Federal Court  Cour fédérale

Date: 20170110

Docket: IMM-4483-15

Citation: 2017 FC 28

Ottawa, Ontario, January 10, 2017

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MANICKAVASAGAM SURESH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

PUBLIC JUDGMENT AND REASONS

I. INTRODUCTION

[1] The applicant, Manickavasagam Suresh, seeks judicial review of a decision of the Immigration Division (ID) of the Immigration and Refugee Board which found that there are reasonable grounds to believe that Mr. Suresh is inadmissible to Canada under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] for being a member of a terrorist organization, and under paragraph 35(1)(a) of the IRPA for being

complicit in war crimes and crimes against humanity. For the reasons that follow, the application for judicial review is dismissed.

II. BACKGROUND

[2] Mr. Suresh is a Sri Lankan citizen of Tamil ethnicity. He arrived in Canada on October 5, 1990 and made a claim for recognition as a Convention refugee. On April 1, 1991, he was granted such status. Mr. Suresh then filed an application for landing. While that application was pending, he was interviewed by the Canadian Security Intelligence Service (CSIS). Both prior to and following his arrival in Canada, Mr. Suresh worked in various capacities in support of the World Tamil Movement (WTM).

[3] In 1995, the Solicitor General of Canada and the Minister of Citizenship and Immigration signed a certificate pursuant to section 40.1 of the former *Immigration Act*, to commence proceedings to remove Mr. Suresh from Canada for being a risk to national security. On November 14, 1997, after open and closed hearings, the Federal Court found the Ministers' certificate to be reasonable. In the open hearings, Mr. Suresh testified and called other witnesses on his own behalf. In ruling on the reasonableness of the certificate, Mr. Justice Teitelbaum found that Mr. Suresh was a member of the Liberation Tigers of Tamil Eelam (LTTE), that the WTM was either a part of or supported the activities of the LTTE, and that there were reasonable grounds to believe that the LTTE had committed terrorist acts.

[4] On September 17, 1997, Mr. Suresh was ordered deported by an Immigration Adjudicator. On January 18, 1998, the Minister of Citizenship and Immigration signed a

certificate pursuant to paragraph 53(1)(b) of the former *Immigration Act* to the effect that Mr. Suresh was a danger to the security of Canada. This certificate was necessary in order to remove Mr. Suresh because he had been found to be a Convention refugee. Mr. Suresh challenged this decision, arguing that his rights under the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982,* Schedule B, *Canada Act, 1982*, 1982, c 11 (UK) [RSC, 1985, Appendix II, No 44] [the *Charter*] had been breached, and that the terms "danger to the security of Canada" and "terrorism" in sections 19 and 53 of the former *Immigration Act* were unconstitutionally vague. This challenge was dismissed by the Federal Court and an appeal to the Federal Court of Appeal was denied. However, leave to appeal to the Supreme Court of Canada was granted.

[5] In May of 2002, the Supreme Court determined that Mr. Suresh had established a *prima facie* case that he faced a substantial risk of torture if deported to Sri Lanka, and that the certificate under paragraph 53(1)(b) did not provide the procedural safeguards required to protect his rights under section 7 of the *Charter*: *Suresh v Canada (Minister of Citizenship and Immigration,* 2002 SCC 1, [2002] 1 SCR 3. The case was remanded to the Minister for reconsideration.

[6] In *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui I*], the Supreme Court struck down the former security certificate procedure that had been carried over to the IRPA when that legislation came into effect in 2003. As a result of that decision, the certificate against Mr. Suresh was quashed by operation of law. Rather than recommence the security certificate process against Mr. Suresh under the replacement legislation

enacted by Parliament in 2008, two reports were issued under section 44 of the IRPA which alleged that he was inadmissible under paragraphs 34(1)(c) and (f) and paragraph 35(1)(a) of the Act.

[7] The first report, dated April 9, 2008, alleged that Mr. Suresh is inadmissible pursuant to paragraph 34 (1)(f) of the IRPA as a member of the WTM; an entity alleged to be a front organization for the LTTE, which was alleged to be a terrorist organization. The second report, dated December 4, 2008, alleged that Mr. Suresh is inadmissible under paragraph 35(1)(a) of the IRPA because of complicity in offences referred to in sections 4 to 7 of the *Crimes against Humanity and War Crimes Act*, SC 2000, c 24, as a member of the LTTE.

[8] Prior to the hearing before the ID, several preliminary applications were made by both parties. Because of these interlocutory proceedings and other developments that are not material to this application, determination of the inadmissibility issues raised by the reports was delayed for several years. The history of the proceedings is set out in ID Member Heyes' extensive Reasons for Decision and in a detailed chronology attached as an appendix. Member Heyes and her predecessor on the inadmissibility proceedings, Member Laut, also provided Reasons for Decision on each of the various interlocutory motions brought by the parties.

[9] A key preliminary issue was the Minister's obligation to disclose classified materials in the government's possession or control concerning Mr. Suresh. Before the inadmissibility hearing began, the Supreme Court had occasion to consider another issue in relation to security certificate proceedings. In *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38,

[2008] 2 SCR 326 [*Charkaoui II*], at paragraphs 48-55, the Court held that there was a duty to retain and disclose original records of investigations carried out by CSIS regarding certificate subjects. The right to make full answer and defence against criminal charges had become one of the principles of fundamental justice included in section 7 of the *Charter*, the Supreme Court observed. While security certificate proceedings are not identical to criminal proceedings, section 7 rights are engaged because of the serious consequences of the certificate procedure on the liberty and security of the named person. Thus, a form of disclosure going beyond that of the summaries that were currently provided was required to protect the fundamental rights affected by the security certificate procedure.

[10] On November 6, 2009, Mr. Suresh requested an order that the Ministers be directed to disclose all relevant exculpatory and neutral information and evidence in their possession. That application was contested by the Ministers. However, by March 4, 2011, a review of classified materials concerning Mr. Suresh had been completed and information that could be described as exculpatory in nature was discovered. The Minister was then ordered to disclose the exculpatory evidence that was relevant to the allegations of inadmissibility.

