Federal Court  Cour fédérale

Date: 20180507

Docket: IMM-1219-18

Citation: 2018 FC 486

Ottawa, Ontario, May 7, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

GREGORY ALLEN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Is the Applicant entitled to disclosure of communications between Canadian and foreign officials for the purposes of a detention review? That is the question raised in this application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act], for judicial review of a decision of the Immigration Division [ID] dated March 6, 2018.

[2] For the reasons that follow, the application is dismissed.

II. Background

[3] The Applicant is a citizen of Jamaica and a former permanent resident of Canada. He lost his Canadian status in 2016 and became the subject of an enforceable removal order due to serious criminal convictions. A negative Pre-Removal Risk Assessment was issued on December 15, 2016. A warrant for his arrest under IRPA was executed on March 24, 2017 prior to the expiry of the penitentiary sentence he was then serving.

[4] The Applicant remains in immigration detention. The ID has reviewed his detention at least once during each 30-day period since the warrant was executed. The removal order has not been enforced because the Canada Border Services Agency [CBSA] has not received a travel document for the Applicant from the Jamaican authorities.

[5] There is no dispute that the Applicant is a Jamaican national and was the holder of a Jamaican passport when he was sponsored to come to Canada in 1997. However, the Jamaican authorities require evidence of a birth registration or other documents establishing his nationality before they will issue a travel document. The Jamaican consul has suggested that an application be made to the Registrar General's Department for a "late entry of name" registration. Information from the Applicant regarding his family history was required for this purpose. The position taken by the Minister before the ID is that the Applicant has not been cooperative in providing such information.

[6] On March 1, 2018, the Applicant applied to the ID for an order requiring the CBSA to disclose: (1) the removal officers' notes, memoranda and correspondence regarding Mr. Allen; (2) communications and correspondence between CBSA and Jamaican authorities; and (3) documentation regarding the CBSA's efforts to address the conditions of Mr. Allen's confinement.

[7] The Minister agreed to provide documents falling within the first and third categories, but objected to the second category arguing that the request was not relevant and disclosure of such communications could injure international relations. The motion was considered at the detention review hearing on March 5, 2018.

[8] The Applicant argued that the correspondence is relevant and must be disclosed since it would address the subject of controversy, his continued detention. He argued that s 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* adopted as Schedule B to the *Canada Act* (UK), 1982, c 11 [*Charter*], is engaged and that his detention can only be maintained in accordance with the principles of fundamental justice; including his right to know and to answer the case. The Applicant contended that he is entitled to examine and assess the evidence used to justify his continuing detention, including communications with the country to which he would be deported. Should the Minister wish to claim a privilege respecting its relations with that country, the Applicant argued, the correct procedure would be to apply s 38 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA].

[9] The Minister's response was that the documents were not relevant and that the proper mechanism for disclosure of such records is through the *Privacy Act*, RSC 1985, c P-21, subject to the relevant provisions of that statute pertaining to privileged information. The Minister's counsel argued that the motion was an attempt to import criminal rules of evidence into an administrative proceeding. And further, that there would be injury to CBSA's relations with the foreign governments that are required to issue travel documents for their nationals subject to removal orders if their communications were routinely disclosed.

[10] As for the merits of the Applicant's continuing detention, the Minister argued that he continues to pose a danger to the public and would be unlikely to appear for removal from Canada if released from detention. The Applicant did not respond to the Minister's case for continuing detention since, in his submissions, further disclosure was required to understand and meet the case.

[11] On March 6, 2018, in extensive reasons, the ID found that the Applicant's continued detention was justified on two grounds: first, that the Applicant continues to pose a danger to the public pursuant to s 58(1)(a) of the IRPA and second, that the Applicant would be unlikely to appear for removal from Canada pursuant to s 58(1)(b). The danger finding was predicated upon the Applicant's criminal convictions and proven willingness to use violence.

[12] With regard to the Applicant's flight risk, the ID Member found that he displays a pattern of not cooperating with immigration and police authorities including, on multiple occasions, evading arrest. The Applicant is determined to remain in Canada, the ID found, by frustrating the

Minister's efforts to remove him. The Minister, the ID said, has been "exceptionally diligent in seeking to address the issues that arise" and in "ensuring that Mr. Allen receives a travel document as soon as reasonably possible". The Applicant "is deliberately, knowingly and determinedly obstructing authorities' efforts to get him a travel document".

