SUPREME COURT OF CANADA

CITATION: Charkaoui *v.* Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9

DATE: 20070223
DOCKET: 30762, 30929, 31178

BETWEEN:

Adil Charkaoui
Appellant
and
Minister of Citizenship and Immigration and
Minister of Public Safety and Emergency Preparedness
Respondents
- and -
Attorney General of Ontario, Amnesty International,
British Columbia Civil Liberties Association, Canadian Bar Association,
Canadian Civil Liberties Association, Canadian Council for Refugees,
African Canadian Legal Clinic, International Civil Liberties Monitoring Group,
National Anti-Racism Council of Canada, Canadian Arab Federation,
Canadian Council on American-Islamic Relations, Canadian Muslim Civil
Liberties Association, Criminal Lawyers' Association
(Ontario), Federation of Law Societies of Canada,
University of Toronto, Faculty of Law — International
Human Rights Clinic and Human Rights Watch
Interveners

AND BETWEEN:

Hassan Almrei
Appellant
and
Minister of Citizenship and Immigration and
Minister of Public Safety and Emergency Preparedness
Respondents
- and -
Attorney General of Ontario, Amnesty International,
British Columbia Civil Liberties Association, Canadian Bar Association,
Canadian Civil Liberties Association, Canadian Council for Refugees,
African Canadian Legal Clinic, International Civil Liberties Monitoring Group,
National Anti-Racism Council of Canada, Canadian Council on American-Islamic
Relations, Canadian Muslim Civil Liberties Association,
Criminal Lawyers' Association (Ontario), Federation of Law Societies of Canada,
University of Toronto, Faculty of Law — International
Human Rights Clinic and Human Rights Watch
Interveners

AND BETWEEN:

Mohamed Harkat

Appellant

and

Minister of Citizenship and Immigration, Minister of Public Safety and Emergency Preparedness and Attorney General of Canada

Respondents

- and -

Attorney General of Ontario, Amnesty International, British Columbia Civil Liberties Association, Canadian Bar Association, Canadian Civil Liberties Association, Canadian Council for Refugees, African Canadian Legal Clinic, International Civil Liberties Monitoring Group, National Anti-Racism Council of Canada, Canadian Council on American-Islamic Relations, Canadian Muslim Civil Liberties Association, Criminal Lawyers' Association (Ontario), Federation of Law Societies of Canada, University of Toronto, Faculty of Law — International Human Rights Clinic and Human Rights Watch

Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 143)	McLachlin C.J. (Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

Charkaoui *v.* Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9

Adil Charkaoui *Appellant*

v.

Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness *Respondents*

and

Attorney General of Ontario, Amnesty International, British Columbia Civil Liberties Association, Canadian Bar Association, Canadian Civil Liberties Association, Canadian Council for Refugees, African Canadian Legal Clinic, International Civil Liberties Monitoring Group, National Anti-Racism Council of Canada, Canadian Arab Federation, Canadian Council on American-Islamic Relations, Canadian Muslim Civil Liberties Association, Criminal Lawyers' Association (Ontario), Federation of Law Societies of Canada, University of Toronto, Faculty of Law — International Human Rights Clinic, and Human Rights Watch *Interveners*

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Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness *Respondents*

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Attorney General of Ontario, Amnesty International, British Columbia Civil Liberties Association, Canadian Bar Association, Canadian Civil Liberties Association, Canadian Council for Refugees, African Canadian Legal Clinic, International Civil Liberties Monitoring Group, National Anti-Racism Council of Canada, Canadian Council on American-Islamic Relations, Canadian Muslim Civil Liberties Association, Criminal Lawyers' Association (Ontario), Federation of Law Societies of Canada, University of Toronto, Faculty of Law — International Human Rights Clinic, and Human Rights Watch *Interveners*

- and -

Mohamed Harkat *Appellant*

v.

Minister of Citizenship and Immigration, Minister of Public Safety and Emergency Preparedness, and Attorney General of Canada *Respondents*

and

Attorney General of Ontario, Amnesty International, British Columbia Civil Liberties Association, Canadian Bar Association, Canadian Civil Liberties Association, Canadian Council for Refugees, African Canadian Legal Clinic, International Civil Liberties Monitoring Group, National Anti-Racism Council of Canada, Canadian Council on American-Islamic Relations, Canadian Muslim Civil Liberties Association, Criminal Lawyers' Association (Ontario), Federation of Law Societies of Canada, University of Toronto, Faculty of Law — International Human Rights Clinic, and Human Rights Watch *Interveners*

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2006: June 13, 14, 15; 2007: February 23.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the federal court of appeal

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Fair hearing — Immigration — Removal — Permanent resident and foreign nationals detained following issuance of certificates stating that they are inadmissible to Canada on grounds of security — Judge reviewing reasonableness of certificate must ensure confidentiality of information on which certificate is based if disclosure would be injurious to national security — Named persons in certificates denied opportunity to known case put against them — Whether named persons deprived of their right to life, liberty and security of person in accordance with principles of fundamental justice — If not, whether limit imposed on named persons' constitutional right justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 7.

Constitutional law — Charter of Rights — Arbitrary detention — Right to prompt review of detention — Immigration — Removal — Detention of foreign

nationals automatic upon issuance of certificate stating they are inadmissible to Canada on grounds of security — Whether detention without warrant or lack of review of detention until 120 days after reasonableness of certificate judicially confirmed infringes guarantee against arbitrary detention — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 9, 10(c).

Constitutional law — Charter of Rights — Cruel and unusual treatment — Fundamental justice — Immigration — Extended period of detention pending removal — Permanent resident and foreign nationals detained following issuance of certificates stating that they are inadmissible to Canada on grounds of security — Immigration legislation permitting lengthy and indeterminate detention or lengthy periods subject to onerous release conditions — Whether legislation constitutes cruel and unusual treatment or is inconsistent with principles of fundamental justice — Canadian Charter of Rights and Freedoms, ss. 7, 12.

Constitutional law — Charter of Rights — Right to equality — Immigration — Removal — Whether deportation scheme applicable only to non-citizens infringes equality rights — Canadian Charter of Rights and Freedoms, s. 15(1).

Constitutional law — Rule of law — Immigration — Removal — Permanent resident and foreign nationals detained following issuance of certificates stating that they are inadmissible to Canada on grounds of security — Judge's determination on reasonableness of certificate final — Whether unavailability of appeal infringes rule of law — Whether rule of law prohibits automatic detention or detention on basis of executive decision.

Immigration law — Inadmissibility and removal — Permanent resident and foreign nationals detained following issuance of certificates stating that they are inadmissible to Canada on grounds of security — Whether scheme under which certificates issued and detentions ordered constitutional — Canadian Charter of Rights and Freedoms, ss. 1, 7, 9, 10(c), 12, 15 — Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 33, 77 to 85.

The *Immigration and Refugee Protection Act* ("*IRPA*") allows the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate declaring that a foreign national or permanent resident is inadmissible to Canada on grounds of security, among others (s. 77), and leading to the detention of the person named in the certificate. The certificate and the detention are both subject to review by a judge of the Federal Court, in a process that may deprive the person of some or all of the information on the basis of which the certificate was issued or the detention ordered (s. 78). Once a certificate is issued, a permanent resident may be detained, and the detention must be reviewed within 48 hours; in the case of a foreign national, the detention is automatic and that person cannot apply for review until 120 days after a judge determines the certificate to be reasonable (ss. 82-84). The judge's determination on the reasonableness of the certificate cannot be appealed or judicially reviewed (s. 80(3)). If the judge finds the certificate to be reasonable, it becomes a removal order, which cannot be appealed and which may be immediately enforced (s. 81).

Certificates of inadmissibility have been issued by the Ministers against the appellants C, H and A. While C is a permanent resident, H and A are foreign

nationals who had been recognized as Convention refugees. All were living in Canada when they were arrested and detained on the basis of allegations that they constituted a threat to the security of Canada by reason of involvement in terrorist activities. C and H were released on conditions in 2005 and 2006 respectively, but A remains in detention. Both the Federal Court and the Federal Court of Appeal upheld the constitutional validity of the *IRPA*'s certificate scheme.

Held: The appeals should be allowed.

(1) *Procedure for determining reasonableness of certificate and for review of detention*

The procedure under the *IRPA* for determining whether a certificate is reasonable and the detention review procedures infringe s. 7 of the *Charter*. While the deportation of a non-citizen in the immigration context may not in itself engage s. 7, features associated with deportation may do so. Here, s. 7 is clearly engaged because the person named in a certificate faces detention pending the outcome of the proceedings and because the process may lead to the person's removal to a place where his or her life or freedom would be threatened. Further, the *IRPA*'s impairment of the named person's right to life, liberty and security is not in accordance with the principles of fundamental justice. The procedure for determining whether a certificate is reasonable and the detention review procedure fail to assure the fair hearing that s. 7 requires before the state deprives a person of this right. [13-14] [17-18] [65]

The right to a fair hearing comprises the right to a hearing before an independent and impartial magistrate who must decide on the facts and the law, the right to know the case put against one, and the right to answer that case. While the

IRPA procedures properly reflect the exigencies of the security context, security concerns cannot be used, at the s. 7 stage of the analysis, to excuse procedures that do not conform to fundamental justice. Here, the *IRPA* scheme includes a hearing and meets the requirement of independence and impartiality, but the secrecy required by the scheme denies the person named in a certificate the opportunity to know the case put against him or her, and hence to challenge the government's case. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law. The judges of the Federal Court, who are required under the *IRPA* to conduct a searching examination of the reasonableness of the certificate, in an independent and judicial fashion and on the material placed before them, do not possess the full and independent powers to gather evidence that exist in an inquisitorial process. At the same time, the person named in a certificate is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process. The result is a concern that the judge, despite his or her best efforts to get all the relevant evidence, may be obliged, perhaps unknowingly, to make the required decision based on only part of the relevant evidence. Similar concerns arise with respect to the requirement that the decision be based on the law. Without knowledge of the information put against him or her, the person named in a certificate may not be in a position to raise legal objections relating to the evidence, or to develop legal arguments based on the evidence. If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. The *IRPA* provides neither. [23] [27-31] [38] [45] [50-52] [61] [65]

The infringement of s. 7 is not saved by s. 1 of the *Charter*. While the protection of Canada's national security and related intelligence sources constitutes a pressing and substantial objective, and the non-disclosure of evidence at certificate

hearings is rationally connected to this objective, the *IRPA* does not minimally impair the rights of persons named in certificates. Less intrusive alternatives developed in Canada and abroad, notably the use of special counsel to act on behalf of the named persons, illustrate that the government can do more to protect the individual while keeping critical information confidential than it has done in the *IRPA*. [66] [68] [70] [73] [85] [87]

(2) *Detention of foreign nationals*

The detention of foreign nationals without warrant does not infringe the guarantee against arbitrary detention in s. 9 of the *Charter*. The triggering event for the detention of a foreign national is the signing under s. 77 of the *IRPA* of a certificate stating that the foreign national is inadmissible on grounds of security, violation of human or international rights, serious criminality or organized criminality. The security ground is based on the danger posed by the named person, and therefore provides a rational foundation for the detention. However, the lack of review of the detention of foreign nationals until 120 days after the reasonableness of the certificate has been judicially confirmed (s. 84(2)) infringes the guarantee against arbitrary detention in s. 9 of the *Charter*, which encompasses the right to prompt review of detention under s. 10(*c*) of the *Charter*. While there may be a need for some flexibility regarding the period for which a suspected terrorist may be detained, this cannot justify the complete denial of a timely detention review. [88-89] [91] [93]

The infringement of ss. 9 and 10(*c*) is not justified under s. 1 of the *Charter*. The *IRPA* provides permanent residents who pose a danger to national security with a mandatory detention review within 48 hours. It follows that denial of

review for foreign nationals for 120 days after the certificate is confirmed does not minimally impair the rights guaranteed by ss. 9 and 10(*c*). [93-94]

(3) *Extended periods of detention*

While the s. 12 guarantee against cruel and unusual treatment cannot be used as a mechanism to challenge the overall fairness of a particular legislative regime, indefinite detention without hope of release or recourse to a legal process to procure release may cause psychological stress and therefore constitute cruel and unusual treatment. The *IRPA* in principle imposes detention only pending deportation, but it may in fact permit lengthy and indeterminate detention, or lengthy periods of detention subject to onerous release conditions. The principles of fundamental justice and the guarantee of freedom from cruel and unusual treatment require that, where a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. The person must be accorded meaningful opportunities to challenge his or her continued detention or the conditions of his or her release. [97-98] [105] [107]

