

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

ADIL CHARKAOUI

APPELLANT

AND:

**MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA**

RESPONDENT

AND:

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

INTERVENERS

Court File

**No. 30929
BETWEEN:**

HASSAN ALMREI

APPELLANT

AND:

**MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA**

RESPONDENTS

**(NOTE: Same interveners as above except for
Canadian Arab Federation)**

Court File

**No. 31178
BETWEEN:**

MOHAMED HARKAT

APPELLANT

AND:

**MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA**

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PART I – THE FACTS

1. The CBA relies on the statement of facts set out in the factum of the Appellant.

PART II - QUESTIONS IN ISSUE

2. The within appeals by leave of this Court are from decisions of the Federal Court of Appeal upholding the constitutionality of certain provisions of the *Immigration and Refugee Protection Act (IRPA)* pertaining to security certificates. The Appellants raise numerous issues on appeal.

3. The intervener, the Canadian Bar Association (the CBA), seeks to address only those issues related to section 7 of the *Charter*. Specifically, the CBA’s position is that the detention of those subject to the security certificate procedure deprive them of their rights to liberty and security of the person. Further, this deprivation is inconsistent with fundamental justice as it infringes upon some of the basic tenets of our legal system: the right against self-incrimination, right to counsel, and judicial independence.

4. Further, the CBA submits that any balancing of procedural fairness and national security interests, in the context of this case, ought to occur under section 1 of the *Charter* and not in determining whether there is a violation under section 7. Without provision for an *amicus curiae* counsel representing the interests of the person concerned and the public in the certificate process, there is no proportionality between the section 7 infringements and the interests of national security, and therefore the security certificate provisions cannot be justified under section 1.

PART III - ARGUMENT

A. Provisions of *IRPA* Pertaining to Non-Disclosure of Information

5. The relevant sections of *IRPA*, sections 76 through 78, provide a scheme that replaces the normal deportation proceedings set out in the Act in circumstances where the government seeks to protect confidential information on grounds that its release would jeopardize national security or put individuals at risk of harm and allows for the consideration of evidence received by the judge *ex parte*.

6. The Federal Court has long maintained that the provisions dealing with security certificates are constitutional. This matter was first addressed in the case of *Ahani v. M.C.I.* where the Court upheld the constitutionality of the provisions. Madam Justice McGillis concluded this procedure was consistent with the principles of fundamental justice because it constituted a reasonable and adequate balance of the competing interests of the state to protect confidential sources of information versus the right of individuals to adequate disclosure to be able to defend themselves against the allegations. Her analysis balanced the rights of the individual and the interests of the state within a contextual analysis of the principles of fundamental justice. She concluded that the procedure offered sufficient due process within the context of an immigration proceeding. The decision was upheld by the Federal Court of Appeal and its reasons echoed those of the trial judge.

Ahani v. Canada, [1995] 3 F.C. 669 (T.D.)

Ahani v. Canada, [1996] F.C.J. No. 937 (C.A.)

7. In the courts below in *Charkaoui*, both the Federal Court and Federal Court of Appeal applied essentially the same reasoning. They concluded that there was no violation of the *Charter* in applying these provisions to permanent residents, relying on the reasoning in *Ahani*. Mr. Justice Noel of the Federal Court again emphasized the role of the trial Judge hearing the case in challenging the *in camera* evidence.

Re Charkaoui, [2003] F.C.J. No. 1816

Re Charkaoui, [2004] F.C.J. No. 2060 (F.C.A.)

B. Section 7 Liberty and Security of the Person Interests are Engaged

8. The CBA acknowledges that the deportation process *per se* does not automatically engage section 7 interests.

Medovarski v. Canada, (M.C.I.) [2005] 2 S.C.R. 539 at para. 46
Canada (M.E.I.) v. Chiarelli, [1992] 1 S.C.R. 711 (hereinafter “*Chiarelli*”) at p.733

9. However, this Court has found that section 7 liberty interests will be engaged if the procedure affects the person’s right to make fundamental life choices and security of the person interests will be engaged if the state action causes severe emotional distress.

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307 (hereinafter “*Blencoe*”) at paras. 49-54
Godbout v. Longueuil, [1997] 3 S.C.R. 844 (hereinafter “*Godbout*”) at paras. 66 and 67
R v. Morgentaler, [1988] 1 S.C.R. 30 (hereinafter “*Morgentaler*”)

10. It is settled law that section 7 liberty interests encompass freedom from physical restraint. In *Blencoe v. British Columbia (Human Rights Commission)*, the majority of this Court held that the liberty interest in section 7 of the *Charter* is not restricted to freedom *from* physical restraint but includes the right of an individual to make fundamental personal choices free from state interference.

