IS INDEFINITE DETENTION OF TERRORIST SUSPECTS REALLY CONSTITUTIONAL?

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1. Introduction

Is it lawful, in Canada, for a suspected terrorist to be detained indefinitely on the basis of secret evidence, without being charged with a criminal offence? If the Federal Court of Appeal's holdings in *Charkaoui*[2] are correct, then the answer is "yes." This conclusion is astounding. In a legal order that has committed itself to the rule of law and the vigorous protection of individual rights, one would think that extraordinary circumstances would be required to justify indefinite detention of a person who has not been convicted of an offence.[3] Indeed, the House of Lords recently declared a similar scheme for indefinite detention to be contrary to the European Convention on Human Rights.[4] More particularly, under the *Canadian Charter of Rights and Freedoms*, one would think that such a scheme is obviously inconsistent with the principles of fundamental justice and justifiable under s. 1 only in an extreme emergency, if at all.[5] Yet in *Charkaoui*, the court dismisses the detainee's s. 7 claims rather brusquely, and does not reach the question of whether any extraordinary circumstances justify the scheme. In this comment, I restate the principal constitutional challenges to the statutory scheme at issue in *Charkaoui*, and suggest that there is more substance to these challenges than the court recognized. What is perhaps most disturbing is not the result; maybe there is some legal or political argument that could justify indefinite detention as part of a counter-terrorism strategy, though what that argument could be is not clear. The court's readiness to

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[2] *Re Charkaoui* (2004), 247 D.L.R. (4th) 405, 2004 FCA 421 [*Charkaoui*].

3 The statutory scheme does not expressly contemplate indefinite detention; however, I argue below that the scheme permits indefinite detention.

[4] *A v. Secretary of State for the Home Department* (2004), [2005] 2 W.L.R. 87, [2004] UKHL 56 [A]. The British statutory scheme at issue in A does expressly contemplate indefinite detention where the suspected terrorist cannot be deported.

[5] *Reference Re: Section 94(2) of the Motor Vehicle Act (British Columbia)* (1985), 24 D.L.R. (4th) 536, [1985] 2 S.C.R. 486 at 518 [*BC Motor Vehicle Reference* cited to S.C.R.]. A s. 7 violation can be justified under s. 1 only "in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like".

accept that very significant derogations from the adversarial process are consistent with the principles of fundamental justice, even when the liberty of the individual is at stake, is the most disturbing aspect of this decision.

The Statutory Scheme for Indefinite Detention

The *Immigration and Refugee Protection Act* (IRPA)[6] states several grounds on which non-citizens of Canada are inadmissible to Canada. One of these grounds is a risk to "security", which includes "engaging in terrorism" and other acts of violence,[7] or "being a member of an organization that there are reasonable ground to believe engages, has engaged or will engage" in acts of terrorism and other acts of violence.[8] An inadmissible non-citizen who is in Canada may be deported. Where the government wishes to deport someone on security grounds, it may invoke the security certificate procedure. The Minister of Citizenship and Immigration and the Solicitor General may "sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security ..."[9] The Minister then must refer the certificate to a designated judge of the Federal Court, who shall "determine whether the certificate is reasonable".[10] If unreasonable, the certificate shall be quashed;[11] if reasonable, the certificate is "conclusive proof" that the non-citizen is inadmissible on security grounds and becomes a removal order.[12] If the person applied for protection,[13] the designated judge must determine whether the Minister's decision on the

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[6] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].

[7] *IRPA, supra* note 5 at ss. 34(1)(b)-(e).

[8] *IRPA, supra* note 5 at s. 34(1)(f). For the purposes of the *IRPA*, " 'terrorism' ... includes any 'act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'": *Suresh v. Canada*, [2002] 1 S.C.R. 3 at para. 98, 2002 SCC 1 [*Suresh* cited to S.C.R.]. This definition, if expressed exclusively, would be narrower than the definition of "terrorist activity" in the *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.01(1).

[9] *IRPA, supra* note 5, s. 77(1). The terms "permanent resident" and "foreign national" are defined at *IRPA*, ibid., 2(1). Essentially, a "foreign national" is a non-citizen who does not have permanent resident status.

[10] *IRPA, supra* note 5, s. 80(1).

[11] *IRPA, supra* note 5, s. 80(2).

[12] *IRPA, supra* note 5, s. 81.

