T-3024-93

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

IN THE MATTER OF a Declaration between Mansour Ahani and Her Majesty the Queen

AND IN THE MATTER OF a Certificate issued pursuant to Section 40.1 of the *Immigration Act*, S.C. 1976-77, c - 52, as amended

AND IN THE MATTER OF Section 40.1, and the specific provisions thereof, and Section 117 of the *Immigration Act*, S.C. 1976-77, c - 52, as amended

AND IN THE MATTER OF the *Constitution Act*, 1982 and the *Canadian Charter of Rights and Freedoms*

AND IN THE MATTER OF the *Canadian Bill of Rights*, S.C. 1970, App. III, c. 44, as amended

BETWEEN:

MANSOUR AHANI

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT

McGILLIS, J.

INTRODUCTION

The plaintiff is a Convention refugee who has challenged the constitutional validity of section 40.1 of the *Immigration Act*, R.S.C. 1985, c.I-2, as amended. Under this statutory scheme, the Chief Justice or a designated judge of this Court is required to review a certificate signed by the Solicitor General of Canada and the Minister of Employment and Immigration indicating that a person, other than a Canadian citizen or permanent resident, is a member of an inadmissible class in Canada for specified reasons, including terrorism. The plaintiff has attacked the legislation on the basis that it violates sections 7, 9 and 10(c) of the *Canadian Charter of Rights and Freedoms* and subsection 2(e) of the *Canadian Bill of Rights.*

FACTS

The trial in this matter proceeded on the basis of an agreed statement of facts which was supplemented by three affidavits and the cross-examination of one affiant. The following are the facts as I find them.

On October 14, 1991, the plaintiff entered Canada and claimed Convention refugee status based on his political opinion and membership in a particular social group. The plaintiff initially supported his refugee claim with a declaration that he had been beaten by members of the Islamic Revolutionary Committee in Iran for being intoxicated. On December 31, 1991, the plaintiff claimed that his return to Iran would endanger his life due to his knowledge of Iranian covert operations and personnel. He further claimed that he acquired this knowledge while he was a forced conscript in the foreign assassins branch of the Iranian Foreign Ministry. On December 31, 1991, the plaintiff was found to have a credible basis for his claim to Convention refugee status. On April 1, 1992, the Immigration and Refugee Board determined that the plaintiff was a Convention refugee.

On June 9 and June 15, 1993, the Solicitor General of Canada ("Solicitor General") and the Minister of Employment and Immigration ("Minister") respectively certified under subsection 40.1(1) of the *Immigration Act* that they were of the opinion, based on a security intelligence report received and considered by them, that the plaintiff was a member of an inadmissible class described in the anti-terrorism provisions in sections 19(1)(e)(iii), 19(1)(e)(iv)(C), 19(1)(f)(ii), 19(1)(f)(iii)(B), and 19(1)(g) of the *Immigration Act*. On June 17, 1993, the certificate of the Solicitor General and the Minister was filed with an immigration officer and with this Court. On the same date, the plaintiff was served with a copy of the certificate and taken into detention. The plaintiff has remained in detention since that date.

On June 22, 1993, in accordance with paragraph 40.1(4)(a) of the *Act*, Mr. Justice Denault reviewed the security intelligence report *in camera* and heard other evidence presented on behalf of the Solicitor General and the Minister in the absence of the plaintiff. Under paragraphs 40.1(4)(b) and (c) of the *Act* respectively, Mr. Justice Denault provided the plaintiff with a summary of the information and ordered that the plaintiff be given a reasonable opportunity to be heard on the determination of whether the certificate filed by the Solicitor General and the Minister was reasonable on the basis of the evidence and information available.

Since June 25, 1993, the defendant has been ready and willing to participate in the procedure outlined in paragraph 40.1(4)(d) of the *Act* to determine the reasonableness of the certificate signed by the Solicitor General and the Minister. To date, the plaintiff has not exercised his right to be heard and no hearing has taken place.

On November 23, 1993, a supplementary statement of information was issued by Mr. Justice Denault and forwarded to the counsel for the plaintiff.

The security intelligence report considered by the Solicitor General and the Minister, as well as the designated judge, was based, in part, on information obtained by the Canadian Security Intelligence Service ("Service") in eight interviews with the plaintiff and in a polygraph examination administered to him on February 12, 1993. The security intelligence report contains references to this information. The Service compiled for its reporting purposes the information obtained from the plaintiff during these eight interviews. In February 1994, following a request by counsel for the plaintiff for disclosure of this information, edited compilations of these reports were made available to him.

The summary of information initially given to the plaintiff by Mr. Justice Denault referred to the polygraph examination and to three occasions when the polygraphist determined that the answers given by the plaintiff to questions were untrue. The reports of the Service pertaining to the duration of the polygraph examination, the number of questions asked, a certificate attesting to the proper operation of the machine, and the credentials of the polygraphist were made available to counsel for the plaintiff in March 1994, following a request by him for that and other information.

The plaintiff is 31 years old. In August 1992, he engaged in a form of marriage to a woman in Toronto.