[11] In October 2011, the ID appointed Mr. Anil Kapoor, Barrister and Solicitor, to act as Special Advocate. Mr. Kapoor was granted access to all the relevant documents the Minister intended to file as evidence in the admissibility proceedings, as well as all the classified exculpatory material relevant to the matter disclosed by the Minister. Prior to reviewing the material, Mr. Kapoor met with Mr. Suresh and his counsel. He then reviewed and approved summaries of the classified documents that were released to the applicant. The ID heard

submissions from counsel for both parties and the Special Advocate concerning the extent of the Minister's disclosure obligations, having regard to the Supreme Court of Canada's decision in *Charkaoui II*. Classified submissions were presented by the Special Advocate on behalf of Mr. Suresh and by the Minister.

[12] Mr. Suresh and the Special Advocate argued that the Minister should be ordered to produce all information in CSIS's possession relating to Mr. Suresh since this was the type of disclosure that was ordered by the Federal Court in security certificate cases. Mr. Suresh argued that the Minister had been selective in providing evidence that the Minister considered to be relevant. In the certificate cases, the Special Advocates had access to security files and had reviewed the information to identify relevant neutral and exculpatory evidence. The Minister argued that such disclosure was not necessary in this case, unlike the security certificate proceedings, since the Minister did not intend to rely on any of the classified information that had been disclosed to the Special Advocate. In contrast, certificate proceedings relied on both open material disclosed to the subject and closed material presented in a classified security intelligence report provided only to the Court and the Special Advocates.

[13] Among other things, Member Heyes found that there was no significant difference between the security certificate proceedings before the Federal Court and inadmissibility proceedings before the Immigration Division in respect of the disclosure of information. Section 86 of the IRPA, pertaining to inadmissibility hearings, cross-references the security certificate provisions of the statute. Member Heyes noted also that whether it is a determination of

inadmissibility or the issuance of a removal order under section 80 of the IRPA following a determination that a certificate is reasonable, the results are the same.

[14] Member Heyes concluded that broad *Charkaoui II* disclosure could be ordered by the ID and noted that it had been done in an ID case reviewed by the Federal Court: *Victoria v Canada (Minister of Public Safety and Emergency Preparedness),* 2011 FC 1392, [2013] 3 FCR 414. However, notwithstanding the procedural similarities between security certificate proceedings at the Federal Court and inadmissibility proceedings before the ID, in her view, fairness did not require full disclosure in the circumstances of this case.

[15] The purpose of providing a Special Advocate with *Charkaoui II* disclosure in a certificate case is to remedy the situation caused by the Minister's reliance on evidence and information that is not disclosed to the named person. The inability of the person and his counsel to review the confidential material adversely affects his right to know the case to be met. The matter before the ID was distinguishable, the Member found, as the evidence upon which the Minister intended to rely had been disclosed to Mr. Suresh. It could not be said that Mr. Suresh was unaware of the case to be met because a significant portion of the Minister's evidence was provided by Mr. Suresh himself in his refugee claim, as well as in his testimony and the testimony of other witnesses he called on his own behalf during the security certificate proceedings. As a result, the Member denied Mr. Suresh's application for further disclosure in a decision issued on May 16, 2013.

[16] The evidence filed by the Minister included nine volumes of transcripts of the security certificate hearing held by the Federal Court in 1996. As part of those hearings were held *in camera*, the Minister sought permission from the Federal Court to use portions of the testimony from Mr. Suresh and other witnesses called during the proceeding. In an order dated July 22, 2009, Chief Justice Lutfy granted permission on the condition that the confidentiality of the closed hearing transcripts be maintained.

[17] Citing the Supreme Court's findings in *Charkaoui I*, above, Mr. Suresh argued that his testimony in the security certificate proceedings was obtained in breach of the *Charter* and contrary to the principles of natural justice, and should therefore be excluded under subsection 24(2) of the *Charter*. Mr. Suresh submitted that he was not a compellable witness before the ID and that the effect of admitting the transcripts would be to render him compellable. In support of that argument, counsel cited the decision of this Court in *(Re) Jaballah*, 2010 FC 224, [2011] 3 FCR 155 [*Jaballah*]. In that ruling, Justice Dawson held that the person named in a security certificate was not compellable before the Federal Court in a review of the reasonableness of the certificate.

[18] After hearing extensive arguments from the parties, ID Member Heyes determined that there was insufficient evidence to conclude that the testimony of Mr. Suresh and his other witnesses was obtained in violation of the *Charter*. Mr. Suresh had voluntarily testified, even if the decision to do so was made on the mistaken assumption that he was compellable in security certificate proceedings. As such, the Member found that Mr. Suresh was a compellable witness

before the ID, and that the transcripts of the security certificate proceedings could be entered into evidence at the admissibility hearing.

[19] As a result of Chief Justice Lutfy's 2009 Order relating to the transcripts and having regard to the considerations set out in paragraph 166(b) of IRPA, the Member ordered that the proceedings were to be conducted in the absence of the public. All of the preliminary proceedings, the transcripts, and other evidence tendered by the parties were to be kept confidential.

[20] The admissibility hearing was held on June 6, 2014. Both parties and the Special Advocate filed written submissions. Neither party called Mr. Suresh or any other witness to testify. The Minister chose not to rely on the fact that in 2008, both the WTM and the LTTE had been listed as terrorist entities under section 83 of the *Criminal Code of Canada*, RSC, 1985, c C-46.

[21] Mr. Suresh worked for the WTM before his arrival in Canada and continued to work in Canada as its coordinator. The Member accepted the Minister's evidence that the WTM operated under the control of the LTTE and was part of the same organization. Member Heyes found that the evidence established that Mr. Suresh was a member of the LTTE, and that the LTTE was an organization that engaged in acts of terrorism which also fell within the meaning of war crimes and crimes against humanity.

[22] Mr. Suresh, the Member concluded, made significant, voluntary, and knowing contributions to the crimes or criminal purpose of the LTTE prior to his arrival in Canada and was thereby complicit in the acts of the LTTE as determined by the test set out by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*].

