Date: 20051230

Docket: DES-04-02

Citation: 2005 FC 1740

BETWEEN:

MOHAMED HARKAT

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS CANADA

Respondents

REASONS FOR ORDER

LEMIEUX J.

A. INTRODUCTION

[1] Mohamed Harkat, (applicant) a citizen of Algeria and a foreign national in Canada, applied on September 23, 2005, for judicial release from detention pursuant to subsection

84(2) of the *Immigration and Refugee Protection Act* (Act) which came into force on June 28, 2002. Mr. Harkat arrived in Canada on October 6, 1995, after, according to him, residing in Pakistan for five years. Immediately upon his arrival, he made a refugee claim which, on February 24, 1997, was granted. He then made an application for permanent residence on March 18, 1997, which was refused on December 13, 2002.

[2] Section 84 of the Act reads:

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.
Judicial release	Mise en liberté judiciaire
(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. [*emphasis mine*]	(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.

[3] Mr. Harkat has been detained at the Ottawa Regional Detention Centre since December 10, 2002, on a security certificate issued in early December 2002 pursuant to subsection 77(1) of the Act. He filed his application for judicial release from detention after my colleague Justice Dawson ruled on March 22, 2005, [2005 FC 393], the Ministers' security certificate was reasonable.

[4] Under section 81 of the Act if a security certificate is determined reasonable it is conclusive proof that the foreign national named in it is inadmissible; it is a removal order that may not be appealed against and is in force without the necessity of holding or continuing an examination or an admissibility hearing. The person named in it may not apply for protection under subsection 112(1) of the Act.

[5] Subsection 82(2) of the Act headed “Mandatory detention” provides that a foreign national who is named in a security certificate issued under subsection 77(1) “shall be detained without the issue of a warrant”. This means that unlike the case of a permanent resident under section 83 of the Act, his application is Mr. Harkat’s first opportunity to have his detention reviewed under the Act.

[6] The security certificate alleged Mr. Harkat was inadmissible to Canada on security grounds being a person described in paragraphs 34(1)(*c*) and 34(1)(*f*) of the Act because there were reasonable grounds to believe that:

(1) he has engaged in terrorism by supporting terrorist activities; and

(2) he was, or is, a member of the Bin Laden Network which is an organization that there are reasonable grounds to believe has engaged or will engage in terrorism.

[7] The principal findings and conclusions reached by Justice Dawson determining reasonable the security certificate issued in respect of Mr. Harkat are:

> ¶ 113 Even without finding Mr. Harkat's testimony to be implausible and incredible on the three material points set out above, on the basis of the confidential information it is clear and beyond doubt that Mr. Harkat lied under oath to the Court in several important respects, including his denials that he:
>
> (i) knowingly supported or assisted Islamic extremists;
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> (ii) assisted Islamic extremists who have come to Canada;
>
> (iii) was associated with Abu Zubaida;
>
> (iv) was in Afghanistan; and
>
> (v) lived in Peshawar.
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> ¶ 114 With respect to the confidential information I rely upon to find Mr. Harkat to be incredible, I have paid close attention to the detail of the information provided, asked specific questions and received answers about the reliability of the various sources of information, and considered whether information was corroborated by more than one independent source. Having done so, I find that credible and reliable information coming from a number of independent sources, many of which are corroborated, contradicts Mr. Harkat's denial on each of these points. Weighing that evidence against Mr. Harkat's testimony, I conclude, on a balance of probabilities, that Mr. Harkat's denials are not credible and that he lied in his evidence to the Court.
>
> . . .
>
> ¶ 143 A consideration of all of the evidence before me establishes, on an objective basis, grounded on evidence I find to be credible, that there are reasonable grounds to believe that:
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> 1. Prior to arriving in Canada, Mr. Harkat engaged in terrorism by supporting terrorist activity.
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> 2. Mr. Harkat travelled to and was in Afghanistan.
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> 3. Mr. Harkat supported terrorist activity as a member of the terrorist group known as the Bin Laden Network. Before and after he arrived in Canada Mr. Harkat was linked to individuals believed to be in this network.
>
> 4. The Bin Laden Network engages in acts of terrorism in order to obtain its stated objective of establishing Islamic states based on a fundamentalist interpretation of Islamic law. The Bin Laden Network has been directly or indirectly associated with terrorist acts in several countries. (Parenthetically, I observe that Mr. Harkat did

not challenge the contention of the Ministers that the Bin Laden Network is an organization that has engaged, or will engage, in terrorism.)

5. The Bin Laden Network operated terrorist training camps and guest houses in Afghanistan and Pakistan. The camps provided sanctuary, funds, and military and counter-intelligence training. Abu Zubaida ran the Khaldun and Darunta training camps in Afghanistan.

6. Mr. Harkat acknowledges he was a supporter of the FIS. When the FIS severed its links with the GIA, Mr. Harkat indicated his loyalties were with the GIA. The GIA seeks to establish an Islamic state in Algeria through the use of terrorist violence. Mr. Harkat's support of the GIA is consistent with support for the use of terrorist violence.

7. Mr. Harkat lied to Canadian officials about his:

- work for a relief company in Pakistan;

- travel to Afghanistan;

- association with those who support international extremist networks;

- use of the alias Abu Muslima; and

- assistance to Islamic extremists.

I infer that such lies were for the purpose, at least in part, of distancing himself from those who support terrorism and to mislead Canadian authorities about his involvement in the support of terrorist activities.

8. Mr. Harkat has assisted Islamic extremists who have come to Canada.

9. Mr. Harkat has associated with Abu Zubaida since the early 1990's. Abu Zubaida was one of Osama Bin Laden's top lieutenants from the 1990's until his capture.

10. While in Canada Mr. Harkat has been in contact with individuals known to be involved in Islamic militant activities.

¶ 144 It follows that Mr. Harkat is inadmissible to Canada as a person described in paragraphs 34(1)(c) and 34(1)(f) of the Act because there are reasonable grounds to believe that:

(i) Mr. Harkat has engaged in terrorism by supporting terrorist activity; and

> (ii) Mr. Harkat was, or is, a member of the Bin Laden Network which is an organization that there are reasonable grounds to believe has engaged or will engage in terrorism. [*emphasis mine*]

[8] For completeness, I detail Justice Dawson's three implausibility findings which she referred to in paragraph 113 of her reasons finding the security certificate issued against Mr. Harkat to be reasonable. At paragraph 105 of her reasons she wrote:

> ¶ 105 There is a presumption at law that testimony given under oath is truthful, unless there is a reason to doubt the truthfulness of the evidence. However, three aspects of Mr. Harkat's testimony, while possibly true, raise a real question as to whether his evidence is plausible or rings true. These areas were Mr. Harkat's evidence about how he acquired his job with the Muslim World League, his salary while employed by the Muslim World League in Pakistan, and his travel from Ottawa to Toronto, by van, with Mr. Ahmed Khadr.

[9] In respect of being hired by the Muslim World League for the warehouse supervisor job, Justice Dawson concluded:

> ¶ 106 … Given Mr. Harkat's testimony that the Muslim World League did not want a Pakistani or an Afghani for the job, and that honesty was required for the supervisor position, Mr. Harkat's testimony sheds no light on how the Muslim World League satisfied itself that Mr. Harkat was sufficiently honest for the position and is difficult to believe.

[10] In terms of his salary, Justice Dawson said that no explanation was given as to why Mr. Harkat was paid so well and concluded: "It is again difficult to believe that someone in Mr. Harkat's circumstance would be paid $18,000 U.S. while working in a refugee camp in Pakistan".

[11] Finally, in terms of his travel from Ottawa to Toronto, by van, with Ahmed Khadr, a high ranking associate of Osama Bin Laden, Justice Dawson stated that both Mr. Harkat and Mr. Khadr allegedly worked in Pakistan in the area of Islamic charities but yet Mr. Harkat said he had little or almost no discussion with Mr. Khadr when he traveled with him in a van from Ottawa to Toronto. She observed Mr. Harkat said Mr. Khadr's only advice to him was to tell the truth to immigration authorities. Justice Dawson found:

> [108] …Given their common background in relief work in Pakistan, and notwithstanding Mr. Harkat's explanation that he was pre-occupied, I find it implausible that this was the extent of the conversation over a five hour journey with one of Osama Bin Laden's highest ranking authorities.

[12] She concluded:

> ¶ 109 These aspects of Mr. Harkat's testimony did not ring true as he testified. Plausibility findings are to be made only where the evidence is so far beyond the realm of what could reasonably be expected that one can safely conclude that the testimony cannot be true. While Mr. Harkat's testimony on these points could possibly be true, realistically one would not reasonably expect that Mr. Harkat would be hired and paid as he explained, or that there to be no real conversation with Mr. Khadr over a five hour journey. As. Mr. Harkat testified I found his evidence on these points to be inherently implausible and incredible.

[13] After receiving the applicant's material, the Chief Justice of this Court immediately contacted counsel for the parties to set a schedule of steps leading to fixed hearing dates for the public examination of Mr. Harkat's application for judicial release.

[14] In accordance with that schedule, counsel for the respondents filed, on October 7, 2005, public and confidential versions of a document entitled "Information pertaining to the

application for release by Mohamed Harkat pursuant to section 84 of the *Immigration and Refugee Protection Act"* supported by two volumes of public materials and three volumes of confidential materials.

[15] After my undertaking the necessary study of all materials, both public and confidential, filed before Justice Dawson in connection with the security certificate and the additional materials filed for the purpose of this application, I, on October 14, 2005, in camera and *ex parte,* met with counsel and officials of the respondents for three hours and made several suggestions how the public version of the respondents' information document opposing Mr. Harkat's detention release might be expanded to ensure maximum public disclosure to Mr. Harkat and his counsel without compromising national security information. Issues of relevance were also raised. The Court met again, *in camera* and *ex parte* with the respondents' same persons on October 17, 2005, to hear their response to the Court's suggestions and explanations why the views of the Court on some of its October 14th proposals could not be accommodated.

[16] As a result of that exchange, counsel for the respondents served and filed on October 17, 2005, an amended and expanded public information document. I am satisfied it provides for maximum disclosure in the circumstances.

[17] The Court held public hearings on October 24, and 25, as well as on November 2, 3, 4 and 8, 2005. Evidence was also adduced by Mr. Harkat's counsel *in* camera in the presence of counsel for the respondents on November 25, 2005. The Court also heard from counsel for the respondents *ex parte* and in camera on November 4, 2005, for approximately two hours and on November 29 and 30, 2005, for approximately 10 hours.

B. The Federal Court of Appeal's decision in *Almrei*

[18] The leading case on the interpretation and application of subsection 84(2) of the Act is the Federal Court of Appeal's decision in *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 54, whose reasons for judgment were rendered by Justice Létourneau. I note that the Supreme Court of Canada recently granted leave to appeal this decision.

