Federal Court  Cour fédérale

Date: 20131025

Docket: DES-7-08

Citation: 2013 FC 1097

Ottawa, Ontario, October 25, 2013

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

IN THE MATTER OF A CERTIFICATE SIGNED PURSUANT TO SUBSECTION 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 SUBSECTION 77(1) OF THE *IRPA;*

AND IN THE MATTER OF MOHAMED ZEKI MAHJOUB

REASONS FOR ORDER AND ORDER

[1] Mr. Mohamed Zeki Mahjoub is the named person in security certificate proceedings initiated pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*]. In the course of the proceedings, Mr. Mahjoub brought a Notice of Constitutional Question, asking the Court to determine the constitutionality of section 33 and Division 9 of the *IRPA* and certain provisions of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23 [*CSIS Act*].

Relief Sought

[2] In his "Modified Notice of Constitutional Question" dated November 8, 2012, Mr. Mahjoub:

> seeks declaratory relief in the form of an order declaring unconstitutional and invalid pursuant to section 52 of the *Constitution,* section 24 of the *Charter* and section 18 of the *Federal Courts Act*:
>
> - Section 33 and Division 9 (sections 77 to 87.2) of the *Immigration and Refugee Protection Act*, (S.C. 2001, c. 27)('IRPA') and Sections 4, 6 and 7 (3)of the *Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, alone or by they [*sic*] combined effect with sections 2, 12, 17 and 21 of the CSIS Act;
>
> - Sections 2, 12, 17 and 21 of the CSIS Act and CSIS policies or guidelines adopted under section 6 of the CSIS Act alone or by they [*sic*] combined effect with the IRPA.

[3] Mr. Mahjoub has challenged the constitutionality of the *CSIS Act* which I have addressed in my *Warrants Decision* at paragraphs 18-89**.** In these reasons, I shall only address the challenge to section 33 and Division 9 of the *IRPA* as well as sections 4, 6, and 7(3) of *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3 [the *Act to amend the IRPA*].

[4] I reproduce the impugned statutory provisions in Annex 1.

Facts

[5] On June 26, 2000, Mr. Mahjoub was arrested and detained under the authority of a security certificate signed pursuant to the former *IRPA* regime. On October 5, 2001, the Federal Court of Canada (as it then was) found this security certificate to be reasonable (*Mahjoub (Re)*, 2001 FCT 1095) and Mr. Mahjoub was deemed inadmissible to Canada on the grounds of national security. Removal proceedings began against him.

[6] In February 2007, several detainees subject to security certificates successfully challenged the constitutionality of paragraph 78(*g*) and sections 83 and 84(2) of the former *IRPA* regime (*Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui I*] at paragraphs 139 and 141). The Supreme Court of Canada found certain aspects of the former regime unconstitutional and granted a suspension of invalidity to give Parliament one year to amend the *IRPA* to comply with the *Charter of Rights and Freedoms*, Part I to the *Constitution Act*, 1982, c. 11 (U.K.), Schedule B [*Charter*] (*Charkaoui I* at paragraph 140).

[7] As a result, in early 2008, Parliament enacted new provisions of the *IRPA* through the *Act to amend the IRPA*, in particular to eliminate the distinction in the security certificate regime between foreign nationals and permanent residents, and to create the special advocates regime to protect the named person's interests when the Ministers seek to adduce confidential information as evidence in support of the security certificate against the named person.

[8] On February 22, 2008, the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration signed a security certificate naming Mr. Mahjoub

pursuant to the new *IRPA* regime. Shortly thereafter, the current reasonableness proceeding began in this Court.

[9] Subsequently in June 2008, the Supreme Court of Canada released a further decision on the constitutionality of the previous *IRPA* regime which, among other things, condemned the Canadian Security Intelligence Service's (CSIS or Service) destruction of original notes as a violation of section 7 of the *Charter* and clarified the disclosure obligations of the Ministers in the course of the reasonableness proceedings (*Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2008 SCC 38 [*Charkaoui II*]).

[10] Meanwhile, in April 2007, by Order of Mr. Justice Mosley, this Court released Mr. Mahjoub on stringent terms and conditions. In March 2009, Mr. Mahjoub elected to return to detention because his family members withdrew as supervising sureties. He was released again on stringent conditions in November 2009.

[11] On February 19, 2010, Mr. Mahjoub filed a Notice of Constitutional Question challenging the constitutionality of the new *IRPA* regime. He filed an additional Notice of Constitutional Question on December 3, 2010, and he submitted a "Modified" Notice of Constitutional Question on November 8, 2012, and additional submissions on November 16, 2012.

Issues

[12] I will address the following issues on this motion:

1. Are Mr. Mahjoub's constitutional challenges supported by adequate facts?

2. Do sections 4, 6 and 7(3) of the *Act to amend the IRPA* infringe Mr. Mahjoub's *Charter* rights?

3. Do section 33 and Division 9 (sections 77-87.2) of the *IRPA* infringe Mr. Mahjoub's *Charter* rights?

    a. Must there be a form of judicial review before the Ministers can sign a certificate?

        i. With notice to the named person?

        ii. Without notice such as a process involving the Security Intelligence Review Committee?

b. Is the open court principle, namely sections 2(*b*), 7 and 11 of the *Charter*, compromised by *in camera* proceedings and confidential evidence?

i. Does section 11 apply to these proceedings?

ii. Do *in camera, ex parte* proceedings inherently infringe the named person's *Charter* rights?

iii. Does Mr. Mahjoub have the right to challenge national security privilege claims in a *voir dire* before the proceedings go *in camera*?

c. Is judicial independence, namely section 7 of the *Charter*, compromised in Division 9 of the *IRPA*?

i. Do designated judges inherently lack or appear to lack independence or impartiality?

ii. Does the control exercised by the designated judge over disclosure by virtue of paragraphs 83(1)(*c*) and (*d*) of the *IRPA* compromise the Court's independence or appearance of independence?

iii. Does the existence of *in camera* proceedings and confidential evidence compromise the independence or appearance of independence of the Court?

iv. Is the Court implicated in the Ministers' alleged misconduct?

d. Is the special advocates regime as established in section 85 of the *IRPA*, coupled with the disclosure of summaries to the named person provided for in paragraph 83(1)(*e*) of the *IRPA*, a sufficient substitute for full disclosure so that Mr. Mahjoub knows the case to meet and can respond to it?

i. Has the Federal Court of Appeal's decision in *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 122 [*Harkat*], informed by the Supreme Court of Canada's decision in *Charkaoui I*, already decided this question?

ii. Does the inevitable "split brain" problem necessarily infringe Mr. Mahjoub's rights?

iii. Does the "reasonably informed" standard of paragraph 83(1)(*e*) infringe Mr. Mahjoub's rights?

iv. If the named person cannot be reasonably informed by summaries, does the proceeding infringe Mr. Mahjoub's rights, and is this such a proceeding?

e. Is Mr. Mahjoub's right to counsel and counsel of choice pursuant to sections 7 and 10(*b*) of the *Charter*, the independence of the bar and solicitor-client privilege compromised by the special advocates regime established in section 85 of the *IRPA*?

i. Is section 10(*b*) relevant to Mr. Mahjoub's challenge?

ii. Does the lack of solicitor-client relationship between the special advocates and Mr. Mahjoub infringe his rights?

f. Is the requirement that admissible evidence be "reliable and appropriate" in paragraph 83(1)(*h*) of the *IRPA* unconstitutionally vague, overbroad, or arbitrary?

i. Is "reliable and appropriate" or a similar standard judicially defined?

ii. Does this provision allow for evidence that is disproportionate or grossly disproportionate to the objective of presenting fair and useful evidence?

iii. Does this standard and subsection 83(1.1) infringe Mr. Mahjoub's right to a fair trial by insufficiently guarding against unreliable evidence?

g. Does the security certificate regime infringe Mr. Mahjoub's right to silence under section 7 and section 13 of the *Charter*?

i. Does section 13 apply to these proceedings?

ii. Given the *in camera* evidence, can Mr. Mahjoub's choice to testify or not to testify be considered an informed decision?

h. Is the standard of proof of "reasonable grounds to believe" disproportionately low given the consequences of the security certificate procedure and the right of due process?

i. Did the *IRPA* regime allow the Ministers to arbitrarily detain Mr. Mahjoub?

i. Is this a situation of preventive justice which requires that the person concerned be allowed to live a normal life in proportion to the alleged and proven danger?

ii. If so, does the *IRPA* regime comply with this requirement?

Analysis

1. *Are Mr. Mahjoub's constitutional challenges supported by adequate facts?*

[13] Constitutional issues cannot be decided in a factual vacuum. In this case, however, there are adequate facts to support Mr. Mahjoub's constitutional challenge. With a few exceptions that shall be discussed below, he has been directly affected by the impugned provisions. Moreover, even if he has not suffered all of the potential effects of the legislation, a *Charter* applicant may raise a reasonable hypothesis to challenge the legislation in question **(***R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at paragraph 117, *R. v. Heywood,* [1994] 3 S.C.R. 761 at page 799).

2. *Do sections 4, 6 and 7(3) of the* Act to amend the IRPA *infringe Mr. Mahjoub's* Charter *rights?*

[14] The Ministers submit that the *Act to amend the IRPA* does not affect Mr. Mahjoub's *Charter* rights and therefore cannot be challenged on that basis.

[15] In my view, Mr. Mahjoub's challenge to the *Act to amend the IRPA* must fail. Insofar as it changed the *status quo, an Act to amend the IRPA* only had an effect on the *IRPA* itself and not on individual rights. Insofar as it maintained the *status quo* and affected individual rights, the *Act to amend the IRPA* implemented provisions of the previous *IRPA* regime that the Supreme Court did not consider unconstitutional in *Charkaoui I*. The impugned provisions of this statute are as follows:

4. Division 9 of Part 1 of the Act is replaced by the following:	**4**. La section 9 de la partie 1 de la même loi est remplacée par ce qui suit :
[Sections 76-87.2 of the current *IRPA*]	[Les articles 76-87.2 de la LIPR actuelle]
6. In sections 7 to 10, "the Act" means the *Immigration and Refugee Protection Act*.	6. Aux articles 7 à 10, « Loi » s'entend de la *Loi sur l'immigration et la protection des réfugiés*.
7. (3) If, on the day on which this Act comes into force, the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration sign a new certificate and refer it to the Federal Court under subsection 77(1) of the Act, as enacted by section 4 of this Act, the person who is named in the certificate (*a*) shall, if they were detained under Division 9 of Part 1 of the Act when this Act comes into force, remain in detention without a new warrant for their arrest and detention having to be issued under section 81 of the Act, as enacted by section 4 of this Act; or (*b*) shall, if they were released	**7**. (3) Dans le cas où, à la date d'entrée en vigueur de la présente loi, le ministre de la Sécurité publique et de la Protection civile et le ministre de la Citoyenneté et de l'Immigration déposent à la Cour fédérale un nouveau certificat au titre du paragraphe 77(1) de la Loi, édicté par l'article 4 de la présente loi, la personne visée par le certificat qui est détenue au titre de la section 9 de la partie 1 de la Loi à l'entrée en vigueur de la présente loi demeure en détention sans que les ministres aient à lancer un mandat pour son arrestation et sa détention au titre de l'article 81 de la Loi, édicté par l'article 4 de la présente loi;

from detention under conditions under Division 9 of Part 1 of the Act when this Act comes into force, remain released under the same conditions unless a warrant for their arrest and detention is issued under section 81 of the Act, as enacted by section 4 of this Act.	celle qui est en liberté sous condition au titre de la section 9 de la partie 1 de la Loi à l'entrée en vigueur de la présente loi demeure en liberté aux mêmes conditions, à moins que les ministres ne lancent un mandat pour son arrestation et sa détention au titre de l'article 81 de la Loi, édicté par l'article 4 de la présente loi.

[16] Sections 4 and 6 have no impact on Mr. Mahjoub's individual rights. Section 4 only serves to change the *IRPA*. Section 6 is a mere definition provision. Mr. Mahjoub's only substantiated challenge is to paragraph 7(3)(*b*), which maintained Mr. Mahjoub's conditions of release since it engaged his liberty interest. However, even this challenge is without merit as the detention provisions of the previous *IRPA* regime survived constitutional scrutiny in *Charkaoui I* (see especially paragraphs 89 and 110).

[17] I am therefore not persuaded that the impugned provisions of the *Act to amend the IRPA* are unconstitutional.

3. *Do section 33 and Division 9 (sections 77-87.2) of the* IRPA *infringe Mr. Mahjoub's* Charter *rights?*

[18] Mr. Mahjoub has, in essence, challenged the entire security certificate regime in its current incarnation pursuant to Division 9 of the *IRPA*. While Mr. Mahjoub also makes multitudinous allegations that the behaviour of the Ministers and agencies involved in the security certificate process, including their policies, violates his *Charter* rights, these issues have been addressed in the *Abuse of Process Decision*.

a. Must there be a form of judicial review before the Ministers can sign a certificate?

[19] Mr. Mahjoub submits that the *IRPA* regime infringes his *Charter* right to a fair trial because it does not provide for any judicial oversight or hearing prior to the Ministers being able to sign a security certificate and detain the named person. He postulates two alternatives: a process like the current proceeding which would occur prior to the signing of the security certificate, and a Security Intelligence Review Committee (SIRC) review.

[20] At the outset I would note that it is for Parliament to decide the process to be followed in Certificate proceedings. Simply because Mr. Mahjoub can conceive of a regime that he finds fairer does not mean that the current regime does not pass constitutional muster.

i. With notice to the named person

[21] Under the first alternative, proposed by Mr. Mahjoub, it would not be possible for the named person to make submissions on whether or not the Ministers should sign a security certificate without giving notice to the named person. This would defeat the purpose of the security certificate process, which is, as Justice Dawson puts it at paragraph 59 of *Jaballah (Re)*, 2010 FC 79, "precautionary and preventative," by alerting a person whom the Ministers believe to be a serious security threat to the Ministers' investigation and intention to detain and deport him or her. It would afford the named person the opportunity to hide from or otherwise thwart the actions of the authorities that are intended to keep the country safe.

ii. Without notice such as a process involving the Security Intelligence Review Committee

[22] Mr. Mahjoub's second proposal contemplates that an independent body, such as the SIRC, would review the evidence presented by the Department of Public Safety and Emergency Preparedness and Citizenship and Immigration in support of a security certificate before the Ministers sign the certificate. It could even make submissions to the Ministers, drawing their attention to weaknesses or lacunae in the evidence presented.

[23] Nevertheless, this solution is impractical because it would unduly delay the issuance of security certificates. Faced with threats to national security, the executive cannot be constrained by judicial processes from acting quickly to neutralize a threat **(***Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*] at paragraphs 120-121**)**.