[23] With respect to the constitutional validity of paragraphs 34(1)(f) and 35(1)(a) of the IRPA, and arguments that Mr. Suresh's *Charter* rights had been violated, after conducting a review of the authorities and the evidence, the Member found that neither invalidity nor a breach of rights had been established. The Member determined that this was not a case in which the governing jurisprudence concerning the *Charter* and the IRPA could be revisited. She was not persuaded that the courts' interpretations of these provisions of the IRPA had changed in any discernible way in recent years. Accordingly, the Member dismissed Mr. Suresh's application for a stay of proceedings or other remedy under subsection 24(2) of the *Charter*, and found that Mr. Suresh was inadmissible to Canada on both grounds.

[24] The Member's decision, including a summary of the classified portion of her reasons, was issued on September 16, 2015 along with deportation orders pursuant to paragraphs 229(1)(a) and 229(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[25] Upon filing of the application for judicial review in this matter, the parties sought and obtained a confidentiality order for the content of the Certified Tribunal Record (CTR). Prior to

the hearing, they were directed to produce and file a public record and the hearing itself was conducted in open court.

III. NON-DISCLOSURE APPLICATION

[26] On April 20, 2016, the Minister of Citizenship and Immigration filed an application for the non-disclosure of information pursuant to section 87 of the IRPA. The information at issue was previously disclosed to the applicant in the form of summaries, the content of which was reviewed and agreed to in writing by the Special Advocate, Mr. Kapoor, appointed by the Immigration Division.

[27] On May 20, 2016, a classified affidavit with attachments was filed in support of the application for non-disclosure. The Court considered written representations submitted by the parties and discussed the matter with counsel for the parties by telephone conference. As noted, a confidentiality order had been imposed by the Court on the CTR at the request of the parties. A similar order had been made by the ID and a portion of the ID's decision was classified. The applicant had been provided with a summary of that part of the ruling.

[28] The Court was advised by counsel for the respondent that, as in the ID proceedings, the Minister did not intend to rely on the classified information for the purposes of responding to the application for judicial review. The applicant renewed his request for an inquiry to be made as to whether there was additional information in the possession of the respondent Minister that might be disclosed to him for the purposes of the application for judicial review.

[29] Upon determining that considerations of fairness and natural justice in the circumstances of this case required that a Special Advocate be appointed to protect the interests of the applicant, the Court appointed Mr. Kapoor to perform that role again. The Court was informed that the Special Advocate found no issue with the classified affidavit or the redactions in the materials and did not seek to cross examine the affiant who had made the classified affidavit.

[30] The Court reviewed and compared the summaries with the original documents for which protection was being sought and read the affidavit evidence tendered in support of the application to determine whether the grounds for granting the application for non-disclosure had been established. Having reviewed the classified documents and considered the evidence, the Court was satisfied that the disclosure of the information which the respondent Minister sought to protect would be injurious to national security or would endanger the safety of any person. The Court was also satisfied that the applicant's request for an inquiry into whether there is additional information in the possession of the respondent Minister that might be disclosed to the applicant was beyond the scope of the section 87 application.

[31] In the result, on June 22, 2016, the Court issued an order granting the application for non-disclosure. It also ordered that the classified portion of the ID's decision, of which the applicant had a summary, as well as the classified submissions of the Minister and Special Advocate in the underlying admissibility hearing and contained in the CTR, not be disclosed.

IV. ISSUES

[32] In his written representations, the applicant relied primarily on his submissions before the ID which were filed as part of the Application Record. There was little fresh argument as to how the ID erred in its consideration of those submissions. The Court was invited to refer to them to understand the applicant's case. The applicant's Memorandum of Fact and Law was largely devoted to a review of the facts and history of the proceedings. The respondent asked that they also be granted indulgence to rely on their argument to the ID. This is not a practise to be encouraged as an application for judicial review is not an occasion to simply reweigh the evidence and reconsider the issues presented to the tribunal. The parties should be prepared to assist the Court by focusing on the issues raised by the tribunal's decision.

[33] At the oral hearing on September 7, 2016, counsel for Mr. Suresh engaged in what might be described as a free-wheeling discussion of a broad range of topics. I have extracted from that discussion the following issues:

i. What is the Standard of Review?

ii. Whether the ID breached the duty of fairness by failing to order full *Charkaoui II* disclosure;

iii. Whether Mr. Suresh was a compellable witness before the ID and whether the transcripts of his own testimony in the Security Certificate proceedings were admissible;

iv. Whether the ID erred in its assessment of the evidence;

v. Whether the ID erred in its interpretation of "membership" and "complicity"; and,

vi. Whether the Minister's actions constitute an abuse of process.

[34] During the hearing, counsel for the respondent handed up a recently released decision by Justice Barnes; *B095 v Canada (Minister of Citizenship and Immigration)*, 2016 FC 962, [2016] FCJ No 912 [*B095*]. Mr. Suresh's counsel was also counsel for the applicant in that matter but had not read the decision. In the circumstances, both parties were provided with an opportunity to provide post-hearing submissions relating to that decision as well as possible questions for certification.

V. RELEVANT LEGISLATION

[35] The relevant provisions of the IRPA read as follows:

Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
Security	**Sécurité**
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants :
[…]	[…]
(c) engaging in terrorism;	**c)** se livrer au terrorisme;

[…]	[…]
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	**f)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).
Human or international rights violations	**Atteinte aux droits humains ou internationaux**
35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35 (1)** Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;	**a)** commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;

VI. ANALYSIS

A. *Standard of Review*

[36] Neither party made submissions on the standard of review in their written arguments. At the hearing, the applicant said the standard should be correctness. The respondent said that the weight of authority favoured reasonableness but, on either standard, the decision should be upheld. As noted above, the parties were provided with the opportunity to make post-hearing submissions regarding reasoning and findings in *B095*. In those submissions, the applicant challenged Justice Barnes's findings on the appropriate standard, among other things.

[37] It is generally accepted that issues of procedural fairness are reviewed on a standard of correctness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 4 [*Khosa*]; *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79 [*Khela*].

