*c*) of the Act was admitted at the outset of the hearing. It was denied, however, that the applicant, who submitted several identity documents bearing the name of Gurbachan Singh Sogi, was a member of BKI. The applicant testified that his nickname is Bachan, that he identified himself by that name when he arrived in Canada and that he is here known under that name, as Bachan Singh Sogi. He testified that Sogi is the name of his caste and that in his home village, people generally called him by his nickname, Bachan.

[9]His real identity, he claimed, is Gurbachan Singh Sogi, though he admitted to having used several different names while travelling to different countries. In England, he had earlier used the name Gurbachan Singh, and he

had there made application for refugee status, which was denied. Thereafter, he travelled back to India in February 1997 using the name Jaswinder Singh, the same name he had used in travelling to England. Earlier he had used the name Darim Singh when travelling, and when he came to Canada in May 2001 he used the name Harmanjit Singh until his arrival when he reported his name as Bachan Singh Sogi, and in that name he claimed to be a refugee. His explanation for using different names was that he could not obtain a passport in his own name from Indian authorities.

[10]He denied using certain other names, denied that he was known as "Piare" and he denied any membership in BKI. He acknowledged that he lived at a specified address in Montréal and that letters had there been received, from the Home Office in England. One letter was addressed to a Gurnam Singh and another was addressed to Gurbashan Singh and aliases, one of which was Gurnam Singh. These letters clearly set out that the person addressed in the letters was excluded from the United Kingdom for reasons of national security on grounds of his involvement in international terrorist activities. He was alerted by the Canadian Security Intelligence Service (CSIS) that those letters would be received. There was a further letter from the Home Office, in reply to an inquiry from Mr. Sogi's counsel in Canada, which verified that Gurbashan Singh Sogi and aliases was in fact the subject of the two previous letters.

[11]While it has no significance for this case, since the terrorist characterization of the BKI was not in issue at the hearing, I note that by SOR/2003-235, dated June 18, 2003, *Regulations Amending the Regulations Establishing a List of Entities* (under the *Criminal Code* [R.S.C., 1985, c. C-46] as amended by the *Anti-terrorism Act*, S.C. 2001, c. 41, s. 4) both Babbar Khalsa (BK) and Babbar Khalsa International (BKI) were named as entities that are believed by the Governor in Council to be, or to have, engaged in or to have assisted others in terrorist activities.

The Issues

[12]Ultimately, the basic issue before the admissibility hearing was whether or not the applicant was one and the same person as the addressee of the letters from the Home Office and the same person as one Gurnam Singh referred to in an article that appeared in a newspaper, the *Times of India* on June 9, 2001. That article indicated that one Gurnam Singh, alias Piare, some 40 years old, was a member of BKI and was on his way from Britain to India to assassinate prominent political leaders and public officials.

[13]When this application came on for hearing a preliminary issue was raised by the respondent Minister's application pursuant to section 87 of IRPA, for the non-disclosure of the information that had been protected, and not disclosed to the applicant or his counsel, by the admissibility hearing officer. That issue I deal with first.

[14]I then turn to the issues raised as grounds for judicial review, after considering the appropriate standard of review. The grounds considered are the applicant's allegations that the tribunal erred:

(a) by failing to provide adequate reasons for the conclusion that secret evidence was admissible and relevant, and failing to adequately disclose the evidence;

(b) by ignoring cogent and relevant documentary evidence;

(c) by making a credibility finding that was patently unreasonable in the absence of any reasonable explicit assessment of the totality of the evidence, including that adduced by the applicant;

(d) by following a process that, it is urged, violates the principles of fundamental justice, guaranteed pursuant to 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]].

I. The Application for Non-Disclosure, section 87 IRPA

[15]The Minister's application to the Court for non-disclosure was brought pursuant to section 87 of IRPA, which provides:

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.

[16]The information of concern in this preliminary submission was the same as that earlier found not to be subject to disclosure by the admissibility hearing officer. As we have noted, he concluded, rendering his decision at the conclusion of the *in camera, ex parte* hearing concerning non-disclosure, thus:

After considering the information provided "ex parte" I determined that the information is relevant and that its disclosure would be injurious to national security or to the safety of any person, as per section 78(g) of the Act. Therefore the application under 86 is granted. I will take in consideration the information provided *ex parte*.

In accordance with s. 78h) attached is a summary of the information that enables Mr. Sogi and his counsel to be reasonably informed of the circumstances giving rise to the application.

