

## Jaballah (Re) (T.D.), 2003 FCT 640 (CanLII)

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DES-4-01

2003 FCT 640

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

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

**AND IN THE MATTER OF Mahmoud Jaballah**

Indexed as: Jaballah (Re) (T.D.)

Trial Division, Mackay J.--Toronto, December 17, 18, 2001, January 8, February 13 and March 11, 2002; Ottawa, May 23, 2003.

*Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Referral to F.C.T.D. of certificate of Ministers' opinion respondent, refugee applicant, inadmissible on national security grounds -- Previous certificate quashed by Cullen J. as unreasonable (in Jaballah No. 1) -- Withdrawal of respondent's counsel as of view instant proceedings manipulated by Canadian Security Intelligence Service (CSIS), mere "sham", Court's adjudicative role tarnished -- Referral hearings suspended pending Minister's decision on IRPA protection application -- Respondent remaining in solitary confinement -- Respondent moving to have certificate quashed for abuse of process due to Minister's delay with communicating decision to court -- Court having thrice indicated concern over Minister's delay -- Delay constituting abuse of process -- Abuse of process not justifying quashing certificate but warranting order for resumption of reasonableness proceedings -- Court may rely on information inadmissible in civil, criminal cases -- Court not deciding question of fact but reasonableness of certified opinion -- Res judicata, abuse of process might come into play where, as here, second certificate issued after first quashed -- Ministers not limited to issuing one certificate as exceptional proceedings involving national security interests -- Based on new information in public record, certificate reasonable; respondent inadmissible.*

*Practice -- Res Judicata -- First certificate of Ministers' opinion refugee applicant inadmissible on security grounds quashed as unreasonable by Cullen J. -- Second certificate issued on basis of new evidence -- Respondent moving to have certificate quashed for res judicata, abuse of process, Charter breach due to Minister's delay with deciding IRPA protection application -- Respondent in solitary confinement -- Minister guilty of abuse of process but quashing of certificate not justified -- In exceptional proceedings involving national security interest, usual principle parties limited to one proceeding inapplicable -- Otherwise, state's security interests, reassessed over time as new information received, compromised -- Federal Court Rules, 1998, r. 399(2) (variation of order where new matter arises, discovered) here applicable.*

*Barristers and Solicitors -- Federal Court reference as to whether Ministers' certificate refugee applicant inadmissible as security risk -- Second certificate issued after first quashed by Court -- Respondent's counsel withdrawing on basis barrister's oath precluding his continuing to act -- Of view court proceedings manipulated by Canadian Security Intelligence Agency, Court's adjudicative role tarnished, proceedings mere "sham" -- Counsel's frustration in not knowing all information relied on by Minister's understandable as placed in invidious position, but that is disadvantage imposed by Act of Parliament.*

*Judges and Courts -- Federal Court reference as to reasonableness of Ministers' certificate refugee status applicant inadmissible as security risk -- Counsel withdrawing as to continue allegedly violating barrister's oath -- Of view proceedings manipulated by Canadian Security Intelligence Agency (CSIS), used for investigative, prosecutorial purposes -- Suggesting that Court's adjudicative role tarnished; proceedings mere "sham": courtroom turned into police station -- Appropriate court comment on counsel's condemnation of process -- Suggestion Court had been used by CSIS rejected -- Court following process mandated by legislation -- Counsel in invidious position as some of information relied on by Ministers not disclosed, but such disadvantage imposed by Act of Parliament -- Important proceedings resume to terminate any perception Court implicated in delaying process.*

The Court's determinations arise upon the reference of a certificate, filed by the Solicitor's General and the Minister of Citizenship and Immigration, that the respondent, Jaballah, a refugee status applicant, is inadmissible on security grounds. These proceedings are out of the ordinary. First because this is the second certificate issued against the respondent, the first one having been quashed as unreasonable by Cullen J. The Minister says that this second certificate is based upon new information. Second, because the respondent's counsel withdrew due to advice received from counsel he had consulted because his barrister's oath precluded him from acting further herein. In his submission, these proceedings have been manipulated by CSIS and used for investigative and prosecutorial purposes. Furthermore, it was suggested that the Court's adjudicative role had been tarnished and that these proceedings were nothing more than a "sham". Although counsel had withdrawn from the *Immigration Act*, section 40.1 proceedings, he later asked for this suspension under *Immigration and Refugee Protection Act (IRPA)* section 79 pending the Minister's decision on a protection application to be made by the respondent under section 112 of the last-mentioned statute. The proceedings were suspended in July 2002. Respondent has remained, since August 2001, in solitary confinement and when, in April 2003, the Minister still had failed to communicate his decision to the Court, a motion was made to the Court, based on the Charter and on abuse of process, to resume the suspended proceedings, quash the suspended proceedings, quash the certificate and release Jaballah from detention. The Court's reasons are in two parts. Part I deals with the question whether the proceedings should be resumed, Part II with the reasonableness of the new certificate.

## Part I

It was to be noted that, at the outset, these proceedings were governed by the *Immigration Act* but that statute was, in July 2002, replaced by the IRPA which now governed this matter: *Interpretation Act*, paragraph 44 (c). In the Ministers' opinion, Jaballah is inadmissible as a security risk, having instigated the subversion by force of the Egyptian government, having engaged in terrorism and for being a member of an organization believed to engage in terrorist acts.

The Court has yet to receive the Minister's decision even though it has, on at least three occasions, indicated its concern with the delay. The Court has now determined that the Minister's delay constitutes an abuse of process. In April 2003, Jaballah was served with a letter from a Departmental Officer reporting on an IRPA assessment concluding that respondent belongs to Al Jihad, now a listed organization under *Criminal Code*, Part II.I, and accordingly is a danger to Canadian security. But the assessment referred to with that letter would appear not to satisfy IRPA Regulations, paragraph 172(2)(b). The Regulations require a balancing and weighing of the risk to Jaballah if returned against the risk he presents to the security of Canada, a step yet to be undertaken. Once such decision has been made and communicated, he has a right of response before the Minister's final decision is made. Under IRPA, subsection 79(2), that decision is subject to review for lawfulness and it may be that the assessment must be in accordance with Charter, section 7 standards. The officer's letter should be deemed to be the Minister's risk assessment. It is impossible to predict how long it might take before the Court could get on with determining the reasonableness of the Minister's certified opinion. Meanwhile, the respondent remains in solitary confinement. The abuse of process is not such as to justify the quashing of the certificate but does warrant an order that

proceedings be resumed without further awaiting the Minister's decision on the protection application. Another reason for now resuming the proceedings is that any perception of the Court's implication in delaying the process must end.

## Part II

Following preliminary notions as to disclosure, the Court directed that the applicants produce a CSIS officer familiar with the evidence in *Jaballah No. 1* and that in this case, to testify as to the differences. This witness, referred to as "Mike", alluded to information received since the terrible events of September 11, 2001 and through his testimony were introduced exhibits depicting communication links between Jaballah and Al Qaida operatives. But, following "Mike's" cross-examination, it was urged upon the Court that there was an absence of new evidence that would justify a different outcome from that in *Jaballah No. 1*. Counsel for the applicants, on the other hand, pointed to some eight matters raised by "Mike's" evidence which were not before Cullen J. in 1999. Next, the Court convened expert, *in camera* hearings at which was directed the production of a further summary statement as to the basis for the certified opinion and clearly indicating information now available that was not before Cullen J. and not withheld for security reasons. The Court also confirmed documents that ought not, on security grounds, be disclosed to Jaballah. Upon resumption of the public hearings, the respondent's counsel addressed the Court, advising that, under the oath he had taken as a barrister, he could neither "pervert the law" nor "assist a judge in conduct that is in violation of applicable rules of judicial conduct or other laws" and could not continue to act in this case. His view was that the courtroom had been "turned into the police station" with *Jaballah No. 1* having been used as an investigative basis for the instant case. Counsel having withdrawn from the courtroom, Jaballah was asked by the Court whether his intention was to act for himself or get a new lawyer. He answered as follows: "I cannot represent myself with this proceeding. I have my lawyer and I follow his advice and instructions". From that it had to be concluded that the respondent had declined the advance to secure a replacement lawyer as well as to make submissions on his own behalf or other than to acknowledge that there was before the Court herein information on two matters not before Cullen J. in the earlier case (his telephone number being on a paper in the possession of one Mahjoub, a person whose certification was held reasonable by Nadon J. and Jaballah's rental of a postal box). He understood that this was his opportunity to be heard on the issue of his inadmissibility and the information on the public record upon which the certified opinion was based but declined to take advantage of that opportunity.

It was appropriate that the Court comment upon counsel's condemnation of the process. When asked for an explanation, counsel replied that he was incapable of advising his client as he did not know the case to be met. In his submission, "the Court is being used as an investigative tool by the security forces without a judicial balance and fairness to the person in front of the Court". The Court had followed the process provided for by the legislation and could not accept the suggestion that it had been used by CSIS as an investigative tool or that the proceedings before Cullen J. (*Jaballah No. 1*) were an investigation leading to this proceeding. It is indeed an invidious position for the person concerned and counsel not to be able to see all of the information relied upon by the ministers, but that is a disadvantage imposed by Act of Parliament.

In determining whether the certificate is reasonable, the Court may consider information that would be inadmissible in ordinary civil or criminal proceedings. The decision is not the determination of a question of fact but rather an assessment of the reasonableness of the certified opinion reached in the exercise of ministerial discretion. The Court does, however, accept that where, as here, a second certificate has been issued after the initial one was quashed, such principles as *res judicata* and abuse of process may come into play.

While the legislation makes no provision for a second certified opinion where the first has been found unreasonable, such is not required. These exceptional proceedings, involving national security interests, are not subject to three principle that parties to litigation are limited to bringing one proceeding. Were it otherwise, the state's continuing security interests, reassessed over time on the basis of a mosaic of information gathered from various sources, might be compromised. Rule 399(2), which provides for the variation of an order where a matter has subsequently arisen or been discovered, was here applicable. The Court had to determine whether there was new evidence, discovered since *Jaballah No. 1*, that had it been presented at that trial would probably have changed the results and whether it could have been discovered before completion of that trial by the exercise of reasonable diligence.

There is information in the public record which came to the Ministers' attention after the initial certificate was quashed. This included: (1) an Interpol notice and fingerprints provided by the Government of Egypt implicating the respondent with the supply of weapons and explosives as well as the escape of terrorists; (2) having been to Afghanistan, a country the respondent denied having visited; (3) a paper with the respondent's phone number written on it was found in the possession of one Mahjoub, said to be involved in a militant faction, *Vanguards of Conquest*; (4) use of a post office box rented by the respondent in another name which he testified with *Jaballah No.1* had not been used; (5) where arrested in Pakistan, one Khalil said Deek, said to be an Al Qaida operative, was in possession of a computer disk containing the respondent's post office box address.

Furthermore, the Ministers have new information on Al Qaida which is said to cast new light and understanding on information which they may have possessed at an earlier time. In particular, the respondent is believed to have had contact with a principal aide to Osama bin Laden while in Yemen or Pakistan. Also, the respondent is believed to have been in telephone contact with senior Al Qaida operatives at London in 1998. The respondent has made no response to the Ministers' perception arising from his contacts with these terrorist organization operatives and it can be inferred that unless the respondent was a senior AJ-Al Qaida operative, he could not have had contact with other senior members of those organizations. It had to be concluded that there was significant new information implicating respondent in relation to Al Qaida. Had it been before the Court with *Jaballah No.1*, the certificate may not have been questioned. That conclusion was reinforced by other new information not made public to avoid prejudicing national security. The information on the public record supports the opinion of the Ministers as reasonable under *Regulations Establishing a List of Entities*, enacted under the *Criminal Code* in 2002, Al Qaida, Al Jihad (AJ) and the *Vanguards of Conquest* are included as organizations involved in terrorist activities.

