Date: 20170331

Docket: DES-7-08

Citation: 2017 FC 334

Ottawa, Ontario, March 31, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF Mohamed Zeki MAHJOUB

JUDGMENT AND REASONS

I. Nature of the Matter

[1] On July 20, 2016, I allowed in part a Motion for review of conditions of release brought by Mr. Mohamed Zeki Mahjoub [the Applicant], who sought an order removing all but the usual conditions of release from those imposed on him pursuant to subsection 82(4) and paragraph 82(5)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). Service of the Applicant's Notice of Motion for such relief was followed by service of a Notice of Constitutional Questions, in which the Applicant proposed a number of constitutional issues. Instead of arguing these constitutional issues at the time of the Motion, the Applicant chose, with

permission, to argue them at some later time. The hearing of the Motion, which was therefore restricted to the conditions of release, took place June 8 and 9, 2016. On July 20, 2016, because the Applicant had not yet filed submissions on either his proposed constitutional questions or questions he proposed to certify, and because I did not wish to further delay a decision on his conditions of release, I ordered the relaxation of several conditions of release, now reported as *Re Mahjoub*, 2016 FC 808 [2016 Conditions of Release Order].

[2] The Applicant filed submissions on the constitutional questions and proposed questions for certification on September 30, 2016, following which the Respondents filed their response. The Applicant served a Modified Notice of Constitutional Questions in advance of a hearing, which took place March 1 and 2, 2017, and dealt with his proposed questions to certify together with the constitutional questions. These Reasons deal with the modified constitutional questions and questions the Applicant asks this Court to certify.

II. Background

[3] The background of this case and my various findings and conclusions are outlined in my reasons on the 2016 Conditions of Release Order, which include the following:

> [21] The Applicant has a long history with this Court. In addition, the relevant legislation has evolved over time. Important aspects of his original detention, subsequent release on conditions, the many subsequent reviews of his conditions of release, together with the evolving statutory framework are well summarized by Justice Noël at paras 5 to 20 in *Mahjoub* (Re), 2015 FC 1232 (Conditions of Release decision, October 30, 2015). This decision is the most recent review of the Applicant's many reviews of his conditions of release.
>
> [22] The Applicant is an Egyptian national, born in April 1960. He came to Toronto, Canada, in the last days of December 1995,

having arrived here on a false Saudi Arabian passport. He claimed refugee status, which the Immigration and Refugee Board granted in1996. He became a subject of interest to the Canadian Security Intelligence Service ["CSIS"] sometime in 1996. As a result of this investigation, he became the named person in a certificate issued by the Ministers in June 2000 and was arrested on June 26, 2000. He was in detention from 2000 to 2007; he was released in February 2007, under stringent conditions.

[23] Justice Nadon of the Federal Court of Canada (as he was then) determined that certificate to be reasonable on October 5, 2001. In the Reasons for Order, Justice Nadon noted that the Applicant admitted he had perjured himself by not admitting that he knew a certain individual. Justice Nadon concluded that he did not believe the Applicant's explanation for lying and added that the Applicant had lied before his Court on a number of occasions (see *Canada (Minister of Citizenship and Immigration) v Mahjoub*, 2001 FCT 1095, at paragraphs 57, 58, 68 and 70 (Nadon Decision).

[24] After the original security certificate regime was held to infringe *Charter* rights in 2007 (see *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, [*Charkaoui I*]), a new statutory system was implemented which the Supreme Court of Canada subsequently upheld [*Canada (Minister of Citizenship and Immigration) v Harkat*, [2014] 2 SCR 33].

[25] The Applicant began filing for conditions of release reviews under this new system in 2008.

[26] The new legislation also provides for security certificates that may be challenged in this Court on the basis of reasonableness. Such a certificate was issued against the Applicant. After very lengthy proceedings spanning several years, the late Justice Blanchard held the Applicant's security certificate was reasonable in October, 2013 (see *Mahjoub (Re)*, 2013 FC 1092 (Reasonableness Decision). The Applicant has appealed that decision to the Federal Court of Appeal, which appeal has not yet been heard.

[27] Justice Blanchard found that there were reasonable grounds to believe that the Applicant was a member of the Al Jihad and its splinter or sub-group, the Vanguards of Conquest, and that the Applicant posed a danger to the security of Canada given his contacts with many known or suspected terrorists in Canada and abroad. Justice Blanchard found that Al Jihad and the Vanguards of Conquest are important terrorist groups that were active in

> Egypt and had direct links and relationships with Osama Bin Laden and Al Qaeda.
>
> [28] Thereafter, on December 17, 2013, after hearing an application by the Applicant to be released from all his conditions of release of detention except for a few, the late Justice Blanchard concluded:
>
> > I am satisfied that Mr. Mahjoub poses a threat to the security of Canada as described in my Reasons for Order dated January 7, 2013.

III. Summary of this motion and disposition

[4] The Applicant proposes 37 specifically numbered questions to certify comprised of 19 questions to certify plus 18 constitutional questions. Many of these numbered questions have multiple unnumbered parts and subparts. All of the questions proposed are set out in Annexes A (proposed questions to certify) and B (proposed constitutional questions) attached. The Minister opposed the certification of any questions.

[5] Importantly, there is substantial duplication and overlap between the many questions propounded under categories of questions. Because of this, and in these circumstances, I agree with the Respondents that they should be considered in many cases as related groups to avoid repetition and duplication. That said, I address specific questions where they are sufficiently discrete. In addition I will supplement general comments on groups of questions with specific comments on particular questions where warranted. The grouping of questions in these Reasons generally reflects the grouping proposed by the Ministers.

[6] Also by way of background, this case resembles others like it in this matter; while only 37 numbered questions are proposed at this time (containing numerous parts and

subcomponents) it is worth recalling what the Applicant proposed 126 questions in respect of *Re Mahjoub*, 2013 FC 1092 [Reasonableness Decision] in which the late Justice Blanchard dealt with - and upheld - the reasonableness of the security certificate issued against the Applicant.

[7] In summary, I am unable to identify any serious question of general importance that should be certified. These Reasons also consider the constitutional issues raised by the Applicant, and conclude that none have merit; additionally, none will be certified.

IV. Test for Certification and Certification

[8] Section 82.3 of the *IRPA* provides that an appeal of a decision made under section 82, such as the 2016 Conditions of Release Order, may be brought only if a judge certifies that a serious question of general importance is involved. It also states that no appeal may be made from an interlocutory decision:

> 82.3 An appeal from a decision made under any of sections 82 to 82.2 may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.
>
> [emphasis added]

[9] The Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, (1994), 176 NR 4 at paras 4-6, set out the principles governing the certification of a question under section 82.3. These principles may be summarized as follows:

(i) The question must be one that transcends the interests of the parties to the litigation and contemplates issues of broad significance or general application.

(ii) The question must be dispositive of the appeal. The certification process is not to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of the case.

(iii) The certification process is not to be equated with the reference process established by the *Federal Courts Act*.

[10] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, the Federal Court of Appeal described the threshold for certification as follows:

> [7] Paragraph 74(d) of the Act contains an important "gatekeeper" provision: an appeal to this Court may only be made if, in an application for judicial review brought under the Act, a Judge of the Federal Court certifies that a serious question of general importance is raised and states the question.
>
> […]
>
> [9] It is trite law that 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 *(Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).
>
> [10] In *Varela*, this Court stated that it is a mistake to reason that because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified. The statutory requirement set out in paragraph 74(d) of the Act is a precondition to the right of appeal. If a question does not meet the test for certification, so that the necessary precondition is not met, the appeal must be dismissed.

[11] In addition, as Pelletier JA confirmed in *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paras 11-12, certification may only take place where there is "a serious question of general importance which would be dispositive of an appeal." As a corollary, that Court added that the question must have been raised and dealt with in the decision below: "if it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification."

[12] The Supreme Court of Canada in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at paragraph 25, added that "[t]he certification of a 'question of general importance' is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question."