[17]The summary released by the hearing officer to Mr. Sogi, following the *ex parte in camera* hearing, consisted of three paragraphs, apart from annexes, and the first two paragraphs state:

The Canadian Security Intelligence Service ("CSIS") believes there are reasonable grounds to believe that Mr. Bachan Singh SOGI, born April 4, 1961, is identical to Gurnam SINGH, alias Piare SINGH, and is a member of the Babbar Khalsa International ("BKI") also known as Babbar Khalsa ("BK"), a Sikh extremist organization based in Lahore, Pakistan, that engages, has engaged, or will engage in acts of terrorism. CSIS believes that Mr. Gurnam SINGH arrived in Toronto on May 8, 2001, claimed refugee status under the name Bachan Singh SOGI, and relocated to Montreal. Mr. Gurnam SINGH currently resides at 8500 Jean Billon, Apartment 107, Ville Lasalle, Quebec.

The *Times of India* of June 9, 2001 reports that a BKI terrorist, Gurnam SINGH, also known as Piare, intended to target Punjab Chief Minister Prakash Singh Badal, his son Sukhbir Singh Badal, and former Punjab Chief of Police, KPS Gill. The article also stated that Gurnam SINGH was believed to be highly trained in the use of sophisticated weapons and explosive devices. CSIS investigation has corroborated this information with reliable sources and believes this article refers to the Gurnam SINGH who arrived in Canada on May 8, 2001, under the name of Bachan Singh SOGI.

The summary includes no other reference to the applicant. The third paragraph refers to two organizations, Babbar Khalsa International (BKI) and Babbar Khalsa (BK), described as terrorist groups, and the summary attached a 7-page "Chronology of Terrorist Incidents and Key Events Related to the BK and the BKI", extending from 1985 to June 2002. Also attached was an annex listing 147 references from published unclassified sources which refer to terrorist organizations, including BKI and BK, and their activities, particularly those reported as related to nationalist concerns in India, and to the Air India bombing in 1985, and other terrorist activities.

[18]The Minister's application for non-disclosure in this case was dealt with by the Court in the following manner. After leave was granted for judicial review of the decision made by the admissibility hearing officer, the respondent Minister gave notice that, at the commencement of the hearing then scheduled, the respondent would make application pursuant to subsection 87(1) for an order for non-disclosure of the information that had already been protected against disclosure by the hearing officer at the admissibility hearing.

[19]That application was made at the commencement of the hearing, which commenced in the normal open, public way. The Court then invited submissions in public concerning the respondent's motion. The respondent relied upon subsection 87(1) as the basis for the order requested. For the applicant, the basic unfairness of the process was stressed, in that in this case information relied upon by the hearing officer, or by this Court if it followed the decision of the hearing officer, was not disclosed to the applicant. He thus had no opportunity to respond to it. It was urged for the applicant that this Court, in reviewing the record from the admissibility hearing, while it could only consider that record, had the obligation to consider whether the information not disclosed at the hearing was relevant, and since it was taken into account, whether that was properly done by the decision-maker. Moreover, it was suggested that the relevance of any of the information not disclosed could best be considered in the course of

the judicial review.

[20]If the Court did not agree that the information was relevant and that it could be considered, it had the responsibility to so say. In my view, that would leave it to the Minister to decide whether or not, in the course of the judicial review hearing, information the Court indicated is relevant and should be disclosed, would be disclosed or withdrawn. The Court also had the obligation, it was urged, to preclude the admission of any new information to be considered *ex parte* and *in camera* at this step in the proceedings, as in judicial review proceedings generally when only the evidence in the record before the decision-maker in question is before the Court.

[21]With these submissions on behalf of the applicant, counsel for the Minister was in general agreement. Without determining at that stage what might happen if this Court were to find the information in question not to be relevant, or not to be considered, the Court proceeded on the basis of these general submissions.

[22]The public proceedings then recessed. The Court commenced proceedings *in camera*, and in the absence of the applicant and his counsel. Present at the *in camera* hearing was counsel, and the affiant of an affidavit filed on behalf of the Minister, and the Court registrar with the Judge. With the assistance of counsel for the Minister, the Court then examined and gave preliminary consideration to the information that had not been disclosed to the applicant in the course of his admissibility hearing. I confirm that only the information that was before the admissibility hearing officer was introduced at the commencement of this judicial review, in both the public proceedings and in those then conducted *in camera* in the absence of the applicant and his counsel. Further, no other information was introduced at any later time.

