Federal Court Reports
Almrei v. Canada (Minister of Citizenship and Immigration) (F.C.A.) [2005] 3 F.C. 142

Date: 20050208

Docket: A-169-04

Citation: 2005 FCA 54

CORAM: LÉTOURNEAU J.A.

SEXTON J.A.

SHARLOW J.A.

BETWEEN:

HASSAN ALMREI

Appellant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

and SOLICITOR GENERAL OF CANADA

Respondents

Heard at Toronto, Ontario, on December 16, 2004.

Judgment delivered at Ottawa, Ontario, on February 8, 2005.

REASONS FOR JUDGMENT BY:
LÉTOURNEAU J.A.

CONCURRED IN BY:
SEXTON J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is an appeal against a decision of Blanchard J., of the Federal Court of Canada, sitting as a designated judge (judge) under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] The learned judge dismissed an application for judicial release from detention made by the appellant, Mr. Hassan Almrei, pursuant to subsection 84(2) of the IRPA. In order to facilitate the reading of these reasons, the following table of contents is provided:

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Statement of the issues

[3] Mr. Almrei raises a number of issues that can be summarized as follows:

1 - Whether the judge erred in deciding that, on an application for judicial release pursuant to subsection 84(2) of the IRPA, the burden is on the foreign national to prove that he or she will not be removed from Canada within a reasonable time and that his or her release will not pose a danger to national security or to the safety of any person;

2 - Whether the judge erred in concluding that the time spent by an applicant seeking remedies in court is not to be counted in determining whether removal will occur within a reasonable time;

3 - Whether the judge erred when he decided that section 78 of the IRPA, which deals with the protection of information relating to national security, applies to an application for judicial release under subsection 84(2), thereby allowing a designated judge to hear *ex parte* and *in camera* evidence from the Crown;

4 - Whether the *ex parte* and *in camera* process resulted in a breach of the principles of fairness;

5 - Whether Mr. Almrei had provided evidence that his removal would not occur within a reasonable time and the judge erred in not acknowledging it;

6 - Whether the judge failed to articulate the basis upon which he concluded that the secret evidence that he received was reliable, credible and trustworthy, or whether he failed to properly test the reliability, credibility and trustworthiness of the evidence;

7 - Whether Mr. Almrei failed to establish that he would not be a danger to the security of Canada; and

8 - Whether the judge was mistaken in concluding that the continued detention of Mr. Almrei does not violate his constitutional rights under sections 7 (liberty and security of the person) and 12 (protection against cruel and unusual treatment or punishment) of the *Canadian Charter of Rights and Freedoms* (Charter).

[4] Pursuant to a Direction issued by the Court on December 13, 2004, the parties were invited to submit their views as to whether there is a right to appeal a decision of a designated judge dismissing an application for judicial release made pursuant to subsection 84(2). At their request, the parties were given permission to file written submissions on the issue, January 28, 2005 being the latest date upon which Mr. Almrei could file his reply submissions. They also wanted to review and address a decision rendered by the House of Lords on December 16, 2004 regarding the legality of the detention of foreign nationals under the English *Terrorism Act 2000*: see *A(FC) and others (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56, on appeal from [2002] EWCA Civ 1502. Following a brief summary of the relevant facts and procedure, I will begin by addressing the question of the existence of a right of appeal.

Facts and procedure

[5] The facts in these proceedings require special attention because time and the behaviour of the parties are of the essence of a subsection 84(2) application for judicial release from detention.

[6] Mr. Almrei is a foreign national. He was granted refugee status in June, 2000.

[7] Security intelligence reports indicated that Mr. Almrei was a member of an international network of extremists supporting the views and ideas promoted by Osama Bin Laden and that he was involved in a forgery ring with international connections and ramifications that produces false documents to facilitate international

travel. He had obtained and used false passports to enter and exit countries. These reports also mentioned that he participated in *jihad*. A more detailed account of Mr. Almrei's alleged involvement with extremist groups and with the Bin Laden network can be found at paragraphs 37 to 43 of the judge's decision. I will refer to it and to other relevant facts when reviewing some of the grounds of appeal.

[8] Mr. Almrei has been detained since October 19, 2001 on a security certificate. The certificate asserted that Mr. Almrei was a person inadmissible for the reasons stated in subparagraph 19(1)(*e*)(iii) and division 19(1)(*e*)(iv)(C) as well as subparagraph 19(1)(*f*)(ii) and division 19(1)(*f*)(iii)(B) of the *Immigration Act*, R.S.C. 1985, c. I-2. In a nutshell, it was alleged that there were reasonable grounds to believe that Mr. Almrei was engaged or will engage in terrorism and that he was a member of an organization that had engaged, is engaged or will engage in terrorism. The certificate was found to be reasonable by Tremblay-Lamer J. on November 23, 2001.

[9] On December 5, 2001, Mr. Almrei was informed that the Minister of Citizenship and Immigration (Minister) would be seeking an opinion that he constituted a danger to the security of Canada. The issuance of such an opinion would permit Mr. Almrei's removal to Syria, a country of which he is a citizen.

[10] A deportation order was issued against Mr. Almrei on February 11, 2002 pursuant to subsection 32(6) of the former *Immigration Act* on the ground that he was a member of a class inadmissible to Canada. On June 28, 2002, the *Immigration and Refugee Protection Act* (IRPA) came into force. Mr. Almrei applied for judicial release from detention under the IRPA on September 23, 2002. He could have applied for such release as early as June, 2002.

[11] A first danger opinion was rendered in January 2003, following which the Minister, on January 13, 2003, decided to remove Mr. Almrei to Syria. Mr. Almrei was notified, on January 16, 2003, of the decision to remove him and of the arrangements made to that effect.

[12] The following day, Mr. Almrei sought leave for judicial review of the Minister's decision and a stay against the execution of his removal order. The Minister consented to leave being granted and undertook to suspend the execution of the removal order. In return, Mr. Almrei agreed to suspend his application for judicial release from detention.

[13] The Minister admitted that serious errors were made in the first danger opinion and consented to Mr. Almrei's application for judicial review of the opinion. Consent was given on April 23, 2003. Mr. Almrei then reinstated his application for judicial release from detention and the hearing was set for June 24, 2003. It lasted two days. The parties were given until the end of August 2003 to file written submissions.

[14] While his application for judicial release was still pending before the judge, Mr. Almrei was served, on July 28, 2003, with a subsequent notice that a second danger opinion would be sought pursuant to paragraph 115(2)(*b*) of the IRPA. Mr. Almrei requested and obtained an extension of time, until September 2, 2003, to make submissions on the risk that he would face if a danger opinion were issued and if he were to be returned to Syria.

[15] On September 16, 2003, the parties discussed, during a telephone conference, the resumption of the hearing of the judicial release application. The earliest available date was November 24, 2003.

[16] Thereafter ensued, on October 17, 2003, an order requiring that some material be sealed and protected, and that a Canadian Security Intelligence Service (CSIS) officer be made available for examination by Mr. Almrei. On November 21 and 24, 2003, after submissions were received from the parties, orders were issued whereby the disclosure of certain portions of the evidence was forbidden.

[17] However, on October 23, 2003, the Minister's delegate made a determination, as authorized by paragraph 115(2)(*b*) of the IRPA, that the appellant be removed to Syria. A week later, Mr. Almrei applied for leave and for judicial review of the Minister's delegate's decision.

[18] On November 21, 2003, it was indicated in an affidavit filed on behalf of the Crown that Mr. Almrei's removal date had been fixed and that the removal would occur within two and a half weeks.

[19] The removal being imminent, Mr. Almrei requested a stay of the removal order until his application for leave and for judicial review of the Minister's delegate's decision could be heard. In the meantime, the hearing of the judicial release application was adjourned. On November 27, 2003, the deportation order dated February 11, 2003 was stayed and the judicial release proceedings resumed. They continued on the following day.

[20] At this two-day hearing, arguments were made as to the applicability of the *in camera* and *ex parte* process envisaged by section 78 of the IRPA. The debate led to written submissions made by the parties and a decision by the judge, on December 29, 2003, that section 78 applied to an application for release under subsection 84(2) of the IRPA.

[21] The judicial release hearing resumed on January 5, 2004 and concluded two days later. Submissions were filed by the parties and Mr. Almrei requested and obtained an extension of time, until February 18, 2004, to file his reply submissions. The decision on the subsection 84(2) application for judicial release was rendered on March 19, 2004. This is the decision under appeal.

[22] I should add, for the sake of completeness, that leave to seek judicial review of the second danger opinion was granted on August 3, 2004 and that the hearing on the application for judicial review itself took place on November 16 and 17, 2004. The matter was reserved. At the time of writing these reasons, the decision had not yet been rendered.

[23] As this brief summary of the facts and procedure points out, Mr. Almrei's case has generated many hearings and proceedings which, in turn, have been time consuming and have resulted in a protracted process. I now turn to the legislative framework.

Legislation

[24] I reproduce below all relevant provisions because their reading facilitates the understanding of the analysis that follows:

Division 4 - Inadmissibility	Section 4 - Interdictions de territoire
34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants_:
(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;	*a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(*b*) engaging in or instigating the subversion by force of any government;	*b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
(*d*) being a danger to the security of Canada;	*d*) constituer un danger pour la sécurité du Canada;
(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	*e*) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).	*f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*).
Division 9 - Protection of Information	Section 9 - Examen de renseignements à protéger
76. The definitions in this section apply in this Division.	**76.** Les définitions qui suivent s'appliquent à la présente section.
"information" means	« _renseignements_ » Les renseignements en matière

security or criminal intelligence information and information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of either of them.

de sécurité ou de criminalité et ceux obtenus, sous le sceau du secret, de source canadienne ou du gouvernement d'un État étranger, d'une organisation internationale mise sur pied par des États ou de l'un de leurs organismes.

77. (1) The Minister and the Solicitor General of Canada 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.

77. (1) Le ministre et le solliciteur général du Canada déposent à 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.

