Federal Court		Cour fédérale

Date: 20100122

Docket: DES-6-08

Citation: 2010 FC 79

Ottawa, Ontario, January 22, 2010

PRESENT: The Honourable Madam Justice Dawson

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 MAHMOUD ES-SAYYID JABALLAH

REASONS FOR ORDER

[1] The Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration (together the Ministers) have signed a security certificate in which they express their belief that there are reasonable grounds to believe that Mr. Jaballah is inadmissible to Canada on national security grounds. They specifically allege that Mr. Jaballah was a senior member of the Egyptian Al Jihad, a terrorist organization closely aligned with Al Qaeda. The certificate has been referred to the Court which is in the process of determining

whether it is reasonable.

[2] In the course of that proceeding, Mr. Jaballah has moved for a declaration under subsection 52(1) of the *Constitution Act, 1982* that sections 33, 77 and 78 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) violate section 7 of the *Canadian Charter of Rights and Freedoms, 1982* (Charter). Two aspects of the procedure legislated by Parliament are said to be problematic. First, Mr. Jaballah says that he cannot have a fair hearing because at no time does "an independent and impartial decision maker decide if [he] is or was a member of a terrorist organization or if he did engage in terrorism or subversion by force against the government of Egypt." The Ministers simply form an opinion about the merits of the allegations. However, the Ministers are neither independent nor impartial and there is no hearing before the Ministers. While there is a hearing before the Court, the mandate of the Court is simply to inquire as to whether the Ministers' certificate is reasonable. This does not constitute a full and fair hearing on the merits of the allegations. Second, Mr. Jaballah says that he cannot have a fair hearing because the Act does not require the Ministers to establish their case on a balance of probabilities. Instead, the Act requires the Court to apply the standard of reasonable grounds to believe.

[3] Thus, Mr. Jaballah requests the following relief:

> (i) a declaration that s. 78 of the IRPA as presently worded does not comply with the principles of fundamental justice under s. 7 of the *Charter* and as such must read as follows:

> 78. The judge shall determine whether the [take out – certificate is reasonable] [put in – permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality] and shall quash the certificate if he or she determines that [take out – it] [put in – the permanent resident or foreign national] is not.

(ii) a declaration that

a. the principles of fundamental justice mandate that 'reasonable grounds to believe' in s. 33 of the IRPA be interpreted as establishing a balance of probabilities standard for the determination of facts; or

b. in the alternative that s. 33 be read as follows:

> 33. The facts that constitute inadmissibility under section 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts [take out – for which there are reasonable grounds to believe] [put in – which it is established on a balance of probabilities] that they have occurred, are occurring, or may occur.

(iii) in the alternative a declaration that s. 78 and 33 of the IRPA are of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

[4] The Ministers respond that the security certificate procedures specified in Part 1, Division 9 of the Act, including the interpretive rule found in section 33 of the Act, comply with the fair hearing requirement that is contained within the principles of fundamental justice and which is guaranteed by section 7 of the Charter.

1. The Impugned Legislation

[5] Section 33 and subsection 34(1) of the Act (which is the related provision relevant to Mr. Jaballah) and sections 77 and 78 of the Act are as follows:

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.
34. (1) A permanent resident or a foreign national is inadmissible on security grounds for (*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (*b*) engaging in or instigating the subversion by force of any government; (*c*) engaging in terrorism; (*d*) being a danger to the security of Canada; (*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (*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*) or (*c*).	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants : *a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada; *b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force; *c*) se livrer au terrorisme; *d*) constituer un danger pour la sécurité du Canada; *e*) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada; *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*) ou *c*).
[…]	[…]

77. (1) The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court.	77. (1) Le ministre et le ministre de la Citoyenneté et de l'Immigration déposent à la Cour fédérale le certificat attestant qu'un résident permanent ou qu'un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée.
(2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.	(2) Le ministre dépose en même temps que le certificat les renseignements et autres éléments de preuve justifiant ce dernier, ainsi qu'un résumé de la preuve qui permet à la personne visée d'être suffisamment informée de sa thèse et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon le ministre, à la sécurité nationale ou à la sécurité d'autrui.
(3) Once the certificate is referred, no proceeding under this Act respecting the person who is named in the certificate — other than proceedings relating to sections 82 to 82.3, 112 and 115 — may be commenced or continued until the judge determines whether the certificate is reasonable.	(3) Il ne peut être procédé à aucune instance visant la personne au titre de la présente loi tant qu'il n'a pas été statué sur le certificat. Ne sont pas visées les instances relatives aux articles 82 à 82.3, 112 et 115.