[23]The Court then recessed from the *in camera* proceedings and resumed public hearings in the normal course for hearing the judicial review. At the commencement of the resumed public hearing, I granted orally the order sought by the respondent Minister, and that is to be confirmed in the written order disposing of this matter. When that hearing terminated, the Court reserved decision on the other issues that had been raised.

[24]Subsequently, a further *in camera, ex parte* hearing was initiated by the Court in Ottawa, with counsel for the Minister present, for the sole purpose of assisting the Court in reviewing the information not disclosed, its sources and significance. Also then present was the affiant whose affidavit introducing the information not to be disclosed had been presented to the Court at the earlier hearing, *in camera* and in the absence of the applicant and his counsel. From the Court's perspective this stage was simply a resumption of the *in camera* process for considering the information which the Minister had requested not to be disclosed. I confirm that no additional information was sought or offered in this resumed *in camera* hearing. The information not disclosed when the judicial review hearing commenced in Toronto, which by oral ruling I had found to be relevant and might be considered by the Court, had not been filed in the Court file and was not readily available for examination after the hearing in Toronto. At the resumed *in camera* hearing in Ottawa, those documents were added to the Court file, but separately sealed, to be opened only by a judge designated by the Chief Justice in accord with IRPA.

[25]I confirm, after review of the information not disclosed to the applicant by the admissibility hearing officer, and by preliminary decision of this Court, in my opinion, that information is relevant to the applicant's situation, and its disclosure would be injurious to national security or to the safety of a person. Thus, in accord with subsection 87(2) and paragraphs 78(*e*), (*h*) and (*j*) of IRPA, it was ordered and is now confirmed that the information not be disclosed to the applicant or his counsel, but it may be considered by the Court. It shall be maintained in the Court file on a confidential security basis, sealed in an envelope, to be opened only by a designated judge of the Court, and it shall not form part of the Court record available to the applicant or the public.

II. The Grounds Raised for Judicial Review

(a) The Standard of Review

[26]The ultimate issue before the Court concerns the decision of the admissibility hearing officer that Mr. Sogi is inadmissible to Canada on grounds of his perceived involvement in an organization known for its terrorist activities. Assessing that decision, resulting from an application of provisions of IRPA to the facts of the case, an issue of mixed fact and law, is appropriately done on the standard of reasonableness *simpliciter*.

[27]That ultimate decision is based on the determination of Mr. Sogi's identity as that of the person believed to be known as Gurnam Singh, or by other aliases, a person involved with BKI in terrorist activities. That determination is one of fact and the appropriate standard for the Court in its assessment of that finding is patent unreasonableness, or in the words of paragraph 18.1(4)(*d*) [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Courts Act*, R.S.C., 1985, c. 7 [s. 1 (as am. by S.C. 2002, c. 8, s. 14)], as amended, that is, it is:

18. (4) . . .

d) based on an erroneous finding of fact . . . made in a perverse or capricious manner or without regard to the material before [the decision-maker].

That same standard is applicable in review of any credibility finding.

[28]These standards result from my pragmatic and functional assessment of the statutory provisions in this case. The statute contains no privative clause relating to the decision of the hearing officer, and that decision is subject to judicial review pursuant to the *Federal Courts Act, supra,* section 18.1 [as enacted by S.C. 1990, c. 8, s. 5]; the issues are not polycentric but they concern application of IRPA to Mr. Sogi's circumstances. However, there is no evidence that the admissibility hearing officer has special expertise in determining the issues before him, particularly the issues concerning security intelligence, although on other issues as a member of the Immigration Division he may well have served as an adjudicator under the *Immigration Act* [R.S.C., 1985, c. I-2], which prevailed prior to IRPA coming into force. For decisions on issues relating to assessment of security intelligence the comparative expertise of a designated judge of this Court warrants a review standard of correctness.

[29]In general, these factors warrant a measure of deference to the decisions of the hearing officer, except in review of his decision concerning relevance, and the potential danger to national security by disclosure of the security intelligence information the Minister seeks to have considered but not disclosed.

(b) Adequacy of Reasons for Accepting Classified Evidence and Adequacy of Disclosure

[30]For the applicant it is urged that the hearing officer failed to set out reasons for his preliminary decision that information subject to the Minister's motion for non-disclosure was relevant to the issue of identifying the applicant. Because of the significance of the decision for Mr. Sogi, it is urged, in reliance upon *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817, at paragraph 43, that reasons for the decision are not merely desirable but are required. Here, it is said, the "reasons" are simple conclusions that reflect the words of the statute (paragraphs 78(*f*) and (*g*) of IRPA) that the information examined is "relevant but that its disclosure would be injurious to national security or to the safety of any person".