[13] The late Justice Blanchard stated in *Re Mahjoub*, 2014 FC 200, where he dealt with the 126 questions the Applicant alleged arose out of his Reasonableness Decision:

> [8] In *Varela v. Canada (Minister of Citizenship and Immigration)*, [2010] 1 F.C.R. 129 at paragraph 28, the Federal Court of Appeal stated that section 74 of the IRPA concerns the certification "of 'a' serious question of general importance, not of 'one or more' serious questions of general importance." The Court acknowledged that a specific case could raise more than one question of general importance; the Court held that "[…] this would be the exception rather than the rule." Similar wording is used in section 79 of the IRPA. It is clear that the Federal Court of Appeal did not contemplate the certification of 126 questions. Indeed, at paragraph 43 of its decision, the Court held that "[i]t is a mistake to reason that because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified."

[14] Justice Pelletier, writing for the Federal Court of Appeal in *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 [*Varela*] stated:

> [29] Additionally, a serious question of general importance arises from the issues in the case and not from the judge's reasons. The judge, who has heard the case and has had the benefit of the best arguments of counsel on behalf of both parties, should be in a position to identify whether such a question arises on the facts of the case, without circulating draft reasons to counsel. Such a practice lends itself, as it did in this case, to a "laundry list" of questions, which may or may not meet the statutory test. In this case, none of them did.
>
> [emphasis added]

[15] With these general principles in mind, I turn to the Applicant's proposed questions to certify and constitutional questions. He has numbered his questions consecutively from 1(a) to 8(v)(4); the questions for proposed certification run from 1(a) to 7(e) and the proposed constitutional questions run from 8(a) to 8(v)(4). As indicated, I will deal with the questions either alone or in groups. The references to paragraph numbers after the questions are generally to the paragraphs in my 2016 Conditions of Release Order.

V. Proposed question to certify pursuant to section 82.3 of *IRPA*

Question 1: *What is the threat to the security of Canada to be proven under section 82(5)(b) of the IRPA?*

(a) *Can a danger or threat under subsection 82(5)(b) of the IRPA be found or conditions imposed when the threat to national security has been found inexistent by a CSIS report, updating its previous reports relied upon by the previous rulings of the Federal Court in previous detention reviews? (see Re Mahjoub, 2016 FC 808, paras 65 & 78)*

[16] This question relates to the evidence filed at the proceeding and in particular the CSIS report mentioned in the question itself. As such it is entirely a fact specific question. It neither transcends the interests of the parties to the litigation, nor contemplates issues either of broad significance or general application. Therefore, this proposed question fails to meet the requirements for certification.

Questions 1(b) and 8iv(b):

> *1(b) Is the definition of threat to the security of Canada under the CSIS Act different than a danger to be neutralized under subsection 82(5) of the IRPA? (see Re Mahjoub, 2016 FC 808, paras 65 and 78)*
>
> *8iv(b) Does the law have an unconstitutional effect in that it allows the Court to use the credibility findings of a judge in a past ruling nullified and declared to assess the named person's credibility in a later review of detention/conditions of release? (see Re Mahjoub, 2016 FC 808, paras 23, 52, 57 and Re Mahjoub, 2015 FC 1232, para 6).*

[17] This refers to findings made in the course of the Court's reasons on the conditions of detention. Essentially, the Applicant argues that there is no difference between a threat to the security of *Canada under the Canadian Security Intelligence Service Act*, RSC, 1985, c C-23 [*CSIS Act*] and the danger referred to in sections 81 and 82(5) of the *IRPA*. The Applicant further argues that since, in his submission, he is not a threat under the *CSIS Act*, neither of these *IRPA* requirements are met.

[18] In this connection, Section 1 of the *CSIS Act* defines "threat to the security of Canada" as follows:

> *threats to the security of Canada* means
>
> > (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,
> >
> > (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
> >
> > (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and
> >
> > (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,
>
> but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

[19] Also in this connection, sections 81 and 82(5) of the *IRPA* read as follows:

> **Ministers' warrant**
>
> **81** The Minister and the Minister of Citizenship and Immigration may issue a warrant for the arrest and detention of a person who is named in a certificate if they have reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.

Order

82(5) On review, the judge

> **(a)** shall order the person's detention to be continued if the judge is satisfied that the person's release under conditions would be injurious to national security or endanger the safety of any person or that they would be unlikely to appear at a proceeding or for removal if they were released under conditions; or
>
> **(b)** in any other case, shall order or confirm the person's release from detention and set any conditions that the judge considers appropriate.

[20] These questions do not satisfy the test for certification for a number of reasons. First, they would not be dispositive of an appeal because they are based on incorrect premises. The Applicant incorrectly surmises that the 2016 CSIS Summary concluded that the Applicant was not a danger for the purposes of the *IRPA*, which it did not. In addition, the CSIS Summary relates to the Applicant's recent activities; it did not take into account his past activities, notably those which led the late Justice Blanchard to conclude that the Minister's certificate was reasonable. Further, these questions do not consider that the Applicant is currently living under relaxed but important restrictions which cannot help but affect his threat level and dangerousness, notwithstanding his counsel's assertions otherwise. And, while a CSIS threat assessment may ground a finding of danger under the *IRPA*, the absence of a current threat assessment under the *CSIS Act* does not preclude the Court from finding danger under the *IRPA*. For example, a person may be found to be a danger to the safety of another under the *IRPA* even though he or she does not satisfy the definition of threat to the security of Canada. Moreover, these questions do not satisfy the test for certification because they involve findings of fact and

findings of mixed fact and law that neither transcend the interests of the parties to the litigation, nor contemplate issues of broad significance or general application.

Questions 1(c), 6, 8iii(a), 8iv(c):

> *1(c) In addition to the no threat report of CSIS, can the ruling on the reasonableness of the certificate (and evidence in support) that is, moreover, based essentially on mere past contacts and inferences of past membership in terrorist organization based on such contacts, dating back to 20 years ago, with a conclusion of no involvement in any terrorist activity be proof of a danger or threat to neutralize under subsection 82(5)(b) of the IRPA or can it justify conditions? Is this an unusual and cruel treatment under section 12 of the Charter?*
>
> *6) Are the factors applied by Justice Noel [sic, throughout] and adopted by the Court, rather than the factors set out by the SCC in Charkaoui I, appropriate in a Division 9 IRPA detention review?*
>
> *8iii(a) Is the law imprecise and overbroad and does it contravene the Charter as it permits arbitrary loss of liberty and arbitrary detention in spite of an updated "no threat" report from CSIS (released on January 14, 2016), by allowing, in its application or interpretation or effect, for a ruling that finds the security certificate reasonable to be found to be proof of a danger or threat under subsection 82(5)(b) of the IRPA and to impose conditions of release on the named person in violation of sections 7, 8, 12 and/or 15 of the Charter?*
>
> *8iv(c) Is the law imprecise and overbroad and/or does it contravene the Charter in its application, interpretation or effect in permit[ting] the reviewing judge to apply factors other than those set out by the Supreme Court of Canada in Charkaoui v Canada, 2007 SCC 9 and to ignore other relevant factors such as the named person's status as a convention refugee and the merits of a pending appeal in light of questions raised and filed as evidence in the record to relax conditions or release the named person pending appeal?*

[21] Question 1(c) is not a proper question for certification because, once again, it is fact specific to the case at bar in terms of its reference to the CSIS report or summary already dealt with above. Furthermore, its reference to cruel and unusual punishment under s. 12 of the

Charter was not dealt with either orally or in writing; it is simply a throw-away assertion made by counsel and will not be considered further in the absence of a proper argument. In addition, the question relies on the false premise that the factors mentioned in it, namely, past contacts and inferred membership, were the only justifications for the imposition of conditions which, with respect, is belied by the most cursory reading of the 2016 Conditions of Release Order itself, which considered among other things the Applicant's evidence adduced during testimony, the passage of time and the elements of trust and credibility.

[22] Questions 6 and 8iv(c) are based on a misunderstanding of the Supreme Court of Canada's decision in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui I*]. Contrary to the Applicant's assertion, *Charkaoui I* did not set out an exhaustive or finite list of factors to be considered on detention or conditions of release reviews under these provisions of the *IRPA*. Instead, the Supreme Court of Canada, at paragraph 108 of its decision, explicitly stated the opposite, namely that the considerations listed were "not exhaustive" and only "addressed the more obvious considerations". The Supreme Court of Canada's decision in *Charkaoui I* allows Designated Judges to consider additional factors; the Applicant's argument to the contrary is without merit.