[13] A person may apply to the Minister for protection under ss. 112 and 115 of the IRPA on the ground that the person would face torture, cruel and unusual punishment, or a threat to life if removed from Canada.

protection application was "lawfully made." There is no appeal from the designated judge's decision.[14]

In the hearing to determine the reasonableness of the certificate, the designated judge is required to "ensure the confidentiality of the information on which the certificate is based ... if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person".[15] The designated judge must also hear the evidence in the absence of the person and his or her counsel "if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person".[16] The person named in the certificate is entitled to a summary of the allegations against him or her, but the summary cannot include "anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed."[17] The person named in the certificate is also entitled to lead evidence.[18]

Permanent residents may be detained, and foreign nationals must be detained, when a certificate is issued.[19] Although no provision for bail exists, a detainee can be released on conditions. The detention of a permanent resident must be reviewed within 48 hours and every six months thereafter;[20] a foreign national may be released on conditions 120 days after the certificate is upheld if the designated judge is "satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person."[21] Moreover, a detainee may be released to leave Canada.[22]

The statutory scheme does not expressly contemplate the indefinite detention of a person named in a security certificate; instead, it contemplates the (possibly lengthy) detention of the person until (a) the reasonableness of the certificate is determined, at which point the person will be released or deported, or (b) the person agrees to leave Canada. But, quite possibly, a person named in a security certificate

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[14] *IRPA, supra* note 5, s. 80(3): "The determination of the judge is final and may not be appealed or judicially reviewed."

[15] *IRPA, supra* note 5, s. 78(b).

[16] *IRPA, supra* note 5, s. 78(e).

[17] *IRPA, supra* note 5, s. 78(h).

[18] *IRPA, supra* note 5, s. 78(i)-(j).

[19] *IRPA, supra* note 5, s. 82.

[20] *IRPA, supra* note 5, s. 83(1)-(2).

[21] *IRPA, supra* note 5, s. 84(2). Strangely, a permanent resident cannot apply for release under this section.

[22] *IRPA, supra* note 5, s. 84(1).

can face indefinite detention. Suppose that a judge determines the certificate is reasonable. It then becomes a removal order. The person named might nonetheless succeed in his application for protection under s. 112 if the IRPA. Even if unsuccessful, a stay of the removal order may be obtained on the grounds that the person would face torture in the receiving country. The Supreme Court has held that only in "exceptional circumstances" would Canada deport someone to face torture.[23] But if the person succeeded on the protection application, he would still be subject to detention under ss. 83 and 84 of the IRPA. The only alternative would be to release him at a six-month review or pursuant to s. 84(2).

Thus, the IRPA contemplates (1) the lengthy, perhaps indefinite, detention of persons whom two Cabinet ministers have decided are security threats, and (2) a judicial review of the ministers' determination in which the person cannot see the evidence against him.

The Federal Court of Appeal's Reasons

Adil Charkaoui, a Moroccan national, became a permanent resident of Canada in 1995. On May 21, 2003, a security certificate respecting him was issued and was referred to the Federal Court. He was arrested and detained until February 2005.[24] The government of Canada alleges that Charkaoui "is a member of the terrorist organization of Osama Bin Laden and that he has engaged, is engaging or will engage in terrorist activities."[25] Noël J. conducted a review of the reasonableness of the security certificate largely in camera, and in the absence of Charkaoui and his counsel. Discerning precisely what evidence has been made available to him is difficult, but the most significant evidence he was informed of appears to be the following eyewitness identification:

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[23] In *Suresh, supra* note 7 at para. 76, the Supreme Court held that "barring exceptional circumstances, deportation to face torture will generally violate the principles of fundamental justice". Thus, the court did leave open "the possibility that, in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1." *Ibid.* at para. 78. This *obiter dictum* has been much criticized (see, for instance, Kent Roach, *September 11: Consequences for Canada* (Montreal and Kingston: McGill-Queen's University Press, 2003) at 100-06; David Dyzenhaus, "Intimations of legality amid the clash of arms" (2004) 2 International Journal of Constitutional Law 244 at 267). In any event, even if the Suresh dictum is ultimately affirmed by the Supreme Court, it will not apply in every case.

[24] See *Re Charkaoui*, 2005 FC 248 [*Charkaoui 2005*]; Tu Thanh Ha, "Terror Suspect Held for 21 Months Granted Bail" *The Globe & Mail* (18 February 2005) at A11.

[25] *Charkaoui, supra* note 1 at para. 12.

