Immigration, Anti-Terrorism Measures, and National Security: Exploring the Use of Security Certificates under Canada’s Immigration and Refugee Protection Act (IRPA)

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by

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INTRODUCTION

Since the horrific events on September 11, 2001, several nations enacted new forms of security legislation and counteractive measures to strengthen their national security. Such reforms brought changes to immigration law and policy that affect the entry and processing of foreign citizens. Canada is among these nations that adopted preventive security measures designed to safeguard against threats of terrorism or subversive activities. The Canadian Parliament introduced various forms of security legislation, which were incorporated into Canada’s immigration scheme.

The Immigration and Refugee Protection Act (IRPA), enacted by the Canadian Parliament in 2002\(^1\), represents the core of immigration policy designed to accept or reject non-citizens entering Canada under various categories, including, among others, business entrepreneurs, family class sponsors, students and professionals, skilled laborers, and refugees.\(^2\) The legislative intent behind IRPA is generally to streamline Canada’s immigration process by inviting individuals to contribute to Canadian society, while preventing abuses of the system.\(^3\) As part of this system are special preventive detention procedures known as security certificates, which are issued against non-citizens (both permanent residents and foreign nationals) considered a threat to Canada’s national security.

This paper describes security certificates under the rubric of Canada’s Immigration and Refugee Protection Act. More specifically, security certificates are explored as to its impact on civil liberties for those who have been accused of

\(^{1}\) Government of Canada, Policy Research Initiative, Estibalitz Jimenez (Doctoral student in Criminology) and Francois Crépeau (Professor of International Law) at the Université de Montreal, Immigration and Refugee Protection Act, available at http://policyresearch.gc.ca/page.asp?pagenm=v5n2_art_08 (last visited April 18, 2007). The Immigration and Refugee Protection Act (IRPA) received royal assent on November 1, 2001, and came into effect on June 28, 2002 [hereinafter IRPA Statute].

\(^{2}\) Id. IRPA is divided into 4 main categories: (1) immigration to Canada; (2) refugee protection; (3) enforcement of the Act; and (4) Immigration and Refugee Board (IRB). IRPA generally treats issues such as selection of immigrants, examination, permanent resident status, inadmissibility, detention and release, stays, and Immigration Refugee Board determination of refugee protection claims.

being a threat to the national security of Canada. The author argues that while adequate security measures are necessary to prevent threats to national security, more due process rights are being afforded to detained non-citizens under IRPA’s security certificate regime as a means to balance security with civil liberties. The security certificate regime is evolving through a steady flow of judicial decisions from Canada’s Supreme Court and Federal Courts, thereby prompting federal immigration authorities to balance security with immigration processing without sacrificing civil liberties under Canada’s Charter of Rights and Freedoms (Charter). The nature of this change enables federal authorities to avoid ambiguities and process more accurate intelligence information to justify detaining an accused person.

Part I briefly examines the role of Canada’s Immigration and Refugee Protection Act, describing security certificates as a public safety device. Part II describes the role and process involved in issuing security certificates against accused individuals considered a serious threat to Canada’s national security. Here, various criticisms will be explored against the use of security certificates, forming the basis of its controversial use by Canadian authorities. Finally, Part III discusses two landmark court decisions for security certificates – Adil Charkaoui and Mahmoud Jaballah. These two decisions describe the legal principles applied under the current system of security certificates, and how Canadian courts have treated the controversial aspects of the security certificate process, taking into account due process considerations.

I. CANADA’S IMMIGRATION AND REFUGEE PROTECTION ACT (IRPA)

(a) General Background

The Immigration and Refugee Protection Act (IRPA) was enacted in 2002 by Canada’s Parliament as a means to streamline the immigration laws and
policies that were formerly governed by the Immigration Act of 1978. Generally, IRPA invites foreign nationals under various classes with the objective of allowing them to seek a better lifestyle and to permanently settle in Canada. As with many immigration statutes around the world, Canada’s IRPA invites non-citizens under various categories, including: (1) skilled workers; (2) student visas; (3) family sponsorships (spouses, parents, adopted children, etc); (4) business entrepreneurs; (5) national occupational qualifications (assessing skill levels); and (6) refugees. In the context of security, various IRPA provisions were amended to provide safeguards against individuals who are subject to normal immigration procedures but are suspected of links to terrorism or criminality. These provisions allow federal officials to issue security certificates in order to detain accused individuals who represent a genuine threat to national security.

IRPA represents one of many forms of security legislation in Canada. Other relevant pieces of security legislation include: (1) Anti-Terrorism Act (ATA); (2) Security of Information Act; and the (3) Public Safety Act. The Anti-Terrorism Act represents Canada’s main legislative response to the 9-11 attacks, whereby strong measures were enacted by Parliament to monitor and prevent terrorist activities on Canadian soil. The ATA is part of Canada’s Anti-Terrorism Plan, which has four objectives:

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4 IRPA Statute, supra note 1. The Immigration and Refugee Protection Act (IRPA) effectively replaced the 1978 Immigration Act because the latter was too complex and incompatible with modern immigration processes. See also Martin Jones and Sasha Baglay, Refugee Law, 2007, at 303 and 312, the latter quoting from the Inter-American Commission on Human Rights, “Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (2000)”, available at www.cidh.org/countryrep/Canada2000en/table-of-contents.htm (last visited April 22, 2007) [hereinafter Refugee Law]. IRPA (Bill C-31) was tabled in April 2000, but was reintroduced February 2001, and received royal assent in December 2001. Thereafter, the Standing Committee on Citizenship and Immigration gave 76 recommendations for changes and adjustments to the proposed regulations. IRPA came into force on June 28, 2002.


Prevent terrorists from entering into Canada and protecting Canadians from terrorist acts;

Activate tools to identify, prosecute, convict, and punish terrorists;

Keep the Canada-U.S. border secure, while maintaining economic trade links;

Work with the international community to bring terrorists to justice and end the root causes of violence.

It is the first and second objectives that signal the importance of security certificates. Because there is a direct link between security and immigration in monitoring and detaining suspected individuals, the IRPA provisions relating to security certificates involves a partnership between administrative and intelligence agencies in the form of exchanging sensitive information about the background of the accused. The Preamble to the ATA recognizes that all persons are entitled to live their lives in peace, but that terrorism constitutes a substantial threat to international peace and security as well as to Canada. The ATA also emphasizes that Canada must cooperate with other nations to combat terrorism, but that terrorism is a matter of national concern. In order to address this national concern, the ATA established comprehensive detention procedures in the immigration system to protect Canadians against terrorism.

(b) Principles of Security under IRPA – Detention of Non-Citizens

While IRPA intends to streamline the immigration process by categorizing immigrants into various classes (such as skilled workers, business entrepreneurs, and refugees), security provisions under IRPA provide various grounds for detention of non-citizens. As a general rule, IRPA and its regulations allow for the detention of non-citizens as a preventive security measure under three conditions: (1) when the person is a danger to the public; (2) when the person’s identity has not been established; and (3) when the person is unlikely to
appear at proceedings (risk of flight).\textsuperscript{9} Under section 58 of IRPA, the general rule for detention is that an officer who makes a decision to detain a person must establish proper grounds for detention, otherwise release an individual in detention.\textsuperscript{10}

Aside from these general detention rules, IRPA allows for a special procedure of preventive detention for non-citizens, known as security certificates.\textsuperscript{11} These security certificates are governed by different rules of detention due to the heightened security concerns for those posing a threat to national security. The basis of issuing security certificates against non-citizens under IRPA involve a shared exchange of intelligence data between the Canadian Security Intelligence Service (CSIS)\textsuperscript{12} and two federal Ministers responsible for immigration and border safety, particularly the Minister of Citizenship and Immigration (CIC) and the Minister of PSEP.

As such, careful monitoring and knowledge of those persons entering into Canada with a questionable background are significant. Since many immigrants arrive in Canada under various categories and circumstances, sensitive information about these individuals may reveal whether or not they would pose a significant risk to Canadians. Here, the interplay between intelligence gathering by CSIS and immigration processing under the auspices of the Minister of Citizenship and Immigration (CIC) serve as the basis for issuing security certificates.

Generally, IRPA consists of security provisions against persons viewed as a danger to public safety. First, section 34 of IRPA broadly categorizes the

\textsuperscript{9} Refugee Law, \textit{supra} note 4. Detention for fear of risk of flight can be ordered if there is reason to believe that a person will not appear at an examination, an immigration proceeding, or removal proceeding. The risk of flight must be viewed under the circumstances. The IRPA Regulations provide a list of factors that are required to be considered by Safety Canada Border Services Agency (CBSA) officers and Immigration Division.

\textsuperscript{10} \textit{Id.} at 303.

\textsuperscript{11} \textit{Id.} at 298.

\textsuperscript{12} The Canadian Security Intelligence Service (CSIS) is equivalent to the Central Intelligence Agency in the U.S. Created as a civilian intelligence service in 1984 by an Act of Parliament known as the CSIS Act, CSIS investigates threats to national security, gathers and analyzes intelligence, and reports to the Government of Canada. Through its Security Screening Program, CSIS attempts to prevent foreign nationals from entering into Canada if they pose a legitimate threat. The policy of CSIS is a proactive one, rather than being reactive. See generally Canadian Security Intelligence Service, Role of CSIS, \textit{available at} http://www.csis-scrs.gc.ca/en/about_us/role_of_csis.asp (last visited April 17, 2007).
inadmissibility requirements by denying stay in Canada if the foreign national or permanent resident is a serious threat to national security, participates in serious or organized criminality. Section 34 of IRPA states:

(1) A permanent resident or a foreign national is inadmissible on security grounds for:
(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
(b) engaging in or instigating the subversion by force of any government;
(c) engaging in terrorism;
(d) being a danger to the security of Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of person in Canada; or
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

Interestingly enough, IRPA does not define terrorism, but considers it a ground for inadmissibility. Second, section 55(2) of IRPA strengthens the powers of detention of accused persons without warrant. Third, sections 48 to 52 of IRPA emphasize the enforcement of removal orders issued by the Federal Courts in deporting foreign nationals immediately from Canada, and not permitting them to return unless “authorized by an officer or in other prescribed circumstances”. However, a judicial review hearing that sets aside this removal order may allow the foreign national to return to Canada at the expense of the Minister of Citizenship and Immigration.

14 Id.
15 IRPA Statute, supra note 1. Section 55(2) of IRPA states: “An officer may, without a warrant, arrest and detain a foreign national, other than a protected person, (a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or (b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act”. See generally Department of Justice Canada, Immigration and Refugee Protection Act (2001, c.7), available at http://laws.justice.gc.ca/en/showdoc/cs/l-2.5/bo-ga:l_1-gb:l_6//en#anchorbo-ga:l_1-gb:l_6 (last visited May 3, 2007).
16 Section 52(1) of IRPA. See generally Department. of Justice Canada, supra note 12.
II. SECURITY CERTIFICATES UNDER IRPA

(a) Role of Security Certificates

Under section 77 of IRPA, federal authorities may issue security certificates against persons who are considered a threat to national security. Security certificates are thus enforcement tools to detain those persons posing a significant threat to Canada. The certificates are typically issued on the grounds of: (1) a person or group being a threat to national security; (2) violating human rights or international rights; (3) espionage; and (4) serious or organized criminality.

Security certificates can only be issued against permanent residents, foreign nationals, and refugees, and not against Canadian citizens. Terrorism is not the only factor considered by authorities in detaining an accused foreign national. Rather, intelligence information showing others involved in genocide, torture, spying or organized crime, are also taken into consideration when issuing security certificates. Security certificates have been in place in Canada since 1978, so the concept is not an old one.

However, only 27 security certificates have been issued by the Canadian government against suspected individuals between 1991 and 2003. This sparing use of security certificates over the years reflects the rigorous standard used to determine whether an individual poses a significant threat to national security. Security certificates have targeted various groups, including Islamic

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19 Id.
20 Id.
21 Id. The 28th security certificate was issued after 2003.
fundamentalists, Hindu and Sikh extremists, and Russian nationals engaged in espionage.\(^{22}\)

(b) Procedures to Issue a Security Certificate

The procedure to issue a security certificate involves several steps. First, a security intelligence report\(^{23}\) is prepared by the Canadian Security Intelligence Service (CSIS). Second, the security intelligence report is then reviewed and signed by the Minister of Public Safety and Emergency Preparedness (PSEP) and the Minister of Citizenship and Immigration (CIC), if it is deemed necessary.\(^{24}\) The two Ministers must be thoroughly convinced that the accused individual is a threat to national security, and this therefore inadmissible into Canada. Here, the security intelligence report is referred to the Security Intelligence Review Committee (SIRC).\(^{25}\) Third, once the security certificate is issued by the two Ministers, it is sent to the Federal Court for judicial review.\(^{26}\)

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\(^{22}\) Id.

\(^{23}\) A security intelligence report is fairly rigorous, and several requirements must be met prior to its preparation, including: (1) accused individual must be assessed as being a serious threat to national security; (2) CSIS must possess sufficient information and intelligence about the individual; (3) that information must be reliable and come from multiple sources; (4) the removal of the accused must be of strategic value; and (5) CSIS must have information to support the unclassified document related to the accused. See Canadian Security Intelligence Service, Certificates Under the Immigration and Refugee Protection Act (IRPA), Backgrounder No. 14, Revised Feb. 2005, available at http://www.csis-scrs.gc.ca/en/newsroom/backgrounders/backgrounder14.asp (last visited April 15, 2007) [hereinafter CSIS Certificates]. Well before the enactment of IRPA, security certificates have been available in Canada since 1991.

\(^{24}\) Id.

\(^{25}\) Canada’s Immigration Program, Security Certificates, supra note 9. The Security Intelligence Review Committee (SIRC) is an independent review body which reports to the Canadian Parliament on the operations of the Canadian Security Intelligence Service (CSIS). Parliament has given extraordinary powers for SIRC to examine privacy issues in Canada. See generally Security Intelligence Review Committee (SIRC), Welcome, available at http://www.sirc-csars.gc.ca/index_e.html (last visited May 8, 2007).

\(^{26}\) Canada’s Federal Court is a national court created in 1971 that hears matters related to suits against the Government of Canada, civil suits on federal issues, and challenges to decisions of federal tribunals. The Federal Court consists of a Chief Justice and 32 other judges. At present, there are 28 full-time judges, along with another division known as the Federal Court of Appeal, which was a part of the Federal Court prior to the 2003 amendment to the Federal Courts Act. Historically, the Federal Court was known as the Exchequer Court of Canada, established in 1875. See Federal Court, available at http://cas-ncr-nter03.cas-satij.gc.ca/portal/page/portal/FC_CF/en/Index (last visited April 15, 2007). Under Canada’s Immigration and Refugee Protection Act, any person wishing to challenge a decision made under the Act, whether in Canada or abroad, may make an application to the Federal Court. Leave is required for this application process, and the grounds for judicial review are normally set out in the Federal Courts Act.
Here, an Associate Chief Justice or other designated judge hears some or all of the evidence directly from the Ministers, without the accused person or the accused’s counsel being present. The standard used to justify the Ministers’ issuance of a security certificate is upon reasonable grounds using an “objective basis . . . which is based on compelling and credible information”, pursuant to section 78 of IRPA. This hearing is therefore an opportunity for the judge to assess the reasonableness of the security certificate pursuant to section 78 of IRPA.

However, upon the judge’s discretion, the classified information (contained in the original security intelligence report) can be summarized and forwarded to the accused person to explain the reasons why the security certificate was issued. In this way, the accused becomes aware of the allegations put forth against him or her. The accused also has the opportunity to be heard before the Federal Court judge prior to a ruling that a security certificate should be issued. If eligible, the accused can apply for pre-removal risk assessment (PRRA), whereby the judge will suspend the security certificate hearing and refer to the Ministers of PSEP and CIC to evaluate this new application.

The pre-removal risk assessment is a process that allows non-citizens to apply to immigration officials to avoid being deported from Canada to a country where they may face unusual hardship, torture, and death upon their return. Once the Ministers make a decision on the pre-removal risk assessment

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27 Canada’s Immigration Program, Security Certificates, *supra* note 9. It should also be noted that all other immigration matters related to the accused individual are suspended until a decision is made by the Federal Court as to the relevance of the security certificate.


29 If the classified information is deemed to be injurious to national security, then that information is not required to be divulged to the accused individual. See generally Canadian Security Intelligence Service, *available at* http://www.csis-scrs.gc.ca/en/newsroom/backgrounders/backgrounder14.asp (last visited May 8, 2007).

30 Public Safety Canada, *supra* note 17. The accused may also invite witnesses to testify on his/her behalf before the Federal Court judge.

application, the judge can consider the reasonableness of this decision in the context of the security certificate already issued. In the end, if the security certificate is still found to be reasonable, it automatically becomes a removal or deportation order that cannot be appealed.32

The legislative authority that grants a Federal Court judge to review an accused individual’s detention derives from section 83 of IRPA. More specifically, section 83 states:

(1) Not later than 48 hours after the beginning of detention of a permanent resident or a foreign national under section 82, a judge shall commence a review of the reasons for the continued detention . . . (2) The permanent resident or foreign national must be brought back before a judge at least once in a six-month period following each preceding review and at any other times that the judge may authorize. (3) A judge shall order the detention to be continued if satisfied that the permanent resident or foreign national continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.33

Three essential elements of section 83(3) are thus considered by a Federal Court judge in determining whether or not to maintain the security certificate against the accused: (1) whether the accused continues to be regarded as a danger to national security; (2) whether the accused is a danger to the safety of any person; or (3) whether the accused is unlikely to appear at a removal proceeding.34 As indicated infra, if an accused is considered a threat to national security, but is not a danger to the safety of any person, the Court has the option of releasing the accused under stringent conditions, based on the evidence

32 Id. There are 3 types of removal orders under IRPA: (1) Departure Orders; (2) Exclusion Orders; and (3) Deportation Orders. Departure orders require a person to leave Canada within 30 days, and confirm their departure with an immigration officer. If they comply, such persons may return to Canada, but if not, the departure order automatically becomes a deportation order. Exclusion Orders are those whereby persons may not be permitted to return to Canada for 1 year unless they have written consent of an immigration officer. Deportation orders apply to the most serious cases, and do not allow the return of persons unless written consent is made by an immigration officer. See generally Canada Border Services Agency, Removals, Fact Sheet, available at http://www.cbsa-asfc.gc.ca/media/facts-faits/051-eng.html (last visited May 8, 2007).


34 Id. The third element focuses on the concern that the accused may be a flight risk if a security certificate is issued against him or her.
presented and the surrounding circumstances. Section 83 of IRPA thus illustrates
the interrelationship between the judiciary and the federal immigration
department in evaluating the inadmissibility of non-citizens persons to Canada for immigration purposes.

(c) Criticisms of Security Certificates

Security certificates have come under intense scrutiny, particularly for the
lack of due process and the potentially adverse consequences that affect an
accused person. In particular, secret evidence has been used against non-
citizens detained for indefinite periods, while having virtually no right to counsel
with the possibility of being deported to their country of origin.35 Under current
Canadian immigration policies and customary international law, it is prohibited to
deport non-citizens to countries known for practicing torture and death against
their own citizens.36

This policy was affirmed in Suresh v. Canada (Minister of Citizenship and
Immigration),37 where a Sri Lankan citizen, thought to be a member of the
Liberation Tigers of Tamil Eelam (viewed as a terrorist organization), was
deported back to Sri Lanka. The issue was whether deportation of a Convention
refugee (Suresh) back to Sri Lanka would endanger his life by facing

35 In Charkaoui, Chief Justice Beverly McLachlan highlighted the problems of providing no right to
counsel for detained non-citizens: “Under the IRPA, the government effectively decides what can be
disclosed to the named person. Not only is the named person not shown the information and not permitted
to participate in proceedings involving it, but no one but the judge may look at the information with a view
to protecting the named person’s interests. Why the drafters of the legislation did not provide for special
counsel to objectively review the material with a view to protecting the named person’s interest, as was
formerly done for the review of security certificates by SIRC and is presently done in the United Kingdom,
has not been explained. The special counsel system may not be perfect from the named person’s
perspective, given that special counsel cannot reveal confidential material. But, without compromising
security, it better protects the named person’s s. 7 interests.” at paragraph 86. See Judgments of the
Supreme Court of Canada, Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, available at

36 Elizabeth Liu, Security Certificates, Centre for Constitutional Studies, available at

37 Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3. Canada is a signatory to
the Convention Relating to the Status of Refugees and the Convention Against Torture. See generally
Library of Parliament, Canada’s Immigration Program, Benjamin Dolin, Margaret Young, Law and
Here, the Supreme Court held that Suresh should be granted a stay of removal because the evidence revealed that deportation would result in a substantial risk of torture to Suresh in Sri Lanka. The Suresh case also established a precedent for allowing named individuals in a security certificate to be given adequate information relating to their own deportation, as well as an opportunity to be heard before a judge.

With stringent procedures placed upon an accused non-citizen named in a security certificate, some constitutional principles safeguarding civil liberties during arrest and detention are triggered under Canada’s Charter. Section 10 of the Charter states that:

Everyone has the right on arrest or detention:

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

During most of the security certificate process, the accused is detained for an indefinite period, and warrants may be issued by the Ministers of PSEP and CIC if there is a strong likelihood that the accused will not appear at future hearings. Under IRPA, there is no express provision that allows for indefinite detention, but there are no prohibitions either. In some recent security certificate cases, Federal Courts have ruled that the long period of detention and the delay in removing non-citizens from detention were caused by the non-citizens who chose to challenge their removal orders.

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38 Refugee Law, supra note 4. A Convention Refugee is defined under section 96 of IRPA, which states: “A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.”

40 Id.
41 Id. at 299-300.
42 Id. note 4 at 311.
43 Id.
The Supreme Court of Canada has explained the importance of providing due process to non-citizens:

The right to a fair hearing comprises the right to a hearing before an independent and impartial magistrate who must decide on the facts and the law, the right to know the case put against one, and the right to answer that case. While the IRPA procedures properly reflect the exigencies of the security context, security concerns cannot be used, at the s. 7 stage of the analysis, to excuse procedures that do not conform to fundamental justice. Here, the IRPA scheme includes a hearing and meets the requirement of independence and impartiality, but the secrecy required by the scheme denies the person named in a certificate the opportunity to know the case put against him or her, and hence to challenge the government’s case.44

For the reasons stated above, several international bodies have criticized Canada’s approach to issuing security certificates. For instance, the Inter-American Commission on Human Rights has raise concerns over how non-disclosure of information in the security certificate process affects due process rights.45 Other nations such as New Zealand, the United Kingdom, and the United States have provisions similar to Canada’s security certificate process, with notable differences. Similar debates over the lack of due process rights have been raised in the U.S. for the prisoners of war detained at Guantanamo Bay.46

III. TWO SELECTED LANDMARK CASES INVOLVING SECURITY CERTIFICATES

Since 1991, twenty-eight security certificates have been issued against non-citizens, of which six were issued since September 11, 2001.47 In Canada, five prominent security certificate cases have arisen for Hassan Almrei, Adil Charkaoui, Mohamed Harkat, Mahmoud Jaballah, and Mohamed Mahjoub. For convenience, two of these cases, Adil Charkaoui and Mahmoud Jaballah, will be

45 Id. at 297-98.
47 Id. at 310.
explored to shed light on the application of the security certificate process under IRPA, and its impact on due process rights under the Charter.

Adil Charkaoui

In 2006, the Supreme Court of Canada ruled that section 84(2) of the Immigration and Refugee Protection Act was unconstitutional against Adil Charkaoui. Charkaoui, a Moroccan citizen holding permanent resident status since 1995, was issued a security certificate in May 2003, and was apprehended by the Canadian Security Intelligence Service (CSIS) in Montreal, Quebec under section 77 of IRPA. The allegation against Charkaoui was that he had links with Al-Qaeda, being an alleged member of the Egyptian Al Jihad.

Charkaoui argued that sections 33 and 77 to 85 of IRPA (detentional provisions) were unconstitutional in that they violated sections 7 (right to life, liberty, and security of the person) and 15 (equality rights) of the Charter. After reviewing the evidence firsthand, the trial division of the Federal Court ruled that Charkaoui was an Al-Qaeda operative, and that his detention was justified. Thereafter, Charkaoui appealed to the Federal Court of Appeal, but was unsuccessful because the court made a distinction between citizens and non-citizens in that section 6(1) of the Charter, the provision under which Charkaoui appealed, did not apply to non-citizens.

The Charkaoui matter eventually reached the Supreme Court of Canada, where the court held that security certificates under section 84(2) of IRPA were unconstitutional on the grounds that they did not provide a meaningful form of notice or opportunity to be heard for the accused defendant. Supreme Court Chief Justice Beverley McLachlin ruled that while the security certificate process

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48 The Charkaoui case represents the most recent and profound matter related to the issuance of security certificates in Canada. Prior to Charkaoui, the Supreme Court of Canada heard a security certificate matter for Hassan Almrei. The Almrei ruling guided the Supreme Court’s handling of Charkaoui.
49 Security Certificates, supra note 36.
50 Jaballah Case, supra note 28 at 10.
51 Judgments of the Supreme Court of Canada, supra note 44.
53 Judgments of Supreme Court of Canada, supra note 44.
itself may remain in place, detaining foreign nationals up to 120 days after a security certificate was deemed “reasonable” was inappropriate.54

The Supreme Court of Canada outlined the issues in Charkaoui related to the use of security certificates in the context of sections 7 and 15 of the Charter:

**Issue 1:** Does the procedure under the IRPA for determining the reasonableness of the certificate infringe s.7 of the Charter, and if so, is the infringement justified under s.1 of the Charter?

**Issue 2:** Does the detention of permanent residents or foreign nationals under the IRPA infringe ss.7, 9, 10(c) or 12 of the Charter, and if so, are the infringements justified under s.1 of the Charter?

**Issue 3:** Do the certificate and detention review procedures discriminate between citizens and non-citizens, contrary to s.15 of the Charter, and if so, is the discrimination justified under s.1 of the Charter?

**Issue 4:** Are the IRPA certificate provisions inconsistent with the constitutional principle of the rule of law?55

The Supreme Court focused on the unconstitutionality of using secret evidence and hearings without the detainee being present, which violated section 7 of the Charter of Rights and Freedoms. Section 7 of the Charter states: “everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.56 Section 7 usually involves a 2-step test analysis: (1) determining whether there is an infringement of rights within the section; and (2) determining whether that infringement is contrary to the principles of fundamental justice.57

Here, Charkaoui argued that his indefinite detention period and the use of secret evidence (in the form of privileged information exchanged between Canadian

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54 Id.
55 Id.
57 Refugee Law, supra note 4 at 38. Under Canadian common law, fundamental justice generally refers to a right not to be deprived of life, liberty, and security of the person, which means the dignity and worth of the human person and the rule of law. See Daphne Dukelow, Pocket Dictionary of Canadian Law (2002) at 184. Chief Justice Beverly McLachlan noted in Charkaoui: “The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process: New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46. See Judgments of Supreme Court of Canada, supra note X. Section 7 has been used frequently in immigration detention cases.
intelligence and the federal government) was an infringement of his section 7 rights.

In contrast, section 15 deals with equality rights and states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 15 was relevant in that equality rights applied only to Canadian citizens, and not non-citizens. This distinction was the basis of Charkaoui’s argument in the Federal Court of Appeal.

In Charkaoui, Chief Justice McLachlin ruled as follows:

I conclude that the IRPA unjustifiably violates s. 7 of the Charter by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person’s interests. I also conclude that some of the time limits in the provisions for continuing detention of a foreign national violate ss. 9 and 10(c) because they are arbitrary. I find that s. 12 has not been shown to be violated since a meaningful detention review process offers relief against the possibility of indefinite detention. Finally, I find that there is no breach of the s. 15 equality right.

Chief Justice McLachlin noted that any absence of defense counsel or proper disclosure is fatal to any fair proceedings and further stated that:

Under the IRPA’s certificate scheme, the named person may be deprived of access to some or all of the information put against him or her, which would deny the person the ability to know the case to meet. Without this information, the named person may not be in a position to contradict errors, identify omissions, challenge the credibility of informants or refute false allegations.

Here, the Supreme Court seems to point to the relevance and accuracy of intelligence reports that are relied upon by federal authorities to issue security certificates. The quality of information within these intelligence reports often dictate the seriousness of the threat posed by the accused, and whether or not a security certificate should be issued. The comments made by Chief Justice McLachlan reflect precisely the importance of retaining due process rights to an accused.

59 Judgments of the Supreme Court of Canada, supra note 44.
60 Id. at para. 54.
But the Supreme Court was also careful to stress the need for the federal government to handle threats of terrorism in the interests of national security:

> Confronted with a terrorist threat, state officials may need to act immediately, in the absence of a fully documented case. . . . It may take some time to verify and document the threat. Where state officials act expeditiously, the failure to meet an arbitrary target of a fixed number of hours should not mean the automatic release of the person, who may well be dangerous. 61

This ruling suggests that Canada’s Supreme Court was sensitive in balancing the federal government’s ability to enforce reasonable security measures (against persons who pose a legitimate threat to Canada’s national security) with providing adequate civil liberties to the accused. Despite the “absence of a fully documented case” for an accused individual named in a security certificate, the Supreme Court recognized that not all civil liberties are available for a valid defense. But this largely depends on the seriousness and level of danger that the accused individual poses to Canadians. The more serious the threat to the general public, the more likely the accused will receive longer detention periods and less chance for recourse. Thus, the nature of detention becomes an important issue in defining what rights exist for the accused.

**Detention of the Accused Non-Citizen - The Charkaoui Factors and Related Principles**

The landmark Charkaoui decision provided a list of factors that were delineated by Chief Justice McLachlin under section 83 of IRPA in considering the nature of detention procedures for individuals accused of being a threat to national security. The following represent the Charkaoui factors:

- The reasons for detention are to be considered;
- The length of detention is important;
- The reasons for delay in deportation are to be considered;
- The anticipated future length of detention must be considered;

61 Judgments of Supreme Court of Canada, *supra* note 44 at para. 93.
The availability of alternatives to detention must be explored.  

The first factor justifies detention when the accused is considered a threat to national security. The more serious the threat to national security, the more compelling is the reason for detaining that person. This factor seems to prevent arbitrary detention by conforming to section 57 of IRPA. The second factor implies that the longer the period of detention, the less likely that person will be a direct threat to society. This allows the federal government to gather information and better assess the nature of the threat, as well as sever any link the non-citizen has with a suspected terrorist group. But, the onus will be heavier for the federal government as time proceeds.

It must be stressed, however, that the Supreme Court held that extended periods of detention do not necessarily violate a named individual’s rights under sections 7 (right to life, liberty, or security of the person) or 12 (right not to be subject to cruel and unusual treatment or punishment) of the Charter. This is because lengthy detention is appropriate when opportunities exist for reviewing the nature of the detention (and taking into account the surrounding circumstances).

The third factor suggests that if there is any unexplained delay on the part of the government official, recourse should be available to the accused. The fourth factor suggests that if there is a lengthy detention prior to deportation, or if the future detention time cannot be determined, this should favor release of the accused. The fifth factor indicates that reasonable alternatives to detention should be provided for non-citizens, such as imposing stringent release

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62 Jaballah Case, supra note 28.
63 Department of Justice Canada, IRPA, s. 57, available at http://laws.justice.gc.ca/en/showdoc/cs/I-2.5/bo-ga:1_1-gb:1_6/en#anchorbo-ga:l_1-gb:l_6 (last visit May 5, 2007). Section 57(1) states: “(1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention. Section 57(2) states: “(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.”
conditions. However, the rule is that such release conditions must not be disproportionate to the nature of the threat.

Aside from these factors, Charkaoui also established important legal principles. For instance, the Supreme Court of Canada set the rule that the Ministers of PSEP and CIC bear the initial burden of proof in determining whether an individual is a threat to national security under section 83 of IRPA. Another principle is that IRPA authorizes a Federal Court judge to set conditions that would “neutralize” the risk of danger by allowing the accused individual to be released upon stringent conditions. The standard of proof of “reasonable grounds to believe” on an objective basis, along with the concern over the length of detention of the accused in light of security concerns, forces legislators to expand the rights of the accused within the IRPA security certificate regime. From these principles, the Charkaoui factors forces Canadian legislators to reconsider the security certificate regime.

Mahmoud Jaballah

The most recent Federal Court ruling in determining the reasonableness of a security certificate was made on behalf of Mahmoud Jaballah. Jaballah is an Egyptian national who arrived in Canada on May 11, 1996, with his wife and four children. Jaballah was detained on August 14, 2001, after a security certificate was issued by the Ministers of Public Safety and Emergency Preparedness (PSEP) and Citizenship and Immigration. The grounds for issuing the security certificate was that Jaballah was a threat to national security, being a suspected member of the Egyptian Islamic Al-Jihad, a terrorist group believed to have links

64 Chief Justice Beverly McLachlan explained the nature of alternative to detention by stating: “Stringent release conditions, such as those imposed on Mr. Charkaoui and Mr. Harkat, seriously limit individual liberty. However, they are less severe than incarceration. Alternatives to lengthy detention pursuant to a certificate, such as stringent release conditions, must not be a disproportionate response to the nature of the threat.” See generally Judgments of the Supreme Court of Canada, supra note 50, available at http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html (last visited May 6, 2007).
65 Id. at 8.
66 Id.
67 Id. Mr. Jaballah’s initial request for release was dismissed on February 27, 2004, while his second request was dismissed on February 1, 2006.
68 Id. at 3.
69 Id. at 4.
with Al-Qaeda.\footnote{Jaballah Case, supra note 28 at 16. Under Canada's Criminal Code, section 4, chapter 4, subsection 83.05(1) (amended in 2001), the Egyptian Islamic Al-Jihad and Al-Qaeda are listed terrorist organizations. The Al-Jihad group intends to establish Islamic law in Egypt, and has been active since the late 1970's. See generally Center for Non-Proliferation Studies, available at http://cns.miis.edu/research/wtc01/aljihad.htm (last visited April 19, 2007).} In particular, federal authorities believed that Jaballah should be detained indefinitely and should not be released for fear that he would reacquaint himself with Islamic extremists.

Several hearings took place in order to determine whether the security certificate issued against Jaballah was reasonable. The issue was whether or not Jaballah should be released from detention subject to the terms and conditions of subsection 83(3) of IRPA.\footnote{Id. at 5. Section 83(3) states: “A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.” See Department of Justice Canada, IRPA, available at http://laws.justice.gc.ca/en/showdoc/cs/l-2.5/bo-ga:1_l-gb:1_10//en (last visited May 6, 2007).} The Ministers of PSEP and CIC maintained that Jaballah was considered a threat to national security, but that he was not a threat to the safety of any person. Jaballah admitted that he was a danger to national security within the meaning of the IRPA security provisions, but argued that the degree of danger that he posed to society could be “neutralized” if he were placed under strict release conditions. Ultimately, the Federal Court ruled that Jaballah should be released on the condition of house arrest.\footnote{Id. at 2.}

Led by Justice MacKay, the Federal Court ruled that the security certificate against Jaballah was reasonable, and that he communicated with senior members of both terrorist organizations. However, the Court ordered that Jaballah may not be removed from Canada by the Minister of Citizenship and Immigration if “there is a substantial risk that he would face torture, death, or cruel and unusual punishment.”\footnote{Id. Justice MacKay was the first judge to hear Mr. Jaballah’s case, and made this comment to the effect that the Minister of Citizenship and Immigration should be prohibited from sending an accused individual to his country of origin (in this case, Egypt) where the practice of torture, death, and cruel and unusual treatment is well known. The third and most recent hearing for Mr. Jaballah was held before Justice Carolyn Layden-Stevenson on April 12, 2007.} This ruling echoes Charkaoui by addressing the concept of neutralizing a threat to society by imposing strict release conditions upon an accused non-citizen as a substitute for indefinite detention.
The ruling further indicates how a judge can intervene between the Minister of Citizenship and Immigration and the accused individual, thus affecting the outcome of that person’s chance of either remaining in Canada or being deported. Here, the political background and history of the defendant’s country of origin is examined by the Federal Court to determine whether or not the accused should be deported back to that country. The application of the Charkaoui factors to the Jaballah case illustrates some practical aspects of security principles related to immigration detention.

First, in regards to the length of detention for Jaballah, the Federal Court held that while his total detention period was close to 8 years, this detention reduced the danger posed by him because it would have disrupted any contact he may have had with the Egyptian Al Jihad. This line of reasoning follows the Supreme Court of Canada’s opinion in Charkaoui that any lengthy period of detention of an accused individual will likely disrupt any contact or communication with extremist groups previously associated with the individual.

Second, the Federal Court held that the reasons for delay in deportation were unreasonably long for Jaballah. This delay was unreasonable because of: (1) the Federal Court’s 2003 evaluation of Jaballah’s security certificate being set aside; (2) the Ministers’ 2005 determination of Jaballah’s case being set aside for judicial review; and (3) the long period of time the government required to consider Jaballah’s own concern over the risk of torture and human rights abuses if he were deported back to Egypt. Third, the anticipated future length of detention was held to be in Jaballah’s favor because the Ministers acknowledged that his future detention could not be determined fairly.

Fourth, the availability of alternatives to detention, which was stressed by the Supreme Court of Canada in Charkaoui, was re-visited in the Jaballah matter. Jaballah argued that no alternative to detention was considered by federal authorities other than to deport him back to Egypt, a country that even the Supreme Court of Canada understood was well known to persecute its own citizens. Because of the lack of alternative options provided to Jaballah, the
Federal Court held that the government’s decision to deport him to Egypt would favor his release.\textsuperscript{74}

The Federal Court therefore treated the evidence and the surrounding circumstances of Jaballah’s prior association with known terrorist groups to be determinative of whether or not he should be released with restricted conditions. The Federal Court ruled that since there were no available alternatives to Jaballah’s detention, other factors justified his release, including among others: (1) the government’s evidence being the same as when he was first detained; (2) his contacts with terrorist groups being disrupted by the long period of detention; (3) no evidence that linked Jaballah with anyone acting against Canada; and (4) no allegation that he is a danger to the safety of any person.\textsuperscript{75} Based on these factors, the Federal Court held that Jaballah may be released with restricted conditions, primarily being that of house arrest.

\textbf{CONCLUSION}

The interrelationship between national security, anti-terrorism and immigration is becoming more pronounced in Canada. While Canada still remains an attractive destination for immigrants, there is often a balancing act between inviting foreign nationals to contribute to Canadian society and preventing the settling of persons considered a serious threat to national security. Since September 11, 2001, several nations have fashioned anti-terrorism legislation to curb threats to their national security within the framework of immigration policy and practice. This new trend in security legislation enforcement has reformed immigration processing through the gathering and

\textsuperscript{74} Jaballah Case, \textit{supra} note 28 at 13. Justice Carolyn Layden-Stevenson, who delivered the opinion of the Federal Court, noted: “It is indisputable that this factor weighs heavily in Mr. Jaballah’s favour when consideration is given to the length of time that he has already spent in detention and the fact that it is improbable that he will be removed from Canada within the near future. This factor is highly significant because the detention must be “hinged” to the purpose of detention. At this point, while Mr. Jaballah’s case is borderline, there is nothing before me to suggest that the Ministers have abandoned the intention to deport him . . . The problem is that, thus far, they have seemingly failed to explore any options other than deportation to Egypt.”

\textsuperscript{75} \textit{Id.} at 19.
monitoring of sensitive intelligence information about non-citizens with a suspect background, giving federal authorities considerable arrest and detention powers.

Canada enacted various forms of security legislation after 9-11, but added a public safety dimension to their immigration legislation under the Immigration and Refugee Protection Act (IRPA) by way of security certificates. Although security certificates have been used sparingly over the years, its use in recent times has raised considerable constitutional debate in terms of: (1) the use of secretive or classified information from security intelligence reports that justify long periods of detention and ultimate deportation for non-citizens; (2) an accused being detained with little or no right to counsel; and (3) an accused possibly being deported back to a country known for its practice of torture and cruel and unusual punishment. Hence, the concern about the lack of due process facing accused persons is legitimate, prompting federal authorities to balance civil liberties with national security when issuing security certificates.

The security certificate regime under IRPA demonstrates how Canada links security with immigration processing by coordinating decisions between administrative agencies and the judiciary. There is no question that security legislation is needed to safeguard the interests of national security in any nation. However, if democratic countries are to practice and endorse fair legal representation on behalf of accused non-citizens, they should be mindful of the inherent qualities of due process that provide adequate notice and an opportunity to be heard for individuals who are accused of serious crimes.

A fair and prudent legal system defers to constitutional principles of due process, which provide accountability and accuracy in weighing relevant evidence against accused individuals. Moreover, given the heightened restrictions included in modern terrorism-related legislation, and the challenge of profiling individuals suspected of terrorism, the Canadian judiciary’s treatment of security certificates is important in two ways. First, it helps determine the weaknesses in security legislation intended to enhance national security. Second, the recognition that due process rights must be strengthened for non-citizens closely conforms to constitutional protection under sections 7 (right to
life, liberty, and security of the person) and 15 (equality rights) under Canada’s Charter of Rights and Freedoms.

Over the years, the controversial use of security certificates in Canada has come under greater scrutiny in light of some precedent rulings from the Supreme Court of Canada and the Federal Courts. These court rulings not only help strengthen due process rights for an accused named in a security certificate, but establish clearer burdens of proof on government officials, set better standards in weighing evidence against the accused, and refine procedures underlying the adjudication process. This is particularly true when adverse consequences are likely to flow from an unfair proceeding, resulting in deportation to an unsafe country.

In this way, more meaningful representation can be achieved on behalf of detained persons within the scope of security certificates, keeping close to Canada’s Charter. Notwithstanding security concerns in protecting its nation from terrorism, Canada can still follow its rich tradition of open immigration, but both the legislative and judicial branches must continue improving the security certificate regime in order to sensibly balance security with immigration.