Date: 20100226

Docket: DES-6-08

Citation: 2010 FC 224

Ottawa, Ontario, February 26, 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] Mahmoud Jaballah is named in a security certificate signed by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness (Ministers). The certificate has been referred to the Court pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) and the Court is in the process of determining whether the certificate is reasonable.

[2] In the course of this proceeding, Mr. Jaballah has moved for an order:

> Excluding pursuant to s. 24(2) of the *Charter* all evidence given by Mr. Jaballah in the course of the proceedings pursuant to the security certificates issued against him prior to the issuance of present security certificate of February 22, 2008 as those proceedings were conducted in breach of the principles of fundamental justice.
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> Further, or in the alternative, precluding the Ministers from using Mr. Jaballah's evidence before the IRB or in proceedings in relation to the security certificates issued against him in 1999 and 2001, in accordance with s. 13 of the *Charter*.
>
> In the further alternative, precluding the Ministers from using Mr. Jaballah's evidence before the IRB or in proceedings in relation to the security certificates issued against him as part of their case in chief, in accordance with s. 13 of the *Charter*.

[3] An initial request that the security certificate be quashed pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms, 1982*, (Charter) has been withdrawn by Mr. Jaballah.

[4] The relevant facts underpinning the motion are as follows.

1. Factual Background

[5] Mr. Jaballah is not a citizen of Canada. He and his family arrived in Canada on May 11, 1996, and claimed refugee protection. A hearing ensued before the Immigration and Refugee Board (IRB). Mr. Jaballah testified in support of that claim for a number of days, commencing in May of 1998.

[6] Mr. Jaballah's refugee claim was pending when, on March 31, 1999, the Minister of Citizenship and Immigration and the Solicitor General of Canada signed a security certificate in which they expressed their opinion that Mr. Jaballah was inadmissible to Canada on national security grounds.

[7] Mr. Jaballah was provided with a summary of the case against him and certain non-secret supporting documents. A hearing into the reasonableness of the certificate proceeded before Justice Cullen of this Court. Mr. Jaballah testified before Justice Cullen in June and August of 1999. Justice Cullen issued reasons and an order on November 2, 1999, in which he found the security certificate was not reasonable so that it was quashed.

[8] A second security certificate was issued against Mr. Jaballah on August 13, 2001. Mr. Jaballah was again provided with a summary of the case against him and non-secret supporting documents. This material was subsequently supplemented and amended. In reasons reported at [2007] F.C.J. No. 518 concerning Mr. Jaballah, Justice Layden-Stevenson wrote:

> 44. Second is the fact that the public record in this matter is voluminous. The summary of the Ministers' evidence with respect to Mr. Jaballah is extensive and has been amended and expanded over time. There is little to distinguish the evidence (documents and testimony submitted by the parties on the public record) from the information (which for convenience I will call the classified information although it is more appropriately characterized as defined in section 76 of the IRPA). [Emphasis added.]

[9] A hearing to determine the reasonableness of the second certificate proceeded before Justice MacKay of this Court. On the advice of his lawyer, Mr. Jaballah did not testify at the second proceeding and, in the course of the hearing, Mr. Jaballah's counsel withdrew. On May 23, 2003, Justice MacKay issued reasons and an order in which he found the certificate to be reasonable.

[10] That finding of reasonableness was set aside by the Federal Court of Appeal on procedural grounds in July of 2004. The matter was remitted to the Federal Court and Justice MacKay was again designated by the Chief Justice to determine whether the certificate was reasonable.

[11] On August 24, 2005, Mr. Jaballah applied for release from detention. During the detention review hearing in September of 2005, Mr. Jaballah testified for four days. His testimony and cross-examination touched upon matters relevant to the reasonableness of the certificate. The motion for release from detention was dismissed.

[12] The hearing into the reasonableness of the certificate then followed. On May 23, 2006, Justice MacKay ordered that:

> […] any testimony of Mr. Jaballah, given at this stage with respect to the August 2001 security certificate issued against him, shall be used solely for the purposes of this proceeding (Court file DES-04-01) pending further order of this Court, to be made after receiving submissions of counsel for the parties concerning appropriate limitations, if

> any, of the future use of testimony now offered by Mr. Jaballah.

[13] After hearing submissions from counsel concerning any limitations to be placed upon the future use of testimony provided by Mr. Jaballah, on August 18, 2006 Justice MacKay ordered that:

> The respondent, Mr. Jaballah, shall have use and derivative use immunity for testimony given by him in open Court in May and July 2006 in regard to the reasonableness of the Ministers' security certificate issued in August 2001 in any possible criminal proceedings against him, except any prosecution in respect of perjury or the giving of contradictory evidence, and also, unless he agrees to its use, in any subsequent proceedings concerning reasonableness of the Ministers' security certificate of August 2001 if the current proceeding should be aborted or quashed as a result of the Supreme Court of Canada's anticipated decision with respect to appeals in the cases known under the names *Almrei*, *Charkaoui*, and *Harkat.*

[14] During May and July, 2006, Mr. Jaballah testified at the hearing to determine the reasonableness of the certificate.

[15] On October 16, 2006, Justice MacKay issued reasons and an order again finding the security certificate to be reasonable.

[16] A further application for release from detention was made by Mr. Jaballah. This application was heard by Justice Layden-Stevenson, then a judge of this Court. Mr. Jaballah testified before her in October of 2006. On October 2, 2006, Justice Layden-Stevenson issued an

order on the following terms:

> IT IS HEREBY ORDERED that the Applicant, Mr. Jaballah, shall have use and derivative use immunity for testimony given by him in open Court in October, 2006 in regard to a review of detention arising as a result of the Ministers' security certificate issued in August, 2001 in any possible criminal proceedings against him, except any prosecution in respect of perjury or the giving of contradictory evidence, and also, unless he agrees to its use, in any subsequent proceedings concerning reasonableness of the Ministers' security certificate of August, 2001 if the certificate proceedings should be aborted or quashed as a result of the Supreme Court of Canada's anticipated decision with respect to appeals in the cases known under the names *Almrei, Charkaoui* and *Harkat*. [Emphasis in original.]

[17] On February 23, 2007, the Supreme Court of Canada released its judgment in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Charkaoui I). The Court determined that section 7 of the Charter was engaged in security certificate proceedings and that the then existing procedure under the Act in respect of security certificates infringed section 7 of the Charter. This was because the secrecy then required under the Act denied a person named in a security certificate the opportunity to know the case against him or her, and therefore denied the person the opportunity to meaningfully challenge the government's case.

[18] A third security certificate in respect of Mr. Jaballah was issued by the Ministers on February 22, 2008. The case now advanced against Mr. Jaballah is set out in a secret security intelligence report. A public summary and an amended public summary of the security intelligence report have been provided to Mr. Jaballah. The amended public summary discloses that, in support of their allegations, the Ministers rely upon portions of Mr. Jaballah's testimony

given before the IRB, Justice Cullen and Justice MacKay. The Ministers do not rely upon Mr. Jaballah's evidence before Justice Layden-Stevenson.

