Federal Court		Cour fédérale

Date: 20090930

Docket: DES-7-08

Citation: 2009 FC 988

Ottawa, Ontario, September 30, 2009

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

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

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA;*

AND IN THE MATTER OF Mohamed Zeki Mahjoub.

REASONS FOR ORDER

[1] Mohamed Zeki Mahjoub is subject to a security certificate and is currently being detained at the Kingston Immigration Holding Centre (the KIHC) pursuant to section 81 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA). He is presently the only person detained at KIHC.

[2] The factual circumstances of the various security certificate proceedings in respect of Mr. Mahjoub have been thoroughly canvassed elsewhere (see e.g. *Canada (Minister of Citizenship and Immigration and Minister of Public Safety) v. Mahjoub*, 2009 FC 34; *Canada (Minister of Citizenship and Immigration and Minister of Public Safety) v. Mahjoub*, 2009 FC 248).

[3] The present motion concerns Mr. Mahjoub's conditions of detention and the mechanisms put in place by which he can make complaints relating to those conditions. Mr. Mahjoub argues that the conditions of his detention violate sections 7 and 15 of the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c.11 (the *Charter*). Specifically, he argues that the conditions of his detention are discriminatory vis-à-vis persons detained pursuant to the *Corrections and Conditional Release Act*, 1992, c. 20 (the CCRA), because unlike persons detained under the CCRA, he is not able to initiate complaints about the conditions of his detention with the Office of the Correctional Investigator (OCI), an ombudsman who provides independent investigation into inmates' complaints. In relation to section 7, Mr. Mahjoub argues that the absence of an independent grievance process for persons detained under security certificates pursuant to the IPRA offends section 7 of the *Charter*.

[4] In advancing both claims, Mr. Mahjoub compares his situation to that of inmates detained in federal penitentiaries. Therefore, before addressing the merits of his constitutional challenge, it is useful to understand the detention scheme under the IPRA, under which Mr. Mahjoub is detained, and the detention scheme under the CCRA, which governs federal inmates. To that end, I provide the following background information.

Background on the IPRA and CCRA Detention Regimes

[5] The KIHC is a federal detention facility exclusively used for persons named in security certificates who are detained pursuant to section 81 of the IRPA. The Canada Border Service Agency (the CBSA), responsible for persons detained pursuant to the IRPA, is the authority charged with operating the KIHC. The KIHC is located on the premises of the Millhaven Institution, a federal penitentiary in Bath, Ontario. The Correctional Service of Canada (the CSC), responsible for the operation of the Millhaven Institution, provides the services and employees to operate the KIHC under a Memorandum of Understanding with CBSA.

[6] The complaint and grievance procedure put in place for persons detained at the KIHC is found in the President's Directive 081: Redress Process, CBSA 2006 (the Directive). Detainees are entitled to submit formal written complaints and grievances about their conditions of detention. The redress process begins at the lowest levels of the CBSA or the CSC management, and escalates to increasingly higher levels. The first formal level is a complaint process, which is dealt with at the local level. It is followed by a three-level grievance process, the first two levels being dealt with at the regional level and the final grievance being dealt with at the national level. Depending on the nature of the complaint, the CSC or the CBSA will be charged with responding to the complaint. These are the sole agencies involved in the complaint and grievance procedure. At each level of the complaint and grievance procedure, the detainee is to be provided with complete and written responses to the issues raised.

[7] Mr. Mahjoub contrasts the grievance procedure for persons detained under security certificates, to the grievance procedure made available to inmates in federal penitentiaries. Persons convicted of criminal offences and detained in federal penitentiaries, such as Millhaven, are under

the authority of the CSC, and the manner in which their sentences are served is governed by the CCRA. These inmates have access to a complaint and grievance procedure under the CCRA, which is similar to the one made available to persons detained under security certificates, described above. Inmates also have access to the complaint mechanism of the OCI, as set out in the Part III of the CCRA. The OCI acts as an independent ombudsman and its primary function is to investigate and bring resolution to individual offender complaints (see the CCRA, s. 167). Where the OCI determines that a problem exists and that a complaint is well-founded, it informs and makes non-binding recommendations to the Correctional Commissioner or the National Parole Board (see the CCRA, ss. 177-179).

