DES-3-03

2005 FC 1670

IN THE MATTER OF a certificate filed under subsection 77(1) and sections 78 to 80 of the *Immigration and Refugee Protection Act* (IRPA);

IN THE MATTER OF the decision of the Minister of Citizenship and Immigration as to whether to protect a person named in a security certificate, under paragraphs 95(1)(c), 112(3)(d) and 113(b) and (c), subparagraphs 113(d)(i) and (ii), subsections 115(2) and 77(2), paragraph 101(1)(f) and section 104 of the IRPA and sections 167 to 172 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR) and the constitutional challenge to those provisions;

AND IN THE MATTER OF Adil Charkaoui.

INDEXED AS: CHARKAOUI (RE) (F.C.)

Federal Court, Noël J.—Montréal, October 4; Ottawa, December 9, 2005.

Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Security Certificate — Application contesting validity of security certificate issued under Immigration and Refugee Protection Act (IRPA), s. 77 based on Ministers' satisfaction applicant member of terrorist organization — Applicant challenging constitutional validity of provisions of IRPA governing applications for protection, pre-removal risk assessment, application of principle of non-refoulement, national security — Protection claims system established by IRPA not unconstitutional — Application dismissed.

Constitutional Law — Charter of Rights — Applicant challenging validity of security certificate issued by Ministers under Immigration and Refugee Protection Act, s. 77 — Submitting acts, omissions, decisions of Ministers amounting to treatment prohibited by Charter, ss. 7, 12, 15 — Proceedings initiated by Ministers against applicant serious, involving grave consequences for life — However, not cruel, unusual treatment within meaning of Charter — Ordinary conduct of administrative, judicial process not contrary to Charter, s. 12 — That particular rules apply to non-citizens like applicant not contrary to Charter, ss. 7, 15 — Applicant not suffering torture, cruel, inhuman, degrading punishment, treatment.

Bill of Rights — Applicant submitting provisions of Immigration and Refugee Protection Act (IRPA) relating to protection applications contrary to principles protected by Canadian Bill of Rights, certain international law instruments — Distinction between Canadian citizens, non-citizens justifying different treatment accorded to applicant as compared to Canadian citizens — That particular set of rules applies to non-citizens like applicant not contrary to Bill of Rights, s. 1(b) — Provisions of IRPA relating to claims for protection not contrary to international law instruments, Bill of Rights.

Administrative Law — Applicant submitting actions of Ministers, representatives gave rise to reasonable apprehension of bias, decision makers no longer able to perform duties under Immigration and Refugee Protection Act (IRPA) in respect of him — Said actions not amounting to mistreatment, not indicating appearance of bias on part of decision makers as carried out in compliance with IRPA — Reasonable, right-minded person with thorough knowledge of case would arrive at same determination.

Construction of Statutes — Immigration and Refugee Protection Act (IRPA), s. 3(3)(f) providing Act must be construed, applied in manner complying with international human rights instruments to which Canada signatory — Review of objectives of IRPA indicating intent to prioritize security — IRPA, s. 3(3)(f) general, interpretive provision not operating to incorporate international law into domestic law.

Practice — Stay of Proceedings — Applicant (alleged member of terrorist organization) arguing procedure followed,

decisions made in course of signing of security certificate, preventive detention, release on conditions and protection claim amounting to abuse of process such as would justify suspending proceedings — Suspension of proceedings draconian, exceptional remedy — No abuse of process, nothing oppressive or vexatious in relation to applicant — Principles of fundamental justice followed from outset — That matter proceed to conclusion in interests of justice, applicant.

This was an application challenging the validity of a security certificate issued by the Solicitor General of Canada (now the Minister of Public Safety and Emergency Preparedness) and the Minister of Citizenship and Immigration (together, the Ministers) under section 77 of the *Immigration and Refugee Protection Act* (IRPA). The security certificate was based on the satisfaction of the Ministers that the applicant has been and is still a member of the Usama bin Laden network, an organization that has engaged, is engaged or will engage in acts of terrorism. The applicant has been a permanent resident of Canada since 1995. On May 16, 2003, a security certificate and an arrest warrant were signed by the Ministers. Later that year, the Federal Court released a judgment finding that the applicant's detention was valid based on the danger presented to national security and another judgment declaring the provisions relating to the security certificate to be constitutional. The provisions challenged by the applicant relate to applications for protection by persons named in a security certificate. The IRPA provides that before being returned to his country of origin, a person may apply for a pre-removal risk assessment (PRRA). In the case of persons who are not named in a security certificate, if the assessment shows that there is a possibility of torture or crual or unusual treatment or punishment, refugee protection is granted and the person will not be removed. Persons named in a security certificate may also make a PPRA application but they must make the application before a decision is made as to whether the certificate is reasonable. The fact that a person is named in a security certificate means that a specific procedure will apply to the person when he makes an application. The Minister or the Minister's delegate must weigh the risk of removal against the objective of national security, in accordance with the applicable decisions of the courts. This procedure was the subject of the constitutional challenge herein. The applicant made five main arguments, corresponding to the five questions submitted to the Court. First, the applicant submitted that the Ministers delegated a power contrary to subsection 6(3) of the IRPA in that they made the decision to sign the security certificate and arrest warrant regarding him without having the entire Canadian Security Intelligence Service (CSIS) file before them. Second, the applicant challenged the constitutional validity of the provisions of the IRPA governing applications for protection, pre-removal risk assessment, the application of the principle of non-refoulement and national security. Third, the applicant argued that the acts, omissions and decisions of the Ministers regarding him created a context in which the effects amounted to treatment prohibited by sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* by exposing him, since May 2003, to the possibility of removal to Morocco, a country where there is a risk of torture. Fourth, the applicant contended that, by their decisions, the Ministers created an appearance of bias which disqualified them as decision makers by preventing them from performing the functions assigned to them by the IRPA. Fifth, the applicant submitted that the circumstances and proceedings to which he was subject justified a permanent suspension of the proceedings.

Held, the application should be dismissed.

(1) There was no evidence showing that the Ministers had before them only the CSIS report, and did not have the evidence on which the report was based, or that they had before them only an incomplete report for the purpose of deciding whether or not to sign the security certificate. A finding of law cannot be based on hypotheses or suppositions. The question of whether Ministers and the Government of Canada exceeded their jurisdiction or otherwise acted illegally and unconstitutionally when they signed and filed an arrest warrant and security certificate against the applicant based on a CSIS report and without themselves having regard to the evidence concerning the applicant was answered in the negative.

(2) The protection application involves a two-pronged procedure by which the decision maker must assess both the risk associated with returning a person named in a security certificate to his country of origin and the danger that the person may constitute to national security. The Minister must weigh these two factors before reaching a conclusion. The decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, upholding the weighing exercise provided for in paragraph 53(1)(*b*) of the former *Immigration Act*, (now found in subparagraph 113(*d*)(ii) and subsection 115(2) of the IRPA and section 172 of the *Immigration and Refugee Protection Regulations* (IRPR)), was binding. Paragraph 3(3)(*f*) of the IRPA, cited as a new provision by the

applicant in an attempt to distinguish *Suresh*, provides that the Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. It must not be given a larger role than Parliament intended. In a recent decision, the Supreme Court of Canada pointed out that there is only one rule of statutory construction, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. A review of the objectives of the IRPA, as interpreted by the Supreme Court of Canada, indicated an intent to prioritize security. Read as a whole, the provisions of the IRPA are designed to prevent people from being returned to countries where they face a risk of torture. However, Parliament also wished to ensure the security of Canada by adopting subsection 34(1) of the IRPA which states the general rule of inadmissibility on grounds of security. Parliament chose to give special treatment to persons who are named in a security certificate, and the clarity of the provisions challenged by the applicant illustrates that intention. Parliament would not have enacted very specific and precise provisions relating to persons named in a security certificate if it intended to neutralize or cancel them. Paragraph 3(3)(*f*) is a general, interpretive provision that does not operate to incorporate international law into domestic law. The *United Nations Convention Relating to the Status of Refugees* and the *International Covenant on Civil and Political Rights* place great weight on the objectives of national security and the public interest, and provide for exceptions accordingly. The texts of these international conventions are in complete harmony with Canadian law.

With respect to the *Canadian Bill of Rights* and the right to equality (paragraph 1*b*), the distinction made between Canadian citizens and non-citizens justifies the different treatment accorded to the applicant as compared to Canadian citizens. As a permanent resident, the applicant is subject to the IRPA, unlike Canadian citizens. That Act is an immigration code, in itself, which makes a clear distinction between citizens and non-citizens. The fact that a particular set of rules applies to non-citizens like the applicant is therefore not contrary to paragraph 1(*b*) of the Bill of Rights. The provisions of the IRPA relating to claims for protection are not contrary to the Charter or to the international law instruments referred to or to the Bill of Rights.

(3) The applicant submitted that the Ministers, by four different acts or omissions, treated him in a manner prohibited by sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* and by the Convention against Torture. His first argument, that the threat of removal to a country where he faces a risk of torture amounts to a form of torture was rejected. The proceedings to which the applicant was subject did not amount to a violation of section 7 of the Charter. Proceedings initiated by the Ministers against the applicant were very serious and involved grave consequences for his life. However, it was not a treatment that could be characterized as crual or unusual within the meaning of section 12 of the Charter. The ordinary conduct of an administrative and judicial process is not contrary to section 12 of the Charter; the proceedings must take their course in the interest of justice. Two main factors contributed to the length of the proceedings in the applicant's case: the complexity of the process itself and the decisions made by the Ministers and their representatives on the one hand, and the decisions made by the applicant in the context of this case on the other hand. In addition to numerous motions, the applicant twice requested a suspension of the proceedings, which he was granted. The determination as to whether the certificate was reasonable could not be made, given those suspensions, and the proceedings could not be completed until that determination is made. The fact that particular rules apply to non-citizens like the applicant is not contrary to sections 7 and 15 of the Charter. Moreover, the wording of article 1, paragraph 1 of the Convention against Torture indicates that an administrative or judicial process cannot be regarded as torture. The applicant has not suffered any torture or cruel, inhuman or degrading punishment or treatment. Second, the applicant submitted that the fact that eight months had passed between the date on which the PRRA was completed (August 21, 2003), concluding that there was a risk of torture if he were removed to Morocco, and the date on which the report was disclosed to him (April 2, 2004) amounted to mistreatment. The PRRA was not concealed, but the Ministers were required under the IRPR to deliver the two reports to the applicant at the same time. Third, the applicant characterized as mistreatment the opinion stated in the diplomatic note from Foreign Affairs Canada dated February 18, 2004, decribing him a threat to the security of Canada. The objective of that letter was to obtain certain information and assurances from Morocco concerning human rights if the applicant were returned. The opinion that the applicant is a threat to the security of Canada had been widely publicized by the media. Only the decision as to whether the certificate is reasonable will make it possible to say whether that opinion is sound or not. This could not be found to be a fact that amounts to mistreatment. Fourth, it was alleged that the time taken to respond to the protection claims amounted to mistreatment. The first claim was dealt with over a period of 12 months; the second protection claim is still being considered. A claim of this nature has to take into consideration the facts that result from the passage of time. The

time that has passed in this case, for consideration of the applicant's protection claim, did not amount to mistreatment. The applicant's situation did not, in itself, amount to cruel or unusual treatment within the meaning of the sections of the Charter cited by the applicant or the meaning of the Convention against Torture. Nor did the Ministers' conduct amount to cruel or unusual treatment within the meaning of those instruments.

(4) The applicant submitted that the actions of the Government of Canada, taken as a whole, gave rise to a reasonable apprehension of bias, and that the decision makers were no longer able to perform their duties under the IRPA in respect of him. The actions cited did not indicate an appearance of bias on the part of the decision makers, since they were actions carried out in compliance with the IRPA. A reasonable and right-minded person with thorough knowledge of the case would arrive at the same determination. The Ministers and the Government of Canada did not, by their acts, create an appearance of bias that disqualifies them as decision makers and prevents them from performing the functions assigned to them by the Act.

(5) The applicant claimed that the procedure followed and the decisions made amounted to an abuse of process such as would justify suspending the proceedings. In a recent decision, the Supreme Court of Canada reiterated that a suspension of proceedings is a draconian and exceptional remedy. There was nothing oppressive or vexatious in relation to the applicant and the principles of fundamental justice were followed from the outset. No abuse of process such as would justify a permanent suspension was found, whether in relation to the signing of the security certificate, preventive detention, release on conditions or the protection claim. It is in the interests of justice and in the applicant's interests that this matter proceed to its conclusion. There was no fact situation that might amount to an abuse of process such as would justify a permanent suspension of the proceedings.

statutes and regulations judicially considered

Canadian Bill of Rights, R.S.C., 1985, Appendix III, ss. 1(*b*), 2(*b*).

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, 12, 15, 24.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 52.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36, Arts. 1, 3, 16.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 50, 57 (as am. by S.C. 1990, c. 8, s. 19(F); 2002, c. 8, s. 54).

Immigration Act, R.S.C., 1985, c. I-2, s. 53(1)(*b*) (as am. by S.C. 1992, c. 49, s. 43).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(3)(*d*),(*f*), 6(3), 33, 34(1)(*c*),(*d*),(*f*), 35, 36, 76 "judge" (as am. by S.C. 2002, c. 8, s. 194), 77 (as am. *idem*), 78, 79 (as am. *idem*), 80, 81, 82, 83, 84, 85, 95(1)(*c*), 97(1), 98, 101(1)(*f*), 102(1), 104, 112(3)(*d*), 113(*b*),(*c*),(*d*), 114(1),(2),(3), 115, Sch.