78. The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not.	78. Le juge décide du caractère raisonnable du certificat et l'annule s'il ne peut conclure qu'il est raisonnable.

2. Is Section 7 of the Charter Engaged?

[6] Section 7 of the Charter, relied upon by Mr. Jaballah, guarantees the right to life, liberty and security of the person and the right not to be deprived of the same except in accordance with the principles of fundamental justice. A person claiming a violation of a section 7 right must first prove that there has been a deprivation of a guaranteed right and then establish that the deprivation was not in accordance with the principles of fundamental justice.

[7] In the present case, the Ministers concede that Mr. Jaballah's liberty interest is engaged so as to in turn engage section 7 of the Charter.

[8] In *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Charkaoui I) the Supreme Court of Canada found, at paragraph 18, that the appellants' challenges to the fairness of the security certificate process, which led to possible deportation and loss of liberty associated with detention, raised important issues of liberty and security that engaged section 7 of the Charter. I therefore conclude that the Ministers are correct to concede that this proceeding engages rights that are protected by section 7 of the Charter.

3. Considerations of National Security

[9] In Charkaoui I, at paragraphs 19 to 27, the Supreme Court of Canada explained how the principles of fundamental justice reflect the exigencies of national security concerns. Important points are that:

- Section 7 of the Charter does not require a particular type of process. What is required is a fair process having regard to the nature of the proceedings and the interests at stake.
- The procedures required to meet the demands of fundamental justice depend on the context, and societal interests may be taken into account.
- The seriousness of the individual interests at stake form part of the contextual analysis. Factual situations analogous to criminal proceedings merit greater vigilance by the courts.
- The question for the Court is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation. The issue is whether the process is fundamentally unfair to the affected person.

4. The Relevant Principles of Fundamental Justice

[10] In Charkaoui I, the Supreme Court of Canada stated that the "overarching principle of fundamental justice" that applied to security certificate proceedings was that "before the state can detain people for significant periods of time, it must accord them a fair judicial process." See:

paragraph 28.

[11] At paragraph 29, the Court identified a number of the constituent elements of a fair judicial process. There, the Court wrote:

> This basic principle has a number of facets. It comprises the right to a *hearing*. It requires that the hearing be *before an independent and impartial magistrate*. It demands a *decision by the magistrate on the facts and the law*. And it entails the *right to know the case put against one*, and the *right to answer that case*. Precisely how these requirements are met will vary with the context. But for s. 7 to be satisfied, each of them must be met in substance. [Emphasis in original.]

[12] On the evidence before it, the Supreme Court found that the requirements of a hearing before an independent and impartial magistrate were met, but the former provisions of the Act were insufficient to meet the requirements that the decision be based on the facts and the law, and that the affected person know the case to be met.

[13] Subsequently, Parliament amended certain of the security certificate procedures – most notably providing for the creation and use of special advocates.

5. <u>Does the Hearing Now Specified in the Act Comply with the Principles of Fundamental Justice?</u>

a. Mr. Jaballah's Assertion

[14] As noted above, in Charkaoui I, the Supreme Court of Canada considered whether under

the former legislative regime the requirement that the designated judge reach a decision on the facts and the law was met. At paragraph 48, the Court wrote:

> To comply with s. 7 of the *Charter*, the magistrate must make a decision based on the facts and the law. In the extradition context, the principles of fundamental justice have been held to require, "at a minimum, a meaningful judicial assessment of the case on the basis of the evidence and the law. A judge considers the respective rights of the litigants or parties and makes findings of fact on the basis of evidence and applies the law to those findings. Both facts and law must be considered for a true adjudication. Since *Bonham's Case* [(1610), 8 Co. Rep. 113b, 77 E.R. 646], the essence of a judicial hearing has been the treatment of facts revealed by the evidence in consideration of the substantive rights of the parties as set down by law" (*Ferras*, at para. 25). The individual and societal interests at stake in the certificate of inadmissibility context suggest similar requirements.