[19] Mr. Almrei, like Mr. Harkat, is a foreign national and has refugee but not permanent resident status in Canada. He is a citizen of Syria who has been detained on a security certificate since October 19, 2001, a certificate found to be reasonable by Justice Tremblay-Lamer on November 23, 2001. Mr. Almrei was, a few days later, informed the Minister of Citizenship and Immigration would be seeking an opinion that he constituted a danger to the security of Canada which might permit his removal to Syria despite his refugee status in Canada.

[20] From *Almrei, supra*, I take the following principles from Justice Létourneau's reasons:

(1) At paragraph 5 of his reasons, he stated "the facts in these proceedings require special attention because time and the behaviour of the parties are of the essence of a subsection 84(2) application for judicial release from detention". [*emphasis mine*]

(2) Broadly speaking, the objective of subsection 84(2) is "to ensure that due diligence will be exercised by the authorities in removing a foreign national who has been detained for security reasons" (paragraph 28). This subsection contains an obligation "to proceed with the removal within a reasonable time" (paragraph 28) [*emphasis mine*].

(3) Unreasonable delay by the authorities that unduly and unjustifiably prolongs the detention of a person is a violation of his or her constitutional right to liberty and security of the person (paragraph 29). [*emphasis mine*]

(4) "The primary focus of a section 84(2) application for judicial release is whether or not the foreign national will be removed within a reasonable time. The secret evidence is not needed for that purpose. It is only if there is evidence that the removal will not take place within a reasonable time that it is necessary to consider whether the release of the foreign

national would pose a danger to national security or to the safety of any person" (paragraph 33). [*emphasis mine*]

(5) "In a section 84(2) application for judicial release, removal within a reasonable time, after the security proceedings are completed, is the central question" (paragraph 34) [*emphasis mine*].

(6) "A renewal of a section 84(2) application is possible if new facts are discovered or if there is a substantial change in circumstances since the previous application" (paragraph 36).

(7) The objective behind subsection 84(2) is "is to ensure judicial examination of detention and judicial protection against indeterminate or indefinite detention" (paragraph 36).

(8) On an application for judicial release pursuant to subsection 84(2), the burden is on the foreign national to prove that he or she will not be removed from Canada within a reasonable time and that his or her release will not pose a danger to national security or to the safety of any person. That burden has to be discharged on a balance of probabilities (paragraph 39). [*emphasis mine*]

(9) "A person who applies for judicial release under subsection 84(2) must establish four things:

(a) that he or she has not been removed from Canada;

(b) that at least 120 days have elapsed since the Federal Court determined the security certificate to be reasonable;

(c) that he or she will not be removed from Canada within a reasonable time; and

(d) that the release would not pose danger to national security or to the safety of any person (paragraph 41)";

(10) Of these four conditions, Justice Létourneau wrote the following at paragraph 42:

> ¶ 42 The first two conditions for the application of subsection 84(2) are straightforward and certainly not difficult to prove. As for the last two conditions, the person applying for judicial release is faced with an evidentiary burden. This means that he has to file some evidence that he has reasonable grounds to believe that the removal will not be effected within a reasonable time and that his release will not pose a danger to national security or to the safety of any person. That evidence has to be answered. Otherwise, the applicant will be entitled to release. This means that the burden then shifts to the party that opposes the release. In practice, the Crown cannot sit idle. It also bears an evidentiary burden, i.e. the burden of introducing evidence that the removal will occur within a reasonable time and, if necessary, that the applicant is still a threat within the terms of subsection 84(2) of the IRPA. The judge will then assess the evidence adduced by both parties and determine whether the conditions of subsection 84(2) are met. [*emphasis mine*]

(11) ". . . it is now known that a decision on the reasonableness of the security certificate is not a decision that is conclusive proof that the person is a danger to the security of Canada: see *Suresh v. Canada (M.C.I.),* [2002] 1 S.C.R. 3, at paragraph 83. To put it in different terms, the decision on the security certificate is not determinative of the merit, opportunity and legality of the detention of that person, although it may

be grounded on a finding that the person is a danger to the security of Canada pursuant to paragraph 34(1)(d) of the IRPA" (paragraph 48).

(12) "A subsection 84(2) application requires the judge to determine whether the foreign national will or will not be removed from Canada "within a reasonable time". This concept of "removal within a reasonable time" requires a measurement of the time elapsed from the moment the certificate was found to be reasonable and an assessment of whether that time is such that it leads to a conclusion that removal will not occur within a reasonable time. Concerns about a possible violation of the "reasonable time" requirement emerge after the 120 days mentioned in subsection 84(2) have elapsed and removal has not yet occurred" (paragraph 55). [*emphasis mine*]

(13) "Where the removal of a foreign national is delayed so as to bring into play the "reasonable time" requirement, the judge hearing the judicial release application must consider the delay and look at the causes of such delay" (paragraph 57).

(14) "Thus, in determining whether there will be execution or enforcement of the removal order within a reasonable time, a judge must look at the delay generated by the parties as well as at the institutional delay which is inherent in the exercise of a remedy . . . subsection 84(2) … authorizes a judge to discount, in whole or in part, the delay resulting

from proceedings resorted to by an applicant that have the precise effect of preventing compliance by the Crown with the law within a reasonable time, as required by the provision. In other words, where an applicant, rightly or wrongly, tries to prevent his removal from Canada and delay ensues as a result of his action, he cannot be heard to complain that his removal has not occurred within a reasonable time, unless the delay is unreasonable or inordinate and not attributable to him" (paragraph 58). [*emphasis mine*]

(15) ". . . to a limited extent . . . the length of the past detention and the conditions of detention are relevant factors to be taken into account in considering an application for judicial release under subsection 84(2) …these two factors are far from being determinative of the application" (paragraph 80) [*emphasis mine*].

(16) "Indeed, the test for granting or refusing a subsection 84(2) application is future-oriented. Evidence has to be provided that the applicant will not be removed within a reasonable time. If the government produces, at the hearing, credible and compelling evidence of an imminent removal from Canada, the time already served and the conditions of detention lose much of their significance because what is at issue on the application is either more detention, release or removal. Since a planned removal within a reasonable time is compliance with the law, judicial release

under subsection 84(2) ceases to be an option. Past delays, conditions of detention and even abuses, while they might give rise to other remedies, are no longer operative factors within the terms of subsection 84(2) since there is then no evidence that the applicant will not be removed within a reasonable time" (paragraph 81). [*emphasis mine*]

(17) "The length and conditions of past detention may be relevant in assessing the credibility of the evidence submitted that the removal is imminent. … As for the conditions of detention, they may be such, especially when coupled with a lengthy detention, that the phrase "within a reasonable time" takes another significance, one of urgency. The removal must then be effected even more expeditiously in order to be in compliance with the requirements of subsection 84(2)" (paragraph 82). [*emphasis mine*]

(18) "It is in this light that, where necessary, the length and conditions of past detention must be looked at by the judge along with the operative causes of delay" (paragraph 83).

C. THE EVIDENCE

(1) The evidence of the applicant

[21] All of the applicant's evidence was adduced in public except in the *in camera* hearing held on November 25, 2005.

(a) The applicant's documentary evidence

[22] Prior to the public hearing which began on October 24, 2005, the applicant filed five classes of documents in four volumes as follows:

(1) The affidavit of Simon King for the purpose of informing the Court what had transpired from March 24, to October 24, 2005.

(2) The affidavit of Michael Nuyen informing the Court of the technology behind two types of ankle bracelets for electronic surveillance which would be worn by the applicant should he be released and be permitted within certain hours to be outside the family home accompanied by sureties.

(3) The affidavits of several sureties including the applicant's wife, Sophie Harkat, her mother, Pierrette Brunette, Pierre Loranger, a resident in the family home, Jessica Squires, Kevin Skerrett and Leonard Bush who would supervise Mr. Harkat's compliance with his release conditions.

(4) The affidavits of over 70 individuals who pledged several thousand dollars by way of contribution towards a surety or performance bond to ensure that Mr. Harkat would abide by the terms of his release;

(5) A compendium of material relevant to *refoulement* under section 115 of the Act; and

(6) A separate document from *Human Rights Watch* of April 2005 entitled "Still at Risk" (diplomatic assurances, no safeguard against torture)".

(7) The evidence of Dr. Cameron who conducted a psychiatric examination of Mr. Harkat in September of 2005.

[23] What Mr. King's affidavit discloses are the following material events:

(a) On March 24, 2005, two days after the filing of Justice Dawson's decision on the reasonableness of the security certificate, the Acting Manager of the Canada Border Services Agency (Agency or CBSA) in Ottawa (Acting Manager) wrote to Mr. Harkat informing him the CBSA, pursuant to paragraph 115(2)(*b*) of the Act, would be seeking from the Minister's delegate an opinion that he was a person who represents a danger to the security of Canada. The Acting Manager told Mr. Harkat an opinion rendered pursuant to that paragraph had serious consequences notwithstanding he had been found a Convention refugee. If the Minister was of the opinion that he should not be allowed

to remain in Canada on the basis of the danger that he would represent to the security of Canada, it could result in his removal from Canada to his country of citizenship, Algeria. Mr. Harkat was told he could provide written representations on a preliminary basis and would be provided a further opportunity to rebut CIC's memorandum to the Minister's delegate containing CIC's recommendations and documents for the purpose of the danger opinion.

(b) On April 21, 2005, after obtaining a fifteen day extension, Paul Copeland, one of Mr. Harkat's counsel, made a preliminary submission enclosing several pieces of documentary evidence in the form of *Country Reports* on Algeria, originating from the U.S. Department of State for the years 2004 and 2005, from the testimony of a witness from *Human Rights Watch* before the U.S. House of Representatives Committee on International Relations and from an *Amnesty International* report on Algeria. Various other documents and expert evidence in the form of affidavits from Professors Entelis and Joffé on the situation in Algeria as well as a letter from *Amnesty International* dated April 21, 2005, opposing the deportation of Mr. Harkat to Algeria were also forwarded.

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(c) In his April 21, 2005 letter to the Acting Manager, Mr. Copeland asked for immediate advice whether or not Canada was seeking diplomatic assurances from Algeria. He indicated he looked forward to receiving from CBSA Ottawa the complete package of material that will be presented to the Minister's delegate. He requested the name of the Minister's delegate and enquired about his or her qualifications, education, and training. He enquired whether there were any reports from UN groups, NGOs or other governments concerning the situation in Algeria that will be relied on by the Government of Canada.