The respondent is accordingly inadmissible to Canada on security grounds.

statutes and regulations judicially

considered

*Canadian Bill of Rights*, R.S.C., 1985, Appendix III, s. 2(e).

*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. 7, 9, 10(c).

*Criminal Code*, R.S.C., 1985, c. C-46, Part II.I (as enacted by S.C. 2001, c. 41, s. 4).

*Federal Court Rules, 1998*, SOR/98-106, r. 399(2).

*Immigration Act*, R.S.C., 1985, c. I-2, ss. 19(1)(e) (as am. by S.C. 1992, c. 49, s. 11), (f) (as am. *idem*), 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), 76, 77, 78, 79, 80, 81, 82(2), 84(2), 97, 112, 113(d).

*Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 172.

*Interpretation Act*, R.S.C., 1985, c. I-21, s. 44(c).

*Regulations Establishing a List of Entities*, SOR/2002-284, s. 1.

cases judicially considered

not followed:

*Al Sayegh (Re)* (1997), 131 F.T.R. 7 (F.C.T.D.); *Almrei (Re)* (2001), 19 Imm. L.R. (3d) 297 (F.C.T.D.).

applied:

*Canada (Minister of Citizenship and Immigration) v. Mahjoub* 2001 CanLII 22178 (F.C.), (2001), 81 C.R.R. (2d) 350; 199 F.T.R. 190; 13 Imm. L.R. (3d) 33 (F.C.T.D.); *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669; (1995), 32 C.R.R. (2d) 95; 100 F.T.R. 261 (T.D.); affd  reflex, (1996), 37 C.R.R. (2d) 181; 201 N.R. 233

(F.C.A.); leave to appeal to S.C.C. refused, [1997] 2 S.C.R. v; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001 SCC 59 \(CanLII\)](#), [2001] 2 S.C.R. 983; (2001), 204 D.L.R. (4th) 542; 17 B.L.R. (3d) 1; 11 C.C.E.L. (3d) 1; 8 C.C.L.T. (3d) 60; 12 C.P.C. (5th) 1; [2001] 4 C.T.C. 139; 274 N.R. 366; 150 O.A.C. 12; *Ladd v. Marshall*, [1954] 1 W.L.R. 1489 (C.A.); *Mackay v. Canada (Attorney General)* (1997), 129 F.T.R. 286 (F.C.T.D.).

considered:

*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) 159; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1.

referred to:

*Canada (Minister of Citizenship and Immigration) v. Jaballah*, [1999] F.C.J. No. 1681 (T.D.) (QL); *Jaballah (Re)*, [2001 FCT 1287 \(CanLII\)](#), 2001 FCT 1287; [2001] F.C.J. No. 1748 (T.D.) (QL); *Jaballah (Re)*, [2003 FCA 111 \(CanLII\)](#), [2003] 3 F.C. 73; (2002), 224 F.T.R. 20 (T.D.); *Jaballah v. Canada (Minister of Citizenship and Immigration)* (2000), 196 F.T.R. 175; 9 Imm. L.R. (3d) 45 (F.C.T.D.); *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2001 FCT 1095 \(CanLII\)](#), [2001] 4 F.C. 644; (2001), 212 F.T.R. 42 (T.D.).

MOTION for an order (1) that an officer's report constitutes the Minister's risk assessment, (2) that the Minister's delay in determining a protection application amounts to an abuse of process and (3) that the certificate be quashed and the respondent released from custody. Motion allowed as to (1) and (2) and hearing resumed to assess reasonableness of the Ministers' certified opinion. Based on new evidence not before the Court in proceedings on the previous certificate quashed as unreasonable, the certificate is reasonable and the respondent is inadmissible.

appearances:

*Robert F. Batt, Marthe Beaulieu* for applicant.

*Rocco Galati* for respondent.

solicitors of record:

*Deputy Attorney General of Canada* for applicant.

*Galati, Rodrigues, & Associates*, Toronto, for respondent.

The following are the reasons for orders determinations rendered in English by

MacKay J.:

## INTRODUCTION

[1]These reasons concern a number of determinations by the Court arising from proceedings that began on August 15, 2001, by reference to the Court of a certificate, filed by the Solicitor General and the Minister of Citizenship and Immigration pursuant to then 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 *Immigration Act* [R.S.C., 1985, c. I-2], that in their opinion, the respondent, Mr. Jaballah, a foreign national who came to Canada in 1996 and applied for refugee status, is inadmissible to Canada on national security grounds.

[2]The proceedings were suspended in early July 2002 at the request of Mr. Jaballah when he applied to the Minister to be found to be a person in need of protection, pursuant to section 112 of the *Immigration and Refugee Protection Act*, [S.C. 2001, c. 27](#), as amended, (the IRPA) which came into force June 28, 2002. Since then the respondent has remained, as he has been since mid-August 2001, in detention in solitary confinement. No final decision on his application to the Minister has been communicated to the Court, as has been expected in accord with the IRPA and the IRPA Regulations [*Immigration and Refugee Protection Regulations*, SOR/2002-227]. On April 11, 2003 the Court heard a motion on behalf of the respondent, based on the principle of abuse of process

and claiming Charter interests [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], the purpose of which would be that the Court should now resume its suspended proceedings, previously suspended, and quash the certificate of the Minister, and release Mr. Jaballah from detention.

[3] In summary, the determinations now made, filed in two separate orders and determinations, now allow the respondent's motion in part, in so far as an assessment of the risk to Mr. Jaballah if he were now returned to Egypt, the Pre-Removal Risk Assessment (PRRA) by an officer acting on behalf of the Minister, which was provided to the respondent in August 2002, and now filed by direction of the Court in April 2003, is deemed to be the assessment of the risk by the Minister pursuant to paragraph 172(2)(a) of the IRPA Regulations, made in accord with section 97 of the IRPA.

[4] Further, the Court determines that, as there is as yet no satisfactory explanation for the delay in advising it of a decision by the Minister in relation to the application for protection, without any firm indication of a date for decision, continuing delay constitutes an abuse of the Court's process with the respondent continuing in detention, without right of review. In these circumstances, the appropriate relief in the circumstances of this case is to resume the proceedings that deal with the issue raised by reference of the Minister's certificate to the Court, leaving to the Minister a decision on the application for protection as the IRPA directs.

[5] In Part II of these reasons, the Court now determines, pursuant to subsection 80(1) of the IRPA that the certificate dated August 13, 2001 by the applicant Ministers, on the basis of the evidence and information available to the Court, is reasonable.

[6] Since there is no decision communicated on the application for protection, no determination is made whether such a decision is lawful, as provided for by subsection 80(1). Presumably when made, the decision will be subject to judicial review.

[7] These reasons are long. They include reference to several stages in the proceedings. The following headings and paragraph numbers where each section begins, may assist in providing an overview of the context in which my determinations are made.

#### Part I Background

1. The legislative regime, the context for determinations [8]
2. The Court's determination to resume proceedings [17]
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  - (b) Information new to the Ministers after November 1, 1999 [81]
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#### Part III Conclusions, Orders, Costs [98]

## PART I BACKGROUND

### 1. THE LEGISLATIVE REGIME, THE CONTEXT FOR DETERMINATIONS

[8]When this proceeding began, in August 2001, it was governed by the *Immigration Act*, R.S.C., 1985, c. I-2, as amended (the 1985 Act), and in particular, section 40.1 of that Act, under which the certified opinion issued and the matter was referred to this Court. However, before this decision was rendered, the 1985 Act was repealed and replaced by the IRPA, which came into force on June 28, 2002. This proceeding, begun under the 1985 Act, has continued under the IRPA, which provides in part, (consistent with the general principle under paragraph 44(c) of the *Interpretation Act*, R.S.C., 1985, c. I-21, as amended), that:

**190. Every application, proceeding or matter under the former Act that is pending or in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.**

Relevant provisions of the IRPA are reproduced in Annex A, with brief references to comparable provisions of the 1985 Act. Statutory references in these reasons are primarily to the IRPA now in force, with additional references to comparable provisions in the 1985 Act where that seems appropriate.

[9]This proceeding began with the referral to the Court of a certificate by the applicants, the Minister of Citizenship and Immigration and the Solicitor General of Canada, pursuant to paragraph 40.1(3)(a) of the 1985 Act (now replaced by subsection 77(1) of the IRPA), for the Court to assess the reasonableness of the certificate, pursuant to paragraph 40.1(4) of the 1985 Act (now replaced by subsections 80(1) and 80(2) of the IRPA). That certificate states the opinion of the applicants, based upon security intelligence reports, that Mr. Jaballah, who is not a Canadian citizen but who, after arriving in Canada in 1996, had claimed Convention refugee status under the 1985 Act, is inadmissible to Canada as a person 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*], 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 that Act.

[10]Comparable provisions of the IRPA, to those referred to in the Ministers' certificate, are paragraphs 34(1)(b), 34(1)(c) and 34(1)(f). Thus in the terms of the IRPA, the certified opinion of the Ministers is that Mr. Jaballah is inadmissible on security grounds for:

- engaging in or instigating the subversion by force of any government; in this case the Government of Egypt (paragraph 34(1)(b));
- engaging in terrorism (paragraph 34(1)(c));
- being a member of an organization, pursuant to paragraph 34(1)(f), that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph 34(1)(b) or (c).

[11]My determinations are made pursuant to subsection 80(1) of the IRPA, after consideration of the evidence and information filed in the Court and adduced on behalf of the applicants, and in the absence of any evidence adduced by or on behalf of Mr. Jaballah, except that tendered on his behalf from earlier proceedings in 1999, when he had produced evidence relating to a similar certificate that was referred to the Court in accordance with subsection 40.1(3) of the 1985 Act. After hearings, that earlier certificate was found to be unreasonable and it was quashed by order of Mr. Justice Cullen (see *Canada (Minister of Citizenship and Immigration) v. Jaballah*, [1999] F.C.J. No. 1681 (T.D.) (QL), hereinafter *Jaballah No. 1*).

[12]These proceedings are unusual in that this is the second certificate with respect to Mr. Jaballah, issued for the same general purposes, setting out the same opinion by the applicant Ministers under then section 40.1 of the 1985 Act. The first certificate dated March 31, 1999, as noted, was found to be unreasonable, and was quashed by Mr. Justice Cullen's Order, dated in early November 1999. The second certificate, dated August 13, 2001, is now before the Court. It is said by counsel for the applicant Ministers to be based substantially on new information, a perspective not shared by the respondent, Mr. Jaballah.

[13]The proceedings are unusual also in that after hearings commenced, and were to continue on March 11, 2002,

to hear evidence and argument on behalf of Mr. Jaballah to respond to information claimed by the Ministers to be new, counsel for Mr. Jaballah announced his withdrawal from the section 40.1 proceedings. Doing so, he said, was based on advice of counsel that he had consulted and on the ground that his oath as a barrister would not permit him to continue in these proceedings. In his view, the proceedings had been manipulated by the Canadian Security Intelligence Service (CSIS) and had been used as an investigatory, prosecutorial service. The Court's traditional role as an adjudicator had been tarnished and these proceedings were a "sham". That perception, by experienced counsel, warrants addressing, after these reasons first provide an overview of the process followed.