[23] Question 8iv(c) suffers from the fact that it does not arise from the judgment, and is again based on the false premise that the Applicant's status as a convention refugee was ignored; this premise cannot stand in light of paragraphs 106 and 107 of the 2016 Conditions of Release Order.

[24] Question 8iii(a) is another fact specific question, based on the Applicant's mischaracterization of the case against him, i.e., as exclusively related to the CSIS summary regarding his current activities. In my view, this question neither transcends the interests of the parties to the litigation, nor contemplates issues either of broad significance or general application. Not being dispositive, and having no general relevance, it is not a proper question for certification.

[25] None of these questions will be certified.

Questions 1(d), 2(a), 2(b), 8iii(b), and 8iii(c):

> *1(d) Can a danger or threat under subsection 82(5)(b) of the IRPA be found or condition imposed on the basis of Federal Court reasonableness or detention review rulings rendered void by the ruling of Charkaoui v Canada, [2007] SCJ No 9 and C3, including previous rulings on credibility related to testimonial evidence and admissions?*
>
> *2(a) Can the credibility findings of a judge in a ruling nullified be used by another judge to assess credibility?*
>
> *2(b) Can a judge conducting a Division 9 IRPA detention review rely upon findings and rulings under the previous regime declared unconstitutional?*
>
> *8iii(b) Is the law imprecise and overbroad and contravenes the Charter as it permits, in its application or interpretation or effect, a finding of danger under subsection 82(5)b) of the IRPA and the imposition of conditions on the basis of a Federal Court reasonableness decision or detention review rulings rendered void by the Supreme Court of Canada in Charkaoui v Canada, 2007 SCC 9 and the legislation C-3? (see Re Mahjoub, 2016 FC 808, paras 23, 57, 93, 84, 87, 93, 99,100).*
>
> *8iii(c) Does the law contravene the Charter, in its application, interpretation or effect, in that it permits arbitrary loss of liberty and arbitrary detention by allowing for the reviewing Court to rely on past findings and rulings including credibility findings made under the previous regime nullified and declared unconstitutional? (see Re Mahjoub, 2016 FC 808, paras 23, 52, 57, 72 and Re Mahjoub, 2015 FC 1232, paras 6-9, 80-81)*

[26] These questions are not proper ones to certify for several reasons. First, they start from the flawed premise that condition of release reviews should be conducted afresh from the ground up or, as counsel argues, on a *de novo* basis. In my respectful view, conditions of release reviews are not *de novo* reviews nor do they start with a blank slate. The Federal Court of Appeal determined that under the detention review scheme, an Applicant is unable to distance him or herself from previous determinations made in relation to his or her detention. In my view the same holds true for condition of release reviews. As Rothstein JA stated in the Federal Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 [*Thanabalasingham*]:

> THE CERTIFIED QUESTION
>
> [5] There are two issues that must be decided: (1) whether detention reviews are hearings *de novo*; and (2) who bears the burden of proof in a detention review.
>
> Nature of the Hearing
>
> [6] I think it is important to first clarify the use of the term *de novo*. Strictly speaking, a *de novo* review is a review in which an entirely fresh record is developed and no regard at all is had to a prior decision (see *Bayside Drive-in Ltd*. v. M.N.R. (1997), 218 N.R. 150 at 156 (F.C.A.); *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145 at 166 (C.A.)). This is not what occurs in a detention review. In *Canada (Minister of Citizenship and Immigration) v. Lai*, [2001] 3 F.C. 326 at 334 (T.D.), Campbell J. held that in a detention review, "all existing factors relating to custody must be taken into consideration, including the reasons for previous detention orders being made." Although Campbell J. was dealing with the former Act, there is no reason why this ruling should not apply to the new Act. Therefore, *de novo* review is not a precisely accurate way of describing the kind of review hearing held under sections 57 and 58 of the new Act.
>
> [7] On the other hand, I also cannot accept the submission made by the Minister in his factum that the findings of previous Members should not be interfered with in the absence of new

evidence. In considering detention reviews held under the former Act, MacKay J. of the Trial Division (as it then was) held that:

> [...] the concern, at the time of the review, is whether there are reasons to satisfy the adjudicator that the person in detention is not likely to pose a danger to the public and is likely to appear for an examination, inquiry or removal. It is not sufficient, in my opinion, that the adjudicator proceed ... by accepting the decisions of previous adjudicators and considering primarily what may have happened since the last previous decision (*Salilar v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 150 at 159 (T.D.)).

[8] Nothing in the new sections 57 and 58 indicates that MacKay J.'s reasoning should not continue to apply to detention review hearings held under the new Act. As Adjudicators did under the former Act, the Immigration Division reviews "the reasons for the *continued* detention" [emphasis added]. Nor does the new Act draw any distinction between the first and subsequent detention reviews or impose any requirement for new evidence to be presented. Rather, at each hearing, the Member must decide afresh whether continued detention is warranted.

The Treatment of Prior Decisions

[9] The question then is what weight must be given, in subsequent reviews, to previous decisions. As became clear in oral argument, the Minister does not say that prior decisions to detain an individual are binding at subsequent detention reviews. Rather, the Minister says that a Member must set out clear and compelling reasons in order to depart from previous decisions to detain an individual.

[10] Detention review decisions are the kind of essentially fact-based decision to which deference is usually shown. While, as discussed above, prior decisions are not binding on a Member, I agree with the Minister that if a Member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out. There are good reasons for requiring such clear and compelling reasons.

[11] Credibility of the individual concerned and of witnesses is often an issue. Where a prior decision maker had the opportunity to hear from witnesses, observe their demeanour and assess their credibility, the subsequent decision maker must give a clear

> explanation of why the prior decision maker's assessment of the evidence does not justify continued detention. For example, the admission of relevant new evidence would be a valid basis for departing from a prior decision to detain. Alternatively, a reassessment of the prior evidence based on new arguments may also be sufficient reason to depart from a prior decision.
>
> [12] The best way for the Member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion, i.e. explaining what the former decision stated and why the current Member disagrees.
>
> [13] However, even if the Member does not explicitly state why he or she has come to a different conclusion than the previous Member, his or her reasons for doing so may be implicit in the subsequent decision. What would be unacceptable would be a cursory decision which does not advert to the prior reasons for detention in any meaningful way.

[27] There is no support in the jurisprudence for a de novo approach in reviews of conditions of release. Such an approach is contrary to the approach adopted by the Federal Court of Appeal for analogous detention reviews, and to the Supreme Court of Canada's teachings in *Charkaoui I*, which placed "reasons for the detention" at the top of the list of relevant considerations.

[28] These questions advance the proposition that the Applicant may have some sort of immunity or privilege against being cross-examined on statements he made involuntarily under oath in previous proceedings. That however starts the debate on another false premise because the Applicant could not point to any evidence that his testimony before Justice Nadon was involuntary or that he was compelled to testify. In any event the 2016 Conditions of Release Order is not based solely on the evidence before Justice Nadon, nor does it rely exclusively on prior findings by other judges as is evident, again, from a most cursory review.

[29] Finally, because they are fact specific and not dispositive, these proposed questions may not be certified as a question of general importance; they do not transcend the interests of the parties.

Question 1(e):

> *1(e) Is it appropriate for a judge conducting a detention review under Division 9 of the IRPA to proceed on the basis that there is a reduced danger only because of the conditions, without evidence to that effect? Is that impermissible speculation? Is that impermissible as illogical? (see Re Mahjoub, 2016 FC 808, paras 76, 77, 79, 95 and 102)*

[30] This is not a proper question for certification; on its face it is based on the evidence in this case and, more particularly, on an allegation concerning lack of evidence. As such it is fact-specific and neither transcends the interests of the parties, nor contemplates issues of broad significance or general application.

