

## **An Evaluation of the Special Advocates Program in Canada**

It is hardly surprising that many of the legal battles that have occurred in the national security area have occurred within the context of immigration law. Deportation and detention pending deportation have been used in Canada as key weapons by the government in its efforts to protect Canada from persons believed to be connected to terrorist groups. The reason for this is clear. Non-citizens involved in immigration proceedings do not generally have the same due process rights that would be afforded to them if they were charged with a criminal offence.

In Canada, the Supreme Court has been hesitant to accept the engagement of the *Charter of Rights and Freedoms* in immigration proceedings.<sup>1</sup> As a result, procedures that would not pass *Charter* scrutiny in a criminal context because of the unquestioned engagement of section seven of the *Charter*, have been employed in immigration proceedings because of the different constitutional context that applies in these cases.

New procedures were introduced into immigration law when security officials investigating potential threats to national security advised the government that they had intelligence information that indicated that non-citizens in Canada posed a threat to Canada, but the information was either in a form that was not admissible in an ordinary judicial proceeding, or was so sensitive that its disclosure would place informants at risk or would otherwise jeopardize national security interests. These representations led to the creation of these exceptional procedures that were designed to neutralize the threats.

Two important changes were introduced into the immigration legislation during this time. The first was the introduction of membership as a ground for inadmissibility. For the first time, a person could be found inadmissible for mere membership in an organization. A person would be held accountable for all of the actions of the organization he belonged to, even if he himself did not engage in any illicit acts. Although the term “member” has not been defined by the legislation, there is now considerable jurisprudence on its meaning. The Court has concluded that:

---

<sup>1</sup> The first case where the Supreme Court considered the impact of the *Chart* on the deportation of non-citizens was *Chiarelli*. The case involved the use of a certificate in Appeal of a deportation order. The procedure in question allowed the Minister to file a certificate based on security and intelligence information that was not disclosed to the person. Once upheld after a hearing by the Security Intelligence Review Committee, it resulted in the person losing the right to a humanitarian and compassionate appeal to the appeal division. The person was entitled to a full hearing with full disclosure before the Immigration tribunal and an appeal on questions of law to the Immigration Appeal Board. In *Chiarelli v MEI* 1992 1 SCR 711 the Supreme Court held that: “The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country” The Court declined to determine whether section seven was engaged in the deportation process and held that the principles of fundamental justice were not violated through a process that withheld information from the person concerned because the consequence of the process was that it only resulted in the loss of the right to appeal the deportation on humanitarian grounds—a right that was not part of the principles of fundamental justice. After *Chiarelli*, the question of the engagement of section seven in deportation proceedings was the subject of ongoing debate in the jurisprudence. In *Medovarski v MCI* 2005 SCC 51 the Court affirmed that deportation per se did not automatically engage section 7. The issue was only recently resolved by the Court in the decision of *Charkaoui* 2007 SCC 9 where the Court held that the determination of the engagement of section seven in deportation would require an analysis of the possible impact of the deportation on the person concerned.

1. The term is not to be defined from the perspective of the individual or the organization. Therefore, it matters not whether the person has formally joined the organization. What is relevant is the degree of commitment that the person shows or has shown to the organization. There is a distinction between someone who supports an organization and someone who is determined to be a member. When determining whether or not a person is a member, the tribunal must consider the nature of the person's involvement, the length of time he or she has been involved, and the degree of commitment the person shows to the organization and its objectives. The issue must be decided on a case by case basis. The term is to be interpreted broadly.<sup>2</sup>
2. A person can be found inadmissible even if he or she is no longer a member at the time of the admissibility proceeding or determination. Past membership in the organization is sufficient.<sup>3</sup>
3. A person can be found inadmissible even if he or she was not a member of the organization at the time the organization engaged in acts of terrorism. There is no need for a temporal connection between the commission of the acts of terrorism and the person's membership.<sup>4</sup>
4. A person can be found inadmissible even if his or her membership occurred at a time when the person was a minor.<sup>5</sup>
5. In assessing whether or not a person is a member of a terrorist organization, the tribunal must distinguish between different organizations that may or may not be connected. It is an error to find a person inadmissible if the evidence indicates that the acts of terrorism were not committed by the organization that the person belongs to but rather by some other group. Thus, for example, membership in a political organization that has an independent military wing that engages in terrorist acts is not sufficient to warrant a finding of inadmissibility.<sup>6</sup>
6. When assessing whether or not a person is a member, it will be necessary to consider whether or not the person's actions were the product of free choice or were done under coercion, compulsion or duress.<sup>7</sup>
7. The fact that a person is formally a member of the organization is dispositive of the question of membership even if the person's activities on behalf of the organization were very limited.<sup>8</sup>

---

<sup>2</sup> See *Re Suresh* 1997 FCJ 1537; *Singh v MEI*; 1998 FCJ 1147; *Re Baroud*, (1995), 98 F.T.R. 99, [1995] F.C.J. No. 829

<sup>3</sup> See *Sittampalam v MCI* 2005 FCJ 1485 affirmed FCA 258 DLR (4<sup>th</sup>) 583

<sup>4</sup> See *Yamani v Canada* 2006 FCJ 1826 In *Gebreab v MCI* 2010 FCA 274 the Court of Appeal held that there was no requirement that there be a temporal connection between the person's activities and his membership as long as it was established that the organization that committed the acts was the same one as the one to which the person belonged.