[8] The OCI has jurisdiction over "offenders'" complaints, under section 167 of the CCRA:

167. (1) It is the function of the Correctional Investigator to conduct investigations into the problems of offenders related to decisions, recommendations, acts or omissions of the Commissioner or any person under the control and management of, or performing services for or on behalf of, the Commissioner that affect offenders either individually or as a group.	167. (1) L'enquêteur correctionnel mène des enquêtes sur les problèmes des délinquants liés aux décisions, recommandations, actes ou omissions qui proviennent du commissaire ou d'une personne sous son autorité ou exerçant des fonctions en son nom qui affectent les délinquants individuellement ou en groupe.

[9] Offender is defined at section 99 of the CCRA, and does not include persons detained under security certificates pursuant to IRPA:

"offender" means	« délinquant »
(a) a person, other than a young person within the meaning of the Youth Criminal Justice Act, who is under a sentence imposed before or after the coming into force of this section	a) Individu condamné — autre qu'un adolescent au sens de la Loi sur le système de justice pénale pour les adolescents —, avant ou après l'entrée en vigueur du présent article, à une peine d'emprisonnement :

(i) pursuant to an Act of Parliament or, to the extent that this Part applies, pursuant to a provincial Act, or	(i) soit en application d'une loi fédérale ou d'une loi provinciale dans la mesure applicable aux termes de la présente partie,
(ii) on conviction for criminal or civil contempt of court if the sentence does not include a requirement that the offender return to that court, or	(ii) soit à titre de sanction d'un outrage au tribunal en matière civile ou pénale lorsque le délinquant n'est pas requis par une condition de sa sentence de retourner devant ce tribunal;
(b) a young person within the meaning of the Youth Criminal Justice Act with respect to whom an order, committal or direction under section 76, 89, 92 or 93 of that Act has been made,	b) adolescent, au sens de la Loi sur le système de justice pénale pour les adolescents , qui a fait l'objet d'une ordonnance, d'une détention ou d'un ordre visés aux articles 76, 89, 92 ou 93 de cette loi.
but does not include a person whose only sentence is a sentence being served intermittently pursuant to section 732 of the Criminal Code;	La présente définition ne vise toutefois pas la personne qui, en application de l'article 732 du Code criminel, purge une peine de façon discontinue.

[10] Mr. Mahjoub argues that the definition of "offender" contained in section 99 of the CCRA is under-inclusive, such that persons being detained in a federal facility pursuant to a security certificate do not come within the meaning of "offender" and as a result are not able to initiate a complaint with the OCI which would trigger the powers and duties set out in the CCRA. According to Mr. Mahjoub, the exclusion of security certificate detainees from the definition of "offender" and from access to the OCI is contrary to sections 7 and 15 of the *Charter*.

Issues Raised By Mr. Mahjoub

[11] Two constitutional issues are raised in this motion:

(1) Does the definition of "offender" set out in the CCRA contravene subsection 15(1) of the *Charter*?

(2) Does the definition of "offender" set out in the CCRA contravene section 7 of the *Charter*?

[12] The parties agreed that the motion be adjudicated on the following agreed statement of facts:

> Both parties agree that there are live issues between Mr. Mahjoub and the staff of the KIHC;
>
> Those live issues are not sought to be adjudicated on this motion;
>
> Both parties agree that if Mr. Mahjoub was an "offender" or "inmate" as defined under the CCRA, he could initiate a complaint with the OCI which would trigger the powers and duties set out in the Act.

[13] No further evidence was adduced.