Blencoe, supra at paras. 49-52
Godbout, supra at para. 66

11. It is now well established that the right to security of person includes the right to be free from “serious state-imposed psychological stress.” In *Blencoe*, this Court found two requirements for making this type of finding under section 7. First, the psychological stress has to be imposed by the state, and second, the psychological stress must be serious.

12. Section 7 is engaged in this case because subsection 82(1) of *IRPA* requires the detention of a permanent resident named in a certificate described in subsection 77(1), if the Ministers issue a warrant for his or her detention. The person has the right to apply for release but release will only be granted if the judge is satisfied that the person does not pose a danger to national security or the safety of persons, and will appear for removal. Subsection 82(2) of *IRPA* imposes mandatory detention of all foreign nationals who have been issued a certificate described in subsection 77(1) until 120 days *after* the Justice

determines the reasonableness of the certificate. These cases have *all* involved lengthy detentions. The Appellant Charkaoui, for example, is a permanent resident of Canada who was detained from May 2003 until he was ordered released in February 2005. The conditions for his release are extremely strict, amounting to house arrest. As such, his right to liberty is engaged.

13. Section 7 is also engaged because all of the appellants have suffered state-imposed severe emotional distress as a result of lengthy separation from families, and the threat of permanent separation if the certificates are affirmed, becoming effective deportation orders. This coupled with the threat of deportation to countries where the appellants allege a fear of persecution and torture is sufficient to engage a section 7 security of the person interest. Thus, the intervener submits that the Appellants' detention in the circumstance of this case violates their rights to liberty and security of the person under section 7 of the Charter

Morgentaler, supra at p. 56
Blencoe, supra, at paras. 56-57
New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46 (hereinafter “*G.(J.)*”) at paras. 58-61

C. Security Certificate Provisions are Inconsistent with Fundamental Justice

14. The intervener's position is that the deprivation of liberty and security of the person is not in accordance with the principles of fundamental justice for three reasons. First, by depriving the person named in the security certificate with the particulars of the allegations against them, the person is effectively forced to incriminate him or herself in order to refute any adverse evidence that might be in the possession of the authorities. Second, the process effectively denies those named in a security certificate a right to counsel, given that their counsel is not aware of the evidence used against them, nor able to participate in the testing of that evidence. Third, the process has undermined the independence of the designated judge by requiring that the judge assume a role incompatible with the judicial function.

a) Right against self-incrimination

15. The right against self-incrimination has been found to be a principle of fundamental justice by this Court. While the right against self-incrimination has generally been considered in the context of compulsion to testify, the intervener contends that it is also applicable to the cases at bar, where the persons named in the security certificate have to rebut evidence not presented to them. The jurisprudence of this Court has articulated two primary purposes for this right, namely to protect against unreliable confessions, and to protect against abuses of power by the state. The latter purpose, which is directly relevant to the security certificate procedure, was articulated more fully in *R v. Jones*, where Chief Justice Lamer described a violation of the principle against self-incrimination as:

Any state action that coerces an individual to furnish evidence against him or herself in a proceeding in which the individual and the state are adversaries....

R v. White, [1999] 2 S.C.R. 417 at para. 43

R v. Jones, [1994] 2 S.C.R. 229 at para. 33

16. This Court recently considered the right against self-incrimination in the context of national security concerns in *Application under s. 83.28 of the Criminal Code (Re)*, where it confirmed that the right against self-incrimination was a principle of fundamental justice. However, the Court concluded that the right against self-incrimination was not violated in the context of section 83.28, because adequate safeguards could be put in place to ensure, to the extent that the person was compelled to give information, that information could not be used against the person in any subsequent proceeding. Indeed, the Court read into the provisions of the *Criminal Code* a requirement that a judge make an order ensuring that the evidence could not be used not only in any subsequent *Criminal Code* proceeding but also any subsequent immigration or extradition process. As a result, the right against self-incrimination could be preserved by ensuring that the information was not used in any subsequent legal process.

Application under s.83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248 (hereinafter “*Re Application under s. 83.28*”) at paras. 72,73, and 78

17. To assess the impact of the security procedure on the right against self-incrimination, it is important to consider the procedure’s practical effects. The security

certificate process denies the named person access to any meaningful disclosure regarding the case to be met. The person has a right to be heard, but must exercise that right in a vacuum. The result is a process where the person must make assumptions that are not based on a real understanding of the government's case.

18. The person's right to be heard is conditioned by this lack of meaningful disclosure. The person, confronted with the finding of inadmissibility by the Minister, faced with inadequate disclosure and with the requirement of adducing evidence to satisfy the judge that the certificate is not reasonable, will in most cases be forced to speculate as to the evidence the government might have. The person will almost certainly find it necessary to adduce potentially incriminatory evidence in order to attempt to rebut the government's evidence.