<sup>5</sup> *Poshteh v MCI* 2005 FCA 85

<sup>6</sup> See *Cardenas v MEI* 1993 FCJ 139

<sup>7</sup> *Thiyagarajah v MCI* 2010 FC 339

<sup>8</sup> *Saleh v MCI* 2010 FC 303

This very broad understanding of the term “member” can be used to cover a broad range of situations and indeed may well cover situations where the person’s membership was benign.<sup>9</sup>

In conjunction with the addition of the concept of membership to grounds of inadmissibility, the Government of Canada also introduced changes in the immigration legislation in 1989 that allowed for the use of intelligence information as evidence in proceedings involving the deportation of non permanent residents.<sup>10</sup> The information was presented in in-camera, ex parte proceedings that were held before a Justice of the Federal Court. The role of the Justice was to determine whether or not the information was relevant to the proceedings and whether its disclosure to the person would place national security at risk. If the Justice concluded that the evidence was relevant and could not be disclosed, then he or she would prepare a summary of the information that could be disclosed to the named person. The proceedings would then proceed on two tracks. In the open, public proceeding, the Justice would hear evidence from the named person. That evidence would of course be subject to challenge by counsel for the Minister who had the advantage of knowing the contents of the secret file.

At the same time, the Justice would receive evidence in the secret proceedings. There was no one representing the interests of the named person in those proceedings. It fell to the Justice to challenge the reliability of this evidence. During the course of the proceedings, the named person would be subject to detention. The detention could not be reviewed until 180 days after the Court had rendered a decision on the validity of the certificate.

These procedures were controversial from their inception. Many important and credible non-governmental organizations argued that the exceptional procedures were unfair and could not be justified on national security grounds. They argued that it was manifestly unfair to require a person to defend him or herself against serious allegations involving alleged membership in terrorist groups without having access to the evidence being used by the state. They argued that the Judge could not fairly represent the interests of the named person in the secret hearing and could not properly challenge the evidence without being able to seek advice and instructions from the person.

---

<sup>9</sup> see *Suresh v MCI* supra in *Suresh* the Court upheld the validity of the inadmissibility provision based on membership because section 34 (2) contained a relief clause that allowed the Minister to find a person inadmissible if it would not be in the national interest of Canada to determine that the person was inadmissible. This provision has now been interpreted restrictively by the Federal Court of Appeal in the case of *Agraira v MCI* 2011 FCA 103. Given this narrow interpretation it may well be that the broad interpretation could now be challenged on grounds of overbreadth.

<sup>10</sup> When security certificates were first introduced there were two separate procedures. In the case of non permanent residents the certificate was referred to the Federal Court where a justice determined its reasonableness. In the case of a permanent resident the certificate was referred to the Security Intelligence Review Committee. The Committee would hold both open and in camera hearings. Counsel for the Committee would meet with the person concerned and would also cross examine the witnesses put forward by CSIS in the closed ex parte hearings. After the Supreme Court concluded that the Federal Court procedure did not comply with fundamental justice, many experts called on the government to adopt the SIRC model. Instead the Government chose to implement the Special Advocate model.

Moreover, given that the proceedings were almost always extended over months and in some cases years, they argued that it was unfair to hold persons in detention without charge based on secret evidence that was not subject to challenge.

These concerns led to a direct challenge to the constitutionality of these provisions. In *Ahani v. Canada*,<sup>11</sup> the Federal Court declined to determine whether or not the security certificate procedure engaged section seven, because the Court concluded that the procedure was consistent with fundamental justice. Justice McGillis of the Federal Court concluded that the balancing of the competing national security interests and the procedural protections was to be engaged when determining whether or not the proceedings were in accordance with the principles of fundamental justice:

38 I have concluded that, in enacting section 40.1 of the Immigration Act, Parliament developed a procedure in which it attempted to strike a reasonable balance between the competing interests of the individual and the state. In particular, Parliament placed the responsibility of reviewing the reasonableness of the ministerial certificate on an independent member of the judiciary and accorded him the power to examine the security or criminal intelligence reports, to hear evidence, to give disclosure with a view to permitting the person to be "reasonably informed", and to provide the person with a "reasonable opportunity to be heard." In my opinion, the contextual analysis confirms that the principles of fundamental justice have been respected in the procedure devised by Parliament in section 40.1 of the Immigration Act.<sup>12</sup>