Immigration and Refugee Protection Regulations, SOR/2002-227, ss. 138 "urgent need of protection", 160, 162, 163, 164, 167, 168, 169, 170, 171, 172, 230.

International Covenant on Civil and Political Rights, December 19, 1966, [1976] Can. T.S. No. 47, Art. 12(3), 13, 14(1), 19(3)(*b*), 21, 22(2).

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Arts. 9, 32, 33(2).

Universal Declaration of Human Rights, GA Res. 217 A (III), UN GAOR, December 10, 1948, Art. 29(2).

cases judicially considered

followed:

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1; 2002 SCC 1.

applied:

Montréal (City) v. 2952-1366 Québec Inc., [2005] 3 S.C.R. 141; (2005), 258 D.L.R. (4th) 595; 32 Admin. L.R. (4th) 159; 201 C.C.C. (3d) 161; 18 C.E.L.R. (3d) 1; 36 C.R. (6th) 78; 134 C.R.R. (2d) 196; 15 M.P.L.R. (4th) 1; 340 N.R. 305; 2005 SCC 62; *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539; (2005), 258 D.L.R. (4th) 193; 339 N.R. 1; 2005 SCC 51; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; (1991), 84 D.L.R. (4th) 438; 67 C.C.C. (3d) 1; 8 C.R. (4th) 1; 6 C.R.R. (2d) 193; 129 N.R. 81; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91; (2005), 28 Admin. L.R. (4th) 161; 197 C.C.C. (3d) 225; 15 C.P.C. (6th) 51; 30 C.R. (6th) 107; 47 Imm. L.R. (3d) 1; 254 D.L.R. (4th) 193; 335 N.R. 220; 2005 SCC 39; *R. v. Scott*, [1990] 3 S.C.R. 979; (1990), 116 N.R. 361; 43 O.A.C. 277.

considered:

De Guzman v. Canada (Minister of Citizenship and Immigration), [2005] 2 F.C.R. 162; (2004), 245 D.L.R. (4th) 341; 19 Admin. L.R. (4th) 291; 124 C.R.R. (2d) 189; 257 F.T.R. 290; 40 Imm. L.R. (3d) 256; 2004 FC 1276; *Agiza v. Sweden*, [2005] UNCAT 9.

referred to:

Charkaoui (Re), [2004] 3 F.C.R. 32; (2003), 253 F.T.R. 22; 38 Imm. L.R. (3d) 56; 2003 FC 1419; *Charkaoui (Re)*, [2004] 1 F.C.R. 528; (2003), 237 F.T.R. 143; 2003 FC 882; *Charkaoui (Re)* (2004), 245 F.T.R. 276; 39 Imm. L.R. (3d) 318; 2004 FC 107; *Charkaoui (Re)* (2004), 255 F.T.R. 199; 2004 FC 624; *Charkaoui (Re)* (2004), 260 F.T.R. 238; 2004 FC 1031; *Charkaoui (Re)*, [2005] 3 F.C.R. 389; (2005), 252 D.L.R. (4th) 601; 261 F.T.R. 11; 2005 FC 248; *Charkaoui (Re)*, [2005] 2 F.C.R. 299; (2004), 247 D.L.R. (4th) 405; 126 C.R.R. (2d) 298; 328 N.R. 201; 2004 FCA 421; leave to appeal to S.C.C. granted, [2005] C.S.C.R. No. 66 (QL); *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 517; (2004), 254 F.T.R. 129; 2004 FC 853; *Charkaoui (Re)*, 2004 FC 1562; [2004] F.C.J. No. 1922 (QL); *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; (1992), 90 D.L.R. (4th) 289; 2 Admin. L.R. (2d) 125; 72 C.C.C. (3d) 214; 8 C.R.R. (2d) 234; 16 Imm. L.R. (2d) 1; 135 N.R. 161; *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 142; (2005), 251 D.L.R. (4th) 13; 45 Imm. L.R. (3d) 163; 330 N.R. 73; 2005 FCA 54; *Valente v. The Queen et al.*, [1985] 2 S.C.R. 673; (1985), 52 O.R. (2d) 779; 24 D.L.R. (4th) 161; 23 C.C.C. 3d) 193; 49 C.R. (3d) 97; 19 C.R.R. 354; 37 M.V.R. 9; 64 N.R. 1; 14 O.A.C. 79; *R. v. Regan*, [2002] 1 S.C.R. 297; (2002), 201 N.S.R. (2d) 63; 209 D.L.R. (4th) 41; 161 C.C.C. (3d) 97; 49 C.R. (5th) 1; 91 C.R.R. (2d) 51; 2002 SCC 12; *R. v. Khan*, [2001] 3 S.C.R. 823; (2001), 207 D.L.R. (4th) 289; [2002] 3 W.W.R. 1; 160 Man. L.R. (2d) 161; 160 C.C.C. (3d) 1; 47 C.R. (5th) 348; 279 N.R. 79; 2001 SCC 86; *Harkat (Re)*, [2005] 2 F.C.R. 416; (2004), 125 C.R.R. (2d) 319; 259 F.T.R. 98; 2004 FC 1717.

authors cited

Canada. Parliament. Standing Committee on Citizenship and Immigration. *Evidence*, No. 062, 2nd Sess., 37th Parl., May 27, 2003.
Canada. Parliament. Standing Committee on Citizenship and Immigration, 2nd Sess., 37th Parl. *Evidence*: Meeting 11, April 26, 2001; Meeting 12, April 30, 2001; Meeting 16, May 2, 2001; Meeting 20, May 4, 2001; Meeting 22, May 8, 2001; Meeting 24, May 15, 2001.
Canada. Parliament. Standing Committee on Citizenship and Immigration. *First Report, Bill C-11, An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 1st Sess., 37th Parl., May 28, 2001.

APPLICATION challenging the validity of a security certificate issued by the Solicitor General of Canada and the Minister of Citizenship and Immigration under section 77 of the *Immigration and Refugee Protection Act*. Application dismissed.

appearances:

J. Daniel Roussy, J.C. Luc Cadieux and *Daniel Latulippe* for the Solicitor General of Canada and the Minister of Citizenship and Immigration.

Dominique Larochelle and *Johanne Doyon* for Adil Charkaoui.

solicitors of record:

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

Des Longchamps Bourassa Trudeau & LaFrance, Montréal, and *Doyon, Morin*, Montréal, for Adil Charkaoui.

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

NOËL J.:

I. INTRODUCTION

[1] The applicant, Adil Charkaoui (Mr. Charkaoui) has been named in a security certificate under section 77 [as am. by S.C. 2002, c. 8, s. 194] of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The security certificate is based on the satisfaction of the Solicitor General of Canada (now the Minister of Public Safety and Emergency Preparedness) and the Minister of Citizenship and Immigration (Minister of Immigration) (the Ministers) that Mr. Charkaoui has been and is still a member of the Usama bin Laden network, an organization that has engaged, is engaged or will engage in acts of terrorism, that as such he has engaged, is engaged or will engage in terrorism, and accordingly that Mr. Charkaoui has been, is or will be a danger to the security of Canada (see paragraphs 34(1)(*c*), (*d*) and (*f*) of the IRPA).

[2] This is the second constitutional proceeding brought by Mr. Charkaoui. The first was a challenge to the constitutional validity of sections 33 and 77-85 [s. 79 (as am. *idem*)] (provisions relating to certificates and detention) of the IRPA. The Federal Court (*Charkaoui (Re)*, [2004] 3 F.C.R. 32) and the Federal Court of Appeal (*Charkaoui (Re)*, [2005] 2 F.C.R. 299) found those provisions to be constitutional. The application for leave to appeal from the judgment of the Federal Court of Appeal to the Supreme Court of Canada was allowed and the hearing is scheduled for early summer 2006 [[2005] C.S.C.R. No. 66 (QL)].

[3] Mr. Charkaoui has made five main arguments, corresponding to the five questions he has submitted to the Court.

[4] First, Mr. Charkaoui submits that the Ministers have delegated a power contrary to subsection 6(3) of the IRPA in that they made the decision to sign the security certificate and arrest warrant regarding him without having the entire Canadian Security Intelligence Service (CSIS) file before them. In Mr. Charkaoui's submission, the decision maker had access only to a report by CSIS.

[5] Second, Mr. Charkaoui challenges the constitutional validity of the provisions of the IRPA governing applications for protection, pre-removal risk assessment, the application of the principle of non-refoulement and national security: paragraphs 95(1)(*c*), 112(3)(*d*), 113(*b*) and (*c*) and subparagraphs 113(*d*)(i) and (ii), subsections 115(2) and 77(2), paragraph 101(1)(*f*) and section 104 (paragraph 101(1)(*f*) and section 104 were not included in the constitutional question, and appear only in Mr. Charkaoui's memorandum of fact and law (Mr. Charkaoui's memorandum)) and sections 167-172 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR). A notice of constitutional question was served on the Attorneys General of Canada and of the provinces in accordance with section 57 [as am. by S.C. 1990, c. 8, s. 19(F); 2002, c. 8, s. 54] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. by S.C. 2002, c. 8, s. 14)] (FCA). The question submitted to the Court reads as follows in the notice (typographical errors in the original French not corrected):

[TRANSLATION] Do the provisions of the IRPA . . . governing applications for protection, sections 95(1)(c) (final portion), 112(3)(d), 113(b),(c) and (d)(i) and (ii) and 115(2) of the IRPA, read together with sections 77(2) and the corresponding regulatory provisions, sections 167 to 172 IRPR, violate:

(i) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Can. T.S.

1987, No. 36?

(ii) The Convention relating to the Status of Refugees, Can. T.S. 1969 No. 6, Preamble, s. 33?

(iii) Sections 7, 12 and 15 of the Canadian Charter, Canada Act, 1982, Schedule B?

(iv) The Canadian Bill of Rights, 8-9 Eliz. II, c. 44, R.S.C. 1985, App. III?

(v) The International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47?

(vi) The Universal Declaration of Human Rights, G.A. Res 217 A (III), Doc. A/810 U.N., at page 171 (1948)?

[6] Third, Mr. Charkaoui submits that the acts, omissions and decisions of the Ministers regarding him create a context in which the effects amount to treatment prohibited by sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act, 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (Canadian Charter) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, [1987] Can. T.S. No. 36 (entry into force June 16, 1987) (Convention against Torture), by exposing him, since May 2003, to the possibility of removal to the Kingdom of Morocco (Morocco), a country where there is a risk of torture.

[7] Fourth, Mr. Charkaoui submits that by their decisions, the Ministers have created an appearance of bias which disqualifies them as decision makers by preventing them from performing the functions assigned to them by the IRPA.

[8] Fifth, Mr. Charkaoui submits that the circumstances and proceedings to which he is subject justify a permanent suspension of the proceedings.

II. RELIEF SOUGHT

[9] The relief sought by Mr. Charkaoui is as follows:

- A permanent suspension of the proceedings against him;

- A declaration that the security certificate and arrest warrant signed and issued against him are invalid and of no force or effect, under sections 7, 12, 15 and subsection 24(1) of the Canadian Charter and section 50 of the FCA (which in fact allows for a stay of proceedings and not a declaration of invalidity);

- A declaration that the provisions of the IRPA governing applications for protection, the final portion of paragraph 95(1)(*c*), section 98, paragraphs 112(3)(*d*) and 113(*b*) and (*c*) and subparagraphs 113(*d*)(i) and (ii), read together with subsection 77(2), paragraph 101(1)(*f*) and section 104 and the corresponding provisions of the regulations, sections 167-172 of the IRPR, are unconstitutional and of no force or effect against him under section 52 of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (CA 1982);

- Such other orders as will be requested or as it may please the Court to make as remedies for the alleged violations of Mr. Charkaoui's rights, under section 24 of the Canadian Charter;

- Judgment reserving the applicant's other rights;

- Costs.

(See Mr. Charkaoui's memorandum, May 27, 2005, at paragraph 94, under the heading [TRANSLATION] "Nature of the Order Sought".)

III. SUMMARY OF THE LEGAL SITUATION AND FACTS

(a) Provisions relating to applications for protection and national security

[10] The provisions that Mr. Charkaoui challenges are those relating to applications for protection by persons named in a security certificate. Those provisions are paragraph 95(1)(*c*), section 98, paragraphs 112(3)(*d*) and 113(*b*) and (*c*) and subparagraphs 113(*d*)(i) and (ii) and subsection 115(2) of the IRPA, read together with subsection 77(2), paragraph 101(1)(*f*), section 104, subsections 114(1), (2), and (3), 79(2) and 80(1) and paragraphs 81(*a*), (*b*) and (*c*) of the IRPA. The relevant sections of the IRPR are sections 167-172. All of those provisions are reproduced in Appendix 1.

[11] The IRPA provides that before a person is returned to his or her country of origin, the person may apply for a pre-removal risk assessment (PRRA application). In the case of persons who are not named in a security certificate, if the assessment shows that there is a possibility of torture or cruel or unusual treatment or punishment, refugee protection is granted and the person will not be removed.

