Date: 20090327

Docket: DES-3-08

Citation: 2009 FC 322

Ottawa, Ontario, March 27, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

IN THE MATTER of a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act (IRPA)* by the Minister of Citizenship and Immigration and the Minister of Public Security and Emergency Preparedness;

AND IN THE MATTER OF the referral of the certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF Hassan ALMREI

REASONS FOR ORDER AND ORDER

[1] These reasons set out the Court's determination of two motions brought on behalf of Mr. Almrei, hereafter referred to as the respondent, in anticipation of forthcoming hearings into the reasonableness of the security certificate issued against him. Written submissions were filed by both parties and oral submissions were presented in a public hearing at Toronto, Ontario on February 18, 2009.

[2] The first motion is in part based on arguments previously heard by the Chief Justice in the respondent's motion regarding the constitutionality of section 85.4(2) and 85.5(b) of the *Immigration and Refugee Protection Act*, 2001, c. 27 ("IRPA") in *Re Almrei*, 2008 FC 1216. Chief Justice Lutfy dismissed the respondent's constitutional challenge to the impugned provisions as premature and lacking a factual matrix, although he resolved certain issues on the basis of statutory construction. The Federal Court of Appeal refused to entertain an appeal from this decision on the ground that the order dismissing the constitutional motion was interlocutory in nature and not a final judgment.

[3] In a direction to the Registry not to receive the appeal, Justice Létourneau noted that the order preserved any party's right to challenge, with an appropriate factual matrix, the constitutionality of the impugned provisions.

[4] The respondent submits that there is now an appropriate factual matrix to bring forward a constitutional motion since the special advocates have reviewed the secret evidence and he has discrete strategic questions to ask them as he prepares for the reasonableness hearing. In the alternative, he submits, Chief Justice Lutfy's decision leaves open the opportunity to request broad authorization from the presiding judge for the special advocates to respond to his questions.

[5] Pursuant to sections 85.4(2) and 85.5(b) of the IRPA, special advocates may only communicate with another person about the security certificate proceeding with a judge's authorization after they have received information and evidence that is not disclosed to the respondent. The respondent challenges the constitutionality of this requirement and seeks leave to

file questions in a sealed envelope without disclosing them to the Court or serving them on counsel for the Ministers. The respondent claims that the nature of the questions is such that the special advocates can reply with a simple “yes” or “no” response without the risk of disclosing any of the confidential information they have received. In the respondent’s view, disclosure of the questions to the Court and the Ministers would violate his rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (“the *Charter*”).

[6] The second motion relates to disclosure. The respondent’s submissions are intended to assist the Court when determining issues related to the disclosure to Mr. Almrei of information and other evidence filed by the Ministers and also relate to the exclusion of evidence on the grounds that it may have been obtained through torture or other cruel, inhuman or degrading treatment or punishment. While the respondent concedes that the disclosure motion is premature, he submits that this is the only opportunity for him and his counsel to make submissions on these matters before the Court proceeds with the closed portion of the hearings.

COMMUNICATION MOTION

Legislative Framework

[7] As a result of the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 (“*Charkaoui 1*”), the IRPA was amended by Parliament to provide for, among other things, the participation of special advocates in

the security certificate process to ensure that the named persons' interests are adequately protected when the Court receives "information and other evidence" in the absence of the public and of the named persons and their counsel.

[8] Justice Simon Noël aptly characterized the role of the special advocates in his reasons in *Re Harkat*, 2009 FC 204, at paragraph 58:

> […] The primary role of the Special Advocate is to protect the interests of the named person where evidence is heard in his or her absence. This is accomplished in two steps: by maximizing the disclosure to be made to the named person and counsel and by testing the reliability and credibility of evidence in the *closed* portion of the proceedings by cross-examining witnesses produced by the Ministers. Any further action to be taken by the Special Advocates must be authorized by the judge who is charged with ensuring that the proceeding move forward as expeditiously, informally and fairly as possible (*IRPA* provisions s. 85.2(c), and *Almrei v. Canada*, 2008 FC 1216, at para. 57-59).

[9] While special advocates play a vital role in the security certificate process, the scope of their participation is subject to the national security considerations which the legislation is also intended to protect. The Supreme Court has recognized that these considerations can limit the disclosure of information to the affected person: *Charkaoui 1*, above, at paragraph 58. Such considerations must also necessarily limit communications between the special advocates and the named person, as the statute provides.