19. Indeed, in the case of the Appellant Almrei, when his application for an *in camera* hearing was refused, he chose not to testify. Once the Appellant made that choice, the Court concluded that the secret evidence was sufficient to uphold the Minister's finding and the Justice affirmed the certificate.

20. Moreover, unlike a section 83.23 proceeding, where the court can adequately protect against self-incrimination by insulating the person from the potential consequences of being compelled to give incriminatory evidence, there is substantial risk of self-incrimination in the context of the security certificate proceeding. Rather than being able to circumscribe evidence to address the "charges," the named persons must provide much more information to defend themselves. This procedure makes the person an unwilling participant in the government's fishing expedition. The effect, therefore, of inadequate and partial disclosure is a serious risk that, by seeking to address the allegations, the person will incriminate him or herself in a manner inconsistent with the principles of fundamental justice. The role of the judge in the *in camera* and public hearings cannot rectify the problems that emerge as a result of the inherent unfairness of the procedure.

b) Right to Counsel

21. The intervener submits that the sections 76 to 78 of *IRPA* undermine a person's right to counsel. The right to counsel is not absolute, however, in certain circumstances where fundamental interests are at stake, the proceedings are complex, and the individual lacks capacity to adequately represent their interests, this Court has held that section 7 mandates that a person receive representation by counsel. This is due to the fact that right to a fair hearing includes the right to participate effectively.

G.(J.), *supra* at paras. 73, 75, and 86.

22. Referral of a certificate under subsection 77(1) of *IRPA* is an extremely serious matter. The certificates in these appeals state that the Appellants are inadmissible on security grounds within the meaning of sections 33, 34 and 77 of *IRPA*. The general allegation upon which the security certificates are based is that the Appellants are members of a terrorist organization and have engaged, are engaging or will engage in terrorist activities.

23. If a security certificate is determined to be reasonable by a judge of the Federal Court, section 81 of *IRPA* lists several adverse consequences that flow from that finding:

- (a) it is *conclusive proof* that the permanent resident or 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).

[Emphasis added]

24. In short, if the Appellants are unsuccessful at the end of the process, it will result in them being labeled terrorists, their status as a long-term permanent residents removed, and their permanent removal from Canada subject only to a possible challenge of their removal to their respective countries of nationality based on a risk of torture.

25. The process contemplated under section 78 is meant to be adversarial in nature. The Minister presents the case and then the named person is given an opportunity to respond. The process is in no way analogous to the *Delghani v. Canada (M.E.I.)* case where the Court held that there is no right to counsel during a routine interview.

Delghani v. Canada (M.E.I.), [1993] 1 S.C.R. 1053 at pp. 1077 and 1078

26. Given the complexity of the issues at stake in this process, the intervener submits that it would be virtually impossible for an individual to navigate the system without the assistance of counsel.

G.(J.), *supra* at paras. 75, 80, and 82

27. Given the complexity of the proceedings and the secretive nature of the hearings, a high degree of procedural fairness and a right to counsel is owed to the named person. The legislation provides for the named person to be represented by counsel and an opportunity to respond to summaries provided by a judge of the Federal Court. However, the named person and their counsel are not entitled to be present at the hearing or to test the government's evidence.

28. A person named on a security certificate has the right to have access to counsel. However, this right is rendered meaningless if counsel does not have the required information to be able to effectively represent their client. To ably represent a person within the context of an adversarial hearing process, counsel must be able to effectively assist the client by testing the evidence used against the client.

29. In *G.(J.)*, this Court has determined that for a parent to effectively participate in a hearing with serious issues at stake, they required counsel. The person named in a security certificate requires counsel to effectively participate in a hearing that can result in their continued detention or deportation. Effective representation is at the core of a right to counsel. Jurisprudence relating to the incompetence of counsel is instructive in setting out what is required of counsel. It is not enough for counsel to only be present.

The jurisprudence is clear that counsel must also be effective for the adversarial system to function properly.

R v. Widdifield, [1995] 25 O.R. (3d) (Ont. C.A.) at p. 171

R v. B.(L.C.), [1996] 104 C.C.C. (3d) 353, (Ont.C.A.), at pp. 367-368

Shirwa v. Canada (M.E.I.), [1994] 2 F.C. 51 (T.D.), at para. 13

30. In the present appeals, sections 76 to 78 of *IRPA* obstruct counsel from effectively representing the interests of the person named on the security certificate. Counsel is kept in the dark about the case, is denied access to the Crown's witnesses, and is therefore denied the opportunity to effectively challenge the evidence through cross-examination or presentation of rebuttal evidence. Having counsel respond to vague summaries of the evidence is not a substitute for an advocate on the behalf of the named person being present at the hearing. The named person and counsel are left to guess at the evidence that has been given, its source and its reliability. In such a proceeding the ability of counsel to defend the client is so undermined so as to make the right to counsel nugatory. As such, the intervener submits that the sections 76 to 78 processes undermine the person's right to counsel.