[15] Mr. Jaballah submits that "a meaningful judicial assessment" in the context of the security certificate process requires the Court to make a substantive determination of the case against him "not a judicial review on a reasonableness standard, albeit on an expanded record." More specifically, the judge must “determine the merits of the allegations against him”.

b. Proper Characterization of the Proceeding

[16] The Ministers argue that Mr. Jaballah is mistaken when he asserts that the Court's inquiry is simply a judicial review on an expanded record. I agree.

[17] The Federal Court of Appeal has rejected the proposition that the hearing before this Court is in the nature of a judicial review. In *Jaballah (Re) (F.C.A.)*, [2005] 1 F.C.R. 560, at

paragraph 7, Justice Rothstein for the Court wrote that security certificate proceedings under what were then sections 79 and 80 of the Act "are not a judicial review." In *Charkaoui (Re)* (2004), 247 D.L.R. (4th) 405, at paragraph 53, Justices Décary and Létourneau for the Court wrote, that:

> […] This is a *sui generis* proceeding. It is not one of the initiating proceedings covered in rule 61 of the *Federal Court Rules, 1998*: it is not an action, an application for judicial review or an appeal.

[18] That this is the case is reflected by the following.

[19] The Act requires the Ministers to refer security certificates to the Court. When a certificate is referred, the Ministers are required to file with the Court the information and evidence upon which the certificate is based, and a summary of such information and evidence that enables the person named in the certificate to be reasonably informed of the case made by the Ministers. There is no requirement for leave to proceed before the Court and the Ministers bear the onus of establishing that the certificate is reasonable.

[20] As well, since the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326 (Charkaoui II), the Canadian Security Intelligence Service (CSIS or Service) is obliged to retain operational notes in its possession relevant to persons named in security certificates and to disclose this information to the Ministers and the Court. The Court then summarizes such information for the person concerned, as more particularly described at paragraph 62 of Charkaoui II.

[21] Charkaoui II also contemplates that the Court may receive new evidence at any stage of the process, so that the Court may well have evidence before it that was not known to the Ministers when the certificate was issued.

[22] Paragraph 83(1)(*e*) of the Act places an ongoing obligation on the Court to provide a person named in a certificate with summaries of information and other evidence.

[23] Additionally, a person named in a security certificate has the right to have his or her interests protected in closed proceedings by a special advocate. As the public communications that have been released to Mr. Jaballah show, in the present case the special advocates have cross-examined Service witnesses, sought and obtained disclosure of further information to Mr. Jaballah, directed inquiries seeking further information from counsel for the Ministers, and moved on the closed record for an order staying the proceeding on grounds of abuse of process and *res judicata.*

[24] A person named in a security certificate is provided with an opportunity to be heard. The person may call witnesses and adduce such evidence as he or she considers appropriate.

[25] The Supreme Court has instructed judges conducting such proceedings to eschew an overly deferential approach and to engage in "a searching examination of the reasonableness of the certificate on the material placed before them." See: Charkaoui I at paragraph 38.

[26] The question the Court is to determine is whether, on all of the information and evidence before it, the certificate is reasonable at that point in time. See: *Almrei (Re)*, 2009 FC 1263 at paragraph 6. The Court does not inquire as to whether the Ministers' decision was reasonable when made, based upon the evidence and information then before the Ministers.

[27] In light of the onus, the requirement that the Ministers adduce evidence in both open and closed proceedings, the right of the person concerned to cross-examine the Ministers' witnesses and to adduce evidence, the required searching examination of the evidence led in both the open and closed hearings by the designated judge and the fact the decision is to be made on a contemporaneous (not retrospective) basis, it is not accurate to characterize the proceeding as a judicial review on an expanded evidentiary basis.

c. Consideration of the Nature of the Hearing and the Section 7 Requirements

[28] The question now before the Court is whether such a process and hearing provides a meaningful judicial assessment of the case on the basis of the evidence and the law. Does the designated judge consider the respective rights of the parties, make findings of fact on the basis of evidence and apply the law to those findings?

[29] Mr. Jaballah argues that the designated judge does not make a decision on the facts and law because the judge is not required or directed to determine the merits of the allegations of inadmissibility made against him. Instead, the judge must decide whether the certificate is

reasonable. Thus, Mr. Jaballah imports into the concept of a decision on the facts and law a requirement that the decision must be a substantive one.