As a result, the constitutionality of the security certificate procedure was accepted and not subject to reconsideration until 2007.<sup>13</sup> When the immigration law was amended to allow for the use of security certificates against permanent residents, a new constitutional challenge was launched. The case reached the Supreme Court and, in its 2007 decision of *Charkaoui v MCI*,<sup>14</sup> the Court struck down the procedure as being inconsistent with the *Charter of Rights and Freedoms*. The Court reached the following conclusions in relation to the procedure:

1. The Court determined that section seven -- the right to life, liberty and security of the person -- was engaged in the security certificate procedure. The Court distinguished *Medovarski* by noting that that case merely stood for the proposition that section seven was not automatically engaged in deportation. The Court noted that the consequences of deportation were so severe and included possible detention and risk of deportation to torture as to engage

---

<sup>11</sup> 1995 3 FCR 669

<sup>12</sup> The decision was affirmed by the Federal Court of Appeal which approved the reasons of the Federal Court see 201 NR 233. Leave to appeal to the Supreme Court was denied see 1996 SCCA 496

<sup>13</sup> Access to appellate review is limited because there is no appeal from a decision of the Federal Court unless a serious question of general importance is certified by the Federal Court. The constitutionality of the procedure was only subject to challenge after 2002 when the law was changed and the security certificate procedure application was extended to include permanent residents. Charkaoui was the first permanent resident to be made the subject of a security certificate. He challenged the constitutionality of the procedure and was ultimately successful at the Supreme Court.

<sup>14</sup> Charkaoui 2007 SCC 9

section seven.<sup>15</sup>

2. The proper place for the balancing of the requirements of fairness with the constraints of national security is in the section one assessment. While the national security interests can provide a context which may to some extent inform the requirements of fundamental justice, they cannot be permitted to erode the essence of section seven. “The principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*. The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be.”<sup>16</sup>

3. The Court determined that the principle of fundamental justice that was implicated in the security certificate process was the right to a fair hearing, and specifically the right to know and meet the case.

**29** This basic principle has a number of facets. It comprises the right to a *hearing*. It requires that the hearing be *before an independent and impartial magistrate*. It demands a *decision by the magistrate on the facts and the law*. And it entails the *right to know the case put against one*, and the *right to answer that case*. Precisely how these requirements are met will vary with the context. But for s. 7 to be satisfied, each of them must be met in substance.<sup>17</sup>

4. The Court concluded that the right to answer the case was not met. The Court concluded that the Judge acting alone could not sufficiently represent the interests of the person in the secret ex parte hearing so as to provide the person concerned with the ability to fully answer the case against him.

**65** In the *IRPA*, an attempt has been made to meet the requirements of fundamental justice essentially through one mechanism -- the designated judge charged with reviewing the certificate of inadmissibility and the detention. To Parliament's credit, a sincere attempt has been made to give the designated judge the powers necessary to discharge the role in an independent manner, based on the facts and the law. Yet, the secrecy required by the scheme denies the named person the opportunity to know the case put against him or her, and hence to challenge the government's case. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law. Despite the best efforts of judges of the Federal Court to breathe judicial life into the *IRPA* procedure, it fails to assure the fair hearing that s. 7 of the *Charter* requires before the state deprives a person of life, liberty or security of the person. I therefore conclude that the *IRPA*'s procedure for determining whether a certificate is reasonable does not conform to the principles of fundamental justice as embodied in s. 7 of the *Charter*. The same conclusion necessarily applies to the detention review procedures under ss. 83 and 84 of the *IRPA*.<sup>18</sup>

5. The Court concluded that the procedure could not be saved under section one

---

<sup>15</sup> Charkaoui 2007 SCC 9 par 12-18

<sup>16</sup> Ibid par 19-27

<sup>17</sup> Ibid par 29

<sup>18</sup> Ibid par 60-65

because the procedure did not minimally impair the rights of the named person because there were other models which allowed for fuller participation by the named person. These included, inter alia, the SIRC model that had been used prior to 2002 in the case of deportation of permanent residents on security grounds, and the appointment of Special Advocates which were used in similar proceedings in Europe.<sup>19</sup>

6. The Court concluded that the mandatory detention provisions of the regime resulted in arbitrary detention and held that there must be a possibility to review detention within a reasonable time and periodic reviews thereafter.<sup>20</sup>

After the *Charkaoui* decision, the Government of Canada introduced amendments to the legislation that included the requirement that Special Advocates be appointed to represent the interests of the named person in the closed proceedings. The new provisions allow the Special Advocates to have access to the secret material, to make submissions on behalf of the named person with respect to further disclosure to him or her, and to participate in the secret proceedings and make submissions before the Court.<sup>21</sup> Once the Special Advocate receives the secret evidence, he or she is barred from any further communication with the named person without leave of the Court.<sup>22</sup>

The question of whether or not these procedures will pass constitutional scrutiny is yet to be finally determined.<sup>23</sup> In *Charkaoui*, the Supreme Court did make it clear that section seven did mandate compliance with the requirement that a person know and meet the case:

**61** In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, makes it difficult, if not impossible, to find substitute procedures that will satisfy s. 7. Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here.<sup>24</sup>

---

<sup>19</sup> Ibid par 85-87

<sup>20</sup> Ibid par 94

<sup>21</sup> See IRPA par 85.1 and 85.1

<sup>22</sup> See IRPA 85.5

<sup>23</sup> As noted below in *Re Harkat* 2010 FC 1247 Justice Noel dismissed Harkat's constitutional challenge. The Court concluded that Mr. Harkat had been provided sufficient disclosure to be able to receive a fair hearing and to be able to respond to the allegations. The finding in this case has been appealed. Moreover, it is certainly arguable that this decision is not an endorsement of the procedure per se or a finding consistent with the decision of the House of Lords in *Secretary of State v AF* discussed below that the procedure was fair in this particular case.