[38] In *B095*, the ID made certain interlocutory rulings similar to those at issue in this case, regarding the applicant's compellability and the failure to exclude certain evidence. Justice Barnes found that such interlocutory rulings must be assessed on the standard of reasonableness because the Board is entitled to deference where there is a factual or evidentiary aspect to the determination: *Satheesan v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 346, [2013] FCJ No 371 at paras 36-37 [*Satheesan*]; *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] SCJ No 8 at para 68 [*Commission scolaire*]. In any event, Justice Barnes found that the ID's procedural and evidentiary rulings would withstand scrutiny even if the correctness standard was applied.

[39] Mr. Suresh argues that Justice Barnes' conclusion on the standard of review is novel, problematic, and not supported by the decisions upon which he relies. He contends that *Commission scolaire* and *Satheesan* are distinguishable because those cases were not fairness cases; the issues in *Commission scolaire* were evidentiary while those in *Satheesan* were factual. He submits that compelling the person concerned to testify is a matter of fairness in respect of his ability to control his own case thereby attracting the standard of correctness.

[40] The position of the respondent is that Justice Barnes' finding on the standard of review on the procedural fairness issues is consistent with the Federal Court of Appeal's conclusions in *Forest Ethics Advocacy Association v National Energy Board of Canada et al*, 2014 FCA 245, [2014] FCJ No 1089 at paras 70-72 [*Ethics Advocacy*] and *Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59, [2014] FCJ No 236 at paras 48-62 [*Maritime Broadcasting*]; *Bergeron v Canada (Attorney General)*, 2015 FCA 160, [2015] FCJ No 834 at paras 67-71 [*Bergeron*]. The respondent also argues, as Justice Barnes concluded in *B095*, that nothing turns on this issue because even if the standard is correctness, the proceeding was fair and without error.

[41] I think it fair to say that the jurisprudence regarding the standard of review for procedural fairness is unsettled as the Court of Appeal noted in *Bergeron*, above, at paragraph 67. In *Khela*, at paragraphs 79 and 89, the Supreme Court observed that some deference should be owed to the administrative decision-maker on some elements of the procedural decision. The Court of Appeal in *Bergeron*, at paragraph 68, said that "the standard is not purely correctness and that some deference can come to bear". The Court did not consider it necessary to resolve the issue because on the record before it, even on a standard of correctness, there was no ground to interfere with the Commissioner's decision on the basis of procedural fairness.

[42] In this matter, the ID's rulings involved the exercise of discretion afforded to the decision-maker under its home statute and the Board's relaxed rules of evidence and procedure. Further, the interlocutory decisions made by the ID were largely evidentiary. Short of a decision

that deprives a person of a fair hearing, I agree with Justice Barnes that the Board is entitled to deference when the determination is largely factual or evidentiary.

[43] Inadmissibility findings are, generally, questions of mixed fact and law calling for review on a standard of reasonableness: *Kojic v Canada (Citizenship and Immigration)*, 2015 FC 816, [2015] FCJ No 805 [*Kojic*]. As such, the Court should only intervene if it concludes that the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 90 at para 47.

[44] Findings by the ID under section 35 of the IRPA regarding membership in a terrorist organization have also been found to attract a reasonableness standard: *Kanagendren v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86, [2015] FCJ No 382 at paras 5-11.

[45] Similarly, a finding of inadmissibility under section 34 of the IRPA has repeatedly been found to be reviewable on the reasonableness standard: *Moussa v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 545, [2015] FCJ No 537 at para 24; *Najafi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 876, [2013] FCJ No 958 at para 82; *Flores Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1045, [2012] FCJ No 1127 at para 36.

[46] In *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] SCJ No 39 at paragraph 59, the Supreme Court of Canada affirmed that the reviewing court must exhibit great deference to the tribunal's findings of fact. Finally, an administrative tribunal's

assessment of *Charter* issues is assessed on a reasonableness standard: *Doré v Barreau du Québec*, 2012 SCC 12, [2012] SCJ No 12.

(1) Whether the ID breached the duty of fairness by failing to order *Charkaoui II* disclosure

[47] The applicant argues that the Minister was required to disclose all the evidence in his possession even if the Minister did not intend to rely on that evidence to make the government's case. The Minister reviewed the confidential information and disclosed evidence of an exculpatory nature. The part that was disclosed to the Special Advocate, and to the applicant in summary form, was exculpatory evidence only.

[48] The applicant argues that it was unfair to limit the Special Advocate's review to the exculpatory documents identified by the Minister. He takes issue with the fact that the Minister is the one that selected what he felt was exculpatory and argues that the Special Advocate should have been permitted to review the entire security file relating to him, not just the documents that the Minister deemed to be exculpatory. As such, given the lack of *Charkaoui II* disclosure, the applicant submits that the ID's finding that the Minister did not have to disclose evidence that would not be relied upon is unfair and unreasonable.

[49] The applicant submits that the Supreme Court's reasoning in *Charkaoui II*, predicated on section 7 of the *Charter*, should apply equally in inadmissibility proceedings as the conditions of release and the risks of removal may be the same as those that apply in a certificate case. The

procedural rights should be the same whether the determination is made by the Federal Court in a certificate proceeding or the ID in an inadmissibility hearing.

[50] The respondent's position is that the ID properly considered the submissions of the parties and the Special Advocate, and concluded that *Charkaoui II* disclosure was not required in the circumstances because the case against Mr. Suresh was being made on unclassified evidence which had been disclosed. As such, Mr. Suresh was aware of the case to be met. The evidence came from his own testimony and that of the other witnesses called in his support at the security certificate hearing. Broader disclosure would have unnecessarily prolonged the hearing and would not have erased Mr. Suresh's words from the record. The Supreme Court's decision in *Charkaoui II* does not assist the applicant as an inadmissibility hearing does not engage section 7 interests.

[51] I note that in the Special Advocate's submissions to the ID there were allusions to "other related documents" in the confidential documents that had not been produced. Member Heyes addressed this in her May 16, 2013 reasons. She observed that the Special Advocate's submissions in this respect were somewhat vague but she was prepared to order disclosure of the additional evidence if persuaded that it was necessary. Ultimately, the Member did not find that there was a need to order production of these documents to allow Mr. Suresh to know the case to be met and to properly respond to it.