(d) During the period between April 22, 2005 and September 12, 2005, Mr. King's affidavit exhibits correspondence exchanged between Mr. Copeland and the CBSA or Citizenship and Immigration Canada (CIC) or material received by Mr. Copeland on the situation in Algeria and, in particular, in respect of suspected members or sympathizers of groups such as *Le Groupe Islamique Armé* (GIA) which he passed on to the Canadian Government. For example, on May 13, 2005, Mr. Copeland forwarded to the Acting Manager CBSA Ottawa a news item concerning the torture of an Algerian individual. On June 9, 2005, Mr. Copeland wrote to CBSA Ottawa pointing out he had not received responses to four outstanding questions. He also enclosed two documents related to

a decision concerning an Algerian national by the U.S. Board of Immigration Appeals dated May 26, 2005, upholding a refugee claim by concluding that the individual had met his burden of showing he had a well-founded fear of persecution in Algeria on account of political opinion. On June 29, 2005, Mr. Copeland wrote to the Minister of Foreign Affairs enquiring whether the Department was seeking diplomatic assurances from the Government of Algeria [*emphasis mine*]. On June 27, 2005, he was still asking for answers to his outstanding questions. He received a reply on July 28, 2005, from Louis Dumas, Manager, and Counter-terrorism in the National Security Division at CBSA. Mr. Dumas told Mr. Copeland three of his questions would be addressed in the CBSA's memorandum to the Minister's delegate. Mr. Dumas indicated the Minister's delegate would soon be selected. When acknowledging receipt of the Minister of Foreign Affairs' letter of acknowledgement, Mr. Copeland forwarded to the Minister a United Nations Press Release concerning Prime Minister Blair's plans to seek diplomatic assurances from certain countries. That UN press release dated August 23, 2005, was headed "Diplomatic Assurances not an Adequate Safeguard for Deportees". On September 12, 2005, Mr. Dumas advised, upon enquiry from Mr. Copeland, the memorandum for

> the Minister's delegate was forthcoming and would be transmitted shortly to Mr. Harkat and to him for comments.

[24] During the public hearing, Mr. Harkat's counsel, Paul Copeland and Andrew Webber, filed many documents. An important one was filed on October 29, 2005 entitled Memorandum to the CIC Minister's Delegate and related correspondence. The memorandum recommends Mr. Harkat be returned to Algeria. It was received by Mr. Copeland's office on October 24, 2005, when he was in Ottawa on the first day of hearing on Mr. Harkat's application. In fact, this document is CBSA's disclosure package in respect of the danger opinion it was seeking from the Minister's delegate. The disclosure package included its memorandum to the Minister's delegate and twelve appendices. Mr. Dumas' letter invited representations to the Minister within fifteen (15) days with advice that if Mr. Harkat or his counsel required additional time in order to submit representations, they should address any request to Mr. Peter Foley of the CBSA. I note CBSA's memorandum is 54 pages in length. In addition, the twelve (12) appendices are of unknown length.

[25] The related correspondence principally concerns the assurances Canada was seeking from Algeria in respect of Mr. Harkat, namely:

(1) A letter dated July 25, 2004, from the Canadian Embassy in Algiers to the Algerian Foreign Ministry. In that document, the Canadian Embassy asked;

(a) if Mr. Harkat was deported to Algeria, whether the Algerian Government would consent to his return and would issue him a travel document for this purpose;

(b) whether Mr. Harkat faces outstanding criminal charges in Algeria or has he been found guilty by an Algerian Court;

(c) if Mr. Harkat has been or would be found guilty by an Algerian Court and sentenced to death, would the Algerian Government guarantee that the sentence would not be carried out; and

(d) is the Algerian Government in a position to provide explicit guarantees Mr. Harkat will be treated in a humane fashion and would not be subject to torture or to any other inhumane or cruel treatment in conformity with international obligations contracted by Algeria by virtue of the Convention against torture; and the International Covenant on Civil and Political Rights.

(2) A response from the Algerian Government dated December 8, 2004. The Department of Foreign Affairs for Algeria advised:

(a) as to capital punishment while prescribed in the *Algerian Penal Code* for various crimes, there has been a moratorium in Algeria against execution of the death penalty since 1993 noting, however, that such a moratorium is not backed by any legislative or regulatory provision;

(b) Algeria has signed the UN Convention against torture and other relevant instruments which is a guarantee in itself. Moreover, the Algerian Ministry of Foreign Affairs recalled that Algeria recognized the competence of two UN surveillance committees operating under the Convention on torture and the one related to civil and political rights and regularly presented reports to those two committees; and

(c) the Algerian Government could not give any guarantees concerning the non-execution of a sentence imposed by an Algerian Court on account of the principle of the separation of powers;

(3) a further letter dated June 20, 2005, from the Canadian Embassy in Algiers asking whether Mr. Harkat is subject to any outstanding indictments or whether a warrant of arrest is in force against Mr. Harkat in Algeria;

(4) a letter dated July 17, 2005, in response from the Ministry of Foreign Affairs providing information with respect to Mr. Harkat from the archives of Bureau Interpol Alger. Specifically, it responded that “sur le plan interne l’intéressé ne faisait l’objet que d’une fiche d’attention, en date du 19/02/92, se rapportant à son séjour en Afghanistan”

[26] Mr. Copeland filed a letter dated October 26, 2005 to Mr. Foley at CBSA seeking, for the reasons set out therein, a three-month extension to make submissions countering CBSA’s memorandum to the Minister’s delegate and requesting whether that document could be provided in electronic format so that it might be forwarded in that manner quickly to his experts and to Human Rights Watch for input. He also asked the Minister of Public Safety about the qualifications of the Minister’s delegate. I was informed by Mr. Copeland during the hearing that time for Mr. Harkat’s reply to CBSA’s memorandum to the Minister’s delegate was only extended to mid-December 2005.

[27] I need not detail all of the other documents filed during the hearings by counsel for the applicant. I mention a few. They cover topics such as news items of recent events concerning the alleged CIA secret jails, the alleged treatment by the U.S. of Al Qaeda detainees and policy debates in the U.S. concerning detainee policy and torture. Other documents filed were a *Newsweek* article entitled “The Debate over Torture”, November

21, 2005, detention proceedings in New Zealand concerning Mr. Zaoui, the Security Intelligence Review Committee Annual Report 2004-2005, a report by the Jamestown Foundation on Algerian Salafists and the new face of terrorism in Spain, the Human Rights Committee Report functioning under the International Covenant on Civil and Political Rights concerning Canada, a Human Rights Watch Report of October 2004 entitled “The United States ‘Disappeared’”, and a letter dated October 27, 2005 forwarded to the Federal Court by the International Civil Liberties Monitoring Group.

[28] To round out the description of documents filed by counsel for the applicant, as exhibit “U”, is volume II of the applicant’s bound document entitled Memorandum to the CIC Minister’s Delegate and related correspondence. Included in that package, is a letter dated November 14, 2005, from Peter Foley of the CBSA consisting of additional disclosure related to the danger opinion being sought. Amongst those documents is found correspondence concerning the assurances Canada is seeking from Algeria in respect of Mr. Harkat. First, there is a letter dated September 5, 2005. Canada asked the Algerian Ministry of Foreign Affairs two questions: the first was information to determine the last date of departure of Mr. Harkat from Algerian territory. The second asked for written confirmation from Algeria whether Mr. Harkat currently faces criminal charges or whether there is an existing warrant of arrest against him. The Algerian Ministry of Foreign Affairs responded on October 26, 2005. It advised Canada that Mr. Harkat, at no time, has been the subject of a criminal proceeding in Algeria nor is he or has been the subject of an

arrest warrant. Algeria advised Canada that the Ministry would be transmitting to Canada information concerning the date of Mr. Harkat's last exit from Algeria. Counsel for the applicant also filed a copy of a memorandum of understanding between the Government of the United Kingdom and the Government of Jordan regulating understandings with respect to specified persons prior to deportation.

(b) The oral evidence on behalf of the applicant

[29] Three classes of witnesses deposed oral testimony on behalf of Mr. Harkat and were cross-examined. Mr. Harkat himself, Mrs. Harkat, her mother and other proposed supervisory sureties and other witnesses, namely, Mr. Nuyen and Dr. Cameron.

[30] Mr. Harkat's testimony was brief. He expressed his strongly held fear of return to torture if deported to Algeria and the nightmares which were associated with this fear. He denied ever supporting Islamic extremism and ever supporting the Osama Bin Laden Network. He avowed being against violence to human beings. He talked about his bank accounts and lack of funds. He denied having friends associated with Islamic extremism or supporting violence. He did not adduce any evidence in support of his claims or any evidence corroborating any of them. He testified he would respect the release conditions which are proposed in connection with his application for judicial release.

[31] The essence of Sophie Harkat's testimony and those of other proposed supervising sureties concerned their duties and responsibilities as supervising sureties, their knowledge of the conditions which would surround his proposed release from detention and their obligation to immediately notify the authorities if those conditions were breached. Briefly stated, those conditions are analogous to house arrest: a strict curfew, inability to be outside the family home unless in company of a supervising surety; no use of telecommunication devices; no internet access; reporting to authorities; wearing of an electronic bracelet; no association with specified persons; no speaking Arabic over the one land line telephone access which would be available to him in the family home. Mrs. Harkat and all of the other proposed supervising sureties believed Mr. Harkat would live up to these conditions and if he breached them, they would immediately report him to the authorities. In addition, the supervising sureties testified to the considerable amount of money they were willing to put up which they were aware they would lose if release conditions were not complied with.

[32] Mr. Nuyen is a project manager for JEMTEC Inc. JEMTEC provides services related to the electronic monitoring of the activities of individuals who wear an anklet which functions as a transmitter. He had been retained by counsel for the applicant. He described two systems: a basic electronic monitoring system and a more sophisticated system called passive GPS tracking system. He touched upon an even more sophisticated tracking system known as active GPS tracking although he admitted that

this technology albeit in expanding use in the United States, was not extensively known in Canada but could be available. He described publicly the limitations surrounding these systems. After hearing his testimony and at the request of counsel for the respondents, I heard evidence *in camera* and *ex parte* on the operational limits of the technology and how Mr. Harkat could operationally exploit the limitations. I was of the view the operational limits of the technology should not be disclosed in public as such disclosure would be detrimental to national security. I rejected the remaining evidence tendered *in camera* and *ex parte*, being of the view it should be presented in public.

[33] Dr. Colin Cameron is the Medical Director of the Trauma Disorders Program at the St-Lawrence Valley Correctional and Treatment Centre and an Assistant Professor of Psychiatry at the University of Ottawa. On September 27, 2005, he conducted a three-hour psychiatric assessment of Mr. Harkat at the Ottawa-Carleton Detention Centre by giving him a battery of tests. Based on his assessment of Mr. Harkat, Dr. Cameron expressed the belief that he suffers from major depression and symptoms of post-traumatic stress disorder. He said Mr. Harkat's mental health was liable to worsen the longer he stayed incarcerated. In particular, he stated in his testimony that Mr. Harkat's vivid nightmares of facing torture in Algeria had started only since his incarceration. Dr. Cameron stated in his affidavit and the report attached to it, that Mr. Harkat, whether or not he is released from detention, should be prescribed anti-depressants. He feared that Mr. Harkat's depressive condition would worsen if it is not treated properly and that it is

likely to progress the longer he stays incarcerated. Furthermore, Dr. Cameron was of the opinion that Mr. Harkat exhibits pro-social attitudes and no indication of psychopathy.