Questions 3(a), 3(b), 8iii(d):

> *3(a) Is it contrary to ss. 7 and/or 13 of the Charter to allow cross-examination on affidavit on evidence given in an unconstitutional proceeding to impeach credibility in a later detention review?*
>
> *3(b) Was the reasoning used to allow such cross-examination a violation of the right to silence or use immunity under section 7 of the Charter and the Canada Evidence Act because this is an IRPA proceeding contrary to binding authority in Bagri, Charkaoui I, Chakaoui II and Harkat?*
>
> *8iii(d) Is the law, in its application, interpretation or effect, unfair and contravenes ss. 7 and / or 13 of the Charter including the right to silence or immunity under section 7 of the Charter and the Canada Evidence Act and is contrary to the binding authority in Re Application re s. 83.28 of the Criminal Code; ("Bagri"), [2004], S.C.J. No. 40, Charkaoui v Canada, 2007 SCC 9, Charkaoui v Canada, 2008 SCC 38 and Canada v Harkat 2014 SCC 37 in that it permits arbitrary loss of liberty and arbitrary detention by allowing for the reviewing Court to cross- examine the named person on evidence given in an unconstitutional proceeding to impeach credibility in a later review of conditions?*

[31] These questions are overlapping and were revised by counsel before the hearing. In my respectful view, they should not be certified because they have already been asked and answered.

[32] To begin with, cross-examination is "the ultimate means of demonstrating truth and of testing veracity". The Supreme Court of Canada has instructed that the right of cross-examination must therefore be protected and broadly construed: *R v Lyttle*, 2004 SCC 5 at paras 42-44, where the Court stated:

> 42 In *R. v. Osolin*, [1993] 4 S.C.R. 595, Cory J. reviewed the relevant authorities and, at p. 663, explained why cross-examination plays such an important role in the adversarial process, particularly, though of course not exclusively, in the context of a criminal trial:
>
> > There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence. See *R. v. Anderson* (1938), 70 C.C.C. 275 (Man. C.A.); *R. v. Rewniak* (1949), 93 C.C.C. 142 (Man. C.A.); *Abel v. The Queen* (1955), 115 C.C.C. 119 (Que. Q.B.); *R. v. Lindlau* (1978), 40 C.C.C. (2d) 47 (Ont. C.A.).
>
> 43 Commensurate with its importance, the right to cross-examine is now recognized as being protected by ss. 7 and 11(d) of

> the *Canadian Charter of Rights and Freedoms*. See *Osolin, supra*, at p. 665.
>
> 44 The right of cross-examination must therefore be jealously protected and broadly construed.

[33] These questions derive from the fact that this Applicant in this case was cross-examined on evidence he gave many years ago before Justice Nadon. The fundamental flaw in the Applicant's argument, as already noted, is that the Applicant was not compelled to give that evidence. He was assisted by counsel in preparing the affidavit he chose to file at that time, and further, counsel also represented him at the hearing during which he was cross-examined. His evidence was given voluntarily; nothing suggests it was compelled. The case law relied on by the Applicant, including *In the matter of an application under section 83.28 of the Criminal Code*, 2004 SCC 42, is not helpful, because it deals with situations where evidence was compelled and not, as here, where the evidence was given evidence was voluntarily. He may have been under an incorrect impression in this regard; however he had counsel and there is no merit to his suggestion that he was compelled.

[34] The same attack now mounted has been mounted unsuccessfully on many occasions, as outlined in the 2016 Conditions of Release Order (see paras 83 and following).

[35] In my view, these questions were asked and answered by Justice Dawson, as she then was, in *Re Jaballah*, 2010 FC 224 [*Jaballah*]. In that case, Justice Dawson considered and rejected virtually all of the arguments the Applicant now seeks to litigate regarding the availability of immunity or privilege as protection from cross-examination on testimony given voluntarily at a previous hearing. In *Jaballah*, Justice Dawson found that the applicant before

her, in essentially the same situation as the Applicant before me, was not compellable.

Her Ladyship rejected a claim to immunity and privilege under *IRPA* after detailed analysis with reference to the criminal law on this point:

> [92] I believe the values that informed the Court's analysis in *Henry* should inform considerations of the scope of the protection afforded to Mr. Jaballah under section 7 of the *Charter*. The liberty and security interests that are engaged in this proceeding are significant, however, I do not see that they justify greater protection than would be afforded to an accused in a criminal proceeding.
>
> [emphasis added]

[36] With respect, I agree. To put Justice Dawson's finding regarding protection afforded criminal accused into perspective, I observe that the Supreme Court of Canada in *R v Henry*, 2005 SCC 76 [*Henry*] reviewed and reformulated the law and principles in terms of the protection against self-criminalization and section 13 of the *Charter*. It concluded:

> 47 Accused persons who testify at their first trial and then volunteer inconsistent testimony at the retrial on the same charge are in no need of protection "from being indirectly compelled to incriminate themselves" in any relevant sense of the word, and s. 13 protection should not be available to them.
>
> […]
>
> 48 Insofar as *Kuldip* permitted cross-examination of the accused on the inconsistent testimony he volunteered at his first trial, *Kuldip* should, of course, be affirmed. However, insofar as the Court felt compelled by *Mannion* to narrow the purpose of the cross-examination to the impeachment of credibility, and to deny the probative effect of the answers on the issue of guilt or innocence, it seems to me our decision today not to follow *Mannion* renders such restrictions no longer operative. If the contradiction reasonably gives rise to an inference of guilt, s. 13 of the *Charter* does not preclude the trier of fact from drawing the common sense inference.

> 50 I would go further. Even though s. 13 talks of precluding the use of prior evidence "to incriminate that witness", and thus implicitly leaves the door open to its use for purposes other than incrimination such as impeachment of credibility (as *Kuldip* accepted), experience has demonstrated the difficulty in practice of working with that distinction. If, as *Noël* held, and as Arthur Martin J.A. observed in *Kuldip*, the distinction is unrealistic in the context of s. 5(2) of the *Canada Evidence Act*, it must equally be unrealistic in the context of s. 13 of the *Charter*. Accordingly, by parity of reasoning, I conclude that the prior *compelled* evidence should, under s. 13 as under s. 5(2), be treated as inadmissible in evidence against the accused, even for the ostensible purpose of challenging his or her credibility, and be restricted (in the words of s. 13 itself) to "a prosecution for perjury or for the giving of contradictory evidence".
>
> [emphasis added]

[37] Thus, the Applicant's proper questions to certify lack the necessary evidentiary foundation: his answers were not compelled and as *Henry* concludes, section 13 is not available to assist. These questions have been asked and answered already.

[38] I also note that the Applicant himself specifically challenged the truthfulness of the allegations made in the SIR in his affidavit: "I […] am still suffering from having been falsely accused by the Ministers, in the certificate proceedings". Having directly raised these allegations in his own affidavit, there is even less reason to doubt the Ministers' entitlement to challenge the truthfulness of his evidence.

Questions 3(c), 3(d), 8iii(e):

> *3(c) In the alternative, if such cross examination was lawful with respect to issues of credibility (see Reasons: paras 83-86), can the evidence induced from such cross examination be used as a substantive evidence of risk?(see Re Mahjoub, 2016 FC 808, paras 56, 93-96)*

3(d) Is it an error of law or an error in principle to make adverse findings of fact and draw conclusions of risk based on such cross-examination, objections during cross-examination and exercise of the right to silence? (see Re Mahjoub, 2016 FC 808, paras 81, 87-89, 91, 93, 103-104)

8iii(e) In the alternative, even if such cross-examination is constitutional with respect to issues of credibility, is the law imprecise and overbroad and/or does it contravene the Charter in that it permits arbitrary loss of liberty and arbitrary detention by allowing, in its application, interpretation or effect, the use of evidence induced from such cross-examination as a substantive evidence of risk under s. 82(5)b) of the IRPA or the use of objections during such cross-examination or the exercise of the right to silence to make adverse findings of fact and draw conclusions of risk under s. 82(5) of the IRPA?

[39] These are not proper questions to certify for the same reasons as the previous set of proposed questions. It is trite to observe that a court may use evidence given in cross-examination. In any event, these questions are fact-specific, notwithstanding counsel's attempt to cast them in general terms. The Court's use of its assessment of the evidence and conduct of the hearing before it in the current case is not dispositive.

[40] In addition, I agree with the submission of the Ministers' counsel in this regard:

"The Applicant's arguments are in essence a disagreement with how the Court weighed evidence. The Court found that multiple objections by public counsel during the cross-examination had the effect of disrupting the cross-examination and permitting the Applicant an opportunity to adjust his answers. This finding was open to the Court as the trier of fact. The Court was entitled to assign limited weight to the answers given."