[31]The summary of information provided to the applicant is said by his counsel to be simply a statement that "CSIS believes that you are a member of the Babbar Khalsa", an organization engaged in terrorist activities as discussed in numerous public sources which were then listed as an annex to the summary. It is argued that the reasons for the belief of CSIS, and for the hearing officer's conclusion for the non-disclosure of information are not spelled out. Yet I note that at the hearing when the preliminary decision was tabled and the summary published to the applicant, the hearing officer is reported to have advised orally that he had "examined, *in camera*, in the absence of the applicant and his counsel, information indicating that Mr. Sogi was identified as Gurnam Singh and Piare Singh that there was information referred to as reliable from national and foreign agencies". Thus, somewhat more explanation was given orally.

[32]For the applicant it is urged that if the hearing officer merely rubber-stamped the request on behalf of the Minister for non-disclosure, that also would be reviewable error. There is no evidence of this, indeed there is the hearing officer's brief description of his review of the information provided *in camera* showing that he did examine the evidence. The fact that his conclusion was to grant the Minister's request does not, in itself, support a conclusion that his decision was reached merely because it had been requested by the respondent or had been reached earlier by CSIS or an immigration officer in a report under subsection 44(1) of IRPA.

[33]While there was not an explanation in detail by the hearing officer for his conclusion there was relevant evidence that should not be disclosed, I am not persuaded that the circumstances here, concerning an interlocutory

procedural decision, are similar, as the applicant urges, to those underlying the decision of the Supreme Court of Canada in *Baker, supra*, where the importance of reasons was stressed. There the absence of reasons concerned a substantive decision disposing of a humanitarian and compassionate application, a final decision. In this case, the decision of the hearing officer is a preliminary procedural one, about the relevance of evidence and the determination it not be disclosed on security grounds. It is implicitly subject to review, as is the evidence not disclosed, on judicial review of the hearing officer's decision.

[34]If the Court were persuaded that the hearing officer decided within the authority delegated by statute, the fact that reasons were not spelled out for the decision, that information was relevant but should not be disclosed is not, in my opinion, in itself, a basis for judicial intervention. If the Court were to conclude otherwise, that the information in question was not relevant, or if relevant that it is patently unreasonable to consider that its disclosure would be injurious to national security, the Court's responsibility under the Act is to return that information to the Minister and not to take it into consideration (paragraph 78(*f*)). In that assessment, the Court, with experience in assessing relevance and in seeking to balance the interests of the state and those of the individual must conclude that the hearing officer's decision is essentially correct in relation to these preliminary procedural issues. If not, the Court should order the matter be returned for reconsideration. I am not persuaded that the hearing officer was incorrect in his assessment of relevance and for non-disclosure in this case.

[35]Leaving aside Charter implications for the moment, there is little doubt that the hearing officer in this case acted within the letter of section 78 of IRPA. It provides, in relation to proceedings under subsection 86(2), that the hearing officer shall ensure confidentiality of the information, withholding it even from the person concerned or his or her counsel, if the hearing officer is of the opinion its disclosure would be injurious to national security or the safety of any person. If that is the case, the hearing officer provides the person concerned with a summary of the information or evidence to enable him or her to be reasonably informed of circumstances giving rise to the Minister's action. Thereafter, the person concerned has opportunity to be heard, and the hearing officer may take into consideration anything relevant, whether it be admissible or not in a court of law (see section 78 generally).

[36]As I read paragraph 78(*g*), the scope of action for the hearing officer considering an application for non-disclosure under subsection 86(1), or for this Court on a similar application under subsection 87(1), is restricted to determining whether the information in question is relevant and whether it should be referred to in the summary to be released. If it is not relevant it is returned to the Minister and not further considered, as is the case if the information is withdrawn by the Minister or if it is determined that the information is relevant and should be part of the summary (paragraph 78(*f*)). In sum, only the Minister can determine that information he relies upon shall be released.

[37]In this case concerning Mr. Sogi, the Court determines that the information not disclosed is relevant to the issues before the Court, concerning the identity and the activities and associations of the applicant. Moreover, the Court finds its disclosure would be injurious to national security. The hearing officer did not err in so concluding, nor is there error in his failing to set out detailed reasons for those conclusions, particularly in light of his responsibility to ensure that the information in question is maintained in confidence and not disclosed (paragraph 78(*b*), IRPA).