> ... Abou Zubaida, considered a close collaborator of Osama Bin Laden, had recognized [*Charkaoui*] in a photograph and designated him as a person he had seen in Afghanistan in 1993 and in 1997-98.
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> ... Ahmed Ressam had also recognized him in two photos, adding that he had met him in Afghanistan in the summer of 1998 when the two were training in the same camp. Upon seeing [*Charkaoui*'s] photograph, Mr. Ressam identified [him] under the name of Zubeir Al-Maghrebi, just as Abou Zubaida had done one month previously.[26]

Charkaoui's counsel could not cross-examine or otherwise question these eyewitnesses. Charkaoui initially declined to testify before the designated judge, but after the Court of Appeal released its reasons, he changed his mind and testified, denying the government's allegation that he is a terrorist and offering innocent explanations for some of the international travel that was of concern.[27]

The review of the reasonableness of the certificate naming Charkaoui is not yet complete. If the certificate is found to be reasonable, the government will, presumably, attempt to deport him to Morocco where, he asserts, he may be tortured.[28] He will then, presumably, apply for a stay of his removal on the ground that deporting him to face torture would be unconstitutional.

Charkaoui applied to the designated judge for a declaration that certain sections of the IRPA were unconstitutional. The application was dismissed.[29] Charkaoui appealed to the Federal Court of Appeal.[30] The Court of Appeal dismissed the constitutional arguments rather peremptorily. The fact that the decision leading to inadmissibility was taken by the executive, not the judiciary, did not violate the independence of the judiciary.[31] Limiting the judge's role to determining the rea-

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[26] *Charkaoui, supra* note 1 at paras. 18-19.

[27] See *Charkaoui 2005, supra* note 23 at paras. 13-25.

[28] The government of Morocco alleges that Charkaoui is a member of a militant Islamist group allied with al-Quaeda: see *Charkaoui 2005, supra* note 22 at para. 9. Amnesty International reports that the government of Morocco has tortured suspected Islamist terrorists: see Amnesty International, "Morocco/Western Sahara: Torture in the 'Anti-Terrorism' Campaign - the Case of Témara Detention Centre" (24 June 2004), online: Amnesty International <http://web.amnesty.org/library/index/ENGMDE290042004>.

[29] *Re Charkaoui*, 2003 FC 1419, 38 Imm. L.R. (3d) 56. [*Charkaoui 2003*]

[30] The designated judge's determination of the reasonableness of the certificate will not be appealable, but the Court of Appeal held both that he had jurisdiction to entertain the constitutional challenge and that his disposition of the challenge was appealable: *Charkaoui, supra* note 1 at paras. 21-62.

[31] *Ibid.* at paras. 65-8.

sonableness of the government's allegations, rather than their truth, raised no constitutional problem, as it was merely an instance of the judiciary determining the legality of executive action through judicial review.[32] In considering the procedure by which the evidence against the person is reviewed *in camera* by the designated judge, without the person having the opportunity to review or respond to it, the court reminded the person of his right to be reasonably informed of the allegations[33] and his right to call evidence.[34] The court emphasized that the designated judge had access to *all* the information on which the government based its allegation,[35] and placed a heavy burden on the designated judge to "maintain[] a balance between the parties".[36] Thus, the IRPA's departures from the usual rules of adversarial proceedings did not render the security certificate scheme unconstitutional.

Charkaoui argued further that the "reasonable grounds" standard for inadmissibility was inadequate under s. 7. The court rejected this argument, interpreting the "reasonable grounds" standard as requiring "a real and serious possibility" that one of the facts making the person inadmissible would occur.[37] However, the court also agreed with the designated judge that the "reasonable grounds" standard did not require proof to any standard, not even the civil standard, that the facts would occur.[38]

The claim that the terms "reasonable grounds" and "danger to the security of Canada" were unconstitutionally vague or overbroad was rejected as "without merit".[39] The court justified the unavailability of bail on the basis of the dangerousness of the person named in the security certificate.[40] The claim based on s. 15 of the *Charter* was dismissed with no real reasons.[41]

Finally, Charkaoui relied on s. 3(3)(f) of the IRPA, which requires the IRPA to be construed and applied in a manner that complies with international human rights

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[32] *Ibid.* at paras. 69-74.

[33] *Ibid.* at para. 79.

[34] *Ibid.*

[35] *Ibid.* at para. 80.

[36] *Ibid.* at para. 82.