[12] Persons named in a security certificate may also make a PRRA application but they must make the application before a decision is made as to whether the certificate is reasonable. It is thus not possible for such persons to make an application for protection once the designated judge confirms that the certificate is reasonable (sections 80 and 81 of the IRPA). There is another major difference: two assessments rather than one are done. First, a pre-removal risk assessment (PRRA—a report submitted under section 97 and paragraph 113(*d*) of the IRPA) will be done (see subsection 112(1) and paragraphs 97(1)(*a*) and (*b*) of the IRPA). Second, a restriction assessment will be prepared (report submitted under subparagraph 113(*d*)(ii) and subsection 112(3) of the IRPA), the purpose of which will be to determine whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada (see subparagraph 113(*d*)(ii) of the IRPA). Those reports are then submitted to the Minister or the Minister's delegate for final decision (subsection 172(1) of the IRPR). Cases may arise in which files are submitted to the Minister or the Minister's delegate consisting of both a PRRA concluding that removal to the country of origin is risky and a restriction assessment concluding that the person concerned constitutes a danger to national security. The Minister or the Minister's delegate must then consider both reports and also the written response of the person concerned, if any. The Minister or the Minister's delegate must then weigh, or balance, the reports that have been submitted and reach a final decision having regard to the applicant's written response (see section 172 of the IRPR). In doing this, the Minister or the Minister's delegate must follow the directives given in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 and *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 517 (F.C.). In the analysis below, we will see the principles that apply in those circumstances, as stated by the courts, in detail. In any event, if the Minister concludes that protection should be granted, the person named in the security certificate will not be entitled to refugee protection, and rather only to a stay (subsection 114(1) of the IRPA). Ultimately, the lawfulness of the decision of the Minister or the Minister's delegate is subject to review by a designated judge (see section 76 [as am. by S.C. 2002, c. 8, s. 194], definition of expression "judge" and section 80 of the IRPA).

[13] To summarize, the fact that a person is named in a security certificate means that a specific procedure will apply to the person when he or she makes an application for protection. The Minister or the Minister's delegate must weigh the risk of removal against the objective of national security, in accordance with the applicable decisions of the courts. It is this procedure that is the subject of the constitutional challenge in this case.

(b) Detailed chronology of events

[14] In order to properly understand the legal issues raised by this proceeding, it is important that we review certain facts of the case, in chronological order:

- Mr. Charkaoui has been a permanent resident since 1995;

- On May 16, 2003, a security certificate and an arrest warrant were signed by the Ministers and the certificate was filed at the Federal Court Registry;

- On May 21, 2003, the arrest warrant was executed;

- On May 30, 2003, the notification required by section 160 of the IRPA (Notification Regarding Pre-removal Risk Assessment: Persons Named in a Security Certificate) was sent to Mr. Charkaoui by an officer of Citizenship and Immigration Canada (CIC). The notification informed Mr. Charkaoui that he had the right to make a PRRA application and stated that if Mr. Charkaoui wished to exercise that right, a form had to be sent by June 14, 2003 and written submissions sent by June 29, 2003 (the time allowed is set out in section 164 of the IRPR);

- On July 15, 2003, the undersigned released a judgment finding that Mr. Charkaoui's detention was valid based on the danger to national security [[2004] 1 F.C.R. 528 (F.C.)];

- Mr. Charkaoui obtained an extension of time for filing submissions and sent them to the CIC at the end of July 2003 (they are dated July 31) (see sections 162 and 163 of the IRPR). In his submissions, Mr. Charkaoui stressed the reasons why he fears that he will be tortured if he is returned to Morocco;

- On August 21, 2003, the officer in charge of the pre-removal risk assessment completed his assessment and concluded that there [TRANSLATION] "is a probability of torture, death threats and cruel and unusual treatment or punishment if he [Mr. Charkaoui] returns to Morocco." The PRRA was disclosed to Mr. Charkaoui on April 2, 2004, more than seven months later;

- On December 5, 2003, the undersigned released a judgment declaring the provisions relating to the security certificate to be constitutional (see *Charkaoui (Re)*, [2004] 3 F.C.R. 32 (F.C.));

- On December 23, 2003, Mr. Charkaoui's counsel sent a demand to the CIC pointing out that five months had passed since the PRRA application was filed. In that demand, Mr. Charkaoui asked that he be provided with the PRRA without delay;

- By order dated January 8, 2004, the undersigned held that the hearing to determine whether the certificate was reasonable would be held on April 5 to 8, 2004;

- On January 23, 2004, the Court released a second judgment upholding the detention [(2004), 245 F.T.R. 276 (F.C.)];

- On January 31, 2004, Mr. Charkaoui was granted an initial suspension of proceedings, under subsection 79(1) of the IRPA. The hearing to decide whether the certificate was reasonable, which had been scheduled for early April (see the order dated January 8, 2004), was cancelled;

- On February 18, 2004, the Department of Foreign Affairs and International Trade (Foreign Affairs Canada) sent a diplomatic note (diplomatic note) informing the Ministry of Foreign Affairs and Cooperation of Morocco (Foreign Affairs Morocco) of the proceedings against Mr. Charkaoui [TRANSLATION] "for the purpose of removing him from Canada and returning him to Morocco because he constitutes a threat to the security of Canada." In that note, Foreign Affairs Canada asked Morocco to undertake, in the event that Mr. Charkaoui was returned, to treat him humanely and not to subject him to torture or to other cruel, inhuman or degrading acts. That letter was disclosed to Mr. Charkaoui on June 8, 2004;

- On March 10, 2004, Mr. Charkaoui filed a motion for recusal. That motion was dismissed by order of the undersigned on April 28, 2004 [(2004), 255 F.T.R. 199 (F.C.)];

- On April 2, 2004, CIC sent Mr. Charkaoui a letter to which three reports were attached:

    - The PRRA dated August 21, 2003;

    - A restriction assessment dated February 24, 2004, which would not be submitted to the Minister's delegate because it was incomplete;

    - A second restriction assessment dated April 1, 2004.

In the letter, Mr. Charkaoui was invited to comment on the reports, and he did so on April 17, 2004;

- On April 18, 2004, Morocco replied to the diplomatic note from Foreign Affairs Canada. In its letter, Morocco stated that there were no judicial proceedings against Mr. Charkaoui, that there was no request for his extradition, that protection against violence, torture, and so on is guaranteed by the constitution of Morocco and that Morocco has ratified a number of international human rights conventions, including the *International Covenant on Civil and Political Rights*, December 19, 1966, [1976] Can. T.S. No. 47 (entry into force March 23, 1976) (International Covenant) and the Convention against Torture;

- On June 8, 2004, the Canada Border Services Agency sent Mr. Charkaoui the diplomatic note from Foreign Affairs Canada dated February 18, 2004, and the reply by Morocco dated April 18, 2004, so that he could comment on them and so that everything could be submitted to the Minister's delegate. Mr. Charkaoui filed his submissions in late July 2004, after obtaining an extension of time;

- By order dated July 23, 2004, the undersigned upheld Mr. Charkaoui's detention for the third time [(2004), 260 F.T.R. 238 (F.C.)];

- On August 6, 2004, the Minister's delegate made a decision (decision of August 6, 2004) denying the protection application. She concluded that under paragraph 113(*d*) of the IRPA, Mr. Charkaoui was not a person in need of protection within the meaning of section 97 of the IRPA and that he was a danger to the security of Canada. There was an addendum to that decision dated August 20, 2004 (addendum of August 20, 2004);

- On September 10, 2004, Morocco signed an international arrest warrant for Mr. Charkaoui (arrest warrant) stating, *inter alia*, that he was an active member of the Moroccan Islamic Combatant Group (GICM). The warrant was amended on March 17, 2005, and remains in effect;

- On or about December 23, 2004, Mr. Charkaoui's father met with the Consul of Morocco in Montréal and was informed that Mr. Charkaoui was not wanted in Morocco;

- On February 17, 2005, the undersigned released Mr. Charkaoui, finding that the danger had been neutralized, given the circumstances. The order also imposed 15 preventive conditions on Mr. Charkaoui (see *Charkaoui (Re)*, [2005] 3 F.C.R. 389 (F.C.) and the update to the conditions of release, *Charkaoui (Re)* (November 10, 2005), Ottawa DES-3-03);

- On March 16, 2005, the Ministers filed a motion to set aside the decision of the Minister's delegate dated August 6, 2004 (including the addendum of August 20, 2004) refusing Mr. Charkaoui protection. The Ministers' motion was based on the occurrence of new facts that made the request necessary (issuance of the arrest warrant). By judgment dated March 22, 2005, the decision was set aside;

- On March 16, 2005, Mr. Charkaoui made a second application to suspend the proceedings, under subsection 79(1) of the IRPA. That application was allowed by order dated March 22, 2005. The order also set aside the decision of the Minister's delegate and cancelled the hearing scheduled for April 4 to 8, 2005 (see order of November 9, 2004 [2004 FC 1562]), which was to have been held for the purpose of determining whether the security certificate was reasonable;

- On April 6 and 21, 2005, Mr. Charkaoui sent two demands to the CIC in which it was asked to make a decision granting him protection as soon as possible;

- On May 11, 2005, Mr. Charkaoui instituted this proceeding. By order dated June 30, 2005, the hearing was scheduled for October 4, 5 and 6, 2005;

- On May 11, 2005, Citizenship and Immigration Canada informed Mr. Charkaoui that a new Minister's delegate would [TRANSLATION] "shortly" be assigned the case and that he would be kept informed. To date, the undersigned has not been informed that a new Minister's delegate has been named;

- This application was heard on October 4 and 5, 2005.

IV. FIVE QUESTIONS IN ISSUE AND OUTLINE OF ANALYSIS

[15] Counsel for Mr. Charkaoui submitted a large number of arguments to the Court on constitutional, international law and procedural grounds and in relation to the interpretation of the facts. Some arguments have been intermingled in Mr. Charkaoui's memorandum. Given that situation, it is not an easy matter for the Court to ensure that all components of the case have been set out and addressed. So that I can be satisfied, to the extent possible, that I will respond to all of the concerns raised, I will reproduce the questions as they were stated by Mr. Charkaoui in his memorandum.

[16] The five questions in issue are as follows. They will be addressed in this order:

[TRANSLATION]

(i) Did the Ministers and the Government of Canada exceed their jurisdiction or otherwise act illegally and unconstitutionally when they signed and filed an arrest warrant and security certificate against the applicant based on a CSIS report and without themselves having regard to the evidence concerning the applicant?

(ii) Does the IRPA, paragraph 95(1)(c) (final portion), section 98, paragraphs 112(3)(d) and 113(b) and (c) and subparagraphs (d)(i) and (ii) and subsection 115(2), read together with subsection 77(2), paragraph 101(1)(f) and section 104 and the corresponding provisions of the Regulations, sections 167 to 172 IRPR, violate sections 7, 12 and 15 of the Canadian Charter and the *Canadian Bill of Rights* and the international conventions to which Canada is a signatory?

(iii) Did the Ministers and the Government of Canada, by their acts or omissions, treat the applicant in a manner prohibited by sections 7, 12 and 15 of the *Canadian Charter of Rights* and by the *Convention against Torture* when they, as they have done and continue to do, exposed him to being returned to a country where he is at risk of being tortured in the circumstances referred to in sections 77 to 85 of the IRPA?

(iv) Did the Ministers and the Government of Canada, by their acts, create an appearance of bias that disqualifies them as decision-makers and prevents them from performing the functions assigned to them by the Act?

(v) Do the treatment to which the applicant has been exposed and continues to be exposed, and the acts of the Government of Canada toward him, justify a permanent suspension of the proceedings against the applicant and the other orders sought?

(See Mr. Charkaoui's memorandum, paragraphs 16, 14, 13, 15, and 17.)

V. ANALYSIS

(i) Did the Ministers and the Government of Canada exceed their jurisdiction or otherwise act illegally and unconstitutionally when they signed and filed an arrest warrant and security certificate against the applicant based on a CSIS report and without themselves having regard to the evidence concerning the applicant?

[17] Mr. Charkaoui submits that when the Ministers signed the security certificate and arrest warrant in May 2003, they had before them only a CSIS report and not all of the evidence. To establish this, Mr. Charkaoui introduced an excerpt from the testimony of Robert Batt, counsel for CSIS, into evidence. The words reported in it were spoken by Mr. Batt in his presentation to the members of the Standing Committee of the House of Commons on Citizenship and Immigration (CI Committee) on May 27, 2003 (see Canada, Parliament, Standing Committee on Citizenship and Immigration, 2nd Sess., 37th Parl., *Evidence*, No. 062, May 27, 2003 (Mr. Robert Batt). Mr. Batt explained the procedure in relation to a security certificate as follows at that time:

The starting point for these cases is basically that intelligence is available that an individual is a member of a

terrorist group, an organized crime group, or whatever or that he or she is otherwise inadmissible. This information is put together in the form of a security intelligence report, and then it is presented to the two ministers, the Minister of Citizenship and Immigration and the Solicitor General of Canada. It has to go to these two political ministers before it goes anywhere else. If these two ministers agree, they sign a certificate indicating that in their opinion the information is reasonable and that the person is inadmissible to Canada.

The certificate and the security intelligence report, which is a classified document, are then filed with the Federal Court, and the chief justice of the Federal Court appoints a designated judge to review the information.

[18] In Mr. Charkaoui's submission, that excerpt shows that the Ministers' decision was made solely on the basis of a report, and not having regard to all of the evidence concerning him. In his submission, this was an illegal delegation of the authority assigned to the Ministers (subsection 6(3) of the IRPA) to CSIS that must result in the security certificate and arrest warrant being quashed. Subsection 6(3) of the IRPA reads as follows:

6. . . .

