Date: 20060201

Docket: DES-04-01

Citation: 2006 FC 115

BETWEEN:

IN THE MATTER OF a certificate pursuant to Section 40.1 of the *Immigration Act*, R.S.C. 1985, c. I-2, now deemed to be under s-s 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27;

AND IN THE MATTER OF the referral of that certificate to the Federal Court of Canada;

AND IN THE MATTER OF Mahmoud JABALLAH,

Applicant

and

The Attorney General of Ontario

Intervenor

REASONS FOR ORDER: Re continuing detention and the *Charter*

MacKAY D.J.:

Introduction and background

[1] This is an application by Mahmoud Es Sayy Jaballah, pursuant to s-s. 52(1) of the *Constitution Act, 1982* and s-s. 24(1) of the *Charter of Rights and Freedoms* (the "*Charter*"), for his release from detention until the matters concerning him before this Court, in this security certificate proceeding under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*Act*" or "*IRPA*"), are finally determined.

[2] Mr. Jaballah, a foreign national who is a citizen of Egypt, has been held in detention since August 14, 2001, when a security certificate was issued against him under s. 40.1 of the *Immigration Act (1978)*, now continued in effect by s-s. 77(1) of the *Act.* Mr. Jaballah and his family had earlier arrived in Canada, in 1996, and then claimed Convention refugee status, a claim not determined when he was detained in 1999 under an earlier security certificate that was later quashed by Mr. Justice Cullen in November 2000. He remained in Canada as a foreign national pending determination of his refugee claim. That claim was denied, but that decision was set aside on judicial review in October, 2000 and the refugee claim was still outstanding when he was the subject of a second security certificate of the Ministers, and he was detained, without a warrant, on August 14, 2001. Mr. Jaballah's refugee claim, after it was heard again, was denied in April 2003, but the claims of his wife and four of his children were allowed and they were declared to be Convention refugees.

[3] The second certificate, issued by the Minister of Citizenship and Immigration and the then Solicitor General of Canada, the latter now replaced by the Minister of Public Safety and Emergency Preparedness of Canada, set out their opinion that Mr. Jaballah is inadmissible to Canada on specified grounds of national security. He was detained, without warrant or order in accord with s-s. 82(2) of the *Act*, and the certificate was referred to this Court, and to me as a judge designated in accord with the *Act*, for determination whether the certificate is reasonable.

[4] That determination has been delayed longer than anyone might have contemplated. These proceedings I summarize very briefly.

1) In July 2002 Mr. Jaballah applied under *IRPA* to be found to be a person in need of protection and, in accord with the *Act* (s-s. 79(1)), the proceedings for consideration of the certificate were suspended.

2) In August 2002 an immigration department PRRA officer completed a risk assessment, which was released to Mr. Jaballah, indicating the officer's opinion that the respondent would be at risk of torture, death or cruel or unreasonable treatment if he were returned to Egypt. That determination was subsequently found by this Court not to constitute, by itself, the decision required of the Minister under the *Act* and *Regulations* concerning the application for protection made by Mr. Jaballah.

3) After repeated urging by the Court to counsel for the Minister of Citizenship and Immigration that a decision be made on the application for protection, all to no avail, this Court on a motion by Mr. Jaballah, heard in April 2003, found that in the circumstances failure to determine the application for protection constituted an abuse of process under *IRPA*. The Court then proceeded to consider the reasonableness of the Ministers' certificate, and that certificate was upheld as reasonable on May 23, 2003 (see *Re Jaballah*, [2003] 4 F.C. 345, [2003] F.C. J. No. 822, 2003 FCT 640).

4) The Ministers initiated an appeal of the decision insofar as it determined an abuse of process, and Mr. Jaballah initiated a cross-appeal and a separate appeal concerning the finding that the certificate was reasonable.

5) On November 20, 2003, this Court heard a motion for Mr. Jaballah that he be released from detention, in accord with s-s. 84(2) of the *Act*, after continuing in detention more than 120 days after the certificate had been found to be reasonable. That motion was denied (see See *Jaballah* v. *Canada* (*Minister of Citizenship and Immigration*), [2004] F.C. J. No. 420, 2004 FC 299).

6) On December 30, 2003, Mr. Jaballah was advised by the Minister of Citizenship and Immigration that his July 2002 application for protection was denied. The Court was advised of the result but not of the decision by letter received January 6, 2004. Mr. Jaballah sought judicial review of that decision of the Minister, an application not heard before the appeals were considered.

7) In July 2004, the Federal Court of Appeal determined the appeals by the Ministers and by Mr. Jaballah concerning the May 2003 decisions, respectively that there was abuse of process and that the Ministers' certificate was reasonable. The former determination was upheld as was this Court's remedy of the abuse, that is the August

2002 PRRA decision should be deemed to be that of the Minister of Citizenship and Immigration concerning the risk to Mr. Jaballah if he were to be returned to Egypt. Yet the Court was found to have acted without authority in its decision concerning the reasonableness of the certificate since that decision was taken without waiting for a Ministerial decision on the application for protection. The decision on the certificate was quashed and the matter was referred to this Court for reconsideration. The Court, with the undersigned as designated judge, then resumed reconsideration of the certificate pursuant to the *Act*, s-s. 79(2) of *IRPA*.

8) After hearing arguments in August 2004 and considering further written submissions of counsel, in March 2005 I found the Minister's decision concerning Mr. Jaballah's application for protection was not lawfully made. That decision was quashed and proceedings with respect to the certificate were again suspended, in accord with s-s. 80(2), to allow the Minister of Citizenship and Immigration to make a new decision on the application for protection.

9) By Order of July 7, 2005, I directed that in continuing proceedings

    a) this Court's determination of May 23, 2003, that the PRRA assessment of August, 2002 continue to be deemed to be the determination of the Minister concerning the risk to Mr. Jaballah if he were now returned to Egypt;

b) the matters for reconsideration by the Minister, to be reported to Mr. Jaballah and to the Court in accordance with subparagraph 113(d)(ii) of *IRPA* and s-s. 172(2) of the *Regulations*, are the danger that Mr. Jaballah constitutes to the security of Canada if he remains in this country, and the determination whether, despite the risk to him if he now be returned to Egypt, his application for protection should be refused; and

c) the Minister's decision on the application for protection should be filed on or before September 26, 2005, as it subsequently was, after Mr. Jaballah had opportunity to comment on the record to be considered by the Minister or his delegate.

This application

[5] Then this application by Mr. Jaballah was initiated in this Court on August 24, 2005. That followed an application for *habeas corpus* and other relief made before Mr. Justice Trafford of the Ontario Superior Court of Justice. He stayed that proceeding on application of counsel for the federal Ministers and also for the Attorney General of Ontario, in expectation that Mr. Jaballah could bring an application for timely relief in this Court (*Jaballah* v. *Attorney General of Canada, Attorney General of Ontario et al.*, Court file M-77-05, 2005/08/22 Ont. S.C.J.). Copies of affidavits originally sworn in May 2005, by the respondent, his family members and proposed

sureties, for *habeas corpus* proceedings in the Ontario Court, were filed under direction of this Court in support of Mr. Jaballah in this application.

[6] By a telephone conference with counsel for the parties and the Court on August 29, 2005 arrangements were made for the hearing of this application for release from detention to commence in Toronto on September 7, 2005. That hearing, which the Court considered to be a matter of urgency, continued for 5.5 days. Then counsel for Mr. Jaballah advised that it was not possible to make oral submissions immediately, that time was required for preparation of appropriate submissions, and counsel for the parties were not all free again until October 19th, some six weeks thereafter. With regret, the Court recessed until the latter date.

[7] The hearing of this matter concluded on October 21, 2005. Thereafter the Court spent considerable time in review of the information previously withheld from release to Mr. Jaballah and his counsel to assess whether any of that information could now be released. While that task was primarily directed to future proceedings concerning the lawfulness of the September 26, 2005 decision of the Minister's delegate on Mr. Jaballah's application for protection and concerning the reasonableness of the security certificate, until the review was completed it was uncertain whether any information that might now be released could be relevant for consideration of the application for release from detention.

