

**Date: 20030619**

**Docket: DES-4-02**

**Citation: 2003 FCT 759**

**IN THE MATTER OF** a certificate signed pursuant to  
subsection 77(1) of the *Immigration and Refugee Protection Act*,

S.C. 2001, c. 27, (the "Act");

**AND IN THE MATTER OF** the referral of that certificate  
to the Federal Court of Canada pursuant to subsection 77(1),

sections 78 and 80 of the *Act*;

**AND IN THE MATTER OF** Mohamed Harkat.

### **REASONS FOR ORDER**

#### **DAWSON J.**

[1] Mr. Harkat has moved for an order pursuant to section 79 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("Act") suspending this proceeding in order to permit him to make, and the Minister of Citizenship and Immigration ("Minister") to decide, an application for protection. What fundamentally is put in issue in this motion is the timing of the Minister's decision as to whether Mr. Harkat may be removed from Canada if, in this proceeding, he is found to be inadmissible to Canada. This issue, in turn, depends upon ascertaining Parliament's intention as expressed in the Act.

#### **BACKGROUND FACTS**

[2] The factual basis on which this dispute arises is as follows. On February 24, 1997, Mr. Harkat was found to be a Convention refugee.

[3] Thereafter, on December 10, 2002 a certificate, signed by the Minister and the Solicitor General of Canada ("security certificate" or "certificate") was referred to this Court pursuant to subsection 77(1) of the Act for determination as to whether the certificate is reasonable. The security certificate asserts that Mr. Harkat is inadmissible to Canada under paragraphs 34(1)(c) and 34(1)(f) of the Act. Those paragraphs render a permanent resident or foreign national inadmissible on security grounds for engaging in terrorism, or for being a member of an organization that there are reasonable grounds to believe engages, has engaged, or will engage in terrorism.

At the time the security certificate was issued Mr. Harkat was a foreign national, as defined in the Act, and he had not acquired permanent resident status.

[4] On December 24, 2002, counsel for Mr. Harkat gave formal notice of Mr. Harkat's application for protection pursuant to section 112 of the Act. In response, Mr. Harkat's counsel was advised that because Mr. Harkat was previously determined to be a Convention refugee, he is a protected person referred to in subsection 115(1) of the Act. In consequence, it was said that Mr. Harkat may not apply for protection under section 112 of the Act.

## **THE ISSUE**

[5] The legal question to be answered in this motion is whether Mr. Harkat is entitled to apply for protection pursuant to subsection 112(1) of the Act. If so, it follows that he is entitled to request the suspension of this proceeding pending determination of the application for protection.

## **ANALYSIS**

### **(i) The Relevant Provisions of the Act**

[6] I turn first to consider the legislative framework relevant to this motion, and specifically the inter-relation of the provisions of the Act which deal with security certificates, refugee protection and pre-removal risk assessments. The provisions of the Act to which I refer are set out in Annex A to these reasons.

#### **(a) The Security Certificate Regime**

[7] One effect of the issuance of a security certificate, provided for in subsection 77(2) of the Act, is that upon referral of the certificate to the Court, any proceeding under the Act may neither be commenced nor continued in respect of the person named in a security certificate. The one exception to this provision is an application for protection under subsection 112(1) of the Act. The stay of proceeding provided in subsection 77(2) continues until a decision is made as to whether the security certificate is reasonable.

[8] With respect to an application for protection, on the request of the Minister or a foreign national named in the certificate, the judge designated to hear the certificate proceedings ("designated judge") shall, pursuant to subsection 79(1) of the Act, suspend the proceeding with respect to the reasonableness of the certificate in order to allow the Minister to reach his or her decision with respect to the application for protection. When the Minister has reached that decision, the Minister is required to give notice of the decision to the foreign national and to the designated judge, at which time the judge shall resume the certificate proceedings. In addition to ruling on the reasonableness of the certificate, the judge is then also required to review the lawfulness of the decision of the Minister on the application for protection. Such review is to be done on the basis of the grounds for judicial review listed in subsection 18.1(4) of the *Federal Court Act*. See: subsection 79(2) of the Act.