[10] Another important feature of the legislation, found in section 83(1)(d) of the IRPA, affirms the designated judge's responsibility to protect the confidentiality of information and other evidence provided by the Minister that would be injurious to national security or endanger the safety of any person if disclosed ("the confidential information"). Thus, the legislation imposes both a

responsibility to protect on the judge and a limitation on communication by the special advocates to avoid inadvertent disclosure of the confidential information.

[11] The relevant provisions for the purposes of this motion are sections 85.4(2) and 85.5 of the IRPA. They describe the special advocates' obligations in relation to the confidential information. From the point in time when they receive the confidential information, and for the duration of the proceeding, the special advocates may not communicate with anyone about the proceeding, except with the judge's authorization and subject to conditions. The sections read as follows:

85.4 (1) The Minister shall, within a period set by the judge, provide the special advocate with a copy of all information and other evidence that is provided to the judge but that is not disclosed to the permanent resident or foreign national and their counsel.	**85.4** (1) Il incombe au ministre de fournir à l'avocat spécial, dans le délai fixé par le juge, copie de tous les renseignements et autres éléments de preuve qui ont été fournis au juge, mais qui n'ont été communiqués ni à l'intéressé ni à son conseil.
Restrictions on communications — special advocate	Restrictions aux communications — avocat spécial
(2) After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.	(2) Entre le moment où il reçoit les renseignements et autres éléments de preuve et la fin de l'instance, l'avocat spécial ne peut communiquer avec qui que ce soit au sujet de l'instance si ce n'est avec l'autorisation du juge et aux conditions que celui-ci estime indiquées.

85.5 With the exception of communications authorized by a judge, no person shall	**85.5** Sauf à l'égard des communications autorisées par tout juge, il est interdit à quiconque :
(*a*) disclose information or other evidence that is disclosed to them under section 85.4 and that is treated as confidential by the judge presiding at the proceeding; or	*a*) de divulguer des renseignements et autres éléments de preuve qui lui sont communiqués au titre de l'article 85.4 et dont la confidentialité est garantie par le juge présidant l'instance;
(*b*) communicate with another person about the content of any part of a proceeding under any of sections 78 and 82 to 82.2 that is heard in the absence of the public and of the permanent resident or foreign national and their counsel.	*b*) de communiquer avec toute personne relativement au contenu de tout ou partie d'une audience tenue à huis clos et en l'absence de l'intéressé et de son conseil dans le cadre d'une instance visée à l'un des articles 78 et 82 à 82.2.

[12] As agreed by the parties, there is nothing in the statute which would prevent the respondent from sending questions directly to the special advocates without the prior authorization of the Court. The statutory limitation arises, however, when the special advocates seek to communicate their answers to the respondent and his counsel without authorization from the Court. The respondent seeks to have the Court step aside while the special advocates provide the requested information. The Court should not be made privy to the answers the special advocates might provide to tactical or strategic questions, in the respondent's view, for fear that it may influence the Court's determination of the merits of the reasonableness issue.

Charter Argument

[13] The respondent argues that the impugned legislation imposes severe and unnecessary limitations on the ability of the special advocates to communicate with the named person after they have reviewed the closed evidence. The respondent submits that an absolute bar on communication without judicial authorization undermines his right to a fair hearing and breaches the solicitor-client like relationship between him and his special advocates.

[14] The respondent acknowledges that the exigencies of national security may affect the manner in which he is able to have his interests represented, but relies on paragraph 61 of *Charkaoui 1* to substantiate his argument that if his section 7 rights are to be satisfied, he must either be given the necessary information, or a substantial substitute for that information must be found. The respondent submits that a substantial substitute must entail a procedure which allows the respondent *himself* to have sufficient disclosure so as to be able to respond to the allegations against him in a meaningful way. Under the current legislation, the special advocates cannot make proper inquiries of the named person so as to be able to respond to information reviewed *in camera* and *ex parte* because of the absolute bar on communications without judicial authorization.

[15] The respondent argues that the severe limits on communication are such that the special advocates are not an adequate substitute for his disclosure rights. Moreover, he contends, the impugned legislation is so overbroad that it constrains his ability to know the case to be met and precludes him from effectively participating in the proceeding.

[16] Further, the respondent submits, the ability of the special advocate regime to comply with section 7 of the *Charter* requires, at minimum, that the special advocates be able to provide, without judicial oversight, strategic advice to the named person whose interests they represent in the closed hearings.