[14]A further step in these proceedings was initiated on July 1, 2002 when counsel who had withdrawn from the section 40.1 proceedings, requested on behalf of Mr. Jaballah that these proceedings be suspended pursuant to section 79 of IRPA pending a decision of the Minister of Citizenship and Immigration on an application for protection, then proposed to be made by the respondent under section 112 of the IRPA, an application possible under that Act at that stage in the proceeding. With decision under reserve on the Ministers' motion that the Court find their certificate reasonable, the proceedings in regard to the certificate were then suspended pursuant to subsection 79(1) of the IRPA. While notice from the Minister of his decision on that application has not yet been received by the Court, it is now determined that the delay in providing that notice, while Mr. Jaballah remains in detention, in solitary confinement, and is not sufficiently explained, and without a reasonable forecast of its termination, in the circumstances of this case constitutes an abuse of process.

[15]That warrants resumption by the Court of its primary task, and in accord with subsections 79(2) and 80(1) of the IRPA, I now resume consideration of whether the certificate of the Ministers is reasonable.

[16]After describing the basis of the Court's determination to resume the proceedings, these reasons then provide a brief description of the immigration circumstances of the respondent. These reasons then describe in summary the proceedings here followed in relation to the Ministers' certificate. The principal issue is whether there is "new information" before this Court, which was not before Mr. Justice Cullen in 1999, that supports a conclusion that the current certificate of the Ministers' opinion concerning Mr. Jaballah is reasonable.

## 2. THE COURT'S DETERMINATION TO RESUME THE PROCEEDINGS

[17]On April 11, 2003 a motion on behalf of Mr. Jaballah was considered seeking, *inter alia*, orders that the decision of a PRRA officer, dated August 15, 2002 and then forwarded to him, be filed and deemed by the Court to be the decision of the Minister concerning the risk to Mr. Jaballah if he were removed from Canada. The motion sought a further order that the certificate of the Ministers now be quashed because of abuse arising from delay in deciding Mr. Jaballah's application for protection made in July 2002, and that Mr. Jaballah be released from detention.

[18]Delay, while Mr. Jaballah continues in detention in solitary confinement, as he has been since August 14, 2001, in the circumstances of this case, in my opinion, constitutes abuse of process.

[19]The circumstances of this case at two stages have been described in previous decisions (see: *Jaballah (Re)*, 2001 FCT 1287 (CanLII), 2001 FCT 1287, [2001] F.C.J. No. 1748 (T.D.) (QL) dated November 23, 2001; and also *Jaballah (Re)*, 2003 FCA 111 (CanLII), [2003] 3 F.C. 73 (T.D.)). The former deals with a number of preliminary issues raised by Mr. Jaballah including the application of the principles of abuse of process or *res judicata* in this reference which I declined to apply at that stage of proceedings, having heard no evidence or argument that would warrant application of those principles. That decision also describes the background up to the fall of 2001, including reference to the earlier certificate issued concerning Mr. Jaballah, which was found to be unreasonable and quashed in November 1999.

[20]The second of the earlier decisions dealt with submissions of the parties about the provisions of the IRPA and the IRPA Regulations relating to the process of the Court following Mr. Jaballah's application for protection and his receipt of the PRRA, dated August 15, 2001, that his application should be granted. This assessment was based on finding substantial grounds for belief that, if removed from Canada to his native Egypt, Mr. Jaballah would face a risk of torture, and a risk to his life or of cruel and unusual treatment or punishment, under paragraphs 97(1)(a) and (b) of the IRPA. The assessment concluded that the application should be allowed.

[21]At that stage, counsel for Mr. Jaballah urged that the Court should treat the assessment received by Mr. Jaballah, not by the Court, as the decision of the Minister in relation to the application for protection and that the certificate issued by the applicant Ministers in August 2001 should be quashed. There was no report to the Court of the Minister's decision on the application for protection. I found that under the IRPA and the IRPA Regulations, the Court's resumption of proceedings was directed after the decision of the Minister was reported to the Court, and that the decision of the Minister under subparagraph 113(d)(ii) of the IRPA (and subsection 172(2) of the IRPA Regulations) is to be based on factors set out in section 97, and on an assessment whether the application should be refused "because of the nature and severity of the acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada".

[22]To date there has been no report on the second aspect of the Minister's decision and no decision has been made. The Court made clear on at least three occasions that it was concerned with the delay, which in September 2002 was forecast to be at least three months before a decision would be rendered. In November and December 2002, the Court was advised by letters from counsel for the Minister of initiatives taken by representatives of the Government of Canada to seek information and assurances from representatives of the Government of Egypt. When there was no further information by mid-March 2003, the Court initiated a telephone conference, arranged for a hearing on the matter, and welcomed a motion by counsel for Mr. Jaballah. The Court then reserved decision but now determines that the motion is allowed in part, in so far as it seeks an order that the PRRA decision, dated August 15, 2002, is filed, on behalf of the Minister as directed by the Court on April 11, 2003, and is deemed to be the report of the Minister in relation to the risk facing Mr. Jaballah if he were returned to Egypt.

[23]Moreover, the Court determines that the delay in rendering the decision on the application for protection constitutes an abuse of process. The explanation provided, of discussions within government about the process of implementing the new procedure under the IRPA for applying for protection, of time-consuming discussions with representations of the Government of Egypt, have thus far led to no report to the Court.

[24]I note that at the hearing on April 11, 2003, where the principal concern was with delay, counsel for Mr. Jaballah tabled with the Court an affidavit exhibiting a copy of a letter from an officer of the Minister's department which was served on Mr. Jaballah on April 8, 2003 and a copy was later served on his counsel. The letter appends a memorandum and "An Assessment pursuant to R. 172(2)(b) of the Immigration and Refugee Protection Act," dated April 3, 2003, by a senior analyst in the Case Review Division, Case Management Branch of the Minister's department. That assessment reviews the circumstances of Mr. Jaballah's case, finds it "apparent" that he is "a member of the group known as `Al Jihad'", now an organization listed under Part II.I [ss. 83.01-83.33] of the *Criminal Code* [R.S.C., 1985, c. C-46 (as enacted by S.C. 2001, c. 41, s. 4)] as an entity believed to be engaged in terrorist activity and concludes "it is my assessment that Mahmoud Es-Sauy [apparently the name by which the writer refers to Mr. Jaballah] is a danger to the security of Canada".

[25]That conclusion is not a surprise, in view of the Minister's certificate issued in August 2001. It would have been surprising if an officer acting for the Minister would now find that the respondent is not a danger to Canadian security. From correspondence, it appears Mr. Jaballah has been given an extension of time, to June 10, to respond in writing to the assessment that he is "a danger to the security of Canada".

[26]With respect, that assessment does not seem at first glance to meet requirements of paragraph 172(2)(b) of the IRPA Regulations which speaks of a written assessment to be provided to the applicant on the basis of factors in subparagraph 113(d)(ii) of the IRPA. That subparagraph in turn speaks of whether the application for protection should be refused "because of the danger that the applicant constitutes to the security of Canada". That balancing step, weighing the risk to Canadian security which the applicant constitutes, and implicitly the risk to him if he be returned, is yet to be undertaken.

[27]As I read the IRPA and the IRPA Regulations, any decision that weighs the risk to Mr. Jaballah if he is returned and the danger that he constitutes to the security of Canada, will be required to be communicated to Mr. Jaballah (Regulations, paragraph 172(2)(b)) with an opportunity to respond (Regulations, subsection 172(1)) before the decision on behalf of the Minister is made. That decision would then be subject to review of its lawfulness (IRPA, subsection 79(2)). That assessment, it may be argued, will be required to be made in conformance with section 7 of the Charter, in light of the comments of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3. There, in discussing the Minister's

decision that a refugee be deported, the Court said, in part, at paragraphs 76-78:

The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*. . . .

In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the *Charter*. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.

We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. (A violation of s. 7 will be saved by s. 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like" . . . . Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases. [Citations omitted.]

[28]Unless the Minister's decision on the application for protection is favourable to Mr. Jaballah's claim, the portents are for continuing argument about, and resolution of, the lawfulness of the decision of the Minister, before this Court would otherwise resume proceedings under subsection 79(2) of the IRPA. At this stage, there simply is no reasonable prediction of when that process would be completed and when there would be a resumption of consideration of the reasonableness of the Ministers' certified opinion that Mr. Jaballah is inadmissible to Canada. Meanwhile, the respondent continues to be held in detention, thus far in solitary confinement, at the direction of the Ministers. Under the IRPA, the opportunity of a person in Mr. Jaballah's position to have a review of his detention arises only a fixed period after a determination that the Ministers' certificate is reasonable, and the person concerned is not removed from Canada and is still held in detention.

[29]In my opinion, delay in determining Mr. Jaballah's application for protection while he remains in detention, with no reasonable forecast of when that decision will be made, constitutes abuse of process in this case. The delay has no significance for the Court's primary function here, that is, to assess the reasonableness of the certificate referred to it for consideration. Whether the Minister's decision on the application for protection is made tomorrow or some months from now, this Court's responsibility to assess the certificate's reasonableness will remain the same.

[30]In the circumstances, while the Court is not prepared to accept the remedy proposed by counsel for Mr. Jaballah, that is, an order quashing the Ministers' certificate, the abuse of process does warrant an order that the proceedings concerning the certificate now be resumed without waiting for the Minister's decision on the application for protection. In my opinion, though I have not heard argument on the matter, Mr. Jaballah is entitled under the IRPA to an answer in response to the application for protection and the Minister has a duty to provide a decision in accord with the IRPA. Further, whenever that decision is rendered, in my opinion it will be subject to an application for leave and for judicial review.

[31]I am not prepared to quash the certificate before the Court, not merely because the delay, which I find constitutes abuse, concerns a side issue principally relating to the possible ultimate removal of Mr. Jaballah from Canada, a matter not before the Court, but also because much time, effort and energy has been expended by the applicant Ministers and their departments, by counsel and by the Court. The abuse found does not warrant quashing the certificate, without a decision on the reasonableness of the Ministers' certificate.

[32]For Mr. Jaballah, a preliminary motion that the certificate be quashed on the principle of abuse of process

(discussed in *Jaballah (Re)*, 2001 FCT 1287 (CanLII), 2001 FCT 1287, *supra*) concerned another perceived abuse, not delay in a decision on an application for protection, rather based on the perception that in these proceedings there is no evidence that was not before Mr. Justice Cullen in 1999 in *Jaballah No. 1*. I did not accept the preliminary objection when heard, and I do not consider the basis of the perceived abuse is established. It is clear from these reasons that having carefully reviewed the evidence before Mr. Justice Cullen and that before this Court, there is new information and evidence available to this Court.

[33]I am not persuaded that there is any abuse of process or undue prejudice to Mr. Jaballah, beyond that contemplated under the IRPA, in the proceedings up to the time of Mr. Jaballah's application for protection in July 2002.

[34]There is another factor of significance for the decision to now resume consideration of the reasonableness of the Ministers' certificate in light of the absence of any reasonable forecast of when the Court might otherwise deal with the certificate. Any perception that this Court is implicated in delaying its process concerning Mr. Jaballah must end, despite delay by the Minister's department on an issue not yet before the Court, and not relevant to determinations concerning the certificate before the Court.

[35]While I find there is abuse of process in the delay in providing a decision on the application for protection by Mr. Jaballah, the Court does not approve the respondent's motion that in view of this abuse the certificate of the Ministers should now be quashed. Rather, the Court does resume its proceedings in regard to the certificate and now proceeds to deal with that matter. Further, I do not accept the application for Mr. Jaballah's release from detention where he is held at the Ministers' direction. His release from continuing detention may be dealt with by a detention review under the IRPA.

[36]Before setting out considerations relating to the proceedings for the assessment of the Ministers' certificate, the context for that assessment is assisted by a brief review of immigration circumstances of the respondent.

