Security certificates: Next steps

Introduction

The recent Supreme Court of Canada ruling on security certificates (*Charkaoui*)[1] struck down as unconstitutional certain provisions in the *Immigration and Refugee Protection Act* (IRPA), notably with respect to the non-disclosure of information used in a decision to detain and remove a person under a security certificate. The Court found that non-disclosure, or the use of "secret evidence", violates section 7 of the Canadian Charter of Rights and Freedoms, which guarantees the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The Court, however, suspended the declaration of the Charter violation for one year, in order to allow Parliament time to amend the law. Parliament will therefore be debating how best to act in the wake of this decision. This submission is intended to assist Parliamentarians in their deliberations.

Need for a strategy of criminal prosecutions

The Canadian government has been pursuing a strategy of removal under immigration legislation, rather than a strategy of criminal prosecutions. This is a mistake, for a number of reasons:

- Immigration procedures do not guarantee those affected the same procedural protections as the criminal justice system.
- Among the most significant differences is the much lower standard of proof for many immigration procedures than for criminal prosecutions ("reasonable grounds to believe" rather than "proof beyond a reasonable doubt"). It is often difficult for an innocent person to defend themselves against the charge that there are "reasonable grounds to believe" an allegation about them. Furthermore, immigration procedures, including the security certificate procedure, rely on an extremely broad definition of security inadmissibility that covers associations that are not contrary to any law.[2] In addition, a decision by the Federal Court to uphold a security certificate is not subject to appeal.[3]
- The *Canada Evidence Act* now provides for "secret" evidence in criminal trials.[4] The government therefore cannot claim that it needs to resort to immigration procedures simply because it wishes to avoid disclosing some evidence.
- Immigration procedures can only be used against non-citizens, whereas both citizens and non-citizens may pose a security threat. The immigration strategy is therefore ill-adapted to the evil it is meant to address. It is also discriminatory because it is applied to some people and not others.

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[1] *Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9, 23 February 2007.

[2] For example, a person is inadmissible not only for engaging in terrorism, but also for being a member of organization that engages, has engaged or may engage in terrorism. *Immigration and Refugee Protection Act* [IRPA], s. 34. This means that all current and former members of the African National Congress, the governing party in South Africa, are inadmissible to Canada on security grounds.

[3] IRPA, s. 80(3).

[4] *Canada Evidence Act*, para. 37-38. This provision was part of the *Anti-Terrorism Act*, 2001, c. 41, s. 43. The amendments are problematic and have been criticized by the UN Human Rights Committee. See below footnote 23.

- The immigration strategy fails to take account of the international dimension of security threats. It assumes that threats arise within borders when both logic and the evidence available today points to the opposite.[5] It ignores the responsibility to limit risks of violence. It is a "not in my backyard" approach to security that is satisfied with removing a potential security threat from Canada without regard to whether the person will, after removal, continue to pursue acts of violence against Canada or another target.
- Recourse to immigration procedures inhibits the normal work of police investigation, which is essential to combating crime. The standard response to suspicions of criminal activity is an investigation with a view to uncovering sufficient concrete evidence to launch a prosecution, if warranted. However, when cases are referred to the immigration stream based on suspicions, they are diverted from police attention. The concrete evidence that might assist in averting acts of violence, as well as leading to prosecution, is likely never uncovered.[6]
- Canada has international obligations to prosecute acts of terrorism.[7]
- Removing persons suspected of having links to terrorism is likely to expose those persons to a serious risk of torture, in violation of Canada's obligation under the Convention against Torture not to send anyone to torture. There is extensive evidence that persons removed on grounds of suspected links to terrorism are at high risk of torture in their countries of origin.[8]
- The use of security certificates leads to long-term indefinite detention. The Supreme Court recognized in *Charkaoui* that "while the *IRPA* in principle imposes detention only pending deportation, it may in fact permit lengthy and indeterminate detention or lengthy periods subject to onerous release conditions."[9] The Court also recognized that "[s]tringent release conditions, such as those imposed on Mr. Charkaoui and Mr. Harkat, seriously limit individual liberty."[10] In 2006, the UN Human Rights Committee expressed its concern over Canadian security certificate rules, whereby "some people have been detained for several years without criminal charges, without being adequately informed about the reasons for their detention, and with limited judicial review."[11] Similarly, the UN Working Group on Arbitrary Detention, following a visit to Canada, criticized Canada's use of security certificates and recommended that "detention of terrorism suspects be imposed in the

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[5] See UK House of Lords, A (FC) and others (FC) v. Secretary of State for the Home Department, "Belmarsh", [2004] UKHL 56, December 2004, paras. 33 and 44.