[17] Moreover, the respondent argues that the need to protect the confidential information does not justify an incursion into the confidential sphere of communications between the special advocates and the named persons, a relationship the respondent characterizes as a *sui generis* solicitor-client like relationship. Requiring the special advocates to obtain judicial authorization before communicating to the named person risks divulging privileged information relating to legal strategy.

[18] Sections 85.4 and 85.5 should be read down to allow communication about legal issues that do not require disclosure of confidential information, the respondent submits. In the alternative, he requests that the Court exercise the discretion granted to it under the IRPA to authorize the requested communication.

[19] The Ministers' position is that the new scheme affords a substantial substitute and provides sufficient opportunity for the named person to meet the case against him. The named person receives a summary of the Ministers' case at the outset and is provided with information on a continuing basis throughout the proceeding. Moreover, the special advocates appointed to protect the named person's interests have access to the confidential information. They participate in the closed hearings and may, with judicial authorization, communicate to the named person and their

counsel. While the named person is entitled to a fair process, the process in question does not have to be the most favourable to his interests. A legislative scheme that gives the Court discretion is not unconstitutional and the protection of information from release *per se* does not render a proceeding unfair, in the Ministers' submission.

Lack of Adjudicative Facts

[20] In support of this motion, the respondent relies on affidavits previously filed in his first motion challenging the constitutionality of sections 85.4(2) and 85.5(b) and the sworn affidavit of Sarah Boyd, student-at-law. The Ministers argue, and I agree, that these affidavits are of little assistance. The affidavit sworn by Ms. Boyd merely states the purpose of the motion. It provides no adjudicative facts to assist the Court in determining whether the impugned provisions breach the *Charter* or whether the specific relief sought should be granted. The other affidavits present the same assertions based on the affiants' interpretation of the legislation that were before Chief Justice Lutfy.

[21] As the Chief Justice held in *Re Almrei*, above, courts of first instance must be prudent before declaring newly enacted legislation unconstitutional.

[22] The Court has often stressed the importance of a factual basis in *Charter* cases. In *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, it was cautioned that *Charter* decisions must not be made in a factual vacuum. In *R v. Mills*, [1999] S.C.J. No. 68, at paras. 36-37, the Supreme Court discussed the approach to take in determining whether a constitutional challenge is premature:

> The mere fact that it is not clear whether the respondent will in fact be denied access to records potentially necessary for full answer and defence does not make the claim premature. The respondent need not prove that the impugned legislation would probably violate his right to make full answer and defence. […]
>
> […] The question to answer is whether the appeal record provides sufficient facts to permit the Court to adjudicate properly the issues raised. [Emphasis added]

[23] The respondent submits there is now an "appropriate factual matrix" since the reasonableness hearing has been scheduled and the special advocates have reviewed the confidential information. The respondent wishes to communicate with his special advocates regarding his representation in order to help him and his counsel prepare for the reasonableness hearing. In my view, nothing of substance has changed since the prior motion was disposed of other than that the respondent now has a list of questions he wishes to put to the special advocates.

[24] The principal relief sought in this motion is supported solely by the respondent's speculation about the effects of the limitation on communication. He argues that this undermines his right to a fair hearing and infringes his s. 7 *Charter* rights. This argument, however, is premised on the assumption that there are clear and unequivocal constitutional defects with sections 85.4 and 85.5 on their face. While the level of facts necessary to evaluate constitutional claims will vary, I agree with the Chief Justice's reasoning in *Re Almrei*, above, that s. 7 *Charter* claims necessitate a greater degree of adjudicative facts where the alleged infringement concerns the effects on procedural fairness (at para. 34).

[25] The substance of this motion has not changed since it was decided by the Chief Justice last November. Absent an appropriate factual context in which to determine whether the respondent's

alleged breach of procedural fairness is substantiated, it remains premature to evaluate whether the impugned provisions violate the respondent's *Charter* rights.

Alternate Relief

[26] In the alternative, the respondent asks the Court to exercise its discretion to allow him and his counsel to communicate with their special advocates by way of a sealed envelope containing questions regarding Mr. Almrei's representation to be answered with a "yes" or "no" response, without disclosing the questions to the Ministers or the Court.

[27] Respondent's counsel assures that the requested communication will not trench into the confidential information or other evidence at issue in this proceeding. The Ministers argue that this request inappropriately seeks to replace the Court's supervision of the confidentiality of the proceedings with that of the special advocates and raises the prospect of inadvertent disclosure.