### 3. IMMIGRATION CIRCUMSTANCES OF THE RESPONDENT

[37]Mr. Jaballah arrived in Canada in 1996 and he, his wife and four children claimed refugee status. The family originated in Egypt where Mr. Jaballah, his wife and at least his elder children are citizens. The family, then fewer in number, left Egypt in 1991 on a religious pilgrimage and did not return because of concern about the treatment by Egyptian authorities, of Mr. Jaballah, who alleges he had faced recurring arrests, detention and torture, and of his wife who had been detained, and so mistreated on one occasion that she had a miscarriage. From 1991 the family lived for three months in Saudi Arabia, then moved to Pakistan. Mr. Jaballah lived in 1994-95 in Yemen and Azerbaijan, apart from his family who remained in Pakistan. He rejoined them in 1996 and he and his family travelled through Turkey and Germany to Canada. On their arrival here in May 1996, Mr. Jaballah, who travelled using a false Saudi Arabian passport, his wife and four children, claimed Convention refugee status. Since their arrival in Canada two other children have been born to Mr. Jaballah and his wife.

[38]On March 4, 1999, the Convention Refugee Determination Division (the CRDD) of the Immigration and Refugee Board decided that Mr. Jaballah and his family born abroad were not Convention refugees. That decision was then the subject of an application for leave and for judicial review.

[39]Meanwhile, on March 31, 1999 Mr. Jaballah had been arrested on the first security certificate issued against him by the applicants. That certificate was referred to this Court and, as noted, after hearings it was quashed by order of Mr. Justice Cullen in November 1999.

[40]Later, leave having been granted for judicial review of the negative CRDD decision which rejected the family's refugee application, that decision was set aside on September 28, 2000, and it was referred back for reconsideration by a differently constituted panel (see: *Jaballah v. Canada (Minister of Citizenship and Immigration)* (2000), 196 F.T.R. 175 (F.C.T.D.)). Thereafter the rehearing of Mr. Jaballah's refugee claim by the CRDD was scheduled for August 16, 2001.

[41]Rehearing of the refugee claim so far as it concerns his wife and children, was finally completed, after a long delay on April 9, 2003. As we have seen on August 15, 2001, the certificate giving rise to this proceeding was referred by the Ministers to the Court, and to me as the Judge designated pursuant to subsection 40.1(4) of the

1985 Act (now sections 76 and 78 of the IRPA). On August 14, 2001, the second certificate under section 40.1 of the 1985 Act having been issued by the applicant Ministers, Mr. Jaballah was arrested, and he has since been detained in solitary confinement.

## PART II

### 4. PROCEEDINGS REGARDING THE MINISTERS' CERTIFICATE PRELIMINARY MATTERS

[42]Preliminary proceedings in relation to the Ministers' certificate, including preliminary motions argued at hearings on October 31 and November 1, 2001, are reviewed in earlier reasons (see: *Jaballah (Re)*, 2001 FCT 1287 (CanLII), 2001 FCT 1287, *supra*). In those reasons and by accompanying orders I dealt with preliminary motions of the parties, including the striking of *subpoenas duces tecum* issued on behalf of the respondent to the applicant Ministers. In response to the respondent's motion to stay proceedings, counsel for the applicants acknowledged that the principles of *res judicata*, issue estoppel and abuse of process might be applicable in situations where a second certificate is issued under section 40.1 of the 1985 Act, but they urged that these principles were not applicable in this case because there is new evidence before the Court, not presented in *Jaballah No. 1*. I dismissed the respondent's motion that the proceedings be stayed on one or more of those principles at the preliminary stage, without prejudice to the respondent's returning to argue the application of those principles after evidence had been heard in this matter.

[43]My earlier reasons record that pursuant to paragraphs 40.1(4)(a) and (b) and subsection 40.1(5.1) of the 1985 Act the Court had considered evidence submitted on behalf of the applicant Ministers, *in camera* and *ex parte*, with counsel for the Ministers present, but in the absence of Mr. Jaballah or counsel on his behalf. I then approved a summary statement of the information before me, to be provided to Mr. Jaballah, omitting from that statement any information that, if disclosed, in my opinion would be injurious to national security or the safety of persons. With that summary the respondent was also provided with six binders of copies of documents, the binders being identified as A1, A2, A3, A4, A5 and B. That collection of documents released to Mr. Jaballah comprises some of the documentary information before the Ministers and submitted to the Court. It excludes any relevant documents withheld on grounds of national security or of potential injury to the safety of persons.

[44]The earlier reasons also dealt with two other matters raised by the respondent which are worth recording here. I indicated that constitutional issues raised, so far as they were similar to those raised before Mr. Justice Nadon in *Canada (Minister of Citizenship and Immigration) v. Mahjoub* (2001), 31 C.R.R. (2d) 350 (F.C.T.D.), if argued herein, would be dealt with as Nadon J. had done, unless this Court could be persuaded that he was clearly wrong. That included his determination that a judge considering a certificate issued under section 40.1 of the 1985 Act has no authority to consider arguments about the constitutionality of that statutory provision, which has been found not to infringe sections 7, 9, or paragraph 10(c) of the *Canadian Charter of Rights and Freedoms* or paragraph 2(e) of the *Canadian Bill of Rights* [R.S.C., 1985, Appendix III] (see: *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669 (T.D.), appeal dismissed (1996), 37 C.R.C. (2d) 181 (F.C.A.), leave to appeal refused [1997] 2 S.C.R. v). While there was no further argument of constitutional issues before me, I note for the record that they were raised.

[45]The final matter raised in preliminary motions of the respondent concerned issues of disclosure of more than the summary statement of evidence and the documents released to Mr. Jaballah. I directed that he be provided with names of one or more CSIS officers knowledgeable about the summary public statements issued in *Jaballah No. 1* and in this case, and a list of all officers of CSIS, the RCMP or other public servants who have interviewed Mr. Jaballah, together with information about those interviews. Subsequently, I directed that the applicants produce an officer of CSIS, knowledgeable about the evidence in *Jaballah No. 1* and in this case, to testify about the differences in the evidence and information as set out in the public summary statements issued and the documents released to Mr. Jaballah in the two cases.

[46]In mid-December 2001, a representative of CSIS, identified only as "Mike" for purposes of the hearing, was called as a witness by counsel for the Ministers. He was examined and then cross-examined, with regard to what new information, not adduced in *Jaballah No. 1*, was before this Court, especially in the public summary statement issued to the respondent. His evidence was given with particular attention to a document entitled "Comparison of Summaries, Jaballah No. 1 (February 5, 1999) and Jaballah No. 2 (August 14, 2001)" prepared by counsel for the

Ministers. I will examine in some detail the information which Mike testified was new in this case, after first completing the description of these proceedings.

[47]It is useful to refer briefly to the summary statements released to Mr. Jaballah in *Jaballah No. 1* in 1999 and in this case. Each sets forth the information made public that is the basis for the respective opinion of the Ministers. The opinion certified in 2001 is the same as that certified in 1999, i.e., that Mr. Jaballah is considered inadmissible to Canada pursuant to the classifications set out in the same paragraphs of section 19 of the 1985 Act. Much of the public information included in the summary statement on which the current opinion is said to be based is the same as that which was before Mr. Justice Cullen. Some information now relied upon which was not available to the Ministers when the first certificate was issued, comes from Mr. Jaballah himself by his own evidence or testimony in his CRDD refugee application and hearing, or in his testimony adduced in *Jaballah No.1*. It is the use of that latter evidence which led counsel for the respondent to allege misuse of the Court process by CSIS and by the applicant Ministers who now argue, in part at least in reliance on Mr. Jaballah's testimony in *Jaballah No. 1*, that the certificate now before the Court is reasonable.

[48]I note for the record that the summary statement provided to Mr. Jaballah in this matter, and the documents released to him, were prepared and compiled before mid-August 2001, more than a month before the terrible events in New York and elsewhere in the United States on September 11, 2001, and well before the subsequent events in Afghanistan and more recently in Iraq and elsewhere in the world. While in his testimony in mid-December 2001, Mike referred to recent information received since September 11 without specifying its substance, no other information originating or reported after that September date was filed with the Court at any time, except for the exhibits introduced through Mike's testimony.

[49]Those exhibits include copies of judgment/orders of United States Federal Court indictments and convictions, and diagrams to demonstrate CSIS' perceptions of communication links between cells of the Al Jihad/Al Qaida network, particularly in or about August 1998, when the United States embassies in Nairobi and in Dar es Salaam were targets of lethal car bombs on the same day, resulting in substantial loss of life. The latter exhibits are interesting and they depict communication links between Mr. Jaballah in Toronto and certain known Al Qaida operatives or centres, and between those centres in various countries. At least in part, those exhibits are said to be based on indictments in proceedings in United States courts in regard to the 1998 embassy bombings. I note that the judgment/orders resulting from those indictments, which were introduced in these proceedings through testimony of Mike for the Ministers, do not include reference to, or support allegations specifically relating to Mr. Jaballah. There is no reference to these perceived communication links in the summary of the Ministers' case, either the original or the supplementary summary referred to in these reasons. The diagrams in themselves are of no weight as evidence and in so far as they are based on information available to the Ministers before November 1, 1999, they are not based on "new" information, not available or provided in *Jaballah No. 1*.

## 5. EFFORTS TO IDENTIFY "NEW" INFORMATION

[50]When the two summary statements, issued in *Jaballah No. 1* and in this case, were compared by counsel for Mr. Jaballah, he urged that there is relatively little different information provided to support the same opinion of the Ministers on this second occasion. Indeed, for Mr. Jaballah it is said that there is no significant new evidence that could warrant a different determination from that reached in *Jaballah No. 1*.

[51]That position was urged upon the Court following the testimony and cross-examination of Mike in December 2001. Counsel for the respondent had earlier asked a series of questions in cross-examination that led to confirmation by Mike that any allegations of involvement of Mr. Jaballah, and of his perceived relationships with others, were in essence similar to those alleged by the Ministers as the basis for their certified opinion in *Jaballah No. 1*. In re-examination counsel for the Ministers asked a closing question which led to questions by the Court and by counsel for Mr. Jaballah in further cross-examination, as follows (transcript, December 18, 2001, at pages 662-667):

Mr. Batt [for the Ministers]:

Q. Mike, I take it that in relation to the overall responses that you have given your position is that there is new information and that new information casts a different light on the old information. Would that be a correct

summation of what you have been saying for the last two days?

A. That would be correct, yes.

The Court: . . . I am not sure what the implications of that answer are, and it may be that I should not be asking you but should be awaiting counsel's submissions on it.

I want to be fairly clear in my own mind that the view taken relates to new information to which Mr. Jaballah might be expected to respond. I am not sure whether that arises from your response which says that it is new light on old information. That may not be what you said but, if it is, then it is troubling. What do you mean by "new light?"

The Witness: The allegations, my lord, certainly remain the same. The activities of the individuals that Mr. Jaballah was in contact with and was associated with--we did not have all the information of those individuals and their activities and the meaning of their contact with Mr. Jaballah. With the recent investigations that have been carried out additional information has come up on those individuals and what they were actually involved in.

The Court: But they are not here.

The Witness: I am trying to think of how else I can phrase it.

The different terrorist incidences that have taken place, mainly the one that took place in East Africa in 1998--there is additional information that has since surfaced on which individuals were involved and to what extent they were involved and how they were interconnected with each other. It is that information, my lord, that has given a clearer focus as to what actually took place in these operations, who was responsible for what, how the communications between those different cells actually took place, and who was involved in those communications.

The Court: Thank you. Each of you has an opportunity to comment or to question Mike if you wish arising out of my question.

Mr. Galati [for Mr. Jaballah]:

Q. I just have one question, my lord.

#### FURTHER CROSS-EXAMINATION

...