[52] The Member did not accept that the dictates of fairness and natural justice extended to requiring disclosure to the Special Advocate of materials in the possession of CSIS that relate to

Mr. Suresh when the Minister's case is based on evidence which had already been disclosed to Mr. Suresh. That seems to me to be a reasonable conclusion.

[53] The respondent's position regarding the application of section 7 of the *Charter* to an inadmissibility hearing is supported by the authorities. In *Segasayo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 173, [2010] FCJ No 205 (appeal dismissed, 2010 FCA 296), Justice Harrington discussed the question as follows:

> **27** This reasoning follows that of the Federal Court of Appeal in Poshteh v. Canada (Minister of Citizenship and Immigration), 2005 FCA 85, on a certified question with respect to non-admissibility of a person who was considered a member of a terrorist organization in accordance with section 34(1)(f) of IRPA. In speaking for the Court of Appeal, Mr. Justice Rothstein, as he then was, held that section 7 of the Charter was not in issue. He stated at paragraph 63:
>
> > Here, all that is being determined is whether Mr. Poshteh is inadmissible to Canada on the grounds of his membership in a terrorist organization. The authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 Charter rights. (See, for example, *Barrera v. Canada (MCI)* (1992), 99 D.L.R. (4th) 264 (F.C.A.).) A number of proceedings may yet take place before he reaches the stage at which his deportation from Canada may occur. For example, Mr. Poshteh may invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest. Therefore, fundamental justice in section 7 of the Charter is not of application in the determination to be made under paragraph 34(1)(f) of the Act.

[54] A similar conclusion was reached in *Tareen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1260, [2015] FCJ No 1308 at paragraphs 31 and 47. As noted by Justice Barnes in *B095*, above, at paragraph 35, after referring to *Poshteh* and other authorities:

> While an inadmissibility finding may give rise to significant inconveniences, its effect is not to deport to torture or to automatically trigger a detention – decisions that could engage section 7 of the *Charter*.

[55] Mr. Suresh vigorously takes issue with Justice Barnes' characterization of the inadmissibility finding as giving rise to "significant inconveniences" as he now is at risk of *refoulement.* I agree that this amounts to more than an inconvenience but the Supreme Court has made it clear that an admissibility hearing does not by itself engage the applicant's section 7 interests under the *Charter*. These interests are to be considered at the pre-removal risk assessment stage: *B010 v Canada (Minister of Citizenship and Immigration),* 2015 SCC 58, [2015] 3 SCR No 704 at para 75.

[56] Restrictions on disclosure are not, in themselves, in breach of the *Charter*, particularly in the context of national security: *Harkat v Canada (Citizenship and Immigration),* 2012 FCA 122, [2012] FCJ No 492 at paras 111 and 112. In *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110, at paragraph 7, the Supreme Court reiterated that it had repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual.

[57] In my view, Member Heyes' finding that fairness did not require full disclosure in the circumstances of this case was reasonable. As the Member observed, the purpose of providing a Special Advocate with *Charkaoui II* disclosure in the security certificate context is to remedy the situation caused by the Minister's reliance on evidence and information that is not disclosed to the named person. The inability of the named person and his counsel to review the confidential material adversely affects his right to know the case to meet. That was not the situation faced by

Mr. Suresh. He knew that the Minister would be relying on his own testimony at both the refugee hearing and in the security certificate proceedings. He knew what he and what other witnesses had said on those occasions and knew the case he had to meet.

[58] At best, Mr. Suresh hoped that the Special Advocate would find something in the records kept by the Ministers that would be of some assistance to him. That hope is what is commonly referred to as a "fishing expedition". I expect that Mr. Suresh also hoped to take advantage of the CSIS policy prior to *Charkaoui II* of destroying original notes of interviews and other information collected after summaries were prepared and reports were entered into the database. In that respect, he was hoping for an opportunity to argue that his *Charter* rights had been infringed by the destruction policy.

[59] In this instance, the evidence that the Minister intended to rely upon was disclosed to Mr. Suresh. It is not at all clear to me that there is anything in the CSIS databanks that would assist Mr. Suresh in countering his own prior evidence. Moreover, the Minister clearly stated that he did not intend to rely on the relatively small amount of classified secret materials that were disclosed to the Special Advocate. The Minister relied solely on the open source materials and the transcripts to prove the allegations. The Court has read the classified materials which are the subject of the non-disclosure order and is satisfied that the summaries disclosed to Mr. Suresh are a faithful rendition of the content. The Court is also satisfied that the original content would have had no substantive bearing on either the ID proceedings or this judicial review application if released to Mr. Suresh.

[60] It bears reiteration that it cannot be said that Mr. Suresh was unaware of the case to be met. That case did not consist of new evidence, or evidence concealed in the government's databanks and file folders. Rather, the case against the applicant consisted of information that was provided by Mr. Suresh when he claimed to be a Convention refugee, as well as his testimony and the testimony of the witnesses he called on his behalf during the security certificate proceedings in 1996. All of this material has been provided to Mr. Suresh by the Minister.

[61] The same level of disclosure that had been ordered in the security certificate proceedings to comply with *Charkaoui II* was not required. There is no evidence that other information has been withheld that would be of assistance to Mr. Suresh. The Member's finding that Mr. Suresh had not established why further disclosure was required to allow him to know the case to be met was, in my view, reasonable.

(2) Whether Mr. Suresh was a compellable witness before the Immigration Division and whether the transcripts of his own testimony in the Security Certificate proceedings were admissible

[62] The IRPA grants the ID a wide discretion to admit evidence. Section 173 frees the Division from the application of strict, technical rules of evidence. It allows, for example, the admission of hearsay evidence.

[63] Having reviewed the transcripts, Member Heyes concluded that their content was relevant to the issues to be determined at the hearing. The evidence given in the testimony described the nature of the LTTE in Sri Lanka and in Canada, the activities and nature of the WTM and its links to the LTTE and Mr. Suresh's alleged roles and responsibilities in both organizations. As such, she concluded, the material was relevant to what must be decided at the hearing.