[38]Having so decided, the hearing officer cannot be faulted for providing inadequate disclosure. Disclosure is, of course, an element of fair process. Yet here Parliament has limited disclosure by imposing the duty to "ensure the confidentiality of the information . . . and . . . other evidence that may be provided to the judge if, in the opinion of the judge [or the hearing officer], its disclosure would be injurious to national security or to the safety of any person" (paragraph 78(*b*) of IRPA). The hearing officer and this Court are merely discharging their obligations set out by the statute, unless the process established by the Act is found unconstitutional.

(c) Alleged Ignoring of Relevant Documentary Evidence

[39]The applicant's submission that evidence was ignored relates to numerous items of evidence introduced on behalf of Mr. Sogi at the admissibility hearing which are said to clearly contradict the findings of the hearing officer. The argument is that although reference was made in his decision to this evidence, it was not assessed or weighed in any way, though it directly concerned the key issue before the hearing officer, Mr. Sogi's identity. His information was referred to but rejected without explanation. An explanation for its rejection is required, so it is

said, on authority of the decision in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (F.C.T.D.).

[40]In *Ozdemir v. Canada (Minister of Citizenship and Immigration)* (2001), 282 N.R. 394 (F.C.A.), Mr. Justice Evans commented at paragraph 9:

Decision-makers are not bound to explain why they did not accept every item of evidence before them. Much depends on the significance of that evidence when it is considered in light of the other material on which the decision was based: . . . .

[41]Yet there are a number of decisions where this Court has allowed judicial review when findings of fact by a decision-maker are contradicted by evidence before her or him and no reference to that evidence is made in the decision. That is not the situation in this case. Here, numerous items of evidence referred to as identity documents, were presented by the applicant. These documents were referred to in the decision of the hearing officer as follows:

Mr. Bertrand [counsel then for Mr. Sogi] filed a series of 25 documents among them a birth certificate, a marriage certificate, driver's license, letters from different persons and the personal information form provided to the Refugee Protection Division concerning his refugee claim which was supposed to be heard but for which the hearing was suspended pending the admissibility hearing . . . .

[42]Thus, the evidence introduced by the applicant, documents which related to Gurbachan (or Bachan) Singh Sogi was referred to, albeit somewhat summarily, in the decision here questioned. The respondent submits the evidence is not directly relevant to the issue of concern, the identity of the applicant, but in my view, it is at least as relevant as the public documentary information, specifically relied upon by the hearing officer. These were the letters from the Home Office in London, addressed to one Gurnam Singh or another addressed to Gurbachan Singh and aliases, at the applicant's address, and a third letter from that office, to counsel for Mr. Sogi, confirming that his client, Gurbachan Sogi, was the subject of their two previous letters advising that the addressees were precluded from entering the U.K. for reasons of national security and involvement in international terrorist activities.

[43]Finally, the article in the *Times of India* of June 9, 2001, referring to one Gurnam Singh, alias Piare, a member of BK, was also relied upon by the hearing officer. The applicant submits that reliance upon that article as referring to the applicant ignores evidence that is not really in question, that is, the applicant arrived in Canada in early May 2001 and was here awaiting processing of his refugee claim at the date of the newspaper article. I note the article in question does not state when the subject terrorist upon whom it reports was expected to travel to India, but it does state that travel was said to be expected to be from the United Kingdom. I agree that the newspaper article is of little or no weight in determining the identity of Mr. Sogi. But even if that article is ignored, there is other evidence to support the conclusion of the hearing officer.

[44]Certainly, the decision here in question would have been clearer had it explicitly stated that the documentary evidence introduced by Mr. Sogi was not accepted, even though that was implicitly clear, and if the preference for conflicting evidence, and reasons for that preference, had been expressed. Nevertheless, the hearing officer's decision does refer to the evidence introduced by Mr. Sogi, albeit briefly, then refers to Mr. Sogi's admitted use of aliases in the past, the letters sent to his address, and the subsequent letter to the applicant's counsel, all from the Home Office. Those letters, from official authorities in Britain, and the applicant's admission he had used aliases in the past, are the bases in the public record for the hearing officer's conclusion that Mr. Sogi was not credible in denying he had used the names Gurnam or Piare Singh.

