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Graham Hudson

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As Good as it Gets? Security, Asylum, and the Rule of Law after the Certificate Trilogy

Introduction

Few elements of Canada's national security apparatus have received as much legal, popular, or scholarly attention as security certificates.¹ Although in existence since 1978, they have become a symbol of the heavy human rights costs associated with contemporary counter-terrorism law, policy and practices. The reasons are easy to understand. Certificates are based largely on secret evidence, allow for the indefinite detention of non-citizens who are alleged to pose a threat to the security of Canada, pave the way for the removal of persons to face the substantial risk of persecution, torture, or similar abuses, and are arguably discriminatory on the basis of citizenship.² The certificate regime also rests on a broader assemblage of security-based policies and practices associated with several high profile human rights abuses, including those perpetrated against Maher Arar, Abdullah Almalki, and Ahmad El Maati.

Certificates have for these reasons been described as "exceptional".³ A contested term, exceptionality may be defined simply as that which is rarely or infrequently used. This is a misleading definition; while certificates *per se* are infrequently used, security-based detentions and deportations have since the early 1990's occurred rather regularly through more ordinary measures, while the use of secret evidence in the context of these and related practices is commonplace.⁴ Indeed, successive governments have steadily "securitized" the entire

¹ For a small sampling of literature, see: Colleen Bell, "Subject to Exception: Security Certificates, National Security and Canada's Role in the 'War on Terror'" (2006) 21:1 CJLS 63; Canadian Bar Association, *Submission on Bill C-3 Immigration and Refugee Protection Act Amendments* (Certificate and Special Advocates, 2007); Information in Immigration Proceedings Prior to the Introduction of the Current Legislation Canadian Council for Refugees, *Security Certificates: Next Steps* (2007) Ottawa, Canada, online: <http://ccrweb.ca/documents/Certificates07.pdf>; Craig Forcese & Lorne Waldman, "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (2007) University of Ottawa, Faculty of Law (online: <http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf>); Human Rights Watch, "Canada: Parliament Should Amend Bill on Special Advocates" (19 November 2007) online: <http://www.hrw.org/fr/news/2007/11/18/canada-parliament-should-amend-bill-special-advocates>; John Ip, "The Rise and Spread of the Special Advocate" (2008) PL at 717-741; International Civil Liberties Monitoring Group, "Submission of Information by the ICLMG to the Committee Against Torture (CAT) for the Examination of Canada's 6th Report in May 2012" (2012) Montreal, Canada (online: <http://www.justiceforhassandiab.org/wp-content/uploads/2012/12/allmandiclmg160412.pdf>); David Jenkins, "There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology" (2011) 42:2 Colum HRL Rev 279; Kent Roach, "When Secret Intelligence Becomes Evidence: Some Implications of Khadr and Charkaoui II" (2009) 47 Sup Ct L Rev 147.

² Similar provisions were *A and others v Secretary of State for the Home Department*, [2004] UKHL 56.

³ Bell, *supra* note 1; Colleen Bell, *The Freedom of Security: Governing Canada in the Age of Counter-Terrorism* in particular, chapter 2, "The Socio-Legal Paradox of Freedom: security certificates and the politics of exception" (UBC Press, 2011) 55; Irina Ceric, "The Sovereign Charter: Security, Territory and the Boundaries of Constitutional Rights" (2012) 44:1 Ottawa L Rev 1; Mike Larsen and Justin Piche, "Incarcerating the 'inadmissible': KIHIC as an Exceptional Moment in Canadian Federal Imprisonment" (2007) 45 YCISS 1; Kent roach, "The Law Working Itself Pure? The Canadian Experience with Exceptional Courts and Guantánamo" in Fionnuala Ni Aoláin & Oren Gross, eds, *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge University Press, 2013) 201.

⁴ These measures include admissibility hearings, refugee claim hearings, detention reviews, as well as a host of supplemental preventive and deterrent measures that include revocation of passports and the removal of the citizenship of so-called "foreign fighters" (when such fighters have dual citizenship). I will outline the similarities between these proceedings and certificates in Part IV of this paper. In the meantime, see: Jo Anne Colson, "Canadian refugee policy: The politics of the frame" (2013) Ph.D. Thesis, Trent University, Peterborough, pp. 132-

immigration and refugee law system, employing such practices as: enhanced surveillance and screening of migrants,⁵ arbitrary detentions, expedited removals, limitations on the procedural and substantive rights of asylum seekers, and greater information-sharing/institutional co-operation at the domestic and international levels.⁶ In combination with recent legislative reforms,⁷ these practices support a range of adjudicative and discretionary decision-making processes that operate outside of the context of certificates.⁸

We may instead adopt a constitutional definition of the exceptionality, which refers to measures and practices that do not (self-evidently) cohere with constitutional principles or autonomous legal values, such as the rule of law.⁹ The difficulty with this understanding of exceptionality is that reasonable people can disagree about what the law allows. In three recent cases -- *Charkaoui I*,¹⁰ *Charkaoui II*,¹¹ and *Harkat v. Canada*¹²-- the Supreme Court decided that the pernicious qualities of certificates are more or less manageable, so long as courts, parliament, and other legal actors are vigilant in operationalizing core constitutional principles. In *Charkaoui I* and *Charkaoui II*, the Court decided that elements of the certificate regime were unconstitutional, but could be saved if parliament addressed deficiencies in disclosure and adversarial challenge. In *Harkat v. Canada*, the Court reviewed parliament's response to the *Charkaoui* judgments, finding that the current regime passes constitutional muster. It also upheld the reasonableness of the certificate issued against Mr. Harkat, paving the way for his removal

140; Philippe Bourbeau, *The Securitization of Migration: A Study of Movement and Order* (New York: Routledge, 2011) at 20; Sharryn J. Aiken, "National Security and Canadian Immigration: Deconstructing the Discourse of Trade-Offs" in Francois Cr peau, eds, *Les Migrations Internationales Contemporaines: Une Dynamique Complexe au Coeur de la Globalization* (Presses de L'Universit  de Montr al, 2009) at 172-199; Sharryn J. Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy," (2002) *Revue Qu b coise de droit international* 14:1 at 19.

⁵ Deborah Waller Meyers, "Does "Smarter" Lead to Safer? An Assessment of the US Border Accords with Canada and Mexico" (2003) 41(4) *IM* 5; Richard Friman, "Migration and Security. Crime, Terror and the Politics of Order" in Ariane Chebel d'Appollonia & Simon Reich, eds, *Immigration, Integration and Security: America and Europe in Comparative Perspective* (Pittsburgh: University of Pittsburgh Press, 2008) 130-144.

⁶ Graham Hudson, "Transnational Human Rights Advocacy and the Judicial Review of Global Intelligence Agency Cooperation in Canada" in Craig Forcese & Fran ois Cr peau, eds., *Terrorism, Law and Democracy: Ten Years After 9/11* (Canadian Institute for the Administration of Justice, 2011); Canada-US Beyond the Border 2011; Government of Canada, Border Action Plan, Alexander Moens, "The Challenging Parameters of the Border Action Plan" in *Perimeter Security and the Beyond the Border Dialogue*, Special report, Border Policy Research Institute (Western Washington University, 2011) 15-21

⁷ *Protecting Canada's Immigration System Act*, SC 2012, C. 17; *Balanced Refugee Reform Act*, S.C. 2010, c. 8.

⁸ Examples include admissibility hearings, detention reviews, and decisions to deport in the context of persecution, torture, extra-judicial killings, and similar human rights abuses. I will provide a more detailed description of these various decision-making processes in Part IV of the paper.

⁹ Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005); David Dyzenhaus, "The State of Emergency in Legal Theory" in Victor V. Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-Terrorism Law and Policy* (Cambridge; New York: Cambridge University Press, 2005) 65; Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?" (2003) 112 *Yale LJ* 1011; John Ferejohn & Pasquale Pasquino, "The Law of Exception: A Typology of Emergency Powers" (2004) 2 *International Journal of Constitutional Law* 210; Colin McQuillan, "The Real State of Emergency: Agamben on Benjamin and Schmitt" (2011); Walter Benjamin, "On the Concept of History" [trans. H. Zohn] in H. Eiland & M. W. Jennings, eds, *Walter Benjamin: Selected Writings, Volume 4: 1938-1940* (Cambridge: Harvard University Press, 2003a).

¹⁰ *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350.

¹¹ *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326.

¹² *R v Harkat*, 2014 SCC 37, [2014] SCR.

from Canada.¹³ Mr. Harkat is the first of five alleged terrorists named in certificates since 9/11 to be subject to removal.

The immanence of Mr. Harkat's removal highlights a third, doctrinal definition of exceptionality. In the 2002 case of *Suresh v. Canada*, the Supreme Court ruled that Canada is generally prohibited from deporting persons to face the substantial risk of torture. Derogating from our international obligations, it went on to say that deportation to torture may be justified under "exceptional circumstances".¹⁴ The Court did not clarify what counts as an exceptional circumstance. Given that Mr. Harkat claims that he would be subject to torture or similar abuse if returned to Algeria,¹⁵ the precise ambit (and legality) of this zone of exceptionality is critical. Amidst revelations concerning Canada's complicity in torture as well as extensive normative developments,¹⁶ the Court may soon have occasion to revisit *Suresh*, much as it did with respect to extradition to face the death penalty.¹⁷

The purpose of this paper is to use constitutional discourses on the legality of security certificates to shed light on darker, neglected corners of the security/migration nexus, with special regard to deportation to torture. I will argue that the certificate trilogy and *Suresh* rest on the same, cardinal principle: decisions that expose asylum seekers to (the substantial risk of) serious human rights abuses must be constrained by enhanced procedural protections, such as disclosure, adversarial challenge, and judicial review. On the one hand, courts have internalized this principle in the context of certificates and functionally equivalent proceedings, which is to say they have imposed meaningful (albeit imperfect) constraints on the ability of the executive to *label* persons security risks. On the other hand, the ability of decision-makers to subsequently deport security risks to face torture or similar abuses remains effectively unconstrained -- so much so, it is doubtful that Canada has complied with *Suresh*. If the Supreme Court takes its own rationale in the certificate trilogy seriously, it must either revise its position in *Suresh*, or, encourage the extension of the procedures and practices used in the certificate regime to the entire security/migration nexus, including the removal process.

The paper is divided into four parts. First, I will review the shifting legislative and constitutional landscape within which certificates operate, highlighting core principles elucidated in *Charkaoui I* and *II*. This will include reference to recent legislative changes ushered in by Bill C-51 (hereafter the "*Anti-Terrorism Act, 2015*"). Second, I will use *Harkat* as a base for appraising how parliament and the Federal Court have attempted to operationalize the constitutional principles outlined in *Charkaoui I* and *II*. I will focus in particular on how the Supreme Court has placed the bulk of responsibility for guarding the rule of law on the shoulders of Federal Court judges. I will argue that its trust in the Federal Court's ability (and willingness) to discharge this role is the primary condition under which it tolerates legislative language and executive practices that continue to provide for the possibility of grave injustice and human rights abuses. Fourth, I will reflect on how the position of the Court in the certificate trilogy obligates it to take notice of non-compliance with *Suresh*. I will argue that certain procedural protections used in the certificate regime therein should be used to improve the quality and

¹³ *Harkat (Re)*, 2010 FC 1241, [2012] 3 FCR 251.

¹⁴ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at para. 78.

¹⁵ Sean Kilpatrick, "Mohamed Harkat says he'll need a casket if deported to Algeria", *The Canadian Press* (15 May 2014) online CTV News: <<http://www.ctvnews.ca>>

¹⁶ I will detail these factual and normative developments below.

¹⁷ *United States v Burns*, 2001 SC 7, [2001] 1 SCR 283.

fairness of decision-making about the deportation of security risks in contexts where there exists a substantial risk of torture and similar abuse.