2. The Issues

[19] These reasons address the following issues:

a. Is Mr. Jaballah entitled to a remedy under subsection 24(2) of the Charter?

b. Is Mr. Jaballah entitled to a remedy under section 13 of the Charter?

c. Is this a proper case for the application of paragraph 83(1)(*h*) of the Act?

3. Is Mr. Jaballah entitled to a remedy under subsection 24(2) of the Charter?

[20] Subsection 24(2) of the Charter states:

24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.	24. (2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

[21] The first matter, therefore, for the Court to consider is whether Mr. Jaballah’s prior

testimony "was obtained in a manner that infringed or denied any rights or freedoms" guaranteed by the Charter.

[22] It is Mr. Jaballah's submission that "it is beyond controversy" that his right to a fair hearing, guaranteed by section 7 of the Charter, was violated in the previous security certificate proceedings because the prior legislative regime failed to allow him to know the case against him and to meet that case. It follows, he further submits, that his testimony before this Court in the prior proceedings was obtained in a manner that infringed his right to know the case against him and to meet that case. It should, therefore, be excluded in this proceeding. Mr. Jaballah does not seek to exclude his testimony before the IRB on this basis.

[23] The Ministers respond that Mr. Jaballah has not established that, in these circumstances, subsection 24(2) of the Charter is engaged. This is said to be because there was no connection between the Charter violation found by the Supreme Court of Canada in Charkaoui I and Mr. Jaballah's evidence which was given voluntarily and under oath. Absent a relevant Charter violation in the gathering of evidence, subsection 24(2) has no application.

[24] The phrase "obtained in a manner" was considered by the Supreme Court in *R. v. Strachan*, [1988] 2 S.C.R. 980. The Court observed that ordinarily only a few Charter rights, those protected by sections 8, 9 and 10 of the Charter, will be relevant to the gathering of evidence and therefore be relevant to the remedy of exclusion under subsection 24(2) of the

Charter. The Court rejected the requirement of a strict causal nexus because that would require courts to speculate upon whether evidence would have been discovered in the absence of the prior Charter violation. At pages 1005 and 1006, the majority of the Court wrote:

> 46. In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained. Accordingly, the first inquiry under s. 24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment, particularly where the Charter violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, though obtained following the breach of a Charter right, will be too remote from the violation to be "obtained in a manner" that infringed the Charter. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote. [Emphasis added.]

[25] Subsection 24(2) was again considered by the Supreme Court of Canada in *R. v. Goldhart*, [1996] 2 S.C.R. 463. The issue before the Court was whether the *viva voce* evidence of a witness who was arrested following an illegal search was subject to a subsection 24(2) analysis. The majority of the Court found that subsection 24(2) had no application to the facts before the Court because there was no temporal connection between the *viva voce* evidence and the Charter breach. Further, any causal connection was too remote.

[26] At page 482 of the report, the Court reviewed its prior jurisprudence, writing:

> Although Therens and Strachan warned against over-

> reliance on causation and advocated an examination of the entire relationship between the Charter breach and the impugned evidence, causation was not entirely discarded. Accordingly, while a temporal link will often suffice, it is not always determinative. It will not be determinative if the connection between the securing of the evidence and the breach is remote. I take remote to mean that the connection is tenuous. The concept of remoteness relates not only to the temporal connection but to the causal connection as well. It follows that the mere presence of a temporal link is not necessarily sufficient. In obedience to the instruction that the whole of the relationship between the breach and the evidence be examined, it is appropriate for the court to consider the strength of the causal relationship. If both the temporal connection and the causal connection are tenuous, the court may very well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the Charter. On the other hand, the temporal connection may be so strong that the Charter breach is an integral part of a single transaction. In that case, a causal connection that is weak or even absent will be of no importance. Once the principles of law are defined, the strength of the connection between the evidence obtained and the Charter breach is a question of fact. Accordingly, the applicability of s. 24(2) will be decided on a case-by-case basis as suggested by Dickson C.J. in Strachan. [Emphasis added.]

[27] Turning to the application of the law to the facts before the Court, the Court wrote as follows at page 483:

> In order to assess properly the relationship between the breach and the impugned evidence, it is important to bear in mind that it is the viva voce evidence of Mayer that is said to have been obtained in a manner that breaches the Charter. A distinction must be made between discovery of a person who is arrested and charged with an offence and the evidence subsequently volunteered by that person. The discovery of the person cannot simply be equated with securing evidence from that person which is favourable to the Crown. The person charged has the right to remain silent and in practice will usually exercise it on the advice of counsel. The prosecution has no assurance, therefore, that the person will provide any information let alone sworn testimony

that is favourable to the Crown. In this regard it has been rightly observed that testimony cannot be treated in the same manner as an inanimate object. As Brooke J.A. observed in his dissenting opinion, at p. 85:

> Testimony is the product of a person's mind and known only if and when that person discloses it. It cannot be obtained or discovered in any other way. Testimony which is heard for the first time some months after a search cannot be equated with or analogized to evidence of an inanimate thing found or seized when an illegal search is carried out.

Similarly, Rehnquist J., as he then was, in United States v. Ceccolini, 435 U.S. 268 (1978), explained the difference as follows, at pp. 276-77:

> Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence.

When the evidence is appropriately characterized as indicated above, the application of the relevant factors yields a different result from that reached by the trial judge and the majority of the Court of Appeal. In order to find a temporal link the pertinent event is the decision of Mayer to cooperate with the Crown and testify, and not his arrest. Indeed the existence of a temporal link between the illegal search and the arrest of Mayer is of virtually no consequence. Moreover, any temporal link between the illegal search and the testimony is greatly weakened by intervening events of Mayer's voluntary decision to cooperate with the police, to plead guilty and to testify. The application of the causal connection factor is to the same effect. The connection between the illegal search and the decision by Mayer to give evidence is extremely tenuous. Having regard, therefore, to the entire chain of events, I am of the opinion that the nexus between the impugned evidence and the Charter breach is remote. In this regard I agree with Brooke J.A. when he states, at pp. 85-86:

> Clearly, the testimony of Mayer cannot be said to be derivative of the breach as was the case of the testimony of Hall in R. v. Burlingham.... There may be some link to the evidence of the finding of the marijuana, but this is surely not a basis on which to say the testimony was discovered or obtained by the breach of the appellant's rights. There must be a point at which a chain connecting the breach and the testimony is sufficiently weakened as to render the testimony untainted or too remote from the original breach. If this is not so, the ramifications may be far-reaching with respect to the exclusion of testimony of a co-accused where the Crown seeks to take advantage of it. In my opinion, the link between the breach and Mayer's testimony does not survive an analysis of remoteness or attenuation.
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> For the foregoing reasons, the relationship between the infringement of s. 8 of the Charter and the viva voce evidence of Mayer does not lead me to conclude that the latter was obtained in a manner that infringes or denies a Charter right or freedom. Section 24(2) of the Charter is, therefore, not engaged and is not available to exclude the evidence. The evidence is relevant and was properly admitted at trial. The majority of the Court of Appeal was in error in setting aside the conviction.