(2) The evidence of the respondents

[34] The respondents' evidence was adduced during the Court's public hearings and in hearings conducted *ex parte* and *in camera*. The respondents' material took two forms: the filing of public and confidential national security documents and the examination of witnesses for the respondents in public and during the *ex parte in camera* sessions which have been identified in these reasons.

(a) The respondents' documentary evidence

(i) Filed in public

[35] As noted, in relation to Mr. Harkat's application for judicial release, counsel for the respondents filed two volumes of public documents which numbered 50 in total. Amongst these, the first document filed was the public summary of the case which Mr. Harkat faced in proceedings related to the reasonableness of the security certificate issued against him. This summary was vetted by Justice Dawson and authorized by her to ensure maximum disclosure without compromising national security information. The second document filed was Justice Dawson's reasons holding that the security certificate was reasonable. I do

not intend to identify the other documents contained in these two public volumes except to refer to two sets of documents which created some controversy during the public hearings.

[36] The first set of documents was authored by PG who is employed at CSIS. The first document is “What is Al Qaeda” dated June 10, 2005. The second document authored by PG is dated June 24, 2005 and is entitled “Islamic Extremism and Detention: How Long Does the Threat Last”. PG was called as a witness by counsel for the respondents and he was cross-examined. The second set of documents were authored by Dr. Mark Sageman. He is a former CIA case officer in Afghanistan and is now a forensic psychiatrist. The first essay authored by him is dated November 1, 2004 and is entitled “Understanding Terror Networks”. The following document also authored by him and filed in these proceedings is his statement to the National Commission on Terrorist Attacks upon the United States dated July 9, 2003. Its subtitle is headed “The Global Salafi Jihad”. Dr. Sageman was not called as a witness by counsel for the respondents and, consequently, not cross-examined.

[37] As noted, also filed in public by counsel for the respondents is a document dated October 17, 2005, amended and highlighted after review by this Court.

[38] I return to a brief description of the public disclosure document which Justice Dawson approved at the start of her consideration of the reasonableness of the security certificate and the follow-up 22-page Information Document which I approved on October 17, 2005.

[39] The main elements of the public case advanced by Canada with respect to the reasonableness of the security certificate filed against Mr. Harkat was advanced by the Canadian Security Intelligence Service (CSIS) in a public document ultimately approved by Justice Dawson which is dated December 2, 2002, entitled “Statement Summarizing the Information and Evidence pursuant to section 78(h) of the *Immigration and Refugee Protection Act*.

[40] The main body of this document has 41 paragraphs where CSIS details its belief that Mr. Harkat is an Islamic extremist; a supporter of Afghani, Pakistani and Chechen extremists; was and is a member of the Bin Laden Network; and, that Mr. Harkat’s role in this terrorist network is exemplified by his actions and intentions.

[41] The summary statement informed Mr. Harkat what CSIS knew about him as a person: his date and place of birth in Algeria, the date he first entered Canada, his grant of Convention refugee status on February 24, 1997, and the date of his application for permanent residence in Canada. It identified his place of residence in Ottawa.

[42] The public summary statement told Mr. Harkat why CSIS believed Mr. Harkat has engaged in terrorism and was a member of an organization that there are reasonable grounds to believe has engaged, or will engage, in terrorism. Justice Dawson summarized these allegations at paragraph 49 of her reasons in respect of the reasonableness of the security certificate:

> ¶ 49 It is the position of the Service, as set out in the summary of the confidential information, that:
>
> 1. Prior to arriving in Canada, Mr. Harkat engaged in terrorism by supporting terrorist activity, but he concealed from Canadian authorities that he had supported Islamic extremists and travelled to Afghanistan.
>
> 2. He is a supporter of Afghani, Pakistani and Chechen extremists.
>
> 3. Mr. Harkat supported terrorist activity as a member of the terrorist group known as the Bin Laden Network, which includes Al Qaida. Before and after he arrived in Canada Mr. Harkat was and is linked to individuals believed to be in this network.
>
> 4. Mr. Harkat is associated with organizations that support the use of political violence and terrorism.
>
> 5. The Bin Laden Network engages in acts of terrorism in order to obtain its stated objective of establishing Islamic states based on a fundamentalist interpretation of Islamic law. The Bin Laden Network has been directly or indirectly associated with terrorist acts in several countries, including the August 7, 1998 bombings of the United States' Embassies in Kenya and Tanzania, the October 12, 2000 bombing of the naval destroyer U.S.S. Cole in Yemen, and is suspected of being involved in the planning and execution of the September 11, 2001 World Trade Center and Pentagon attacks.
>
> 6. The Bin Laden Network, through Al Qaida, operated, and to some degree still operates, terrorist training camps and guest houses in Afghanistan, Pakistan and Sudan. The camps provide sanctuary, funds, military and counter-intelligence training including terrorist and guerrilla warfare techniques. The camps also teach the manufacture of explosive devices. It has been reported that as many as 5,000 militants may have been trained and dispersed to some 50 countries. One example of such a trainee is Ahmed Ressam. Mr. Ressam identified Abu Zubaida as the person who ran the Khaldun and Darunta training camps in Afghanistan where he trained. Mr. Ressam stated

that Abu Zubaida arranged for his trip to Afghanistan, and provided him with Afghan clothes and an Afghan guide in order to take Mr. Ressam from Pakistan to the Khaldun camp.

7. The Bin Laden Network uses "sleepers" and suicide operatives in international terrorist operations. "Sleepers" are established in foreign countries for extended periods of time prior to a given operation being executed.

8. Mr. Harkat was a supporter of the Front islamique du salut ("FIS") in Algeria.

9. When the FIS severed its links with the Groupe islamique armée ("GIA"), he indicated that his loyalties were with the GIA. The GIA seeks to establish an Islamic state in Algeria through the use of terrorist violence, and it has engaged in civilian massacres. Mr. Harkat's decision to align himself with the GIA indicates his support for the use of terrorist violence.

10. Mr. Harkat has lied to Canadian officials about his:

1. period of work for a relief company in Pakistan;
2. travel to Afghanistan;
3. association with those who support international extremist networks;
4. use of aliases; and
5. assistance to Islamic extremists.

Such lies were for the purpose, in part, of disassociating himself from individuals or groups who support terrorism, or who may have participated in the Bin Laden Network.

11. Mr. Harkat has assisted Islamic extremists who have come to Canada.

12. Mr. Harkat has associated with Abu Zubaida since the early 1990s. Abu Zubaida was one of Osama bin Laden's top lieutenants since the 1990s. In March 2003, the service was advised that Abu Zubaida was able to identify Mr. Harkat by his physical description and his activities, including the fact that Mr. Harkat operated a guest house in Peshawar, Pakistan in the mid 1990s for Mujahedeen travelling to Chechnya.

13. Mr. Harkat has been in contact with other individuals known to be involved in Islamic militant activities.

[43] The summary statement contains ten appendices covering such subject matters as an extensive background brief relating to the Bin Laden Network (Annex I containing fifteen pages and over 45 paragraphs), the Islamic Salvation Front (FIS), the Armed Islamic Group (GIA), Ahmed Said Khadr, Abou Zoubaida and Ibn Khattab).

[44] As noted, in connection with Mr. Harkat's application for judicial release, CSIS filed an information document whose public version I approved as containing the maximum allowable public information permissible without breaching national security.

[45] CSIS introduced the information document by stating "the information contained herein is intended to support the Service's opinion that the release of Mr. HARKAT would place him in a position to recommence his contacts with members of the Islamic extremist network, allowing them to be involved in the planning and execution of terrorist acts".

[46] CSIS took the position that the release of Mr. Harkat will pose a danger to national security or to the safety of any person. In support of that position, CSIS indicated, since November 2002, (when the two responsible ministers signed the security certificate) it has received and assessed further information concerning Mr. Harkat relating to: Abu Abdallah Pakistani, Hadje Wazir, Ahmed Said Khadr, Ibn Khattab, and the support of Chechen Terrorism; Mr. Harkat's sources of funding, his aliases; the continuing threat from Al Qaeda and the Osama Bin Laden Network; Mr. Harkat's credibility; his non-renunciation of

the Islamic extremist cause; his non-renunciation of the use of violence; and, his potential to re-associate with the Islamic extremists if he were released from detention. I summarize each of these elements:

(1) **Abu Abdallah Pakistani**

[47] On October 6, 1995, Mr. Harkat arrived in Toronto from Malaysia, via the United Kingdom, using a falsified Saudi Arabian passport. In an interview with CSIS on June 11, 1998, Mr. Harkat stated he purchased that passport from Abu Abdallah Pakistani who lived in Islamabad. The information document tells Mr. Harkat that CSIS sought information about the individual known as Abu Abdallah Pakistani.

(2) **Hadje Wazir**

[48] In his testimony before Justice Dawson, Mr. Harkat was asked whether he knew anybody by the name of Hagi Wazir [*sic*]. Mr. Harkat answered “Hagi Wazir [*sic*]. There is — he’s like have — running a bank in Pakistan”. In an interview with the Service, Mr. Harkat described Hadje Wazir as his friend and banker. The information document dated October 17, 2005, stated CSIS’s belief that Mr. Hadje Wazir is a Hawala dealer in Pakistan who may have been involved in financial transactions with Islamic extremists and other clients. CSIS informed Mr. Harkat of its belief that he is associated in some manner with some financial transactions of Hadje Wazir.

(3) **Ahmed Said Khadr**

[49] The information document of October 17, 2005, described who Ahmed Said Khadr was, *i.e.* the Egyptian-born head of a family of Islamic extremists who was killed by Pakistani forces in 2003. It states Mr. Khadr was the Director of an aid agency known as Human Concern International (HCI) which worked closely with Al Qaeda in Afghanistan. It states Mr. Khadr supported the Mujahedeen financially and often met and talked with senior Al Qaeda leaders. He provided references for individuals wishing to partake in extremist training in Afghanistan. The information document makes reference to the Khadr children and their involvement in the values and beliefs of Al Qaeda.

(4) **Ibn Khattab and Support of Chechen Terrorism**

[50] In a Service interview, Mr. Harkat denied any association with Ibn Khattab. The information document of October 17, 2005, describes who Ibn Khattab is, *i.e.* a former Chechen Mujahedeen leader who was killed by Russian forces in April 2002 and who was an associate of Osama Bin Laden. It states that following the Soviet defeat and its withdrawal from Afghanistan, Ibn Khattab went to Tajikistan and from there to the Jihads in Chechnya and Dagestan. It indicates Osama Bin Laden sent fighters to support the Jihad in Chechnya and that the Russian authorities alleged that Chechen rebels under Ibn Khattab's command were responsible for a series of bombings in various Russian cities in the summer of 1999 which resulted in the deaths of hundreds of civilians. It tells us that

since Khattab's death, the threat posed by Chechen extremism has not subsided and provides examples. It tells Mr. Harkat that CSIS believes his release from detention will place him in a position to establish connections with individuals who support Chechen extremism and to associate with and provide support to those individuals.