Extended periods of detention pending deportation under the certificate provisions of the *IRPA* do not violate ss. 7 and 12 of the *Charter* if accompanied by a process that provides regular opportunities for review of detention, taking into account all of the relevant factors, including the reasons for detention, the length of the detention, the reasons for the delay in deportation, the anticipated future length of detention, if applicable, and the availability of alternatives to detention. However, this

does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice. [110-116] [123]

(4) *Differential treatment of citizens and non-citizens*

Since s. 6 of the *Charter* specifically provides for differential treatment of citizens and non-citizens in deportation matters, a deportation scheme that applies to non-citizens, but not to citizens, does not for that reason alone infringe s. 15 of the *Charter*. Even though the detention of some of the appellants has been long, the record does not establish that the detentions at issue have become unhinged from the state's purpose of deportation. [129] [131]

(5) *Rule of law*

The rule of law is not infringed by (1) the unavailability of an appeal of the designated judge's review of the reasonableness of the certificate; or (2) the provision for the issuance of an arrest warrant by the executive in the case of a permanent resident, or for mandatory arrest without a warrant following an executive decision in the case of a foreign national. First, there is no constitutional right to an appeal, nor can such a right be said to flow from the rule of law in the present context. Second, the rule of law does not categorically prohibit automatic detention, or detention on the basis of an executive decision, and the constitutional protections surrounding arrest and detention are set out in the *Charter*. [133] [136-137]

(6) *Remedy*

The *IRPA*'s procedure for the judicial approval of certificates is inconsistent with the *Charter*, and hence of no force or effect. This declaration is suspended for one year from the date of this judgment. If the government chooses to have the reasonableness of C's certificate determined during the one-year suspension period, the existing process under the *IRPA* will apply. After that period, H and A's certificates will lose their "reasonable" status and it will be open to them to apply to have the certificates quashed. Likewise, any certificates or detention reviews occurring after the one-year delay will be subject to the new process devised by Parliament. Further, s. 84(2), which denies a prompt hearing to foreign nationals by imposing a 120-day embargo, after confirmation of the certificate, on applications for release, is struck, and s. 83 is modified so as to allow for review of the detention of a foreign national both before and after the certificate has been deemed reasonable. [139-141]

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Center v. Quebec (Minister of Health and Social Services), [2001] 2 S.C.R. 281, 2001 SCC 41; *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Jaballah, Re* (2004), 247 F.T.R. 68, 2004 FC 299; *Charkaoui (Re)*, [2005] 3 F.C.R. 389, 2005 FC 248; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40; *R. v. Taubler* (1987), 20 O.A.C. 64; *R. v. Turlon* (1989), 49 C.C.C. (3d) 186; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, 2005 SCC 44; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Malik*, [2005] B.C.J. No. 521 (QL), 2005 BCSC 350; Eur. Court H.R., *Chahal v. United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V; *M. v. Secretary of State for the Home Department*, [2004] 2 All E.R. 863, [2004] EWCA Civ 324, aff'g [2004] UKSIAC 17/2002 (BAILII), March 8, 2004; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Swain*, [1991] 1 S.C.R. 933; *Rasul v. Bush*, 542 U.S. 466 (2004); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Slivenko v. Latvia* [GC], No. 48321/99, ECHR 2003-X; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Wiles*, [2005] 3 S.C.R. 895, 2005 SCC 84; *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214; Eur. Court H.R., *Soering* case, judgment of 7 July 1989, Series A, No. 161; *Charkaoui (Re)*,

[2004] 1 F.C.R. 528, 2003 FC 882; *Ahani v. Canada (Minister of Citizenship and Immigration)* (2000), 24 Admin. L.R. (3d) 171; *Harkat v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 321, 2006 FC 628; *Almrei v. Canada (Minister of Citizenship and Immigration)* (2005), 270 F.T.R. 1, 2005 FC 1645; *R. v. Governor of Durham Prison, ex parte Singh*, [1984] 1 All E.R. 983; *A. v. Secretary of State for the Home Department*, [2005] 3 All E.R. 169, [2004] UKHL 56; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *Zündel, Re* (2004), 331 N.R. 180, 2004 FCA 394.

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APPEAL from a judgment of the Federal Court of Appeal (Richard C.J. and Décary and Létourneau JJ.A.), [2005] 2 F.C.R. 299, 247 D.L.R. (4th) 405, 328 N.R. 201, 126 C.R.R. (2d) 298, 42 Imm. L.R. (3d) 165, [2004] F.C.J. No. 2060 (QL), 2004 FCA 421, upholding a decision of Noël J., [2004] 3 F.C.R. 32, 253 F.T.R. 22, 38 Imm. L.R. (3d) 56, [2003] F.C.J. No. 1816 (QL), 2003 FC 1419, refusing to declare parts of the *Immigration and Refugee Protection Act* unconstitutional at the request of the appellant Charkaoui. Appeal allowed.

APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Sexton and Sharlow JJ.A.), [2005] 3 F.C.R. 142, 251 D.L.R. (4th) 13, 330 N.R. 73, 45 Imm. L.R. (3d) 163, [2005] F.C.J. No. 213 (QL), 2005 FCA 54, upholding a decision of Blanchard J., [2004] 4 F.C.R. 327, 249 F.T.R. 53, 38 Imm. L.R. (3d) 117, [2004] F.C.J. No. 509 (QL), 2004 FC 420, refusing to declare parts of the *Immigration and Refugee Protection Act* unconstitutional at the request of the appellant Almrei. Appeal allowed.

APPEAL from a judgment of the Federal Court of Appeal (Richard C.J. and Décary and Létourneau JJ.A.) (2005), 340 N.R. 286, [2005] F.C.J. No. 1467 (QL), 2005 FCA 285, upholding a decision of Dawson J. (2005), 261 F.T.R. 52, 45 Imm. L.R. (3d) 65, [2005] F.C.J. No. 481 (QL), 2005 FC 393, refusing to declare parts of the *Immigration and Refugee Protection Act* unconstitutional at the request of the appellant Harkat. Appeal allowed.

Johanne Doyon and *Julius H. Grey*, for the appellant Charkaoui.

John Norris and *Barbara Jackman*, for the appellant Almrei.

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Lorne Waldman, for the intervener the Canadian Bar Association.

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David Baker and *Faisal Bhabha*, for the interveners the Canadian Council on American-Islamic Relations and the Canadian Muslim Civil Liberties Association.

Michael Code, for the intervener the Criminal Lawyers' Association (Ontario).

Neil Finkelstein and *Catherine Beagan Flood*, for the intervener the Federation of Law Societies of Canada.

Sujit Choudhry and *Robert A. Centa*, for the interveners the University of Toronto, Faculty of Law — International Human Rights Clinic, and Human Rights Watch.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.

2 In this case, we are confronted with a statute, the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), that attempts to resolve this tension in the immigration context by allowing the Minister of Citizenship and Immigration (the "Minister"), and the Minister of Public Safety and Emergency Preparedness (collectively "the ministers") to issue a certificate of inadmissibility leading to the detention of a permanent resident or foreign national deemed to be a threat to national security. The certificate and the detention are both subject to review by a judge, in a process that may deprive the person named in the certificate of some or all of the information on the basis of which the certificate was issued or the detention ordered. The question is whether the solution that Parliament has enacted conforms to the Constitution, and in particular the guarantees in the *Canadian Charter of Rights and Freedoms* that protect against unjustifiable intrusions on liberty, equality and the freedom from arbitrary detention and from cruel and unusual treatment.

3 I conclude that the *IRPA* unjustifiably violates s. 7 of the *Charter* by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person's interests. I also conclude that some of the time limits in the provisions for continuing detention of a foreign national violate ss. 9 and 10(*c*) because they are arbitrary. I find that s. 12 has not been shown to be violated since a meaningful detention review process offers relief against the possibility of indefinite detention. Finally, I find that there is no breach of the s. 15 equality right.

II. Background

4 The provisions of the *IRPA* at issue in this case, reproduced in the Appendix, are part of Canada's immigration law. Their purpose is to permit the removal of non-citizens living in Canada — permanent residents and foreign nationals — on various grounds, including connection with terrorist activities. The scheme permits deportation on the basis of confidential information that is not to be disclosed to the person named in the certificate or anyone acting on the person's behalf or in his or her interest. The scheme was meant to "facilitat[e] the early removal of persons who are inadmissible on serious grounds, including persons posing a threat to the security of Canada" (*Clause by Clause Analysis* (2001), at p. 72). In reality, however, it may also lead to long periods of incarceration.

5 The *IRPA* requires the ministers to sign a certificate declaring that a foreign national or permanent resident is inadmissible to enter or remain in Canada on grounds of security, among others: s. 77. A judge of the Federal Court then reviews the certificate to determine whether it is reasonable: s. 80. If the state so requests, the

review is conducted *in camera* and *ex parte*. The person named in the certificate has no right to see the material on the basis of which the certificate was issued. Non-sensitive material may be disclosed; sensitive or confidential material must not be disclosed if the government objects. The named person and his or her lawyer cannot see undisclosed material, although the ministers and the reviewing judge may rely on it. At the end of the day, the judge must provide the person with a summary of the case against him or her — a summary that does not disclose material that might compromise national security. If the judge determines that the certificate is reasonable, there is no appeal and no way to have the decision judicially reviewed: s. 80(3).

6 The consequences of the issuance and confirmation of a certificate of inadmissibility vary, depending on whether the person is a permanent resident of Canada or a foreign national whose right to remain in Canada has not yet been confirmed. Permanent residents who the ministers have reasonable grounds to believe are a danger to national security *may* be held in detention. In order to detain them, the ministers must issue a warrant stating that the person is a threat to national security or to another person, or is unlikely to appear at a proceeding or for removal. Foreign nationals, meanwhile, *must* be detained once a certificate is issued: under s. 82(2), the detention is automatic. While the detention of a permanent resident must be reviewed within 48 hours, a foreign national, on the other hand, must apply for review, but may not do so until 120 days after a judge of the Federal Court determines the certificate to be reasonable. In both cases, if the judge finds the certificate to be reasonable, it becomes a removal order. Such an order deprives permanent residents of their status; their detention is then subject to review on the same basis as that of other foreign nationals.

7 The removal order cannot be appealed and may be immediately enforced, thus eliminating the requirement of holding or continuing an examination or an admissibility hearing: s. 81(*b*). The detainee, whether a permanent resident or a foreign national, may no longer apply for protection: s. 81(*c*). Additionally, a refugee or a protected person determined to be inadmissible on any of the grounds for a certificate loses the protection of the principle of non-refoulement under s. 115(1) 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: s. 115(2). This means that he or she may, at least in theory, be deported to torture.

8 A permanent resident detained under a certificate is entitled to a review of his or her detention every six months. Under s. 83(3), a judge must order the detention of a permanent resident to be continued if the judge is satisfied that the person continues to pose a danger to security or to the safety of another, or is unlikely to appear at a proceeding or for removal.

9 The detention of foreign nationals, on the other hand, is mandatory. If a foreign national has not been removed within 120 days of the certificate being found reasonable by a judge, however, the judge may order the person released on appropriate conditions if "satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person": s. 84(2). Even if released, the foreign national may be deported.

10 Mr. Charkaoui is a permanent resident, while Messrs. Harkat and Almrei are foreign nationals who had been recognized as Convention refugees. All were living in Canada when they were arrested and detained. At the time of the decisions on appeal, all had been detained for some time — since 2003, 2002 and 2001 respectively. In 2001, a judge of the Federal Court determined Mr. Almrei's certificate to be reasonable; another determined Mr. Harkat's certificate to be reasonable in 2005. The reasonableness of Mr. Charkaoui's certificate has yet to be determined. Messrs. Charkaoui and Harkat were released on conditions in 2005 and 2006 respectively, but Mr. Harkat has been advised that he will be deported to Algeria, which he is contesting in other proceedings. Mr. Almrei remains in detention. In all these cases, the detentions were based on allegations that the individuals constituted a threat to the security of Canada by reason of involvement in terrorist activities. In the course of their detentions, all three appellants challenged, unsuccessfully, the constitutionality of the *IRPA*'s certificate scheme and detention review process.

III. Issues

11 The appellants argue that the *IRPA*'s certificate scheme under which their detentions were ordered is unconstitutional. They argue that it violates five provisions of the *Charter*: the s. 7 guarantee of life, liberty and security of the person; the s. 9 guarantee against arbitrary detention; the s. 10(*c*) guarantee of a prompt review of detention; the s. 12 guarantee against cruel and unusual treatment; and the s. 15 guarantee of equal protection and equal benefit of the law. They also allege violations of unwritten constitutional principles. I discuss these claims under the following headings:

A. Does the *procedure* under the *IRPA* for determining the reasonableness of the certificate infringe s. 7 of the *Charter*, and if so, is the infringement justified under s. 1 of the *Charter*?

