Charkaoui (Re) (F.C.), 2003 FC 882 (CanLII)

Date: 2003-07-15
Docket: DES-3-03
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DES-3-03

2003 FC 882

IN THE MATTER of a certificate pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act);

IN THE MATTER of the referral of this certificate to the Federal Court of Canada pursuant to subsection 77(1) and sections 78 and 80 of the Act;

IN THE MATTER of the warrant for the arrest and detention and the review of the reasons justifying continued detention pursuant to subsections 82(1), 83(1) and 83(3) of the Act;

AND IN THE MATTER OF Mr. Adil Charkaoui.

Indexed as: Charkaoui (Re) (F.C.)

Federal Court, Noël J.--Montréal, July 2 and 3; Ottawa, July 15, 2003.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Security grounds -- Ministers referring certificate to Federal Court -- Detention review -- Ministers believe respondent Osama bin Laden terrorist network member -- Constituting danger to Canadian security -- Court following provisions of legislation, interpretation of designated judge's role provided by Ahani v. Canada -- Evidence at hearing summarized -- Standard of proof that stated by Thurlow C.J. in Attorney General of Canada v. Jolly -- Designated judge must be curious, concerned, maintain sceptical attitude in conducting critical review of facts, seriously test protected information -- Continued detention justified -- Ministers believing respondent trained in sabotage, assassination -- Trained in martial arts as was one September 11 aircraft hijacker -- Believed associated with bin Laden network sleeper agent -- Witness for Ministers explaining term "sleeper agent" -- Important that period of respondent's life (1992 to end of decade) largely unaccounted for -- Suspicious trip to Pakistan in 1998 -- Not sufficiently addressing contacts with 5 named persons -- Conditional release on bail denied as danger remains -- Respondent still presenting danger in spite of publicity regarding arrest, Court proceedings -- No relief under Charter.

Constitutional Law -- Charter of Rights -- Criminal Process -- S. 11(e) inapplicable to Immigration and Refugee Protection Act detention review as proceeding one of immigration, not criminal, law.

This was a detention review under *Immigration and Refugee Protection Act*, subsections 82(1), 83(1) and 83(3).

One purpose of the Act is to maintain (or, in French, "*garantir*") the security of Canadians and, to that end, Parliament has given the Solicitor General and Minister of Citizenship and Immigration the power to declare a

permanent resident or foreign national inadmissible on security grounds by referring a certificate to Federal Court. This was done in the instant case as the Ministers were of opinion that the respondent, Charkaoui, belongs or belonged to Osama bin Laden's terrorist network and accordingly constituted a danger to Canadian security. The Ministers also signed an arrest warrant as he was either a national security danger or unlikely to appear at a proceeding or for removal. The warrant was executed and Charkaoui remains in detention.

For the purposes of this detention review, the Court discharged its onerous duty by following both the parameters imposed by the legislation and the interpretation of the role of designated judge provided by this Court in *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669 and sustained by the Court of Appeal. At the hearing, the Ministers called but one witness; respondent filed 14 affidavits, of which 7 affiants were cross-examined. Following the hearing, certain ministerial representatives were examined in the absence of respondent and his lawyer, as is authorized by Act, section 78. At that time, certain additional protected information furnished by the Ministers was clarified. This information could not be disclosed to respondent.

The issue for determination was whether, in view of Charter, sections 7, 11 and 15 and Act, subsections 83(1), (3), respondent's detention should be continued.

A CSIS officer gave testimony regarding the Al-Qaeda terrorist network led by Osama bin Laden. Up to 100,000 persons have been trained by that organization. Canada was specifically targeted in a statement made by Osama bin Laden in November 2002. Under cross-examination, the officer admitted that he did not know whether respondent was an Al-Qaeda member.

Witnesses called for respondent testified as to his outrage at the September 11, 2001 terrorist attacks, that he never displayed violent conduct or advocated terrorism as a means of change and appeared to be a man who favoured peace and respect for human rights.

In reviewing the ministerial action, the designated judge is not to look for proof of the existence of the facts but rather to analyze the proof as a whole while asking himself whether it is sufficient for a person to have a reasonable belief that there is a danger to national security or the safety of any person or that the respondent will avoid the procedure or removal. While not at the level of preponderance of probabilities, the standard must tend toward a serious possibility of the existence of facts based on reliable and justifiable evidence. The Court could not accept respondent's argument, that the Minister's evidence had to establish a definite probability that the person would commit the terrorist activities.

Even so, the designated judge must be curious, concerned by what is advanced and maintain a sceptical attitude in conducting a critical review of the facts. He must verify the human, technical and documentary sources, their reliability and the truth of what they may relate. He must seriously test the protected documentation and information. In addition, he must analyze the evidence, taking into account the danger to national security.

Held, respondent's detention continued to be justified.

An analysis of the evidence raised certain concerns and worries that were at the very heart of this case. The Ministers explained that "bin Laden has advised his supporters to blend in with Western society and to prepare terrorist attacks". In the Ministers' opinion, respondent is a member of the bin Laden network and would have been trained in such areas as: operating rocket-propelled grenade-launchers, sabotage, urban combat and assassination. Furthermore, respondent practised karate and martial arts. It was noteworthy that one of those who participated in the hijacking of American Airlines Flight 93 had taken martial arts training in preparation for September 11. In addition, the Ministers associated respondent with a bin Laden network sleeper agent. According to the CSIS witness, that is a term that applies to both terrorism and espionage and such an agent is trained and then sent back to his country and told "Go back to your usual life, act as if nothing is happening . . . And then one of these days . . . you will get a message . . . and that's the time to do what we want you to do". The sleeper agent may be activated to do something in the country where he has been living or to travel to some other country to mount an attack.