(5) **Sources of funding**

[51] During a service interview with Mr. Harkat in August of 1998, Mr. Harkat advised that he did not have a bank account in Pakistan and that he carried his money with him at all times and never dealt with banks. The information document of October 17, 2005, expresses CSIS's belief that Mr. Harkat was not truthful about his dealings with financial institutions connected to Islamic extremists.

(6) **Aliases**

[52] The information document expresses CSIS's belief that Mr. Harkat lied about never having used Aliases in the past, specifically, but not limited to Abu Muslim, Abou Muslim or Abu Muslima; in part to distance himself from being associated with individuals or groups who may have participated in dealings with the Bin Laden Network. It adds that this was an inference drawn by Justice Dawson. The information document informs Mr. Harkat that during an interview with CSIS, he said he only used aliases when he met people in Pakistan that he did not trust. During that interview, he denied that one of the aliases he used was Abu Muslim/Abu Muslima. The information document indicates that

in testimony before the Federal Court on October 28, 2004, Mr. Harkat admitted he was known by the name Abu Muslim.

(7) **Continuing Threat from Al Qaeda and the Osama Bin Laden Network**

[53] The information document of October 17, 2005, expresses CSIS's view that since Mr. Harkat's detention, the actions of Al Qaeda have demonstrated that the danger to the public from this network has intensified and that its threat has not diminished. It indicates Al Qaeda has claimed responsibility for the March 2004 train bombings in Madrid, Spain, and that in September of 2005, this organization openly claimed responsibility for the multiple London terror bombings of July 2005.

(8) **Credibility**

[54] The information document states that based on the incredible and untruthful statements Mr. Harkat made to the Federal Court and to other Canadian officials in the past, CSIS believes he will continue to make untruthful statements in the future in an attempt to disassociate himself with individuals and groups who support Islamic extremism.

(9) **Non-Renunciation of the Islamic Extremist Cause**

[55] The information document states that CSIS holds no information that would lead to the belief that Mr. Harkat has truthfully renounced the Islamic extremist cause in general,

or specifically, the extremist causes associated with or espoused by the Osama Bin Laden Network.

(10) **Non-Renunciation of the Use of Violence**

[56] The information document states CSIS holds no information that would lead to the belief that Mr. Harkat has truthfully renounced the use of violence against the public in general.

(11) **Potential to Reassociate with Islamic Extremists**

[57] The information document expresses CSIS's opinion that Mr. Harkat is highly likely to reassociate with Islamic extremists if released from detention, and will continue to support the Islamic extremist cause. It refers to the opinions of P.G., a CSIS employee who, as noted, authored a report entitled *Islamic Extremists and Detention: How Long Does the Threat Last?* It also relies upon the work of Dr. Marc Sageman.

(12) **Service Conclusion**

[58] CSIS concludes, in the information document, that the threat from Mr. Harkat has not been neutralized with the passage of time nor that while in detention Mr. Harkat has truthfully renounced his support for the Islamic extremist cause. It expresses its belief that Mr. Harkat was and continues to be a well-connected member of an international network

of extremist individuals which support the Islamic extremist ideals espoused by Osama Bin Laden and condones the use of serious violence.

[59] CSIS believes Mr. Harkat is a danger to the safety of persons in Canada and injurious to national security because he has

- supported and continues to support Islamic extremist groups and individuals;
- not renounced the Islamic extremist cause;
- not renounced the use of serious violence in support of political, religious or ideological objectives;
- indirectly remained informed of, individuals who support Islamic extremism;
- been assessed as an individual highly likely to re-associate with Islamic extremists if released from detention; and
- made untruthful statements to Canadian officials, and will continue to do so, in an attempt to disassociate himself with individuals and groups who support Islamic extremism.

[60] In the opinion of CSIS, his release would place him in a position to recommence his contacts with members of the Islamic Extremist Network, allowing them to be involved in the planning and execution of terrorist attacks. On this basis, CSIS is of the view his release would be injurious to national security and the safety of persons.

(ii) Filed in confidence

[61] In support of its opposition to Mr. Harkat's application for judicial release on the conditions which have been described, CSIS incorporated all of the confidential material which was before Justice Dawson on the reasonableness of the security certificate. That included the security intelligence report upon which the certificate was based. This document contained a large number of footnotes that referred to other documents which, in turn, were contained in a number of reference indices that accompanied the narrative portion of the security intelligence report.

[62] In addition, in respect to the new information contained in the confidential information report specifically produced for the purpose of Mr. Harkat's judicial release application, CSIS followed the same procedure.

[63] For obvious reasons, I am unable to disclose the confidential information that is before the Court because its disclosure would be injurious to national security or to the safety of any person. In her reasons related to her finding the security certificate issued against Mr. Harkat was reasonable, Justice Dawson explained why it was necessary to keep certain security information confidential and set out the general principles relevant to the Court's assessment of the confidential information. She pointed to subsection 78(b) of

the Act where Parliament has made the designated judge responsible to ensure the confidentiality of the information upon which the security certificate is based and of any other evidence provided to the judge, where disclosure would be injurious to national security or the safety of any person. She explained that this obligation and its companion obligation to provide a summary to the person concerned reflected the “tension between the democratic requirement of open court proceedings and the equally compelling necessity of keeping security information secret”. She gave the following examples of information of the type that must be kept confidential including:

> ¶ 89 . . .
>
> 1. Information obtained from human sources, where disclosure of the information would identify the source and put the source's life in danger (see the decision of Madam Justice McGillis in Ahani, supra at paragraph 19 where Justice McGillis discusses when human source information may be disclosed). As well, jeopardizing the safety of one human source will make other human sources or potential human sources hesitant to provide information if they are not assured that their identity will be protected.
>
> 2. Information obtained from agents of the Service, where the disclosure of the information would identify the agent and put the agent's life in danger.
>
> 3. Information about ongoing investigations where disclosure of the information would alert those working against Canada's interest and allow them to take evasive action.
>
> 4. Secrets obtained from foreign countries or foreign intelligence agencies where unauthorized disclosure would cause other countries or agencies to decline to entrust their own secret information to an insecure or untrustworthy recipient. (See Ruby, supra at paragraph 43 and following for discussion of the fact that Canada is a net importer of intelligence information, and such information is necessary for the security and defence of Canada and its allies).
>
> 5. Information about the technical means and capacities of surveillance and about certain methods or techniques of investigation of the Service where disclosure would assist persons of interest to the Service to avoid or evade detection or surveillance or the interception of information.

(b) The respondents' oral evidence

[64] Counsel for the respondents called two witnesses during the public portion of the hearing who were cross-examined. P.G., the CSIS analyst and Jeannine Millman, who recently became the Removals Manager at the National Headquarters of the CBSA in Ottawa (Removals Manager).

[65] The trust of the Removals Manager's evidence focused on the time it would take to remove Mr. Harkat from Canada if the Minister's delegate endorsed CBSA's recommendation that he be removed to Algeria.

[66] She explained that unless Mr. Harkat had a valid Algerian passport (which he does not have because it has expired), it would be necessary for CBSA to apply to the Algerian Consulate in Ottawa for a travel document.

[67] With Mr. Harkat's cooperation, she estimated CBSA to have the necessary papers for Mr. Harkat's removal to Algeria within a number of days, a week perhaps.

[68] If Mr. Harkat did not cooperate in the process, she testified it would take longer but fairly quickly particularly if the uncooperative client had an expired passport.

[69] Based on the two documents he authored in 2005, which have previously been mentioned, P.G.'s evidence in a nutshell explained to us who Al Qaeda is and how it functions at its core, with its affiliates and those while not having a formal link with Al Qaeda are inspired by its ideology and are prepared to carry out acts of terrorism. These three components form the Bin Laden Network.

[70] He also informed the Court that Osama in Laden had specifically referred to Canada on two occasions as the possible recipient of a terrorist strike.

[71] The second aspect of P.G.'s testimony focused on Islamic extremism which seeks political change through violence. He expressed the view that Islamic extremists maintain their ties and views and their relationships in Islamic extremist networks for a very long time and that notoriety and incarceration does not diminish their passion or fanaticism for extremism.

[72] Under cross-examination, P.G. tempered his opinion concerning the predictability of the recidivist behaviour of notorious or incarcerated Islamic extremists.

ANALYSIS

(1) Principles

[73] Earlier in these reasons, I extracted certain principles identified in the Federal Court of Appeal's decision in *Almrei, supra*, governing the application of subsection 84(2), the judicial release section applicable to foreign nationals whose security certificate has been found reasonable. I now emphasize certain of these principles identified by Justice Létourneau.

[74] The objective of subsection 84(2) is to ensure that due diligence will be exercised by the authorities in removing a foreign national who has been detained for security reasons under a security certificate which has been found reasonable. The government must proceed with the removal within a reasonable time because unreasonable delay by the authorities that unduly end up justifiably prolong the detention of a person is a violation of his or her constitutional right to liberty and security of the person.

[75] The burden is on the applicant for judicial release to prove that he or she will not be removed from Canada within a reasonable time and that his or her release will not pose a danger to national security or the safety of any person, a burden which must be discharged on a balance of probabilities. The concept of "removal within a reasonable time" requires a measurement of the time elapsed from the moment the security certificate

was found to be reasonable and an assessment of whether that time is such that it leads to a conclusion that removal will not occur within a reasonable time. Concerns about a possible violation of the reasonable time requirement emerge after the 120 days mentioned in subsection 84(2) have elapsed and has not yet occurred.

[76] Where removal of a foreign national is delayed so as to bring into play the reasonable time requirement, the judge hearing the judicial release application must consider the delay and look to the causes of such delay. Time and the behaviour of parties are of the essence of a subsection 84(2) application for judicial release from detention.

[77] As stated in other subsection 84(2) judicial review application decisions (see, *Canada (Minister of Citizenship and Immigration v. Mahjoub,* [2004] 1 F.C.R. 493, and *Jaballah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 299), the test in subsection 84(2) of the Act is a two-fold test. The judge designated to hear an application under that subsection must be satisfied that the foreign national will not be removed from Canada within a reasonable time and that such person released will not pose a danger to national security or to the safety of any person.

[78] *Jaballah, supra*, is a decision rendered by Justice MacKay. Mr. Jaballah is an Egyptian citizen whose application for refugee recognition was denied by the Refugee

Protection Division of the Immigration and Refugee Board as was his subsequent application under section 112 of the Act for protection, a decision rendered in January 2004 by the Minister's delegate after Justice MacKay had completed his hearings in respect of Mr. Jaballah's application for judicial release but before he had rendered his decision on February 24, 2004.