B. Does the *detention* of permanent residents or foreign nationals under the *IRPA* infringe ss. 7, 9, 10(*c*) or 12 of the *Charter*, and if so, are the infringements justified under s. 1 of the *Charter*?

C. Do the certificate and detention review procedures *discriminate* between citizens and non-citizens, contrary to s. 15 of the *Charter*, and if so, is the discrimination justified under s. 1 of the *Charter*?

D. Are the *IRPA* certificate provisions inconsistent with the constitutional principle of the rule of law?

A. *Does the Procedure Under the IRPA for Determining the Reasonableness of the Certificate Infringe Section 7 of the Charter, and if so, Is the Infringement Justified Under Section 1 of the Charter?*

1. Is Section 7 of the *Charter* Engaged?

12 Section 7 of the *Charter* guarantees the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. This requires a claimant to prove two matters: first, that there has been or could be a deprivation of the right to life, liberty and security of the person, and second, that the deprivation was not or would not be in accordance with the principles of fundamental justice. If the claimant succeeds, the government

bears the burden of justifying the deprivation under s. 1, which provides that the rights guaranteed by the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

13 The provisions at issue, found at Division 9 of Part 1 of the *IRPA*, clearly deprive detainees such as the appellants of their liberty. The person named in a certificate can face detention pending the outcome of the proceedings. In the case of a foreign national, this detention is automatic and lasts at least until 120 days *after* the certificate is deemed reasonable. For both foreign nationals and permanent residents, the period of detention can be, and frequently is, several years. Indeed, Mr. Almrei remains in detention and does not know when, if ever, he will be released.

14 The detainee's security may be further affected in various ways. The certificate process may lead to removal from Canada, to a place where his or her life or freedom would be threatened: see e.g. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 207, *per* Wilson J. A certificate may bring with it the accusation that one is a terrorist, which could cause irreparable harm to the individual, particularly if he or she is eventually deported to his or her home country. Finally, a person who is determined to be inadmissible on grounds of security loses the protection of s. 115(1) of the *IRPA*, which means that under s. 115(2), he or she can be deported to torture if the Minister is of the opinion that the person is a danger to the security of Canada.

15 In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, this Court stated, at para. 76, that "barring extraordinary circumstances, deportation to torture will generally violate the principles of

fundamental justice protected by s. 7 of the *Charter*." More recently, the Federal Court has ruled that another certificate detainee is at risk of torture if deported, and that there were no exceptional circumstances justifying such a deportation: *Jaballah (Re)* (2006), 148 C.R.R. (2d) 1, 2006 FC 1230. The appellants claim that they would be at risk of torture if deported to their countries of origin. But in each of their cases, this remains to be proven as part of an application for protection under the provisions of Part 2 of the *IRPA*. The issue of deportation to torture is consequently not before us here.

16 The individual interests at stake suggest that s. 7 of the *Charter*, the purpose of which is to protect the life, liberty and security of the person, is engaged, and this leads directly to the question whether the *IRPA*'s impingement on these interests conforms to the principles of fundamental justice. The government argues, relying on *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, 2005 SCC 51, that s. 7 does not apply because this is an immigration matter. The comment from that case on which the government relies was made in response to a claim that to deport a non-citizen violates s. 7 of the *Charter*. In considering this claim, the Court, *per* McLachlin C.J., noted, at para. 46, citing *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733, that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada". The Court added: "Thus the deportation of a non-citizen <u>in itself</u> cannot implicate the liberty and security interests protected by s. 7" (*Medovarski*, at para. 46 (emphasis added)).

17 *Medovarski* thus does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny. While the

deportation of a non-citizen in the immigration context may not *in itself* engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so.

18 In determining whether s. 7 applies, we must look at the interests at stake rather than the legal label attached to the impugned legislation. As Professor Hamish Stewart writes:

> Many of the principles of fundamental justice were developed in criminal cases, but their application is not restricted to criminal cases: they apply whenever one of the three protected interests is engaged. Put another way, the principles of fundamental justice apply in *criminal* proceedings, not because they are criminal proceedings, but because the liberty interest is always engaged in criminal proceedings. [Emphasis in original.]
>
> ("Is Indefinite Detention of Terrorist Suspects Really Constitutional?" (2005), 54 *U.N.B.L.J.* 235, at p. 242)

I conclude that the appellants' challenges to the fairness of the process leading to possible deportation and the loss of liberty associated with detention raise important issues of liberty and security, and that s. 7 of the *Charter* is engaged.

2. How Do Security Considerations Affect the Section 7 Analysis?

19 Section 7 of the *Charter* requires that laws that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process. These principles include a guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security: *Suresh*, at para. 113.

20 Section 7 of the *Charter* requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake: *United States of America v. Ferras*, [2006] 2 S.C.R. 77, 2006 SCC 33, at para. 14; *R. v. Rodgers*, [2006] 1 S.C.R. 554, 2006 SCC 15, at para. 47; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 656-57. The procedures required to meet the demands of fundamental justice depend on the context (see *Rodgers*; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361; *Chiarelli*, at pp. 743-44; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at paras. 20-21). Societal interests may be taken into account in elucidating the applicable principles of fundamental justice: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 98.

21 Unlike s. 1, s. 7 is not concerned with whether a limit on life, liberty or security of the person is *justified*, but with whether the limit has been imposed in a way that respects the principles of fundamental justice. Hence, it has been held that s. 7 does not permit "a free-standing inquiry . . . into whether a particular legislative measure 'strikes the right balance' between individual and societal interests in general" (*Malmo-Levine*, at para. 96). Nor is "achieving the right balance . . . itself an overarching principle of fundamental justice" (*ibid.*). As the majority in *Malmo-Levine* noted, to hold otherwise "would entirely collapse the s. 1 inquiry into s. 7" (*ibid.*). This in turn would relieve the state from its burden of justifying intrusive measures, and require the *Charter* complainant to show that the measures are not justified.

22 The question at the s. 7 stage is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation. The issue is whether the process is fundamentally unfair to the affected person. If so, the deprivation of life, liberty or security of the person simply does not conform to the requirements of s. 7. The inquiry then shifts to s. 1 of the *Charter*, at which point the government has an opportunity to establish that the flawed process is nevertheless justified having regard, notably, to the public interest.

23 It follows that while administrative constraints associated with the context of national security may inform the analysis on whether a particular process is fundamentally unfair, security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s. 7 stage of the analysis. If the context makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found. But the principles must be respected to pass the hurdle of s. 7. That is the bottom line.

24 In the instant case, the context is the detention, incidental to their removal or an attempt to remove them from the country, of permanent residents and foreign nationals who the ministers conclude pose a threat to national security. This context may impose certain administrative constraints that may be properly considered at the s. 7 stage. Full disclosure of the information relied on may not be possible. The executive branch of government may be required to act quickly, without recourse, at least in the first instance, to the judicial procedures normally required for the deprivation of liberty or security of the person.

25 At the same time, it is a context that may have important, indeed chilling, consequences for the detainee. The seriousness of the individual interests at stake forms part of the contextual analysis. As this Court stated in *Suresh*, "[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*" (para. 118). Thus, "factual situations which are closer or analogous to criminal proceedings will merit greater vigilance by the courts": *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077, *per* Iacobucci J.

26 The potential consequences of deportation combined with allegations of terrorism have been under a harsh spotlight due to the recent report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. Mr. Arar, a Canadian citizen born in Syria, was detained by American officials and deported to Syria. The report concludes that it is "very likely that, in making the decisions to detain and remove Mr. Arar to Syria, the U.S. authorities relied on information about Mr. Arar provided by the RCMP", including unfounded suspicions linking Mr. Arar to terrorist groups: *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006) ("Arar Inquiry"), at p. 30. In Syria, Mr. Arar was tortured and detained under inhumane conditions for over 11 months. In his report, Commissioner O'Connor recommends enhanced review and accountability mechanisms for agencies dealing with national security, including not only the Royal Canadian Mounted Police, but also Citizenship and Immigration Canada and the Canada Border Services Agency. He notes that these immigration-related institutions can have an important impact on individual rights but that there is a lack of transparency surrounding their activities because their activities often involve sensitive

national security information that cannot be disclosed to the public: *A New Review Mechanism for the RCMP's National Security Activities* (2006), at pp. 562-65. Moreover, the sensitive nature of security information means that investigations lead to fewer prosecutions. This, in turn, restricts the ability of courts to guarantee individual rights: "Unless charges are laid, . . . the choice of investigative targets, methods of information collection and exchange, and means of investigation generally will not be subject to judicial scrutiny, media coverage or public debate" (p. 439).

27 The procedures required to conform to the principles of fundamental justice must reflect the exigencies of the security context. Yet they cannot be permitted to erode the essence of s. 7. The principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*. The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be.

3. Relevant Principles of Fundamental Justice

28 The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. "It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process": *Ferras*, at para. 19. This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on

a motion of *habeas corpus*. It remains as fundamental to our modern conception of liberty as it was in the days of King John.

29 This basic principle has a number of facets. It comprises the right to a *hearing*. It requires that the hearing be *before an independent and impartial magistrate*. It demands a *decision by the magistrate on the facts and the law*. And it entails the *right to know the case put against one*, and the *right to answer that case*. Precisely how these requirements are met will vary with the context. But for s. 7 to be satisfied, each of them must be met in substance.

30 The *IRPA* process includes a hearing. The process consists of two phases, one executive and one judicial. There is no hearing at the executive phase that results in issuance of the certificate. However, this is followed by a review before a judge, where the named person is afforded a hearing. Thus, the first requirement, that of a hearing, is met.

31 Questions arise, however, on the other requirements, namely: that the judge be independent and impartial; that the judge make a judicial decision based on the facts and the law; and finally, that the named person be afforded an opportunity to meet the case put against him or her by being informed of that case and being allowed to question or counter it. I conclude that the *IRPA* scheme meets the first requirement of independence and impartiality, but fails to satisfy the second and third requirements, which are interrelated here.

4. Is the Judge Independent and Impartial?

32 Although the scope of the required hearing can vary according to context (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817), a hearing must include "[a]n independent judicial phase and an impartial judge" (*Ferras*, at para. 25). This requirement is also consistent with the unwritten constitutional principle of judicial independence: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. It has also been called "the cornerstone of the common law duty of procedural fairness" (*Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42 ("*Re Bagri*"), at para. 81), and is necessary in order to ensure judicial impartiality: *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 139. It is not enough that the judge in fact be independent and impartial; fundamental justice requires that the judge also appear to be independent and impartial. This flows from the fact that judicial independence has two facets: actual independence and perceived independence (*Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689).

33 The *IRPA* scheme provides for the certificate issued by the ministers to be reviewed by a "designated judge", a judge of the Federal Court of Canada. The question here is whether, from an institutional perspective, the role assigned to designated judges under the *IRPA* leads to a perception that independence and impartiality are compromised.

34 The designated judge has been aptly described as the "cornerstone of the procedure established by Parliament" in the *IRPA* (*Charkaoui (Re)*, [2004] 3 F.C.R. 32, 2003 FC 1419, at para. 120, *per* Noël J.). The judge is the sole avenue of review for the named person and the only person capable of providing the essential judicial component of the process.

35 When reviewing the certificate, the judge sees all the material relied on by the government. But if the government claims confidentiality for certain material, the judge cannot share this material with the named person. The judge must make his or her decision without hearing any objections the named person might be able to make, were he or she granted access to the whole of the record. Part of the hearing may be held *in camera*, with only the judge and the government lawyers in the room. The named person is not there. His or her lawyer is not there. There is no one to speak for the person or to test the evidence put against him or her.

36 These circumstances may give rise to a perception that the designated judge under the *IRPA* may not be entirely independent and impartial as between the state and the person named in the certificate. Speaking at a conference in March 2002, Hugessen J. of the Federal Court expressed unease with the role assigned to designated judges under the *IRPA*:

> We do not like this process of having to sit alone hearing only one party, and looking at the materials produced by only one party . . . .
>
> If there is one thing that I learned in my practice at the Bar, and I have managed to retain it through all these years, it is that good cross-examination requires really careful preparation and a good knowledge of your case. And by definition, judges do not do that. . . . [W]e do not have any knowledge except what is given to us and when it is only given to us by one party we are not well suited to test the materials that are put before us. [Emphasis added.]
>
> (J. K. Hugessen, "Watching the Watchers: Democratic Oversight", in D. Daubney et al., eds., *Terrorism, Law and Democracy: How is Canada changing following September 11?* (2002), 381, at p. 384)

37 Three related concerns arise with respect to independence and impartiality. First is the concern that the *IRPA* may be perceived to deprive the judge of his or her

independent judicial role and co-opt the judge as an agent of the executive branch of government. Second is the concern that the designated judge functions as an investigative officer rather than a judge. Third is the concern that the judge, whose role includes compensating for the fact that the named person may not have access to material and may not be present at the hearing, will become associated with this person's case.