In response to all aspects of the constitutional challenge to the validity of section 40.1 of the *Immigration Act*, counsel for the Attorney General of Canada tendered as an exhibit at trial the affidavit of Harry Norman Southern, the Chief of the Counter Terrorism Section of the Toronto Regional Office of the Service. Counsel for the plaintiff consented to the filing of the affidavit at trial and cross-examined Mr. Southern on his evidence. In his affidavit,

Mr. Southern deposed to the mandate of the Service, the need to prevent "routine, full disclosure of security intelligence reports", the need to protect the anonymity of human sources of information and the "third party rule" under which foreign states or institutions and international organizations of states require the Service to obtain their consent prior to disclosing information provided by them in confidence. Mr. Southern also provided evidence concerning international terrorism, the objectives and methods of terrorists, and terrorism in Canada. In describing terrorism in Canada, Mr. Southern listed 18 acts of terrorism, domestic or international in scope, which either occurred or had their genesis in Canada since 1982. In his list of examples, Mr. Southern referred to a litany of incidents which included violent terrorist acts against foreign diplomats and embassies in Ottawa, the Air India disaster in which luggage containing a bomb was checked in at Vancouver, and the Narita Airport bomb in Japan in which the exploding luggage also came from Vancouver. In his affidavit, Mr. Southern deposed that terrorists use Canada as a safe haven, as well as for the planning and procurement of weapons and materiel. He further indicated that terrorist groups operating in Canada "...are engaged in a variety of ongoing activities in support of terrorism." For example, such groups obtain and provide logistical support for terrorist operations outside of Canada, develop and maintain a support base necessary to commit terrorist acts in Canada, fundraise, spread propaganda and disinformation, conduct surveillance on and manipulate immigrants, assist other terrorists in entering and leaving the United States of America, smuggle people into Canada and engage in other illegal activities. Mr. Southern further deposed that, "although homeland conflicts are brought to Canada by only a small proportion of immigrants and refugees, the vast majority of groups and individuals in Canada who come to the attention of the [Service] counter terrorism program are involved in regional conflicts in their countries of origin." Mr. Southern confirmed that public safety in Canada is the number one priority of the Service. With respect to the requirement that an alleged terrorist be detained in custody pending the determination of the reasonableness of the ministerial certificate under section 40.1 of the *Immigration Act*, Mr. Southern stated that the interests of public safety require such detention. In this regard, he indicated that individuals who are engaged in terrorism are very dangerous, are frequently fanatical in their beliefs, have little regard for human lives, including their own, and are transient. He further stated that, as part of its international obligations, Canada is expected to pursue vigorously all legal avenues to identify and deal with terrorists, and to prevent the use of its territory as a safe haven or a base of operations for terrorists. The cross-examination of Mr. Southern by counsel for the plaintiff did not undermine or diminish in any significant manner the facts deposed to in his affidavit.

The plaintiff tendered affidavit evidence from Reginald Whitaker and Garry Carter to be used in the analysis under section 1 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), if section 40.1 of the *Immigration Act*, or any part of it, were found to violate section 7 of the *Charter*. He also filed as an exhibit a letter dated December 21, 1994 from the Co-ordinator of Security and Designated Proceedings of this Court concerning certain procedural aspects of this case. Counsel for the Attorney General of Canada consented to the filing of the evidence at trial, did not cross-examine the affiants and took the position that their evidence ought to be accorded little or no weight for various reasons. Reginald Whitaker, a political science professor at York University in North York, Ontario, alleged in his affidavit, among other things, that the information of the Service about the Middle East, including Iran, was unreliable due to certain factors. He also deposed to the dangers inherent in the use of "summaries" in section 40.1 of the *Immigration Act* proceedings. Garry Carter, a private investigator who was one of the most experienced and highly regarded criminal investigators in the Metropolitan Toronto Police Force for many years, concentrated in his affidavit primarily on the editing and disclosure procedures used by the courts in relation to authorizations to intercept private communications granted under the provisions of the *Criminal Code of Canada*. In view of my conclusions in this case, it is unnecessary for me to outline in any greater detail the evidence tendered by the plaintiff.

ISSUE

Whether section 40.1 of the *Immigration Act* infringes or denies the rights guaranteed by sections 7, 9, or 10(c) of the *Canadian Charter of Rights and Freedoms* or is inoperative by virtue of subsection 2(e) of the *Canadian Bill of Rights*.

LEGISLATIVE PROVISIONS

The legislative provisions referred to in this judgment are reproduced, for ease of reference, in Schedule "A".

ANALYSIS

i) ***section 40.1 proceedings***

Any description of the statutory scheme applicable in this matter must start from the premise that the right to enter Canada is granted to Canadian citizens and, in a qualified manner, to

permanent residents.[1] Furthermore, Canadian citizens have a statutory right to remain in Canada, while permanent residents and Convention refugees enjoy only a qualified right to remain in the country.[2] For example, a Convention refugee found to be a person described in the anti-terrorist provisions in paragraphs 19(1)(e) or (f) of the *Immigration Act* would lose his right to remain in Canada.

In the 1988 amendments to the Part III Exclusion and Removal provisions in the *Immigration Act*,[3] Parliament enacted two completely separate and distinct legislative schemes, under the heading "Safety and Security of Canada", governing the removal from Canada of persons with criminal or terrorist backgrounds or propensities: sections 39 and 40 for permanent residents and sections 40.1 and 40.2 for persons other than Canadian citizens and permanent residents. In the 1992 amendments to the *Immigration Act*, Parliament adopted section 38.1, which explained the legislative purposes of sections 39 to 40.1. In particular, Parliament indicated that the express purposes of these statutory provisions were:

> (a) to enable the Government of Canada to fulfil its duty to remove persons who constitute a threat to the security or interests of Canada or whose presence endangers the lives or safety of persons in Canada;
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> (b) to ensure the protection of sensitive security and criminal intelligence information; and
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> (c) to provide a process for the expeditious removal of persons found to be members of an inadmissible class referred to in section 39 or 40.1.

A review of section 38.1 of the *Immigration Act* further confirms that, in enacting different legislative procedures for permanent residents and for persons who are not Canadian citizens or permanent residents, Parliament expressly recognized that the latter group have no right to come into or to remain in Canada, while permanent residents have only a qualified right to do so.

In enacting section 40.1 of the *Immigration Act*, Parliament created a mechanism for the expeditious review by an independent judicial arbiter of the reasonableness of the decision of two separate ministers to issue a certificate that a person, other than a Canadian citizen or permanent

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[1] See subsection 4(1) of the *Immigration Act*.

[2] Subsections 4(2) and (2.1) of the *Immigration Act*.

[3] An Act to Amend the *Immigration Act*, 1976 and the *Criminal Code* in consequence thereof, S.C. 1988, c. 36, now c. 29, (4th Supp.), proclaimed in force October 3, 1988

resident, is a member of an inadmissible class of persons for various specified reasons, including terrorism. Under the scheme established in section 40.1, the Minister and the Solicitor General are required to make their decision that a person is a member of an inadmissible class solely on the basis of "...security and criminal intelligence reports received and considered by them."[4] The filing of the ministerial certificate with an immigration officer or other specified officials triggers various statutory procedures, including the mandatory detention of the named person and the reference of the certificate to this Court for a determination of its reasonableness.[5] Within three days of the filing of the certificate, the Minister must "cause a notice to be sent" informing the named person that a certificate has been filed and that, following a reference to this Court, a deportation order may be made against him.[6] Within seven days of the reference of the certificate to this Court, the Chief Justice or a judge designated by him ("designated judge") must examine, *in camera*, the security or criminal intelligence reports considered by the Minister and the Solicitor General "...and hear any other evidence or information that may be presented..." on their behalf.[7] Since the Minister and the Solicitor General are required to make their decisions solely on the basis of the security or criminal intelligence reports, the designated judge knows exactly what information was considered by them prior to the issuance of the certificate. The security or criminal intelligence reports are the only evidence which the designated judge must hear *in camera*. In the event that "other evidence or information" is to be tendered, the Minister or Solicitor General may request that "all or part of such evidence or information" be heard by the designated judge in the absence of the named person and his counsel. The designated judge may only accede to this ministerial request where he forms the opinion that the disclosure of the evidence or information "...would be injurious to national security or to the safety of persons."[8] The burden of establishing that the "other evidence or information" ought not to be disclosed for reasons of national security or safety rests squarely on the minister who seeks to have it tendered in the absence of the named person and his counsel. In short, the disclosure of this evidence or information to the named person may be withheld under the statutory scheme only following a ministerial request and an independent judicial determination that its release would

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[4] Subsection 40.1(1) of the *Immigration Act*

[5] Paragraphs 40.1(2)(b), 3(a) and 4(d)

[6] Paragraph 40.1(3)(b)

[7] Paragraph 40.1(4)(a)

[8] Paragraph 40.1(4)(a)

be injurious to national security or to the safety of persons. It follows that, absent a judicial determination of non-disclosure on the basis of national security or safety in relation to all or part of the "other evidence or information", this material will be disclosed to the named person. All of this exercise must be completed within seven days of the reference of the certificate to this Court.

Following the completion of his examination of the security or criminal intelligence reports and the hearing, if any, of other evidence or information in the absence of the named person and his counsel, the designated judge has a heavy burden to provide disclosure in order to permit the named person to challenge the reasonableness of the certificate issued by the Minister and the Solicitor General. In particular, the designated judge must provide the named person with a statement summarizing the information available "...as will enable [him] to be reasonably informed of the circumstances giving rise to the issue of the certificate." [9] In preparing the statement of information for the named person, the designated judge must assess the right of the named person to be "reasonably informed of the circumstances...having regard to whether, in [his] opinion..., the information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons."[10] The designated judge therefore has the discretion to refuse to disclose information to the named person only where he formulates the opinion that disclosure would be injurious to national security or to the safety of persons. The disclosure powers accorded to the designated judge are broad and require the cautious exercise of judicial discretion to ensure that the competing interests are properly balanced. By way of example from a practical perspective, a designated judge would be required to provide disclosure of human source information, if it were necessary to enable the named person to be "reasonably informed", save and except where the very nature of the information would reveal the identity of the source and endanger his safety or compromise national security. In many instances, information may be divulged without fear of identifying the source, in that several persons may have had access to the information provided by him to the authorities. In this type of situation, counsel for the ministers will have a difficult burden to meet in attempting to convince the designated judge that the information should not be disclosed. The designated judge must also bear in mind that the "reasonably informed" standard which Parliament chose to adopt in relation to persons other than Canadian citizens and permanent residents is lower than the standard applicable to permanent residents in the parallel scheme enacted

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[9] Paragraph 40.1(4)(b)

[10] *Id.*

in section 39 of the *Immigration Act*. With respect to permanent residents, Parliament provided in subsection 39(6) of the *Immigration Act* that a permanent resident must be provided with "...a statement summarizing such information... as will enable the person to be as fully informed as possible of circumstances giving rise to the report."

The designated judge must also provide the named person with a reasonable opportunity to be heard.[11] Under the terms of the statute, the nature of the hearing to be accorded to the named person has been described simply as "a reasonable opportunity to be heard." At a minimum, "a reasonable opportunity to be heard" would permit the named person and his counsel to appear before the designated judge, subpoena and call witnesses, and make submissions on matters, including the disclosure of information to the named person. However, given the broad wording used in the legislation, the nature of the hearing afforded to a named person may vary according to the circumstances of the case. Furthermore, it is significant to note that the legislation only requires that the designated judge "provide" the named person with "a reasonable opportunity to be heard". In the event that the named person fails to avail himself of the opportunity to be heard within a reasonable period of time, as has occurred in this case, the designated judge should proceed to determine the reasonableness of the certificate on the basis of the evidence and information available. Indeed, the fact that Parliament clearly intended these proceedings to be conducted expeditiously requires the designated judge to proceed in this fashion.[12] It bears noting that, in the case at bar, the plaintiff has attempted to use the length of his stay in custody, which has occurred as a result of his failure to avail himself of his statutory right to be heard, in support of his argument that his detention violates the principles of fundamental justice or is arbitrary.

In conducting his review on the reasonableness of the certificate, the designated judge is permitted to "... receive, accept and base [his] determination..." of reasonableness on such evidence or information as he sees fit, "...whether or not the evidence or information is or would be admissible in a court of law."[13] This relaxed evidentiary standard applies to all aspects of the review conducted by the designated judge and, as such, benefits all parties to the proceedings. At the

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[11] Paragraph 40.1(4)(c)

[12] See paragraph 38.1(c) of the *Immigration Act* which indicates that one of the purposes of sections 39 to 40.2 is "to provide a process for the expeditious removal of persons found to be members of an inadmissible class referred to in section 40.1."

[13] Subsection 40.1(5)

conclusion of the review, the designated judge must determine whether the certificate is reasonable on the basis of the evidence and information available. If the designated judge finds that the certificate is not reasonable, he must quash it.[14] The determination made by the designated judge is not subject to appeal or review by any court.[15] A certificate which has been reviewed and not quashed by a designated judge constitutes "conclusive proof" that the named person is a member of the inadmissible class or classes described in it.[16] Following a determination of the reasonableness of the certificate, the detention of the named person continues until his removal from Canada, unless he has not been deported within 120 days of the making of the removal order.[17] In these circumstances, the legislation provides a procedure permitting the named person to apply for his release from detention.[18] Nothing in the law requires a named person to contest the reasonableness of the certificate. Indeed, the Minister may at any time order the release of the named person from detention in order to permit his departure from Canada, even if the designated judge has not yet made a determination of the reasonableness of the certificate.[19]

The proceedings under section 40.1 of the *Immigration Act* are directed solely and exclusively to determining the reasonableness of the ministerial certificate identifying the named person as a member of certain inadmissible classes of persons. This section of the legislation does not deal with the question of deportation. In the present case, the provisions in section 53 of the *Immigration Act* would be applicable in relation to deportation, by virtue of the fact that the plaintiff is a Convention refugee. In the event that a designated judge determined the certificate to be reasonable on the basis of evidence and information available, the Minister would be required under section 53 of the *Immigration Act* to make the separate determination of whether the plaintiff constituted a danger to the security of Canada before an order could be made deporting him to a country where his life or freedom would be threatened. If the Minister determined that the plaintiff did constitute a danger to the security of Canada, the plaintiff would be entitled to challenge this

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[14] Paragraph 40.1(4)(d)

[15] Subsection 40.1(6)

[16] Paragraph 40.1(7)(a)

[17] Paragraph 40.1(7)(b)

[18] Subsections 40.1(8), (9), (10) and (11)

[19] Subsection 40.1(7.1)

decision by bringing an application for leave and for judicial review. Furthermore, if a removal order were made against the plaintiff, subsections 70(2), (3) and (4) of the *Immigration Act* would permit him to appeal that order to the Appeal Division of the Immigration and Refugee Board on a ground of appeal involving a question of law or fact or mixed law and fact. The plaintiff would also be entitled to make an application for leave and for judicial review of any ensuing decision of the Appeal Division.

In my overview of the prescribed procedure, I have refrained from making reference to subsection 40.1(5.1) of the *Immigration Act* which deals with "information obtained in confidence from the government or an institution of a foreign state or from an international organization of states or an institution thereof." Counsel for the Attorney General of Canada submitted that the constitutionality of subsection 40.1(5.1) of the *Immigration Act* ought not to be determined in the context of the present case since there is no foreign government or international information available in relation to the plaintiff. I agree with this submission and I specifically refrain from making any comment in this judgment on the constitutionality of subsection 40.1(5.1) of the *Immigration Act*.

ii) section 7 of the Charter

Section 7 of the *Charter* provides as follows:

> 7. 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.

The approach to be taken in assessing an alleged violation of the section 7 Charter rights of an individual to life, liberty and security of the person was described by Sopinka, J. in *Rodriguez v. B.C.(A.G.)*, [1993] 3 S.C.R. 519 at page 584 in the following terms:

> Section 7 involves two stages of analysis. The first is as to the values at stake with respect to the individual. The second is concerned with possible limitations of those values when considered in conformity with fundamental justice.

In conducting the first stage of this two part analysis, the rights accorded to the plaintiff, as a Convention refugee, under the provisions of the *Immigration Act* must be determined in order to assess the scope of the protection available to him under section 7 of the *Charter*.[20]

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[20] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R.177, per Wilson, J. at page 204.

Section 3 of the *Immigration Act* affirms that immigration law and policy will be designed and administered to promote Canadian domestic and international interests, recognizing various needs. The competing factors outlined in section 3, which are relevant in the context of this case, include the need "to fulfil...international obligations with respect to refugees and to uphold its humanitarian tradition..., to maintain and protect... safety and good order and to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity."[21] In recognition of its obligations in respect of refugees, Parliament has accorded certain limited rights to Convention refugees in the *Immigration Act*. Under subsection 4(2.1) of the *Immigration Act*, a Convention refugee enjoys a qualified right to remain in Canada. This qualified right is extinguished where it is established, among other things, that the Convention refugee is a person described in certain inadmissible classes, including those pertaining to terrorism. Even if a Convention refugee loses his qualified right to remain in Canada, subsection 53(1) of the *Immigration Act* prohibits his removal from Canada to a country where his life or freedom would be threatened, unless he is a member of certain inadmissible classes and the Minister formulates the opinion that he "...constitutes a danger to the security of Canada." A Convention refugee who has been removed from Canada may avail himself of the right to re-enter Canada under paragraph 14(1)(c) of the *Immigration Act*, in circumstances where he "...has not been granted lawful permission to be in any other country." A Convention refugee also has the qualified right under subsections 46.04(1) and (3) of the *Immigration Act* to apply, on behalf of himself and his dependents, for landing, unless he is a member of certain inadmissible classes, including those pertaining to terrorism. Under paragraph 19(4)(j) and section 20 of the *Immigration Regulations*, a Convention refugee may apply for employment authorization in Canada. These are the limited rights granted to a Convention refugee under the *Immigration Act* and *Regulations*.

In addition to the statutory rights accorded to a Convention refugee, counsel for the plaintiff submitted that the plaintiff had certain "constitutionally protected interests" which were engaged by the section 40.1 *Immigration Act* proceedings. In particular, he submitted that these interests included the loss of liberty from detention, stress flowing from the allegations made against him, the stigma associated with confirmation of the certificate, his forced removal from Canada, and "the threat to life associated with the potential repatriation to a country which...will likely

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[21] Paragraphs 3(g), (i) and (j) of the *Immigration Act.*

persecute..." him. Counsel for the plaintiff submitted that these interests were protected by section 7 of the *Charter*.

A review of the rights granted under the *Immigration Act* to a Convention refugee confirms that a finding of membership in certain inadmissible classes, including those pertaining to terrorism, triggers the condition attached to his qualified rights to remain in Canada and to apply for landing. In these circumstances, a Convention refugee ceases to have these two rights. Furthermore, the absolute nature of his right under subsection 53(1) not to be removed from Canada to a country where his life or freedom would be threatened becomes conditional on the Minister formulating the opinion that he does not constitute a danger to the security of Canada. However, the right of a Convention refugee to re-enter Canada in the circumstances prescribed in paragraph 14(1)(c) of the *Immigration Act* is not affected by a finding of inadmissibility. Although the ability of a Convention refugee to apply for employment authorization under the *Immigration Regulations* would necessarily be lost if he were removed from the country,

I consider this factor to be of no significance for the purposes of the analysis under section 7 of the *Charter*. In summary, a finding of membership in certain inadmissible classes, including those pertaining to terrorism, causes a Convention refugee to lose his qualified rights to remain in Canada and to be considered for landing and makes his right not to be removed to a country where his life or freedom would be threatened conditional on a ministerial determination that he does not constitute a danger to the security of Canada.

Having considered the statutory rights of the plaintiff as a Convention refugee under the *Immigration Act*, I have concluded that the threshold question to be determined in the first stage of the section 7 *Charter* analysis is whether the loss of his qualified rights to remain in Canada and to apply for landing or the change in the nature of his right not to be removed from the country constitute a deprivation of his right to life, liberty or security of the person. However, I have further concluded that it is unnecessary for me to answer this question, as I am of the opinion that the procedure prescribed in section 40.1 of the *Immigration Act* does not violate the principles of fundamental justice.[22] In the circumstances, it is also unnecessary for me to consider whether the alleged breach of his "constitutionally protected interests" constitutes a deprivation of the right to life, liberty or security of the person.

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[22] See the approach taken by Sopinka, J. in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at pages 731-732.

With respect to the second stage of the section 7 *Charter* analysis, the principles to be applied in determining whether a statutory scheme violates the principles of fundamental justice were enunciated by Sopinka, J. in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711. In considering the constitutionality of previous legislation governing the deportation of permanent residents convicted of certain criminal offences,
Sopinka, J. confirmed the importance of adopting a contextual approach to the interpretation of section 7 of the *Charter*. In this regard, he stated as follows at page 733:

> Thus in determining the scope of principles of fundamental justice as they apply to this case, the court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country.
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> ...
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> The distinction between citizens and non-citizens is recognized in the *Charter*. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1).
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> Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the *Immigration Act*.

In my opinion, these words of Sopinka, J. are directly applicable to the case at bar. Accordingly, I have concluded that the constitutional validity of section 40.1 of the *Immigration Act* must be analysed in the context of "the principles and policies underlying immigration law." Furthermore, I note that proceedings under section 40.1 of the *Immigration Act* are directed solely to determining the reasonableness of the ministerial certification of inadmissibility. This question is purely and simply an immigration matter.

In *Chiarelli v.Canada (Minister of Employment and Immigration)*, *supra*, Sopinka, J. also suggested that proceedings similar in nature to those before the designated judge may not be subject to the principles of fundamental justice. The issue raised by Sopinka, J. was not argued before me. For the purposes of my analysis, I have therefore assumed that the section 40.1 *Immigration Act* proceedings before a designated judge are subject to the principles of fundamental justice.[23]

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[23] In *Chiarelli v. Canada (Minister of Employment and Immigration)*, *supra*, Sopinka, J. indicated as follows at page 742:

In his written and oral submissions, counsel for the plaintiff argued that the principles of fundamental justice in section 7 of the *Charter* give rise to "procedural due process rights". He submitted that, in the context of proceedings under section 40.1 of the *Immigration Act*, the principles of fundamental justice would guarantee the following procedural rights to the plaintiff: the right not to be arbitrarily detained, the right to a hearing before an unbiased decision-maker, the right to disclosure of any information in the possession of the state "which may potentially assist the person" in answering the allegations, the right to respond meaningfully to the allegations, and the right to appeal or review the decision. He further submitted that the principles of fundamental justice include "the right to have the state bear the risk of an erroneous determination that will deprive him of his rights to life, liberty or security of the person." Many of the submissions made by counsel for the plaintiff in support of his argument concerning the "procedural due process rights" were premised on the erroneous assumption that proceedings under section 40.1 of the *Immigration Act* were criminal or quasi-criminal in nature.

In determining the protections afforded by section 7 of the *Charter* to a person in proceedings under section 40.1 of the *Immigration Act*, I am mindful of the guidance provided by Sopinka, J. in *Chiarelli v. Canada (Minister of Employment and Immigration), supra*, at pages 743-744:

> The scope of principles of fundamental justice will vary with the context and the interests at stake. In *R. v. Lyons* (1987), 32 C.R.R. 41, [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193, 82 N.S.R. (2d) 271, La Forest J., writing for the majority, stated (p. 82 C.R.R., p. 361 S.C.R.):
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> > It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness (see e.g., the comments to this effect of Wilson J. in *Singh v. Minister of Employment and Immigration* (1985), 14 C.R.R. 13 at pp. 52-53, [1985] 1 S.C.R. 177 at pp. 212-13...). It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context, but not in another.

"Parliament could have simply provided that a certificate could issue without any hearing. Does the fact that Parliament has legislated beyond its constitutional requirement to provide that a hearing will be held enable the respondent to complain that the hearing does not comport with the dictates of fundamental justice? It could be argued that the provision of a hearing *ex gratia* does not expand Parliament's constitutional obligations. I need not resolve this issue in this case because I have concluded that, assuming that proceedings before the Review Committee were subject to the principles of fundamental justice, those principles were observed."

> Similarly, the rules of natural justice and the concept of procedural fairness, which may inform principles of fundamental justice in a particular context, are not fixed standards.

An analysis of the scope of the principles of fundamental justice in proceedings under section 40.1 of the *Immigration Act* must therefore be conducted in the context of immigration principles and policies, and with regard to the competing interests of the state and the person in question. In *Chiarelli v. Canada (Minister of Employment and Immigration), supra*, Sopinka, J. noted at page 744 that, although the individual had an interest in a fair procedure, the state had "...a considerable interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources."

With respect to the immigration context, I have already quoted the observation of Sopinka, J. that "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country." Furthermore, as noted previously, immigration law and policy in Canada recognize several competing needs, including those pertaining to our international and humanitarian obligations to refugees, the safety of Canadian society and the promotion of international order by denying the use of our territory to persons likely to engage in criminal activity. In section 38.1 of the *Immigration Act*, Parliament specifically addressed the statutory purposes of certain sections, including section 40.1, noting that Canada had a duty "to remove persons who constitute a threat to the security or interests of Canada or whose presence endangers the lives or safety of persons in Canada." Parliament further indicated that section 40.1 of the *Immigration Act*, among others, was intended to ensure the protection of sensitive security and criminal intelligence information and to provide an expeditious process for the removal of persons in certain inadmissible classes, including those pertaining to terrorism. Furthermore, in the present case, the facts established in the evidence of Harry Norman Southern, the Chief of Counter Terrorism in the CSIS Toronto Regional Office, demonstrate unequivocally that Canada has compelling interests, both domestically and internationally, in pursuing terrorists, in denying them access to our country and in protecting national security and human source information. Despite these considerations, it must nevertheless be recognized that the plaintiff has a competing interest in the fairness of procedures under section 40.1 of the *Immigration Act*.

I have concluded that, in enacting section 40.1 of the *Immigration Act*, Parliament developed a procedure in which it attempted to strike a reasonable balance between the competing

interests of the individual and the state. In particular, Parliament placed the responsibility of reviewing the reasonableness of the ministerial certificate on an independent member of the judiciary and accorded him the power to examine the security or criminal intelligence reports, to hear evidence, to give disclosure with a view to permitting the person to be "reasonably informed", and to provide the person with a "reasonable opportunity to be heard." In my opinion, the contextual analysis confirms that the principles of fundamental justice have been respected in the procedure devised by Parliament in section 40.1 of the *Immigration Act*.

Despite my conclusion in this matter, I wish to address certain specific submissions made by counsel for the plaintiff in support of his argument that certain "procedural due process rights" must be incorporated in the principles of fundamental justice in the context of this case.

With respect to the contention that the principles of fundamental justice include the right not to be arbitrarily detained, counsel for the plaintiff submitted that a person named in a certificate has a right to apply for release from custody, in the same manner as a person "accused of the most serious crime known to our criminal law." As I indicated earlier, the scope of the fundamental justice applicable in proceedings under section 40.1 of the *Immigration Act* must be analysed in the context of immigration principles and policies and not according to criminal law standards. The argument advanced by counsel for the plaintiff concerning the right to apply for release was founded on the statutory provisions in the *Criminal Code of Canada*, as well as on criminal law principles and policies, none of which have any application in the case at bar. In any event, I note that the detention in this case is statutorily mandated and occurs only following the determination by two ministers that a person who is neither a Canadian citizen nor a permanent resident is a member of certain inadmissible classes of persons, including those pertaining to terrorism. Furthermore, a review of the provisions of section 40.1 of the *Immigration Act* and its legislative purpose as expressed in section 38.1 confirms that the proceedings are to be conducted expeditiously, with the concomitant expectation that the detention of the person will not be lengthy. As I indicated earlier, the fact that a person fails to avail himself of his opportunity to be heard and chooses to remain in custody in Canada, rather than seeking to depart from the country, cannot be used as a basis for legitimizing his assertion that his detention violates the principles of fundamental justice. Having considered the detention requirement in section 40.1 of the *Immigration Act* in the immigration context, I am satisfied that the principles of fundamental justice do not require

Parliament to create a procedure providing for the pre-determination release of the person, as was submitted by counsel for the plaintiff. Furthermore, the facts deposed to by Mr. Southern in support of his statement that the interests of public safety require such detention indicate that individuals who are engaged in terrorism are often dangerous, are frequently fanatical, have little regard for human lives and are transient. He further indicated that the international obligations of Canada require it to pursue vigorously all legal avenues to identify and deal with terrorists. In my opinion, the facts established in the evidence of Mr. Southern assist in demonstrating that, in the immigration context, the principles of fundamental justice are not violated by the pre-determination detention of a person certified by two ministers to have a terrorist background or propensities. Furthermore, I note that section 40.1 of the *Immigration Act* provides for the post-determination release of a person from custody in circumstances where his deportation has not occurred within 120 days after the making of the removal order.[24] The existence of this statutory release scheme in a post-determination situation involving extended delay confirms that Parliament specifically considered the question of release from detention and chose to permit it only in the very limited circumstances outlined in subsection 40.1(8). Given the compelling state interests involved in dealing with alleged terrorists, I am of the opinion that the failure of Parliament to provide for a mechanism of pre-determination release does not violate the principles of fundamental justice.

Counsel for the plaintiff further submitted that the nature of the process created by section 40.1 of the *Immigration Act* creates a reasonable apprehension of bias on the part of the designated judge who conducts the *in camera* hearing. I cannot accept this submission. In my opinion, nothing in the procedure prescribed in section 40.1 of the *Immigration Act* raises a reasonable apprehension of bias on the part of the designated judge. To the extent that the submission of counsel for the plaintiff is founded on the assertion that the participation of a designated judge in an *in camera* hearing compromises his impartiality, I note that in *Chiarelli v. Canada (Minister of Employment and Immigration), supra*, the Supreme Court of Canada held that the Security Intelligence Review Committee Rules, which permitted the discretionary exclusion of one or more parties during evidence or representations, did not violate the principles of fundamental justice.

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[24] See subsections 40.1 (7.1), (8), (9) and (10) of the *Immigration Act*

With respect to the question of disclosure, counsel for the plaintiff structured his argument primarily on the principles enunciated in *Regina v. Stinchcombe*, [1991] 3 S.C.R. 326. and other criminal law cases. As I have indicated earlier, criminal law principles have no application in this case. In my opinion, the statutorily mandated process of disclosure in section 40.1 of the *Immigration Act*, which requires an independent member of the judiciary to balance the competing interests of the state and the individual, complies with the principles of fundamental justice in the immigration context. Furthermore, the use of summaries of evidence in immigration matters involving national security and informant information was specifically approved in *Chiarelli v. Canada (Minister of Employment and Immigration* by Sopinka, J. at pages 745-746 in the following terms:

> Although the first day of the hearing was conducted *in camera*, the respondent was provided with a summary of the evidence presented. In my view, these various documents gave the respondent sufficient information to know the substance of the allegations against him, and to be able to respond. It is not necessary, in order to comply with fundamental justice in this context, that the respondent also be given details of the criminal intelligence investigation techniques or police sources used to acquire that information.

In the circumstances, I am therefore satisfied that the disclosure procedures in section 40.1 of the *Immigration Act* do not violate the principles of fundamental justice.

In a similar vein, counsel for the plaintiff submitted that the procedure prescribed in section 40.1 of the *Immigration Act* deprives a person of the right to respond in a meaningful fashion to the case advanced by the state. I cannot accept this submission for the reasons indicated in my discussion of the disclosure argument advanced by counsel for the plaintiff. Furthermore, I am of the opinion that the summary of the evidence and information, together with any other material disclosed by either the state or the designated judge, provides the individual with the substance of the allegations and thereby permits him to respond to the case against him. Counsel for the plaintiff further argued that section 117 of the *Immigration Act*, which prevents the production of a security or criminal intelligence report or evidence referred to in section 40.1 "before a court, person or body with jurisdiction to compel the production of information", prevents the person from responding meaningfully. In particular, he submitted that section 117 of the *Immigration Act* "serves to prohibit the designated judge conducting the hearing from compelling the production of information or the attendance of certain witnesses...". This argument is founded on a misunderstanding of the meaning of section 117 of the *Immigration Act*. In my opinion, the plain and obvious wording of section 117 of the *Immigration Act* indicates that courts or bodies, other than a designated judge under section

40.1, are prohibited from compelling the production of security or criminal intelligence reports. Simply put, section 117 of the *Immigration Act* has no application whatsoever in proceedings which are conducted under section 40.1. Counsel for the plaintiff also argued that the absence of an express power in section 40.1 of the *Immigration Act* to subpoena witnesses constituted a deprivation of the right to respond meaningfully. I cannot accept this submission. In my opinion, Rule 333 of the *Federal Court Rules* would be available to a person facing proceedings under section 40.1 of the *Immigration Act* and would permit him to subpoena witnesses.

Counsel for the plaintiff further submitted that the principles of fundamental justice require the state to establish the allegations made against the person named in a ministerial certificate beyond a reasonable doubt. I disagree. In my opinion, the criminal law standard of proof beyond a reasonable doubt has no application in proceedings under section 40.1 of the *Immigration Act*. Furthermore, I am of the view that it is unnecessary for me, in the context of this case, to determine the standard applicable in proceedings under section 40.1 of the *Immigration Act*.

Finally, counsel for the plaintiff submitted that section 40.1(6) of the *Immigration Act*, which provides that a determination made by a designated judge is not subject to appeal or review by any court, violates sections 7 and 10(c) of the *Charter*. The question of rights of appeal was the subject of comment by the Supreme Court of Canada in *Kourtessis v. M.N.R.*, [1993] 2 S.C.R.53. In discussing rights of appeal, La Forest J. stated as follows at pages 70-71:

> "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 by the relevant legislature.
>
> There are various policy reasons for enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice... A further policy rationale, and one that is important to the case before this court, is that there should not be unnecessary delay in the final disposition of proceedings..."

The procedure created by Parliament in section 40.1 of the *Immigration Act* constitutes the mechanism for reviewing the decision made by the two ministers. I am satisfied, on the basis of the principles enunciated in *Kourtessis v. M.N.R., supra*, that the principles of fundamental justice do not require the provision of a further right of appeal or review. Furthermore, in expressly prohibiting a further appeal or review, Parliament reinforced the notion that proceedings under section 40.1 of the *Immigration Act* are expeditious in nature. Finally, the failure of

Parliament to provide a further right of appeal or review has no effect on any rights of the plaintiff under subsection 10(c) of the *Charter*.

iii) section 9 of the Charter

Section 9 of the *Charter* provides as follows:

"Everyone has the right not to be arbitrarily detained or imprisoned."

With respect to section 9 of the *Charter*, counsel for the plaintiff relied on the submissions which he made in support of his contention that the principles of fundamental justice include the right not to be arbitrarily detained. I am satisfied that the pre-determination detention of the named person under section 40.1 of the *Immigration Act* is not arbitrary, in that it is expressly authorized by law and occurs only following a separate decision by two ministers that a person, who is neither a Canadian citizen or permanent resident, has a terrorist background or propensities. In the circumstances, there is no infringement or denial of the right under section 9 of the *Charter*.

iv) *Subsection 2(e) of the Canadian Bill of Rights*

Subsection 2(e) of the *Canadian Bill of Rights* provides as follows:

> 2. Every law in Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ...
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

I am of the opinion that section 40.1 of the *Immigration Act* is not inoperative by virtue of subsection 2(e) of the *Canadian Bill of Rights*.

DECISION

The action is dismissed. There is no order as to costs.

OTTAWA
12 September 1995Judge