[6] Ian Macdonald, former UK Special Advocate, recently made this point in testifying before the Canadian Parliament: Standing Committee on Citizenship and Immigration, Evidence [Macdonald testimony], 39th Parliament, 1st Session, 26 April 2007, (at 11:10, 11:25 and 11:45-12:05).

[7] *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, GA. Res. 54/109, ratified by Canada 15 February 2002, Art. 4, 9,10; see also, UN Security Council Resolution 1456 (2003), 20 January 2003, UN Doc.S/RES/1456: "States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute" (para. 3); UN General Assembly Resolution 58/81 (2003), 9 December 2003, UN Doc.A/RES/58/81, para. 7.

[8] The UN Committee against Torture, in its concluding observations on Canada in 2005 expressed concern at "[t]he State party's apparent willingness, in the light of the low number of prosecutions for terrorism and torture offences, to resort in the first instance to immigration processes to remove or expel individuals from its territory, thus implicating issues of article 3 of the Convention more readily, rather than subject him or her to the criminal process" [article 3 prohibits removal to torture]. *Committee Against Torture*, Conclusions and recommendations of the Committee against Torture: Canada, 7 July 2005, para 4(e). CAT/C/CR/34/CAN. The Supreme Court recognized the "potential consequences of deportation combined with allegations of terrorism", which they note "have been under a harsh spotlight due to the recent report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar." *Charkaoui*, at para. 26.

[9] *Charkaoui*, at para. 105.

[10] Ibid. at para. 116.

[11] Human Rights Committee, CCPR/C/CAN/CO/5, 20 April 2006, at para. 14.

framework of criminal procedure and in accordance with the corresponding safeguards enshrined in the relevant international law".[12]

- The use of security certificates imposes dramatic constraints and heavy burdens not only on those who are the subject of the certificate, but also on their families. Conditions of release have included intrusive monitoring of the family home as well as the requirement that family members supervise the person subject to a security certificate at all times.[13] The effect is to deprive the whole family of much of their liberty.
- The use of immigration procedures has led to protracted legal challenges resulting in important decisions finding against different aspects of the procedures.[14] The *Charkaoui* decision will not be the last: further issues are already before the courts, notably with respect to return to torture. The success of legal challenges reflects the fact that immigration procedures violate non-citizens' rights in many ways.
- The security certificate regime has proven extremely costly, both in legal costs and in expenses for detaining persons and for monitoring those released under conditions.[15]

Concern over expanding use of secret evidence

> "Openness and transparency are hallmarks of legal proceedings in our system of justice." Justice Dennis O'Connor[16]
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> "Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case." Chief Justice McLachlin[17]

The use of secret evidence runs directly counter to the vital principles that courts must be open and that individuals have the right to know and meet the case against them. These principles are particularly important when, as in security certificates, fundamental rights, including the right to liberty, are at stake.

Secret evidence is repugnant primarily, of course, because of the injustice it causes to persons affected. However, its use also undermines public confidence in the justice system. As the Supreme Court has said, "In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy."[18] Many Canadians have opposed the

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[12] UN Economic and Social Council, *Report of the Working Group on Arbitrary Detention: Visit to Canada*, E/CN.4/2006/7/Add.2, 5 December 2005, at para. 92.

[13] The UN Working Group on Arbitrary Detention pointed out, for example, that Adil Charkaoui was released on very strict terms and conditions "that disrupt the life of his entire family." Ibid. at para. 86

[14] See, in addition to *Charkaoui*, *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3; 2002 SCC 1.