[30] In oral argument, Mr. Jaballah's counsel advised that she had been unable to locate any case law that has specifically addressed this point. See: transcript November 2, 2009 at page 547 and following.

[31] For the following reasons, I have not been persuaded that the principles of fundamental justice require the Court to determine the substantive merits of the allegations of inadmissibility made against Mr. Jaballah.

[32] I begin by acknowledging the reference Mr. Jaballah relies upon at paragraph 48 of Charkaoui I to consideration of the "substantive rights of the parties as set down by law". This reference is found in a quotation taken from the earlier decision of the Supreme Court in *United States of America v. Ferras*, [2006] 2 S.C.R. 77, an extradition case. The Supreme Court noted the similar interests at stake in extradition and security certificate proceedings and found the principles of fundamental justice required similar procedures (Charkaoui I at paragraph 48). In *Ferras*, the Court considered whether the provisions of the *Extradition Act*, S.C. 1999, c. 18 for the admission of evidence, rendered the extradition process unfair. More specifically, was there a real risk that a person may be committed for extradition where the evidence did not establish conduct which, if committed in Canada, would justify committal for trial? The Supreme Court found that fundamental justice required that a person sought for extradition be accorded an

independent and impartial judicial determination, based on the facts and evidence, of the ultimate question of whether the case for extradition prescribed by subsection 29(1) of the *Extradition Act* had been established - that is, whether there was sufficient evidence to establish the case for extradition. Fundamental justice did not require determination of more.

[33] By analogy, in the present case I conclude that the principles of fundamental justice require that a person named in a security certificate must receive a meaningful determination of whether the case for inadmissibility prescribed by section 33 and subsection 34(1) of the Act have been established - that is, are there reasonable grounds to believe that the relevant matters alleged in subsection 34(1) of the Act have occurred, are occurring, or may occur. More will be said about the reasonable grounds to believe standard below.

[34] The designated judge, who Mr. Jaballah acknowledges to be independent and impartial, must engage in an independent and searching review of the information and evidence in order to independently determine whether there are reasonable grounds to believe the facts and matters alleged. Further, the judge must determine whether the facts meet the legal test of inadmissibility. See: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at paragraph 116. The designated judge reaches his or her own independent conclusion as to the reasonableness of the certificate. If the certificate is found not to be reasonable, the designated judge must quash it. Given both the nature of the hearing and the expanded evidentiary record, the designated judge may well be better situated than the Ministers

were when they reached their original opinion.

[35] In light of the protections described above, the designated judge's decision is made in consideration of the concerned person's substantive rights as defined by section 7 of the Charter and the principles of fundamental justice. So long as the legislation is properly construed, and the Court does not become (to use the words of Chief Justice McLachlin in *Ferras*) "a rubber stamp," the process is fundamentally fair to Mr. Jaballah.

[36] In this regard, while Parliament could have established another type of proceeding, the principles of fundamental justice do not require a particular type of process. It is not unusual in the immigration context for the Court to review the reasonableness of a ministerial decision. This does not entail an analysis of the merits of the decision. Rather, the Court is limited to assessing the legality of the decision at issue. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraph 31, the Supreme Court of Canada acknowledged the relative expertise of the Minister of Citizenship and Immigration in matters of national security. While, without doubt, Mr. Jaballah has an important interest in not being subject to removal from Canada, one of the fundamental responsibilities of a government is to ensure the security of its citizens by detaining and endeavouring to remove people who threaten national security. The process selected by Parliament seeks to reconcile those competing interests.

[37] Having considered the relevant contextual factors, I have concluded that the process is not fundamentally unfair to Mr. Jaballah. As the Federal Court of Appeal noted in *Charkaoui*, cited

above, "Parliament has chosen, in the interests of opportuneness, responsibility and accountability, not to give the designated judge the duty and the power to rule on the actual merits of a security certificate." See: paragraph 70. In this proceeding, Mr. Jaballah has not demonstrated that Parliament's decision was contrary to the Charter.

[38] I now turn to consider Mr. Jaballah's concerns with respect to the reasonable grounds to believe threshold.