(3) Notwithstanding subsection (2), the Minister may not delegate the power conferred by subsection 77(1) or the ability to make determinations under subsection 34(2) or 35(2) or paragraph 37(2)(*a*).

[19] The Ministers submit that there is no evidence to show that the information provided to the Minister was incomplete. They submit that they had before them all of the available evidence when they signed the security certificate and that in acting as they did, they fully exercised their jurisdiction.

[20] In my opinion, Mr. Charkaoui's position cannot be accepted. There is no evidence showing that the Ministers had before them only the CSIS report, and did not have the evidence on which the report was based. A report that includes numerous appendices in several volumes was filed at the Court Registry with the security certificate in May 2003. As well, the public portion of the report was given to Mr. Charkaoui and was accompanied by a summary of the evidence that could not be disclosed for reasons of national security, in accordance with subsection 77(1) and paragraphs 78(*g*) and (*h*) of the IRPA. I do not have any evidence before me showing that the Ministers had before them only an incomplete report for the purpose of deciding whether or not to sign the security certificate. I cannot base a finding of law on hypotheses or suppositions.

[21] The answer to the first question is therefore "no", there being no evidence.

(ii) Does the IRPA, paragraph 95(1)(*c*) (final portion), section 98, paragraphs 112(3)(*d*) and 113(*b*) and (*c*) and subparagraphs 113(*d*)(i) and (ii) and subsection 115(2), read together with subsection 77(2), paragraph 101(1)(*f*) and section 104 and the corresponding provisions of the Regulations, sections 167 to 172 of the IRPR, violate sections 7, 12 and 15 of the Canadian Charter and the *Canadian Bill of Rights* and the international conventions to which Canada is a signatory?

[22] Mr. Charkaoui submits that the proceedings against him infringe his constitutional rights. In his submission, the provisions of the IRPA relating to protection applications are contrary to the principles protected by sections 7, 12 and 15 of the Canadian Charter, by the *Canadian Bill of Rights*, R.S.C., 1985, Appendix III (CBR) and by certain international law instruments. More specifically, Mr. Charkaoui submits that those provisions are a bar to any consideration of danger to national security and in any event do not allow a person to be returned to a country where torture is practised or tolerated. In Mr. Charkaoui's view, the statutory and regulatory rules governing protection applications allow individuals to be returned to be tortured when they allow the decision maker to have regard to the restriction assessment and to the PRRA.

[23] In reply, the Ministers submit that the protection application involves a two-pronged procedure, the validity of which has been affirmed by the Supreme Court of Canada. In their submission, the decision maker must assess both the risk associated with returning a person named in a security certificate to his or her country of origin and the danger that the person may constitute to national security. In their submission, the Minister must weigh these two factors before reaching a conclusion. The Ministers further suggest that although returning a person to be tortured is condemned in Canada, such a return has not been ruled out by the Supreme Court of Canada, as long as there are

extraordinary circumstances in the nature of an act of God. In their submission, each case must be considered on an individual basis and only the illegal exercise of the decision-making power by the Minister or the Minister's delegate may, based on the facts, result in a declaration of unconstitutionality. The Ministers rely on *Suresh* and on paragraph 53(1)(*b*) [as am. by S.C. 1992, c. 49, s. 43] of the former *Immigration Act*, R.S.C. 1985, c. I-2 (former Act), and also point out that that paragraph is similar to the new section 113 of the IRPA. The Ministers are further of the opinion that the weighing process set out in the IRPA and the IRPR has already withstood constitutional scrutiny, and that the Supreme Court upheld it in *Suresh*. For the reasons set out below, I agree with the position taken by the Ministers.

[24] I will address the arguments based on the Canadian Charter and international law first, because the two arguments are closely related. I will conclude by briefly addressing the CBR.

The Canadian Charter and International Law Instru-ments

[25] *Suresh* deals with paragraph 53(1)(*b*) of the former Act. That paragraph prohibited returning a person (a refugee or a person who had been denied refugee status for one of the reasons listed in the former Act) to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion, unless:

53. (1) . . .

(*b*) the person is a member of an inadmissible class described in paragraph 19(1)(*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) and the Minister is of the opinion that the person constitutes a danger to the security of Canada;

[26] The equivalent of paragraph 53(1)(*b*) of the former Act is now found in subparagraph 113(*d*)(ii) and section 115 of the IRPA:

113. . . .

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

. . .

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

. . .

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

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

. . .

(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

(See also section 172 of the IRPR.)

[27] The weighing process provided for in paragraph 53(1)(*b*) of the former law was upheld in *Suresh*. In that

unanimous decision, signed by “the Court”, the following appears at paragraph 58:

Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state’s genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada’s constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere torture.

[28] Having upheld the weighing or balancing process, the Court considered the possibility of return to a country where there was a risk of torture, in exceptional circumstances. At paragraph 78, the Court wrote:

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 [Canadian] *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”: see *Re B.C. Motor Vehicle Act*, *supra*, at p. 518; and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 99.) 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 [Convention against Torture] directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the [Canadian] *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.

[29] Mr. Charkaoui pointed out that there is a new Act, the IRPA, which contains new sections, new wording and an interpretation section that provides that the Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory (see paragraph 3(3)(*f*) of the IRPA). For that reason, in Mr. Charkaoui’s submission, *Suresh* is not applicable. Article 3 of the Convention against Torture, which Canada has signed and ratified, reads as follows:

ARTICLE 3

1. No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Mr. Charkaoui adds that the directives given in *Suresh* do not apply to his situation because that decision dealt with the Minister’s discretion, while here it is the provisions of the IRPA that are being challenged.

[30] In my opinion, *Suresh*, upheld the weighing exercise provided for in paragraph 53(1)(*b*) of the former Act. The same weighing exercise is now found in subparagraph 113(*d*)(ii) and subsection 115(2) of the IRPA and section 172 of the IRPR. In both the former Act and the IRPA, the Minister is asked to balance the possibility of return to a country where there is a risk of torture against the assessment of danger to national security. In both cases, the person was named in a security certificate. I do not believe that *Suresh* should be distinguished, and I do not see how I could not be bound by what the Supreme Court decided in that decision.

[31] Protection applications are indeed now governed by new provisions in the IRPA and the IRPR, and those provisions are worded differently. However, the weighing principle is still present in the new Act, and was not materially altered by the IRPA. There are therefore no grounds for considering a different approach from the one set out in *Suresh*. I also note that in *Suresh* the Court was careful to state, at paragraph 78, that “[t]he ambit of an

exceptional discretion to deport to torture, if any, must await future cases".

[32] I believe that we must keep that passage in mind in deciding whether the balancing process is constitutional. We must also remember that possibilities may arise other than return when a person both represents a danger and faces a risk of torture if returned. While there may be a risk of torture in a country, a person might nonetheless be returned because the country in question had negotiated a return protocol that included a satisfactory plan for supervision of detention. In such a case, it would have to be decided whether there was a violation of the Canadian Charter. While I state no opinion as to the constitutional validity of such alternatives to return, the following example illustrates that there are solutions other than simple deportation.

[33] In *Agiza*, for example, the Swedish government returned a person convicted *ex parte*, in Egypt, of terrorist activities. In that case, the Government had given assurances that were considered by the Swedish government to be sufficient. A mechanism providing for regular visits and diplomatic supervision was arranged. The United Nations (UN) Committee against Torture decided that, having regard to the very specific circumstances of the case, Article 3 of the Convention against Torture had been violated (see *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 [[2005] UNCAT 9 (24 May 2005)], at paragraph 13.4). The mechanism itself, on the other hand, was not regarded by the Committee against Torture as violating the Convention against Torture. I mention this only as an example of the efforts made at the international level to find an alternative to simple deportation.

[34] That example shows that it is conceivable, having regard to the decision of the Supreme Court in *Suresh*, that there could be special treatment for persons named in a security certificate but who cannot be returned, given the risk of torture. Such treatment might or might not withstand constitutional scrutiny. It is not the role of this Court, in this case, to decide whether such treatment would comply with the Canadian Charter or with Canada's international commitments. At this stage of these proceedings, that is a hypothetical question. I must have regard to the passage from *Suresh* quoted above. Mr. Charkaoui is awaiting a PRRA and no effort to deport him to a country where there is a risk of torture has been made. No particular weighing exercise, and no decision in which the resulting discretion is exercised, is being considered. Nor is it the role of the Federal Court to propose solutions that comply with the Canadian Charter. Under *Suresh*, the Court cannot consider whether there has been a violation of the Canadian Charter until the exercise of discretion has resulted in a decision, and that is not the case here.

[35] In attempting to distinguish his situation from the situation in *Suresh*, Mr. Charkaoui points out that there are now provisions in the IRPA for construing and applying that Act. In particular, Mr. Charkaoui cites paragraph 3(3)(*f*) of the IRPA. That paragraph reads as follows:

3. (1) . . .

(3) This Act is to be construed and applied in a manner that:

. . .

(*f*) complies with international human rights instruments to which Canada is signatory.

Mr. Charkaoui argues that return to a country where there is a risk of torture is contrary to article 3 of the Convention against Torture and accordingly that the provisions relating to protection applications are invalid in that they allow for the possibility of such a removal.

[36] Paragraph 3(3)(*f*) must not be given a larger role than Parliament intended. In *De Guzman v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 F.C.R. 162 (F.C.), Mr. Justice Kelen explained the meaning of paragraph 3(3)(*f*). At paragraph 53, he wrote:

. . . [p]aragraph 3(3)(*f*) of IRPA codifies the common law canon of statutory construction that domestic law should be interpreted to reflect the values contained in international human rights conventions to which Canada has ascribed. In *Baker* the Supreme Court held at paragraph 70 that the human rights values in these international conventions "help inform the contextual approach" which the Court should incorporate when interpreting statutes. However, paragraph 3(3)(*f*) of IRPA does not incorporate international human rights conventions as part of

Canadian law, or state that they override plain words in a statute. Paragraph (3)(3)(*f*) of IRPA means that the conventions be considered by the Court as "context" when interpreting ambiguous provisions of the immigration law. I am of the opinion that paragraph 117(9)(*d*) of the Regulations is plain, clear, and unambiguous. It leaves no room for such interpretation.

[37] While I note the opinion of Mr. Justice Kelen, I believe that we should take the analysis farther, having regard to the very particular wording of paragraph 3(3)(*f*). Very recently, in *Montréal (City) v. 2952-1366 Québec Inc*., [2005] 3 S.C.R. 141, at paragraph 9, the Supreme Court of Canada pointed out today there is only one rule of statutory construction:

As this Court has reiterated on numerous occasions, "Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26). This means that, as recognized in *Rizzo & Rizzo Shoes* "statutory interpretation cannot be founded on the wording of the legislation alone" (at para. 21).

[38] In order to interpret paragraph 3(3)(*f*) of the IRPA properly, we must start by reviewing the objectives of the IRPA, as they have been interpreted by the Supreme Court of Canada. Very recently, in the unanimous decision in *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, Chief Justice McLachlin of the Supreme Court of Canada commented on the IRPA and certain principles that apply in immigration law, at paragraphs 10 and 46, as follows:

The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g. see s. 3(1)(*i*) of the *IRPA* versus s. 3(*j*) of the former Act; s. 3(1)(*e*) of the *IRPA* versus s. 3(*d*) of the former Act; s. 3(1)(*h*) of the *IRPA* versus s. 3(*i*) of the former Act. Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

. . .

The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms.*

[39] While the wording used in paragraph 3(3)(*f*) does use the expressions "complies" / "*se conformer*" (as compared to "ensures" / "*d'assurer*", used in paragraph 3(3)(*d*)), nonetheless the IRPA must be read as a whole to determine the intention of Parliament. The provisions of the Act and of the IRPR show that Parliament was motivated by a genuine desire to combat torture. For example, the purpose of sections 35 and 36 and the schedule to the IRPA is to prevent people who have committed acts of torture from being admitted to Canada. The provisions of the IRPA are also designed to prevent people from being returned to countries where they face a risk of torture. For example, subsection 97(1) of the IRPA provides that as a general rule, people who face a risk of torture or cruel or unusual treatment or punishment are persons in need of protection. Subsection 102(1) further grants regulation-making power by which countries that practise torture may be identified. The definition of the expression "urgent need of protection" found in section 138 of the IRPR also attests to Parliament's desire not to return people to countries where they face a risk of mistreatment. However, Parliament also wishes to ensure the security of Canada. Subsection 34(1) of the IRPA states the general rule of inadmissibility on grounds of security. Those general rules are clarified by a series of other rules that seek to strike a balance between national security and protection against torture (see paragraph 3(1)(*h*) and Division 9 of the IRPA). Under section 230 of the IRPR, the Minister has the authority to impose a stay on removals to a country where there is a generalized danger to the entire

population, but that section also provides that the stay does not apply to persons who are inadmissible on security grounds. As well, under paragraph 101(1)(*f*) [of the IRPA], a claim for refugee protection, which is normally granted where a person faces a risk of torture, cannot be granted if a person is inadmissible on grounds of security.

[40] In my opinion, Parliament has chosen to give special treatment to persons who are named in a security certificate, and the clarity of the provisions challenged by Mr. Charkaoui illustrates that intention. I find it hard to see why Parliament would have been at pains to enact very specific and precise provisions relating to persons named in a security certificate if it intended to neutralize or cancel them out by paragraph 3(3)(*f*) of the IRPA.