[45]The decision then refers to the CSIS report, i.e., the information not disclosed and, satisfied about reliability of that information, concludes, on a balance of probabilities, that the applicant, who arrived in Toronto on May 8, 2001, is the person referred to in the letters from the Home Office.

[46]Thus there was evidence, not disclosed to the applicant, which the hearing officer found supported his conclusion. That conclusion is based on evidence which by implication was clearly preferred by the hearing officer to the evidence presented by Mr. Sogi. The latter documents, so far as they support the claim that Gurbachan Singh Sogi, the applicant, is not the addressee of letters from the Home Office or a person considered to be

involved with terrorist activities, is not expressly contradicted by the hearing officer but he did accept, in the face of contradictory evidence available to him, some of it not disclosed, that the applicant is indeed the person identified as having terrorist connections. That finding of fact is not patently unreasonable on the evidence before the hearing officer and there is no basis for the Court to intervene.

(d) The Credibility of the Applicant

[47]The conclusion that the applicant is the person said to be involved in terrorist activities was made in part in light of a finding of a lack of credibility of Mr. Sogi. While much of the applicant's evidence was accepted, the hearing officer found the applicant's denial of his use of the names Gurnam or Piare not to be credible in light of the applicant's own admission that he had used a number of aliases in the past. That conclusion is said to have been reached without weighing or assessing the totality of evidence including extensive testimony of the applicant. The officer made no comment on that testimony apart from the admission that aliases had been used, and no consideration was given to the explanation by Mr. Sogi that other names than his own had been used to flee persecution. It is urged no reasonable basis is disclosed for concluding the applicant was not credible.

[48]Yet his use of a number of aliases was admitted by the applicant. In view of this, it was within the determination of the hearing officer to conclude as he did, that denial of use of certain aliases, Gurnam or Piare, was not credible. The hearing officer heard the applicant's testimony including his denial. The inference drawn, that the denial was not credible, was a matter for determination by the hearing officer. Having accepted that letters from the Home Office were authentic and were directed to the applicant, their addresses to some of the aliases believed to have been used by Mr. Sogi was inferred, in preference to the applicant's denial of the use of certain aliases.

[49]In my view, that determination is not patently unreasonable. In other words, it is not a finding of fact that is capricious or made without reference to the evidence. Even if this Court might have assessed the evidence differently, there is no basis to intervene in light of the appropriate measure of deference owed to the hearing officer as the finder of fact.

(e) The Process Followed and section 7 of the Charter

[50]For the applicant it is urged that section 86 provides a process that engages section 7 of the Charter, and that process is said to be contrary to the principles of fundamental justice.

[51]The respondent Minister argues that in so far as this claim rests on a perceived imminent risk of removal to a country where the applicant claims he will face a risk of torture, the claim is premature. The hearing officer's decision does not create an imminent risk of removal. Whether removal will occur awaits a further decision on behalf of the Minister, after a pre-removal risk assessment (PRRA) decision, both of which decisions may be subject to judicial review.

[52]I am not persuaded that Mr. Sogi's claim is based upon concern of imminent risk of torture. Rather it is based on his continuing loss of liberty resulting from the decision, the effect of which is his continuing detention. While that continues and he is known to be designated as one associated in terrorist activities there is, in my view, a direct loss of psychological integrity. In that sense his liberty and security interests are adversely affected by state action pursuant to section 86. That engages section 7 of the Charter which assures to everyone:

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

That right is assured to everyone, including a foreign national in Canada (*Singh et al. v. Minister of Employment and Immigration*, 1985 CanLII 65 (S.C.C.), [1985] 1 S.C.R. 177, at page 202).

[53]In *R. v. Beare; R. v. Higgins*, 1988 CanLII 126 (S.C.C.), [1988] 2 S.C.R. 387, at page 401, Mr. Justice La Forest set out requirements for the application of section 7 of the Charter in the following terms:

To trigger its operation there must first be a finding that there has been a deprivation of the right "to life, liberty

and security of the person" and, secondly that the deprivation is contrary to the principles of fundamental justice.