The Ministers' findings, that respondent represents a danger to national security, were very serious, so it was up to respondent to present some evidence that challenged that of the Ministers. It was important to note, in considering the testimony of respondent's witnesses, that a period of his life--from 1992 to the end of that decade--was, in

part, unaccounted for. Even one of respondent's witnesses, Mr. Ouazzani, acknowledged that he had been worried and suspicious about respondent's 1998 trip to Pakistan (supposedly to study the Muslim religion in preparation for writing a book). Unlike respondent's witness, the Court was not satisfied by respondent's explanation. Nor had respondent addressed the Court's concern over his contacts with five named individuals. Respondent's evidence failed to alleviate these concerns.

Counsel sought respondent's release on conditions and bail but, since the Court concluded that a danger remained, that was not considered. Nor was the applicability of Charter, paragraph 11(*e*) to this type of case decided. That provision applies in the criminal law context while this proceeding was in respect of immigration law. Finally, relief was not available under Charter, sections 7 and 15. The Court noted that the proceedings herein, as provided for by the statute, appeared to be consistent with Charter, section 7 principles of natural justice. There was little discussion as to the applicability of Charter, section 15.

Finally, as to whether the publicity surrounding his arrest and these proceedings would neutralize the danger, counsel for the Ministers said that, as a sleeper agent, the respondent could still be pressed into active service if so required.

statutes and regulations judicially

considered

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

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23 , s. 18.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(1)(*h*), 34(1)(*c*),(*d*),(*f*), 58(3), 74(*d*), 77(1), 78, 80(1), 82, 83, 84, 85.

cases judicially considered

applied:

Attorney General of Canada v. Jolly, [1975] F.C. 216; (1975), 54 D.L.R. (3d) 277; 7 N.R. 271 (C.A.); *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (F.C.A.), [2001] 2 F.C. 297; (2000), 195 D.L.R. (4th) 422; 265 N.R. 121 (C.A.); *Yao v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 741 (CanLII), 2003 FCT 741; [2003] F.C.J. No. 948 (T.D.) (QL); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 281 N.R. 1; *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.).

considered:

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307; (2000), 190 D.L.R. (4th) 513; [2000] 10 W.W.R. 567; 81 B.C.L.R. (3d) 1; 3 C.C.E.L. (3d) 165; 77 C.R.R. (2d) 189.

referred to:

Ahani v. Canada, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669; (1995), 32 C.P.R. (2d) 95; 100 F.T.R. 261 (T.D.); affd by reflex, (1996), 37 C.R.R. (2d) 181; 201 N.R. 233 (F.C.A.); leave to appeal to S.C.C. denied [1996] S.C.C.A. No. 496; *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (S.C.C.), [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.

DETENTION REVIEW, under *Immigration and Refugee Protection Act*, subsections 82(1), 83(1) and 83(3). Detention continues to be justified.

appearances:

Johanne Doyon for Adil Charkaoui.

J. Daniel Roussy for Solicitor General of Canada.

J. C. Luc Cadieux and *Daniel Latulippe* for Minister of Citizenship and Immigration.

solicitors of record:

Doyon & Montbriand, Montréal, for Adil Charkaoui.

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

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

Noël J.:

INTRODUCTION

[1]Pursuant to a warrant for the arrest and detention of Mr. Adil Charkaoui (the respondent) signed by the Minister of Citizenship and Immigration and the Solicitor General of Canada (the Ministers), duly executed on May 21, 2003, the designated judge has an obligation to commence a review of the reasons for the continued detention. Having reviewed the record and held a hearing at which the respondent was heard through witnesses and his counsel, I will explain in the following paragraphs the results of the review of the reasons for the detention, pursuant to subsections 83(1) and 83(3) of the Act [*Immigration and Refugee Protection Act*, S.C. 2001, c. 27].

CONTEXT

[2]One of the purposes of the Act is to maintain (in the French version: *garantir*) the security of Canadians (see paragraph 3(1)(*h*) of the Act). Given this overriding objective, Parliament has provided some tools to secure this result. One such tool is giving the Ministers mentioned above the power to declare a permanent resident or foreign national inadmissible on grounds of security by referring a certificate duly signed to that effect to the Trial Division of the Federal Court (see subsection 77(1) of the Act).

[3]In the case at bar, such a certificate was signed on May 16, 2003 and subsequently referred to the Federal Court of Canada. The Ministers concluded that the respondent should be declared inadmissible because in their opinion he was or is a member of the Osama bin Laden network, an organization that engages, has engaged or will engage in acts of terrorism and that as such, the respondent is engaging, has engaged or will engage in terrorism and that consequently the respondent constitutes, has constituted or will constitute a danger to the security of Canada (see paragraphs 34(1)(*c*), (*d*) and (*f*) of the Act).

[4]The reasonableness of the certificate will therefore be assessed by the designated judge (see section 78 and subsection 80(1) of the Act). However, the respondent's counsel has already stated that she will be raising the issue of the constitutional validity of the entire procedure surrounding the certificate and the verification of its reasonableness, along with the continuation of the detention.

[5]However, within the framework of the powers assigned by Parliament, and for the purpose of maintaining the security of Canadians, the Ministers also signed, on May 16, 2003, a warrant to arrest the respondent, being of the opinion that they had reasonable grounds to believe that he is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal (see subsection 82(1) of the Act). The arrest warrant was executed on May 21, 2003 and the respondent has since been in detention.