[41] As a final point, the origin of paragraph 3(3)(*f*) of the IRPA and the work done in preparation for enacting it provide us with clarification of its exact meaning. When the IRPA was enacted in 2002, it introduced a series of major changes. Some of those changes incorporated amendments that gave effect to international commitments made by Canada. That is the case, for example, for the inclusion of persons who face a risk of torture among those persons who are entitled to the protection of Canada (section 97 of the IRPA). Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 1st Sess., 37th Parl., 2001 (Royal Assent, November 1, 2001), included paragraph 3(3)(*f*), which was proposed by the CI Committee in its report dated May 28, 2001 (Canada, Parliament, Standing Committee on Citizenship and Immigration, 1st Sess., 37th Parl., First Report, May 28, 2001). Paragraph 3(3)(*f*) was then passed by both Houses, and given Royal Assent, with the same wording.

[42] A number of people testified before the CI Committee. Some of them proposed that a provision be included referring to international law (see, for example, Canada, Parliament, Standing Committee on Citizenship and Immigration, 1st Sess., 37th Parl., *Evidence*: Meeting 12, April 30, 2001, “Mr. Chilwin Cheng”; Meeting 16, May 2, 2001 “Mr. Andrew Brouwer”; Meeting 20, “Ms. Darlène Dubuisson-Balthazar”). The clause-by-clause consideration of the bill followed, at Meetings 22 and 24, on May 8 and 15, 2001 (Meeting 23, on May 10, 2001, was held *in camera*). Some excerpts from those proceedings are set out in Appendix 2 to these reasons, for information purposes only. In my opinion, it is apparent from those proceedings that what the members wanted to do was not to provide for international law to cancel out or neutralize the clear provisions of the IRPA. If that had been the intention of Parliament, it would have said so clearly, given that such a provision would have had an extremely significant impact on domestic law. Rather, I believe, as can be seen in what the members said, the objective was to clearly identify the values of the receiving country, to ensure that any new international conventions signed by Canada would be included, to allow for progressive interpretation of the IRPA and to make it plain that Parliament intended to abide by its international obligations. I do not believe that any more than that should be seen in it.

[43] Mr. Charkaoui further submits that in addition to its interpretive role, paragraph 3(3)(*f*) must also guide the application of the IRPA. Even if Mr. Charkaoui is correct on this point, I do not believe that it is impossible to reconcile article 3 of the Convention against Torture with the “application” of the weighing process provided for in the IRPA. On this point, I believe that we must apply what the Supreme Court said in *Suresh*, in which it clearly upheld the weighing exercise set out in the IRPA, taking into account the Convention against Torture on which Mr. Charkaoui relies. In this case, the “application” of the IRPA could not operate in such a way as to violate article 3 of the Convention against Torture, even if that Convention were incorporated into domestic law, because to date, no action has been taken against Mr. Charkaoui that might violate article 3 of the Convention against Torture. The applicable Canadian law (the impugned provisions of the IRPA and *Suresh*) is in complete harmony with the Convention against Torture, as long as no decision has been made to remove to a country where there is a risk of torture. Only then could a violation occur.

[44] To summarize, the decision in *Suresh*, upheld the balancing mechanism set out in the IRPA. The interpretation of paragraph 3(3)(*f*) of the IRPA leads to the conclusion that it is a general, interpretive provision that does not operate to incorporate international law into domestic law. The effect of that provision is not to give international law norms status equal or superior to domestic law, or to invalidate domestic law.

[45] We must keep all this in mind as we examine the other international law instruments cited by Mr. Charkaoui. In addition to the Convention against Torture, which I addressed above, he relies on the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (Convention Relating to the Status of Refugees) and the International Covenant. He did not cite any specific provision.

[46] After reading the two conventions referred to above, I have concluded that this argument must be rejected. The explanation I gave concerning the role of international conventions in domestic law applies to those treaties. In addition, although I will not reproduce the text of the conventions here or analyse them exhaustively, I would like to mention several provisions that show that these two conventions place great weight on the objectives of national security and the public interest, and provide for exceptions accordingly (Convention Relating to the Status of Refugees, articles 9 and 32 and subsection 33(2); International Covenant, subsection 12(3), article 13, subsection 14(1), paragraph 19(3)(b), article 21 and subsection 22(2)). In my opinion, the texts of these international conventions are in complete harmony with Canadian law.

[47] I believe that the same thing can be said of the 1948 *Universal Declaration of Human Rights*, GA Res. 217 A (III), Doc. A/810 UN (Universal Declaration), which Mr. Charkaoui also cited (see subsection 29(2)). The Universal Declaration is not, in any event, an international convention; rather, it is a resolution of the UN General Assembly. As such, it does not have mandatory effect. Justices Létourneau and Décary have in fact already reminded the applicant of this, in December 2004 (see *Charkaoui (Re)* [[2005] 2 F.C.R. 299 (F.C.A.)], at paragraph 138).

[48] With respect to the CBR, I note that Mr. Charkaoui did not explain in his memorandum which provisions I should rely on to strike down the provisions of the IRPA. Paragraphs 1(*b*) (right to equality) and 2(*b*) (prohibition on cruel or unusual punishment or treatment) appear to me to be relevant. With respect to the right to equality, first, we must note the distinction made between Canadian citizens and non-citizens, which justifies the different treatment accorded to Mr. Charkaoui as compared to Canadian citizens. As a permanent resident, Mr. Charkaoui is subject to the IRPA, unlike Canadian citizens. That Act is an immigration code, in itself, which makes a clear distinction between citizens and non-citizens (see *Medovarski*; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, and *Charkaoui (Re)*, [2004] 3 F.C.R. 32 (F.C.), at paragraph 62). The fact that a particular set of rules applies to non-citizens like Mr. Charkaoui is therefore not contrary to paragraph 1(*b*) of the CBR. On the final point, I will address the prohibition on cruel or unusual punishment or treatment (paragraph 2(*b*) of the CBR) in detail in my answer to question (iii), since Mr. Charkaoui has stated a number of other reasons as the basis for his arguments.

[49] To summarize, the provisions of the IRPA relating to claims for protection are not contrary to the Canadian Charter or to the international law instruments referred to above or the CBR. The answer to the second question is therefore “no”.

(iii) Did the Ministers and the Government of Canada, by their acts or omissions, treat the applicant in a manner prohibited by sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* and by the Convention against Torture when they, as they have done and continue to do, exposed him to being returned to a country where he is at risk of being tortured in the circumstances referred to in sections 77 to 85 of the IRPA?

[50] In Mr. Charkaoui’s submission, the fact that the Ministers are still considering returning him to Morocco, and have been doing so since March 2003, amounts to treatment of him that is prohibited by sections 7, 12 and 15 of the Canadian Charter and by the Convention against Torture. The facts, acts and omissions, as presented by Mr. Charkaoui, that, in his opinion, establish mistreatment contrary to sections 7, 12 and 15 of the Canadian Charter and to the Convention against Torture, are as follows:

[TRANSLATION]

- The threat of return to face torture made by the Government of Canada against Mr. Charkaoui for over a year amounts to a form of torture or inhuman and degrading treatment, and is thus in itself a violation of the Convention against Torture as well as a violation of the Charter. . . . In fact, Mr. Charkaoui has been so affected by this situation that he has needed psychiatric medical treatment [see Mr. Charkaoui’s memorandum, at paragraphs 24 and 37];

- The PRRA report dated August 21, 2003, which concluded that there was a risk of torture if Mr. Charkaoui were returned to Morocco, was concealed for eight months. [see Mr. Charkaoui’s memorandum, at paragraphs 43 and 68 (in fact, the delay was a little more than seven months: from August 21, 2003, to April 2, 2004)];

- In a diplomatic note dated February 14, 2004, sent to Morocco, Canadian Foreign Affairs stated the opinion that Mr. Charkaoui [TRANSLATION] "is a threat to the security of Canada", even before examining the file on this point [see Mr. Charkaoui's memorandum, at paragraphs 66 and 67];

- The Minister's delegate took into account Morocco's diplomatic response, dated April 18, 2004, and regarded it as a serious assurance. In Mr. Charkaoui's submission, this is not a genuine serious assurance [see Mr. Charkaoui's memorandum, paragraphs 6 and 31];

- Mr. Charkaoui considers the twelve months that it took to obtain a response to the first protection claim (from July 31, 2003, the date when submissions were filed, to August 6, 2004, the date of the report) to be unacceptable. Mr. Charkaoui also considers the seven months that have passed since he send [*sic*] the demand seeking a favourable decision, in April 2005 (from April 6, 2005, the date when the first demand was made, to the date of the hearing on this application, October 4 and 5, 2005), to be unacceptable.

[51] The Ministers argue that the times in question are not excessive and that Mr. Charkaoui has not been treated differently from other people subject to similar proceedings.

Mr. Charkaoui's situation

[52] Mr. Charkaoui argues that the threat of removal to a country where he faces a risk of torture amounts to a form of torture. Mr. Charkaoui complains of the anxiety he has been caused by waiting for a decision on the protection claim made in July 2003, and reiterated in the demands made in April 2005 (the initial claim authorized removal to Morocco but was set aside by the Court). He adds that it is still possible that his protection claim will be refused, and that he will accordingly be returned to Morocco, the country where he faces a risk of torture.

[53] In my opinion, that argument must be rejected. First, with respect to section 7 of the Canadian Charter, Mr. Charkaoui does not refer in his memorandum to any judgment that would show me that proceedings such as the proceedings he is subject to amount to a violation of that section. Nor has Mr. Charkaoui specified what aspect of the section he is relying on.

[54] With respect to section 12 of the Canadian Charter, I have no doubt that the proceeding in question amounts to "treatment" within the meaning of that section, as Mr. Charkaoui claims. However, it is not treatment that can be characterized as cruel or unusual within the meaning of the Canadian Charter. The only authorities cited by Mr. Charkaoui in his memorandum are reports produced by Physicians for Human Rights, which is not a disinterested organization. I believe that we must keep in mind that the proceedings initiated by the Ministers against Mr. Charkaoui are very serious and necessarily involve grave consequences for his life. The grounds on which the security certificate is based, the arrest warrant, the preventive detention that is reviewed periodically and the release subject to 15 conditions certainly limit his liberty and autonomy, and the liberty and autonomy of his family and friends. The consequences of those proceedings are out of the ordinary. They certainly cause stress and, I am sure, are a constant source of worry for Mr. Charkaoui. It is a consequence of any legal proceeding (whether civil, criminal or immigration) that the people involved are affected. They have in common that they cause the people stress. The degree will of course vary, depending on the significance of the proceeding and the interests that could be affected. That is an inevitable consequence, inherent in the judicial process, and I find it hard to see how the ordinary conduct of an administrative and judicial process could be contrary to section 12 of the Canadian Charter. I sympathize with Mr. Charkaoui in this respect, but the proceedings must take their course in the interests of justice.

[55] In addition, it must be noted that there are two main factors that have contributed to the length of the proceedings in Mr. Charkaoui's case. The first is the complexity of the process itself and of the decisions made by the Ministers and their representatives. The second is the decisions that Mr. Charkaoui has made in the context of this case.

[56] First, a protection claim relating to a person named in a security certificate involves a number of actors who all have different jobs to do. There is the PRRA officer, who assesses the human rights situation in the country to which removal may be effected, having regard to the submissions filed by the person named in the certificate. Foreign Affairs Canada and Foreign Affairs Morocco have been involved, through the exchange of diplomatic

letters. There is the intelligence branch officer, who analyses the facts for the purpose of the restriction assessment, in order to form an opinion as to the risk that the person presents to the security of Canada. The person concerned, who has to comment on the various documents submitted at every point in the consideration of the protection claim, is involved. And at the end of it all, there is the role of the Minister or the Minister's delegate, who must decide the protection claim. There are very probably other people who contribute to the consideration process. At the end of that process, the Minister or the Minister's delegate has to exercise the discretion that is the result of the weighing done. In some cases, as I noted in the answer to question (ii), alternatives may be considered to avoid removal to a country which might torture a person who, on the other hand, represents a security risk. In those cases, developing alternatives may be a lengthy process, because of the very nature of the alternatives. Then there is the final decision, the lawfulness of which is itself subject to review by the designated judge (subsection 80(1) of the IRPA). In short, the process is extremely complex and inevitably involves the passage of time. Making a quick decision, without taking the time to allow for complete consideration of the issues, the facts and the options to be explored, would certainly not do justice to the person concerned. In this case, the first protection claim was set aside and the proceedings were suspended. We must now await a decision on the protection claim that Mr. Charkaoui made again in April 2005. As of the date of this judgment, the time this has taken is understandable. (See *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 142 (F.C.A.), at paragraph 86.)