31. Moreover, the role played by the Federal Court judge, either within the ambit of the *in camera* hearing or within the context of the public hearing cannot possibly rectify the imbalance created by the procedure. Vigorous questioning of government witnesses in the secret hearing does not allow counsel for the named person to play a more effective role. The judge can do nothing in the public hearing that will allow counsel to be more effective. Counsel is denied the most basic disclosure, and denied the ability to effectively challenge the credibility of their client's accusers. Counsel cannot be assisted by the presiding judge in this regard as their role is to decide the reasonableness of the Ministers' decision.

c) Judicial Independence

32. One principle of fundamental justice is that a person is entitled to a hearing before an independent and impartial tribunal. This principle is explicitly referenced in ss.96 to 100 of the *Constitution Act, 1867* and section 11(d) of the *Charter*. In *Reference re*

Motor Vehicle Act (B.C.), this Court held that the guarantees of fundamental justice are to be found first in sections 8 to 14 of the *Charter*. This Court has held that subsection 11(d) applies with modifications to administrative tribunals.

Reference re Motor Vehicle Act (British Columbia) s.94(2), [1985] 2 S.C.R. 486 at p. 503

Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3 at paras. 83 and 84

33. Even more broadly, however, judicial independence is a foundational principle of our Constitution. It underlies and extends beyond the explicit scope of particular constitutional terms. This Court has held that *raison d'être* for the principle of judicial independence is threefold: impartiality in adjudication, preservation of our constitutional order, and public confidence in the administration of justice. Public confidence can be maintained only if judicial independence is maintained in appearance as well as in operation. The public perception and reality of judicial independence are equally important for constitutional purposes.

British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473 at para. 66

Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 (hereinafter "*Re Provincial Court Judges*") at paras. 83-89

Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General), [2005] 2 S.C.R. 286 (hereinafter "*Bodner*") at paras. 4-6

Ell v. Alberta, [2003] 1 S.C.R. 857 (hereinafter "*Ell*") at paras. 18, 23-24

34. Independence requires "the complete liberty of individual judges to hear and decide the cases that come before them" without executive or legislative encroachment, and without interference from parties to litigation. In determining whether the principle of judicial independence has been undermined, the appropriate test is whether a reasonable and informed person would find that the court is independent. A judge ought not to consider their own perceptions and "insider" experience as a judge in determining

whether their ability to impartially test the evidence is compromised by a lack of independence, but view the question from the perspective of the “judged.”

Bodner, supra, at para. 5.

Re Provincial Court Judges, supra, at paras 118 and 123-130

Section 83.28, supra, at paras. 80 and 83

Valente v. The Queen, [1985] 2 S.C.R. 673 at p.689

Ell, supra, at para. 32

35. This Court recently considered the principle of judicial independence in the national security context in *Application Re Section 83.28 of the Criminal Code*, where it was noted that the requirement of an independent and impartial judiciary is the “lifeblood of democracies.” In the *Application Re Section 83.28 of the Criminal Code* case, the majority found that the judicial role in the investigative procedure authorized by section 83.28 did not compromise the independence of the judiciary, based on three factors:

- (a) the role of the judge in that proceeding was not to question the individual or to challenge the evidence but merely to act as a mediator to ensure the fairness of the proceeding;
- (b) the Crown instigates the process and the Crown conducts the examination;
- (c) “concerns about the judicial investigative hearings stem largely from its being held *in camera*.” The Court dealt with this concern by relying on the presumption in proceedings under s.83.28 in favour of open hearings.

Re Application under s. 83.28., supra at paras. 89-95

36. In contrast, the CBA submits that the judge’s multifaceted role and the *in camera* nature of the security certificate hearing are incompatible with the principle of an independent judiciary. As opposed to the role of a judge under section 83.28, sections 76 to 85 of *IRPA* require the judge to receive evidence, consider submissions on non-disclosure, and test the credibility of evidence heard in proceedings held *in camera*. These roles are not ones suited to an independent judiciary that is not accustomed to assuming the role of counsel. It is also not compatible with the fact-finding role of a judge who will be required to weigh and assess the credibility of the *in camera* evidence against the evidence presented in the public hearings by the named person. Moreover, the

judge's ability to effectively challenge the evidence is undermined by the fact that he or she must remain independent from the named person and cannot seek guidance from him or her on issues that might emerge in the *in camera* evidence. It is doubtful whether the judge can properly fulfill this function given that she cannot possibly be fully apprised of or understand the position of the named person. It is the role of counsel for the named person to understand the position of the client and to challenge the evidence of the Minister.