[6]As a designated judge, within 48 hours of the detention, I commenced the review of the reasons for the respondent's arrest and continued detention and on May 30, 2003 I provided him with an opportunity to be heard in this regard (see paragraph 78(*i*) and subsection 83(1) of the Act). At the commencement of the hearing the respondent, through his counsel, requested a postponement to July 2, 2003 for a duration of two days in order to prepare for the hearing, and this was granted.

[7]To gain a clear understanding of the Ministers' position in regard to both the certificate and the continued detention, I reviewed the documents on which the certificate and the arrest warrant are based and I held a hearing in the absence of the respondent and his counsel (see paragraphs 78(*d*) and (*e*) of the Act). I identified the information the disclosure of which would not infringe national security or the safety of any person, bearing in mind the importance of sufficiently informing the respondent of the circumstances on which the certificate and the continued detention are based. I also asked that the information be conveyed at the earliest opportunity, which was

done on May 26, 2003 (see paragraphs 78(*g*) and (*h*) of the Act). I am satisfied that in assuming this onerous duty I have taken full account of the parameters imposed by Parliament and the interpretation of the role of the designated judge developed by the Federal Court (see *Ahani v. Canada*, 1995 CanLII 3528 (F.C.), [1995] 3 F.C. 669 (T.D.), at page 681, upheld by the Court of Appeal reflex, (1996), 37 C.R.R. (2d) 181 (F.C.A.); leave to appeal to the S.C.C. refused, [1996] S.C.C.A. No. 496). And I continue to be vigilant as to the possibility of giving the respondent additional information according to the circumstances.

[8]The hearing concerning the continued detention was held at Montréal on July 2 and 3, 2003. The Ministers, taking into account the national security limitations imposed by Parliament, called one witness. The respondent, in return, filed seven affidavits with the consent of counsel for the Ministers and called seven witnesses. A summary of the evidence at the hearing follows. Counsel for the respondent stated that she considered her evidence incomplete since the immigration file on the respondent had been delivered to her with several exclusions. On behalf of the respondent, she has filed a complaint with the Privacy Commissioner concerning these exclusions and she is awaiting the results. She also stated that she would have liked to have called the investigators of the Canadian Security Intelligence Service (the CSIS) to testify concerning certain interviews with the respondent but that she did not know their names. It is common knowledge that the names of CSIS employees may be protected by section 18 and the oath of secrecy of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23 (the CSIS Act), unless these names become public or other circumstances so warrant. I suggested to the respondent's counsel that if the respondent could identify these individuals by their names through an affidavit, I would then see to it that the necessary steps were taken if applicable, subject to the submissions by the Ministers. The respondent's counsel declined the offer and asked me to decide as to the continued detention on the basis of the evidence as presented.

[9]Following the hearing, I examined some representatives of the Ministers at a hearing in the absence of the respondent and his counsel, as is my general authority under section 78 of the Act. Likewise, I took advantage of this opportunity to clarify certain points concerning some additional protected information supplied to the Court by the Ministers. In the hearing held at Montréal, I informed the respondent of the holding of this *ex parte* hearing at Ottawa and the receipt of the additional information. The respondent's counsel restated her objection to this procedure. This additional information shall nevertheless remain inaccessible to the respondent and his counsel for reasons of national security. However, I am reviewing some aspects of this evidence.

ISSUE

[10]The only issue to be determined at this stage is the following: "Should the respondent continue to be detained, under sections 7, 11 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] (the Charter) and subsections 83(1) and (3) of the Act, in view of the available evidence and information?"

SUMMARY OF THE EVIDENCE HEARD AT THE HEARING

[11]The testimony at the hearing began with the examination of a CSIS officer who, for reasons of security and anonymity, is identified only by his first name, Jean-Paul. He has been working at the CSIS for 13 years. He is at present deputy chief of investigations into Islamic and Sunni terrorism.

[12]Jean-Paul testified primarily about the Al-Qaeda terrorist network led by Osama bin Laden. He explained the origin of the network and the recruitment and training of its members. Among other things, he stated that between 50,000 and 100,000 persons have passed through the training camps since 1980. He also informed the Court that Canada had specifically been targeted and directly threatened in a statement made by Osama bin Laden in November 2002. Jean-Paul also described in a general way Canada's efforts to protect itself against terrorism. However, he was unable to disclose the CSIS investigation practices.

[13]On cross-examination, the witness acknowledged that he is not personally responsible for the respondent's case, and that, based on his knowledge of the file, he was unable to state that the respondent is a member of the Al-Qaeda terrorist network.

[14]The evidence presented by the respondent's counsel consists of 14 affidavits, of which 7 affiants were cross-examined. The seven other statements were filed on consent, without cross-examination. I propose to discuss the

witnesses who were cross-examined first, and then to summarize the other affidavits.

[15]The first person to testify in favour of the respondent was Mr. Larbi Ouazzani. He was born in Morocco in 1953 and has been a Canadian citizen since 1999. He is currently working full time as an assembler of aircraft components at Bombardier Aéronautique. Mr. Ouazzani has known the respondent for about three and a half years, since the respondent's wife is the first cousin of Mr. Ouazzani's wife.

[16]Although Mr. Ouazzani admitted he did not have a very close relationship with the respondent, he nevertheless offered to post bail of up to $15,000. In his testimony, he was able to tell of a discussion they had about the terrorist attacks of September 11, 2001 not long after that incident. He said he had observed the outrage and obvious disagreement of the respondent concerning the occurrence of this atrocity.