78. 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

78. Les règles suivantes s'appliquent à l'affaire_:

a) le juge entend l'affaire;

b) le juge est tenu de garantir la confidentialité des renseignements justifiant le certificat et des autres éléments de preuve qui pourraient lui être communiqués et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

c) il procède, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le

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 Solicitor General of Canada 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 Solicitor General of Canada 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

permettent, sans formalisme et selon la procédure expéditive;

d) il examine, dans les sept jours suivant le dépôt du certificat et à huis clos, les renseignements et autres éléments de preuve;

e) à chaque demande d'un ministre, il examine, en l'absence du résident permanent ou de l'étranger et de son conseil, tout ou partie des renseignements ou autres éléments de preuve dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

f) ces renseignements ou éléments de preuve doivent être remis aux ministres et ne peuvent servir de fondement à l'affaire soit si le juge décide qu'ils ne sont pas pertinents ou, l'étant, devraient faire partie du résumé, soit en cas de retrait de la demande;

g) si le juge décide qu'ils sont pertinents, mais que leur divulgation porterait atteinte à la sécurité nationale ou à celle d'autrui, ils ne peuvent faire partie du résumé, mais peuvent servir de fondement à l'affaire;

h) le juge fournit au résident permanent ou à l'étranger, afin de lui permettre d'être suffisamment informé des circonstances ayant donné

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) 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

lieu au certificat, un résumé de la preuve ne comportant aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

i) il donne au résident permanent ou à l'étranger la possibilité d'être entendu sur l'interdiction de territoire le visant;

j) il peut recevoir et admettre en preuve tout élément qu'il estime utile - même inadmissible en justice - et peut fonder sa décision sur celui-ci.

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

protection made under subsection 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 Courts Act.

80. (1) 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) 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) The determination of the judge is final and may not be appealed or

(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 les Cours fédérales.

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.

(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 au ministre de statuer sur celle-ci.

(3) La décision du juge est définitive et n'est pas susceptible d'appel ou de contrôle judiciaire.

81. Le certificat jugé

judicially reviewed.

81. 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).

82. (1) The Minister and the Solicitor General of Canada 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) 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) Not later than 48 hours after the beginning of detention of a permanent

raisonnable fait foi de l'interdiction de territoire et constitue une mesure de renvoi en vigueur et sans appel, sans qu'il soit nécessaire de procéder au contrôle ou à l'enquête; la personne visée ne peut dès lors demander la protection au titre du paragraphe 112(1).

82. (1) Le ministre et le solliciteur général du Canada peuvent lancer un mandat pour l'arrestation et la mise en détention du résident permanent visé au certificat dont ils ont des motifs raisonnables de croire qu'il constitue un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.

(2) L'étranger nommé au certificat est mis en détention sans nécessité de mandat.

83. (1) Dans les quarante-huit heures suivant le début de la détention du résident permanent, le juge entreprend le contrôle des motifs justifiant le maintien en détention,

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) 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) 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) 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) 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

l'article 78 s'appliquant, avec les adaptations nécessaires, au contrôle.

(2) Tant qu'il n'est pas statué sur le certificat, l'intéressé comparaît au moins une fois dans les six mois suivant chaque contrôle, ou sur autorisation du juge.

(3) L'intéressé est maintenu en détention sur preuve qu'il constitue toujours un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.

84. (1) Le ministre peut, sur demande, mettre le résident permanent ou l'étranger en liberté s'il veut quitter le Canada.

(2) Sur demande de l'étranger dont la mesure de renvoi n'a pas été exécutée dans les cent vingt jours suivant la décision sur le certificat, le juge peut, aux conditions qu'il estime indiquées, le mettre en liberté sur preuve que la mesure ne sera pas exécutée dans un délai raisonnable et que la mise en liberté ne constituera pas un danger pour la sécurité nationale ou la sécurité d'autrui.

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.

86. (1) The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, make an application for non-disclosure of information.

(2) Section 78 applies to the determination of the application, with any modifications that the circumstances require, including that a reference to "judge" be read as a reference to the applicable Division of the Board.

87. (1) The Minister may, in the course of a judicial review, make an application to the judge for the non-disclosure of any information with respect to information protected under subsection 86(1) or information considered under section 11, 112 or 115.

(2) Section 78, except for the provisions relating to the obligation to provide a summary and the time limit referred to in paragraph 78(d), applies to the determination of the application, with any modifications that the circumstances require.

86. (1) Le ministre peut, dans le cadre de l'appel devant la Section d'appel de l'immigration, du contrôle de la détention ou de l'enquête demander l'interdiction de la divulgation des renseignements.

(2) L'article 78 s'applique à l'examen de la demande, avec les adaptations nécessaires, la mention de juge valant mention de la section compétente de la Commission.

87. (1) Le ministre peut, dans le cadre d'un contrôle judiciaire, demander au juge d'interdire la divulgation de tout renseignement protégé au titre du paragraphe 86(1) ou pris en compte dans le cadre des articles 11, 112 ou 115.

(2) L'article 78 s'applique à l'examen de la demande, avec les adaptations nécessaires, sauf quant à l'obligation de fournir un résumé et au délai.

Preliminary issue: Whether a right of appeal exists against a decision of a designated judge rendered pursuant to subsection 84(2) of the IRPA

[25] Rights of appeal are statutory rights. As a general rule, they do not exist unless they are created by statute. Subsection 27(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 gives a right of appeal against an interlocutory or final decision of the Federal Court. This Court held in *Charkaoui v. The Minister of Citizenship and Immigration and The Solicitor General of Canada*, 2004 FCA 421, [2004] FCJ No. 2060 (QL) (*Charkaoui*, 2004 FCA 421) at paragraphs 40 to 42, that a decision of a designated judge under the IRPA is a decision of the Court. Therefore, a decision rendered by a designated judge pursuant to subsection 84(2) can be appealed unless the right of appeal has been expressly or implicitly denied.

[26] Counsel for the respondents (the Crown) contends that the right of appeal conferred by the *Federal Courts Act* has been implicitly denied by the regime put in place under the IRPA. He relies upon another decision of this Court involving Mr. Charkaoui, *Charkaoui v. The Minister of Citizenship and Immigration and The Solicitor General of Canada*, [2004] 1 F.C.R. 451 (C.A.) (*Charkaoui*, [2004] 1 F.C.R. 451) where it was found that the decision of a designated judge regarding the detention of a permanent resident is not subject to appeal mainly because of the continuous detention review process for permanent residents established by section 83 of the IRPA. With respect, I believe that the situation is factually and legally different in the present instance where the detention of a foreign national occurs under sections 82 and 84.

[27] The review of the detention of a permanent resident under section 83 takes place before a judge makes a determination on the reasonableness of the certificate, and thus before the judicial determination that would result in the permanent resident being found conclusively to be inadmissible to Canada. A decision by our Court of Appeal, to whom, by way of appeal, the question of detention would be submitted, if it were to conclude that the detainee poses no risk to the security of Canada, would, for all practical purposes, preempt the decision of the judge on the reasonableness of the security certificate while such decision has been reserved to the designated judge and is final and without appeal or judicial review: see subsection 80(3) of the IRPA. By contrast, a review of the detention of a foreign national under subsection 84(2) happens after the determination on the reasonableness of the certificate has been made and in the different context of a delayed removal from Canada. At that stage, an appeal on the question of detention bears no impact on the finding regarding the reasonableness of the certificate and on the designated judge's exclusive jurisdiction to make such a finding.

[28] Secondly, nothing indicates, in subsection 84(2) of the IRPA, that the appeal permitted under subsection 27(1) of the *Federal Courts Act*, is prohibited. A right of appeal of a decision rendered pursuant to subsection 84(2) is not incompatible with the objective of that subsection which, broadly stated, is to ensure that due diligence will be exercised by the authorities in removing a foreign national who has been detained for security reasons. Contrary to section 83 which applies to permanent residents whose continuous and mandatory periodical revision of detention by a designated judge makes a right of appeal impracticable and impractical, subsection 84(2) does not afford this kind of protection. In these circumstances, a review by way

of appeal is likely to ensure better compliance with the provision and the obligation that it contains to proceed with the removal within a reasonable time.

[29] Thirdly, the issue of detention or release is an important and significant one in the context of an unreasonable delay by the authorities that unduly and unjustifiably prolongs the detention of a person in violation of his or her constitutional right to liberty and security of the person. I can see no benefit to society in either the illegal, unconstitutional or unwarranted detention of a foreign national or his or her illegal or unwarranted release from detention resulting from legal errors or arbitrary findings, by a designated judge, that cannot be corrected. If Parliament's intent was to leave undisturbed erroneous or arbitrary decisions leading to an unlawful detention or release, it would have either expressly made these decisions under subsection 84(2) final and exempt from appeal, as it did with respect to the reasonableness of the security certificate, or it would have somehow indicated, at least impliedly as it did in section 83, that this is what it wished.

[30] Fourthly, as will become apparent when I review Mr. Almrei's grounds of appeal, subsection 84(2) is a provision which, in the public interest, requires binding interpretations and directions as to its scope, meaning, the factors to be taken into account in its application and the burden and onus of proof, a result which can only be obtained from an appellate power since a designated judge is not bound by the decisions of other designated judges. Consistency and uniformity in the interpretation and application of this provision is most desirable when the constitutional right to liberty and the government's obligation to prevent a violation of that constitutional right are at stake.

[31] Fifthly, as a purely practical reason to be acknowledged as this Court did in *Charkaoui*, 2004 FCA 421, *supra*, at paragraph 60, parallel challenges could have been or could be initiated before the Federal Court and possibly the same designated judge regarding Charter breaches of sections 7 and 12 and the scope of the jurisdiction of a judge hearing a subsection 84(2) application, be it a question of lack, abuse or excess of jurisdiction or refusal to exercise it. The ensuing decisions of the Federal Court on these constitutional challenges, Charter breaches or jurisdictional questions would be subject to appeal. Two of Mr. Almrei's grounds of appeal raise these questions and it would be a waste of time and judicial resources to ask him to start new proceedings in the Federal Court.