[28] In my view, it is clear from subsection 85.4(2) of the IRPA that Parliament has mandated that special advocates obtain judicial authorization for all communications after having received the confidential information. In my view, this is consistent with the designated judge's obligation to ensure the confidentiality of the confidential information (s. 83(1)(d) of IRPA). Judicial supervision aims to prevent intentional or inadvertent disclosure of the confidential information. Chief Justice Lutfy's comments in *Re Almrei*, above, at paragraph 105, stand for the same proposition:

> In my view, if Parliament's objective is to be met, special advocates cannot communicate with another person about the proceeding, absent judicial authorization, even concerning an order or direction made public by the presiding judge. If special advocates were allowed to determine on their own initiative when they could

> communicate about the proceeding, even where confidential information is not being discussed, Parliament's attempt to limit inadvertent disclosure would be compromised. […]

[29] The role of the special advocates is to protect the named person's interests in the closed proceedings. While they play a significant and unique role in the security certificate proceeding, their responsibilities and powers are limited to those listed in sections 85.1 and 85.2 of the IRPA. Any further action proposed to be taken by the special advocates, including communication to the named person and his counsel once they have reviewed the confidential information, must be authorized by the designated judge who is charged with ensuring that the proceedings move forward as expeditiously, informally and fairly as possible, but who must also ensure the safeguarding of the confidential information.

[30] Justice Eleanor Dawson released a decision on March 5, 2009 (2009 FC 240) which addressed two common issues of law that have arisen in four of the security certificate proceedings. One of the issues concerned the role of the designated judge when counsel for the Ministers and the special advocates agree that a portion of the *Charkaoui 2* disclosure may be released to the named person. Justice Dawson concluded that no information filed with the Court in confidence pursuant to *Charkaoui 2* can be disclosed to the person named in a security certificate without the prior approval of the Court. Her finding was based on the overarching role of the designated judge to protect the confidential information:

> It follows, in my view, from a plain reading of the Act that none of the Charkaoui 2 disclosure may be disclosed to the named person or his counsel without first affording to the designated judge the opportunity to fulfill his or her obligation under paragraph 83(1)*(d)* of the Act. (at para. 31)

[31] I find it appropriate to adopt this reasoning for the purposes of this motion. Accordingly, in order to fulfil my obligations under the Act, I am required to vet all communications between the special advocates and the named person and/or his counsel. Even the smallest risk of inadvertent disclosure must be of concern to the Court.

[32] As noted above, the respondent can convey his questions without the involvement of the Court. But the Court has a statutory responsibility to ensure the confidentiality of the protected information. The proper exercise of that responsibility, in my view, entails oversight of communications by the special advocates once they have had access to the confidential information.

[33] Mr. Almrei and his counsel are given free reign to communicate to their special advocates without prior authorization. However, the IRPA explicitly mandates the special advocates to seek judicial authorization if they wish to communicate anything to the named person and his counsel, regardless of the nature of the communication. In the result, Mr. Almrei and his counsel may send their questions to the special advocates without my consent, however the special advocates' responses to those questions must necessarily go through the Court.

[34] Chief Justice Lutfy held in *Re Almrei*, above, that it is open to the special advocates to seek directions from the designated judge to communicate to the named person and/or his counsel in the absence of counsel for the Ministers. However, counsel for the Ministers submit that they at least expect to be given notice that a request for authorization to communicate has been made by the special advocates. In some circumstances this may be appropriate; however I am reluctant to make a definite pronouncement on the requirement to give notice.

[35] Division 9 of the IRPA confers the designated judges with enough flexibility to properly dispose of communication requests in varying circumstances. Upon a request from the special advocates pursuant to subsection 85.4(2), the judge will determine the extent (if any at all) of the communication that can be disclosed to the named person and/or his counsel. Circumstances may be such that disclosure to the Ministers' counsel is appropriate, but there is no bar to the special advocates seeking authorization without notice to the Ministers.

[36] For these reasons, I cannot allow the respondent's communication request in the form in which it has been presented. In keeping with sections 85.2(c) and 85.4(2) of the IRPA, if the special advocates wish to communicate their responses to the respondent's "yes" or "no" questions, they must first obtain authorization on a motion to the Court with or without notice to the Ministers.