[28] Important points in that analysis are that:

- Testimony cannot be treated in the same manner as an inanimate object (such as drug paraphernalia found during an illegal search) because there is no assurance that a person will testify or give evidence that is contrary to their interest; and
- On the facts before the Court, any temporal link was greatly weakened by the intervening events of the witness' decisions to cooperate with the police, plead guilty and testify.

[29] As the Supreme Court noted in *Strachan*, ordinarily few Charter rights will be relevant to the gathering of evidence and hence be relevant to subsection 24(2) of the Charter. However, in the present case no argument was made that section 7 of the Charter is, as a matter of law, incapable of supporting a Charter violation within the contemplation of subsection 24(2) of the Charter. I accept that section 7 can support a remedy under subsection 24(2) of the Charter. Notwithstanding, it is fair to state that the facts now before the Court provide an unusual context in which to consider subsection 24(2) of the Charter.

[30] For that reason, during the oral argument of this motion, I canvassed with counsel what would constitute relevant causal or temporal links in this context. Counsel agreed that a causal link would require a connection between Mr. Jaballah's previous testimony and the section 7 violations articulated by the Supreme Court of Canada. They further agreed that a temporal link would require some connection between when Mr. Jaballah's evidence was obtained and the time at which the Charter breach occurred. See: transcript October 30, 2009 pages 260-261 and pages 364-365.

[31] Turning to whether a causal link exists between a Charter breach and Mr. Jaballah's prior testimony, the starting point of my analysis is the articulation by the Supreme Court of Canada in Charkaoui I of the nature of the Charter infringing conduct. The Court made the following points:

- A fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case (paragraph 53);
- Under the then existing provisions of the Act, the named person might be deprived of access to some or all of the information put against him or her. This denied the person named in the certificate the ability to know the case to be met (paragraph 54);
- Ultimately, a designated judge might have to consider information that was not included in the summary provided to the person concerned. In the result, the judge might be required to decide the case, wholly or in part, on the basis of information that the named person and his or her counsel never saw. The named person may, therefore, have known nothing of the case to be met. Although technically afforded an opportunity to be heard, the person concerned might be left in the position of having no idea about what needed to be said (paragraph 55);
- Without knowledge of the information before the Court, the named person might not have been able to raise relevant legal objections or to develop relevant legal arguments. This undermined the judge's ability to come to a decision based upon all relevant facts and law (paragraphs 52 and 65);
- The right to know the case to be met is not absolute. The Supreme Court had previously recognized, and continued to recognize, that national security concerns can limit the extent of disclosure of information to an affected individual (paragraphs 57 and 58);

- In some contexts, substitutes for full disclosure might permit compliance with section 7 of the Charter. For section 7 to be satisfied, either the named person must be given the necessary disclosure, or a substantial substitute for the disclosure of that information must be found. Neither circumstance occurred under the former legislative scheme. (Paragraphs 59 and 61); and,
- The procedures then in force for determining whether a certificate was reasonable could not be justified as minimal impairments of the individual's rights to judicial determination on the facts and the law, and to know and meet the case. Mechanisms developed in Canada and abroad, such as the Security Intelligence Review Committee counsel and the special advocate system employed in the United Kingdom, illustrated that the government could do more to protect the rights of a person named in a security certificate while keeping critical information confidential (paragraphs 71 and 81).

[32] To summarize, in Charkaoui I the Supreme Court found that section 7 of the Charter requires that either a person named in a security certificate be given the opportunity to know and meet the case, or that a substantial substitute for the provision of sufficient information must be found.

[33] I now turn to consider whether there is a connection between the section 7 violation identified by the Supreme Court in Charkaoui I and Mr. Jaballah's prior testimony.

[34] In oral argument, counsel for Mr. Jaballah agreed that in order to assess whether there was any linkage between the alleged Charter breach and the content of Mr. Jaballah's prior evidence, one must know the extent to which the nature of the case to be met had been disclosed to Mr. Jaballah at the time his evidence was given. See: transcript October 30, 2009 at pages 358-359. That said, there is limited information before the Court on this motion as to the content of the summaries and the supporting evidence provided to Mr. Jaballah in the prior proceedings.

[35] Counsel for Mr. Jaballah did provide a comparison document, issued in the course of the 2001 reasonableness proceeding, that compared the content of the summaries originally provided in 1999 with the summary provided in the 2001 security certificate proceedings. Counsel for Mr. Jaballah then contrasted the lack of information said to be in the summaries with the content of Mr. Jaballah's cross-examination on September 13, 2005. However, as set out above, Justice Layden-Stevenson explained that the summary provided to Mr. Jaballah in 2001 was amended and expanded over time so that at least by the 2006 detention review hearing there was little, in her view, to distinguish the evidence in the public record from the confidential information.

[36] On this motion all of the transcripts of Mr. Jaballah's prior testimony are contained in a compendium filed with the Court. However, the summaries and supplementary disclosures provided from time to time are not.

[37] The consequence of the failure to provide the disclosure is that it is difficult to assess the extent to which Mr. Jaballah did not know the case to be met when he testified from time to time, and to then assess how that may or may not have affected the content and fairness of his testimony.

[38] A second difficulty faced by Mr. Jaballah in establishing any causal connection is that, for reasons discussed below, I find that Mr. Jaballah is not, and was not, a compellable witness in the prior security certificate proceedings. Mr. Jaballah's prior testimony before this Court was voluntary. Indeed, on the advice of his then counsel, Mr. Jaballah chose not to testify during the 2001 reasonableness hearing. As noted by the Court in *Goldhart*, it follows that the Ministers had no assurance that after the certificate was issued Mr. Jaballah would provide evidence, let alone evidence that the Ministers would later seek to rely upon. Because Mr. Jaballah was not a compellable witness, his evidence could not be "obtained" by the Ministers. Mr. Jaballah's testimony could only result from his voluntary decision to testify, a decision he made in consultation with his counsel.

[39] Further, the fact that Mr. Jaballah may have been deprived of proper disclosure of the case to be met would preclude the drawing of any adverse inference that he failed to adduce evidence at an earlier time on a point that neither he nor his counsel could know was relevant.

[40] Different considerations apply where, with the assistance of counsel, Mr. Jaballah chose to give evidence. Mr. Jaballah has not explained how the fact that he may not have known the entire case to be met would impact upon the reliability of the testimony he chose to give. Put another way, Mr. Jaballah has failed to establish how any failure to make full disclosure would have affected the reliability of his prior voluntary testimony such that it is unfair to hold him to the content of his earlier evidence.

[41] The final difficulty I see with the establishment of a causal connection between the section 7 violation and Mr. Jaballah's testimony is that the Supreme Court in Charkaoui I was careful to recognize that the right to know the case is not absolute. National security considerations can limit the extent of disclosure of information to an affected individual. It appears that the Supreme Court contemplated that a person named in a security certificate may in future have to proceed in the absence of full disclosure of the case to be met, so long as a substantial substitute is provided for that missing disclosure (for example, a special advocate). However, Mr. Jaballah submits that where a person named in a security certificate does not know the case to be met, his or her testimony will *per se* be obtained in a manner that infringes their rights under section 7 of the Charter. This submission appears to be contrary to the Supreme Court's premise that the right to know the case is not absolute.