[24] Mr. Mahjoub has failed to demonstrate that the *IRPA* regime is unconstitutional because it does not provide for a preliminary review process involving the named person or an independent body prior to the Ministers issuing the security certificate. Further, given the national security concerns discussed above, it is difficult to imagine how his proposed alternatives would be practical in the circumstances of persons believed to constitute serious and imminent threats to national security. In any event, I find that Mr. Mahjoub has not shown that the absence of such a preliminary review process violates his fair trial rights. In my view, Division 9 of the *IRPA* providing for the mandatory referral of the certificate to the Federal Court satisfies Mr. Mahjoub's section 7 rights to challenge the certificate while allowing the executive to respond expeditiously to imminent security threats.

*b. Is the open court principle, namely sections 2(*b*), 7 and 11 of the* Charter, *compromised by* in camera *proceedings and confidential evidence?*

[25] Mr. Mahjoub submits that *in camera* proceedings and confidential evidence violate the open court principle, which offends his section 2(*b*), 7 and 11 rights. The Supreme Court in *Vancouver Sun (Re),* 2004 SCC 43 [*Vancouver Sun*] at paragraphs 23 and 26 maintains that the open court principle is a "hallmark of democratic society," "applies to all judicial proceedings" and is "inextricably linked" to the right to freedom of expression protected by section 2(*b*) of the *Charter*. Accordingly, Mr. Mahjoub claims a right to public court proceedings, and in particular to challenge any attempt by the Ministers to claim national security privilege in a *voir dire* prior to going *in camera*. In contrast, paragraph 83(1)(*c*) of the *IRPA*, with its imperative language "shall, on each request of the Minister" prevents him from doing so, making the Ministers' right to go *in camera* automatic:

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 :
…	[…]
(*c*) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;	*c*) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

i. Does section 11 of the Charter *apply to these proceedings?*

[26] One of the themes throughout Mr. Mahjoub's submissions is that he enjoys all of the *Charter* rights that are normally only accorded to those accused of public offences. The language of the *Charter* does not appear to support this view. Section 11(*d*) of the *Charter* expressly states that "[a]ny person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" [emphasis added].

[27] At first glance, the Supreme Court jurisprudence also does not seem to support this view. In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 [*Wigglesworth*] at page 554, section 11 of the *Charter* is only found to apply "to persons prosecuted by the State for public offences involving punitive sanctions, i.e. criminal, quasi-criminal and regulatory offences, either federally or provincially enacted." At page 558, the Supreme Court clarifies that:

> …those [section 11] rights are accorded to those charged with criminal offences, to those who face the prosecutorial power of the State and who may well suffer a deprivation of liberty as a result of the exercise of that power…For this reason it is, in my view, preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters and to leave other 'offences' subject to the more flexible criteria of 'fundamental justice' in s. 7.

[28] Particularly relevant for this proceeding is the Supreme Court's comment at page 560 that "[p]roceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of 'offence' proceedings to which s. 11 is applicable."

[29] However, at page 562, Justice Wilson explains that there are two prongs to the non-cumulative test. A proceeding can fail the penal "by nature" test but pass the "true penal consequence" test. In other words, section 11 applies to non criminal proceedings where there are true penal consequences. The Supreme Court says that:

> Assuming such a situation is possible, it seems to me that in cases where the two tests conflict the 'by nature' test must give way to the 'true penal consequence' test. If an individual is to be subject to penal consequences such as imprisonment – the most severe deprivation of liberty known to our law – then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.

In addition, Justice Wilson does not discount the possibility of section 7 providing similar procedural protection. *R. v. Rodgers*, 2006 SCC 15 [*Rodgers*] at paragraph 59 affirms the *Wigglesworth* test.

[30] In *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 [*Chiarelli*] at page 735, the Supreme Court establishes that deportation proceedings are "not concerned with the penal consequences of the acts of individuals." Justice Dawson in *Jaballah (Re)*, 2010 FC 224 at paragraph 76 takes the remark in *Chiarelli* to mean that section 11 rights are not applicable to security certificate (inadmissibility) proceedings. She makes this finding while maintaining that "section 7 may provide a residual protection" for section 11 rights. In particular, she found that section 11(*c*) did not apply. Similarly, Justice Lemieux finds at paragraph 113 of *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1740 that there is no analogous right to trial within a reasonable time as there is in criminal proceedings by virtue of section 11(*b*). He bases his conclusion on *Blencoe v. British Columbia*

(Human Rights Commission), 2000 SCC 44 [*Blencoe*]. This Court's February 1, 2012 Reasons for Order dealing with a detention review concluded that the presumption of innocence found in section 11(*d*) of the *Charter* does not apply (at paragraph 40).

[31] In summary, while section 11 of the *Charter* is not applicable to Division 9 proceedings, many of the relevant rights under section 11 are residually protected by the right to a fair trial found under section 7. This would include the open court principle, which is found in section 11(*d*).

ii. Do in camera, ex parte *proceedings inherently infringe the named person's Charter rights?*

[32] Mr. Mahjoub argues that *in camera, ex parte* proceedings such as those permitted by subsection 83(1) of the *IRPA* are inherently *Charter*-infringing because they constitute an unfair process and violate the open court principle.

[33] *Ex parte* proceedings are not inherently unfair and must be proven to be in violation of the right to a fair hearing, even in the criminal context. *Rodgers*, above, explains at paragraph 47:

> However, it is important to note at the outset that the fallacy in Mr. Rodgers' argument is that it presupposes that notice and participation are themselves principles of fundamental justice, any departure from which must be justified in order to meet the minimal constitutional norm. As I read his reasons, Fish J. adopts the same reasoning. With respect, it is my view that this is not the proper approach. The constitutional norm, rather, is procedural fairness. Notice and participation may or may not be required to meet this norm — it is well settled that what is fair depends entirely on the context…

[34] *Rodgers* is cited at paragraph 57 of *Charkaoui I*, in which the Supreme Court also mentions that "[t]he right to know the case to be met is not absolute." In *Canada (Attorney General) v. Khawaja*, 2007 FCA 388 [*Khawaja*], the Federal Court of Appeal poses the question in this fashion at paragraphs 138-39:

> Is it a denial of fundamental justice for the Attorney General to say, in Mr. Khawaja's absence, things which he could not say in his presence? Given that notice and participation are not themselves principles of fundamental justice, the question cannot be answered on the basis of an invariable rule that notice and participation are required. If the rationale for the *audi alteram partem* rule is to allow a party to bring forward information "that could help the decision-maker reach a fair and prudent conclusion" (see *Gill*, as quoted above), then the question is whether the capacity of the decision-maker to arrive at such a conclusion has been diminished by the fact of *ex parte* proceedings.
>
> Taking the law as to disclosure to be as I have described it, the answer to the question just posed is that the capacity of the decision-maker to arrive at a fair and prudent decision has, in the circumstances been improved, over what it would otherwise have been, by the fact of *ex parte* proceedings. The absence of Mr. Khawaja means that the Attorney General can speak freely and specifically of the risks of disclosure but more importantly, the applications judge can ask specific questions and expect specific answers. None of this is possible if the judge and counsel for the Attorney General are required to speak at a level of generality which precludes full disclosure and close questioning by the judge hearing the application.

[35] In my view, this reasoning applies equally to the *in camera* portion of security certificate proceedings. The question is, of course, to what extent the interests of the named person must be advanced *in camera*. Paragraph 61 of *Charkaoui I* explains:

> In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, makes it difficult, if not impossible, to find substitute procedures that will satisfy s. 7. Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know

> the case to meet, and an opportunity to meet the case. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found…

Thus, the Supreme Court suggests that so long as there is a substantial substitute for disclosure, section 7 is not violated.

[36] Concerning the open court principle, while *Vancouver Sun* at paragraph 26 explains that "the open court principle, to put it mildly, is not to be lightly interfered with", the *Dagenais/Mentuck* test has been developed to determine whether a publication ban or any other freedom of the press restriction is justified by a balancing of interests, which "may include privacy and security interests" (*ibid.* at paragraph 28). *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 [*Ruby*] similarly comments on the importance of the principle (at paragraph 53), and indicates that *in camera* proceedings infringe section 2(*b*) of the *Charter*. However, their existence could be justified by section 1 of the *Charter*, and although the provisions in *Ruby* were not saved by it, the remedy was to read them down (at paragraph 60). The open court principle therefore is not absolute.

[37] *Vancouver Sun* indicates that the burden of displacing the open court principle rests on the party seeking to close the proceedings to the public (paragraphs 31, 83). This is so because any restriction on the open court principle is an infringement on section 2(*b*) that must be justified under section 1 of the *Charter*. According to Mr. Mahjoub, this fact renders paragraphs

83(1)(*c*) and 83(1)(*d*) unconstitutional because 83(1)(*c*) does not require the Ministers to justify going *in camera* beyond simply requesting to do so, and 83(1)(*d*) does not require a reasonable basis for *in camera* proceedings nor a remedy for the non-disclosure.

[38] I do not accept Mr. Mahjoub's argument that paragraph 83(1)(*c*), insofar as it allows for an *in camera* hearing upon the Ministers' request, is a violation of the open court principle or is overbroad. In light of *Ruby*, in which similar provisions were found to be a reasonable limit on section 2(*b*), such a finding would be inconsistent with existing jurisprudence. The Supreme Court states at paragraph 60 of *Ruby*:

> I have already concluded that the *Privacy Act* validly obliges a reviewing court to accept *ex parte* submissions from a government institution, on request, in order to prevent the inadvertent disclosure of sensitive information. It follows, for the same reasons, that these *ex parte* submissions must be received *in camera*. The appropriate remedy is therefore to read down s. 51(2)(*a*) so that it applies only to the *ex parte* submissions mandated by s. 51(3). A reviewing court retains the discretion, pursuant to s. 46, to conduct the remainder of the hearing or any portion thereof, either in public, or *in camera*, or *in camera* and *ex parte*.

[39] Mr. Mahjoub does not have a right to challenge the Ministers' claims of national security privilege in a *voir dire* before the hearing proceeds *in camera* as he contends. As *Khawaja* makes clear, notice and participation are not principles of fundamental justice. The named person's interest in contesting the propriety of the Ministers' national security privilege claims can be more efficiently and effectively advanced by the special advocates *in camera*, where a fulsome discussion may take place.

[40] I similarly reject Mr. Mahjoub's submission that paragraph 83(1)(*d*) fails to require a reasonable basis for keeping information confidential and that the provision does not provide a remedy for non-disclosure. In my view, that provision sets a high threshold to be met before the information is protected. I reproduce the impugned paragraph below, with paragraphs 83(1)(*b*) and (*e*) included for context:

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 :
…	[…]
(*b*) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;	*b*) il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à titre d'avocat spécial dans le cadre de l'instance, après avoir entendu l'intéressé et le ministre et accordé une attention et une importance particulières aux préférences de l'intéressé;
…	[…]
(*d*) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;	*d*) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
(*e*) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a	*e*) il veille tout au long de l'instance à ce que soit fourni à l'intéressé un résumé de la

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;	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;

[41] First, paragraph 83(1)(*d*) requires that the judge keep the information provided by the Minister confidential if its disclosure "would" be injurious to national security or the safety of any person. This requires the judge to evaluate the validity of the Ministers' claim that the information they have provided *ex parte* would be injurious if disclosed before preserving the confidentiality of the Ministers' information. It logically follows that if *in camera* proceedings are justified under section 1 of the *Charter* in such circumstances, not disclosing the information in those closed proceedings is also justified (*Almrei (Re)*, 2009 FC 1263, at paragraphs 113, 117 [*Almrei*])**.** The special advocates are free to argue on the named person's behalf that the Ministers' claim is not justified and request disclosure to the named person.

[42] Second, paragraph 83(1)(*e*) requires that the named person be 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". Although this provision does not remedy every instance of non-disclosure (which, according to *Ruby*, does not always require a remedy), along with the special advocates provided in 83(1)(*b*), it serves to preserve the fairness of the proceeding.

[43] Finally, I turn to Mr. Mahjoub's argument that *in camera*, *ex parte* proceedings violate important instruments of international law, namely article 10 of the *Universal Declaration of Human Rights* (*UNDHR*) and article 14 of the *International Covenant on Civil and Political Rights* (*ICCPR*).

[44] Article 10 of the *UNDHR* reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[45] The *UNDHR* must be informed by the *ICCPR*, which is more detailed, and it is a treaty to which Canada is a party.

[46] Article 14(1) of the *ICCPR* reads as follows:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

[47] Article 14(1) makes an exception to the right to a public hearing in the case of "national security in a democratic society." While it states that the "press and the public may be excluded,"

a national security exception would be nonsensical if a person deemed to be a security threat could not be similarly excluded simply by virtue of being a party to the proceedings. In the case of subsection 83(1), special advocates provide a substitute for the excluded party's presence and may challenge the propriety of excluding the named person if they believe there is no valid concern of "national security in a democratic society." I find no inconsistency between the impugned provisions and Canada's international obligations.

c. *Is judicial independence, namely section 7 of the* Charter, *compromised in Division 9 of the* IRPA?

[48] According to Mr. Mahjoub, Division 9 proceedings compromise judicial independence in four ways. He submits that judges designated pursuant to section 76 lack independence because of their designation, because they control the disclosure process pursuant to paragraphs 83(1)(*c*) and (*d*), because they preside over *in camera* proceedings, and because they are implicated in the Ministers' and the Service's misconduct, particularly the interception of solicitor-client communications. I shall deal with each of these allegations in turn.

[49] In *Charkaoui I*, the Supreme Court considered whether the previous *IRPA* regime compromised the appearance of independence and impartiality of designated judges. At paragraph 46 of its reasons the Court concluded that:

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

i. Do designated judges inherently lack or appear to lack independence or impartiality?

[50] Mr. Mahjoub alleges that the definition of "judge" under section 76 of the *IRPA* "is unconstitutional because it violates the unwritten constitutional principles of the rule of law, separation of powers and judicial independence" by allowing the Chief Justice of the Federal Court to create a "sub-set" of judges who can deal with Division 9 matters, which is "effectively the appointment of judges by other judges". For ease of reference, I reproduce the impugned definition below:

76. The following definitions apply in this Division.	**76.** Les définitions qui suivent s'appliquent à la présente section.
…	[…]
"judge" *« juge »* "judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.	« juge » *"judge"* « juge » Le juge en chef de la Cour fédérale ou le juge de cette juridiction désigné par celui-ci.