PRINCIPLES OF DISCLOSURE MOTION

[37] While the respondent accepts that the IRPA contemplates that some portion of the proceedings be held *in camera* and *ex parte,* he submits that he should not be precluded from making submissions about general principles that should apply to issues that may arise in the closed hearings. In anticipation of the reasonableness hearing, he seeks to elicit the Court's position on issues pertaining to paragraph 83(1)(e) of the IRPA.

[38] As noted above, counsel for the respondent concedes that this motion is largely premature. Nonetheless, in anticipation of the need for the Court to make decisions with respect to the

disclosure to him of further information, he seeks a prior ruling that the Court will apply the balancing test set out in section 38.06(2) of the *Canada Evidence Act*, R.S., 1985, c. C-5.

[39] The respondent's submissions are also offered to assist the Court in determining whether evidence ought to be excluded if there are reasonable grounds to believe that it was obtained through torture or other cruel, inhuman or degrading treatment or punishment ("CID" treatment or punishment).

[40] The governing legislation is paragraph 83(1)(e) and subsection 83(1.1) of the IRPA and subsection 38.06(2) of the *Canada Evidence Act*, which read as follows:

83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	**83.** (1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :
(*e*) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;	*(e*) il veille tout au long de l'instance à ce que soit fourni à l'intéressé un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui et qui permet à l'intéressé d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;
(…)	(…)

Clarification

(1.1) For the purposes of paragraph (1)(*h*), reliable and appropriate evidence does not include information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture.

Disclosure order

38.06 (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.

Disclosure order

(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure

Précision

(1.1) Pour l'application de l'alinéa (1)*h*), sont exclus des éléments de preuve dignes de foi et utiles les renseignements dont il existe des motifs raisonnables de croire qu'ils ont été obtenus par suite du recours à la torture, au sens de l'article 269.1 du *Code criminel*, ou à d'autres peines ou traitements cruels, inhumains ou dégradants, au sens de la Convention contre la torture.

Ordonnance de divulgation

38.06 (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements, sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

Divulgation modifiée

(2) Si le juge conclut que la divulgation des renseignements porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte

and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.	tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

Principles of Disclosure to the Named Person

Respondent's Submissions

[41] The respondent argues that the question of disclosure in the security certificate context should be governed by a balancing of the interests of the individual against the risk of injury to national security, as set out in section 38.06 of the *Canada Evidence Act*, and that the analysis for determining the extent of disclosure should follow the framework set out in *Canada (Attorney General) v. Ribic*, 2003 FCA 246.

[42] As discussed above with respect to the first motion, the respondent submits that the mere presence of the special advocates in the security certificate proceedings does not adequately restore the named person's right to a fair hearing. He submits that the purpose of paragraph 83(1)(e) of the

IRPA is twofold: to ensure the fullest possible disclosure and to protect information that would be prejudicial to national interests if disclosed. In his view, the co-location of the two competing interests, coupled with the purpose and intent of the legislation enacted post-*Charkaoui 1*, support the view that a proper balancing is required.

[43] Further, the respondent submits that the threshold for maintaining the confidentiality of information is that it *would* pose a danger. The use of the word "would" requires something more than a "reasonable expectation of probable harm" but evidence of specific and current injury. The Court must be satisfied that an injury from disclosure *will* result to national security or a person's safety in order to justify non-disclosure. In order to meet the *Ribic* test, the Ministers must proffer evidence of harm that is not general, vague or lacking in particularity in order to establish their claim for national security confidentiality.

[44] Under the *Canada Evidence Act* formula, if the Court finds that disclosure would be injurious, it would then determine whether the public interest in disclosure outweighs the public interest in non-disclosure. The respondent submits that the same balancing of the competing interests should be applied in this context. In the wake of *Charkaoui 1* and *Charkaoui 2*, he says, the bias in this balancing exercise must necessarily be in favour of the most complete disclosure possible.

[45] The respondent further submits that that the use of the French word "suffisamment" in paragraph 83(1)(e) indicates that the named person must have *enough* information about the Ministers' case against him. The designated judge must therefore balance the need for *enough*

disclosure to ensure a fear hearing against the risk disclosure might have on national security interests. Where the consequences of disclosure are minimal and the importance to the named person of knowing the information in order to meet the case is great, the discretion vested in the judge should weigh in favour of disclosure.