[8] After that review was completed counsel requested, and opportunity was granted, for submissions to be made in regard to two recent decisions concerning other applications for release from detention, in the cases of *The Minister of Citizenship and Immigration and the Solicitor General of Canada* v. *Mohamed Zeki Mahjoub*, 2005 F.C. 1596 (per Dawson J., November 25, 2005), (hereafter "*Mahjoub*"), and *The Minister of Citizenship and Immigration and the Solicitor General of Canada* v. *Hassan Almrei*, 2005 FC 1645 (per Layden-Stevenson J. December 5, 2005) (hereafter "*Almrei*"). Written submissions were received from counsel for Mr. Jaballah and for the Ministers of Canada, on December 12 and 19, 2005 respectively.

[9] In addition to these decisions, this Court has considered *Re Charkaoui* [2005] 3 F.C.R. 389, [2005] F.C.J. No 269 (Q.C.) (F.C.) (per Noel J.) and *Harkat* v. *The Minister of Citizenship and Immigration*, 2005 F.C. 1740 (per Lemieux J.). In all these cases the courts were concerned with applications for release from detention under the requirements of s-ss. 83 and 84(2) of *IRPA*, requirements not specified as applicable under the Act in relation to continuing detention under s-s. 82(2).

[10] After full consideration of the evidence relevant to the application for release from detention and of the submissions of counsel, for the reasons set out hereafter, my conclusions are as follows.

i) The Court has authority to consider this application for relief made pursuant to the *Charter* and the *Constitution Act 1982*.

ii) I n this case the long continuing detention of Mr. Jaballah under s. 82(2) as a foreign national, without statutory opportunity for review of that detention pending consideration of the reasonableness of the Ministers' certificate, results in loss of his equality before the law and his right to equal benefit of the law on a discriminatory basis contrary to s-s. 15(1) of the Charter when compared with the circumstances for a permanent resident similarly detained under a security certificate under s. 83 of IRPA, because of Mr. Jaballah's status as a foreign national, a ground analogous to those set out in s-s. 15(1).

iii) Those circumstances warrant, as a remedy under s-s. 24(1) of the *Charter*, an exemption from the continuing application of s. 82(2) of *IRPA* unless his detention is ordered by a judge, in these proceedings this judge, following review of his detention on the same grounds as are applicable in the case of a permanent resident similarly detained, under s-s. 83(3) that is

83 (3) A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.	83 (3) L'intéressé est maintenu en détention sur preuve qu'il constitue toujours un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.

iv) Having considered this application, I conclude that I am satisfied Mr. Jaballah continues to be a danger to national security of Canada, and that his detention should be continued, pending any further Order.

v) The application for release from detention by Mr. Jaballah is dismissed.

vi) The provisions for detention under ss. 82 to 85 or *IRPA* have been held by the Court of Appeal not to infringe upon the rights guaranteed by ss. 7, 9 and 12 of the *Charter*. This Court is bound by those decisions. This Court makes no determination on the issue raised concerning the constitutional validity of s-s. 82(2) in light of s-s. 15(1) of the *Charter*, and that provision remains in force.

Detention and consideration of a security certificate

[11] *IRPA* provides for detention of permanent residents and foreign nationals in a variety of circumstances, including those when a certificate is issued under s-s. 77(1) that such a person is inadmissible to Canada on grounds of security. The provisions concerning detention in these circumstances include the following

Detention	Détention
82. (1) The Minister and the Solicitor General of Canada may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate described in s-s 77(1) if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.	**82.** (1) Le ministre et le solliciteur général du Canada peuvent lancer un mandat pour l'arrestation et la mise en détention du résident permanent visé au certificat dont ils ont des motifs raisonnables de croire qu'il constitue un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.
(2) A foreign national who is named in a certificate described in s-s 77(1) shall be detained without the issue of a warrant.	(2) L'étranger nommé au certificat est mis en détention sans nécessité de mandat.
83. (1) Not later than 48 hours after the beginning of detention of a permanent resident under section 82, a judge shall commence a review of the	**83.** (1) Dans les quarante-huit heures suivant le début de la détention du résident permanent, le juge entreprend

reasons for the continued detention. Section 78 applies with respect to the review, with any modifications that the circumstances require.	le contrôle des motifs justifiant le maintien en détention, l'article 78 s'appliquant, avec les adaptations nécessaires, au contrôle.
(2) The permanent resident must, until a determination is made under s-s 80(1), be brought back before a judge at least once in the six-month period following each preceding review and at any other times that the judge may authorize.	(2) Tant qu'il n'est pas statué sur le certificat, l'intéressé comparaît au moins une fois dans les six mois suivant chaque contrôle, ou sur autorisation du juge.
(3) A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.	(3) L'intéressé est maintenu en détention sur preuve qu'il constitue toujours un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.
84. (1) The Minister may, on application by a permanent resident or a foreign national, order their release from detention to permit their departure from Canada.	**84.** (1) Le ministre peut, sur demande, mettre le résident permanent ou l'étranger en liberté s'il veut quitter le Canada.
(2) A judge may, on application by a foreign national who has not been removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable, order the foreign national's release from detention, under terms and conditions that the judge considers appropriate, if satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person.	(2) Sur demande de l'étranger dont la mesure de renvoi n'a pas été exécutée dans les cent vingt jours suivant la décision sur le certificat, le juge peut, aux conditions qu'il estime indiquées, le mettre en liberté sur preuve que la mesure ne sera pas exécutée dans un délai raisonnable et que la mise en liberté ne constituera pas un danger pour la sécurité nationale ou la sécurité d'autrui.

[12] Of course, if the designated judge finds that the security certificate is not reasonable the certificate is quashed (s-s. 80(2)), and the person detained under the certificate is released. Moreover, the Minister of Citizenship and Immigration, on application by a detained person,

whether a permanent resident or a foreign national, may order release to permit his or her departure from Canada (s-s. 84(1)).

[13] The *Act* makes no provision for review of the continuing detention of a foreign national under s-s. 82(2), except upon application by a detained person who has not been removed from Canada within 120 days after the Federal Court determines the certificate issued by the Ministers to be reasonable. If that statutory right should occur, as it did previously for Mr. Jaballah in 2003, the reviewing judge may order a foreign national's release from detention under terms and conditions, if satisfied that the person concerned will not be removed from Canada within a reasonable time and that release will not pose a danger to national security or the safety of any person (s-s. 84(2), *IRPA*). In this case, since there has been no effective determination of the reasonableness of the certificate in the four and a half years since he has been detained, Mr. Jaballah has no statutory right under *IRPA* to have the basis for his continuing detention reviewed.

[14] The situation of Mr. Jaballah, as a foreign national, is different than if he were a permanent resident of Canada. If a person in the latter class is detained under a security certificate, within 48 hours of commencement of the detention, a judge shall commence a review of the continuing detention. The reviewing judge shall order the detention to continue if satisfied that the person continues to be a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal (s-s. 83(3), *IRPA*). If not released following a review of detention, a permanent resident must, until the reasonableness of the certificate is determined, be brought back

before a judge at least once in the six-month period following each preceding review, and at any other time the judge may authorize (s-s. 83(2), *IRPA*).

[15] The situation of a Canadian citizen who is considered to present a risk to national security may be contrasted with that of a foreign national or a permanent resident considered to present a similar risk. A citizen may only be detained if arrested and charged with an offence, or in exceptional circumstances for preventive arrest subject to review, under the *Criminal Code.* In those circumstances, prosecution follows, with criminal standards of proof. No prosecution of a permanent resident or a foreign national is required before deportation may be ordered following a determination by the Court that a security certificate is reasonable.

Procedural matters

[16] Certain procedural issues were raised at the commencement of the hearing on September 7, 2005.

[17] First, notice of constitutional questions arising, in particular in relation to possible relief sought on grounds alleging breach of the *Charter of Rights and Freedoms*, in accord with s. 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 as amended, was directed to be given by counsel for Mr. Jaballah without delay, to the Attorneys General of provinces and of the territories except that of Ontario who was aware of the hearing. Confirmation of service to them, by facsimile, was subsequently filed with the Court.