[37] *Ibid.* at para. 107.

[38] *Ibid.* at paras. 71-3.

[39] *Ibid.* at para. 109.

[40] *Ibid.* at paras. 112-121.

[41] *Ibid.* at para. 129.

instruments to which Canada is signatory. The court noted that Canada was signatory to the International Covenant on Civil and Political Rights,[42] but commented that the Universal Declaration of Human Rights[43] was "of no binding effect, though it plays an important role in customary international law", and that the role of the European Convention for the Protection of Human Rights and Fundamental Freedoms[44] was "limited".[45] However, in the court's view, the precise role of these international instruments in Canadian law was really beside the point: since the impugned sections of the IRPA survived *Charter* scrutiny, they must also comply with Canada's international obligations.[46]

Three Constitutional Arguments Revisited

The Principles of Fundamental Justice

Section 7 of the *Charter* reads as follows:

> 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.

The approach to a s. 7 claim is well-established. First, the claimant must show that the impugned law or government action engages one of the three interests – life, liberty or security of the person. Second, if one of these interests is engaged, then the law or government action must comply with the principles of fundamental justice. The list of principles of fundamental justice is not closed, though the Supreme Court of Canada has clearly identified several principles,[47] and has clearly rejected several others.[48] The demands of fundamental justice can vary depending on the context. But regardless of context, once the court determines that a law or a government

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[42] December 16, 1966, Can.T.S. No. 47.

[43] December 10, 1948, G.A. Res. 217A(III).

[44] November 4, 1950, 213 U.N.T.S. 221.

[45] *Ibid.* at para. 138.

[46] *Ibid.* at para. 142.

[47] *BC Motor Vehicle Reference, supra* note 4 (no penal liability without fault); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36 (a law must not be vague); *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348 (a law must not be overbroad in relation to its own purposes).

[48] *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74 (the "harm principle" is not a principle of fundamental justice); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 (the "best interests of the child" is not a principle of fundamental justice).

action affects one of the three protected interests and is inconsistent with the principles of fundamental justice, a s. 7 violation is established. There is no further "balancing" of the state's interests and individual interests beyond what is expressed in the principles of fundamental justice themselves.[49]

New principles of fundamental justice do not need to be identified when considering the constitutional issues raised in *Charkaoui*. There is no doubt that the processes at issue in *Charkaoui* engage s. 7.[50] Quite apart from any interests arising from the possibility of deportation, s. 7 is engaged by the security certificate scheme simply because the liberty of the person named in the security certificate is at stake. Many of the principles of fundamental justice were developed in criminal cases, but their application is not restricted to criminal cases: they apply whenever one of the three protected interests is engaged. Put another way, the principles of fundamental justice apply in *criminal* proceedings, not because they are criminal proceedings, but because the liberty interest is always engaged in criminal proceedings.[51] Therefore, the process of testing the security certificate is subject to all of the principles of fundamental justice that have been developed in criminal cases.

The right to a fair hearing is the principle of fundamental justice most obviously engaged by the security certificate regime. Normally, this right includes the right to disclosure of the government's case, the right to hear the evidence and to challenge it by way of cross-examination, and the right to call evidence in response. The procedure by which a security certificate is judged reasonable derogates very significantly from these rights: the government's case is not disclosed to the person (the person gets a summary only) and cannot be heard or challenged by way of cross-

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[49] "We do not think ... that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure 'strikes the right balance' between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice." *Malmo-Levine, supra* note 46 at para. 96. If this holding is correct, the court's own treatment of the applicable principle of fundamental justice in *Suresh* was in error. If the principles of fundamental justice entitle a person facing deportation to torture only to a fair process in which the possibility of torture is to be balanced with national security interests, then the question the court has asked is, precisely, whether the legislation authorizing this process has struck the right balance between individual and societal interests.

[50] The court notes at one point that "the procedure pertaining to the determination of the reasonableness of the security certificate does not result in a civil sentence or a criminal conviction." *Charkaoui, supra* note 1 at para. 84. The purpose of this comment is unclear, as there is no doubt — and the court does not doubt — that s. 7 is engaged.