Question 4: *Should a judge conducting a Division 9 IRPA detention review while an appeal is pending consider the merits of the appeal to relax conditions or release the named person pending appeal?*

[41] In my respectful view, the Applicant has failed to establish how this proposed question would be dispositive of an appeal; it does not meet the test for certification.

Question 5: *Should a judge conducting a Division 9 IRPA detention review consider the fact that the person is a Convention Refugee?*

[42] This proposed question again does not arise from the judgment in respect of which it is said to arise; again and also with respect, this question is based on the false premise that the Applicant's status as a convention refugee was ignored. That premise cannot stand in light of paragraphs 106 and 107 of the 2016 Conditions of Release Order. It is also fact specific. Therefore no question will be certified.

Questions 7(a)-(e), 8i, 8ii, 8ii(a), 8ii(b), 8iv:

7(a) *Does a proof of a danger or threat to neutralize under subsection 82(5)b) of the IRPA need to be proven and this, on the balance of probability threshold in order to impose conditions? (see Re Mahjoub, 2016 FC 808, para 75)*

7(b) *Is a threat to national security based on RGB contrary to fundamental justice? (see Re Mahjoub, 2016 FC 808, para 75)*

7(c) *Is a threat to national security based on RGS contrary to fundamental justice (based on Suresh SCC in 2002) applicable under Division 9 of the IRPA? (see Re Mahjoub, 2016 FC 808, paras 66-67; 75)*

7(d) *Can findings of fact in respect to danger be made based on a burden of proof of reasonable grounds to believe or must the Court apply a burden of proof on a balance of probabilities?*

7(e) *If the findings of facts in respect to danger can be made on a reasonable grounds to believe burden, is the test applied in this case whereby Brown J. adopted and applied the legal test previously applied by Noël J. that whether the person is a threat to the security of Canada is to be "grounded on an objectively reasonable suspicion… to be expressed on a standard of*

reasonable grounds to believe" (paras 67 and 75 of Brown J.'s decision of July 20, 2016 and para 53 of Noël J.'s decision of October 30, 2015), wrong in that it is lower than a reasonable grounds to believe ("RGB") standard?

8i Is the law overbroad and imprecise in that it permits bail conditions to be imposed as interpreted by this Court if there are only reasonable grounds to believe that there is an objectively reasonable suspicion of danger or a threat to Canadian society and even with a ruling on the certificate rejecting the existence of a current danger to national security and when the threat to national security related to the same person (and or facts) has been found inexistent by an updated recent CSIS report? (see Re Mahjoub, 2016 FC 808, paras 65-67, 75 & 78).

8ii Does the law contravene the Charter and principles of fundamental justice as it permits arbitrary loss of liberty and arbitrary detention if there are only reasonable grounds to believe that there is an objectively reasonable suspicion of danger or a threat to Canadian society and even with a ruling on the certificate rejecting the existence of a current danger to national security and when the threat to national security related to the same person (and or facts) has been found inexistent by an updated recent CSIS report? (see Re Mahjoub, 2016 FC 808, paras 65-67, 75 & 78).

8ii(a) Is the law imprecise and overbroad and/or does it contravene the Charter in its application, interpretation or effect, as it permits arbitrary loss of liberty and arbitrary detention if there are findings of fact in respect to danger based on a burden of proof of "reasonable grounds to believe" rather than the proper burden of proof on a "balance of probabilities"?

8ii(b) In the alternative, if it is constitutional for findings of fact in respect to danger to be made on a "reasonable grounds to believe" burden, is the law imprecise and overbroad and/or does it contravene the Charter in that is allows for the Courts to determine whether a person is a threat to the security of Canada on the legal test of "on an objectively reasonable suspicion… to be expressed on a standard of reasonable grounds to believe", which is lower than a "reasonable grounds to believe" standard? (Re Mahjoub, 2016 FC 808, paras 67 and 75 and para 53 of Noël J.'s decision of October 30, 2015).

8iv Does the law have a discriminatory effect on non-citizens as it allows for detention or conditions under the low threshold compared to citizens in similar situations who are subject to the higher threshold of balance of probabilities; (for example under s. 810.011 of the Criminal Code) and without a truly de novo hearing?

[43] These overlapping questions come down to a single issue: is the assessment of danger on a detention review, or as in this case, a condition of release review, conducted on the basis of a decision made on reasonable grounds to believe (in respect of which the Applicant uses the shorthand "RGB"), or is the decision to be made on the higher threshold of balance of probabilities? In my respectful opinion, this is not a proper question to certify because it has already been answered by the Supreme Court of Canada in *Charkaoui I*, at paragraph 39 of that decision:

> 39 First, an active role for the designated judge is justified by the language of the IRPA and the standards of review it establishes. The statute requires the designated judge to determine whether the certificate is "reasonable", and emphasizes factual scrutiny by instructing the judge to do so "on the basis of the information and evidence available". This language, as well as the accompanying factual, legal and administrative context, leads to the conclusion that the designated judge must review the certificate on a standard of reasonableness. Likewise, since the ministers' decision to detain a permanent resident is based on "reasonable grounds to believe", "[i]t is logical to assume that in subsequent reviews by a designated judge, the same standard will be used" (*Charkaoui (Re)*, [2005] 3 F.C.R. 389, 2005 FC 248, at para. 30). The "reasonable grounds to believe" standard requires the judge to consider whether "there is an objective basis . . . which is based on compelling and credible information": *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40, at para. 114. "Reasonable grounds to believe" is the appropriate standard for judges to apply when reviewing a continuation of detention under the certificate provisions of the IRPA. The IRPA therefore does not ask the designated judge to be deferential, but, rather, asks him or her to engage in a searching review.
>
> [emphasis added]

[44] Assuming that Supreme Court of Canada's pronouncements are to be followed by lower courts, there is no merit to the Applicant's arguments that this Court should reject the reasonable

grounds to believe test as approved by the Supreme Court. The relevant passage in the foregoing is the Supreme Court's ruling that:

> [L]ikewise, since the ministers' decision to detain a permanent resident is based on "reasonable grounds to believe", "[i]t is logical to assume that in subsequent reviews by a designated judge, the same standard will be used" (*Charkaoui (Re)*, [2005] 3 F.C.R. 389, 2005 FC 248, at para. 30).

[45] In my respectful view, given that our highest Court has ruled that a determination on detention reviews is based on the "reasonable grounds to believe" threshold, I am not persuaded that a different standard should apply on reviews of conditions of release. I am unable to see why the test should differ. This view is reinforced by the fact that the Supreme Court of Canada recently reiterated its approval of the same legislative scheme in *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 4.

[46] The Applicant's argument emphasized that a court may only find facts on a balance of probabilities, not on reasonable grounds to believe or reasonable grounds to suspect, and that neither of the latter two tests may legitimately be uses as the basis for decisions on condition of release reviews. This argument appears to have been put to rest by the Supreme Court of Canada's judgment in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, in two respects. First, the Supreme Court approved the use of reasonable grounds to believe and did so with specific reference to the concept of suspicion in the following terms (at para 114):

> […] The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of

> proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.).

[47] Secondly, the Supreme Court stated:

> 116 When applying the "reasonable grounds to believe" standard, it is important to distinguish between proof of questions of fact and the determination of questions of law. The "reasonable grounds to believe" standard of proof applies only to questions of fact: *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.), at p. 311. This means that in this appeal the standard applies to whether Mr. Mugesera gave the speech, to the message it conveyed in a factual sense and to the context in which it was delivered. On the other hand, whether these facts meet the requirements of a crime against humanity is a question of law. Determinations of questions of law are not subject to the "reasonable grounds to believe" standard, since the legal criteria for a crime against humanity will not be made out where there are merely reasonable grounds to believe that the speech could be classified as a crime against humanity. The facts as found on the "reasonable grounds to believe" standard must show that the speech did constitute a crime against humanity in law.
>
> [emphasis added]

[48] As seen in the underlined passage, the Supreme Court found that the "reasonable grounds to believe" standard applies only to questions of fact. The Applicant argues the opposite.