[18] Second, counsel for the Attorney General of Ontario sought leave to intervene in the proceedings related to the application for release from detention. He did so in anticipation of notice of constitutional issues raised, confirmed orally at commencement of the hearing, and because that Attorney General had a particular interest, in expected allegations that conditions of detention for Mr. Jaballah, in the provincial remand centre where he has been detained, are such that they give rise to described breaches of certain *Charter* rights. After hearing from counsel for the parties and from the Attorney General of Ontario, the Court directed that the latter's motion to intervene was allowed, for the purposes of admission of evidence by affidavit and submissions, with advance notice to other counsel, concerning the conditions of detention and their effect, if any, on *Charter* rights. Leave to examine or cross-examine any witness, if that were desired, was left to be dealt with as counsel for the Attorney General of Ontario might request. Requests were subsequently made and granted for his examination of the acting Superintendent of the Toronto West Detention Centre, where Mr. Jaballah has been detained, who was called as a witness by Mr. Jaballah, and for cross examination of Mr. Jaballah in regard to medical services rendered to him while detained.

[19] Third, a further procedural issue referred to but not disputed by counsel for the parties, concerned the jurisdiction of this Court to consider the prime remedy here sought, that is, release from detention for Mr. Jaballah on grounds alleged of infringement, by the provisions of *IRPA*, or by their application to Mr. Jaballah, of rights guaranteed by the *Charter*. All counsel before the Court acknowledge Mr. Justice Trafford's opinion in the Ontario Court that this Court lacks

statutory jurisdiction to issue *habeas corpus,* except as specifically provided for in relation to members of the armed forces under s. 17 of the *Federal Court Act.* Yet all were in support of the Court's authority to deal with the application for release from detention in this case where the Court is urged to grant relief under s-s. 24(1) of the *Charter,* or under s-s. 52(1) of the *Constitution Act, 1982,* on the ground that rights guaranteed by the *Charter* have been infringed.

[20] In my opinion following the decision of the Federal Court of Appeal in *Charkaoui* v. *the Minister of Citizenship and Immigration and the Solicitor General of Canada,* 2004 FCA 421, there can be no doubt of this Court's jurisdiction to determine the issues raised in this application. As a designated judge under *IRPA* it is my responsibility to hear and determine constitutional questions arising in the context of proceedings concerning the reasonableness of the security certificate, including the related proceedings in this case to review of the continuing detention of Mr. Jaballah. (See *Charkaoui, supra*, per Décary and Létourneau, JJ.A, at para. 144.)

The grounds for relief

[21] The grounds for the relief sought here by Mr. Jaballah's motion are:

> i. Mr. Jaballah's continued detention pursuant to sections 82 to 85 of the *Immigration and Refugee Protection Act* (referred to as the *IRPA*), which provide for the automatic and mandatory detention of a foreign national subject to a security certificate issued under s. 77 of the *Act* and prohibit any possibility of a review of the need to detain until after the security certificate is upheld and the person is not removed from Canada within 120 days thereafter, in failing to provide for a fair and timely review on acceptable standards for release contravene the principles of fundamental justice pursuant to section 7 of the *Charter of Rights and Freedoms* and in applying solely to non-citizens deny the applicant equality before and under the law, and equal protection and benefit of the law without discrimination contrary to s. 15 of the *Charter of Rights and Freedoms*;

ii. Mr. Jaballah's continued detention at a provincial remand facility under conditions which are cruel and unusual breach his rights under s. 12 of the *Charter of Rights and Freedoms* and breach the principles of fundamental justice under section 7 of the *Charter of Rights and Freedoms*;

iii. Mr. Jaballah's continued detention at the Toronto West Detention Centre, a provincial remand facility, without the availability of any other form of detention in a long term facility, constitutes cruel and unusual treatment contrary to section 12 of the *Charter of Rights and Freedoms*, is not in accordance with standards of fair treatment required by the principles of fundamental justice under section 7 of the *Charter of Rights and Freedoms*, and in that the treatment is accorded to the applicant as a non-citizen and as a Muslim contravenes the right to equality before and under the law, and deny him equal protection and benefit of the law without discrimination contrary to s. 15 of the *Charter of Rights and Freedoms*.

[22] When this application was heard counsel for Mr. Jaballah made clear that the primary request before the Court was that he be exempt from the operation of the provision for his continuing detention as a remedy pursuant to s-s. 24(1) of the *Charter* or s-s. 52(1) of the *Constitutional Act, 1982*, because application of the *IRPA* provisions in this case constituted a breach of rights guaranteed by the *Charter*. If relief of that nature is not found appropriate, counsel asks that those provisions of *IRPA* be struck down as infringing on Mr. Jaballah's rights guaranteed by the *Charter*.

[23] Either course of action proposed would be based on similar contextual factors, including applicable legislation and the evidence relevant to the application for release from detention. I propose to review the evidence before the Court before turning to the submissions of counsel.

[24] It may be worth emphasizing that this application proceeds without a statutory basis other than Canada's *Constitution* including the *Charter*. Relatively little evidence was introduced by

testimony and documents directed to the grounds set out for ordered judicial release from detention under s-s. 83(3) for permanent residents, or under s-s. 84(2) for foreign nationals held for four months after a Ministers' security certificate be found reasonable. Thus, other decisions concerned with applying those provisions for release by a judge are of limited relevance here. In this case constitutional arguments related to the facts, in particular the continuing detention of Mr. Jaballah with no statutory right to review the detention until determination is made on the reasonableness of the certificate, or if it be upheld, until four months after that. At this stage one might reasonably expect that the earliest of those opportunities is likely to be a minimum of two months from the filing of this decision.

[25] I turn to review the relevant evidence before the Court upon which this application is based.

Evidence on conditions of detention

[26] Following his arrest on August 14, 2001, Mr. Jaballah was held for approximately six weeks at Millbrook, a federal penal institution. After September 11, 2001, he was there sequestered in solitary confinement, as he was from mid-October, 2001 when he was moved to the Toronto West Detention Centre ("TWDC"), a provincial regional remand centre.

[27] Conditions of solitary confinement in both institutions were unpleasant, with virtually 24 hours a day spent alone in a very small solitary cell, at first with no running water or regular toilet facilities, and very restricted opportunities for contact, whether by visiting or by telephone, with his

family or others. Meals were provided to be eaten in the cell. The only time out of the cell was brief, for a shower, a brief period in the "yard" or a very short visit. All personal effects, including toothbrushes, and reading materials including a prayer book, were kept outside the cell and could only be obtained from a willing guard. No shoes were permitted in the cell. Bedding was limited and in Mr. Jaballah's view was often unclean when supplied. For a few days Mr. Jaballah was kept naked in his cell, a condition that was offensive to his religious beliefs particularly since he was subject to observation at all times. Reasons for his detention in solitary had nothing to do with his own conduct while in detention, and the basis for it was not explained to him.

[28] The Acting Superintendent of TWDC, testifying at the hearing, explained that Mr. Jaballah's assignment to solitary detention was initiated for his own security and the general security of other inmates and staff of the institution, in keeping with policy and practices of Ontario regional detention centres. In circumstances of general uncertainty about the risk presented by the presence of persons held on security certificates in the aftermath of September 11, 2001, he emphasized a concern about Mr. Jaballah's safety in the general institutional population. There was no evidence, apart from Mr. Jaballah's references to occasional difficulties with individual guards or other inmates, that he was treated other than in accord with policies and practices generally applicable to those held in solitary confinement.

[29] For about a month in December 2001 and January 2002 Mr. Jaballah was transferred to a general range at TWDC, but then because of advice about the security risk his presence created, he

was again transferred to solitary confinement. In July 2002 he was transferred, still at TWDC, to a protective custody range and there he has since remained.

[30] TWDC is a maximum security institution. As a regional remand centre, its principal function is for detention of persons charged but not yet tried or sentenced for criminal offences, mainly serious offences, for whom no assessment of risk classification has been made. That assessment is made only after sentence, when a convicted person is to be moved to a provincial detention centre or has been moved to a federal penal institution. Without such assessment, those held at TWDC are subject to general practices for a maximum security institution.

[31] In the protective custody range where Mr. Jaballah is held, cells are designed to hold two people each but for a substantial portion of the time he has been there some cells have had to accommodate three, with the third person sleeping on the floor. Inmates move from their cells to a common room for the range, usually from morning until 7:30 p.m. The common room has fixed metal tables and chairs. Television may be available. Meals are taken in the common room and all activities are conducted in public there, except frequent strip searches of those who have been moved out of the range for a visit or other purpose. In a room for visiting privileges, family or others, including counsel, are restricted and visiting may be cancelled without advance notice because of institutional security concerns, major public health concerns such as SARS, or labour difficulties with institutional employees. Lockdowns, when the institution is closed to visitors, and

inmates are required to return to or remain in their cells, are not infrequent occurrences for security reasons.

[32] For Mr. Jaballah, a devout Muslim, detention has infringed on his religious practice and beliefs. Initially, in solitary he had trouble obtaining a copy of the Koran. His prayers have sometimes been without expected washing, without a prayer mat, and said in public with other detainees as onlookers and occasional hecklers. There have been only infrequent visits by an Iman. Initially he found the food provided had not been prepared in Halal fashion, and he still questions whether that is the case despite policy and described practices to ensure that Halal food is provided, by guaranteeing outside caterers, for Muslim detainees. Strip searching, done regularly under institutional policy, for security reasons after movement out of the range for any purpose, offends his religious principles.

[33] I accept the evidence of Mr. Jaballah's wife Husnah Mohammed Al-Mastouli, and of his eldest son Ahmed, who is now starting university studies, concerning the great difficulties for his family that his separation by reason of detention has meant. I accept also Mr. Jaballah's own testimony that the separation from his family and the limitations his detention impose on any exercise of responsibilities for his family are the most painful and distressing aspect of his detention. Even when his wife and children are able to visit him, they are always separated from him by a glass partition and they communicate only by telephone. He is, in accord with institutional policy, unable to touch or to hold any of them. I note that with the cooperation of the security officers who

accompany Mr. Jaballah to court hearing days on this application, brief touch visits were permitted in the Courtroom when proceedings recessed for a mid-day break.

[34] I accept also the evidence of Paul Evan Greer, Acting Superintendent of TWDC, concerning the bases for maximum security policies, for the regime of detailed regulations and their application. I accept also his description of institutional efforts, particularly in recent years, to foster non-discriminatory application of policies and practices except, where possible, to recognize significant religious or social practices of certain of the inmates. The latter efforts, for Muslims, include provision of prayer books, and mats, the obtaining of Halal food from outside caterers, special arrangements for serving of food for Muslims during Ramadan, and regular weekly volunteer visits by an Iman.

[35] I accept also Mr. Greer's evidence, from TWDC records, that Mr. Jaballah has made few formal complaints, under the established process, about mistreatment by guards or other inmates and, apart from Jaballah's concerns about health conditions, the only significant recorded complaints from him concern the lack of Halal food on occasion. I accept also that the circumstances of detention probably discourage complaints, as both Mr. Greer and Mr. Jaballah testified. The evidence also indicates that any serious physical health concerns of Mr. Jaballah have been addressed by medical assistance arranged by TWDC.

[36] I turn to evidence provided by written report only, by Dr. Michael Bagby, a registered clinical psychologist and a member of the Department of Psychiatry at the University of Toronto, who, on request of Mr. Jaballah's counsel, examined and reported on his assessment of the psychological effects upon Mr. Jaballah of his detention. The assessment was done on the basis of two interviews in person in a private room at TWDC in mid-July 2005, administered test results and interviews of others by telephone.

[37] At the risk of oversimplifying the assessment of Dr. Bagby, I summarize his conclusions thus. Mr. Jaballah has some psychological problems, in particular panic disorder and depression, sometimes serious, especially when he learns of difficulties for his wife and children. His continuing detention causes him considerable stress, from "worry about the welfare of his family, his health and safety, and the uncertainty of his future". His arrest and continuing detention are said to be direct causes of his current psychological and emotional difficulties. For those difficulties he refuses pharmaceutical treatment, except non-prescription analgesics and anti-inflammatory agents. Dr. Bagby's report concludes thus:

> Barring a change in his legal fortunes and faced with the prospect of indefinite incarceration, his prognosis appears poor. Mr. Jaballah is already experiencing a stress reaction and his mental status appears to be in a process of decline.

[38] Despite the difficulties his continuing incarceration present for Mr. Jaballah and for his family, his treatment, both while in solitary confinement and in the protective custody range, has been in keeping with institutional policies applicable to all inmates in the respective institutions.

Moreover his assignment for different detention conditions has been made pursuant to those policies and practices, with no evidence before me that those have been unreasonably applied, or applied with adverse discriminatory effect, to Mr. Jaballah, or to other Muslims generally. As we shall see submissions about discriminatory treatment and possible breach of his right to equality of treatment under the law pursuant to section 15 of the *Charter* are based not on differences in practical terms but on differences in legal consequences under provisions of *IRPA*.

[39] I note for the record that in the course of the hearing counsel for the Minister of Citizenship and Immigration read into evidence a statement on behalf of the Minister concerning intended changes in arrangements for detention of individuals who are subject to security certificates (Transcript, October 19, 2005 p. 830, line 3 to p. 832, line 20). That statement is as follows:

> **MR. MacINTOSH**: I have something to apprise the Court of. The following is the position of the Government of Canada, and I have been authorized to apprise the Court of this.
>
> There has been a decision by the Government of Canada to assume the detention of persons subject to a security certificate and currently detained in the Province of Ontario. These persons will be detained in a federal detention facility.
>
> The regime contemplated under the federal government regime will ameliorate conditions of detention for the individuals who are the subject of security certificates.
>
> The location will be at a place where the necessary and appropriate facilities and infrastructure are available in Ontario.
>
> It is contemplated that a federal facility will be ready to house the security certificate detainees within four to six months. This is the earliest that a facility can be made ready in order to properly outfit and retrofit a facility for these individuals and also to ensure that they are not housed with the general convicted population.
>
> Also I have been authorized to outline some details with respect to conditions of detention.
>
> Subject to any security concerns that may exist in individual cases and generally, the detainees will be allowed to:
>
> 1. Wear their own clothing;

> 2. Purchase at their own expense a personal TV and radio for use in their cell;
> 3. Purchase at their own expense personal hygiene products in addition to basics that will be supplied;
> 4. Subscribe to print material (newspapers and periodicals);
> 5. Have outdoor exercise that meets the standard for federal inmates, to be reviewed as circumstances permit, but not to be less than an hour;
> 6. Subject to determining the logistics, they will be permitted to have access to books from the penitentiary library;
> 7. Meals will be in conformity with penitentiary standards;
> 8. They will be permitted to have supervised access to a phone;
> 9. They will be permitted to have religious visits and ceremonies in the unit, subject to logistics;
> 10. They will be permitted to have access to essential medical and dental care;
> 11. They will be permitted to have contact visits, subject to conformity with conditions, primarily searches.

[40] Counsel for Mr. Jaballah suggested that implementation of such a policy should provide more amenities and should be sited to ensure reasonable access for families and counsel.

Evidence on other aspects

[41] I turn from the evidence of the conditions of Mr. Jaballah's detention to review other evidence relevant to the application for release. Three other general topics were addressed: the support of prospective sureties, and bondspersons if required, under possible conditions upon which release might be ordered, the general assessment of the threat of international terrorism to Canada provided by testimony of an officer of C.S.I.S. ("the service") and documentary evidence filed, and Mr. Jaballah's testimony concerning his willingness to abide by possible conditions and other aspects of his testimony that raised questions of his credibility.