37. The procedures are made more extraordinary in that the scrutiny of the media and the public, necessary to ensure actual judicial independence and fairness and the appearance of independence and fairness, is made impossible with *in camera* proceedings. It is essential to the fair and proper administration of justice that judges be independent, impartial and neutral, and that the public be confident it is so:

In the process of decision-making the judge should be free from any irrelevant controls, overt and covert. [...] The necessity of maintaining not only actual, but also the appearance of, impartiality is mandated by the value of public confidence in the courts, the judges and the judicial process.

[...]

Public accountability of the courts and judges is a necessary derivative of the value of public confidence in the court.

Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges" in Shetreet and Deschenes (eds.), *Judicial Independence: The Contemporary Debate* (Boston: Martinus Nijhoff Publishers, 1985) at pp. 630-631 and 656

38. The dissent's comments regarding judicial independence in the *Application Re Section 83.28 of the Criminal Code* case are helpful for considering the institutional dimension of judicial independence. Justice Lebel wrote:

Without institutional independence, or in other words, without the appearance of a clear separation of powers between the judicial, executive and legislative branches, judicial independence cannot be said to exist.

Justice Lebel went on to state that the institutional independence of the judiciary is even more compromised when the proceedings are held *in camera*. In that circumstance, the dissent held that “a reasonable well-informed person would be justified in questioning the role the judge is really playing in the investigation.” It is important to remember that in section 83.28 proceedings there is a presumption of open hearings, a factor that the majority took into account in finding no violation of judicial independence. In the security certificate proceedings, the hearings are necessarily closed. Consequently, it follows that the judge is at risk of being perceived, as Justice Lebel stated, “as a true ally of the executive branch in a secret investigation that is not subject to scrutiny.”

Re Application under s. 83.28, supra, at paras. 179 and 190

39. Public confidence in the courts requires that these hearings be conducted in a manner that ensures actual fairness and the appearance of fairness. Further, it is essential that the hearings be conducted in a manner that demonstrates the impartiality and neutrality of judges in this new and significant role. Without this, public confidence will be lost.

D. No Balancing of Procedural Fairness and National Security under Section 7

40. It is of considerable importance whether the Court balances the Appellants’ right to fairness with national security interests in the section 7 analysis or the section 1 analysis. The CBA contends that, in the context of this case, societal interests should not be balanced with national security concerns in the section 7 analysis.

41. In assessing the principles of fundamental justice in the context of national security concerns, this Court’s decision in *R v. Malmo-Levine* is instructive. It held there should not be a general balancing between individual and societal interests in considering the content of the principles of fundamental justice, as this would collapse the section 1 inquiry into section 7. The consequences of this collapse are significant as the onus of proof is on the claimant in the section 7 analysis, while it shifts to the Crown in section 1.

R v. Malmo-Levine; R v. Caine, [2003] 3 S.C.R. 571 (hereinafter “*Malmo-Levine*”) at paras. 96 and 97

42. This Court went on to state that the balancing of individual and societal interests is only appropriate when elucidating a particular principle of fundamental justice. It is not appropriate to “bring into account such ‘societal interests’” until a principle of fundamental justice has already been established.

Malmo-Levine, supra at para. 98

43. In the present cases, no new principle of justice is being elucidated and consequently, following the dicta in *Malmo-Levine*, there should be no balancing of rights and societal interests within the section 7 analysis. Right to counsel, judicial independence and the right against self-incrimination are all well-established principles upon which our judicial system is based. Any consideration of societal interests should be done in the section 1 analysis.

44. In the alternative, if the Court finds that the *Malmo-Levine* decision is not applicable, it is the intervener’s position that in the particular context of these appeals, the procedure is not consistent with fundamental justice. This Court has held that the delineation of the principles of fundamental justice requires a contextual analysis and a balancing of societal interests against those of the person. In *Suresh*, the issue before the Court was whether removal to torture violated the principles of fundamental justice. This Court held that delineating the principles of fundamental justice required the Court to balance competing interests.

Suresh v. Canada (M.C.I.), [2002] 1 S.C.R. 3 at para.113

45. When evaluating the procedural protections required by the principles of fundamental justice within the context of an administrative decision made by the Minister in *Suresh* to *refouler* a Convention refugee, the Court concluded that fundamental justice precluded deportation to torture.

46. The issues here relate not only to procedural matters but also to substantive rights. The certificate process negates the role of counsel. It puts the named person in a position where he or she will almost certainly incriminate himself. It undermines judicial

independence. Even with the best of intentions, the judge cannot restore balance to a system so fundamentally unbalanced. Because the process is so unbalanced there can be no proportionality. A system that is completely disproportionate cannot be consistent with the principles of fundamental justice. National security concerns cannot be balanced in section 7 because the procedural and substantive protections are so minimal in the security certificate procedure that there is no possibility of achieving any kind of balance within a section 7 analysis.

