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Docket: IMM-98-06

Citation: 2006 FC 1503

Ottawa, Ontario, December 14, 2006

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

MOHAMMAD ZEKI MAHJOUB

applicant

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

and

THE SOLICITOR GENERAL OF CANADA

respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION AND BACKGROUND FACTS

[1] There have been considerable proceedings related to the present matter. In addition to the following cursory overview, Appendix A to these reasons contains a more detailed chronology of related events.

[2] Mr. Mohamed Zeki Mahjoub (the applicant) is an Egyptian national who came to Canada in 1995 and was found to be a Convention refugee in October 1996.

[3] Mr. Mahjoub has been in detention since the Spring of 2000, when the Solicitor General of Canada and the Minister of Citizenship and Immigration (the Ministers) issued a security certificate qualifying Mr. Mahjoub as inadmissible under section 19 of the *Immigration Act*, R.S.C. 1985, c. I-2 (former Act) in effect at that time. Appendix B to these reasons sets out the relevant parts of the former Act. This opinion was based on a security intelligence report expressing the belief of the Canadian Security Intelligence Service (CSIS) that Mr. Mahjoub was a member of an inadmissible class referred to in the former Act, by virtue of CSIS' opinion that he:

- will, while in Canada, engage in, or instigate, the subversion by force of the government of Egypt

- is a member of the Vanguards of Conquest (VOC), a faction of Al Jihad (AJ). The VOC is an organization that there are reasonable grounds to believe will engage in, or instigate, the subversion by force of the government of Egypt, and will engage in terrorism;

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

- has engaged in terrorism.

[4] The security certificate issued by the Ministers was challenged by Mr. Mahjoub, but was found to be reasonable by Mr. Justice Marc Nadon in *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2001] 4 F.C. 644 (T.D.), 2001 FCT 1095.

[5] In a July 2004 decision, the Minister of Citizenship and Immigration (the Minister) determined that Mr. Mahjoub was a danger to the security of Canada, and upon being returned to Egypt would probably be detained and could suffer human rights abuses. Notwithstanding the finding of a "substantial risk of ill-treatment and human rights abuses" the Minister decided that Mr. Mahjoub should be removed to Egypt, pursuant to paragraph 115(2)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). Mr. Mahjoub applied for judicial review of that decision.

[6] In *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 334, 2005 FC 156 (*Mahjoub* 2005) Justice Eleanor Dawson found that the Minister's decision on the danger issue was based on incomplete evidence. The Minister's delegate had relied only on a CSIS narrative report, and lacked the detailed confidential information upon which the narrative was based. Consequently, the Court found that the delegate could not properly assess the danger posed by Mr. Mahjoub, and by extension, could not properly balance the competing interests at stake. The application for judicial review was allowed, and the matter was remitted for re-determination by another delegate of the Minister.

[7] On re-determination of the matter, a different delegate of the Minister (the delegate) concluded in a decision dated January 3, 2006, that Mr. Mahjoub poses a danger to the security of Canada, that there were sufficient grounds for believing he would not be at substantial risk of torture or other ill-treatment in Egypt, and therefore that he should be returned there.

[8] Mr. Mahjoub brings the present application for judicial review of this January 3, 2006 decision.

APPLICABLE LEGISLATION

[9] Subsection 115(1) of the Act generally prohibits the return of a protected person, including a Convention refugee, to a country where he or she would be at risk of persecution or torture or cruel or unusual treatment or punishment (torture). Subsection 115(2) of the Act sets out exceptions to this general principle. Section 115 of the Act is as follows:

115.(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	115.(1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(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	*a)* pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
	b) pour raison de sécurité ou pour atteinte aux

(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.

droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

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

(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)*e)*, être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle est arrivée au Canada.

ISSUES

[10] The following issues are raised in this judicial review application:

1. Applicable standard of review

2. Danger to the security of Canada

   a. Sources of evidence

      i. Reliance on evidence likely to have been obtained by torture

      ii. Burden of proof

   b. Assessment of the evidence by the delegate

3. Substantial risk of death and/or torture upon return to Egypt

a. Country conditions

i. Death penalty

ii. Substantial risk of torture

b. Egypt's assurances

4. Best interests of the children

5. Alternatives to removal

ANALYSIS

1. <u>Applicable standard of review</u>

[11] Both the danger to the security of Canada and the substantial risk of torture questions are predominantly fact-driven inquiries (*Mahjoub* 2005, above at para.42; *Almrei v. Canada (M.C.I.)*, 2005 FC 355, [2005] F.C.J. No. 437 (QL) at para. 32). I agree with my colleague Mr. Justice Andrew MacKay that Parliament has vested the Minister with broad discretion to balance both these factors in making the relevant determinations (*Re Jaballah*, 2006 FC 346, [2006] F.C.J. No. 404 (QL) at para. 18) (*Jaballah*). Accordingly, a deferential approach must be taken and the delegate's decision must only be set aside if it is patently unreasonable. In order to intervene, a reviewing Court must be satisfied that the decision was made arbitrarily, or in bad faith, or without regard to the appropriate factors, or the decision cannot be supported on the evidence; the Court is not to re-weigh the factors considered or interfere simply because the Court would have reached a different conclusion (*Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at paras. 29, 39, 41) (*Suresh*). As the Supreme Court of Canada stated in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20 at paragraph 52, "[…] a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective" and "[…] [a] decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand."

[12] Given that this application centres on the relatively lengthy reasons of the delegate's decision, and the evidence upon which it was based, it is worth canvassing in tandem with an issue-by-issue analysis.

2. <u>Danger to the security of Canada</u>

<u>Delegate's Reasons</u>

[13] The delegate began by reviewing the circumstances surrounding Mr. Mahjoub's arrival in Canada. She noted that Mr. Mahjoub first came to Canada in 1995 with the use of a forged Saudi passport. She mentioned that his whereabouts from 1986 to 1995 were largely unaccounted for, with the exception of a period in 1992-1993 when he was in Sudan working for a Bin Laden company. At this time Al

Qaeda was headquartered in Sudan. She also referred to the fact that Mr. Mahjoub was interviewed in person by Osama Bin Laden and given the position of Deputy General Manager in charge of some 4,000 employees with a considerable salary (in relative terms), despite the fact that he had no prior relevant experience.

[14] She referred to evidence suggesting Mr. Mahjoub's connection to a terrorist organization, citing among other things his arrival in Canada shortly after Sudan expelled Egyptian extremists. She cited his direct and indirect connections with known terrorists, along with his repeated attempts to intentionally conceal these connections from Canadian authorities. She found that these patterns of connections and persistent attempts to mislead Canadian authorities revealed "an in-depth involvement in the terror network".