[64] The applicant acknowledges that he was not compelled to testify before the ID but argues that the use of the transcripts had the same effect. To receive the transcripts was to conscript him to testify against himself. Until *Jaballah,* he submits, the assumption was that subjects of a security certificate were compellable as that had been the practice in each prior case. He believed he was compellable at the time of the certificate proceeding and considered that he was obliged to testify and to call other evidence on his behalf. Justice Dawson's ruling in *Jaballah,* above, was the first to find that, because of section 7 of the *Charter*, certificate subjects were not compellable in certificate proceedings before the Federal Court.

[65] The applicant argues that Justice Dawson's reasoning in *Jaballah* should apply equally to ID inadmissibility proceedings. He contends that there is no distinction in substance because both proceedings deal with efforts to deport non-citizens based on membership in a terrorist organization. In both procedures, the risk assessment takes place after the deportation order is secured. The only difference is in who makes the decision.

[66] In deciding to admit the evidence, Member Heyes was alert to the fact that the previous scheme for security certificate proceedings had been found to be in breach of the *Charter* as determined by the Supreme Court of Canada in *Charkaoui I*. She considered, however, that it did not necessarily follow that all of the evidence obtained through the former security certificate hearing must be excluded on the grounds that the proceeding was flawed. In *Jaballah*, Justice Dawson held that while the named person was not a compellable witness in the previous security certificate hearing, he voluntarily provided testimony as did Mr. Suresh in this case. Mr. Jaballah failed to establish how the lack of full disclosure would have affected the reliability of his earlier, voluntary testimony. Justice Dawson found, at paragraph 40, that Mr. Jaballah's testimony was not obtained in a matter that breached the *Charter* and that he had failed to establish a causal temporal link between obtaining the evidence (his testimony) and the asserted *Charter* breach. He was not compellable before the Federal Court in the security certificate proceedings by operation of section 7 of the *Charter*, which the Ministers had conceded. Accordingly, the Minister could not rely on his earlier testimony.

[67] Member Heyes was unable to see how the lack of complete disclosure to Mr. Suresh would have had an effect on his sworn testimony at the security certificate proceedings. Suresh was called as a witness by his own counsel and testified over the course of three days before the Federal Court. He had the benefit of counsel and called witnesses to testify on his behalf. The fact that he was in detention did not in itself lead to the conclusion that his testimony is not reliable or voluntary. Persons in detention can and do provide credible and trustworthy evidence. Testimony given under oath is presumed to be accurate and reliable: *Maldonado v Canada (Minister of Employment and Immigration,* [1979] FCJ No 248, [1980] 2 FC 302 (CA).

[68] In my view, it was reasonable for the Member to find that it had not been established that the lack of full disclosure would have had a negative effect on Mr. Suresh's ability to provide credible and reliable testimony. The same is true for the witnesses called by Mr. Suresh; the limited disclosure provided by the Minister should not have affected their ability to provide sworn testimony that is presumed to be credible and trustworthy evidence.

[69] There are clear differences in the IRPA with respect to whether someone is a compellable witness at a security certificate hearing and before the Immigration Division. Paragraph 83 (1)(g) of the IRPA requires the judge presiding over a certificate proceeding to allow both the subject of the hearing and the Minister with "an opportunity to be heard". It does not provide a means to compel the named person to testify, or to sanction a failure to testify, as Justice Dawson noted at paragraph 79 of *Jaballah*. This was the basis of her conclusion that prior transcripts could not be used in security certificate hearings against Mr. Jaballah as they would violate the principles of fundamental justice protected under section 7 of the *Charter*.

[70] There is also no explicit reference to the compellability of witnesses at the ID. However, several provisions point to the power of the Division to compel a witness to testify at an admissibility hearing. Section 165 of the IRPA provides the ID members with the powers and authority of a Commissioner appointed under Part I of the *Inquiries Act*, RSC, 1985 c I-11. Sections 4 and 5 of Part I of the *Inquiries Act* provide Commissioners with the power to summon any witnesses and to require them to give evidence orally or in writing on oath or solemn affirmation. Further, the Commissioners have the same power to enforce the attendance of witnesses and compel them to give evidence as is vested in any court of record in civil cases.

[71] In addition, the *Immigration Division Rules*, SOR/2002-229 [ID Rules] in sections 32 to 35, contains provisions for parties to apply to the Division for a summons for the purpose of ordering a person to testify, and sets out the possible consequences for noncompliance with a summons. Further, sections 127 and 128 of the IRPA create an offense and provide for punishment in cases where an individual refuses to testify. Thus, both IRPA and the ID Rules provide the Division with the authority to compel a witness who is competent to give evidence to testify in a matter before it where such testimony is necessary and required for full and proper hearings to be held.

[72] In *B095*, above, at paragraph 22, Justice Barnes found that an admissibility hearing is a form of inquiry that does not carry penal consequences. Justice Barnes concluded that the ID must be able to compel testimony in order to be able to carry out its mandate.

[73] The applicant has provided no submissions regarding the ID's statutory and regulatory framework and relies essentially on his interpretation of *Jaballah,* above, and his view that there is no inherent difference between a security certificate proceeding and an admissibility hearing.

[74] Having considered these matters, Member Heyes concluded that the potential prejudice of admitting the voluntary, sworn testimony of Mr. Suresh did not outweigh the probative value of the relevant evidence it would provide. In those circumstances, she found that admitting his previously sworn testimony, not obtained in breach of the *Charter*, did not result in unfairness. I am unable to disagree with that conclusion.

(3) Whether the ID erred in its assessment of the evidence

[75] Mr. Suresh argues that the ID's reliance on reports, documents and evidence which he had sought to exclude was unreasonable. The reports at issue include *Janes's Intelligence Review*, a US Department of State Report on Human Rights Practices in Sri Lanka, a Human Rights Watch report, and a profile by the US Department of State on the LTTE. Mr. Suresh also argues that the ID's reliance on some of his testimony while rejecting other aspects was not properly explained or justified.

[76] The applicant's objection to the ID's reliance on the human rights reports submitted by the Minister is his contention that such reports should not be used to support a finding that an individual was a member of a terrorist organization. He argues that relying on such reports to verify refugee claims is one thing, but employing them to determine that an entity is a terrorist organization is another. No authority is offered for this contention.