[17]To demonstrate his support to the respondent, Mr. Ouazzani went to visit him in Rivière-des-Prairies prison. They discussed, among other things, the fact that the respondent had been questioned by CSIS agents on many occasions and had been intercepted by FBI agents during a stopover in New York.

[18]However, what drew my attention to this testimony, as I report in my analysis, is the fact that Mr. Ouazzani asked the respondent the purpose of his trip to Pakistan. It seems to me that Mr. Ouazzani was concerned by the fact that he did not know the respondent had made a trip to Pakistan and wondered about the reason for such a trip.

[19]The other two witnesses had taught the respondent in the context of his master's degree in education (Diplôme d'études supérieures spécialisées en éducation, option didactique--Graduate studies in education, technical option). The first, Ms. Marie McAndrew, a Canadian citizen, has been an associate professor in the Faculty of Education Sciences at the University of Montréal since 1991, incumbent of the chair in ethnic relations since June 2003, director of the research group on ethnicity and adaptation to pluralism in education since 1993, and she teaches at various levels in the University, including graduate studies.

[20]During the Winter 2003 session, Ms. McAndrew was responsible for a multidisciplinary seminar on [translation] "Education and construction of ethnic relationships". The respondent was one of the 15 students enrolled in this 45-hour seminar. Ms. McAndrew also knows him because she met with him twice while he was considering working on a directed study under her supervision. The contemplated topic was the treatment of the Arab and Muslim world in Quebec's course material. However, this topic was not yet confirmed. Ms. McAndrew noted that the respondent was concerned with and critical in regard to the integration of immigrants, particularly young Islamic Arabs in Quebec. She says he had firm opinions but that he was able to qualify his ideas in the course of discussions. Given his knowledge, Ms. McAndrew was insistent on making a distinction between a radical or terrorist individual and a person having activist opinions and concerns about integration. In her view, a terrorist would not have the open-mindedness of the respondent. Also, rather than take the university courses chosen by the respondent, he would have opted instead for relatively "low profile" courses.

[21]Ms. Patricia Lamarre, a Canadian citizen, is an assistant professor at the University of Montréal. She has known the respondent since April 2002, when he was one of her students in the course [translation] "From didactics to a pedagogy of pluralism". Among the themes discussed in this course were those pertaining to the role of the schools in the promotion of societal openness in an effort to counter stereotypes and discrimination. Ms. Lamarre testified, as had Ms. McAndrew, that the respondent participated actively in the discussions and that his opinions were imbued with hope that Muslims could cohabit peacefully with the other groups in Montréal. She also stated that the respondent expressed hope and confidence in education and the schools as a means of promoting changes in the integration of immigrants. Ms. Lamarre considers him a cultivated man who is respected in his community. Both teachers maintain that the respondent has never in any way displayed any violent conduct, nor has he advocated the use of violence or terrorism as a means of change.

[22]The respondent's fourth witness, Mr. Kamal Benkirane, a native of Morocco and permanent resident in Canada since April 1, 2001, is a university colleague of the respondent. The two were students in the course [translation] "Education in today's world" at the University of Montréal and have known each other since September 2002. Although their relations were limited primarily to the classroom and to discussions related to the course content, the two men had once discussed on the telephone terrorist attacks occurring in Casablanca in May 2003. Mr. Benkirane further testified that the respondent saw these attacks as a violation of the dignity of Muslims and

Moroccans, had expressed his opposition to terrorism and had denounced the attack. Mr. Benkirane also told the Court that the respondent telephoned him from prison to ask him to get students at the university to sign petitions emphasizing their disagreement with his arrest. Without inquiring further about the scope and truthfulness of the allegations against the respondent, Mr. Benkirane agreed to help him and to circulate the petitions.

[23]As her fifth witness, the respondent's counsel called another colleague from the respondent's class. Ms. Ligia Beatriz Nino, a native of Colombia, has lived in Canada since 1988 and obtained her Canadian citizenship in May 1997. She has known the respondent only since March 2003 when they were both registered in the courses [translation] "Adult educator skills" and "Languages didactics". She was not acquainted with the respondent's private life outside the university context. She says she spoke to him on the telephone after his arrest simply to greet him and give him some moral support. Ms. Nino also testified that she saw him as a man in favour of peace and respect for human rights, a statement she bases on the group discussions in the classrooms.

[24]Mr. Samir Benshaib, a long-time friend of the respondent, was then called as a witness. Mr. Benshaib and the respondent lived in the same neighbourhood of Casablanca when they were children in Morocco. They played together, were enrolled in the same secondary school and attended the same Tae kwon do club. However, in 1992 they lost contact when they began university. They did not see each other again until 2001, first in Morocco when the respondent was travelling and the second time in Canada, when Mr. Benshaib moved to Montréal. They had since become good friends, and Mr. Benshaib considers the respondent as a brother. While the respondent helped Mr. Benshaib settle in Montréal and get a car for himself, Mr. Benshaib gave him a hand at the pizzeria when he was having some problems.

[25]The respondent telephoned Mr. Benshaib from prison on one occasion. Mr. Benshaib says they talked about the allegations on the telephone. Without going too far into details, they had simply discussed the reason for his arrest, in the belief that it was unthinkable that such allegations would be brought against the respondent. Mr. Benshaib characterizes these allegations as ridiculous while pointing out that the respondent is a good person who likes to help everyone.

