Court File No. 30672

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

ADIL CHARKAOUI

APPELLANT

AND:

MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA

RESPONDENT

Court File No. 30929

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL

BETWEEN:

HASSAN ALMREI

APPELLANT

AND:

MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA

RESPONDENTS

Court File No. 31178

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

MOHAMED HARKAT

APPELLANT

AND:

MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA

RESPONDENTS

MEMORANDUM OF ARGUMENT OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION FOR LEAVE TO INTERVENE

Introduction

1. This is an application pursuant to Rule 18(1) of the *Rules of the Supreme Court of Canada* for leave to intervene in the *Charkaoui*, *Harkat* and *Almrei* appeals.

2. The British Columbia Civil Liberties Association ("BCCLA") specifically seeks leave to file a single written submission not exceeding twenty (20) pages in length for all three appeals and leave to make oral argument not exceeding twenty (20) minutes in length in relation to all three appeals.

The Law Concerning Intervention Applications

3. The two central issues in applications for leave to intervene are as follows:

a. whether the applicant has an interest in the appeal; and

b. whether the applicant's submissions will be useful to the court and different from those of other parties.

R. v. Finta, [1993] 1 S.C.R. 1138

Reference Re Worker's Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335

The Applicant's Interest in the Appeal

4. The BC Civil Liberties Association is one of the country's pre-eminent civil liberties organizations. The BCCLA has played an important and prominent role on almost every significant national civil liberties issue for over 40 years. The BCCLA has intervened before this Court on numerous occasions, and believes that its oral and written submissions have been of some assistance.

   Affidavit of Murray Mollard, at paras.5 and 7

5. The BCCLA has devoted great energies to advocacy in the area of national security. Its long history in the area includes making submissions to inquiries including the MacDonald Commission, the APEC Inquiry, and the Arar Inquiry. It has lobbied or litigated in relation to the Canadian Security Intelligence Service Act, the Emergencies Act, the Anti-Terrorism Act, the Public Safety Act, the Security of Information Act, the Canada Evidence Act, and of course, the Immigration and Refugee Protection Act. It has advocated for enhancements to civilian oversight of the Canadian Security Establishment, CSIS, the RCMP, DFAIT, Immigration Canada, and the CBSA.

   Affidavit of Murray Mollard, at para.6(a)-(r)

6. In relation to the Security Certificate regime under the *Immigration and Refugee Protection Act* ("IRPA"), the BCCLA testified before the Senate Special Committee on the *Anti-Terrorism Act* and made representation to the House of Commons Subcommittee on Public Safety and National Security.

   Affidavit of Murray Mollard, at para.6(q)

7. It is the submission of the BCCLA that its mandate and historical involvement in making submissions to inquiries, lobbying, litigating, and civilian oversight constitute a significant interest in these appeals.

A Useful Perspective Not Otherwise to be Presented on the Appeal

8. The BCCLA has a tangible contribution to make to these appeals beyond the contributions of the other parties and intervenors.

9. The BCCLA recognizes that Canada as a nation is entitled to exercise sovereignty over its territory by controlling the entry and departure of non-citizens over its borders by deporting persons who are a threat to Canada's national security. The process of deportation, however, is to conform to the values and principles which make up and define our constitutional democracy.

10. The statutory imperatives of the IRPA that enable security certificate hearings are fundamentally under tension. Section 78(i) requires the judge to provide the detainee with an opportunity to be heard regarding their inadmissibility but s.78(e) requires the judge to hear information or evidence taken in the absence of the detainee. *Ex parte* hearings are, on the face of it, incompatible with the detainee having a full and fair opportunity to be heard.

11. Section 78(h) requires the judge to provide the detainee with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate but s.78(g) prevents the judge from disclosing information to the detainee when disclosure would be injurious to national security or to the safety of any person. As the *Harkat* case shows, the Federal Court has shown itself prepared in some cases to hear evidence not disclosed to the detainee or the public, and make critical findings based on that evidence. Such detainees could not in good faith be said to be "reasonably informed" of the evidence.

    R. v. Harkat, [2005] F.C.J. No. 481 (F.T.C.) at paras.113 and 114

12. In the submission of the BCCLA, the task before this honourable Court in these related appeals is to resolve the tension between statutory imperatives in a manner

that is consistent with the values and principles enshrined in the *Charter of Rights and Freedoms* without undermining Canada's national security interests.

13. The security certificate regime engages many bedrock *Charter* principles, including the principle of open courtrooms, the adversarial process, independence of the judiciary, and the duty to give reasons.

Open Courtrooms

14. Even in the context of terrorist offences and threats to national security, there is a presumption that judicial hearings are open to the public. Openness is a principal component of the legitimacy of the judicial process. For security certificate cases in which present threats to national security are centrally at issue it may well be that key evidence will frequently be heard *in camera*. Closure of hearings will tend to erode the perceived legitimacy of the security certificate process.

    Vancouver Sun (Re), [2004] 2 S.C.R. 332 at para.25

Duty to Give Reasons

15. At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Reasoned judgments, particularly directed at the resolution of troublesome, confused or contradictory evidence, are required to assist counsel in advising on the merits of a potential appeal and in permitting Courts of Appeal to determine the nature and extent of any errors of fact or law. To the extent that judges rely on secret evidence but can give no reasons in relation to that evidence, the reputation of and confidence in the administration of justice will suffer.

    R. v. Sheppard, [2002] 1 S.C.R. 869 at paras.5 and 55

Adversarial Process

16. The competence of the Canadian judiciary to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

R. v. Swain, [1991] 1 S.C.R. 933 at 971

17. The principles of fundamental justice contemplate an adversarial system founded on respect for the autonomy and dignity of human beings, including the right of an accused in the criminal context to control his or her defence by adducing evidence and making arguments and exercising tactical judgment. In the criminal context, the *sine qua non* of the efficacy and fairness of the adversarial system is disclosure to the accused of information in the control of the government. The search for truth is advanced rather than retarded by the disclosure of information; the failure to disclose undermines the ability of the accused to make full answer and defence.

R. v. Swain, supra at p.972

R. v. Stinchcombe, [1991] 3 S.C.R. 326 at para.17

18. Significant parallels between the arena of criminal law and security certificate deportation hearings justify importing criminal law safeguards into the security certificate context. Security certificates carry potential for drastic effects on the liberty and security interests of detainees, including pre-hearing detention and geographic displacement of long-term residents of Canada. Judicially authorized detention and deportation of a person as a threat to national security involves profound diminution in the social status and standing of that person. The nature of the proceedings and the significance of the interests at stake suggest that the common law tradition of affording a person at the mercy of the state the safeguards of the adversarial system should be maintained in the security certificate context. Additionally, the person may face the prospect of torture or execution at the end of the process.

R. v. Suresh, [2002] 1 S.C.R. 3 at paras.113 to 123

Independence of the Judiciary

19. Judicial independence is integral to the promotion and preservation of the rule of law and it serves as a means to the end of ensuring a reasonable perception of impartiality. Like the context of investigative hearings under the *Criminal Code*,

the concern with judicial independence in security certificate hearings stems largely from the potential that they will be held predominantly *in camera*. However, unlike investigative hearings, the lack of openness in security certificate hearings is a reality rather than a future possibility. In the view of the BCCLA, the presumption that security certificate hearings will be open to the public is not adequate to ensure public perception of judicial independence because the presumption of openness is so routinely rebutted in Federal Court. The Federal Court has shown a willingness to prioritize secrecy when reviewing the reasonableness of security certificates. And secret hearings engender scepticism about judicial independence.

> *Application under s.83.28 of the Criminal Code*, [2004] S.C.R. 248 at paras.80 and 91

Statutory Interpretation of Secrecy and Confidentiality Provisions

20. The BCCLA proposes to argue that the phrase “being a danger to the security of Canada” in s.34(1)(d) and the phrase “injurious to national security” in s.78(b), (e) and (h) of the IRPA should be assigned different meanings.

21. Section 34(1)(d) sets out a criterion for removing a non-citizen from the territorial boundary of Canada. The interpretation thereof is rightly infused with the sovereign power of Canadians to protect themselves by expelling dangerous persons from their soil. In relation to s.34(1)(d), the very broad definition of national security adopted by this court in *Suresh* may be appropriate.

22. In contrast, ss.78(b), (e) and (h) set limits on the duty of the executive to justify the exercise of its authority on behalf of Canadians in open court and justify the exercise of its authority to the persons subject to the exercise of that power. The sections proscribe the level of public scrutiny the judicial process will endure, and effect the integrity of the evidence available to the judiciary. The interpretation of section 78 accordingly should be infused with the constitutional values and presumption of open courtrooms, the duty to give reasons, the adversarial process and the independence of the judiciary. The phrase “injurious to national security”

should be narrowly defined to ensure the primacy of constitutional principles, consistent with the intent of the legislature.

23. A constitutionally precise definition of the phrase "injurious to national security" is critical to ensuring that the imperatives of secrecy will impair procedural fairness as minimally as possible. Procedural fairness is within the expertise of the judiciary and deference to the executive is less warranted on this issue. There is a fundamental difference between expelling a non-citizen from Canada because he or she is a remote threat and closing a courtroom or withholding disclosure because information might be a remote threat.

24. If granted leave to intervene, the BCCLA will argue that the phrase "summary of the information or evidence" and "reasonable informed" in s.78(h) should be interpreted as expansively as possible, in view of the constitutional interests at stake. Similarly, the interpretation of the phrase "an opportunity to be heard" in s.78(i) should be consistent with the interests of the detainee and the interests of the public and those enshrined in the constitution of Canada.

Security Cleared Counsel

25. If granted leave to intervene, the BCCLA will argue for the provision of security cleared lawyers. Such a system would allow a person facing deportation to select from among a roster of security cleared lawyers to advocate on their behalf in their absence at a secret hearing. The security cleared lawyers would have the role of representing the interests of the detainee. The BCCLA believes that, with the proper procedural protections, security cleared lawyers may mitigate the derogation from a fair and public hearing necessary to preserve national security.

26. A system of security cleared lawyers would not be perfect or ideal: neither will the detainee be in a position to give full instruction to the lawyer, nor will the public hear the evidence. However, faith in the security cleared lawyer is constitutionally preferable to faith in a judiciary operating *ex parte* and *in camera*. Assurances of rigorous judicial inquisition and scrutiny, such as appears in paragraphs 93 to 101 of the *Harkat* decision, will not satisfy the reasonable observer. A system of security cleared lawyers should be available to the courts

below to assist them in maximizing public confidence in the security certificate process. In the view of the BCCLA, such a system is well within the power of the judiciary to control its own process to secure fundamental justice.

> *R. v. Harkat*, [2005] F.C.J. No. 481 (F.T.D.) at paras.93 to 101
>
> *R. v. Ribic*, [2005] 1 F.C.J. No. 1964 (F.C.A.) at paras.43-45

Indefinite Detention

27. The IRPA does not provide for the situation when a person is inadmissible to Canada but cannot be deported due to a risk that he or she will be tortured or executed upon deportation. The BCCLA will argue that, in those circumstances, indefinite detention demands procedural protections and evidentiary standards commensurate with the degree of deprivation of liberty. In the absence of a legislative framework, the Court would be required to fashion an appropriate remedy to fill the legislative vacuum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of April, 2006.

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NOTICE TO THE RESPONDENTS TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of this motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.