[9] At the conclusion of this process the judge shall quash the certificate if he or she is of the opinion that it is not reasonable. If the judge does not quash the certificate and finds the certificate to be reasonable, but finds the decision on the application for protection to be not lawfully made, that latter decision is quashed and the proceedings are again suspended pending redetermination of the application for protection. See: section 80 of the Act.

[10] If the certificate is determined to be reasonable, three things follow, as set out in section 81 of the Act. They are that the certificate:

- (a) is conclusive proof that the permanent resident or foreign national named in it is inadmissible;
- (b) is a removal order that may not be appealed against, and is in force; and
- (c) the person named in it may not apply for protection under subsection 112(1).

[11] Accordingly, it is imperative that any application for protection on behalf of a person named in a certificate be made before it is decided that the certificate is reasonable.

(b) The Conferral of Refugee Protection

[12] "Refugee Protection" is a new concept contained in the Act. A person is granted refugee protection, pursuant to section 95 of the Act, when he or she is found to be either a Convention refugee as defined by the United Nations Convention Relating to the Status of Refugees (which definition is incorporated into the Act in section 96), or when found to be a person in need of protection as defined in subsection 97(1) of the Act. People who fall within the definition of a "person in need of protection" are persons that are described in Article 1 of the United Nations Convention Against Torture or are persons who would have been granted protection under the former Immigration Act as members of the Post-Determination Refugee Claimants in Canada Class.

[13] Refugee protection is also conferred, pursuant to subsection 95(c) of the Act, where the Minister allows an application for protection, except where an application for protection is allowed in respect of a person named in a security certificate.

[14] Subsection 95(2) of the Act provides that a person upon whom refugee protection is conferred is a "protected person", subject only to losing such status as a result of certain specifically listed subsequent events, none of which are at issue in this case.

[15] Mr. Harkat is, therefore, by virtue of the February 24, 1997 determination that he is a Convention refugee, a "protected person". Any application for protection now brought, being an application brought subsequent to the issuance of the security

certificate, could not result in refugee protection being conferred so as to make Mr. Harkat a protected person.

[16] A significant benefit is conferred upon protected persons. Section 115(1) provides that a protected person shall not be removed from Canada to a country where they would be a risk of persecution for a Convention ground, or be at risk of torture or cruel and unusual treatment or punishment. There are narrow exceptions to this protection. The exception to this general principle of non-refoulement of potential application to Mr. Harkat is contained in paragraph 115(2)(b) of the Act, which provides that a person who is inadmissible on grounds of security may be returned to a country where there is risk of persecution 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.

(c) The Pre-Removal Risk Assessment

[17] Generally, all persons who are in Canada and who are subject to a removal order which is in force, or who are named in a security certificate, may apply for a pre-removal risk assessment. The exceptions to this general right are found in subsections 112(1) and (2) of the Act. The exceptions found in subsection 112(2) are agreed not to be applicable to Mr. Harkat. More will be said later of the exception contained in subsection 112(1).

[18] Subsection 112(3) provides that applicants who are inadmissible on grounds which include being named in a security certificate, are only eligible to receive a modified pre-removal risk assessment. A person named in a security certificate is not assessed against the fear of persecution within the meaning of the United Nations Convention Relating to the Status of Refugees, but rather is assessed only against the grounds enumerated in section 97 of the Act. (See: subsection 113(d) of the Act). This requires assessment of whether the applicant is at risk of torture, or risk to his or her life, or risk of cruel and unusual treatment.

[19] A further distinction exists where the applicant for a pre-removal risk assessment is described in a security certificate. That distinction, found in paragraph 114(1)(b) of the Act, is that a positive determination will not have the effect of conferring refugee protection. Rather, the effect of a positive decision in this case is to stay the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection. Such a stay of removal may, pursuant to subsection 114(2) of the Act, be cancelled by the Minister if circumstances surrounding the stay have changed.

**(ii) The Applicable Principles of Statutory Interpretation**

[20] Having described generally the legislative scheme, I move to consider the principles to be applied in order to ascertain Parliament's intent as evidenced in the legislation.

[21] The parties agree that the approach to be taken when interpreting the Act is that the words of the Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object

of the Act and the intention of Parliament. See, for example, *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 at paragraph 27.