[15] $3.2 million were spent to open the Kingston Immigration Holding Centre, according to Catherine Solyom, Montreal Gazette, *Protest groups seek abolition of controversial security certificates*, 17 February 2007, http://www.canada.com/nationalpost/story.html?id=b095e28a-11c2-49fb-8320-786db78f47c5&k=38636. Speaking to a parliamentary committee on 15 May 2007, Public Safety Minister Stockwell Day cited the figure of $2.3 million for the construction alone, but noted that he wanted to check its accuracy. *Standing Committee on Public Safety and National Security*, Evidence, 39th Parliament, 1st Session, 15 May 2007, at 11:45. The monitoring of those released on conditions requires significant staff resources from Canada Border Services Agency and presumably other agencies.

[16] *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006), [O'Connor part 1], at p. 304.

[17] *Charkaoui* at para. 61.

[18] *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 1.

security certificate process because there is no way for the public to satisfy themselves that justice is being done.

The importance of the principle of open courts is underlined in both the Canadian legal tradition and in international human rights law. Article 14 of the International Covenant on Civil and Political Rights states that: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." While the Covenant allows for some exceptions to the general rule of publicity, the UN Human Rights Committee, in General Comment 13, has stated that "[t]he publicity of hearings is an important safeguard in the interest of the individual and of society at large."[19]

Over the past several years the government has been expanding the use of secret evidence in different settings (immigration[20], citizenship – attempted, but not passed[21] –, deregulation of charities[22], *Canada Evidence Act*[23]). This trend represents a disturbing erosion of the commitment to the principles of fundamental justice in Canada.

In *Charkaoui*, the Supreme Court ruled that the use of secret evidence in the security certificate procedures "does not conform to the principles of fundamental justice as embodied in s. 7 of the *Charter*."[24] It is important to take very seriously the fact that the Court found that the use of non-disclosed evidence means that decisions are not based on the facts and the law, and that persons affected do not know or have an opportunity to respond to the case against them.[25] The Supreme Court concluded that these flaws mean that those subject to a security certificate do not receive a fair hearing.[26] The proper conclusion to draw from this ruling is that the use of secret evidence is inconsistent with the principles of fundamental justice. We should therefore seek to reduce its use to the absolute minimum, and certainly not contemplate broadening its use.

The Supreme Court did not say, as some believe[27], that secret evidence can be used without violating the Charter if a special advocate is provided. The Court referred to special advocates in relation to arguments about whether the admitted rights violation involved in using secret evidence should nevertheless be allowed. This is because section 1 of the Charter allows limits on rights if the limits are "demonstrably justifiable in a free and democratic society". A limitation of rights is not justifiable if there are less intrusive alternatives: the Court points to the existence of special advocates in other contexts as clear evidence that less intrusive alternatives

[19] UN Human Rights Committee, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), 13 April 1984, at para. 6.
[20] IRPA, 2001, added at s. 86 provisions for secret evidence in hearings before the Immigration and Refugee Board, on the same terms as in security certificate cases.
[21] *Bill C-18 (Citizenship of Canada Act),* November 2002, 37th Parliament, 2nd Session.
[22] *Anti-Terrorism Act,* s. 113.
[23] Also *Anti-Terrorism Act* (see above, footnote 4). The UN Human Rights Committee has criticized Canada for these amendments to the *Canada Evidence Act,* which do not comply with article 14 of the Covenant on Civil and Political Rights. Human Rights Committee, CCPR/C/CAN/CO/5, 20 April 2006, at para. 13.
[24] *Charkaoui*, at para 65.
[25] *Charkaoui*, at paras. 48-64.
[26] *Charkaoui*, at para. 65.
[27] For example, *Detention Centres and Security Certificates*, Report of the Standing Committee on Citizenship and Immigration, April 2007, p. 8: "Since the Court said that a less intrusive approach would be to allow for a special advocate in the security certificate process it is implicit that if Parliament were to amend the Act to provide for a special advocate, the security certificate process would be *Charter* compliant."

exist. It does not follow that the use of secret evidence will necessarily comply with the Charter if a special advocate is present. That was not the question that the Court was addressing.