Mr. Galati [for Mr. Jaballah]:

Q. The answers you gave during your cross-examination with me with respect to nothing new about the allegations or no allegation or direct link to those activities of those other members to Mr. Jaballah still hold. Right?

A. Mr. Jaballah had contact with those individuals at the time that they were operationally active.

Q. I understand that. That was dealt with in 1999. My question is: Given your answer to Mr. Justice MacKay, your answers still hold, for instance, that he is not alleged to have been linked to the USS Cole and the other activities or the structure of the Al Jihad which you now set out as new.

A. Not to the USS Cole, no.

Q. What I am saying is that your answers of today still stand where I pointed you to no new allegations or no direct link or no mention in the transcripts in the U.S. or the U.K. Correct?

A. On the direct link issue, it is the association that Mr. Jaballah had with these different individuals. The role that he played with those individuals is basically the focus of what we are interested in.

Q. But my point is that it is the same contact and role that Mr. Justice Cullen reviewed. It is not a new role that you are alleging post 1999. Correct?

A. We were aware of the contacts. We were not aware of the content of those contacts.

Q. What I am saying is that you are not alleging new contacts 1999 to 2001.

- A. I think there is just the one that we mention there.
- Q. You are only suggesting Mahjoub.
- A. No, there was also the issue of Mr. Al Deek. That is new information. It is sort of on a separate issue.
- Q. My point is: But not with respect to the London people.
- A. The new information on the London people came out of the investigation on the activities of those individuals.
- Q. I understand that, but you are not suggesting that there is new information that shows Mr. Jaballah in 2000 and 2001 renewing contacts with the London people.
- A. That would be correct.
- Q. There is no such information.
- A. That is correct.
- Q. All the information with respect to the London people is old stuff.
- A. The contact with them, yes.

[52]At the conclusion of the examination of Mike on December 18, 2001, the Court adjourned, to meet again on January 8, 2002 for submissions of the parties concerning that evidence, which completed the case for the Ministers. On the latter day, counsel for the applicants addressed eight matters raised by the evidence of Mike which were characterized as new information upon which the certificate of the Ministers was based in this case, which information was not before Mr. Justice Cullen in 1999. Counsel for the respondent again urged that he could not properly assist or advise his client unless the information claimed to be new before this Court could be better identified than was provided by the testimony of Mike and the Ministers' submissions relating to that testimony.

[53]Thereafter, in January and early February 2002, I again convened hearings *in camera* and *ex parte* with counsel and a representative of CSIS, on five occasions, (January 10, 15, 25, 31 and February 4, 2002), all to direct the production of a further summary statement concerning the basis of the certified opinion of the Ministers which was intended, by emphasis in the text, to indicate clearly the information now available that was said to be new in that it was not before Mr. Justice Cullen, and was not withheld for security reasons. Further, I reviewed all documents filed with the Court, both those in the public record which were released to Mr. Jaballah in six binders in August 2001, and the classified documents not released, to identify which of those were considered to be new by the Ministers. A list of "new" documents among those in the public record in this case, which were not provided in *Jaballah No. 1*, was provided to counsel. I considered again those documents not previously released on national security grounds and confirmed for myself that these should continue to be held without disclosure to Mr. Jaballah, in accord with paragraph 40.1(5.1)(d) of the 1985 Act. By telephone conferences with counsel for both parties on January 15, 31 and February 8, I sought to keep counsel for the respondent informed of progress and involved in scheduling further hearings.

[54]As a result of those *in camera* hearings I issued directions dated February 5, 2002. Those directions provided for a further statement entitled "Unclassified Supplementary Summary of Information Relating to Mahmoud Jaballah (Jaballah No. 2), February 4, 2002", which highlighted information on the public record which is considered by the Ministers to be new. The directions also listed documents provided to the respondent that were not before the Court in *Jaballah No. 1*. Arrangements were then made for public hearings to resume on March 11 and continue, to ensure, in accord with paragraph 40.1(4)(c) of the 1985 Act, that Mr. Jaballah had a reasonable opportunity to be heard, before assessing the reasonableness of the certificate issued by the applicant Ministers on the basis of the evidence and information available to the Court.

## 6. WITHDRAWAL OF COUNSEL FOR THE RESPONDENT

[55]When the hearing resumed on March 11, as counsel for the parties had agreed and the Court had directed, for the purpose of hearing any evidence or submissions the respondent Mr. Jaballah might make in response to the information provided to him, his counsel requested the opportunity to address the Court on a preliminary matter. Counsel then advised that, having consulted with his client Mr. Jaballah, having sought advice from other

experienced counsel, and having reviewed these proceedings up to that time, he had come to the conclusion that he then described as follows (transcript, March 11, 2002, pages 879-883):

This backdrop, my lord, leads me to my dilemma on which I have sought various--if I could add them all up, maybe 80 to 120 years of experience of barristers who all agree with me that I have no choice but to advise you that, when I took my barrister's oath in the Province of Ontario, apart from swearing allegiance to Her Majesty the Queen on my barrister's oath as an officer of this Court and all the other courts, by my oath as a barrister I am also required to "not pervert the law but in all things to conduct myself truly and with integrity" and further "to maintain the Queen's interest and interests of the citizens and uphold and maintain them according to the Constitution and law of this province."

My rules of professional conduct and ethics in Ontario further require that I "not engage in conduct involving dishonesty, not engage in conduct that is prejudicial to the administration of justice" and "not knowingly assist a judge or judicial officer in conduct that is in violation of applicable rules of judicial conduct or other law," which we all understand in the province to include the Constitution and binding international treaties.

In essence, my lord, it is my view as a barrister that it would breach the essence of my oath as a barrister, as historically and statutorily understood, as well as the rules of professional conduct to participate any further as a barrister and officer of Her Majesty's Court in this process for the following reasons:

1. The proceedings against Jaballah in total, if you look at Jaballah No. 1 and the present proceeding, clearly manifest the fact that the court room has turned into the police station. The proceedings in Jaballah No. 1 were an investigative, interrogatory and evidentiary basis for Jaballah No. 2.
2. While my presence here would lend to the decorum of a fair and independent judicial review in fact and in substance, in my review of my own barrister's oath, I sincerely and honestly conclude that my presence here would be a sham and a detriment to my client and a complete breach of my oath and rules of professional conduct.

While CSIS and the Solicitor General can jump up and down and pretend all they want about the soundness of the procedure here, the preliminary issues, the process and the invocation of national security as a bar to revealing the case against Jaballah and the case which Jaballah must meet has never been balanced or articulated by this Court or any other court and never adjudicated by this Court nor by the Supreme Court of Canada. We have been blindly accepting the word and procedure invoked by CSIS and the security forces despite the fact that there is no clear statutory outline of that process.

While this in camera, secret procedure without any judicial balance or articulation may be acceptable to the Court, constitutional and international norms of natural justice apply equally to this Court and procedure and, more important for myself, to my oath as a barrister, as I historically understand it from the Magna Carta to the present day.

Because they are embarrassingly absent, I as a barrister with an independent oath to keep and maintain refuse to participate in these proceedings any further. My oath would not forgive me; my conscience would not forgive me; and history would not forgive me.

It is my humble view, my lord, that Nuremberg principles apply equally to Canada and the Canadian judicial systems as they do anywhere else. Japanese and Italo-Canadians were victims of what in my view were crimes against humanity during the Second World War. I will not participate or be complicit in what in my view is a similar injustice against the Muslims and Arabs by participating in this proceeding as structured.

Mr. Jaballah and his family have filed suit in the Ontario court. I will pursue their rights from this Court's determination in other fora, but I am taking my leave from these proceedings, and Mr. Jaballah stands silent in the capable, but secret, hands of your lordship and CSIS counsel.

I cannot proceed any further, my lord. It is as simple as that. I refuse to.

[56]After further brief discussion with the Court, counsel for Mr. Jaballah, and counsel's legal advisor for that day, withdrew from the courtroom.

## 7. ENSURING OPPORTUNITY FOR THE RESPONDENT TO BE HEARD

[57]The Court then called Mr. Jaballah to respond for himself, with the aid of an interpreter, to questions intended to assess his understanding of his position at that stage. The transcript records the pertinent portions of that process, as follows (transcript, March 11, 2002, pages 888-893):

THE COURT: Mr. Jaballah, we do need to know whether you wish to be represented by counsel. If you wish to take a little time to think about where you may go at this stage of the game, I will give you some time, but not very much. All I mean by that is that, if you want to represent yourself, you will need some time to do that. If you decide that you want to be represented by other counsel, then you will need to take some time to arrange for that.

I need to know by 12 noon whether or not you wish to proceed on your own behalf or whether you wish to try to retain other counsel. I am assuming--and you do not need to answer this question. I am assuming that Mr. Galati as your counsel may have advised you in advance of what he was going to do this morning, but who knows. I am not asking you to answer that.

Would you like to take a little time? Would you like to take the stand?

MR. JABALLAH (Through interpreter): Mr. Galati is my counsel, my lawyer, and I would like to follow his instructions. I agree to his position. I agree to the position that my lawyer took this morning, and whatever he says represents what I believe with regard to the evidence that was presented to the Court.

The same evidence that was presented in these proceedings is the same as what was presented two years ago. I did not see anything that I could answer or give my response to.

There were two issues, one with regard to the mailing box and the other one with regard to the telephone number that was found on Mr. Mahjoub. On these two issues I have nothing to answer.

THE COURT: I want to be sure that I understand Mr. Jaballah's position. He says that Mr. Galati is his counsel and he wishes to act in accordance with his advice.

MR. JABALLAH (Through Interpreter): Yes.

THE COURT: My question is: Does he want advice from Mr. Galati now?

MR. JABALLAH (Through Interpreter): He advised me earlier, and I agreed to what he said, and I am following his advice. He is an expert in law. I have nothing else to say.

THE COURT: Do I understand that Mr. Jaballah is aware that Mr. Galati has been advised that there is a significant number--and I don't have the total in my head--of new documents which were not before the Court in Jaballah No. 1?

MR. JABALLAH (Through Interpreter): Yes, and Mr. Galati reviewed these new pieces of evidence, and he reviewed this with me. He said that there was nothing new in these pieces of evidence. He also reviewed this evidence with me, and we both agreed that the only new evidence refers to the telephone number that was found on Mahjoub, of which I have nothing to say, and the mailing box which was in fact not used, and that was evidence in the first hearing.

Everything the lawyer reviewed is the subject of my testimony in the first hearing. I don't know of anything new that I can say in this proceeding.

THE COURT: Mr. Batt, do you have any questions, not about anything other than the position of Mr. Jaballah at this stage? Do you have any questions about that and nothing else?

MR. BATT: I just want to be sure that he understands that this is his reasonable opportunity to be heard. He has a right to state his position if he wishes to do so. As I understand it, if he does not, then we can move to ask your lordship to uphold the certificate as being reasonable and that deportation proceedings may follow. As long as he

understands that, I think that is the key.

MR. JABALLAH (Through Interpreter): The lawyer is my counsel, and I follow his instructions as long as he is the one who is expert on the law. I am not an expert on the law. It is my lawyer who says that this is what should take place. That is his opinion, and I agree.

MR. BATT: My lord, the concern that I have is that, from my perception, the statement that Mr. Galati made this morning was a statement pertaining to Mr. Galati's personal position in light of these proceedings. That does not necessarily pertain to Mr. Jaballah's best interests. It may well be that he should have some advice from a different counsel who has a different perception of the proceedings than Mr. Galati who has basically stepped away from the legislation, as far as I can see.

MR. JABALLAH (Through Interpreter): Again, my position is that I follow my lawyer's instructions. He is the expert on the law and, as he sees it, there is nothing new in the evidence. I am following his instructions and his advice.