[49] As an alternative argument, given the rulings by the Supreme Court of Canada, and their binding effect on this Court, the Applicant asks that the Supreme Court's decisions be ignored. He bases his argument on the Supreme Court's judgment in *Canada (Attorney General) v*

Bedford, 2013 SCC 72 [*Bedford*]. There, the Supreme Court set out where and when a lower court may ignore binding precedent:

> [42] In my view, a trial judge can consider and decide arguments based on *Charter*-provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.
>
> [43] The intervener, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis (I.F., at para. 25).
>
> [44] I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[50] While I accept the proposition that this Court may depart from past SCC jurisprudence in cases where it may be necessary to do so, I am not persuaded the Applicant has satisfied the tests set out in *Bedford*. First, the Supreme Court states that "the threshold for revisiting a matter is not an easy one to reach". Second, there is no realistic basis on which to find that there is a significant change in circumstances either in society or with respect to the Applicant such as to engage the *Bedford* tests. Unlike *Bedford*, I am not looking at a legal regime sanctioned 20 or 25

years ago; *Charkaoui I* and *Harkat* were decided in the last decade. I am also unable to find any significant change in the evidence.

[51] What the Applicant relies on then is his allegation that he has raised new legal issues and therefore meets the *Bedford* test. He says that by alleging Division 9 of the *IRPA*'s is arbitrary, overbroad and not proportionate, he has raised issues not raised in *Charkaoui I*. Of these, he emphasized arbitrariness and overbreadth and noted the discussion of those topics at paragraphs 97 and follows in *Bedford*.

[52] *Bedford* sets out the evolution under section 7 of the doctrines of arbitrariness, overbreadth and proportionality. However, I am not persuaded that the Applicant's arguments made today under the same section 7 are so different that they rise to the nature of "new legal issues" compared to those raised in *Charkaoui I* and *Harkat* as contemplated by *Bedford*. Further, while the Applicant also raises sections 1, 9, 10, 12, 13 and 15 of the *Charter*, these sections (with the exception of section 13) were raised and considered in both *Charkaoui I* and *Harkat*. While section 13 is raised in this proceeding, it is, in my view, part and parcel of the Applicant's claim of immunity or privilege against the use of his evidence and cross-examination, which I dealt with previously in these Reasons.

[53] The *Bedford* test not being established, the default situation applies such that I am obliged to accept the answers given to these questions by the Supreme Court of Canada. Therefore, no questions will be certified in this group.

Question 8iii:

> *8iiii Does the law contravene the Charter in that it permits arbitrary loss of liberty and arbitrary detention without a truly de novo hearing whereby a reviewing Court can maintain previous rulings absent being satisfied that compelling reasons to depart exist allows for the perpetuation of errors of law that violate an individual's right to liberty and security save a certified question which allows the perpetuation of errors of laws?*

[54] The Applicant poses this issue, but offers no support in the legislation or the case law for his argument that the regular six-month reviews of detention or, as in this case, conditions of release, are required to be "*truly de novo*". I agree with the Respondents that such reviews are designed and intended to fine tune the conditions if there is credible evidence showing the need for changes: *Charkaoui I*, paras 117 to 123. In particular, para 117 states: "In other words, there must be detention reviews on a regular basis, at which times the reviewing judge should be able to look at all factors relevant to the justice of continued detention, including the possibility of the *IRPA*'s detention provisions being misused or abused."

[55] In this connection, *Charkaoui I* instructs that past decisions relating to danger ("Reasons for Detention": *Charkaoui I*, above at para 111) and the history of the proceedings pertaining to detention and release reviews ("Length of Detention", "Reasons for the Delay in Deportation", "Anticipated Future Length of Detention" and "Availability of Alternatives to Detention": *Charkaoui I*, above at paras 112-123), should be considered when assessing whether continued detention or imposition of conditions is warranted: see *Charkaoui I*, at paras 110-122.

Questions 8v(1), 8v(2), 8v(3), 8v(4):

> *8v(1) Is it contrary to principles of fundamental justice and the Rule of Law to allow a judge to insulate his own decision from appeal?*
>
> *8v(2) Is the certification process is [sic] a perversion of the law and the Rule of Law in that it allows the judge to effectively decide whether his or her own decision(s) can be appealed and, effectively, to allow him or her to sit on appeal of his or her own decision(s) through the mechanism of certification?*
>
> *8v(3) Is it contrary to the fundamental justice and the Judicial Independence of the Court of Appeal for Parliament to legislate that the lower Court determines what appeals the Court of Appeal can hear?*
>
> *8v(4) The certification process under s 82.3 of the IRPA as interpreted and applied by the Federal Court (in Re Mahjoub 2016 FC 808 and its August 8, 2016 Order) whereby the named person must submit questions for certification prior to issuance of its decision contrary to principles of fundamental justice and the rule of law in that it restricts the named person's right to appeal serious questions of general importance arising from a decision which cannot be known in advance.*

[56] In these proposed questions to certify and constitutional questions, the Applicant challenges the validity of the limitation of the right of appeal created by section 82.3 of *IRPA*, which provides:

> **Appeal**
>
> **82.3** An appeal from a decision made under any of sections 82 to 82.2 may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.
>
> [emphasis added]

[57] The Applicant submitted not only that section 82.3 is invalid, but that, in addition, subsections 74(d) and section 79 are also invalid because they are worded almost identically. These sections state:

> **Judicial review**
>
> **74** Judicial review is subject to the following provisions:
>
> […]
>
> (d) subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.
>
> **Appeal**
>
> **79** An appeal from the determination may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.

[58] The Applicant bases his attack on a number of allegations which I understand as follows: first, while there is no constitutional right to an appeal, if an appeal right is created, it must be constitutionally sound (a point I accept and which is not disputed). Second, section 82.3 is contrary to the rule of law, and is also contrary to the independence of the judiciary, including the independence both of this Court and the Federal Court of Appeal. Third, *Bedford* allows the validity of section 82.3 to be re-litigated, notwithstanding that the Federal Court of Appeal has previously upheld section 82.3 on two occasions (leave to appeal being refused by the Supreme Court of Canada in both). However, I am not persuaded that these questions may be certified

because they have already been dealt with by the Federal Court of Appeal. In addition the Applicant fails to meet the tests set out in *Bedford*.

[59] To consider the last issue first, the Federal Court of Appeal considered and rejected challenges to the *Charter*-validity of section 82.3 and upheld the same on two occasions: *Huynh v Minister of Citizenship and Immigration*, [1996] 2 FC 976, (FCA), leave to appeal to SCC refused, 25379 (24 October 1996) [*Huynh*] (in which the Federal Court of Appeal, per Hugessen JA, held there was no merit to the *Charter* section 15 argument, and rejected numerous *Charter* section 7 arguments); and *Canada (Minister of Citizenship and Immigration) v Huntley*, 2011 FCA 273 at para 11, leave to appeal to SCC refused, 34548 (26 April 2012) [*Huntley*] (where the Court, per Evans JA, rejected the *Charter* section 7 argument saying, at paragraph 11: "In the alternative, counsel submits that paragraph 74(d) violates section 7 of the *Canadian Charter of Rights and Freedoms*. We do not agree. This issue has been settled by *Huynh v Minister of Citizenship and Immigration*, [1996] 2 FC 976 (C.A.)").

[60] But for *Bedford*, this Court would follow the Federal Court of Appeal decisions and reject the Applicant's contentions. However, the Applicant submits he is not bound by this binding precedent because he has met the test in *Bedford*. Noting again that the Supreme Court of Canada has decided that "the threshold for revisiting a matter is not an easy one to reach", the question is whether the Applicant has established a significant change in circumstances or the evidence, or has raised a new legal issue? With respect, there is nothing in the record to show a significant change in circumstances in society or with respect to the Applicant, nor is there any basis in the record to find a significant change in the evidence; *Huntley* was decided in 2012.

[61] Therefore, the only *Bedford* issue remaining is whether the Applicant has raised any new legal issues. In my respectful view, he has not. Merely changing the label on a section 7 argument and tweaking it to call it a rule of law issue is not enough because the fundamental attack is the same: judges should not be able to isolate their decisions from review. That is the same argument made and rejected by the Federal Court of Appeal in *Huynh* and *Huntley*. In both cases, the Supreme Court refused to grant leave to appeal. I am not persuaded that a new legal issue is raised.