[51] If, for some reason, the life, liberty and security interests are not engaged in a penal proceeding, then the state does not have to comply with the principles of fundamental justice: see *Transport Robert Ltée* (2003), 234 D.L.R. (4th) 546, 180 C.C.C. (3d) 254 (Ont.C.A.).

examination.[52] The person does have a right to call evidence, but there is no way to tell whether that evidence is responsive to the government's case. The general justification for this derogation is the protection of national security. Without question, the need to protect national security can be balanced with individual interests in deciding how the principles of fundamental justice should be construed. The question is: Can the assertion that national security is at stake justify the extreme derogations from the adversarial process contemplated by s. 78 of the IRPA, bearing in mind that if the reasonableness of the certificate is upheld, the person will be deported or indefinitely detained?

The Court of Appeal in *Charkaoui* relies on several features of the IRPA in finding that these derogations from the usual adversarial process meet "the minimum requirements of the principles of fundamental justice."[53] First, the person gets a summary of the allegations against him or her.[54] Second, "the designated judge plays a pro-active role in the interest of ensuring fairness":[55] he "has access to all the information on which the Ministers' decision are based, without exception"[56] and must assist the person named in the certificate by carefully examining the evidence against him or her.[57] Third, the person has the right to respond.[58]

If the proceedings were criminal, these features would obviously be inadequate to render the process constitutional. So there must be something about the fact that the proceedings concern immigration or security matters that makes the difference. The court has very little to say on this point. Perhaps we should read the court's reasons as holding that the derogation is justified simply because the government claims that the person in question is a terrorist. In distinguishing some European cases concerning disclosure of evidence, the court says:

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[52] Contrast *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at para. 53, 90 D.L.R. (4th) 289 [*Chiarelli* cited to S.C.R.], where the person challenging deportation on the basis of serious criminality at least had the chance to ask for an opportunity to cross-examine the witnesses who had testified against him in camera.

[53] *Charkaoui, supra* note 21, at para. 122.

[54] *Charkaoui, supra* note 21, at paras. 77-9.

[55] *Ibid.* at para. 80.

[56] *Ibid.*, quoting from the reasons of the designated judge.

[57] *Ibid.* at paras. 80-82.

[58] *Ibid.* at para. 82. See also *Harkat (Re)*, 2004 FC 1717, where Dawson J. relied on these comments from Charkaoui in dismissing an application for the appointment of an *amicus curiae* to represent a detainee's interests when his counsel could not be present.

> ... the obligation to disclose evidence is not erected as an absolute principle. It applies to normal situations. But the threat of terrorism or a threat to national security does not represent or reflect a situation of normality, at least not in our country.[59]

In responding more generally to *Charkaoui*'s submissions under s. 7, the court says:

> If we were to accept the appellant's position that national security cannot justify any derogations from the rules governing adversarial proceedings we would be reading into the Constitution of Canada an abandonment by the community as a whole of its right to survival in the name of a blind absolutism of the individual rights enshrined in that Constitution. We fail to discern any legislative intention along those lines, quite the contrary. ... The individual right to liberty and the security of the person can only be exercised within an institutional framework or social order that commands respect and is respected. It no longer has much meaning or scope when, collectively, the society charged with ensuring its protection has lost its own right to liberty and security as a result of terrorist activities that it was powerless to prevent or eradicate owing to this individual right that it was to protect and intended to protect.[60]

The difficulty with this reasoning is that, as applied to any particular case, it begs the question whether the person named in a security certificate poses a threat to the security of Canada is precisely the issue at stake in the proceedings. One wonders if the court's view is that the mere invocation of a terrorist threat can justify any and all derogations from the procedural protections that are normally in place when a person's liberty is at stake.

One response to these procedural deficiencies would be to appoint a special advocate to represent the detainee's interests in the *in camera* portion of the proceedings. The special advocate would be a lawyer, presumably with the necessary security clearance, who would provide some adversarial context to what would otherwise be an *ex parte* proceeding.[61] The special advocate's representation of the detainee would inevitably be limited, as he or she could not reveal to the detainee any information that the designated judge decided was injurious to national security. Therefore, the advocate would not be able to get proper instructions from the

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[59] *Charkaoui, supra* note 21, at para. 84.

[60] *Ibid.* at para. 100.

[61] Special advocates appear in the United Kingdom in proceedings before the Special Immigration Appeals Commission (SIAC). See *Special Immigration Appeals Commission Act 1997* (U.K.), 1997, c. 68, s. 6. A similar procedure has been used, ad hoc, in a criminal proceeding in Canada: see *Ribic v. Canada (Attorney General)* (2003), 185 C.C.C. (3d) 129, 2003 FCA 246.

detainee.[62] In spite of these limitations, the special advocate could provide considerable assistance to the designated judge in discharging the onerous task of determining the reasonableness of the certificate, in the absence of counsel for the person who has the strongest reasons for challenging it.

The Court of Appeal notes the possibility of using special advocates or an analogous proceeding, but regards it as a policy choice rather than as a constitutional requirement.[63] I suggest that the Court of Appeal made this move too quickly. The designated judge's role is to determine the reasonableness of the certificate. I argue below that this determination inevitably involves an assessment of the merits of the government's case against the detainee. In an adversarial system, the merits of such a determination cannot be properly assessed *ex parte*. In an adversarial system, a judge acting conscientiously, impartially, and in good faith is not expected to assess the merits of a case without hearing each side's submissions as to what inferences should be drawn from the evidence and what legal conclusion they support.[64] Given the state's important interests in preserving the confidentiality of the information that may be reviewed in the determination of reasonableness, some departure from the adversarial process may be justified. Putting the burden of representing the detainee's interests on the designated judge is not. The court should demand, at a minimum, some substitute for the voice of the detainee's counsel in the proceeding. A special advocate could be such a voice.

The Basis for Detention and Exclusion

As noted above, the Court of Appeal rejected *Charkaoui*'s claim that the standard to be applied in reviewing the certificate was constitutionally inadequate. On this point, there is some cause for both optimism and pessimism about the court's reasoning. The court avoids the worst possible interpretation of the standard to be met in the determination of the reasonableness of a security certificate, but it does not fully work out the implications of its own holding that the designated judge's task is to consider the legality of the executive's decision to issue the certificate.

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[62] In the U.K., once the special advocate has seen the secret evidence, he or she is not permitted to contact the detainee at all. This limitation has been a serious frustration to the special advocates who appear before SIAC: See "Terror Lawyers Criticize System" (13 December 2004), online: BBC News <http://news.bbc.co.uk/1/hi/uk/4090777.stm>.

[63] *Charkaoui, supra* note 21, at paras. 126-7.

[64] Compare the comments of Hugessen J., speaking extra-judicially, concerning the detrimental effects of the security certificate scheme on the adversarial process, "the real warranty that the outcome of what we do is going to be just and fair." He expressed serious concerns about the fact that the security certificate proceedings are largely conducted *ex parte* and in secret. See James Hugessen, "Watching the Watchers" in David Daubney, ed., *Terrorism, Law and Democracy* (Montreal: Thémis, 2002) at 384-86.

What does the designated judge decide? According to s. 80(1) of the IRPA, he or she determines "whether the certificate is reasonable". According to the Court of Appeal, the judge is "verifying the legality" of the decision, not assessing its merits;[65] thus, there is no burden of proof – as such – on the government.[66] Rather, the designated judge decides whether there is "a real and serious possibility" that the threat to the security of Canada alleged by the government will occur.[67] Moreover, the information on which the designated judge makes this determination is not "evidence" as that term is understood in a criminal trial; for example, the information will generally include a security report which is itself a compendium of material from a variety of sources.[68]

If the Court of Appeal correctly described the nature of the determination under s. 80(1), the judge's inability to review the merits of the government's allegations raises a nightmarish possibility. The designated judge might conclude that the government's allegations, though in fact *false*, are *reasonable*, and that the certificate must therefore be upheld – with the result that a non-terrorist would be deported or detained as a terrorist. Although the court does not directly entertain the nightmarish possibility, the role the court assigns to the designated judge should prevent it from occurring. The designated judge is required to assess the "truthfulness, reliability and credibility"[69] of the evidence against the person in reviewing the certificate and to determine whether there is "a real and serious possibility" that one of the bases for inadmissibility exists.[70] Thus, presumably, the security certificate might be found unreasonable where the evidence supporting it was false, unreliable, or incredible, or where the detainee's evidence was true, reliable and credible.[71] In other words, the legality of the certificate depends not just on the government going through the motions of issuing it, but on the quality of the reasons for and against the allegations.[72] But once a court embarks on an examination of the quality of the evidence supporting or contradicting the government's allegation, it is investigating the merits of the allegation. Accordingly, there must be some degree of proof associated with

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65 *Charkaoui, supra* note 21, at para. 69.

66 *Charkaoui, supra* note 21, at paras. 70-74.

67 *Ibid.* at para. 107.

68 As in *Zundel (Re)* (2005), 251 D.L.R. (4th) 511 (F.C.).

69 *Charkaoui, supra* note 1 at para. 74.

70 *Ibid.* at para. 108.

71 Noël J. has stated that he will determine Charkaoui's credibility "when the hearing on the reasonableness of the certificate takes place and all the evidence has been presented": *Charkaoui 2005, supra* note 22 at para. 46.

72 Compare *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193; *Dyzenhaus, supra* note 7 at 255.

the idea that the evidence might be inadequate to support the certificate. In this respect, the analogy the court draws between search and arrest warrants and security certificates[73] is not helpful. The reasonableness of a search or arrest warrant is based on the information available to the police officer who sought it and the judicial officer who issued it *at the time it was issued*,[74] whereas the reasonableness of a security certificate is based on all the evidence put before the designated judge. Moreover, the fact that a search or arrest warrant is valid does not mean that the charge against the accused is proved, whereas the process of determining the reasonableness of the security certificate is the process of determining the government's case against the detainee.

In short, the finding that there are reasonable grounds to believe that the detainee is a terrorist can co-exist with the finding that the detainee is *not* a terrorist. In that event, the Court of Appeal clearly intends the certificate to be quashed. Its reasons would be more helpful to designated judges, and more consistent with the demands of legality, if they delineated the degree of proof required in the determination of reasonableness under s. 80(1) of the IRPA.

Equality

The Court of Appeal dismissed Charkaoui's equality argument without any analysis, stating simply that there was "no proof of discrimination within the meaning of section 15 of the Charter".[75] In contrast, an equality argument was the principal basis for the House of Lords' recent holding that the British scheme for indefinite detention of suspected foreign terrorists was contrary to the European Convention on Human Rights.[76] Although the equality guarantee in art. 14 of the European Convention is not worded identically to s. 15 of the Charter, it is rooted in the same concern for human dignity that, according to the Supreme Court's recent jurisprudence, motivates s. 15.[77] It is therefore worth outlining, briefly, how the s. 15 argument against the relevant sections of the IRPA might proceed.

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[73] *Charkaoui, supra* note 21, at paras. 102-104.

[74] When the validity of a warrant is reviewed, the record may be amplified to an extent, but the purpose of the amplification is not to prove or disprove the Crown's case (as, in effect, it is under the security certificate scheme) but to support the claim that there were reasonable grounds at the time the warrant was issued. See the discussion in *R. v. Morris* (1998), 134 C.C.C. (3d) 539 at 558-69, 23 C.R. (5th) 354 (N.S.C.A.) [*Morris* cited to C.C.C.].

[75] *Charkaoui, supra* note 21, at para. 129.

[76] *A, supra* note 43.

[77] See especially *Law v. Canada*, [1999] 1 S.C.R. 497, (sub nom. Law v. Canada (Minister of Human Resources Development)) 170 D.L.R. (4th) 1.

The British scheme, unlike the IRPA, expressly contemplates the indefinite detention of foreign nationals where they cannot be deported owing to a risk of mistreatment in another country. But if it is the case that a permanent resident or other foreign national can in fact be held indefinitely under the IRPA and for the same reason – the inability of the Canadian government to deport him to a jurisdiction where he might face death or torture – then there is no real difference between the two schemes. Under the IRPA, a permanent resident or foreign national can be detained indefinitely, without charge or trial, and without proof even on a balance of probabilities, on the basis of a reasonable belief, supported by secret evidence, that he is, has been, or will be a terrorist. In contrast, a Canadian citizen cannot be detained on this basis.[78] Thus, the IRPA distinguishes between citizens and non-citizens. Citizenship is a ground of discrimination analogous to those listed in s. 15.[79] The final, critical question is whether the distinction is discriminatory. *Law* lists several "contextual factors" to be considered in deciding this question, but the key to all of them is human dignity: does "the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?"[80] The appropriate comparator group would be citizens who are suspected of involvement in terrorism.[81] It is hard to imagine anything more detrimental to the dignity of non-citizens than to label them as suspected terrorists and detain them indefinitely, when Canadian citizens who are also merely suspected of terrorism cannot be detained, particularly where that label is affixed on the basis of secret evidence.