[32] The granting of a right of appeal does raise a practical concern with the handling and review of the secret evidence that was before the designated judge. This concern was discussed in *Charkaoui*, [2004] 1 F.C.R. 451, *supra*, especially in respect of new evidence concerning the issue of national security that may be obtained after a decision on the issue of detention has been rendered. I believe that such a concern, while still a proper one, is not as serious in the present instance for the following reasons.

[33] As these very proceedings reveal and as it will become apparent when I discuss grounds of appeal nos. 6 and 7, the primary focus of a section 84(2) application for judicial release is whether or not the foreign national will be removed within a reasonable time. The secret evidence is not needed for that purpose. It is only if there is evidence that the removal will not take place within a reasonable time that it

is necessary to consider whether the release of the foreign national would pose a danger to national security or to the safety of any person. At that time, a review of the order maintaining detention may require a review of the secret evidence, but, again, this is necessary only if the evidence on the public record appears insufficient to support the order. Thus, the filing of the secret evidence may not be necessary in each case of a section 84(2) application for judicial release.

[34] The situation is obviously quite different when it is a detention review under section 83 because it is done primarily, indeed almost exclusively, on grounds of national security in the context of proceedings to determine the reasonableness of security certificates (the other ground being the likelihood of not appearing at a proceeding or for removal). Thus, in section 83 detention reviews, national security is at the forefront of the review while, in a section 84(2) application for judicial release, removal within a reasonable time, after the security proceedings are completed, is the central question.

[35] In addition, for the reasons that I just stated above, the question of admissibility and evaluation of new evidence relating to national security is less likely to occur in the context of a section 84(2) application for judicial release than in the course of a detention review under section 83. The section 84(2) application comes late in the process, indeed at the enforcement stage of the decision confirming the reasonableness of the security certificate, that is to say at least four months after that decision. The section 83 detention reviews take place early on and throughout the process leading to the adjudication on the security certificate. During these proceedings, disclosure of evidence occurs on a continuing basis: see *Charkaoui*, [2004] 1 F.C.R. 451, *supra*, at paragraph 79. The addition of new evidence relating to national security, at various stages of the process, is almost a hallmark of these proceedings. That is less likely to be the case in subsection 84(2) applications where evidence of removal within a reasonable time is the key element.

[36] The Crown conceded at the hearing that a renewal of a section 84(2) application is possible if new facts are discovered or if there is a substantial change in circumstances since the previous application. It submitted, in its supplementary memorandum of facts and law, that this expansive interpretation of subsection 84(2) is warranted and supported by a purposive interpretation of the section whose objective is to ensure judicial examination of detention and judicial protection against indeterminate or indefinite detention. In such a case, in my respectful view, the procedure to follow is not to bring an appeal from the earlier decision, but to make a new application on the basis of new evidence or of a change in circumstances. Should new evidence be discovered when an appeal in relation to a section 84(2) application is pending and should new evidence pose practical difficulties, this Court can send the matter back to a designated judge for a new determination on the basis of the new evidence.

[37] In conclusion, I do not expect the same kind and level of practical difficulties on a section 84(2) application for judicial release as those that are encountered on a section 83 detention review.

[38] For these reasons, I am of the view that subsection 27(1) of the *Federal Courts Act* is still operative and gives Mr. Almrei a right of appeal against the

decision of the judge on the subsection 84(2) application for judicial release. If I am wrong in my conclusion, I nonetheless believe that, in view of all the time, expense and energy spent, I should answer Mr. Almrei's grounds of appeal.

Analysis of the issues

Ground no. 1: Whether the judge erred in deciding that, on an application for judicial release pursuant to subsection 84(2) of the IRPA, the burden is on the foreign national to prove that he or she will not be removed from Canada within a reasonable time and that his or her release will not pose a danger to national security or to the safety of any person

[39] The issue of the burden of proof on a subsection 84(2) application for judicial release was conclusively determined by this Court in *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1114. Linden J.A., for a unanimous Court, decided that the onus of proof rests with the person who brings the application for judicial release and that it has to be discharged on a balance of probabilities. At issue was an application for judicial release pursuant to subsections 40.1(8) and (9) of the former *Immigration Act*. These subsections have now been replaced by subsection 84(2) of the IRPA. Mr. Almrei wants us to revisit that decision. He submits that it is an impossible burden, especially in view of the fact that it has to be discharged according to the standard of a balance of probabilities.

[40] Apart from the fact that I agree with my colleague Linden J.A. that his conclusion regarding the onus of proof is warranted by the text of subsection 84(2), I do not share Mr. Almrei's concern that it puts an impossible burden on him for the following reasons.

[41] The issue of burden of proof has given rise to a nice theoretical debate in the abstract. However, in practice, the reality is much simpler and rarely does the theoretical problem arise. A person who applies for judicial release under subsection 84(2) must establish four things:

a) that he or she has not been removed from Canada;

b) that at least 120 days have elapsed since the Federal Court determined the security certificate to be reasonable;

c) that he or she will not be removed from Canada within a reasonable time; and

d) that the release would not pose a danger to national security or to the safety of any person.

[42] The first two conditions for the application of subsection 84(2) are straightforward and certainly not difficult to prove. As for the last two conditions, the person applying for judicial release is faced with an evidentiary burden. This means that he has to file *some* evidence that he has reasonable grounds to believe that the removal will not be effected within a reasonable time and that his release will not pose a danger to national security or to the safety of any person. That evidence has to be answered. Otherwise, the applicant will be entitled to release. This means that the

burden then shifts to the party that opposes the release. In practice, the Crown cannot sit idle. It also bears an evidentiary burden, i.e. the burden of introducing evidence that the removal will occur within a reasonable time and, if necessary, that the applicant is still a threat within the terms of subsection 84(2) of the IRPA. The judge will then assess the evidence adduced by both parties and determine whether the conditions of subsection 84(2) are met.

[43] Counsel for Mr. Almrei conceded that if this is what the *Ahani* decision means, as I think it does, he has no difficulty with the onus of proof thus defined resting on an applicant for judicial release under subsection 84(2) and with the standard of proof being that of the balance of probabilities.

[44] Mr. Almrei also objects to the following statement at paragraphs 14 and 15 of the *Ahani* decision on the basis that it imposes an unfair and arduous requirement upon him:

Normally one would expect that an individual would have to show some significant change in circumstances or new evidence not previously available to obtain his release.

To hold otherwise would be to accord the appellant a hearing de novo, something the legislation does not envision.

[45] This statement of the Court now has to be read in the context of sections 82 and 84, especially subsections 82(2) and 84(2).

[46] Indeed, pursuant to subsection 82(2) of the IRPA, the detention of a foreign national is mandatory and does not require a warrant. This situation has to be contrasted with that which prevails when the person who is detained is a permanent resident who is the subject of a security certificate.

[47] The legality of a permanent resident's detention is governed by section 83. Under subsection 83(3), his detention is the subject of constant judicial supervision and protection until a determination is made on the reasonableness of the certificate: see *Charkaoui*, [2004] 1 F.C.R. 451, *supra*, and *Charkaoui*, 2004 FCA 421, *supra*, at paragraph 131. I note in passing that the law appears to be silent on the question of the judicial examination of the detention of a permanent resident after the certificate has been found to be reasonable. Such a resident cannot resort to the subsection 84(2) application for judicial release which, by its wording, is limited to foreign nationals while subsection 84(1), which governs a release from detention ordered by the Minister, applies to either a permanent resident or a foreign national.

[48] By contrast, the detention of a foreign national, which is mandated by law, will not have been the subject of a judicial examination until 120 days have elapsed since the determination of the reasonableness of the certificate and until an application pursuant to subsection 84(2) is brought. Thus, the said application is the first opportunity given to a foreign national to have the legality of his or her detention examined by the judiciary. Therefore, the possibility of a subsection 84(2) application turning into a hearing *de novo* no longer exists since, as curious as it may seem, it is now known that a decision on the reasonableness of the security certificate is not a

decision that is conclusive proof that the person is a danger to the security of Canada: see *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3, at paragraph 83. To put it in different terms, the decision on the security certificate is not determinative of the merit, opportunity and legality of the detention of that person, although it may be grounded on a finding that the person is a danger to the security of Canada pursuant to paragraph 34(1)(*d*) of the IRPA.

[49] In this context of a first hearing, there is no requirement that an applicant seeking judicial release under subsection 84(2) of the IRPA show a change in circumstances or that new evidence not previously available be submitted. It may be that the judge hearing the application can be satisfied on the basis of the existing evidence that the detention which was legally mandated throughout and never reviewed is not warranted by any concerns about national security or the safety of any person.

[50] Of course, there may have been a change in circumstances which may be either of assistance or of detriment to an applicant. New facts may have been discovered which constitute new evidence of the need to detain or to release. The lapse of time may have shed a different and unfavourable light on the grounds invoked for detention. These are all elements that, if adduced in evidence, the judge will consider in reaching his decision as to whether the balance of probabilities has tipped in favour of one party or the other.

[51] Mr. Almrei asked us to reconsider a statement found at paragraph 13 of the *Ahani* decision where my colleague, Linden J.A., wrote "that release under subsection 40.1(9) cannot be an automatic or easy thing to achieve. It is meant to be available 'only in the very limited circumstances' outlined in the legislation". Mr. Almrei's counsel submits that this statement unduly restricts and narrows the scope of a subsection 84(2) application for judicial release.

[52] With respect, I see nothing wrong with the statement. The conditions of subsection 84(2) have to be met before release can be obtained, thus release is not automatic. Whether it is an easy thing to achieve will depend on the evidence adduced at the hearing on the application. As for the circumstances under which release can be obtained, they are determined by the four conditions found in subsection 84(2) of the IRPA which, in fact, limit the scope of review, although I believe that an application under subsection 84(2), like other applications, can be renewed if new facts are discovered or the situation has evolved to a point where detention is no longer necessary or justified.