47. This is true notwithstanding that the context is not criminal law but immigration law. This Court did hold in *Chiarelli* that the basic principle of immigration law is that non-citizens do not have the right to enter into or remain in Canada, and that the state has the right to expel non-citizens not lawfully on its territory. However, even this particular context does not permit such a fundamental departure from due process.

Chiarelli, supra at p.733

48. Of course, it is possible to imagine a procedure even more devoid of procedural protections. For example, the person named in the security certificate could be given no right to counsel, and no summary of the evidence. Such a procedure could never be consistent with the principles of fundamental justice. The current security certificate proceedings operate under a façade of legitimacy. But a process that so undermines Canadian values is a threat to them. The possibility of a more draconian system should not be used to legitimize a process that does not provide meaningful basic protections to those named in a security certificate.

49. The intervener submits that the Courts below erred in their conclusion that the procedure has the necessary proportionality to be consistent with the principles of fundamental justice. Any justification for the procedure, if one exists, must be considered within the ambit of the section 1 analysis.

E. Infringement of Section 7 Not a Reasonable Limit Prescribed by section 1 of the *Charter*

50. The intervener relies on the jurisprudence of this Court that only in very rare circumstances would a deprivation of section 7, not in accordance with the principles of fundamental justice, be saved by section 1 of the *Charter*. It is submitted that the circumstances of this case do not rise to that level.

Godbout, supra, at para. 91;

Re B.C. Motor Vehicle Act, supra, at paras. 104 and 118

G.(J.), supra, at para. 99.

51. The government bears the onus of establishing that a violation of section 7 is a reasonable limit prescribed by law. The first element of the *Oakes* test, the legislative objective of the section, is that certain evidence remain confidential to protect sensitive information from falling into the wrong hands. The intervener acknowledges that this could amount to a pressing and substantial concern.

R. v. Oakes, [1986] 1 S.C.R. 103 at pp. 135-137

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at p. 768

52. However, even if this Court were to find that this is a pressing and substantial concern, the intervener submits that the means chosen to obtain the objective is not proportional to the end. The legislation as it stands renders any participation in that hearing by the named person meaningless because they are not given any opportunity to test the information. It also undermines the independence of the presiding judge.

53. Moreover, sections 76-78 do not impair the Appellants' rights as little as possible. As discussed below, two viable alternatives would meet the requirement of fairness. The security certificate proceedings could operate like Security Intelligence Review Committee (SIRC) hearings or an *amicus curiae* could be appointed for these proceedings to act on behalf of the named person's interests. The intervener submits that either of these options would strike the right balance between protecting sensitive information while still allowing the named person to have some form of meaningful participation at a hearing.

54. The CBA therefore submits that the infringement of section 7 is not a reasonable limit prescribed by section 1 of the *Charter*.

F. Position of the CBA with Respect to the Proper Balance

55. The CBA does not dispute the need for a procedure that protects confidential information within the ambit of a deportation process. The CBA submits that for all the reasons set out above, the current procedure lacks adequate balance. The balance can be achieved either through the use of a specialized tribunal like SIRC or through the use of a special advocate, a system that is currently operating in the United Kingdom.

a) SIRC tribunal

56. The SIRC tribunals use independent counsel who liaise with counsel for the person throughout the hearing process and challenge the secret evidence in the *ex parte*, *in camera* proceeding. Under the former Immigration Act, permanent residents like the appellant would have a right to a hearing before SIRC. This is a longstanding model that has been working – it still protects national security concerns but provides the greatest amount of procedural fairness through independent counsel who represents the interests of the person in the *ex parte*, *in camera* proceedings.

b) Special Advocates

57. In the alternative, a balance could be achieved through the provision of independent counsel whose function would be to represent the interests of the person in the secret hearing, but who would do so without disclosing the information to the person concerned. In the United Kingdom, Special Advocates have existed since 1997. The operation of a Special Immigration Appeals Commission (SIAC) is provided for pursuant to the *Special Immigration Appeal Commission Act 1997*. The role of the Special Advocate is to act on behalf of a person within the secret hearing process. Rule 35 of the SIAC provides that a Special Advocate can:

- i) make submissions to the Commission at any hearing where the appellant is excluded;
- ii) cross-examine witnesses at these hearings; and
- iii) make written submissions to the Commission.

Chahal v. United Kingdom, [1996] 23 EHRR 413, at para. 141
Special Immigration Appeals Commission (Procedure) Rules 2003, Part 7,
 Rule 35.