THE COURT: Thank you. I do want to ask just once more--Mr. Jaballah may not want advice from anyone else. Does he wish to respond to anything on his own behalf?

MR. JABALLAH (Through Interpreter): I cannot represent myself in this proceeding. I have my lawyer and I follow his advice and instructions.

THE COURT: Mr. Batt, if you have any further submissions--I have no further questions of Mr. Jaballah. Do you have any further questions or submissions you wish to make?

MR. BATT: In relation to Mr. Jaballah's status?

THE COURT: No. I understand that Mr. Jaballah does not wish to retain other counsel, that he has decided to accept the advice of previous counsel to make no representations on his own behalf, and that he accepts that this has been his opportunity under the statute to respond to the position of the Ministers.

[58]I find that Mr. Jaballah declined the opportunity to seek services of another counsel. I also find that he declined the opportunity to make any submissions on his own behalf, except that he acknowledged there was information described as new by the Ministers that had not been before the Court in *Jaballah No. 1* in respect of two matters. The first, of which he said he knew nothing, was information that his Toronto telephone number was found on a paper in possession of one Mahjoub, a person also certified under section 40.1 of the 1985 Act by the applicant Ministers as inadmissible to Canada. In that case, the certificate was found reasonable by Mr. Justice Nadon in October 2001 (see *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2001] 4 F.C. 664 (T.D.)). The second, concerned Mr. Jaballah's rental of a postal box, a matter he had testified about in *Jaballah No. 1*, which box he professed, as he had in 1999, not to have used. In all other respects the information considered by the Ministers to be new, was not new in Mr. Jaballah's view since that information was before the Court in *Jaballah No. 1*, a view reached after consultation with his counsel, who had now withdrawn.

[59]I am satisfied that Mr. Jaballah understood that this was his opportunity to be heard with respect to the opinion of the Ministers and to the information on which that opinion was based, so far as that information was made known to him, in accord with paragraph 40.1(4)(c) of the 1985 Act, now paragraph 78(i) of the IRPA. That information was initially provided by the summary statement and documents provided in August 2001. Thereafter, the testimony and cross-examination of Mike in December 2001, submissions of the Ministers related to Mike's testimony in January 2002, and the Court's directions in February 2002, were all for the purpose of disclosing to Mr. Jaballah the information, on which the Ministers' opinion is based, that is said by them to be new in the sense that it was not before Mr. Justice Cullen in 1999 in *Jaballah No. 1*.

[60]I find that Mr. Jaballah was provided with an opportunity to be heard regarding the issue of his inadmissibility and the information on the public record upon which the certified opinion of the Ministers is based, in accord with paragraph 78(i) of the IRPA. I find also that he declined to exercise his right to use that opportunity. He did not respond in any detailed or significant manner to the information and evidence before the Court.

## 8. REVIEWING INFORMATION AND EVIDENCE, 1999 AND 2001

[61] Following the Court's questioning of Mr. Jaballah at the hearing on March 11, 2002, counsel for the Ministers, by oral motion, proposed that the Court find the certificate signed by the Ministers on August 13, 2001, is reasonable, following decisions of the Court in *Al Sayegh (Re)* (1997), 131 F.T.R. 7 (F.C.T.D.) and *Almrei (Re)* (2001), 19 Imm. L.R. (3d) 297 (F.C.T.D.). In each of those cases the judge concerned found the certificate at issue to be reasonable, after the person concerned declined to exercise the opportunity to explain or respond to the information provided and to the Ministers' opinion.

[62] I declined to allow the Crown's motion at that stage since, in my view this case required the Court to determine whether there is new information, not available or before the Court in *Jaballah No. 1*, that supports a different conclusion about the opinion of the Ministers in this case than was reached by Cullen J. in that earlier decision. I had made no determination of this matter prior to the March 11 hearing, and the directions of February 5 specified only what the applicant Ministers, not the Court, considered to be new information. At the hearing on March 11, I noted that I must assess the information which has been provided to Mr. Jaballah, and the information which is not public, in order to assess whether the opinion certified by the Ministers is reasonable. To do so, in view of the principles of *res judicata* and abuse of process, and the opinion expressed for him and by Mr. Jaballah himself, I must determine whether there is information before the Court that was not before the Court in *Jaballah No. 1*, which supports the opinion of the applicants certified in August 2001.

## 9. DELAY IN DETERMINING REASONABLENESS OF CERTIFICATE

[63] As designated judge I regret that determining the ultimate issue has been delayed. On my part, it simply required more time than I anticipated to fully compare the information that was before Mr. Justice Cullen in *Jaballah No. 1* and the information that is before the Court in this proceeding. Until that task was completed, I could not fairly conclude whether there was new information before the Court, different from that in *Jaballah No. 1*, and that Mr. Jaballah's interests have been taken into account as fully and fairly as could be done in light of the general submission of his counsel, before he withdrew, and subsequently of Mr. Jaballah himself, that, in effect, no new evidence of significance is before the Court in this proceeding. No specific submissions were made by the respondent in relation to the information before the Court apart from the general response that it is not new.

[64] As my review of the information filed in relation to both the 1999 and 2001 certificates, and my review of the record and submissions made in this case was about completed, and these reasons were in an advanced draft, counsel for Mr. Jaballah, who had withdrawn from these proceedings on March 11, 2002, wrote to the Court on July 1, 2002, to request suspension of these proceedings pursuant to subsection 79(1) of the IRPA, which Act came into force on June 28, 2002 (SI/2002-97). As earlier referred to, the proceedings were suspended, and subsequent developments were reviewed in *Jaballah (Re)*, 2003 FCA 111 (CanLII), [2003] 3 F.C. 73 (T.D.) and in Part I of these reasons. The result of those developments is the Court's determination to resume the proceedings and to consider its original and primary responsibility to assess the reasonableness of the Ministers' certificate dated August 2001.

## 10. THE PROCESS CONDEMNED BY COUNSEL FOR MR. JABALLAH

[65] Before turning to the issues following notice of the Minister's decision on the application for protection I deal with one other matter of concern, that is, the condemnation of the process herein by counsel for Mr. Jaballah before he withdrew from the proceedings on March 11, 2002.

[66] At that time I asked counsel for Mr. Jaballah for further explanation since he had earlier agreed to the date for resumption of hearings, for the presentation of testimony or evidence in response to the opinion of the Ministers.

[67] In essence, counsel said he did not know the case to be met and could not advise his client. In his words (transcript, March 11, 2002, pages 883-886):

... I don't know what the case is to meet. I am sure you do and I am sure my friend does, because you have seen everything. I am in the dark. Quite frankly, as I see my barrister's oath and I see the judicial system historically as it has evolved, we have, in my humble view, without any disrespect intended--judges in Germany did it; judges

and the lawyers in other places did it. Historically, they thought they were doing the right thing. In reviewing my oath in these proceedings, I think this is an abomination and a breach of natural justice, and we have crossed the line to the point where the Court is being used as an investigative tool by the security forces without a judicial balance and fairness to the person in front of the Court.

...

I am at a complete loss to know what I would do for him except to lend credence to the notion that this is a fair and independent adjudication of the allegations against him, which as a barrister under my oath I cannot conclude in all fairness.

I have my own oath to live with as a barrister.

We often use the term "officer of the court," and it usually is meaningless. However, in this case it means something to me. I took an oath --

...

... I am saying that the process that the Court is providing has been invented by CSIS in flagrant, common-sense opposition to the statutory scheme. ...

...

I don't see where there is not a judicial balancing act on the pieces of evidence that are supposed to be withheld. There is a presumption in the *Act* that disclosure will flow unless it is injurious to national security or others.

The Supreme Court of Canada has made it very clear what the test for that is. I have not been a participant in that test on any of the some 200 documents that are being withheld. I don't know how that is balanced. To balance that in secret and for me to pretend and second-guess and try to guess what the balance was and what the evidence is, I am not acting as a barrister. I am acting as decorum.

[68]Those comments of counsel did little to assist the Court other than to indicate his frustration. I have described the process followed in this case in considerable detail for the record. I believe this Court consistently followed the process provided by Parliament in paragraphs 40.1(4)(a), (b) and (c), and paragraphs 40.1(5.1)(b) and (d) of the 1985 Act as it then applied, a process now provided essentially by section 78 of the IRPA. In addition, the Court directed and heard testimony and cross-examination of Mike, as a representative of CSIS, and submissions related to that, and it issued directions including a highlighted supplementary summary and a list of "new" documents, all intended to clarify for Mr. Jaballah and his counsel, information upon which the opinion of the Ministers is based that they consider to be new in the sense that it was not before the Court in *Jaballah No. 1*. These proceedings, until March 2002, were concerned, apart from other preliminary issues, to clarify what information before the Court is said by the Ministers to be new and to ensure that Mr. Jaballah, as the person named in the Ministers' certificate, would have a reasonable opportunity to be heard in relation to their opinion and the information on which it is based.

[69]In the circumstances, I do not accept counsel's description that this Court has been used by CSIS as an investigative tool, or that reference by the Ministers in this case to information adduced in *Jaballah No. 1* indicates that the earlier proceedings before Cullen J. were simply an investigation leading to this proceeding. As for counsel's concern about disclosure, as I read the applicable legislation there is a clear exception to the principle that information provided to the Court by the Ministers is to be disclosed to the person concerned, and that is where the Court, pursuant to paragraphs 40.1(4)(a) and (b) or subsection 40.1(5.1) of the 1985 Act, now paragraph 78(g) of the IRPA, determines, in the absence of the person named in the certificate and his or her counsel, that the information should not be disclosed on the grounds that disclosure would be injurious to national security or to the safety of persons. Having followed the statutory provisions and taken special steps with assistance of counsel for the Ministers, to identify what the applicants consider to be new information, this Court does not accept the condemnation of these proceedings by Mr. Jaballah's counsel. I do acknowledge that under the IRPA a person who is the subject of the Ministers' certificate and his or her counsel may not see the information relied upon by the Ministers, an invidious position but one provided by Act of Parliament.

## 11. THE REASONABLENESS OF THE CERTIFICATE OF THE MINISTERS

### (a) The test for assessing what information is new

[70]No submissions were made on behalf of or by Mr. Jaballah concerning the appropriate test for considering what information is new, or about the effective date for that test, or about the implications of the Ministers' view that information before the Court in *Jaballah No. 1* should now be reconsidered in the new light shed upon it by new information. With no submissions on behalf of Mr. Jaballah, I did not request specific submissions from counsel for the applicants in regard to the test for identifying new information. Thus the following discussion of the appropriate test to apply in this case evolved without specific advice or submissions of counsel for either party.

[71]By subsection 80(1) of the IRPA, I am to determine whether the certificate of the Ministers is reasonable on the basis of the evidence and information available to the Court, including that produced to Mr. Jaballah, and that filed but withheld from release to him on security grounds. For that determination, the Court may consider information that in its opinion is appropriate, even if that is inadmissible as evidence in ordinary civil or criminal proceedings, and the decision may be based on that information (paragraph 78(j) of the IRPA). In sum, the Court is not bound by traditional rules of evidence and the designated judge makes her or his determination on the information and evidence filed in the Court upon which the certificate is said to be based.

[72]The determination required is not a question of fact in the ordinary sense but rather it is an assessment of the reasonableness of the certified opinion made in the exercise of ministerial discretion, in light of the information on which the opinion is based. While that seems obvious and is in accord with the statute, in the case where a second security certificate of the same opinion is issued after one has been quashed, this Court accepts that the principles of *res judicata*, of issue or cause of action estoppel, or of abuse of process, may be applicable. Information simply repeated, without any significant change from the proceedings in *Jaballah No. 1*, should not now be reassessed in considering the reasonableness of the Ministers' second certified opinion, in my view. If there is no new information the principle of *res judicata* or of abuse of process would apply to preclude a different determination from that reached in *Jaballah No. 1*.