[15] With regard to the Al Jihad/Vanguards of Conquest (AJ/VOC) group, the delegate concluded on the basis of the public and classified record that there was sufficient evidence that Mr. Mahjoub is a senior member. She noted that he has maintained close contacts with operatives of the group, and that prior to his detention he had "constant and high level contacts with members of Osama Bin Laden's terrorist network all over the world, that he likely facilitated the planning of terrorist attacks and provided logistical support".

[16] In summary, the delegate concluded that she was persuaded that "Mr. Mahjoub was and continues to be a high ranking member of the AJ", that the AJ/VOC has now merged with Al Qaeda**,** and that the group's targets have widened beyond overthrowing the Egyptian government to the present goal of "indiscriminately attack[ing] Western civilians and economic interests all over the world". She pointed out that the merged organization has openly threatened all Western countries, that Canada has been specifically targeted, and is currently the only such country that has not been directly attacked. This group has shown that it is extremely dangerous and has the capacity to carry out its mandate all over the world, viewing civilians as legitimate targets.

[17] Given its current decentralization, the delegate was satisfied that the evidence showed that the Al Qaeda network was still capable of executing terrorist acts despite the deaths and detentions of senior members. She concluded that rather than being an impediment to him, the voids left by senior members would permit Mr. Mahjoub to be better positioned to become prominent in the network, and thereby plan further terrorist attacks. Even if he were not able to reinsert himself in the same branches of the organization, she reasoned, he would be able to proceed with terrorist activities targeting Western nations, including Canada, due to "his experience, his influence and his network".

[18] In consideration of the submissions that Mr. Mahjoub could no longer pose a threat to Canada due to his current state of mental and physical health, the delegate was not satisfied that this lessened the threat that he posed to Canada. She similarly rejected the notion that his notoriety would be an impediment to his ability to be involved in future terrorist activities. In view of all the evidence,

she was convinced that the "threatened harm posed by Mr. Mahjoub is substantial, serious, and grounded on objectively reasonable suspicion".

a) Sources of evidence

i. Reliance on evidence likely to have been obtained by torture

[19] The applicant submits that Canadian officials have relied on evidence from Egypt in making its case against him. He maintains the delegate failed to meet the standard of "cogent evidence" required for such an important decision as she impermissibly relied on some information that is "likely to have been obtained by torture", given Egypt's record of using torture for interrogatory purposes. Similarly, he argues, the delegate impermissibly considered his conviction by an Egyptian military court arising from an *in absentia* proceeding, which probably also relied on evidence likely obtained by torture.

[20] For the respondents, there is no basis for the speculation that the delegate relied on evidence which was likely obtained by torture. The delegate took note of the submission that information from Egypt should be treated as suspect, and affirmed that the evidence she considered came from a wide variety of sources over a period of time, with all of it being weighed for its probity. Any elaboration relating to specific evidence beyond that provided in her reasons would have resulted in improper breaches of national security.

[21] A review of the existing jurisprudence will help to provide a useful framework for the present analysis of this issue.

[22] In *Lai v. Canada (M.C.I.)*, 2004 FC 179, [2004] F.C.J. No. 113 (QL) (*Lai* FCTD), my colleague Justice Andrew MacKay held at paragraph 24:

> I agree … that evidence obtained by torture, or other means precluded by the International Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, ought not to be relied upon by a panel considering a refugee application. […]

[23] This view was confirmed by the Federal Court of Appeal in *Lai v. Canada (M.C.I.)*, 2005 FCA 125, [2005] F.C.J. No. 584 (QL) (*Lai* FCA), where Justice Brian Malone concluded at paragraph 95 sub-paragraph (a) that "[…] [s]tatements obtained by torture or other cruel, inhumane or degrading treatment or punishment are neither credible or trustworthy."

[24] In *Re Charkaoui*, 2004 FC 1031, [2004] F.C.J. No. 1236 (QL) (*Charkaoui*), my colleague Justice Simon Noël considered challenges to the evidence on the grounds that it had been obtained by torture. At paragraphs 28 and 29 of *Charkaoui*, above, he essentially found that the evidence at issue from Mr. Rezzam had not been tainted by torture, and that it could form part of the evidentiary record. However, Justice Noël was not satisfied that information against Mr. Charkaoui from

Mr. Abu Zubaida had not likely been obtained by torture/mistreatment, as there was contradictory evidence surrounding the circumstances of its production (*Charkaoui*, above, at paragraphs 30, 31). With regard to this particular evidence, Justice Noël stated at paragraph 31 of *Charkaoui*, above:

> […] bearing in mind the objectives of the Convention Against Torture and the conflicting evidence presented by the two parties, it is the Court's intention not to take into consideration the statement of Mr. Zubaida and not to assign it any importance for the time being in my analysis of the facts. However, the Court is not withdrawing this statement as presented from the record, in view of the type of evidence presented by the parties and the contradiction that exists in the evidence in support of the respective submissions of the parties.

[25] Another colleague, Justice Eleanor Dawson, considered a similar argument made on behalf of Mr. Harkat that torture had tainted evidence obtained from Mr. Abu Zubaida and therefore that it should be inadmissible (*re Harkat*, 2005 FC 393, [2005] F.C.J. No. 481 (QL) at para. 115) (*Harkat 2005*). Mr. Harkat referred to indirect and direct evidence of mistreatment likely suffered by Mr. Abu Zubaida in support of his position, and the Court held that there was "[…] significant concern about the methods used to interrogate Abu Zubaida" (*Harkat* 2005, above, at para. 120). It may be relevant to note that aside from the torture/mistreatment issue there was an "additional pressing concern" of the weight to accord the information from Mr. Abu Zubaida, as there was no evidence before the Court of the specific questions and answers used in producing the information (*Harkat* 2005, above, at para. 122). Ultimately, Justice Dawson concluded that she was "[…] left in doubt as to how Mr. Abu Zubaida came to provide information about Mr. Harkat" and she decided to "give no weight to the information provided to the Court through Abu Zubaida" (*Harkat* 2005, above, at para. 123).

[26] In light of the above, I agree with the applicant that reliance on evidence likely to have been obtained by torture is an error in law. Though not been explicitly articulated, I am persuaded that this general principle has essentially been applied and adopted in Canada in recent cases. It is also consistent with Canada's signing of the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (G.A. res. 39/46, U.N. Doc. A/39/51 (1984)). This view is also consonant with a recent House of Lords decision which held that reliance on evidence likely to have been obtained by torture is an error in law (*A (FC) and others (FC) v. Secretary of State for the Home Department*, [2005] UKHL 71), [2005] H.L.J. No. 13 (QL) (*A(FC)*).