[62] With respect, I am not persuaded by the Applicant's argument that a Federal Court judge who certifies or does not certify a question thereby interferes with the independence of the Federal Court of Appeal because, as the Applicant argues, the Federal Court of Appeal should be able to decide in its discretion which cases it hears. The Applicant argued that "each appellate court should decide what cases it hears". This argument is contradicted by the principle, accepted by the Applicant, that there is no right of appeal; this assertion is tantamount to saying there *is* a constitutionally protected right of appeal that lies in the discretion of appeal courts. This submission is also not supportable by any jurisprudence. The Applicant's argument that section 82.3 interferes with the independence of this Court is similarly unsupportable in the jurisprudence.

[63] In summary, I am not persuaded these proposed questions should be certified, and in the course of these Reasons have considered the various constitutional questions propounded. In many respects this decisions is like that summarized by Pelletier, JA in *Varela* where the applicant filed "a 'laundry list' of questions, which may or may not meet the statutory test. In this case, none of them did."

[64] Therefore the motion will be dismissed.

VI. Conclusion

[65] I have reviewed and decided the Applicant's conditions of release as set out in my Conditions of Release Order of July 20, 2016. As the Applicant raised no serious questions of general importance, none will be certified.

VII. Costs

[66] Neither party requested costs and no costs are ordered.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The motion to certify serious questions of general important is dismissed.

2. The answers to the Applicant's constitutional questions are as set out in these Reasons.

3. There is no order as to costs.

"Henry S. Brown"
Judge

ANNEX A

Questions proposed for certification by the Applicant on July 29, 2016

Question 1:

What is the threat to the security of Canada to be proven under section 82(5) b) of the IRPA?

a) Can a danger or threat under subsection 82 (5) b) of the *IRPA* be found or conditions imposed when the threat to national security has been found inexistent by a CSIS report, updating its previous reports relied upon by the previous rulings of the Federal Court in previous detention reviews? (see *Re Mahjoub*, 2016 FC 808, paras 65 & 78)

b) Is the definition of threat to the security of Canada under the *CSIS Act* different than a danger to be neutralized under subsection 82 (5) of the *IRPA*? (see *Re Mahjoub*, 2016 FC 808, paras 65 and 78)

c) In addition to the no threat report of CSIS, can the ruling on the reasonableness of a certificate (and evidence in support) that is, moreover, based essentially on mere **past** contacts and inferences of **past** membership in an terrorist organisation based on such contacts, dating back to 20 years ago, with a conclusion of no involvement in any terrorist activities be proof of a danger or threat to neutralize under subsection 82 (5) b) of the *IRPA* or can it justify conditions? (see *Re Mahjoub*, 2016 FC 808, paras 9, 26-27, 79, 92, 96-98) is this a unusual and cruel treatment under section 12 of the Charter

d) Can a danger or threat under subsection 82 (5) b) of the *IRPA* be found or conditions imposed on the basis of Federal Court reasonableness or detention review rulings **rendered void** by the ruling of *Charkaoui v. Canada*, [2007] S.C.J. No 9 and C3 (see *Re Mahjoub*, 2016 FC 808, paras 23, 57, 93) including previous rulings on credibility related to testimonial evidence and admissions (see *Re Mahjoub*, 2016 FC 808, paras 23, 57, 84,87,93, 99, 100 and see Question 3(c)) ?

e) Is it appropriate for a judge conducting a detention review under Division 9 of the IRPA to proceed on the basis that there is a reduced danger only because of the conditions, without evidence to that effect? Is that impermissible speculation? Is that impermissible as illogical? (see *Re Mahjoub*, 2016 FC 808, paras 76, 77, 79, 95 and 102)

Question 2: Reliance on Past Rulings in Fact finding

a) Can the credibility findings of a judge in a ruling nullified be used by another judge to assess credibility? (see Reasons, paras 23, 52, 57 (Justice Noel, para [6])?

b) Can a judge conducting a Division 9 IRPA detention review rely upon findings and rulings under the previous regime declared unconstitutional? (see Reasons paras 57 (Noel [7]-[9]) and 72 (Noel [80]-[81])?

Question 3: Regarding cross-examination on evidence before Nadon, J.

a) Is it contrary to ss. 7 and/or 13 of the *Charter* to allow cross-examination on affidavit on evidence given in an unconstitutional proceeding to impeach credibility in a later detention review?

b) Was ~~the reasoning used to allow~~ such cross-examination a violation of the right to silence or use immunity under section 7 of the *Charter* and the *Canada Evidence Act* ~~because this is an IRPA proceeding~~ contrary to binding authority in *Bagri, Charkaoui I, Chakaoui II* and *Harkat* ?

c) In the alternative, if such cross examination was lawful with respect to issues of credibility (see Reasons: paras 83-86), can the evidence induced from such cross examination be used as a substantive evidence of risk? (see *Re Mahjoub*, 2016 FC 808, paras 56, 93-96)

d) Is it an error of law or an error in principle to make adverse findings of fact and draw conclusions of risk based on such cross-examination, objections during cross-examination and exercise of the right to silence? (see *Re Mahjoub*, 2016 FC 808, paras 81, 87-89, 91, 93, 103-104

Question 4

Should a judge conducting a Division 9 *IRPA* detention review while an appeal is pending consider the merits of the appeal to relax conditions or release the named person pending appeal? (see Reasons 45; 51; 98; 114-116)?

Question 5:

Should a judge conducting a Division 9 IRPA detention review consider the fact that the person is a Convention Refugee? (see Reasons paras 46, 53 and 106-107)

Question 6:

Are the factors applied by Justice Noel and adopted by the Court, rather than the factors set out by the SCC in *Charkaoui I,* appropriate in a Division 9 IRPA detention review? (gen: para 70) (specifically 71 to 116)

Question 7: Threshold to prove a danger

a) Does a proof of a danger or threat to neutralize under subsection 82(5) b) of the IRPA need to be proven and this, on the balance of probability threshold in order to impose conditions? (see *Re Mahjoub,* 2016 FC 808, para. 75)

b) Is a threat to national security based on RGB contrary to fundamental justice? (see *Re Mahjoub,* 2016 FC 808, para. 75)

c) Is a threat to national security based on RGS contrary to fundamental justice (based on *Suresh* SCC in 2002) applicable under Division 9 of the IRPA? (see *Re Mahjoub,* 2016 FC 808, paras 66-67; 75)

d) Can findings of fact in respect to danger be made based on a burden of proof of reasonable grounds to believe **or** must the Court apply a burden of proof on a balance of probabilities?

e) If the findings of facts in respect to danger can be made on a reasonable grounds to believe burden, is the test applied in this case whereby Brown J. adopted and applied the legal test previously applied by Noël J. that whether the person is a threat to the security of Canada is to be "grounded on an objectively reasonable suspicion... to be expressed on a standard of reasonable grounds to believe" (paras 67 and 75 of

Brown J.'s decision of July 20, 2016 and para 53 of Noël J.'s decision of October 30, 2015), wrong in that it is lower than a reasonable grounds to believe ("RGB") standard?

ANNEX B

Serious questions of general importance that are dispositive of the case and that transcend the facts of this particular case questions and as such as questions proposed for certification flowing from the constitutional questions raised in the present application:

(8) Are sections 79, 82 (5) (a) and (b) and 82.3 alone or in conjunction with sections 33 and 77 to 85.6 of the *Immigration and Refugee Protection Act* (IRPA) unconstitutional and invalid as they violate sections 2(b), 7, 8, 9, 12 and 15 of the *Canadian Charter of Rights and Freedom*s ("Charter") and the unwritten constitutional principles of the Rule of Law and Judicial Independence, in:

(a) providing a discretion to impose conditions, based on a threshold that is contrary to fundamental justice and has a discriminatory effect on non-citizens (ss. 7, 8, 9, 12 and 15 of the *Charter*);

(b) failing to provide protection against arbitrary detention (ss. 7 and 9 of the *Charter*);

(c) violating of the right to be heard in a public (ss. 2(b) and 7 of the *Charter*);

(d) violating of the right to fair hearing (s. 7 of the *Charter*); and

(e) Creating unconstitutional statutory pre-conditions on the right to appeal through the requirement of certification;

In particular:

i. Is the law overbroad and imprecise in that it permits bail conditions to be imposed as interpreted by this Court if there are only reasonable grounds to believe that there is an objective1y reasonable suspicion of danger or a threat to Canadian society and even with a ruling on the certificate rejecting the existence of a current danger to national security and when the threat to national security re1ated to the same person (and or facts) has been found inexistent by an updated recent CS1S report (see *Re Mahjoub*, 2016 FC 808, paras 65-67, 75 & 78).