58. This special advocate process has been the subject of considerable criticism in the United Kingdom. In April 2005 a Constitutional Affairs Committee reviewed the procedure and recommended changes. The report concluded with three principal recommendations, two of which are particularly significant in determining the type of system that should operate in the Canadian context. The two recommendations were as follows:

- i. Steps are taken to make it easier for Special Advocates to communicate with appellants and their legal advisers after they have seen closed material, on a basis which does not compromise national security. This is for two reasons: first, to ensure that the Special Advocate is in a position to establish whether the charges or evidence can be challenged by evidence not available to the appellant; and second, so that the Special Advocate is able to form a coherent legal strategy with the appellant's legal team; and
- ii. Sufficient professional support is provided to the Special Advocates. We doubt that the proposals put forward by the Attorney General will be sufficient to meet the concerns expressed to us by the Special Advocates. The support provided should include security-cleared staff to assist in research and assessment of controlled material. These arrangements should be formalised into an 'Office of the Special Advocate' to allow appropriate staffing and resources to be dedicated to ensuring suspects obtain fairer hearing.

House of Commons, Constitutional Affairs Committee, *"The operation of the Special Immigration Appeals Commission (SIAC) and the use of the Special Advocates,"* Seventh Report of Session 2004-2005, April 3, 2005, at p. 41

59. The CBA submits that a modified version of the special advocacy system in the United Kingdom would strike an appropriate balance between national security concerns and the named person's right to a fair hearing. In particular, the special advocate should not be restrained from meeting with the person concerned after the *in camera* hearings.

Rather, constraints should be put on the special advocate's ability to disclose any of the *in camera* evidence.

60. A special advocate can ensure that the designated judge maintains an independent role. By the same token, the special advocate can be an effective counsel for the named person within the context of a secret hearing, ensuring they have adequate and proper representation. Finally, the special advocate can assist the named person in ascertaining what evidence is relevant and can therefore prevent the named person from revealing incriminating evidence.

PART IV – COSTS SUBMISSIONS

61. The intervener seeks no costs and asks that no order of costs be made against it.

PART V – ORDER SOUGHT

62. It is the intervener's position that the current system is inconsistent with the principles of fundamental justice and seeks an order from the Court to that effect.

All of which is respectfully submitted by

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PART VI – TABLE OF AUTHORITIES

No.	AUTHORITY	Paragraph References
1.	<i>Ahani v. Canada</i> , [1995] 3 F.C. 669 (T.D.)	6
2.	<i>Ahani v. Canada</i> , [1996] F.C.J. No. 937 (C.A.)	6
3.	<i>Application under s.83.28 of the Criminal Code (Re)</i> , [2004] 2 S.C.R. 248	15, 33, 34, 37
4.	<i>Blencoe v. British Columbia (Human Rights Commission)</i> , [2000] 2 S.C.R. 307	9, 10, 11
5.	<i>British Columbia v. Imperial Tobacco Canada Ltd.</i> , [2005] 2 S.C.R. 473	32
6.	<i>Canada (M.E.I.) v. Chiarelli</i> , [1992] 1 S.C.R. 711	8, 46
7.	<i>Canadian Pacific Ltd. v. Matsqui Indian Band</i> , [1995] 1 S.C.R. 3	31
8.	<i>Chahal v. United Kingdom</i> , [1996] 23 EHRR 413	56
9.	<i>Re Charkaoui</i> , [2003] F.C.J. No. 1816 (T.D.)	7
10.	<i>Delghani v. Canada (M.E.I.)</i> , [1993] 1 S.C.R. 1053	24
11.	<i>Ell v. Alberta</i> , [2003] 1 S.C.R. 857	32, 33
12.	<i>Godbout v. Longueuil</i> , [1997] 3 S.C.R. 844	9, 10
13.	House of Commons, Constitutional Affairs Committee, “ <i>The operation of the Special Immigration Appeals Commission (SIAC) and the use of the Special Advocates</i> ,” Seventh Report of Session 2004-2005, April 3, 2005	57

14.	<i>Medovarski v. Canada, (M.C.I.)</i> , [2005] 2 S.C.R. 539	8
15.	<i>New Brunswick (Minister of Health and Community Services) v. G. (J.)</i> , [1999] 3 S.C.R. 46	11, 20, 25
16.	<i>Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General)</i> , [2005] 2 S.C.R. 286	32,33
17.	<i>R v. B.(L.C.)</i> , [1996] 104 C.C.C. (3d) 353, (Ont. C.A.)	28
18.	<i>R v. Jones</i> , [1994] 2 S.C.R. 229	14
19.	<i>R v. Malmo-Levine; R v. Caine</i> , [2003] 3 S.C.R. 571	40, 41
20.	<i>R v. Morgentaler</i> , [1988] 1 S.C.R. 30	9, 13
21.	<i>R v. Widdifield</i> , [1995] 25 O.R. (3d) 161 (Ont.C.A.)	28
22.	<i>R v. White</i> , [1999] 2 S.C.R. 417	14
23.	<i>R. v. Edwards Books and Art Ltd.</i> , [1986] 2 S.C.R. 713	50
24.	<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103	50
25.	<i>Reference re Motor Vehicle Act (British Columbia) s.94(2)</i> , [1985] 2 S.C.R. 486	31,
26.	<i>Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island</i> , [1997] 3 S.C.R. 3	32, 33
27.	Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges" in Shetreet and Deschenes (eds.), <i>Judicial Independence: The Contemporary Debate</i> (Boston: Martinus Nijhoff Publishers, 1985)	36
28.	<i>Shirwa v. Canada (M.E.I.)</i> , [1994] 2 F.C. 51 (T.D.)	28
29.	<i>Suresh v. Canada (M.C.I.)</i> , [2002] 1 S.C.R. 3	43
30.	<i>Valente v. The Queen</i> , [1985] 2 S.C.R. 673	33