[42] Turning to the existence of a temporal connection between the failure to disclose the case to be met and Mr. Jaballah's testimony, any failure to disclose sufficient information would

commence with the filing of a deficient summary and supporting information. The failure would continue until a proper level of disclosure was provided. The lack of evidence with respect to the state of disclosure prevents me from properly considering the existence of a temporal link, particularly in respect of Mr. Jaballah's later testimony in 2005 and 2006.

[43] The strength of the connection between the evidence obtained and the Charter breach is a question of fact. The applicability of subsection 24(2) is to be decided on a case-by-case basis. See: *Goldhart* at paragraph 40. For the above reasons, Mr. Jaballah has failed to establish the necessary causal or temporal connection between the evidence given through his testimony and the asserted Charter breach. I, therefore, find that Mr. Jaballah has failed to establish the applicability of subsection 24(2) of the Charter to the facts of this case.

[44] I now move to consider Mr. Jaballah’s submissions concerning section 13 of the Charter.

4. Is Mr. Jaballah entitled to a remedy under section 13 of the Charter?

[45] Section 13 of the Charter states:

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.	13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

[46] Mr. Jaballah submits that section 13 precludes the Ministers from using in this proceeding for any purpose any evidence he has previously given in security certificate proceedings, as well as any testimony he gave before the IRB.

[47] The Ministers respond that section 13 does not apply to this proceeding.

[48] With respect to the applicability of section 13, Mr. Jaballah argues that the immunity afforded by section 13 is not limited to criminal proceedings. He acknowledges that early cases, relying upon the interrelationship between sections 13 and 11 of the Charter, held that section 13 applied to administrative proceedings only where they exposed the individual to penalty or forfeiture or "true penal consequences". "True penal consequences" have been defined by the Supreme Court to consist of imprisonment, or a fine which by its magnitude would appear to be imposed to redress a wrong done to society at large, rather than to maintain discipline, professional integrity and standards, or regulate conduct within a limited private sphere of activity. However, Mr. Jaballah submits that "this narrow and restrictive interpretation of the application of s. 13 fails to give adequate effect to the interrelationship between s. 13 and s. 7", and cannot be sustained in light of recent Supreme Court jurisprudence. The cases relied upon are: *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248 (*Re Bagri*), Charkaoui I, and *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326 (Charkaoui II).

[49] The relevance of the two Charkaoui decisions is said to be in the Supreme Court's recognition of the grave consequences that may flow from security certificate proceedings, and the consequent requirement of a fair process that has regard to the nature of the proceedings and the interests at stake.

[50] Mr. Jaballah argues that the need for procedural protections is exceedingly high and those procedural protections must include immunity against the use by the Ministers of his prior testimony. It is here that reliance is placed by Mr. Jaballah upon *Re Bagri*.

[51] In *Re Bagri*, the Court considered the constitutionality of provisions of the *Criminal Code* that empower a judge, on the application of a peace officer, to initiate an investigative hearing where the judge is satisfied that there are reasonable grounds to believe either that a terrorism offense has been committed and that information concerning the offense or the whereabouts of the suspect is likely to be obtained, or that there are reasonable grounds to believe that a terrorism offense will be committed and that the witness has direct and material information relating to the offense or the whereabouts of a suspect. Additionally, reasonable prior attempts must have been made to obtain that information from the witness. The witness may be ordered to attend, to be examined under oath, and to produce anything in his possession or control.

[52] Subsection 83.28(10) of the *Criminal Code* goes on to provide that no person shall be excused from answering a question or producing a thing on the ground that the answer or thing

may tend to incriminate the person or subject the person to a proceeding or penalty. It also confers both use and derivative use immunity in respect of any answer given or thing produced in any criminal proceeding against the person.

[53] Thus, subsection 83.28(10) provides protection to persons compelled to testify in a judicial investigative hearings that are "equal to and, in the case of derivative use immunity, greater than the protections afforded to witnesses compelled to testify in other proceedings" including criminal trials. See: *Re Bagri* at paragraph 73.

[54] In *Re Bagri*, the Supreme Court observed that testimony given in such a proceeding might also be used against non-citizens in deportation hearings held under section 34 of the Act. The Court concluded as follows in this context:

> 77. This appeal is our first opportunity to discuss the parameters of a right against self-incrimination in the context of possible deportation or extradition hearings against, on the facts of this case, persons named under the s. 83.28 proceeding. Prior cases have focussed exclusively on the engagement of s. 7 in relation to government participation where the possibility of torture or death exists. The right against self-incrimination in the guise of testimonial compulsion has been recognized as non-absolute. Indeed, in the reasons above, we have affirmed the need for various procedural safeguards where testimonial compulsion is at issue. This Court has also expressly recognized the dire consequences which may flow from deportation and extradition, as such proceedings frequently have grave consequences for the liberty and security interests of individuals.
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> 78. <u>As in many other areas of law, a balance must be struck between the principle against self-incrimination and the state's interest in investigating offences. We believe such a balance is</u>

> struck by extending the procedural safeguards of s. 83.28 to extradition and deportation hearings. […]
>
> 79. In order to meet the s. 7 requirements, the procedural safeguards found in s. 83.28 must necessarily be extended to extradition and deportation proceedings. In *Branch, supra*, at para. 5, derivative use immunity was stated to apply both in subsequent proceedings where the witness is an accused subject to penal sanctions, and more generally to any proceeding which engages s. 7 of the *Charter*, such as extradition and deportation hearings. The protective effect of s. 83.28(10) would be significantly undercut if information gathered under s. 83.28 was used at the state's discretion in subsequent extradition or deportation proceedings. Therefore, where there is the potential for such use by the state, the hearing judge must make and, if necessary, vary the terms of an order to properly provide use and derivative use immunity in extradition or deportation proceedings. [Emphasis added.]

[55] Mr. Jaballah relies upon that conclusion to argue that:

> Although s. 13 was not considered in this case, it of course not being engaged at the point of the initial compulsion to testify, Mr. Jaballah submits these reasons are nevertheless instructive with respect to its scope and application. In effect, the Supreme Court required that *prospective* use immunity under s. 7 had to embrace not only criminal and quasi-criminal proceedings but also proceedings in respect of deportation and extradition where those proceedings entailed grave consequences for the individual. Mr. Jaballah submits that by parity of reasoning, *retrospective* use immunity under s. 13 ought to be equally encompassing. Mr. Jaballah further submits that this conclusion is bolstered by consideration of the Supreme Court's decisions in the subsequent cases of *Charkaoui (No. 1), supra*, and *Charkaoui (No. 2).* [Footnote omitted.]

[56] With respect, I do not believe that a protection crafted under section 7 of the Charter, in the specific factual context before the Court in *Re Bagri*, can alter the ambit or applicability of section 13 of the Charter. Put another way, section 7 may contain residual protections capable of

extending protection beyond that conferred by section 13 of the Charter. See: *R. v. R.J.S.*, [1995] 1 S.C.R. 451 at paragraph 91. This, however, does not amend or alter the protection provided by section 13 of the Charter.