38 The first concern is linked to the degree of deference that the judge accords to the ministers' conclusion that the facts supported the issuance of a certificate and the detention of the named person. Judges working under the process have eschewed an overly deferential approach, insisting instead on a searching examination of the reasonableness of the certificate on the material placed before them: *Jaballah, Re* (2004), 247 F.T.R. 68, 2004 FC 299; *Charkaoui (Re)*, [2005] 2 F.C.R. 299, 2004 FCA 421, at para. 74. They are correct to do so, having regard to the language of the provision, the history of its adoption, and the role of the designated judge.

39 First, an active role for the designated judge is justified by the language of the *IRPA* and the standards of review it establishes. The statute requires the designated judge to determine whether the certificate is "reasonable", and emphasizes factual scrutiny by instructing the judge to do so "on the basis of the information and evidence available" (s. 80(1)). This language, as well as the accompanying factual, legal and administrative context, leads to the conclusion that the designated judge must review the certificate on a standard of reasonableness. Likewise, since the ministers' decision to detain a permanent resident is based on "reasonable grounds to believe" (s. 82(1)), "[i]t is logical to assume that in subsequent reviews by a designated judge, the same standard will be used" (*Charkaoui (Re)*, [2005] 3 F.C.R. 389, 2005 FC 248,

at para. 30). The "reasonable grounds to believe" standard requires the judge to consider whether "there is an objective basis . . . which is based on compelling and credible information": *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40, at para. 114. "Reasonable grounds to believe" is the appropriate standard for judges to apply when reviewing a continuation of detention under the certificate provisions of the *IRPA*. The *IRPA* therefore does not ask the designated judge to be deferential, but, rather, asks him or her to engage in a searching review.

40 This interpretation of the *IRPA* is confirmed by statements made in the course of the adoption of the scheme. While it was considering the *IRPA*, the Standing Committee on Citizenship and Immigration was informed that the role of the designated judge would be to avoid treatment that is unfair, arbitrary, or in violation of due process (Transcript of the Standing Committee on Citizenship and Immigration, Thursday, April 26, 2001 (online)).

41 Finally, the fact that the designated judge may have access to more information than the ministers did in making their initial decision to issue a certificate and detain suggests that the judge possesses relative expertise on the matters at issue and is no mere rubber stamp: *Charkaoui (Re)*, 2003 FC 1419, at para. 125.

42 I conclude that a non-deferential role for the designated judge goes some distance toward alleviating the first concern, that the judge will be perceived to be in the camp of the government.

43 The second concern is that the judge may be seen to function more as an investigator than as an independent and impartial adjudicator. The law is clear that the principles of fundamental justice are breached if a judge is reduced to an executive, investigative function. At the same time, the mere fact that a judge is required to assist in an investigative activity does not deprive the judge of the requisite independence. In *Re Bagri*, the Court considered whether a provision of the *Criminal Code*, R.S.C. 1985, c. C-46, that provides for a judge to assist the state in gathering evidence in the investigation of a terrorist offence violated s. 7 or s. 11(*d*) of the *Charter*. Under s. 83.28, a judge can order a person to attend before the judge (or before another judge) to give information on a suspected past or future terrorism offence, and supervise the taking of the person's statement. The hearing can take place *in camera*, and its very existence can be kept secret. Critics of s. 83.28 argued that it co-opts the presiding judge into performing an investigative rather than an adjudicative role. The majority held that the provision violates neither s. 7 of the *Charter* nor the unwritten principle of judicial independence. It stressed that s. 83.28 gives judges broad discretion to vary the terms of the order made under it and to ensure that constitutional and common law values are respected. It also noted that judges routinely participate in investigations in the criminal context and that their role in these situations is to "act as a check against state excess" (para. 86), and emphasized that in the context of investigative hearings the judge was not asked to question the individual or challenge the evidence, but merely to mediate and ensure the fairness of the proceeding. However, it warned that "once legislation invokes the aid of the judiciary, we must remain vigilant to ensure that the integrity of its role is not compromised or diluted" (para. 87).

44 The *IRPA* provisions before the Court, like s. 83.28 of the *Criminal Code*, preserve the essential elements of the judicial role. It is even clearer in this case than

in *Re Bagri* that the process established by the legislation at issue is not purely investigative; the judge's task of determining whether the certificate is "reasonable" seems on its face closer to adjudicative review of an executive act than to investigation. On the other hand, the provisions seem to require the judge to actively vet the evidence, an activity that the Court viewed as suspect in *Re Bagri*. Noël J., the designated judge for Mr. Charkaoui's case, stated:

> Designated judges preside over hearings and hear the Minister's witnesses. They examine witnesses themselves as the need arises. They examine the documents carefully to determine which information is related to security and which information is not. In order to do so, they examine, among other things, the sources of the information, the way in which it was obtained, the reliability of the sources and the method used, and whether it is possible to corroborate the information by other means.
>
> (2003 FC 1419, at para. 101)

These comments suggest that while the designated judge may be more involved in vetting and skeptically scrutinizing the evidence than would be the case in a normal judicial hearing, the judge is nevertheless performing the adjudicative function of evaluation, rather than the executive function of investigation. However, care must be taken to avoid allowing the investigative aspect of the process to overwhelm its adjudicative aspect.

45 The third concern is that the judge's role as sole protector of the named person's interest may associate the judge, in fact or perception, with that interest. A judge who is obliged to take on a "defence" role in the absence of counsel may unconsciously become associated with that camp: *R. v. Taubler* (1987), 20 O.A.C. 64, at p. 71; *R. v. Turlon* (1989), 49 C.C.C. (3d) 186 (Ont. C.A.), at p. 191. This concern must be balanced against the opposite concern that the judge may appear to be part of

the government scheme and hence in the government's camp. The critical consideration, however, is that the *IRPA* permits — indeed requires — the judge to conduct the review in an independent and judicial fashion. Provided the judge does so, the scheme cannot be condemned on the ground that he or she is, in fact or perception, in the named person's camp.

46 I conclude that, on its face, the *IRPA* process is designed to preserve the independence and impartiality of the designated judge, as required by s. 7. Properly followed by judges committed to a searching review, it cannot be said to compromise the perceived independence and impartiality of the designated judge.

47 I note that this conclusion conclusively rebuts the appellant Charkaoui's contention that the *IRPA* breaches the unwritten constitutional principle of judicial independence affirmed in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, 2005 SCC 44.

5. Is the Decision Based on the Facts and the Law?

48 To comply with s. 7 of the *Charter*, the magistrate must make a decision based on the facts and the law. In the extradition context, the principles of fundamental justice have been held to require, "at a minimum, a meaningful judicial assessment of the case on the basis of the evidence and the law. A judge considers the respective rights of the litigants or parties and makes findings of fact on the basis of evidence and applies the law to those findings. Both facts and law must be considered for a true adjudication. Since *Bonham's Case* [(1610), 8 Co. Rep. 113b, 77 E.R. 646], the essence of a judicial hearing has been the treatment of facts revealed by the evidence

in consideration of the substantive rights of the parties as set down by law" (*Ferras*, at para. 25). The individual and societal interests at stake in the certificate of inadmissibility context suggest similar requirements.

49 The *IRPA* process at issue seeks to meet this requirement by placing material before the judge for evaluation. As a practical matter, most if not all of the material that the judge considers is produced by the government and can be vetted for reliability and sufficiency only by the judge. The normal standards used to ensure the reliability of evidence in court do not apply: s. 78(*j*). The named person may be shown little or none of the material relied on by the ministers and the judge, and may thus not be in a position to know or challenge the case against him or her. It follows that the judge's decision, while based on the evidence before him or her, may not be based on all of the evidence available.

50 There are two types of judicial systems, and they ensure that the full case is placed before the judge in two different ways. In inquisitorial systems, as in Continental Europe, the judge takes charge of the gathering of evidence in an independent and impartial way. By contrast, an adversarial system, which is the norm in Canada, relies on the parties — who are entitled to disclosure of the case to meet, and to full participation in open proceedings — to produce the relevant evidence. The designated judge under the *IRPA* does not possess the full and independent powers to gather evidence that exist in the inquisitorial process. At the same time, the named person is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process. The result is a concern that the designated judge, despite his or her best efforts to get all the relevant evidence, may be obliged — perhaps unknowingly — to make the required decision based on only part of the

relevant evidence. As Hugessen J. has noted, the adversarial system provides "the real warranty that the outcome of what we do is going to be fair and just" (p. 385); without it, the judge may feel "a little bit like a fig leaf" (Proceedings of the March 2002 Conference, at p. 386).

51 Judges of the Federal Court have worked assiduously to overcome the difficulties inherent in the role the *IRPA* has assigned to them. To their credit, they have adopted a pseudo-inquisitorial role and sought to seriously test the protected documentation and information. But the role remains *pseudo*-inquisitorial. The judge is not afforded the power to independently investigate all relevant facts that true inquisitorial judges enjoy. At the same time, since the named person is not given a full picture of the case to meet, the judge cannot rely on the parties to present missing evidence. The result is that, at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture.

52 Similar concerns arise with respect to the requirement that the decision be based on the law. Without knowledge of the information put against him or her, the named person may not be in a position to raise legal objections relating to the evidence, or to develop legal arguments based on the evidence. The named person is, to be sure, permitted to make legal representations. But without disclosure and full participation throughout the process, he or she may not be in a position to put forward a full legal argument.

6. Is the "Case to Meet" Principle Satisfied?

53 Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case. This right is well established in immigration law. The question is whether the procedures "provide an adequate opportunity for [an affected person] to state his case and know the case he has to meet" (*Singh*, at p. 213). Similarly, in *Suresh*, the Court held that a person facing deportation to torture under s. 53(1)(*b*) of the former *Immigration Act*, R.S.C. 1985, c. I-2, must "[n]ot only . . . be informed of the case to be met . . . [but] also be given an opportunity to challenge the information of the Minister where issues as to its validity arise" (para. 123).

54 Under the *IRPA*'s certificate scheme, the named person may be deprived of access to some or all of the information put against him or her, which would deny the person the ability to know the case to meet. Without this information, the named person may not be in a position to contradict errors, identify omissions, challenge the credibility of informants or refute false allegations. This problem is serious in itself. It also underlies the concerns, discussed above, about the independence and impartiality of the designated judge, and the ability of the judge to make a decision based on the facts and law.

55 Confidentiality is a constant preoccupation of the certificate scheme. The judge "shall ensure" the confidentiality of the information on which the certificate is based and of any other evidence if, in the opinion of the judge, disclosure would be injurious to national security or to the safety of any person: s. 78(*b*). At the request of either minister "at any time during the proceedings", the judge "shall hear" information or evidence in the absence of the named person and his or her counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to

the safety of any person: s. 78(*e*). The judge "shall provide" the named person with a summary of information that enables him or her to be reasonably informed of the circumstances giving rise to the certificate, but the summary cannot include anything that would, in the opinion of the judge, be injurious to national security or to the safety of any person: s. 78(*h*). Ultimately, the judge may have to consider information that is not included in the summary: s. 78(*g*). In the result, the judge may be required to decide the case, wholly or in part, on the basis of information that the named person and his or her counsel never see. The named person may know nothing of the case to meet, and although technically afforded an opportunity to be heard, may be left in a position of having no idea as to what needs to be said.

56 The same concerns arise with respect to the detention review process under ss. 83 and 84 of the *IRPA*. Section 78 applies to detention reviews under s. 83, and it has been found to apply to detention reviews under s. 84(2): *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 142, 2005 FCA 54, at paras. 71-72.

57 The right to know the case to be met is not absolute. Canadian statutes sometimes provide for *ex parte* or *in camera* hearings, in which judges must decide important issues after hearing from only one side. In *Rodgers*, the majority of this Court declined to recognize notice and participation as invariable constitutional norms, emphasizing a context-sensitive approach to procedural fairness. And in *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31, the Court, *per* Rothstein J., held that while "[h]earing from both sides of an issue is a principle to be departed from only in exceptional circumstances", in the ordinary case,

a judge would be "well equipped . . . to determine whether a record is subject to [solicitor-client] privilege" without the assistance of counsel on both sides (para. 21).