[73]Section 40.1 of the 1985 Act contained no provision for a second certified opinion of the Ministers to be filed concerning one person, after a first opinion has been found unreasonable, and similarly, section 77 of the IRPA contains no such provision. Nevertheless, in my opinion, express authorization to file a second certified opinion is not required. These proceedings are exceptional, designed as they are to provide for dealing with cases where interests of national security, *inter alia*, arise as a result of the background or activities of non-Canadians who seek admission to Canada. In my opinion, that exceptional process is not subject to the principle that parties to litigation are limited to bring one proceeding, at least where new evidence or information is presented.

[74]If it were otherwise, the continuing security interests of the state, assessed and re-assessed on the basis of a mosaic of information gathered from various sources over time, might be compromised. The interests of the individual, the interests of fairness of process and the avoidance of its abuse are served by applying, as in the case of regular judicial proceedings, the principles of *res judicata*, of issue and cause of action estoppel, and of abuse of process.

[75]By analogy to regular civil judicial proceedings, it seems appropriate to assess "new information" in any second proceeding by reference to the rules and jurisprudence concerning the reception of fresh evidence to consider varying a matter that has already been determined, or to propose a new trial for a matter decided.

[76]The principle underlying subsection 399(2) of the *Federal Court Rules, 1998* [SOR/98-106], which provides for the setting aside or variance of an order "by reason of a matter that arose or was discovered subsequent to the making of the order", in my view, is appropriate by analogy to apply in this case to assess what is new evidence. Admittedly, there is no motion before the Court to set aside or vary the order made by Mr. Justice Cullen in *Jaballah No. 1*.

[77]In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 S.C.R. 983, Mr. Justice Major, in upholding the decision of a trial judge not to reopen a trial, confirmed that the appropriate test for determining whether new evidence warrants a new trial is whether evidence discovered after trial, if presented at trial would probably have changed the result and whether the evidence could have been obtained before

completion of trial by the exercise of reasonable diligence. Further, Major J. quoted [at paragraph 63] the following comments of Lord Denning in *Ladd v. Marshall*, [1954] 1 W.L.R. 1489 (C.A.) [at page 1491]:

To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

[78] Those same principles, and in particular that the new evidence would probably have an important influence on the result of the case, were adopted by Mr. Justice Teitelbaum of this Court in considering judicial review of a decision by the Veterans Review and Appeal Board in *Mackay v. Canada (Attorney General)* (1997), 129 F.T.R. 286 (F.C.T.D.), at paragraphs 26-27.

[79] In my opinion, applying by analogy these principles, concerning the admission of new evidence after a matter has been determined, would lead to the following standard or test as appropriate for what should here be considered new information.

(i) Relevant information that came into existence or came to the knowledge of the applicant Ministers after November 1, 1999, when proceedings concerning the first certified opinion terminated with the decision in *Jaballah No. 1*, is new information.

Thus, information that was before the Court by testimony or otherwise in that case, or which was then available to the Ministers but not adduced before Mr. Justice Cullen, is not considered new information for this hearing and determination.

(ii) "Partially new information" obtained by the Ministers after November 1, 1999, which is relevant and sheds new light on information known or reasonably obtainable before that date if the totality of the information, the new and the related information from *Jaballah No. 1*, provides a different or fuller understanding of the circumstances, may have weight depending upon findings of Cullen J. in that case.

For example, new information about the role and activities of persons or offices active in Al Jihad, with whom it is believed Mr. Jaballah had contact, may be given weight unless the findings of Mr. Justice Cullen specifically concluded that contact was not established. The principal ground for the decision in *Jaballah No. 1* was Mr. Justice Cullen's assessment that the evidence adduced from and on behalf of Mr. Jaballah was credible, a general finding. That includes Mr. Jaballah's evidence that he did not know certain persons whose names were put to him. It also includes his admission that he did have contact with certain others and in particular with the London offices of an organization, now said to be a front for AJ and Al Qaida.

[80] I turn to assessing the information before the Court, first the information on the public record that I consider to be new, and second, the partially new information shedding new light on earlier known information, that was not before the Court or available to the Ministers before the decision in *Jaballah No. 1*.

(b) INFORMATION NEW TO THE MINISTERS AFTER NOVEMBER 1, 1999

[81] There is information before this Court, which reached the Ministers after November 1, 1999, when the first certificate was quashed by order of Cullen J., and which is included in the public record made available to Mr. Jaballah in the summary statement and documents provided in August 2001, in the testimony of Mike and in the supplementary summary statement issued with directions of the Court on February 5, 2002.

[82] This information concerns the following matters of significance.

(1) An Interpol notice, published July 13, 1999, which reached CSIS, acting for the Solicitor General, only on November 29, 1999, concerning an individual identified as Mahmoud Said, also known as Mahmoud Al Sayed Gaballah Said, who was wanted by the Government of Egypt under a warrant alleging that he was a member of a terrorist organization responsible for planning and logistics, the supply of weapons and explosives to, and the

escape of, active terrorists. In August 2000 CSIS was provided with a certified comparison by an RCMP expert, of fingerprints taken in 1996 by Immigration Canada on his arrival in Canada of Mahmoud Es-Sayyid Jaballah, the respondent, and prints provided by the Government of Egypt to Interpol for its July 1999 notice. That certified comparison indicates that both sets of fingerprints are those of the same person. Absent any explanation, the clear inference is that Mr. Jaballah is the person whose fingerprints were circulated with the Interpol notice and further, that Mr. Jaballah is the person subject to a warrant for arrest in Egypt, though the Interpol notice is said to concern a person under another name. Mr. Jaballah did not respond to this information, although I note this notice was apparently relied upon as one basis for his application for protection in July 2002, at least as referred to in correspondence from his counsel.

(2) Information received since November 1999 reports that Mr. Jaballah spent some time in 1993-94 in Afghanistan, a country he denied having visited when he testified in *Jaballah No. 1*. Mr. Jaballah did not respond to this information that he had been in Afghanistan.

(3) Information arose from the arrest of Mohamed Zeki Mahjoub, a person arrested in 2000 under section 40.1 of the 1985 Act, and found by Mr. Justice Nadon, in 2001, to be subject to a security certificate which was held to be reasonable in that case. Mr. Mahjoub was described by Mike, in his testimony before me, to be an AJ operative with the militant faction known as Vanguard of Conquest and also a member of the Shura Council or governing body of AJ. When arrested in 2000, Mr. Mahjoub had in his possession a paper with a name that he acknowledged referred to Mr. Jaballah and which also had written on it the telephone number of Mr. Jaballah. In this proceeding Mr. Jaballah's response to this information, at the hearing in March following withdrawal of his counsel, was that he "had nothing to say" about this.

(4) Information was received by the Ministers about use of a post office box rented in Toronto by Mr. Jaballah in another name, which box was disclosed by Mr. Jaballah himself in the course of his testimony in *Jaballah No. 1*. Then he said the box had been rented to provide an anonymous box to which his family in Egypt could communicate without indicating his whereabouts, but the box had not been used. Information now available to the Ministers is that correspondence intended for Mr. Jaballah from sources in Canada and abroad had been received at that box on a number of occasions up to June 1999. In testifying about this, Mike described the evidence of use as "physical evidence". In response to this Mr. Jaballah, in brief testimony through an interpreter after his counsel had withdrawn in this proceeding, said only the "mailing box . . . was in fact not used, and that was evidence in the first hearing".

(5) A second matter concerning Mr. Jaballah's post office box is that, while there is no information about its use from another identified potential correspondent, Mike testified that Khalil Said Deek, a member of the information committee of AJ, and believed to be an active operative in Osama bin Laden's Al Qaida, when arrested in Pakistan and deported to Jordan, in December 1999, possessed a computer disk which contained, as a contact for AJ's publications, the address of Mr. Jaballah's post office box in Toronto. Mr. Jaballah did not respond to this information.

(c) INFORMATION PARTLY NEW TO THE MINISTERS IN 2001

[83]In addition, the applicant Ministers have much new information about AJ and Al Qaida operations and the activities of a number of their leaders. It is primarily the new information in respect of these matters that is said by the applicant Ministers to cast new light and understanding on information that may have been available to them prior to November 1, 1999, about those people, their activities and their relationship to Mr. Jaballah. This information, which I describe, for purposes of these reasons, as "partially new" information, concerns:

(1) The place and role of Ayman Al Zawaheri, as leader of the AJ, in the integration of AJ operations with Al Qaida, and as a principal aide to Osama bin Laden. Mr. Jaballah is believed to have had contact with Al Zawaheri while in Yemen or Pakistan;

(2) The status of Ibrahim Eidaous and Abdel Al Bari as senior operatives of AJ and Al Qaida in London, both persons with whom Mr. Jaballah is believed to have had contact by telephone in the summer of 1998, and of their roles in claiming responsibility of AJ for the bombing of United States embassies in Kenya and Tanzania in August 1998. While these hearings continued, at least into the early months of 2002, both these men had been in

detention, involved in ongoing judicial proceedings, in England, and subject to a request for extradition from there to answer to indictments in the United States for their parts in the embassy bombings in 1998 in East Africa;

(3) Kassun Daher, a Canadian citizen and member of an extremist organization based in Lebanon, was arrested in February 2000, and is held in detention in Lebanon. In *Jaballah No. 1*, Mr. Jaballah's contacts with Daher in Canada and with others here, who were believed to be involved with AJ activities, were explored, but he then acknowledged limited contacts but denied knowledge of any terrorist activities of Daher and the others. Daher's involvement in those activities was only fully understood by CSIS on information from elsewhere following Daher's arrest. Mr. Jaballah's contacts with Daher in Canada and after Daher left Canada give rise to concern on the part of CSIS;

(4) The role of Thirwat Salah Shehata whom Mr. Jaballah acknowledged, in testimony in *Jaballah No. 1*, he had once known as his lawyer in Egypt in the 1980s. Information new to the Ministers indicates Shehata is a leader of the AJ and of Al Qaida, for a time he was one of a committee of three leading AJ, head of its security committee and a member of its governing body, the Majlis Shura. While Mr. Jaballah claimed ignorance of Shehata's activities, there is new information of a close relationship between the two men including contact on behalf of Mr. Jaballah with Shehata in Yemen or Pakistan;

(5) The role of the AJ-Al Qaida centres in Baku, Azerbaijan, and in London, England, particularly their roles as communications centres in relation to the bombings of United States' embassies in East Africa in August 1998, and new information about AJ's internal security operations is such that it is believed anyone in contact with those centres would be a part of the larger AJ operations. Mr. Jaballah is said, from his own testimony in *Jaballah No. 1*, to have had contact with the London office of the International Office for the Defence of the Egyptian People (the IODEP), perhaps some 20 times in the summer of 1998, seeking information in support of his refugee claim in Canada or other general information. That office was located at the address of AJ operations in London, operated, it appears from partially new information, under supervision of Eidirous and Al Bari at the time of Jaballah's contacts with London in 1998. It is believed that office was a cover for AJ operations in London and it was implicated as a communications centre for activities related to the conspiracy for bombing of U.S. embassies in Kenya and Tanzania in 1998.

[84]Very little of this partially new information makes specific reference to the respondent, Mr. Jaballah. At the hearings before Mr. Justice Cullen, Mr. Jaballah's evidence was that his contacts with any of the persons here referred to, or with the London office of the IODEP, were made without his knowledge of any terrorist activities or similar involvement of these persons or of the London office. It is the view of the Ministers in light of the partially new information that anyone in contact with Messrs. Al Zawaheri, Eidirous, Al Bari, Shehata, Daher, and with the London office of the IODEP, as Mr. Jaballah is believed to have been, and as he admits in some respects, would be involved with the extremist organizations with which those persons and that office were known to be associated. That perception is based in part on new information about AJ and Al Qaida operations carried on through local cells, with contacts limited to a few key persons, for reasons of internal security of those operations.