Parliament should not adopt amendments to the *Immigration and Refugee Protection Act* to allow secret evidence in the presence of special advocates, for the following reasons:

- The use of secret evidence infringes on the individual's right to fundamental justice. The presence of a special advocate might offer some improvement over the current situation, but it does not resolve the basic problem that the individual is denied a full opportunity to know the case to meet, and to meet the case. The injustice will remain.
- There is another strategy available to the government, which it has not attempted, namely pursuing criminal prosecutions.
- The introduction of special advocates is likely to lead to further litigation. The Supreme Court noted in its decision that s. 7 violations are difficult to justify under s. 1 of the Charter[28], and that the UK Special Advocate system has itself come under criticism.[29]
- The use of Special Advocates in the UK has been fiercely criticized from many sides, including by some who have acted in this role. In announcing his resignation as a Special Advocate with the Special Immigration Appeals Commission (SIAC), Ian Macdonald, QC, said that he felt he was being used to "provide a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial."[30] The UK human rights organization, JUSTICE has recently said: "In our own view, the use of closed sessions and special advocates involves serious limitations on an appellant's right to fair proceedings. The rights limited include the individual's right to know the case against him; be present at an adversarial hearing; examine or have examined witnesses against him; be represented in proceedings by counsel of his own choosing; and to equality of arms."[31] There are ongoing legal challenges to Special Advocates in the UK, which may lead to the courts ruling against their use.[32]
- The findings of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar demonstrate that mistakes can and have been made by Canadian security agencies. Similar findings were made twenty-five years earlier by the McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police.[33] We should therefore be very sceptical of the credibility of undisclosed and untested evidence. Given the potential consequences for individuals accused of having links to terrorism, they must not be asked to defend themselves with a Special Advocate, which is no more than a substitute for full justice. As the Supreme Court has said with respect to access to judicial records: "Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation."[34]

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[28] *Charkaoui*, at para. 66.
[29] Ibid. at para. 83.
[30] News release, "Ian Macdonald QC resigns from SIAC", 1 November, 2004, http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=268
[31] JUSTICE Briefing for House of Lords Debate, Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2007, March 2007, at p. 7, footnotes removed. Available at http://www.justice.org.uk.
[32] In January 2007, the Appeal Committee of the House of Lords confirmed that the House of Lords will hear two appeals against judgments by the Court of Appeal dealing with control orders where special advocates are used. http://www.lawreports.co.uk/HouseofLords/decisionresults07.htm
[33] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law,* Second Report, 1981.
[34] *Attorney General (Nova Scotia) v. MacIntyre*, [1982], 1 S.C.R. 175 at 183-184. The Court also quotes Bentham's articulation of the rationale for "openness" in respect of judicial acts: " 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable

- There are widespread prejudices and misinformation about Arabs and Muslims, which can lead to stereotyping and faulty assessment of evidence. To avoid the danger of racial and religious stereotypes tainting the judicial process, and the danger of the perception that this is occurring, it is particularly important that there be open and transparent testing of the evidence against those alleged to represent a security threat. [35]
- Unlike the concrete evidence required in criminal matters, immigration security cases are often built on allegations of association, profiles and "expert" assessments. A Special Advocate is not able to challenge this type of evidence effectively. Former UK Special Advocate Ian Macdonald recently told a Canadian parliamentary committee about the difficulty of challenging vague assessments made by people who cannot be effectively cross-examined because they do not have direct knowledge of the information on which the assessment is based.[36]
- Some immigration security cases rely heavily on evidence from informers. Informers are notoriously unreliable witnesses: when their evidence is undisclosed it is very difficult for their testimony to be effectively challenged.[37] Similarly, foreign intelligence sources, often relied on in security certificate cases, need vigorous testing.[38]
- The security certificate provisions allow secret evidence to be used when its disclosure "would be injurious to national security or the safety of any person".[39] This is extremely broad, allowing non-disclosure even when the injury to national security is very slight and the infringement on the individual's right to a fair hearing is enormous.