[22] As the Federal Court of Appeal noted *Bristol-Myers Squibb Co. v. Canada (Attorney General)* 2003 FCA 180, at paragraph 13:

This holistic approach to the interpretation of legislation [...] requires a court to attribute the meaning that provides the best fit with both the text and the context of the provision in question. Neither can be ignored, although the clearer the "ordinary meaning" of the text, the more compelling the contextual considerations must be in order to warrant a different reading of it, especially when that involves adding words to those used by the legislator.

### (iii) The Grammatical and Ordinary Sense of the Relevant Text

[23] I begin with consideration of the actual words used by Parliament as found in the Act. The key provisions are subsection 112(1), subsections 115(1) and (2), and subsections 95(1) and (2) which, for ease of reference, are as follows:

112. (1) 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 effect or are named in a certificate described in subsection 77(1).  
(1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est soumise à un ordre de renvoi en vigueur ou nommée au certificat visé au paragraphe 77(1).

[...]

[...]

115. (1) A protected person or a person who is recognized as a refugee by another country to which they would be at risk of persecution or cruel and unusual treatment or punishment shall not be removed from Canada to a country where they would be at risk of persecution or cruel and unusual treatment or punishment.  
(1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

115. (2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire\_:

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

(a) who is inadmissible on grounds of serious criminality and who constitutes a danger to the public in Canada; or  
(a) qui est inadmissible sur des motifs de criminalité grave et qui constitue un danger pour le public au Canada;

(b) who is inadmissible on grounds of organized criminality if, in the opinion of the Minister, a danger to the public in Canada; or  
(b) qui est inadmissible sur des motifs de criminalité organisée si, selon le ministre,

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.

il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

Canada.

[...]

95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :

95. (1) Refugee protection is conferred on a person when a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle

(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection;

b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger; person to be a Convention refugee or a person in need of protection; or

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

b) the Board determines the person to be a Convention refugee or a person in need of protection; or c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

95. (2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4). [Le souligné est de moi.]

95. (2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4). [Le souligné est de moi.]

[24] Subsection 112(1) of the Act specifies who may apply for protection and receive a pre-removal risk assessment. Specifically excluded are persons "referred to in subsection 115(1)". Subsection 115(1) refers to a "protected person" or "a person who is recognized as a Convention refugee by another country to which the person may be returned" (the latter provision is not relevant to this case). Subsection 95(2) provides that a "protected person" is "a person on whom refugee protection is conferred under subsection (1)".

[25] Therefore, because Mr. Harkat has been determined to be a Convention refugee he is a "protected person", and is therefore a person referred to in subsection 115(1) of the Act. It follows on the plain and grammatical wording of the legislation, read in its ordinary sense, that he is not a person entitled to a pre-removal risk

assessment. For Mr. Harkat to be so entitled subsection 112(1) would have to be read as if the phrase "other than a person referred to in subsection 115(1)" was not there.

[26] On Mr. Harkat's behalf it is alleged that subsection 115(1) must be read together with the exception to subsection 115(1) found in subsection 115(2). Reading them together has the result, it is said, of removing Mr. Harkat from the ambit of subsection 115(1).

[27] There are, in my respectful view, two difficulties with this submission. First, subsection 112(1) does not refer to persons referred to "in subsections 115(1) and (2)". It would have been easy for the provision to have so read if that was Parliament's intent. Second, for subsection 115(2) to operate to exclude a person from subsection 115(1) in circumstances such as face Mr. Harkat, the person must be "inadmissible on grounds of security". I am not satisfied that simply being named in a certificate makes one inadmissible on grounds of security within the contemplation of paragraph 115(2) because it is not until the security certificate is found to be reasonable that the inadmissibility of the person named in the certificate is conclusively proven. (See: subsection 81(a) of the Act). Any suggestion of such inadmissibility would not, it seems to me, remain if the certificate were to be quashed. This interpretation is consistent with the position of the Crown on this motion, which is that Mr. Harkat is not inadmissible until the Court determines the certificate to be reasonable.

#### **(iv) The Broader Statutory Context**

[28] The grammatical and ordinary sense of the words used is supported when the relevant provisions are read in the entire context of the Act. (Although I note parenthetically that the text of the legislation appears to be clear, requiring compelling contextual consideration to warrant a different meaning). In order, however, to interpret the provisions governing the right to a pre-removal risk assessment contextually, I shall consider whether the interpretation based on the ordinary sense of the words used:

- (a) is consistent with the regulations to the Act;
- (b) produces an absurd result or, rather, is consistent with the scheme of the Act; and
- (c) is consistent with the object and intention of the Act.