58 More particularly, the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual. In *Chiarelli*, this Court found that the Security Intelligence Review Committee could, in investigating certificates under the former *Immigration Act*, *1976*, S.C. 1976-77, c. 52 (later R.S.C. 1985, c. I-2), refuse to disclose details of investigation techniques and police sources. The context for elucidating the principles of fundamental justice in that case included the state's "interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources" (p. 744). In *Suresh*, this Court held that a refugee facing the possibility of deportation to torture was entitled to disclosure of all the information on which the Minister was basing his or her decision, "[s]ubject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents" (para. 122). And, in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, the Court upheld the section of the *Privacy Act*, R.S.C. 1985, c. P-21, that mandates *in camera* and *ex parte* proceedings where the government claims an exemption from disclosure on grounds of national security or maintenance of foreign confidences. The Court made clear that these societal concerns formed part of the relevant context for determining the scope of the applicable principles of fundamental justice (paras. 38-44).

59 In some contexts, substitutes for full disclosure may permit compliance with s. 7 of the *Charter*. For example, in *Rodgers*, the majority of the Court upheld the constitutionality of *ex parte* hearings for applications under s. 487.055 of the

Criminal Code to take DNA samples from listed multiple offenders, on the ground that the protections Parliament had put in place were adequate (paras. 51-52). Similarly, in *Chiarelli*, the Court upheld the lack of disclosure on the basis that the information disclosed by way of summary and the opportunity to call witnesses and cross-examine RCMP witnesses who testified *in camera* satisfied the requirements of fundamental justice. And in *Ruby*, the Court held that the substitute measures provided by Parliament satisfied the constitutional requirements of procedural fairness (para. 42). Arbour J. stated: "In such circumstances, fairness is met through other procedural safeguards such as subsequent disclosure, judicial review and rights of appeal" (para. 40).

60 Where limited disclosure or *ex parte* hearings have been found to satisfy the principles of fundamental justice, the intrusion on liberty and security has typically been less serious than that effected by the *IRPA*: *Rodgers*, at para. 53. It is one thing to deprive a person of full information where fingerprinting is at stake, and quite another to deny him or her information where the consequences are removal from the country or indefinite detention. Moreover, even in the less intrusive situations, courts have insisted that disclosure be as specific and complete as possible.

61 In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, makes it difficult, if not impossible, to find substitute procedures that will satisfy s. 7. Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from

informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here.

62 The only protection the *IRPA* accords the named person is a review by a designated judge to determine whether the certificate is reasonable. The ministers argue that this is adequate in that it maintains a "delicate balance" between the right to a fair hearing and the need to protect confidential security intelligence information. The appellants, on the other hand, argue that the judge's efforts, however conscientious, cannot provide an effective substitute for informed participation.

63 I agree with the appellants. The issue at the s. 7 stage, as discussed above, is not whether the government has struck the right balance between the need for security and individual liberties; that is the issue at the stage of s. 1 justification of an established limitation on a *Charter* right. The question at the s. 7 stage is whether the basic requirements of procedural justice have been met, either in the usual way or in an alternative fashion appropriate to the context, having regard to the government's objective and the interests of the person affected. The fairness of the *IRPA* procedure rests entirely on the shoulders of the designated judge. Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision on the reasonableness of the certificate is impartial, is based on a full view of the facts and law, and reflects the named person's knowledge of the case to meet. The judge, working under the constraints imposed by the *IRPA*, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing. The judge sees only

what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be. Although the judge may ask questions of the named person when the hearing is reopened, the judge is prevented from asking questions that might disclose the protected information. Likewise, since the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable. Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information.

64 The judge is not helpless; he or she can note contradictions between documents, insist that there be at least some evidence on the critical points, and make limited inferences on the value and credibility of the information from its source. Nevertheless, the judge's activity on behalf of the named person is confined to what is presented by the ministers. The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?

7. Conclusion on Section 7

65 In the *IRPA*, an attempt has been made to meet the requirements of fundamental justice essentially through one mechanism — the designated judge charged with reviewing the certificate of inadmissibility and the detention. To Parliament's credit, a sincere attempt has been made to give the designated judge the powers necessary to discharge the role in an independent manner, based on the facts and the law. Yet, the secrecy required by the scheme denies the named person the opportunity to know the case put against him or her, and hence to challenge the government's case. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law. Despite the best efforts of judges of the Federal Court to breathe judicial life into the *IRPA* procedure, it fails to assure the fair hearing that s. 7 of the *Charter* requires before the state deprives a person of life, liberty or security of the person. I therefore conclude that the *IRPA*'s procedure for determining whether a certificate is reasonable does not conform to the principles of fundamental justice as embodied in s. 7 of the *Charter*. The same conclusion necessarily applies to the detention review procedures under ss. 83 and 84 of the *IRPA*.

8. Is the Limit Justified Under Section 1 of the *Charter*?

66 The *Charter* does not guarantee rights absolutely. The state is permitted to limit rights — including the s. 7 guarantee of life, liberty and security — if it can establish that the limits are demonstrably justifiable in a free and democratic society. This said, violations of s. 7 are not easily saved by s. 1. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Lamer J. (as he then was) stated, for the majority:

> Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases

> arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like. [p. 518]

The rights protected by s. 7 — life, liberty, and security of the person — are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests. It follows that violations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s. 1: *G. (J.)*. Nevertheless, the task may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenges complex.

67 The test to be applied in determining whether a violation can be justified under s. 1, known as the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103), requires a pressing and substantial objective and proportional means. A finding of proportionality requires: (a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective.

68 The protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective. Moreover, the *IRPA*'s provisions regarding the non-disclosure of evidence at certificate hearings are rationally connected to this objective. The facts on this point are undisputed. Canada is a net importer of security information. This information is essential to the security and defence of Canada, and disclosure would adversely affect its flow and quality: see *Ruby*. This leaves the question whether the means Parliament has chosen, i.e. a certificate procedure leading to detention and deportation of non-citizens on the ground that they pose a threat to Canada's security, minimally impairs the rights of non-citizens.

69 The realities that confront modern governments faced with the challenge of terrorism are stark. In the interest of security, it may be necessary to detain persons deemed to pose a threat. At the same time, security concerns may preclude disclosure of the evidence on which the detention is based. But these tensions are not new. As we shall see, Canada has already devised processes that go further in preserving s. 7 rights while protecting sensitive information; until recently, one of these solutions was applicable in the security certificate context. Nor are these tensions unique to Canada: in the specific context of anti-terrorism legislation, the United Kingdom uses special counsel to provide a measure of protection to the detained person's interests, while preserving the confidentiality of information that must be kept secret. These alternatives suggest that the *IRPA* regime, which places on the judge the entire burden of protecting the person's interest, does not minimally impair the rights of non-citizens, and hence cannot be saved under s. 1 of the *Charter*.

(a) *Less Intrusive Alternatives*

70 This is not the first time Canada has had to reconcile the demands of national security with the procedural rights guaranteed by the *Charter*. In a number of legal contexts, Canadian government institutions have found ways to protect sensitive information while treating individuals fairly. In some situations, the solution has involved the use of special counsel, in a manner closely approximating an adversarial process.

71 The Security Intelligence Review Committee ("SIRC") is an independent review body that monitors the activities of the Canadian Security Intelligence Service

("CSIS"). Established in 1984 under the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21 (now R.S.C. 1985, c. C-23), SIRC is composed of three to five members of the Privy Council who are not currently serving in Parliament. Under the former *Immigration Act*, SIRC had the power to vet findings of inadmissibility based on alleged threats to national security; a ministerial certificate could not be issued without a SIRC investigation. If the Minister of Employment and Immigration and the Solicitor General were of the opinion that a non-citizen was inadmissible due to involvement in organized crime, espionage, subversion, acts of violence, etc., they were first obliged to make a report to SIRC: *Immigration Act*, s. 39(2). SIRC would then investigate the grounds for the report, providing the affected person with "a statement summarizing such information available to it as will enable the person to be as fully informed as possible of the circumstances giving rise to the report": s. 39(6). After completing its investigation, SIRC would send a report to the Governor in Council containing its recommendation as to whether a security certificate should be issued: s. 39(9). A copy of the same report would be provided to the non-citizen: s. 39(10). If the Governor in Council was satisfied that the non-citizen was inadmissible on appropriate grounds, he or she could then direct the Minister of Employment and Immigration to issue a security certificate: s. 40(1).

72 Empowered to develop its own investigative procedures, SIRC established a formal adversarial process, with "a court-like hearing room" and "procedures that mirrored judicial proceedings as much as possible". The process also included an independent panel of lawyers with security clearances to act as counsel to SIRC (M. Rankin, "The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness" (1990), 3 *C.J.A.L.P.* 173, at p. 179).

73 A SIRC member presiding at a hearing had the discretion to balance national security against procedural fairness in determining how much information could be disclosed to the affected person. The non-citizen and his or her counsel would normally be present in the hearing room, except when sensitive national security evidence was tendered. (The presiding SIRC member would decide whether to exclude the non-citizen during certain testimony.) At such a juncture, independent, security-cleared SIRC counsel would act on behalf of the non-citizen. The SIRC counsel were instructed to cross-examine witnesses for CSIS "with as much vigour as one would expect from the complainant's counsel" (Rankin, at p. 184; SIRC *Annual Report 1988-1989* (1989) ("SIRC *Annual Report*"), at p. 64). At the end of this *ex parte* portion of the hearing, the excluded person would be brought back into the room and provided with a summary, which would include "the gist of the evidence, without disclosing the national security information" (SIRC *Annual Report*, at p. 64). The SIRC counsel would negotiate the contents of the summary with CSIS, under the supervision of the presiding SIRC member (*ibid.*). The affected person and his or her counsel would then be allowed to ask their own questions, and to cross-examine on the basis of the summary (Rankin, at p. 184).

74 In the words of Professor Rankin, SIRC's procedures represented "an attempt to preserve the best features of the adversarial process with its insistence on vigorous cross-examination, but not to run afoul of the requirements of national security" (p. 185). These procedures illustrate how special counsel can provide not only an effective substitute for informed participation, but can also help bolster actual informed participation by the affected person. Since the special counsel had a role in determining how much information would be included in the summary, disclosure was presumably more complete than would otherwise have been the case. Sensitive

national security information was still protected, but the executive was required to justify the breadth of this protection.

75 In 1988 Parliament added s. 40.1 to the *Immigration Act* to empower the Minister and the Solicitor General to issue security certificates in respect of foreign nationals. Section 40.1 effectively bypassed the SIRC investigation process where foreign nationals were concerned, instead referring the certificate to a designated judge of the Federal Court for subsequent review. Security certificates in respect of permanent residents remained subject to SIRC scrutiny until 2002, when Parliament repealed the *Immigration Act* and replaced it with the *IRPA*.

76 Certain elements of SIRC process may be inappropriate to the context of terrorism. Where there is a risk of catastrophic acts of violence, it would be foolhardy to require a lengthy review process *before* a certificate could be issued. But it was not suggested before this Court that SIRC's special counsel system had not functioned well in connection with the review of certificates under the *Immigration Act*, nor was any explanation given for why, under the new system for vetting certificates and reviewing detentions, a special counsel process had not been retained.

77 The SIRC process is not the only example of the Canadian legal system striking a better balance between the protection of sensitive information and the procedural rights of individuals. A current example is found in the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("*CEA*"), which permits the government to object to the disclosure of information on grounds of public interest, in proceedings to which the Act applies: ss. 37 to 39. Under the recent amendments to the *CEA* set out in the *Anti-terrorism Act*, S.C. 2001, c. 41, a participant in a proceeding who is required to

disclose or expects to disclose potentially injurious or sensitive information, or who believes that such information might be disclosed, must notify the Attorney General about the potential disclosure, and the Attorney General may then apply to the Federal Court for an order prohibiting the disclosure of the information: ss. 38.01, 38.02, 38.04. The judge enjoys considerable discretion in deciding whether the information should be disclosed. If the judge concludes that disclosure of the information would be injurious to international relations, national defence or national security, but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may order the disclosure of all or part of the information, on such conditions as he or she sees fit. No similar residual discretion exists under the *IRPA*, which requires judges not to disclose information the disclosure of which would be injurious to national security or to the safety of any person. Moreover, the *CEA* makes no provision for the use of information that has not been disclosed. While the *CEA* does not address the same problems as the *IRPA*, and hence is of limited assistance here, it illustrates Parliament's concern under other legislation for striking a sensitive balance between the need for protection of confidential information and the rights of the individual.