Conclusion

The indefinite detention of individuals, without charge or trial, whom the state believes threaten its security, is one of the hallmarks of an authoritarian or totalitarian political order. Liberal democratic states have generally avoided indefinite detention, except in time of war. Once the response of the liberal democratic states to the threat posed by Osama bin Laden's organization and other terrorist groups was characterized as a "global war on terrorism" rather than as "counterterrorism", it was per-

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[78] Of course, if there are reasonable grounds to suspect that a Canadian citizen has committed a terrorist crime, arrest and prosecution may occur through the ordinary criminal process. If it is believed that the person may commit a terrorist offence, the process outlined in s. 83.3 of the Criminal Code my be applied, though that section may have constitutional problems of its own.

[79] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

[80] *Law, supra* note 7776, at para. 88.

[81] *A, supra* note 43, at para. 53.

haps unsurprising that indefinite detention of terrorist suspects became part of the response.[82] Canadians are fortunate that their government has not asserted the power to detain anyone as an "enemy combatant" without the possibility of judicial review, as the Bush administration has.[83] But that is not to say that the IRPA's security certificate scheme is something to be proud of. The scheme permits lengthy, possibly indefinite, detention on the basis of secret evidence that cannot be challenged in a proper adversarial context. Because it is presented as an immigration measure rather than as a counter-terrorism measure, it applies only to non-citizens.[84] A citizen who was suspected of terrorism would have to be charged with a criminal offence or subjected to a recognizance under s. 83.3 of the *Criminal Code*. The role of the courts, in the face of such a Draconian departure from the norms of freedom and equality that underlie the liberal democratic legal order, is to use the tools of statutory interpretation and constitutional adjudication to protect those norms as far as possible. Our Supreme Court has often done so.[85] If the government and Parliament really want to derogate from those norms, they have all the tools they need;[86] the courts ought not be too helpful in this derogation.[87]

What is most disappointing about the Federal Court of Appeal's reasoning in *Charkaoui* is its departure from this judicial role. Rather than thinking about ways in which the security certificate scheme could be interpreted or modified through a constitutional remedy to protect freedom and equality, the court chooses between striking down the scheme altogether and endorsing the government's vision of how

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[82] It should be noted, though, that the security certificate scheme predates the terrorist attack of September 11, 2001.

[83] American courts have, in general, rejected this assertion: see *Hamdi v. Rumsfeld*, 72 U.S. 4607, 124 S.Ct. 2633 (2004); *Rasul v. Bush*, 72 U.S. 4596, 124 S.Ct. 2686 (2004). But, while litigation to define the scope of the administration's power and to establish constitutionally acceptable procedures to govern its exercise drags on, detainees continue to be held at Guantánamo Bay and elsewhere.

[84] For a reminder of how measures initially applicable only to non-citizens can become applicable to citizens as well, see David Cole, *Enemy Aliens* (New York: The New Press, 2003); see also *A, supra* note 3 at para. 43, Lord Bingham.

[85] For a recent instance, see *Re Application Under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248, 2004 SCC 42; *Re Vancouver Sun*, [2004] 2 S.C.R. 332, 2004 SCC 43. These two cases are discussed in H. Stewart, "Investigative Hearings into Terrorist Offences: A Challenge to the Rule of Law" C.L.Q., [forthcoming].

[86] In Canada, Parliament may invoke the "notwithstanding" clause (the *Charter, supra* note 21, s. 33) to immunize legislation from review under several sections of the *Charter*, including those that are most germane to the security certificate scheme: ibid., ss. 7 and 15.

[87] Compare Aharon Barak, "A Judge on Judging: The Role of Supreme Court in a Democracy" (2002) 116 Harv.L.Rev. 16; Kent Roach, *The Supreme Court on Trial* (Toronto: Irwin Law, 2001); David Dyzenhaus, *Hard Cases in Wicked Legal Systems* (Oxford: Clarendon Press, 1991); *Liversidge v. Anderson*, [1941] 3 All E.R. 338 at 361 (H.L.), Lord Atkin, dissenting.

it should operate. There are at least two ways in which the court could have addressed the constitutional infirmities of the security certificate scheme without compromising security. First, the court could have required a special advocate to represent the detainee's position, thus enabling the designated judge to review the government's case in a proper adversarial context without imperiling national security. Second, the court could have clarified the standard of proof implicit in this curious scheme, whereby the designated judge determines reasonableness of a security certificate on the basis of the evidence put before him or her, rather than on the basis of the information available to those who issued it when it was issued. Moreover, the court could – at least – have responded to the serious equality concerns raised by a scheme of potentially indefinite detention that applies to non-citizens, but not to citizens.