[27] However, it is also important to note that there must be a credible evidentiary basis linking torture to the specific evidence at issue in order to justify its exclusion (*Lai* FCTD, above, at paras. 28, 50; aff'd *Lai* FCA, above, at paras. 38-42; *Charkaoui*, above, at paras. 27-31). The Federal Court of Appeal has held that general country condition information citing the use of torture should not inevitably lead to a finding that all specific evidence from that country should be excluded, without further substantiation (*Lai* FCA, above, at para. 42). On this point Justice Malone

concluded at paragraph 42 of *Lai* FCA, above, "[…] the very general evidence offered by the appellants about torture by Chinese investigators was not specific and certainly not specific to the statements offered by the Minister in this appeal. […]"

ii. Burden of proof

[28] The respondents submit that a party alleging that specific evidence was obtained by torture bears the onus of adducing proof to establish the claim, on a balance of probabilities standard, though no authorities were submitted on this point. I am not convinced this is the proper burden in the special circumstances of the present matter.

[29] In a proceeding where evidence is public, the person concerned has the ability to challenge specific evidence. Thus, it is appropriate to impose such a burden in the circumstances, as this person has the opportunity and means to properly discharge it. For instance, in *India v. Singh*, [1996] B.C.J. No. 2792 (QL), the British Colombia Supreme Court had the role of determining if there was sufficient evidence to order Mr. Singh to surrender for extradition to India where India relied upon confessional statements of five individuals detained there.

[30] In that case, Mr. Singh submitted that the statements were obtained by torture, and should be excluded. In this context, he knew the content of the statements and the identities of those who made them, and had the opportunity to produce specific evidence attempting to prove the statements were obtained under torture. The Court concluded at paragraph 21 that "[t]he burden of proving that the confessional statements were obtained as a result of the commission of an offence under this torture section [*section 269.1 of the Criminal Code of Canada*] rests upon the Fugitive who makes the allegation … [and] must be proved upon a balance of probabilities". Due to the nature of the proceedings, Mr. Singh was aware of all of the evidence against him, and therefore had the opportunity to adduce evidence necessary to meet the burden placed upon him. In contrast, due to the special nature of the present matter, where part of the evidence is not disclosed to Mr. Mahjoub, this opportunity is somewhat limited. This is a crucial distinction of which I am particularly mindful, and one which I believe is reflected in existing jurisprudence.

[31] In *Harkat 2005*, above, the Ministers submitted that Mr. Harkat had the burden of proving, on a balance of probabilities, that evidence from Mr. Abu Zubaida had been obtained by torture (*Harkat 2005*, above, at para. 116). Mr. Harkat responded that as the location and condition of Mr. Abu Zubaida were unknown, he was limited to putting public material before the Court and inferring the occurrence of torture; some of this public material related directly and indirectly to Mr. Abu Zubaida (*Harkat 2005* at para. 117). After reviewing the public evidence, Justice Dawson stated that "[t]he evidence before the Court satisfies me that better evidence about conditions Mr. Abu Zubaida has been subjected to is not likely to be available to Mr. Harkat" and then concluded that it did raise "significant concern" about the methods used to obtain the evidence (*Harkat 2005* at para. 120). In light of her doubt with regard to this evidence, she gave it no weight (*Harkat*, above, at para. 123).

[32] In a similar vein, Justice Noël decided not to rely on potentially suspect evidence where there was a specifically founded "possibility that such mistreatment

occurred" (*Charkaoui*, above, at para. 31). Thus, the Court's doubt was resolved by giving no weight to the evidence.

[33] In my view, my colleagues' approaches to the burden of proof suggest an appropriate consideration of the special nature of matters such as these, and a recognition of the inherent limitations placed upon individuals such as the applicant. I find such an approach preferable to that proposed by the respondents in the special circumstances of the present context.

[34] In my opinion, in light of the preceding jurisprudence, where the issue is raised by an applicant offering a plausible explanation why evidence is likely to have been obtained by torture, the decision-maker should then consider this issue in light of the public and classified information. Where the decision-maker finds there are reasonable grounds to suspect that evidence was likely obtained by torture, it should not be relied upon in making a determination.

[35] This view is reflected in *A(FC),* above, where the House of Lords found, in a substantively similar context, that a conventional burden of proof should not be placed on the detainee (at paras. 55, 80, 98, 116, 155). Lord Hope of Craighead, in the majority, wrote at paragraph 116:

> […] It would be wholly unrealistic to expect the detainee to prove anything, as he is denied access to so much of the information that is to be used against him. He cannot be expected to identify from where the evidence comes, let alone the persons who have provided it. All he can reasonably be expected to do is to raise the issue by asking that the point be considered by SIAC. There is, of course, so much material in the public domain alleging the use of torture around the world that it will be easy for the detainee to satisfy that simple test. All he needs to do is point to the fact that the information which is to be used against him may have come from one of the many countries around the world that are alleged to practise torture, bearing in mind that even those who say that they do not use torture apply different standards from those that we find acceptable. Once the issue has been raised in this general way the onus will pass to SIAC. It has access to the information and is in a position to look at the facts in detail. It must decide whether there are reasonable grounds to suspect that torture has been used in the individual case that is under scrutiny. If it has such a suspicion, there is then something that it must investigate as it addresses its mind to the information that is put before it which has been obtained from the security services.
> [My emphasis]

[36] Ultimately, I believe that the determination of whether evidence is likely to have been obtained by torture is a fact-driven inquiry. It is unequivocally a conclusion that requires the decision-maker to weigh the evidence in the record, to determine if it was likely the product of torture or not. Thus, I agree with the reasoning of my colleague Justice MacKay in *Jaballah*, above, at paragraphs 40-42, that this issue is essentially one of the weight given to evidence by the delegate. As a fact-driven inquiry that involves weighing the available evidence, as with the other aspects of the decision, this element would be subject to considerable deference by a reviewing court.

[37] The applicant submits the delegate relied on evidence likely to have been obtained by torture in concluding he has ties to terrorism. He alleges that Egypt has a record of using torture to secure information and that it "is apparent from the allegations and summary of the case against him that Canadian officials have relied on evidence obtained directly or indirectly from Egypt and that this includes information provided from individuals detained by that country and from trials [*sic*] proceedings characterized as unfair by international human rights organizations". Specifically, the admissions of Essam Marzouk and Ahmed Agiza, linking Mr. Mahjoub to terrorist networks, were likely the product of torture at the hands of Egyptian security services and were relied upon by the delegate.

[38] In her reasons, the delegate took note of Mr. Mahjoub's position that any information obtained from the Egyptian security services should be considered inherently suspect. She indicated that

> [t]he evidence available both public and classified [*sic*] comes from a wide-range of sources over a period of time. All the evidence has been weighted in accordance with its own probative value and in view of the totality of the body of evidence.

[39] In response to the applicant's submission that the Egyptian conviction should not be given any weight, the delegate wrote:

> The conviction of Mr. Mahjoub in Egypt is not determinative of whether he is a danger to the security of Canada since, like the security certificate conclusion, it is evidence relating to his past membership in a terrorist organization. There is ample evidence, other that [*sic*] the conviction, with regards to Mr. Mahjoub's involvement with a terrorist organization.