6. Does the Reasonable Grounds Standard Comply with the Principles of Fundamental Justice?

a. Mr. Jaballah's assertion

[39] At the outset it is necessary to deal with Mr. Jaballah's interpretation of what the reasonable grounds to believe standard entails. Relying upon authorities such as *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.) at paragraph 60, and *Mugesera*, cited above, at paragraph 114, Mr. Jaballah correctly notes 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 a balance of probabilities. From this, Mr. Jaballah postulates that in issuing the certificate the Ministers "were only determining if there were reasonable grounds to believe [Mr. Jaballah] might have engaged in terrorism or subversion or might be a member of a terrorist organization." Mr. Jaballah goes on to submit that:

> When the test is lower than a balance of probabilities, it is possible to conclude, for example, that it is probable that a person is not a member, yet still conclude that it is possible that the person is. This leads to an exponential increase in the risk of error. While such risks of error may be acceptable in respect of minor or interim or preliminary matters, the decisions made in Mr. Jaballah's and like cases are final and the consequences extremely serious. The benefits of the higher standard balance of probabilities for the named person are significant in that the risk of error in decision making is markedly reduced. This must be assessed against the state's interest in maintaining the lower standard of proof, arguably to ensure all potential threats are caught. However provisions, which lack sufficient precision to identify actual threats, do not advance the protection of Canada's national security. Where identification of threats is so imprecise, this can only lead to a lack of confidence in the process and foster dissatisfaction with an unfair law. [Footnotes omitted.]

[40] The Ministers respond, and I agree, that the standard is higher than Mr. Jaballah asserts.

b. Proper Characterization of the Reasonable Grounds to Believe Standard

[41] In *Mugesera*, the Supreme Court wrote as follows concerning the standard:

> 114. The first issue raised by s. 19(1)(*j*) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. 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. <u>In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information</u>: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 *Imm. L.R.* (3d) 61 (F.C.T.D.).

> 115. In imposing this standard in the *Immigration Act* in respect of war crimes and crimes against humanity, Parliament has made clear that these most serious crimes deserve extraordinary condemnation. As a result, no person will be admissible to Canada if there are reasonable grounds to believe that he or she has committed a crime against humanity, even if the crime is not made out on a higher standard of proof. [Emphasis added.]

[42] In *Sabour*, cited and relied upon by the Supreme Court of Canada in the above quoted passage, this Court quoted from the Minister of Citizenship and Immigration's guideline for the interpretation of "reasonable grounds to believe." At paragraph 15, then Associate Chief Justice Lutfy wrote:

> The respondent's officials have developed a guideline for the interpretation of "reasonable grounds to believe" which properly situates the standard proof between mere suspicion and the balance of probabilities:
>
> > The words "reasonable grounds to believe" import a standard of proof which lies between mere suspicion and the balance of probabilities. Balance of probabilities is lower than the criminal standard of beyond reasonable doubt. The reasonable grounds standard means that there needs to be an <u>objective basis</u> for the belief and that the Immigration officer must be able to satisfy a third party such as an adjudicator or a court that there are indeed reasons to support the belief. The information on which the belief is based should be <u>compelling, credible and corroborated</u>. [Emphasis added in original.]
>
> The requirement, in the department's view, that the information be "compelling, credible and corroborated" is at least as demanding as Justice Dubé's standard of "serious possibility based on credible evidence."

[43] The requirement that the belief be objectively grounded on compelling and credible evidence is an important protection. The standard connotes a degree of probability found on credible evidence, although the required degree of probability is less than a balance of probabilities. See: *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, [2006] 1 F.C.R. 474 (C.A.) at paragraph 22.

[44] I therefore disagree with Mr. Jaballah that, for example, it is possible to conclude that it is probable a person is not a member of a terrorist organization and still have a reasonable belief that the person is a member. If the evidence establishes a probability, that is, anything more likely than not, this would preclude reasonable grounds for belief of the contrary.

[45] Further, notwithstanding the interpretive rule contained in section 33 of the Act, where there is conflicting evidence on a point, the Court must resolve such conflict by deciding which version of events is more likely to have occurred. A security certificate cannot be found to be reasonable if the Court is satisfied that the preponderance of credible evidence is contrary to the allegations of the Ministers.