<sup>24</sup> *Charkaoui* ibid par 69

Thus, section seven will require that the person be given access to the secret information or that a substantial substitute be found. After the first *Charkaoui* decision, the Supreme Court rendered a second decision that dealt with the security certificate process. In *Charkaoui v MCI*,<sup>25</sup> the Supreme Court dealt with the disclosure requirements and held that the person named in the security certificate disclosure was entitled to full disclosure of all of the evidence in the possession of CSIS:

[58] In the context of information provided by CSIS to the ministers and the designated judge, the factors considered in *Suresh* confirm the need for an expanded right to procedural fairness, one which requires the disclosure of information, in the procedures relating to the review of the reasonableness of a security certificate and to its implementation. As we mentioned above, these procedures may, by placing the individual in a critically vulnerable position vis-à-vis the state, have severe consequences for him or her [...]

[62] 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 the 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. If, as we suggest, the ministers have access to all the undestroyed "original" evidence, they will be better positioned to make appropriate decisions on issuing a certificate. The designated judge, who will have access to all the evidence, will then exclude any evidence that might pose a threat to national security and summarize the remaining evidence — which he or she will have been able to check for accuracy and reliability — for the named person.

The effect of the two *Charkaoui* decisions is to require participation of a substantial substitute for the person concerned in the secret ex parte hearings, coupled with full disclosure of the CSIS file to the Special Advocates. Undoubtedly, this new procedure is fairer than the pre-*Charkaoui* procedure. Whether or not the Special Advocate regime, with the added disclosure, meets the requirements of section seven is yet to be finally determined.<sup>26</sup>

## **POST-CHARKAOUI DECISIONS**

### **CHARKAOUI**

After the two *Charkaoui* decisions, there have been three cases determined under the new security certificate procedure. The first was the case of Adil Charkaoui, whose case had already been the subject of two appeals to the Supreme Court. As the disposition of this centered around disclosure issues, in order to understand how the case unfolded, it is important to follow the disposition made by the Court.

---

<sup>25</sup> 2008 SCC 38

<sup>26</sup> In *Re Harkat* the Federal Court concluded that the person concerned in that case had been afforded a fair hearing as a result of the disclosure that he received coupled with the participation of the Special Advocates.

In *Charkaoui*, the Court made what has become known as a “*Charkaoui II* order” requiring full disclosure of the entire CSIS file to the Special Advocates. After disclosure was made, the Court considered how further disclosure would be made to Mr. Charkaoui. The Court ruled, in *Re Charkaoui*,<sup>27</sup> that the concept of national security was to be given a broad understanding:

[79] In *Charkaoui I*, above, the Supreme Court noted that the scope of non-communication in connection with national security can be quite broad (paragraph 61). One of the examples it gave in this regard was the need to protect society or when information has been provided by countries or informants on condition that it not be disclosed or that information may be so sensitive that it cannot be communicated without compromising public security. These illustrations demonstrate that in Canadian domestic legislation, the scope of the communication is not limiting to the point where the only acceptable reason for non-disclosure would be the very life of the nation, its territorial integrity or its political independence, as advanced by counsel for the named person [...]

[83] In brief, I believe that the role of the designated judge in determining disclosure of information to the named person where the government claims confidentiality is to apply the criteria established through jurisprudence while taking into consideration, on the one hand, the need to preserve confidentiality and, on the other, the importance of providing the fullest possible disclosure with the smallest impact on the named person’s right to know the evidence against him to enable him to refute the Ministers’ allegations.<sup>28</sup>

The Court also found that the Minister bears the burden of establishing the requirement for non-disclosure to a balance of probabilities.<sup>29</sup>

The effect of this decision was to place the onus on the Minister to establish the need for non-disclosure and to emphasize the importance of providing the fullest possible disclosure to the named person. Subsequently, after the Court received further submissions, it made an order requiring the Minister to make further disclosure to the named person, Charkaoui.<sup>30</sup> In its final judgment, the Court noted the following:

13 The hearings in camera were held in April and May 2009. In the course of those hearings, the special advocates carried out their duty, under paragraph 85.1(2)(a) of the IRPA, to "challenge 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".

14 Having heard the special advocates' and Ministers' arguments, the Court held that the disclosure of certain evidence would not be injurious to national security or the safety of a person, and it issued a number of orders requiring its disclosure.