<u>Ground no. 2: Whether the judge erred in concluding that the time spent by an applicant seeking remedies in court is not to be counted in determining whether removal will occur within a reasonable time</u>

[53] In support of this ground of appeal, Mr. Almrei relies on the excerpts from the *Ahani* decision that I have analysed above. He adds to them the following statement of the judge, found at paragraph 93 of his decision, in which the judge quotes from *Ahani*:

Mr. Almrei's efforts to resist removal by initiating numerous Court proceedings have contributed significantly to the total time he has been held in detention. While he has the right to bring lawful proceedings, he cannot argue: "...that the removal is not taking place in a reasonable time, when the time necessary to hear all of the applications and appeals stretches into months and years". (*Ahani* (2000)).

[54] The gist of Mr. Almrei's argument appears in paragraph 33 of his memorandum of facts and law where he asserts that "in the absence of any indication in the statute that would permit a judge to discount delay in removal caused by any steps taken by the person to access effective remedies, it is not open to a court to read in limitations to the provision". His challenge goes to the judge's jurisdiction to discount such delay as he did in this instance. As we will see later, Mr. Almrei submits, as an alternative ground of appeal, that the judge, if he possesses such jurisdiction, improperly exercised it: see ground no. 5.

[55] A subsection 84(2) application requires the judge to determine whether the foreign national will or will not be removed from Canada "within a reasonable time". This concept of "removal within a reasonable time" requires a measurement of the time elapsed from the moment the certificate was found to be reasonable and an assessment of whether that time is such that it leads to a conclusion that removal will not occur within a reasonable time. Concerns about a possible violation of the "reasonable time" requirement emerge after the 120 days mentioned in subsection 84(2) have elapsed and removal has not yet occurred.

[56] At this point, I must point out that the notion of a "reasonable time" requirement" is not to be confused with the test itself for judicial release under subsection 84(2) of the IRPA although, of course, the two are closely related. That relationship will be discussed when I analyse Mr. Almrei's fifth ground of appeal. Here we are concerned simply with the notion of delay and the role and power of the judge in computing it.

[57] Where the removal of a foreign national is delayed so as to bring into play the "reasonable time" requirement, the judge hearing the judicial release application must consider the delay and look at the causes of such delay. Judicial remedies have to be pursued diligently and in a timely fashion. The same goes for the Government's responses and the judicial hearing of these remedies. Courts, as they must do, have given priority to the hearing of challenges to the legality of a detention. The Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at paragraphs 115, 121 and 122, found that a delay, in order to be abusive or to amount to unfairness, has to be unreasonable or inordinate. In determining whether a delay has become unreasonable, one has to look at "the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case" (emphasis added): see paragraph 122 of the *Blencoe* decision, *supra*.

[58] Thus, in determining whether there will be execution or enforcement of the removal order within a reasonable time, a judge must look at the delay generated by the parties as well as at the institutional delay which is inherent in the exercise of a remedy. I am satisfied that the jurisdiction conferred by subsection 84(2) of the IRPA

authorizes a judge to 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, as required by the provision. In other words, where an applicant, rightly or wrongly, tries to prevent his removal from Canada and delay ensues as a result of his action, he cannot be heard to complain that his removal has not occurred within a reasonable time, unless the delay is unreasonable or inordinate and not attributable to him. The judge did not err when, relying upon the authority of the *Ahani* decision, he discounted the delay generated by Mr. Almrei's challenge to his removal order.

Ground no. 3: Whether the judge erred when he decided that section 78 of the IRPA, which deals with the protection of information relating to national security, applies to an application for judicial release under subsection 84(2), thereby allowing a designated judge to hear *ex parte* and *in camera* evidence from the Crown

[59] The judge found, as two other designated judges had before him (Dawson J. in *Canada v. Mahjoub*, [2001] 4 F.C. 644; and MacKay J. in *Jaballah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 299, [2004] F.C.J. No. 420 (QL), that the procedure authorized by section 78 of the IRPA applies to a subsection 84(2) application for judicial release. Mr. Almrei contends that this is an error of law because subsection 84(2) does not incorporate section 78 unlike other provisions which specifically mention that section 78 applies: see subsections 83(1), 86(2) and 87(2).

[60] Therefore, the argument goes, Parliament did not intend this unfair secret process, which only benefits the Crown, to apply to the release application because the Crown has already had its opportunity to present secret evidence at the hearing held to determine the reasonableness of the security certificate. Thus, the Crown cannot claim that national security interests are not protected because the security certificate has already been found to be reasonable and is conclusive proof of the person's inadmissibility: see the appellant's memorandum of facts and law at paragraphs 38 to 40. I cannot agree with Mr. Almrei's contention.

[61] First, this position assumes that the need to protect national security ceases to exist with a finding that the security certificate is reasonable and that, thereafter, the question of protection of national security is either not relevant to the issue of release or, if relevant, ought to be decided, as the Crown puts it, on an incomplete record, without regard to the reasons for which an applicant was detained in the first place.

[62] Second, as previously stated, the fact that the security certificate has been found to be reasonable is not conclusive proof that the subject of the certificate is a danger to national security or to the safety of any person: see *Suresh*, *supra*, at paragraph 83. So it leaves this question open for determination, as well as that of whether the subject ought to be detained as a result. Therefore, it cannot be said that the need for the Ministers to adduce evidence, whether confidential or not, on the issue of detention is preempted by the opportunity that they had to do so on the question of the reasonableness of the certificate.

[63] Third, the subsection 84(2) application for judicial release by a foreign national raises the very question of the need to detain in order to protect national

security and does so, as noted above, for the first time. The issue of threat to national security is brought up for the purpose of determining whether a foreign national found to be inadmissible, such as Mr. Almrei, ought to be detained while removal arrangements are made. The judge who hears the judicial release application, as the present proceedings illustrate, is not necessarily the judge who adjudicated upon the reasonableness of the security certificate. Thus, he or she may be considering for the first time evidence which, if publicly released as required by Mr. Almrei's contention, could be prejudicial to national security.

[64] In this respect, it is Mr. Almrei's view that the subsection 84(2) application for judicial release, as drafted, leaves the Crown with two options. One is to release, to Mr. Almrei and to the public, all information, including any information prejudicial to national security, if it wants to make use of that information. The other is not to use such information if it wants to keep it secret or confidential.

[65] The option advocated by Mr. Almrei simply leaves no room for the protection of national security in the context of an inquiry which may necessitate the assessment of the threat posed to national security by a person who seeks to be released from detention. I have no doubt that this is not what Parliament envisaged.

[66] Moreover, Mr. Almrei's position leads to a number of incongruities and inconsistencies, not to say absurdities, that Parliament cannot have intended. The Ministers would now have to reveal, at the stage of the threat assessment for the purpose of release or detention, information prejudicial to national security that was kept confidential throughout the process. To put it differently, while this information was appropriately kept confidential on the principal and, in terms of consequences, far-reaching issue of the reasonableness of the security certificate and the need to remove Mr. Almrei from Canada, such information would now have to be publicly revealed on the secondary issue of detention while awaiting removal.

[67] Furthermore, a foreign national would gain access to information prejudicial to national security in the context of his application for judicial release while a permanent resident is denied such access when his detention is reviewed pursuant to subsection 83(3) of the same IRPA. He would gain access to information that a Canadian citizen, charged with a criminal offence, could not even obtain: see *Canada (Attorney General) v. Ribic*, 2003 FCA 246, leave to appeal to the Supreme Court of Canada denied, October 22, 2003.

[68] This Court ruled in *Charkaoui*, 2004 FCA 421, *supra*, at paragraph 98, that the right of access to information that could be harmful to national security does not depend on a person's legal status because the risk to national security is no less serious, present and genuine if the person seeking access is a permanent resident as opposed to a Canadian citizen or a foreign national. It wrote:

In other words, whether the hat worn by a person is that of a Canadian citizen, permanent resident, temporary resident or mere visitor, his inability to access information that might jeopardize or is jeopardizing national security depends on his deeds and on the State's need to protect itself from attacks and breaches of its security or the safety of the individuals who make up that state, irrespective of their legal or social status.

[69] I cannot see how Parliament would have intended to give a foreign national access to information harmful to national security, let alone one who was alleged by the Crown, in a security certificate, to be inadmissible to Canada on account of the need to protect national security and whose certificate had been judicially found to be reasonable.

[70] Finally, as past and present experience reveal, the situation in matters of national security is susceptible of evolution, although, as we said in relation to the right of appeal, this is less likely in the context of removal. New evidence of the extent, seriousness and imminence of the threat and prejudice to national security may be gathered or uncovered. The position taken by Mr. Almrei means that, if the Crown wanted to adduce that evidence, it would have to publicly reveal its content. This would be the case whether it was forced to use it in rebuttal of the evidence adduced by Mr. Almrei on his application for judicial release or whether it intended such evidence to serve as a complement to the evidence that was filed in the hearing to determine the reasonableness of the certificate. Yet, this evidence already filed in relation to the certificate would, and would have to, remain confidential as required by section 78 of the IRPA while the new supplementary evidence would be publicly released. To ensure and protect the confidentiality of the previous information while having to release the new complementary and related evidence would be an almost impossible task. This cannot be what Parliament intended.

[71] Unfortunately and regrettably, there are such things in the field of legislative drafting as oversights. I believe that Parliament has forgotten to expressly make applicable to subsection 84(2) the procedural regime devised in section 78 of the IRPA to ensure the necessary protection of national security. That being said, the search for Parliament's intent in enacting subsection 84(2) does not end there. This Court must also look at the impugned provision, its purpose, the Division in which it is located, the purpose of that Division and the overall objective of the legislation in order to ascertain whether Parliament's intent can be presumed or is necessarily implied.