[46] In the alternative, if section 83(1)(e) is read as barring such a balancing approach, the respondent submits that this section violates section 7 of the *Charter* in a manner that is not saved by section 1. The respondent maintains that a system that limits disclosure of information in circumstances where section 7 is triggered is one that is fundamentally unfair.

Ministers' Submissions

[47] The Ministers argue that Mr. Almrei's challenge to the constitutional validity of section 83(1)(e) is premature as it does not have a proper evidentiary basis, given that the reasonableness hearing has not yet commenced (at the time of filing the motion), therefore no further disclosure has been made from the closed proceedings. Absent any evidence of how the impugned provision will actually affect Mr. Almrei's constitutional rights, the respondent is asking that this challenge be adjudicated in a factual vacuum. The jurisprudence has held that adjudication of constitutional issues without a factual foundation should be discouraged. The Court should refrain from ruling on the constitutional validity of paragraph 83(1)(e) until the *in camera* hearing has taken place, after the designated judge and the special advocates have performed their proper functions, and once a proper evidentiary basis has been laid.

[48] The Ministers assert that paragraph 83(1)(e) cannot be interpreted as allowing for a balancing of public interests, as the meaning of the provision is clear – the designated judge is not to permit disclosure of any information if doing so would be injurious to national security. It is not possible to read into the plain and unambiguous words of the statute a balancing of the public interest in disclosure against the public interest in non disclosure. The *Charter* cannot be used as an interpretive tool to read in a balancing of interests, as the statute is not ambiguous.

[49] The Ministers submit that Parliament clearly intended that there be no weighing of interests in paragraph 83(1)(e). In deliberations for the amendments to the IRPA, Parliament heard submissions on the balancing approach, but chose not to adopt it. In *Charkaoui 1*, the Supreme Court examined processes in which the need to protect national security information has been reconciled with constitutional procedural rights, including the *Canada Evidence Act* model. The Court found that the *Canada Evidence Act* did not address the same problems as the IRPA and thus was of limited assistance.

[50] In the result, Parliament opted for a different model than that which exists under the *Canada Evidence Act*. Parliament sought to emphasize the importance of protecting information the disclosure of which would be injurious to national security or the safety of any person. Since Parliament did not adopt the recommendation to incorporate a balancing test in the IRPA, such a balancing requirement should not now be read in by the Court, the Ministers submit.

[51] The Ministers maintain that the impugned provision is consistent with the principles of fundamental justice because it provides for a process that protects the interests of Mr. Almrei in the

in camera proceeding. As the Supreme Court recognized in *Charkaoui 1*, in the security certificate context there may not be a right to absolute disclosure.

[52] The Ministers add that principles of fundamental justice do not require the named person to have the most favourable procedure; they simply demand that the procedure for determining the reasonableness of the security certificate be fair. Fundamental justice in the national security context requires that a suitable and appropriate mechanism be put in place to ensure that, as far as possible, the rights and interests of the named person are adequately protected.

[53] The Ministers argue that Parliament has mitigated the disadvantages of Mr. Almrei's absence from the closed proceedings by designating special advocates to represent his interests. They will endeavour to ensure that all relevant facts and law are put before the designated judge and that Mr. Almrei is provided with as much information as possible to know the essence of the Ministers case against him. They do this by reviewing confidential information and by testing the evidence for relevance, reliability and sufficiency. They will challenge the Ministers' position on disclosure by convincing the designated judge to include as much information as possible in the summaries to be provided to Mr. Almrei and his counsel.

Analysis

[54] I agree with the Ministers that at this stage of the proceedings, and in the absence of evidence demonstrating how the impugned provision may adversely affect the respondent's *Charter* rights, it would be premature to comment further on the constitutionality of the legislation.

[55] After examination by the designated judge and the special advocates, disclosure of information or other evidence that is relevant and would not be injurious to national security or endanger any person will go to Mr. Almrei and his counsel in summary form. The summaries prepared and disclosed, in addition to that which he has already received, may be sufficient to allow Mr. Almrei and his counsel to know the crux of the Ministers' case against him. The Court may decide that certain information is irrelevant to Mr. Almrei's case and may decline to hear it or admit it into evidence. The assessment of whether there has, in fact, been a violation of his right to a fair hearing can only be completed with reference to the summaries and the further disclosure which may be made to the respondent after the *in camera* hearings.