---

<sup>27</sup> 2009 FC 342

<sup>28</sup> Ibid par 79-83

<sup>29</sup> Ibid par 102

<sup>30</sup> Given the finding by the Court in 2009 FC 342 there can be no doubt but that the Court was satisfied that the disclosure could be made without injuring national security. Despite this finding, the Minister opted to withdraw it rather than comply with the Court ordered disclosure.



15 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. The Ministers have the right to withdraw evidence under paragraph 83(1)(j) of the IRPA, which 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".<sup>31</sup>

When the Minister decided to withdraw the evidence rather than disclose it, the Court concluded that the withdrawn evidence was no longer considered filed, and that, as a result, the certificate was found to be void.<sup>32</sup> The Court also noted that, had it not been found to be void, the Court would have quashed the certificate as unreasonable because there was no remaining evidence that supported the finding of inadmissibility.

Given how the proceedings unfolded, there can be no doubt that the Special Advocates played an important role in the result. One of their fundamental roles is to seek further disclosure on behalf of the named person. Although what happened within the confines of the ex parte hearing is confidential, the decisions rendered by the Court make it clear that it was through this pre-hearing process that the Special Advocates were able to obtain an order from the Court requiring further disclosure to Mr. Charkaoui. Instead of complying with the order and providing further disclosure, the Minister opted to withdraw the evidence.<sup>33</sup> Once withdrawn, the Court could not consider it when making its determination.

Although it is impossible to say if the outcome would have been the same if the Special Advocates had not been present, there is no doubt that the presence of the Special Advocates in the closed hearing, coupled with the full disclosure of the file through the *Charkaoui II* disclosure to the Special Advocates, created a fairer process, one which in this case resulted in a positive result for the named person, even though there was never a hearing on the merits. Given the decision by the Minister to withdraw the information in question, it is impossible to determine what might have been the outcome had there been a hearing on the merits and whether Mr. Charkaoui would have been able to adequately respond to the allegations so as to have a fair hearing.

### *ALMREI*

In *Almrei*, the hearing unfolded in a radically different fashion. The pre-hearing disclosure provided to Mr. Almrei after the Special Advocates had reviewed the evidence was minimal. However, the Special Advocates were provided with the entire file pursuant to an order rendered by the Court (the *Charkaoui II* order)<sup>34</sup>. This *Charkaoui II* order proved of critical importance in the eventual outcome of the case.

---

<sup>31</sup> See 2009 FC 1030 par 13-15

<sup>32</sup> Ibid par 28

<sup>33</sup> Section 83 (1) (j) of IRPA provides that a judge shall not based a decision on any information that has been withdrawn by the Minister. This provision empowers the Minister to withdraw evidence rather than have it disclosed. Once withdrawn the evidence is not part of the record and cannot be considered by the Judge reviewing the certificate.

<sup>34</sup> See 2009 FC 1263 par 19, 30

The hearing was heard on the merits in two parallel hearings, one in public, one in camera. The allegations that had been made public through the summaries stated that he was a member of the Al Qaeda Network due to his participation in the Afghan jihad, his close relationship with two important leaders of that jihad (Khattab and Sayef), and his acceptance of the ideology of Bin Laden. The Minister sought to rely on the fact that Mr. Almrei had withheld information and had lied about his participation in Afghanistan.

In order to defend himself, Mr. Almrei had to respond to allegations that were based on information that was not disclosed to him.<sup>35</sup> He did not know the scope and nature of the Minister's case and as a result was forced to make assumptions as to what was contained in the evidence so as to be able to respond as fully as possible to a case that he did not fully know or understand.<sup>36</sup> Moreover, given that allegations included the fact that he was a member of a rather amorphous and hard to define organization -- the Bin Laden network -- he had to adduce evidence related to the existence of the organization and the characteristics that one might find in an adherent of the group. Of obvious concern was the broad definition given to both membership and organization within the context of national security cases. Moreover, all the Minister had to do was establish that the certificate was "reasonable", a term that implied that the evidentiary burden on the Minister was low.

In determining the reasonableness of the certificate, the Court had to consider several legal issues. The Court concluded that the term "member" should be given a broad meaning consistent with the jurisprudence and that there is no need for there to be a temporal connection between the terrorist acts and the person's membership in the organization.<sup>37</sup> The Court noted of the term "organization":

[66] It is accepted in the jurisprudence that terrorist organizations are "loosely structured groups that do not apply the niceties of agency law", as Justice Rothstein said in *Singh* above at paragraph 5. In *Ikhlef*, above, at paragraph 64, Justice Blais, as he was then, referred to an organization as "a community of interests and thoughts and regular meetings with persons who were pursuing the same goals".