[72] In the present instance, the very purpose of the subsection 84(2) application, the reference to an absence of threat to national security as an essential condition of release, the context of the detention in the first place, the nature of the security certificate and the procedure to determine its reasonableness, the purpose of Division 9 in which subsection 84(2) is located, which is to ensure the protection of confidential information or information that could be prejudicial to national security, the definition of information in section 76, the similarity between the detention review proceeding of a permanent resident pursuant to subsection 83(3) and an application for judicial release by a foreign national under subsection 84(2), are all factors which, in my respectful view, lead me to conclude that Parliament presumed or implicitly intended that the safeguards contained in section 78 in favour of national security would apply to a subsection 84(2) application for judicial release by a foreign national whose removal from Canada has been ordered in the interests of national security or the safety of any person.

[73] I should add, before concluding, that the same result as the one intended by section 78 of the IRPA could and would be achieved through section 38 of the *Canada Evidence Act*, R.S., c. C-5 which, as a provision of general application,

ensures that, in the course of a proceeding, sensitive or potentially injurious information is not publicly released. The elaborate process put in place by section 38 to prevent the disclosure of such information is mandatory. Sensitive or potentially injurious information is defined as information relating to national security or whose disclosure could injure national security. Resorting to section 38 would simply add another procedural layer before the same court and most likely the same judge. In the end, the result would not be different: an *ex parte* and *in camera* hearing to ensure that information prejudicial to national security is not publicly released. Only additional delays would stem from this process.

[74] Section 38 of the *Canada Evidence Act* seeks to prevent the public release of information relating to or potentially injurious to national security in the course of a proceeding before a court (see the definition of proceeding in section 38). It reinforces my view that the failure by Parliament to mention that section 78 of the IRPA applies to a subsection 84(2) application for judicial release is an oversight, because the subsection 84(2) application, like the subsection 83(3) detention review to which section 78 applies, is a proceeding before a court during which sensitive or potentially injurious information could be publicly released.

[75] Often, the information relating to national security in Canada's possession is received in confidence from foreign states or foreign intelligence services. It would not take long for such valuable sources to 'dry up' if the information thus received in confidence had to be publicly released at each and every detention hearing involving a foreign national who had been found to be inadmissible and ordered to be removed from this country on account of national security. Is this what Parliament intended? To ask the question is to answer it.

[76] In conclusion, the judge made no error when he ruled that section 78 applies to an application for judicial release pursuant to subsection 84(2).

Ground no. 4: Whether the *ex parte* and *in camera* process resulted in a breach of the principles of fairness

[77] This ground of appeal was not pursued by Mr. Almrei in view of this Court's recent finding that the section 78 process respects the principles of fundamental justice: see *Charkaoui*, 2004 FCA 421, *supra*.

Ground no. 5: Whether Mr. Almrei had provided evidence that his removal would not occur within a reasonable time and the judge erred in not acknowledging it

[78] Mr. Almrei submits that the judge erred when he rejected his argument that he will not be removed from Canada within a reasonable time. In his view, the judge misapprehended and, therefore, misapplied the notion of "reasonable time".

[79] More specifically, Mr. Almrei contends that a determination of the meaning of the words "within a reasonable time" found in subsection 84(2) requires a consideration of both the time already spent in detention from the moment of arrest and the conditions of that detention. The harsher these conditions, he says, the 'harder' and 'longer' the time actually served is. He refers us to a number of decisions which have held that the pre-sentencing custody in a remand centre, often referred to as

"dead time", where no training, vocational or educational programs are available, is worth double the time served in normal penal institutions: see, for example, *R. v. Wust*, [2000] 1 S.C.R. 455, at paragraphs 28 to 30, 41 and 45. Detention in solitary confinement, of course, aggravates the situation because most of the time is spent in a cell under severe restrictions, with limited contact with people both inside and outside, and without much possibility of physical exercise: see the statement of Cory J., dissenting in *R. v. Shubley*, [1990] 1 S.C.R. 3, at paragraph 8, where he stated that solitary confinement must be treated as a distinct form of punishment and that its imposition within a prison constitutes a true penal consequence. I shall come back to these contentions and to the actual situation in which Mr. Almrei finds himself when I discuss his claim that his detention amounts to cruel and unusual treatment or punishment.

[80] I agree with Mr. Almrei that, to a limited extent that I will explain, the length of the past detention and the conditions of detention are relevant factors to be taken into account in considering an application for judicial release under subsection 84(2) of the IRPA. However, these two factors are far from being determinative of the application.

[81] Indeed, the test for granting or refusing a subsection 84(2) application is future-oriented. Evidence has to be provided that the applicant will not be removed within a reasonable time. If the government produces, at the hearing, credible and compelling evidence of an imminent removal from Canada, the time already served and the conditions of detention lose much of their significance because what is at issue on the application is either more detention, release or removal. Since a planned removal within a reasonable time is compliance with the law, judicial release under subsection 84(2) ceases to be an option. Past delays, conditions of detention and even abuses, while they might give rise to other remedies, are no longer operative factors within the terms of subsection 84(2) since there is then no evidence that the applicant will not be removed within a reasonable time. There is, on the contrary, evidence that the applicant will be removed shortly. I believe this is what MacKay J. had in mind in *Jaballah, supra*, when at paragraph 35 he wrote:

I should note two considerations relevant in determining whether release will not be in a reasonable time. The first is that the 120 day period of detention before this application for release could be initiated by Mr. Jaballah is measured from the date the Ministers' certificate is found to be reasonable so that time spent in detention before that is not ordinarily a factor, nor is the 120 days, after the certificate is upheld, a factor in assessing whether release in the future will not be in a reasonable time. The 120 day delay is not a measure in itself of a reasonable time, except as a necessary condition of application under s-s. 84(2).

I agree with these two considerations, subject to the following *caveat*.

[82] The length and conditions of past detention may be relevant in assessing the credibility of the evidence submitted that the removal is imminent. The history of events may cast doubt on the reliability of the assertion and evidence submitted that the moment of removal is close or that removal is a 'done deal'. As for the conditions of detention, they may be such, especially when coupled with a lengthy detention, that the phrase "within a reasonable time" takes another significance, one of urgency. The

removal must then be effected even more expeditiously in order to be in compliance with the requirements of subsection 84(2).

[83] It is in this light that, where necessary, the length and conditions of past detention must be looked at by the judge along with the operative causes of delay. With these considerations in mind, I now turn to the merit of Mr. Almrei's ground of appeal.

a) the length of detention

[84] Mr. Almrei has now been detained for more than three years. I hereafter reproduce a timeline which provides a history of the proceedings, indicates the dates of various stages of the proceedings, and, in the right-hand column, where relevant, the time elapsed between procedural stages:

Timeline

2001		
October 19	Mr. Almrei is detained.	
November 23	Tremblay-Lamer J. issues a decision upholding the reasonableness of the security certificate.	Mr. Almrei has been detained for 35 days.
December 5	Mr. Almrei is served with notice that the Minister intends to seek an opinion that he constitutes a danger to the security of Canada, which would permit his removal to Syria.	13 days since certificate was upheld.
2002		
January 28	Mr. Almrei replies to the December 5 notice.	
February 11	A deportation order is issued against Mr. Almrei under subsection 32(6) of the former Act, following a determination that he is a person described under paragraph 27(2)(a). Under the former Act, a security certificate was not automatically deemed a removal order as under IRPA (see paragraph 40.1(3)(b) of the former Act).	82 days since certificate was upheld.
March 21	Although 120 days have elapsed since Tremblay-Lamer J.'s decision upholding the reasonableness of the certificate, under the former Act, a foreign national had to count 120 days from the date of the deportation or removal order (from February 11) before filing an application for judicial release.	120 days since certificate was upheld.
June 10	Mr. Almrei is eligible to apply for judicial release under the former Act.	120 days since removal order issued.
June 28	IRPA comes into force.	
September 23	Mr. Almrei files a motion for review of his detention under subsection 84(2) IRPA. At this stage, there is still no danger opinion that would allow the Minister to remove Mr. Almrei to Syria.	
October 15	Further disclosure is made regarding the December 5,	

	2001 notice.	
November 12	Mr. Almrei replies to the October 15 disclosure.	
November 18	An *ex parte* and *in camera* hearing is held before Blanchard J. to review the Crown's submissions in response to Mr. Almrei's September 23 application under subsection 84(2) IRPA.	
November 19	A summary of the protected information is issued to Mr. Almrei.	
November 25	The public hearing on the subsection 84(2) application for judicial release begins.	Mr. Almrei has been detained for 13 months.
2003		
January 13	The Minister's delegate forms the opinion under paragraph 115(2)(b) IRPA that Mr. Almrei is a danger to the security of Canada. This opinion allows Minister to order Mr. Almrei's removal to Syria.	Over 13 months since notice of intent to seek danger opinion.
January 16	Mr. Almrei is notified of the Minister's decision.	
January 17	Mr. Almrei files an application for leave and for judicial review as well as a motion to stay his removal until such applications are determined.	
January 21	The Minister consents to leave being given on the application for judicial review. Mr. Almrei agrees to suspend the application for judicial release under subsection 84(2) IRPA on condition that the hearing can resume within 7 days at his request.	
April 23	The Minister consents to the application for judicial review by letter, acknowledging that "serious errors" were made in forming the first danger opinion.	
May 16	Blanchard J. orders that judicial review be granted and that review of Mr. Almrei's detention resume on June 24, 2003.	
June 24	Detention review under subsection 84(2) is scheduled to resume. At this time, there is no danger opinion in effect to suggest Mr. Almrei's removal is imminent.	Mr. Almrei has been detained for over 20 months.
July 28	Mr. Almrei receives notice that the Minister will seek a second danger opinion under paragraph 115(2)(b) IRPA.	2.5 months since judicial review of 1st danger opinion was granted.
August 5	Mr. Almrei files submissions on a motion to seal evidence to permit him to testify *in camera* and compel a CSIS representative or RCMP officer to testify.	
August 18	Mr. Almrei requests by letter (and is later granted) an extension to September 2, 2003 to make submissions on the risk he would face if returned to Syria.	
August 27	The Crown files responses to the August 5 motion to seal evidence.	
September 2	Deadline for Mr. Almrei's submissions on the risk he	