> "It is not to the point to say that the special advocate procedure is "better than nothing". Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only." (Lord Steyn)[40]

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to judicial injustice operate. Where there is no publicity there is no justice.' ' Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' "

[35] In his report for the Arar Commission, Justice O'Connor recommended that Canadian agencies involved in security investigations have clear policies prohibiting racial, religious and ethnic profiling and increased training on these issues. He justified his recommendations on the basis of the need to combat both the reality and the perception of profiling, both of which are detrimental to effective policing and security intelligence work. O'Connor part 1, pp. 355-358.

[36] Macdonald testimony, at 11:10, 11:30 and 11:50.

[37] Regarding jailhouse informants, the Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin provides useful cautions about the dangers. Ontario Ministry of the Attorney General, 1998. Chapter III, Jailhouse Informants, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/.

[38] See the comments of Ian Macdonald : "If there's an informer who is speaking to Algerian intelligence, you're not going to have access to that informer to know whether or not the information is reliable. In fact, you may not even know whether or not anything emanating from Algerian intelligence is reliable. That's the problem." Macdonald testimony, at 12:00. Recent developments in Adil Charkaoui's case illustrate the questionable nature of some of the evidence relied on in security certificate cases: in April 2007 Ahmed Ressam recanted his testimony linking Charkaoui to Al-Qaeda, saying his earlier evidence was inaccurate and due to psychological stress. CBC News, "MPs speak out in support of terror suspect", 25 April 2007, http://www.cbc.ca/canada/story/2007/04/25/charkaoui070423.html.

[39] IRPA, s. 78(b). The Supreme Court notes that the provisions for undisclosed evidence in the *Canada Evidence Act* allow for a weighing of the public interest in disclosure against the public interest in non-disclosure, while no such discretion exists under IRPA, which directs judges not to disclose information if its disclosure would be injurious to national security to the safety of any person. *Charkaoui*, at para. 27.

[40] Roberts (FC) v. Parole Board, [2005] UKHL 45 at para. 88, Lord Steyn dissenting.

IRPA s. 86 proceedings

The concerns outlined above with respect to secret evidence in security certificate cases apply equally and indeed with even more force to s. 86 proceedings, which allow for secret evidence before the Immigration and Refugee Board (IRB).[41] The IRB is much less able to meet the procedural fairness hurdles set out by the Supreme Court. The IRB is a quasi-judicial administrative tribunal, not a court, and only some of its decision-makers are lawyers. Hearings before the IRB are conducted with greater informality and fewer procedural protections than before a court. Yet, the potential consequences for persons affected, including prolonged detention and removal from Canada to a danger of persecution or torture, are the same as in security certificate cases.

Use of information obtained under torture

In the security area, a major concern must be the use of evidence obtained under torture. As well as being highly unreliable, its use involves complicity with torture. The UK House of Lords has already concluded that evidence obtained under torture is not admissible in any legal proceeding.[42]

Parliament must make the Canadian position clear by adopting unambiguous legal prohibitions against the use of evidence that may reasonably be suspected of having been obtained under torture.

Need for effective oversight

In the Policy Review component of the Arar Commission, Justice Dennis O'Connor found that the current mechanisms for review of Canadian government security activities are inadequate. Although his focus was the RCMP, he included in his recommendations other agencies, including the Canada Border Services Agency and Citizenship and Immigration Canada.[43] He concluded that where there are broad discretionary powers, oversight is required to ensure conformity with legal and policy requirements and Charter values. As an example of the use of discretionary powers in decisions on national security matters, he specifically mentioned the security certificate process.[44]

Whatever process is adopted by Parliament as an alternative to the current unconstitutional security certificate regime, it is critical that Justice O'Connor's recommendations for effective oversight, including for immigration-related activities, be implemented as soon as possible.

6 June 2007

[41] Before the Immigration Division or the Immigration Appeal Division, but not before the Refugee Protection Division nor the Refugee Appeal Division.
[42] *A (FC) v. Secretary of State* [2005] UKHL 71.
[43] The Supreme Court draws attention to these recommendations in relation to the potential consequences of deportation combined with allegations of terrorism. *Charkaoui*, para. 26.
[44] O'Connor, *A New Review Mechanism for the RCMP's National Security*, VIII, 6, pp. 436-437.