[26]The final witness was Mr. Samir Ezzine, a native of Morocco and Canadian citizen since 1993. He and the respondent have known each other since the summer of 2001. The respondent wanted to purchase a pizzeria and Mr. Ezzine, having already owned a pizzeria, was able to help him in his research. It was a friend of the respondent who had contacted him. Mr. Ezzine initiated the respondent in the operation of his business and in particular helped him with the cook's work. They had met subsequently on many occasions at the mosque.

[27]Mr. Ezzine was interrogated by the CSIS on three occasions. In 1997, he was questioned about his business, about Morocco and in regard to Mr. Saïd Atmani. The other two interrogations were held after the attacks of September 11, 2001. He was first asked if he had heard of people who had crossed the Canada-U.S. border. On a third interview, the CSIS agents proposed that he work for them, a proposition that was refused.

[28]In his affidavit, Mr. Ezzine states that he knows Mr. Abousfiane Abdelrazik and Mr. Raouf Hannachi. He says these two men left Canada in complete legality because they were being constantly harassed by CSIS agents. At the hearing he added that Mr. Abdelrazik's wife has died and that he left his children in Canada to go back to Sudan. Regarding Mr. Hannachi, whom he has known for four years, Mr. Ezzine states that he left Canada in October 2001 to return to Tunisia where he was allegedly tortured. Mr. Ezzine stated that he has not seen Mr. Abdellah Ouzghar for five years. Finally, Mr. Ezzine stated that the respondent knew Mr. Abdelrazik and Mr. Raouf Hannachi enough to shake hands when they crossed paths.

[29]Another important fact on which Mr. Ezzine testified is the trip to Bosnia he made in 1996. He claims he left for about three months to go and assist victims of the war. He says he paid for his trip from his own resources, that his airplane flight cost him $600 and that he spent about $1,000 to buy food and clothing to donate to the victims. At the time, Mr. Ezzine was working in a restaurant in Montréal and earning a minimum wage of $7 an hour. Finally, during his trip, he did not make any friends and did not maintain any contact, he says.

[30]The affidavits filed without cross-examination are those of the respondent's father, his wife, the university professor Ms. Paret, the martial arts teacher, a former employee of the pizzeria and another of the respondent's friends. The respondent's father, Mr. Mohamed Charkaoui, states in his affidavit that he raised his son in accordance with the precepts of their religion, inculcating him with the values of respect, work, tolerance and

faith. He describes the respondent as being consistently curious, eager for knowledge and a lover of travel and literature. He says his son is athletic and has practised the martial arts since he was a teenager. He notes that from his birth to the arrival of his wife in Canada in February 2000, his son always lived under the same roof. He also says he has [translation] "never . . . heard intolerant remarks from the mouth of [his] son Adil, still less hateful remarks or remarks tending to support violence or terrorism as ends to advance some cause." and that he has [translation]" never noticed any strange conduct in [his] son, and his day-to-day activities consist of studying, training, working and taking care of his family."

[31]The respondent's wife, Ms. Fouzia Ouahid, met the applicant [translation] "several years" ago for she was his French teacher in Morocco. In 1997 they became engaged and in August 1998 they married. In her affidavit, she tells of the trip to Morocco that she made with the respondent and explains the events surrounding the searches and interrogations at the Dorval and New York airports and the replies she gave to the FBI agents. She explains that her husband complained that he was being questioned about other persons and that he was asked to work for the CSIS. More generally, she says she needs her husband to help her in the home since she is about to give birth to their second child and that in addition she was injured as a result of an automobile accident.

[32]Ms. Christine Paret, a professor in the faculty of education of the University of Montréal, says she has known the respondent since September 2002 when he was registered in her didactics of textual grammar course. She says she found the respondent an active participant who seemed to her to be very intelligent and open to cultural differences.

[33]Mr. Philippe Gélinas, the martial arts teacher, attests that he has known the respondent since he enrolled in the Académie d'Arts Martiaux Culturels Gélinas, about two years ago. He says the respondent was not a novice when he enrolled, but that he wanted to improve so he could give some courses. The respondent came to take some courses and practised two to three times a week for an hour and a half each time. He notes that Mr. Charkaoui was not an aggressive student and that their topics of conversation normally dealt with the martial arts and the respondent's life in Montréal. However, he reports that the respondent had told him previously that he had been arrested in a plane by FBI agents and that about a year ago the CSIS agents had gone to see him, that they had told him he was a terrorist and that they wanted him to work for them. Mr. Gélinas says the respondent told him he could not work with the CSIS because he is not a terrorist.

[34]The respondent's counsel put in evidence the affidavits of Mr. Abderrahmane Kherour and Mr. Aziz Zahaoui. Mr. Kherour, a Canadian citizen, a native of Algeria, is a former employee in the respondent's pizzeria. They have known each other since July 2001, when he began working for the respondent. Mr. Kherour states in his affidavit that in January 2002 he was questioned by a CSIS agent who showed him a photo of an individual identified as Mr. Samir Ezzine.

[35]Mr. Zahaoui, a Canadian citizen since 2001 and a native of Morocco, has known the respondent since the middle of 1998 and considers him a friend. In his affidavit, he explains that he was contacted several times by CSIS agents who wanted to obtain information about the respondent and about Mr. Abdallah Ouzghar and other persons in Montréal whom he knew. He says he told the agents that the respondent was a student, that he engaged in sports, that he looked after his business and his family. He says he never stated that the persons he had to identify were terrorists. Mr. Zahaoui says he refused to work as an informant but told the CSIS agents that he was prepared to inform on anyone who would do harm in Canada.