	would face if returned to Syria.	
October 17	Blanchard J. orders that certain information be sealed and that a CSIS officer be provided for examination by Mr. Almrei. Mr. Almrei is given **20 days** to file submissions as to which portions of the order should be protected and which parts of the declarations made by him and by one other individual should be expunged from the record. The Crown is given **5 days** to reply.	
October 23	The Minister's delegate forms a second opinion under paragraph 115(2)(b) that Mr. Almrei would not be at risk of torture if removed to Syria, and, in the alternative, that if he were at risk, such risk would be justified due to the risk Mr. Almrei presents to the security of Canada.	Less than 3 months since notice given of intent to seek 2nd danger opinion.
October 30	Mr. Almrei files an application for leave and for judicial review of the second danger opinion.	
November 21	Evidence is filed by the Minister indicating that removal is scheduled to take place within two and one-half weeks. Mr. Almrei requests a stay of removal pending the determination of the applications for leave and for judicial review of the danger opinion. An order is also issued relating to non-disclosure.	
November 24	An additional order is issued relating to non-disclosure.	
November 27	Blanchard J. stays the February 11, 2003 deportation order, pending the outcome of the applications for leave and for judicial review.	
	The subsection 84(2) detention review resumes.	
December 19	Gans J., of the Ontario Superior Court, issues an order relating to Mr. Almrei's conditions of detention. Some issues are resolved voluntarily by staff at the Toronto West Detention Centre. Gans J. orders that Mr. Almrei be given shoes and states that he remains seized of the issues should conditions again deteriorate.	
December 29	Blanchard J. orders that section 78 IRPA applies to a subsection 84(2) application for judicial release.	
2004		
March 19	Blanchard J. releases his decision dismissing Mr. Almrei's subsection 84(2) application.	
December 16	Federal Court of Appeal hears the appeal from Blanchard J.'s dismissal of the subsection 84(2) application.	Mr. Almrei has been detained for over 3 years.

[85] This timeline shows that the initial proceedings were conducted rapidly. A deportation order was issued less than three months after the decision was rendered on the reasonableness of the certificate. However, 13 months elapsed before the danger opinion was issued by the Minister. Why did it take so much time? Was the delay reasonable and who is accountable for it?

[86] In evaluating future risks and security concerns, the Minister must also take into account the fact that removal of a detainee may be to a country where the detainee may face torture and serious violations of human rights: see *Suresh*, *supra*, at paragraphs 117 to 122. This possibility requires that more substantial procedural protections and safeguards be given in the preparation of the danger opinion. The person facing deportation to torture must be informed of the case to be met and be given an opportunity to respond to the case presented by the Minister. He or she is entitled to disclosure, subject to privilege and other lawful exceptions. He or she also has the right to present evidence both on the issue of lack of danger to the security of Canada and on the risk of torture. Consultations with other government departments and with the countries to which the person could be removed may be necessary to obtain and implement safeguards for the life and integrity of the individual whose removal is being ordered. Landing rights may have to be negotiated and obtained. In short, as both the judge in the present case and Dawson J. in the *Mahjoub* case, *supra*, at paragraph 55, pointed out, "more time, rather than less, will reasonably be required to ensure that the principles of fundamental justice are not breached".

[87] Mr. Almrei submits that the delay in preparing the first danger opinion is unreasonable and is due to under-staffing in the Minister's department. He referred us to the testimony of Mr. Foley who said that on June 24, 2003, there were six employees assigned to the national security cases for "the whole country and the whole world": see Appeal Record, vol. 5, pages 1338-1339. The witness acknowledged that there were delays in some cases, but not in Mr. Almrei's case which received priority, with strict time frames to be adhered to for the second danger opinion: *ibidem*, pages 1336, 1339 and 1940. I am willing to accept that some of the delay in preparing the first danger opinion may have been attributable to limited institutional resources. However, the major sources of delay during that period originated with Mr. Almrei.

[88] Indeed, once Mr. Almrei was informed that a danger opinion would be sought from the Minister, with a view to deporting him to Syria, he recanted his story, claiming that he did not have the opportunity to do it at the Federal Court hearing on the reasonableness of the certificate: see his affidavit, Appeal Record, vol. 8, page 2849, at paragraph 4.

[89] In an affidavit given on November 8, 2002, Mr. Almrei divulged information that, since his arrival in Canada in January 1999, he had concealed from his counsel and from Canadian authorities. Mr. Almrei revealed that he had been in Afghanistan and that he had provided help to a fellow Muslim in obtaining a false Canadian passport to facilitate his entry into Canada. Mr. Almrei had previously lied to CSIS officers and misled them when he denied having ever been to Afghanistan. He mentioned that his father was involved with the Muslim Brotherhood and, as a result, he had had to leave Syria around 1980 for fear of detention and torture.

[90] Mr. Almrei also states in his affidavit that he travelled to Thailand, Turkey, Bahrain, the United Arab Emirates, Yemen, Pakistan and Jordan. He went to Pakistan in 1990 with the intention of going to Afghanistan, encouraged as he and other youths were by the Saudi Government to go there and fight the infidels: see his affidavit, pages 2851-52, paragraphs 10 and 11. He eventually ended up in a camp in Afghanistan which he says was not a training camp, but a camp in which he was

nevertheless given an AK-47 and basic training in how to handle it: *ibidem*, paragraph 14. According to his statements, he spent his time there as an Imam, leading prayers and teaching the Koran.

[91] In 1994, Mr. Almrei returned to Pakistan from Saudi Arabia where he had completed high school and worked for a charitable organisation called the Muslim African Agency. He had heard that a new *jihad* was developing in Tajikistan against the Russians. The new group composed of Arabs was under the command of a Mr. Khatab, who was later a commander in Chechnya. Mr. Almrei went through Afghanistan to Mr. Khatab's camp. Then, he moved to Khunduz and stayed there for about a month before returning to Saudi Arabia.

[92] While in Saudi Arabia, Mr. Almrei approached a charitable organization which he said he did not know had connections with Osama Bin Laden. The purpose was to set up a girl's school in Khunduz where he returned again for a stay of five months in 1995. At one time, he crossed the border into Tajikistan with a party scouting Russian positions. At another time, he went into Tajikistan for two weeks to assist in setting up a camp. Once again, he was given an AK-47 for protection. He goes on to relate in some detail, in his affidavit, his numerous trips, namely to Pakistan, the United Arab Emirates, Yemen, Jordan, Thailand and Saudi Arabia.

[93] Mr. Almrei entered Canada with a false passport from the United Arab Emirates which he initially claimed to have destroyed. The passport was later seized at his home. He had a Kuwaiti driver's licence and a Bahraini bank card in the same name as his passport to make his false identity appear more authentic: *ibidem*, page 2860, paragraph 35. Mr. Almrei did not disclose, on arrival, the details of his travels to Afghanistan and he indicated that the purpose of his trips to Pakistan was to buy honey. Not only did he hide from CSIS the fact that he had another name (what he calls a respect name - Abu Al Hareth), but, according to a CSIS report, he told CSIS officers that he had no other name. Mr. Ahmed Ressam, who testified in the United States in the trial of Mokhtar Haouari, asserted that all people going to camps in Afghanistan used aliases, and never their real names: see Appeal Record, vol. 3, page 506. So, for example, Mr. Ressam, whose alias was Nabil, never knew the real name of Abu Zubeida, whom he contacted in Afghanistan and who was in charge of the camps. It will be recalled that Mr. Ressam trained in a camp in Afghanistan and was found guilty in 2001, in Los Angeles, on nine charges relating to terrorism and transporting explosives: *ibidem*, pages 492, 507. Finally, Mr. Almrei lied about his income in Canada.

[94] Needless to say, all this information, newly revealed in opposition to the danger opinion and a possible removal to Syria, necessitated careful analysis and verification not only for what it actually revealed, but also for what it might still conceal. It should come as no surprise to Mr. Almrei that, after all his lies and deliberate omissions, Canadian authorities saw the need to closely investigate the new facts and justifications provided by him for his travels and behaviour: see the testimony of Mr. Foley, Appeal Record, vol. 5, pages 1332-1333. This explains most of the time spent in the preparation of the first danger opinion.

[95] In addition, IRPA, the new legislation, came into force on June 28, 2002 and created a dynamic of its own which generated some institutional delays which can be considered normal in the circumstances.

[96] In conclusion, I cannot say that the time taken to prepare the first danger opinion is such that a conclusion is warranted that the delay was unreasonable and not attributable in whole or in large part to Mr. Almrei.

[97] The delay occurring after January 17, 2003 is the product of Mr. Almrei's applications for judicial review and a motion to stay his removal order until judgment is rendered on the applications. As the timeline reveals, the first application for judicial review and the motion to stay the removal were filed on January 17, 2003 and judgment was delivered on May 16, 2003. Mr. Almrei received notice from the Minister on July 28, 2003 that a second determination of the appellant's risk to the security of Canada and of the possibility of his removal from Canada would be sought under paragraph 115(2)(*b*) of the IRPA. This second opinion, issued on October 23, 2003, took less than three months from the time of the notice given to Mr. Almrei. On October 30, 2003, Mr. Almrei sought leave for judicial review and judicial review of the Minister's delegate's decision. Three weeks later, the Minister filed evidence indicating that the removal would take place within two and a half weeks. Mr. Almrei then requested a stay of removal pending the determination of the applications for leave and for judicial review. Leave to apply for judicial review was granted on August 3, 2004 and the application for judicial review was heard on November 16 and 17, 2004. As previously mentioned, the decision is under reserve.

[98] In respect of the period starting on January 17, 2003, Mr. Almrei complains of abnormally long institutional delays in processing his applications for judicial review. I reproduce a timeline of the proceedings relating to the second application for judicial review and covering the period between October 30, 2003 and November 23, 2004:

Timeline of judicial review proceedings (IMM8537-03)

2003	
October 30	Mr. Almrei files an application for leave and for judicial review.
November 26	Mr. Almrei's application record is filed at the hearing.
November 27	Continuation of hearing on the motion for a stay of removal.
November 28	Reasons for order and order issued by Blanchard J. granting a stay of removal pending the outcome of the application for leave and for judicial review. Meanwhile, the hearing of the motion concerning affidavits and the sealing of information continues.
December 2	Order and reasons for order of Blanchard J. released.
2004	
January 13	Crown's submissions filed relating to the application for leave and for judicial review.
January 27	Mr. Almrei files submissions in reply.
February 3	Crown writes a letter of non-opposition relating to Mr. Almrei's filing of reply submissions on January 27.