78 Crown and defence counsel in the recent Air India trial (*R. v. Malik*, [2005] B.C.J. No. 521 (QL), 2005 BCSC 350) were faced with the task of managing security and intelligence information and attempting to protect procedural fairness. The Crown was in possession of the fruits of a 17-year-long investigation into the terrorist bombing of a passenger aircraft and a related explosion in Narita, Japan. It withheld material on the basis of relevance, national security privilege and litigation privilege. Crown and defence counsel came to an agreement under which defence counsel obtained consents from their clients to conduct a preliminary review of the withheld

material, on written undertakings not to disclose the material to anyone, including the client. Disclosure in a specific trial, to a select group of counsel on undertakings, may not provide a working model for general deportation legislation that must deal with a wide variety of counsel in a host of cases. Nevertheless, the procedures adopted in the Air India trial suggest that a search should be made for a less intrusive solution than the one found in the *IRPA*.

79 The Arar Inquiry provides another example of the use of special counsel in Canada. The Commission had to examine confidential information related to the investigation of terrorism plots while preserving Mr. Arar's and the public's interest in disclosure. The Commission was governed by the *CEA*. To help assess claims for confidentiality, the Commissioner was assisted by independent security-cleared legal counsel with a background in security and intelligence, whose role was to act as *amicus curiae* on confidentiality applications. The scheme's aim was to ensure that only information that was rightly subject to national security confidentiality was kept from public view. There is no indication that these procedures increased the risk of disclosure of protected information.

80 Finally, I note the special advocate system employed by the Special Immigration Appeals Commission ("SIAC") in the United Kingdom. SIAC and the special advocate system were created in response to *Chahal v. United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1831, in which the European Court of Human Rights had held that the procedure then in place was inadequate. The court in *Chahal* commented favourably on the idea of security-cleared counsel instructed by the court, identifying it as being Canadian in origin (perhaps referring to the procedure developed by SIRC).

81 The U.K.'s special advocate system resembles the Canadian SIRC model. Section 6(1) of the *Special Immigration Appeals Commission Act 1997* (U.K.), 1997, c. 68, states that the special advocate is appointed to "represent the interests of an appellant" in any proceedings before SIAC from which the appellant and his or her legal representatives are excluded. Section 6(4), however, specifies that the special advocate "shall not be responsible to the person whose interests he is appointed to represent". Rule 35 of the *Special Immigration Appeals Commission (Procedure) Rules 2003*, S.I. 2003/1034, sets out the special advocate's three main functions: (1) to make submissions to the Commission at any hearings from which the appellant and the appellant's representatives are excluded; (2) to cross-examine witnesses at any such hearings; and (3) to make written submissions to the Commission. After seeing the protected information, the special advocate may not communicate with the appellant or the appellant's representative without authorization from the Commission: rule 36. If the special advocate requests such authorization, the Commission gives the Secretary of State an opportunity to object to the proposed communication before deciding whether to authorize it: rule 38.

82 The use of special advocates has received widespread support in Canadian academic commentary. Professor Roach, for example, criticizes the Court of Appeal's conclusion in *Charkaoui (Re)*, 2004 FCA 421, that such a measure is not constitutionally required:

> In my view, this approach was in error because *in camera* and *ex parte* hearings offend basic notions of a fair hearing and special advocates constitute one example of an approach that is a more proportionate response to reconciling the need to keep some information secret and the need to ensure as much fairness and adversarial challenge as possible. [Emphasis added.]

> (K. Roach, "Ten Ways to Improve Canadian Anti-Terrorism Law" (2006), 51 *Crim. L.Q.* 102, at p. 120)

83 This said, the U.K.'s special advocate system has also been criticized for not going far enough. In April 2005, the House of Commons Constitutional Affairs Committee published a report on the operation of SIAC and the use of special advocates (*The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*). The Committee listed three important disadvantages faced by special advocates: (1) once they have seen the confidential material, they cannot, subject to narrow exceptions, take instructions from the appellant or the appellant's counsel; (2) they lack the resources of an ordinary legal team, for the purpose of conducting in secret a full defence; and (3) they have no power to call witnesses (para. 52).

84 Despite these difficulties, SIAC itself has commented favourably on the assistance provided by special advocates, stating that as a result of the "rigorous cross-examination" of the government's evidence by the special advocate, it was satisfied that the government's assertions were unsupported by the evidence (*M. v. Secretary of State for the Home Department*, [2004] UKSIAC 17/2002 (BAILII), March 8, 2004, at para. 10). The England and Wales Court of Appeal upheld SIAC's decision: [2004] 2 All E.R. 863, [2004] EWCA Civ 324.

(b) *The IRPA Scheme Does Not Minimally Impair the Named Person's Rights*

85 Parliament is not required to use the *perfect*, or least restrictive, alternative to achieve its objective: *R. v. Chaulk*, [1990] 3 S.C.R. 1303. However, bearing in

mind the deference that is owed to Parliament in its legislative choices, the alternatives discussed demonstrate that the *IRPA* does not minimally impair the named person's rights.

86 Under the *IRPA*, the government effectively decides what can be disclosed to the named person. Not only is the named person not shown the information and not permitted to participate in proceedings involving it, but no one but the judge may look at the information with a view to protecting the named person's interests. Why the drafters of the legislation did not provide for special counsel to objectively review the material with a view to protecting the named person's interest, as was formerly done for the review of security certificates by SIRC and is presently done in the United Kingdom, has not been explained. The special counsel system may not be perfect from the named person's perspective, given that special counsel cannot reveal confidential material. But, without compromising security, it better protects the named person's s. 7 interests.

87 I conclude that the *IRPA*'s procedures for determining whether a certificate is reasonable and for detention review cannot be justified as minimal impairments of the individual's right to a judicial determination on the facts and the law and right to know and meet the case. Mechanisms developed in Canada and abroad illustrate that the government can do more to protect the individual while keeping critical information confidential than it has done in the *IRPA*. Precisely what more should be done is a matter for Parliament to decide. But it is clear that more must be done to meet the requirements of a free and democratic society.

B. *Does the Detention of Permanent Residents or Foreign Nationals Under the IRPA Infringe Sections 7, 9, 10(c) or 12 of the Charter, and if so, Are the Infringements Justified Under Section 1 of the Charter?*

1. Time Constraints on Review for Foreign Nationals: Breach of Section 9 or Section 10(*c*)?

88 Section 9 of the *Charter* guarantees freedom from arbitrary detention. This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law. The appellant Mr. Almrei argues that detention under the *IRPA* is arbitrary with respect to foreign nationals, first because it permits their detention without warrant and without regard to their personal circumstances, and second because it prevents review until 120 days after the certificate is confirmed. In both respects, foreign nationals are treated differently than permanent residents.

89 I would reject Mr. Almrei's argument that automatic detention of foreign nationals is arbitrary because it is effected without regard to the personal circumstances of the detainee. Detention is not arbitrary where there are "standards that are rationally related to the purpose of the power of detention": P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 46-5. The triggering event for the detention of a foreign national is the signing of a certificate stating that the foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. The security ground is based on the danger posed by the named person, and therefore provides a rational foundation for the detention. *R. v. Swain*, [1991] 1 S.C.R. 933, in which this Court struck down a provision of the *Criminal Code* requiring that an accused acquitted of an offence on the basis of an insanity defence be detained automatically without a

hearing, is distinguishable. The Court held that it was arbitrary to require the detention of persons acquitted by reason of mental disorder without the application of any standard whatsoever, because "[n]ot all of these individuals will be dangerous": at p. 1013, *per* Lamer C.J. But in the national security context, the signature of a certificate under s. 77 of the *IRPA* on the ground of security is necessarily related to the dangerousness of the individual. While not all the other grounds for the issuance of a certificate under s. 77(1) are conclusive of the danger posed by the named person, danger is not the only constitutional basis upon which an individual can be detained, and arbitrariness of detention under the other grounds was not argued.

90 This leaves Mr. Almrei's argument that the *IRPA* imposes arbitrary detention because it prevents review of the detention of foreign nationals until 120 days after the certificate is confirmed. Whether through *habeas corpus* or statutory mechanisms, foreign nationals, like others, have a right to prompt review to ensure that their detention complies with the law. This principle is affirmed in s. 10(*c*) of the *Charter*. It is also recognized internationally: see *Rasul v. Bush*, 542 U.S. 466 (2004); *Zadvydas v. Davis*, 533 U.S. 678 (2001); art. 5 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 ("*European Convention on Human Rights*"); *Slivenko v. Latvia* [GC], No. 48321/99, ECHR 2003-X, p. 229. While the government accepts this principle, it argues that the 120-day period in s. 84(2) is sufficiently prompt, relying, as did the courts below, on the fact that foreign nationals can apply for release and depart from Canada at any time.

91 The lack of review for foreign nationals until 120 days after the reasonableness of the certificate has been judicially determined violates the guarantee against arbitrary detention in s. 9 of the *Charter*, a guarantee which encompasses the

right to prompt review of detention under s. 10(*c*) of the *Charter*. Permanent residents named in certificates are entitled to an automatic review within 48 hours. The same time frame for review of detention applies to both permanent residents and foreign nationals under s. 57 of the *IRPA*. And under the *Criminal Code*, a person who is arrested with or without a warrant is to be brought before a judge within 24 hours, or as soon as possible: s. 503(1). These provisions indicate the seriousness with which the deprivation of liberty is viewed, and offer guidance as to acceptable delays before this deprivation is reviewed.

92 The government submits that the detention provisions, and more specifically the absence of review for foreign nationals until 120 days after the certificate has been determined to be reasonable, reflect its objective of creating a timely removal process for individuals thought to constitute a danger to national security, and asserts that when the provisions were drafted, it was thought that the removal process would be so fast that there would be no need for review. This is more an admission of the excessiveness of the 120-day period than a justification.

93 It is clear that there may be a need for some flexibility regarding the period for which a suspected terrorist may be detained. Confronted with a terrorist threat, state officials may need to act immediately, in the absence of a fully documented case. It may take some time to verify and document the threat. Where state officials act expeditiously, the failure to meet an arbitrary target of a fixed number of hours should not mean the automatic release of the person, who may well be dangerous. However, this cannot justify the complete denial of a timely detention review. Permanent residents who pose a danger to national security are also meant to be removed expeditiously. If this objective can be pursued while providing permanent residents

with a mandatory detention review within 48 hours, then how can a denial of review for foreign nationals for 120 days after the certificate is confirmed be considered a minimal impairment?

94 I conclude that the lack of timely review of the detention of foreign nationals violates s. 9 and s. 10(*c*) and cannot be saved by s. 1.

2. Do Extended Periods of Detention Under the Scheme Violate Section 7 or the Section 12 Guarantee Against Cruel and Unusual Treatment?

95 The question at this point is whether the extended detention that may occur under the *IRPA* violates the guarantee against cruel and unusual treatment under s. 12 of the *Charter*. The threshold for breach of s. 12 is high. As stated by Lamer J. in *Smith*, treatment or punishment is cruel and unusual if it is "so excessive as to outrage [our] standards of decency": *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1067; also *R. v. Wiles*, [2005] 3 S.C.R. 895, 2005 SCC 84, at para. 4.

96 The s. 12 issue of cruel and unusual treatment is intertwined with s. 7 considerations, since the indefiniteness of detention, as well as the psychological stress it may cause, is related to the mechanisms available to the detainee to regain liberty. It is not the detention itself, or even its length, that is objectionable. Detention itself is never pleasant, but it is only cruel and unusual in the legal sense if it violates accepted norms of treatment. Denying the means required by the principles of fundamental justice to challenge a detention may render the detention arbitrarily indefinite and support the argument that it is cruel or unusual. (The same may be true of onerous conditions of release that seriously restrict a person's liberty without affording an opportunity to challenge the restrictions.) Conversely, a system that

permits the detainee to challenge the detention and obtain a release if one is justified may lead to the conclusion that the detention is not cruel and unusual: see *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 (T.D.), *per* Rothstein J. (as he then was).

97 Mr. Almrei's first submission is that "the combination of the legislative scheme and the conditions of detention . . . [transforms] the Appellant's detention into one that is cruel and unusual". I would reject this submission. This Court has not, in its past decisions, recognized s. 12 as a mechanism to challenge the overall fairness of a particular legislative regime.

98 More narrowly, however, it has been recognized that indefinite detention in circumstances where the detainee has no hope of release or recourse to a legal process to procure his or her release may cause psychological stress and therefore constitute cruel and unusual treatment: Eur. Court H.R., *Soering* case, judgment of 7 July 1989, Series A, No. 161, at para. 111; compare *Lyons*, at pp. 339-41. However, for the reasons that follow, I conclude that the *IRPA* does not impose cruel and unusual treatment within the meaning of s. 12 of the *Charter* because, although detentions may be lengthy, the *IRPA*, properly interpreted, provides a process for reviewing detention and obtaining release and for reviewing and amending conditions of release, where appropriate.