THE ROLE OF THE DESIGNATED JUDGE ON A REVIEW OF THE REASONS FOR CONTINUED DETENTION

[36]The designated judge, at the stage of reviewing the reasons for the arrest warrant and the continued detention, must ask himself whether there is any evidence in support of the Ministers' position that the respondent, since the beginning of his detention, remains a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal (see subsection 83(3) of the Act). I note that Parliament has used the word "or", which creates an alternative between one of the reasons cited. Moreover, the designated judge, having given the respondent an opportunity to be heard, must ask himself whether the evidence presented by the respondent challenges the evidence in support of continued detention, if any. In doing so, he must consider all the evidence of the parties (including that presented in the absence of the respondent). The initial onus is therefore on the Ministers, although it may shift to the respondent if the Ministers' evidence is sufficient. Where applicable, the

respondent must in turn satisfy the designated judge that the continued detention is not justified.

[37]When signing the arrest warrant, the Ministers assessed the danger to national security or the safety of any person or the possibility that the respondent would avoid the procedure or removal according to the reasonableness standard. This is the standard of proof designated by Parliament. Needless to say, the review of the ministerial action must be conducted according to the same standard.

[38]This standard of proof was defined in immigration matters by the Federal Court of Appeal in *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.), per the former Chief Justice Thurlow, who wrote [at pages 225-226]:

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

[39]Thus, the designated judge is not to look for proof of the existence of the facts but rather to analyze the proof as a whole while asking himself whether it is sufficient for a person to have a reasonable belief that there is a danger to national security or the safety of any person or that the respondent will avoid the procedure or removal. Although it is not at the level of the preponderance of probabilities, this standard must tend toward a serious possibility of the existence of facts based on reliable and justifiable evidence. To this effect, Mr. Justice Evans of the Court of Appeal wrote, in *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (F.C.A.), [2001] 2 F.C. 297 (C.A.), at paragraph 60:

As for whether there were "reasonable grounds" for the officer's belief, I agree with the Trial Judge's definition of "reasonable grounds" (*supra*, at paragraph 27, page 658) as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes "a *bona fide* belief in a serious possibility based on credible evidence." See *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.).

[40]This approach was followed quite recently by my colleague Madam Justice Dawson in *Yao v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 741 (CanLII), 2003 FCT 741; [2003] F.C.J. No. 948 (T.D.) (QL), at paragraph 28:

The standard of proof required to establish reasonable grounds for a belief is a standard of proof that connotes "a *bona fide* belief in a serious possibility based on credible evidence". See *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (F.C.A.), [2001] 2 F.C. 297 (C.A.), at paragraph 60. It is not necessary for the Minister to establish either actual membership in an espionage agency, or actual acts of espionage.

[41]The respondent's counsel attempted to persuade me that the Ministers' evidence had to establish a definite probability that the respondent would commit the apprehended activities, since according to the principles of fundamental justice the release of an individual should be the norm and his detention the exception. Taking into account the extracts from judgments referred to above and national security concerns, I believe that the interpretation of the standard proposed by Evans J.A. in *Chiau, supra*, is the most appropriate one in the circumstances.

[42]This perception of the standard of reasonable grounds to believe is essential to ensure national security. To this effect, the Supreme Court of Canada, in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, at paragraph 87, cited with approval Lord Slynn of the House of Lords in Great Britain when he wrote (*Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.), at paragraph 16):

It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of

affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected.

[43]The designated judge must also examine the evidence and ask himself whether there is a serious possibility of the existence of facts that might lead someone reasonably to believe that persons other than the respondent were, are or might be in danger owing to situations that might be created by the respondent or whether there is a serious possibility of the existence of facts that might enable a person reasonably to believe that the respondent would avoid the procedure and/or the removal.

[44]In light of the foregoing, the designated judge, in his review of the protected records and in the hearing in the absence of the respondent, must nevertheless be curious, concerned by what is advanced, and maintain a sceptical attitude with the objective of conducting a critical review of the facts. He must verify the human, technical and documentary sources, their reliability and the truth of what they may relate. To the degree possible, the information must come from more than one source and must not be subject to an imprecise interpretation. Moreover, the designated judge may examine witnesses who can shed light on the protected information and documents. Where necessary, he may question their interpretation of the facts and verify whether there are not other possible interpretations that might tend to favour the respondent. In a word, the designated judge must seriously test the protected documentation and information. This is a demanding role, which must be fully performed given the interests at stake.

[45]Furthermore, the designated judge must analyze the evidence taking into account the danger to national security. He must ask himself what might constitute such a danger. To this effect, the Supreme Court of Canada, in *Suresh*, *supra*, defined as follows, at paragraph 90, what constitutes a danger to the security of Canada:

These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

[46]Having explained the role of the designated judge on a review of the reasons for continued detention, I will now proceed to analyze the evidence by the parties, the law and the submissions. Needless to say, I am unable to refer to the protected documentation and information. However, I will attempt, on the basis of the evidence presented publicly, to raise certain concerns and worries that are at the very heart of this case.

ANALYSIS OF THE EVIDENCE CONCERNING THE CONTINUATION OR NOT OF THE RESPONDENT'S DETENTION

[47]As stated in the content of the document entitled [translation] "Summary of information given to the Minister for the arrest and detention pursuant to paragraph 82(1) of the Act" (exhibit R-3), the Ministers have reasonable grounds to believe that the respondent constitutes (1) a danger to national security; (2) or a danger to the safety of any person; and (3) or that he is unlikely to appear at a proceeding or for removal.