[40] The delegate clearly indicates that the Egyptian conviction is "not determinative of whether he is a danger to the security of Canada" issue. In other words, this single evidentiary element is neither sufficient, nor necessary, to her determination; even without the conviction evidence she would have come to the same conclusion in view of the totality of the evidence. In light of the inherent restrictions on her ability to reference classified information in her reasons, she could not have been more explicit.

[41] In sum, I find that while the applicant was entitled to raise the "likelihood obtained by torture" issue, and have it duly considered by the delegate, this issue ultimately concerns the weight the delegate gave the information that specific evidence was likely obtained by torture.

[42] Contrary to the applicant's submission, I do not believe that the above reasons reveal that it is "apparent" that the delegate relied on evidence likely to have been obtained by torture. Upon reviewing both the public and classified evidence I am satisfied that the delegate did not err in according the evidence the probity she believed it deserved in light of its provenance, and in view of the other available evidence. In coming to this conclusion, I am mindful of the nature of the present context. It is one where the delegate is obliged (as am I) to omit any reference to classified information which could be used by an "informed reader" to the detriment of the security of Canada (*Henrie v. Canada (Security Intelligence Review Committee)* (1988), 53 D.L.R.(4th) 568, at 574-575 (F.C.T.D.), aff'd (1992) 88 D.L.R. (4th) 575 (F.C.A.); *Re Harkat*, 2003 FCT 285, [2003] F.C.J. No. 400 (QL) (*Harkat* 2003); *Almrei v. Canada (M.C.I.)*, [2004] 4 F.C.R. 327, 2004 FC 420 at paras. 58, 62) (*Almrei* 2004).

b) Assessment of the evidence by the delegate

[43] The applicant submits the delegate ignored the exculpatory explanations he offered in response to allegations against him. I disagree, as she did not ignore his explanations, but rather found them not to be credible. For instance, she specifically refers to Mr. Mahjoub's account that he happened to first meet Mr. Marzouk at an airport while making a lost luggage claim, and in light of other evidence, discounts his version as lacking credibility. Indeed, after having considered his explanations, including Mr. Mahjoub's own qualification that certain connections were pure "coincidences", she stated:

> Far from coincidences, these are part of a pattern and are consistent with the rest of the evidence that shows an in-depth involvement in the terror network.

[44] Similarly, I cannot agree that the delegate untenably concluded that his whereabouts were "largely unknown" between 1986 and 1995, and that she ignored his explanations that he went from Saudi Arabia to Sudan before coming to Canada. She specifically cited that his whereabouts in that period were "largely unknown", save for a period in 1992-1993 when he was working for a Bin Laden company in Sudan. Neither the delegate's reasons, nor her reasoning, constitute an error in this regard.

[45] Despite the applicant's submissions, the delegate did not ignore, but rather directly addressed his allegations that his current level of notoriety would preclude any present involvement with covert terrorist networks. On this point, she specifically articulated that "[…] Mr. Mahjoub's notoriety, position and influence, should he remain in Canada and be able to communicate, would be enhanced within the movement […]".

[46] The applicant further submits that the delegate ignored evidence of the significant changes in the terror networks with which he was allegedly involved. More particularly, she ignored the effect of the merger between Al Qaeda and AJ/VOC which occurred long after he left for Canada. That, coupled with the death or detention of any significant contacts that he could have conceivably had in those networks, vitiated any potential risk he could pose.

[47] On the contrary, I find that the delegate expressly considered the impact of these changes since Mr. Mahjoub's arrival in Canada. This is evident from her reasons, where she stated:

> I am persuaded that, <u>from Canada</u>, Mr. Mahjoub has been involved in the terrorist network and would likely continue to be so involved. The death and detention of other senior member of this group would not, in my opinion deter M. Mahjoub's involvement, considering that he would, upon release, be in a position to gain even more influence as a senior member. [My emphasis]

[48] Further, as to the possibility that Mr. Mahjoub might not be able to reintegrate into the former structure, she articulated:

> … I am convinced nonetheless that he would be in a position and would proceed, because of his experience, his influence and his network, to carry out the ideology of targeting for attack Western nations, particularly Canada.

[49] I am satisfied that it was reasonable for the delegate to infer that notwithstanding his considerable public exposure, the applicant could, because of his experience, his influence and his connections, participate in a terrorist organization. She was entitled to give little weight to Mr. Mahjoub's submission that the passage of time and lengthy detention diminished the danger he posed to the security of Canada.

[50] The applicant challenges the delegate's decision for ignoring the evidence contained in his medical and psychological reports, and for not providing adequate reasons why his current condition does not lessen the risk he poses. The delegate noted that the psychological report expressed the opinion that Mr. Mahjoub is exhibiting symptoms of paranoia, and that if he is not released his condition will continue to deteriorate, "that he suspects others are harming him, he bears grudges and is quick to react angrily". She also specifically acknowledged that "Mr. Mahjoub's submissions include a psychologist report and state that Mr. Mahjoub's mental and physical health has been severely affected while in detention". The delegate then stated that she was not satisfied that this would lessen the danger that he poses to the security of Canada. Thus, it is evident that she turned her attention to both his current mental and physical states in making her determination. It was not an error for her to infer that his condition would not neutralize his capacity to participate in planning terrorist activities.

[51] In response to the "guilty by association" argument, I find that the conclusions drawn regarding his involvement with terrorist networks were substantiated on a wide range of evidence, and beyond mere "guilt by association" reasoning. I am satisfied that the delegate's conclusions in this regard mirrored findings by this Court in *Canada (M.C.I.) v. Mahjoub*, 2005 FC 1596, [2005] F.C.J. No. 1948 (QL) (*Mahjoub* DES) at paragraphs 70-73 that the confidential information "… goes far beyond guilt by association …", and that both the public and classified evidence established Mr. Mahjoub's connections with "individuals who were very highly placed and influential in the Islamic extremist movement". Her determination was substantively in line with that of Justice Dawson who concluded that there is a "reasonable basis to believe that Mr. Mahjoub was a leader, a decision-maker, a planner and a recruiter for the radical Islamic cause" (*Mahjoub* DES, above, at para. 91).

[52] Similarly, with regard to the applicant's submission that the delegate used stereotype-based reasoning in concluding that he would engage in terrorism despite changes in circumstances, I do not agree with him. Rather, the delegate's inference with regard to the danger that he posed to the security of Canada reflected a consideration of all of the evidence and essentially reiterated the findings in this regard by this Court in *Mahjoub* DES, above, at paragraphs 80-82, 89-93 that he could re-establish connections with terrorist contacts and/or networks, that notoriety was not necessarily a neutralizing impediment to his continued involvement with terrorist activities, that the terrorist groups with which he was involved continue to remain dangerous and ultimately that he continued to pose a danger to national security or the safety of any person. Further, on this issue, I adopt the reasoning of Justice MacKay in *Jaballah*, above, at paragraph 41:

> […] In my view, general descriptive profiles based on more than one individual may be information of use in intelligence assessments, and the use of such a profile, by the Minister or his delegate, provided it is not the exclusive or principal information relied upon, is not so unreasonable in assessing threats to national security that the Court should intervene on review.