[46] As my colleague Justice Mosley recently wrote, at paragraph 101 in *Almrei (Re)*, 2009 FC 1263:

> I am of the view that "reasonable grounds to believe" in s. 33 implies a threshold or test for establishing the facts necessary for an inadmissibility determination which the Ministers' evidence must meet at a minimum, as discussed by Robertson, J.A. in

> *Moreno*, above. When there has been extensive evidence from both parties and there are competing versions of the facts before the Court, the reasonableness standard requires a weighing of the evidence and findings of which facts are accepted. A certificate can not be held to be reasonable if the Court is satisfied that the preponderance of the evidence is to the contrary of that proffered by the Ministers. [Emphasis added.]

[47] This observation is, in my view, uncontroversial and I endorse it.

c. Consideration of the Reasonable Grounds to Believe Standard and the Section 7 Requirements

[48] Having properly characterized the reasonable grounds to believe standard, I now turn to Mr. Jaballah's submissions.

[49] Mr. Jaballah submits that the standard of reasonable grounds to believe, in conjunction with review on the reasonableness standard and the relaxation of the rules of evidence found in paragraph 83(1)(*h*) of the Act, does not meet the requirements of fundamental justice.

[50] Mr. Jaballah's submissions may be summarized as follows:

- There is no compelling reason to depart from the civil standard of proof.
- In domestic law, courts have permitted a lower standard than the civil standard of proof where the step being taken is interim or preliminary.
- In other contexts, courts have considered whether fairness requires a higher standard of proof, at least for factual conclusions. In such cases the seriousness of

the consequences has largely informed the analysis. Here the consequences to Mr. Jaballah are severe.

- The House of Lords has recognized in administrative law "precedent fact" cases where objective underlying facts must be verified by the courts prior to the assessment of the reasonableness of state action.
- It is unfair that Mr. Jaballah may be found to be inadmissible when the Ministers do not have to conclusively demonstrate the truth of their allegations.

[51] At the outset, it is important to deal with Mr. Jaballah's concerns with respect to paragraph 83(1)(*h*) of the Act. Mr. Jaballah is clear that he does not seek to challenge paragraph 83(1)(*h*) of the Act on constitutional grounds because "it would pose significant difficulties for the state, given the nature of national security investigations, to be required to comply with the rules relating to the admissibility of evidence in civil or criminal proceedings." However, he submits that this "relaxation of the rules of evidence such that the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law" in conjunction with the reasonable grounds to believe standard, and review on the reasonableness standard does not meet the requirements of fundamental justice.

[52] The fact that Parliament has prescribed a different criteria for the admission of evidence in the context of security certificate proceedings does not by itself make the proceeding unfair or

non-compliant with the principles of fundamental justice. Paragraph 83(1)(*h*) of the Act reflects the context of national security proceedings: for example, the difficulty admitting evidence that may have been received from a foreign intelligence agency that would constitute hearsay evidence. The discretion given in paragraph 83(1)(*h*) of the Act must be exercised on a principled basis in accordance with the rule of law and applicable principles of fundamental justice.

[53] Turning to Mr. Jaballah's other arguments, he does not expressly argue that a specific standard of proof is by itself a principle of fundamental justice. A particular standard of proof was not found to be a constituent element of a fair hearing in Charkaoui I. The Supreme Court endorsed, without adverse comment, the application of the reasonable grounds to believe standard in the context of a detention review of a person named in a security certificate. That context is one where vital liberty interests are impacted. Given the wide variety of legal processes found in criminal, civil and administrative law, it would not be possible to specify one standard of proof as a principle of fundamental justice. In every case the inquiry must take into account the context, including the nature of the proceeding and the interests at stake. The issue is whether the process, including the application of a specified test or threshold, is fundamentally unfair to the affected person.

[54] As just stated, in Charkaoui I at paragraph 39, the Supreme Court said that the reasonable grounds to believe standard was the appropriate standard for judges to apply when reviewing the

continuation of detention. Before the Federal Court of Appeal, Mr. Charkaoui had argued that such standard, adopted by Parliament to justify the issuance of a security certificate, was too minimal, and that the standard should be more stringent so as to require that the acts relied upon to establish inadmissibility be proved according to the balance of probabilities. At paragraphs 102 to 107 of its reasons, the Court of Appeal, cited above at paragraph 17, rejected that argument. By virtue of the observation of the Supreme Court of Canada at paragraph 39, that finding appears not to have been set aside by the Supreme Court of Canada. It would thus remain binding on this Court.

[55] In the event that I am wrong, I make the following additional comments.

[56] In the context of national security concerns it is relevant to consider that in the United Kingdom the House of Lords has rejected the argument that the Secretary of State was required to justify "to a high degree of civil probability the decision that a person was a danger to national security and so could be removed." See: *Secretary of State for the Home Department v. Rehman*, [2002] 1 All E.R. 122 at paragraphs 22, 29, 56 and 65. Of particular relevance are the comments of Lord Hoffmann at paragraph 56:

> 56. In any case, I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a

> broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee. [Emphasis added.]

[57] Subsequently, in *Ajouaou v. Secretary of State for the Home Department*, SC/9/2002, the Special Immigration Appeals Commission rejected the contention that where a specific past act was relied upon as part of the reasonable grounds for believing that someone's presence posed a risk to national security, that act had to be proven on the balance of probabilities. See: paragraphs 55 through 61. The first ground for the Commission's conclusion was that such a requirement would be contrary to the express provisions of the legislation which required reasonable grounds for suspecting a person was an international terrorist and reasonable grounds for believing that he or she posed a risk to national security.

[58] Here too Parliament has established a statutory threshold or test.

[59] The relevance of the English jurisprudence is that it evidences judicial recognition of the precautionary and preventative principles that underlie decisions to remove individuals believed to pose a threat to national security. Additionally, it represents judicial acknowledgement that a statutory threshold of reasonable grounds to believe does not, by itself, impair the fairness of a hearing.

[60] I have noted Mr. Jaballah's reliance upon the decision of the House of Lords in *Khawaja v. Secretary of State for the Home Department*, [1983] 1 All E.R. 765 where the Court recognized "precedent fact" cases where objective underlying facts must be verified by the courts. However, the facts and legislation which were before the Court in *Khawaja* are, in my view, distinguishable. There, the legislation provided:

> 9. Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give any such directions in respect of him as in a case within paragraph 8 above are authorised by paragraph 8(1).

[61] As Lord Scarman explained in *Khawaja* at paragraph 52, prior jurisprudence had read the words of paragraph 9 "as meaning: - not 'where a person is an illegal entrant' but 'where the immigration officer *has reasonable grounds for believing a person to be an illegal entrant'*."

[62] After reviewing the law of *habeas corpus*, *certiorari* and the precedent fact principle, Lord Scarman wrote at paragraph 65:

> Accordingly, faced with the jealous care our law traditionally devotes to the protection of the liberty of those who are subject to its jurisdiction, I find it impossible to imply into the statute words the effect of which would be to take the provision, para. 9 of Schedule 2 of the Act, "out of the 'precedent fact' category" (Lord Wilberforce, *supra*). If Parliament intends to exclude effective judicial review of the exercise of a power in restraint of liberty, it must make its meaning crystal clear.

[63] Lord Scarman then concluded that precedent facts should be determined on the civil standard.

[64] The distinguishing feature of *Khawaja* is clear. Here, the Court is not asked to imply terms into a statute which is silent on the standard to be applied. On the contrary, Parliament has clearly established the reasonable grounds to believe test. Reliance upon the precedent fact approach in this context would violate Parliament's intent.

[65] I have also reviewed carefully the cases from other domestic law contexts (for example gun licensing legislation, DNA warrants and American family law) relied upon by Mr. Jaballah. However, the contexts are sufficiently different that I do not find them to be persuasive.

[66] Ultimately, Mr. Jaballah has not established that the process, including the reasonable grounds to believe threshold, is fundamentally unfair to him. Contrary to Mr. Jaballah's assertion, the reasonable grounds to believe threshold, properly interpreted, will not permit the certificate to be upheld where the Court is of the view that it is probable the allegations against Mr. Jaballah are not made out.

[67] For these reasons, Mr. Jaballah's motion will be dismissed. No order will issue at this time as the parties have acknowledged that no interlocutory appeal lies from this decision. An opportunity will, in the future, be afforded for the parties to propose any certified question.

"Eleanor R. Dawson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-6-08

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
MAHMOUD ES-SAYYID JABALLAH

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: October 29, 30, November 2 and 3, 2009

REASONS FOR ORDER BY
THE HONOURABLE MADAM JUSTICE DAWSON

DATED: January 22, 2010

APPEARANCES:

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