[48]To demonstrate the danger to national security and the safety of any person, the Ministers describe the bin Laden network, its mission, some of its members and certain activities. At page 4, they explain that:

[translation] bin Laden has advised his supporters to blend in with Western society and to prepare terrorist attacks.

[49]Furthermore, with the same objective of demonstrating a danger to national security and to the safety of any person, the Ministers refer the reader to the training in Al-Qaeda camps, using as an example the experience of

Ahmed Ressam. He was given military training in such things as the handling of handguns, machine guns and rocket-propelled grenade-launchers. He was instructed in the manufacture of bombs from TNT and plastic explosives as well as sabotage and urban combat operations and assassinations. In the Ministers' opinion, the respondent is a member of the bin Laden network and has received training similar to that of Ahmed Ressam.

[50]To add to the demonstration of danger to national security and to any person, the Ministers link the respondent with violence and explain that he is a karate and martial arts enthusiast, and add that (see page 5, exhibit R-3):

[translation] In the past, it has been observed that some individuals involved with Al-Qaeda are devoted to the practice of karate and/or the martial arts. In particular Ziard Jarrah, who was part of the group that hijacked American Airlines Flight 93, had trained in the martial arts in preparation for the September 11, 2001 operation.

[51]The Ministers expressly and unequivocally associate the respondent with a sleeper agent in the bin Laden network and use Ressam's story as a typical example.

[52]To this effect, the witness Jean-Paul, who testified in support of the ministers' thesis, defined the notion of sleeper agent as follows:

[translation] A sleeper agent is an individual who has been trained in a certain way. It's a term that applies both to terrorism and to espionage. So we're talking about an individual who has been trained to operate in a country in accordance with the needs of the organization that is directing him.

So, if he's a spy, he is a person who is capable of collecting intelligence, sending messages and engaging in acts of sabotage, for example. In the case of a terrorist, it would be an individual who has received, who would have received a certain training enabling him to operate according to the needs of the group.

So if the group needs an engineer, a person who is able to assemble, a kind of explosives manufacturer, when all is said and done, someone who could assemble explosive devices for the organization, he would be trained in that. He is given the necessary courses and then sent back to his country of origin and he is told: "All right. Go back to your usual life, act as if nothing is happening. You don't tell anyone that you have taken those courses. And then one of these days someone is going to come and see you, perhaps you will get a message, a letter, an email, a telephone call and that's the time to do what we want you to do quite simply."

So this person returns to his day-to-day existence and nothing happens until they need him. Then that person could be activated to mount an action in the country where he is or he might have to travel to a foreign country to mount an attack.

[53]In regard to the public evidence of the Ministers concerning the possibility that the respondent is unlikely to appear at a proceeding or for removal, it is limited to the observation that he has some family in Canada but that in reality he has few ties and could easily slip away for neither he nor his wife is a Canadian citizen.

[54]In my opinion, the Ministers' findings and observations that the respondent is a danger to national security and to the safety of any persons are very serious and mean that the respondent must in turn present some evidence that challenges that of the Ministers. This is the task he must assume if he hopes to regain his liberty.

[55]The respondent presented some evidence that he is not a terrorist or member of the Al-Qaeda network, that he is a good father, the father of a two-year-old daughter and a child to be born at the end of the summer, and that he is living peacefully with his wife and his parents, that he is a good student in graduate studies at the University of Montréal, and that he has never supported the terrorist acts for which the Al-Qaeda network has claimed responsibility.

[56]As proof, the respondent put in evidence the testimony of his father, his wife, some professors, colleagues in his class, a childhood friend, a family acquaintance and a male friend. One of the witnesses, Mr. Ouazzani, offered $15,000 in bail and to maintain contact to ensure compliance with any terms that might be imposed should he be released on bail. His father, Mr. Mohamed Charkaoui, in his affidavit, also offered bail in an undetermined amount and contact with his son to guarantee the terms if necessary.

[57]With the exception of the father, the wife and the childhood friend, the witnesses have known the respondent from the late 1990s to today. Although they remained in contact by telephone or by mail, the wife was not with the respondent from 1995 to February 2000, when she came and settled in Canada on a visa (other than for a period in August 1998, at the time of their marriage). The childhood friend lost contact with the respondent in 1992 and did not see him again until January 2001. I note that of the 13 affiants, 10 have known him since the late 1990s or early 2000, or for an even lesser time.

[58]There is therefore a period of life from about 1992 to the end of the nineties that is unexplained in part.

[59]There is also a trip to Pakistan from February to July 1998, which is explained by his father and his wife as a trip to study the Muslim religion as part of a project to write a book on the Muslim religion in French. As a result of the media coverage of this case, this trip aroused some concerns in Mr. Ouazzani, a witness for the respondent:

[translation]

Were you concerned about that trip?

Yes, it was a matter of concern to me. I wanted to know, it worried me . . . In other circumstances, it would be no more suspicious to travel to Pakistan than to the United States. But when you put this whole story in its context, you can't help being suspicious. And when you also put the thing in what I have just explained to you, it becomes comprehensible. Do you understand, My Lord?

[60]Although the witness stated that he was satisfied with the respondent's explanations, I am not. The respondent would have everything to gain from explaining this trip in detail. During a CSIS interview with the respondent on February 27, 2001, it was noted that (see Tab 4, Vol. B, Record of documentation concerning Adil Charkaoui):

[translation] Charkaoui said he had been sponsored to go and take a five-month course in religions in 1998. According to the subject, this religion course is divided into a number of components: course on the Koran; course on Islamic culture; course on the customs of the Koran. Charkaoui said that this five-month course was very beneficial to him and this deepening of the Muslim religion enabled him to answer a number of existential questions. However, Charkaoui himself indicated that he had had some bad experiences during this stay in Pakistan in 1998. The subject indicated that once his course in religion had ended, he was arrested twice within the territorial limits of Pakistan; . . . .