February 10	Mr. Almrei files a motion asking for a retroactive extension of time to file reply submissions. This relates to the submissions filed January 27.
March 2	Prothonotary Milczynski grants the February 10 motion and orders an extension of time *nunc pro tunc* to January 27. Prothonotary Milczynski held that the delay was entirely attributable to the inadvertent error of counsel and that a reasonable explanation for such error and delay was provided.
July 13	Counsel for Mr. Almrei writes to the Federal Court asking why there has been no decision on the application for leave for judicial review, despite the passage of over 8 months.
August 3	Leave is granted for judicial review. A timeline is set for the judicial review proceedings that will see all documents filed with the Court by October 18. The hearing is set for November 1.
August 26	The Crown requests the hearing be moved due to a conflict with another previously scheduled security certificate hearing and suggests alternate dates, all prior to November 1. Counsel for Mr. Almrei does not object to the request.
November 1	Evidence and written representations are filed by the Crown concerning a section 87 application for non-disclosure.
November 9	The Crown makes *in camera* and *ex parte* submissions before Blanchard J.
November 16	The public hearing on the judicial review application beings.
November 19	Mr. Almrei's submissions concerning a section 87 application by the Crown are due but are not received.
November 23	Following a call from the registrar, counsel for Mr. Almrei faxes submissions in response to the Crown's section 87 application.

[99] I cannot say that the delay incurred is unusual or unreasonable, except as regards the period of nine months (from October 30, 2003 to August 3, 2004) which elapsed before a decision was rendered on the leave application for judicial review. I find it disturbing that a leave application, completed for all practical purposes by March 2, 2004, could be kept on hold for five months when the applicant is in detention. While I can understand that applications for leave for judicial review and for judicial review are not applications for *habeas corpus* and that such applications obey a different procedural regime, great vigilance must be exercised and priority given to applications for leave and for judicial review made by detainees. Strict compliance with the time limits provided by the Rules for the filing of material should be adhered to by the parties under monitoring of the Court. That being said, I recognize that the Federal Court, like our Court and most courts, has limited resources, a problem which is known to have been compounded in the Federal Court and in our Court by the Government's slowness in filling new judicial positions allocated by Parliament or existing vacant positions. This state of affairs is most regrettable and Mr. Almrei's complaint is, in part, well-founded. I say in part because he could and should have been more aggressive in moving his file forward.

[100] Apart from the inquiry by counsel for Mr. Almrei on July 13, 2004 about the delay in deciding the application for leave, there is nothing in the record of that file indicating that Mr. Almrei sought an expedited hearing on the application for leave and, subsequently, on the application for judicial review when leave was granted. The

primary responsibility for moving a case forward rests with the moving party while the court's duty is to ensure, on the one hand, that, within the limits of its allocated resources, cases are heard expeditiously when so requested, and, on the other hand, that its process is not being abused by litigants who merely want to delay the process.

[101] In addition, Mr. Almrei could have put an end to his detention if he had shown a willingness to leave the country. Most of his family, including his parents, live in Saudi Arabia. He has a sister living in Lebanon. He travelled freely to Pakistan, Afghanistan, Jordan and other countries: see his affidavit, Appeal Record, vol. 8, paragraphs 6 to 10. He could, at any time, have made an application to the Minister for release pursuant to subsection 84(1) indicating which countries other than Syria he would be willing to go to. The Minister would have had to investigate the possibility of a safe removal to these countries. By his own admission, Mr. Almrei never made any effort or inquiries as to whether countries other than Syria would be willing to accept him: see his testimony, Appeal Record, vol. 4, pages 1128-29.

[102] I have put Mr. Almrei's contentions in their proper context and reviewed them at some length even though they are not relevant to this subsection 84(2) application for judicial release. They are not relevant because the evidence clearly and unequivocally indicates that Mr. Almrei was about to be removed, and would still be removed within weeks, were it not for his proceedings staying the removal and challenging the second danger opinion. In other words, but for these proceedings, there would be compliance with the law by the Crown. The judge could not therefore order Mr. Almrei's release because one of the conditions required under subsection 84(2) to obtain judicial release has not been met, namely that removal will not occur within a reasonable time.

b) the conditions of detention

[103] Mr. Almrei's conditions of detention were initially harsh. He was held in solitary confinement until his transfer to the general population where he was assaulted. For his own protection and at his request, he was returned to solitary confinement. He is detained in a remand centre, the Toronto West Detention Centre, with very little, if any, programs and activities. Moreover, the rules applicable to solitary confinement are very stringent.

[104] There are remedies available to a detainee to challenge the conditions of his detention and improve them. Mr. Almrei has obtained some relief by way of *habeas corpus* in the Ontario Superior Court: see *Almrei v. Canada (Attorney General)*, [2003] O.J. No. 5198. However, what Mr. Almrei is now seeking before this Court and the Federal Court is not a review of his conditions of detention with a view to improving them. Rather, he seeks release from detention pursuant to subsection 84(2) of the IRPA which, as I have previously said, contains a test for release that is future-oriented.

[105] Not unlike the length of detention, the conditions of detention are not operative factors in determining whether the criteria for a subsection 84(2) application are met where, as in the present instance, compliance with the law by the Crown and removal within a reasonable time are made impossible by the proceedings brought by Mr. Almrei. An application under subsection 84(2) of the IRPA is not the appropriate

remedy to complain about and seek relief from conditions of detention. The purpose of subsection 84(2), as previously stated, is to ensure that due diligence is exercised by the authorities in removing a person who is detained. It gives detainees a mechanism whereby the legitimacy and opportunity of their detention will be examined by the judiciary where removal is unduly and inexcusably delayed by the authorities.

[106] In conclusion, I agree with the judge who heard the subsection 84(2) application that a case for Mr. Almrei's judicial release has not been made out since the condition that removal will not occur within a reasonable time has not been met.

Ground no. 6: Whether the judge failed to articulate the basis upon which he concluded that the secret evidence that he received was reliable, credible and trustworthy or whether he failed to properly test the reliability, credibility and trustworthiness of the evidence

Ground no. 7: Whether Mr. Almrei has failed to establish that he would not be a danger to the security of Canada

[107] These two grounds can be considered together.

[108] The subsection 84(2) application for judicial release requires an applicant to satisfy the judge that he will not be removed from Canada within a reasonable time and that his release will not pose a danger to national security. Since Mr. Almrei has failed to satisfy the first criterion, he is not entitled to judicial release. There is, therefore, no need to speculate as to whether his release would or would not pose a threat to national security. That disposes of the seventh ground of appeal.

[109] It also disposes of the sixth ground of appeal because the question of the reliability, credibility and trustworthiness of the secret evidence is also linked essentially to the issue of the threat to national security which is the second criterion to be met under subsection 84(2).

[110] I do not want to leave these two grounds of appeal without mentioning the difficulty that could have arisen from the fact that the Crown chose not to file the secret evidence with us. Had the question of national security been a live issue on this appeal, the Crown's decision not to file the secret evidence would have deprived Mr. Almrei of two meaningful grounds of appeal. This Court would have been left in a dilemma that the IRPA does not solve. In order to protect Mr. Almrei's right of appeal, I would have had no hesitation in directing the Crown to elect between producing the evidence or renouncing its ability to rely on it, and informing it of the consequences of a refusal to do both.

Ground no. 8: Whether the judge was mistaken in concluding that the continued detention of Mr. Almrei does not violate his constitutional rights under sections 7 (liberty and security of the person) and 12 (protection against cruel and unusual treatment or punishment) of the Charter

[111] Mr. Almrei takes issue with the judge's finding that his rights under sections 7 and 12 of the Charter are not breached by his detention:

7. [Life, liberty and security of person.] Everyone has 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.	**7. [Vie, liberté et sécurité.]** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
12. [Treatment or punishment.] Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	**12. [Cruauté.]** Chacun a droit à la protection conte tous traitements ou peines cruels et inusités.

Mr. Almrei argues that three years in solitary confinement is excessive and constitutes cruel treatment or punishment. He refers us to some decisions or dissenting opinions that can be distinguished on the facts of this case.

[112] For example, Mr. Almrei cites the dissenting opinion of Cory J. in *R. v. Shubley*, [1990] 1 S.C.R. 3, at paragraph 8 where the learned judge stated, as an example, that "the imposition of a year or more of solitary confinement could probably not withstand a Charter challenge that it constituted cruel and unusual punishment". In *Abbot v. Canada*, [1993] F.C.J. No. 673 (QL), at paragraph 159, a penitentiary inmate was forcefully put in segregation when the segregation was not factually and legally justified. Here the solitary confinement is no longer imposed on Mr. Almrei. It is at his request and for his own protection that he is detained in solitary confinement. This fact certainly sheds a different light on Mr. Almrei's allegation that, to use the terms of section 12 of the Charter, he is subjected to "cruel and unusual treatment or punishment", especially in view of the fact that the prison authorities bear a statutory duty to take reasonable measures to ensure the protection of the persons that they detain.

[113] In any event, even if I assume without deciding, that Mr. Almrei's detention constitutes cruel and unusual treatment, I believe that the remedy he seeks is not the appropriate and just remedy that section 24 of the Charter would authorize in the circumstances.