[51] The issue was considered by the Federal Court of Appeal in *Atwal v. Canada,* [1988] 1 F.C. 107 (C.A.) [*Atwal*]. In that case it was argued that under the *Act*, Parliament had constituted a discrete superior court, composed of the designated judges and as such was acting neither as a judge of the Federal Court nor in a special capacity as *persona designata*. The Federal Court of Appeal held that no such category could be inferred without a clear expression by Parliament. The Court concluded at page 117, that "a judge designated for the purposes of the Act is either acting as a judge of the Federal Court or *persona designata*…" The Court applied the principles articulated in *Herman et al. v. Deputy Attorney General (Can.),* [1979] 1 S.C.R. 729. The

Supreme Court held that *prima facie*, Parliament should be taken to intend a judge to act *qua* judge whenever it grants powers to a judge by statute. A contrary intention that the judge is acting in the special capacity *persona designata* would require specific legislative provision. The Supreme Court adopted the following test in considering whether such a contrary intention appears in the relevant statute: "is the judge exercising a peculiar, and distinct, and exceptional jurisdiction, separate from and unrelated to the tasks which he performs from day-to-day as a judge, and having nothing in common with the court of which he is a member?" Mr. Justice Mahoney on behalf of the Court of Appeal on application of the above-noted test wrote: "I find no clear evidence in the Act of a Parliamentary intention that a designated judge act in any capacity other than as a judge of the Federal Court" (at page 118). In his reasons, the learned judge found that the issuance of warrants and the authorization of electronic surveillance to be an accepted judicial function of the Federal Court and expressly held that "…the fact that the Chief Justice has designated very few of its judges for purposes of the Act are [not] the sort of considerations which the Supreme Court had in mind as resulting in a judge acting as per *persona designata* rather than *qua* judge."

[52] Since the applicable provisions at issue are essentially the same today, the reasoning in *Atwal* still finds application in this instance. It follows that since designated judges are acting as judges of the Federal Court for the purposes of the Division 9 of the *CSIS Act*, they do not constitute a separate Court created by the Chief Justice as argued by Mr. Mahjoub.

[53] One of the core characteristics of judicial independence is administrative independence (*Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and*

Impartiality of Judges of the Prov. Court of P.E.I., [1997] 3 S.C.R. 3 at paragraph 119). Part of this administrative independence is the ability of the Federal Court to control its own process. The Chief Justice is charged with the administration of the Court which includes the assignment of cases to individual judges. The act of designating certain judges of the Court to deal with Division 9 matters cannot in and of itself be viewed as affecting judicial independence. There is a strong presumption that the Chief Justice is acting with integrity (*Felipa v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 272 [*Felipa*]). Compelling evidence would be required to show otherwise. There is simply no evidence on the record to suggest that any undue influence was exerted on judges through the designation process.

[54] It was open to Parliament to provide as it did and require the designation of certain judges to deal with Division 9 matters. I find nothing about the requirement that offends judicial independence. Once assigned a particular matter under Division 9, the designated judge is free to consider and decide the matter as he or she sees fit, in the same way as any colleague would proceed in the Federal Court with assignments not under Division 9.

[55] Further there may well be good reason for such a requirement. Since the policy rationale behind the provision was not fully developed by the parties, I will say only that having a limited number of judges designated for Division 9 work does favour the development of expertise within the Court. Given the nature of the work under Division 9, which includes the urgent treatment of certain applications, the development of expertise among the designated judges relating to matters dealt with under Division 9 of the *Act* can only be viewed as a positive development.

[56] Also of concern is whether designated judges are perceived to be independent and unbiased. The test for reasonable apprehension of bias is objective, "based on what the reasonable, right-minded person with knowledge of the facts would conclude" (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at paragraph 79).

[57] Mr. Mahjoub has failed to establish that a reasonable person, fully informed of the circumstances, would consider that designated judges did not enjoy independent status. The case law that he cites in which judicial independence was found to be violated is not analogous to the situation of judges designated pursuant to section 76 of the *IRPA*. *Mackin v. New Brunswick*, 2002 SCC 13 deals with the potential for financial influence on supernumerary judges due to a *per diem* pay scale dependent on workload, which would allow for arbitrary encroachments on pay. *R. v. Lippé*, [1991] 2 S.C.R. 114 concerns legislation allowing for deputy judges to work part-time as lawyers, potentially creating a conflict of interest. While the majority in *Felipa* suggests at paragraph 81 that "[t]he workload of a deputy judge who has retired from office as a judge of a superior court is entirely within the gift of the Chief Justice which means that his entitlement to the statutory *per diem* remuneration is also within the gift of the Chief Justice", and that might give rise to an "apprehension of undue influence on the part of the Chief Justice", the Court declines to deal with that issue.

[58] I therefore conclude that the designation of judges by the Chief Justice of the Federal Court pursuant to section 76 of the *IRPA* would be perceived by a reasonable and informed person as consistent with the independence and impartiality of the judiciary.

[59] Mr. Mahjoub also contends that because the designated judges are security cleared by the Service, this process "creates an Executive intrusion into judicial independence" and "an obvious systemic appearance of bias because the judges are vetted by the very party in the litigation whose material will be considered in any Division 9 *IRPA* case". Mr. Justice MacKay's decision in *Jaballah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 299 is cited in support of the argument. It is unclear why Mr. Mahjoub relies on this decision, for at paragraph 59, Justice MacKay explicitly rejects the suggestion that designated judges are "first cleared by CSIS" and any suggestion that "designated judges could fairly be seen as nominees of CSIS."

[60] In any event I am in a position to dispose of this argument in short order. CSIS plays no role in relation to security clearance for designated judges as alleged by Mr. Mahjoub. Security screening of judges would occur at the time of their initial appointment. The designation of a judge of the Federal Court to deal with Division 9 work under the *CSIS Act* is in the absolute discretion of the Chief Justice of the Federal Court (see section 76 of the *IRPA*). The only prerequisite is that the judge be a judge of the Federal Court.

[61] I therefore conclude that a reasonable and informed person would not perceive the Service to have any influence over designated judges so as to affect their independence or impartiality.

ii. Does the control exercised by the designated judge over disclosure by virtue of paragraphs 83(1)(c) *and (*d*) of the* IRPA *compromise the Court's independence or appearance of independence?*

[62] Mr. Mahjoub takes issue with the designated judge's ability to vet information for disclosure pursuant to paragraphs 83(1)(*c*) and (*d*) of the *IRPA*. He argues that these provisions allow the designated judge to be influenced by information that will not be put into evidence and that will not be disclosed to the named person. Mr. Mahjoub insists that to avoid undue influence of this information, the confidential information provided by the Ministers should have been disclosed "party to party", or at least another designated judge should have performed the vetting.

[63] For ease of reference, I reproduce these provisions below:

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 :
…	[…]
(*c*) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;	*c*) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
(*d*) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national	*d*) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité

security or endanger the safety of any person;	nationale ou à la sécurité d'autrui;
…	[…]

[64] The impugned provisions require the judge to ensure the confidentiality of information and evidence provided by the Minister if the judge is of the opinion that disclosure would be injurious to national security or endanger the safety of any person. Should the judge opine that certain information needs to be protected for these reasons, it will not be made available to the named person or to public counsel. However, the confidential information will be made available to the special advocates who are charged with protecting the named person's interests in such circumstances. Further, pursuant to paragraph 83(1)(*e*) of the *IRPA*, the judge is required to ensure that the named person is provided a summary of information and other evidence that enables that person to be reasonably informed of the case made by the Minister. I have already dealt with this issue in the context of Mr. Mahjoub's argument concerning the adequacy of disclosure. I held that the special advocate regime was sufficient to address the concerns raised. I will not repeat my reasons for so finding here. Suffice it to say that confidential information that cannot be released to Mr. Mahjoub or public counsel will have been reviewed by the Special Advocates who have, from my observations, been diligent in protecting Mr. Mahjoub's interest in the *in camera* portion of these proceedings. Any confidential information that will be put into evidence will be vetted and tested by the Special Advocates. On many occasions in this proceeding, the Special Advocates have effectively challenged the admissibility of evidence. Consequently, contrary to the submissions of Mr. Mahjoub, information that is adduced on the confidential record is properly before the Court.

[65] That Parliament entrusts the Federal Court with the role of determining whether or not disclosure of information is injurious does not offend the principle of judicial independence. The designated judge is capable of exercising independent judgment concerning the injury, if any, that disclosure of a particular piece of information would cause. Mr. Mahjoub fails to convince me that any constitutional principle is violated as a consequence of this provision.

[66] While it would be possible for another designated judge to perform the vetting of disclosure, it is not necessary for the same reason that the impugned provisions of the *IRPA* do not offend the principle of judicial independence. It is a normal judicial function for a judge to disabuse himself or herself of information to which he or she is exposed but which is either not adduced as evidence by the parties or is ruled inadmissible. This is the case even in the criminal context and when the judge is exposed to highly relevant and inculpatory information such as a confession (the example given in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at page 347).

[67] Given that in the normal course of trials, a judge is expected to be able to disabuse himself or herself of information that is not in evidence, the fact that the designated judge is exposed to disclosure for the purposes of vetting under paragraph 83(1)(*d*) of the *IRPA* does not compromise judicial independence or impartiality.

[68] Finally, concerning Mr. Mahjoub's submission that disclosure ought to be made on a party to party basis, Justice Dawson's interpretation of paragraph 83(1)(*d*) in the common issues decision *Almrei (Re)*, 2009 FC 240, is the final decision on the matter for the purpose of this proceeding. At paragraph 31, she concludes 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". Thus, "party to party" disclosure without the involvement of the designated judge is not possible under the *IRPA*. I agree with the learned judge's reasons and conclusion.

[69] For the above reasons I reject Mr. Mahjoub's argument relating to paragraphs 83(1)(*c*) and (*d*) of the *IRPA*.

iii. Does the existence of in camera *proceedings and confidential evidence compromise the independence or appearance of independence of the Court?*

[70] The named person in *Charkaoui I* challenged the previous *IRPA* regime partly on this basis. In the previous regime, the potential for *in camera* proceedings and confidential evidence to compromise the independence of the designated judges was even greater than in the current regime, the special advocates were not provided for and there was no one to represent the named person's interests *in camera*. Nevertheless, the Supreme Court concludes that the *IRPA* process is "designed to preserve the independence and impartiality of the designated judge, as required by s. 7" (at paragraph 46) and that "this conclusion conclusively rebuts the appellant Charkaoui's contention that the *IRPA* breaches the unwritten constitutional principle of judicial independence affirmed in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, 2005 SCC 44" (at paragraph 47).

[71] The addition of the special advocates has served to further reduce the appearance that "the judge will be perceived to be in the camp of the government" (*Charkaoui I* at paragraph 42).

I therefore find that the *in camera* proceedings as provided for in the current *IRPA* process and its treatment of confidential evidence does not undermine the principle of judicial independence.

iv. Is the Court implicated in the Ministers' alleged misconduct?

[72] Mr. Mahjoub further impugns the independence and impartiality of the Court by claiming that the Court's presumed knowledge of the alleged misdeeds of the Service, including the Service's interception of solicitor-client communications and its reliance on information that the Court later found, on reasonable grounds, to be obtained from torture or cruel, inhuman and degrading treatment, implicates the Court in those misdeeds.

[73] The Service was permitted to intercept solicitor-client communications under s. 21 warrant authority as long as that authority complied with the requirements of *Atwal* and *Solosky v. The Queen*, [1980] 1 S.C.R. 821 [*Solosky*], in their appropriate circumstances (see the *Warrants Decision* at paragraphs 85-87). Simply because I found, upon review, that certain conditions in certain warrants were insufficient does not mean that the Court was complicit in any alleged misdeeds of the Service.

[74] When Justice Mosley ordered that Mr. Mahjoub be released on stringent conditions in February 2007 **(**2007 FC 171**)**, the Court could not have anticipated that the Service would misinterpret the Order as allowing them to intercept solicitor-client communications. Similarly, after Justice Layden-Stevenson issued a clarification to this effect in an Order dated December 18, 2008, the Court could not have anticipated that the Service would not fully comply with the Order. When the issues were brought to the attention of the Court, they were

dealt with on an expeditious basis. The Court could not possibly be implicated in the alleged misconduct as alleged by Mr. Mahjoub.

[75] Similarly, the question of the inadmissibility of certain derivative evidence pursuant to subsection 83(1.1) of the *IRPA* was hotly contested. The Court's decision was made after hearing the submissions of the parties and the Special Advocates. The Court heard the evidence and decided the issues on the basis of the evidence adduced and provided reasons for its decision. To suggest that the Court was otherwise implicated in the alleged misconduct is ludicrous.

[76] As in all cases of alleged misconduct by a party, the Court must hear the evidence in support of the allegation, decide the matter, and provide the appropriate remedy when applicable. It has done so in this proceeding. The Court cannot be held responsible for the conduct of litigants appearing before it. Nor can it be responsible for a party's decision to rely on evidence that would later be ruled inadmissible pursuant to subsection 83(1.1). To suggest otherwise in the absence of any evidence to support such allegations is speculative and offensive to the principles of judicial independence.

[77] I therefore reject Mr.Mahjoub's argument.

> *d. Is the special advocates regime as established in section 85 of the* IRPA*, coupled with the disclosure of summaries to the named person provided for in paragraph 83(1)(*e*) of the* IRPA*, a sufficient substitute for full disclosure so that Mr. Mahjoub knows the case to meet and can respond to it?*

[78] Mr. Mahjoub challenges the new *IRPA* regime on the basis that the special advocates coupled with the disclosure provision of paragraph 83(1)(*e*) do not satisfy his right to a fair trial under section 7 of the *Charter*. Although the Ministers submit that this issue has already been

decided in *Harkat*, Mr. Mahjoub insists that his challenge approaches the issues from a different perspective than the challenge before the Federal Court of Appeal.

i. Has the Federal Court of Appeal's decision in Harkat, *informed by the Supreme Court of Canada's decision in* Charkaoui I, *already decided this question?*

[79] I agree with the Ministers that *Harkat*, informed by the content of the right to a fair trial in the security certificate context described in *Charkaoui I*, has decided this question. These decisions are binding on this Court.

[80] *Charkaoui I* states at paragraph 20, that "[s]ection 7 of the *Charter* requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake…" At paragraph 24, the Supreme Court further states that "[f]ull disclosure of the information relied on may not be possible," and at paragraph 27, it explains "[t]he principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process… The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be."

[81] In paragraph 29 of *Charkaoui I*, the Supreme Court mentions the essentials of the section 7 right to due process when extended detention and potential deportation is involved: "it entails the *right to know the case put against one*, and the *right to answer that case*. Precisely how these requirements are met will vary with the context." Finally, at paragraph 61, the

Supreme Court explains that "[i]f s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found."

[82] *Harkat* evaluates the current regime, including the special advocates, in light of how well it responds to this issue of knowing the case to meet and responding to that case. At paragraphs 58-67, the Federal Court of Appeal describes in detail the role and powers of the special advocates within the new regime. Mr. Harkat's complaints about the regime were:

1. that it does not allow the named person sufficient disclosure, and

2. that the special advocates cannot be adequately instructed by the named person since the Federal Court must authorize communications with the special advocates.