[56] Until the designated judge has the opportunity, with the special advocates, to consider and test the Ministers' information *in camera* and to prepare a summary of that evidence as per s. 83(1)(e), it would be speculative to conclude that the respondent's right to know the case against him and to prepare a response has been infringed. The designated judge and the special advocates must be permitted to perform their roles in so far as the receipt, testing and disclosure of the Ministers' closed evidence are concerned.

[57] The security certificate scheme embraces two concepts, namely the protection of national security and the right to a fair hearing. Paragraph 83(1)(d) of the IRPA imposes a duty on the judge to ensure the confidentiality of information and other evidence provided by the Minister that would be injurious to national security or endanger the safety of any person if disclosed. The impugned provision, paragraph 83(1)(e) of the IRPA, requires the judge to ensure that the named person is

provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Ministers.

[58] While the word “suffisamment” used in the French version of s. 83(1)(e) is normally translated in English as “sufficiently”, reading the paragraph as a whole I believe it has the same meaning in both versions. The object of the enactment is to provide enough disclosure so as to permit the named person to be reasonably informed of the Ministers’ case. What will be reasonable will depend to a great extent on the relevancy of the information.

[59] Parliament has mandated the designated judge to protect all information and other evidence that would be injurious to national security or would endanger another person if disclosed. Parliament has also mandated the designated judge to provide the named person with summaries throughout the proceeding to enable him/her to be reasonably informed of the Ministers’ case. These concepts are not, in my view, necessarily competing or conflicting. In any event, absent a factual scenario in which the Court is presented with a choice between disclosure and protection of the information, it is premature to suggest that the Court would deny disclosure of relevant information that could assist the respondent.

Evidence Obtained through Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment

[60] The respondent seeks a declaration of principle that will apply to the determination of whether information will be excluded because there are reasonable grounds to believe that it was obtained by conduct falling within the meaning of the international *Convention against Torture and*

Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], 1465 UNTS.

[61] The respondent acknowledges that to date there is no allegation in these proceedings that information or other evidence which forms part of the Ministers' case against him has been obtained by the use of torture or CID treatment or punishment.

[62] Subsection 83(1.1) of the IRPA provides that evidence obtained by such means should not be considered reliable or appropriate for the purpose of security certificate proceedings. Torture is defined by reference to the applicable *Criminal Code* offences against such conduct but CID treatment or punishment is not defined in the IRPA or the *Criminal Code*. The respondent submits that the Court should fill the legislative lacuna by defining CID treatment or punishment.

[63] Moreover, the respondent submits that when his counsel or the special advocates make plausible assertions that evidence was obtained through torture or CID treatment or punishment, the Court should probe whether there are reasonable grounds to believe that the information is indeed the product of such treatment or punishment. The respondent submits that there should be no requirement to show that the individual piece of information at issue was obtained through such treatment or punishment and suggests that exclusion should be made where there are reasonable grounds to believe that the government's information was obtained from a source, state or service that engages in torture or CID treatment or punishment on a systemic basis.

[64] The Ministers maintain, and I agree, that this request is also premature. Since the application of these principles is dependent on a very particular evidentiary basis, I see no advantage in framing them in the abstract at this time.

ORDER

THIS COURT ORDERS that:

1. The constitutional motion regarding communication by the special advocates is dismissed as premature, without prejudice to any party's right to challenge, with an appropriate factual matrix, the constitutionality of sections 85.4(2) and 85.5(b) of the IRPA at a later time.
2. The alternate relief sought is denied. The special advocates must obtain the Court's authorization prior to communicating their answers to the respondent's questions.
3. The motion to import the balancing test in section 38.06 of the *Canada Evidence Act* is dismissed without prejudice to any party's right to challenge, with an appropriate factual basis, the constitutionality of paragraph 83(1)(e) of the IRPA at a later time.
4. The Court will not issue a declaration of principles with respect to the disclosure of information to the respondent at this time.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-3-08
STYLE OF CAUSE:	**IN THE MATTER OF a certificate signed Pursuant to section 77(1) of the *Immigration and Refugee Protection Act (IRPA)*;** **AND IN THE MATTER OF the referral of a Certificate to the Federal Court pursuant to Section 77(1) of the *IRPA*;** **AND IN THE MATTER OF Hassan ALMREI**
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	February 18, 2009
REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	March 27, 2009

APPEARANCES:

Marianne Zoric Urszula Kaczmarczyk Bernard Assan Marcel Larouche	for the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness
Lorne Waldman	for Hassan Almrei
Paul Copeland	for Special Advocates

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