[53] The applicant submits on the authority of *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, [2000] F.C.J. No. 1685 (C.A.) (QL), that the delegate failed to provide sufficient reasons that articulate and sustain her findings. The legal duty to provide reasons is well established, the underlying rationale is varied and what constitutes adequate reasons will change with the circumstances of each case. (*VIA Rail*, above, at paras. 17-20). However, I will stress again that the circumstances of the present matter are particular, given the inherent constraints imposed by classified information which cannot be disclosed. Such constraints mean that the delegate had an overriding legal obligation not to disclose or specifically refer to any information that might compromise national security or the safety of any person in her reasons. This necessarily restricts the public articulation of the specific evidentiary basis underpinning conclusions, where any of the evidence relied upon is classified; in the words of Justice Noël "[o]ften the very form of disclosure can have an impact on national security or the safety of any person" (*Re Charkaoui*, 2003 FC 1418, [2003] F.C.J. No. 1815 (QL) at para. 16; see also *Harkat*

2003, above). On a tangential note, I find myself in a similar position with regard to the present matter, as stated by Mr. Justice Edmond Blanchard in *Almrei* 2004, above, at paragraph 62:

> […] I am obligated by law not to disclose any information which would be injurious to national security or to the safety of any person. In consequence, my reasons cannot be as complete as they would otherwise be with respect to why such information was either accepted or rejected in whole or in part.

[54] In relation to the issue of the danger that Mr. Mahjoub poses to the security of Canada, there was much relevant classified information, not contained in the public record. Having personally reviewed all of the information, both classified and public, which was before the delegate, I recognize how her findings could appear insufficiently corroborated solely through the lens of the public record. However, when considered in concert with the classified evidence, I am satisfied that her conclusions were well-grounded in the evidence before her. I do not find that she committed any reviewable errors with regard to the danger to the security of Canada issue.

3. **Substantial risk of death and/or torture upon return to Egypt**

Delegate's Reasons

[55] The delegate first considered Mr. Mahjoub's submission that he could be executed if returned to Egypt, substantiated by the fact that other Egyptians tried at the same time received this penalty. She decided that in light of his 15-year sentence, and her examination of the Egyptian Criminal Code, that he "does not face a harsher punishment than the one he received". She also concluded that there was no evidence to support the allegation that others who were sentenced to imprisonment along with Mr. Mahjoub were subsequently executed. Consequently, she declared that there was no substantial risk that Mr. Mahjoub would face the death penalty upon his return to Egypt.

[56] The delegate enumerated the sources she had considered in her assessment of the country conditions in Egypt. She mentioned according more weight to recent reports as they were "more likely to reflect the situation that Mr. Mahjoub would face upon return", and giving less weight to those that failed to cite methodologies or failed to express the basis for their conclusions.

[57] She remarked that US Department of State (US DOS) reports concluded that Egypt's "human rights record remain [*sic*] poor". She also cited Human Rights Watch (HRW) that "torture and mistreatment are routine, particularly during

interrogation and criminal investigation". However, she concluded the Egyptian government was making efforts to hold security officials accountable for such abuses, and generally the human rights situation had been improving in Egypt in recent years.

[58] The delegate gave little weight to a 2005 Amnesty International (AI) report that concluded that torture is used systematically throughout Egypt on the grounds that it cited no definite sources of evidence. She opined that it was based on vague, anecdotal and uncorroborated evidence.

[59] With regard to a document chronicling the experiences of Mr. Al Maati upon his return to Egypt under circumstances similar to Mr. Mahjoub, the delegate determined that the document "contains numerous conjectures, suppositions and hearsay allegations" and fails to corroborate its allegations, thereby undermining its probity. Furthermore, she decided that the two cases were to be distinguished, and consequently the alleged experiences of Mr. Al Maati had little bearing on the present matter, and deserved little weight.

[60] The delegate accorded considerable weight to the 2002 *Bilasi-Ashri* decision of the Court of Appeal of Austria[1] in concluding there were not large scale violations of human rights in Egypt, and that such abuses were not an "institutionalized every day practice". The delegate deemed that the rigour of the judicial process in that matter conferred a greater degree of probity on its conclusions, compared with that of other evidence. However, she found that "there is sufficient evidence that torture remains a problem" and therefore that it was necessary to assess the assurances Egypt provided.

[61] Egypt had given assurances to Canada that Mr. Mahjoub would not be tortured upon his return, in the form of two diplomatic notes and a letter from Major General Omar M. Soliman, GIS Chief. The delegate reviewed the trustworthiness of the assurances "as to their nature, their content as well as precedents and incentives with regards to the Egyptian government". She gave little weight to the letter in view of its unofficial nature. However, she did accord considerable weight to the diplomatic notes as they constituted "part of the official record of bilateral relations between Canada and Egypt". She decided that Egypt would not torture Mr. Mahjoub after officially denying it would, concluding it had too much to lose in the event it reneged on its guarantee.

[62] In response to the submissions that the Egyptian assurances were not reliable, substantiated on the basis of HRW reports, an affidavit from AI's Ms. Gloria Nafziger and a letter from an Egyptian-American professor, the delegate questioned the basis on which these assertions were founded. She preferred to rely on the submissions of the Swedish government to the Committee Against Torture (CAT) in the *Agiza v. Sweden* matter ((2005) U.N. Doc. CAT/C/134/D/233/2003), where Sweden maintained that Egypt abided by its assurances, though this was contradicted by HRW, the alleged victim of the abuses and his mother. The delegate also favoured the Swedish position that the notoriety of a case will tend to enhance the likelihood of compliance with assurances.

[63] In relation to the cases of deportation from Sweden to Egypt, specifically the matter involving Mr. Agiza, the delegate undermined the statements by the CAT that Sweden should have known that Egypt "resorted to consistent and widespread use of torture against detainees". She decided that the CAT's conclusions to this effect relied on its own dated findings from 1996, and disregarded later reports which did not specifically mention systemic torture, and which stated that Egypt had

been improving. In the delegate's view this dictated that the CAT evidence deserved little weight.