The support of prospective sureties for Mr. Jaballah

[42] In addition to testifying about the difficulties arising for his family from his continuing detention, his wife and his eldest son, Ahmad, expressed their belief in his innocence of any involvement in terrorist activities, in their concern that his circumstances were the result of continuing efforts of Egyptian security authorities to persecute him by providing misinformation about his activities, now mostly more than two decades ago, in Egypt. They stressed the unfairness of his detention with no criminal conduct charges against him, elsewhere or in Canada, against which he could defend himself, and their beliefs that, if released, Mr. Jaballah would abide by any reasonable conditions imposed so that he would not cause further difficulties for his family. Both testified that if he were released and court-imposed conditions were not met, they would have the obligation to, and would, report any such failure to authorities. His son undertook, if required, to relinquish his own computer, which he relied on for his studies, to avoid its use by his father if Mr. Jaballah were released.

[43] There were also 18 other prospective sureties, mainly Canadian citizens and a few permanent residents, prepared to act as guarantors for Mr. Jaballah's release on reasonable conditions. Most had come to know him, or to know of him through his family or from his teaching at the school in Toronto where he had been a teacher and principal for some months in 2000. None of them had known him before he came to Toronto. None knew of his relationships reported by C.S.I.S. to be with other persons of concern to security services in Canada or abroad. None was aware of details outlined in the public documents filed in the security certificate proceedings, which

gave rise to concerns of the Ministers. Yet all of them expressed respect and sympathy for Mr. Jaballah and his deep commitment to serve his family. They expressed confidence that, if released, he would abide by all imposed conditions, and would do nothing to cause difficulties for his own family, or for any sureties or their families. Among these prospective sureties there is a shared belief that he is not a violent person and would not be associated with terrorism.

[44] Most of these persons by affidavit or testimony were prepared to post bonds, subject to forfeit, if Mr. Jaballah were released and then failed to meet conditions imposed by the Court. One was prepared to replace him in detention for a month, if that could be arranged, so that Mr. Jaballah could be with his family. Prospective bonds, undertaken to be pledged, were collectively nearly $120,000, a substantial sum for a relatively small group of supporters within his community. Since I make no order for his release at this stage, there is no need for further assessment of their proposed undertakings.

General assessment of terrorist threat to Canada

[45] P.G., a senior middle east analyst of C.S.I.S., responsible for research and analysis, and for production of papers and studies on Islamic extremism, testified on behalf of the Service. Before joining C.S.I.S. in 2001, he had served some 18 years with the Canadian Security Establishment, as a multi-lingual research analyst.

[46] P.G. described the history of Al-Qaeda since the 1980's, working at first against Soviet forces in Afghanistan and later with the Taliban, directing its efforts to training terrorists from many countries and sending them off around the world on terrorist missions, or as "sleeper cells" with no immediate mission but ultimately to attack mid-east governments considered to be supportive of western interests and governments, and against western governments and societies. Since the attack in New York on September 11, 2001, the amorphous Al Qaeda organization has evolved, with its central core, still presided over by Osama Bin Laden, reportedly located in the border region of northern Pakistan. An evolving role is now played by Al-Qaeda affiliates led by those trained in the 1980's and 1990's, largely in Afghanistan, operating from time to time to cause havoc in various countries, for example in Bali, in Madrid and earlier against U.S. embassies in East Africa, and against the ship U.S.S. Cole in Kuwait. Finally, there are other individuals or organizations having no real links to Al-Qaeda but determined to emulate it, as those responsible for London transit bombings in 2005 would appear to be.

[47] Among affiliates of Al-Qaeda, the Egyptian Islamic Jihad or Egyptian Al Jihad continues to be an organization that is widely assessed as terrorist. Since forming an association by agreement with Bin Laden in 1998 to promote Jihad, it has widened its targeted interests beyond Egypt. It is an organization, listed as of July 23, 2002 as a terrorist organization under Part II.1 of the *Criminal Code* of Canada, in which the Ministers concerned believe Mr. Jaballah has been involved since at least the mid-1980's.

[48] On at least two occasions since September 11, 2001 public statements of Bin Laden or on his behalf have warned that Canada can be expected to be a target of terrorist activities. The Respondent's Record filed for this application contains copies of news articles, other writings and government publications concerning the threat to Canada of international terrorism, and activities in this country that support it. Some Canadians or persons who have since come to Canada have been trained in camps in Afghanistan while those were in operation. There is no doubt that international terrorism is a continuing threat to Canadian security, and there is no doubt that there are persons in Canada who are considered to be linked to international terrorist activities.

[49] In the course of his testimony P.G. commented:

> It is the belief of the Service that detention, whether short-term or long-term, has no effect on the dedication and on the allegiance of Islamic extremists to their causes. There certainly has been a number of examples in a number of countries worldwide where individuals who were incarcerated for varying periods of time have gained their releases and returned to the same activities which they were engaged prior to their incarceration and for which in fact they were incarcerated.

P.G. illustrated that belief by reference to specific examples, including a report of ten released detainees from Guantanamo Bay who, upon return to Afghanistan, engaged again in acts of violence against western coalition forces. Two other individuals who, after release from detention, are reported to have played leading roles in terrorist actions in Madrid and in Iraq. Admittedly those examples were without reference to other released detainees whose subsequent activities are unknown or unreported, for example, terrorist suspects released from preventive detention in the

United Kingdom in 2004, by order of the House of Lords, under the legal regime there found applicable.

[50] While he had read the evidence, both public and classified, concerning Mr. Jaballah, P.G. acknowledged that he had not met Mr. Jaballah, he had not otherwise studied him specifically, and he was unaware of the views about him held by his family and members of his community in Toronto. PG did acknowledge that, after the first security certificate against Mr. Jaballah was quashed and he was released, there was no allegation on the public record that he had renewed any of his associations with other persons of concern to C.S.I.S., or that he had engaged in other activities that would be considered detrimental to Canada's national security. P.G. acknowledged also that he was unaware of any information on the public record that Mr. Jaballah had been trained in any camp in Afghanistan, and similarly no public allegation was known to him that Mr. Jaballah had ever personally engaged in active combat.

[51] Nevertheless P.G. also testified that:

> It is the belief of the Service that Mr. Jaballah continues to represent a threat to Canadian security and that this threat has not – and I emphasize "not" – been neutralized as a result of his incarceration.

I return to this assessment in considering relief requested here.

Mr. Jaballah's attitude to his release and his credibility

[52] Mr. Jaballah testified about the conditions of his detention, its effects upon him and his family. He had not previously testified in the certificate proceedings which commenced in August 2001, except, after his then counsel had walked away from the Court's proceedings and any responsibility for Mr. Jaballah's case, when he testified only to affirm that he would not adduce any evidence to respond to the certified opinion of the Ministers that he was inadmissible to Canada because of perceived connection or involvement with terrorists or terrorism. Now, in the course of his testimony in support of his application for release from detention, he testified about background circumstances of his arrests, torture and detentions in Egypt, and about his travels and activities after leaving there and before coming to Canada in 1996.

[53] In the course of his testimony Mr. Jaballah undertook that if now released he would obey any conditions imposed upon him by the Court. He stressed that for him the important thing is to be close to his family. Conditions of house arrest, or time outside his home only in the company of persons approved by the Court, he undertook would be met if he were released. In his own words: (transcript p. 501 lines 7-12)

> …I am willing to accept any condition that the Court asks me to observe because breaking those conditions would mean that I would be deprived of the only thing that I am fighting for, which is being with my children.

[54] I have no doubt about Mr. Jaballah's deep interest in being with and supporting his family. Yet his credibility about other matters leaves much to be desired. In cross-examination, he first

stated that he could not remember whether he had contacted anyone in Pakistan after he had come to Canada, he had not contacted anyone in Yemen after leaving there where he only knew one person he had worked with, and later after leaving Azerbaijan in 1995 he had left no friends behind and had no communication with persons in either country after coming to Canada. Later he was asked about telephone company records, then produced, which indicated a number of calls to all three countries, including 72 to Yemen and 47 calls to Azerbaijan from his Canadian telephone, mainly in 1996 and 1997. He then acknowledged that some of the recorded calls were his, or perhaps his wife's. While some recorded calls were so brief, a minute or so, they might have indicated inability to complete a call, as he suggested, numerous longer calls that he appeared to acknowledge as his, were not satisfactorily explained.