In another meeting, on July 26, 2002, the CSIS investigators noted that (see Tab 3, Volume B, Record of documentation concerning Adil Charkaoui):

[translation] . . . Charkaoui denied being in Afghanistan and having made the Jihad there. He confirmed he had been in Pakistan to do some studies in the Islamic religion in several cities of Pakistan, primarily in Karachi. He noted that he had attended some madrassas in that country.

[61]It seems to me that for the purpose of clarifying this stay of close to six months in Pakistan, the respondent could have had recourse to his passport, his professors, the University or institution where he studied the Muslim religion, etc. But nothing was done in this regard.

[62]Another concern appears to me to be what the Ministers claim are the contacts the respondent has with certain individuals ("Summary of information pursuant to paragraph 78(h) of the Act", Tab B, Exhibit R-3). With the exception of the witness Mr. Ezzine, the evidence as adduced by the respondent is largely silent in this regard. Again, I think the respondent would facilitate his application for release if he were to address this concern.

[63]Taking into account the limitations imposed on me, I therefore identify, *inter alia*, three significant concerns that have not been satisfactorily addressed in the respondent's evidence:

- the respondent's life from 1992 to 1995 (in Morocco) and from 1995 to 2000 (in Canada), including the trips;

- the respondent's trip to Pakistan from February to July, 1998;

-the respondent's contact with, *inter alia*, Abousfiane Abdelrazik, Samir Ait Mohamed, Karim Saïd Atmani, Raouf Hannachi and Abdellah Ouzghar;

[64]Having clearly identified three concerns, I must note that I am unable, from the respondent's evidence, to neutralize or alleviate them. The evidence as presented is incomplete, insufficient, and does not answer all of the findings made by the Ministers in concluding that the respondent, at the time the warrant was signed, was a danger to national security or the safety of anyone or that he would attempt to avoid the proceedings and/or removal.

[65]Having carefully reviewed the evidence of each party and having found that at the time the warrant of arrest was signed, the Ministers had reasonable grounds to believe that the respondent was a danger to national security or the safety of any person or that he would attempt to avoid the proceedings and/or removal, I consider that he still remains a danger for the reasons given above and that the detention continues to be justified.

[66]There is provision in subsection 58(3) of Division 6 of the Act (Detention and Release) for release with the posting of a guarantee for compliance. This division applies through section 85 of the Act, which states that in the case of an inconsistency between sections 82 to 84 and the provisions of Division 6, sections 82 to 84 prevail to the extent of the inconsistency. Thus, since sections 82 to 84 do not cover any terms that may be linked to a release prior to the hearing on the certificate, *a contrario*, that are not inconsistent on this specific point, subsection 58(3) may serve as a base reference on release and the conditions therefor. The respondent, through his counsel, asked that I release him on conditions and bail. Since I have reached the conclusion that the danger still remains, which in itself is just cause, I need not contemplate this possibility at this stage of the proceedings. The danger remains and it is not a conditional release and bail that will eliminate this danger at this time. Furthermore, I need not decide at this point the applicability of paragraph 11(*e*) of the Charter to this type of case. However, I will allow myself the following comment, that this is a Charter provision that applies to the criminal law, while we are dealing here with immigration law. The Supreme Court has already issued the following caution in this regard (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307, at paragraph 88):

This Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct.

[67]The respondent's counsel, in an attempt to persuade me to release him, also asked that I consider sections 7 and 15 of the Charter. Again, I do not think I should, at this stage, rule on this, in view of the conclusion I have reached. However, I will add that the approach taken in this case, as prescribed by the Act, appears to be consistent with the principles of natural justice enshrined in section 7 of the Charter. I note that the respondent has been given information that enables him to be sufficiently informed of the circumstances, he has presented 14 witnesses, and his point of view was clearly communicated in the submissions by his counsel (See *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (S.C.C.), [1992] 1 S.C.R. 711). Concerning the argument based on section 15 of the Charter, there was very little discussion on this and I think it will have its raison d'être during the hearing on the constitutional validity of the certificate and the verification procedure.

[68]During the submissions by one of the counsel for the Ministers, I asked him whether the publicity resulting from the arrest and the proceedings would not neutralize the danger. In response, I was told that the respondent would revive his contacts and that, as a sleeper agent, he might go into action, given his mission and his situation.

[69]At this stage, I continue to be concerned for the foregoing reasons. Taking into account the evidence as a whole, I do not feel sufficiently reassured to conclude that the danger is neutralized through the publicity resulting from the arrest and the proceedings. I note that the respondent will have an opportunity to submit new evidence pursuant to the statutory review under subsection 83(2) of the Act.

[70]The Act is silent as to the right of appeal from the present interlocutory decision, and I note that there is a statutory review of continued detention under subsection 83(3) of the Act. Since I am uncertain of the application of paragraph 74(*d*) of the Act, and wish to allow the parties to assess the situation, if necessary, I am going to allow the submission to me of one or more questions for purposes of certification within 15 days of this judgment, if that section applies to this case.

[71]The Ministers, through their counsel, did not ask for costs, so I need not rule in that regard.

ORDER

THE COURT ORDERS THAT:

The respondent be continued in detention pursuant to subsection 83(3) of the Act until the designated judge rules again in regard to the continuation of detention under subsection 83(2) of the Act.

Without costs.