#### **(a) The Regulations**

[29] It is argued on Mr. Harkat's behalf that his interpretation of the Act is borne out by the Immigration and Refugee Protection Regulations, SOR/2002-227 ("Regulations") and particularly by subsection 160(1) and paragraph 160(3)(b) of the Regulations. They are as follows:

160. (1) Subject to subsection (2) and for 160. (1) Sous réserve du paragraphe (2), the purposes of subsection 112(1) of the pour l'application du paragraphe 112(1) de

Act, a person may apply for protection la Loi, toute personne peut faire une  
after they are given notification to that demande de protection après avoir reçu du  
effect by the Department. ministère un avis à cet effet.

[...]

[...]

160. (3) Notification shall be given

160. (3) L'avis est donné :

[...]

[...]

(b) in the case of a person named in ab) dans le cas de la personne mentionnée  
certificate described in subsection 77(1) of dans le certificat prévu au paragraphe 77(1)  
the Act, on the provision of a summary de la Loi, lorsque le résumé de la preuve  
under paragraph 78(h) of the Act. visé à l'alinéa 78h) de la Loi est fourni.

[30] In my view, the answer to this submission is found in the wording of  
subsection 160(1) of the Regulations which indicates that the provisions are "for the  
purposes of subsection 112(1) of the Act" and that "a person may apply for protection  
after they are given notification to that effect". It is common ground that notification  
was not provided to Mr. Harkat. In my view that was appropriate, given that the  
regulatory provisions exist for the purposes of subsection 112(1) of the Act and  
subsection 112(1) does not, as I found above, authorize an application for protection  
being brought by a person who, having been found to be a refugee, is already a  
protected person.

[31] Put another way, the Regulations cannot alter the scope of protection  
provided in the Act.

**(b) Absurd Result?**

[32] On Mr. Harkat's behalf it is argued that this interpretation leads to the  
following absurd results:

(i) someone who has not been determined to be a Convention refugee  
does get a pre-removal risk assessment, prior to the section 80 determination  
of a certificate, and judicial review of the decision rendered with respect to the  
application for protection, without leave, pursuant to subsection 79(2) of the  
Act; however

(ii) someone who has been determined to be a Convention refugee, must  
wait and then get a risk assessment, "if at all", after the determination of the  
certificate, for which leave would be required to judicially review the decision.  
This is described by Mr. Harkat's counsel as "an absurd and nonsensical result  
incongruous with the clear intent of protection against torture and the clear  
scheme of the Act".

[33] I respectfully disagree. The legislative scheme as I have described above  
does not lead to lesser rights for a person who is determined to be a Convention



refugee and thereby given refugee protection before the issuance of a security certificate. Such a person at all times maintains their right not to be refouled unless the Minister determines, pursuant to paragraph 115(2)(b) of the Act, that he or she should not be allowed to remain in Canada because of the nature and severity of acts committed, or because of danger to the security of Canada.

[34] By comparison, a person who has not received refugee protection and who is named in a security certificate is only entitled to a modified pre-removal risk assessment. That assessment cannot consider the existence of a well-founded fear of persecution on Convention grounds, and cannot result in the conferral of refugee protection. The result of the favourable decision is a stay of removal which provides protection similar to that enjoyed by a person with refugee protection.

[35] It is true that if after the completion of the certificate proceedings the Minister exercises his or her discretion to refole a protected person, that decision may only be reviewed by the Court if leave is granted by the Court. However, the threshold at law for the granting of leave is low, an applicant need only establish a fairly arguable case. See: *Bains v. Canada (Minister of Employment and Immigration)* (1990), 109 N.R. 239 (F.C.A.) at paragraph 1. This does not create an absurd result, and it is offset, at least in part, by the fact that if leave is given a right of appeal exists from the resulting decision where a question is certified by the Court. By comparison, the decision of the designated judge with respect to the reasonableness of the certificate and the lawfulness of the pre-removal risk assessment is not in any event appealable.