[54]I am not persuaded that loss of opportunity to have his refugee claim considered and that a removal order has been issued against him are bases for finding section 7 of the Charter is engaged (see Madam Justice McGillis in *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669 (T.D.); upheld by 2000 CanLII 15800 (F.C.A.), (2000), 24 Admin. L.R. (3d) 171 (F.C.A.); leave to appeal to S.C.C. dismissed at [1997] 2 S.C.R. v). Yet, in my opinion, continuing detention of Mr. Sogi, presumably initiated by an immigration officer under section 55 of the Act, even though that detention is the subject of periodic reviews under section 57, deprives the applicant of his right to physical liberty. Moreover, psychological distress caused to him by the state's action of detaining him and labelling him a terrorist deprives him of the right to security of the person protected by section 7 unless those deprivations are consistent with principles of fundamental justice (see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307). Since, in my view, section 7 of the Charter is engaged by the process under sections 44, 55 and 67 here followed, I turn to the issue of whether that process is consistent with principles of fundamental justice.

[55]It is accepted that the somewhat similar process pursuant to sections 77 [as am. by S.C. 2002, c. 8, s. 194] and 78, comparable to section 40.1 [as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31] of the former *Immigration Act*, would not violate section 7 and other provisions of the Charter (see *Ahani*, *supra*). There the Minister of Citizenship and Immigration and the Solicitor General together issue a certificate of their opinion that a permanent resident or a foreign national is inadmissible on grounds of security and the certificate is referred to the Federal Court for assessment of its reasonableness. That process is said to be different from the one followed in this case in two significant respects. Those are in the manner by which they are initiated and in the persons who are reviewers of the security information.

[56]Under section 77 the process begins by two ministers considering the information and agreeing to issue a certificate which is then referred directly to this Court for consideration of a designated judge whether the certificate is reasonable or not. This Court is charged under several Acts of Parliament with reviewing information relied upon in relation to security matters in a variety of contexts and it is anticipated that a designated judge of the Court will have developed expertise in dealing with such matters.

[57]It is urged in this case the process does not require an initial review by two ministers, rather the information in question is laid directly before a member of the Immigration Division by officials of CSIS. I do not fully accept that description for this process commences under subsection 44(2) of IRPA by the Minister of Citizenship and Immigration, if he or she is of opinion that a report of an immigration officer is well-founded that a permanent resident or a foreign national is inadmissible. The Minister may refer the report of that opinion to the Immigration Division for an admissibility hearing. That was done in this case and at that hearing, pursuant to section 86, the Minister sought an order for non-disclosure. The application was considered by the member of the Immigration Division hearing the matter who, applying section 78, then ordered non-disclosure of some information considered by the Minister, and in turn by the hearing officer, in reaching his conclusion that Mr. Sogi is inadmissible.

[58]Thus, the main differences between the process under section 77 and that followed in this case are two: initial consideration of information by two ministers rather than one, and review and assessment of information sought to be subject to an order for non-disclosure on motion of the ministers or Minister, by a judge of this Court under sections 77 and 78; or review by a member of the Immigration Division who, it is urged, has no experience at least prior to June 2002 in considering information said to be security intelligence, and in seeking to balance the state's interests with the interests of the individual concerned in the fullest possible disclosure of the case to be met.

[59]There is one other difference in the two processes. In that commenced under section 77 by the certificate of the two ministers, the decision of the designated judge concerning the reasonableness of the certificate is final and may not be appealed or judicially reviewed (subsection 80(3) of IRPA). In the process followed in this case, commenced under subsection 44(2) and then sections 86 and 87, the entire decision of the admissibility hearing officer is subject to judicial review by a designated judge of this Court, including review of the decision that information not be disclosed for reasons of national security. Thus a designated judge of this Court is involved in this process but at a stage removed from the somewhat similar role played under sections 77 and 78.

[60]In *Ahani* (T.D.), *supra*, at pages 681-683, Madam Justice McGillis, discussing the task of the designated judge in balancing the interests of the state and those of the individual concerned, wrote:

Since the Minister and the Solicitor General are required to make their decisions solely on the basis of the security or criminal intelligence reports, the designated judge knows exactly what information was considered by them prior to the issuance of the certificate. The security or criminal intelligence reports are the only evidence which the designated judge must hear *in camera*. In the event that "other evidence or information" is to be tendered, the Minister or Solicitor General may request that "all or part of such evidence or information" be heard by the designated judge in the absence of the named person and his counsel. The designated judge may only accede to this ministerial request where he forms the opinion that the disclosure of the evidence or information "would be injurious to national security or to the safety of person." The burden of establishing that the "other evidence or information" ought not to be disclosed for reasons of national security or safety rests squarely on the minister who seeks to have it tendered in the absence of the named person and his counsel. In short, the disclosure of this evidence or information to the named person may be withheld under the statutory scheme only following a ministerial request and an independent judicial determination that its release would be injurious to national security or to the safety of persons.