99 On its face, the *IRPA* permits detention pending deportation on security grounds. In reality, however, a release from detention may be difficult to obtain. The Federal Court suggested that Mr. Almrei "holds the key to his release": *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2004] 4 F.C.R. 327, 2004 FC 420,

at para. 138. But voluntary departure may be impossible. A person named in a certificate of inadmissibility may have nowhere to go. Other countries may assume such a person to be a terrorist and are likely to refuse entry, or the person may fear torture on his or her return. Deportation may fail for the same reasons, despite the observation that "[i]n our jurisdiction, at this moment, deportation to torture remains a possibility" in exceptional circumstances: *Almrei*, 2005 FCA 54, at para. 127. The only realistic option may be judicial release.

100 In the case of a permanent resident, detention is continued if the judge is satisfied that the person "continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal": s. 83(3). The ministers bear the initial burden of establishing that these criteria are met: *Charkaoui (Re)*, [2004] 1 F.C.R. 528, 2003 FC 882, at para. 36. In the case of a foreign national, release may be granted if the judge is "satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person": s. 84(2). Unlike s. 83(3), s. 84(2) places the onus on the detainee: see *Ahani v. Canada (Minister of Citizenship and Immigration)* (2000), 24 Admin. L.R. (3d) 171 (F.C.A.).

101 Courts thus far have understood these provisions to set a high standard for release. In interpreting the predecessor to s. 84(2) under the *Immigration Act*, the Federal Court of Appeal held that judicial release "cannot be an automatic or easy thing to achieve", and that it "is not to be routinely obtained": *Ahani*, at para. 13. At the same time, courts have read the provision as allowing the judge to inquire whether terms and conditions could make the release safe. This is an invitation that Federal Court judges have rightly accepted: *Harkat v. Canada (Minister of Citizenship and*

Immigration) [2007] 1 F.C.R. 321, 2006 FC 628, at para. 82; *Almrei v. Canada (Minister of Citizenship and Immigration)* (2005), 270 F.T.R. 1, 2005 FC 1645, at paras. 419-26. Likewise, when reviewing the detention of a permanent resident under s. 83(3), judges have examined the context that would surround release in order to determine whether the person would pose a security risk: *Charkaoui (Re)*, 2005 FC 248, at paras. 71-73.

102 The cases at bar illustrate the difficulty that may be encountered in seeking release from a detention imposed under the *IRPA*. At the time of writing, Mr. Almrei, a foreign national, has been detained for over five years. He cannot be deported until the Minister issues an opinion that he constitutes a danger to the public. But two "danger opinions" have already been quashed by the Federal Court, the last one in March 2005. The Minister has yet to issue a new one. In dismissing Mr. Almrei's application for judicial release, Layden-Stevenson J. held that Mr. Almrei had established that his removal was not imminent, was not a "done deal" and would not occur within a reasonable time (para. 272). However, she held that she was compelled to keep him in detention because she found that his release would pose a danger to national security under s. 84(2): *Almrei*, 2005 FC 1645. Mr. Almrei argues that as far as he is concerned, his detention is indefinite.

103 Mr. Harkat has been released from detention, but remains under house arrest and continuous surveillance by the Canada Border Services Agency ("CBSA") and the RCMP by virtue of an order by Dawson J. He must at all times wear an electronic monitoring device and obtain the CBSA's permission before leaving his house. He must at all times be under the supervision of either his wife or his mother-in-law. Access to his residence is restricted to individuals who have posted sureties

and to Mr. Harkat's legal counsel, as well as to emergency, fire, police and health care professionals. The CBSA is permitted to intercept all telephone and oral communications between Mr. Harkat and any third party. Mr. Harkat is forbidden to use any cellular phone or any computer with Internet connectivity. Breach of any of the numerous conditions in Dawson J.'s order would lead to automatic rearrest; however, these conditions are subject to ongoing review and amendment. The government is attempting to deport him to Algeria; whether this is possible may depend on the outcome of legal processes that are still pending.

104 Mr. Charkaoui has been released from detention under conditions that are somewhat less onerous: *Charkaoui (Re)*, 2005 FC 248, at para. 86. These conditions have a serious impact on his liberty, and he remains in jeopardy of being rearrested for a breach of his conditions. But the conditions are subject to ongoing review and have been amended several times subsequent to his release. More legal avenues remain to be explored. Whether the government will seek to deport Mr. Charkaoui or detain him anew may depend on the outcome of his application for protection and the determination of the reasonableness of his certificate.

105 It is thus clear that while the *IRPA* in principle imposes detention only pending deportation, it may in fact permit lengthy and indeterminate detention or lengthy periods subject to onerous release conditions. The next question is whether this violates s. 7 or s. 12 based on the applicable legal principles.

106 This Court has previously considered the possibility of indefinite detention in the criminal context. In *Lyons*, a majority of the Court held that "dangerous offender" legislation allowing for indefinite detention did not constitute cruel and

unusual treatment or punishment within the meaning of s. 12 of the *Charter* because the statutory scheme includes a parole process that "ensures that incarceration is imposed for only as long as the circumstances of the individual case require" (p. 341, *per* La Forest J.). It is true that a judge can impose the dangerous offender designation only on a person who has been convicted of a serious personal injury offence; this Court indicated that a sentence of indeterminate detention, applied with respect to a future crime or a crime that had already been punished, would violate s. 7 of the *Charter* (pp. 327-28, *per* La Forest J.). But the use in criminal law of indeterminate detention as a tool of sentencing — serving both a punitive and a preventive function — does not establish the constitutionality of preventive detention measures in the immigration context.

107 The principles underlying *Lyons* must be adapted in the case at bar to the immigration context, which requires a period of time for review of the named person's right to remain in Canada. Drawing on them, I conclude that the s. 7 principles of fundamental justice and the s. 12 guarantee of freedom from cruel and unusual treatment require that, where a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. Such persons must have meaningful opportunities to challenge their continued detention or the conditions of their release.

108 The type of process required has been explored in cases involving analogous situations. In *Sahin*, Rothstein J. had occasion to examine a situation of ongoing detention (for reasons unrelated to national security) under the *Immigration*

Act. He concluded that "what amounts to an indefinite detention for a lengthy period of time may, in an appropriate case, constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice" (p. 229) and held that ongoing detention under the *Immigration Act* could be constitutional if it resulted from the weighing of a number of factors (at pp. 231-32):

> The following list, which, of course, is not exhaustive of all considerations, seems to me to at least address the more obvious [considerations]. Needless to say, the considerations relevant to a specific case, and the weight to be placed upon them, will depend upon the circumstances of the case.
>
> (1) Reasons for the detention, i.e. is the applicant considered a danger to the public or is there a concern that he would not appear for removal. I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public.
>
> (2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.
>
> (3) Has the applicant or the respondent caused any delay or has either not been as diligent as reasonably possible. Unexplained delay and even unexplained lack of diligence should count against the offending party.
>
> (4) The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc.
>
> A consideration that I think deserves significant weight is the amount of time that is anticipated until a final decision, determining, one way or the other, whether the applicant may remain in Canada or must leave.

109 Factors regarding release are considered in another part of the *IRPA* and the accompanying *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRP Regulations*"). When a non-citizen not named in a certificate is detained because he or she is inadmissible and also is a danger to the public or is unlikely to

appear for examination, the non-citizen is entitled to detention reviews before the Immigration and Refugee Board: *IRPA*, ss. 55 to 57. In determining whether the non-citizen should be held or released, the Board must take into account "prescribed factors": (a) the reason for detention; (b) the length of time in detention; (c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time; (d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and (e) the existence of alternatives to detention (s. 58 *IRPA* and r. 248 *IRP Regulations*).

110 I conclude that extended periods of detention under the certificate provisions of the *IRPA* do not violate ss. 7 and 12 of the *Charter* if accompanied by a process that provides regular opportunities for review of detention, taking into account all relevant factors, including the following:

(a) *Reasons for Detention*

111 The criteria for signing a certificate are "security, violating human or international rights, serious criminality or organized criminality" (s. 77). Detention pursuant to a certificate is justified on the basis of a continuing threat to national security or to the safety of any person. While the criteria for release under s. 83 of the *IRPA* also include the likelihood that a person will appear at a proceeding or for removal, a threat to national security or to the safety of a person is a more important factor for the purpose of justifying continued detention. The more serious the threat, the greater will be the justification for detention.

(b) *Length of Detention*

112 The length of the detention to date is an important factor, both from the perspective of the individual and from the perspective of national security. The longer the period, the less likely that an individual will remain a threat to security: "The imminence of danger may decline with the passage of time": *Charkaoui (Re)*, 2005 FC 248, at para. 74. Noël J. concluded that Mr. Charkaoui could be released safely from detention because his long period of detention had cut him off from whatever associations with extremist groups he may have had. Likewise, in Mr. Harkat's case, Dawson J. based her decision to release Mr. Harkat in part on the fact that the long period of detention meant that "his ability to communicate with persons in the Islamic extremist network has been disrupted": *Harkat*, 2006 FC 628, at para. 86.

113 A longer period of detention would also signify that the government would have had more time to gather evidence establishing the nature of the threat posed by the detained person. While the government's evidentiary onus may not be heavy at the initial detention review (see above, at para. 93), it must be heavier when the government has had more time to investigate and document the threat.

(c) *Reasons for the Delay in Deportation*

114 When reviewing detentions pending deportation, judges have assessed whether the delays have been caused by the detainees or the government: *Sahin*, at p. 231. In reviewing Mr. Almrei's application for release, the Federal Court of Appeal stated that a reviewing judge could "discount, in whole or in part, the delay resulting from proceedings resorted to by an applicant that have the precise effect of preventing compliance by the Crown with the law within a reasonable time": *Almrei*, 2005 FCA

54, at para. 58; see also *Harkat*, 2006 FC 628, at para. 30. Recourse by the government or the individual to applicable provisions of the *IRPA* that are reasonable in the circumstances and recourse by the individual to reasonable *Charter* challenges should not count against either party. On the other hand, an unexplained delay or lack of diligence should count against the offending party.

(d) *Anticipated Future Length of Detention*

115 If there will be a lengthy detention before deportation or if the future detention time cannot be ascertained, this is a factor that weighs in favour of release.

(e) *Availability of Alternatives to Detention*

116 Stringent release conditions, such as those imposed on Mr. Charkaoui and Mr. Harkat, seriously limit individual liberty. However, they are less severe than incarceration. Alternatives to lengthy detention pursuant to a certificate, such as stringent release conditions, must not be a disproportionate response to the nature of the threat.

117 In other words, there must be detention reviews on a regular basis, at which times the reviewing judge should be able to look at all factors relevant to the justice of continued detention, including the possibility of the *IRPA*'s detention provisions being misused or abused. Analogous principles apply to extended periods of release subject to onerous or restrictive conditions: these conditions must be subject to ongoing, regular review under a review process that takes into account all the above factors, including the existence of alternatives to the conditions.

118 Do the provisions for review of detention under the *IRPA*'s certificate scheme satisfy these requirements? To answer this question, we must examine ss. 83(3) and 84(2) in greater detail.

119 Section 84(2) governs the release of foreign nationals. It requires the judge to consider whether the "release" of the detainee would pose a danger to security. This implies that the judge can consider terms and conditions that would neutralize the danger. The judge, if satisfied that the danger no longer exists or that it can be neutralized by conditions, may order the release.

120 Section 83(3), which applies to permanent residents, has a slightly different wording. It requires the judge to consider not whether the *release* would pose a danger as under s. 84(2), but whether the *permanent resident* continues to be a danger. An issue may arise as to whether this difference in wording affects the ability of the judge to fashion conditions and hence to order conditional release. In my view, there is no practical difference between saying a person's release would be a danger and saying that the person is a danger. I therefore read s. 83(3), like s. 84(2), as enabling the judge to consider whether any danger attendant on release can be mitigated by conditions.

121 On this basis, I conclude that for both foreign nationals and permanent residents, the *IRPA*'s certificate scheme provides a mechanism for review of detention, which permits the reviewing judge to fashion conditions that would neutralize the risk of danger upon release, and hence to order the release of the detainee.

122 Reviewing judges have also developed a practice of periodic review in connection with release procedures: *Charkaoui (Re)*, 2005 FC 248, at para. 86. In the immigration context, such periodic reviews must be understood to be required by ss. 7 and 12 of the *Charter*. The Federal Court of Appeal has suggested that once a foreign national has brought an application for release under s. 84(2), he or she cannot bring a new application except on the basis of (i) new evidence or (ii) a material change in circumstances since the previous application: *Almrei*, 2005 FCA 54; see also, *Ahani*, at paras. 14-15. Such an interpretation would lead to a holding that s. 84(2) is inconsistent with ss. 7 and 12; however, since s. 84(2) has already been found to infringe s. 9 and cannot be saved under s. 1, it is not necessary to decide this issue.