[64] In summary, the delegate gave little weight to any of the evidence submitted on behalf of Mr. Mahjoub on the assurances issue, concluding that it all essentially stemmed from the *Agiza* case, which lacked probity in her view.

a) Country conditions

i. Death Penalty

[65] The applicant submits that the delegate ignored evidence that others tried along with Mr. Mahjoub, when he was convicted *in absentia***,** received the death penalty. Upon careful review of the evidence on this issue, I find no direct reference to the alleged execution of those convicted *in absentia* along with Mr. Mahjoub. Thus, I am not persuaded that the delegate ignored evidence**.** Even if I could have reached a different conclusion, I find that it was not patently unreasonable for her to conclude that there was no substantial risk that Mr. Mahjoub would face the death penalty upon return.

ii. Substantial risk of torture

[66] The assessment of whether Mr. Mahjoub faces a substantial risk of torture upon return to Egypt required the delegate to consider the country's general human rights record as well as the personal risk to him, assurances provided by Egypt that he will not be tortured along with a concomitant assessment of the value of these assurances, the ability of the Egyptian government to effectively control its own security forces, and more (*Suresh*, above). This issue is a fact-driven inquiry and requires me to accord a high level of deference to the decision-maker. However, I remain mindful of the Supreme Court of Canada's articulation at paragraph 126 of *Suresh,* above that:

> The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual … will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. […]

[67] The delegate properly determined that the risk of torture must be "personal and present" and evaluated against a "balance of probabilities" standard in order to constitute a "substantial risk" in this context *(Suresh v. Canada (M.C.I.),* [2000] F.C.J. No. 5 at paragraphs 150-152 (C.A.)(QL) (*Suresh* FCA). In other words, whether on the finding of facts, it is more likely than not that the individual would be personally subjected to a danger of torture *(Li v. Canada (MC.I.),* [2005] 3 F.C.R. 239, 2005 FCA 1 at paragraph 29.

[68] The applicant submits the delegate selectively relied on information that went against the bulk of the evidence in concluding there was no institutionalized

torture in Egypt. In his view, this suggests an arbitrary rejection of important, credible evidence on this issue. I agree with the applicant. In coming to this conclusion, the delegate determined that the human rights documentation from Amnesty International and Human Rights Watch was unreliable and not credible, and therefore gave it little or no weight.

[69] Referring to the 2005 AI report on Egypt citing the systematic use of torture in Egyptian detention centres, she categorized the report as "anecdotal and hearsay" in nature, using vague and uncorroborated statements such as "circumstances suggesting that torture … may have caused or contributed to their deaths" or "several members … were reportedly tortured … others were apparently denied medical attention in prison". Thus, she would give the AI report little weight as a result.

[70] In my opinion, it was arbitrary for the delegate to reject the probity of the 2005 AI report on the grounds that it was "hearsay and anecdotal", and then subsequently rely on the US DOS reports that could be similarly qualified. The latter reports, which the delegate preferred over the others, are also "anecdotal" in their reliance on individual instances of torture and citations of police prosecution for abuses, and "hearsay" in their reproduction of findings made by third parties, such as international agencies like HRW. Ironically, it is interesting to note the 2004 US DOS report itself cited HRW with regard to the 2002 torture of Zaki Abd al-Malak in Ismailia, Egypt, and the 2003 US DOS report cited AI concerning the State Security Investigations Service (SSIS) use of torture in March and April, 2003.

[71] The delegate effectively ignored the ultimate findings of the Committee Against Torture (CAT) in the *Agiza v. Sweden* matter ((2005) U.N. Doc. CAT/C/134/D/233/2003) that torture was systemic in Egypt. She rejected its probity as it "used its own findings from 1996" and the fact that a later CAT report from 2002 made "no conclusion as to institutionalized and systemic torture". In my opinion, this was misleading. In fact, CAT relied on its 1996 report, as one "among other" more recent sources cited in the *Agiza* matter. Further, the 2002 CAT report (*Conclusions and recommendations of the committee against torture : Egypt. 23/12/2002; . CAT/C/CR/29/4, December 23, 2002)*, referenced in the *Agiza* citation found "the persistence of the phenomenon of torture and ill-treatment of detainees by law enforcement officials" and also "the widespread evidence of torture and ill-treatment in administrative premises under the control of the State Security Investigation Department" in finding that Egypt systematically used torture.

[72] The delegate's blanket rejection of information from agencies with worldwide reputations for credibility such as AI and HRW is puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources. Indeed, the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country condition reports, which in turn are used by Immigration and Refugee tribunals, in recognition of their general reputation for credibility (France Houle, «Le fonctionnement du régime de preuve libre dans un système non-expert : le traitement symptomatique des preuves par la Section de la protection des réfugiés» (2004) 38 R.J.T. 263 at para. 71 and at n. 136).

[73] This reputation for credibility has been affirmed by Canadian courts at all levels. The Supreme Court of Canada relied on information compiled by AI, as well

as one of its reports, in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (at 829, 830, 839). That Court also cited AI in *Suresh*, above, at paragraph 11 in noting the use of torture in the context of that case.

[74] Similarly, the Federal Court has recognized the reliability of both Amnesty International and Human Rights Watch. For instance, my colleague Justice Michael Kelen referred to a HRW report as "credible" (*Buri v. Canada (M.C.I.)*, 2001 FCT 1358, [2001] F.C.J. No. 1867 (QL) at para. 22); another colleague, Justice François Lemieux, stated that an immigration officer erred in failing to consider a current AI report relating to country conditions, where the report was not among the documents she had considered and where the officer's views were contrary to its findings (*Kazi v. Canada (M.C.I.)*, 2002 FCT 178, [2002] F.C.J. No. 223 (QL) at paras. 28, 30).

[75] In *Thang v. Canada (Solicitor General)*, 2004 FC 457, [2004] F.C.J. No. 559 (QL) at para.8, Justice James O'Reilly seemingly recognized that the credibility of AI did not necessarily mandate that a decision-maker agree with the conclusions of its reports, but it did require her to state why she found the report unpersuasive. It remains open to this reviewing Court to assess whether the delegate's treatment of evidence from such credible sources was done arbitrarily or by ignoring crucial evidence.

[76] On country conditions, the delegate relied on the 2003 and 2004 US DOS reports citing serious human rights abuses committed by Egyptian Security forces, and qualifying the overall record as "poor" with "serious problems remain[ing]". She also mentions a 2005 HRW report, depicting torture as "routine", especially during interrogation and criminal investigation. She highlighted differences between the two sources with regard to the increasing accountability of police officers, stating that she preferred the US DOS reports over the HRW report as they contained greater detail. She concluded that she found "… the statement contained in the US Report that the Egyptian Government is making efforts to hold security personnel accountable more persuasive".

[77] "Efforts" to improve accountability do not alter the fundamental, overall findings of the US DOS reports, reinforced by the HRW report, that serious human rights problems exist in Egypt. Crucially, both sources essentially come to similar conclusions on the determinative issue; the current state of the human rights situation in Egypt. It is logically flawed for the delegate to highlight difference on *ex post facto* accountability when both reports agree on crucial, determinative evidence.