[79] Not being a Convention refugee as Mr. Harkat is, while the application of section 112 of the Act relating to protection came into play for Mr. Jaballah, subsection 115 of the Act dealing with *refoulement* does not.

[80] In his analysis on the question whether Mr. Jaballah will not be removed in a reasonable time, Justice MacKay noted no evidence was adduced directly by Mr. Jaballah but reliance was placed on the testimony of a CBSA official who, during the hearing, admitted it was not possible for him to forecast when Mr. Jaballah's application for protection under section 112 might be determined. Another factor was the delay in determining that application after the initial PRRA advice in August 2002 that he was a person in need of protection, a delay which Justice MacKay had, in a previous decision, characterized as an abuse of process.

[81] In *Jaballah, supra,* at the time of the hearing of his application for release, no date for the removal of Mr. Jaballah could be predicted and that it was still the case when

Justice MacKay released his reasons dismissing Mr. Jaballah subsection 84(2) application noting, however, that his application for protection had been determined against Mr. Jaballah before the release of his reasons.

[82] However, he noted that this negative decision of need for protection against Egypt was at the initial stages of an application for judicial review and any decision on that review may be subject to an appeal. Justice MacKay stated the prospects of appeal and the uncertainty when those proceedings may be dealt with could not be ignored in relation of the light of the implications of the decision by the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3, for removal of a foreign national to possible death or torture.

[83] I reproduce below paragraphs 35 through 39 of Justice MacKay's decision in *Jaballah*, *supra.* I note that paragraph 35 of his reasons in *Jaballah* was specifically endorsed by Justice Létourneau in *Almrei, supra:*

> ¶ 35 I should note two considerations relevant in determining whether release will not be in a reasonable time. The first is that the 120 day period of detention before this application for release could be initiated by Mr. Jaballah is measured from the date the Ministers' certificate is found to be reasonable so that time spent in detention before that is not ordinarily a factor, nor is the 120 days, after the certificate is upheld, a factor in assessing whether release in the future will not be in a reasonable time. The 120 day delay is not a measure in itself of a reasonable time, except as a necessary condition of application under s-s. 84(2). Thereafter, the burden to establish requirements under s-s. 84(2) is that of the applicant. In the normal course, release under s-s. 84(2) is not automatic or easily achieved; one would expect the applicant to show change in circumstances or new evidence not previously available to obtain release (see Ahani v. Canada (Minister of Citizenship and Immigration), supra).

> ¶ 36 For Mr. Jaballah it is urged that, when the Ministers cannot provide a date for his removal from Canada, it is not possible for the Court to conclude his removal would be effected in a reasonable time. There may be circumstances that would lead the Court to so conclude, but that is not the case here. It is true, uncertainty about a date of removal at the time this matter was heard resulted in part from the lack of a decision on Mr. Jaballah's application to be a person in need of protection. That cause of uncertainty is now removed. Other causes, perhaps inchoate when this matter was heard, have now become confirmed with Mr. Jaballah's applications for judicial review. That application and the appeals of the parties from my decision of May 23, 2003 are now major factors giving rise to uncertainty of any prediction of a date for his removal from Canada.
>
> ¶ 37 While Mr. Jaballah is entitled to pursue his legal rights in Canada, he may not rely on any uncertainty in predicting when those matters may be determined as a basis to claim uncertainty about when his removal, if it is ultimately pursued, would be effective. Uncertainty from that cause cannot result in a conclusion that his removal will not be in a reasonable time as intended in s-s. 84(2). Delay resulting from judicial proceedings initiated by the applicant, cannot be considered unreasonable, in my opinion (Singh v. Canada, supra).
>
> ¶ 38 In these circumstances I find that Mr. Jaballah has not met the onus of establishing that he will not be removed from Canada within a reasonable time, as required by s-s. 84(2).
>
> ¶ 39 If that finding were to be accepted there is no need to assess whether the second criterion under s-s. 84(2) is met, that is, whether the applicant's release will not pose a danger to national security. That issue was fully argued before me and I propose to deal with it next so that all of the issues here raised are determined in the event this matter is subject to appeal. [*emphasis mine*]

[84] It was Justice Dawson who decided on July 30, 2003, Mr. Mahjoub's application for judicial release pursuant to subsection 84(2) of the Act. In that decision, she held that Mr. Mahjoub had not satisfied her on either prong of the two-part test set out in subsection 84(2) of the Act.

[85] Mr. Mahjoub is somewhat similarly situated as Mr. Harkat is. He is a foreign national and a citizen of Egypt but has been recognized by Canada as a Convention

refugee. He has been detained on a security certificate since June 2000. Unlike Mr. Harkat, but like Mr. Almrei, the reasonableness of his security certificate was determined promptly by Justice Nadon, then of this Court and now a member of the Federal Court of Appeal who, on October 5, 2001, determined the certificate to be reasonable.

[86] In *Mahjoub, supra*, the following steps had been taken with regards to Mr. Mahjoub's removal from Canada after Justice Nadon's finding on October 5, 2001. On October 27, 2001, Citizenship and Immigration Canada (CIC) informed Mr. Mahjoub of its intention to seek the Minister's opinion under now paragraph 115(2)(*b*) of the Act which sets out the exception to non-*refoulement* with respect to Convention refugees or protected persons who may face risk in a country to which they may be removed. Because of the Supreme Court of Canada's decision in *Suresh*, *supra*, decided in January 2002, consultations within CIC and other departments took place to examine whether the implementation of additional safeguards were necessary. It was decided that assurances should be sought from the Egyptian authorities. Written assurances were received from the Egyptian authorities in February and March 2003 which were served on Mr. Mahjoub on March 28, 2003, along with other documents that would be used by the Minister to make a decision pursuant to paragraph 115(2)(*b*). Mr. Mahjoub's responding submissions were due on May 23, 2003, after which the Minister would be in a position to formulate his opinion whether Mr. Mahjoub should be allowed to remain in Canada.

[87] In *Mahjoub, supra*, the Director, Security Review, Intelligence Branch of CIC, acknowledged to Justice Dawson of the uncertainty surrounding Mr. Mahjoub's removal from Canada because he had sought and was granted leave to seek judicial review from a removal order issued by an adjudicator and because another proceeding was pending before this Court with respect to a negative decision regarding Mr. Mahjoub's humanitarian and compassionate application. In addition, the Director did not know how long it would take for the Minister's delegate to make a decision with respect to whether Mr. Mahjoub should be removed from Canada but proffered the opinion CIC will not take "undue time, to render its decision". However, the Director acknowledged Mr. Mahjoub would have the opportunity to bring an application for judicial review from that decision.

[88] In her analysis on the issue whether removal will take place within a reasonable time, after outlining the submissions of the parties, Justice Dawson held the following at paragraphs 50 and 51 of her decision reported at 2003 FC 928:

> ¶ 50 In considering these submissions, I accept that the reference to a period of 120 days in subsection 84(2) reflects Parliament's intent that once a certificate has been determined to be reasonable, the person named in the certificate should be removed expeditiously. However, by requiring as one of the criteria for release that the Court consider whether removal will or will not take place within a reasonable time, Parliament has contemplated that in some circumstances removal will not have occurred within 120 days, but the period of detention may still be a reasonable period. Otherwise, release after 120 days would be automatic, absent considerations of national security or the safety of persons. The right to apply for release after 120 days undoubtedly acts as an impetus to officials to assure an expeditious removal, and at the same time assures that any post 120-day delay can be the subject of judicial scrutiny.
>
> ¶ 51 What in any particular case will be reasonable will depend upon the facts and circumstances of that case. [*emphasis mine*]

[89] At paragraph 52, she identified pending and contemplated court proceedings which Mr. Mahjoub has initiated or will initiate and concerns as to whether he faces a risk of torture or death if he is removed to Egypt as the two most significant circumstances underpinning the uncertainty when Mr. Mahjoub might be removed from Canada. The essence of her finding that Mr. Mahjoub had not met the burden of satisfying her on the balance of probabilities that he will not be removed from Canada within a reasonable time is found at paragraphs 53, 55, 56, 57 and 58 of her reasons which I cite:

> ¶ 53 With respect to the first circumstance, it is Mr. Mahjoub's undoubted legal right under the Act and the Charter to challenge the lawfulness of decisions made about his immigration status. The evidence establishes that there are two applications for judicial review before this Court. Future challenges are likely, for example in the event that the Minister determines Mr. Mahjoub may be returned to Egypt. It was largely for these reasons that the Director could not state with any certainty when Mr. Mahjoub would be removed. However, while it is Mr. Mahjoub's right to exhaust all avenues of legal recourse, the time required for those challenges cannot, in my view, be relied upon by Mr. Mahjoub for the purpose of arguing that he will not be removed from Canada within a reasonable time. A similar conclusion was reached by Mr. Justice Rothstein, while a Judge of the Federal Court Trial Division, in Singh v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 970 (T.D.) (QL), at paragraph 7. In the words of Mr. Justice Rothstein, with which I entirely agree:
>
> An individual is free to take those steps available to him at law to remain in Canada. If he does so, however, he may not claim that on the basis of his own actions, that he will not be removed from Canada within a reasonable time for purposes of paragraph 40.1(9)(a).
>
> . . .
>
> ¶ 55 It flows directly from this, in my view, that where a risk of torture is asserted by a person who has been found to be a Convention refugee, more time, rather than less, will reasonably be required to ensure that the principles of fundamental justice are not breached.
>
> ¶ 56 This is not to say that Suresh applies to make every delay in effecting removal reasonable. Rather, the Court must in each case assiduously consider whether every reasonable effort has been made to secure prompt removal, in a manner consistent with the protection afforded by the Charter.

> ¶ 57 Here, an order of removal was obtained on March 26, 2002. This order remains in force, albeit subject to legal challenge. As a result of the decision of the Supreme Court in Suresh, issued on January 11, 2002, additional steps were taken by CIC. Assurances were sought and obtained from the Government of Egypt. Those written assurances were provided to Mr. Mahjoub and he was afforded the opportunity to make submissions in response to those assurances and to the material to be put before the Minister for the purpose of obtaining the Minister's opinion as to whether Mr. Mahjoub should be allowed to remain in Canada. Cogent evidence was not adduced in this proceeding to suggest that CIC has dragged its feet or has otherwise been guilty of improper or unreasonable delay.
>
> ¶ 58 As no decision about removal has yet been made by the Minister, and as any such decision may well be challenged in this Court, and as no evidence was [page518] adduced about circumstances surrounding the giving of the assurances of the Egyptian government, I am not prepared to comment upon the weight to be given to the written assurances tendered in evidence before me. I am satisfied, however, that for the purpose of the issue before me, they evidence the efforts of CIC to comply with the requirement implicit in subsection 84(2) of the Act that Mr. Mahjoub be removed from Canada as soon as reasonably practicable, in a manner consistent with observing rights protected by the Charter. [*emphasis mine*]

[90] After I reserved my decision in this case, two of my colleagues rendered decisions with respect to section 84(2) judicial release applications. The first of these two decisions was rendered by Justice Dawson in respect of Mr. Mahjoub's second application for release pursuant to subsection 84(2) of the Act and is cited as *Canada, (Minister of Citizenship and Immigration) v. Mohamed Zeki Mahjoub,* 2005 FC 1596 (hereinafter *Mahjoub No. 2)*. The second decision is the one rendered in respect of Mr. Almrei's second application for release pursuant to section 84(2) of the Act and was rendered by Justice Layden-Stevenson, a decision which is cited as *Almrei v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1645 (hereinafter *Almrei No. 2*).