[13] The Applicant's request for additional disclosure was denied. While the Member observed that the case was somewhat unique in that the Jamaican authorities were requiring a birth certificate before issuing a travel document, he found that the correspondence between the Jamaican and Canadian officials was not relevant since it was not being relied upon by the Minister. The Member noted that the Applicant received full disclosure of the information the Minister was relying upon. Further, that IRPA does not contain any specific requirements for disclosure by either party at a detention review and the ID rules provided only minimal requirements for disclosure. It was left to the ID to fashion orders for disclosure in appropriate circumstances in each case.

[14] In this case, the Member found, the information required to satisfy the Jamaican authorities was within the control of the Applicant. He had stated at various times that he had previously been in possession of both his birth certificate and his passport which were now missing. There was no evidence that he had contacted the authorities of his country of nationality to replace these documents. Nor had he made any allegation that the process that the Minister was engaged in was incorrect, intended to confuse the situation or delay his removal.

[15] The level of procedural fairness owed to the Applicant in the detention review did not require the disclosure of correspondence between CBSA and the Jamaican authorities, the Member held. The Applicant fully knew the case that he had to meet but had failed to cooperate with basic requirements of the process, such as completing the forms required to obtain a travel document. There was no unfairness to him in the process because he had been fully informed from the outset of what was required.

[16] In conclusion, the Member held that there was no absolute right to disclosure of the correspondence between the Minister's officials and the Jamaican authorities. While it was not determinative, the Member noted that the Applicant had not made a request under the *Privacy Act.* He did not accept that an application under the *Canada Evidence Act* would lead to a result in a reasonable period of time. What would resolve the matter, the Member held, was the Applicant's cooperation in completing the necessary forms fully and accurately for transmission to the Jamaican authorities. Absent that, and considering the Applicant's significant current danger and flight risk, the Member found that his lack of cooperation weighed heavily against him citing *Canada (MPSEP) v Lunyamila*, 2016 FC 1199 [*Lunyamila 2016*] and *Canada (MPSEP) v Lunyamila*, 2018 FC 211.

III. Issues

[17] On this application, the Applicant has not challenged the reasonableness of the ID's findings on his continued detention. Rather, he contends that he was denied procedural fairness by the ID's failure to order disclosure of the requested correspondence.

[18] Having considered the parties' submissions, the issues are as follows:

A. What is the correct standard of review?

B. Did the refusal to order disclosure of the communications breach procedural fairness?

IV. Relevant legislation

[19] The relevant provisions of the IRPA read as follows:

Release – Immigration Division	**Mise en liberté par la Section de l'immigration**
58 (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that	**58 (1)** La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants :
(a) they are a danger to the public;	**a)** le résident permanent ou l'étranger constitue un danger pour la sécurité publique;
(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);	**b)** le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);
[…]	[…]

[20] And the relevant provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], are:

Other factors	**Autres critères**
248 If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:	**248** S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
(a) the reason for detention;	**a)** le motif de la détention;
(b) the length of time in detention;	**b)** la durée de la détention;
(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	**c)** l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(d) any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency or the person concerned; and	**d)** les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère, de l'Agence des services frontaliers du Canada ou de l'intéressé;
(e) the existence of alternatives to detention.	**e)** l'existence de solutions de rechange à la détention.

[21] The *Immigration Division Rules*, SOR/2002-229 [*ID Rules*], provide at s 26:

Disclosure of documents by a party	**Communication de documents par une partie**
26 If a party wants to use a document at a hearing, the party must provide a copy to the other party and the Division. The copies must be received	**26** Pour utiliser un document à l'audience, la partie en transmet une copie à l'autre partie et à la Section. Les copies doivent être reçues :
(a) as soon as possible, in the case of a forty-eight hour or seven-day review or an admissibility hearing held at the same time; and	**a)** dans le cas du contrôle des quarante-huit heures ou du contrôle des sept jours, ou d'une enquête tenue au moment d'un tel contrôle, le plus tôt possible;
(b) in all other cases, at least five days before the hearing	**b)** dans les autres cas, au moins cinq jours avant l'audience.