[57] Moreover, the decisions that Mr. Charkaoui has made are relevant. Although Parliament intended that these proceedings be dealt with "informally and expeditiously" (paragraph 78(*c*) of the IRPA) and the undersigned at all times sought to get to the bottom of the matter with diligence, having regard to the parties' interests, this was impossible. Numerous motions were brought in the course of these proceedings (first constitutional challenge to the security certificate and preventive detention, detention reviews and motion for recusal, in addition to the current constitutional and procedural challenge) that have occupied the time and energy of the parties and the Court. In all, the proceedings have been suspended for 13 months, twice at Mr. Charkaoui's request, under subsection 79(1) of the IRPA. Each time that the Court set dates for the hearing to determine whether the certificate was reasonable, the dates were cancelled because of a suspension application or for some other reason. I am not criticizing Mr. Charkaoui for this; he chose to exercise the rights given him by the law. However, these acts and decisions have contributed to the length of the proceedings, and I must take this into account. In *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, Mr. Justice La Forest made the following comment, at page 838:

The appellant laid great stress on the "death row" phenomenon and the manner of execution. The death row phenomenon owes its existence in large part to the fact that it is not unusual for prisoners to spend many years on death row as they pursue their various appeals through the United States court system. The unwieldy and time-consuming nature of this generous appeal process has come under heavy criticism in the United States in recent years, and is the subject of efforts at reform. While the psychological stress inherent in the death row phenomenon cannot be dismissed lightly, it ultimately pales in comparison to the death penalty. Besides, the fact remains that a defendant is never forced to undergo the full appeal procedure, but the vast majority choose to do so. It would be ironic if delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice; see *Richmond v. Lewis*, 921 F.2d 933 (9th Cir. 1990), at p. 950. As in *Soering*, *supra*, there may be situations where the age or mental capacity of the fugitive may affect the matter, but again that is not this case.

Although that was an extradition case and the Judge's comments related to section 7 of the Canadian Charter, I believe that his reasoning can be applied, in part, to the analysis of the meaning of section 12 of the Canadian Charter. It may be difficult for a person who "takes advantage of the full and generous avenue of the appeals available," on the one hand, to argue successfully that his or her rights under the Canadian Charter have been jeopardized, on the other hand. In the case before us, Mr. Charkaoui twice requested a suspension of the proceedings, which he was granted. The determination as to whether the certificate is reasonable cannot be made, given those suspensions. The proceedings cannot be completed until that determination has been made. If the certificate were found to be unreasonable, that would be the end of the proceedings and Mr. Charkaoui would regain complete liberty. These comments must not be interpreted as blaming Mr. Charkaoui for the decisions he has made. The Court recognizes his right to make them. That is his right. Nonetheless, there are consequences.

[58] With respect to section 15 of the Canadian Charter, I have already cited the relevant case law, holding that the fact that particular rules apply to non-citizens like Mr. Charkaoui is not contrary to sections 7 and 15 of the

Canadian Charter (*Chiarelli v. Canada (Minister of Employment and Immigration* and *Charkaoui (Re)* [[2004] 3 F.C.R. 32 (F.C.)]).

[59] Mr. Charkaoui also relies on the Convention against Torture, but does not cite any authority in support of his argument that the proceedings to which he is subject violate that Convention. The wording of the final portion of article 1, paragraph 1 of the Convention against Torture seems to indicate, rather, that an administrative or judicial process cannot be regarded as torture:

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Cruel, inhuman or degrading punishment or treatment is not defined anywhere in the Convention against Torture. Nonetheless, if the drafters of the Convention had intended to allow such proceedings to be regarded not as torture, but as cruel, inhuman or degrading punishment or treatment under article 16 of the Convention, they would not have been at pains to expressly exclude it in article 1. As a final point, I explained in my answer to question (ii) what the nature of the role of the Convention against Torture (and international treaties in general) is in the context of paragraph 3(3)(*f*) of the IRPA. Having regard to that interpretation and to the reasons given above (both in my reasons relating to the Canadian Charter and in those relating to the Convention against Torture), I am of the opinion that Mr. Charkaoui has not suffered any torture or cruel, inhuman or degrading punishment or treatment.

Time Taken for Disclosure of the PRRA of August 21, 2003

[60] Mr. Charkaoui complains that eight months passed between the date on which the PRRA was completed (August 21, 2003), concluding that there was a risk of torture if he were removed to Morocco, and the date on which the report was disclosed to him (April 2, 2004). In Mr. Charkaoui's submission, this fact shows that he has been subject to mistreatment.

[61] Subsections 172(1), (2) and (3) of the IRPR provide for a procedure for disclosing the PRRA and the restriction assessment. Subsections 172(1) and (2) of the IRPR read as follows:

172. (1) Before making a decision to allow or reject the application of an applicant described in subsection 112(3) of the Act, the Minister shall consider the assessments referred to in subsection (2) and any written response of the applicant to the assessments that is received within 15 days after the applicant is given the assessments.

(2) The following assessments shall be given to the applicant:

(*a*) a written assessment on the basis of the factors set out in section 97 of the Act; and

(*b*) a written assessment on the basis of the factors set out in subparagraph 113(*d*)(i) or (ii) of the Act, as the case may be.

[62] If we consider the wording of the subsections set out above, it would seem that the assessments must be sent together, to allow for a written reply within 15 days after they are received. The record shows that the two assessments were disclosed to Mr. Charkaoui on April 2, 2004. In my opinion, the PRRA was not concealed. Some time did indeed pass between the point when the PRRA was completed and the point when the restriction assessment was done. The Ministers were required, however, under the IRPR, to deliver the two reports to Mr. Charkaoui at the same time, so that when he responded to the content of the reports he had access to essentially the same evidence (excluding the confidential evidence, for reasons of security) as did the decision maker. It is logical that the IRPR would be written this way, since it would be pointless to provide a person named in a security certificate with an incomplete file in cases where the PRRA was completed before the restriction assessment. An incomplete report

could only result in a premature and partial reply. That being said, it might have been worth drafting the subsections in question more clearly, to ensure that when the reports were completed they were sent at the same time to the person concerned, so that he or she could reply within 15 days, or to allow disclosure of the PRRA or the restriction assessment once each was completed.

The Diplomatic Note of February 18, 2004

[63] The third fact that Mr. Charkaoui characterized as mistreatment is the opinion stated in the diplomatic note from Foreign Affairs Canada dated February 18, 2004, describing him as a threat to the security of Canada.

[64] In my opinion, the objective of that letter was to obtain certain information and assurances from Morocco concerning human rights if Mr. Charkaoui were returned. The opinion expressed in it reiterates in full the opinion of the Ministers as set out in the security certificate dated May 16, 2003. It is not the opinion of the Minister's delegate, because the delegate's opinion regarding the danger that Mr. Charkaoui presented was not formalized until August 6, 2004, five months after the diplomatic note was sent. In addition, the opinion set out in the diplomatic note was nothing new. The opinion that Mr. Charkaoui is a threat to the security of Canada had been widely publicized by the media. Only the decision as to whether the certificate is reasonable will make it possible to say whether that opinion is sound or not. This therefore cannot be found to be a fact that amounts to mistreatment.

[65] In his memorandum, Mr. Charkaoui seems to have added to the facts by claiming that the Minister's delegate should not have used the diplomatic note from Morocco, dated April 18, 2004, in the analysis of the first protection claim (paragraph 6 of Mr. Charkaoui's memorandum). Because that decision was set aside by order dated March 21, 2005, I need not rule as to the propriety of using the diplomatic note in making the decision. However, I note that the record shows that counsel for Mr. Charkaoui filed submissions concerning the correspondence exchanged between Foreign Affairs Canada and Foreign Affairs Morocco (see the letter from Ms. Doyon dated July 27, 2004, in the Court's record). I would add that this kind of exchange of diplomatic notes would be part of the evidence that would be relevant in deciding whether a decision on a protection claim was lawful (see subsection 80(1) of the IRPA). This fact therefore does not amount to mistreatment.

Time Taken to Respond to Protection Claims

[66] The final set of facts alleged to amount to mistreatment involve the time taken to respond to the protection claims. The first claim was dealt with over a period of 12 months. The second protection claim is currently being considered, and has been for the last seven months. In my analysis of Mr. Charkaoui's situation, I described my understanding of the procedure that is followed when a protection claim is made. I would add that a claim of this nature has to take into consideration the facts that result from the passage of time. A situation may change over time. For example, it was not until September 2004 that an international arrest warrant was issued by Morocco against Mr. Charkaoui. When the diplomatic note from Morocco dated April 18, 2004 was written and the decision of the Minister's delegate dated August 6, 2004 was made, the international arrest warrant had not been issued. This shows that events may have a definite impact on the process of considering a protection claim. Accordingly, I cannot conclude that the time that has passed in this case, for consideration of Mr. Charkaoui's protection claim, amount to mistreatment. That finding is based on the time that has passed to date. The reasonableness of the time may have to be reassessed in future.

[67] For these reasons, I find that Mr. Charkaoui's situation does not, in itself, amount to cruel or unusual treatment within the meaning of the sections of the Canadian Charter cited by Mr. Charkaoui or the meaning of the Convention against Torture. Nor do I believe that the Ministers' conduct (whether because of the time taken to disclose the PRRA, the wording of the diplomatic note or the time taken to process the protection claim) amounts to cruel or unusual treatment within the meaning of those instruments.

(iv) Did the Ministers and the Government of Canada by their acts, create an appearance of bias that disqualifies them as decision makers and prevents them from performing the functions assigned to them by the Act?

[68] Mr. Charkaoui further argues that in processing the protection claim, the Government of Canada, the Ministers and their employees engaged in actions that created an appearance of bias that prevents them in future

from making objective and unbiased decisions under the IRPA. To show the existence of an appearance of bias, Mr. Charkaoui cited the same facts (see paragraph 65 of his memorandum) as the facts he used to show that he is the victim of cruel or unusual treatment (see the reasons in this judgment in the answer to question (iii)).

[69] Mr. Charkaoui submits that the actions of the Government of Canada, that is, of the Ministers and their representatives, taken as a whole, give rise to a reasonable apprehension of bias, and that in this situation the decision makers are no longer able to perform their duties under the IRPA in respect of him. Mr. Charkaoui cited *Valente v. The Queen et al*., [1985] 2 S.C.R. 673 to define the test for determining whether there is a reasonable apprehension of bias. The question is whether reasonable and right-minded persons, thinking the matter through and viewing it realistically and practically, would arrive at the conclusion that there is an apprehension of bias. The grounds for the apprehension must be serious.

[70] I explained in my answer to question (iii) why I believe that the actions cited by Mr. Charkaoui do not amount to mistreatment. I would add that, as a whole, they do not appear to me to be actions such as would indicate an appearance of bias on the part of the decision makers, since they are actions carried out in compliance with the IRPA. For that reason, I find that a reasonable and right-minded person with thorough knowledge of the case would arrive at the same determination.

[71] The answer to question (iv) is therefore "no."

(v) Do the treatment to which the applicant has been exposed and continues to be exposed and the acts of the Government of Canada toward him, justify a permanent suspension of the proceedings against the applicant and the other orders sought?

[72] As I noted in my answer to question (iii), Mr. Charkaoui has claimed that he is subject to a proceeding and to circumstances the effect of which is similar to torture, or to a form of torture or inhuman and degrading treatment. In addition, Mr. Charkaoui is of the opinion that the procedure followed and the decisions made amount to an abuse of process such as would justify suspending the proceedings.

[73] In reply, the Ministers argue that there is nothing to justify suspending the hearing. They submit that a suspension of proceedings is a last resort and that there is no situation that would justify a finding of abuse of process. In their submission, the procedures for filing a security certificate, the arrest warrant, detention and detention reviews have been properly followed.

[74] In the recent decision of the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91, at paragraph 12, that Court had occasion to reiterate that a suspension of proceedings is a draconian and exceptional remedy:

. . . [t]his Court has in past decisions ruled that the stay of proceedings is a remedy that must be limited to the most serious cases, such as in situations involving abuse by the prosecution (*R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at para. 53; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 59; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 59 and 68).

[75] The dissenting opinion of Madam Justice McLachlin (as she then was) in *R. v. Scott*, [1990] 3 S.C.R. 979, at page 1007, cited with approval in *R. v. Regan*, [2002] 1 S.C.R. 297, at paragraph 50, provides a good summary of the meaning of the concept of abuse of process:

In summary, abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively.

[76] Since I have had to answer four questions in detail since starting this analysis and I do not want to repeat myself, I will simply point out that I have identified nothing that amounts to an abuse of process in relation to Mr.

Charkaoui. I see nothing oppressive or vexatious and the principles of fundamental justice have been followed from the outset. In this case, the procedure followed in relation to the signing of the security certificate, detention and release on conditions has followed the process set out in the IRPA and the IRPR. The same is true for the protection claims, although the facts changed along the way. As a final point, I would add that the Court has had to review certain of the decisions made in the course of this case and that no abuse of process such as would justify a permanent suspension has been found, whether in relation to the signing of the security certificate, preventive detention, release on conditions or the protection claim. On the contrary, it is in the interests of justice that this matter proceed to its conclusion. It is also in Mr. Charkaoui's interests that it do so.

[77] The answer to the fifth question is therefore "no". I do not see any fact situation in this case that might amount to an abuse of process such as would justify a permanent suspension of the proceedings. I would add that if I had found that there was a fact situation that might resemble such an abuse, I would have had to consider alternative remedies for rectifying the fact situation before contemplating a permanent suspension of the proceedings (see *R. v. Khan*, [2001] 3 S.C.R. 823, at paragraph 80).

VI. OTHER MATTERS

[78] Mr. Charkaoui made additional arguments, briefly and with little in the way of grounds. I will attempt to address them all.

Violation of the Rights of Members of the Arabic and Muslim Community

[79] In Mr. Charkaoui's submission, the procedure followed by the Ministers in this case is an improper and unconstitutional use of the IRPA. In his opinion, that procedure [TRANSLATION] "exposes the members of the Arabic and Muslim community, like the applicant, to the violation of their most [*sic*] essential fundamental rights and to administrative and judicial errors" (see Mr. Charkaoui's memorandum, paragraph 27). I have carefully examined the affidavits in support of the application, and I have not identified any evidence on this point. I therefore need not respond to it specifically.