[55] Again, there are telephone records of some 75 calls from his telephone to London England, mainly to the International Office for Defence of the Egyptian People, believed to be an office with an operational link for Al Qaeda. These calls he admitted making when he was seeking advice or assistance for his refugee claim, to support his application to review his failed refugee claim. Yet many calls recorded in 1996 and early 1997 were made before Mr. Jaballah's application for refugee status was heard, and, in my opinion, these were not satisfactorily explained. Nor was there any satisfactory explanation of more than 20 calls billed by Bell Canada to Mr. Jaballah's phone number from June 4 to 6, 1996, soon after his arrival in Canada, made to the United Kingdom, Yemen, Azerbaijan and Pakistan.

[56] Other testimony about his lack of communication with certain others in this country after his arrival here, was cast into doubt by records of calls from his telephone to Montreal, to Winnipeg and to Edmonton, in each centre to phone numbers of persons suspected by C.S.I.S. of links to international terrorist activity. As for travels within Canada he first said he had only visited Montreal, to arrange automobile insurance at a lower premium than he could arrange in Toronto, and to Niagara Falls and London. Later when asked specifically about other centres he had visited, he acknowledged that he had driven to St. Catherine's, and also to Winnipeg to visit a particular person, described by him as not really a friend, who had been of assistance to him and his family on their arrival in Canada. His contact with another person, then living in Alberta, one since charged with terrorist funding activities by prosecutors in the United States, was said to have been casual, and initiated by the person in Alberta whom Jaballah claims he really did not know. Yet there were numerous phone calls recorded from Jaballah's Toronto number to Edmonton and to Leduc where his acquaintance was then based. These calls were not satisfactorily explained.

[57] The calls and visits in question were now almost a decade ago but Mr. Jaballah's explanations, while not directly relevant to the conditions of his detention, which is the prime issue of concern in this application, were not satisfactory and are simply not credible. In my opinion that in turn casts doubt upon any undertaking he might give in relation to conditions imposed if he were to be released at this stage.

The claim for a "constitutional exemption"

[58] The primary relief sought by Mr. Jaballah is that he be exempt from the continuing application of the detention provisions of *IRPA* pending final determination of all issues arising in this proceeding, on the ground that their application in his case results in infringement of rights guaranteed by the *Charter*, in particular by ss. 7, 9, 12 and 15(1). That submission is made without reference to the constitutional validity of the detention provisions as enacted. Indeed, the theory of a constitutional exemption as a possible remedy under s. 24(1) of the *Charter* is that the Court may order that a person whose rights are adversely affected under otherwise valid legislation may be exempt from application of the legislation insofar as that infringes on rights guaranteed by the *Charter*.

[59] It is urged that relief of this sort be granted pursuant to s-s. 24(1) of the *Charter*, which provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent

[60] It is argued that continuing detention of Mr. Jaballah, mandated in this case by s-s. 82(2) since he is a foreign national, with no judicial review of the appropriateness of his detention until as

a consequence of the assessment of the reasonableness of the Ministers' certificate under which he is held, results in infringement of his *Charter* rights.

[61] Several factors are said to support that submission, factors which also underlie the alternate submission that the detention provisions as enacted are unconstitutional for they conflict with the *Charter's* guarantees of:

— the right to life, liberty and security of the person and the right not to be deprived thereof except in accord with principles of fundamental justice (s. 7);

— the right not to be arbitrarily detained (s. 9)

— the right not to be subjected to any cruel and unusual punishment (s. 12); and

— equality before and under the law, and the equal protection of the law, without discrimination based on e.g. national or ethnic origin or religious or other designated or analogous grounds (s-s. 15(1)).

[62] The factors relied upon by Mr. Jaballah as supporting his release, either because an exemption should be granted in his case or because the detention provisions are said to be unconstitutional, are these:

i) the duration of his detention, now four and a half years, since August 2001;

ii) the conditions of his detention and their effects upon him;

iii) the indeterminate future duration of his detention if it should continue;

iv) the lack of any provision under *IRPA* for judicial review of whether his continuing detention is warranted, and

v) the discriminatory impact of the provisions on Mr. Jaballah as a foreign national.

[63] The duration of his detention cannot be considered without at least acknowledging its purpose is to hold a foreign national who is considered by two Ministers of the Crown to be inadmissible to Canada because he presents a risk to national security, as a preventive measure, not indefinitely but only so long as that ministerial determination is contested and, if that be upheld as reasonable, then pending his departure from Canada. S-s. 82(2) of the *Act* providing for detention of a foreign national without the issue of a warrant or judicial review is in the context of other provisions, i.e., for release by the Minister of Citizenship and Immigration upon application by a person detained to permit his or her departure from Canada (s-s. 84(1)). If the certificate is contested but upheld as reasonable, continuing detention thereafter, if the person has not been removed for 120 days, may be reviewed by a judge (s-s. 84(2)). In the context of the provisions for detention, read as a whole, the future duration of any continuing detention is indeterminate only in the sense that a date for Mr. Jaballah's release cannot be predicted with any certainty.

[64] While his counsel submits that the application in this case concerns only judicial release from detention and that the provision for release by the Minister is irrelevant, the Court cannot ignore the context in which detention here arises. As a foreign national Mr. Jaballah has no right to be admitted to Canada. He is, in the certified opinion of responsible Ministers, inadmissible to

Canada on grounds which Parliament has determined are serious enough to warrant his detention without a warrant until he accepts the Ministers' opinion and departs from Canada, or the opinion is found to be unreasonable, or if found reasonable, then if he applies after 4 months of further detention and is then released under s-s. 84(2).

[65] Insofar as the conditions of his detention and the effects of these upon Mr. Jaballah are relevant in considering the motion for his release, I accept the evidence of Dr. Bagby concerning the psychological effects of the conditions upon Mr. Jaballah. I also accept the evidence of his wife and son about the effects of his continuing detention on his family. That said, the conditions of his detention are those of a maximum security institution designed and operated as a remand centre, holding persons on serious criminal charges pending trial. The conditions are far from ideal and they may be particularly difficult for anyone detained over a long period. The institutions concerned are not resorts. Some aspects of detention, for persons seeking to contest the decision of the Ministers, will be addressed, at least in part, by the announced policy to change arrangements for holding security certificate detainees in future.

[66] In *Ahani*, commenting on s. 40.1 of the *Immigration Act, 1978*, (the predecessor legislation to *IRPA*), concerning detention in security certificate cases, Madam Justice McGillis wrote ((1995) 100 F.T.R. 201 at para. 48):

> [48] With respect to s. 9 of the *Charter*, counsel for the plaintiff relied on the submissions which he made in support of his contention that the principles of fundamental justice include the right not to be arbitrarily detained. I am satisfied that the pre-determination detention of the named person under s. 40.1 of the

> *Immigration Act* is not arbitrary, in that it is expressly authorized by law and occurs only following a separate decision by two ministers that a person, who is neither a Canadian citizen or permanent resident, has a terrorist background or propensities. In the circumstances, there is no infringement or denial of the right under s. 9 of the *Charter*.

[67] Speaking for the Court of Appeal in upholding the decision in *Ahani*, *supra,* 201 N.R. 233 at para.[4] Mr. Justice Marceau, commented concerning the detention of those subject to a security certificate, as follows:

> …It is true that the filing of the certificate has the immediate unfortunate effect of leading to the arrest and detention of the person concerned, a fate normally reserved to criminals, and this is, no doubt, the most sensitive aspect of the scheme. It must not be forgotten, however, that this detention is not imposed as a punishment, nor is its sole function to assure the presence of the person. Rather, it is principally a means of providing preventive protection to the Canadian public. And in view of the test for the issuance of the certificate, that is to say the reasoned opinion of two ministers based on security information; in view of the fact that the scheme provides for the obligatory judicial scrutiny of the reasonableness of those opinions within an acceptably short period of time; in view also of the possibility given to the detained to put an end to the detention at any time by agreeing to leave the country; and in view, finally, of the type of prohibited class of individuals there are reasons to believe we are dealing with, that is to say individuals somehow associated with terrorism, it appears to us, as it appears to the learned trial judge, that such preventive detention is not arbitrary, nor excessive.