[91] Both of these decisions applied the principles stated by the Federal Court of Appeal in *Almrei, supra*. Both found the applicants had satisfied the Court they would not be removed from Canada within a reasonable time but failed to convince either of the designated judges that they did not constitute a danger to the security of Canada. Accordingly, both applications for judicial release were dismissed.

[92] As I read Justice Dawson's reasons in *Mahjoub No. 2, supra,* what weighed very heavily on her mind were the following facts:

(1) The conditions of his detention;

(2) The length of his detention noting the fact he has been detained since June 26, 2000, and that more than four years have elapsed since the security certificate was found to be reasonable on October 5, 2001;

(3) Delay to effect removal has been protracted for a number of reasons some attributable to Mr. Mahjoub but others not. One significant source of delay not attributable to Mr. Mahjoub is the time taken by the Minister's delegate to render a danger opinion under paragraph 115(2)(*b*) of the Act (from May 23, 2003 to July 22, 2004), Mr. Mahjoub having been advised on October 22, 2001, that the opinion would be sought. Justice Dawson noted that in the absence of a danger opinion, Mr. Mahjoub could not be removed from Canada but must remain in

detention unless released by the Court or unless the Minister, on Mr. Mahjoub's request, sought his release from detention in order to permit him to leave Canada.

(4) The fact the Minister's delegate's opinion was quashed by the Court on January 31, 2005, with the result that the Minister's decision to return to Egypt was set aside and the matter returned for reconsideration by a different Minister's delegate.

[93] After examining these facts along with the reasons behind the Court's September 8, 2004 stay of Mr. Mahjoub's removal to Egypt pending determination of the application for judicial review of the Minister's decision to remove him there, the absence of a further danger opinion which is necessary to permit Mr. Mahjoub's removal to Egypt and the likely certainty Mr. Mahjoub would further challenge such a danger opinion because of the uncertainty on this point arising in *Suresh, supra*, led Justice Dawson to conclude Mr. Mahjoub was not in a condition of imminent removal such that the conditions of his detention and time already served would lose much of their significance. In the circumstances, taking into account the conditions of his detention and the length of that detention, Justice Dawson was satisfied Mr. Mahjoub would not be removed from Canada within a reasonable time. She exercised her discretion not to discount the delay on account of the fact that past and future proceedings taken by Mr. Mahjoub have increased the delay.

[94] In *Almrei No. 2, supra,* Justice Layden-Stevenson was influenced by similar factors as those considered by Justice Dawson in *Mahjoub No. 2*. As noted, Mr. Almrei is a citizen of Syria and a Convention refugee who has been detained under a security certificate since October 19, 2001, one found to be reasonable by Justice Tremblay-Lamer on November 23, 2001. On December 5, 2001, Mr. Almrei was advised CIC would be seeking the Minister's opinion he was a danger to the security of Canada which could lead to his *refoulement* to Syria. As noted, *Suresh, supra*, was decided by the Supreme Court of Canada in January 2002.

[95] On January 13, 2003, the Minister's delegate was of the opinion Mr. Almrei was a danger to the security of Canada pursuant to paragraph 115(2)(*b*) of the Act. Mr. Almrei promptly sought leave to apply for judicial review and judicial review of the Minister's decision also seeking a stay which became moot on the Minister's undertaking he would not be removed until his application was determined. The Minister's delegate's danger opinion was set aside with the consent of the Minister of Citizenship and Immigration who acknowledged serious errors with respect to that opinion.

[96] On July 28, 2003, Mr. Almrei received notice the Minister would be making a further determination, pursuant to paragraph 115(2)(*b*) of the Act as to whether he should be removed from Canada on the basis he posed a threat to national security. On October 23,

2003, a Minister's delegate determined Mr. Almrei would not be at risk of torture if he were returned to Syria. In the alternative, the Minister's delegate found that any risk faced by Mr. Almrei in Syria was justified because of the danger he posed to the security of Canada. Mr. Almrei applied for leave and for judicial review. An affidavit filed in the Federal Court on November 21, 2003, indicated that a date for Mr. Almrei's removal had been selected with removal to be effected within two and a half weeks. Mr. Almrei applied for and was granted a stay of the removal order pending the disposition of his application for leave and judicial review of the second danger opinion.

[97] On March 11, 2005, Justice Blanchard of this Court quashed the second danger opinion and ordered that the matter be remitted for redetermination by another Minister's delegate. At the time Justice Layden-Stevenson rendered her decision, that is five months after Mr. Almrei's submissions were completed on July 29, 2005, the Minister's delegate's danger opinion pursuant to paragraph 115(2)(*b)* was outstanding. Justice Layden-Stevenson noted Mr. Almrei cannot be removed from Canada until the opinion from the Minister is completed unless the Minister permits him to leave Canada destined for a country of his choice willing to receive him. Failing that, he must remain in detention unless released by the Court.

[98] As noted, Justice Layden-Stevenson was satisfied, on the balance of probabilities, that Mr. Almrei will not be removed within a reasonable time. She noted Mr. Almrei has

been in detention for more than four years. The security certificate was found to be reasonable on November 23, 2001. In her view, it was evident that the time required to effect Mr. Almrei's removal has been "elongated primarily as a result of his pursuit of legal remedies to thwart his removal". She added the Federal Court of Appeal "has concluded that the determination of whether a delay has become unreasonable requires examination of five different factors that in the end amounts to having regard to the totality of circumstances. In that connection, she relied upon paragraph 57 of Justice Létourneau's decision in *Almrei, supra* which I cite:

> ¶ 57 Where the removal of a foreign national is delayed so as to bring into play the "reasonable time" requirement, the judge hearing the judicial release application must consider the delay and look at the causes of such delay. Judicial remedies have to be pursued diligently and in a timely fashion. The same goes for the Government's responses and the judicial hearing of these remedies. Courts, as they must do, have given priority to the hearing of challenges to the legality of a detention. The Supreme Court of Canada in Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, at paragraphs 115, 121 and 122, found that a delay, in order to be abusive or to amount to unfairness, has to be unreasonable or inordinate. In determining whether a delay has become unreasonable, one has to look at "the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case" (emphasis added): see paragraph 122 of the Blencoe decision, supra.

[99] She referred to the principle that if credible and compelling evidence of an imminent removal is produced, both the conditions of detention and the time already served lose much of their significance and that the history of events is relevant in the sense that it may provide reasons to doubt the reliability of evidence that the moment of removal is close at hand and to question how much further delay is reasonable.

[100] At paragraph 258 of her reasons she wrote:

> ¶ 258 Where delay ensues, as a result of an applicant's efforts to prevent his removal, the Court has a discretion to discount, in whole or in part, the resulting delay (paragraph 58). The conditions of detention may be such, especially when coupled with a lengthy detention, that the phrase "within a reasonable time" takes "another significance, one of urgency" (paragraph 82). The removal must then be effected even more expeditiously in order to be in compliance with the requirements of subsection 84(2). It is in this light that, where necessary, the length and conditions of past detention must be looked at by the judge along with the operative causes of delay (paragraph 83). Thus, alone or in combination, lengthy detention and oppressive conditions can make the matter one of urgency and the standard of reasonableness a stringent one.

[101] Justice Layden-Stevenson acknowledged Mr. Almrei's detention was a lengthy one since October 19, 2001, the security certificate having been found reasonable on November 23, 2001.

[102] Justice Layden-Stevenson found that Mr. Almrei, with the exception of a transient experience with the general population, has been in solitary confinement for the duration of his tenure at the Metro-West, a necessary segregation because, in the general population, his personal safety would be at risk. She described that in segregation, Mr. Almrei is confined to his cell for approximately twenty-three and a half (23 ½) hours per day. During the other half hour, he showers and has fifteen to twenty minutes of exercise but if there are lock-downs or staff shortages, he cannot shower or exercise. He is permitted visitors for a total of forty minutes each week and is permitted phone calls. She found that the Metro-West Institution is a remand facility designed for short-term incarceration for individuals awaiting trial or sentencing. She stated this facility was not

only ill-equipped but not designed for long-term detainees and noted a psychological assessment which stated that solitary confinement is the most psychologically impactful and deleterious form of incarceration. She had no hesitation in concluding that the conditions under which Mr. Almrei has been held, for the length of time that he has been held, are unacceptable and fall far short of that one would expect in Canada and that, as a result, in the exercise of her discretion, she declined to discount any delay that can be attributed to Mr. Almrei from March 14, 2004 to the present in determining whether there will be removal within a reasonable time.

[103] Justice Layden-Stevenson noted Mr. Almrei's counsel's submissions regarding the allegations of Messrs. Arar, El Maati and Almalki, describing their respective experiences in Syria, and the fact that it cannot be presumed that the Minister's delegate's decision will be that Mr. Almrei can be removed. She stated these arguments "merit consideration to the extent that they will also have been made to the Minister's delegate and will undoubtedly be closely studied by that individual". She indicated the Supreme Court of Canada has not determined what circumstances could exist to justify deportation to face torture and that there are powerful indicia in *Suresh, supra,* that deportation to face torture is conduct fundamentally unacceptable, conduct that shocks the Canadian conscience and therefore violates fundamental justice. She endorsed the view that where a risk of torture is asserted by a person who has been found to be a Convention refugee, more time rather than less will be required.

[104] Justice Layden-Stevenson clearly acknowledged that the issue which confronted her is not one where she is called upon to review the risk analysis portion of the danger opinion because the decision of a Minister's delegate has yet to be made. She added, however, that Mr. Almrei's submissions do inform the question of "removal within a reasonable time" because it was clear to her, in view of the submissions, that Mr. Almrei will undoubtedly seek leave to apply for judicial review and, if necessary, a stay of deportation, if the Minister's delegate should determine that he can be removed from Canada.