[83] The Court of Appeal, rejecting both of these complaints, concludes at paragraph 116 "that paragraph 85.4(2) and section 85.5 of the Act have built in the flexibility necessary to ensure the fairness of the process and the protection of national security and the safety of any person." It elaborates at paragraph 119:

> The revised Act provides the judge with the necessary tools to ensure a fair process. With the assistance of the special advocates acting on behalf of the appellant, the judge is vested with the necessary powers at common law and under the *Charter* and the Act to satisfy the fairness requirement of section 7 of the *Charter*. He possesses the power to order disclosure of information, authorize additional communications, remedy a failure to disclose and grant a just and appropriate remedy under subsection 24(1) of the *Charter* where a breach of procedural fairness has occurred. He can take preemptive action to prevent a violation of a named

> person's right to liberty and security of the person. All of these factors, coupled with the *Charkaoui* #2 disclosure, are a sufficient substitute for full disclosure. [Emphasis added]

[84] The Federal Court of Appeal's decision in *Harkat* disposes of Mr. Mahjoub's challenge in this case.

[85] Mr. Mahjoub submits that this Court decided differently in its February 19, 2010 Reasons for Order. He makes this submission by taking the Court's comment that the Special Advocates were not a sufficient substitute for disclosure (at paragraph 51) out of context. In certain instances, disclosure will be necessary for the named person to be reasonably informed of the case against him or her, but paragraph 83(1)(*e*) provides for this. It is open to the Court, in individual circumstances, to find that the special advocates are an insufficient substitute for disclosure. This does not invalidate the entire special advocates' regime.

ii. *Does the inevitable "split brain" problem necessarily infringe Mr. Mahjoub's rights?*

[86] Although I find *Harkat* to determine the constitutionality of the special advocates and disclosure regime, I wish to dispose of Mr. Mahjoub's submission that what he dubs the "split brain" issue, the restricted communication between Mr. Mahjoub and the Special Advocates, itself infringes Mr. Mahjoub's right to a fair trial. I believe it is important to address this issue since Mr. Mahjoub relies on criticisms of the special advocates system in the United Kingdom raised by the Supreme Court in *Charkaoui I* at paragraph 83 that seem to suggest a similar regime would be constitutionally inadequate if imported into Canada. *R. v. Ahmad*, 2011 SCC 6 [*Ahmad*] at paragraph 47 invokes these criticisms, saying "there are numerous criticisms of the

special counsel procedure under the *IRPA* [and in the United Kingdom], and we do not by any means discount the weight of these criticisms" although special advocates might be able to assist with section 38 proceedings under the *Canada Evidence Act*, R.S.C., 1985, c. C-5. These comments could be interpreted to raise the possibility that the Supreme Court might disagree with the Federal Court of Appeal.

[87] In my view, the Federal Court of Appeal's decision withstands scrutiny, even in light of the criticisms of the special advocates system in the United Kingdom.

[88] In *A and Others v United Kingdom*, [2009] ECHR 301, the European Court of Human Rights considers the use of special advocates in paragraphs 216-220. At paragraph 220, it concludes:

> The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the

> allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied. [Emphasis added].

[89] *Secretary of State for the Home Department v AF & Anor*, [2009] UKHL 28 [*AF*] is considered the cornerstone case on special advocates in the UK, and it is subsequent to the ECHR decision in *A and Others v United Kingdom*. In the context of "control orders" (which are analogous to Canada's security certificates in that they are used for the detention and deportation of international terrorists and involve "significant restriction of liberty", see *AF* at paragraph 1), it concludes that the special advocates regime on its own was insufficient: there also had to be adequate disclosure of the allegations against the "controlee." The House of Lords at paragraph 5 cites *Secretary of State for the Home Department v. MB and AF*, [2007] UKHL 46 [*MB*] for a description of the rules governing the special advocate regime. Again citing *MB*, the House of Lords mentions that the Canadian system (the original "special advocates" system in existence in 1996) has been cited in European human rights law (e.g. *Chalal v. United Kingdom*, [1996] ECHR 54) as an example of procedures that "both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice" (at paragraph 13).

[90] Lord Phillips, in the majority, concludes at paragraph 68, without criticizing the special advocates regime, that additional disclosure had to be provided to the controlee with the caveat at paragraph 66 that "[i]n *A v United Kingdom* the Strasbourg court has nonetheless recognised that, where the interests of national security are concerned in the context of combating terrorism, it may be acceptable not to disclose the source of evidence that founds the grounds of suspecting that a person has been involved in terrorism-related activities."

[91] In summary, in conjunction with what the UK Supreme Court calls "gisting" (giving the individual subject to state action the "gist" of the allegations against that person, including some specifics), neither the UK Supreme Court nor the European Court of Human Rights takes issue with the use of special advocates to protect the individual's rights in *in camera* proceedings concerning national security privilege. In my view, this is precisely what the *IRPA* regime provides for in sections 85 to 85.2 in conjunction with paragraph 83(1)(*e*).

[92] Finally, I turn to the extensive criticism of the UK special advocates regime offered in the Joint Committee on Human Rights in their report on Counter-Terrorism Policy and Human Rights (Sixteenth report). I address below the three major concerns raised at paragraph 54 of the report in turn:

(a) I am not convinced that "the special advocates' lack of access to independent expertise and evidence" can ever be remedied, for the same limitations would exist even if the case were fully disclosed to public counsel. The government is likely to have access to greater resources and expertise in the domain of national

security than named persons in any event, just as the Crown typically has greater resources and expertise in forensics and criminology than the accused in criminal proceedings. Nevertheless, unlike in the UK system, the special advocates pursuant to paragraph 85.2(*c*) may do anything to further the named person's interests *in camera* that is not enumerated in the statute with the leave of the Court. For example, the Special Advocates in this proceeding were permitted to call an expert witness.

(b) I do not believe that "the special advocates' ability to test the Government's objections to disclosure of the closed case" is as limited in Canada as it may be in the UK. In Canada the major categories of information that are classified are reasonably well-established: information which, if disclosed, would breach the third party rule, information disclosing investigative techniques, information identifying sources, and information identifying the particulars of an ongoing investigation. Pursuant to paragraph 85.2(*b*) of the *IRPA*, the special advocates are expressly authorized to challenge the Ministers' claims of national security privilege.

(c) The issue of "the special advocates' ability to communicate with the affected person after seeing the closed material" is an ongoing issue in our courts as well as the UK courts (see *Almrei* at paragraph 113). The main issue in the report is a notice requirement to the government. No such notice requirement exists in the *IRPA*, as mentioned in paragraph 75 of the report. In *Almrei (Re***)**, 2008 FC 1216,

> Chief Justice Lutfy indicated that it was expected the Ministers would be given notice that a request for communication had been made (at paragraph 65). However, this is not necessarily the case. In these proceedings, the Special Advocates were permitted to seek leave from the Court to communicate *ex parte*, without notice to the Ministers.

[93] In addition to the characteristics of the *IRPA* special advocates regime that I have described in response to the criticisms of the UK system, there are a number of characteristics that further alleviate the "split brain" problem caused by the necessary restrictions on the special advocates. Before the special advocates gain access to the confidential material in the case, they may have free discussions with the named person and his or her counsel. It is open to the named person to disclose to the special advocates everything he or she knows in relation to the summarized allegations provided to the named person. As the Court releases disclosure to the named person, the named person is free to communicate to the special advocates any observations, changes in strategy, or additional issues that the named person believes to be raised by the disclosure.

[94] If the special advocates are of the view that something specific needs to be done to protect the named person's interests, the special advocates can make a request under section 85.2 for the Court's approval to communicate with the named person or to do anything else not otherwise provided for in the *IRPA*. As the Federal Court of Appeal concludes in *Harkat* at paragraph 116, simply because there is a possibility that the Court will erroneously refuse to allow communication or any other action does not render section 85.2 unconstitutional.

[95] To conclude, the *IRPA* regime adequately responds to what Mr. Mahjoub terms the "split brain" problem and to the criticisms levelled against the UK special advocates system. In my view, Mr. Mahjoub's challenge to the regime on this basis does not succeed.

*iii. Does the "reasonably informed" standard of paragraph 83(1)(*e*) infringe Mr. Mahjoub's rights?*

[96] Further, Mr. Mahjoub argues that the requirement that the Court provide the named person with summaries that "reasonably inform" him of the case to meet found in paragraph 83(1)(*e*) of the *IRPA* provides insufficient disclosure to protect his right to a fair trial.

[97] Mr. Mahjoub submits that summaries will fail to give the context of the information and the actual words uttered such that the meaning of the evidence will be unascertainable, similar to the famous "I killed David" statement in *R. v. Ferris*, [1994] 3 S.C.R. 756 [*Ferris*].

[98] The issue of the sufficiency of summaries was raised in *Harkat*, and the Federal Court of Appeal's response is binding on this Court. At paragraphs 76 and 77, the Federal Court of Appeal explains that the answer to the question of what "reasonably informed" entails is found in the French version of the provision:

> As a matter of fact, the French version of the texts uses the very words "suffisamment informé (sufficiently informed) de la thèse du ministre à l'égard de l'instance en cause" (emphasis added). The French version is in this respect more precise than the English version, more favourable to the named person and more compliant with the fairness requirement of section 7 of the *Charter*. Both texts, English and French, have equal force (see section 18 of the

> *Charter*) and, for the reasons stated above, the French version is to be preferred.
>
> Moreover, I agree with counsel for the respondents that the concept of "reasonably informed" is subject to and qualified by section 7 of the *Charter*: the named person has to be informed to the point that he knows the case against him and is able to meet it.
>
> [Emphasis in original]

[99] The Federal Court of Appeal in *Harkat* is therefore satisfied that the statutory provision requiring that the named person be reasonably informed of the case to meet and be able to meet it does not infringe section 7 of the *Charter*.

[100] In *Harkat*, the named person argued, as Mr. Mahjoub argues now, that the Court should have to balance the national security interest against the public interest in disclosure (including prejudice to Mr. Mahjoub in non-disclosure). The Federal Court of Appeal roundly rejects this suggestion of a balancing process analogous to section 38 of the *Canada Evidence Act* in paragraphs 101, 102 and 103, and maintains at paragraph 103 that the judge's disclosure obligations in the security certificate process are already "governed by the more demanding test of fairness required by section 7 of the *Charter* rather than the concept of public interest." In other words, paragraph 83(1)(*e*) must be read with the named person's section 7 rights in mind.

[101] Mr. Mahjoub contends that he should not be forced to prove prejudice from non-disclosure because he has no way of knowing what is not disclosed to him. In support of his argument he relies on paragraph 27 of *Ahmad* and page 499 of *R. v. Durette* [1994] 1 S.C.R. 469. This argument is without merit. Mr. Mahjoub is not, in fact, forced to prove prejudice without

access to what is not disclosed because he has the assistance of the Special Advocates who have access to all of the information and have a duty to raise the issue of prejudice to Mr. Mahjoub from non-disclosure *in camera*.

[102] Mr. Mahjoub further submits, again relying on *Ahmad*, that all non-disclosure must be remedied. Nonetheless, paragraph 30 of *Ahmad* states that "[t]here will be many instances in which non-disclosure of protected information will have no bearing at all on trial fairness or where alternatives to full disclosure may provide assurances that trial fairness has not been compromised by the absence of full disclosure." In security certificate cases, in which all information forming part of the Ministers' case and all information identified in *Charkaoui II* is disclosed to the special advocates, there is a built-in alternative to full disclosure for all relevant information. Although it is not expressly provided for in the provisions of Division 9, *Charkaoui II* guarantees that the Court and the special advocates have access to any potentially exculpatory information within the Service's holdings. Summaries of the information sufficient to know the case to meet are also provided directly to the named person, which is an additional built-in alternative to full disclosure.

[103] Moreover, with respect to the context of the information in the summaries, the wording of paragraph 83(1)(*d*) only requires the Court to keep the confidentiality of information that, if disclosed, would be injurious to national security or the safety of any person. The rest of the information will be disclosed to the named person. If the context is not disclosed, it is because providing the context would be injurious. The Court ensures, with the assistance of the special advocates and Ministers' counsel, that the summaries released to the named person are not

misleading. In addition, the special advocates are able to make submissions about the context of the information *in camera*, and to challenge undisclosed aspects of the information, to take a common example the manner in which the information was obtained. These two factors distinguish this situation from that in *Ferris*.

[104] Finally, Mr. Mahjoub invokes paragraph 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, to further support his constitutional challenge. In my view, the provision does not add anything to the specific analysis of disclosure in a case involving national security interests: it merely warns that legislation should be construed and applied so as not to abrogate the right to a fair hearing in accordance with the principles of fundamental justice. These are the same considerations of the analysis of the provisions' conformity with section 7 of the *Charter*.

iv. If the named person cannot be reasonably informed by summaries, does the proceeding infringe Mr. Mahjoub's rights, and is this such a proceeding?

[105] Mr. Mahjoub also challenges the constitutionality of paragraph 83(1)(*i*), which reads 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 :
…	[…]
(*i*) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national;	*i*) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'intéressé;

[106] Mr. Mahjoub argues that this provision would permit the judge to decide the reasonableness of the certificate based entirely on what is not disclosed to the named person.

[107] This provision, as Mr. Mahjoub describes it, would be at odds with paragraph 83(1)(*e*) that requires the named person to be "reasonably informed" ("suffisament informé") of the Ministers' case against him or her.

[108] I reject Mr. Mahjoub's argument. While paragraph 83(1)(*i*) provides that a judge may base a decision on evidence or information not disclosed to the named person and for which no summary is provided, there must nevertheless be sufficient other evidence or information disclosed to the named person, either directly or by way of a summary, to enable the named person to be reasonably informed of the Ministers' case. The two provisions must be read together. Put differently, in no instance would a certificate be found reasonable where the named person is not reasonably informed of the Ministers' case against him. To find otherwise would violate the named person's right to a fair trial.

[109] As the Federal Court of Appeal remarks in *Harkat* at paragraph 119, "[t]he revised Act provides the judge with the necessary tools to ensure a fair process." Simply because the Court cannot, or does not, avail itself of those tools does not mean that the statute is unconstitutional.

*e. Is Mr. Mahjoub's right to counsel and counsel of choice pursuant to sections 7 and 10(*b*) of the* Charter*, the independence of the bar and solicitor-client privilege compromised by the special advocates regime established in section 85 of the* IRPA*?*

[110] Mr. Mahjoub contends that his right to be represented by counsel of his choice is infringed by Division 9 of the *IRPA*, in particular the special advocates' regime. He invokes section 7 and section 10(*b*) of the *Charter* in advancing this claim. In addition, he submits that the independence of the Bar and solicitor-client privilege are compromised by the special advocates' regime.