. . . the designated judge has a heavy burden to provide disclosure in order to permit the named person to challenge the reasonableness of the certificate issued by the Minister and the Solicitor General. In particular, the designated judge must provide the named person with a statement summarizing the information available "as will enable [him] to be reasonably informed of the circumstances giving rise to the issue of the certificate." In preparing the statement of information for the named person, the designated judge must assess the right of the named person to be "reasonably informed of the circumstances . . . having regard to whether, in [his] opinion . . . , the information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons." The designated judge therefore has the discretion to refuse to disclose information to the named person only where he formulates the opinion that disclosure would be injurious to national security or to the safety of person. The disclosure powers accorded to the designated judge are broad and require the cautious exercise of judicial discretion to ensure that the competing interests are properly balanced. [Footnotes omitted.]

[61]That passage emphasizes the special responsibility of the designated judge considering a motion for non-disclosure under the sections 77 and 78 process. That same responsibility must be assumed by the member of the Immigration Division considering a motion for non-disclosure in an admissibility hearing pursuant to section 86 and again by the designated judge concerned with judicial review to whom a motion for non-disclosure is made under section 87. Neither of those decision-makers discharges the responsibility under the Act by approving, without question, a recommended arrangement for non-disclosure and for approval of a prepared summary of the information intended to reasonably inform the person affected of the circumstances giving rise to the Minister's decision.

[62]It is urged for Mr. Sogi that there is no explanation offered why the process followed in this case, introduced when IRPA became effective in June 2002, is considered necessary when the pre-existing process under the former section 40.1 of the *Immigration Act* was continued with little change under sections 77 and 78. In my opinion the necessity for legislation enacted by Parliament is essentially an issue of policy and is not generally a matter of concern to a court assessing the constitutional validity of legislation. It is not of concern here as a matter of law.

[63]Do the differences in process following subsection 44(2) and sections 86 and 87 constitute a process so different from that under sections 77 and 78, essentially upheld in *Ahani, supra*, and so infringing upon the individual's interests that it can be considered to be contrary to the principles of fundamental justice, and thus in contravention of section 7 of the Charter? In my opinion the differences introduced by the process under subsection 44(2) and sections 86, 87 do not contravene the principles of fundamental justice, for the same reasons that Madam Justice McGillis in *Ahani, supra*, at pages 691-697, found the section 40.1 process under the former Act did not contravene principles of fundamental justice.

[64]While the circumstances are different, the same result was reached by the Supreme Court in upholding the application of provisions under the *Privacy Act* [R.S.C., 1985, c. P-21] for information that is not agreed to be disclosed to be provided *in camera* without the person concerned or his counsel present (see *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (CanLII), [2002] 4 S.C.R. 3).

Conclusions

[65]I confirm that when this matter was heard, after review of the information not disclosed to the applicant by the admissibility hearing officer, I determined and orally ordered, that the information not disclosed is relevant to the decision of the Minister in relation to the applicant, and further that its disclosure would be injurious to national security or to the safety of a person. I confirm that information is not to be disclosed, but that it may be considered by the Court. It shall be maintained with the Court file to be examined only by a designated judge under IRPA.

[66]I confirm my conclusions that the admissibility hearing officer did not err in assessing certain information as relevant and not to be disclosed for the protection of national security; he did not err in providing inadequate disclosure of information as alleged; he did not err in ignoring relevant evidence introduced by the applicant; and his finding that the applicant's denial of the use by him of certain aliases was not patently unreasonable in the circumstances. Thus no ground is established to warrant intervention on typical grounds raised in judicial review of an administrative decision.

[67]Finally, I am not persuaded that the process here followed, pursuant to subsection 44(2), sections 86 and 87, is contrary to the principles of fundamental justice, and though it adversely affects the physical liberty and the psychological security of the applicant, that process is excepted from infringing section 7 of the Charter.

A Certified Question

[68]Counsel for both parties agreed at the end of the hearing that this case appeared to raise a certifiable question under paragraph 74(*d*) of IRPA, for consideration of the Court of Appeal, concerning the application of section 7 of the Charter in the circumstances of this case. Subject to refining the question satisfactorily, I agree that a question be certified.

[69]An order disposing of this application, in accord with these reasons will follow after a brief opportunity for submissions of counsel concerning the text of any question to be certified. Counsel are asked to consult and to advise the Court on or before December 18, 2003 of their respective proposals for any question for certification.