[67] In *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 349, [2004] 3 F.C.R. 301, rev'd on other grounds, 2005 FCA 122, [2006] 1 F.C.R. 474 (*Thanaratnam* at paragraph 31, Justice James O'Reilly identified the characteristics of an organization as "identity, leadership, a loose hierarchy and a basic organizational structure". In *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2007] 3 F.C.R. 198 at paragraph 38, Justice

---

<sup>35</sup> The threshold for admission of evidence at the security certificate proceeding requires that the evidence be reliable and appropriate. The best evidence rule does not apply and hearsay is admissible (see Almrei par 83) The Court noted that the test required: I read the two versions as requiring more than mere relevance. Evidence may be relevant but not useful or fitting for a variety of reasons including the manner in which it was obtained. (Par 84)

<sup>36</sup> The fact that the named person is given a right to respond to allegations that are not fully disclosed places him in the position where he must assume what is the scope and extent of the Minister's case. This has undoubtedly resulted in the named person disclosing matters that were not within the knowledge of the Minister, in essence creating a situation where the person is compelled to incriminate him or herself in order to attempt to respond to the case.

<sup>37</sup> Ibid par 63, 68

Linden endorsed these factors as helpful in making a determination under s. 37 but considered that no one of them is essential. He held that an “unrestricted and broad” interpretation should be given to “organization” (at paragraph 36).

Finally, in terms of the evidentiary burden on the Minister, the Court noted that the standard of proof was “reasonable grounds to believe”, which was less than a balance of probabilities. However, the Court did note that:

[101] I am of the view that “reasonable grounds to believe” in s. 33 implies a threshold or test for establishing the facts necessary for an inadmissibility determination which the Ministers' evidence must meet at a minimum, as discussed by Robertson, J.A. in *Moreno*, above. When there has been extensive evidence from both parties and there are competing versions of the facts before the Court, the reasonableness standard requires a weighing of the evidence and findings of which facts are accepted. A certificate cannot be held to be reasonable if the Court is satisfied that the preponderance of the evidence is to the contrary of that proffered by the Ministers.

Given the combination of a lower evidentiary threshold, a broad understanding of the terms member and organization, and the use of secret evidence that was not disclosed to him, the task facing Mr. Almrei was a daunting one. In the public hearings, Mr. Almrei successfully responded to those public allegations. Through his own evidence and that of several expert witnesses, he was able to challenge the reliability of much of the Minister’s public case. He was able to establish to the satisfaction of the Court that Sayef and Khattab were not followers of Bin Laden. He provided a context for his participation in Afghanistan. He admitted to being untruthful and explained his reasons for withholding information. He testified as to his rejection of the Bin Laden ideology.

However, despite having responded as fully as he could to the evidence that had been provided to him, the public judgment makes it clear that this would not have resulted in the quashing of the certificate because the secret evidence, if accepted, was sufficient to sustain the finding:

[162] In this case, the reliability of the information provided by several human sources became a key issue. If the information from the sources is to be believed, Mr. Almrei is dedicated to the Bin Laden ideology and a threat to the security of Canada. It was crucial, therefore, for the Court to determine whether the sources were credible. That assessment depended in part on information held by CSIS in the source management files; how they were recruited, developed and managed as directed sources and the internal assessments of their reliability.<sup>38</sup>

Thus, despite all of the efforts of Mr. Almrei and his open counsel, the success of his defense depended on the reliability of information provided by sources whose identities were not disclosed to Mr. Almrei. Moreover, as the information could not be

---

<sup>38</sup> Ibid par 162

disclosed without jeopardizing the sources, Mr Almrei did not have access to any of the information relating to the specific allegations made by the sources.

In such a circumstance, there are only a few possible scenarios. Either the information emanating from the source information has to be disclosed in a form that is sufficient to allow Mr. Almrei to respond to it, or the information might be subject to successful challenge by the Special Advocates who would rely on inconsistencies contained in the record which includes the *Charkaoui II* disclosure. If neither of these are possible, then the only conclusion is that the person has been denied adequate knowledge of the case to meet, such that the proceedings would be fundamentally unfair and in breach of section seven despite the presence of Special Advocates. This is consistent with the position taken by the House of Lords in *Secretary of State v AF*,<sup>39</sup> where the Court noted:

63. There are, however, strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him. The first is that there will be many cases where it is impossible for the court to be confident that disclosure will make no difference. Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge. Next there is the point made by Megarry J in respect of the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result. The point goes further. Resentment will understandably be felt, not merely by the controlee but by his family and friends, if sanctions are imposed on him on grounds that lead to his being suspected of involvement in terrorism without any proper explanation of what those grounds are. Indeed, if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust.

64. The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations. Where the evidence is documentary, he should have access to the documents. Where the evidence consists of oral testimony, then he should be entitled to cross-examine the witnesses who give that testimony, whose identities should be disclosed. Both our criminal and our civil procedures set out to achieve these aims. In some circumstances, however, they run into conflict with other aspects of the public interest, and this is particularly the case where national security is involved. How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament. That law now includes the Convention, as applied by the HRA. That Act requires the courts to act compatibly with Convention rights, in so far as Parliament permits, and to take into account the Strasbourg jurisprudence.

---

<sup>39</sup> 2009 UKHL 28.