[57] In oral argument, counsel for Mr. Jaballah acknowledged that security certificate proceedings are not criminal in nature, and do not attract true penal consequences. See: transcript October 29, 2009 at page 112.

[58] Given that acknowledgment, and my conclusion that the decision in *Re Bagri* cannot by itself extend the application of section 13 of the Charter, I find that Mr. Jaballah has failed to establish that section 13 of the Charter applies to this proceeding.

[59] There remains to consider paragraph 83(1)(*h*) of the Act.

5. Is this a proper case for the application of paragraph 83(1)(*h*) of the Act?

[60] Paragraph 83(1)(*h*) of the Act provides that in proceedings relating to security certificates:

83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	83. (1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :
[…]	[…]
(*h*) the judge may receive into evidence anything that, in the judge's opinion, is reliable and	*h*) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice

appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;	— qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

[61] During oral argument, I enquired of counsel for the parties whether paragraph 83(1)(*h*) of the Act would permit the Court to refuse to receive evidence on the ground that the evidence was not reliable or was not appropriate. Both parties agreed that it would. See: transcript October 30, 2009 at pages 328-330 and pages 379-381. For the following reasons, I believe that to be correct.

[62] On its face, paragraph 83(1)(*h*) appears intended to facilitate the admission of evidence that would otherwise be inadmissible. The provision recognizes the type of information and intelligence that is collected in the context of national security investigations. An example would be information obtained from a reliable foreign agency. The Court may be satisfied that the information is reliable and appropriate, but under traditional rules of evidence it would be inadmissible as hearsay.

[63] Notwithstanding that purpose, the use of broad and permissive words and phrases such as "may", "in the judge's opinion" and "reliable and appropriate" confer broad discretion upon the designated judge to control, on a principled basis, the information and evidence received by the Court.

[64] Support for that view is found in subsection 83(1.1) of the Act which states:

Clarification	Précision
83(1.1) For the purposes of paragraph (1)(*h*), reliable and appropriate evidence does not include information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture.	83(1.1) Pour l'application de l'alinéa (1)*h*), sont exclus des éléments de preuve dignes de foi et utiles les renseignements dont il existe des motifs raisonnables de croire qu'ils ont été obtenus par suite du recours à la torture, au sens de l'article 269.1 du *Code criminel*, ou à d'autres peines ou traitements cruels, inhumains ou dégradants, au sens de la Convention contre la torture.

[65] The clause by clause analysis of Bill C-3 states that subsection 83(1.1) was added to clarify that reliable and appropriate evidence does not include information believed on reasonable grounds to have been obtained by torture. That subsection 83(1.1) is simply a "clarification" reflects, in my view, Parliament's intent that information or evidence tainted by unreliability or inappropriateness should not be received by the Court.

[66] Having so characterized paragraph 83(1)(*h*) of the Act, I will first consider what, if any, use can be made in this proceeding of Mr. Jaballah's prior testimony given in the reasonableness and detention review hearings associated with the first two certificates. I will then move to consider what, if any, use can be made of his testimony before the IRB.

a. Mr. Jaballah's evidence given before this Court in the proceedings related to the two prior security certificates.

[67] For Mr. Jaballah's prior testimony to be received into evidence it must be reliable and appropriate. My concern is with respect to the appropriateness of receiving this evidence.

[68] In *Penetanguishene Mental Health Center v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498 the word "appropriate" was found to generally confer a very broad latitude and discretion. At the same time, the word must take its meaning from the relevant context (see paragraphs 48 and 51).

[69] In the context of security certificate proceedings, the process so impacts upon the named person's liberty interests that section 7 of the Charter is engaged. See: Charkaoui I at paragraph 18.

[70] The application of section 7 does not dictate any particular process, but requires a fair process having regard to the nature of the proceedings and the interests at stake. It is the context that determines what procedures are required in order to conform to the principles of fundamental justice. The Supreme Court has stated that factual situations that are closer to criminal proceedings will merit greater vigilance by the courts. In security certificate proceedings, the overarching principle of fundamental justice is that persons named in security certificates must be accorded a fair judicial process. See: Charkaoui I at paragraphs 20, 25 and 28.

[71] Absent exceptional circumstances that are difficult, if not impossible, to envision, where

the receipt of evidence would violate the principles of fundamental justice it would not be appropriate to receive such evidence. The question therefore becomes whether receipt of Mr. Jaballah's prior evidence before this Court would accord with the principles of fundamental justice.

[72] In order to determine whether it is appropriate to receive Mr. Jaballah's prior testimonial evidence, it is necessary to identify the nature of that evidence and the extent of the protections required by section 7. The question raised by the parties whether Mr. Jaballah is a compellable witness in these proceedings impacts upon both of these considerations. Additionally, while I have found that section 13 of the Charter does not apply to this case, I believe that the content of the protection provided by that section has some relevance to the extent of the procedural protections required by the principles of fundamental justice.

[73] The Ministers contend on this motion that Mr. Jaballah, as a person named in a security certificate, is not a compellable witness in proceedings related to the certificate. The Ministers say that this consequence flows from the operation of section 7 of the Charter and the wording of paragraph 83(1)(*g*) of the Act. See: transcript October 30, 2009 at page 266 and pages 300-302. Paragraph 83(1)(*g*) provides:

83(1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	83(1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :
[…]	[…]

(*g*) the judge shall provide the permanent resident or foreign national and the Minister with an opportunity to be heard;	*g*) il donne à l'intéressé et au ministre la possibilité d'être entendus;

[74] Mr. Jaballah disagrees, and states that he is a compellable witness such that his prior testimony should be treated as having been compelled. Mr. Jaballah supports this submission by reference to the strong presumption of compellability both at common law and in the structure of the Charter. He also relies upon the *obiter* comment of my colleague Justice Mosley in *Almrei (Re)*, [2009] F.C.J. No. 1 to the effect that Mr. Almrei "could, conceivably" be compelled to testify at a detention review hearing.

[75] Because of the consequences that I believe flow from a finding that a person named in a security certificate is not a compellable witness, it is important to resolve this issue.

[76] I acknowledge the presumption of compellability at common law and the structure of the Charter whereby section 11(*c*) only protects a person from compulsion when they are charged with an offence. I also acknowledge that the jurisprudence establishes that section 11(*c*) of the Charter does not apply in inadmissibility proceedings. See, for example, *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at page 735 where the Court wrote that deportation provisions are "not concerned with the penal consequences of the acts of individuals."

[77] However, I do not believe section 11(*c*) of the Charter to exhaust Charter protection against compellability. Just as section 7 of the Charter may provide a residual protection against self-incrimination, section 7 may provide a residual protection against compellability. Security certificates entail the detention of a non-citizen incidental to the Ministers' attempt to remove the person from the country. The seriousness of the liberty and security interests implicated in this process require commensurate procedural protections that meet the common law duty of fairness and the requirements of fundamental justice.