[68] The decision of the Supreme Court of Canada in *R.* v. *Swain*, [1991] 1 S.C.R. 933, [1991] S.C.J. No.32 (Q.L.) is relied on, by analogy, on behalf of Mr. Jaballah. There Chief Justice Lamer considered ss. 9 and 12 as examples of rights protected also under the more general guarantee of s. 7 of the *Charter*. The criterion for considering whether punishment is cruel and unusual within the meaning of s. 12 is whether the punishment prescribed is grossly disproportionate to the offence and to the offender, so excessive as to outrage standards of decency. In this case, Mr. Jaballah's detention is not, strictly speaking, "punishment". It has been characterized by the Court of Appeal

in *Ahan*i, *supra*, and in *Charkaoui*, 2004 FCA 421, as a preventive measure for the safety of the public and to ensure that one considered inadmissible to Canada who is not successful in challenging that opinion of the Ministers concerned, may be deported. That preventive measure is an aspect of the Canadian government's responsibility in regard to national security in respect of international terrorism and and in enforcement of immigration requirements. Detention of that nature, under conditions applicable in regular institutions for detaining persons charged with criminal offences, and which does not include conditions excessive for general institutional security purposes, cannot be characterized as cruel and unusual treatment or punishment.

[69] In my opinion the legislative process for detention in this case, initiated under s-s. 82(2) of *IRPA*, cannot be compared with that found unconstitutional in *Swain*. Here the provision is mandatory but it is not arbitrary. It provides for detention of a foreign national for a reason, that is the opinion of two Ministers of the Crown, responsible for immigration and for national security, that Mr. Jaballah is not admissible to Canada for national security reasons. The grounds for that opinion have been identified to him, even if all the information available to the Ministers has not been provided. Further, the detention under s-s. 82(2), while mandatory upon the certification by the Ministers, is not indeterminate in the sense found in *Swain*. It will end upon Mr. Jaballah's decision not to contest the Ministers' opinion further and to accept removal from Canada, or if he succeeds in establishing that the opinion is unreasonable and is to be quashed, or if he is not successful in that quest but remains in detention for 120 days after the certificate may be upheld,

and he then meets the requirements for release under s-s. 84(2). In my opinion, those possibilities for terminating the detention in this case, distinguish detention in this case from that in *Swain*.

[70] Finally, I mention briefly three other aspects of his circumstances which are urged for Mr. Jaballah. First, it is said the Court should not ignore, as an aspect of threatened personal security in relation to s. 7 rights, the stress resulting from the threat of removal to a risk of death or torture in Egypt. I am not persuaded this is relevant in considering effects of his detention, for even if he were now released, as a foreign national with no right yet to remain in Canada, that same threat and stress would be facing him. Second, the duration of his detention, since August 2001 is not by itself a standard for assessing the expeditiousness of these proceedings. In *Ahani*, *supra*, and in *Charkaoui*, *supra*, the courts concerned explained the statutory process as one designed to be expeditious. Yet those courts have also pointed out that any lapse of time arising from judicial or other proceedings initiated by the person in detention to contest the opinion of the Ministers is not alone a basis for assessing whether proceedings are reasonably expeditious, unless there be delay that can be considered an abuse of process.

[71] While much time has elapsed since this security certificate proceeding began, that time has been required, in essence to ensure fairness in proceedings, mainly initiated by Mr. Jaballah, as is his right.

[72] It is urged that detention here should be considered subject to limits prescribed by law as justified in a free and democratic society (s. 7 of the *Charter*) and that some of those limits applicable here should include the necessity for examination of the need or purposes of detention both before it begins and periodically so long as it continues, as a number of international agreements provide. Those agreements may inform the content of "limits prescribed by law" under s. 7 in some cases, but, in my opinion, not in relation to a legislative process when Parliament, aware of such procedural protections as demonstrated in relation to permanent residents subject to security certificates under s. 83, did not similarly provide procedural protection for foreign nationals when they are subject to national security certificates.

[73] In view of the nature and purpose of the detention of Mr. Jaballah, difficult as those conditions may be for him and his family, in my opinion the conditions do not constitute cruel and unusual punishment under s. 12 of the *Charter*. His mandatory detention as provided by s. 82(2) of *IRPA*, by itself, does not constitute arbitrary detention or imprisonment under s. 9 of the *Charter*. Further, the conditions and their effects do not infringe upon his rights guaranteed by s. 7 of the *Charter*.

[74] These conclusions about the conditions of his detention and their effects are consistent with decisions of the Court of Appeal in *Ahani*, *supra* and in *Charkaoui*, *supra*. In those cases the Court

upheld the security certificate process, including provisions for detention, under *IRPA* and its precursor, finding they did not infringe on rights guaranteed under ss. 7, 9 and 12 of the *Charter*.

[75] I find otherwise in respect of equality of rights guaranteed by s-s. 15(1) of the *Charter*. In my opinion the right to equality and equal benefit of the law without discrimination on a ground analogous to those specified, assured to Mr. Jaballah and every individual in Canada by s-s. 15(1), is infringed by the effects of continuing detention under s. 82(2) as it has been applied in his case.

[76] S-s. 15(1) of the *Charter* provides:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[77] The standard for assessing a claim that s-s. 15(1) of the *Charter* has been infringed has been summarized by Chief Justice McLachlin, writing for the Supreme Court in *Auton* v. *British Columbia* (*Attorney General*), [2004] 3 S.C.R. 657 at para. 22, and applied in that case as outlined commencing at para. 27. That summary is whether there is (1) differential treatment under the law (2) on the basis of an enumerated or analogous ground (3) which constitutes discrimination, in that

the distinction or difference denies the equal human worth and dignity under the law of the claimant.

[78] In considering equality rights affected by the continuing application of s-s. 82(2) in this case, I emphasize that I do not assess the constitutional validity of that provision of the *Act* in light of s-s. 15(1) of the *Charter*. Rather it is the effects of that continuing application which here give rise to concern, where it has continued without review.

[79] It is urged for Mr. Jaballah that in considering whether there is differential treatment, the appropriate comparator group is Canadian citizens who are considered threats to national security for whom the only provision for preventive detention is found in the *Criminal Code*, with early and periodic review of that detention pending trial on a criminal charge. I am not persuaded that is an appropriate comparator group. The *Criminal Code* provides for administration of the criminal law and it applies to all individuals in Canada regardless of citizenship or immigration status. *IRPA* applies to immigrants and foreign nationals, not to Canadian citizens who under s. 6 of the *Charter* have mobility rights to enter, to leave, and to travel within Canada. Permanent residents and foreign nationals in Canada have only qualified rights to remain, and foreign nationals require permission to be admitted to this country.

[80] There is another comparator group, that is permanent residents detained under a security certificate who, under s. 83 of *IRPA*, have procedural rights not available to foreign nationals. If

certified by the Ministers under a security certificate, a foreign national is, upon issue of a warrant, subject to mandatory detention but that detention continues subject to review by a judge within 48 hours after beginning of the detention and it continues subject to further review at least once every six months thereafter. That review is not available to a foreign resident detained under s-s. 82(2) of *IRPA*. Citizenship was held to be a ground analogous to those specified in s-s. 15(1) for purposes of admission to a provincial law society (*Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143). In my view, the treatment of one foreign national differently from another who has been admitted as a permanent resident, with only a qualified right to remain, cannot be justified as providing equal protection and benefit of the law.