### **(c) The Object and Intent of the Act**

[36] It is common ground that one of the objects of the Act is to streamline or expedite immigration proceedings in Canada while, at the same time, protecting the safety of Canada, maintaining the security of Canadian society, and promoting international justice and security by denying access to Canadian territory to persons who are security risks. See: paragraphs 3(1)(h) and (i) of the Act.

[37] Further, the Act is to be construed and applied in a manner that ensures that decisions taken under the Act are consistent with the *Canadian Charter of Rights and Freedoms*, and comply with international human rights instruments to which Canada is signatory. See: paragraphs 3(3)(d) and (f) of the Act.

[38] Nothing in the interpretation which I give to subsection 112(1) is, in my view, inconsistent with the objects of the Act, or the Charter, or international human rights instruments. Rather, such interpretation reflects that, in the words of the Supreme Court of Canada in *Chieu, supra* at paragraph 59, "the Act treats citizens differently from permanent residents, who in turn are treated differently from Convention refugees, who are treated differently from individuals holding visas and from illegal residents. It is an important aspect of the statutory scheme that these different categories of individuals are treated differently, with appropriate adjustments to the varying rights and context of the individuals in these groups". While those words were written with respect to the former Immigration Act, I consider them to be equally apposite to the current Act.

[39] Mr. Harkat argues that this interpretation contradicts the object of the Act to streamline proceedings, in that the Act intends to collapse into the inquiry as to the reasonableness of the certificate all issues of removal. I again, respectfully, disagree. First, to so collapse the proceeding would, for the reasons set out above, arguably diminish the protection already afforded to someone such as Mr. Harkat who now enjoys protection as a Convention refugee. Second, the interpretation urged by Mr. Harkat would result in the suspension of this proceeding, followed by the decision with respect to a pre-removal risk assessment, and then the conclusion of the certificate proceedings. At the end of that Mr. Harkat would still, in my view, have the right he now enjoys not to be refoiled without a further decision by the Minister, which decision would be judicially reviewable with leave of the Court. The Act as I interpret it provides for only one decision as to whether Mr. Harkat may be removed. This interpretation provides for a more streamlined proceeding.

[40] Mr. Harkat also argues that it is unfair that any decision of the Minister under section 115 to remove him would be judicially reviewed, on leave, by a different judge than the designated judge. The other judge would not, it is argued, have the benefit of the complete record now before the Court. I am not satisfied that this would be the case. Any judicial review of the Minister's decision would be based upon the record before the Minister, which may be at least co-extensive with that now before the Court. Moreover, the nature of the decision on judicial review is not to substitute the Court's discretion for that of the Minister on all of the facts known to the Court. Rather, the function of the Court on judicial review is to gauge the lawfulness of the Minister's decision on the record before him or her.

[41] A final point. Mr. Harkat relied upon the decision of my colleague Mr. Justice MacKay in *Re Jaballah*, 2002 FCT 1046 in support of his interpretation of the Act. However, Mr. Jaballah was not a Convention refugee and so his circumstances are distinguishable from those of Mr. Harkat. Mr. Justice MacKay was not required to consider the legislative scheme as it applies to a Convention refugee.

## **CONCLUSION**

[42] For these reasons, I have concluded that Mr. Harkat is not entitled to apply for protection pursuant to subsection 112(1) of the Act. An order will issue, therefore, dismissing the motion.

[43] The Crown seeks its costs of this motion. As this is a novel point, not yet decided by the case law, in the exercise of my discretion I consider that each side should bear their own costs. There will be no order as to costs.

\_\_\_\_\_  
"Eleanor R. Dawson"

Judge

Ottawa, Ontario

June 19, 2003

## ANNEX A

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

77. (1) Le ministre et le solliciteur général du Canada déposent à la Section de première instance de la Cour fédérale le certificat attestant qu'un résident permanent ou qu'un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée pour qu'il en soit disposé au titre de l'article 80.

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

(2) Il ne peut être procédé à aucune instance visant le résident permanent ou l'étranger au titre de la présente loi tant qu'il n'a pas été statué sur le certificat; n'est pas visée la demande de protection prévue au paragraphe 112(1).

[...]

[...]

79. (1) On the request of the Minister, 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).

79. (1) Le juge suspend l'affaire, à la demande du résident permanent, de l'étranger ou du ministre, pour permettre à un juge de décider d'une demande de protection visée au paragraphe 112(1).