*i. Is section 10(*b*) relevant to Mr. Mahjoub's challenge?*

[111] In *R. v. Willier*, 2010 SCC 37 [*Willier*] at paragraph 26, the Supreme Court remarks that "[w]hile s. 10(*b*)'s text remains the starting point in its interpretation, an understanding of its animating purposes is essential to a full understanding of its content. This is especially true in this case, as the text of s. 10(*b*) makes no explicit mention of the right to counsel of choice." However, the right to consult with counsel of choice is an integral part of the right. As stated in *R. v. Bartle*, [1994] 3 S.C.R. 173 at page 191, "a person who is "detained" within the meaning of s. 10 of the *Charter* is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty" [emphasis in original], and as explained in *Willier* at paragraph 28, the purpose of the right is to mitigate the disadvantage of detention. This also entails a reasonable opportunity to speak with a specific lawyer of the detainee's choosing (at paragraph 35).

[112] As stated in *R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.) [*McCallen*] at paragraph 32, "It is well established that s. 10(*b*) includes not only the right to retain counsel but the right to

retain the counsel of the accused's choice and the right to be represented by that counsel throughout the proceedings." At paragraphs 34 to 38, the Ontario Court of Appeal further explains:

> …The solicitor-client relationship is anchored on the premise that clients should be able to have complete trust and confidence in the counsel who represent their interests....
>
> …There should be no room for doubt about counsel's loyalty and dedication to the client's case. It is human nature that the trust and confidence that are essential for the relationship to be effective will be promoted and more readily realized if clients have not only the right to retain counsel but to retain counsel of their choice.
>
> …The very nature of the right is that the subjective choice of the client must be respected and protected. Absent compelling reasons involving the public interest, the government and the courts need not be involved in decisions about which counsel clients may choose to act on their behalf.
>
> In addition to constituting a valuable personal right to clients, s. 10(*b*) provides a right that is an important component in the objective perception of fairness of the criminal justice system. … Including [*sic*] with this fundamental right to counsel, the additional right to choose one's own counsel enhances the objective perception of fairness because it avoids the spectre of state or court interference in a decision that quite properly should be the personal decision of the individual whose interests are at stake and whose interests the counsel will represent.
>
> The corollary to this point, which is central to this case, is that the perception of fairness will be damaged, and in many cases severely so, if accused persons are improperly or unfairly denied the opportunity to be represented by the counsel they choose.

[113] There is no evidence on the record that Mr. Mahjoub was not afforded an opportunity to contact counsel of his choosing upon his arrest in June 2000. There is also no evidence on the record that Mr. Mahjoub was not permitted to engage the counsel of his choice to represent him. Mr. Mahjoub has not indicated any specific provision in Division 9 of the *IRPA* that directly or

indirectly infringes this right. Mr. Mahjoub has not demonstrated how the *IRPA* affected his section 10(*b*) right.

ii. Does the lack of solicitor-client relationship between the special advocates and Mr. Mahjoub infringe his rights?

[114] Mr. Mahjoub's attack on the special advocates' regime with respect to section 10(*b*) is two-fold. He first claims that the *IRPA*, in expressly stating that there is no solicitor-client relationship between the named person and the special advocates deprives him of his section 10(*b*) rights**.** Second, he claims that the *IRPA*, in requiring him to choose from among a list of security-cleared lawyers as special advocates and not allowing him to use his counsel to represent him *in camera*, violates his right to be represented by his counsel of choice.

[115] For ease of reference, I reproduce below the relevant provisions:

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 :
…	[…]
(*b*) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;	*b*) il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à titre d'avocat spécial dans le cadre de l'instance, après avoir entendu l'intéressé et le ministre et accordé une attention et une importance particulières aux préférences de l'intéressé;

…

(1.2) If the permanent resident or foreign national requests that a particular person be appointed under paragraph (1)(*b*), the judge shall appoint that person unless the judge is satisfied that

(*a*) the appointment would result in the proceeding being unreasonably delayed;

(*b*) the appointment would place the person in a conflict of interest; or

(*c*) the person has knowledge of information or other evidence whose disclosure would be injurious to national security or endanger the safety of any person and, in the circumstances, there is a risk of inadvertent disclosure of that information or other evidence.

(2) For greater certainty, the judge's power to appoint a person to act as a special advocate in a proceeding includes the power to terminate the appointment and to appoint another person.

[…]

(1.2) Si l'intéressé demande qu'une personne en particulier soit nommée au titre de l'alinéa (1)*b*), le juge nomme cette personne, à moins qu'il estime que l'une ou l'autre des situations ci-après s'applique :

a) la nomination de cette personne retarderait indûment l'instance;

b) la nomination de cette personne mettrait celle-ci en situation de conflit d'intérêts;

c) cette personne a connaissance de renseignements ou d'autres éléments de preuve dont la divulgation porterait atteinte à la sécurité nationale ou à la sécurité d'autrui et, dans les circonstances, ces renseignements ou autres éléments de preuve risquent d'être divulgués par inadvertance.

(2) Il est entendu que le pouvoir du juge de nommer une personne qui agira à titre d'avocat spécial dans le cadre d'une instance comprend celui de mettre fin à ses fonctions et de nommer quelqu'un pour la remplacer.

85. (1) The Minister of Justice shall establish a list of persons who may act as special advocates and shall publish the list in a manner that the Minister of Justice considers appropriate to facilitate public access to it.

…

85.1 (1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

…

(3) For greater certainty, the special advocate is not a party to the proceeding and the relationship between the special advocate and the permanent resident or foreign national is not that of solicitor and client.

(4) However, a communication between the permanent resident or foreign national or their counsel and the special advocate that would be subject to solicitor-client privilege if the relationship were one of solicitor and client is deemed to be subject to solicitor-client privilege. For greater certainty, in respect of that

85. (1) Le ministre de la Justice dresse une liste de personnes pouvant agir à titre d'avocat spécial et publie la liste de la façon qu'il estime indiquée pour la rendre accessible au public.

[…]

85.1 (1) L'avocat spécial a pour rôle de défendre les intérêts du résident permanent ou de l'étranger lors de toute audience tenue à huis clos et en l'absence de celui-ci et de son conseil dans le cadre de toute instance visée à l'un des articles 78 et 82 à 82.2.

[…]

(3) Il est entendu que l'avocat spécial n'est pas partie à l'instance et que les rapports entre lui et l'intéressé ne sont pas ceux qui existent entre un avocat et son client.

(4) Toutefois, toute communication entre l'intéressé ou son conseil et l'avocat spécial qui serait protégée par le secret professionnel liant l'avocat à son client si ceux-ci avaient de tels rapports est réputée être ainsi protégée, et il est entendu que l'avocat spécial ne peut être contraint à témoigner à l'égard d'une telle communication dans quelque instance que ce soit.

> communication, the special advocate is not a compellable witness in any proceeding.

[116] At the outset, Mr. Mahjoub's argument is predicated on a right to be represented by counsel *in camera*. Just as he or she does not have a right to full disclosure (see paragraphs 78-84 above), logic dictates that a named person does not have a right to be represented by counsel with respect to the undisclosed information. Special advocates need not be a named person's solicitors for the regime to be constitutional; they are a policy choice of the legislature, a "substantial substitute" for disclosure as required by section 7 of the *Charter*, and they have statutory duties to represent the named person in his or her absence to alleviate the unfairness created by a lack of disclosure. Mr. Mahjoub has presented me with no basis on which to find subsection 85.1(3) unconstitutional.

[117] I agree with Mr. Mahjoub that some of the considerations raised in *McCallen* are relevant to special advocates. So that the special advocates can represent his or her interests *in camera* effectively, a named person should ideally be able to confide in the special advocates and trust them to represent his or her interests. To the extent practicable, Division 9 of the *IRPA*, particularly paragraph 83(1)(*b*) and subsection 83(1.2), allows for the named person to select his or her special advocates. These provisions place limits on the choice, including conflicts of interest and the requirement that special advocates appear on an approved list prepared by the Minister of Justice (subsection 85(1)), but even in criminal proceedings where national security is not at issue, the right to be represented by counsel of one's choice is constrained by practical limits. As the Ontario Court of Appeal explains at paragraph 40 of *McCallen*:

> Nevertheless, the right to retain counsel of choice is not an absolute right; it is obviously limited to those counsel who are competent to undertake the retainer and are willing to act. There are two further limitations on the right that are in issue on this appeal: the first is the requirement that counsel be available to represent the client within a reasonable period of time and the second is the requirement that counsel be free of any disqualifying conflict of interest.

[118] Paragraphs 83(1.2)(*a*) and (*b*) speak directly to these limitations. In addition, there is a practical concern that the special advocates, in order to be entrusted with classified information and for the protection of the public interest, need to be acceptable to the executive. Despite this, the *IRPA* does not predispose the special advocates to influence from the executive. On the contrary, the special advocates would be contravening subsection 85.1(1) of the statute if they did not act solely to represent the named person's interest. The *IRPA* also creates solicitor-client privilege at subsection 85.1(4) to ensure that the special advocates cannot disclose any information provided to them by the named person and to ensure they can never testify against the named person. Subsection 87.2(2) requires that the regulations for determining the list of special advocates exclude anyone affiliated with the federal public administration.

[119] The limitation on choice of special advocates that Mr. Mahjoub finds the most objectionable is his inability to use his counsel as special advocates or to have them access the confidential information proffered by the Ministers. He cites the *Air India* prosecution [*R. v. Malik*, 2005 BCSC 350] [*Air India*], referred to in *Ahmad*, for an example of an alternative that would respect his right to be represented by counsel of his choice. In *Air India*, counsel for the accused were given access to confidential material after giving an undertaking not to disclose the contents to anyone without permission, including the accused (*Ahmad* at paragraph 30).

[120] In *Air India*, the prosecution and the defence came to an agreement that having defence counsel examine the confidential information and undertake not to disclose its contents to anyone was an acceptable way to deal with the confidential information while safeguarding national security. Nothing in the *IRPA* precludes such an agreement except when the judge invokes paragraph 83(1)(*c*). The Ministers could refrain from invoking that provision and instead adopt an *Air India*-type arrangement. However, simply because this arrangement is available and is the arrangement that Mr. Mahjoub prefers does not make every alternative unconstitutional.

[121] In my view, an *Air India* arrangement in a case in which the confidential information proffered is relevant (as opposed to irrelevant as it almost universally was determined to be in *Air India*) risks crippling the solicitor-client relationship between the named person and his or her counsel. Counsel would no longer be able to communicate fully and frankly with the named person and would have to exercise caution and restraint in their advocacy lest their actions or words inadvertently disclose details of the confidential information. This is antithetical to how counsel is supposed to represent a client, and it would leave the named person without a zealous representative who can take any action to defend the named person's interests. If the named person's counsel are not exposed to the confidential information at all, they can act as they wish and speak to whom they wish without a thought for inadvertent disclosure.

[122] The right to be represented by counsel of one's choice is untouched by Division 9 of the *IRPA*. The named person is free to choose counsel as in any other proceeding, and his or her rights under section 10(*b*) of the *Charter* are therefore satisfied. Special advocates are not the

named person's counsel, nor need they be. They are a Court-appointed substantial substitute for disclosure to ensure the fairness of the trial. The special advocates' effectiveness and integrity is enhanced by provisions in the *IRPA* that give them the trappings of a solicitor-client relationship with the named person and are necessary to ensure that they are a sufficient substitute for disclosure to respect section 7 of the *Charter*. However, the trappings do not make the Special Advocates counsel for Mr. Mahjoub and consequently do not engage his section 10(*b*) right to counsel of choice.

*f. Is the requirement that admissible evidence be "reliable and appropriate" in paragraph 83(1)(*h*) of the* IRPA *unconstitutionally vague, overbroad, or arbitrary?*

[123] Mr. Mahjoub argues that paragraph 83(1)(*h*) of the *IRPA* is unconstitutionally vague, overbroad, or arbitrary because "reliable and appropriate" is inadequately defined and circumscribed, allowing the judge unfettered discretion to allow any kind of information to be tendered as evidence.

[124] For ease of reference, I reproduce the impugned provision below.

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 :
(*h*) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;	*h*) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;
…	[…]

(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.	(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.

[125] The test for vagueness was established in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at page 643. The Supreme Court articulates the test as follows: "[t]he doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate." In *Suresh*, the Supreme Court further elaborates at paragraph 81 that a law is vague "(1) because it fails to give those who might come within the ambit of the provision fair notice of the consequences of their conduct; or (2) because it fails to adequately limit law enforcement discretion…"

i. Is "reliable and appropriate" or a similar standard judicially defined?

[126] As *Harkat* consulted the equally authoritative French version of the impugned phrase "reasonably informed" for elucidation, so too shall I consult the French version of "reliable and appropriate" for further guidance. "Digne de foi" typically means "credible" and "utile" means "useful." This indicates that Parliament intended the Court to make a determination whether

information proffered by the parties is credible and will be useful to the Court before admitting it into evidence.

[127] Additional guidance can be found in *Mooring v. Canada (CNLC)*, [1996] 1 S.C.R. 75 at paragraph 27 (page 92). In that decision, Justice Sopinka indicates that it is the Parole Board's job to consider any reliable information "provided it has not been obtained improperly." Paragraph 36 (page 96) describes the test as "reliable and persuasive" and expressly excludes information derived from torture as an extreme example. For reliability, one examines the source.

[128] "Reliable" therefore indicates evidence that is credible, that is somehow worthy of belief. "Appropriate" indicates useful to the Court in making its decision, and it also refers to properly collected, an interpretation that is further reinforced by subsection 83(1.1) which provides a clear example of inappropriate evidence.

[129] This provision therefore is not vague. The definition of "reliable and appropriate" gives guidance for legal debate: in moving to exclude information from evidence a party can argue (and in this proceeding Mr. Mahjoub has argued) that the information is not credible, is not useful to the Court, or was obtained improperly. Further, the provision gives named persons, the Ministers, and government agencies notice that information that they seek to tender as evidence in security certificate proceedings before the Federal Court must be worthy of belief, useful, and appropriately obtained, and it clearly gives them notice that information believed on reasonable grounds to be derived from torture or cruel, inhuman and degrading treatment will not be

admissible. This in turn circumscribes the government's discretion as to how and where it collects information in support of security certificates.

ii. Does this provision allow for evidence that is disproportionate or grossly disproportionate to the objective of presenting fair and useful evidence?

[130] In *Jaballah (Re)*, 2010 FC 79 at paragraph 52, Justice Dawson makes the following remarks in response to Mr. Jaballah's challenge to the more relaxed evidentiary standard in security certificate proceedings:

> The fact that Parliament has prescribed a different criteria for the admission of evidence in the context of security certificate proceedings does not by itself make the proceeding unfair or non-compliant with the principles of fundamental justice. Paragraph 83(1)(*h*) of the Act reflects the context of national security proceedings: for example, the difficulty admitting evidence that may have been received from a foreign intelligence agency that would constitute hearsay evidence. The discretion given in paragraph 83(1)(*h*) of the Act must be exercised on a principled basis in accordance with the rule of law and applicable principles of fundamental justice.