[77] Reliance on open source information has consistently been upheld by the Federal Court in immigration proceedings, including in security certificate proceedings: *Mahjoub (Re),* 2013 FC 1092 at paras 101-103. I agree with the respondent that the Member adequately explained why the open source information was given weight.

[78] Specifically, the Member noted at paragraph 95:

> The reliability of evidence can be assessed using a variety of means including assessing its consistency, examining whether other sources support or contradict the information, the source of the evidence and other information regarding the accuracy of that

> source for example..... The Minister's documentary evidence, taken from a variety of sources, does establish, on reasonable grounds to believe that the LTTE was an organization that engaged in acts of terrorism.

[79] The Member also noted, in the same paragraph, that the applicant did not file any objective evidence or call any witnesses to contradict the documentary evidence submitted by the Minister.

[80] The documentary evidence was only used to establish that the LTTE is an organization that had engaged in acts of terrorism. The ID did not rely on this evidence to find that Mr. Suresh was a member of the LTTE or had personally engaged in acts of terrorism. The Member's reliance on this evidence for this limited purpose was reasonable and adequately justified in the decision.

[81] The applicant further argues that the ID erred in its treatment of the exculpatory evidence that was disclosed and made available to him in summary form. The Member considered that it should be afforded little weight. The applicant's argument is that had further evidence been disclosed, the exculpatory evidence may have supported his position, and when considered in context, may have garnered more weight. In my view, this is pure speculation. It was open to the Member to consider the exculpatory evidence and determine what weight she would give it. That is a finding which calls for deference. In any event, having reviewed the summaries and the original reports on which they were based, I would not have come to any other conclusion.

(4) Whether the ID erred in its interpretation of “membership” and “complicity”

[82] In reaching its conclusion that Mr. Suresh was a member of the LTTE, the Member reviewed the relevant case law regarding the definitions of terrorism and organization as they pertain to paragraph 34(1)(f) of the IRPA. Having determined that the LTTE met the definition of a terrorist organization, the member proceeded to address the evidence related to the WTM. She was satisfied that the totality of the Minister’s evidence established that there are reasonable grounds to believe that the WTM raised money for the LTTE. The Member reviewed the testimony of Mr. Suresh before the Federal Court in the security certificate proceedings, as well as other testimony adduced at that hearing. After weighing the evidence, the Member determined that Mr. Suresh’s own testimony established that he was a member of the LTTE and, as the Coordinator of the WTM, had raised and sent funds to further the aims of the LTTE.

[83] The applicant argues that the ID erred in law in concluding that Mr. Suresh was a member of the LTTE because he never joined the LTTE, and did not share the violent tactics of the LTTE. He submits that it was legally incorrect to find that the LTTE was engaged in acts of terrorism because their actions targeted the military and the police. He attempts to characterize the actions of the LTTE as “warfare between armed parties to a conflict” and the findings of the ID as “perverse and unreasonable”. This argument ignores the evidence noted by the ID of the violence perpetuated by the LTTE against the civilian population in Sri Lanka. I see no merit to the arguments attempting to frame the LTTE’s actions as acceptable within the context of an armed conflict. It is not for this Court to re-weigh the evidence considered by the ID.

[84] I am also not persuaded that the ID erred in finding that Mr. Suresh was a member of the LTTE. As the Federal Court of Appeal stated in *Harkat (Re),* 2012 FCA 122, [2012] 3 FCR 635 at paragraph 149, there is abundant jurisprudence that membership within the meaning of the statute includes materially supporting terrorist activities, such as by providing funds, even though such acts are not directly linked to violence: *Suresh v Canada (Minister of Citizenship and Immigration*), [2000] FCJ No 5, [2000] 2 FC 592 (FCA); *Ikhlef (Re),* 2002 FCT 263, [2002] FCJ No 352 at para 54; *Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, [2010] FCJ No 1092 at paras 127-130. The evidence, including that from Mr. Suresh himself, adequately supported the Member's finding.

[85] The applicant further argues that the ID erred in law by incorrectly applying the test for complicity in war crimes set out by the Supreme Court in *Ezokola,* above. He contends that there was no factual basis for finding that Mr. Suresh's support to the LTTE was linked to any crime or criminal purpose.

[86] I agree with the respondent that the ID properly identified the test from *Ezokola.* The evidence reasonably supported a finding that Mr. Suresh was aware of the LTTE's illegal activities and criminal purpose. The ID acknowledged that there was no suggestion that Mr. Suresh personally committed war crimes, and appropriately noted that personal participation is not required to make a finding that Mr. Suresh was complicit in the acts of the LTTE. The ID reviewed the evidence and held that Mr. Suresh's actions were not those of a mere associate, but rather a dedicated supporter who voluntarily worked on behalf of the LTTE and willingly

followed the direction of the organization's leadership. As such, the ID's finding that there were reasonable grounds to believe that Mr. Suresh was complicit in war crimes is reasonable.

(5) Whether the Minister's actions constitute an abuse of process

[87] The applicant argues that pursuing a complicity ground of inadmissibility was abusive as previous immigration proceedings against Mr. Suresh did not raise the issue of criminality, and no new evidence was led to substantiate allegations of criminal misconduct. The respondent's position is that once the security certificate was quashed, proceedings against Mr. Suresh began anew and there is nothing in the IRPA that precludes the Minister from alleging an additional ground of inadmissibility. The ID agreed with this position.

[88] The applicant contends that he was specifically told in 1995 that the Minister would not raise any criminal issue against him. In his affidavit, sworn in 1999 and included in the applicant's record, Mr. Suresh states:

> Because of the certificate issued against me I was made the subject of a hearing before a designated judge of the Federal Court, Mr. Justice Teitelbaum. In the course of this hearing, the Ministers' counsel conceded several points on the record: there are no allegations of criminal misconduct or criminal activity against me; no allegations that I engaged in terrorism in Sri Lanka; and no allegations of any known procurement by me of ammunition, arms, weapons or material of military application in Canada nor any allegation that I was involved in shipping materials from Canada.