[78] Further, though the US DOS reports stated that security personnel have been held accountable for abuses, the detail provided in these reports related only to police officers, and to a lesser extent, prison officials. The HRW report superficially differed in that it only stated that security officials (i.e., non-police) had not been prosecuted. Substantively, both sources essentially agreed on this point.

[79] The delegate noted that "victims can bring criminal or civil actions for compensation relating to police abuse" as impliedly supporting the conclusion that Mr. Mahjoub does not face substantial risk of torture upon his return. In my view, even if torture victims can increasingly bring about *ex post facto* claims, it does little to prevent the occurrence of such abuses in the first place. Logically, such a finding

does not relate to the "personal and present" risk of torture faced by the applicant upon his return to Egypt.

[80] The delegate expressed her preference for recent reports over more dated information, as being more likely to reflect the situation of Mr. Mahjoub. In fact, she did the opposite. Substantively, she found the 2002 Court of Appeal of Austria *Bilasi-Ashri* decision, which relied upon pre-2001 evidence, to be more indicative of the current human rights situation in Egypt than more recent reports from the US DOS, HRW, and AI. Although she noted that the extradition never occurred, as Egypt refused to agree to the conditions stipulated by Austria, she nevertheless found the 2002 *Bilasi-Ashri* decision to be persuasive. She ignored that this refusal is reflective of Egypt's general attitude towards human rights. It was not tenable for her to rely on this single source of evidence to conclude that torture was not prevalent in Egypt, where the bulk of the evidence pointed to the contrary conclusion.

[81] I adopt the position of Justice Marshall Rothstein who stated in *Rosales v. Canada (M.E.I.)*, [1993] F.C.J. No. 1454 (T.D.) (QL) at paragraph 7 that a reviewable error is committed when a decision-maker "arrives at its conclusion by ignoring relevant and apparently overwhelming evidence to the contrary".

[82] I find that the delegate's selective reliance on one piece of evidence that held that human rights abuses were not a systemic problem in Egypt, against the overwhelming bulk of the evidence which essentially pointed to the contrary, to be patently unreasonable.

[83] Despite her conclusion that human rights abuses were not systematic and institutionalized in Egypt, the delegate nevertheless found that the situation was problematic. Thus, she proceeded with an evaluation of Egypt's assurances not to torture or mistreat Mr. Mahjoub in the event of his return to Egypt.

(b) <u>Egypt's assurances</u>

[84] The Supreme Court of Canada in *Suresh*, above, warned against placing too much reliance on assurances made by governments that have engaged in torture in the past. Specifically, at paragraph 124, the Court cautioned:

> […] We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. […]

[85] The unanimous Court also highlighted the difference between assurances regarding the death penalty (through a potentially legal process) and torture (an illegal process), as the former are easier to monitor and generally more reliable than the latter (*Suresh*, above, at para. 124).

[86] The Court then offered important guidance, suggesting factors the Minister may take into account in evaluating assurances given by a foreign government with regards to torture (*Suresh*, above, at para. 125:

> In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces. In addition, it must be remembered that before becoming a Convention refugee, the individual involved must establish a well-founded fear of persecution (although not necessarily torture) if deported.

[87] In my view, these factors provide a cautious framework for any analysis of the trustworthiness of assurances given by a foreign government. For instance, a government with a poor human rights record would normally require closer scrutiny of its record of compliance with assurances. A poor record of compliance may in turn require the imposition of additional conditions, such as monitoring mechanisms or other safeguards which may be strongly recommended by international human rights bodies. Conversely, a country with a good human rights record would often likely have a correspondingly good record of compliance, and therefore additional conditions may be unnecessary to enhance the reliability of assurances.

[88] In the present case, the applicant submits that the delegate failed to apply the analysis suggested by the Supreme Court and disregarded the bulk of evidence from a multitude of sources that cited Egypt's non-compliance with assurances. I agree with the applicant. Although I recognize that the Supreme Court accorded some discretion in applying these factors, I nevertheless believe it required at least a degree of analytical consideration by any decision-maker charged with assessing the reliability of assurances.

[89] Although the delegate gave little weight to an unofficial letter, she accorded considerable weight to the diplomatic notes "written in the third person and constituting official government communications". As a well established form of high level communication between the countries, she found them to be more persuasive. However, in doing so she failed to take into account the human rights record of the government as well as its record of compliance with assurances. This is particularly troubling in light of the extensive human rights reports provided to the delegate discussing the poor human rights record of Egypt. Even more troubling is the reliance of the delegate on the assurance given by the Egyptian government that Mr. Mahjoub would be treated in full conformity with the Human Rights Charter given the uncontradicted evidence before her that there is no such Charter in Egypt.

[90] I further agree with the applicant that the delegate erred by ignoring the overwhelming bulk of evidence which documents Egypt's poor record of compliance. For instance, she rejected multiple reports dealing with assurances by Human Rights Watch (including "Empty Promises: Diplomatic Assurances No Safeguard Against Torture"; "Still at Risk: Diplomatic Assurances No Safeguard Against Torture"; "Black Hole: The Fate of Islamists Rendered to Egypt"), the first two which dealt specifically and extensively with the issue; the April 2005 report (*Still at Risk*, at 5) concluded that

> [g]overnments in states where torture is a serious human rights problem almost always deny such abusive practices. It defies common sense to presume that a government that routinely flouts its obligations under international law can be trusted to respect those obligations in an isolated case.

[91] She rejected the affidavit of Ms. Gloria Nafziger, Amnesty International (AI) refugee coordinator in Toronto, which stated "individuals have reportedly been subjected to torture upon return despite assurances having been provided by Egyptian officials in advance that they would not be tortured", as the delegate found there was "little in the form of evidenciary [*sic*] basis for this conclusion".

[92] As it "relies on evidence from other reports, [and] makes general and unsubstantiated allegations" she gave little weight to a letter from the American-Egyptian professor which states these assurances are regularly and consistently violated: "The Government of Egypt frequently fails to abide by its promises when it comes to the human rights of detainees"; "a culture of impunity exists with respect to ongoing torture, especially against anyone who is viewed as an opponent of the regime"; "[i]t is certain that a person extradited to Egypt under the circumstances involved in this case will be tortured"; "[i]n my view, it is beyond doubt that if returned to Egypt Mr. Mahjoub is extremely likely to be tortured, mistreated and abused".

[93] In sum, she gave little weight to any of the reports**,** the affidavit and the letter "since they mostly stem from one case, that of Mr. Agiza, that they mostly rely on the claims from the plaintiff himself, claim [*sic*] directly contradicted by the Government of Sweden."

[94] Rather than accepting the bulk of the evidence on Egypt's poor record of compliance, the delegate unusually relied almost entirely on the <u>submissions</u> of Sweden in *Agiza v. Sweden*, above, that Egypt abided by its assurances. I find that her favouring of a biased party's submissions over the final conclusions of the CAT to be perverse.