Analysis

Mr. Mahjoub's Section 15 Claim

[14] Section 15 of the *Charter* states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[15] Persons detained under security certificates pursuant to the IRPA do not have access to the OCI as they are not included in the definition of offender of the CCRA, while persons detained in federal facilities pursuant to criminal law do have access to the OCI. Mr. Mahjoub alleges that the basis for this differential treatment is citizenship. He argues that the CCRA is discriminatory in its effect because all security certificate detainees are non-citizens.

[16] In *R. v. Kapp*, 2008 SCC 41 at para. 17, the Supreme Court affirmed *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, and identified a two-step analysis in assessing a claim of discrimination:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

The Appropriate Comparator Group

[17] A section 15(1) analysis requires that I begin by identifying the appropriate comparator group, and then in accordance with the first step of the *Kapp* test, ask whether, as compared with people in that group, the claimant has been denied a benefit on the basis of an enumerated or analogous ground.

[18] In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at paras. 51 to 53, the Supreme Court summarized the law pertaining to the choice of comparators. The Court reiterated the position it had adopted in *Hodge v. Canada (Minister of Human Resources Development*), 2004 SCC 65, [2004] 3 S.C.R. 357:

> First, the choice of the correct comparator is crucial, since the comparison between the claimants and this group permeates every

> stage of the analysis. “[M]isidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis”: Hodge, supra, at para. 18.
>
> Second, while the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the claimants is not appropriate: Hodge, supra, at para. 20.
>
> Third, the comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination: Hodge, supra, at para. 23. The comparator must align with both the benefit and the “universe of people potentially entitled” to it and the alleged ground of discrimination: Hodge, at paras. 25 and 31.

[19] In this case, Mr. Mahjoub has selected as the comparator group “persons detained in federal facilities pursuant to criminal law.” During oral argument, counsel for Mr. Mahjoub also described the comparator group as “federal detainees in a maximum security prison” and as “persons detained in a federal facility on a long term basis.” In this regard, counsel stated:

> In terms of Mr. Mahjoub's position, he comes to the Court and says, "I am not a citizen of Canada, but I am entitled to the same concern, respect and consideration that every other federal detainee has who is in a maximum security prison."
>
> […] The problem is that you have a non-citizen who is detained on a long-term basis. The reality in these cases is that they are long term detainees. They have the same prison guards in the same penitentiary as an inmate. In that sense, in actual terms, there is no difference between Mr. Mahjoub and an inmate who is down the hall from the Administration building in his detention centre where he is being detained. [My emphasis.]

[20] The Ministers did not propose an alternative comparator group.

[21] I accept as proper the initial comparator group proposed by Mr. Mahjoub, namely “persons detained in federal facilities pursuant to criminal law.” In my view, this the most appropriate

comparator group in Mr. Mahjoub's circumstance. It mirrors the characteristics of the claimant, Mr. Mahjoub, in terms of detention in a federal facility and bears an appropriate relationship to the benefit that constitutes the subject matter of the complaint: access to the OCI.

[22] The further articulation of the comparator group by counsel for Mr. Mahjoub during oral argument, i.e.: "federal detainees in maximum security prisons" and "long-term detainees in federal facilities," are not, in my view, appropriate because they are under-inclusive. Access to the OCI is not limited to offenders held in maximum security prisons, and therefore "federal detainees in maximum security prisons" is not an appropriate comparator group. Further, offenders detained in federal penitentiaries have access to the OCI irrespective of the length of their detention and therefore "long-term detainees in federal facilities" is also under inclusive.

Does the law create a distinction based on an enumerated or analogous ground?

[23] The first step of the *Kapp* test involves an inquiry into whether there is a differential treatment between Mr. Mahjoub and the comparator group on the basis of an enumerated or analogous ground.

[24] The differential treatment alleged by Mr. Mahjoub is that persons, in his circumstances, detained in federal facilities under security certificates pursuant to the IRPA do not have access to the OCI, while persons who are part of the comparator group, that is to say persons detained in federal facilities pursuant to criminal law, do have access to the OCI.

[25] Mr. Mahjoub argues that his citizenship is the enumerated or analogous ground which is the basis for his differential treatment. The Supreme Court has on two occasions confirmed that

citizenship is an analogous ground protected under section 15 of the *Charter* (*Andrew*, *supra*; *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23). Once a ground has been found to be analogous, it serves as a permanent marker of potential discrimination and need not be revisited (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8). Thus, there can be little doubt that if the impugned legislation differentiates on the basis of citizenship, the first step in *Kapp* will be satisfied.

[26] The question is, therefore, whether the lack of access to the OCI (differential treatment), for persons detained under security certificates pursuant to the IRPA, is based on citizenship (analogous ground)? The main issue in Mr. Mahjoub's section 15(1) challenge is whether there is a proper causal link between the benefit sought, access to the OCI, and the ground of discrimination alleged, which is citizenship.

[27] On its face, the CCRA does not create a distinction between citizens and non-citizens. A non-citizen, convicted of a criminal offence and detained in a federal penitentiary, has access to the OCI. The Ministers argue that the analogous ground of citizenship is not the reason for the differential treatment, rather it is the legal basis for detention which is the reason for the differential treatment. As stated by counsel for the Ministers:

> But the deprivation is not because of citizenship. The deprivation is because of the reason for the detention, because of the purpose that detention is to serve.[…] It is for all of those reasons that they are not inmates in penitentiaries.

[28] Mr. Mahjoub submits that it is the effect of the CCRA which is problematic, because all security certificate detainees are non-citizens, by definition only non-citizens are deprived of access to the OCI. Mr. Mahjoub alleges that the legal basis for detention – in this case detention under

security certificates pursuant to the IRPA – is used as proxy to discriminate on the basis of citizenship. Mr. Mahjoub therefore makes a claim of indirect discrimination.

[29] The context of the CCRA legislative scheme and its purpose raise doubts about whether citizenship can be a basis for the differential treatment of security certificate detainees in relation to access to the OCI. In *Auton*, at para. 42, the Supreme Court of Canada stated that the appropriate approach for evaluating a claim of indirect discrimination includes an examination of the overall purpose of the legislative scheme:

> A statutory scheme may discriminate either directly, by adopting a discriminatory policy or purpose, or indirectly, by effect. Direct discrimination on the face of a statute or in its policy is readily identifiable and poses little difficulty. Discrimination by effect is more difficult to identify. Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address.

[30] Section 3 of the CCRA sets out the purpose of the federal correctional system. The section provides as follows:

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by	3. Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance
(a) carrying out sentences	

imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

[31] The overarching purpose of the legislative scheme at issue is to provide, in the interest of maintaining a just, peaceful and safe society, for the safe and humane custody of offenders serving sentences while assisting with their rehabilitation with the view of eventual reintegration in society The OCI is an integral part of the federal correctional system and is set up as an independent body to address the complaints of those persons convicted of criminal offences and detained in federal penitentiaries. The exclusion from access to the OCI of persons detained under security certificates pursuant to the IRPA is not inconsistent with the overarching purpose of the correctional system and the legislative scheme of the CCRA. The latter focuses on sentences imposed by criminal courts and rehabilitation of convict which may lead to their reintegration in society. Individuals detained under the IRPA are held pending their eventual removal from Canada. They are not serving a criminal sentence. Nor does the IRPA contemplate their rehabilitation.

[32] Further, persons detained under security certificates are not the only group of federal detainees without access to the OCI. The CCRA does not purport to be a comprehensive scheme for all persons detained in federal facilities. For example, it does not cover persons held in RCMP

holding centers, National Defence detention facilities, Aboriginal Police holding facilities and immigration holding centers. The persons detained in such centers do not have access to the OCI. As Peter Hogg, *Constitutional Law* (Scarborough, Ont.: Thomson Carswell, 2007, 5th ed. Vol. 2) explains at page 55-34:

> In a scheme that is supposed to be comprehensive, it is natural to make the comparison between those who are denied benefits and those who are granted benefits. The comparison is less persuasive (and the consequences more costly) where the scheme is not comprehensive and the claimant group is only one of a number of groups from whom the benefits is withheld.

If all persons detained in federal facilities were able to access the OCI except for persons detained under security certificates pursuant to the IRPA, Mr. Mahjoub's claim under subsection 15(1) of the *Charter* would be more compelling. However, in the present case, Mr. Mahjoub seeks to access the OCI program made available to persons convicted of criminal offences who are serving sentences in federal penitentiaries under a legislative scheme which addresses correctional matters and sentencing with a focus on rehabilitation.

[33] Counsel for Mr. Mahjoub emphasized the similarities in terms of the conditions of detention of Mr. Mahjoub and persons detained in federal facilities pursuant to criminal law, particularly those at Millhaven. This was done in an effort to convince the Court that in all respects except for citizenship, Mr. Mahjoub is similarly situated to the other detainees and that it is Mr. Mahjoub's lack of citizenship that is the basis for his being barred from accessing the OCI. With due respect, I disagree. In a successful subsection 15(1) *Charter* challenge, an immutable personal characteristic such as citizenship must form the basis of the exclusion of the legal benefit. Although only non-citizens are security certificate detainees, it is not the lack of citizenship, *per se*, which bars them

from access to the OCI but rather the fact that they are not persons convicted of criminal offence under Canada's Correctional Services Regime.

[34] In their written submissions, counsel stated that it was the combination of namely citizenship and the legal basis for detention which was underlying the differential treatment. During oral argument, counsel could not isolate citizenship as the only factor on which the differential treatment was based:

> They put him [Mr. Mahjoub] in a maximum security penitentiary and they never really considered the question of whether he should have a fair chance at having his complaints about his conditions dealt with. They have already dealt with it for everybody else, citizens and non-citizens, but not him. Why? I would say the root of it is that he is being held under immigration legislation.
>
> In Mr. Mahjoub's case his access to the advantage of the Correctional Investigator has been limited because he is not an offender. He hasn't committed a crime. He is just a non-citizen detained on a security certificate, but in the same facilities, on the same premises, guarded by the same people." [My emphasis]

[35] In the circumstances, the impugned provision of the CCRA simply does not contemplate a differential treatment based on citizenship. I conclude that the differential treatment between person detained in federal facilities pursuant to criminal law and those detained under security certificates pursuant to IRPA is not based on citizenship. Mr. Mahjoub has not met the first part of the *Kapp* test. As the section 15 jurisprudence teaches, not all differences in treatment amount to discrimination under the *Charter*. There may well be strong policy reasons to consider an independent investigative regime for the IPRA detainees housed on the grounds of federal penitentiaries. Such an investigational regime need not be the same as the OCI. It follows, therefore, that the lack of access to the OCI for security certificate detainees under the IRPA does not constitute discrimination under section 15 of the *Charter* vis-à-vis CCRA detainees.

Mr. Mahjoub's Section 7 Claim

[36] Section 7 of the *Charter* provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[37] A section 7 challenge involves a two stage inquiry. First, a claimant must establish deprivation one of the protected interests; life, liberty or security of the person. Second, if the claimant meets the burden of establishing the deprivation, then the claimant must establish that the deprivation was not in accord with the principles of fundamental justice. See: *Canadian foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, at para. 3.

[38] The legality of Mr. Mahjoub's detention under section 81 of the IRPA is not in dispute. The motion is not about the deprivation of Mr. Mahjoub's liberty interest that resulted from his initial detention, but rather about his residual liberty interest as a detainee under the IRPA. It is well established that inmates remain vested with residual rights regarding the nature and conduct of their detention notwithstanding their general deprivation of liberty. See: *Dumas v. Leclerc Institute,* [1986] 2 S.C.R. 459; *Martineau v. Matsqui Disciplinary Bd.*, [1980] 1 S.C.R. 602; *Cunningham v. Canada*, [1993] 2 S.C.R. 143.

[39] Mr. Mahjoub maintains that the grievance procedure in place for persons detained under security certificates pursuant to the IRPA fails to provide an independent mechanism for review of complaints of detainees, available essentially to all other federal inmates. As a detainee under the IRPA, Mr. Mahjoub argues that the conditions of his detention do not, consequently, meet the requirements of fundamental justice and as a consequence violates his section 7 of the *Charter*.

[40] As stated above, the parties agree that there are live issues between Mr. Mahjoub and the staff of the KIHC that relate to the conditions of Mr. Mahjoub's detention but do not seek adjudication of these issues in the present motion. Nevertheless, counsel for Mr. Mahjoub relies on the complaints made by Mr. Mahjoub, in relation to the conditions of his detention, to demonstrate that there have been deprivations of Mr. Mahjoub's residual liberty interests and, as a consequence, the conditions of his detention have infringed his fundamental rights.

[41] The Ministers agree that Mr. Mahjoub's section 7 rights are engaged in the circumstances. At the hearing, in oral argument, counsel expanded on the Ministers' position in the following terms:

> I had not taken it to mean that we were suggesting that there is any validity to these complaints that were being made [by Mr. Mahjoub]. If that is your understanding, then we would not accept that section 7 is engaged. We were looking at it more broadly.
>
> As my friend [counsel for Mr. Mahjoub] is saying, if at the end of the day the complaints were found to be well-founded, then that would engage a liberty interest.
>
> […] I think what we have done within the written materials [Ministers' submissions] is that we have broken that down under the different steps in section 7. While we agree that section 7 is engaged, we don't agree that there is a principle of fundamental justice at play here or that it has been infringed.

> […] I think both parties saw the interest in getting this matter to the Court under the circumstances. I understand that having more evidence would have been more helpful to you, but in the circumstances in which we find ourselves we have agreed to say it is engaged.

[42] The position of the Ministers, as I understand it, is to agree that Mr. Mahjoub's section 7 rights are "engaged." However, the Ministers do not agree that the conditions of Mr. Mahjoub's detention further deprive him of his liberty or security interest, but simply that should his complaints be accepted as well-founded, then his section 7 liberty interests "would be engaged". On this basis, they ask the Court to determine whether the grievance procedure available to Mr. Mahjoub respects the principles of fundamental justice.

[43] While I have little difficulty accepting that Mr. Mahjoub's section 7 interests are engaged in the circumstances, this cannot, without a proper factual foundation, lead to a finding that his rights have been infringed. Such a deprivation must be established before moving to address the issue of whether Mr. Mahjoub's rights were infringed in a manner not in accordance with the principles of fundamental justice. The jurisprudence of the Supreme Court teaches that to trigger the operation of section 7, there must first be a finding of deprivation. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 47, Justice Bastarache stated:

> Thus, before it is even possible to address the issue of whether the respondent's s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. These two steps in the s. 7 analysis have been set out by La Forest J. in *R. v. Beare*, 1988 CanLII 126 (S.C.C.), [1988] 2 S.C.R. 387, at p. 401, as follows:
>
> > To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that

> the deprivation is contrary to the principles of fundamental justice.
>
> Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there. [My emphasis]

[44] Here, there is insufficient factual basis upon which I can determine that there has been a deprivation of the right to "life, liberty and security of the person" in the circumstances. The only facts before me, which were agreed to, are that if Mr. Mahjoub was an "offender" or "inmate" as defined in the CCRA, he could initiate a complaint with the OCI which would engage the powers and duties set out in the Act. Simply being deprived of a particular grievance process is, in itself, not sufficient to establish a deprivation of a section 7 right. Not every deprivation will necessarily lead to a section 7 right being infringed. The circumstances surrounding the deprivation are important, such as: the context in which the deprivation arises, the seriousness of the offending activity of activities that give rise to the rights violation. Such information is required in order to evaluate whether fundamental justice has been respected in the circumstances.

[45] The level of procedural safeguards required to respect the principles of fundamental justice will vary with the circumstances. Where a more serious rights violations is at issue, more stringent procedural safeguards will be warranted. The Supreme Court made clear that the application of the principles of fundamental justice, which include a guarantee of procedural fairness, be applied with regard to the circumstances and consequences of the deprivation. In *Charkaoui v. Canada (Citizenship and Immigration) (Charkaoui 1)* at paras. 19 to 20, Chief Justice McLachlin stated in this regard:

> Section 7 of the *Charter* requires that laws that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process. These principles include a

> guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security: *Suresh*, at para. 113 [*Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1].
>
> Section 7 of the Charter requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake: *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77, at para. 14; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 47; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 656-57.[…] [My emphasis]

She also added at para. 22:

> The question at the s. 7 stage is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation. […] [My emphasis]

[46] Further, it is well-established that an evidentiary basis is required for the Court to entertain the section 7 *Charter* claim. In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at 361, Justice Cory for the majority stated that:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.

[47] Adjudicative facts, facts which are specific, and must be proved by admissible evidence, are especially important in the context of section 7. As Chief Justice Lutfy stated in *Almrei (Re)*, 2008 FC 1216 at para. 34:

> The level of adjudicative facts necessary to evaluate constitutional claims will vary. I expect that assessing s. 7 Charter claims will necessitate a greater degree of adjudicative facts, particularly when the alleged infringement concerns the effects on procedural rights protected by the principles of fundamental justice. Here, the affidavit evidence is of limited assistance.

[48] Mr. Mahjoub's section 7 claim lacks any adjudicative facts in respect of the limitation on or infringement of his section 7 rights. Mr. Mahjoub has failed to adduce sufficient evidence to establish a deprivation of his section 7 liberty or security interests.

[49] My above finding is determinative of Mr. Mahjoub's section 7 *Charter* challenge. In accord with the above cited jurisprudence of the Supreme Court, without a finding that Mr. Mahjoub's life, liberty or security of the person is implicated, the section 7 analysis should end. Without a proper factual foundation, a proper analysis of whether any deprivation that could arise in the circumstances was not in accord with the principles of fundamental justice is not possible. I will therefore not conduct a comprehensive analysis of the second step of the section 7 inquiry, as requested by the parties. I am prepared, nevertheless, to offer the following observations in the hope that they may be useful to the parties.

[50] Claimants whose life, liberty or security of the person is put at risk are entitled to relief only to the extent that their complaints arise from a breach of an identifiable principle of fundamental justice. See: *Chaoulli v. Quebec (A.G.)*, 2005 SCC 35, at para. 199.

[51] The main argument advanced by Mr. Mahjoub, in regards to fundamental justice, is that not having access to an independent and impartial oversight mechanism for his complaints relating to his conditions of detention and treatment infringe his liberty and security interests in a way that breach the principles of fundamental justice. Mr. Mahjoub argues that the grievance procedure for security certificate detainees does not provide a sufficiently independent and impartial system for procedural fairness to be met.

[52] As stated above, the principles of fundamental justice include the guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security (*Charkaoui 1*, at para. 19). In terms of procedural fairness, section 7 does not require a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake (*Charkaoui 1*, at para. 20).

[53] While we are unable to assess the seriousness of the rights violation at issue, by reason of the paucity of evidence, we are aware that the grievance procedure set out in the Directive allows Mr. Mahjoub to pursue a complaint up the successive administrative rungs of the CSC and the CBSA. The process remains internal to the respective departments and therefore cannot be said to be an independent review of Mr. Mahjoub's complaints.

[54] However, security certificate detainees have access to two other external review mechanisms: judicial review of grievance decisions pursuant to section 18 of the *Federal Courts Act*, R.S., 1985, c. F-7 (the Act), and application for a writ of *habeas corpus*. A person detained under a security certificate can, by virtue of sections 2 and 18 of the Act, seek judicial review of a grievance decision taken at the final national level (third level grievance) on grounds of fairness and compliance with the *Charter*. The Federal Court has the jurisdiction to give prerogative, declaratory and injunctive relief against a "federal board, commission or other tribunal" which includes public officials exercising powers or jurisdiction under a federal statute. In the correctional context, the jurisdiction of the Federal Court to review final decisions relating to inmate grievances was recognized in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 (paras. 30-31 and 71). Mr. Mahjoub could apply for a judicial review of a grievance decision after having exhausted the

grievance procedure. At this time, Mr. Mahjoub has not exhausted the grievance process to which he has access.

[55] Security certificate detainees also have access to a review of their conditions of detention by way of *habeas corpus.* Mr. Almrei, detained under a security certificate, used *habeas corpus* to challenge the conditions of his detention before the Ontario Superior Court. In *Almrei v. Canada (Attorney General),* [2003] O.J. No. 5198 (QL), at para. 29, Mr. Justice Gans found that denying Almrei footwear in his own cell was unlawful, he stated:

> A further restriction on liberty, beyond that of the normal prison experience, can therefore be the target of a habeas corpus application.

[56] The Federal Court of Appeal in *Almrei v. Canada (Minister of Citizenship and Immigration),* 2005 FCA 54, discussed this case and found that *habeas corpus* was an appropriate remedy for security certificate detainees challenging the conditions of their detention. The principle that *habeas corpus* can be used to review the conditions imposed on detainees is derived from correctional law. As noted in *R v. Miller,* [1985] 2 S.C.R. 613, at 642:

> I do not say that habeas corpus should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.

[57] I accept the submission made on behalf of Mr. Mahjoub that *habeas corpus* may not be the ideal process or most practical or effective means to address day to day complaints relating to the detention of security certificate detainees. It is nevertheless an independent review process available to him. Judicial review and *habeas corpus* are two independent external review mechanisms which

allow security certificate detainees to challenge the legality of their conditions of detention. Therefore, it cannot be said that Mr. Mahjoub does not have access to an independent and external review process for complaints he may have in relation to the conditions of his detention.

Conclusion

[58] For the above reasons I conclude that the definition of offender as set out in section 99 of the CCRA neither contravenes section 7 nor section 15(1) of the *Charter*. Accordingly, the motion will be dismissed.

Certified Question

[59] At the conclusion of oral argument, I indicated that I would give the parties an opportunity to be heard on the issue of certification. The parties are directed to serve and file, within seven days of the date of these reasons, written submissions on whether section 74(*d*) of IPRA, which provides for the certification of a serious question of general importance on appeal, is engaged in the context of the present motion.

[60] In the event section 74(*d*) of the IRPA is engaged, the parties are directed to serve and file their respective proposed question(s) and submission(s), if any, within seven (7) days of the date of these reasons. In that event, the parties will be given an additional three days to file written replies, if any.

[61] Following consideration of the parties' submissions, an order will issue dismissing the motion and disposing of the issue of a serious question of general importance as contemplated by section 74(*d*) of the IRPA.

"Edmond P. Blanchard"

Judge

Ottawa, Ontario
September 30, 2009

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-7-08
STYLE OF CAUSE:	The Minister of Citizenship & Immigration and The Minister of Public Safety v. Mohamed Zeki Mahjoub
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 27, 2009
REASONS FOR ORDER:	BLANCHARD J.
DATED:	September 30, 2009

APPEARANCES:

Ms. Rhonda Marquis Ms. Judy Michaely Ms. Dupe Oluyomi	FOR THE APPLICANTS
Ms. Marlys Edwardh Ms. Barbara Jackman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANTS
Marlys Edwardh Professional Corporation Jackman & Associates	FOR THE RESPONDENT