[85]There is no response by or on behalf of Mr. Jaballah to the perception of the Ministers, arising from his contacts with known AJ operatives and from the new information concerning the activities and the methods of AJ operations, that he has been involved in AJ operations before and after his arrival in Canada. Further, there is no response to or explanation of his contacts with those persons and with the London office of AJ apart from that in his testimony in *Jaballah No. 1*. That testimony was basically accepted by Mr. Justice Cullen as credible, but his decision was made with substantially less information before the Court than is now the case, particularly about AJ operations, their organization and methods to maintain internal security. The inference drawn and now strengthened by the new information is one adverse to Mr. Jaballah, that unless he was a senior AJ-Al Qaida operative, he could not have had contact with so many others who were senior members and active in those organizations.

#### (d) CONCLUSION CONCERNING NEW INFORMATION BEFORE THIS COURT

[86]I conclude there is new information before this Court that was not before the Court in *Jaballah No. 1*. Some of that information is significant in its direct implications for Mr. Jaballah, including the Interpol notice and the identification, by fingerprint comparison, of the person concerned in that notice as Mr. Jaballah, information that

he had spent time in Afghanistan, the fact that his telephone number was found in Mr. Mahjoub's possession, the fact that his anonymously rented postal box had been used and that its address was found on a computer disk in the possession of an accused extremist detained in Jordan, and information that certain persons with whom Mr. Jaballah had contact were active operatives with senior responsibilities in AJ/Al Qaida, some of whom were involved in communications concerning the bombings in Kenya and Tanzania in 1998.

[87]That information, new to the Ministers and not before the Court in *Jaballah No. 1* is all on the public record in the summary statements and documents provided to Mr. Jaballah, and by testimony of Mike. The decision in *Jaballah No. 1* was rendered without the additional new information now before the Court, not disclosed to Mr. Jaballah because of concern for national security or the safety of others, which relates to the contacts between Mr. Jaballah and others involved in AJ operations. That information, not on the public record, in part contradicts the evidence Mr. Jaballah gave in *Jaballah No. 1*, and it could only be ignored if there were persuasive explanation on his part, explanation which only Mr. Jaballah could provide, but which he declined to do.

[88]It is my opinion, considering only the public information that is before the Court that is new and significant, not ascertainable by the Ministers before November 1, 1999, that information, had it been available for the earlier proceedings, could well have led to a different conclusion in *Jaballah No. 1*. That conclusion is reinforced by other new information before the Court that was not made public but was withheld from Mr. Jaballah on grounds that its disclosure would prejudice national security or the safety of others.

[89]In these circumstances, the principles of *res judicata*, issue estoppel and abuse of process, perceived because this is a second proceeding relating to a second certificate, of the same opinion that was before the Court in *Jaballah No. 1*, have no application here.

(e) FINDING THE CERTIFICATE IS REASON-ABLE

[90]As earlier noted and I now repeat, I find that, in accord with the statute as it then applied and with paragraph 78(i) of the IRPA, Mr. Jaballah had a reasonable opportunity to be heard, to respond to the opinion certified by the Ministers on August 13, 2001 and to the information made available to him upon which the opinion is based. He did not respond to any of the significant new information before the Court, which was not before Mr. Justice Cullen in *Jaballah No. 1*.

[91]It was in these circumstances that counsel for the Ministers moved orally, at the hearing in March 2002, that the Court find the certificate of the Ministers in relation to Mr. Jaballah is reasonable.

[92]As in *Al Sayegh (Re)*, *supra*, and *Almrei (Re)*, *supra*, where the person who is the object of the opinion of the Ministers, has the opportunity to respond to that opinion and to the information on which it is based, but declines to explain or respond, the Court is left to assess whether the certified opinion is reasonable on the only evidence that is before it.

[93]The certified opinion is that Mr. Jaballah is inadmissible to Canada on grounds of security, in the words of subsection 77(1) of the IRPA. Those grounds, described in August 2001 under the provisions of then section 19 of the 1985 Act, now have their expression as paragraphs 34(1)(b), (c) and (f) of the IRPA.

[94]I find that the information on the public record includes items that support the opinion of the Ministers as reasonable, particularly in the absence of explanation or response by Mr. Jaballah. I refer in particular to the Interpol notice, the finding of Mr. Jaballah's telephone number in the possession of Mr. Mahjoub when the latter was arrested, the information about the inclusion of Mr. Jaballah's postal box address in Toronto among information contained on a computer disk seized on the arrest of Mr. Deek in Jordan, the use of Mr. Jaballah's postal box despite his denial, the communication links or relationships between Mr. Jaballah and senior leaders of AJ or its London office, and the inference that only persons actively involved with senior leaders of the organization would have such access. All these matters, provided in the public record to Mr. Jaballah, in my opinion provide a reasonable basis for the opinion of the Ministers that Mr. Jaballah engaged or was engaging in or instigating subversion by force of any government, in this case the Government of Egypt (within paragraph 34(1)(b) of the IRPA), that he had engaged or was engaged in terrorism (within paragraph 34(1)(c) of the IRPA), and that he is a member of an organization, in this case Al Jihad (AJ) that there are reasonable grounds to believe

engages, has engaged or will engage in acts to subvert by force the government of Egypt or acts of terrorism (within paragraph 34(1)(f) of the IRPA).

[95]I note that the term "terrorism" as used in section 19 of the 1985 Act, and used similarly in section 34 of the IRPA is not a word that is unconstitutionally vague. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, *supra*, at paragraph 98, the Court commented:

In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.

[96]I note further that by SOR/2002-284, dated July 23, 2002 the Governor General in Council, acting pursuant to subsection 83.05(1) of the *Criminal Code* as enacted by S.C. 2001, c. 41, s. 4, upon the recommendation of the Solicitor General of Canada, enacted *Regulations Establishing a List of Entities*. Those regulations by section 1 provide a list of entities, which the regulations state there are reasonable grounds to believe, have knowingly carried out, attempted to carry out, participated in or facilitated terrorist activity, or are knowingly acting on behalf of, at the direction of, or in association with an entity that has knowingly carried out, attempted to carry out, participate in or facilitated a terrorist activity. The listed entities include Al Qaida, Al Jihad (AJ) also known as Egyptian Islamic Jihad (EIJ), and the Vanguard of Conquest.

[97]The information before the Ministers and in the public record provided by the Court to Mr. Jaballah, in my opinion, clearly supports the certified opinion of the Ministers as reasonable, that Mr. Jaballah is inadmissible to Canada on security grounds, as earlier concluded in relation to grounds included in paragraphs 34(1)(b), (c) and (f) of the IRPA. I determine, noting the absence of any substantial response by or on behalf of the respondent, Mr. Jaballah, that the opinion certified by the applicant Ministers on August 13, 2001 is reasonable.

### PART III CONCLUSIONS, ORDERS, COSTS

[98]A summary of the key determinations of the Court follows.

1. The motion of the respondent, Mr. Jaballah, heard on April 11, 2003 is allowed in part, that is, in so far as the PRRA report of an officer dated August 15, 2002, is filed and is deemed to be the risk assessment of the minister concerning Mr. Jaballah, if he were to be returned to Egypt.
2. The motion is also allowed in that the Court finds that continuing delay in deciding Mr. Jaballah's application for protection constitutes an abuse of process, for it is not satisfactorily explained, and is without reasonable forecast about when the decision may be rendered, while Mr. Jaballah remains in detention, in solitary confinement since August 14, 2001, with no right of review of that detention.
3. That abuse warrants the resumption of the Court's primary purpose in these proceedings to assess the reasonableness of the certified opinion of the Ministers, but that abuse which relates to a process collateral to the Court's primary function, does not warrant quashing the certificate, nor does it warrant the release of Mr. Jaballah without a normal review of that detention.
4. The proceedings in regard to the certificate are resumed, leaving outstanding the necessary determination by or on behalf of the Minister on Mr. Jaballah's application for protection.
5. The Court's process in relation to the certificate has followed the requirements of the *Immigration Act*, now the IRPA. In so doing, the process, in my opinion, has been lawful.
6. There is new information and evidence before this Court that was not before the Court in *Jaballah No. 1*,

information that, had it been available in that case, might well have led Mr. Justice Cullen to a different conclusion.

7. Mr. Jaballah, initially with counsel, and later representing himself, had a reasonable opportunity to respond to the new information before this Court, but he did not do so.

8. In light of the information and evidence before this Court, including in particular the new information not provided in *Jaballah No. 1*, the certificate of the Ministers, dated August 13, 2001, is reasonable, on the basis of the information and evidence in the public record, available to Mr. Jaballah. Further, that conclusion is supported by other information available to the Court, not provided to the respondent on grounds of national security.

9. The certified opinion of the Ministers, now found to be reasonable, is that Mr. Jaballah is inadmissible to Canada as a person within paragraphs 34(1)(b), 34(1)(c) and 34(1)(f) of the IRPA.

[99] Separate orders and determinations are now issued. The first includes determinations on procedural and other matters arising in consideration of the submissions of the parties on April 11, 2003. The second sets out my determination that the certificate of the Ministers is reasonable.

## COSTS

[100] On the matter of costs, Mr. Jaballah asked for costs on a solicitor and client basis in his motion heard on April 11, 2003. That was in part successful. In my opinion, the motion would have been unnecessary were it not for the continuing unexplained delay in deciding the application for protection, a delay which continues to this day. That delay in the circumstances constitutes an abuse of process. Mr. Jaballah is entitled to the costs of preparation for and of the hearing on April 11, 2003 on a solicitor and client basis.

[101] Costs were not requested on behalf of the applicant Ministers. If either party has further concerns about other costs of these proceedings, upon which the other party does not agree, the matter may be raised by written submissions or by personal appearance.

## Annex A

Excerpt from the *Immigration and Refugee Protection Act*, [S.C. 2001, c. 27](#), as amended.

### Comparable Provision of 1985 Act

#### Division 9

#### Protection of Information

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

**76.** The definitions in this section apply in this Division.

"information" means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of either of them.

None

"judge" means the Associate Chief Justice of the Federal Court or a judge of the Trial Division of that Court

designated by the Associate Chief Justice.

Subsection paragraphe 40.1(4)

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

subsection 40.1(1)

(2) When the certificate is referred, a proceeding under this Act respecting the person named in the certificate, other than an application under subsection 112(1), may not be commenced and, if commenced, must be adjourned, until the judge makes the determination.

subsection 40.1(2)

**78.** The following provisions govern the determination:

(a) the judge shall hear the matter;

subsection 40.1(4), 40.1(5)

(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;

subsection 40.1(4)

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

subsection 40.1(4)

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

subsection 40.1(4)

(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;

None

(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;

paragraph 40.1(5.1) c)

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

paragraph 40.1(5.1) *d*)

(*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;

paragraph 40.1(4) *b*)

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

section 40.1

(*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.

paragraphe 40.1(5)

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

None

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

None

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

paragraph 40.1(4)*d*)

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

paragraph 40.1(4)*d*)

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

None

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

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

subsection 40.1(7)

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

section 40.1

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

section 40.1

Detention

**82. (1) . . .**

**82. (1) [ . . . ]**

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

(2) L'étranger nommé au certificat est mis en détention sans nécessité de mandat. Detention

alinéa 40.1(7)*b*)

. . .

[ . . . ]

**84. (1)**

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

subsections 40.1(8), 40.1(9)

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