I. The Constitution of Security Certificates

A. Legislative Framework

In existence since 1978, security certificates are a long-standing component of immigration and refugee law. Governed under Division 9 of the *Immigration and Refugee Protection Act* (IRPA),¹⁸ certificate proceedings begin when the Ministers of Public Safety Canada and Citizenship and Immigration Canada issue a certificate against a non-citizen who they allege is inadmissible to Canada on the grounds of security, violation of human or international rights, serious criminality and organized criminality.¹⁹ The bulk of evidence used to support this allegation is provided by the Canadian Security Intelligence Service (CSIS), although the Ministers may also rely on information provided by the Canadian Border Services Agency (CBSA), the Royal Canadian Mounted Police (RCMP), and Communications Security Establishment Canada (CSE). Evidence consists in human source intelligence (e.g. informants, espionage), signals intelligence (intercepted communications), foreign intelligence, and “open sources”. This information and intelligence is collected through domestic operations, as well as through formal and informal partnerships with foreign intelligence and law-enforcement agencies.²⁰

Once the Ministers believe they have reasonable grounds to suspect that a non-citizen poses a security risk, they will issue a certificate and a warrant for the arrest of the named person. A Federal Court judge (hereafter the “designated judge”) will review the reasons for the detention and the reasonableness of the certificate itself. The judge must order the continuation of the detention if the release of the named person would be injurious to national security, endanger the safety of any person, or enhance the risk of flight. Detention reviews occur within the first 48 hours after a detention begins and at six months intervals thereafter, (at least) until the reasonableness of the certificate has been determined.²¹

Until recently, the IRPA required the Ministers to provide the designated judge with all relevant information and other evidence upon which the certificate is based.²² As part of the suite of amendments introduced through the some-to-be-enacted *Anti-Terrorism Act, 2015*, the scope of this disclosure will be reduced to evidence that is “relevant to the ground of inadmissibility

¹⁸ *Immigration and Refugee Protection Act*, SC 2001

¹⁹ *Ibid* at s 77(1).

²⁰ For an overview of how security intelligence is gathered and shared, see: Graham Hudson, “Transnational Human Rights Advocacy and the Judicial Review of Global Intelligence Agency Cooperation in Canada” in Craig Forcese & François Crépeau, eds., *Terrorism, Law and Democracy: Ten Years After 9/11* (Canadian Institute for the Administration of Justice, 2011); Adam D. Svendsen, “Connecting Intelligence and Theory: Intelligence Liaison and International Relations” (2009) 24:5 *Intelligence and National Security* 700; Martin Rudner, “Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism” (2004) 17:2 *International Journal of Intelligence and Counterintelligence* 193; Glen M. Segell, “Intelligence Agency Relations Between the European Union and the U.S.” (2004) 17:1 *International Journal of Intelligence and Counterintelligence* 81; Stéphane Lefebvre, “The Difficulties and Dilemmas of International Intelligence Cooperation” (2003) 16:4 *International Journal of Intelligence and Counterintelligence* 527; D.S. Reveron, “Old Allies, New Friends: Intelligence-Sharing in the War on Terror” (2006) 50:3 *Orbis* 453; 2001) *The Journal of Conflict Studies* 7; Richard J. Aldrich, “Beyond the Vigilant State: Globalisation and Intelligence” (2009) 35 (4) 889-902.

²¹ *IRPA*, *supra* note 18 at s 82.

²² *Ibid* at s 77(2).

stated in the certificate”.²³ The Ministers must then prove, on a balance of probabilities, that they had reasonable grounds to issue the certificate. If the designated judge finds that a certificate is reasonable, the person is inadmissible and subject to removal from Canada. The designated judge is authorized to make decisions on the basis of evidence not disclosed to the named person.

Provisions in Division 9 of IRPA govern the general framework for proceedings. Section 83 specifies the procedures by which information is to be protected, directing designated judges to: proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit; to receive into evidence, and base a decision on, anything that s/he considered to be reliable and appropriate, even if it is inadmissible in a court of law; and to ensure the confidentiality of information and other evidence provided by the Minister if, in the judge’s opinion, its disclosure would be injurious to national security or endanger the safety of any person. At the initiative of the Ministers, the latter determination is made during the course of a closed hearing.

According to the IRPA, named persons are entitled to the disclosure of such evidence as is necessary to be “reasonably informed” of the case against him.²⁴ Disclosed evidence comes in the form of a Public Security Intelligence Report (PSIR), “source matrices”, and summaries of closed evidence prepared by the Minister.²⁵ Named person and his counsel are allowed to call and to cross-examine Minister’s witnesses who testify during open hearings. The *Immigration and Refugee Protection Act* (IRPA) directs designated judges to maintain the confidentiality of information the disclosure of which would adversely affect national security (including the integrity of national security operations, strategies and relationships) or the safety of individual persons e.g. intelligence officers and operatives, human sources. Closed hearings are attended at by the judge, Ministers, “special advocates” (SAs), and a court worker. Each of these parties has access to Secret Security Intelligence Reports (SSIR), which include the history, results, and progress of ongoing or stalled intelligence operations.

Due to the *ATA, 2015*, not all of this information will be filed with the Federal Court; only such information that is relevant to the ground of admissibility outlined in the certificate will be filed. Special Advocates may request the disclosure of information in the possession of the government but that has not been filed. This enables SAs to access exculpatory evidence, challenge the reliability of submitted evidence or the reasonableness of the government’s position, or identify whether evidence may have been derived from torture. The *ATA, 2015* allows the Ministers to challenge further disclosure on the grounds that requested information does not enable the named person to be reasonably informed of the case against him. This supposes, wrongly, that the right to be reasonably informed suffices to enable named persons to adequately defend themselves. As we will see when we review *Harkat*, the adequacy of the SA regime is a separate matter from the right of named persons to be reasonably informed- - both are necessary for a trial to be fair.

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²⁴ *IRPA*, *supra* note 14 at s 83.

²⁵ Since 2005, the Federal Court has required that source matrices include information that places intelligence in context, including: the origin and the length of the relationship between CSIS and a human source or foreign intelligence service; whether there are reasons to believe the information or intelligence was provided for self-gain; whether a human source has a prior criminal record or under investigation by a law-enforcement or security intelligence agency; the extent to which information or intelligence has been, or is, corroborated by other evidence or information; and, whether the information or intelligence was acquired through torture or grave human rights abuse; and the accuracy of any document that records or summarizes intercepted information; see *Harkat (Re)*, 2005 FC 393, [2006] 1 FCR D-5 at paras 94-96.

B. *Charkaoui I*

Prior to *Harkat*, the Supreme Court of Canada twice reviewed elements of the certificate regime for consistency with the *Charter*.²⁶ In *Charkaoui I*, it invalidated certain provisions in IRPA governing the protection of information. A primary issue was the constitutionality of the use of closed evidence. At the time, the impugned provisions required that such evidence be tendered during closed hearings attended at only by the designated judge and the Ministers – there were no SAs. The court found that the absence of counsel representing the interests of named persons during closed proceedings contravened the s. 7 *Charter* right to a fair trial. Importantly, this decision rested on its observation that certificates lead to three actual or potential substantive harms: protracted detention, deportation to torture, and harm to dignity.²⁷

The cardinal principle in *Charkaoui I* – and the certificate trilogy as a whole – is that proceedings that lead to (the risk) of serious deprivations of life, liberty, or security of the person requires enhanced procedural protections. It does not matter whether the proceedings are criminal or administrative in nature; what matters is the impact the decision has on the well-being of the affected person. While certificate proceedings are administrative in nature, the Court accordingly relied on criminal law principles to resolve the question of whether named persons were receiving a fair trial, which consists of three conditions. First, the named person must know and be able to respond to the Minister’s allegations. This requires that the named person receive a certain, unspecified amount of direct disclosure. Second, the designated judge must base her decision made on the basis of the facts and law. This condition could be satisfied by the presence of opposing counsel during secret trials (i.e. adversarial challenge), who may challenge the reliability and sufficiency of secret evidence as well as the strength of the Minister’s arguments. Third, the designated judge must be independent and impartial.²⁸

The Court ruled that the first two conditions were sorely lacking. The Court gave the government an opportunity to save the certificate regime by pointing to several alternative approaches to using secret evidence. Prior to the introduction of the IRPA, for example, the reasonableness of certificates was reviewed by the Security Intelligence Review Committee (SIRC) – an independent body tasked with the review of CSIS activities.²⁹ SIRC was assisted by security-cleared counsels who, among other things, advanced the interests of a complainant. While not an advocate *per se*, SIRC counsel had access to closed evidence and could cross-examine government witnesses during closed hearings. Similar approaches were used during the Arar Inquiry.³⁰ The Court also took notice of the fact that the United Kingdom has employed a SIRC-style SA model since 1997.³¹ Notwithstanding some notable weaknesses, including under-resourcing of SAs and statutory bars to communication between SAs and affected persons, this

²⁶ It upheld the constitutionality of pre-9/11 certificate legislation in *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711.

²⁷ *Charkaoui I*, *supra* note 10 at paras 12-18. The court did not use the term “dignity” directly. It stated that a “certificate may bring with it the accusation that one is a terrorist, which could cause irreparable harm to the individual”, adding later that this includes – and thus is not limited to-- deportation to torture. The Court was aware of the 2004 judgment of UK House of Lords that similar provisions in the UK were discriminatory within the meaning of Article 14 of the European Conventions on Fundamental Freedoms and Human Rights; *A and Others*, *supra* note 2.

²⁸ *Charkaoui I*, *supra* note 10 at paras 28-31

²⁹ Murray Rankin, “The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness” (1990) 3 CJALP 173.

³⁰ Hudson, *supra* note 6 at 33.

³¹ *Charkaoui I*, *supra* note 10 at paras 80-84.

system was certainly superior to the IRPA system then under review. The Court left it for parliament to decide how to bring the certificate regime into conformity with the *Charter*.

Parliament shortly thereafter amended the IRPA, empowering SAs to attend at closed hearings in order to a) challenge the Ministers' claims that certain information cannot be disclosed for reasons of national security or personal safety, and b) challenge the relevance, reliability and sufficiency of secret evidence. Section 85.2 of IRPA specifies that SAs may make oral and written communication with respect to classified information. SAs may also participate in, and cross-examine witnesses who testify during closed hearings.

Designated judges have been required to interpret and apply these provisions in consideration of *Charkaoui I*. Over time, a series of questions has recurred, including: may SAs access all information on file with the government that is relevant to a named person, or, can they only access evidence submitted by the Ministers? Under what circumstances might procedural fairness justify the disclosure of privileged material, such as the employment records of CSIS agents or the identities of confidential informants?³² May SAs cross-examine CSIS human sources –whose identities would normally be kept confidential-- in order to challenge the reliability of evidence? To what extent may SAs communicate with named persons, or other SAs, about a case after having seen classified material? To what extent are communications between SAs and named persons covered by solicitor-client privilege? Finally, do named persons have a right to direct disclosure, regardless of what is disclosed to SAs?

Foreseeing some of these issues, parliament provided designated judges with broad discretion over procedural matters relating to SAs. For instance, s. 85.6 authorizes the Chief Justices of the Federal Court of Appeal and the Federal Court, along with a committee of their choosing, to make rules governing the practices and procedures relating to SAs. Designated judges, of which there are typically between 8-10, receive training in handling secret evidence and presiding over secret trials, and regularly confer with one another about lessons learned and best practices. Section 85.2(c) directs designated judges to authorize “any other powers that are necessary to protect the interests of the permanent resident or foreign nationals”. Section 85.5 allows judges to waive prohibitions on communication between SAs and named persons. Finally, parliament provided named persons with a right of appeal to the Federal Court of Appeal for serious questions of general importance, excluding interlocutory decisions.³³ These legislative provisions and the institutional culture of the Federal Court have helped ensure consistent practice among designated judges.

C. *Charkaoui II*

Shortly following the 2008 amendment of IRPA, the Court turned its attention to the outer limits of the certificate regime: the assemblage of security intelligence practices that produce evidence used against named persons. In *Charkaoui II*, the Court again analogized the certificate regime with criminal proceedings, this time noting that functional distinctions between security intelligence and law-enforcement have blurred post-9/11, and, that certificate-based deportations can lead to arrest and prosecution abroad.³⁴ The Court decided that CSIS, and any other domestic institution providing the Ministers with security intelligence and other information, is subject to criminal law principles relating to the retention and disclosure of evidence. Operationally, this means that CSIS must retain and disclose to the Ministers all

³² *Harkat (Re)*, 2009 FC 203, [2009] 339 FTR 60

³³ *IRPA*, *supra* note 18 at s 82(3).