That is why the clear terms of the judgment in *A v United Kingdom* resolve the issue raised in these appeals.

65. Before *A v United Kingdom*, Strasbourg had made it plain that the exigencies of national security could justify non-disclosure of relevant material to a party to legal proceedings, provided that counterbalancing procedures ensured that the party was accorded “a substantial measure of procedural justice” – *Chahal v United Kingdom* (1996) 23 EHRR 413, at para 131. Examples were cited by the Grand Chamber in *A v United Kingdom* at paras 205-208, covering the withholding of material evidence and the concealing of the identity of witnesses. The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.<sup>40</sup>

In *Almrei*, as the Court noted in its decision, the Special Advocates were able to discover evidence in the *Charkaoui II* material that undermined the reliability of the informants to a point where the Court rejected the evidence as not being reliable:

[163] 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.

[164] 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 [...]

[436] As indicated above, I am satisfied that certain of the human sources relied upon by the Service are not credible and that the information that they provided is not reliable and appropriate within the meaning of the statute.

[437] I state my findings about the sources in the closed set of reasons for judgment. My conclusion about their credibility is based upon operational and source management reports and the cross-examination of the Service witness conducted by the Special Advocates in the closed hearings. Having considered all of the information and evidence carefully, I am satisfied that certain of the human sources in this case had motives to concoct stories that cast *Almrei* in a negative light.

---

<sup>40</sup> This position has not yet been accepted by the Courts in Canada. In *Almrei* the Court did not deal with the constitutional issue because it found in Mr. *Almrei*'s favour on the merits. In *Harkat* as we shall see below, the Court found that Mr. *Harkat* had been provided with sufficient evidence and information so as to be able to know the case he had to meet.

[438] Information was provided by one source in September 2001 that is implausible given what is known now about the chronology of events including Almrei's travels and Bin Laden's movements. I accept that the Service did not have reason to doubt the information at that time, although the source was then designated as being of unknown reliability. However, when given a further opportunity in 2004 to recount his knowledge of what Almrei had told him about his experiences in Afghanistan, the source provided information which is consistent with Almrei's own evidence. The source was highly motivated to curry favour with the Service in 2001. In preparing the SIR, the Service chose to go with the 2001 account and ignored what he said three years later.

As a result of the Court's conclusions on the reliability of the human sources and its findings with respect to the public record, the Court concluded that the certificate was not reasonable and it was quashed.

What are the lessons that can be deduced from the *Almrei* case? First, a hearing that requires a person to respond to an unknown case cannot by its nature be fair. In this particular case, the Special Advocates were able to successfully undermine the credibility of the sources without having access to Mr. Almrei. However, it is very unlikely that this situation will arise often. When it does not, unless sufficient disclosure can be provided to allow the person to challenge effectively the evidence of the source, the named person will be able to assert that there is a fundamental unfairness in the proceedings.

### **HARKAT**

*Harkat* is the third case to be determined by the Federal Court using the new procedure that included Special Advocates. The hearing, on its face, proceeded in a manner similar to that in *Almrei*, although *Harkat* did get considerable pre-hearing disclosure in relation to the allegations and was able to communicate with the Special Advocates about some of them, under strict limitations. As in the cases of *Charkaoui* and *Almrei*, the Special Advocates were provided with the entire file pursuant to an order rendered by the Court (the *Charkaoui II* order).<sup>41</sup>

The hearing was heard on the merits in two parallel hearings, one in public, one in camera. The allegations that had been made public through the summaries stated that he was a member of the Al Qaeda Network due to his participation in the Afghan jihad, his close relationship with important leaders of that jihad (Khattab), that he operated a guest house for Khattab, that Khattab was an ally of Bin Laden, that he was a sleeper agent, and that he had connections with leaders of the Bin Laden network. The Minister sought to rely on the fact that Mr. Harkat had withheld information and had lied about his participation in Afghanistan.

In order to defend himself, Mr. Harkat, like Mr. Almrei, had to respond to allegations that were based on information that was not disclosed to him. He did not know the scope and nature of the Minister's case and, as a result, was forced to make assumptions as to what was contained in the evidence so as to be able to respond as fully

---

<sup>41</sup> See 2010 FC 1242 par 23

as possible to a case that he did not fully know or understand.<sup>42</sup> Moreover, given that the allegations included, as they had for Mr. Almrei, that he was a member of the amorphous Bin Laden network, he had to adduce evidence related to the existence of the organization. As in the case of *Almrei*, of obvious concern was the broad definition given to both membership and organization within the context of national security cases. Moreover, the low evidentiary threshold only required the Minister to establish that the certificate was “reasonable”, a term that implied that the evidentiary burden on the Minister was lower than a balance of probabilities although it did require credible objective evidence.

In addition to the public hearing, hearings were held in camera, ex parte where Mr. Harkat’s interests were protected by two Special Advocates. Save as permitted by the Court, the Special Advocates were barred from having any communication with Mr. Harkat. After hearing all of the evidence, the Court upheld the reasonableness of the certificate. The Court found that Mr. Harkat was not credible, that he had contradicted himself and that his evidence was inconsistent with the open and secret material before the Court. The Court concluded that there was a Bin Laden network, that Khattab was connected to a terrorist group from Chechnya, that Mr. Harkat was affiliated with his network, and that Mr. Harkat was a sleeper agent in Canada.<sup>43</sup>

In addition to finding that the certificate was reasonable, the Court also rejected Mr Harkat’s constitutional objection to the proceedings. In upholding the constitutionality of the Special Advocate model, the Court rejected the notion that there were other models that might provide greater procedural protection to the named person. In so doing, the Court noted that the Special Advocate procedure compared favourably to the UK model because there was greater disclosure in Canada and the Special Advocates had greater powers than their UK counterparts.<sup>44</sup>

The Court noted that the delineation of the scope of the principles of fundamental justice required a balancing of societal and individual interests.<sup>45</sup> In assessing the sufficiency of the disclosure to Mr. Harkat, the Court noted that he had received far greater disclosure of the case under the new proceedings and that, in the end, he had sufficient information to know the case against him.<sup>46</sup>

Based on the reasons for judgment, there can be no doubt but that the secret evidence did play an important role in the proceedings. Moreover, it is clear that the Court accepted the reliability of the secret evidence. Thus, despite the finding by the Court that Mr. Harkat was given sufficient disclosure so as to be able to know and meet the case against him, it is clear that the findings of the Court were, to some unknown but

---

<sup>42</sup> The fact that the named person is given a right to respond to allegations that are not fully disclosed places him in the position where he must assume what is the scope and extent of the Minister’s case. This has undoubtedly resulted in the named person disclosing matters that were not within the knowledge of the Minister, in essence creating a situation where the person is compelled to incriminate him or herself in order to attempt to respond to the case.

<sup>43</sup> Ibid par 346-370, 398

<sup>44</sup> 2020 FC 1247 par 80

<sup>45</sup> Ibid par 81

<sup>46</sup> Ibid par 143

significant extent, influenced by evidence that was not disclosed to Mr. Harkat in a manner that would allow him to specifically respond to the allegations made against him. Such a process is not fair.

However, the question that must be decided is whether it is fair enough, given the national security context. Justice Noel concluded that it was, because he ruled that Mr. Harkat had received sufficient disclosure so as to be able to properly respond to the allegations. He found that the combination of the added disclosure provided to Mr. Harkat, taken together with the presence of the Special Advocates, created a fair process.

### CONCLUSIONS

The difficulty with any conclusion by the Courts that this new version of the security certificate procedure is fair lies in the fact that it must be accepted by the public in circumstances where the entire record is not available for scrutiny. As the House of Lords noted in the *AF* case,<sup>47</sup> faith in the justice system is undermined unless justice is seen to be done. The presence of the Special Advocates, coupled with the additional disclosure provided through the *Charkaoui II* process, have undoubtedly made this procedure fairer. At the same time, the Special Advocates cannot be seen as the panacea used to ensure the fairness of all *ex parte* confidential proceedings. Where there is substantial secret evidence that is relied on and it is not disclosed to the named person, in the absence of clear contradictions between the record and the information provided by sources, the ability of the Special Advocates to challenge the secret information is very limited. In these circumstances, it is doubtful that the Special Advocates ought to be considered a substantial substitute for the person in the closed hearings.

Interestingly, in reaching his decision to uphold the constitutionality of the procedure in *Harkat*, Justice Noel concluded that the balancing of societal interests and individual fairness issues was to be done within the context of the analysis of the principles of fundamental justice. It could be argued that this position is not in accord with the dicta of the Supreme Court, where the Court noted that the “the principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*. The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be”.<sup>48</sup>

The Court did note that there must either be full disclosure or a substantial substitute in order to comply with section seven: “If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here”. The new procedure envisions that the substantial substitute for full disclosure to the named person includes enhanced disclosure to him or her, coupled with full participation of the Special Advocates and *Charkaoui II* disclosure in the closed proceedings. In *Almrei* and *Charkaoui*, the combination worked effectively to the benefit of the named person.

---

<sup>47</sup> *Supra*.

<sup>48</sup> *Ibid* par 19-27



In *Harkat*, the named person has appealed the Court's determinations and the appeal will be considered by the Courts in due course. Ultimately, this and other cases will determine where the balance will be drawn between the requirements of individual rights for a fair hearing and the collective need to be protected against security threats. Ultimately, the Appellate Courts will determine whether a proper balance was reached in *Harkat*. They will have to consider all of the evidence, both open and closed, and determine whether the combination of the participation of the Special Advocates coupled with the *Charkaoui II* disclosure was a substantial substitute for full disclosure. The Courts will have to determine as well whether the demands of national security are such that they can override the requirements of fundamental justice. In reaching its conclusion, the Courts will also have to be cognizant of the damage that is caused to respect for the rule of law by proceedings that are conducted in secret.