[95] In the present case, neither of the two diplomatic notes relied upon by the delegate mention monitoring mechanisms, and they contain no specific commitments not to abuse Mr. Mahjoub. The only element that could be construed as an assurance is a general statement that he would be treated in accordance with the Human Right Charter, though the evidence demonstrates it does not exist.

[96] Furthermore, an effective monitoring mechanism was specifically recommended by the Special Rapporteur on Torture as a precondition for the return of Mr. Mahjoub (*Letter from Theo van Boven, Special Rapporteur on Torture of the Commission on Human Rights, to His Excellency The Minister of Foreign Affairs of Canada*; April 2, 2002). There is nothing in the record that indicates any such mechanism or other "safeguard", nor anything to suggest that Canada ever sought such a condition from Egypt. Indeed, there is nothing in the record which demonstrates any specific requests by the Canadian government in terms of assurances.

[97] I remain mindful that the proper role of this reviewing court does not entail a reweighing of the evidence. However, the delegate consistently ignored critical evidence, failed to take important factors into consideration and arbitrarily relied on selected evidence. This flawed approach can be considered nothing short of patently unreasonable with regard to the substantial risk of torture issue.

4. **Best Interests of the children**

[98] The delegate considered the submissions made by Mr. Mahjoub's wife that his deportation would have a detrimental impact on their children but concluded that "[h]owever detrimental the effect that Mr. Mahjoub's deportation would have [*sic*] on his children, I am unable to find that their best interest outweighs my findings that Mr. Mahjoub is a danger to the security of Canada."

[99] The applicant submits that this statement suggests that the best interests of the children *could not* outweigh the danger he posed to Canada; without a corresponding analysis of the evidence, it does not meet the requirement to provide cogent reasons. Such a failure to provide reasons addressing the factual specificities of this issue constitutes an error in his view.

[100] The respondents submit that Mr. Mahjoub is not entitled to a positive determination of this issue merely on the grounds that he has children in Canada, and that it is in their interest that he remains here. The best interests of his children do not trump the substantial danger that the applicant poses to Canadian security. Therefore this decision is reasonable, and the reasons sufficiently reveal its basis.

[101] My colleague Justice MacKay addressed a similar issue in *Jaballah*, above, at paragraph 38, and I agree with his finding in that case that the delegate deserves considerable deference with regard to this issue.

[102] I am not persuaded in the circumstances of the present matter that the delegate made her determination without regard to the information before her. She acknowledged Mr. Mahjoub's specific situation, as well as the impact that his deportation was likely to have on his children, but nevertheless concluded that their best interests did not affect her ultimate determination. I can find no grounds for this Court's intervention with regard to this issue.

5. **Alternatives to removal**

[103] The delegate concluded that the release of Mr. Mahjoub under conditions would compromise national security, as he would be able to re-establish his links to terrorist networks, and be able to participate in the facilitation and furthering of terrorist activities. She expressed concern that by virtue of the terrorist network's sophistication and proven capacities, Mr. Mahjoub could potentially leave the country and "disappear". In her view, this all precluded any possibility of conditional release.

[104] In considering the option of removal to a third country, the delegate canvassed his position on the issue but concluded that "Mr. Mahjoub's counsel has not provided any listing of countries that would be considered safe third countries [...]".

[105] The applicant submits the delegate's rejection of conditional release as an option usurps the court's role in determining whether a release can be made in a way that protects Canada's security. He argues the delegate did not properly consider the effect of his "blown cover" and fragile mental/physical state and that the decision reflects an exaggerated and stereotypical view of terrorists. He also challenges the delegate's position that he has the onus to identify a safe third country alternative.

[106] The respondents distinguish the present situation from that in *Suresh*, above, in view of the delegate's determination that Mr. Mahjoub does not face substantial risk of torture or death if returned to Egypt. This essential difference means that the same importance should not be attached to safe third country alternatives in the present case.

[107] The delegate's expression of her opinion with regard to conditional release does not preclude this Court from determining whether the applicant may be released with conditions, where such an application is made. I make no further comment on this issue, as it forms the subject matter of another proceeding before this Court.

[108] With regard to the third country alternative, the Supreme Court of Canada specified that a deportation to torture issue required the consideration of specific factors such as the human rights record of the receiving state, personal risk to the individual, assurances and so on, and that "[i]t may also involve a reassessment of the refugee's initial claim and a determination of whether a third country is willing to accept the refugee" (*Suresh*, above, at para. 39; *emphasis added*). I concur with the respondents that in light of this permissive language used by the Court in *Suresh*, above, there was no obligation on the delegate to necessarily conduct an analysis concerning third country alternatives. In view of her conclusion that Mr. Mahjoub did not face a substantial risk of torture on his return to Egypt, there was no reason for the delegate to proceed with such an analysis.

CONCLUSION

[109] In light of my preceding reasons, I find that the delegate's decision with regard to the substantial risk of torture faced by Mr. Mahjoub on his return to Egypt was patently unreasonable. Mr. Mahjoub's application for judicial review is allowed, and the delegate's decision is set aside. This matter is to be remitted for re-determination in accordance with these reasons by another delegate of the Minister.

[110] I am cognizant that in redetermining this matter, it is possible for the subsequent decision-maker to conclude that Mr. Mahjoub faces a substantial risk of torture and that he continues to pose a danger to the security of Canada. This would inevitably lead to the issue of whether the present circumstances justify deportation to face torture, the balancing exercise addressed by the Supreme Court of Canada in *Suresh*, above.

[111] However, this is not a live issue in the present matter, and therefore it would be beyond my purview to consider it. In coming to this conclusion, I rely on comments made by my colleague Justice Dawson in *Mahjoub* 2005, above, at paragraph 65, where she similarly declined to deal with the Charter issues as it was unnecessary to do so:

> The Supreme Court has … cautioned that Charter issues should not be decided where it is not necessary to do so, and has stressed that Charter issues are to be decided on a proper evidentiary record. See, for example, *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paragraphs 6 to 12 for authority that unnecessary issues of law should not be decided (particularly constitutional issues) …

[112] At the end of the hearing, one of the counsel for the applicant, Ms. Jackman, indicated that if the Court based its decision on administrative law principles, there would probably not be a certified question.

[113] The Court agreed to allow the parties one week to make submissions with regard to a potential question, or questions, to be certified. Accordingly, counsel for the parties have 7 days following the release of this decision, to file submissions with the Court in this regard, if they so chose.

JUDGMENT

The application for judicial review is allowed and the delegate's decision to return the applicant to Egypt is set aside. This matter is to be remitted for re-determination in accordance with these reasons by another delegate of the Minister.

Counsel for the parties have 7 days following the release of this decision to file submissions with the Court for certification of a question or questions.

"Danièle Tremblay-Lamer"

Judge