[81] In my opinion the effect of continuing detention without any review under s-s. 82(2) results in a loss of equal protection and equal benefit of the law for a foreign national solely on the basis of his immigration status. That treatment is discriminatory on a ground analogous to those specified in s-s. 15(1) of the *Charter* for no readily discernable reason, at least none that would appear to be relevant to national security concerns, the purpose of detention under both s-s. 82(2) and s. 83 of *IRPA*.

[82] If the effects of continuing application of s-s. 82(2) without a judicial review of the detention is, as I find, to deny Mr. Jaballah rights assured by s-s. 15(1) of the *Charter*, what is the appropriate remedy under s-s. 24(1) of the *Charter*? For Mr. Jaballah it is urged that he should now be granted exemption from continuing detention on constitutional grounds, unless there be review of that

detention on the same basis as provided for a permanent resident detained, as Mr. Jaballah is, under a security certificate, that is, by considering detention on the standards set out in s-s. 83(3) of *IRPA*.

[83] I find that remedy proposed is appropriate in the circumstances of this case where Mr. Jaballah's detention has been more than 4 years without judicial review of the appropriateness of its continuing. That review, which counsel for Mr. Jaballah proposed could proceed on the basis of the evidence presented in this application for release, I now undertake on a basis similar to that applicable in the case of a permanent resident under s-s. 83(3). That is that the detention is to continue if I, as the reviewing judge, am satisfied that Mr. Jaballah "continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal".

[84] I note that Madam Justice McLachlin (as she then was), after discussing the possibility of a "constitutional exemption" in *R.* v. *Seaboyer* [1991] 2 S.C.R. 577 at 627 ff, declined to grant an exemption where to do so would not uphold the statutory provision there in question substantially as Parliament had enacted it, would introduce judicial discretion without useful guidelines, and would provide a result similar to striking down the provision on constitutional grounds.

[85] In my opinion, none of the concerns about a constitutional exemption expressed in *Seaboyer* are here at play. The remedy here proposed does respect the statutory provision in question, s-s. 82(2) of *IRPA* remains in force for mandatory detention of a foreign national who is the subject of a

security certificate, and the judicial discretion introduced is to provide only that after long detention without judicial review of the reasons for continued detention, it shall only be continued where a judge, after review, so orders on the same grounds as are applicable in the review of continuing detention of a permanent resident similarly detained. That discretion does not produce a result similar to that which would result if the provision here in questions was struck down on constitutional grounds. S-s. 82(2) of *IRPA* remains in force providing for mandatory detention of a foreign national who is the subject of a security certificate.

Detention provisions of IRPA and the *Charter*

[86] In view of my determination to grant a constitutional exemption to Mr. Jaballah from continuing detention under s-s. 82(2) of *IRPA* unless there be a review of the detention and an order for its continuance by a judge, there is no necessity to deal with the alternative issue raised on his behalf, that is that the provision concerning detention be struck down on constitutional grounds, as infringing on s-s. 15(1) equality rights secured by the *Charter*. Thus, I make no decision about validity of s-s. 82(2) in light of s-s. 15(1) of the *Charter*.

[87] The effect of this decision is to provide that detention under s-s. 82(2) after a long term without judicial review, shall be continued only by a judge's order after review in relation to the same terms as are applicable under s-s. 83(3) in the case of a permanent resident similarly detained.

Review of Mr. Jaballah's detention

[88] I adopt the terms of s-s. 83(3) by analogy as the appropriate standards for review of Mr. Jaballah's detention. Those terms are that

83 (3) A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.	83 (3) L'intéressé est maintenu en détention sur preuve qu'il constitue toujours un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.

[89] The evidence before me in this application for release, in my opinion, is unequivocal that Mr. Jaballah continues to be a danger to national security. That was the evidence of P.G. He and counsel referred to contextual documentary evidence concerning terrorists generally, including Islamic extremists and others, and reports of the Director of C.S.I.S. to parliament's committees. That documentary evidence did not relate directly to Mr. Jaballah, but it is relevant to the general context in the era of international terrorism today.

[90] In response to that, counsel for Mr. Jaballah urge consideration of several factors, including

1) the opinion of C.S.I.S. expressed by P.G., is said to be unfounded;

2) the absence of any evidence of Mr. Jaballah's involvement in any activities threatening Canada's national security after the first certificate against him was quashed;

3) any danger he might have posed in 1999 should now be effectively eliminated by publicity and by his lengthy detention, as an alleged terrorist;

4) Al Quaeda and Egyptian Al Jihad have presumably undergone changes since 1999 and whatever links Jaballah may have had with them can probably not be restored;

5) the Court has capacity to craft terms and conditions for his release and those would inevitably be supplemented by continuous surveillance by security service staff; and

6) the circumstances of those persons who have been detained under security certificates in recent years is indicative of racial profiling by C.S.I.S.

[91] Only the first of these considerations responds directly to the issue of whether Mr. Jaballah constitutes a danger to national security, the key issue for considering his continuing detention. I am not persuaded the opinion expressed by P.G. is unfounded. There is evidence and information in the public record, and more in the confidential record that would support the assessment of P.G., an assessment I accept for this review. A number of the other considerations concern the measure of possible threat Mr. Jaballah poses and they are observations made essentially in the absence of evidence. I acknowledge the Court has capacity to devise terms and conditions for release (*Re Charkaoui*) but here no persuasive argument was made that this could or should be done when there is a threat to national security. I must add, in relation to the last of the considerations suggested, there is no evidence at all of racial profiling by C.S.I.S. in its task of assessing who may pose a threat to national security. The fact that only foreign nationals of Arabic descent, and presumably of Muslim religious faith, are currently held in detention, if that is the case, is not evidence that C.S.I.S. work is concerned only or primarily with persons with those qualities.

[92] Finally, I add for the record that my determination, on the evidence and arguments adduced in these certificate proceedings and in this application for release, that Mr. Jaballah continues to be a danger to national security is a decision at this stage made on the record before me. It is not a decision on the issue of the reasonableness of the security certificate. That issue will be addressed after hearing further evidence, for the presentation of which leave has been granted.

Conclusion

[93] As earlier indicated, at para. 10 of these Reasons, the several conclusions reached in this application for release from detention, which have now been set out by separate Order, are:

i) This Court has authority to consider the application for release from detention made pursuant to the *Charter* and the *Constitution Act, 1982*.

ii) In the circumstances of this case, the long continuing detention of Mr. Jaballah under s-s. 82(2) of *IRPA*, as a foreign national, without statutory opportunity for review of that detention, pending consideration of the reasonableness of the Ministers' certificate, results in loss of his right to equality before the law and his right to equal benefit of the law on a discriminatory basis with respect to his immigration status, contrary to s-s. 15(1) of the *Charte*r when compared with the circumstances for a permanent resident similarly detained under a security certificate under s. 83 of *IRPA*

iii) Those circumstances warrant, as a remedy under s-s. 24(1) of the *Charter*, an exemption from the continuing application of s-s. 82(2) of *IRPA* unless his detention is ordered by a judge, in this proceedings this judge, following review of his detention on the same grounds as are applicable, in the case of a permanent resident similarly detained, under s-s. 83(3) of *IRPA*, that is,

83 (3) A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.	83 (3) L'intéressé est maintenu en détention sur preuve qu'il constitue toujours un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.

iv) Upon considering this application, the evidence adduced and submissions made, I am satisfied that Mr. Jaballah continues to be a danger to national security, and thus his detention should be continued pending further order.

v) This application for release from detention by Mr. Jaballah is dismissed

vi) The provisions for detention under ss. 82 to 85 of *IRPA* have been held by the Court of Appeal not to infringe upon rights guaranteed by ss. 7, 9 and 12 of the *Charter*. This Court is bound by those decisions. No determination is made about the constitutional validity of s-s. 82(2) of *IRPA* in light of s-s. 15(1) of the *Charter*, and that provision of the *Act* remains in force.

vii) Costs sought by Mr. Jaballah on a solicitor and client basis were not addressed when this matter was heard. Costs on that basis are not awarded. The matter of costs on this application may be addressed by counsel at the conclusion of the proceedings.

"W. Andrew MacKay"
DEPUTY JUDGE