ii. Does the law contravene the Charter and principles of fundamental justice as it permits arbitrary loss of liberty and arbitrary detention if there are only reasonable grounds to be1ieve that there is an objective1y reasonable suspicion of danger or a threat to Canadian society and even with a ruling on the certificate rejecting the existence of a current danger to national security and when the threat to national security related to the same person (and or facts) has been found inexistent by an updated recent CS1S report (see *Re Mahjoub*, 2016 FC 808, paras 65-67, 75 & 78).

ii(a) Is the law imprecise and overbroad and/or does it contravene the Charter in its application, interpretation or effect, as it permits arbitrary loss of liberty and arbitrary detention if there are findings of fact in respect to danger based on a burden of proof of "reasonable grounds to be1ieve" rather than the proper burden of proof on a "balance of probabilities".

ii(b) In the alternative, if it is constitutional for findings of facts in respect to danger to be made on a "reasonable grounds to believe" burden, is the law imprecise and

overbroad and/or does it contravene the *Charter* in that is allows for the Courts to determine whether a person is a threat to the security of Canada on the legal test of "*on an objectively reasonable suspicion ... to be expressed on a standard of reasonable grounds to believe*", which is lower than a "reasonable grounds to be1ieve" standard (*Re Mahjoub,* 2016 FC 808, paras 67 and 75 and para 53 of Noël J.'s decision of October 30, 2015).

iii. Does the law contravene the *Charter* in that it permits arbitrary loss of liberty and arbitrary detention without a truly *de novo* hearing whereby a reviewing Court can maintain previous rulings absent being satisfied that compelling reasons to depart exist allows for the perpetuation of errors of law that violate an individual's right to liberty and security save a certified question which allows the perpetuation of errors of laws;

iii(a) Is the law imprecise and overbroad and does it contravenes the Charter as it permits arbitrary loss of liberty and arbitrary detention in spite of an updated "no threat" report from CSIS (released on January 14, 2016), by allowing, in its application or interpretation or effect, for a ruling that finds the security certificate reasonable to be found to be proof of a danger or threat under subsection 82(5) b) of the *IRPA* and to impose conditions of release on the named person in violation of sections 7, 8, 12 and/or 15 of the *Charter* (see *Re Mahjoub,* 2016 FC 808, paras 9, 26-27, 79, 92, 96-98).

iii(b) Is the law imprecise and overbroad and contravenes the Charter as it permits, in its application or interpretation or effect, a finding of danger under subsection 82(5)b) of the *IRPA* and the imposition of conditions on the basis of a Federal Court

reasonableness decision or detention review rulings rendered void by the Supreme Court of Canada in in *Charkaoui v Canada,* 2007 SCC 9 and the legislation C-3 (see *Re Mahjoub,* 2016 FC 808, paras 23, 57, 93, 84, 87, 93, 99, 100).

iii(c) Does the law contravene the *Charter,* in its application, interpretation or effect, in that it permits arbitrary 1oss of liberty and arbitrary detention by allowing for the reviewing Court to rely on past findings and rulings inc1uding credibility findings made under the previous regime nullified and declared unconstitutional (see *Re Mahjoub,* 2016 FC 808, paras 23, 52, 57, 72 and *Re Mahjoub,* 2015 FC 1232, paras 6-9, 80-81).

iii(d) Is the law, in its application, interpretation or effect, unfair and contravenes ss. 7 and / or 13 of the *Charter* inc1uding the right to silence or immunity under section 7 of the *Charter* and the *Canada Evidence Act* and is contrary to the binding authority in *Re Application re s. 83.28 of the Criminal Code*; ("*Bagri*"), [2004], S.C.J. No. 40, *Charkaoui v. Canada,* 2007 SCC 9, *Charkaoui v. Canada,* 2008 SCC 38 and *Canada v. Harkat,* 2014 SCC 37 in that it permits arbitrary loss of liberty and arbitrary detention by allowing for the reviewing Court to cross-examine the named person on evidence given in an unconstitutional proceeding to impeach credibility in a later review of conditions.

iii(e) In the alternative, even if such cross-examination is constitutional with respect to issues of credibility, is the law imprecise and overbroad and/or does it contravene the *Charter* in that it permits arbitrary loss of liberty and arbitrary detention by allowing, in its application, interpretation or effect, the use of evidence induced

from such cross-examination as a substantive evidence of risk under s. 82(5)b) of the *IRPA* or the use of objections during such cross-examination or the exercise of the right to silence to make adverse findings of fact and draw conclusions of risk under s. 82(5) of the *IRPA*.

iv. Does the law have a discriminatory effect on non-citizens as it allows for detention or conditions under the low threshold compared to citizens in similar situations who are subject to the higher threshold of balance of probabilities; (for example under s. 810.011 of the *Criminal Code*) and without a truly *de novo* hearing;

iv(a). Is the law and in particular subsection 82(5) of the *IRPA*, overbroad and imprecise in that it permits the definition of a danger to be neutralized under subsection 82(5) to be interpreted differently that the definition of "threat to the security of Canada" under the *CSIS Act* (see *Re Mahjoub* 2016 FC 808, para 65 and 78)

iv(b). Does the law have an unconstitutional effect in that it allows the Court to use the credibility findings of a judge in a past ruling nullified and declared to assess the named person's credibility in a later review of detention / conditions of release (see *Re Mahjoub*, 2016 FC 808, paras 23, 52, 57 and *Re Mahjoub*, 2015 FC 1232, para 6).

iv(c). Is the law imprecise and overbroad and/or does it contravene the *Charter* in its application, interpretation or effect in permits the reviewing judge to apply factors other than those set out by the Supreme Court of Canada in *Charkaoui v. Canada*, 2007 SCC 9 and to ignore other relevant factors such as the named person's status as a convention refugee and the merits of a pending appeal in light of the questions

raised and filed as evidence in the record to relax conditions or release the named person pending appeal (generally, see para 70 and specifically, see paras 45-46, 51, 53, 71 to 116 of *Re Mahjoub,* 2016 FC 808).

v. Do the pre-conditions of the right to appeal, restricted by a certified question from the same judge, allow herein for errors of law to be perpetuated from one review of conditions to another and are they in breach of fairness and right to an impartial placing the appellant's section 7 rights in jeopardy contrary to the principles of fundamental justice and the unwritten constitutional principles of the Rule of Law and Judicial Independence. While right to appeal is statutory, when it impacts on section 7 rights (as it does here), that statute cannot provide for a right to appeal in a manner that is contrary to principles of fundamental justice, the Rule of Law or Judicial Independence (*NS Pharmaceutical* (SCC); *Faranacci* (OCA); *Vriend* (SCC); *Chaoulli* (SCC)). Specifically:

(1) Is it contrary to principles of fundamental justice and the Rule of Law to allow a judge to insulate his own decision from appeal.

(2) Is the certification process is a perversion of the law and the Rule of Law in that it allows the judge to effectively decide whether his or her own decision(s) can be appealed and, effectively, to allow him or her to sit on appeal of his or her own decision(s) through the mechanism of certification;

(3) Is it contrary to the fundamental justice and the Judicial Independence of the Court of Appeal for Parliament to legislate that the lower Court determines what appeals

the Court of Appeal can hear (SCC cases of *Provincial Court Judges Reference*; *Beauregard*; *Mackin* and *Imperial Tobacco*).

(4) The certification process under s. 82.3 of the IRPA as interpreted and applied by the Federal Court (in *Re: Mahjoub* 2016 FC 808 and its August 8, 2016 Order) whereby the named person must submit questions for certification prior to issuance of its decision contrary to principles of fundamental justice and the rule of law in that it restricts the named person's right to appeal serious questions of general importance arising from a decision which cannot be known in advance.

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**IN THE MATTER OF** a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*); **AND IN THE MATTER OF** the referral of a certificate to the Federal Court pursuant to section 77(1) of the IRPA; **AND IN THE MATTER OF** Mohamed Zeki MAHJOUB ["Mr. Mahjoub"]
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 1 AND 2, 2017
JUDGMENT AND REASONS:	BROWN, J.
DATED:	MARCH 31, 2017

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