³⁴ *Charkaoui II*, *supra* note 11 at paras 26-28, 50-55.

information on file that is “relevant” to a named person, whether it is inculpatory or exculpatory. The Ministers, in turn, are responsible for ensuring that all of this information is disclosed to the designated judge and SAs. In consideration of the position of the Minister and SAs, the judge then determines what material may be disclosed to the named person and what material must remain classified.

Charkaoui II provided considerable guidance to designated judges with respect to questions of disclosure, but some old questions remained and new questions quickly emerged, including: what is the exact scope of CSIS’ obligation to disclose? Must it disclose all information that is minimally relevant or only information that is reasonably necessary in order for the SAs to test the accuracy of submitted evidence?³⁵ Does *Charkaoui II* disclosure include information that may be privileged, such as the identities of human sources? If CSIS’ confidential informants do enjoy privilege, under what conditions (if any) may it be lifted? If there is no privilege, or if it is lifted, should SAs also be able to cross-examine human sources? How might *Charkaoui II* affect the fairness of proceedings that were already underway, given that large volumes of information that should have been disclosed in principle were already destroyed in accordance with long-standing internal policy? Finally, courts still had not addressed whether named persons are entitled to receive a certain amount of direct disclosure. As adequate as the SA system may be, it does not completely satisfy the free-standing, s. 7 right of a named person to know and respond to the case against him.

D. Summary

In sum, Parliament’s intent that certificate proceedings be carried out “as informally and expeditiously as possible” has not been realized. To the contrary, they have proven to be exceedingly complex, time-consuming, and administratively burdensome. The internal operations of public and closed proceedings, and within which stream certain information appropriately belongs, have been subject to frequent interlocutory hearings, appeals, and *Charter* challenges. *Charter* challenges have in two instances yielded landmark Supreme Court rulings, but there remained a plethora of questions about how the Federal Court was to operationalize abstract principles. Parliament’s decision to allow the Federal Court and Federal Court of Appeal to produce rules, and to resolve questions, of procedure has facilitated as measure of consistency. Designated judges frequently confer, receive direction from the Chief Justice of the Federal Court (and of Appeal), and regularly cite each other’s decisions. Consistency is also supported by the availability of appeals on questions of law, both to the Federal Court of Appeal and the Supreme Court. Still, the usual operations and institutional capacities of the Federal Court have been strained by the need for judges to manage large volumes of factual information across public and closed hearings, while building and maintaining a body of jurisprudence in the context of a shifting constitutional and legislative landscape.

II. *Harkat v. Canada:*

Harkat v. Canada is the most recent Supreme Court of Canada case on the constitutionality of the certificate regime. The case was triggered by a 2010 finding by designated judge Noel J. that the certificate issued against Mr. Harkat was reasonable.³⁶ Facing removal, Mr. Harkat’s

³⁵ *Harkat*, *supra* note 27 at para 12.

³⁶ *Harkat*, *supra* note 12 at paras 107-109.

only chance of having the certificate against him quashed was to persuade the Supreme Court that the post-*Charkaoui I* legislative framework for certificates remained unconstitutional, or, that the proceedings against him were conducted in an unfair manner.

A. A Second Look at Certificate Legislation

The first set of issues concerned whether parliament fully incorporated the elements of a fair trial into Division 9 of the IRPA. There were host sub-issues at play here, including: a) whether named persons receive enough information to be reasonably informed of the case against them, b) whether Special Advocates possess the powers and resources necessary to discharge their roles, c) whether the *Charter* allows for hearsay to be used as evidence.

As noted, the Court in *Charkaoui I* stated that a fair trial consists in three distinct but interrelated elements: the right to know and to respond to the Minister's allegations, the right to have decisions made on the basis of the facts and law, and the right to have decisions made by an independent and impartial adjudicator. The Court found that a certificate proceeding will always be unfair if a) the named person is only provided access to general assertions (i.e. the right to know/respond to the case is violated), and b) if there is an absence of adversarial challenge (i.e. a decision is not [reliably] based on the facts and law). As we saw, the Court dealt with these issues by recommending the introduction of a SA system. But the Court did not squarely address the question of whether the s. 7 right of named persons to know and meet the case against them requires a certain degree of direct disclosure, regardless of what may be disclosed to a SA.

There are some analogs for determining the scope of direct disclosure. In a criminal trial, for example, an accused is entitled to receive any and all information in the possession of the Crown that is relevant to his/her defence and that is not subject to a limited class of privilege. The accused is always entitled to information that is submitted as evidence. Even here, there may be conflicts between disclosure and national security. These conflicts are governed by s. 38 of the *Canada Evidence Act* (CEA).³⁷ This provision authorizes judges to order the disclosure of sensitive information if the public interest in doing so outweighs the public interest in non-disclosure.³⁸ When this happens in the context of a criminal trial, the Crown may respond by withdrawing the contested information as evidence. This means that information that is not disclosed to an accused may not, under any circumstances, be submitted as evidence in a criminal trial. In the event that the non-disclosure of evidence unduly limits the capacity of the accused to make full answer and defence, a judge may provide certain remedies, including staying proceedings.

The Court has consistently found that this model is inappropriate for certificates.³⁹ This is because requiring that evidence either be disclosed to a named person or withdrawn undermines the entire purpose of the certificate regime. While the Court has been applying criminal law principles to certificate proceedings, it was reluctant to find that the use of secret evidence during administrative proceedings is *per se* unconstitutional. The real question was the extent of direct disclosure required or, put negatively, the extent of submitted evidence that may be constitutionally withheld from the named person. The Court decided that named persons are entitled to receive what it called an "incompressible minimum amount of disclosure"; in the

³⁷ *Canada Evidence Act*, RSC 1985, c C-5

³⁸ *Harkat*, *supra* note 12 at para 69.

³⁹ *Ibid* at para 50; *Charkaoui I*, *supra* note 10 at para 77.

absence of this minimum core, proceedings will be deemed unfair.⁴⁰ Designated judges were directed to determine whether there has been a sufficient degree of direct disclosure on a case-by-case basis. In the event that a judge directs disclosure of material the Minister resolutely wishes to keep classified, “the Minister must withdraw the information or evidence whose non-disclosure prevents the named person from being reasonably informed.”⁴¹ Incidentally, the *ATA, 2015* provides the Minister with the exclusive right to appeal decisions on disclosure – an act which suspends the disclosure order until the matter has been settled by the Federal Court of Appeal.

The Court then addressed the tendency of the government to over-claim national security confidentiality. This issue has been a subject of judicial concern, both within the context of security certificates⁴² and beyond.⁴³ It should be noted that over-claiming of confidentiality is often not driven by disregard for the *Charter*; it is more frequently a function of novel and complex relationships between government lawyers and members of the intelligence community, and an understandable concern on the part of the former to err on the side of over-claiming than divulging highly sensitive information. Nonetheless, the Court took occasion to direct designated judges to “be vigilant and skeptical with respect to the Minister’s claims of confidentiality.”⁴⁴ Recognizing the exceptional nature of security certificates and its place at the outer limits of constitutionality, it concluded by stating that over-claiming threatens the integrity of the certificate regime’s “fragile equilibrium”, and that “systematic over-claiming would infringe the named person’s right to a fair process or undermine the integrity of the judicial system, requiring a remedy under s. 24(1) of the *Charter*.”⁴⁵

With these issues out of the way, the Court turned its attention to the adequacy of the SA system. As noted, SAs are prohibited from communicating with named persons after accessing classified material. This provision impedes effective advocacy, as communication helps SAs: receive meaningful instruction and information from affected persons, use knowledge about personal history and relationships to challenge the reliability or sufficiency of circumstantial evidence, prepare the named person for (cross-examination), and more effectively cross-examine the Ministers’ witnesses.⁴⁶ In addition to improving legal representation, the freer, two-way flow of information between SAs and named persons (and their counsel) would concomitantly improve the ability of designated judges to decide on the basis of law and the facts.

⁴⁰ *Harkat*, *supra* note 12 at para 55; this aspect of the judgment was informed by the 2009 case of *Secretary of State for the Home Department v. A and Others*, decided by the European Court of Human Rights. The ECtHR decided that a trial would be unfair if disclosed material consists “purely” of general assertions, and where a decision is “based solely or to a decisive degree on closed material”. para 220; see also *Secretary of State for the Home Department v. A.F. (No. 3)*, [2009] UKHL 28, [2009] 3 All ER 643, at para 59; *Secretary of State v. M.B.*, [2007] UKHL 46 [“SSHD v. MB”]; *A. and Others v. the United Kingdom, Application 3455-05*, and ECHR Feb. 19, 2009; *Secretary of State for the Home Department v. AF and Others*, [2009] UKHL 28 [“SSHD v. AF”]

⁴¹ Just such a scenario occurred in *Charkaoui (Re)*, 2009 FC 1030, [2010] 4 FCR 448, when Trembley-Lamer J. ordered the disclosure of evidence notwithstanding the Minister’s ardent position that this would result in injury to national security. The Minister chose to withdraw the evidence, which resulted in the quashing of the certificate against Mr. Charkaoui.

⁴² *Almrei (Re)*, 2009 FC 1263, [2011] 1 FCR 163.

⁴³ *Canada (Attorney General) v. Almalki*, 2010 FC 1106, [2012] 2 FCR 508 at para 108; *Khadr v. Canada (Attorney General)*, (2008) FC 549, 329 FTR 80 at paras 73-77 and 98; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006) at 302.

⁴⁴ *Harkat*, *supra* note 12 at para 63.

⁴⁵ *Ibid* at para 64.

⁴⁶ Forcese & Waldman, *supra* note 1 at 35-38.

The constitutionality of the IRPA on this point was saved by s. 85.4(2), which authorizes designated judges to allow communication on a case-by-case basis. It turns out that designated judges have adopted the practice of authorizing communication “in most cases”.⁴⁷ The Court explicitly directed designated judges to continue this practice and, what is more, to “take a liberal approach” to communication requests, refusing authorization only “where the Minister has demonstrated, on a balance of probabilities, a real — as opposed to a speculative — risk of injurious disclosure”.⁴⁸ It also noted that SAs may receive an “unlimited amount of one-way communication” from named persons, the utility of which is enhanced by the provision of fulsome summaries and PSIR- a reality that will hopefully be safeguarded by the provision of a minimum core of disclosure.⁴⁹

A practical difficulty arises, though, as SAs may receive such permission only after submitting a formal request during interlocutory hearings attended at by the Ministers -- divulging prior communication and litigation strategies may obviously prejudice the named person and breach of solicitor-client privilege. In addition to being powerfully protected at common law and constitutional law,⁵⁰ solicitor-client privilege is expressly protected under s. 85.1(4) of the IRPA. The Court decided that this potential unfairness may be averted if designated judges employ safeguards, such as hearing the submissions of SAs in the absence of the Ministers.⁵¹

A final issue related to hearsay. This is an issue of general importance because evidence derived from security intelligence work often contains appreciable levels of hearsay. Hearsay is ordinarily inadmissible as evidence in large part due to questions of reliability.⁵² It will be recalled that the IRPA allows designated judges to receive into evidence anything they consider to be reliable and appropriate, even if inadmissible in a court of law.⁵³ The Court upheld the constitutionality of this provision on the grounds that the IRPA empowers designated judges to exclude evidence that s/he finds to be unreliable or that excessively prejudices a named person.⁵⁴ This allows judges to protect against unfairness while accommodating the realities of security intelligence work.

B. Were Proceedings Against Mr. Harkat Fair?

The next cluster of issues concerned whether proceedings against Mr. Harkat cohered with the principles outlined in *Charkaoui II*. This segment of the judgment dealt with the extents to which criminal law principles should govern certificate proceedings. For example, Mr. Harkat argued that his SAs should have the authority to cross-examine or at least learnt he identities of CSIS human sources. The government responded that these sources are protected by “informer

⁴⁷ *Harkat (Re)*, 2010 FC 1242, [2012] 3 FCR 432 at para 139.

⁴⁸ *Harkat*, *supra* note 12 at para 70.

⁴⁹ *Ibid* at para 71.

⁵⁰ *Smith v Jones*, [1999] 1 SCR 455; *R v Hebert*, [1990] 2 SCR 151; *R v Jones*, [1994] 2 SCR 229 at pp 246-55; *Re Shell Canada Ltd.*, [1975] FC 184, 22 CCC (2d) 70 (CA); *Solosky v The Queen*, [1980] 1 SCR 821.

⁵¹ *Harkat*, *supra* note 12 at para 72; *Almrei (Re)*, 2008 FC 1216 [2009] 3 FCR 497 at paras 60-61.

⁵² David M. Tanovich, “Starr Gazing: Looking into the Future of Hearsay in Canada” (2003) 28 Queen’s LJ 371.

⁵³ This allows for the admission of evidence if a judge is “satisfied that the information is reliable and appropriate”, even though” under traditional rules of evidence it would be inadmissible as hearsay”; *Jaballah (Re)*, 2010 FC 224, [2011] 3 FCR 155 paras 61-62.

⁵⁴ *Harkat*, *supra* note 12 at para 76.

privilege”, which is ordinarily used to withhold the identities of police informants. It is a cardinal rule in criminal law that the identities of police informants are privileged, meaning that they cannot be divulged to the defence or to the public.⁵⁵ This obviously means that informers cannot be cross-examined. The rationale for informer privilege is twofold: to protect the informer and, in so doing, to encourage others to come forward with important information.⁵⁶ The non-disclosure of information pertaining to informers runs counter to the principle of full disclosure. However, informer privilege has acquired constitutional status, such that the identity of the informer will be divulged if and only if it is necessary to demonstrate the innocence of the accused.⁵⁷

When *Harkat* was before the Federal Court, Noel J. held that CSIS human sources are protected by privilege. Consistently with the logic of *Charkaoui II*, Noel J. reasoned that such sources are functionally equivalent to police informers and that utmost secrecy is essential to effective intelligence work.⁵⁸ It is standard practice, for example, to “compartmentalize” information pertaining to the identities of human sources, such that only those who have a “need to know” such information in order to fulfill an operational requirement are provided with access.⁵⁹ The injury that would result from not maintaining the confidentiality of informer identities would result in the breakdown of short- and long-term relationships that are among the primary means through which CSIS acquires intelligence and other information.⁶⁰ Noel J. held that the only circumstance under which SAs would be granted access to such information would be to “prevent a flagrant breach of procedural justice which would bring the administration of justice into disrepute”.⁶¹

The question of privilege was practically important in the context of *Harkat* because of a series of revelations concerning ministerial malfeasance. Since 2005, the Federal Court has required the ministers to disclose to the court all relevant information regarding the credibility and reliability of human sources, including the source’s motivation, evaluation, payment and background.⁶² Following *Charkaoui II*, this information would of course also be disclosed to SAs. In 2009, the Ministers informed designated judge Noel J. that they did not disclose that a CSIS informant had failed a polygraph test in 2001.⁶³ What is more, a CSIS employee had reworded the original report in 2008 to conceal this fact; whereas the original, 2001 report indicated that the source in question was untruthful “on all relevant questions”, a second, “quality control” assessment of the test provided in 2008 indicated that the source was truthful on half of the relevant questions, and that the answers to the other half should have been found inconclusive. The official report disclosed to the Federal Court did not contain any account of this revision or the original results; the court only received the amended report. The employee in

⁵⁵ *R v Leipert*, [1997] 1 SCR 281.

⁵⁶ *Harkat (Re)*, 2009 FC 204, [2009] 4 FCR 370 at para 13.

⁵⁷ *R v Scott*, [1990] 3 SCR 979 at 995–996; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 SCR 253 at para 29; *Marks v. Beyfus*, (1890) 25 QBD 494 (CA) at 498.

⁵⁸ See also *Royal Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, First Report, *Security and Information* (Queen’s Printer, 1979) at 42.

⁵⁹ *Harkat*, *supra* note 56 at paras 25–31, 32–48; *R v Treu*, [1979] JQ No. 202 (QL); *Ribic v Canada (Attorney General)*, 2003 FCA 246, [2005] 1 FCR 33 at para 6, and by the Ontario Court of Appeal in *R v Ribic*, 2008 ONCA 790, 238 CCC (3d) 225; *Regulation of Investigatory Powers Act*, UK 2000, c 23, at para 29(5)(e); Part 4 of *Executive Order 12356* [3 CFR 66 (1982)] Sec. 4.1 General Restrictions on Access.

⁶⁰ *Harkat*, *supra* note 56 at paras 25–31.

⁶¹ *Ibid* at para 46.

⁶² *Harkat (Re)*, 2005 FC 393, 261 FTR 52, at paras 93, 94 and 98.

⁶³ *Harkat (Re)*, 2009 FC 553 at paras 1–3.

question did not make mention of this post-facto change when the designated judge asked whether there was “anything unusual in the file relating to the human sources”.⁶⁴

Noel J. considered this incident a “troubling” and “flagrant” violation of procedural justice that impugned the integrity of the court.⁶⁵ He lifted informer privilege, ordering the disclosure of information about the human source to the court and SAs, including information that might have revealed his/her identity.⁶⁶ He later ordered the disclosure of similar information on another human source.⁶⁷ Finally, he chose to rely on information provided by the human source in question only when corroborated by extrinsic evidence.⁶⁸ It was in context of this breach of justice that SAs representing Mr. Harkat requested that all information relating to the human source be excluded or, in the alternative, that they be authorized to cross-examine the source.

The Court reviewed Noel J.’s decision on these matters in *Harkat*. On the question of privilege, it decided that the functions of CSIS and police forces are sufficiently distinct as to preclude “automatically applying traditional police informer privilege to CSIS human sources”.⁶⁹ As noted by the Federal Court of Appeal both in *Harkat* and in *Canada (AG) v. Almalki*,⁷⁰ class privilege is a fairly rare and inflexible protection which does not easily fit the realities of security intelligence work. In contrast to that inhering between police and informers, relationships between CSIS employees and human sources tend to be comparatively fluid, complex, and informal. Due to the categorical, all-or-nothing nature of class privilege, and the unique institutional and social contexts of security intelligence work, the question of informer privilege would best be left to Parliament rather than to courts.⁷¹ Parliament has since amended the CSIS Act to prohibit the disclosure of the identities of CSIS human sources, or information from which identity may be inferred, in any legal proceeding, including certificate proceedings. However, a named person or SA may contest that the person concerned is a human source, or, that certain information may not safely be disclosed.

It remains to be seen whether this amendment will withstand *Charter* scrutiny. It is worth noting here that the Court in *Harkat* stated that disclosure of information pertaining to human sources would be only to persons with security-clearance and who are obligated to maintain the confidentiality of the information.⁷² On the one hand, this is not likely to inhibit the ability of CSIS to recruit new sources or to otherwise use traditional techniques for acquiring and processing information. On the other, it helps SAs and judges assess the reliability of evidence, most especially in light of above-noted instances of misdirection. The rights of named persons may be dependent on the disclosure of human source files and related information to SAs. It should also be noted that designated judges take into account the fact that information from human sources is hearsay when weighing the evidence.⁷³

There remained two outstanding issues: a) whether the destruction of important source materials – including recordings of intercepted communications used to link Mr. Harkat with

⁶⁴ *Harkat (Re)*, 2009 FC 1050 at para 27.

⁶⁵ *Harkat*, *supra* note 63 at para 16; *Harkat*, *supra* note 64 at paras 62-68.

⁶⁶ *Harkat*, *supra* note 63.

⁶⁷ *Harkat*, *supra* note 64 at para 69.

⁶⁸ *Harkat*, *supra* note 13 at fn 1.

⁶⁹ *Harkat*, *supra* note 12 at para 85.

⁷⁰ *Canada (Attorney General) v. Almalki*, 2011 FCA 199, [2012] 2 FCR 594 at paras 29-30.

⁷¹ *R v Harkat*, 2012 FCA 122 at paras 92-100; *Almalki*, *supra* note 70 at paras 20-26, 30.

⁷² *Harkat*, *supra* note 12 at para 83.

⁷³ *Ibid* para 90.

known terrorists-- rendered the proceedings against Mr. Harkat unfair, and b) whether the Ministers failed to discharge their duties of candour and utmost good faith in failing to secure recent foreign intelligence relevant to Mr. Harkat's defence.

Pursuant to precedent established in the context of criminal law, the Ministers have a duty to retain evidence relevant to the defence of the named person and to explain the loss or destruction of such evidence; the failure to do so results in a *Charter* breach.⁷⁴ Given the law established in *Charkaoui II*, the destruction of source files by CSIS constituted "unacceptable negligence" amounting to a breach of the Ministers' disclosure obligations. Since this breach prejudiced Mr. Harkat's ability to make full answer and defence, it amounted to a violation of his s. 7 right to procedural fairness.⁷⁵ This breach does not, however, entail the right to a remedy – not even in the criminal law context. The provision of a remedy is a question to be determined on a case-by-case basis. Courts will here consider the nature and extent of the prejudice suffered,⁷⁶ "the context of the rest of the evidence and the position taken by the defence".⁷⁷

Mr. Harkat sought one of two remedies: a stay of proceedings, or, an order excluding the summaries of the information contained in the destroyed files. The former remedy was refused. The request for the latter remedy received differing responses from the Federal Court, the Federal Court of Appeal, and the Supreme Court. In principle, the exclusion of evidence addresses any prejudice to the claimant to the extent necessary to preserve the integrity of the justice system. Since evidence may help courts perform their "truth-seeking" function despite producing prejudicial effects, alternatives to exclusion are to be preferred.⁷⁸ The Federal Court refused to exclude the evidence on the grounds that summaries of the original operational notes and recordings were reliable, and hence the prejudice was minimal while the probative value was high. The Federal Court of Appeal excluded the summaries, noting that the reliability of the summaries could not be adequately tested and that the extent of the prejudice against Mr. Harkat was therefore unknown.⁷⁹

The Supreme Court sided with the Federal Court on this issue. Not fully addressing the concerns of the Federal Court of Appeal, it declared the summaries to be reliable. It also noted admission of the summaries would not adversely affect the integrity of the justice system, as the destruction of the originals occurred prior to *Charkaoui II*, pursuant to policies that had not yet been declared unconstitutional. The destruction of the originals was, in other words, inadvertent and understandable given the uncertainty of the law at the time.

One wonders how the Court knew that the summaries were reliable without comparing them with the originals. Presumably, the designated judge was able to corroborate the summaries by reference to closed material, but questions of Ministerial compliance with its disclosure obligations, both prior to and following *Charkaoui II*, raise serious doubts about the effectiveness of this method. It is likely that the courts placed great weight on the good faith of CSIS employees to, *inter alia*, accurately transcribe intercepted communications. The designated judge would have carefully assessed the trustworthiness of relevant employees responsible for the summaries when they were (cross-)examined during closed hearings.

⁷⁴ *R v La*, [1997] 2 SCR 680 at paras 18-20.

⁷⁵ *Harkat*, *supra* note 12 at para 93.

⁷⁶ *Charkaoui II*, *supra* note 11 at para 46.

⁷⁷ *R v J.G.B.*, [2001] 139 OAC 341 at para 38.

⁷⁸ *R v Bjelland*, 2009 SCC 38, [2009] 2 SCR 651, at para 3.

⁷⁹ *Harkat*, *supra* note 71 at para. 83.

Courts have adopted similarly deferential stances towards the Ministers and CSIS employees in other certificate cases. In the case of Hassan Almrei, for example, Mosely J. found that the destruction of primary source material (in this case, electronic surveillance) did not prejudice Mr. Almrei, as public summaries kept him reasonably informed.⁸⁰ It bears mentioning, though, that signals intelligence did not form a prominent part of the Ministers' case against Mr. Almrei.⁸¹ It also bears mentioning that Mosley J. admonished the Ministers for a breach of candor for failing to include in their SIR information that weakened or contradicted their case. To make matters worse, they seem to have all but halted their investigation of Mr. Almrei after 2001, in the belief that they did not need to consider it necessary to routinely update their knowledge of Mr. Almrei and the risk he posed to Canada. These failings were so severe that it resulted in a finding that the certificate against Mr. Almrei was unreasonable.⁸²

This brings us to the last issue. Mr. Harkat argued that the Ministers failed to secure from foreign intelligence agencies relevant information regarding the terrorists with whom he allegedly associated. This information could have been used to identify weaknesses in the summaries and closed evidence, as well as provide a more up-to-date picture of the threat environment, Islamic extremism and the Bin Laden Network. All of this could have had a bearing on the reasonableness of the certificate, at least by providing a fuller picture of whether Mr. Harkat currently poses a threat to the security of Canada. Unsurprisingly, the foreign intelligence agencies concerned refused the formal requests of the Ministers.⁸³ The Court did not find a breach of candor and good faith because, unlike in *Almrei*, the Ministers made a reasonable effort to acquire this information and, what is more, they have “no general obligation to provide disclosure of evidence or information that is beyond their control”.⁸⁴

C. Summary

In sum, *Harkat* seems to have resulted in the constitutionalization of the certificate regime. The legislative framework, including new provisions governing SAs, has survived a “second look”,⁸⁵ and the evolving practices of the Federal Court have largely aligned with the principles elucidated in *Charkaoui I* and *II*. While the IRPA provides for the possibility of an unfair process, this alone does not render it unconstitutional -- what matters is the manner in which it is interpreted and applied. The Court directed designated (and appellate) judges to tend to the constitutionality of certificate proceedings on a case-by-case basis, using *Charter* principles, the language of the IRPA, and the evolving practices of the Federal Court. Also at issue -- although far less prominently-- were the extents to which the Ministers and CSIS have complied with their statutory and constitutional obligations. Importantly, the Court did not seriously review executive practices or policies, focusing instead on the performance of legal institutions. Its concern was primarily with encouraging and facilitating the comprehensive and coherent application of internal norms by designated judges in order to better constrain the actuality of executive decision-making.

⁸⁰ *Almrei*, *supra* note 42 at para. 491.

⁸¹ *Ibid* at para. 491.

⁸² *Ibid* at paras. 504-509.

⁸³ For a copy of the letters of request sent, see: *Harkat (Re)*, 2010 FC 1243, Annex “A”, at paras 6-7.

⁸⁴ *Harkat*, *supra* note 12 at para 103.

⁸⁵ – Kent Roach, “Sharpening the Dialogue Debate: The Next Decade of Scholarship” (2007) 45:1 Osgoode Hall LJ 169; Peter W. Hogg, Allison A. Bushell Thornton, & Wade K. Wright, “Charter Dialogue Revisited: Or ‘Much Ado About Metaphors’” (2007) 45:1 Osgoode Hall LJ 1.

Designated judges have accordingly faced a steep learning curve. Amidst a shifting constitutional and legislative landscape, they seem to have produced a fairly consistent body of law concerning the interpretation and application of the IRPA as well as the extents to which criminal law principles apply to certificate proceedings. The evolving practices of the Federal Court have remained subject to appeal and, in some instances, have been transformed into binding law through the Supreme Court's judgments in *Charkaoui I*, *Charkaoui II* and *Harkat*. In fact, the Court's judgments in these cases have served both as a framework for the production of new practices (such as with disclosure following *Charkaoui II*), and a means of clarifying and refining resultant jurisprudence.

IV. Truly Exceptional? *Harkat*, *Suresh* and Deportation to Torture

The constitutionalization of certificates sits uneasily alongside their supposed status as “exceptional” measures. A highly contested concept, exceptionality may be loosely defined as a state in which a sovereign asserts power that transcends the rule of law. Exceptional measures are on this reading those that cannot be justified by reference to constitutional principles or autonomous legal values, including the rule of law. Power is justified politically by reference to a real or fictitious emergency that threatens the existence of a political community.⁸⁶ But it may also be justified by means of invalid, unsound, or insincere interpretations of pre-existing legal norms.⁸⁷ In this latter instance, the executive (and possibly the legislative and executive branch) uses the form of law to rationalize injustice, while the substance of law remains absent.⁸⁸

We should be quite ambivalent about the way the Supreme Court has reviewed the constitutionality of the certificate regime. On the one hand, *Charkaoui I* and *II* have resulted in meaningful improvements to procedural rights, including the provision of SAs and enhanced disclosure. In *Harkat*, the Court improved the capacity of SAs to represent named persons by directing designated judges to be liberal in the granting of communication requests, to safeguard solicitor-client privilege, to ensure the provision of a minimum core of disclosure, and to be vigilant against over-claiming of national security confidentiality. Coupled with enhanced disclosure pursuant to *Charkaoui II*, these changes have been meaningful. The permissibility of communication between SAs and named persons, for example, has helped SAs directly refute the veracity of the Minister's allegations and supporting evidence, rather than to simply challenge what inferences may be reasonably drawn from the evidentiary record;⁸⁹ the accuracy or correctness of evidence is as important as -- if not more so-- whether conclusions drawn from the evidence are reasonable. Vigilance against over-claiming of confidentiality has also had powerful impacts, as evidenced by the quashing of the certificate against Messrs. Charkaoui⁹⁰ and Almrei.⁹¹

⁸⁶ Gross, *supra* note 9; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* [trans. G. Schwab] (Chicago: University of Chicago Press, 1985) pp 5-6.

⁸⁷ Benjamin, *supra* note 9; Agamben, *supra* note 9.

⁸⁸ Dyzenhaus, *supra* note 9 at 72; Agamben, *supra* note 9 at chapter 2 “Force of Law without Law”

⁸⁹ For an example where SA system is better here than UK see: Amnesty International, *Left in the Dark: The use of Secret Evidence in the United Kingdom* (London UK: Amnesty International Publications, 2012), online: <http://www.refworld.org/pdfid/50bdbb6b2.pdf> at p. 11

⁹⁰ *Charkaoui (re)*, *supra* note 41.

⁹¹ *Almrei*, *supra* note 42.

On the other hand, there remain outstanding procedural issues. SAs remain at a disadvantage, lacking the same levels of professional and administrative support available to government lawyers. Whereas the latter may confer with each other on cases and legal strategies, the former work alone, balancing their roles as SA with private practice. Prohibitions on communication between SAs and named persons can adversely affect legal representation when one's legal strategy depends on the content of classified material – a problem again not faced by government lawyers.

Less discussed are a host of outstanding substantive issues, including the protracted detentions, harm to dignity, and the risk of deportation to torture. In *Charkaoui I*, the Court provided a short, doctrinally flat decision on the question of discrimination,⁹² but provided some guidance on the length of time for which named persons may be detained.⁹³ Following *Harkat*, and the beginning phases of his removal, the question of deportation to torture is the elephant in the room. *Suresh* ostensibly settled this issue in 2002, when the Court held that it is “generally” unconstitutional to deport someone to face the substantial risk of torture. However, it also decided that deportation to torture would be permitted under “exceptional circumstances”.⁹⁴ This is to say that there is a presumption against deportation to torture, which the government may rebut if it demonstrates evidence of a “serious threat to national security”. The Court specified that:

A person constitutes a “danger to the security of Canada” if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be “serious”, in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.⁹⁵

The Court was clear that determinations of risk are fact-based, political, and entitled to deference: if “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.”⁹⁶ Decisions concerning the risk a person poses as well as whether the person may be safely removed from Canada are findings of fact reviewable on a standard of patent unreasonableness. The Court did not clarify what counts as an “exceptional circumstance”, stating only that “the ambit of an exceptional discretion to deport to torture, if any, must await future cases”.⁹⁷

I do not want to tread too heavily into thorny, theoretical debates about the exceptionality of certificates or deportation to torture. Instead, I would like to take a moment and reflect on the relationship between *Harkat* and *Suresh*, both in terms of what we may expect regarding the possible removal of Mr. Harkat and, more generally, the intersection of procedural and substantive justice in the context of security-based deportation proceedings.

A. Beyond Certificates: The (non-)Impact of Constitutional Principles on Adjudicative and Discretionary Decision-Making

⁹² *Charkaoui I*, supra note 10 at paras 129-132.

⁹³ The Court held that lengthy “extended periods of detention under the certificate provisions of the IRPA do not violate ss. 7 and 12 of the *Charter* if accompanied by a process that provides regular opportunities for review of detention, taking into account all relevant factors”, including the anticipated length of detention” (*Ibid* at para 110).

⁹⁴ *Suresh*, supra note 14 at para 78.

⁹⁵ *Ibid* at para 90.

⁹⁶ *Ibid* at para 85.

⁹⁷ *Ibid* at para 78.

One of the principles elucidated with equal force in *Suresh* and the certificate trilogy -- as well as the foundational case of *Singh v Canada (Minister of Employment and Immigration)*⁹⁸ -- is that the greater the risk of substantive injustice associated with a decision, the greater should be the procedural protections to which affected persons are entitled. More than this, there should be a reliable system for ensuring that authoritative decision-makers interpret and apply enabling statutory provisions and regulations in a manner that consists with constitutional principles. According to the Supreme Court in the certificate trilogy, this vigilance is the condition under which it will tolerate provisions and practices that provide for the possibility of grave injustice. The “administrative” nature of a decision does not justify inadequate procedural protections before removing of persons to face human rights abuses abroad.

The certificate trilogy illustrates that the actualization of this principle depends on deep institutional commitment and broad-based internalization of constitutional norms by relevant actors. Unfortunately, those who make decisions about deportation to torture lack this commitment and supporting institutional architecture. Consider the process by which security risks are removed from Canada when there is a question of torture or similar abuse. The first stage in this process involves a finding of inadmissibility, which can occur in various ways. It may occur once a certificate has been found to be reasonable. Far more often, it occurs following an admissibility hearing, a refugee claim hearing, or a finding of inadmissibility by a Minister’s Delegate (MD) in the absence of an oral hearing altogether.⁹⁹ The Minister is always represented in admissibility hearings, and may intervene in refugee claim hearings for reasons that include national security. When there is an issue of, *inter alia*, national security, s. 86 of the IRPA states that:

The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, apply for the non-disclosure of information or other evidence. Sections 83 and 85.1 to 85.5 apply to the proceeding with any necessary modifications, including that a reference to “judge” be read as a reference to the applicable Division of the Board.

This provision ensures that ordinary proceedings presided over by an IRB member are conducted expeditiously, informally, and with precisely the same legislative rules regarding the admissibility of evidence and the non-disclosure of classified material as used in certificate cases. They become, in other words, functional equivalents to certificate proceedings.

Once an applicant has been deemed to be inadmissible, they are subject to the second stage of removal. In most cases, an immigration official (IO) will conduct a Pre-Removal Risk Assessment (PRRA) and determine whether an applicant is at risk of persecution, torture or similar abuse.¹⁰⁰ IOs will look at both the general human rights record of their country of origin and whether the claimant faces a particularized, personal risk. If the IO determines that there is a risk of persecution or torture, the third step involves the filing of a threat assessment by an analyst in the National Security Division of the Intelligence Directorate, Canada Border Services Agency. These two reports are then sent to a MD, while a (redacted) copy is sent to the applicant. If the MD agrees with the report, s/he will balance the danger the applicant poses to Canadian security with the risk of torture s/he faces if deported. In situations where there is a substantial risk of torture, the MD will issue a “danger opinion” pursuant to s. 115(2) of the

⁹⁸ [1985] 1 S.C.R. 177

⁹⁹ *IRPA*, *supra* note 18 at ss 44-45, 107, 107(1).

¹⁰⁰ *Ibid* at ss. 112-114.

IRPA, thereby invoking the *Suresh* exception. There is no right to an oral hearing concerning the issuance of a danger opinion, but affected persons are entitled to receive and submit written challenges against the information upon which the decision is made (excluding that protected by national security confidentiality). S/he is also entitled to the reasons for the decision.¹⁰¹

We may usefully distinguish this process into two types. The first would be adjudicative in nature, and would include certificate proceedings, admissibility hearings, detention reviews, and judicial reviews. Notice that these hearings relate to the *labeling* of persons as security threats, are presided over by independent and impartial adjudicators, and are both adversarial and oral. The second would be discretionary, in which the Minister or her delegate makes a decision independently of an oral, adversarial hearing. Discretionary decisions relate to a range of subject matter, but for our purposes it is important to note that they are decisions to *remove* persons who have been successfully labeled as security threats. This means that final decisions about whether there is a substantial risk of torture or similar abuse is a discretionary decision – albeit one that is notionally (though in many cases, not practically) subject to judicial review. It turns out that the principles of the certificate trilogy seem to have had positive impacts on adjudicative decisions to label someone a security threat, while *Suresh* has had little to no impact on subsequent discretionary decisions to remove such persons in the context of torture or similar abuse.

Section 86, for instance, ensures that proceedings before the IRB are subject to relevant provisions of Division 9 of the IRPA, even if the hearing is not, strictly speaking, a certificate proceeding. As part of this process, IRB adjudicators are authorized (and obligated) to appoint a SA.¹⁰² Importantly, IRB members who preside over such hearings receive comprehensive training in secret evidence and national security law, while all secret hearings before the IRB involve a SA. Similarly, s. 87.1 of the IRPA authorizes Federal Court judges to appoint SAs during judicial reviews that include secret evidence. This may occur during reviews of IRB decisions, or, Ministerial decisions that rested in part on sensitive information. Presumably, SAs are appointed when secret evidence forms an important component of the decision under review. Yet, there have been some cases where the Federal Court has refused to appoint a SA. In the 2007 case of *Segasayo v. Canada*, for instance, Blais J. held that the provision of SAs during the review of a Ministerial decision to deny an exemption was inappropriate.¹⁰³ He reasoned, first, that “only those subject to a security certificate face detention while awaiting a decision on their inadmissibility”.¹⁰⁴ Second, the extent of closed evidence in the case was much smaller than a certificate hearing.¹⁰⁵ Finally, whereas the Court in *Charkaoui I* was concerned about deportation to torture, those not named in certificates are less likely to face that risk because they may still claim protection, either as a refugee or a person in need of protection.¹⁰⁶ Similarly, the

¹⁰¹ *Suresh*, *supra* note 14.

¹⁰² Parliament elected to provide for the appointment of SAs before IRB members, even though the constitutionality of reliance on closed material during admissibility hearings was upheld in the 2003 case of *Sogi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1429, [2004] 2 FCR 427.

¹⁰³ *Segasayo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 372, [2008] 1 FCR 121 at paras 28-29.

¹⁰⁴ *Ibid* at para 28.

¹⁰⁵ *Ibid* at para 29.

¹⁰⁶ Blais J. stated that, unlike a security certificate, “even deportation is not a certainty in this case, since the applicant has been recognized as a Convention refugee, and is thus subject to section 115 of the Act”; *Ibid* at para 28.

Federal Court refused to appoint a SA in *Kanyamibwa v Canada*¹⁰⁷, noting that the claimant in this case was not at risk of torture or similar human rights abuses.

I would cautiously say that the certificate trilogy has influenced adjudicative proceedings outside the context of certificates *per se*. There may well be a process of acculturation within the IRB that mirrors that which has occurred within the Federal Court. However, the rationale of the Federal Court in refusing to appoint a SA during judicial reviews highlight some persistent and dangerous assumptions about the substantive injustices faced by persons deemed inadmissible on security grounds – even if the decision was right on the facts of a particular case. First, it is untrue that only persons named in certificates are detained pending determinations of admissibility. In point of fact, the CBSA regularly detains asylum seekers alongside those whose refugee claims have been rejected.¹⁰⁸ Problems with record keeping have prevented the isolation of the precise number of asylum seekers who have been detained (as well as for how long and on what grounds), as the CBSA classifies asylum seekers and persons whose claims have been rejected under the same category.¹⁰⁹ Nonetheless, Canada has been subject of a number of international criticisms for increasing its detention of asylum seekers, as well as for using provincial or municipal prisons for this purpose¹¹⁰ What is most relevant for our purposes is that detention inhibits the capacity of asylum seekers to make successful claims for protection, owing to such factors as lack of access to counsel, family abroad, the internet, supporting information, and important documents.¹¹¹

New measures allow for the automatic and mandatory 12 month detention of groups of persons whom the Minister deems to be “irregular arrivals” – a category intended to apply to groups of persons believed to have arrived through human smuggling/trafficking routes and who cannot be examined or investigated in a timely manner.¹¹² Section 55 of the IRPA authorizes the detention of non-citizens whom an officer has reasonable grounds to believe is inadmissible and a danger to the public or a flight risk. Foreign nationals may be arrested and detained without warrant, while permanent residents may simply be detained without a warrant. Detentions are reviewed regularly,¹¹³ although as noted the continuation of detention may be ordered on the basis of closed material. What is more, continued detentions must be allowed if the CBSA is still conducting an investigation, even if the grounds of the investigation do not relate to the initial reasons for the detention.¹¹⁴ This provision has been used more frequently in recent years, specifically in relation to irregular migrants arriving by boat.¹¹⁵ Finally, the government has prolonged detentions by vigorously challenging decisions to release affected persons. The detention continues until the challenge is finally resolved, resulting in prolonged, if not indefinite, detention.¹¹⁶

¹⁰⁷ *Kanyamibwa v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 66 at paras 50-56; see also, *Rajadurai v Canada (Citizenship and Immigration)*, 2009 FC 119, [2009] 3 FCR D-4.

¹⁰⁸ Delphine Nakache, “The Human and Financial Cost of Detention of Asylum-Seekers in Canada” (2011) UNHCR, online: http://www.unhcr.ca/resources/documents/RPT-2011-12-detention_assylum_seekers-e.pdf at 35-36.

¹⁰⁹ The CBSA classifies both categories as “refugees” or “refugee claimants; *Ibid* at 35-36.

¹¹⁰ *Ibid* at 24.

¹¹¹ *Ibid* at 55.

¹¹² See *IRPA*, *supra* note 18 ss. 20.1, 55(3.1).

¹¹³ The Immigration Division reviews detentions within the first 48 hours and 7 days, and then again every 30 days; see *IRPA*, *supra* note 18 s 57.

¹¹⁴ *Ibid* at s 58(1)(c).

¹¹⁵ Nakache, *supra* note 108 at 58.

¹¹⁶ *Canada (Minister of Citizenship and Immigration) v. B386*, 2011 FC 175 at para 11.

The Federal Court may have also underestimated the extent to which national security and other priorities related to risk management have affected the examination and investigation of irregular migrants. Two agencies are involved here: CSIS and the Canadian Border Services Agency (CBSA). CSIS is, of course, the primary source of intelligence in certificate cases, but it may also investigate any applicant who poses a threat to national security.¹¹⁷ In fact, most files are handled by the CBSA, which has grown considerably in size and sophistication since it was established in 2003. The CBSA is authorized to examine and investigate all applicants who may be inadmissible on, among other things, security grounds. In these cases, CBSA officers rely on the Security Intelligence Section (SIS) of the Intelligence Operations and Analysis Division of the CBSA for intelligence and other information.¹¹⁸ Officers also receive assistance from the National Security Screening Division (NSSD) of the International Operations Directorate of the CBSA, if foreign intelligence or information is needed.¹¹⁹ The SIS and NSSD conduct independent security intelligence and information gathering, risk assessments and investigations,¹²⁰ using human sources (including confidential informants),¹²¹ signals intelligence¹²² and foreign intelligence. The CBSA is also legislatively authorized to participate in bilateral correspondences and information-sharing with agencies operating within an applicants' country of origin.¹²³

In recent years, the CBSA has increasingly focused on the intersection of criminality and (irregular) migration, employing technologies and practices similar to those used by police services.¹²⁴ It has a Criminal Investigations Division and partners with domestic and foreign police services through "Joint Force Operations".¹²⁵ The CBSA thus engages in both security intelligence and law-enforcement activities, but in this case, both functions are housed within the same agency. This mirrors the blurring of the roles and responsibilities of CSIS and the RCMP, and is reminiscent of pre-CSIS years when security intelligence was collected by the RCMP. It

¹¹⁷ This is part of its statutory mandate to "provide security assessments to departments of the Government of Canada" and to "conduct such investigations as are required for the purpose of providing security assessments"; *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, ss 13, 15; Government of Canada, *ENF 2/OP 18 Evaluating Inadmissibility* (Citizenship and immigration Canada, 2013) online:

<http://www.cic.gc.ca/english/resources/manuals/enf/enf02-eng.pdf> at 46-50

¹¹⁸ *Ibid* at 19.

¹¹⁹ *Ibid* at 15.

¹²⁰ Arar Report, *supra* note 43; Report of the Auditor General of Canada, *Chapter 5 – Keeping the Border Open and Secure – Canada Border Services Agency* (Ottawa: Office of the Auditor General of Canada, 2007) online:

http://www.oag-bvg.gc.ca/internet/English/parl_oag_200710_05_e_23829.html

¹²¹ Jim Bronskill, "Canada's Border Agency Enlisting Informants, Prompts Internal Review" *The Canadian Press* (16 January 2014), online: <<http://www.questia.com/newspaper/1P3-3184759001/canada-s-border-agency-enlisting-informants-prompts>>; Jim Bronskill, "Canada's Border Agency Enlisting Informants, Prompts Internal Review" *The Canadian Press* (15 January 2014), online: <<http://www.thestar.com>>

¹²² Canada Border Services Agency, *Policy on the Overt Use of Audio-Video Monitoring and Recording Technology* (Programs Branch) (August 2011) online: <http://www.documentcloud.org/documents/372080-cbsa-policy-on-overt-use-of-av-aug2011.html>

¹²³ *Canada Border Services Agency Act*, SC 2005, c 38, s 13; see also Jonathan Woodward, "Canada Deported Man to Torture in Sri Lanka: Affidavit" CTV News Vancouver (8 October 2013) online: CTV News Vancouver <<http://bc.ctvnews.ca/canada-deported-man-to-torture-in-sri-lanka-affidavit-1.1489741>>

¹²⁴ CBSA Enforcement Manual Part 1, *Chapter 1 – Introduction to CBSA Enforcement*, (30 April 2009) online: <http://vancouverlaw.ca/resources/Customs-Enforcement-Manual-1-of-3.pdf> at 2-6.

¹²⁵ Canada Border Services Agency, *CBSA Participation in Joint Force Operations* (Final Report) (9 February 2013) online: <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2012/jfo-opc-eng.html>

should be recalled that the rights impacts associated with this blurring motivated the Supreme Court to impose upon CSIS standards of disclosure normally applicable to police agencies in *Charkaoui II*. It should also be noted that a foundational principle of national security since the MacDonald Commission is that security intelligence and policing be kept separate.¹²⁶ Importantly, the CBSA is not yet subject to independent review, nor has there been significant *Charter* review of its activities.¹²⁷

Thus, “ordinary” proceedings and certificate proceedings rest on the same substratum of executive practices regarding detention and intelligence-gathering and –sharing. As in the certificate context, these practices can lead to arrest, detention, prosecution, and possibly grave human rights abuse following removal. Following the arrival of the MV Sun Sea, for example, Canada removed Sathyapavan "Sathi" Aseervatham on the basis of past criminality and his involvement in organizing the Sun Sea’s voyage. There are reports that Sathi was immediately detained by Sri Lankan authorities upon his arrival and subsequently tortured.¹²⁸ Given that refugee determination hearings are private, it is unclear how Sri Lankan authorities knew of the timing of his arrival or why they suspected him of being linked to terrorist organizations. It has been suggested that the CBSA shared identity documents with Sri Lankan authorities, possibly in order to complete its investigations.¹²⁹ Although it clearly puts asylum seekers at risk, the Federal Court has on several occasions allowed the practice.¹³⁰

This brings us to common presumptions about the nature and frequency of deportations to torture or similar abuse. Blais J. asserted that those named in certificates are more likely than others to face this risk. It turns out this is not true: persons named in certificates have in fact been comparatively less likely to face this risk. In *Mahjoub v. Canada*,¹³¹ Dawson J. held that a danger opinion issued against Mr. Mahjoub was unreasonable, on the grounds that there was an inadequate factual foundation for the assertion that he posed a danger to the security of Canada. The MD in question relied only on the narratives contained in the Minister’s SIR, and the fact that the certificate issued against Mr. Mahjoub had been found to be reasonable in 2001. She was not, however, provided with confidential reference appendices that would have placed the narrative in fuller context and provided more up-to-date information regarding the danger Mr. Mahjoub posed to Canada after having been publically labeled a terrorist and detained for years. The court noted that, while one’s past activities may render them inadmissible:

“the effect of the passage of time, and the effect of the person's apprehension and detention, should be considered so that ... their future behaviour may be assessed. It may be, for example, that the fact of apprehension and disclosure of a person's associations or activities will neutralize their future ability to conduct clandestine activities”.¹³²

¹²⁶ *Freedom and Security Under the Law: Second Report* (Ottawa: The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, 1981); Wesley K. Wark, “Canada and the Intelligence Revolution”, in Heike Bengert et al, eds, *The 21st Century* (Frank Cass, 2003) 170.

¹²⁷ For a list of good suggestions about how to enhance the review of the CBSA, see BCCLA <http://bccla.org/wp-content/uploads/2014/03/20140305-CBSA-accountability-release-backgrounder.pdf>

¹²⁸ *CBSA Act*, *supra* note 123.

¹²⁹ Canadian Council for Refugees, “CCR Expresses Deep Concerns Over Canadian Response to Sri Lankans Fleeing Human Rights Abuses”, *Canadian Council for Refugees* (11 October 2013) online: <https://ccrweb.ca/en/public-statement/2013-10-11>.

¹³⁰ *Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 1095 (Justice Phelan); *Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 1009 (Justice Lemieux); *Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 1095 (Justice Phelan).

¹³¹ *Mahjoub v Canada (Minister of Citizenship and Immigration)*, 2005 FC 156, [2005] 3 FCR 334.

¹³² *Ibid* at para 55.

A similar ruling was made in the case of *Jaballah*¹³³ and *Almrei*.¹³⁴

Subsequent cases involving Mr. Mahjoub have dealt more squarely with the substantive issue of deportation to torture. After reconsidering the file in light of a fuller factual record that included closed material, a MD again concluded that Mr. Mahjoub posed a threat to Canadian security, and that he could be safely removed from Canada. In 2007, Tremblay-Lamer J. upheld the former determination, but quashed the decision on the grounds that it was unreasonable to conclude that Mr. Mahjoub would not face a substantial risk of torture if deported. The onus of proving a risk of torture is on the claimant, who must provide evidence concerning the human rights record of the home state as well as a personalized risk i.e. a risk that is greater than that of the general population. Tremblay-Lamer J. found that the MD had “selectively relied on information that went against the bulk of the evidence in concluding there was no institutionalized torture in Egypt” and arbitrarily rejected “important, credible evidence on this issue”.¹³⁵ A similar judgment was made in the case of Mr. Almrei.¹³⁶

All other instances of deportation to torture have occurred outside the context of certificates. The case of *Sogi v. Canada* is an especially good example. Immigration officials decided in 2003 and in 2005 that Mr. Bachan Singh Sogi (who had previously been deemed inadmissible for reasons relating to national security) would face a substantial risk of torture should he be returned to India.¹³⁷ The MD issued a danger opinion, asserting that Mr. Sogi could nonetheless be deported pursuant to the *Suresh* exception. The Federal Court quashed the danger opinion on grounds unrelated to the justifications offered in support of deportation to torture.¹³⁸ The government subsequently reassessed the risk and, in 2006, a MD decided that Mr. Sogi could now be safely removed. The Federal Court refused to grant a stay of removal pending a review of the reasonableness of this decision.¹³⁹ During this process, the UN CAT twice requested that Canada stay removal until it had time to issue its own decision on the case. Canada ignored these requests and deported Mr. Sogi anyway. Shortly thereafter, the UN CAT issued an advisory opinion that there was in fact a substantial risk of torture. It has been reported that Mr. Sogi was “imprisoned, beaten and subjected to ill-treatment” after his removal.¹⁴⁰

In *Dadar v. Canada*,¹⁴¹ a MD decided that the claimant would not face a substantial risk of torture if returned to Iran. The claimant applied to the UNCAT, which found that he did in fact face a substantial risk of torture.¹⁴² The Federal Court refused to intervene or to grant a stay of proceedings in light of the CAT’s views.¹⁴³ In 2011, the UN CAT again found that the decision of a MD was erroneous, this time in the case of Somali national Jama Warsam.¹⁴⁴ In 2007, an immigration officer had found that Mr. Warsam would face a substantial risk of torture if returned to Somalia, in part because of wide-spread and systematic human rights abuses. There

¹³³ *Jaballah (Re)*, 2006 FC 1230 at paras 72-86.

¹³⁴ *Almrei v Canada (Minister of Citizenship and Immigration)*, 2005 FC 355 at paras 83-94.

¹³⁵ *Mahjoub*, 2007 FC 1503 at para 68.

¹³⁶ *Almrei*, *supra* 134 at paras 57-62.

¹³⁷ *Sogi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 853 at para 3.

¹³⁸ *Ibid* at paras 18-21.

¹³⁹ *Bachan Singh v Canada (Citizenship and Immigration)*, 2006 FC 799 at paras 3-8.

¹⁴⁰ Amnesty International Canada, *Matching International Commitments with National Action: A Human Rights Agenda for Canada* (2012) at 20.

¹⁴¹ *Dadar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1381.

¹⁴² *Mostafa Dadar v Canada*, Communication No. 258/2004, U.N. Doc. CAT/C/35/D/258/2004 (2005).

¹⁴³ *Dadar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 382.

¹⁴⁴ *Jama Warsame v Canada*, CCPR/C/102/D/1959/2010, UN Human Rights Committee (HRC), 1 September 2011

was a personalized risk as Mr. Warsame had never been to Somalia (he was born in Egypt and had lived in Canada since the age of 4), did not speak local languages, and had no resources upon which to rely for safety. Subsequently, a MD decided that there was in fact no personalized risk. Importantly, Mr. Warsam could not have the decision of the MD judicially reviewed because he lacked the financial capacity to hire a lawyer.¹⁴⁵ He was fortunate enough to have secured refugee status while in transit in the Netherlands, raising questions about the correctness (if not the good faith) of the MD's determination.¹⁴⁶

In *Muhammad v. Canada (Citizenship and Immigration)*¹⁴⁷, there was a serious issue of political interference with respect to a MD's finding that the claimant, Arshad Muhammad, was not at risk of torture if returned to Pakistan. The claimant had initially been denied refugee status in 2003 due to his membership in a terrorist organization. He fled, spending the next 8 years in hiding. In 2011, he was apprehended after his name and picture had been posted on the CBSA's "Most Wanted" website. An IO prepared a PRRA assessment and concluded that Muhammad faced a personal risk of torture due to the fact that the allegations against him were widely publicized and likely known by Pakistani authorities.¹⁴⁸ The claimant argued before the Federal Court that the MD's decision was unreasonable, owing in part to political interference. Among the noted irregularities was a highly unusual meeting between the MD and the Director General of Border Operations of CBSA, Glenda Lavergne, before the MD had rendered her decision. Court-ordered disclosure of correspondences revealed that Lavergne had expressed concern that a positive finding would affect the reputation and viability of the most wanted list.¹⁴⁹ The Court found that the MD's decision to ignore the PRRA assessment was unreasonable because it was unsupported by the factual record. It also ruled, however, that there was no reasonable apprehension of bias and that there was insufficient evidence of lack of independence and impartiality.¹⁵⁰

These cases highlight a serious lack of consistency and, frankly, independence in the decisions of IOs and MDs. In some situations, persons have been recognized by IOs to be in need of protection, only to have MDs make the opposite finding under highly politicized circumstances. Consistency is hampered by a host of institutional barriers pervasive within immigration and refugee law, including: the financial inability of most refugee claimants to hire lawyers,¹⁵¹ the elimination or reduction of rights to appeal, expedited refugee claim hearings, the use of Designated Countries of Origin criteria, the refusal of the Federal Court to order stays of removal pending reviews of Ministerial decisions, and inconsistent Federal Court decisions on the certification of applications for judicial review of such decisions.¹⁵² Another difficulty is that claimants must adduce evidence both of the general human rights record of their country of origin and a particularized, personal risk. Since decisions of the MD on questions of fact are

¹⁴⁵ *Ibid.* at para 2.6.

¹⁴⁶ *Amnesty International*, *supra* note 140 at 21.

¹⁴⁷ *Muhammad v Canada (Citizenship and Immigration)*, 2014 FC 448 (CanLII).

¹⁴⁸ *Ibid* at para 7.

¹⁴⁹ *Ibid* at paras 111-123

¹⁵⁰ *Ibid* paras 145-156.

¹⁵¹ On the correlation between legal representation and successful refugee claims, see Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall LJ 71.

¹⁵² Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queens LJ 1; 9 Osgoode CLPE Research Paper 1.

reviewable only on a standard of patent unreasonableness, it is quite possible for there to be incorrect but reasonable decisions concerning the risk of torture.

All of this is to say that certificates are just one component of a far broader set of measures by which the state investigates, detains, and deports non-citizens deemed to be security risks. Together with certificates, rather ordinary measures that have long been a part of our immigration and refugee law framework form part of an alternate legal order organized around an interconnected set of legislative provisions and executive practices highly attuned to security. While cases such as *Charkaoui I and II*, *Harkat*, and *Suresh* establish constitutional boundaries to security-based detention and deportation practices, the institutional framework necessary for minimal adherence to the rule of law seem to have been strenuously applied only to the most conspicuous part of this alternate order: certificates. The usual justification for this (i.e. that certificates are an exceptional case) is unpersuasive, as the risk of deportation to serious human rights abuse is actually higher for those whose removal begins through ordinary processes than for those named in certificates.

B. *Where to From Here? Revisiting Suresh*

Some of these issues may be resolved by revisiting *Suresh*. The likelihood of this is uncertain, as some Federal Court judges have been reluctant to seriously engage with the question of torture abroad, on the dubious grounds that these are extra-territorial matters and hence beyond the reach of the *Charter*.¹⁵³ With a fuller factual record of the intersection of security, migration and torture post-9/11, the emergence of new domestic and international norms, a less heightened sense of emergency, and the best practices of foreign jurisdictions at its disposal,¹⁵⁴ the Supreme Court would be quite justified in finding that principles of fundamental justice have developed to such a degree that deportation to torture is no longer permissible under any circumstance.¹⁵⁵ What would this mean?

One answer is that Canada would explore the feasibility of seeking “diplomatic assurances” against torture, much as it does with respect to extradition to countries that impose

¹⁵³ *Amnesty International Canada v Canadian Forces (Defence Staff, Chief)*, (2009) 305 DLR (4th) 741 FCA; Catherine Dauvergne, “How the Charter Has Failed Non-Citizens in Canada – Reviewing Thirty Years of Supreme Court of Canada Jurisprudence” (2013) 58:3 McGill Law Journal 663; Eva Kapustova, “Different Perceptions of the Obligation not to Refoule: The European and the Canadian Approach” (2012) Central European University, Budapest Hungary; Roach, Kent, “The Dangerous Game of Complicity in Torture” (2012) 58:3&4 *The Criminal Law Quarterly*.

¹⁵⁴ Arar Report, *supra* note 43; House of Commons, *Review of the Findings and Recommendation Arising from the Iacobucci and O’Connor Inquiries*, 40th Parl, 2nd Sess (June 2009) online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4004074&Language=E&Mode=1&Parl=40&Ses=2>; Canadian Civil Liberties Association, *Report to the UN Committee Against Torture* (2012) 48th Session Regarding List of Issues to be Considered in Connection of the Sixth Periodic Report of Canada (CAT/C/CAN/6). United Nations Committee against Torture, “Consideration of Reports Submitted by States Parties Under Article 19 of the Convention” (2011); Aoife Duffy, “Expulsion to Face Torture? Non-Refoulement in International Law” (2008) 20:3 Int’l J Refugee L 373; Thomas Poole, “Recent Developments in the ‘War on Terrorism’ in Canada” (2007) 7:3 Human Rights Law Review; Alex Neve, “Extraordinary Rendition, the Canadian Edition: National Security and Challenges to the Global Ban on Torture” (2007) 2 Societies Without Borders at 117–130; Vijay M. Padmanabhan, “To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement” (2011) 80 Fordham L Rev 73; OHCHR, “Expulsions of aliens in international human rights law” (2006) OHCHR Discussion paper, Geneva.

¹⁵⁵ For commentary on this point, see article, Craig Forcese “Touching Torture with a Ten Foot Pole” (2014) 52:1 Osgoode Hall Law Journal at 57-59.

capital punishment. The Court said very little about the adequacy of assurances. International perspectives shed light on this issue. In *Othman (Abu Qatada) v. the United Kingdom*,¹⁵⁶ the UK tested the tolerance of the ECtHR for assurances. The ECtHR held that there are circumstances in which assurances reduce the personalized risk of torture to the point that deportation is legally permissible. This applies even when the state that provides the assurance engages in systematic, widespread torture.¹⁵⁷ The strength of assurances must be assessed in consideration of the following factors:

- (i) whether the terms of the assurances have been disclosed to the Court
- (ii) whether the assurances are specific or are general and vague
- (iii) who has given the assurances and whether that person can bind the receiving State
- (iii) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them
- (iv) whether the assurances concerns treatment which is legal or illegal in the receiving State
- (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances
- (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers
- (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible
- (x) whether the applicant has previously been ill-treated in the receiving State
- (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.¹⁵⁸

While in this case the assurances were complied with, many view assurances as inherently unreliable.¹⁵⁹ There is no shortage of cases where countries have not abided by their promises to respect human rights. In *Agiza v. Sweden*,¹⁶⁰ Sweden was found to be in contravention of international law when it deported Ahmed Agiza to Egypt on the strength of an assurance against torture. Once returned, Agiza was subject to beatings and electronic shocks. The most relevant example would, of course, be that of Maher Arar, who was subject to torture after he was "returned" to Syria by the US on the basis of an assurance against torture.

In my view, the most valuable approach would be to improve the institutional architecture employed to examine asylum seekers, to ensure that decisions about risk of torture are based on law and the facts, and to provide more adequate mechanisms for the review of these decisions (and underlying intelligence practices). This could happen in various ways, including greater disclosure during security-based admissibility, detention review, and refugee claim hearings. There is some indication that the Federal Court is moving in this direction. In *Seyoboka*

¹⁵⁶ *Othman (Abu Qatada) v The United Kingdom*, Application no. 8139/09, Council of Europe: European Court of Human Rights, 17 January 2012.

¹⁵⁷ *Ibid.* at para. 193.

¹⁵⁸ *Ibid* at para 189.

¹⁵⁹ Human Rights Watch, "Diplomatic Assurances" Against Torture: Questions and Answers (November 2006) online: http://www.hrw.org/sites/default/files/related_material/ecaqna1106web.pdf

¹⁶⁰ *Agiza v Sweden*, Communication no. 233/2003, decision of 20 May 2005.

v. Canada (Minister of Citizenship and Immigration),¹⁶¹ Montingy J. found that those facing allegations of international criminality and other serious charges in the context of adversarial IRB hearings are entitled to "a high degree of procedural fairness" and expanded disclosure, pursuant to *Charkaoui II*. Relying on this case, Harrington J. found in *B135 v. Canada (Citizenship and Immigration)*¹⁶² that the Minister was obligated to disclose certain evidence to an IRB board member during a refugee claim hearing concerning a passenger of the Sun Sea. This evidence indicated that several passengers who had been returned to Sri Lanka were detained, beaten and subject to ill-treatment, and that the whereabouts of one passenger is unknown.¹⁶³

International and foreign standards are also relevant to the processes by which MDs make decisions about the risk of torture, especially when decisions are based on material that cannot be disclosed to the affected person. The ECtHR and other international and foreign courts have recently ruled that asylum seekers do not have the right to access closed material upon which decision-makers rely when determining the risk of torture.¹⁶⁴ However, this decision was predicated in part on the fact that the UK's Special Immigration Appeals Commission (SIAC) makes final decisions about risk of torture after an oral hearing in which the interests of affected persons are represented by SAs. The SIAC – which is responsible for reviewing decisions of the UK Government with respect to detention and deportation-- is composed of a judge, a senior member of the Asylum & Immigration Tribunal, and a layperson with expertise in national security and independent adjudicators. The SA system adopted in Canada was modeled in large part after the SIAC system. Unlike in the UK, though, our SA system has been effectively confined to adjudicative proceedings and does not extend to Ministerial decisions about the risk of torture. We might consider employing something similar to the SIAC system in cases where deportation to torture intersects with national security or similar imperatives i.e. make decisions to deport in the context of torture less discretionary and more adjudicative.

In the alternative, courts should reconsider the adoption of deferential stances towards the findings of MDs in the context of security. With respect, the Canadian government has lost trust on this issue, owing to its role in the torture of Maher Arar, Abdullah Almaki, Ahmad El Maati, Muayyed Nureddin, the human rights abuses perpetrated against Omar Khadr, the Afghan Detainee issue, and recently publicized documents concerning the CSIS stance on the permissibility of relying on torture for "actionable" intelligence.¹⁶⁵ Matters have not been improved by disrespect for the roles and responsibilities of the UN CAT. In three cases Canada deported persons despite the fact that the UN CAT found there to be a substantial risk of torture. In one case, the affected person was deported notwithstanding this finding, and in another the affected person was removed before the committee had concluded its deliberations. In this latter case, two requests for a temporary suspension of removal were ignored. It is true that the views of the UN CAT are not binding, but they may be viewed in some measure as findings of fact or, at least, bases for appraising the reasonableness of decisions of IOs and MDs. Insofar as there were substantial risks of torture in these cases, and no good reason provided as to why the *Suresh* exception applied, the removal of these men was arguably contrary to the *Charter*.

¹⁶¹ *Seyoboka v Canada (Minister of Citizenship and Immigration) (F.C.)*, 2009 FC 104, [2010] 2 FCR 3.

¹⁶² *B135 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 871.

¹⁶³ *Ibid* at para 23.

¹⁶⁴ *Othman*, *supra* note 156; *ZZ v Secretary of State for the Home Department*, [2013] EUECJ C-300/11; *BB, R (on the application of) v Special Immigration Appeals Commission & Anor*, [2011] EWHC 336 (Admin).

¹⁶⁵ Forcese, *supra* note 155.

V. Conclusion

If viewed simply within the context of Division 9 of IRPA and Supreme Court judgments, the certificate regime may seem to be a rather unique system. It is perhaps on the basis of its putatively distinctive form as well as grave human rights implications that the Supreme Court thrice imposed stringent constitutional constraints on the decisions of those operating within this setting. Yet, certificates remain but one part of a larger process by which migration in general -- and irregular migration in particular -- has been securitized. It is worth remembering here that Parliament transferred jurisdiction over certificate proceedings from SIRC to the Federal Court following an emergency parliamentary session that was convened to deal with the irregular arrival of 174 Sikh asylum seekers in 1987.¹⁶⁶ In the late 1980's and early 1990's, Parliament, CSIS, the Department of National Defence, and the Department of Foreign Affairs and International Trade all identified, for the first time, irregular migration as a distinct security threat, owing in part to the threats posed by terrorism.¹⁶⁷

Irregular migration – which may be defined as the process by which people enter or reside in a country without that country's legal permission--¹⁶⁸ has since risen high on Canada's national security agenda. We have responded with “smarter” approaches to border control characterized by a number of themes, including greater emphasis on risk management, enhanced surveillance and screening of migrants,¹⁶⁹ and greater information-sharing/institutional cooperation at the domestic and international levels.¹⁷⁰ Following the widely publicized arrivals of two boats of Tamil asylum seekers on Canadian shores in 2009 and 2010, organizational changes and capacities have been further influenced by legislation. Parliament has tightened restrictions on irregular migrants through a range of preventive and deterrent measures, such as: visa regimes, carrier sanctions, expedited refugee claim hearings, limitations on rights of appeal, Designated Country of Origin criteria, the criminalization of irregular entry, mandatory detention for groups of migrants classified as “irregular arrivals”, enhanced surveillance, and biometrics.¹⁷¹

¹⁶⁶ Colson, *supra* note 4 at 134.

¹⁶⁷ *Ibid* at 132-138; Sharryn J Aiken, “Of Gods and Monsters: National Security and Canadian Refugee Policy” (2002) 14:1 *Revue Québécoise de droit international*; Sherene Razack, “Simple Logic: Race, the Identity Documents Rule and the Story of a Nation Besieged and Betrayed” (2000) 15 *JL & Soc Pol’y* 181; Reginald Whitaker, “Refugees: The Security Dimension” (1998) 2:3 *Citizenship Studies* 413 at 427; Yasmeen Abu-Laban, “Welcome/STAY OUT: The Contradiction of Canadian Integration and Immigration Policies at the Millennium” (1998) 30:3 *Canadian Ethnic Studies* 191-211; Yasmeen Abu-Laban & Christina Gabriel, *Selling Diversity: Immigration, Multiculturalism, Employment Equity and Globalization* (Peterborough: Broadview Press, 2002); Rose Baaba Folson, ed., *Calculated Kindness* (Halifax NS: Fernwood Publishing, 2004); Anna Pratt, *Securing Borders – Detention and Deportation in Canada* (Vancouver/Toronto: UBC Press, 2005).

¹⁶⁸ Bastian Vollmer, “Policy Discourses on Irregular Migration in the EU – ‘Number Games’ and ‘Political Games’” (2011) 13(3) *EJML* 317.

¹⁶⁹ Deborah Waller Meyers, “Does ‘Smarter’ Lead to Safer? An Assessment of the US Border Accords with Canada and Mexico” (2003) 41(4) *IM* 5; Richard Friman, “Migration and Security. Crime, Terror and the Politics of Order” in Ariane Chebel d’Appollonia & Simon Reich, eds, *Immigration, Integration and Security. America and Europe in Comparative Perspective* (Pittsburgh: University of Pittsburgh Press, 2008) 130-144.

¹⁷⁰ Hudson, *supra* note 16; Moens, *supra* note 4; Canada-US Beyond the Border 2011; Government of Canada, Border Action Plan.

¹⁷¹ François Crépeau, Delphine Nakache & Idil Atak, “International Migration: Security Concerns and Human Rights Standards” (2007) 44:3 *Transcultural Psychiatry* 311; for co-op see Canada-US Beyond the Border, *supra* note 170; Moens, *supra* note 4.

Certificates are perhaps the most conspicuous, but far from the only, oldest, or most commonly used, of these measures. The disaggregation of certificates from this larger context is evident in how discussions about them have been structured by the grammar of constitutional rights and principles germane to criminal law. This has produced a rather unique institutional approach to managing the intersections among security, migration and asylum. Factors influencing the constitutionalization of certificates include concerted social and political mobilization, powerful legal advocacy, media awareness, and the internalization and operationalization of human rights norms by judges of the Federal Court, Federal Court of Appeal, and the Supreme Court. The authenticity and quality of this institutional experiment is open to question, but a strong case can be made that executive decision-making has been subjected to the rule of law. In any event, after *Harkat*, the current regime is likely to be as good as it gets.

But the construction of this regime may have come at the cost of bracketing some important substantive justice issues, as well as how these issues are and are not handled by decision-makers in analogous institutional settings. At best, the certificate trilogy stands for the principle that named persons are entitled to heightened procedural fairness by virtue of the impact security-based detentions and deportations have on life, liberty, and security of the person. High on this list are the ways in which being labeled a terrorist heightens the risk of persecution, torture, and similar abuses among those who are returned to certain countries. What is hard to fathom is why one would think that this impact is unique to certificates, or that they it is any more tolerable when they arise pursuant to ordinary immigration and refugee law measures. Why have procedural safeguards been heightened in the former context, but not (and even reduced) in the latter?

All throughout the certificate trilogy, the Court has stated that the applicability of *Charter* principles depends on the impacts that laws, policies and practices have on the integrity of affected persons, and not on how one formally classifies those laws e.g. as criminal, administrative. It was on the basis of subsequent analogies between certificates/security intelligence agencies and criminal proceedings/law-enforcement agencies that the Court applied principles germane to the latter in and to the former. Yet, the migration of human rights norms from criminal to certificate contexts has not been followed by the migration of rights from certificates to functionally connected or even equivalent proceedings. The reasons offered for this have typically involved formal, if not hierarchical distinctions between certificate and all other security-based detention and deportation proceedings. These distinctions rest on dubious assumptions about the nature and putatively lighter impacts the latter have on the rights of asylum seekers. Similarly, the practices of the CBSA have hitherto not received the same level of independent judicial or administrative review as CSIS in this context.

It is for these reasons that one would do well to analyze *Harkat*, not just for what it says about the certificate regime, but for what it can and should say about other, neglected corners of the security/migration nexus. If the Court is serious that the very real risks of substantive injustice faced by named persons necessitates procedural safeguards at least as robust as those now used in certificate proceedings, and if (as the evidence shows) this risk is at least as great for those caught up in more ordinary proceedings, then it should make as a priority ensuring the more effective operationalization of the principles it laid down in *Suresh*. Absent movement in this area, the procedural gains made in the context of reviews of the reasonableness of certificates will be vastly outweighed by the continued existence of woefully inadequate procedures by which decisions about deportation to torture are made and reviewed. This will

only increase the sense among skeptics that the constitutionalization of the certificate regime uses the form of law to mask the emptying out of its substance.