V. Analysis

A. Standard of Review

[22] There is no dispute between the parties that the overall standard of review for a detention decision is reasonableness: *Lunyamila 2016*, above at paras 20-21; *Canada (MPSEP) v Dehart*, 2013 FC 936 at para 34. The Applicant submits and I agree that the issue of whether the ID should have ordered disclosure of the requested communications is a question of procedural fairness to be reviewed on the correctness standard: *Canada (MCI) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79 [*Khela*].

[23] There has been some uncertainty in recent decisions of the Federal Court of Appeal as to what "correctness" means in the context of procedural fairness. As the Respondent noted during oral argument, this was discussed by Justice Rennie in *Canadian Pacific Railway Company v. Canada (AG)*, 2018 FCA 69 at paras 32–56 [*Canadian Pacific*]. In that case, at para 40, Justice Rennie observed that what fairness requires in any particular circumstances is highly variable and contextual. The content or degree of fairness required is informed by the five, non-exhaustive contextual factors identified in *Baker v Canada (MCI)*, [1999] 2 SCR 817 at p 837–841, 174 DLR (4th) 193 [*Baker*].

[24] Justice Rennie was of the view that the fifth factor, the degree of deference accorded to the decision maker, was relevant in *Canadian Pacific*. But the ultimate question was whether the party knew the case they had to meet, had an opportunity to respond and had an impartial decision maker consider their case fully and fairly. Deference may be appropriate with respect to the decision-maker's choice of procedure but not with respect to whether the duty of fairness has been met.

[25] In my view, the same question is to be determined in this matter. Did the Applicant know the case he had to meet, have an opportunity to respond and to have an impartial decision maker consider his case fully and fairly? The conclusion I have reached is that he was not denied procedural fairness when the ID refused to order disclosure of the communications.

B. Did the refusal to order disclosure of the communications breach procedural fairness?

[26] The question of whether there was a beach of procedural fairness concerns the scope of disclosure required of the Minister at a detention review. In particular, whether there is an obligation on the part of the Minister to provide information beyond that upon which the Minister intends to rely. And if the Minister fails to provide everything that the Applicant requests, is it incumbent upon the ID to order further disclosure?

[27] As set out in the relevant provisions of s 58(1) of the IRPA, the ID is required to order the release of the Applicant unless, taking into account prescribed factors, it is satisfied that he is a danger to the public or is unlikely to appear for removal. The relevant prescribed factors in s 26 of the *ID Rules* include the length of time in detention, any unexplained delays or lack of diligence on the part of the Minister or the person concerned, and the existence of alternatives to detention.

[28] In this instance, as noted above, the ID considered that the Minister had been "exceptionally diligent" in making efforts to remove the Applicant and that the delays were attributable to the Applicant's lack of cooperation. The ID's reasons in support of those findings are set out in detail in the March 6, 2018 decision. They were not challenged on the hearing of this application.

[29] The Applicant argues that he is owed a high-level of procedural fairness because of the length of his detention – eleven months at the time of the ID hearing. He contends that disclosure

of the requested correspondence is required to satisfy the "case to meet principle" since diligence and delays are among the prescribed factors to consider before a detention review decision can be made. He seeks the requested correspondence to challenge the Respondent's claim that the Minister's officials have proceeded with diligence and to demonstrate that the delays to his removal have been caused by that lack of diligence. He says that he has never been given an opportunity to independently examine the Minister's claims that the impediment to issuance of a travel document is solely his non-cooperation.