[114] Indeed, what Mr. Almrei seeks is release from a detention that is lawful and statutorily mandated: see subsection 82(2). He uses his conditions of detention to cast doubts on the legality of an otherwise lawful detention. The appropriate and just remedy in these circumstances would be to alter or suppress those conditions of detention which can be said to aggravate his detention or constitute an illegal or unwarranted form of additional punishment or treatment. However, this is not what Mr. Almrei asks of this Court. He has not requested that his conditions of detention be reviewed, that he be transferred to another institution or that he be released into the general population while awaiting removal. In circumstances where a detainee's segregation takes place at his own request and where his complaint is about the severity of segregation, judicial release, with or without conditions, from a mandatory detention in the interest of national security, is not the just and appropriate remedy contemplated by the Charter.

The decision of the House of Lords in *A(FC) and others (FC) v. Secretary of State for the Home Department*

[115] Mr. Almrei acknowledges that this House of Lords decision deals with questions that do not arise in our case.

[116] As a matter of fact, the English decision does not address the lawfulness of individual detentions as we are required to do in this instance. Lord Scott of Foscote writes in this respect, at paragraph 141 of the decision:

The issue in these appeals is not whether the indefinite executive detention of these appellants under section 23 of the *Anti-terrorism, Crime and Security Act 2001* is lawful. The merits of the case against each appellant allegedly justifying his detention has not been argued in these proceedings. That issue is for another day and other proceedings... It is possible that in those proceedings it will be held in relation to one or some or all of the appellants that his or their detention was not justified and was therefore unlawful.

[117] The whole case is about the legality of indefinite detention, without charges, of suspected international terrorists, authorized by subsection 23(1) of the English *Anti-terrorism, Crime and Security Act 2001*, c. 24, and the discriminatory application of this provision to non-United Kingdom nationals. Subsection 23(1) reads:

23. Detention

(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by

(*a*) a point of law which wholly or partly relates to an international agreement, or

(*b*) a practical consideration.

[118] There is no legal provision in the IRPA authorizing indefinite administrative detention. As for the question of discrimination, there was evidence coming from the Home Office that the terrorist threat in the U.K. did not derive solely from foreign nationals. Almost 30% of suspects under the former *Terrorism Act 2000* were British and nearly half of the persons suspected by the authorities of involvement in international terrorism were British nationals: see paragraph 32 of the decision. However, only non-U.K. nationals were arrested and indefinitely detained. Hence, a finding of discrimination on the basis of nationality. As Lord Bingham of Cornhill said at paragraph 54:

The undoubted aim of the relevant measure, section 23 of the 2001 Act, was to protect the UK against the risk of Al-Qaeda terrorism... That risk was thought to be presented mainly by non-UK nationals but also and to a significant extent by UK nationals also. The effect of the measure was to permit the former to be deprived of their liberty but not the latter. The appellants were treated differently because of their nationality or immigration status.

[119] Also at issue were other provisions of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 (European Convention on Human Rights) as interpreted by the European Court of Human Rights, regulating detention with a view to deportation and precluding deportation to a country where the detainee faces the prospect of torture and inhuman treatment. Lord Hope of Craighead warned against the use of foreign jurisprudence when there is significant difference in the language being construed: see paragraph 131 where he said that for that reason, it was safer to rely on the jurisprudence surrounding the European Convention than on jurisprudence from our Supreme Court relating to the interpretation of the Charter.

[120] On the issue of deportation, it is important to note that, in our jurisdiction, subsection 115(1) of the IRPA establishes the principle of *non-refoulement*, which prohibits the removal of a person to a country where he or she 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.

[121] Exceptionally, paragraph 115(2)(*b*) does authorize the *refoulement* of persons inadmissible on grounds of security if the Minister is of the opinion that such persons would present a danger to the security of Canada if allowed to remain in Canada. One would be inclined to think that Parliament's intent in that paragraph is quite clear.

[122] However, Parliament has subjected the interpretation and application of the IRPA to international human rights instruments to which Canada is signatory. Paragraph 3(3)(*f*) of the IRPA reads:

3. [...]	**3.** ...
(3) This Act is to be construed and applied in a manner that	(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet_:...
[...]	
(*f*) complies with international human rights instruments to which Canada is signatory.	*f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

[123] This creates an internal contradiction in the IRPA because Canada is signatory to both the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force March 23, 1976; accession by Canada May 19, 1976) (Covenant) and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36 (Convention against Torture).

[124] The Convention against Torture was ratified by Canada in 1987. Articles 1, 2, 3 and 16 of the Convention absolutely prohibit deportation to torture, without any possibility of derogation. The ratification of the Covenant occurred in 1976. It also prohibits torture and it would seem, therefore, deportation to a place of torture. This

result is achieved through articles 4(2) and 7 which indicate that no derogation is permitted from article 7. General Comment No. 20 of the UN Human Rights Committee, which monitors the implementation of the Covenant incorporates the prohibition against *refoulement* to a risk of torture into article 7.

[125] The *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (Refugee Convention) would appear to conflict with the Covenant as well as with the Convention against Torture. Article 33(2) of the Refugee Convention allows the *refoulement* of a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, upon criminal convictions, constitutes a danger to the community of that country.

[126] On this issue of *refoulement* to a country where the deportee might be subject to torture, the Canadian position is not as conclusive as the position adopted by the English Courts pursuant to the European Convention on Human Rights. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, our Supreme Court acknowledged that there were indicia that the prohibition on torture had reached the status in international law of a peremptory norm from which no derogation is acceptable. At paragraphs 62 to 65, the Court suggested that, as a minimum, it was a norm that could not be easily derogated from. Yet, it did not close the door on a possible deportation to torture. At paragraph 76, it held that "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by section 7" of the Canadian Charter. Deportation to torture might be saved by the balancing process mandated under section 7 or might be possible under section 1. This issue is the subject of other proceedings. It is not before us on this section 84(2) application for judicial release.

[127] In the House of Lords' decision, the legal impossibility of deporting to torture the persons arrested made the detention indefinite. In our jurisdiction, at this moment, deportation to torture remains a possibility and, therefore, each case will have to be assessed on its own merits. In other words, there is no automatic detention of indefinite duration in all cases resulting from an impossible derogation to a prohibition against deportation to torture. If this ever happens, subsection 84(2) is intended to provide judicial relief: see *Ahani*, *supra*, at paragraph 14.

[128] Looking at the facts of the case before us and the law applicable to them, it is obvious that the facts and the legal situation in the House of Lords' decision were quite different. In the present instance, we are not, at this time, factually and legally confronted with a situation of indefinite detention resulting from an impossible removal or a lack of due diligence in effecting removal. Mr. Almrei was to be and would have been removed were it not for the stay of removal that he sought and obtained. It is premature to conclude that Mr. Almrei is subject to indefinite detention.

[129] Moreover, no issue of discrimination arises in our case. There is no evidence, as there was in the English case, of a sizeable number of Canadian nationals being suspected of international terrorism whose detention would be required and yet not pursued and effected.

[130] Finally, there is no evidence of an improper use of immigration laws, as there appears to have been in the English case, to fight international terrorism: see

paragraphs 44, 53 and especially 134 where Lord Hope of Craighead wrote that the issue which the Derogation Order was designed to address was not at its heart an immigration issue. In our case, Mr. Almrei entered Canada by fraud and under false pretences, an act which justified the use of immigration laws in controlling and securing access to Canadian territory.

The decision of the U.S. Supreme Court in *Clark v. Martinez*

[131] In his supplementary memorandum of facts and law, Mr. Almrei referred us to the newly released (January 12, 2005) decision of the U.S. Supreme Court in *Clark v. Martinez*, 543 U.S. (2005). The decision relates to the detention and removal of an alien and the limits to that detention. Instructive as it is, this case, however, deals with a different situation.

[132] Not unlike the legal status of an alien in Canada, a detained alien in the U.S. is entitled to conditional release if he can demonstrate that there is no significant likelihood of removal in the reasonably foreseeable future: see page 6 of the opinion of Scalia J. The authorities are given six months to effectuate a removal, but that period can be renewed indefinitely: see page 14 of the decision, footnote 8 as well as pages 1 and 2 of the opinion of O'Connor J. Successive detentions can occur if the release of an alien will threaten the security of the U.S. or the safety of the community or of any person.

[133] In the *Martinez* case, the evidence revealed that the U.S. Government conceded that it was no longer involved in repatriation negotiations with Cuba and, therefore, there was nothing to indicate that a substantial likelihood of Martinez's removal to that country existed. The situation is otherwise in our case.

Conclusion

[134] In this appeal, Mr. Almrei has raised several issues that are premature in the sense that they are either not borne out by the facts or are not relevant to a section 84(2) application. It would be unwise to address them, especially in the abstract. However, on the basis of the facts that were before the designated judge, I cannot conclude that he erred in dismissing Mr.Almrei's application for judicial release. I would therefore dismiss the appeal.

[135] I believe it is appropriate to underline some of the operational difficulties posed by the legislation. The IRPA is the subject of frequent legislative reviews. This appeal and the two Charkaoui cases show the need for a reassessment of the policy regarding the right of appeal in detention matters with a view to clarifying Parliament's intent and achieving greater consistency. They also point to the necessity of reviewing the circumstances under which a designated judge can hold hearings in private and hear evidence in the absence of a permanent resident or a foreign national. The review process could also usefully address the question of the use of, and access to, secret evidence by judges sitting on appeal against decisions rendered by designated judges. Finally, Parliament should indicate what remedy is available to a permanent resident who is detained and who will not be removed from Canada within a reasonable time.

"Gilles Létourneau"

J.A.

"I agree

J. Edgar Sexton J.A."

"I agree

K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	SEXTON J.A.
	SHARLOW J.A.
DATED:	FEBRUARY 8, 2005

APPEARANCES:

John R. Norris	FOR THE APPELLANT
Barbara Jackman	
Mr. Hadayt Nazami	
Donald MacIntosh	FOR THE RESPONDENTS
Alexis Singer	
Toby Hoffmann	

SOLICITORS OF RECORD:

Barbara Jackman	FOR THE APPELLANT
Barristers and Solicitor	
Mr. Hadayt Nazami	
Barrister and Solicitor	
Morris Rosenberg	FOR THE RESPONDENTS
Deputy Attorney General of Canada	

John Norris

Barrister and Solicitor