Right to a Special Advocate

[80] I have also noted that at paragraph 4 of his affidavit dated May 9, 2005, Mr. Charkaoui asks that he be granted the right to a special advocate to represent his interests and to respond to the evidence that has been kept confidential for reasons of national security. That subject was not addressed in oral argument and is not dealt with specifically in Mr. Charkaoui's memorandum. I therefore need not respond to it. Nonetheless, I would say to the applicant that this subject was addressed by the Federal Court of Appeal in *Charkaoui (Re)* [[2005] 2 F.C.R. 299], at paragraphs 123-126, and by Madam Justice Dawson of this Court in *Harkat (Re)*, [2005] 2 F.C.R. 416. In both those cases, the Courts refused to grant such a right to persons named in a security certificate. I therefore need not deal with this argument in further detail.

Decision-making Powers Assigned to the Executive Branch

[81] Mr. Charkaoui's final argument is that the Minister of Citizenship and Immigration and the Minister's officials are not an appropriate tribunal within the meaning of article 14 of the International Covenant. That article provides:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

[82] The explanations provided in answer to question (ii) apply in this situation for determining the role of the International Covenant in relation to domestic law. Moreover, in Canadian legislation, Parliament often assigns the power to make decisions that affect individuals' rights to the executive branch and administrative decision makers. In immigration, the executive plays a major role (in particular in relation to inadmissibility and protection claims). Those decisions may be reviewed by the Federal Court. The same is true of a decision concerning a protection claim (by a person named in a security certificate; see paragraph 80(1) of the IRPA).

[83] This subject was also addressed in the first constitutional challenge. At issue was the Ministers' decision to sign a security certificate and arrest warrant. The same principles apply in this case. Under the IRPA, the executive has a role to play. The judicial branch becomes involved when necessary. That system was upheld by the Federal Court of Appeal in *Charkaoui (Re)*, at paragraph 65:

It is undeniable that the initial inadmissibility decision is made by the executive, as are thousands of other decisions made by government ministers, but that decision is subject to the intervention of the judiciary as is often the case for the decisions of federal agencies or a multitude of ministerial or governmental decisions. So there is nothing unlawful, still less abnormal, in a decision of public interest being taken by a minister of the government who is responsible for enforcing the statute under which that decision is made.

(The application for leave to appeal from that judgment was allowed by the Supreme Court of Canada [[2005] C.S.C.R. No. 66 (QL)] and the hearing is scheduled for early in 2006.)

[84] To support that passage, I note what the Supreme Court wrote in *Suresh*, at paragraph 121, concerning the balancing provision in paragraph 53(1)(*b*) of the former Act and the possibility of holding a hearing:

Weighing these factors together with all the circumstances, we are of the opinion that the procedural protections required by s. 7 in this case do not extend to the level of requiring the Minister to conduct a full oral hearing or a complete judicial process. However, they require more than the procedure required by the Act under s. 53(1)(*b*)—that is, none—and they require more than Suresh received.

[85] Section 116 of the IRPA and Division 4 of the IRPR in fact grant a person named in a security certificate more rights than did paragraph 53(1)(*b*) of the former Act. Briefly, they provide for the possibility of a hearing where the credibility of the person concerned is in issue, a procedure for disclosing documents and the right to reply, and the obligation of the decision maker to have regard to all evidence in the file (see sections 167, 173 and 174 of the IRPR).

[86] As a final point, it is surprising, to say the least, that the applicant has made this argument, given that a similar argument was rejected by the Federal Court of Appeal in *Charkaoui (Re)*, at paragraphs 139-143. The argument is therefore rejected again.

VII.CONCLUSION

[87] In so far as possible, and taking into account the application, the affidavits, the documents filed, the memoranda of fact and law and oral argument, I have answered all of the questions submitted having regard to the Canadian Charter, the IRPA, the IRPR, the CBR and the international law instruments cited by Mr. Charkaoui. In oral argument, counsel placed more weight on certain items, but all of them have been taken into consideration.

[88] Having examined the constitutional question posed in detail (see point (ii) of the analysis), my answer is that the provisions of the IRPA governing claims for protection (paragraphs 95(1)(*c*) (final portion), 112(3)(*d*) and 113(*b*) and (*c*), subparagraphs (*d*)(i) and (ii) and subsection 115(2), read together with subsection 77(2)) and sections 167-172 of the IRPR do not violate sections 7, 12 and 15 of the Canadian Charter, the CBR, the Convention against Torture, the Convention Relating to the Status of Refugees, the International Covenant or the Universal Declaration. In short, Mr. Charkaoui has not persuaded the Court that the protection claims system established by the IRPA is unconstitutional. Mr. Charkaoui failed to show that the IRPA, the application of that Act to him or the decisions made amount to torture, inhuman treatment or degrading treatment. The ordinary procedure has followed its course, and the length of that procedure at this point is due to its inherent complexity and the legitimate decisions made by Mr. Charkaoui and his representatives and by the Ministers and their representatives.

[89] The system established by Parliament for protecting persons named in a security certificate is accordingly declared to be valid. Nonetheless, it should be stressed that any deportation order made against a person named in a security certificate continues to be fully subject to review for lawfulness, having regard to the Canadian Charter and to *Suresh*. In this case, no such decision is before the Court.

[90] I have reviewed the five questions asked by Mr. Charkaoui, reproduced in paragraph 29 of this judgment, and the answer to each of those questions is “no”. Unless there is something that I missed, I have also responded to all of the additional concerns raised by Mr. Charkaoui in his memorandum. Accordingly, the application is dismissed and the relief sought is denied.

ORDER

THE COURT ORDERS THAT:

- Mr. Charkaoui’s application be dismissed.

APPENDIX 1

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

DIVISION 9

PROTECTION OF INFORMATION

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

. . .

77. (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.

. . .

PART 2

REFUGEE PROTECTION

DIVISION 1

REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION

95. (1) Refugee protection is conferred on a person when

. . .

(*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

. . .

DIVISION 2

CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION

. . .

Examination of Eligibility to Refer Claim

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

. . .

(*f*) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*).

. . .

Suspension or Termination of Consideration of Claim

. . .

104. (1) An officer may, with respect to a claim that is before the Refugee Protection Division or, in the case of paragraph (*d*), that is before or has been determined by the Refugee Protection Division or the Refugee Appeal Division, give notice that an officer has determined that:

(*a*) the claim is ineligible under paragraphs 101(1)(*a*) to (*e*);

(*b*) the claim is ineligible under paragraph 101(1)(*f*);

(*c*) the claim was referred as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter and that the claim was not otherwise eligible to be referred to that Division; or

(*d*) the claim is not the first claim that was received by an officer in respect of the claimant.

(2) A notice given under the following provisions has the following effects:

(*a*) if given under any of paragraphs (1)(*a*) to . . . .

(*b*) if given under paragraph (1)(*d*), it terminates proceedings in and nullifies any decision of the Refugee Protection Division or the Refugee Appeal Division respecting a claim other than the first claim.

. . .

DIVISION 3

PRE-REMOVAL RISK ASSESSMENT

Protection

112. (1) A person in Canada, other than a person refereed to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

. . .

(3) Refugee protection may not result from an application for protection if the person

. . .

(*d*) is named in a certificate referred to in subsection 77(1).

113. Consideration of an application for protection shall be as follows:

. . .

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

. . .

Principle of Non-refoulement

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

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

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

(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

Immigration and Refugee Protection Regulations, SOR/2002-227

DIVISION 4

PRE-REMOVAL RISK ASSESSMENT

. . .

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:

(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

(*b*) whether the evidence is central to the decision with respect to the application for protection; and

(*c*) whether the evidence, if accepted, would justify allowing the application for protection.

168. A hearing is subject to the following provisions:

(*a*) notice shall be provided to the applicant of the time and place of the hearing and the issues of fact that will be raised at the hearing;

(*b*) the hearing is restricted to matters relating to the issues of fact stated in the notice, unless the officer conducting the hearing considers that other issues of fact have been raised by statements made by the applicant during the hearing;

(*c*) the applicant must respond to the questions posed by the officer and may be assisted for that purpose, at their own expense, by a barrister or solicitor or other counsel; and

(*d*) any evidence of a person other than the applicant must be in writing and the officer may question the person for the purpose of verifying the evidence provided.

169. An application for protection is declared abandoned

(*a*) in the case of an applicant who fails to appear at a hearing, if the applicant is given notice of a subsequent hearing and fails to appear at that hearing; and

(*b*) in the case of an applicant who voluntarily departs Canada, when the applicant's removal order is enforced under section 240 or the applicant otherwise departs Canada.

170. An application for protection may be withdrawn by the applicant at any time by notifying the Minister in writing. The application is declared to be withdrawn on receipt of the notice.

171. An application for protection is rejected when a decision is made not to allow the application or when the application is declared withdrawn or abandoned.

172. (1) Before making a decision to allow or reject the application of an applicant described in subsection 112(3) of the Act, the Minister shall consider the assessments referred to in subsection (2) and any written response of the applicant to the assessments that is received within 15 days after the applicant is given the assessments.

(2) The following assessments shall be given to the applicant:

(*a*) a written assessment on the basis of the factors set out in section 97 of the Act; and

(*b*) a written assessment on the basis of the factors set out in subparagraph 113(*d*)(i) or (ii) of the Act, as the case may be.

(3) The assessments are given to an applicant when they are given by hand to the applicant or, if sent by mail, are deemed to be given to an applicant seven days after the day on which they are sent to the last address that the applicant provided to the Department.

(4) Despite subsections (1) to (3), if the Minister decides on the basis of the factors set out in section 97 of the Act that the applicant is not described in that section:

(*a*) no written assessment on the basis of the factors set out in subparagraph 113(*d*)(i) or (ii) of the Act need be made; and

(*b*) the application is rejected.

APPENDIX 2

Excerpts from evidence of the Standing Committee on Citizenship and Immigration (Canada, Parliament, Standing

Committee on Citizenship and Immigration, 1st Sess., 37th Parl.) concerning Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 1st Sess., 37th Parl., 2001 (Royal Assent, November 1, 2001)

* Some excerpts have been translated from French.

Meeting 11, April 26, 2001

Ms. Joan Atkinson (Assistant Deputy Minister, Policy and Program Development, Citizenship and Immigration Canada):

. . .

Let me talk a bit about the Convention against Torture. Some groups have raised questions or concerns. I think that many groups have been very glad to see that we have incorporated the provisions of the Convention against Torture into the legislation as part of the consolidated decision-making at the Immigration and Refugee Board. However, some want to go further and incorporate into the act article 3 of the convention, which prevents the return of any person to a situation where they would face torture.

We of course are committed to providing protection to those individuals who would probably face torture if they were returned to their country of origin. But another important objective for us is to ensure that serious criminals and security risks who pose a danger to the public are removed from Canada. In order to satisfy our dual mandate of ensuring the safety and security of Canadians and, as a general rule, not exposing individuals to torture, Bill C-11 provides for the pre-removal risk assessment. This will take into consideration the Convention against Torture criteria relating to the risk of torture on return and examine both the risk to the person and the risk to the safety and security of the Canadian public.

And finally, on the pre-removal risk assessment, some groups have suggested that the pre-removal risk assessment should be conducted by the Immigration and Refugee Board and not CIC. We did carefully consider that option before putting what we have in Bill C-11 forward, and our conclusion was that CIC was the more appropriate decision-maker for a number of reasons.

Currently CIC conducts risk assessments prior to removal, so we have that experience, and we have an initial infrastructure we can build on. The IRB's mandate relates to the examination or risk to a person on return and the need for protection. Their mandate does not extend to include an examination of the risk to Canada or of the public safety or security considerations when they look at those protection decisions.

A pre-removal and risk assessment that is conducted by CIC, on the other hand, allows the minister to take into account individual risk and public safety concerns and also allows for protection decisions to be rendered in a timely manner in conjunction with our removal priorities.

So that's it, Mr. Chairman, in terms of touching on some of the key issues about which we know individuals have expressed some concerns.

Meeting 12, April 30, 2001

Ms. Elizabeth Briemberg (President, Board of Directors, MOSAIC):

. . .

MOSAIC has been a very important organization in the city of Vancouver since 1972. It's a multicultural, multilingual non-profit organization whose goal is to assist immigrants and refugees in settlement, and it provides services in language, settlement, employment, and the like.

. . .

Mr. Chilwin Cheng (Vice-President, Board of Directors, MOSAIC):

. . .

Thank you, Mr. Chair.

There are two points I want to address. One is with respect to how to make it more consistent with our values. As a lawyer myself, I know the courts have been moving in the past ten years to interpreting legislation as a whole. They don't just look to specific sections. Increasingly they are looking towards the purpose and objectives sections of legislation to ascertain how to interpret legislation. In that regard, I see there is no reference at all in clauses 3 and 4 of the bill to the Charter of Rights and Freedoms— none of it—or to Canada's humanitarian and compassionate grounds. So the act is devoid of the very values that drive the factors of this bill. As a simple measure, I would submit that a reference to the charter and to Canada's international legal obligations, humanitarian and compassionate grounds, should be put in clauses 3 and 4.

The Chair: Chilwin, for your own further reference, you would want to review paragraph 3(3)(d) of the bill. That speaks of the Charter of Rights and Freedoms.

Mr. Chilwin Cheng: There's no explicit reference, though, with respect to the manner in which the act is to be construed later on in the bill. My submission, with respect to you, is that international obligations still stand.