[105] Moreover, she acknowledged that the Supreme Court of Canada has granted leave with respect to the Federal Court of Appeal's decision in respect of Mr. Almrei as it has also done on the constitutional question related to the Federal Court of Appeal's decision in *Re Charkaoui*, [2005] 2 F.C.R. 299, with respect to the constitutional question. She preferred that the hearing of the appeal by the Supreme Court of Canada was, at the point of her writing, several months away and that speculation as to when a decision may be rendered was nothing more than that. She concluded that it was at least arguable that Mr. Almrei will not be removed before the Supreme Court of Canada makes its determination in respect to his appeal and that as a result, she concluded Mr. Almrei has not established that his removal was not imminent. According to her, "it was not a done deal" and that it will not occur within a reasonable time.

(2) Application to this case and conclusions

[106] For the following reasons, I conclude that that Mr. Harkat has not satisfied me that he will not be removed within a reasonable time. In the circumstances, I need not rule on whether he has satisfied me that he is not a danger to the security of Canada or any person.

[107] Clearly, Mr. Harkat's detention has been a lengthy one. It has been three years and a few weeks that he has been detained on a security certificate at the Ottawa-Carleton Detention Centre since early December 2002. But the ruling on the reasonableness of the security certificate is recent; it was determined on March 22, 2005.

[108] Counsel for Mr. Harkat led no evidence to explain the time lapse from the time he was first detained to the time when Justice Dawson resumed her consideration of the public hearings on October 25, 2004, under the helm of Mr. Harkat's new counsel Messrs. Copeland and Webber who had worked diligently and effectively to represent Mr. Harkat since they were retained in late June 2004.

[109] In her reasons, Justice Dawson attributed the period of delay from July 2003 to June 2004 to Mr. Harkat and not to the Ministers. In addition, Mr. Harkat, as noted, appointed new counsel at the end of June 2004 who asked for an adjournment of the

scheduled recommencement of proceedings fixed for August 2004. The request for adjournment was granted in order to allow Messrs. Copeland and Webber to familiarize themselves on the file. Justice Dawson explained the nature of the delay in her reasons on the *amicus curiae* issue reported at *(Re) Harkat*, 2004 FC 1717. As I read her reasons, none of the causes of the delay to bring the hearing on the reasonableness of the security certificate to a conclusion was attributed by her to anything which could be laid at the feet of the respondent Ministers. After new counsel were engaged and the public hearings commenced in October 2004, matters proceeded expeditiously and effectively.

[110] Moreover, counsel for Mr. Harkat did not lead much evidence on the conditions of Mr. Harkat's detention. Apart from a period of time in solitary confinement, Mr. Harkat has mixed in the general population at the Ottawa-Carleton Detention Centre. Dr. Campbell did testify that during incarceration, Mr. Harkat developed depression and PTSD but a fair reading of his evidence suggests that the cause of those illnesses is not attributable to incarceration *per se* but rather is said to be because of his fear of return to Algeria. (See transcript, vol. 2, page 408).

[111] Dr. Cameron, whose expertise was not challenged, acknowledged under cross-examination:

(a) That in his report he identified Mr. Harkat's major sources of stress as his present incarceration; the uncertainty around his future and particularly his fear of deportation to Algeria (*ibid.,* page 438);

(b) deportation is an extremely stressful experience (*ibid.,* page 438);

(c) so long as the stress of potential deportation continues he would continue to experience the possibility of PTSD and depression (*ibid.,* page 439);

(d) he did not mean to suggest that if Mr. Harkat were released from prison he still would not suffer depression and/or PSTD;

(e) that not all people who commit violent crimes are psychopaths;

[112] As Justice Létourneau noted in *Almrei, supra,* the focus of a subsection 84(2) application for judicial release from detention is on the issue whether Mr. Harkat will be removed from Canada within a reasonable time. Justice Létourneau was clearly aware of and influenced by the Supreme Court of Canada's decision in *Blencoe v. B.C. Human Rights Commission,* [2000] 2 S.C.R. 307, a case where Mr. Blencoe attempted to shut down a human rights investigation under the *B.C. Human Rights Code* on the grounds of unreasonable delay.

[113] *Blencoe, supra*, and in particular Justice Bastarache's majority reasons for judgment, is the source for the following propositions:

(1) The section 11(*b*) guarantee of a right to an accused person to be tried within a reasonable time cannot be imported into section 7 of the *Charter of Rights and Freedom.* There is no analogous provision to section 11(*b)* of the Charter which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be tried within a reasonable time;

(2) The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay and other circumstances of the case;

(3) While a person is entitled to take steps challenging the B.C. Human Rights Commission's process and while Mr. Blencoe was entitled to take legal steps as he did, the delay attributable to those challenges cannot be computed into the delay caused by the Commission.

[114] Counsel for Mr. Harkat did not lead direct evidence on the issue of whether Mr. Harkat would not be removed within a reasonable time. Rather, he relied on the fact that from the date he made his preliminary submissions to the CBSA in respect to the seeking of a section 115(2)(*b*) opinion, six months had passed before the CBSA submitted its memorandum to the Minister's delegate seeking a positive section 115(2)(*b)* opinion.

According to counsel for Mr. Harkat, this six-month timeframe is evidence that the CBSA is not doing its job on a timely basis. This six-month timeframe is *prima facie* unreasonable. This six-month delay falls within the principle expressed by Justice Létourneau in *Almrei, supra*, at paragraph 42, that Mr. Harkat has discharged his onus of leading some evidence that he has reasonable grounds to believe that the removal will not be effected within a reasonable time. Counsel pursues his argument that Mr. Harkat, having led this evidence, that evidence has to be answered. The burden has shifted to the government who has not called any evidence to justify the six-month delay and, as a result, Mr. Harkat is entitled to be released.

[115] Mr. Harkat's counsel also sated he does not know when Mr. Harkat might be removed and does not know when the Minister's delegate will render a decision on the section 115(2)(*b*) issue. He acknowledged that I should not be speculating on these two points.

[116] With respect to seeking leave to appeal to the Supreme Court of Canada from the Federal Court of Appeal's September 6, 2005 decision dismissing his constitutional challenge, Mr. Harkat's counsel argued that any delay arising on account of such challenge should not count against Mr. Harkat who would be pursuing a constitutional challenge fundamental to the process.

[117] It is true that six months have passed between the time counsel for Mr. Harkat made his preliminary submissions to the CBSA and the time the CBSA filed its memorandum with the Minister's delegate. Mr. Copeland had forwarded his preliminary submissions to the CBSA on April 21, 2005, with the CBSA's disclosure package to the Minister's delegate being dated October 21, 2005.

[118] I do not accept counsel for Mr. Harkat's argument that, in and of itself, this six-month period is *per se* unreasonable and constitutes *prima facie* evidence that Mr. Harkat will not be removed within a reasonable time.

[119] In my view, the evidentiary burden had not shifted to the respondents to explain this particular delay.

[120] I question whether the six-month timeframe is accurate because, throughout the summer of 2005, counsel for Mr. Harkat was continuously submitting additional material.

[121] However, more importantly, the applicant's focus, in isolation, on the time it took to prepare the CBSA's memorandum to the Minister's delegate is misplaced. Such focus is not in keeping with the teaching in *Blencoe, supra,* at paragraph 122 which stated there are several factors to be considered whether a delay has become inordinate and is also not in tune with paragraph 55 of Justice Létourneau's reasons in *Almrei*, *supra,* where he

said that the concept of “removal within a reasonable time, requires a measurement of the time elapsed from the moment the certificate was found to be reasonable and an assessment of whether that time is such that it leads to a conclusion that removal will not occur within a reasonable time. Concerns about a possible violation of the reasonable time requirement emerge after the 120 days mentioned in subsection 84(2) have elapsed and removal has not yet occurred”. On these principles, it cannot be said that the time it took to prepare the CBSA’s memorandum leads to a conclusion that removal will not occur within a reasonable time. Moreover, a simple reading of Mr. Dumas’ memorandum to the Minister’s delegate, plainly evidences that it took a considerable time to prepare it; the points addressed are numerous and complex. The CBSA’s memorandum had to take into account and reply to, after analysis, to the extensive preliminary submissions provided on behalf of Mr. Harkat. It had to be a carefully tailored document to address the *Suresh* concerns. It is simply unrealistic to suggest that a document of this sort can be put together quickly.

[122] I find the following factors significant in coming to the conclusion the applicant has not discharge his onus to satisfy me that he will not be removed within a reasonable time:

(1) While his incarceration has been lengthy, a good period of time from June 2003 to October 2004, is delay attributable to Mr. Harkat or arises out of his engagement of new legal counsel. The time period before and

after this timeframe for the completion of the hearing on the reasonableness of the security certificate was not unusual;

(2) All indicators are that the CBSA is proceeding expeditiously in this matter and is not dragging its feet. It began seeking assurances from the Algerian Government in 2003. Two days after Justice Dawson's decision on the reasonableness of the security certificate, Mr. Harkat was notified a danger opinion would be sought against him and the timeframe for preliminary submissions were set and completed expeditiously;

(3) The process leading to a decision by the Minister's delegate on the section 115(*b*) opinion is completed. The Minister's delegate's decision is pending. I cannot speculate when the Minister's delegate's decision will be rendered. If there is unreasonable delay, Mr. Harkat can renew his application for judicial release;

(4) The conditions of his detention are not a factor. Dr. Cameron did not testify Mr. Harkat's depression and PTSD was caused by his incarceration. He did state Mr. Harkat should be treated with anti-depressants which I trust has occurred;

(5) Any delay on account of Mr. Harkat's pursuing legal redress to prevent his removal, on the prevailing jurisprudence, should not count in Mr. Harkat's favour for an early release;

(6) This is not the kind of case such as in *Mahjoub No. 2* and *Almrei No. 2*, *supra,* where there was delay surrounding decisions taken by the Minister's delegate where some of those decisions were quashed. As noted here, the Minister's delegate has yet to render a first opinion on the section 115(2)(*b*).

(7) The uncertainty surrounding Mr. Harkat's removal would relate to steps which he might take to block a decision by the Minister's delegate to authorize his removal to Algeria. Once again, if this causes delay in his removal, such a delay cannot be attributable to the removal authority.

[123] Mr. Harkat has not satisfied me he will not be removed within a reasonable time. I reach this decision entirely on the public record. As Justice Létourneau stated in *Almrei, supra*, there is no need to examine confidential information in the circumstances.

[124] My finding Mr. Harkat has not met the first prong of the two-part test under subsection 84(2) of the Act means I need not consider whether Mr. Harkat's release would not pose a danger to national security and whether such danger can be contained by the use of sureties and the imposition of conditions, a conclusion which Justice Noël reached in *Charkaoui,* 252 D.L.R. (4th) 601 (F.C.), a decision rendered before he had examined the reasonableness of the security certificate issued against Mr. Charkaoui, a permanent

resident in Canada and after three detention reviews pursuant to subsection 83(2) of the Act.

[125] For these reasons, Mr. Harkat's application for judicial release from detention is dismissed.

"François Lemieux"
JUDGE

OTTAWA, ONTARIO
DECEMBER 30, 2005

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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