[78] The Ministers would only attempt to compel a person named in the security certificate to testify for the purpose of furnishing evidence that the Ministers could rely upon. In my view, to coerce such a person to furnish evidence against his or her interest, in circumstances where their liberty and security interests are so engaged, would not afford the person a fair judicial process and would be contrary to the principles of fundamental justice. This is so because the factors that favour the importance of the search for truth do not outweigh the factors that favour protecting the individual against undue compulsion by the state.

[79] I conclude, therefore, that the Ministers are correct when they concede that, by operation of section 7 of the Charter, Mr. Jaballah is not a compellable witness. I also agree that this conclusion is consistent with the language of the Act. Paragraph 83(1)(*g*) requires the judge to "provide the permanent resident or foreign national and the Minister with an opportunity to be heard." This language is not consistent with the ability to coerce testimony from any party.

Further, the Act does not provide any mechanism to compel the named person's testimony or to sanction any failure to testify.

[80] Further, as the Ministers submit, a person named in a certificate can present their case through evidence other than his or her own testimony.

[81] Finally, with respect to the *obiter* remark of Justice Mosley in *Almrei*, again as the Ministers point out, at paragraph 70(*a*) of those reasons Justice Mosley ruled that Mr. Almrei could choose not to testify at the detention review.

[82] Having found Mr. Jaballah not to be compellable, I believe that consequences flow from this conclusion.

[83] In *R. v. Dubois*, [1985] 2 S.C.R. 350 at page 353, the majority of the Supreme Court considered the value promoted by the non-compellability rule. While I agree with the Ministers that there should be no wholesale importation of criminal justice principles into what is otherwise an immigration matter, I believe it to be instructive to consider the value promoted by the non-compellability rule, particularly where the applicability of that rule is conceded by the Ministers.

[84] In *Dubois*, at page 357, the Court accepted that the non-compellability rule seeks to promote the principle of the case to meet. The Court quoted with approval the following: the

"important protection [of the non-compellability rule] is not that the accused need not testify, but that the Crown must prove its case before there can be any expectation that he will respond." The Supreme Court went on to note that the corollary of the initial right to silence was protection against self-incrimination. At pages 365 and 366, Justice Lamer (as he then was) wrote:

> 38. Having established that s. 13 is a form of protection against self-incrimination, it is still necessary to consider whether this implies that an accused who has chosen to testify should be protected in a retrial of the same offence or one included therein.
>
> 39. I do not see how the evidence given by the accused to meet the case as it was in the first trial could become part of the Crown's case against the accused in the second trial, without being in violation of s. 11(d), and to a lesser extent of s. 11(c). […]
>
> 40. To allow the prosecution to use, as part of its case, the accused's previous testimony would, in effect, allow the Crown to do indirectly what it is estopped from doing directly by s. 11(c), i.e. to compel the accused to testify. It would also permit an indirect violation of the right of the accused to be presumed innocent and remain silent until proven guilty by the prosecution, as guaranteed by s. 11(d) of the Charter. Our constitutional Charter must be construed as a system where "Every component contributes to the meaning as a whole, and the whole gives meaning to its parts" (P.A. Cote writing about statutory interpretation in The Interpretation of Legislation in Canada (1984), at p. 236). The courts must interpret each section of the Charter in relation to the others (see, for example, R. v. Carson (1983), 20 M.V.R. 54 (Ont. C.A.); R. v. Konechny, [1984] 2 W.W.R. 481 (B.C.C.A.); Reference re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1 (C.A.); R. v. Antoine, supra). To hold that a new trial is not "any other proceedings" within the meaning of s. 13 would in fact authorize an interpretation of a Charter right which would imply a violation of another Charter right. Such a result should be avoided. [Emphasis added.]

[85] The correctness of this view was recently re-affirmed by the Supreme Court of Canada in

R. v. Henry, [2005] 3 S.C.R. 609 at paragraphs 25-27 and 39-40.

[86] By parity of reasoning, allowing the Ministers to use Mr. Jaballah's prior testimony as part of their case in chief would allow the Ministers to indirectly compel Mr. Jaballah to testify.

[87] I therefore conclude that, just as compelling Mr. Jaballah to testify would violate the principles of fundamental justice, allowing the Ministers to use his prior testimony as part of their case in chief would also violate principles of fundamental justice. It follows that it would not be appropriate to receive such material into evidence.

[88] The next matter that must be considered is this. If in this proceeding Mr. Jaballah chooses to testify, can the Ministers use his prior testimony for purposes of cross-examination. More specifically, would such use be in accordance with the principles of fundamental justice?

[89] As noted by the majority of the Supreme Court in *R v. R.J.S.*, at paragraph 108, any rule demanded by the principle against self-incrimination which places a limit on compellability is in dynamic tension with the opposing principle of fundamental justice which suggests that, in the search for the truth, all relevant evidence should be available to the Court.

[90] This tension is, I believe, reflected in the following passage from *Henry*:

> 2. […] It seems a long stretch from the important purpose served by a right designed to protect against compelled self-

> incrimination to the proposition advanced by the appellants in the present case, namely that an accused can volunteer one story at his or her first trial, have it rejected by the jury, then after obtaining a retrial on an unrelated ground of appeal volunteer a different and contradictory story to a jury differently constituted in the hope of a better result because the second jury is kept in the dark about the inconsistencies.
>
> 3. The protective policy of s. 13 must be considered in light of the countervailing concern that an accused, by tailoring his or her testimony at successive trials on the same indictment, may obtain through unexposed lies and contradictions an unjustified acquittal, thereby bringing into question the credibility of the trial process itself. Effective cross-examination lies at the core of a fair trial: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 608; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 663; *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58, at para. 76; *R. v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5, at para. 41. Catching a witness in self-contradictions is one of the staples of effective cross-examination.

[91] In *Henry*, the Supreme Court reviewed prior jurisprudence that had interpreted the scope of the protection against self-incrimination guaranteed by section 13 of the Charter. The circumstances before the Court in *Henry* were that the accused persons had voluntarily testified both at their first trial and at their subsequent re-trial. At the second trial they told a different version of events and they were cross-examined on their prior inconsistent testimony. They argued before the Supreme Court that this use of their prior testimony violated their right against self-incrimination guaranteed by section 13 of the Charter. The Court concluded that section 13 does not apply to protect an accused who chooses to testify at his or her re-trial on the same indictment.

[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.

[93] For this reason, if Mr. Jaballah chooses to testify in this proceeding, the Ministers may cross-examine him upon any prior statement made in previous security certificate proceedings.

b. IRB Testimony

[94] Mr. Jaballah confined his submissions concerning his testimony before the IRB to section 13 of the Charter. Given, however, that I have concluded that section 7 of the Charter is relevant, it is necessary for me to consider whether it would be contrary to principles of fundamental justice to receive such testimony from the Ministers in support of their case.

[95] In their section 13 analysis, counsel for Mr. Jaballah argued that the IRB hearing was "another proceeding" and that he was a compellable witness before the IRB. They relied upon the fact that, at the relevant time, the governing legislation conferred on members of the IRB all of the powers and authorities of a commissioner appointed under Part I of the *Inquiries Act*, R.S., 1985, c. I-11 including the power to require a person to appear and testify. The Ministers responded that while IRB members did possess the powers of commissioners of inquiry, the

nature of the IRB proceedings and of Mr. Jaballah's testimony must be considered.