With respect to how this affects women and children in particular, we've already made some reference to our brief. The issue is that there's a conceptual flaw in the bill. There is no distinction made between refugees and permanent residents who come in through the economic class or other issues. The issues—I was trying to be bilingual earlier on, it got lost in the translation—are different. With refugees, we're talking about people coming from war-torn countries, famine conditions, poverty-stricken areas, where economic consideration just is not in the game. Rather, when these people come to Canada, they're escaping a bad situation. What we've highlighted in our brief is that women and children, by and large, are affected the most, because in many countries they have no legal standing. There are no identification documents for them. They haven't had the money to save, because they depend on other sources of income. So the very putting in of economic factors as part of the refugee determination process immediately affects women and children that way.

Meeting 16, May 2, 2001

Mr. Andrew Brouwer (Manager, Research and Policy, Maytree Foundation): Thank you, Mr. Chair, honourable members.

My name is Andrew Brouwer. I'm with the Maytree Foundation, which is a charitable foundation based here in Toronto. The objectives of our refugee and immigrant program are twofold. One is improving access to professions and trades for newcomers; the other is reducing unnecessary delays in the landing process for refugees in legal limbo. I'm going to focus my comments today on those two areas.

. . .

Mr. Andrew Brouwer: One of the proposals I had in the brief referred to the objective for the bill, recommendation three of our brief. I think if you were to amend subclause 3(3) to say that the act is to be construed and applied in a manner that complies with Canada's international human rights obligations, including the conventions on refugees, against torture, and on the rights of the child, that would provide a really solid basis for interpretation down the road. I think that would be a really simple change but absolutely critical.

Meeting 20, May 4, 2001

Ms. Marlène Dubuisson-Balthazar (Lawyer and Board Member, National Association of Women and the Law): Good afternoon, Mr. Chairman and members of the Standing Committee. I have with me Andrée Côté, the Director of Legal Affairs at the National Association of Women and the Law.

The National Association of Women and the Law is a feminist, not-for-profit organization whose objective is to promote social justice and the right of women to equality, through education and law-reform activities. The members of our association include lawyers, judges, women who are law professors and students and other individuals interested in promoting the rights of women.

In addition to the organizations involved in drafting the brief, two other groups, the Legal Education and Action Fund of the west coast and the Ontario Francophone Immigrant Women's Movement, recently gave us their support.

In view of the time we have today, we would like to draw your attention to three points in our brief that we consider extremely important. First of all, we would like to emphasize how important it is that the bill guarantee respect for and promotion of the human rights of all immigrants and of all refugees; to deal with the issue of individuals in the family class; and to raise the issue of female domestic workers, which seems to have been forgotten in Bill C-11.

We are pleased to note that Bill C-11 refers explicitly to the Canadian Charter of Rights and Freedoms. However, we deplore the fact that no reference is made to Canada's international obligations or to the international instruments to which Canada is a signatory.

We feel so strongly about this that we recommend that Bill C-11 include an explicit reference to Canada's international obligations in the area of human rights and that subclause 3(3) be amended to specify that the act is to be construed and applied in a manner that complies with the international standards on human rights and the international instruments that Canada has signed.

Meeting 22, May 8, 2001

Ms. Madeleine Dalphond-Guiral (Laval Centre, BQ):

. . .

A number of concerns have been expressed time and again, and I'd like to point them out to you to see whether you too agree they should be taken into consideration, in particular, that we should mention in the Bill those international treaties and conventions signed by Canada, to very clearly identify values upheld by Canada and Quebec. For instance, there are many references to torture, and people were pleased to see that, but there is also the whole matter of violence against women, for example, and those kinds of things.

There must be a way to draft something which would be very inclusive. Twenty-five years from now, we'll have certainly signed other conventions and, at that time, we'll need to amend the act. So I'd like to know whether you would be inclined to include something like that.

. . .

Hon. Elinor Caplan: Thank you very much for your question.

. . .

On the question of conventions and treaties, the Convention against Torture is recognized in the legislation, as is the best interest of the child in the principles of the act. The Geneva Convention is also recognized. It just is not possible to list all the conventions and treaties in the legislation without having a thick, long list of all the conventions we have signed. You're correct that there will be other conventions in the future.

I think that you're referring to something I want to make a statement on to the committee, and that is, I don't know of any country in the world that has enshrined article 3 from the Convention against Torture in legislation. I would just leave that to you to think about.

We in the government—and I've repeated this on many occasions—take our international obligations very seriously as a matter of principle and will continue to do so.

. . .

Mr. John McCallum (Markham, Lib.): Thank you.

. . .

Second, I'm not sure exactly what the language would be, but without changing the substance of the bill, would it possible to go in the direction more of welcoming and less of criminality, to expand the objectives, clause 3, to include words about our commitment to immigration, our commitment to justice and humanitarian treatment around the world, and this kind of thing, or perhaps in a preamble to give a more positive flavour?

. . .

Ms. Elinor Caplan: Let me start with the suggestion on foreign national. I think the idea is interesting. However, a permanent resident would also have to be described as a non-citizen, because you have to distinguish in the bill between citizens and those who are not yet citizens. So if you were to have your three categories, they would be citizen, permanent resident non-citizen, and foreign national. As I said before, I'm open to the view of the committee, but it is important that we distinguish in the bill between the rights of citizens and non-citizens in some way as you look at three categories or however many. That has to be part of the bill, because permanent residents do not have all the rights of citizens in this legislation, for obvious reasons.

On the question of second chance, the answer is yes, of course. The decision that there would be one opportunity to go to the Immigration and Refugee Board for determination I think is a very good policy. However, for change of circumstance or the kind of situation you have described so eloquently, the PRRA is the opportunity for a second chance, as is H and C consideration. And appeal to the minister is always a possibility in the kinds of cases where an individual, for whatever reason, particularly if there should be abusive situations, can make a direct request to have reconsideration on the basis of changed circumstance before removal.

. . .

Ms. Judy Wasylycia-Leis (Winnipeg North Centre, NDP):

. . .

The second concern has to do with Madeleine's point that this is an overhaul of a bill, 25 years after the last major bill. We can't miss the opportunity to make sure we're consistent with our international obligations, and I think the question here that you didn't answer is, what would be so wrong with actually putting in the statement on principles the fact that Canada is determined to be in compliance with the international conventions to which we are signatories? What would be wrong with actually spelling out compliance with the UN conventions on refugees, on torture, and on the rights of the child?

. . .

Ms. Elinor Caplan: Before I leave, there's one thing I wanted to point out, and that relates to the convention. I would draw the committee's attention to page 3 of the bill, under "Objectives". Paragraph 3(2)(b) says:

> to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement

That's the commitment under the objectives, to ensure that our international obligations are met.

Meeting 24, May 15, 2001

Ms. Madeleine Dalphond-Guiral: BQ4.

Okay. Here goes. What is missing here are Canada's international obligations, both present and future. So we listed here the main obligations as requested by many people, including women's groups who want the bill to clearly spell out aspects such as elimination of violence and discrimination against women. I think that by adding this list of instruments and adding "present and future" before "international obligations" we would clearly state the intent of the bill.

The Chair: Can I be helpful?

Ms. Madeleine Dalphond-Guiral: Yes.

The Chair: G3 just proposed a new paragraph 3(3)(e), which talks about minority communities language. In your BQ4 paragraph 3(3)(e) talks about international obligations. I wonder, so we're clear, if you could say that would be a new paragraph 3(3)(f), now that we've passed G3?

Ms. Madeleine Dalphond-Guiral: Yes. Absolutely.

The Chair: Yes?

Ms. Madeleine Dalphond-Guiral: Of course. We did not know that the government would introduce a new paragraph 3(3)(e). So I am pleased to make this paragraph 3(3)(f).

The Chair: Then do you want to talk to us about your new paragraph 3(3)(f) on BQ4? ?

Ms. Madeleine Dalphond-Guiral: I hope this will be our new paragraph 3(3)(f). You have it in front of you and that is all I. . .

The Chair: Okay. Joan, any comments with regard to BQ4, which says:

> ensures that Canada fulfils its international obligations with respect to human rights.

Is that covered, do you believe, somewhere in subclause 3(2)?

Ms. Joan Atkinson: Yes, we do make specific reference to our obligations out of the Geneva Convention and the Convention against Torture, as well as to the best interests of the child. But more generally, in paragraph 3(2)(e), we make reference to "upholding Canada's respect for the human rights and fundamental freedoms of all human beings", and in paragraph 3(2)(b) to fulfilling "Canada's international obligations with respect to refugees" and affirming "Canada's commitment to international efforts to provide assistance to those in need of resettlement". Again, we think we cover in those areas the Government of Canada's objectives in fulfilling its international obligations under various instruments.

The Chair: There's a question we talked about last week with an awful lot of witnesses. We all agree with what you just said about international obligations. The question is, do we have to list all of those international obligations we've been a signatory to, or are they automatically covered? I think that's what Madeleine and others have tried to say: why don't you list all those conventions? That's what the discussion last week was all about.

Ms. Joan Atkinson: Let me start by saying I don't think it's possible to provide a comprehensive list, because whatever list we come up with, we've probably not caught all the international conventions to which Canada is a party. So I think it's a bit dangerous to try to list all the conventions, and when there are new conventions coming up that Canada will be signing in the future, it's difficult to have a list. It's not possible to cover all the treaties and obligations and conventions that may have an impact on immigration or refugee issues.

Daniel, do you want to respond to the specific question about the legal implications?

Mr. Daniel Therrien: I would add that, to ensure this flexibility, we already have a provision in the substantive clauses of the bill, in subsection 97(2). In the definition of "person in need of protection" we target people who are at

risk and who are protected by the Convention against torture, as outlined in subsection 97(1). But subsection 97(2) provides the flexibility to extend the definition of "person in need of protection" to those who would be protected under future conventions. We believe this is where we can provide the required flexibility.

The Chair: Okay. Are there any further comments? Judy.

Ms. Judy Wasylycia-Leis: Yes. I want to support Madeleine's amendment. You'll notice it's fairly similar to the next one, amendment NDP9, with different listings of all the conventions and protocols.

I want to make the argument that it's important that reference to our international obligations and the international conventions be made in subclause 3(3), which deals with application of the law.

It is true our international legal obligations are referenced in the preceding subclause 3(2). I think it has to be stated somewhere in this subclause as well. I don't think the new paragraph 3(3)(d), referencing the charter of rights, covers the international obligations. I think we have to be clear about explicitly stating our need to adhere to international human rights obligations and conventions.

If it's too difficult to list them all, and obviously there is some difficulty given our two different lists, then I'm wondering if we could come back to this as the recommendation by simply stating:

> This Act is to be construed and applied in a manner
>
> (e) that complies with international human rights instruments to which Canada is a signatory.

It would cover that concern. I think there has to be something here.

The Chair: Okay. Thank you for bringing that up.

Joan, can I ask you a technical question as to where you would place this? Everyone says it's probably referred to in the objectives as to whether or not it needs to be in subclause 3(3), which is the application of the law.

What's your answer to Judy?

Ms. Joan Atkinson: It's possible, of course.

In terms of delineating a list of instruments, as I said before, you're in danger of missing some, perhaps even existing ones, and certainly future conventions and instruments we may sign onto that would have relevance to immigration and refugee matters. There's a real danger in trying to list instruments.

The Chair: If we didn't list them and did what Judy indicated, saying "international" and "construed in", we would be signators. Would that cause any difficulties?

Ms. Joan Atkinson: It's certainly possible to do that.

The Chair: Then may I suggest, Madeleine and Judy, on amendments BQ4 and NDP9, that you defer these things? Let's come up with something that might be acceptable and we'll consider it a little later.

Ms. Judy Wasylycia-Leis: I have wording I could share.

The Chair: Let's get rid of amendments BQ4 and NDP9. We'll deal with it now.

Do you want to withdraw amendment BQ4, Madeleine?

Ms. Madeleine Dalphond-Guiral: Yes. It is clear that it will be withdrawn anyway. I believe it is in our interest to cooperate to come up with something that will be acceptable to everyone and that will demonstrate our will to fulfil

our international commitments other than under the Convention Relating to the Status of Refugees and the Convention Against Torture, etc.

The Chair: Amendments BQ4 and NDP9 are withdrawn.

Judy, what do you have?

Ms. Judy Wasylycia-Leis: I move that there be a new paragraph 3(3)(f) that reads:

> This Act is to be construed and applied in a manner
>
> (f) that complies with international human rights instruments to which Canada is a signatory.

Ms. Madeleine Dalphond-Guiral: Those Canada has already signed and those it will sign in the future.

Ms. Judy Wasylycia-Leis: Yes. Agreed.

Ms. Madeleine Dalphond-Guiral: Agreed?

Ms. Judy Wasylycia-Leis: Absolutely.

The Chair: Okay.

Can I ask, Joan and Daniel, do you have any difficulties with that before we consider it? None?

Ms. Joan Atkinson: No, I think we speak to those issues in terms of the provisions later on, with refugee protection, pre-removal risk assessment, and so on.

The Chair: There's a new paragraph 3(3)(f). Does everyone understand what it's going to say? Are there any objections to that? None. Okay, it is paragraph 3(3)(f). Can we make that a government motion?

Ms. Judy Wasylycia-Leis: Sure.

The Chair: Okay, good. Thank you. We'll make paragraph 3(3)(f) a government motion. We're all agreeing to it anyway, it doesn't matter.

(Amendment agreed to—[See *Minutes of Proceedings*])