PART VII – LIST OF STATUTES

1. Section 76 of the *Immigration and Refugee Protection Act, 2001*, c. 27.

Definitions

76. The definitions in this section apply in this Division.

“information” means 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.

“judge” means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.

Définitions

76. Les définitions qui suivent s’appliquent à la présente section.

« juge » Le juge en chef de la Cour fédérale ou le juge de cette juridiction désigné par celui-ci.

« renseignements » Les renseignements en matière 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.

2. Section 77 of the *Immigration and Refugee Protection Act, 2001*, c. 27.

Referral of certificate

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

Effect of referral

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

Dépôt du certificat

77. (1) Le ministre et le ministre de la Sécurité publique et de la Protection civile 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.

Effet du depot

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

3. Section 78 of the *Immigration and Refugee Protection Act, 2001, c. 27.*

Judicial consideration

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 circumstances and considerations of fairness and natural justice permit;
- (d) the judge shall examine the information and any other evidence in private within seven days after the referral of the certificate for determination;
- (e) on each request of the Minister or the Minister of Public Safety and Emergency Preparedness made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;
- (f) the information or evidence described in paragraph (e) shall be returned to the Minister and the Minister of Public Safety and Emergency Preparedness and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary;

Examen judiciaire

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 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

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

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

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

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

à l'étranger, afin de lui permettre d'être suffisamment informé des circonstances ayant donné 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.

4. Section 81 of the *Immigration and Refugee Protection Act*, 2001, c. 27.

Effect of determination — removal order

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

Effet du certificat

81. Le certificat jugé 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).

for protection under subsection 112(1).

5. Section 1 of the *Canadian Charter of Rights and Freedoms*

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Libertés fondamentales

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

6. Section 7 of the *Canadian Charter of Rights and Freedoms*

Legal Rights

7. 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.

Garanties juridiques

7. 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.

7. Part 7 of the *Special Immigration Appeals Commission (Procedure) Rules 2003, SI 2003 No. 1034*

Functions of special advocate

35. The functions of a special advocate are to represent the interests of the appellant by -

- (a) making submissions to the Commission at any hearings from which the appellant and his representatives are excluded;
- (b) cross-examining witnesses at any such hearings; and
- (c) making written submissions to the Commission.

Special advocate: communicating about proceedings

36. - (1) The special advocate may communicate with the appellant or his representative at any time before the Secretary of State serves material on him which he objects to being disclosed to the appellant.

(2) After the Secretary of State serves material on the special advocate as mentioned in paragraph (1), the special advocate must not communicate with any person about any matter connected with the proceedings, except in accordance with paragraph (3) or a

direction of the Commission pursuant to a request under paragraph (4).

(3) The special advocate may, without directions from the Commission, communicate about the proceedings with -

- (a) the Commission;
- (b) the Secretary of State, or any person acting for him;
- (c) the relevant law officer, or any person acting for him;
- (d) any other person, except for the appellant or his representative, with whom it is necessary for administrative purposes for him to communicate about matters not connected with the substance of the proceedings.

(4) The special advocate may request directions from the Commission authorising him to communicate with the appellant or his representative or with any other person.

(5) Where the special advocate makes a request for directions under paragraph (4) -

- (a) the Commission must notify the Secretary of State of the request; and
- (b) the Secretary of State must, within a period specified by the Commission, file with the Commission and serve on the special advocate notice of any objection which he has to the proposed communication, or to the form in which it is proposed to be made.

(6) Paragraph (2) does not prohibit the appellant from communicating with the special advocate after the Secretary of State has served material on him as mentioned in paragraph (1), but -

- (a) the appellant may only communicate with the special advocate through a legal representative in writing; and
- (b) the special advocate must not reply to the communication other than in accordance with directions of the Commission, except that he may without such directions send a written acknowledgment of receipt to the appellant's legal representative.