[96] I agree, and view Mr. Jaballah's evidence before the IRB to be qualitatively different from his testimony in previous certificate proceedings.

[97] Mr. Jaballah's refugee claim was one initiated as a result of his own free decision to embark on that process. Before or during the process he would have learned that in order to advance a refugee claim, he was required to file a personal information form, completed under oath, and to appear and testify under oath. Mr. Jaballah chose to do both. Throughout the refugee claim, Mr. Jaballah was not coerced into providing evidence. Any failure to file a personal information form or to attend a hearing would not have led to any penalty or proceeding for contempt. Rather, a hearing would have been held into the abandonment of the refugee claim. In the refugee hearing, Mr. Jaballah was not in an adversarial position to the state. Unless the Minister of Citizenship and Immigration was of the view that cessation or exclusion clauses applied (under subsection 2(2) of the former *Immigration Act* or sections E or F of the Article 1 of the Convention) refugee hearings held before the IRB were viewed to be non-adversarial in nature in that there was no case to be met by the claimant. This was because there was no party adverse in interest to the claimant. See: *CRDD Handbook*, March 31, 1999, pp. 1-8 to 1-12.

[98] In *R v. Fitzpatrick*, [1995] 4 S.C.R. 154, the Supreme Court affirmed that any limit on the principle against self-incrimination should be determined by reference to the two rationales which underlie that principle. They are: first, to protect against unreliable confessions, and

second, to protect against the abuse of power by the state. In *Fitzpatrick*, the Court found that neither rationale would be threatened by allowing the Crown to use, on a prosecution for over-fishing, documents the accused fisherman was compelled by regulation to provide. The Supreme Court found the protection against self-incrimination afforded by section 7 of the Charter did not elevate all records produced under statutory compulsion to the status of compelled testimony at a criminal or investigation hearing.

[99] I similarly find neither rationale to be threatened if Mr. Jaballah's IRB testimony is received in evidence. With respect to the fear of unreliable confessions, Mr. Jaballah's testimony before the IRB was not a confession. Further, I do not see how allowing that evidence to be adduced in a security certificate proceeding would increase the likelihood of false testimony before the IRB. Strong sanctions already exist for the giving of false testimony under oath. As in *Fitzpatrick*, the fear of an increased incentive to falsify evidence is not a reasonable basis on which to conclude that the principle of self-incrimination applies in the circumstances before me.

[100] With respect to the second rationale, protection against state abuse, in my view there is little danger of abusive state conduct arising out of the voluntary participation in a refugee claim and the subsequent use of that testimony.

[101] For these reasons, I find the principles of fundamental justice would not be violated, and so it would be appropriate for the Court to receive Mr. Jaballah's prior evidence before the IRB

as part of the Ministers' case. Also, if Mr. Jaballah chooses to testify in this proceeding, his IRB testimony can be used in cross-examination by the Ministers.

[102] This latter conclusion is consistent with the decision of Justice Moseley in *Almrei (Re)* where, at paragraphs 71-75, he found that if Mr. Almrei chose to testify at a detention review hearing he could be cross-examined at that hearing on the basis of his prior statements and testimony.

c. Derivative use immunity

[103] Mr. Jaballah submits that derivative use immunity applies in this proceeding. The Ministers do not disagree.

[104] The special advocates have identified one item of information in the closed record filed in support of the current security certificate which they say is derivative evidence. The Ministers agree that should the Court find that the Ministers' reliance on Mr. Jaballah's prior testimony violates one or more of Mr. Jaballah's Charter rights, the one item of information can be considered to be derivative evidence.

[105] I agree that derivative use immunity applies in this proceeding. See: *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at paragraph 5 and *Re Bagri* at paragraph 79. I am also satisfied that the information in question is causally linked to Mr. Jaballah's 1999

testimony. As such, the principles of fundamental justice would be violated if the Ministers are allowed to use this evidence in support of the certificate. It would not be appropriate to receive this information and evidence as part of the Ministers' case.

d. The protection provided by Justice MacKay's order.

[106] Justice MacKay's order of August 18, 2006 conferred use and derivative use immunity upon Mr. Jaballah in respect of his testimony given before Justice MacKay in May and July, 2006. My reasons with respect to the use that the Ministers may make of Mr. Jaballah's prior testimony before this Court make it unnecessary to consider the effect of Justice MacKay's order except in one respect. I have found that should Mr. Jaballah choose to testify, the Ministers may cross-examine him upon his prior testimony in this Court. That finding makes it necessary to consider whether Justice MacKay's order conferred any broader protection in respect of the 2006 testimony.

[107] Mr. Jaballah's supplementary submissions of December 3, 2009, set out the background to the making of the August 18, 2006 order and his argument as to why the use immunity granted extends to use for the purposes of impeachment on cross-examination. That order was delivered in the context of an application for the adjournment of further proceedings against Mr. Jaballah pending the outcome of the Supreme Court's decision in Charkaoui I. In dismissing the application, Justice MacKay found that a court order could adequately address Mr. Jaballah's concerns for the potential harm of having his evidence used by the Ministers in future hearings. Mr. Jaballah submits that it is apparent from the record that the potential harm sought to be

protected against included impeachment. He points to Mr. Norris's submissions of July 11, 2006 (at page 812):

> Mr. Jaballah ought to receive use and derivative use immunity in regard to that testimony in any other proceeding. That is to say that his very testimony could not be used either to continue to build the case against him in some future proceeding or information derived from his testimony equally ought not to be available to the Ministers or, more broadly speaking, to the Crown and the Government of Canada in building its case against Mr. Jaballah either directly as part of his case-in-chief *or as the basis for cross-examination of Mr. Jaballah*. [Emphasis in original.]

Further submissions were made regarding the scope of use immunity available to compellable as opposed to voluntary witnesses on the basis of *Henry* (May 23, 2006, pp. 276-277). This was to the effect that a compellable witness would be shielded from cross-examination on previous testimony. Mr. Jaballah submits that in light of this, and Justice MacKay's finding that he was "virtually compelled by circumstances to testify if he [was] to exercise his opportunity to establish that the Ministers' certificate is unreasonable", the order ought to be read as conferring protection not only against the use of his testimony in the Ministers' case in chief, but against its use in cross-examination as well.

[108] The Ministers respond by first arguing that the Court should not consider itself bound by Justice MacKay's order because it was premature. This is said to be because under section 13 of the Charter, the question of whether evidence is incriminating falls to be determined when one attempts to use the evidence, not when the evidence is first given. The Ministers argue that the Court should not be precluded from making its own determination and, when doing so, the Court

should be mindful that it is a principle of fundamental justice that relevant evidence should be available to the trier of fact.