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

(2) Le ministre notifie sa décision sur la demande de protection au résident permanent ou à l'étranger et au juge, lequel reprend l'affaire et contrôle la légalité de la décision, compte tenu des motifs visés au paragraphe 18.1(4) de la Loi sur la Cour fédérale.

80. (1) The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision referred to in subsection 18.1(4) of the Federal Court Act.

80. (1) Le juge décide du caractère raisonnable du certificat et, le cas échéant, de la légalité de la décision du ministre, compte tenu des renseignements et autres éléments de preuve dont il dispose.

80. (1) The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision referred to in subsection 18.1(4) of the Federal Court Act.

(2) Il annule le certificat dont il ne peut conclure qu'il est raisonnable; si l'annulation ne vise que la décision du ministre il suspend l'affaire pour permettre l'application pour protection, if any, is lawfully made.

(3) La décision du juge est définitive et

(2) The judge shall quash a certificate if n'est pas susceptible d'appel ou de contrôle the judge is of the opinion that it is not judiciaire. reasonable. If the judge does not quash the certificate but determines that the decision 81. Le certificat jugé raisonnable fait foi de on the application for protection is not l'interdiction de territoire et constitue une lawfully made, the judge shall quash the mesure de renvoi en vigueur et sans appel, decision and suspend the proceeding to sans qu'il soit nécessaire de procéder au allow the Minister to make a decision on contrôle ou à l'enquête; la personne visée the application for protection.(3) The ne peut dès lors demander la protection au determination of the judge is final and titre du paragraphe 112(1). may not be appealed or judicially reviewed. [...]

81. If a certificate is determined to be 95. (1) L'asile est la protection conférée à reasonable under subsection 80(1), toute personne dès lors que, selon le cas\_:

- (a) it is conclusive proof that the a) sur constat qu'elle est, à la suite d'une permanent resident or the foreign national demande de visa, un réfugié ou une named in it is inadmissible; personne en situation semblable, elle devient soit un résident permanent au titre
  - (b) it is a removal order that may not be du visa, soit un résident temporaire au titre appealed against and that is in force d'un permis de séjour délivré en vue de sa without the necessity of holding or protection; continuing an examination or an admissibility hearing; and b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;
  - (c) the person named in it may not apply for protection under subsection 112(1). c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).
- [...]

95. (1) Refugee protection is conferred on (2) Est appelée personne protégée la a person when personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée

- (a) the person has been determined to be a au titre des paragraphes 108(3), 109(3) ou Convention refugee or a person in similar 114(4). circumstances under a visa application and becomes a permanent resident under 96. A qualité de réfugié au sens de la the visa or a temporary resident under a Convention - le réfugié - la personne qui, temporary resident permit for protection craignant avec raison d'être persécutée du reasons; fait de sa race, de sa religion, de sa nationalité, de son appartenance à un
- (b) the Board determines the person to be groupe social ou de ses opinions a Convention refugee or a person in need politiques\_ of protection; or a) soit se trouve hors de tout pays dont elle
- (c) except in the case of a persona la nationalité et ne peut ou, du fait de described in subsection 112(3), the cette crainte, ne veut se réclamer de la Minister allows an application for protection de chacun de ces pays;

protection.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait

(2) A protected person is a person onsa résidence habituelle, ne peut ni, du fait whom refugee protection is conferredde cette crainte, ne veut y retourner.

under subsection (1), and whose claim or

application has not subsequently been97. (1) A qualité de personne à protéger la deemed to be rejected under subsectionpersonne qui se trouve au Canada et serait 108(3), 109(3) or 114(4). personnellement, par son renvoi vers tout

pays dont elle a la nationalité ou, si elle n'a

96. A Convention refugee is a personpas de nationalité, dans lequel elle avait sa who, by reason of a well-founded fear ofrésidence habituelle, exposée\_:

persecution for reasons of race, religion,

nationality, membership in a particulara) soit au risque, s'il y a des motifs sérieux social group or political opinion, de le croire, d'être soumise à la torture au

sens de l'article premier de la Convention

(a) is outside each of their countries ofcontre la torture;

nationality and is unable or, by reason of

that fear, unwilling to avail themselves ofb) soit à une menace à sa vie ou au risque the protection of each of those countries;de traitements ou peines cruels et inusités

or

dans le cas suivant\_:

(b) not having a country of nationality, is(i) elle ne peut ou, de ce fait, ne veut se outside the country of their formerréclamer de la protection de ce pays,

habitual residence and is unable or, by

reason of that fear, unwilling to return to(ii) elle y est exposée en tout lieu de ce that country. pays alors que d'autres personnes

originaires de ce pays ou qui s'y trouvent

97. (1) A person in need of protection is ane le sont généralement pas,

person in Canada whose removal to their

country or countries of nationality or, if(iii) la menace ou le risque ne résulte pas they do not have a country of nationality,de sanctions légitimes - sauf celles

their country of former habitual residence,infligées au mépris des normes would subject them personally internationales - et inhérents à celles-ci ou

occasionnés par elles,

(a) to a danger, believed on substantial

grounds to exist, of torture within the(iv) la menace ou le risque ne résulte pas meaning of Article 1 of the Conventionde l'incapacité du pays de fournir des soins

Against Torture; or

médicaux ou de santé adéquats.

(b) to a risk to their life or to a risk of(2) A également qualité de personne à cruel and unusual treatment or punishmentprotéger la personne qui se trouve au if

Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par

(i) the person is unable or, because of thatrèglement le besoin de protection.

risk, unwilling to avail themselves of the

protection of that country,

[...]

(ii) the risk would be faced by the person112. (1) La personne se trouvant au Canada in every part of that country and is notet qui n'est pas visée au paragraphe 115(1)

faced generally by other individuals in orpeut, conformément aux règlements,

from that country, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (2) Elle n'est pas admise à demander la protection dans les cas suivants\_:

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care. a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la Loi sur l'extradition;

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection. b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);

[...] c) si elle n'a pas quitté le Canada après le rejet de sa demande de protection, le délai prévu par règlement n'a pas expiré;

112. (1) 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). d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif au rejet de sa demande d'asile ou de protection, soit à un prononcé d'irrecevabilité, de désistement ou de retrait de sa demande d'asile.

(2) Despite subsection (1), a person may not apply for protection if (3) L'asile ne peut être conféré au demandeur dans les cas suivants\_:

(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act; a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible; b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement

(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 c) d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un

(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 d) il est nommé au certificat visé au

was rejected.

paragraphe 77(1).

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

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

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les

(b) is determined to be inadmissible 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 term of imprisonment of at least 10 years;

(b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires; une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

(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) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles mentionnés à l'article 97 et d'autre part\_;

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

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

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

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available,

or that the applicant could not reasonably have been expected to have presented, at the time of the rejection;

s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu

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

en cause, à la mesure de renvoi le visant. (2) Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113d) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé.

(c) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

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

(3) Le ministre peut annuler la décision accordée la demande de protection s'il estime qu'elle découle de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

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

(4) La décision portant annulation emporte nullité de la décision initiale et la demande de protection est réputée avoir été rejetée.

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

Principe du non-refoulement  
(1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

114. (1) A decision to allow an application for protection has the effect of conferring refugee protection; and

(1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(a) in the case of an applicant described in subsection 112(3), the effect of conferring refugee protection; and

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

(b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or a place in respect of which the applicant was determined to be in need of protection.

a) pour grande criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ces actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine the application and may cancel the stay.

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

(3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of withholding material facts on a relevant matter, the Minister may vacate the decision.

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

(3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of withholding material facts on a relevant matter, the Minister may vacate the decision.

(4) If a decision is vacated under subsection (3), it is nullified and the

(4) If a decision is vacated under subsection (3), it is nullified and the



application for protection is deemed to have been rejected.

#### Principle of Non-refoulement

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

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

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

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

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

**FEDERAL COURT OF CANADA**

**TRIAL DIVISION**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** DES-4-02

**STYLE OF CAUSE:** IN THE MATTER OF A CERTIFICATE SIGNED

PURSUANT TO SUBSECTION 77(1) OF THE

IMMIGRATION AND REFUGEE PROTECTION ACT

and

MOHAMED HARKAT

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** JUNE 12, 2003

**REASONS FOR ORDER OF MADAM JUSTICE DAWSON**

**DATED:** JUNE 19, 2003

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