[131] While Mr. Jaballah did not challenge the provision directly because "it would pose significant difficulties for the state, given the nature of national security investigations, to be required to comply with the rules relating to the admissibility of evidence in civil or criminal proceedings" (at paragraph 51), I see no reason to deviate from Justice Dawson's conclusion. The provision does not give the judge "unfettered discretion" to admit information that would render the proceedings unfair: the judge's discretion must be exercised in accordance with the principles of fundamental justice.

[132] In *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 [*Lavallee*], the Alberta Court of Appeal gave a more restrictive evidentiary provision as broad and discretionary interpretation as possible. At paragraph 14, the Alberta Court of Appeal recognizes the right and even the obligation of the panel to consider the admissibility of evidence and considers it inappropriate to "set out a laundry list of situations in which a panel can or should exercise that right". The Alberta Court of Appeal adds, at paragraph 16, that the impugned provision "says that the Commission is not bound by the rules of evidence; it does not say that it is obliged to ignore them entirely". Finally, at paragraph 17, the Alberta Court of Appeal observes that "[i]t does not follow that Commission panels are required to hold a *voir dire* as a matter of course to determine the admissibility of evidence. That is not required by the legislation or by the principles of procedural fairness."

[133] Discretion is similarly a positive aspect of the provision in Division 9 proceedings, so long as it is exercised within the constraints of "reliable and appropriate" described above. Information that is "disproportionate or grossly disproportionate" to the "legitimate goal of presenting fair and useful evidence", as Mr. Mahjoub puts it, would not be admissible because it would not conform to the "appropriateness" requirement. As in *Lavallee*, the judge in a Division 9 proceeding is not required to ignore the rules of evidence entirely, for those rules largely developed out of concerns for reliability and appropriateness.

[134] Paragraph 83(1)(*h*) does not deprive the Court of the discretion to exclude evidence that would render the proceedings unfair. In fact, the word "may" suggests the contrary, that the Court has the discretion not to receive any particular piece of information into evidence

(*Jaballah (Re)*, 2010 FC 224 at paragraph 63). The remedy in *Harkat*, implemented in these proceedings, is an example of the exclusion of unfair evidence. Again, this discretion must be exercised in accordance with the principles of fundamental justice.

[135] Mr. Mahjoub asserts a right to the "presumptive inadmissibility" of hearsay evidence. He bases his assertion on *R. v. Khelawon*, 2006 SCC 57 [*Khelawon*], and he argues that the party tendering hearsay evidence must bear the burden of establishing its reliability before it is admitted into evidence.

[136] Because paragraph 83(1)(*h*) requires that evidence be "reliable and appropriate", the burden *is* on the party tendering hearsay evidence, or any other evidence, to establish its reliability (and appropriateness) as I explained at length in my Reasons for Order on the subsection 83(1.1) motion (*Mahjoub (Re)*, 2010 FC 787 at paragraphs 42 and 46). Nonetheless, given the expeditious nature of the proceedings mandated by paragraph 83(1)(*a*) and the fact that these are not criminal proceedings, it would be inappropriate to formalistically hold a *voir dire* every time hearsay evidence is tendered, as the Alberta Court of Appeal remarks in *Lavallee, above*, and contrary to the practice in criminal law (*Khelawon* at paragraph 47). As has occurred in these proceedings, upon the objection of a party as the opposing party attempts to introduce evidence, or upon the Court's own initiative, the Court can receive submissions on the reliability and appropriateness of the evidence a party seeks to tender and then rule on its admissibility. Such rulings have been made in an *ad hoc* fashion throughout the proceedings, but the motion to exclude evidence under subsection 83(1.1) and the motion to exclude unsourced evidence are

also examples of the Special Advocates requiring the Ministers to prove the reliability and appropriateness of the evidence upon which they rely.

[137] While paragraph 83(1)(*h*), in allowing the admission evidence that would otherwise be inadmissible, does away with the presumptive inadmissibility of hearsay evidence, it does not create a presumption of *admissibility* of hearsay. Nevertheless, in practice throughout these proceedings, the Court has required the opposing party to "raise the issue" of the reliability or appropriateness of the evidence (as Mr. Mahjoub conceded on the subsection 83(1.1) motion, Reasons for Order at paragraph 54), which the party tendering the evidence must then rebut. The burden of establishing admissibility remains on the party adducing the evidence.

[138] Like the "necessity and reliability" test for hearsay exceptions in criminal law, one must distinguish between the "reliability threshold" for admissibility and the "ultimate reliability" of the evidence that will determine how the trier of fact weighs it (*Khelawon* at paragraph 3). In doing so, however, the judge must take into account all of the factors that influence the information's reliability, and most importantly those factors that present or overcome dangers to the fairness of the trial, not just the circumstances in which the information was obtained (*ibid.* at paragraph 55).

[139] The constitutional right engaged in requiring that the evidence before the Court be "reliable and appropriate" is the same right engaged in criminal proceedings, in which to be admissible evidence (particularly hearsay) must be "necessary and reliable." Justice Charron elaborates on this right at paragraphs 48 and 49 in *Khelawon*:

> …the constitutional right guaranteed under s. 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defence, the fairness of the trial must also be assessed in the light of broader societal concerns: see *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 69-76. In the context of an admissibility inquiry, society's interest in having the trial process arrive at the truth is one such concern.
>
> The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it…

[140] Concerning the admissibility of hearsay evidence in security certificate proceedings, I am satisfied that the "reliable and appropriate" requirement of paragraph 83(1)(*h*) safeguards Mr. Mahjoub's fair trial rights. In my view, this reasoning also applies to other evidence. I find, consequently, that the provision is not unconstitutional.

iii. Does this standard and subsection 83(1.1) infringe Mr. Mahjoub's right to a fair trial by insufficiently guarding against unreliable evidence?

[141] Mr. Mahjoub submits that he has a right to be protected against information derived from torture but directs me to no specific provision of the *Charter*. In my view, this right is subsumed under his right to a fair trial provided by section 7 of the *Charter*.

[142] Although he has obtained the exclusion of significant evidence in this proceeding as a result of subsection 83(1.1) (see *Mahjoub (Re)*, 2010 FC 787), Mr. Mahjoub argues that this provision does not go far enough in protecting his rights. He submits that subsection 83(1.1) is unconstitutional because it does not create a rebuttable presumption that all information originating from foreign agencies known to engage in torture is derived from torture. He also contends that the *IRPA* is deficient because it does not require the Service to determine the original source of its information and screen it to remove all information derived from torture prior to the signing of the security certificate by the Ministers.

[143] Mr. Mahjoub appears to be arguing that without a "rebuttable presumption", the provision is not compliant with the *Charter*. I disagree. What is required to satisfy Mr. Mahjoub's fair trial rights is that information obtained or derived from torture be excluded from the evidence. The provision expressly provides for this. Mr. Mahjoub has not persuaded me that a rebuttal presumption is required. The designated judge will make the determination on the basis of the evidence in each circumstance. The absence of such a presumption did not prevent me from excluding significant evidence in the Special Advocates' motion to include evidence pursuant to s. 83(1.1) of the *IRPA*.

[144] In addition, Division 9 of the *IRPA* is not unconstitutional simply because it does not force the Service to adopt a particular policy that would screen out information derived from torture or cruel, inhuman and degrading treatment. A named person's rights are not engaged by the Service's collection of information derived from torture or cruel, inhuman and degrading treatment until that information is tendered as evidence in a legal proceeding affecting his or her rights. In this proceeding, the Court can only examine the impugned provisions for infringement of Mr. Mahjoub's rights. If information derived from torture cannot be used to support a security certificate signed against Mr. Mahjoub without violating his right to a fair trial due to its inherent lack of reliability, a sufficient remedy is the exclusion of that information from the proceeding. Subsection 83(1.1) expressly provides for the exclusion of such information.

[145] The only significance of the Service's inadequate screening policy in this proceeding is that it failed to convince me that the Service had prevented any information derived from torture from appearing as support for the Security Intelligence Report (SIR) on which the security certificate is based (*Mahjoub (Re)*, 2010 FC 787 at paragraph 90). Beyond enforcing subsection 83(1.1), it would encroach upon the separation of powers for this Court to require the Service to implement a particular policy. It is for the Service to adopt its own internal reforms or for the legislature to mandate them with legislative amendments.

g. Does the security certificate regime infringe Mr. Mahjoub's right to silence under section 7 and section 13 of the Charter?

[146] Mr. Mahjoub submits that the Division 9 regime infringes his right to silence guaranteed by sections 7 and 13 of the *Charter* by depriving him of an informed, voluntary choice to testify or not in his own defence.

i. Does section 13 apply to these proceedings?

[147] The Ministers contend that section 13 of the *Charter* does not apply to the issue raised by Mr. Mahjoub, relying on *Knutson v. S.R.N.A.* (1990), 75 D.L.R. (4th) 723 (Sask. C.A.).

[148] I reproduce section 13 of the *Charter* below for ease of reference.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.	13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

[149] Mr. Mahjoub did not testify in this proceeding. Consequently, the only manner in which this *Charter* right might be applicable to these proceedings is if the Ministers sought to adduce Mr. Mahjoub's testimony from the previous security certificate proceedings before Justice Nadon. This issue was addressed by Justice Dawson in one of the common issues decisions (*Jaballah (Re)*, 2010 FC 224 at paragraphs 84 and 86, relying in part on *Dubois v. The Queen*, [1985] 2 S.C.R. 350). I agree with Justice Dawson that to allow the Ministers to use

Mr. Mahjoub's previous testimony would be indirectly compelling him to testify, and the Ministers have not been permitted to do so. Further, the Ministers are not seeking to adduce Mr. Mahjoub's testimony from other proceedings. This issue does not arise. I conclude that section 13 of the *Charter* finds no application in the circumstances.

ii. Given the in camera evidence, can Mr. Mahjoub's choice to testify or not to testify be considered an informed decision?

[150] *Application under section 83.28 of the Criminal Code (Re),* 2004 SCC 42, confirms that the right against self-incrimination is a principle of fundamental justice, and as such state compulsion to testify engages the liberty interest under section 7 of the *Charter* (at paragraphs 67, 69 and 70). The jurisprudence also teaches that in order for this right to be respected, a criminal accused needs to be able to make an informed choice to testify **(***R. v. Underwood*, [1998] 1 S.C.R. 77 at paragraph 5**).** There is a dearth of case law speaking to this right outside of the criminal context.

[151] Even if I accept that this is an administrative case with "true penal consequences" as described in *Wigglesworth*, I am not persuaded that the mere existence of *in camera* evidence deprives the named person of his or her ability to make an informed choice whether or not to testify. Paragraph 83(1)(*e*) requires that the named person be provided with summaries that sufficiently inform him or her of the Ministers' case that he or she is able to meet it. Necessarily, this entails disclosure of enough detail to make an informed choice whether or not to testify, which is an integral part of meeting the Ministers' case.

[152] Since the Division 9 regime requires the named person to be informed of the case to meet with enough detail that he or she is able to meet it, I am not persuaded that the existence of *in camera* evidence prevents Mr. Mahjoub from making an informed choice whether or not to testify. Moreover, as determined in the *Reasonableness Decision*, I am satisfied that Mr. Mahjoub was reasonably informed of the Ministers' case (see the *Reasonableness Decision* at paragraph 173).

h. Is the standard of proof of "reasonable grounds to believe" disproportionately low given the consequences of the security certificate procedure and the right of due process?

[153] Mr. Mahjoub challenges the standard of proof required for a security certificate, "reasonable grounds to believe", claiming that it is disproportionately low given the rights at stake. He argues that the Ministers must prove their case to at least the civil standard of proof, if not beyond a reasonable doubt.

[154] The standard is found in section 33 of the *IRPA*. Section 33 of the *IRPA* reads as follows:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur. [Emphasis added]	**33.** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir. [Je souligne]

[155] Detention is also authorized on a "reasonable grounds to believe" standard in section 81. For ease of reference, I reproduce this provision below:

81. The Minister and the Minister of Citizenship and Immigration may issue a warrant for the arrest and detention of a person who is named in a certificate if they have reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal. [Emphasis added]	81. Le ministre et le ministre de la Citoyenneté et de l'Immigration peuvent lancer un mandat pour l'arrestation et la mise en détention de la personne visée par le certificat dont ils ont des motifs raisonnables de croire qu'elle constitue un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi. [Je souligne]

[156] Justice Dawson has already decided this issue in *Jaballah (Re)*, 2010 FC 79, a decision that is binding on this proceeding with Mr. Mahjoub's agreement (see the Order of this Court dated March 15, 2010). At paragraph 2, she explains that "Mr. Jaballah says that he cannot have a fair hearing because the Act does not require the Ministers to establish their case on a balance of probabilities." The learned Justice concludes at paragraphs 53 and 54 that

> …A particular standard of proof was not found to be a constituent element of a fair hearing in Charkaoui I. The Supreme Court endorsed, without adverse comment, the application of the reasonable grounds to believe standard in the context of a detention review of a person named in a security certificate…
>
> As just stated, in Charkaoui I at paragraph 39, the Supreme Court said that the reasonable grounds to believe standard was the appropriate standard for judges to apply when reviewing the continuation of detention. Before the Federal Court of Appeal, Mr. Charkaoui had argued that such standard, adopted by Parliament to justify the issuance of a security certificate, was too minimal, and that the standard should be more stringent so as to require that the acts relied upon to establish inadmissibility be proved according to

> the balance of probabilities. At paragraphs 102 to 107 of its reasons, the Court of Appeal, cited above at paragraph 17, rejected that argument. By virtue of the observation of the Supreme Court of Canada at paragraph 39, that finding appears not to have been set aside by the Supreme Court of Canada. It would thus remain binding on this Court.

[157] At paragraphs 114 and 115 of *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 [*Mugesera*], the Supreme Court describes the standard as follows:

> The first issue raised by s. 19(1)(*j*) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.).
>
> In imposing this standard in the Immigration Act in respect of war crimes and crimes against humanity, Parliament has made clear that these most serious crimes deserve extraordinary condemnation. As a result, no person will be admissible to Canada if there are reasonable grounds to believe that he or she has committed a crime against humanity, even if the crime is not made out on a higher standard of proof. [Emphasis added.]

[158] Justice Dawson notes, and I concur, that the Supreme Court in *Charkaoui I* at paragraph 39 confirmed that "reasonable grounds to believe" was the appropriate standard to apply to a detention review pursuant to subsection 82(1) of the *IRPA*. Before the Federal Court of Appeal, Mr. Charkaoui had argued that the standard was inappropriate because it was too

minimal. In *Charkaoui (Re)* (2004), 247 D.L.R. (4th) 405 at paragraphs 102 to 107, the majority rejects this argument. The Supreme Court endorses the Court of Appeal's view.

[159] Mr. Mahjoub contends that even if he mounts a defence, he is incapable of rebutting the Ministers' case because the standard of proof is so low.

[160] This argument, too, has been rejected in this proceeding. At paragraphs 44 and 45 of *Jaballah (Re)*, 2010 FC 79, Justice Dawson rejects Mr. Jaballah's submission that:

> …it is possible to conclude that it is probable a person is not a member of a terrorist organization and still have a reasonable belief that the person is a member. If the evidence establishes a probability, that is, anything more likely than not, this would preclude reasonable grounds for belief of the contrary.
>
> Further, notwithstanding the interpretive rule contained in section 33 of the Act, where there is conflicting evidence on a point, the Court must resolve such conflict by deciding which version of events is more likely to have occurred. A security certificate cannot be found to be reasonable if the Court is satisfied that the preponderance of credible evidence is contrary to the allegations of the Ministers.

[161] In addition, Justice Mosley at paragraph 101 of *Almrei* writes:

> …When there has been extensive evidence from both parties and there are competing versions of the facts before the Court, the reasonableness standard requires a weighing of the evidence and findings of which facts are accepted. A certificate can not be held to be reasonable if the Court is satisfied that the preponderance of the evidence is to the contrary of that proffered by the Ministers.

[162] In my view, there is no question that Mr. Mahjoub can rebut the Ministers' case on the "reasonable grounds to believe" standard of proof by presenting his own case. This issue has also been decided.

[163] The above cited comments in *Charkaoui I* coupled with the Supreme Court's remarks in *Mugasera* are binding on this Court, as is Justice Dawson's decision in *Jaballah*. The issue is therefore decided.

[164] Given the clear jurisprudence on this issue, I find that it was an abuse of the Court's process for Public Counsel to raise the matter again in these proceedings (See *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at paragraphs 35-55).

i. Did the IRPA *regime allow the Ministers to arbitrarily detain Mr. Mahjoub?*

[165] Mr. Mahjoub contends that because of Division 9 of the *IRPA*'s alleged unconstitutionality, the detention provision of the regime, section 81, allows for unlawful and therefore arbitrary detention. He makes a more specific supplementary argument that the Division 9 regime can be classified as "preventive justice" and therefore requires that the individual concerned be permitted to live a normal life in proportion to the proven danger to society that he or she presents.

i. Is this a situation of preventive justice which requires that the person concerned be allowed to live a normal life in proportion to the alleged and proven danger?

[166] Mr. Mahjoub makes an analogy between the Division 9 regime and another regime designed to prevent harm when someone is considered a risk to public safety, namely section 810.1 of the *Criminal Code*. As explained in *R. v. Budreo* (2000), 46 O.R. (3d) 481 (C.A.), this section permits the court to impose a recognizance on an individual, even if that individual has not committed an offence before. At paragraph 25, the Ontario Court of Appeal characterizes the provision as "preventative," not "punitive." To characterize the measure as "punitive", according to the Ontario Court of Appeal at paragraph 29, the measure must entail "true penal sanctions" as described in *Wigglesworth*. It concludes at paragraph 30 that section 810.1's "purpose is not to punish crime but to prevent crime from happening. Its sanctions are not punitive, nor are they intended to redress a wrong; they are activity and geographic restrictions on a person's liberty intended to protect a vulnerable group in our society from future harm." Most importantly, at paragraph 39 the Ontario Court of Appeal concludes:

> I think it fair to conclude that detention or imprisonment under a provision that does not charge an offence would be an unacceptable restriction on a defendant's liberty and would be contrary to the principles of fundamental justice. But as Then J. observed, the restrictions contemplated by s. 810.1 permit a defendant to lead a reasonably normal life.

[167] Also relying on *Noble c. Teale*, [2006] R.J.Q. 181 (C.S.) and *R. v. Dyck* (2005), 203 C.C.C. (3d) 365 (Ont. S.C.J.), Mr. Mahjoub argues that since Division 9 allows for imprisonment or release on stringent conditions without charge, the detention violates a principle of fundamental justice and violates Mr. Mahjoub's right pursuant to section 9 of the *Charter* not to be arbitrarily detained. The preventative response of the state to a threat, he argues, must be proportionate to the risk assessed and must insofar as possible allow the named person to live a normal life.

ii. If so, does the IRPA *regime comply with this requirement?*

[168] It is true that the Division 9 regime, particularly section 81, permits detention without charge, entirely on the basis of risk. I reproduce the detention provision below:

81. The Minister and the Minister of Citizenship and Immigration may issue a warrant for the arrest and detention of a person who is named in a certificate if they have reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.	**81**. Le ministre et le ministre de la Citoyenneté et de l'Immigration peuvent lancer un mandat pour l'arrestation et la mise en détention de la personne visée par le certificat dont ils ont des motifs raisonnables de croire qu'elle constitue un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi.

[169] The Appellants in *Charkaoui I* raised the issue of arbitrary detention with respect to Division 9 of the *IRPA*. The Supreme Court dismissed their argument at paragraph 89 as follows:

> I would reject Mr. Almrei's argument that automatic detention of foreign nationals is arbitrary because it is effected without regard to the personal circumstances of the detainee. Detention is not arbitrary where there are "standards that are rationally related to the purpose of the power of detention": P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 46-5. The triggering event for the detention of a foreign national is the signing of a certificate stating that the foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. The security ground is based on the danger posed by the named person, and therefore provides a rational foundation for the detention…in the national security context, the signature of a certificate under s. 77 of the *IRPA* on the ground of security is necessarily related to the dangerousness of the individual. While not all the other grounds for the issuance of a certificate under s. 77(1) are conclusive of the danger posed by the named person, danger is not the only constitutional basis upon

> which an individual can be detained, and arbitrariness of detention under the other grounds was not argued.

[170] Section 81 requires the Ministers to be satisfied that the named person poses a threat to national security, the safety of any person, or will not appear for proceedings for removal before they can detain the named person. Pursuant to section 82, the Federal Court judge reviewing the named person's detention or conditions of release must carefully examine the individual's circumstances and the specific measures required to neutralize the threat proven by the Ministers. Division 9 of the *IRPA* therefore takes into account the individual's circumstances and ensures that detention is a proportionate response to the threat on an ongoing basis.

[171] The Supreme Court in *Charkaoui I* has established that detention under the security certificate regime is not arbitrary. The Supreme Court found that this is particularly so when the certificate is signed on security grounds. The security grounds speak to the danger posed by the named person and therefore provides a rational foundation for detention.

[172] Further, safeguards are built into the scheme that provide for a judicial review of the detention. The first of such reviews must be conducted within 48 hours of the detention, and every six months thereafter. In conducting the review, a judge must be satisfied that the named person's release under conditions would be injurious to national security or endanger the safety of any person in order to continue the detention (s. 82(1) to (5)).

[173] In the national security context where a certificate is issued on security grounds which are necessarily related to dangerousness of the individual, I am satisfied that detention in these circumstances is not arbitrary.

Conclusion

[174] In conclusion, on the basis of the above reasoning, I find that Mr. Mahjoub's challenges to section 33 and Division 9 of the *IRPA* as well as his challenge to certain provisions of an *Act to amend the IRPA* ought to be dismissed. The various provisions at issue, considered individually and collectively, do not violate Mr. Mahjoub's *Charter* rights.

[175] Further, I adopt, for the purposes of this motion, my findings disposing of Mr. Mahjoub's challenge to the constitutionality of certain provisions of the *CSIS Act* found in my decision relating to Mr. Mahjoub's motion to exclude evidence obtained by warrants authorized pursuant to section 21 of the *CSIS Act*.

[176] In the result, Mr. Mahjoub's constitutional challenges are dismissed.

ORDER

THIS COURT ORDERS that the application is dismissed.

"Edmond P. Blanchard"

Judge

ANNEX I – Impugned Statutory Provisions

4. Division 9 of Part 1 of the Act is replaced by the following:

[Sections 76-87.2 of the current *IRPA*]

6. In sections 7 to 10, "the Act" means the *Immigration and Refugee Protection Act*.

7. (3) If, on the day on which this Act comes into force, the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration sign a new certificate and refer it to the Federal Court under subsection 77(1) of the Act, as enacted by section 4 of this Act, the person who is named in the certificate

(*a*) shall, if they were detained under Division 9 of Part 1 of the Act when this Act comes into force, remain in detention without a new warrant for their arrest and detention having to be issued under section 81 of the Act, as enacted by section 4 of this Act; or

(*b*) shall, if they were released from detention under conditions under Division 9 of Part 1 of the Act when this Act comes into force, remain released under the same conditions unless a warrant for their arrest and detention is issued under section 81 of the Act, as enacted by section 4 of this Act.

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

76. The following definitions apply in this Division.

4. La section 9 de la partie 1 de la même loi est remplacée par ce qui suit :

[Les articles 76-87.2 de la LIPR actuelle]

6. Aux articles 7 à 10, « Loi » s'entend de la *Loi sur l'immigration et la protection des réfugiés*.

7. (3) Dans le cas où, à la date d'entrée en vigueur de la présente loi, le ministre de la Sécurité publique et de la Protection civile et le ministre de la Citoyenneté et de l'Immigration déposent à la Cour fédérale un nouveau certificat au titre du paragraphe 77(1) de la Loi, édicté par l'article 4 de la présente loi, la personne visée par le certificat qui est détenue au titre de la section 9 de la partie 1 de la Loi à l'entrée en vigueur de la présente loi demeure en détention sans que les ministres aient à lancer un mandat pour son arrestation et sa détention au titre de l'article 81 de la Loi, édicté par l'article 4 de la présente loi; celle qui est en liberté sous condition au titre de la section 9 de la partie 1 de la Loi à l'entrée en vigueur de la présente loi demeure en liberté aux mêmes conditions, à moins que les ministres ne lancent un mandat pour son arrestation et sa détention au titre de l'article 81 de la Loi, édicté par l'article 4 de la présente loi.

33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

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

"information"
« renseignements »
"information" means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization.
"judge"
« juge »
"judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.

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

77. (1) The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court.

77. (1) Le ministre et le ministre de la Citoyenneté et de l'Immigration 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.

(2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.

(2) Le ministre dépose en même temps que le certificat les renseignements et autres éléments de preuve justifiant ce dernier, ainsi qu'un résumé de la preuve qui permet à la personne visée d'être suffisamment informée de sa thèse et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon le ministre, à la sécurité nationale ou à la sécurité d'autrui.

(3) Once the certificate is referred, no proceeding under this Act respecting the person who is named in the certificate — other than proceedings relating to sections 82 to 82.3, 112 and 115 — may be commenced or continued until the judge determines whether the certificate is reasonable.

(3) Il ne peut être procédé à aucune instance visant la personne au titre de la présente loi tant qu'il n'a pas été statué sur le certificat. Ne sont pas visées les instances relatives aux articles 82 à 82.3, 112 et 115

78. The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not.

78. Le juge décide du caractère raisonnable du certificat et l'annule s'il ne peut conclure qu'il est raisonnable.

79. An appeal from the determination may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.

79. La décision n'est susceptible d'appel devant la Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci; toutefois, les décisions interlocutoires ne sont pas susceptibles d'appel.

80. A certificate that is determined to be reasonable is conclusive proof that the person named in it is inadmissible and is a removal order that is in force without it being necessary to hold or continue an examination or admissibility hearing.

80. Le certificat jugé raisonnable fait foi de l'interdiction de territoire et constitue une mesure de renvoi en vigueur, sans qu'il soit nécessaire de procéder au contrôle ou à l'enquête.

81. The Minister and the Minister of Citizenship and Immigration may issue a warrant for the arrest and detention of a person who is named in a certificate if they have reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.

81. Le ministre et le ministre de la Citoyenneté et de l'Immigration peuvent lancer un mandat pour l'arrestation et la mise en détention de la personne visée par le certificat dont ils ont des motifs raisonnables de croire qu'elle constitue un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi.

82. (1) A judge shall commence a review of the reasons for the person's continued detention within 48 hours after the detention begins.

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

(2) Until it is determined whether a certificate is reasonable, a judge shall commence another review of the reasons for the person's continued detention at least once in the six-month period following the conclusion of each preceding review.

(2) Tant qu'il n'est pas statué sur le certificat, le juge entreprend un autre contrôle des motifs justifiant le maintien en détention au moins une fois au cours des six mois suivant la conclusion du dernier contrôle.

(3) A person who continues to be detained after a certificate is determined to be reasonable may apply to the Federal Court for another review of the reasons for their

(3) La personne dont le certificat a été jugé raisonnable et qui est maintenue en détention peut demander à la Cour fédérale un autre contrôle des motifs justifiant ce maintien une

continued detention if a period of six months has expired since the conclusion of the preceding review.

fois expiré un délai de six mois suivant la conclusion du dernier contrôle.

(4) A person who is released from detention under conditions may apply to the Federal Court for another review of the reasons for continuing the conditions if a period of six months has expired since the conclusion of the preceding review.

(4) La personne mise en liberté sous condition peut demander à la Cour fédérale un autre contrôle des motifs justifiant le maintien des conditions une fois expiré un délai de six mois suivant la conclusion du dernier contrôle.

(5) On review, the judge

(5) Lors du contrôle, le juge :

(*a*) shall order the person's detention to be continued if the judge is satisfied that the person's release under conditions would be injurious to national security or endanger the safety of any person or that they would be unlikely to appear at a proceeding or for removal if they were released under conditions; or

a) ordonne le maintien en détention s'il est convaincu que la mise en liberté sous condition de la personne constituera un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi si elle est mise en liberté sous condition;

(*b*) in any other case, shall order or confirm the person's release from detention and set any conditions that the judge considers appropriate.

b) dans les autres cas, ordonne ou confirme sa mise en liberté et assortit celle-ci des conditions qu'il estime indiquées.

82.1 (1) A judge may vary an order made under subsection 82(5) on application of the Minister or of the person who is subject to the order if the judge is satisfied that the variation is desirable because of a material change in the circumstances that led to the order.

82.1 (1) Le juge peut modifier toute ordonnance rendue au titre du paragraphe 82(5) sur demande du ministre ou de la personne visée par l'ordonnance s'il est convaincu qu'il est souhaitable de le faire en raison d'un changement important des circonstances ayant donné lieu à l'ordonnance.

(2) For the purpose of calculating the six-month period referred to in subsection 82(2), (3) or (4), the conclusion of the preceding review is deemed to have taken place on the day on which the decision under subsection (1) is made.

(2) Pour le calcul de la période de six mois prévue aux paragraphes 82(2), (3) ou (4), la conclusion du dernier contrôle est réputée avoir eu lieu à la date à laquelle la décision visée au paragraphe (1) est rendue.

82.2 (1) A peace officer may arrest and detain a person released under section 82 or 82.1 if the officer has reasonable grounds to

82.2 (1) L'agent de la paix peut arrêter et détenir toute personne mise en liberté au titre des articles 82 ou 82.1 s'il a des motifs

believe that the person has contravened or is about to contravene any condition applicable to their release.

(2) The peace officer shall bring the person before a judge within 48 hours after the detention begins.

(3) If the judge finds that the person has contravened or was about to contravene any condition applicable to their release, the judge shall

(*a*) order the person's detention to be continued if the judge is satisfied that the person's release under conditions would be injurious to national security or endanger the safety of any person or that they would be unlikely to appear at a proceeding or for removal if they were released under conditions;

(*b*) confirm the release order; or

(*c*) vary the conditions applicable to their release.

(4) For the purpose of calculating the six-month period referred to in subsection 82(2), (3) or (4), the conclusion of the preceding review is deemed to have taken place on the day on which the decision under subsection (3) is made.

82.3 An appeal from a decision made under any of sections 82 to 82.2 may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.

82.4 The Minister may, at any time, order that a person who is detained under any of sections 82 to 82.2 be released from

raisonnables de croire qu'elle a contrevenu ou est sur le point de contrevenir à l'une ou l'autre des conditions de sa mise en liberté.

(2) Le cas échéant, il la conduit devant un juge dans les quarante-huit heures suivant le début de la détention.

(3) S'il conclut que la personne a contrevenu ou était sur le point de contrevenir à l'une ou l'autre des conditions de sa mise en liberté, le juge, selon le cas :

a) ordonne qu'elle soit maintenue en détention s'il est convaincu que sa mise en liberté sous condition constituera un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi si elle est mise en liberté sous condition;

b) confirme l'ordonnance de mise en liberté;

c) modifie les conditions dont la mise en liberté est assortie.

(4) Pour le calcul de la période de six mois prévue aux paragraphes 82(2), (3) ou (4), la conclusion du dernier contrôle est réputée avoir eu lieu à la date à laquelle la décision visée au paragraphe (3) est rendue.

82.3 Les décisions rendues au titre des articles 82 à 82.2 ne sont susceptibles d'appel devant la Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci; toutefois, les décisions interlocutoires ne sont pas susceptibles d'appel.

82.4 Le ministre peut, en tout temps, ordonner la mise en liberté de la personne détenue au titre de l'un des articles 82 à 82.2

detention to permit their departure from Canada.

pour lui permettre de quitter le Canada.

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 :

(*a*) the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

a) le juge 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;

(*b*) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;

b) il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à titre d'avocat spécial dans le cadre de l'instance, après avoir entendu l'intéressé et le ministre et accordé une attention et une importance particulières aux préférences de l'intéressé;

(*c*) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

c) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(*d*) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(*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

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;

be injurious to national security or endanger the safety of any person if disclosed;

(*f*) the judge shall ensure the confidentiality of all information or other evidence that is withdrawn by the Minister;

(*g*) the judge shall provide the permanent resident or foreign national and the Minister with an opportunity to be heard;

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

(*i*) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national; and

(*j*) the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it.

(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.

(1.2) If the permanent resident or foreign national requests that a particular person be appointed under paragraph (1)(*b*), the judge shall appoint that person unless the judge is satisfied that

(*a*) the appointment would result in the

f) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance;

g) il donne à l'intéressé et au ministre la possibilité d'être entendus;

h) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

i) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'intéressé;

j) il ne peut fonder sa décision sur les renseignements et autres éléments de preuve que lui fournit le ministre et les remet à celui-ci s'il décide qu'ils ne sont pas pertinents ou si le ministre les retire.

(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.

(1.2) Si l'intéressé demande qu'une personne en particulier soit nommée au titre de l'alinéa (1)*b*), le juge nomme cette personne, à moins qu'il estime que l'une ou l'autre des situations ci-après s'applique :

a) la nomination de cette personne

proceeding being unreasonably delayed;

(*b*) the appointment would place the person in a conflict of interest; or

(*c*) the person has knowledge of information or other evidence whose disclosure would be injurious to national security or endanger the safety of any person and, in the circumstances, there is a risk of inadvertent disclosure of that information or other evidence.

(2) For greater certainty, the judge's power to appoint a person to act as a special advocate in a proceeding includes the power to terminate the appointment and to appoint another person.

84. Section 83 — other than the obligation to provide a summary — and sections 85.1 to 85.5 apply to an appeal under section 79 or 82.3, and to any further appeal, with any necessary modifications.

85. (1) The Minister of Justice shall establish a list of persons who may act as special advocates and shall publish the list in a manner that the Minister of Justice considers appropriate to facilitate public access to it.

(2) The *Statutory Instruments Act* does not apply to the list.

(3) The Minister of Justice shall ensure that special advocates are provided with adequate administrative support and resources.

85.1 (1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the

retarderait indûment l'instance;

b) la nomination de cette personne mettrait celle-ci en situation de conflit d'intérêts;

c) cette personne a connaissance de renseignements ou d'autres éléments de preuve dont la divulgation porterait atteinte à la sécurité nationale ou à la sécurité d'autrui et, dans les circonstances, ces renseignements ou autres éléments de preuve risquent d'être divulgués par inadvertance.

(2) Il est entendu que le pouvoir du juge de nommer une personne qui agira à titre d'avocat spécial dans le cadre d'une instance comprend celui de mettre fin à ses fonctions et de nommer quelqu'un pour la remplacer.

84. L'article 83 — sauf quant à l'obligation de fournir un résumé — et les articles 85.1 à 85.5 s'appliquent, avec les adaptations nécessaires, à l'appel interjeté au titre des articles 79 ou 82.3 et à tout appel subséquent.

85. (1) Le ministre de la Justice dresse une liste de personnes pouvant agir à titre d'avocat spécial et publie la liste de la façon qu'il estime indiquée pour la rendre accessible au public.

2) La *Loi sur les textes réglementaires* ne s'applique pas à la liste.

(3) Le ministre de la Justice veille à ce que soient fournis à tout avocat spécial un soutien administratif et des ressources adéquats.

85.1 (1) L'avocat spécial a pour rôle de défendre les intérêts du résident permanent ou de l'étranger lors de toute audience tenue à huis clos et en l'absence de celui-ci et de son conseil dans le cadre de toute instance visée à l'un des articles 78 et 82 à 82.2.

permanent resident or foreign national and their counsel.

(2) A special advocate may challenge

(*a*) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and

(*b*) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.

(3) For greater certainty, the special advocate is not a party to the proceeding and the relationship between the special advocate and the permanent resident or foreign national is not that of solicitor and client.

(4) However, a communication between the permanent resident or foreign national or their counsel and the special advocate that would be subject to solicitor-client privilege if the relationship were one of solicitor and client is deemed to be subject to solicitor-client privilege. For greater certainty, in respect of that communication, the special advocate is not a compellable witness in any proceeding.

85.2 A special advocate may

(*a*) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;

(*b*) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or

(2) Il peut contester :

a) les affirmations du ministre voulant que la divulgation de renseignements ou autres éléments de preuve porterait atteinte à la sécurité nationale ou à la sécurité d'autrui;

b) la pertinence, la fiabilité et la suffisance des renseignements ou autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil, et l'importance qui devrait leur être accordée.

(3) Il est entendu que l'avocat spécial n'est pas partie à l'instance et que les rapports entre lui et l'intéressé ne sont pas ceux qui existent entre un avocat et son client.

(4) Toutefois, toute communication entre l'intéressé ou son conseil et l'avocat spécial qui serait protégée par le secret professionnel liant l'avocat à son client si ceux-ci avaient de tels rapports est réputée être ainsi protégée, et il est entendu que l'avocat spécial ne peut être contraint à témoigner à l'égard d'une telle communication dans quelque instance que ce soit.

85.2 L'avocat spécial peut :

a) présenter au juge ses observations, oralement ou par écrit, à l'égard des renseignements et autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil;

b) participer à toute audience tenue à huis clos et en l'absence de l'intéressé et de son conseil, et contre-interroger les témoins;

foreign national and their counsel; and

(*c*) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.

c) exercer, avec l'autorisation du juge, tout autre pouvoir nécessaire à la défense des intérêts du résident permanent ou de l'étranger.

85.3 A special advocate is not personally liable for anything they do or omit to do in good faith under this Division.

85.3 L'avocat spécial est dégagé de toute responsabilité personnelle en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans le cadre de la présente section.

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.

(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.

(3) If the special advocate is authorized to communicate with a person, the judge may prohibit that person from communicating with anyone else about the proceeding during the remainder of the proceeding or may impose conditions with respect to such a communication during that period.

(3) Dans le cas où l'avocat spécial est autorisé à communiquer avec une personne, le juge peut interdire à cette dernière de communiquer avec qui que ce soit d'autre au sujet de l'instance, et ce jusqu'à la fin de celle-ci, ou assujettir à des conditions toute communication de cette personne à ce sujet, jusqu'à la fin de l'instance.

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

a) de divulguer des renseignements et autres éléments de preuve qui lui sont communiqués au titre de l'article 85.4 et

judge presiding at the proceeding; or

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.

85.6 (1) The Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court may each establish a committee to make rules governing the practice and procedure in relation to the participation of special advocates in proceedings before the court over which they preside. The rules are binding despite any rule of practice that would otherwise apply.

85.6 (1) Les juges en chef de la Cour d'appel fédérale et de la Cour fédérale peuvent chacun établir un comité chargé de prendre des règles régissant la pratique et la procédure relatives à la participation de l'avocat spécial aux instances devant leurs cours respectives; ces règles l'emportent sur les règles et usages qui seraient par ailleurs applicables.

(2) Any committee established shall be composed of the Chief Justice of the Federal Court of Appeal or the Chief Justice of the Federal Court, as the case may be, the Attorney General of Canada or one or more representatives of the Attorney General of Canada, and one or more members of the bar of any province who have experience in a field of law relevant to those types of proceedings. The Chief Justices may also designate additional members of their respective committees.

(2) Le cas échéant, chaque comité est composé du juge en chef de la cour en question, du procureur général du Canada ou un ou plusieurs de ses représentants, et d'un ou de plusieurs avocats membres du barreau d'une province ayant de l'expérience dans au moins un domaine de spécialisation du droit qui se rapporte aux instances visées. Le juge en chef peut y nommer tout autre membre de son comité.

(3) The Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court — or a member designated by them — shall preside over their respective committees.

(3) Les juges en chef de la Cour fédérale d'appel et de la Cour fédérale président leurs comités respectifs ou choisissent un membre pour le faire.

86. The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, apply for the non-disclosure of information or other evidence. Sections 83 and 85.1 to 85.5 apply to the proceeding

86. Le ministre peut, dans le cadre de l'appel devant la Section d'appel de l'immigration, du contrôle de la détention ou de l'enquête, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. Les articles 83 et 85.1 à 85.5 s'appliquent à

with any necessary modifications, including that a reference to "judge" be read as a reference to the applicable Division of the Board.

l'instance, avec les adaptations nécessaires, la mention de juge valant mention de la section compétente de la Commission.

87. The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to appoint a special advocate and to provide a summary — applies to the proceeding with any necessary modifications.

87. Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé.

87.1 If the judge during the judicial review, or a court on appeal from the judge's decision, is of the opinion that considerations of fairness and natural justice require that a special advocate be appointed to protect the interests of the permanent resident or foreign national, the judge or court shall appoint a special advocate from the list referred to in subsection 85(1). Sections 85.1 to 85.5 apply to the proceeding with any necessary modifications.

87.1 Si le juge, dans le cadre du contrôle judiciaire, ou le tribunal qui entend l'appel de la décision du juge est d'avis que les considérations d'équité et de justice naturelle requièrent la nomination d'un avocat spécial en vue de la défense des intérêts du résident permanent ou de l'étranger, il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à ce titre dans le cadre de l'instance. Les articles 85.1 à 85.5 s'appliquent alors à celle-ci avec les adaptations nécessaires.

87.2 (1) The regulations may provide for any matter relating to the application of this Division and may include provisions respecting conditions and qualifications that persons must meet to be included in the list referred to in subsection 85(1) and additional qualifications that are assets that may be taken into account for that purpose.

87.2 (1) Les règlements régissent l'application de la présente section et portent notamment sur les exigences — conditions et qualités — auxquelles doit satisfaire toute personne pour que son nom figure sur la liste dressée au titre du paragraphe 85(1), ainsi que sur les autres qualités qui constituent des atouts et dont il peut être tenu compte à cette fin.

(2) The regulations

2) Les règlements :

(*a*) shall require that, to be included in the list, persons be members in good standing of the bar of a province, not be employed in the federal public administration, and not otherwise be associated with the federal public administration in such a way as to impair their ability to protect the interests of the permanent resident or foreign national;

a) prévoient que, pour que le nom d'une personne puisse figurer sur la liste, celle-ci doit être membre en règle du barreau d'une province et ne pas occuper un emploi au sein de l'administration publique fédérale ni par ailleurs être associée à celle-ci de manière que sa capacité de défendre les intérêts du résident permanent ou de l'étranger serait

and

(*b*) may include provisions respecting those requirements

compromise;

b) peuvent préciser ces exigences.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-7-08

STYLE OF CAUSE: **IN THE MATTER OF A CERTIFICATE SIGNED PURUSANT 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 MOHAMED ZEKI MAHJOUB

PLACE OF PUBLIC HEARING: TORONTO, ONTARIO / OTTAWA, ONTARIO

DATES OF PUBLIC HEARING: OCTOBER 12, 13, 15, 18, 19, 20, 21, 22, 25, 26, 27, 2010
NOVEMBER 1, 2, 23, 24, 25, 29, 30, 2010
DECEMBER 1, 6, 7, 8, 14, 15, 2010
JANUARY 10, 11, 12, 17, 19, 20, 21, 2011
JUNE 2, 3, 9, 13, 14, 15, 17, 20, 21, 27, 28, 29, 2011
JULY 4, 5, 6, 7, 8, 11, 12, 13, 14, 2011
JULY 24, 25, 26, 2012
AUGUST 1, 8, 2012
SEPTEMBER 6, 9, 10, 11, 12, 2012
NOVEMBER 26, 27, 28, 29, 30, 2012
DECEMBER 3, 4, 6, 7, 10, 2012

REASONS FOR ORDER AND ORDER: BLANCHARD J.

DATED: OCTOBER 25, 2013

APPEARANCES:

Mr. Donald MacIntosh Mr. David Tyndale Mr. Bernard Assan Mr. Peter Southey Ms. Marianne Zoric Ms. Mahan Keramati Mr. Christopher Ezrin Ms. Balqees Mihirig Ms. Judy Michaely Ms. Rhonda Marquis Mr. James Mathieson Mr. Marcel Larouche Mr. Toby Hoffmann Ms. Proja Filipovich Mr. Philippe Lacasse Ms. Erin Bobkin Ms. Dominique Castagne	FOR THE APPLICANTS MINISTER OF CITIZENSHIPAND IMMIGRATION AND MINISTER OF PUBLIC SAFETY
Ms. Johanne Doyon Mr. Paul Slansky Mr. Yavar Hameed Mr. David Kolinsky Mr. Khalid Elgazzar Ms. Lucie Joncas	FOR THE RESPONDENT MR. MOHAMED ZEKI MAHJOUB
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