[30] In *Brown v Canada (MCI)*, 2017 FC 710 [*Brown*], Justice Fothergill undertook a comprehensive analysis of the scheme permitting detention for immigration purposes in the context of a constitutional challenge to the legislation. At paragraph 159, he set out the minimum requirements of lawful detention for removal purposes under the IRPA and the Regulations:

> […]
>
> (a) The Minister of PSEP must act with reasonable diligence and expedition to effect removal of a detainee from Canada.
>
> (b) The onus to demonstrate reasons that warrant detention or continued detention is always on the Minister of PSEP.
>
> (c) Before ordering detention, the ID must consider the availability, effectiveness and appropriateness of alternatives to detention.
>
> (d) At each detention review, the ID must decide afresh whether continued detention is warranted.
>
> (e) Detention may continue only for a period that is reasonable in all of the circumstances, including the risk of a detainee absconding, the risk the detainee poses to public safety and the time within which removal is expected to occur.
>
> (f) Once the Minister of PSEP has made out a prima facie case for continued detention, the individual must present some evidence or

> argument, or risk further detention. The Minister of PSEP may establish a prima facie case in a variety of ways, including reliance on reasons for prior detentions.
>
> (g) The Minister of PSEP must provide reasonable notice of the evidence or information that will be relied upon at the detention review. Detainees or their representatives may request further disclosure, and ask that the Enforcement Officer be summoned to appear at the hearing.
>
> (h) If insufficient disclosure is provided, a detainee or representative may ask the ID to briefly adjourn the hearing, or to bring forward the date of the next review. If necessary, an application for judicial review may be brought in this Court on an expedited basis.
>
> (i) Detainees held in an IHC may challenge the location or conditions of their detention directly to the CBSA. Detainees held in a provincial correctional facility may challenge the location or conditions of their detention in accordance with the procedures of that facility. Detainees may also bring applications for *habeas corpus* or judicial review in a superior court.

[31] The Applicant submits that in this case, the disclosure he has received has been insufficient. As a consequence, relying on para 159 (h) of *Brown*, he says that it has been necessary to bring this application for judicial review. Until he is given an opportunity to review the requested documents, it is impossible for him to make any evidence based allegations. On a detention review, he submits, the Minister must prove diligence and the ID has to independently assess such efforts rather than rely on the Minister's representations. For him to challenge the Minister's assertions and for the ID to make an independent assessment, disclosure of the requested documents is required, the Applicant argues.

[32] The Applicant further submits that the evidence of non-cooperation presented by the Minister does not diminish his right to know and to answer the case that he has to meet. Nor does

his right to request the release of records under the *Privacy Act*. Moreover, the delays inherent in obtaining records and the exceptions to disclosure under the *Privacy Act* make that option impracticable.

[33] The Minister cannot baldly assert a claim of privilege for documents on the ground that disclosure would be injurious to international relations without resorting to the process outlined in the CEA, the Applicant contends. Alternatively, the Minister could make an application for non-disclosure of the information under s 86 of the IRPA and, if dissatisfied with the outcome, seek judicial review under s 86.1 of the Act.

[34] The Respondent submits that the requested disclosure is not relevant to any issue in dispute. Any disclosure requirement must take its context from the immigration detention. The Applicant is only entitled to the materials that were before the ID in the form of documents disclosed as exhibits, recordings of his detention reviews and the reasons given for his continued detention at prior reviews.

[35] By way of preliminary observations, there is nothing in the record before the Court that would suggest that the Minister would have grounds for seeking a non-disclosure order under s 86 or judicial review under s 86.1 of the *IRPA*. Those provisions are limited to matters in which disclosure would constitute a risk of injury to national security or to any person. While the risk of disclosure of information that could injure international relations falls within the scope of s 38 of the CEA, the ID was correct, in my view, to recognize that the use of that procedure would not

be consistent with the need to conduct detention review proceedings in a timely and informal manner. That is not to say that it may not be necessary in an appropriate case.

[36] The ID's role on a detention review is to determine whether continued detention is justified. This was described by MacKay J in *Salilar v. Canada (MCI)*, [1995] 3 FC 150 at 159 (TD) in these terms: "…the concern, at the time of the review, is whether there are reasons to satisfy the adjudicator that the person in detention is not likely to pose a danger to the public and is likely to appear for an examination, inquiry or removal." See also *Canada (MCI) v Thanabalasingham*, 2004 FCA 4 at paras 6-16 [*Thanabalasingham*]; *Canada (MCI) v Lai*, [2001] 3 FC 326 at para 15, 2001 FCT 118.

[37] As stated by Justice Fothergill at para 159 of *Brown*, the onus is on the Minister at each detention review to make out a *prima facie* case for continued detention. That can be done in a variety of ways including reliance on compelling or persuasive reasons for prior detention. However, the evidentiary burden may shift to the subject once the Minister has established a *prima facie* case. The individual must then present some evidence or risk continued detention.