123 In summary, the *IRPA*, interpreted in conformity with the *Charter*, permits robust ongoing judicial review of the continued need for and justice of the detainee's detention pending deportation. On this basis, I conclude that extended periods of detention pending deportation under the certificate provisions of the *IRPA* do not violate s. 7 or s. 12 of the *Charter*, provided that reviewing courts adhere to the guidelines set out above. Thus, the *IRPA* procedure itself is not unconstitutional on this ground. However, this does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under s. 24(1) of the *Charter.*

124 These conclusions are consistent with English and American authority. Canada, it goes without saying, is not alone in facing the problem of detention in the immigration context in situations where deportation is difficult or impossible. Courts in the United Kingdom and the United States have suggested that detention in this

context can be used only during the period where it is reasonably necessary for deportation purposes: *R. v. Governor of Durham Prison, ex parte Singh*, [1984] 1 All E.R. 983 (Q.B.); *Zadvydas*.

125 A case raising similar issues is the decision of the House of Lords in *A. v. Secretary of State for the Home Department*, [2005] 3 All E.R. 169, [2004] UKHL 56 ("*Re A*"). This was an appeal brought by nine foreign nationals who were suspected of involvement in terrorism, but were not charged with any crime. The United Kingdom government sought to deport them, but in most cases this was impossible due to a risk of torture. So most of the individuals were detained at Belmarsh Prison under s. 23 of the *Anti-terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24. This provision empowered the government to detain suspected international terrorists under the provisions governing detention pending deportation, despite the fact that removal from the United Kingdom was temporarily or indefinitely prevented, in derogation from art. 5 of the *European Convention on Human Rights*: see *Chahal*.

126 The government claimed that this derogation was necessary to combat the national security threat posed by Al-Qaeda terrorists. The House of Lords, by a majority of 8 to 1, accepted that Al-Qaeda terrorism represented a serious threat to the life of the nation, but seven of the eight Lords who accepted this premise nevertheless concluded that s. 23 was not strictly required by the exigencies of the situation. These same seven Lords also concluded that s. 23 was incompatible with art. 14 of the *European Convention on Human Rights*, because of the way it discriminated between nationals and non-nationals. The derogation permitting permanent detention of non-nationals treated them more harshly than nationals. Absent the possibility of

deportation, it lost its character as an immigration provision, and hence constituted unlawful discrimination.

127 The finding in *Re A* of breach of the detention norms under the European Convention on Human Rights was predicated on the U.K. Act's authorization of permanent detention. The *IRPA*, unlike the U.K. legislation under consideration in *Re A*, does not authorize indefinite detention and, interpreted as suggested above, provides an effective review process that meets the requirements of Canadian law.

128 The fairness of the detention review procedure arises as an independent issue. I concluded above that this procedure, like the certificate determination procedure, denies the right to a fair hearing and does so in a way that does not minimally impair the detainee's rights. For the reasons given earlier, Parliament must therefore revisit the provisions for detention review in order to meaningfully protect the procedural rights of detainees.

C. *Do the Certificate and Detention Review Procedures Discriminate Between Citizens and Non-Citizens, Contrary to Section 15 of the Charter, and if so, Is the Discrimination Justified Under Section 1 of the Charter?*

129 The appellant Mr. Charkaoui argues that the *IRPA* certificate scheme discriminates against non-citizens, contrary to s. 15(1) of the *Charter*. However, s. 6 of the *Charter* specifically allows for differential treatment of citizens and non-citizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter*: *Chiarelli*.

130 It is argued that while this is so, there are two ways in which the *IRPA* could, in some circumstances, result in discrimination. First, detention may become indefinite as deportation is put off or becomes impossible, for example because there is no country to which the person can be deported. Second, the government could conceivably use the *IRPA* not for the purpose of deportation, but to detain the person on security grounds. In both situations, the source of the problem is that the detention is no longer related, in effect or purpose, to the goal of deportation. In *Re A*, the legislation considered by the House of Lords expressly provided for indefinite detention; this was an important factor leading to the majority's holding that the legislation went beyond the concerns of immigration legislation and thus wrongfully discriminated between nationals and non-nationals: paras. 54, 81, 134, 157-58, 180 and 229.

131 Even though the detention of some of the appellants has been long — indeed, Mr. Almrei's continues — the record on which we must rely does not establish that the detentions at issue have become unhinged from the state's purpose of deportation. More generally, the answer to these concerns lies in an effective review process that permits the judge to consider all matters relevant to the detention, as discussed earlier in these reasons.

132 I conclude that a breach of s. 15 of the *Charter* has not been established.

D. *Are the IRPA Certificate Provisions Inconsistent With the Constitutional Principle of the Rule of Law?*

133 The appellant Mr. Charkaoui claims that the unwritten constitutional principle of the rule of law is infringed by two aspects of the *IRPA* scheme: the

unavailability of an appeal of the designated judge's determination that the certificate is reasonable; and the provision in s. 82 for the issuance of an arrest warrant by the executive (in the case of a permanent resident) or for mandatory arrest without a warrant following an executive decision (in the case of a foreign national).

134 The rule of law incorporates a number of themes. Most fundamentally, it requires government officials to exercise their authority according to law, and not arbitrarily: *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 748-49. It requires the creation and maintenance of an actual order of positive laws: *Reference re Manitoba Language Rights*. And it is linked to the principle of judicial independence: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.

135 Mr. Charkaoui's claim is based not on any of these themes, but on the content of the *IRPA*. But as this Court held in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49, "it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation . . . based on its content" (para. 59). Even if this dictum leaves room for exceptions, Mr. Charkaoui has not established that the *IRPA* should be one of them.

136 First, Mr. Charkaoui argues that the rule of law is violated by the unavailability of an appeal of the judge's determination of the reasonableness of the certificate. But there is no constitutional right to an appeal (*Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53); nor can such a right be said to flow from the rule of law in this context. The Federal Court is a superior court, not an administrative tribunal: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 4. Federal Court judges, when reviewing certificates

under the *IRPA*, have all the powers of Federal Court judges and exercise their powers judicially. Moreover, the Federal Court of Appeal has reinforced the legality of the process by holding that it is appropriate to circumvent the s. 80(3) privative clause where the constitutionality of legislation is challenged (*Charkaoui (Re)*, 2004 FCA 421, at paras. 47-50) or where the named person alleges bias on the part of the designated judge (*Zündel, Re* (2004), 331 N.R. 180, 2004 FCA 394).

137 Second, Mr. Charkaoui argues that the rule of law is violated by the provision for arrest under a warrant issued by the executive (in the case of a permanent resident) or for automatic detention without a warrant (in the case of a foreign national). But the rule of law does not categorically prohibit automatic detention or detention on the basis of an executive decision. The constitutional protections surrounding arrest and detention are set out in the *Charter*, and it is hard to see what the rule of law could add to these provisions.

IV. Conclusion

138 The scheme set up under Division 9 of Part 1 of the *IRPA* suffers from two defects that are inconsistent with the *Charter*.

139 The first is that s. 78(*g*) allows for the use of evidence that is never disclosed to the named person without providing adequate measures to compensate for this non-disclosure and the constitutional problems it causes. It is clear from approaches adopted in other democracies, and in Canada itself in other security situations, that solutions can be devised that protect confidential security information and at the same time are less intrusive on the person's rights. It follows that the

IRPA's procedure for the judicial confirmation of certificates and review of detention violates s. 7 of the *Charter* and has not been shown to be justified under s. 1 of the *Charter*. I would declare the procedure to be inconsistent with the *Charter*, and hence of no force or effect.

140 However, in order to give Parliament time to amend the law, I would suspend this declaration for one year from the date of this judgment. If the government chooses to go forward with the proceedings to have the reasonableness of Mr. Charkaoui's certificate determined during the one-year suspension period, the existing process under the *IRPA* will apply. After one year, the certificates of Mr. Harkat and Mr. Almrei (and of any other individuals whose certificates have been deemed reasonable) will lose the "reasonable" status that has been conferred on them, and it will be open to them to apply to have the certificates quashed. If the government intends to employ a certificate after the one-year delay, it will need to seek a fresh determination of reasonableness under the new process devised by Parliament. Likewise, any detention review occurring after the delay will be subject to the new process.

141 The second defect is found in s. 84(2) of the *IRPA*, which denies a prompt hearing to foreign nationals by imposing a 120-day embargo, after confirmation of the certificate, on applications for release. Counsel for the ministers submitted in oral argument that if this Court were to find that s. 84(2) violates the *Charter*, the appropriate remedy would be to strike s. 84(2) and read foreign nationals into s. 83. This is a good first step, but it does not provide a complete solution, since s. 83 deals with detention review only *until the certificate has been determined to be reasonable*, whereas s. 84(2) deals with detention review *after it has been determined to be*

reasonable. Striking s. 84(2) would therefore leave no provision for review of detention of foreign nationals once the certificate has been deemed reasonable.

142 Accordingly, I conclude that the appropriate remedy is to strike s. 84(2) as well as to read foreign nationals into s. 83 and to strike the words "until a determination is made under subsection 80(1)" from s. 83(2).

143 I would allow the appeals with costs to the appellants, and answer the constitutional questions as follows:

1. Do ss. 33 and 77 to 85 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, in whole or in part or through their combined effect, offend the principle of judicial independence protected by:

   (a) s. 96 of the *Constitution Act, 1867*, or

   (b) the Preamble to the *Constitution Act, 1867*?

Answer: No.

2. Do ss. 33 and 77 to 85 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, in whole or in part or through their combined effect, offend the constitutional principle of the rule of law?

Answer: No.

3. Do ss. 33 and 77 to 85 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, in whole or in part or through their combined effect, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

5. Do ss. 33 and 77 to 85 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, in whole or in part or through their combined effect, infringe s. 9 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

7. Do ss. 33 and 77 to 85 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, in whole or in part or through their combined effect, infringe s. 10 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

9. Do ss. 33 and 77 to 85 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, in whole or in part or through their combined effect, infringe s. 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

10. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

11. Do ss. 33 and 77 to 85 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, in whole or in part or through their combined effect, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

12. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

APPENDIX

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

33. [Rules of interpretation] The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

77. (1) [Referral of certificate] The Minister and the Minister of Public Safety and Emergency Preparedness shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80.

(2) [Effect of referral] When the certificate is referred, a proceeding under this Act respecting the person named in the certificate, other than an

application under subsection 112(1), may not be commenced and, if commenced, must be adjourned, until the judge makes the determination.

78. [Judicial consideration] The following provisions govern the determination:

(*a*) the judge shall hear the matter;

(*b*) the judge shall ensure the confidentiality of the information on which the certificate is based and of any other evidence that may be provided to the judge if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

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

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

(*e*) on each request of the Minister or the Minister of Public Safety and Emergency Preparedness made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(*f*) the information or evidence described in paragraph (*e*) shall be returned to the Minister and the Minister of Public Safety and Emergency Preparedness and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary;

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

(*h*) the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed;

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

(*j*) the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.

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

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

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

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

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

81. [Effect of determination — removal order] If a certificate is determined to be reasonable under subsection 80(1),

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

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

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

Detention

82. (1) [Detention of permanent resident] The Minister and the Minister of Public Safety and Emergency Preparedness may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate described in subsection 77(1) if they have reasonable grounds to believe

that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.

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

83. (1) [Review of decision for detention] Not later than 48 hours after the beginning of detention of a permanent resident under section 82, a judge shall commence a review of the reasons for the continued detention. Section 78 applies with respect to the review, with any modifications that the circumstances require.

(2) [Further reviews] The permanent resident must, until a determination is made under subsection 80(1), be brought back before a judge at least once in the six-month period following each preceding review and at any other times that the judge may authorize.

(3) [Order for continuation] A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.

84. (1) [Release] The Minister may, on application by a permanent resident or a foreign national, order their release from detention to permit their departure from Canada.

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

85. [Inconsistency] 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.

PRE-REMOVAL RISK ASSESSMENT

Protection

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

(2) [Exception] Despite subsection (1), a person may not apply for protection if

(*a*) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*;

(*b*) they have made a claim to refugee protection that has been determined under paragraph 101(1)(*e*) to be ineligible;

(*c*) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or

(*d*) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

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

(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

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

Principle of Non-refoulement

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

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

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

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

(3) [Removal of refugee] 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.

Appeals allowed with costs.

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