Federal Court  Cour fédérale

Date: 20091014

Docket: DES-4-08

Citation: 2009 FC 1030

[REVISED ENGLISH TRANSLATION]

Ottawa, Ontario, October 14, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF
Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration (the Ministers), dated July 31, 2009, for an immediate determination, in accordance with section 78 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of the reasonableness of a certificate issued on February 22, 2008.

The certificate attests that Adil Charkaoui, a permanent resident, is inadmissible on grounds of security.

[2] This application was made after the Ministers withdrew certain information and other evidence which, in their opinion, would be injurious to national security or endanger the safety of any person if disclosed. However, the Ministers specify that the withdrawal of this information cannot be taken to mean that they no longer considered it reliable.

HISTORY OF THE PROCEEDINGS

[3] The Court will discuss only the facts relevant to the outcome of this matter.

[4] On February 22, 2008, the Ministers referred the certificate under section 77 of the IRPA. Also, in accordance with subsection 77(2) of the IRPA, the Minister of Public Safety and Emergency Preparedness filed information and other evidence in support of the certificate, seeking to keep a considerable amount of it confidential on the basis that it would be injurious to national security or would endanger the safety of any person if disclosed.

[5] On September 3, 2008, at a public hearing, the Ministers acknowledged that they owe a duty to disclose to Mr. Charkaoui the evidence on which the certificate is based — a duty that is adapted to public safety requirements, as held by the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326 [*Charkaoui II*]. I will discuss the scope and impact of this duty at paragraphs 75 to 80 of these reasons.

[6] At the hearing, the Court repeatedly noted the duty, conferred by Parliament on the designated judge, to ensure the confidentiality of the information if its disclosure would be injurious to national security (transcript of September 3, 2008, at pages 12, 14, 16, 27, 28, 30, 33, 35, 71, 72, 79 and 82).

[7] On September 12, 2008, counsel representing the Ministers in the five cases involving security certificates notified the Court, by unclassified letter, that in accordance with the Supreme Court's decision in *Charkaoui II* they had asked CSIS to scrutinize the information and other evidence in each of the five cases in order to determine whether the original operational notes had been retained.

[8] As a result, it was determined that certain original operational notes had been retained. The Ministers thought it important to specify that none of these notes pertained to CSIS' interviews of Mr. Charkaoui.

[9] Counsel for the Ministers specified that these original notes would be sent to the Court and the special advocates, who would be called upon to examine all the information and other evidence (including original operational notes) which, on grounds of national security or safety of any person, was not disclosed to Mr. Charkaoui.

[10] On the same day, September 12, 2008, in response to an order of this Court, the Assistant Director (Intelligence) for CSIS wrote that, to the best of his knowledge, CSIS had disclosed all relevant information and other evidence that could be disclosed to Mr. Charkaoui without causing injury to national security or the safety of any person.

[11] Mr. Charkaoui then asked to cross-examine a CSIS representative about the sufficiency of the disclosure of public evidence.

[12] On September 19, 2009, this Court, reiterating the judge's obligation to ensure the confidentiality of information, dismissed that application. The Court was of the opinion that it had to examine the evidence in an *in camera* proceeding, with the assistance of the special advocates, before determining whether any additional information would be disclosed.

[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.

[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".

[16] On July 31, 2009, the Ministers stated that, in their opinion, the evidence remaining in the file was not sufficient to meet their burden of showing that the certificate was reasonable. They also asked the Court to determine whether the certificate was reasonable.

[17] On August 5, 2009, the Court asked the parties to state their positions on the following two questions (among others):

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

2. If the Court has to determine whether the certificate is reasonable and quash it, what questions, if any, should it certify for the Court of Appeal?

[18] On September 4, 2009, the Ministers made further written submissions, both public and secret, in response to these questions. In those submissions, the Ministers reiterated that they were not prepared to withdraw the certificate, and asked the Court to certify two questions for the Federal Court of Appeal, in accordance with section 79 of the IRPA.

[19] On September 17, 2009, Mr. Charkaoui made further written submissions in response to the Court's questions, asking that the security certificate be quashed, and objecting to the certification of the questions proposed by the Ministers.

[20] The special advocates also made further written submissions, both public and secret, on September 22, 2009.

[21] A public hearing, at which the Court heard the Ministers and Mr. Charkaoui, was held in Montréal on September 24, 2009. In addition, upon the Ministers' request, a hearing *in camera*, during which the Court heard the Ministers and the special advocates, was held in Ottawa on September 30, 2009.

THE ISSUES

[22] The issues that the Court must now decide are as follows:

A. Is the certificate valid and reasonable?

B. Should the questions proposed by the Ministers be certified?

A. Is the certificate valid and reasonable?

[23] Subsection 77(2) of the IRPA states that when the Ministers refer a security certificate in respect of a person, the Minister of Public Safety and Emergency Preparedness "shall file with the Court the information and other evidence on which the certificate is based".

[24] The Ministers cannot legally refer a certificate without filing the evidence on which it is based. Such action would not be authorized by the IRPA, which requires that the certificate be referred *and* that the evidence be filed at the same time. Thus, a certificate referred without the filing of the evidence on which it is based would be *ultra vires* the Ministers, illegal, and void. Obviously, that was not the situation in this case: the Ministers did file the evidence which, in their opinion,

justified the certificate against Mr. Charkaoui. However, as permitted by the IRPA, they chose to withdraw a significant part of that evidence.

[25] Now that this information has been withdrawn, the Ministers admit that the evidence is no longer sufficient to support the certificate. Consequently, the certificate no longer exists within the criteria established by Parliament. Despite the Ministers' insistence on it, the fact that the evidence in support of the certificate physically exists and that the Ministers would like to add it back to the file without actually disclosing it is of no import. Paragraph 83(1)(*j*) of the IRPA states that the designated judge "shall not base a decision on information or other evidence provided by the Minister . . . if the Minister withdraws it".

[26] For greater accuracy, one might refer to Gérard Cornu, Association Henri Capitant, *Vocabulaire juridique*, which defines the [TRANSLATION] "withdrawal" of an [TRANSLATION] "administrative act" as the "disappearance of such an act by virtue of the subsequent intent of its maker, with prospective or retroactive effect, as the case may be". [Emphasis added.]

[27] Thus, once the evidence is withdrawn by the Ministers and returned to them, it can no longer be considered "filed". Yet this is a requirement of the IRPA.

[28] Consequently, since the Ministers' admission that the remaining evidence is no longer sufficient to justify it, the certificate has been *ultra vires* the Ministers. It is void.

[29] This is because the executive power can only be exercised under the conditions and within the limits set by the IRPA. As the Supreme Court notes in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190,

> . . . [a]ll decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. . . . Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.

[30] The Ministers are not concealing the reasons why they are not withdrawing the certificate. They want to force the Court to make a decision as to whether the certificate is reasonable, thereby enabling them to ask that certain questions be certified for the Court of Appeal so that they can get a judgment from that Court in the hope that they can add back key information in support of the certificate without having to disclose it to Mr. Charkaoui. As for Mr. Charkaoui's counsel, they submit that in view of the circumstances, the certificate should be quashed, because the withdrawal of the evidence has removed the legal basis for the certificate and undermined its validity.

The appropriate remedy

[31] The corollary of the prohibition against the executive acting in the absence of legal authority is that each person has the right not to be subject to such action. This raises the question of what remedy is appropriate in view of the inaction of the Ministers, who failed to revoke the certificate against Mr. Charkaoui even though it became *ultra vires* (due to its inconsistency with section 77 of the IRPA) when the evidence on which it is based was withdrawn.

[32] In the Ministers' submission, the only avenue open to this Court under the IRPA is a determination of whether the certificate is reasonable. Specifically, the IRPA provides the following:

> **78.** The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not.
>
> **78.** Le juge décide du caractère raisonnable du certificat et l'annule s'il ne peut conclure qu'il est raisonnable.

The Ministers stress that this provision is mandatory (as suggested by, among other things, the use of the imperative "shall" in the English version.)

[33] Although this argument might initially appear persuasive, it disregards the fact that if the certificate has been voided by the withdrawal of the evidence on which it is based, there is simply no certificate the reasonableness of which this Court can determine anymore.

[34] In my opinion, the Ministers' power to withdraw a certificate unsupported by the evidence is not discretionary. On the contrary, it flows directly from the wording of the IRPA itself.
The Ministers challenge the very existence of this power. But it would be absurd for the Ministers to be unable to withdraw a certificate if, for example, following a change of circumstances (such as the receipt of new information exculpating the person named in the certificate) they formed the opinion that the person no longer poses a danger to national security.

[35] Although the IRPA does not expressly state that a security certificate can be withdrawn, it would, in my opinion, run counter to section 7 of the *Canadian Charter of Rights and Freedoms* to interpret it as though it cannot. Indeed, under such an interpretation, an individual could remain

subject to a security certificate, and the restrictions on his or her liberty that it entails, even if the Ministers do not believe that those restrictions are justified. This would be contrary to the principles of fundamental justice and to all logic.

[36] What must the Court do in view of the Ministers' inaction following their withdrawal of the evidence in support of the certificate?

[37] Under paragraph 18(1)(*a*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7,

". . . the Federal Court has exclusive original jurisdiction to . . . grant declaratory relief, against any federal board, commission or other tribunal".

[38] For a century now, the declaration has been considered "the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions": *Dyson v. Attorney General* (1910), [1912] 1 Ch. 158, at page 165. Indeed, "given the flexible nature of the declaration, there are few limitations on its availability" (David Philip Jones and Anne S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Thomson Reuters Canada, 2009), at page 758). Perhaps the most important limitation is that "there must be some basis on which the application is brought and not merely some abstract desire to obtain clarification . . . . Absent a factual foundation within the jurisdiction of the Court, remedies are meaningless" (*Pieters v. Canada*, 2004 FC 27, [2004] F.C.J. No. 72 (QL), at paragraph 17). In other words, the declaration must serve a practical purpose related to a specific set of facts.

[39] That requirement is met in this case. The factual circumstances surrounding the security certificate that names Mr. Charkaoui are clear, since the Ministers acknowledge having withdrawn

evidence that is essential to support the existence of the certificate. Consequently, a declaration that the certificate is void is, in my opinion, the most appropriate remedy.

[40] When did the certificate become void?

[41] Mr. Charkaoui submits that the withdrawal of the evidence shows that the Ministers acted in bad faith because they never intended to disclose the evidence even though they should have known that they would be required to do so. He submits that, given these circumstances, it was improper to refer the certificate in the first place, and that the Court should issue a declaration to that effect.

[42] However, the Court cannot accept Mr. Charkaoui's allegation in the absence of a full debate regarding the evidence confirming or infirming it; it is a grave allegation, and the Ministers should have the opportunity to contradict it.

[43] Thus, I find that when the Ministers admitted, on July 31, 2009, that the evidence remaining in the record was insufficient to justify the certificate's existence, the certificate became *ultra vires* the Ministers and void.

[44] However, it is clear that if this Court were not declaring the certificate void due to its being *ultra vires* the Ministers, it would still find the certificate unreasonable because the evidence on which it is based is insufficient.

[45] In addition, the questions that the Ministers seek to have certified do not depend on the precise form of the Court's judgment as to the validity or reasonableness of the certificate. Thus, it is this Court's duty to decide on request for certification.

B. Should the questions proposed by the Ministers be certified?

Introduction: The right of appeal and its limits

[46] A party who loses his or her case does not have an absolute right to appeal. Indeed, as the Supreme Court reiterated in *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 [*Kourtessis*] at pages 69-70,

> …[a]ppeals are solely creatures of statute; see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. . . Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.

[47] As the Supreme Court explained in its well-known decision in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, limiting the number and length of appeals (and their cost) is one of the public policy objectives that courts must take into account. However, Parliament can pursue the same objectives by determining the appropriate way to circumscribe the right of appeal within a statutory scheme.

[48] There is every reason to believe that Parliament was pursuing these objectives by limiting the right of appeal in the context of proceedings under Division 9 of the IRPA. In fact, the structure of Division 9 suggests that Parliament wanted the procedure for reviewing the reasonableness of security certificates to be as brief as possible. Thus, paragraph 83(1)(*a*) of the IRPA provides that, in such proceedings, "the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit". Consistent with this desire for brevity, Parliament decided, in section 79 of the IRPA, that "[a]n appeal from the determination [as to whether a security certificate is reasonable] may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding."

[49] Here, the Ministers are asking the Court to certify serious questions of general importance in accordance with section 79 of the IRPA. The proposed questions are worded as follows:

> A. What are the criteria to be applied by a designated judge when considering the issue raised under paragraph 83(1)(*d*) of the IRPA, namely whether, in the judge's opinion, the disclosure of information and other evidence

provided by the Ministers would be injurious to national security or endanger the safety of any person? More specifically:

i. How can the designated judge resolve the inherent tension between his or her duty to ensure the confidentiality of information and other evidence which, if disclosed, would be injurious to national security or endanger the safety of any person in accordance with paragraph 83(1)(*d*) of the IRPA, and his or her duty to ensure throughout the proceeding that the permanent resident or foreign national is provided with a summary of information and other evidence that enables him or her to be reasonably informed of the case made by the Ministers in the proceeding under paragraph 83(1)(*e*) of the IRPA?

ii. When a designated judge considers how the inherent tension described in point i. above can be resolved in order to protect the rights of the permanent resident or foreign national, what weight must the judge give to the fact that the procedure established in Division 9 of the IRPA provides that, in paragraph 85.1(2)(*b*), the special advocate appointed by the judge is responsible for challenging the relevance, reliability and sufficiency of, and the weight to be given to, the evidence that is not disclosed to the person named in the certificate?

1. The criteria to apply to the question of certification

[50] Although the "serious question of general importance" test has not yet been analyzed in depth in a security certificate proceeding, it has been explained in numerous cases arising under other provisions of the IRPA. Indeed, paragraph 74(*d*) of the IRPA states that "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question".

[51] It is no accident that paragraph 74(*d*) and section 79 of the IRPA employ the same wording. During the debates on Bill C-3, Bill MacKenzie, Parliamentary Secretary to the Minister of Public Safety, stated that the limited right of appeal under the new section 79 of the IRPA "is consistent with the way other decisions under the *Immigration and Refugee Protection Act* may be appealed" (*House of Commons Debates*, No. 44 (5 February 2008) at 1325). The case law regarding "the way other decisions . . . may be appealed" is therefore applicable to a security certificate proceeding. Besides, the parties seem to agree on the criteria applicable to the certification of questions for the Court of Appeal.

[52] The leading case on the concept of "serious question of general importance" is *Canada (Minister of Citizenship and Immigration) v. Liyanagamage* (1994), 176 N.R. 4, [1994] F.C.J. No. 1637 (QL) [*Liyanagamage*], where the Federal Court of Appeal explained, at paragraph 4, that in order for a question to be certified as being a "serious question of general importance", the judge must find that it is

> one which . . . transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application . . . but it must also be one that is determinative of the appeal. The certification process . . . is neither to

> be equated with the reference process established by section 18.3 of the *Federal Court Act*, nor is it to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case.

[53] The Federal Court of Appeal has recently had the opportunity to re-explain this test in *Varela v. Canada (Citizenship and Immigration)*, 2009 FCA 145, [2009] F.C.A. No. 549 (QL). The Court began by pointing out, at paragraph 28, that it would be exceptional for more than a single question of general importance to be dispositive of an appeal. The Court then noted, at paragraph 29, that "a serious question of general importance arises from the issues in the case and not from the judge's reasons". In addition, the Court reiterated, at paragraphs 32, 35, 37 and 40, the importance of the requirement that the question proposed for certification be dispositive of the appeal. Moreover, at paragraph 42, it overturned the certification of a question to which there was a clear answer. The Federal Court of Appeal concluded, at paragraph 43, by noting that "[i]t is a mistake to reason that because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified". If the question certified by the judge does not meet the criteria established by Parliament, "the pre-condition to the right of appeal has not been met".

[54] Moreover, in order to be of "general application" and "transcend the interests of the immediate parties to the litigation", a question must normally pertain to law, not facts. As Justice Marc Noël (then of the Federal Court (Trial Division)) noted, "[a] question whose answer turns on the facts is unlikely to transcend the interests of the immediate parties and hence, will rarely be of general importance" (*Baldizon-Ortegaray v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 307, [1993] F.C.J. No. 440 (QL)).

2. The parties' positions

The Ministers' position

[55] The Ministers submit that the questions they propose for certification under section 79 of the IRPA meet the criteria for the certification of a "serious question of general importance" developed by the case law, and, in particular, in *Liyanagamage*, above.

[56] The Ministers argue that these questions raise concerns that could come up in any security certificate proceeding and are therefore of general importance. Moreover, this would be the first appeal in a proceeding involving the review of a security certificate since Parliament changed the procedure in 2008. The Ministers reiterate their disagreement with the Court's disclosure orders in this matter, and submit that it would be appropriate to have the Federal Court of Appeal clarify the factors that a judge must take into account before issuing such orders.

Mr. Charkaoui's position

[57] Mr. Charkaoui objects to the certification of the questions proposed by the Ministers, and argues that they are questions of fact that cannot be regarded as being of "general importance" and therefore do not pass the *Liyanagamage* test. In this regard, Mr. Charkaoui relies on *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at paragraph 85, where the Supreme Court expressed its opinion that "the determination of what constitutes a 'danger to the security of Canada' is highly fact-based".

[58] In addition, Mr. Charkaoui submits that the courts, including the Supreme Court of Canada, have already defined the criteria applicable to the disclosure of the information that the Ministers seek to keep confidential. Consequently, he submits that there is no need to obtain additional explanations from the Federal Court of Appeal.

The special advocates' position

[59] The special advocates submit that the Ministers' main question is about the criteria applicable to the disclosure of information. They point out that these criteria have already been analyzed in depth by Justice Dawson in *Harkat (Re)*, 2005 FC 393, [2005] F.C.J. No. 481. In this case, the Court has followed that analysis. The Ministers themselves refer to and accept it implicitly.

[60] However, the special advocates submit that what is motivating the Ministers to petition the Court of Appeal is not a need to clarify the criteria applicable to the disclosure of information, but rather their disagreement with the disclosure orders made by the Court in this matter. The special advocates submit that this objective does not warrant the certification of questions for the Court of Appeal. Their argument is twofold.

[61] First, the special advocates argue that the Ministers take issue with this Court for having erred by "balancing" Mr. Charkaoui's procedural rights with the requirements of national security. In other words, the Court has weighed national security and procedural fairness, and, in the process, has permitted information to be disclosed which would be injurious to national security, based on a finding that procedural fairness outweighs national security.

[62] However, the special advocates submit that the Court has done no such "balancing" and that, instead of finding that one of these values outweighs the other, the Court has reconciled them. The examples that the Ministers raise in their confidential written submissions show that the approach used in the *in camera* disclosure process was to neutralize information prejudicial to national security (or the safety of a person) by summarizing that information in such a way as to remove from the summary submitted to Mr. Charkaoui any information the disclosure of which would be injurious to national security.

[63] This "neutral summary" approach simultaneously respects all the parameters set by Parliament in the IRPA. It allows the designated judge to ensure the confidentiality of sensitive information while ensuring that the person named in the certificate has enough information throughout the proceeding. It also enables the special advocates to fulfil their duty, under paragraph 85.1(2)(*a*) of the IRPA, to challenge the assertions that the information is confidential.

[64] This approach is consistent with the reasoning of the Supreme Court of Canada in *Charkaoui II*, above, with respect to disclosure, and with the descriptive criteria for identifying national security information, provided by Justice Eleanor Dawson in *Harkat*, above.

[65] Second, the special advocates submit that, to the extent that the Ministers' problems with this Court pertain to the contents of some of its disclosure orders, the objections to those orders raise questions of mixed fact and law. In their submission, such questions are not "of general importance" and cannot be certified. A dispute that is solely about the contents of the summaries would not, in their submission, meet the threshold for a question of general importance.

3. The questions proposed by the Ministers

[66] The questions proposed by the Ministers are, at first glance, theoretical questions that could arise in other proceedings under Division 9 of the IRPA. The Ministers appear to want the Federal Court of Appeal to specify the criteria that a designated judge must apply when considering requests for disclosure in such proceedings—criteria that include the significance of the special advocates' role.

[67] However, this first impression is misleading. An analysis of the context in which the questions were prepared shows that the Ministers are not truly using them to obtain an explanation of the law governing a request for disclosure in a designated proceeding.

[68] Contrary to what the proposed questions might suggest, the Ministers are not arguing that the Court has applied the wrong criteria to the request for disclosure in this matter. Indeed, the Ministers themselves are relying on Justice Dawson's "codification" of the criteria in *Harkat*, above, at paragraph 89. As the special advocates argue, the Court has relied on the very same "codification" in this matter, both in the judgment on the national security standard (*Charkaoui (Re)*, 2009 FC 342, [2009] F.C.J. No. 396 (QL)) and in the disclosure orders that the Ministers have challenged in their confidential submissions.

[69] Thus, upon a reading of the Ministers' submissions as a whole, it appears that what they seek to challenge are not the criteria applicable to disclosure requests, but the Court's application of those criteria.

[70] In essence, what the Ministers are criticizing is the Court's "balancing" of national security against procedural fairness. In the Ministers' submission, no such "balancing" should take place because national security must outweigh procedural fairness. The question whether the Court is entitled to weigh the requirements of national security and procedural fairness was raised in *Almrei (Re)*, 2009 FC 322, [2009] F.C.A. No. 681, at paragraphs 54 to 59. My colleague Justice Mosley held that, absent a factual matrix, the question was premature. I would note, however, that Justice Mosley then ordered the disclosure of the interception summaries and an overview of the surveillance reports relevant to Mr. Almrei's file.

[71] A question on this subject could have been certified as a general question if such an exercise had taken place here. But as the special advocates have shown, by taking the Ministers' examples in context, the Court has consistently refused to engage in such a balancing exercise.

[72] At this stage, it would be helpful to explain the methodology that the Court followed before making the disclosure orders with which the Ministers disagree.

The Court's methodology with respect to disclosure

[73] The statutory and jurisprudential framework in which the Court has operated should first be explained.

[74] First, it must be recalled that, in paragraph 85.1(2)(*a*) of the IRPA, Parliament has expressly given the special advocate the role of "challeng[ing] 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". Thus, the special advocates played an active role in the disclosure process.

[75] It should also be noted that the IRPA confers an important role on the designated judge, who, under paragraph 83(1)(*d*), "shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person". [Emphasis added.] Thus, each time the question arises, the designated judge must determine whether the disclosure of information would be injurious to national security or the safety of any person.

[76] Although their expertise is taken into consideration in this delicate mandate, the judge owes no deference to the assertions made by CSIS or the Ministers in this regard; nor does it owe any deference to the special advocates. The decision is the designated judge's alone. This is what Parliament decreed.

[77] Second, the Supreme Court provided several clarifications regarding the approach that designated judges must take when deciding applications for the disclosure of information and other evidence.

[78] As I have stated, the Supreme Court of Canada considered the disclosure process in the context of an examination of the reasonableness of a security certificate in *Charkaoui II*, above. At the outset of its analysis, the Supreme Court stressed, at paragraph 56, that the procedural fairness requirement, adapted to this context, includes "the disclosure of the evidence" on which the

certificate is based "to the named person, in a manner and within limits that are consistent with legitimate public safety interests". [Emphasis added.]

[79] The Court also specified, at paragraph 62, that in order to respect these limits, "[t]he 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".

[80] In other words, the judge's role, as stated at paragraph 63, is to "filter the evidence he or she has verified and determine the limits of the access to which the named person will be entitled at each step of the process . . . ".

[81] It should be recalled that, in September 2008, the Ministers acknowledged that they have a duty to disclose the evidence on which the certificate is based. It should also be recalled that the Assistant Director of CSIS wrote to the Court that all the evidence that could be disclosed to Mr. Charkaoui without causing prejudice to national security had already been disclosed.

[82] With the statutory and case law framework discussed above in mind, the Court then ordered that a hearing *in camera* would have to be held before the disclosure of any further evidence would be permitted. In keeping with paragraph 83(1)(*d*) of the IRPA, ensuring the confidentiality of information that, if disclosed, would be injurious to national security or endanger the safety of any person has always been a central preoccupation of the Court, as the numerous orders, directions and communications issued by the Court in these proceedings will attest. (The most relevant documents are attached as Appendix "A".)

[83] The purpose of the hearings *in camera* was to enable the Court, with the assistance of the special advocates and the Ministers' lawyers, to achieve this objective by means of a process of filtering and of producing neutralized summaries.

[84] To facilitate this process, the special advocates prepared disclosure proposals based on the themes developed by Justice Dawson in *Harkat*, above: Canadian and foreign agencies, human sources, interceptions, and investigative techniques. These proposals were submitted to the Ministers, who could give or withhold their consent to the disclosure as proposed by the special advocates.

[85] Hearings *in camera* were later held with respect to the evidence that the Ministers did not agree to disclose. Applying paragraph 83(1)(*d*) of the IRPA, quoted above, the Court decided, item by item, whether its disclosure would injure national security or endanger the safety of any person. Whenever the Court found that it would, it refused the disclosure of the item, regardless of its potential importance to Mr. Charkaoui. In doing so, the Court rejected the special advocates' proposal that the Court weigh the interests in play and order the disclosure of information important to Mr. Charkaoui's defence despite the risk to national security.

[86] In the course of these hearings *in camera*, following the Ministers' consent to the disclosure of the content of the interceptions, the Court sought to ensure that the summaries that the Ministers had provided were in conformity with the originals.

[87] The Court issued certain oral orders intended to achieve this objective. At the same time, the Court demanded that the Ministers tell Mr. Charkaoui whether the original evidence had been retained or not, in accordance with paragraph 42 of the decision in *Charkaoui II*, above, where it was specified that "the retention and accessibility of this information is of particular importance where the person named in the certificate and his or her counsel will often have access only to summaries or truncated versions of the intelligence . . .". In the Court's opinion, this was the logical consequence of the letter of September 12, 2008, in which the Ministers acknowledged that certain notes had been retained.

[88] However, as counsel for the Ministers acknowledged at the public hearing of September 24, 2009, the Ministers responded to these orders by withdrawing all the interceptions from the evidence in support of the certificate.

[89] The withdrawal of this evidence, which was crucial to the Ministers' case, fatally obstructed the disclosure process. Given the reduced breadth of the information sources, which prevented the information from being neutralized, it became difficult to provide Mr. Charkaoui with an accurate summary of the evidence without disclosing evidence that could be injurious to national security and endanger the safety of any person.

[90] This was the breaking point that resulted in the Court's issuance of the direction dated July 9, 2009, in which the parties and the special advocates were asked for written submissions on the effect of the withdrawal of certain information tendered in support of the certificate.

Conclusion on the certification of a question for the Court of Appeal

[91] Thus, the true question proposed by the Ministers, which pertains to the legitimacy of a judicial balancing of national security against procedural fairness as part of the disclosure of evidence on which a security certificate is based, is not relevant to these proceedings, because the Court has never engaged in such an exercise. Thus, the question cannot be determinative of the outcome of a future appeal, and the Court cannot certify it.

[92] What the Ministers are truly seeking to do is to challenge certain disclosure orders made by this Court. In fact, they themselves assert that their ultimate goal is to "reinsert" evidence in support of the certificate, albeit without (one has to assume) having to disclose it in accordance with the Court's orders. In sum, as the special advocates point out, the Ministers' objections invite an item-by-item re-assessment of the specific summaries to the disclosure of which the Ministers object. This objection pertains to the facts of this case. It does not transcend the parties' interests and is not of general importance. It raises no question that meets the criteria of section 79 of the IRPA.

[93] Accordingly, this Court is bound by the IRPA the decisions of the Federal Court of Appeal, to refuse to certify the question proposed by the Ministers.

4. Reservation of rights

[94] Mr. Charkaoui is asking that this Court "reserve its rights" so that, after quashing the certificate, it can rule on an application seeking recognition that Mr. Charkaoui's constitutional rights were violated in the course of the proceedings concerning him, and seeking a remedy under section 24 of the *Canadian Charter of Rights and Freedoms*.

[95] Mr. Charkaoui is relying on section 24 of the Charter, which provides that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

[96] Mr. Charkaoui submits that this Court, being the designated judge assigned to this matter, is the court of competent jurisdiction, principally because his application is closely tied to the facts of this case, with which this Court is familiar.

[97] Mr. Charkaoui is relying on the decision in *Charkaoui (Re)*, 2004 FCA 421, [2004] F.C.J. No. 2060, 247 D.L.R. (4th) 405 (*Charkaoui I*) where the Federal Court of Appeal held that a designated judge tasked with examining the reasonableness of a security certificate has jurisdiction to decide constitutional questions submitted by way of a motion.

[98] The Ministers reject Mr. Charkaoui's position, and submit that once the certificate is quashed or declared unreasonable, the designated judge's jurisdiction is exhausted. They submit that

if Mr. Charkaoui wishes to apply for a remedy under section 24 of the Charter, he should do so in another proceeding.

[99] I agree with the Ministers' position. Mr. Charkaoui's application for a remedy under section 24 of the Charter is a proceeding distinct from the determination whether the security certificate is reasonable; the decision of the Federal Court of Appeal in *Charkaoui I*, above, on which Mr. Charkaoui relies, is not applicable to this case, and this Court is not necessarily "a court of competent jurisdiction" within the meaning of the Charter.

[100] At paragraph 57 of its reasons in *Charkaoui I*, the Federal Court of Appeal held that "it would work against the best interests of justice to force litigants to undertake parallel proceedings based on a single decision, *a fortiori* when such proceedings are brought in the same Court".

[101] However, that reasoning does not apply here. As the Federal Court of Appeal noted at paragraph 58 of its decision in *Charkaoui I*, "the appellant, in challenging his detention, is simply pleading in his defence that some provisions of the IRPA are unconstitutional. Logically, this defence ought to be arguable by a motion within the framework of the original proceeding without the need to initiate a parallel proceeding or to open a new file." It would indeed be absurd and contrary to the rule of law and the supremacy of the Constitution to prevent a person, who is the object of a legal proceeding, from defending him- or herself within the framework of that same proceeding by arguing that the law on which the proceeding is based is unconstitutional. In this case, however, Mr. Charkaoui's application is not "parallel" to the examination of the certificate. On

the contrary, as he himself acknowledges, that proceeding is subsequent to the quashing of the certificate.

[102] Since the certificate has been declared void, the Court's jurisdiction is exhausted. This can no longer be considered a "mini-trial within a trial" [emphasis added] as it was in *Charkaoui I* (paragraph 59).

[103] As for Mr. Charkaoui's argument based on the concept of "court of competent jurisdiction" within the meaning of subsection 24(1) of the Charter, it cannot succeed, because a remedy under that provision "must be fitted into the existing scheme of Canadian legal procedure" in order to be granted (*R. v. Mills*, [1986] 1 S.C.R. 863, at page 953). Subsection 24(1) of the Charter does not have the effect of broadening the jurisdiction of this Court or any other court. It simply seeks to ensure that there will always be a competent court to grant a remedy for a Charter breach. If Mr. Charkaoui goes ahead with his application for a remedy and establishes that his application has merit, the Federal Court can be such a court.

[104] However, it is not up to a party seeking relief from the Federal Court to choose the judge who will decide his or her application, unless of course it is "parallel" to a matter that is already before the Court—for instance, a counterclaim. Mr. Charkaoui has the right to seek relief from the Federal Court, but does not have a right to have the matter decided by the same judge who examined the certificate. The assignment of files is a prerogative of the Chief Justice.

CONCLUSION

[105] Having devoted a great deal of time and effort to this file, the Court understands and shares the frustration of those who would have preferred that it end with a judgment on the merits based on an assessment of all the evidence in support of the certificate. However, the IRPA gives the Ministers the option to withdraw that evidence, and the Court, like the Ministers, Mr. Charkaoui, and the public, must live with the consequences of the Ministers' exercise of that option.

[106] Like the Supreme Court in *Kourtessis*, above, this Court is aware that "there is a widespread expectation that there must be some way to appeal the decision of a court of first instance", and it is aware that this expectation is even stronger when the decision from which the appeal is sought is important in the eyes of the public.

[107] The fact remains that this Court's duty is to apply the laws enacted by Parliament. Parliament has provided, in adopting the IRPA, precise and stringent limits on the right of appeal. These limits differ, for example, from the criteria that govern applications for leave to appeal to the Supreme Court under subsection 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26. Those criteria emphasize the national importance and the novelty of the questions that an appeal would raise. Under Division 9 of the IRPA, the Court is required to decline to certify a question unless it is a "serious question of general importance".

[108] The Court agrees that if it had carried out a judicial balancing process and had found that procedural fairness outweighed national security, the question whether it was entitled to do so would have been a question of law that would have met the threshold for certifying a question of general importance.

[109] However, the Court did not do so. In truth, the disagreement between the Ministers and the Court pertains solely to case-by-case decisions to the effect that the disclosure of certain evidence would not, in the Court's opinion, be injurious to national security. Parliament has expressly given the designated judge the responsibility to determine which information must remain confidential. The Ministers are not complaining that the Court has exceeded this mandate; rather, they are complaining that the Court erred in fact in carrying it out.

[110] It is understandable that a disagreement about the assessment of certain evidence has caused the Ministers to believe that the Court has allowed individual rights to prevail over national security requirements. However, this belief is unfounded.

[111] In this regard, it is worth recalling the extent to which the concept of national security is a matter of perspective. There can be grey areas which leave room for disagreement. The example of the Court's order that the Ministers undertake efforts to contact foreign intelligence agencies with a view to obtaining their consent to the disclosure of evidence is illustrative: the Ministers' position on the national security repercussions of such efforts changed from one week to the next.

[112] In short, the Court reiterates that the questions proposed by the Ministers are inextricably bound up with the facts of this case. A disagreement about the implementation of certain interlocutory orders with which the Ministers disagree does not meet the threshold established for the certification of a question.

JUDGMENT

THE COURT ORDERS THAT:

1. The certificate issued on February 22, 2008, attesting that Adil Charkaoui is inadmissible on grounds of security, is declared void.

2. There is no question to certify for the Federal Court of Appeal.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-4-08

STYLE OF CAUSE: **IN THE MATTER OF a certificate pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act* (IRPA)**

AND IN THE MATTER OF the referral of this certificate to the Federal Court pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

REASONS FOR JUDGMENT: TREMBLAY-LAMER J.

DATED: October 14, 2009

PLACE OF PUBLIC HEARING: Montréal, Quebec

DATE OF PUBLIC HEARING: September 24, 2009

APPEARANCES AT PUBLIC HEARING:

Johanne Doyon Lucie Joncas	FOR ADIL CHARKAOUI
Nancie Couture Daniel Latulippe Gretchen Timmins René LeBlanc	FOR THE MINISTERS
Denis Couture François Dadour	SPECIAL ADVOCATES

PLACE OF HEARING
***IN CAMERA*:** Ottawa, Ontario

DATE OF HEARING
***IN CAMERA*:** September 30, 2009

APPEARANCES AT HEARING *IN CAMERA*:

Nancie Couture Nadine Piché René LeBlanc	FOR THE MINISTERS
Denis Couture François Dadour	SPECIAL ADVOCATES

SOLICITORS OF RECORD:

Johanne Doyon Doyon & Associés Inc. Montréal, Quebec	FOR ADIL CHARKAOUI
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John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE MINISTERS
Denis Couture Ashton, Ontario	SPECIAL ADVOCATES
François Dadour Poupart, Dadour et Associés Montréal, Quebec	
Louis Belleau Filteau Belleau Montréal, Quebec	FOR THE INTERVENER

APPENDIX "A"

Federal Court  Cour fédérale

Date: 20080903

Docket: DES-4-08

Montréal, Quebec, September 3, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

IN THE MATTER OF the change to the conditions
of the named person's release

AND IN THE MATTER OF Adil Charkaoui

ORDER

UPON the preliminary motion brought by Mr. Charkaoui (the named person) for "party-to-party" disclosure of the information and other evidence related to the security certificate concerning him under subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended;

CONSIDERING the parties' written submissions following the decision in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 (*Charkaoui 2008*);

CONSIDERING the public hearing held on September 3, 2008;

CONSIDERING that, at this hearing, the parties recognized the principle, established by the Supreme Court of Canada in *Charkaoui 2008*, that procedural fairness includes a duty of disclosure to the named person "in a manner and within limits that are consistent with legitimate public safety interests";

CONSIDERING that, in this context, the Supreme Court has held that a form of disclosure of all the evidence that goes beyond the mere summaries provided to the Ministers and the designated judge is required to protect the named person's fundamental rights;

CONSIDERING that Mr. Joyal, representing the Ministers as their counsel, has asserted that the government evidence that, if disclosed, would not be injurious to national security or the safety of any person has been disclosed completely to the named person and that no further evidence exists that could be disclosed to him;

CONSIDERING that he also stated that a letter to this effect would be filed within a few days;

AND CONSIDERING that Mr. Joyal did not object to the Court's issuance of an order requiring that all government evidence that can be disclosed without endangering national security or the safety of any person be disclosed on a "party-to-party" basis, but, rather, merely stated that such an order would be redundant;

AND CONSIDERING this Court's opinion that such an order is in the interests of justice,

THE COURT ORDERS THAT:

The motion is granted. Within ten days of this order, the Ministers shall either disclose on a "party-to-party" basis all relevant evidence or information, whether favourable or unfavourable to the Ministers' case, that they can disclose without injury to national security or danger to the safety of any person, or they shall confirm that this duty has been met.

"Danièle Tremblay-Lamer"
Judge

Federal Court  Cour fédérale

Date: 20089019

Docket: DES-4-08

Ottawa, Ontario, September 19, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

AND the referral of this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND the appointment of a special advocate
pursuant to paragraph 83(1)(*b*) of the IRPA

AND Adil CHARKAOUI

ORDER

UPON the Court's order dated September 3, 2008, which stated that the Ministers were to either disclose on a "party-to-party" basis all relevant evidence or information, whether favourable or unfavourable to the Ministers' case, that they could disclose without injury to national security or danger to the safety of any person, or confirm that this duty had been met;

CONSIDERING the Ministers' response, set out in the two letters and appendices dated September 11 and September 12, 2008;

CONSIDERING that paragraph 83(1)(*a*) of the IRPA provides that, in this proceeding, the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

CONSIDERING that, after reading the letters of counsel for the named person and of the special advocates, dated September 8 and September 12, 2008, and the letter of the Ministers, dated September 18, 2008, the Court is of the opinion that the request by counsel for the named person to examine a CSIS representative with respect to the sufficiency of the government evidence (such as the protection of human sources) involves information or other evidence which would, be injurious to national security or endanger the safety of any person if disclosed **within the meaning of in paragraph 83(1)(*c*) of the IRPA**;

AND CONSIDERING the designated judge's obligation under paragraph 83(1)(*d*) of the IRPA to ensure the confidentiality of such information,

The Court dismisses the application of counsel for the named person to examine, at this stage, a CSIS representative with respect to the sufficiency of the disclosure of the government evidence; this process shall be conducted *in camera* by the designated judge with the assistance of the special advocates, and the Court shall, throughout the proceeding, ensure that the named person

is given a summary of the evidence that contains no elements that would be injurious to national security or endanger the safety of any person if disclosed (paragraph 83(1)(*e*));

CONSIDERING, however, that the special advocates were unable to meet the timeline set by the Court for consulting the classified evidence commencing on September 8, 2008, and that the Court accepts that the timeline established for the *in camera* hearings be changed accordingly;

THE COURT ORDERS THAT:

(1) The special advocates shall have until October 24, 2008, to study the classified evidence and prepare for the *in camera* hearings;

(2) The *in camera* hearings shall begin on October 27, 2008, and shall resume the week of November 3, 2008. At that time, it shall be decided whether a third week is necessary;

(3) For the time being, the timeline already set by the Court on June 20, 2008, shall not be changed with respect to the subsequent stages.

"Tremblay-Lamer J."
Judge

Federal Court  Cour fédérale

Date: 20081028

Docket: DES-4-08

Ottawa, Ontario, October 28, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate
under subsection 77(1)
of the *Immigration and Refugee Protection Act (IRPA)*

IN THE MATTER OF the referral
of this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF Adil Charkaoui

ORDER

HAVING taken into account the effect of the Supreme Court of Canada's decision in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 (*Charkaoui No. 2*) on the Ministers' duties of disclosure of information and other evidence related to Mr. Adil Charkaoui — including drafts, diagrams, recordings and photographs in the possession of the Canadian

Security Intelligence Service (CSIS) — to the designated judge for the purposes of the *ex parte* and *in camera* proceedings;

HAVING considered the testimony (on examination and cross-examination) of two CSIS employees, who described the scope of the disclosure necessary for compliance with the decision in *Charkaoui No. 2*, and whose description shall define what the Ministers and CSIS shall have to disclose under this order but shall not limit subsequent case-by-case motions by the special advocates during the upcoming *in camera* hearings;

HAVING considered the representations made by counsel for the Ministers and by the special advocates on this point;

HAVING been informed by one of the CSIS witnesses that it would take six months to bring together and send this information with a view to complying with *Charkaoui No. 2*;

AND CONSIDERING the request that the Ministers and CSIS carry out their disclosure obligations under *Charkaoui No. 2* as expeditiously as possible,

THE COURT ORDERS that:

-The Ministers and CSIS file, with the designated proceedings section of the Court, all information and all evidence related to Mr. Adil Charkaoui, including, among other things, drafts, diagrams, recordings and photographs in the possession of CSIS.

- The Ministers shall report to the Court on the progress at an *in camera* hearing to be held within six (6) weeks of this order.

"Danièle Tremblay-Lamer"
Judge

Federal Court  Cour fédérale

Date: 20081205

Docket: DES-4-08

Ottawa, Ontario, December 5, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate under subsection 77(1) of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of this certificate to the Federal Court pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

Communication by the Court to Mr. Adil Charkaoui and his Solicitors of Record

- Counsel for the Ministers, and the special advocates, were consulted prior to the issuance of this communication.
- In accordance with its Direction dated November 26, 2008, the Court held an *in camera* hearing on December 3, 2008, to hear the report of a witness concerning the status of the Ministers' disclosure obligations under the decision in *Charkaoui v. Minister of Citizenship and Immigration and Solicitor General of Canada*, 2008 SCC 38 (*Charkaoui II*).

- The witness explained that the process put in place at the Canadian Security Intelligence Service (CSIS), in accordance with the witness's testimony of October 27, 2008, identified a few thousand documents (and although the exact number will be confirmed in January 2009, the witness said the range was from 2,500 to nearly 3,500 documents) that will be subject to a preliminary review at the first stage of disclosure in accordance with *Charkaoui II*.
- The witness specified that the second stage of disclosure under *Charkaoui II* would consist in telling the Court and the special advocates whether originals of the few thousand documents identified exist.
- This second stage must take place at the same time as the process of reviewing, validating and analyzing the identified documents, and will end in early April 2009.
- The deadline for the first stage of disclosure is January 28, 2009.
- In accordance with the Court's communication dated November 26, 2008, and with their responsibilities under subsection 85.1(2) of the IRPA, the special advocates filed their proposals challenging the Minister's assertions that the disclosure of certain information or other evidence (in relation to the paragraphs of the classified Security Intelligence Report, but also from the CSIS reports which, the Ministers say, support those paragraphs) would be injurious to national security.
- Counsel for the Ministers shall make their position on the proposal known on or before January 28, 2009.
- At the same time as they filed their proposal, the special advocates also argued that their statutory mandate to challenge the assertions of secrecy was ongoing, and could be

exercised again in the future due to their ever-increasing mastery of the file, which, it should be added, is entirely consistent with additional disclosure under *Charkaoui II*.

- The special advocates also thought it important to specify, in relation to the implementation of that disclosure, that they were aware of future written submissions and of the arguments regarding the final interpretation of the phrase "party-to-party" proposed by counsel for the named person.
- The special advocates asked that the Court allow some questions of law to be argued by the parties prior to the *in camera* hearings that would later be held with respect to their disclosure proposal.
- They formulated the following questions of law:

  - What is the content and validity of the national security standard in the law?

  - Who bears the burden (the evidentiary burden and the burden of persuasion) of proving that disclosure does or does not pose a danger to national security or the safety of any person?

  - What standard of proof is associated with this burden?

- In light of the special advocates' arguments, the Court allowed their questions of law to be argued both by them and by the parties, prior to the *in camera* hearings that would later be held in connection with the special advocates' challenges. These questions shall be attached to the other question of law ("party-to-party disclosure") for which counsel for the named person must file their written submissions on January 9, 2009, and for which counsel for the Ministers must file their written submissions on January 16, 2009.
- As the Court was preparing to issue this communication, the special advocates raised the following new question, with four associated sub-questions:

- Can the upcoming disclosure be used against the named person?

(a) Under subsection 77(2) of the IRPA, are the Ministers bound by the allegations in the Security Information Report and by the information and other evidence from CSIS that substantiate it, and that was filed with the Court at the same time as the certificate?

(b) In this regard, although the CSIS investigation may be ongoing (*Charkaoui II*, at paragraph 73), can additional disclosure that alleges no facts subsequent to the Security Information Report stemming from an ongoing CSIS investigation be used against the named person?

(c) If so, must the Court personally verify each document to be disclosed? This is a question that Justice Dawson appears to have asked herself in issuing her public Direction dated October 23, 2008, in *Jaballah.*

(d) If the upcoming disclosure can be used against the named person, will he be entitled to a remedy under the Charter to prevent the relief granted to him by the Supreme Court in *Charkaoui II* from being turned against him in this way?

The special advocates believe it is essential that the named person know his "legal jeopardy" and have submitted that these questions have a direct impact on the way in which the Court, the special advocates and the parties use this additional disclosure in the near future. In this regard, they believe that these questions are of fundamental importance to the named person.

- After being informed of the position of counsel for the Ministers on this subject, the Court will allow the parties to argue these questions of law prior to the first stage of the additional disclosure so that everyone will be apprised of the legal rules that apply to this "new" material.

- Since the parties are already dealing with various questions of law, the Court suggests that this last question and its sub-questions also be included in the written submissions due from the parties on January 6 and January 19, 2009, and that they then be the subject of public argument during the week of January 19, 2009.

"Danièle Tremblay-Lamer"
Judge

Federal Court  Cour fédérale

Date: 20081210

Docket: DES-4-08

Montréal, Quebec, December 10, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral
of this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

ORDER

After holding an *in camera* hearing, *ex parte* the named person and his counsel, in which the witness Jean-Paul was heard, and after hearing the oral arguments of counsel for the Ministers and the special advocates, the Court is satisfied that the disclosure of the witness's identity by name would endanger his safety (paragraph 83(1)(*d*) of the IRPA). Consequently, the Court shall proceed by way of public hearing, commencing with the testimony of the witness Jean-Paul.

Since the question is a question of mixed fact and law and is closely bound up with the confidential evidence, the Court determined that it was not possible, in this particular instance, for it to be argued in public.

"Danièle Tremblay-Lamer"
Judge

Federal Court  Cour fédérale

Date: 20090123

Docket: DES-4-08

Montréal, Quebec, January 23, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

COMMUNICATION TO MR. ADIL CHARKAOUI AND HIS SOLICITORS OF RECORD

At the public hearing of January 22, 2009, Ms. Doyon asked whether both sides have made a case supported by evidence—that is to say, whether counsel for the Ministers have provided evidence that makes the government's case, and whether the special advocates have provided evidence that makes a case against the government. The Court considers it important to answer that, at this stage, there is no evidence against the government's case.

The Court also considers it important to provide the following additional information:

Certain documents may have been filed by the special advocates at hearings held in the absence of Mr. Charkaoui and his counsel in support of their role to protect Mr. Charkaoui's interests, in accordance with section 85.2 of the *Immigration and Refugee Protection Act*, during any part of the proceeding that is held in the absence of the public and of Mr. Charkaoui and his counsel, as well as at a hearing held *ex parte* in the absence of the Ministers' counsel on January 12, 2009.

To the extent that the disclosure of such document(s) would not injure national security or endanger public safety, the document(s) will be disclosed as part of the upcoming disclosure.

Moreover, when the Ministers have fully adduced their evidence (Phase II), the law enables the special advocate to exercise, with the judge's authorization, any power necessary to protect the interests of the named person. The special advocates could ask the Court for leave to present evidence against the government's case, in accordance with paragraph 85.2(*c*) of the *Immigration and Refugee Protection Act*.

"Danièle Tremblay-Lamer"

Judge

Federal Court  Cour fédérale

Date: 20090227

Docket: DES-4-08

Ottawa, Ontario, February 27, 2009

Present: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate under subsection 77(1) of the *Immigration and Refugee Protection Act* (IRPA);

IN THE MATTER OF the referral of that Certificate to the Federal Court under Subsection 77(1) of the IRPA;

AND IN THE MATTER OF Adil Charkaoui;

AND THE BARREAU DU QUÉBEC, Intervener

COMMUNICATION TO ADIL CHARKAOUI AND HIS SOLICITORS OF RECORD

On February 18, 2009, the Court registry received the copy of the disclosure ordered in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 (*Charkaoui II*). The computer medium submitted included approximately 3,000 documents.

The Court wishes to inform the person concerned and his solicitors that it appears from the letter from the Ministers attached to the disclosure that the copy provided to the special advocates

has been redacted, while the version provided to the Court simply highlights the passages expunged from the version provided to the special advocates, so that the passages in question can still be read.

The reasons advanced by the Ministers to justify the redacting of the copy provided to the special advocates are:

(a) investigations, whether underway or not, that do not relate to the person concerned;

(b) identification of human sources;

(c) identification of employees of the Canadian Security Intelligence Service (CSIS);

(d) matters/subjects/individuals/groups of interest to foreign agencies that do not relate to the person concerned;

(e) solicitor-client privilege; and

(f) Cabinet confidences.

The Court attaches hereto a letter from the special advocates dated February 25, 2009. You will note, in the second salient point on page 2 of the letter, that the special advocates intend to request de-redacting for their benefit and that their requests be heard *in camera* in the event that the Ministers refuse.

The Court wished to bring this information to the attention of the person concerned and his solicitors so that they would also have an opportunity to present legal arguments regarding the rules that apply in determining the requests to be made by the special advocates, *in camera*, regarding the

documents covered by disclosure under *Charkaoui II*, to the extent possible, during the public argument on questions of law to take place on March 10 and 11.

The Court also issued a written direction to the Ministers on February 24, 2009, asking whether they were prepared to consent to disclosure of the content of any intercepted communication to which the person concerned was a party and any surveillance report concerning him. A similar approach has been taken in other cases.

As well, after considering the first proposal for disclosure made by the special advocates and the Ministers' response, and in order to make a ruling regarding possible disclosure to the person concerned, the Court also ordered that the Ministers immediately obtain the approvals that seem to be required in relation to information originating from the domestic agencies involved, and one foreign agency, which they said they were prepared to disclose, subject to approval from the foreign agency in question.

Danièle Tremblay-Lamer

J.

Federal Court  Cour fédérale

Date: 20090318

Docket: DES-4-08

Ottawa, Ontario, March 18, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF
Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

ORDER

After considering the special advocates' first disclosure proposal and the Ministers' response thereto, the Court issues the following order:

1) **THE COURT ORDERS** the Ministers, in accordance with what they proposed in their response to the special advocates' first proposal, to act on their proposal immediately

each time they have said that they are ready to issue a declaration, a general statement or a summary and/or to disclose information. The Court wishes to note that the declaration, statement or summary must reflect the information stated in the Security Intelligence Report. No change shall be justified unless it is for national security considerations, or considerations related to the safety of a person.

"Danièle Tremblay-Lamer"
Judge

Federal Court  Cour fédérale

Date: 20090616

Docket: DES-4-08

Ottawa, Ontario, June 16, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF
Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

COMMUNICATION TO MR. ADIL CHARKAOUI AND HIS SOLICITORS OF RECORD

The Court is hereby forwarding you a summary of the hearing held *in camera* on June 11, 2009. During that hearing, the Ministers called a witness to explain their change of position having regard to the refusal to return to the foreign agencies to ask for the reservation to be lifted.

After hearing the witness, the Court finds that a significant part of the witness's testimony contains no elements that put national security at risk. This has made it possible to prepare a sufficiently detailed summary of the testimony while excluding confidential elements.

"Danièle Tremblay-Lamer"
Judge

Federal Court  Cour fédérale

Date: 20090618

Docket: DES-4-08

Ottawa, Ontario, June 18, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF
Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

COMMUNICATION TO MR. ADIL CHARKAOUI AND HIS SOLICITORS OF RECORD

The Court, deeming that there is no national security element, is forwarding you a copy of the recently issued correspondence.

The Court also hereby informs you that the *in camera* hearings on the disclosure proposals, including the *Charkaoui II* documents that fall under the third party rule, will take place on July 7 and 8, 2009.

"Danièle Tremblay-Lamer"
Judge

Federal Court  Cour fédérale

Date: 20090720

Docket: DES-4-08

Ottawa, Ontario, July 20, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF
Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

DIRECTION

In a top secret letter dated July 8, 2009, the Ministers notified the Court that they were withdrawing more information and evidence from the Security Information Report concerning Adil Charkaoui (DES-4-08), in addition to withdrawing the interceptions. The reason that the Ministers gave for doing this is harm to national security, and, in particular, the human sources program. This withdrawal took place after orders were issued on May 25, 26 and 27, 2009, and on June 1, 2009, directing the public disclosure of certain evidence.

The Court refuses to change the content of the orders because it made its decision following lengthy argument *in camera* with respect to the disclosure of information on which the certificate is based. The Court is satisfied that the information in question has been neutralized and does not

constitute information or other evidence that is injurious to national security or endangers the safety of any person.

Before permitting the disclosure of the new summary to Mr. Charkaoui and his counsel, the Court asks that the Ministers confirm, no later than July 22 at noon, that the withdrawal of new evidence does not affect the proposed summary.

"Danièle Tremblay-Lamer"
Judge

Federal Court  Cour fédérale

Date: 20090805

Docket: DES-4-08

Ottawa, Ontario, August 5, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF
Adil Charkaoui

AND THE BARREAU DU QUÉBEC, Intervener

DIRECTION

First of all, the Court wishes to clear any confusion by specifying that the disclosure orders that this Court issued orally in April and May 2009 were issued in the context of a set of disclosure proposals made by the special advocates, and were therefore not limited to the information and other evidence derived from the interceptions.

One illustration of this, and it should be sufficient, is all the analysis that this Court requested with regard to the legal consequences of the Ministers' initial refusal to seek the lifting of the third party rule.

The Court ruled on each disclosure proposal when discordance remained between the Ministers' assertions that the disclosure of the information would harm national security or the safety of any person, and the special advocates' assertions to the contrary. These orders led to the withdrawal of certain information because the Ministers, contrary to the opinion of the Court, believed that their disclosure would be injurious to national security or would endanger the safety of one or more persons. Whatever may have been stated at these hearings has already been the subject of communications issued by the Court.

Secondly, the Court wishes to repeat that, after the parties and special advocates make their written submissions, public and *in camera* hearings will be scheduled for September, after the summer break. (See the direction of this Court dated July 9, 2009.)

However, in light of the Ministers' written submissions that their evidence does not meet the burden of proving that the certificate issued against the named person is reasonable, and in light of their request that this Court make a decision about this question (and about the certification of certain questions for the Court of Appeal); and

In light of the named person's application for an unconditional release, the public hearings (and perhaps the hearings *in camera*) shall pertain to all these elements, and, in particular, to the following:

3. Is the Ministers' conclusion a change of circumstances within the meaning of section 82.1 of the IRPA, resulting in the lifting of the named person's conditions of detention without further delay?

4. In view of the Ministers' admission that the evidence is not sufficient to meet their burden of proof under the IRPA, is it appropriate for the Court to make a decision about the reasonableness of the certificate, or should it not simply be revoked by the Ministers without further ado? (See the judgment of Justice Mitting of the England and Wales High Court of Justice, Queen's Bench Division, Administrative Court, in the matter of the *Prevention of Terrorism Act 2005*: *Secretary of State for the Home Department v. AN*, [2009] EWHC 1966 (Admin.) (31 July 2009): http://www.bailii.org/ew/cases/EWHC/Admin/2009/1966.html.)

5. If the Court were to make a decision with respect to the reasonableness of the certificate and quash it, should it certify questions for the Court of Appeal? If so, which questions should it certify?

Once the Court is apprised of the availability of counsel for the public hearings (and possibly hearings *in camera*), it will establish deadlines for the filing of further written submissions in response to these questions.

"Danièle Tremblay-Lamer"
Judge