[109] In their supplementary written submissions of December 3, 2009, the Ministers reiterate that Mr. Jaballah's prior testimony was voluntary and not compelled. They note that a finding of "virtual compulsion" is not an explicit finding that Mr. Jaballah was legally compelled. They further submit that:

> […] should the Court find generally that Mr. Jaballah's testimony was not compelled, it would be incongruous to interpret the Order any differently than that the use immunity provision does not restrict use of the testimony for the purposes of impeaching his credibility on cross-examination, as that testimony was not compelled. The Ministers submit that the Order should be read in such a manner that the benefit conferred by MacKay J. in granting use immunity was to solidify for Mr. Jaballah that his testimony from May and July 2006 would not be used in future proceedings against him in first instance, as he asserted had occurred in the past. The Order should not however be read as precluding use of his testimony to impeach his credibility in cross-examination as that would be an overly broad reading of the provisions of the Order.
>
> […]
>
> In fashioning the Order as he did, Justice MacKay should not be deemed to have wanted or intended to go further than the robust protections afforded by the *Charter*, the common-law and the jurisprudence which protects a person from being compelled to testify.

[110] I begin by rejecting the Ministers' submission that the Court should not consider itself bound by the August 18, 2006 order. I reject this as being an impermissible collateral attack on the order. Further, it would be repugnant for the Court to resile from the assurance given to

Mr. Jaballah in exchange for his testimony.

[111] Turning to the scope of the protection provided, some months before the order was made, in *Henry,* the Supreme Court had clarified the scope of the protection against self-incrimination provided by section 13 of the Charter. While I have found section 13 not to apply to this proceeding, I believe that section 13 informs how use immunity operates in Canadian law. This reflects the view expressed by a number of academic writers that section 13 of the Charter has made redundant section 5 of the *Canada Evidence Act*. (Prior to the enactment of the Charter section 5 of the *Canada Evidence Act* provided a narrower protection against self-incrimination.) See, for example, Paciocco & Steusser, *Law of Evidence*, 5th ed. at page 288. It is also consistent with the view expressed in *Henry*, at paragraph 23, that a consensus exists that section 13 of the Charter was intended to extend section 5 of the *Canada Evidence Act*.

[112] In *Henry,* the Supreme Court drew a distinction between the extent of the available protection against self-incrimination based upon whether prior testimony is compelled or voluntary. Thus, if an accused voluntarily testifies he can be cross-examined on his previous testimony. Conversely, prior compelled evidence is inadmissible even for the purpose of challenging a witness' credibility.

[113] The scope of the requested immunity was very much a live issue before Justice MacKay. In my view, had he intended to provide immunity greater than that available in criminal

proceedings, Justice MacKay would have expressly identified the extent of the enhanced protection. He did not, and I conclude the order provides protection consistent with that available under section 13 of the Charter in criminal proceedings.

[114] Mr. Jaballah places great reliance upon the fact that Justice MacKay noted that Mr. Jaballah was "virtually compelled by circumstances to testify." However, at law testimony is either compellable or not. The law does not recognize "virtual compellability." I believe that Justice MacKay was referring to the tactical obligation Mr. Jaballah may have felt to testify. Such tactical pressure would be relevant to the exercise of discretion as to whether to afford prospective immunity in exchange for testimony. It is irrelevant to the consideration of whether evidence was compelled. See: *R. v. Darrach*, [2000] 2 S.C.R. 443 at paragraphs 47-51.

[115] For these reasons, I find that the extent of the immunity provided in respect of Mr. Jaballah's 2006 testimony is coextensive with that which I have found is otherwise available to a person named in a security certificate. Should Mr. Jaballah decide to testify in this proceeding, he may be cross-examined upon his 2006 testimony. This conclusion would be equally applicable to the identical protection conferred by Justice Layden-Stevenson's order of October 2, 2006.

e. Final Comment

[116] For the above reasons, I have concluded that if Mr. Jaballah chooses to testify in this

proceeding, the Ministers may cross-examine him upon any prior statement made in prior security certificate proceedings or before the IRB. However, prior testimony before this Court may not be used by the Ministers as part of their case in chief.

[117] In reaching this conclusion, I have been mindful of the tension between the principle against self-incrimination and the search for the truth. In the present case, no issue arises with respect to statements Mr. Jaballah may have made to authorities prior to the institution of any of the certificate proceedings. Except for the one item of information derived from Mr. Jaballah's prior testimony (described above at paragraph 104) no information or evidence is excluded from the Ministers' case which was the product of the investigation conducted by the Canadian Security Intelligence Service. Therefore, the excluded evidence does not impact in any meaningful way upon the ability of the Ministers to investigate and prepare a case alleging inadmissibility.

[118] This, I believe, is reflected in the Ministers' acknowledgment, made in the course of submissions concerning *R. v. Grant*, [2009] 2 S.C.R. 353, that the exclusion of Mr. Jaballah's prior testimony would not "gut" the Ministers' case. See: transcript October 30, 2009 at page 290.

[119] What is in issue here is a very unique situation: where there have been three prior reasonableness hearings, and a number of associated detention review hearings, years later can

the Ministers use Mr. Jaballah’s prior testimony against him in support of their case in the current proceeding?

[120] The finding that the evidence cannot be used to build the Ministers' case in chief, but can be used in cross-examination should Mr. Jaballah decide to testify, represents the balance between protecting Mr. Jaballah's right to a fair hearing and protecting the public's right to have all relevant evidence available in the search for the truth.

6. Conclusion

[121] Mr. Jaballah's motion will, therefore, be allowed in part. The Ministers may not, as part of their case against Mr. Jaballah, rely on Mr. Jaballah’s testimony from his previous security certificate hearings. However, should Mr. Jaballah choose to testify in the current proceeding, he may be cross-examined on that same testimony. The Ministers will not be similarly restricted in their use of the evidence Mr. Jaballah gave at his IRB hearing. That testimony may be used in their case against Mr. Jaballah and for the purpose of cross-examination. Mr. Jaballah will have derivative use immunity in respect of the item of information in the closed record mentioned in these reasons. The Court will not receive this information in support of the Ministers’ case. Finally, Mr. Jaballah will not, as a result of Justice Mackay’s August 18, 2006 order, receive any broader protection in respect of his May and July, 2006 testimony than I have found he is otherwise entitled to. If he chooses to testify in the current proceeding, Mr. Jaballah may be cross-examined on that evidence as well.

[122] No order will issue at this time because the parties have acknowledged that no interlocutory appeal lies from this decision. An opportunity will in future be afforded to 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, 2009

MR. JABALLAH'S SUPPLEMENTARY OPEN SUBMISSIONS: December 3, 2009

MINISTERS' SUPPLEMENTARY OPEN AND CLOSED SUBMISSIONS: December 3, 2009
January 4, 2010

SPECIAL ADVOCATES' CLOSED SUBMISSIONS: December 9, 2009

REASONS FOR ORDER BY THE HONOURABLE MADAM JUSTICE DAWSON

DATED: February 26, 2010

APPEARANCES:

Ms. Marlys Edwardh Ms. Adriel Weaver	For Mr. Jaballah
Mr. Donald MacIntosh Mr. John Provart	For the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness

Mr. John Norris	Special Advocate

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	For the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness