PROCESS AND SUBSTANCE: CHARKAOUI I IN THE LIGHT OF SUBSEQUENT DEVELOPMENT

Rayner Thwaites*

INTRODUCTION

The Canadian security certificate regime found in the *Immigration and Refugee Protection Act 2001* [1] provides for the removal of non-citizens on security grounds and detention pending removal. In February 2007, by way of a unanimous judgment in *Charkaoui I*,[2] the Supreme Court of Canada upheld the regime, subject to changes to its procedures mandated by the *Canadian Charter of Rights and Freedoms*.[3] The Court addressed the procedures for the review of certification and detention, leaving the legality of the indefinite detention of non-citizens and deportation to torture to be resolved on a case by case basis. The Court's reasoning in *Charkaoui I* has been criticized, by myself and others, on the grounds that it used procedure to avoid the substantive issues of primary concern to the appellants.[4]

But that criticism may be insufficiently appreciative of what improved procedures can achieve. Procedural modifications to the security certificate regime instigated by *Charkaoui I* had, by the end of 2009, resulted in the release of two of the five men certified under the regime. The security certificates issued against Mr. Charkaoui and Mr. Almrei were ruled to be void and quashed, respectively.

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* Lecturer, Faculty of Law, Victoria University of Wellington, New Zealand. Thanks to Alberto Costi. The piece draws on a portion of my doctorate and has benefitted from the comments and criticisms of David Dyzenhaus, Karen Knop, Audrey Macklin and Kent Roach in that process. All errors and distortions remain the responsibility of the author.

1 SC 2001, c 27, as amended by SC 2002, c 8, SC 2005, c 38 [IRPA]. This was the version of IRPA considered in *Charkaoui I*. Subsequent section changes are cited to IRPA as amended by SC 2008, c 3 [IRPA-2008].

2 *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2007] 1 SCR 350 [*Charkaoui I*].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 Rayner Thwaites, "Discriminating Against Non-Citizens Under the *Charter: Charkaoui* and Section 15" (2009) 34 Queen's LJ 669 [Thwaites, "*Charkaoui* and Section 15"] at 706; Kent Roach "*Charkaoui* and Bill C-3: Some Implications for Anti-terrorism Policy and Dialogue between Courts and Legislatures" (2008) 42 SCLR (2d) 281 [Roach, "*Charkaoui* and Bill C-3"] at 348-350.

From the present vantage point, it appears that *Charkaoui I* initiated a cycle of legal developments that was beneficial to constitutionalism and ultimately to some of the detainees.[5] These jurisprudential developments, discussed below, highlight the positive contribution made by the procedural rulings in *Charkaoui I*.

In this article I examine the relationship between process and substance in *Charkaoui I* in the light of these subsequent jurisprudential developments. I argue that the benefits of the procedural solution on which the Court determined in that decision do not outweigh the costs. My objective is to provide a fuller accounting of the costs of the Court's decision in *Charkaoui I* to opt for an exclusively procedural solution to rights infringements.

My analysis of the relationship between process and substance in *Charkaoui I* is informed by United States commentary on litigation on alleged enemy combatants in the "war on terror", in particular an article by Jenny Martinez.[6] In response to the question "why is it that the litigation concerning the alleged enemy combatants at Guantanamo and elsewhere has been going on for more than six years and almost nothing seems to have been decided?", Martinez turned to the way in which the "war on terror" litigation in the United States had been "fixated on process".[7] Speaking to the implications of a pattern of procedural rulings in the United States counterterrorism context, she stated:

> [f]irst, by delaying the ultimate resolution of rights claims, it has allowed serious violations of human rights to continue for years. Second, this approach has foreclosed many rights based challenges without considering the merits of those challenges.[8]

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[5] For a qualified argument of this form see Graham Hudson, "Whither International Law? Security Certificates, the Supreme Court and the Rights of Non-citizens in Canada" (2009) 26 Refuge 172 [Hudson, "Whither International Law?"] at 183. He states that Charkaoui I "left open" the possible reshaping of the security certificate procedure to allow for "expanded levels of disclosure, fairness and adversarial challenge". Although perhaps a subtle point, I endorse, and address myself to, the stronger claim that Charkaoui I did not just leave open such reshaping, but actively contributed to it. [indent ch?]

[6] The title of the present article echoes Jenny S. Martinez, "Process and Substance in the 'War on Terror'" (2008) 108 Colum L Rev 1013. In that article she develops a typology of different relationships between process and substance that I have found very useful in analysing *Charkaoui I*.

[7] *Ibid* at 1014-1015. Also on the "mystery" of why "after nearly seven years...not a single detainee has ever been released, by order of any court or any other body in a position of authority, against the wishes of the Administration.": see Linda Greenhouse, "The Mystery of Guantanamo Bay – Jefferson Lecture, University of California, Berkeley, September 17, 2008" (2009) 27 Berkeley J Int'l L 1 at 2. Martinez's question has been taken up in Judith Resnik, "Detention, the War on Terror and the Federal Courts" (2010) 110 Colum. L Rev 579 at 625-634. See also Richard Fallon Jr, "The Supreme Court, Habeas Corpus and the War on Terror: An Essay on Law and Political Science" (2010) 110 Colum L Rev 352 at 391-392, 395-396.

[8] Martinez, *supra* note 6 at 1031.

The first of Martinez's points is serious, but it is the more obvious, and I want to focus on the second issue she raises.

In Part I, I return to *Charkaoui I,* highlighting the Court's lack of decision on the substantive rights challenges before it. In Part II, I examine subsequent jurisprudential developments, which show that *Charkaoui I* has served as the basis for a steady ratcheting up of the procedural protections afforded to those certified under the security certificate regime. Putting Parts I and II together, I characterize *Charkaoui I* as simultaneously an evasive decision on the substantive rights challenges, and a solid contribution in relation to the procedural rights of those concerned. In Part III I provide an accounting of the costs of the procedural solution adopted in *Charkaoui I.*

It may lend clarity to my argument to state my underlying position on the substance at the outset. The central concern of the article is with the need for full and transparent engagement with rights infringements arising from the use of highly coercive powers. Although my sympathies with the situation of those subject to indefinite detention and/or constraint under the security certificate process will be evident, I do not dispute that some form of preventive detention may be necessary. The decisive legal move on preventive detention should be the imposition of a time limit, transforming it into either provisional-charge or provisional-deportation detention.[9] This would allow time for the collection of evidence. A variation on this suggestion would be to hold that while "reasonable grounds for suspicion" might suffice for initial detention, the evidential burden on the government should increase with the lapse of time until a point is reached where the evidential burden is that of criminal law, and the government is forced to charge or release.[10] Finally, it should be acknowledged that the Canadian security certificate regime has become, at least in its application to foreign terrorist suspects, a preventive detention regime rather than detention for the purpose of facilitating removal, and its application should accordingly be extended to citizens.

1. The "procedural solution" adopted in Charkaoui I

The appellants in *Charkaoui I* were non-citizens, against whom either a removal order had been made or who were in the midst of proceedings ultimately concerned with whether such an order should be made. The removal orders in question followed from issuance of a ministerial certificate that the relevant individual was inadmissible to Canada for reasons of security (a security certificate) and determination by a single judge of the Federal Court, following the procedures set out under IRPA, that the

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[9] See Clive Walker, "Keeping Control of Terrorists Without Losing Control of Constitutionalism" (2007) 59 Stan L Rev 1395 at 1458 and 1463. Walker reiterates this proposal in Clive Walker, *Blackstone's Guide to The Anti-Terrorism Legislation*, 2nd ed (Oxford: Oxford University Press, 2009) at para 7.110 and in Clive Walker, "The Threat of Terrorism and the Fate of Control Orders" [2010] PL 4 at 16.

[10] See Craig Forcese & Lorne Waldman, "A Bismarckian Moment: Charkaoui and Bill C-3" (2008) 42 SCLR (2d) 355 at 409.

individual's certification was "reasonable".[11] The appellants remained in Canada due to concerns about a risk of persecution or torture on return to their respective countries of nationality.[12] The IRPA provides for open-ended detention of those certified, with the danger the certified non-citizen poses to national security or the safety of any person constituting a sufficient reason for continued detention.[13] All three appellants remained in detention or were subject to onerous conditions on release at the time of hearing and judgment in *Charkaoui I*.[14]

The three appellants in *Charkaoui I* challenged the constitutionality of the security certificate regime on a number of grounds.[15] They argued that procedures for "reasonableness" review of a decision to issue a security certificate, and the procedures for reviewing detention, infringed s. 7 of the *Charter*, and that the incidence of detention review did not meet the requirements of ss. 9 and 10. They also argued that detention under the regime constituted "cruel and unusual treatment or punishment" under s. 12, and was discriminatory under s. 15.[16] The Court directed most of its reasoning to the deficiencies of the statutory requirements for the Federal Court's review of certification and detention.[17] The Court held that the procedures under the security certificate regime did not comply with s. 7 of the *Charter* and further that the procedures were not justified under s. 1.[18] It issued a declaration of invalidity (suspended for one year) on this ground. The Court suggested procedural changes to mitigate the damage to procedural rights that resulted when information was withheld from those named in

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[11] Under the IRPA, a judicially approved "reasonableness" certificate constitutes an order for removal from Canada: IRPA, s 81 (IRPA-2008, s 80). Two of the appellants, Mr. Harkat and Mr. Almrei had their certification judicially approved at the time of hearing and judgment in *Charkaoui I*. Mr. Charkaoui had not.

[12] The IRPA prohibits the return of "protected persons" to a country where they would be at a risk of persecution or torture: IRPA, s 115. It allows for a ministerial discretion to make an exception to this prohibition on return for a protected person who is "inadmissible on grounds of security..." This ministerial discretion is exercised through what are colloquially called "danger opinions" which weigh the risk to the named individual against the danger to the security of Canada. A danger opinion may be quashed on judicial review. Danger opinions to the effect that a certified individual may be removed have been quashed repeatedly: see the examples discussed in Thwaites, "*Charkaoui* and Section 15", *supra* note 4 at 693-694.

[13] IRPA, *supra* note 1, s 83 and 84; IRPA-2008, *supra* note 1, s 82.

[14] Release on conditions had been ordered in *Re Charkaoui*, 2005 FC 248, 252 DLR (4th) 601 [*Charkaoui, fourth application for release*] (after 21 months in a detention facility); and *Harkat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 628, [2007] 1 FCR 321 [*Harkat, second application for release*] (after almost 3.5 years in a detention facility). Mr. Almrei remained in detention at the time of hearing and judgment. He was eventually released in *Re Almrei*, 2009 FC 3 (after more than 7 years in a detention facility).

[15] The Supreme Court's decision in *Charkaoui I, supra* note 2, was an appeal from three cases of the Federal Court of Appeal. The Supreme Court heard the matters together over three days in June 2006.

[16] A challenge was also mounted based on the constitutional principle of the rule of law.

[17] *Charkaoui I, supra* note 2 at paras 12-87.

[18] *Ibid* at paras 85-87.

security certificates on grounds of national security. It also severed certain phrases and provisions, and read in terms, so as to ensure that judicial review commenced within 48 hours of the beginning of detention and took place at least once in each six-month period following the preceding review.[19]

The Court did not set any time limits on how long a non-citizen could be held in detention after a deportation order had been made. Crucially, the Court held that, subject to the procedural changes it required, continuing detention of non-citizens under the security certificate regime did not contravene ss. 12 (cruel or unusual treatment) or 15 (equality) of the *Charter*.[20] It reasoned that the augmented procedural protections required under its s. 7 analysis "answered" the substantive *Charter* challenges under ss. 12 and 15.[21]

The Court devoted most of its reasoning to identifying deficiencies in the statutory requirements for review of certification and detention contained in Part 1, Div 9 of the IRPA. A central characteristic of the Court's reasoning in *Charkaoui I* was its lack of decision on the substantive issues. No one was ordered released. No one was ordered removed. The spectacle of a detention regime ostensibly facilitating deportation, under which deportation does not occur, continued. There was no discussion of the existing constitutional allowance for a discretion to deport to torture in exceptional circumstances,[22] nor was the constitutionality of indefinite detention directly addressed. Instead, the Court provided for the possibility of rights infringements being identified on a case by case basis and devoted its energies to examining and ultimately strengthening the procedural protections afforded to those certified under the regime.

The features of the Court's reasoning set out in the preceding paragraph can be characterized as implementing a form of constitutional minimalism.[23] The characterization is useful in that it points to a principled motivation for the Court's approach. In the influential account of constitutional minimalism offered by Sunstein in the United States counterterrorism context,[24] the approach is defined by a preference

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[19] *Ibid* at paras 141-42. The IRPA had previously provided that non-citizens who were not permanent residents were only eligible for detention review 120 days after a decision had been made on the reasonableness of the certificate, which in some cases (for example that of Harkat) meant that those named were ineligible for detention review for years. Harkat was taken into detention in December 2002. A reasonableness decision was not delivered until 22 March 2005: *Re Harkat* (2005), 261 FTR 52.

[20] *Charkaoui, ibid* at paras 123, 131.

[21] *Ibid* at paras 3, 123, 131.

[22] Commonly referred to as the Suresh exception, after *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

[23] For an earlier assessment of *Charkaoui I* in terms of Sunstein's constitutional minimalism see Roach, "*Charkaoui* and Bill C-3" *supra* note 4 at 287, 290.

[24] Cass Sunstein, "Minimalism at War" [2004] SCLR (2d) 47. Sunstein's article was an application to

for narrowness over breadth and shallowness over depth.[25] Sunstein's position is motivated by the view that it is better, particularly in the area of national security where the threat is uncertain and unknown, to avoid setting substantive constitutional standards, at least for a few more years.[26] Such a delay is prudent given the risk of an inappropriately calibrated response, that is one that has an unnecessarily adverse impact either on rights or on the government's ability to respond to threats to security. The reasoning on the substantive *Charter* challenges in *Charkaoui I* met the "minimalist" criteria of "narrowness" and "shallowness". On the narrowness criterion, the Court adopted a "one case at a time" approach to the key substantive points at issue. It held out the prospect that a court may, in a future case, determine that the "hinge" between detention and deportation has been broken.[27] Its reasoning was also shallow in Sunstein's sense, in that it did not develop the basis for its conclusion that detention remained for the purpose of deportation in the cases before it, nor did it make clear how it would be determined when this purpose ceased to authorise detention. The non-committal jurisprudence on substantive rights expressed in these criteria is intended to ensure the reviseability of the law on those issues, putting minimal constraints on future legislatures and courts. Whether these criteria do in fact ensure such reviseability is the subject of critical discussion in Part 3.

None of this is to deny that the Court in *Charkaoui I* addressed a range of rights concerns. As noted above, it required changes to mitigate damage to procedural rights and tightened up the provisions governing the incidence of detention review. It held open the prospect of a judge "concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice" and ordering a remedy under the *Charter* on that basis.[28] It endorsed the established Federal Court practice of ordering release from detention with onerous conditions sufficient to "neutralize" the threat.[29] And it acknowledged that restraint under such conditions was not unproblematic.[30]

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emergencies of a minimalist position he argued was appropriate in all constitutional cases. For his account of the minimalist position see: Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

[25] Sunstein, "Minimalism at War", *ibid*, at 48.

[26] Worries about unduly fettering the executive arguably have less force in Canada as compared to the United States. The notwithstanding clause (s 33 of the Charter) arguably allows for a "safety valve" should the Parliament come to the conclusion that particular legal rights prevent a necessary response to a public emergency: see Kent Roach, "Constitutional, Remedial and International Dialogues about Rights: The Canadian Experience" (2005) 40 Tex Int'l LJ 537 at 572-573.

[27] On the use of "hinge" see *Charkaoui, supra* note 2 at para 131.

[28] *Charkaoui I, supra* note 2 at para 123.

[29] *Ibid* at para 101. As examples of this Federal Court practice, and the language of "neutralization", see *Charkaoui, fourth application for release, supra* note 14 at para 78; *Harkat, second application for release, supra* note 14 at para 82.

[30] *Ibid* at paras 103-104.

2. The procedural legacy of Charkaoui I: subsequent developments

> We must always remember that we are not dealing with Canadians. We are dealing with non-Canadians. The security certificate provisions do not involve Canadians, only non-Canadians. The non-Canadian category includes people with no status and people who have permanent resident status but are not citizens.[31]

In response to *Charkaoui I* the Canadian legislature enacted Bill C-3.[32] *Charkaoui I* did not dislodge the preventive detention regime from the immigration legislation. As repeatedly reiterated in the above quoted statement in support of Bill C-3, the legislative response continued to focus on non-citizens alone.[33]

In *Charkaoui I,* the Supreme Court had ruled that the certification decisions previously made under the security certificate regime would lose their "reasonable" status one year after judgment.[34] The government accordingly quashed the earlier certification decisions, and on 22 February 2008, the day the amendments introduced by Bill C-3 came into effect, the Ministers signed new security certificates for five foreign terrorist suspects already held under the regime, referring the certificates to the Federal Court for reasonableness review.[35]

All those re-certified under the security certificate regime in February 2008 have by now, at some point, been released from detention, subject to conditions.[36]

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[31] *House of Commons Debates*, 39th Parl, 2nd Sess, No 20 (20 November 2007) at 1085 (Derek Lee).

[32] *An Act to Amend the Immigration and Refugee Protection Act (Certificate and Special Advocate),* SC 2008, c 3.

[33] Cf. The legislative response to the House of Lords decision in *A v Secretary of State for the Home Department* [2005] 2 AC 68 [*Belmarsh*]. The short name of the decision is that of the prison where the relevant detainees were held. *Belmarsh*, like *Charkaoui I*, was also a decision on the legality of the indefinite detention of non-citizens subject to a removal order. The majority in *Belmarsh* held that the indefinite detention of non-citizens subject to removal orders was discriminatory and not strictly necessary to address the claimed emergency. *Belmarsh* led the legislature to withdraw the provisions under challenge, which had provided for indefinite detention in such terms, and introduce a regime of "control orders" applicable to citizens and non-citizens alike: *Prevention of Terrorism Act 2005* (UK), c 2. The comparison between the two decisions has been central to commentary on *Charkaoui I*. See for example Maureen T Duffy and Rene Provost, "Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada" (2009) 40 Case W Res J Int'l L 531 at 545-552; Thwaites, "*Charkaoui* and Section 15", *supra* note 4 at 710-714; Roach, "*Charkaoui* and Bill C-3", *supra* note 4 at 308-310.

[34] *Charkaoui I, supra* note 2 at para 140.

[35] IRPA-2008, *supra* note 1, s 77(1). Five persons were re-certified by the Minister under the *Immigration and Refugee Protection Act* as amended by Bill C-3: Mr. Almrei, Mr. Charkaoui, Mr. Harkat, Mr. Jaballah and Mr. Mahjoub.

[36] This is not to say that none are presently in detention. Mr. Mahjoub was subsequently readmitted to detention at his request, due to the impact the conditions imposed on his release were having on his family, with whom he shared the home to which he was largely confined: *Canada (Minister of*

The Federal Court practice of release on conditions was well established at the time of the decision in *Charkaoui I*, and endorsed in that judgment.[37] Bill C-3 provided the practice with a statutory basis.[38] In the case of release on conditions, the Court in *Charkaoui I* endorsed an existing practice. It made a more active contribution in relation to the procedures to be applied on review of certification and detention. This article considers the consequences of the Court's procedural contribution in *Charkaoui I*. The legislative response, Bill C-3, has received careful academic appraisal.[39] I simply register that one of its primary contributions was the introduction of special advocates into the security certificate regime.

The role of the special advocate is to "protect the interests" of the certified person in proceedings under the security certificate regime whenever, for reasons of confidentiality, evidence is heard in the absence of both him and his counsel.[40] The special advocate is intended to counterbalance 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 certified person during closed hearings.[41] A feature of the mechanism is that once the special advocate has received the confidential material, the barriers put in place to communication between the special advocate on the one hand and the certified person and his or her lawyers on the other are considerable. As has become evident in jurisprudence on special advocates, in Canada and overseas, the ability of the special advocate to perform his or her functions is crucially informed by both the degree of disclosure to the advocate him or herself and, as a distinct issue, the degree of disclosure to the certified person and his counsel. The latter issue goes to the certified person's ability to give effective instructions to the special advocate.[42]

Citizenship and Immigration) v Mahjoub 2009 FC 439. Blanchard J confirmed by order Mr. Mahjoub's request to return to detention (ordering the immediate cessation of all monitoring of the family home).

[37] *Charkaoui I, supra* note 2 at para 101.

[38] IRPA-2008, *supra* note 1, s 82(5).

[39] See the commentaries in vol 42 of the Supreme Court Law Review (2d): see Roach, "*Charkaoui* and Bill C-3", *supra* note 4; Forcese and Waldman, "A Bismarckian Moment", *supra* note 10; David Dunbar & Scott Nesbit "Parliament's Response to *Charkaoui*: Bill C-3 and the Special Advocate Regime under IRPA" (2008) 42 SCLR (2d) 415.

[40] IPRA 2008, s 85 (to date all the certified persons in the Canadian context have been male). There is a growing body of literature on the special advocate process; see for example John Ip, "The Rise and Spread of the Special Advocate" [2008] PL 717; Craig Forcese and Lorne Waldman, "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (August 2007), online: University of Ottawa <http://aix1.uottawa.ca/ ~cforcese/other/sastudy.pdf>.

[41] See the unanimous judgment of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 29, 625 at para 220.

[42] In addition to the Canadian jurisprudence discussed, see for example the decision of the House of Lords in *AF v Secretary of State for the Home Department* [2009] UKHL 28.

In the last several months of 2009, two of the five persons subject to security certificates exited the regime entirely. I discuss the circumstances leading to Mr. Charkaoui's and Mr. Almrei's exits from the security certificate regime below, following an examination of a Canadian Supreme Court decision bearing on the security certificate regime, *Charkaoui II.* This decision confirmed a commitment on the part of the Court, evidenced in *Charkaoui I,* to trying to ensure meaningful judicial review in a context characterized by secret evidence.

A. Charkaoui II.

In *Charkaoui II*, the Court did not address the interpretation of Bill C-3, nor its constitutionality.[43] It sought to address certain problems arising from the use of secret evidence and, in particular, the judge's dependence on the executive's selection and characterization of the evidence.[44] The facts of the case were that prior to the fourth periodic review of Mr. Charkaoui's detention,[45] government counsel informed the judge that it had failed to disclose a document at the outset of the proceedings, namely a summary of two Canadian Security Intelligence Service [CSIS] interviews with Mr. Charkaoui in 2002. The judge ordered their immediate disclosure.

Following a review of the summaries, Mr. Charkaoui requested disclosure of the complete notes and recordings of the CSIS interviews. The government responded that there were no recordings on file and that CSIS interview notes were, in accordance with CSIS policy, systematically destroyed once the officers had completed their reports. Mr. Charkaoui argued that he was entitled to the notes and applied for a stay of proceedings, requesting that the certificate against him be quashed.[46] The trial judge dismissed the application, drawing a distinction between the work of an intelligence agency and a police force, and holding that the former was not subject to the disclosure obligations of the latter under the criminal law.[47] He also cautioned against the application of criminal justice standards in the immigration context. His decision was upheld by the Federal Court of Appeal.[48]

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[43] *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2008] 2 SCR 326 [*Charkaoui II*] at para 18. For commentaries on the decision see Kent Roach "When Secret Intelligence Becomes Evidence: Some Implications of *Khadr* and *Charkaoui II*" (2009) 47 SCLR,(2d) 147; and the Postscript to Gus Van Harten, "*Charkaoui* and Secret Evidence" (2008) 42 SCLR (2d) 251 at 277-279.

[44] See van Harten, *ibid* at 278.

[45] On the periodic review of detention see IRPA, s 83 and s 84; IRPA-2008, s 82.

[46] *Charkaoui II, supra* note 43 at paras 10-11.

[47] *Re Charkaoui* (2005) 261 FTR 1 at para 17.

[48] *Re Charkaoui* (2006) 272 DLR (4th) 175.

The Supreme Court allowed Mr. Charkaoui's appeal in part.[49] It held that CSIS's policy of destroying interview notes breached its duty to retain and disclose information under the *Canadian Security Intelligence Service Act*.[50] The Court interpreted the relevant provision, s. 12 of the CSIS Act,[51] in the light of s. 7 of the *Charter*. It rejected the claim that s. 7 rights are confined to the criminal justice system or are to be aggressively contextualised downward in the immigration context, stating:

> whether or not the constitutional guarantees of s. 7 of the *Charter* apply does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state's actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life. By its very nature, the security certificate procedure can place these rights in serious jeopardy, as the Court recognized in *Charkaoui*. To protect them, it becomes necessary to recognize a duty to disclose evidence based on s. 7.[52]

In adopting this position, the Court confirmed its approach to review of the security certificate procedures in *Charkaoui I*. The decision in *Charkaoui II* showed that the Court was well aware of the procedural deficiencies that remained following *Charkaoui I,* chief among them the judge's dependence on the executive to select and characterize the material introduced as secret evidence.[53] In *Charkaoui II,* the Court took steps to address this issue. It held that "[r]etention of the notes will make it easier to verify the disclosed summaries and information based on those notes.[54]

The Court held that, while CSIS was not a police agency, it was subject to duties of disclosure that went beyond provision of mere summaries of information.[55] The Court took care not to treat the security certificate process as equivalent to a

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[49] It held that the only appropriate remedy was to confirm the duty to disclose Charkaoui's entire file to the designated judge, who would then act as a filter on what was disclosed to Mr. Charkaoui and his counsel. As an appeal on an interlocutory point, it was held to be premature to determine how the destruction of the notes impacted on the reliability of the evidence. That assessment was left with the reviewing judge.

[50] RSC 1985 c C-23 [*CSIS Act*], s 12. The Federal Court of Appeal had also held that the *CSIS Act* required the retention of information, but held that Mr. Charkaoui had suffered no prejudice in the present case, and that the postponement ordered by trial judge constituted an appropriate remedy.

[51] Section 12 of the *CSIS Act* provides: "The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada."

[52] *Charkaoui II*, *supra* note 43 at para 53.

[53] See van Harten, *supra* note 43 at 278, 279.

[54] *Charkaoui II*, *supra* note 43 at para 39.

[55] *Ibid* at para 50. Earlier in the judgment, the Court stated that the activities of Royal Canadian Mounted Police and CSIS had been converging: see *ibid* at paras 25-28.

criminal trial.[56] Nonetheless, starting from the proposition that "[t]he consequences of security certificates are often more severe than those of many criminal charges",[57] the Court reasoned that s. 7 of the *Charter* required "a procedure for verifying the evidence adduced against [the individual]"[58] that centred on the reviewing judge. The Court stated that:

> If the original evidence was destroyed, the designated judge has access only to summaries prepared by the state, which means that it will be difficult, if not impossible, to verify the allegations. [indent ch?]
>
> As things stand, the destruction by CSIS officers of their operational notes compromises the very function of judicial review. To uphold the right to procedural fairness of people in Mr Charkaoui's position, CSIS should be required to retain all information in its possession and to disclose it to the ministers and the designated judge. The ministers and the designated judge will in turn be responsible for verifying the information they are given.[59]

In its ruling on disclosure, the Court in *Charkaoui II* referred back to the procedural problems raised by secret evidence that had been identified in *Charkaoui I,* namely that "[d]espite the judges best efforts to question the government witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information".[60] The disclosure requirements insisted on in *Charkaoui II* were an attempt to ameliorate this state of affairs. The disclosure in question was disclosure to the designated judge and Minister. Much of this information will then be provided to the special advocate but not to either the detainees or their lawyers. As was made clear in the 2009 decision on the reasonableness of Mr. Almrei's certification, discussed in section II.C below, increased disclosure to the judge and special advocate can serve to expose weaknesses in the government case. The decision in Mr. Almrei's case is discussed following consideration of Mr. Charkaoui's own, earlier, exit from the security certificate regime.

B. Exit from the security certificate regime 1 – Mr. Charkaoui.

The security certificate issued against Mr. Charkaoui was declared void in October 2009. The events leading to this ruling constitute an instance in which, faced with the choice between release of someone it has certified as a security risk or greater public

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[56] *Ibid* at para 47 and 50-63.

[57] *Ibid* at para 54.

[58] *Ibid* at para 56.

[59] *Ibid* at paras 61-62. See also at para 42.

[60] *Charkaoui I, supra* note 2 at para 63, quoted in *Charkaoui II, supra* note 43 at para 60.

disclosure of intelligence, the government has opted for release. The events described below arose in the course of the reasonableness review of the security certificate issued in February 2008.[61] To initiate the reasonableness review the Ministers filed a Notice of Referral of Certificate in each case together with a top-secret Security Intelligence Report [SIR] with supporting reference materials. The SIR was a narrative report prepared by CSIS setting out its grounds for believing that a person was inadmissible to Canada. A public summary of the SIR entitled a "Statement Summarizing the Information" with the corresponding open source reference material was served on each of the certified individuals and filed with the Court.[62]

In the course of *in camera* proceedings for Mr. Charkaoui in April and May 2009, special advocates challenged "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".[63] As a consequence, the Court was persuaded to issue a number of orders requiring disclosure of certain material. The Ministers disagreed with the Court's determinations, and decided to withdraw that evidence rather than disclosing it in accordance with the Court's orders, as they are entitled to do under the IRPA.[64] On 31 July 2009, the Ministers stated that, in their opinion, the evidence remaining in the file was not sufficient to meet their burden of showing that the certificate was reasonable. Nevertheless, they asked the Court to determine whether the certificate was reasonable in order to force an appeal on the level of disclosure required.[65] On 5 August 2009 the Court stated the following question for the parties:

> Given the Ministers' admission that the evidence is not sufficient to meet the burden of proof imposed by the IRPA, is it appropriate for the Court to determine whether the certificate is reasonable, or should the certificate simply be **withdrawn** by the **Ministers** without further formalities?[66]

The Ministers reiterated that they were not prepared to withdraw the certificate, and certified two questions on disclosure to the Federal Court of Appeal.[67] Following further submissions by the parties, in a public hearing in Montreal on 24

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[61] On the re-certification of certain foreign terrorist suspects in 2008 see text accompanying note 35.

[62] *Re Almrei* 2009 FC 1263 [*Almrei 2009 Reasonableness Decision*] at para 17.

[63] Section 85.1(2)(a) of IRPA-2008, *supra* note 35. The facts are taken from *Re Charkaoui* 2009 FC 1030 [*Charkaoui 2009*].

[64] Section 83(1)(j) of IRPA-2008, *supra* note 35, provides that the judge determining the reasonableness of a security certificate "shall not base a decision on information or other evidence provided by the Minister . . . if the Minister withdraws it".

[65] *Charkaoui 2009*, *supra* note 63 at para 30. See Graham Hudson, "A Delicate Balance: *Re Charkaoui* and the Constitutional Dimensions of Disclosure" (2010) 18 *Const Forum Const* 129 at 133.

[66] *Ibid* at para 17. Bolding in original.

[67] *Ibid* at para 18. In accordance with s 9 of IRPA-2008, *supra* note 35.

September 2009, the judge ordered the immediate release of Mr. Charkaoui without conditions, with reasons to follow.[68] Those reasons were provided in a judgment of 14 October 2009, in which the judge held that the security certificate was *ultra vires* and void, on the basis of the Minister's admission that the information remaining on file was insufficient to support certification.[69] Accordingly, she did not proceed to determine the reasonableness of the certificate. Further, the judge refused to certify the appeal question proposed by the Ministers, on the grounds that they were in truth just seeking to re-open the Court's assessment of the facts.[70]

C. Exit from the Security Certificate regime 2 – Mr. Almrei.

As with Mr. Charkaoui, on 22 February 2008 a new security certificate was issued in respect of Mr. Almrei and referred to the Federal Court for reasonableness review. The "reasonableness" decision for Mr. Almrei, on the Minister's "post-Bill C-3" certification decision of 22 February 2008, was handed down on 14 December 2009,[71] following public hearings and *in camera* hearings spread over 40 days between March and September 2009. At the end of a lengthy judgment, the Court concluded that the certificate issued against Mr. Almrei was not reasonable and must be quashed. The judge determined that Mr. Almrei was not, at the time of judgment, a danger to the security of Canada and that none of the grounds of inadmissibility required for certification had been established.[72] He further found that CSIS and the Ministers were in breach of their duty of candour to the court.[73]

The *Almrei 2009 Reasonableness Decision* showed the practical effects of the combination of the ruling on disclosure in *Charkaoui II* and the procedural reforms necessitated by the Court's decision in *Charkaoui I*, in particular the introduction of special advocates:

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[68] On Mr. Charkaoui's release see Andrew Chung, "Charkaoui to be freed", *Toronto Star* (24 September 2009), online: Toronto Star <http://www.thestar.com/news/canada/article/700356>; Les Perreaux and Colin Freeze, "Al Qaeda suspect freed, Ottawa's terror law shattered", *Globe & Mail* (24 September 2009), online: Globe & Mail <http://www.theglobeandmail.com/news/national/judge-lifts-charkaoui-restrictions/article1299943/>.

[69] *Charkaoui 2009*, *supra* note 63 at paras 39, 23-45.

[70] The Ministers were found to be seeking an "item-by-item re-assessment of the specific summaries to the disclosure of which the Ministers object. This objection pertains to the facts of this case. It does not transcend the parties' interests and is not of general importance. It raises no question that meets the criteria of section 79 of the IRPA" [bold in original]: *Ibid* at para 92, see also paras 109, 112. See Hudson, "A Delicate Balance", *supra* note 65 at 134.

[71] *Almrei 2009 Reasonableness Decision*, *supra* note 62.

[72] *Ibid* at para 504.

[73] *Ibid* at para 503. Both Mr. Almrei and the special advocates filed motions that the government had breached its duty of candour: see at paras 480-481. The special advocates did so on the basis of the government's failure to disclose material exculpatory evidence.

> Production of the Charkaoui 2 information also allowed for a comparison of the reports of information provided by the human sources with other information held by CSIS including the intercept and surveillance reports. That comparison identified some serious contradictions. In the result, I was satisfied that the highly relevant information provided by one source in particular was not credible as it conflicted with surveillance and intercept reports made by CSIS personnel regarding the same dates and times.
>
> It is of particular concern that these contradictions did not come to light until they were put to the Service witness in cross-examination by the Special Advocates. That witness was unable to provide satisfactory explanations for the failure of the Service to analyse the conflicting reports and to disclose this information to the Ministers and to the Court. This suggests a serious lack of analytical capacity in managing the enormous volume of information collected by the Service.[74]

Increased disclosure pursuant to *Charkaoui II* enabled the identification of "serious contradictions" in the government's evidence. These contradictions came to light when the government witness was cross-examined by the special advocates. The decision gave grounds for confidence that the procedural innovations required by *Charkaoui I* and *Charkaoui II* had achieved real advances in the ability of the courts to scrutinize national security decision-making. The *Almrei 2009 Reasonableness Decision* conveys that the cumulative effect of Canadian judicial decisions in the area has been to enable more effective judicial scrutiny of national security matters.

The findings also raised serious concerns about the Canadian government's use of the security certificate process. In concluding that CSIS and the Ministers had breached their duty of candour to the court, the judge stated:

> In this case, information that was inconsistent with that presented to the Court through the SIR only came to light when it was ordered produced in conformity with the Service's *Charkaoui II* obligations. This included surveillance and intercept reports that contradicted human source reports on which the Service and the Ministers relied. Information that was inconsistent with the content of the Source Exhibit was only disclosed when the Court began to order the production of information from the human source management files. The *Charkaoui II* disclosure obligation does not absolve the Service from the responsibility to fairly consider and present the information in their possession when they prepare the SIR. Nor does it absolve the Ministers from the responsibility to ensure that the information and evidence filed in support of the certificate is complete, thorough and fairly presented.[75]

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[74] *Ibid* at paras 163-164.

[75] *Ibid* at para 502.

He found that the government had made little effort to revise or review the bases on which Mr. Almrei was held over the eight year period that he was subject to the security certificate regime.[76]

In the course of the judgment the judge spoke of shifts in the standard of review of national security matters over the preceding eight years. The Minister had submitted that they were entitled to deference on the danger posed by Mr. Almrei, citing the statement from *Suresh* that: "Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister's decision."[77] The judge noted that the Court in *Suresh* had supported its position with reference to Lord Hoffmann's statements in *Rehman* on the relative expertise and access to special information possessed by the executive.[78] He continued:

> Much has changed in the past eight years, including the Supreme Court's decision in *Charkaoui I* and the House of Lords decision in the Belmarsh case in which they resiled from the *Rehman* dictum where the question to be determined is legal as opposed to political: *[Belmarsh]*.[indent ch – further out than ff quote]

In *Charkaoui I*, the Supreme Court observed that judges were correct to eschew an overly deferential approach in security certificate cases given the nature of the proceedings. It was stated that "[t]he IRPA does not ask the designated judge to be deferential, but, rather, asks him or her to engage in a searching review."[79] In the *Almrei 2009 Reasonableness Decision*, Mosley J reasoned:

> Here, the Court is making a fresh determination based on all of the information and other evidence presented including additional material which was not before the Ministers. The Court, as a result of *Charkaoui II*, has had access to operational and human source management information not previously made available. In the closed sessions, the information relied upon by the Ministers was called into question and the Court heard evidence about the manner in which the SIR was prepared. Having reviewed all of the information and evidence, I consider that little deference is owed to the Ministers decision.[80]

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[76] *Ibid* at para 413: "...I found it troubling that the work done to prepare the new SIR in 2008 had not kept pace with developments in the field. And the sources relied upon by the Service were often non-authoritative, misleading or inaccurate"; see also para 426: "the SIR presented in 2008 simply recycled stale information without attempting to offer a more balanced and nuanced view."

[77] *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at para 85, quoted in *Almrei 2009 Reasonableness Decision, supra* note 62 at para 102.

[78] *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 [*Rehman*].

[79] *Charkaoui I*, supra *note 2, paras 38-39.*

[80] *Almrei 2009 Reasonableness Decision, supra* note 62 at paras 103-105. On the *Belmarsh* decision, see

This last passage draws an analogy between the shift in judicial understandings of the deference appropriate in national security matters between *Rehman* and *Belmarsh* in the United Kingdom on the one hand, and between *Suresh* and *Charkaoui I* in Canada on the other. The contrast between *Rehman* and *Belmarsh* has become emblematic of domestic courts becoming more assertive in review of national security matters with the lapse of time after September 11, 2001.[81] There are, however, important *continuities* between *Suresh* and *Charkaoui I* of relevance to the current argument.

The decision in *Charkaoui I* was similar in key respects to *Suresh*. In both cases, by way of unanimous judgments, the Court upheld, as potentially free of constitutional limitation, a sweeping power over non-citizens. In *Suresh*, it was the possibility of deportation to torture. In *Charkaoui*, to this possibility was added that of indefinite administrative detention.[82] Further, in both cases, the Court chose to address any rights infringements on a case by case basis, rather than directly addressing the existence and width of the statutory powers in question.[83]

Suresh was a decision handed down in the months after 9/11. The Court's decision in *Suresh* to baulk at imposing an absolute limit on the government's power to deport a foreign terrorist suspect is perhaps unremarkable given the timing. The decision in *Charkaoui I* cannot be accounted for on such a basis. By the time the Court came to judgment in *Charkaoui I,* the inability of the security certificate regime to achieve the ostensible purpose of removal was readily apparent from the Federal Court jurisprudence. Already by 2005, in the course of an application for release, a judge wrote, "Mr Almrei insists that the legislation does not contemplate the present circumstances... it is arguable that when prolonged detention occurs, the legislation has diverted from its stated goal [namely removal from Canada]".[84] Moreover, the

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supra note 33.

[81] See for example Eyal Benvenisti, "United We Stand: National Courts Reviewing Counterterrorism Measures" in Andrea Bianchi and Alexis Keller, eds, *Counterterrorism: Democracy's Challenge* (Oxford: Hart Publishing, 2008) 251 at 252-255.

[82] On the way in which the possibility of deportation to torture assisted the argument for the legal permissibility of indefinite detention see: Rayner Thwaites, "A Coordinated Judicial Response to Counterterrorism? Counter-examples" in Mark B Salter, ed, *Mapping Transatlantic Security Relations: The EU, Canada, and the War on Terror* (New York: Routledge, 2010) 236 [Thwaites, "A Coordinated Judicial Response?"] at 249-252; and Thwaites, "*Charkaoui* and Section 15", *supra* note 4 at 699-700, 708-709, 712-713; Roach, "*Charkaoui* and Bill C-3", *supra* note 4 at 307.

[83] In this regard, *Suresh* and *Charkaoui* were consistent with the Supreme Court's earlier decision in *Canada (Employment and Immigration) v Chiarelli* [1992] 1 SCR 711. In that decision, the Supreme Court focused on Special Intelligence Review Committee's actual practices as opposed to the powers granted under the statute. On the contrast with comparative authorities on this point, the willingness to address the existence and width of the statutory powers of detention, see Thwaites, "*Charkaoui* and Section 15", *supra* note 4 at 705-706.

[84] *Almrei v Canada (Minister of Citizenship and Immigration)* 2005 FC 1645 at para 428, Layden-Stevenson J. See further Thwaites, "*Charkaoui* and Section 15", *supra* note 4 at 693-696.

Canadian Supreme Court also had the benefit of the House of Lords' reasoning in *Belmarsh*, a decision that the Court felt compelled to distinguish rather than reject on any aspect of its reasoning.[85]

3. The unavoidability of substance: Charkaoui I and the use of process

In the light of subsequent developments, earlier criticisms of *Charkaoui I*'s procedural orientation are arguably unbalanced in failing to give appropriate weight to the benefits of the procedural reforms resulting from that decision. Special advocates were introduced in response to *Charkaoui I*. The cross-examination by special advocates in the *Almrei 2009 reasonableness decision* exposed contradictions in the government case. Further, the endorsement of searching review in *Charkaoui I* was heeded by the judge in that decision, informing his reasoning. For the reasons given below, I argue that these benefits are nonetheless outweighed by the costs of the "procedural solution" adopted.

A. The procedural solution puts non-citizens' Charter rights at risk.

In *Charkaoui I,* the Court adopted a procedural solution to the rights infringements before it. It focused on the adequacy of the review procedures in the security certificate regime and stated that enhanced procedural protections "answered" the *Charter* challenges to the substantive treatment.[86] The Court showed judicial candour in its reasoning on the procedural aspects of the security certificate regime, moving directly and transparently from an enunciation of certain substantive values to its ruling on how the procedural provisions contravened the *Charter*.[87] Those values were encapsulated in 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".[88] Focusing on the way in which the procedural requirements of the *Charter* were arrived at, the relationship between procedure and substance was transparent and fully argued.

The initial problem was that the Court then relied on its procedural rulings to avoid having to engage with the substantive rights challenges: whether the detention in itself infringed the right to liberty and/or whether it was justified in the circumstances, whether it amounted to cruel and unusual treatment or punishment, or whether it was discriminatory. The Court rejected challenges on the foregoing grounds with little

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[85] A discussion of *Belmarsh* formed part of the Court's reasoning in *Charkaoui I*. The Canadian Supreme Court claimed that its reasoning was compatible with that of the House of Lords in *Belmarsh* and that the two cases could be distinguished on the facts. For an argument that this claim is unsustainable see Thwaites, "A coordinated judicial response?" *supra* note 82 at 247-254; Duffy and Provost, *supra* note 33 at 548–552.

[86] *Charkaoui I, supra* note 2 at para 131.

[87] For such an account of the relationship between procedure and substance in the U.S. context see Martinez, *supra* note 6 at 1048 and more generally on "procedure as substance".

[88] *Charkaoui I, supra* note 2 at para 61.

discussion of why the *status quo* was warranted, beyond the underdeveloped claim that these concerns were "answered" by the enhanced procedural protections it held to be required. Considering *Charkaoui I* in the context of the rights challenges brought, the preceding Federal Court jurisprudence on security certificates,[89] and the comparative authorities referred to in the judgment,[90] the abiding sense is that procedure was used to avoid directly addressing the substantive issues before the Court.[91]

Nonetheless, in the light of subsequent events, the Court's decision to rely on procedure may look like a wise and far-sighted choice. The attention to procedures in *Charkaoui I* appears to have inaugurated a cycle of procedural developments characterized by a steady ratcheting up of procedural protections.[92] Direct engagement with the substantive rights challenges would have resulted in revocation or radical transformation of the regime, or an open and detailed justification of it. As is most evident in the *Almrei 2009 Reasonableness Decision*, the slow transformation of the regime now appears to be occurring through attention to procedure, by way of the introduction of special advocates and augmented disclosure obligations.[93]

A positive evaluation of the procedural course taken by the Court holds that the deferral of any potential relief for the detainees was justified by other gains. It is worth reiterating that we are talking about indefinite detention and/or constraint, in circumstances where the prospect of deportation to a real risk of torture has not been foreclosed. Nonetheless a positive evaluation of the procedural course can draw on a number of propositions in support. Good process probably was more likely to lead to good results. Second, these results were achieved without unnecessary confrontation, through the relatively technical paths of procedure, an area in which lawyers can claim expertise.[94]

In response to the first proposition, namely faith that the workings of process would eventually resolve the issues before the Court, the short rejoinder is that the Court took a risk. Insofar as there was a hope that the procedures would eventually resolve the deadlock between the government's determination that those certified be

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[89] See Thwaites, "*Charkaoui* and Section 15", *supra* note 4 at 693-696.

[90] See Thwaites, "A Coordinated Judicial Response?", *supra* note 82.

[91] See also Audrey Macklin, "Transjudicial Conversations About Security and Human Rights" in Mark B. Salter, ed., *Mapping Transatlantic Security Relations: The EU, Canada, and the war on terror* (New York: Routledge, 2010) 212 at 221-222.

[92] On the theme of "cycles of legality" in the national security context, see David Dyzenhaus, "Cycles of Legality in Emergency Times" (2007) 18 PLR 165 [Dyzenhaus, "Cycles of Legality"].

[93] Further, the government is presently reviewing the regime and there are predictions that it will abandon security certificates, at least in its application to foreign terrorist suspects: Cristin Schmitz, "Special Advocates Predict No More Security Certificates" The Lawyer's Weekly (16 July 2010), online: <http://www.lawyersweekly.ca/index.php?section+article& articleid+1216>.

[94] For an evaluation of "the allure of legal process" in these terms see Martinez, *supra* note 6 at 1025.

held in detention and/or under constraints pursuant to immigration legislation and its ongoing inability to remove them, that hope risked remaining unfulfilled. In the case of three of the five persons re-certified in February 2008, it does remain unfulfilled. In relation to the two instances in which certified individuals have exited from the regime by way of court order, amendments to the procedures necessitated by court rulings have exposed serious weaknesses in the government case. But the contingency of these developments needs to be appreciated. In the *Almrei 2009 Reasonableness Decision* deficiencies in the government case became evident with the assistance of a non-government expert. The lawyers in the case could foresee other cases in which deficiencies in the evidence would only become evident with the involvement of the certified individual. Current barriers to communication between the certified individual and those in receipt of confidential material render any such involvement highly problematic.[95]

In relation to the second proposition, the safety and legal *appropriateness* of a focus on procedure, the question is whether there has been a proper accounting of the costs. Insofar as the Court is appropriately characterized as using procedure to avoid the substantive legal issues of concern to the parties, it is not fulfilling the central judicial function of deciding the dispute before it. Or, as developed below, it is not justifying that decision in an open and transparent manner.

Furthermore, there is the danger that seemingly fair procedures will distract people from unfair outcomes.[96] The Court's extended discussion of procedure has a lulling effect. The prolonged discussion of the merits and demerits of the procedure under the security certificate regime in *Charkaoui I* proceeded as if the regime itself was otherwise basically legally and constitutionally sound. At no point in this discussion did it raise as problematic the fact that the regime was confined to non-citizens. Long before we arrive at the Court's cursory consideration of whether the regime was discriminatory against non-citizens, the Court had indicated its decision on the substantive treatment by focusing on the secondary issue of whether the procedures for review of that treatment passed constitutional muster.

And finally, as I discuss in the next section, *Charkaoui I* did not simply defer or avoid the merits of the case. What was really troubling about the style of reasoning in *Charkaoui I* was how much the Court *decided* without discussion. To unpack this

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[95] The lawyers did not express confidence that the procedures would necessarily result in an effective challenge to the government's case in other matters: See Cristin Schmitz, "Security Certificates Quashed by Court" *The Lawyer's Weekly* (25 December 2009), online: <http://www.lawyersweekly.ca/ index. php? section=article&articleid=1069>, quoting from Gord Cameron (a special advocate in the matter) and Lorne Waldman (Almrei's lead public counsel).

[96] Martinez, supra note 6 at 1087. See also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 3, 30-31 and 50 on "grey holes", spaces in which there is some rule of law protections, but these are inadequate to ensure either the rule of law or a commitment to human rights.

last criticism, I look at how the "minimalist" judicial approach adopted by the Court cannot be said to have left the substantive issues it avoided "open".

B. Constitutional minimalism undervalues a non-citizen's

To resolve the situation of the appellants in *Charkaoui I*, the Court needed to determine whether the open-ended administrative detention of non-citizens who are subject to a removal order could be reconciled with the *Charter* right to personal liberty. Was detention imposed "in accordance with the principles of fundamental justice" (s. 7), or could it be "demonstrably justified in a free and democratic society" (s. 1)? The Court reasoned that detention would be consistent with the *Charter* right to liberty if it could be characterised as being for the purpose of deportation. The issue of whether detention was legitimately for removal purposes also had implications for a discrimination, or equality, analysis. If the administrative detention of non-citizens was not for the purposes of removal, why was it confined to non-citizens? In the absence of a satisfactory answer to this question, the measures would contravene the equality right in s. 15 of the *Charter*.[97]

In *Charkaoui I,* the Court held that detention of a non-citizen subject to a removal order, in circumstances where there was no real prospect of removal in the reasonably foreseeable future, did not in itself infringe s. 7 of the *Charter.* It was clear that the legality of detention rested on the view that, even in these circumstances, it might be said that the detention was for the purpose of removal.[98] As set out in Part I,[99] on the substantive treatment of the detainees, that is, the prospect of deportation to torture and the reality of indefinite administrative detention, the Court adopted a form of constitutional minimalism.

In *Charkaoui I* the Court decided central issues without discussion or supporting reasoning. This objection can be recast as stating that minimalist judgments, such as *Charkaoui I,* may actually do more than minimalist theory assumes.[100] Minimalism is motivated by the desire to keep legal questions open, so preserving greater space for democratic deliberation. But as applied to *Charkaoui I,* this seems

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[97] The same issues were explicitly addressed by the House of Lords in *Belmarsh, supra* note 33.

[98] See the court's emphasis on the need for the detentions to remain "hinged" to the state's purpose of deportation: *Charkaoui I, supra* note 2 at paras 131, 126. See also the way in which the Court distinguished *R v Lyons* [1987] 2 SCR 309, in which the Court indicated that "a sentence of indeterminate detention, applied with respect to a future crime or a crime that had already been punished, would violate s 7 of the Charter": See *ibid* at paras 106-107. The ground for distinguishing *Lyons* was simply that it was not in the "immigration context".

[99] See text accompanying note 23 *supra*, and following.

[100] See for example Martinez, *supra* note 6 at 1029, and more generally her discussion of "substance disguised as process".

descriptively inadequate.[101] *Charkaoui I* established that detention pending deportation may continue for over five years without constitutional objection, and that open-ended powers of administrative detention of non-citizens were not *per se* discriminatory or otherwise unconstitutional.[102] It lent its support to the view that legal responsibility for these issues could be deferred, to be addressed by the courts on a case by case basis. These rulings do not truly leave the legal issues "open". This is so in a number of respects.

In considering whether the security certificate procedures were a proportionate infringement of the right to liberty, the Court considered a range of alternative procedures, among them the special advocate procedure, for dealing with confidential information that were more "minimally impairing" of the right. As has been raised by Roach and Dyzenhaus, in highlighting these alternatives, the Court ran the risk of signalling "judicial pre-approval" of any legislative response that adopted one of them. The criticism proceeds on the basis that it would have been preferable for the Court to confine itself to pointing out the shortcomings of the current system, thus leaving itself less open to the perception that the government could meet the legal objections by adopting one of the alternatives mooted by the Court.[103] Against this, there is clearly pressure on the Court in the national security area to substantiate the view that there are workable alternatives.

Second, *Charkaoui I* left the existing legislation "intact but uncertain" in its operation, leaving litigants and legislatures uncertain as to what point in time detention will be found to be constitutionally excessive.[104] The "one case at a time" approach adopted by the Court expressed an impoverished understanding of a rights based democracy. In particular, it failed to insist that powers affecting non-citizens subject to a removal order were tailored to ensure respect for *Charter* rights (critically the right to liberty under s. 7 or the equality right under s. 15). It did not require that the legislature take responsibility for ensuring that the power it conferred on the executive was compatible with the *Charter* rights of non-citizens subject to removal orders.[105] Rather, the Court allowed for the continuance of a statutory power that it foresaw might

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[101] Roach, "*Charkaoui* and Bill C-3", *supra* note 4 at 307-308.

[102] In addition, the Court in *Charkaoui I* left the "*Suresh* exception" (named after the decision, *supra* note 77), the constitutionality of an exceptional discretion to deport to torture, untouched. For the central role the failure to address the *Suresh* exception played in maintaining that the constraints on the appellants was "pending removal", and so appropriately confined to non-citizens, see Thwaites "A Coordinated Judicial Response?", *supra* note 82 at 249-252.

[103] Roach, "*Charkaoui* and Bill C-3", *supra* note 4 at 304-306. See also Dyzenhaus, "Cycles of Legality", *supra* note 92 at 175-176.

[104] Roach, "*Charkaoui* and Bill C-3", *supra* note 4 at 307-308.

[105] For an argument that where a statute confers a discretion to engage in activities that may breach constitutional rights, that provision should itself be struck down as failing to take adequate measures to ensure *Charter* rights, see Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 41 Osgoode Hall LJ 1.

unjustifiably infringe rights, indicating that the courts would attend to such violations if and when they occurred. The Court relieved the legislature of responsibility for protecting substantive rights, leaving the onus on those adversely affected to bring a challenge through the courts.

Finally, looking forward to the ability of non-citizens to bring a rights challenge, what is troubling about *Charkaoui I* is the range of substantive decisions that were embedded in the reasoning with little by way of justification or debate.[106] It upheld the prolonged detention of the appellants without ever openly characterizing it as indefinite administrative detention, or indicating the constitutional status of the indefinite detention of non-citizens subject to a removal order. It allowed for preventive detention of non-citizens on grounds of dangerousness, without indicating what the constitutional bounds on this practice are, absent regular review to a particular standard. Nor were sub-constitutional mechanisms employed to set legal limits on the duration of such detention. In circumstances where the prospect of removal was the justification for confining the regime to non-citizens, the Court raised a number of factors that will break the connection between detention and removal without explaining why the appellants could not successfully invoke them in the circumstances. It is misleading to characterize these positions as leaving the issues on which they touch open, because the Court's silence and avoidance gave legal sanction to the relevant practices. The Court's position on these issues forms the starting point for future legal argument in Canada. An argument that the detention of non-citizens subject to a removal order, in circumstances where there is no real prospect of removal in the reasonably foreseeable future, cannot be detention for the purposes of deportation and so *prima facie* infringes s. 7 and s. 15, is presently unavailable in the Canadian constitutional context, following *Charkaoui I*. Critically, the Court arrived at this position while leaving the merits of the appellants' substantive *Charter* challenges under s. 7 and s. 15 largely unaddressed.

CONCLUSION

The Court in *Charkaoui I* simultaneously set the law on two paths. In relation to procedure, the Court's acknowledgment "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",[107] has resulted in a range of procedural changes. As outlined in Part II, these changes have improved a certified individual's ability to challenge the case against them. Awareness of the severe impact of such measures on the certified individuals has not, however, resulted in any clear judicial statement as to substantive limits on the duration of detention.

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[106] See for example Martinez, *supra* note 6 at 1058, and more generally her discussion of "substance disguised as process".

[107] *Charkaoui I, supra* note 2 at para 61.

The security certificate process operates as a preventive detention regime confined to foreign terrorist suspects. Non-citizens have been continuously subject to detention and/or constraint under the regime for ten or so years and we still do not know where the constitutional boundaries of the practice lie. Debate can be joined as whether such deferral of the substantive issues is wise. But the problem is not simply the deferred resolution of the issues generating the security certificate litigation. Consideration of *Charkaoui I* raises doubts as to the extent to which minimalism can, in practice, deliver on one of the desiderata it prides itself on, namely leaving the issues "open". One does not, through avoiding engagement with the substantive rights, necessarily avoid determining their scope and nature. The story of constitutional litigation on the Canadian security certificates shows how the range of arguments available in a rights based challenges can be diminished by avoiding those challenges and acquiescing in the continuance of the practice under challenge. In this sense, the rights based challenges are resolved adversely to the claimant without argument.

None of this is to deny the value of procedural protections. The jurisprudential developments subsequent to *Charkaoui I* attest to the valuable contribution made by that decision. It initiated a changed understanding of the level of procedural protection appropriate to the coercive powers authorized under the security certificate process.[108] As outlined, in operation these augmented procedures have resulted in some of those certified exiting the regime. But the prospect that these procedures are part of a preventive detention regime that is fundamentally "unfixable" in its present form, discriminating as it does against non-citizens and disconnected from reasoning on the legal bounds on preventive detention more generally, needs to be confronted.

[108] See *Almrei 2009 Reasonableness Decision, supra* note 62 at paras 103-105, quoted in the text, *supra* note 79.