[38] Proceedings before the ID are informal and the normal rules of evidence do not apply, as Justice Fothergill noted at paras 122-123 of *Brown.* Hearsay evidence is admissible and, in practice, the requirement to introduce evidence arises only when a statement is contradicted by another party. It was therefore open to the ID Member to accept the facts and arguments presented by the Minister's representative regarding the efforts to obtain a travel document from

the Jamaican authorities unless the information was challenged by the Applicant. As noted above, the Applicant has made no such challenge.

[39] The mandatory requirements for disclosure by the Minister to the ID and the person detained in the *Immigration Division Rules* are set out in Rule 8(1) and specify basic biographical and procedural information. Rule 26 requires that copies must be provided if a party wants to use a document at a hearing and Rules 27 to 31 concern the form and manner in which such documents are to be disclosed to the ID and the other party. As the ID noted, there are no provisions in the Act or the Regulations that define the nature and extent of disclosure that the Minister must provide for detention reviews, other than these rules.

[40] In *Suresh v Canada (MCI)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh (SCC)*], the Supreme Court of Canada considered the protections afforded by s 7 of the *Charter* to an individual facing deportation under s 53(1)(b) of the *Immigration Act*, RSC 1985, c I-2. The Court examined what was required by the duty of fairness and the principles of fundamental justice:

> [115] What is required by the duty of fairness – and therefore the principles of fundamental justice – is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker*, *supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J. More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: Baker,

> supra, at paras. 23-27. This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker*, *supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.

[41] Of particular importance in *Suresh (SCC)* was that Mr. Suresh, a Convention refugee and applicant for permanent residence, faced a risk of deportation to possible torture at the hands of the authorities of his homeland. In the circumstances, the Court concluded, Mr. Suresh was entitled to more than the procedural fairness required by the *Immigration Act.* In particular, he must be informed of the case to be met subject to claims of privilege or similarly valid reasons for reduced disclosure, such as safeguarding confidential public security documents: *Suresh (SCC),* above at para 122. The subject must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise: *Suresh (SCC),* above at para 123.

[42] In *Charkaoui v Canada (MCI)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui I*], the Supreme Court undertook a constitutional analysis of the security certificate regime under the recently enacted IRPA. At the time, the scheme permitted deportation of permanent residents or foreign nationals on the basis of confidential information that was not to be disclosed to the person named in the certificate: *Charkaoui I*, above at paras 4-5. In some instances, the detention of the person named was mandatory and automatic: *Charkaoui I*, above at paras 6-9.

[43] The challenge to the constitutionality of the scheme turned on whether the principles of fundamental justice under s 7 of the *Charter* were respected. Of note, the Court considered whether the named person is afforded an opportunity to meet the case put against him or her by being informed of that case and being allowed to question or counter it: *Charkaoui I*, above at

para 31. In the result, the scheme was held to not satisfy the principles of fundamental justice and was struck down.

[44] In arriving at that conclusion, the Supreme Court held that an extended period of detention would not violate s 7 or s 12 of the *Charter* if accompanied by a process that provides regular opportunities for review of detention, taking into account all relevant factors, including (a) the reasons for detention, (b) the length of detention, (c) the reasons for delay in deportation, (d) the anticipated future length of detention, and (e) the availability of alternatives to detention: *Charkaoui I*, above at paras 110-128.

[45] In *Charkaoui v Canada (MCI)*, 2008 SCC 38, [2008] 2 SCR 326 [*Charkaoui II*], the Supreme Court examined the retention and disclosure of information in the possession of CSIS. The issue was whether CSIS had a duty to disclose information to persons subject to security certificate proceedings and if so, the basis and scope of the duty to disclose such information: *Charkaoui II*, above at para 19.

[46] Although the Court had previously noted in *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809 [*May*], that the criminal law disclosure requirement established in *R v Stinchcombe*, [1995] 1 SCR 754, is not applicable in the administrative context, the Court cautioned against a cookie-cutter approach:

> [53] But whether or not the constitutional guarantees of s. 7 of the *Charter* apply does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state's actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life. By its very nature, the security certificate

> procedure can place these rights in serious jeopardy, as the Court recognized in *Charkaoui*. To protect them, it becomes necessary to recognize a duty to disclose evidence based on s 7.

[47] In the present matter, the Applicant's liberty interest is engaged by continued detention during the removal process but he is not otherwise at risk of serious jeopardy.

[48] Relying on *Suresh (SCC)*, above, and *Ruby v Canada (Solicitor General)*, [2002] 4 SCR 3, 2002 SCC 75 [*Ruby*], the Court in *Charkaoui II* emphasized the importance of being sensitive to the circumstances and context of each situation:

> [56] In *La* (at para. 20), this Court confirmed that the duty to disclose is included in the rights protected by s. 7. Similarly, in *Ruby v. Canada (Solicitor General)*, [2002] 4 SCR 3, 2002 SCC 75, at paras. 39-40, the Court stressed the importance of adopting a contextual approach in assessing the rules of natural justice and the degree of procedural fairness to which an individual is entitled. In our view, the issuance of a certificate and the consequences thereof, such as detention, demand great respect for the named person's right to procedural fairness. In this context, procedural fairness includes a procedure for verifying the evidence adduced against him or her. It also includes the disclosure of the evidence to the named person, in a manner and within limits that are consistent with legitimate public safety interests.
>
> [57] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 113, concerned the nature of the right to procedural fairness in a context where a person had been deprived of rights protected by s. 7 of the *Charter* [quoting *Suresh (SCC)*, above at para 115.]
>
> [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.

[49] I had occasion to consider the Minister's duty of disclosure in admissibility hearings in *Suresh v Canada (MPSEP)*, 2017 FC 28 [*Suresh (FC)*], a case involving the same individual some fifteen years after the Supreme Court proceedings. As in the present matter, Mr. Suresh argued that the Minister was required to disclose evidence in their possession even if the Minister did not intend to rely on that evidence to make their case: *Suresh (FC)*, above at para 47. Mr. Suresh argued that the "reasoning in *Charkaoui II*, predicated on s 7 of the *Charter*, should apply equally in inadmissibility proceedings as the conditions of release and the risks of removal may be the same as those that apply in a certificate case": *Suresh (FC)*, above at para 49.

[50] In response, the Minister argued that it was not required to disclose such information since the case against Mr. Suresh was being made on unclassified evidence that had been disclosed: *Suresh (FC)*, above at para 50. I concluded that, in the circumstances, the level of disclosure that the Supreme Court had considered necessary for the closed security certificate proceedings was not required for an inadmissibility hearing since all of the information that was being relied upon had been disclosed to the applicant and he knew the case that he had to meet.

[51] The Applicant points to Justice Fothergill's statements in *Brown*, above at para 159, that detainees can request further disclosure and, if insufficient disclosure is provided, may ask the ID to briefly adjourn the hearing and ask that the Enforcement Officer be summoned to appear. If

necessary, Justice Fothergill noted, an application for judicial review may be brought to this Court.

[52] In my view, to best understand Justice Fothergill's comments about disclosure at para 159 of *Brown*, it is important to review his analysis at paras 121 to 128 of that judgment. In those paragraphs, Justice Fothergill notes that there is a general requirement to introduce evidence only when a statement is contradicted by another party and that "[t]his requirement is generally respected in practice. At a minimum, it is something either a detainee or a representative may insist upon": *Brown*, above at para 122.

[53] *Brown* discusses the procedure by which the Minister must disclose evidence; the Minister must give notice, the detainees can request further disclosure, the ID may rule on the request and, if necessary, a judicial review of a negative disclosure decision may be brought in this Court. *Brown* does not address the nature and extent of disclosure by the Minister required to satisfy the principle of the case to be met, and, ultimately, to comply with the principles of fundamental justice. I do not read *Brown* for the proposition that the Minister must disclose information that it does not intend to rely upon at a detention review hearing.

[54] The Applicant may be deprived of his liberty pending his removal only in accordance with the principles of fundamental justice; in particular, the right to know and meet the case: *Suresh (SCC)*, above at para 122; *Charkaoui I*, above at para 53. In the present matter, the question turns on whether the Minister's disclosure of the evidence relied upon satisfies this

principle in the context of detention reviews. I believe that it does and that the ID did not err in refusing to order disclosure of the requested communications.

[55] It is worth noting here that there is no suggestion in these proceedings that the Applicant is at risk of torture or of other serious harm upon his return to Jamaica, as counsel acknowledged at the hearing of this application. The harms that he faces are those which are normal consequences of deportation. But there is no question that he faces a continued deprivation of his liberty while detained for the purposes of removal.

[56] A contextual analysis is required to determine the level of disclosure that is necessary in these circumstances: *Charkaoui II*, above at paras 50-53; *May,* above at paras 89-93; see also *Khela*, above at para 83.

[57] Compared to the security certificate proceedings discussed in *Charkaoui I, Charkaoui II*, and *Suresh (SCC),* the Applicant has not been denied access to any of the evidence being relied upon by the Minister in the detention review proceedings. The Minister did not use any of the requested documents as evidence to establish a ground for detention pursuant to s 58 of the IRPA or to urge the ID to consider the "other factors" listed at s 248 of the Regulations. To the contrary, the Applicant has had access to all of the Minister's evidence put forward to justify his continued detention.

[58] As noted in *Charkaoui I*, above at para 110, extended periods of detention would not violate s 7 or s 12 of the *Charter* if accompanied by a process that provides regular opportunities for review of detention, taking into account all of the relevant factors.

[59] In the present case, the Applicant argues that he is owed a high level of procedural fairness since he should be considered a long-term detainee. The Applicant takes the position that this heightened level of procedural fairness compels the disclosure of the communications between Canadian and Jamaican authorities. The Applicant doesn't know whether there is anything in the correspondence that would assist his case against continued detention. He hopes to find something that would allow him to argue that the reason for the delay in his removal is not his own lack of cooperation but rather a lack of diligence on the part of the Minister. I agree with the Respondent that this amounts to a "fishing expedition".

[60] As discussed above, the length of detention is one of several relevant factors in assessing the degree of procedural fairness required, and whether s 7 of the *Charter* is respected. In this case, the amount of time involved since the first detention review has not been excessive. He was detained under the immigration warrant on March 23, 2017 and his first detention review was held on March 27, 2017. Between then and June 2017 there were attempts to find the Applicant's passport and birth certificate which he told CBSA he had given to the Toronto Police. Thereafter, the efforts to obtain a travel document focused on finding his name in the Jamaican birth registry and obtaining a new birth certificate.

[61] The other prescribed factors include the reasons for detention, the reasons for delay in deportation, the anticipated future length of detention, and the availability of alternatives to detention. The reasons for detention in this case were clearly stated by the ID Member in his reasons for decision. The reasons for delay and the anticipated future length of detention are both attributable to the Applicant's non-cooperation.

[62] I disagree with the Applicant's submission that the Court should ignore his lack of cooperation when assessing whether he is being deprived of procedural fairness. The reasons for detention and the reasons for delay in deportation expressed by the ID in this matter weigh heavily against the Applicant.

[63] From the very start, at the Applicant's 7-day detention review, the ID noted that the length of future detention was largely in his hands. If he cooperated and completed the required forms, his detention would not be long. The ID noted the Applicant's lack of cooperation in the hearings dated May 5, 2017, August 21, 2017, October 16, 2017, December 8, 2017 (somewhat cooperative), January 5, 2018, and the detention review subject to this application dated March 6, 2018 (I cannot find other than Mr. Allen is deliberately, knowingly and determinedly obstructing authorities' efforts to get him a travel document).

[64] Although it must be noted that he was unrepresented at several of his prior detention reviews, the Applicant has not sought judicial review of the ID's findings that he is not cooperating. In the present application, while represented by counsel, he does not challenge the ID's findings on lack of cooperation.

[65] According to the Respondent's affidavit evidence, Canada's communication with Jamaican authorities first came into play in a detention review dated June 26, 2017, roughly three month after the Applicant's transfer to immigration detention on March 24, 2017. Canada's communications with Jamaican authorities regarding the issuance of a travel document was discussed in other detention reviews between August 21, 2017 and December 8, 2017. Prior to

the present application, the Applicant did not make a request for disclosure of this correspondence.

[66] As noted by Chief Justice Crampton in *Lunyamila 2016,* above at para 59, the scheme of the IRPA and the Regulations contemplates that persons who are a danger to the public or who are a flight risk and who are not cooperating with the Minister's efforts to remove them from this country, must, other than in exceptional circumstances, continue to be detained until such time as they cooperate with their removal. The type of exceptional circumstances which may justify release may include unexplained and very substantial delays by the Minister that are not attributable to the detained person's lack of cooperation or to unwillingness on the part of the Minister to incur substantial costs. There was no evidence of such circumstances before the ID.

[67] Chief Justice Crampton further added that the "refusal to fully cooperate factor would also be a very important factor to consider in assessing whether the deprivation of the detainee's rights to liberty has been effected" in accordance with the principles of fundamental justice," as set forth in s. 7 of the Charter": *Lunyamila 2016,* above at para 86.

[68] The evidence before the ID was sufficient to persuade the Member that the reasons for delay in effecting the Applicant's removal were attributable to his non-cooperation rather than to a lack of diligence on the part of the Minister. On the record, that finding was reasonably open to the ID. As was the ID's finding that the Applicant had failed to demonstrate the relevance of the requested correspondence.

[69] There may be cases in which it is necessary to order the production of further disclosure by the Minister, including the disclosure of communications with foreign governments. Where appropriate, when faced with an order from the ID to disclose the information, the Minister may choose to invoke s 38 of the CEA to seek an order from this Court to protect the information on the ground that its disclosure would injure international relations. In the present matter, I am satisfied that procedural fairness did not require that the ID order disclosure of the communications between the Minister's officials and the Jamaican authorities absent a finding that it was material to the proceedings.

[70] As argued by the Respondent, it was open to the Applicant to ask for the opportunity to cross-examine the enforcement officer on the notes and other documents that were disclosed for the purposes of the March 5, 2018 hearing. The Applicant might then be able to establish an evidentiary basis for requesting additional disclosure of relevant material.

[71] In post-hearing correspondence, the Court was advised by counsel for the Applicant that at the April 13, 2018 detention review, the ID made a request of the Minister to provide an update at the next review regarding the information required by the Jamaican authorities and what had already been sent to them. No order was made requiring disclosure of the requested documents. In the circumstances, I am satisfied that there is no need for intervention by this Court.

VI. Questions for certification

[72] The Applicant has requested that the following question be certified:

> Within the context of a long-term detainee's detention review, is the Minister under a duty to disclose all relevant material, including evidence useful to the detainee, subject to a proper claim of privilege?

[73] The Respondent submits that the question is overly broad, does not arise from the facts of this case, and has been addressed by the Court in *Brown*. The Applicant's production motion did not seek all relevant material in the Minister's possession and *Brown* addressed the minimum requirements of lawful detention including disclosure.

[74] In reply, the Applicant submits that the determinative issue before the Court is whether he is entitled to the disclosure of relevant documents and that this issue was not addressed in *Brown*. The Court in *Brown* discussed the mechanism for resolving disclosure problems but did not address the scope of a detainee's right to disclosure.

[75] I agree with the Respondent that the proposed question is too broad and would not be determinative of an appeal on the facts of this case. The ID did not rule out making a broader disclosure order. Nor has this Court. It remains open to an applicant to seek such disclosure when it is warranted by the circumstances and there is an evidentiary basis to demonstrate the relevance of the requested information. As stated by the Federal Court of Appeal in *Lai v Canada (MPSEP)*, 2015 FCA 21 at para 10, an issue that need not be decided cannot ground a properly certified question.

JUDGMENT IN IMM-1219-18

THIS COURT'S JUDGMENT is that: The application is dismissed and no question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1219-18
STYLE OF CAUSE:	GREGORY ALLEN V THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 18, 2018
JUDGMENT AND REASONS:	MOSLEY, J.
DATED:	MAY 7, 2018

APPEARANCES:

Simon Wallace Clifford McCarten	FOR THE APPLICANT
Kareena R. Wilding	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCarten Wallace Law Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT