Federal Court  Cour fédérale

Date: 20110805

Docket: DES-7-08

Citation: 2011 FC 977

Ottawa, Ontario, August 5, 2011

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 AND ORDER

[1] On May 2, 2011, the Court issued its Reasons for Order relating to the most recent review of Mr. Mahjoub's conditions of detention. On May 16, 2011, Public Counsel on behalf of Mr. Mahjoub submitted the following questions for certification as questions of general importance pursuant to subsection 74(*d*) of the *Immigration and Refugee Protection* Act, S.C. 2001, c 27 (IRPA):

> **QUESTION 1**: Can the Court's analysis relating to danger, in prior detention reviews and/or prior review of conditions made on the basis of a procedure found to

be unconstitutional by the Supreme Court of Canada in *Charkaoui*, [2007] 1 SCR 350, be validly considered by the Court as relevant in the context of a review of conditions made under the new law?

QUESTION 2: Can the Court's analysis in prior detention reviews and/or prior review of conditions made on the basis of a procedure found to be unconstitutional by the Supreme Court of Canada in *Charkaoui*, [2007] 1 SCR 350, be applied for guidance on principles relating to proportionality of the conditions and/or on questions of danger in a subsequent and new review of conditions under the new law?

QUESTION 3: Can an analysis in relation to danger in the context of a review of conditions under sections 82(4) and 82(5)(*b*) of the IRPA be based on the nature of the allegations from the Ministers and not on evidence of a danger or danger finding based on the evidence in the record before it, on submissions raising the lack of grounds to danger findings?

QUESTION 4 : Within the context of conditions to be imposed by a judge under section 82(4) and (5)(*b*) of the IRPA, does the burden of justification of any conditions which infringe constitutional rights of a person, fall to the Ministers with the burden of proof and with the *Oakes test* ?

QUESTION 5: Does the judge presiding over a detention review and/or a review of conditions under section 82 of the IRPA should [*sic*] conduct the review in accord with the principles submitted at subparagraphs (1) (2) and (8) of paragraph 13 of the Court order reasons in instance?

The law

[2] Section 74(*d*) of the IRPA provides as follows:

(*d*) 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.	(*d*) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[3] The Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89, at paragraph 11, defined the threshold for certifying a question as follows: "Is there a serious question of general importance which would be dispositive of an appeal?" The Court went on to say at paragraph 12 of its Reasons:

> The corollary of the fact that a question must be determinative of the appeal is that it must be a question which has been raised and dealt with in the decision below. Otherwise, the certified question is nothing more than a reference of a question to the Court of Appeal. If a question arises on the facts of a case before an applications judge, it is the judge's duty to deal with it. If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification.

[4] The question must transcend the immediate interests of the parties to the litigation and contemplates issues of broad significance or general application. Further, the certification process is not 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 the case and is not to be equated with the reference process established by the *Federal Courts Act*, RSC 1985 c F-7. See: *Canada (Minister of Citizenship and Immigration) v Liyanagamage (F.C.A.)*, [1994] F.C.J. No 1637 (QL), (1994), 176 N.R. 4 at paragraphs 4-6.

[5] "A certified question must also lend itself to a generic approach leading to an answer of general application. That is, the question must transcend the particular context in which it arose." *Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68.

[6] A serious question of general importance arises from the issues of the case, and not from the judge's reasons. In that sense the process of certification is different than that of the normal

appellate process. The Court is called upon to exercise a "gatekeeper function" and the test for certification is a strict one and any question certified must meet the criteria. See: *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paragraphs 22-29.

Proposed questions for Certification by Mr. Mahjoub.

[7] I now turn to the proposed questions for certification.

> **QUESTION 1** : *Can the Court's analysis relating to danger, in prior detention reviews and/or prior review of conditions made on the basis of a procedure found to be unconstitutional by the Supreme Court of Canada in Charkaoui [2007] 1 SCR 350, be validly considered by the Court as relevant in the context of a review of conditions made under the new law?*
>
> **QUESTION 2**: *Can the Court's analysis in prior detention reviews and/or prior review of conditions made on the basis of a procedure found to be unconstitutional by the Supreme Court of Canada in Charkaoui [2007] 1 SCR 350, be applied for guidance on principles relating to proportionality of the conditions and/or on questions of danger in a subsequent and new review of conditions under the new law?*

[8] The review at issue post-dated the Supreme Court of Canada's determinations in both, *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui I*] and *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 [*Charkaoui II*]. The two above questions are based on the false premise that the procedure relating to detention reviews was found to be unconstitutional by the Supreme Court of Canada in *Charkaoui I*. The Supreme Court's decision in *Charkaoui I* to strike down parts of the security certificate regime did not affect the legal principles to be applied on a detention review. Further, the Court, in reviewing Mr. Mahjoub's conditions of release, did not rely on the part of the legislative scheme that was found to be unconstitutional by the Supreme Court. Its analysis relating to danger from prior detention reviews made on the basis of the prior provisions is therefore relevant. As a consequence, the questions are

not proper questions for certification since they do not arise on the issues in this case. The proposed questions will therefore not be certified.

> **QUESTION 3**: *Can an analysis in relation to danger in the context of a review of conditions under sections 82(4) and 82(5)(b) of the IRPA be based on the nature of the allegations from the Ministers and not on evidence of a danger or danger finding based on the evidence in the record before it, on submissions raising the lack of grounds to danger findings?*

[9] At paragraph 33 of its Reasons for Order, the Court wrote: "On the record before me, having regard to the nature of the allegations against Mr. Mahjoub, I am unable to accede to Mr. Mahjoub's request that he be released essentially without conditions." It is clear that the Court relied on all of the evidence called to date in rendering its decision and not on the Ministers' allegations as suggested by Mr. Mahjoub. In the context of an interim detention review, it cannot be expected that a determination be made on "danger to the security of Canada" before all the evidence has been called and before a final finding on the merits is made. The proposed question does not arise in the circumstances of the case and will consequently not be certified.

> **QUESTION 4** : *Within the context of conditions to be imposed by a judge under section 82(4) and (5)(b) of the IRPA, does the burden of justification of any conditions which infringe constitutional rights of a person, fall to the Ministers with the burden of proof and with the Oakes test ?*

[10] At paragraph 23 of its reasons, the Court wrote: "The Ministers bear the burden of establishing the need to maintain stringent conditions of release." Counsel for Mr. Mahjoub raised the issue of whether the existing conditions were proportional to the risk, but did not argue that any conditions imposed should individually be subject to the *Oakes* test (*R. v Oakes*, [1986] 1 SCR 103). The proposed question was not raised or dealt with in the decision under review, and therefore is not a proper question for certification. Further, the Supreme Court in *Charkaoui I*, at paragraphs

121 and 123, held that the overall scheme of detention under IRPA including reviews of detention and reviews of conditions of release, complies with the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act* 1982 being schedule B to the *Canada Act 1982 (U.K.)* 1982, c 11 [the *Charter*]. The *Oakes* test is a guideline to assist a Court in determining whether a statutory provision which violates the Charter, can be saved under section 1 of the Charter. There is no support in law for the proposition that each condition of release be held up to the test in *Oakes*. The proposed question will therefore not be certified.

> **QUESTION 5**: *Does the judge presiding over a detention review and/or a review of conditions under section 82 of the IRPA should [sic] conduct the review in accord with the principles submitted at sub paragraphs (1) (2) and (8) of paragraph 13 of the Court order reasons in instance?*

[11] At paragraph 20 of its Reasons for Order, the Court adopted the principles and applied the legal framework established in *Charkaoui I* in reviewing Mr. Mahjoub's conditions of release. In this proposed question Mr. Mahjoub is again urging the adoption of the analysis he proposed during the review. He argued that the review be conducted in accord with certain principles, including the following:

1. that the appropriate conditions under subsection 82(5)(*b*) of IRPA be imposed only if it is determined that a serious prejudicial act will be committed … [on] "a belief, objectively established, that the individual will commit an offence".
2. The fear on reasonable grounds "must reflect a risk of serious and imminent danger".
8. "The danger to the security of Canada must be grave in the sense that the danger must be serious according to a broad and fair interpretation and in conformity with

> the international standards which require evidence of potentially grave threat that puts the nation in danger."

[12] The Court rejected Mr. Mahjoub's proposed approach in favour of the procedure for review of conditions of release set out by the Supreme Court of Canada in *Charkaoui I*. The proposed question seeks to reopen the very issue that was specifically addressed by the Supreme Court of Canada. In *Suresh v Canada (Minister of Citizenship and Immigration),* [2002] 1 SCR 3, the Supreme Court acknowledged that "danger to the security of Canada" is difficult to define and provided guidance as to how it should be interpreted. At paragraph 85 of its reasons, the Court wrote:

> Subject to these qualifications, we accept that a fair, large and liberal interpretation in accordance with international norms must be accorded to "danger to the security of Canada" in deportation legislation. We recognize that "danger to the security of Canada" is difficult to define. We also accept that the determination of what constitutes a "danger to the security of Canada" is highly fact-based and political in a general sense. All this suggests a broad and flexible approach to national security and, as discussed above, a deferential standard of judicial review. Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister's decision. [My emphasis]

The review at issue was conducted in accordance with the approach mandated by the Supreme Court of Canada. This Court determined that it was not necessary to revisit this issue since the approach and the applicable principles had been determined by the Supreme Court. As noted earlier, the jurisprudence teaches that if the judge decides that an issue need not be dealt in order to dispose of the case, it is not an appropriate question for certification, see; *Zazai*, above, at paragraph 12.

More fundamentally, the proposed certified question fails to transcend the particular context in which it arose. Additionally, the question sought to be certified seeks to revisit the question of what constitutes “danger to the security of Canada” notwithstanding that this issue has been addressed and settled by the Supreme Court. The certification process is not 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 the case. The proposed question is therefore not a proper question for certification and will not be certified.

Conclusion

[13] I have carefully considered the written submissions of the parties on the above questions for certification. I conclude that Mr. Mahjoub has not raised a serious question of general importance that would be dispositive of the case as contemplated by subsection 74(*d*) of the IRPA.

ORDER

THIS COURT ORDERS that the request to certify the proposed questions be dismissed. Mr. Mahjoub has not raised a serious question of general importance that would be dispositive of the case as contemplated by subsection 74(*d*) of the *Immigration and Refugee Protection Act*.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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REASONS FOR ORDER AND ORDER ON CERTIFICATION OF QUESTION SUBMITTED BY MR. MAHJOUB ON MAY 16, 2011:	BLANCHARD J.
DATED:	August 5, 2011

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