[89] Mr. Suresh's counsel stated at the hearing that this affidavit was prepared in support of Mr. Suresh's motion to stay removal from Canada after the Federal Court's finding that the security certificate was reasonable. Counsel stated that she believes that when she drafted the

above paragraph of the affidavit, she took it verbatim from the record and undertook to find the reference and include it in her post-hearing submissions. No pinpoint reference has been provided and the Court has been unable to locate such a verbatim statement in the record of the security certificate proceedings. That is not to say that it was not made at some point during the proceedings, just that such a statement could not be found.

[90] In raising the issue before the ID, Mr. Suresh's counsel argued that when he met with CSIS officers and with DFAIT officials, "[n]o one identified the work he [Mr. Suresh] was doing as problematic". Counsel further argued that (1) there is no evidence of a police investigation, by the Toronto Police or the RCMP, (2) no charges have been laid, and (3) the Minister stipulated in the past that Suresh was not involved in criminal activity. This last point appears to have been based on the 1999 affidavit and passages from the examination-in-chief of Mr. Suresh during the security certificate proceedings. In those passages, Mr. Suresh stated that CSIS officers and DFAIT officials had not expressed concerns about his fundraising activities when they interviewed him or indicated that they were illegal. He understood their concerns to be about allegations of extortion within the Tamil community.

[91] The ID Member found, at paragraph 243 of her reasons, that "[n]o evidence was presented to the effect… that any representations were made to Mr. Suresh that the Minister did not intend to pursue any enforcement action against him". The Member found that nothing in the IRPA precludes the Minister from alleging an additional ground of inadmissibility.

[92] The Minister submits that even if Mr. Suresh's affidavit evidence is accepted, what was conceded does not affect the complicity argument being made now. The affidavit suggests that the Minister conceded that Mr. Suresh himself had not committed a criminal or terrorist act or procured weapons. However, that is not at issue in the proceedings before this Court. The allegation before the ID was that Mr. Suresh was complicit with the LTTE's criminal purpose through his leadership position in the WTM.

[93] Ultimately, this issue comes down to whether it was reasonable for the ID to find that there is nothing inherently unfair in applying the law of complicity to evidence that was previously adduced as voluntary, sworn testimony at a prior proceeding. I am not prepared to find, in the particular circumstances of this case, that the Member erred. That is not to say that an abuse of process argument may not succeed in another case where a new ground of inadmissibility is brought forward at a late stage when prior attempts at removal had been unsuccessful. Each case must be determined on its own merits. Here, despite the prolonged delays while interlocutory issues were being resolved, the Ministers demonstrated a continuing determination to remove Mr. Suresh for his involvement with the WTM and LTTE. That involvement has been the primary basis for his inadmissibility. The addition of another ground of inadmissibility related to that involvement has not changed that.

VII. Certified Questions

[94] As noted, the parties were provided with an opportunity to propose serious questions of general importance for certification following the hearing. The applicant proposed several questions for consideration:

A. Is section 7 of the Charter engaged at the admissibility hearing stage of the removal process where the subject person is a Convention refugee or claims a well-founded fear of persecution or to be at a substantial risk of cruel or inhuman treatment if removed from Canada?

B. Is the reasoning on the Supreme Court in *Charkaoui v Canada* (MPS), 2009 SCC 38 on the duty of disclosure applicable to hearings before Immigration Division officials such that full disclosure of the Applicant's file is mandated – directly or to a special advocate – not only the parts of the file that the Ministers have concluded may be exculpatory evidence?

C. Does the reasoning of the Federal Court in *Canada (MPS) v Jaballah*, 2010 FC 224 apply in respect of its conclusions on compellability of the subject person and the exclusion of prior statements made in the course of a statutory proceeding that which was found by the Supreme Court in *Charkaoui v Canada (MPS)*, 2007 SCC 1, to be constitutionally invalid as breaching the subject person's rights under s 7 of the Charter?

D. Is it open to the ID member to discount evidence which is exculpatory for the subject person, where the reason for this is that the Ministers destroyed the source records? Is it an abuse of process to proceed with the admissibility hearing in such circumstances?

E. Does 'significant contribution to a crime or the criminal purpose of the group' as contemplated by the Supreme Court in *Ezokola v Canada (MPS)*, 2013 SCC 40, include support activities in the Tamil diaspora for the LTTE where the nexus between the activities and the group is general and not focused on a specific crime or criminal purpose?

[95] In *Mudrak v Canada (Minister of Citizenship and Immigration)* 2016 FCA 178, [2016] FCJ No 630, the Court of Appeal reiterated the principles set out in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 FCR 290, at paragraph 9. To be certified, a question must (i) be dispositive of the appeal, and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons.

[96] I agree with the respondent that the first question should not be certified because the principle that section 7 of the *Charter* is not engaged at the inadmissibility stage is now well-established by decisions of the Supreme Court and the Federal Court of Appeal.

[97] The second question would not be dispositive of the appeal. The reasoning of the Supreme Court in *Charkaoui II* was that fairness in the context of a security certificate proceeding required a procedure for verifying evidence adduced against him or her that was not disclosed to the individual or his counsel. In the present case, the evidence adduced against the applicant was his own testimony and those of his witnesses from the security certificate proceeding. He has been unable to explain why a procedure for verification is necessary in these circumstances or how he has been prejudiced by the lack of full *Charkaoui II* disclosure.

[98] I have some difficulty understanding the third question which is reason enough not to certify it. But to the extent that it calls for certification of a question regarding the application of the principles expressed in *(Re) Jaballah* to admissibility proceedings, the jurisprudence is already clear.

[99] The fourth proposed question is not one of general importance but arises from the unusual factual history of this case. Moreover, the ID's reasons for attributing little weight to the "exculpatory evidence" were numerous and not limited to the underlying documents no longer being available.

[100] Finally, the fifth question is not certifiable as the Supreme Court has already addressed it in *Ezokola,* above. At paragraph 87 of the decision, the Court wrote that the person's contribution "…does not have to be "directed to specific identifiable crimes" but can be directed to "wider concepts of common design, such as the accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes...".

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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