Federal Court  Cour fédérale

Date: 20111130

Docket: IMM-1862-11

Citation: 2011 FC 1392

Ottawa, Ontario, November 30, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

AMPARO TORRES VICTORIA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Division of the Immigration and Refugee Board (the "Board" or the "Tribunal") dated March 4, 2011, whereby the Board declined the Applicant's request for an immediate ruling on the applicability of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter] in the proceeding. The Board Member explained that she would reserve on the *Charter* issues until she had heard all of the evidence and submissions

pertaining to the Applicant's admissibility inquiry pursuant to subsection 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons that follow, I am of the view that this application ought to be dismissed, essentially because it is for the Immigration Division to decide the *Charter* issues advanced by the Applicant before this Court can be called upon to review such a decision.

1. Facts

[3] The Applicant, Amparo Torres Victoria, is a citizen of Colombia. She was born on June 21, 1955, in the city of Cali. She claims to be a trade union and human rights activist, as well as a founding member of the Union Patriotica, a political movement which was apparently an umbrella organization for leftist political parties in Colombia. The main guerrilla force in Colombia, the Revolutionary Armed Forces of Colombia ("FARC"), was involved in peace negotiations with the government of Colombia in 1985. As part of the peace talks, the FARC agreed to become a legalized political movement and joined the Union Patriotica until they decided to abandon the peace process, in 1987.

[4] As a result of her activities, the Applicant was the subject of numerous threats to her life. She was also kidnapped, beaten, abused and detained for several months, allegedly by the paramilitaries, for her activities as a member of the Union Patriotica and for being associated with the FARC. She fled Colombia upon her release in February 1993, along with her common-law spouse and their three children. She was recognized as a refugee by the United Nations High Commission for Refugees in Mexico, and she chose to immigrate to Canada with two of her sons.

Her husband decided to remain in Mexico, to join the FARC, and to become the international media spokesman for the FARC.

[5] The Applicant's older brother is a member of the FARC, and one of her sisters was first kidnapped and then killed by the paramilitaries because of his involvement in the organization. Her two other sisters and her mother fled to Mexico and claimed refugee status when her other sister was first abducted.

[6] Having been recognized as a Convention refugee, the Applicant arrived in Canada on December 10, 1996 as a permanent resident. She then applied for citizenship on June 13, 2000.

[7] The Respondent later learned of her involvement in the FARC, and referred a report to the Immigration Division pursuant to ss. 44(2) of *IRPA* alleging that she was inadmissible under ss. 34(1)(f) due to her membership in a terrorist organization. In advancing that allegation, the Minister has relied on confidential evidence, the disclosure of which would be injurious to Canada's national security.

[8] This is the second proceeding involving the Applicant before the Immigration Division. At the first proceeding, the member decided to determine the subsection 34(1)(f) allegation on its merits, prior to assessing the Applicant's *Charter* challenge to *IRPA*'s secret evidence provisions in the context of an admissibility hearing. The member heard all the evidence and adjourned the hearing in order to prepare his decision. Unfortunately, he later advised that he would be unable to render his decision before his authority under *IRPA* had lapsed.

[9] In February 2007, the Supreme Court of Canada released its decision in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui #1*]. In that decision, the Court found, *inter alia*, that *IRPA* did not adequately protect the rights of the named person to a fair hearing, and therefore struck down s. 33 and 77-85 of *IRPA* as infringing s. 7 of the *Charter*. It is on the basis of that decision that counsel for the Applicant made a motion before the first member of the Immigration Division dealing with her case, arguing that the same reasoning applies to the non-disclosure of information in the context of an admissibility hearing pursuant to s. 86 of *IRPA*.

[10] When the second proceeding before the Immigration Division started, Parliament had adopted Bill C-3. This Bill, which came into force on February 22, 2008, was in response to the declaration of invalidity pronounced in *Charkaoui #1*. In a nutshell, these amendments to *IRPA* introduced the special advocate regime; pursuant to paragraph 83(1)(b), the designated judge shall appoint a special advocate whose name must be on a list established by the Minister of Justice. The role of the special advocate is "to protect the interests" of the named person in closed hearings (subsection 85.1(1) of *IRPA*). Of relevance for the case at bar, these amendments to *IRPA* have extended the role of special advocates to all the proceedings before the Immigration Division involving confidential evidence, including an admissibility hearing (see s. 86 of *IRPA*).

[11] In June 2008, upon the Applicant's request, the Immigration Division appointed Mr. Waldman as the Applicant's special advocate. In July 2008, the Minister provided the Applicant with the open source evidence that it intended to rely on to establish the ss. 34(1)(f) allegation. In September 2008, Member Funston was assigned to determine the ss. 34(1)(f) allegation on its

merits. In October 2008, the Applicant advanced several motions, including a request for a ruling that s. 7 of the *Charter* be engaged in the proceeding. In October 2008, Member Funston declined that request.

[12] Further open source information was adduced in August 2009. In November 2009, following the Applicant's and Mr. Waldman's request, Mr. Dadour was appointed as a second special advocate. In December 2009, Mr. Dadour was provided with copies of prior correspondence, decisions and a transcript of a pre-hearing conference. Mr. Dadour was given access to the closed material in February 2010.

[13] The special advocates filed two motions in late March 2010. Closed hearings were held in June and July 2010 on the first motion concerning the order of proceedings. In September 2010, the Immigration Division held that counsel for the Applicant should participate in the special advocates' first motion and make submissions thereon on the Applicant's behalf. Counsel was provided with a copy of the special advocates' and the Minister's submissions on the order of proceedings issue.

[14] On March 4, 2011, the Board Member ruled that the closed proceeding should proceed before the public proceeding, in order for the Applicant to be as informed as possible regarding the issues and evidence that confronted her. With the Minister presenting his secret evidence first, and the special advocates being given the opportunity to challenge that evidence and cross-examine any witnesses, this would result in as much evidence as possible being potentially disclosed to the Applicant at the proceeding, as well as any further summaries of the evidence. That being said, the Board Member did not preclude the possibility to return to the closed proceeding, after the public

proceeding, in order to enquire into the Minister's secret evidence should any new evidence arise in the public proceeding that could have led the special advocates to challenge the relevancy, reliability and sufficiency of any aspect of the Minister's secret evidence. This aspect of the Board's decision is not challenged in this application for judicial review.

[15] In early 2011, the Applicant asked the Immigration Division to make an immediate determination as to whether her s. 7 *Charter* rights were engaged in the Immigration Division proceedings concerning her. In her March 4, 2011 decision, the Board Member recognized that the issues of fairness, the principles of fundamental justice and one's rights guaranteed under the *Charter* have arisen throughout these proceedings. She also acknowledged that both public counsel and the special advocates have argued that the Applicant's s. 7 *Charter* rights are engaged, as the Applicant is subject to a proceeding that could ultimately lead to her removal from Canada and subsequent persecution. She nevertheless declined to rule immediately on this issue, explaining that she would reserve on the *Charter* issues until she had heard all the evidence and submissions on the admissibility issues:

> In my view, it is premature to make findings with respect to an individual's *Charter* rights with respect to the potential consequences of an admissibility proceeding while the issue turns upon something that, in fact, may never happen: i.e., the issuance of a removal order.

[16] This is the decision that is being challenged in the present application for judicial review, which was filed on March 22, 2011.

[17] Subsequent to that decision, the Immigration Division released another decision dated May 12, 2011 that is material to the case at bar. The special advocates have put forward a number of

preliminary motions, starting on September 11, 2009, for full disclosure of the material relating to the Applicant, including the entire Canadian Security Intelligence Service ("CSIS") file. These motions have led to additional disclosure by the Minister, who agreed voluntarily to provide further material to the special advocates, first on December 11, 2009 and then again, on December 23, 2010. Upon review of the new material, however, the special advocates renewed their application for full disclosure on February 21, 2011.

[18] The motion of the special advocates is predicated on the applicability of the decision of the Supreme Court of Canada in *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326 (*Charkaoui #2*) to the circumstances of the present case. In that decision, it will be remembered, it was held that to uphold the right to procedural fairness of people subject to a security certificate, CSIS is required to retain all its operational notes and to disclose them to the ministers for the issuance of a security certificate. Subsequently they would be required to disclose them to the designated judge for the review of the reasonableness of the certificate and of the need to detain the named person. Pursuant to ss. 85.4(1) of *IRPA*, added by Bill C-3, the special advocates shall be provided with a copy of all information and evidence that is provided to the judge by the Minister.

[19] The special advocates asserted that their request for full disclosure was in keeping with disclosure requirements set out in *Charkaoui #2*; basic administrative law principles of procedural fairness and natural justice, and the rights enjoyed by the Applicant under section 7 of the *Charter*. They were of the view that an admissibility hearing before the Immigration Division involving an application for non-disclosure is akin to a security certificate proceeding. They both involve the

non-disclosure of evidence to the subject of the proceedings, they both require that there be a substantial substitute in place of the person concerned, and the consequences to the named person in security certificate cases is the same as those encountered by the person concerned in an admissibility hearing, namely, as in this case, possible removal to Colombia.

[20] The Immigration Division granted the motion for disclosure. In doing so, Member Funston highlighted her understanding of *Charkaoui #2*, to the effect that for a security certificate proceeding to comply with fundamental justice, there must be disclosure of the materials in CSIS' possession that relates to the named person. She determined that the procedural protections mandated by *Charkaoui #2* would also apply to the Immigration Division concerning the Applicant. Similar to a security certificate proceeding, the hearing on the ss. 34(1)(f) allegation could result in a deportation order. The Immigration Division proceeding was subject to the same protection of information scheme (under *IRPA*) that applies to security certificates. Therefore, she agreed with the special advocates that there was no real difference between the consequences of a security certificate and those of the ss. 34(1)(f) proceeding before the Immigration Division.

[21] For good measure, the Immigration Division did point out one real difference between security certificate cases and section 86 proceedings in the context of an admissibility hearing. As the Board Member noted, in the case of a security certificate, the deportation order is issued first by the Minister. The relevance, reliability and sufficiency of the Minister's information is then challenged by the special advocates in the context of the closed proceedings. The order is reversed in the case of an admissibility hearing, where the relevance, reliability and sufficiency of the Minister's information is challenged by special advocates during the closed proceedings involving

the section 86 portion of the admissibility hearing. This would occur prior to any final determination as to whether or not the person concerned is inadmissible and, therefore, should be issued a deportation order. That being said, the Immigration Division found that distinction of no significance, as the ultimate determination made by the Federal Court in a security certificate proceeding and by the Immigration Division in the context of an admissibility hearing, can produce the same result (i.e. the person is or is not inadmissible pursuant to s. 34 of *IRPA*). Moreover, what happens at the closed and open proceedings before the Federal Court and the Immigration Division is virtually the same.

[22] Despite these similarities, the Minister had argued that as this is not a security certificate case, neither the *Charter* nor the disclosure requirements set out in *Charkaoui #2* apply in an admissibility hearing before the Immigration Division. Relying on Rule 3 of the *Immigration Division Rules*, SOR/2002-229 [*Rules*], which provides that "the Minister must provide …any relevant information or document that the Minister may have…", the Minister argued that there is no duty to disclose irrelevant material, nor to disclose more evidence or information to the special advocates than what would be disclosed to the person concerned.

[23] The Immigration Division rejected the Minister's arguments, and found that the circumstances of the Applicant are not those of a typical admissibility hearing for two reasons. First, she is a declared Convention refugee who was found to have a well-founded fear of persecution in Colombia. Second, she is the subject of an admissibility hearing where the Minister has applied for non-disclosure of information pursuant to section 86 of *IRPA*. Accordingly, the Board Member determined that those characteristics made the Applicant's case comparable to that

of a security certificate, and that the same procedural protections that fundamental justice would require there, would also apply to the ss. 34(1)(f) proceeding:

> [33] Both procedures involve inadmissibility on security grounds, both procedures involve protected information that is not disclosed to the subject of the proceedings, both procedures are governed by the same statutory provisions regarding the protection of information, both procedures involve Special Advocates whose role and responsibilities are identical in both proceedings. There are, in my view, many more similarities between the two proceedings than there are differences.
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> [34] In my view, the aforementioned distinguishing characteristics lead to a more apt comparison with the Security Certificate cases. Through the section 86 proceedings, Ms. Torres, potentially, is being denied the right to know the entire case to meet. I am more persuaded by the arguments of the Special Advocates in their submissions that Ms. Torres' case is more akin to the Security Certificate cases in that there is essentially no difference between the two proceedings. As such, since the procedural protections of section 7 of the *Charter* apply in the Security Certificate cases, so too should those same protections apply in this particular case.

2. Issues

[24] This application for judicial review raises two issues. The first one is whether this application is moot, in light of the decision made by the Immigration Division on May 12, 2011. The second is whether the Court should decline to rule on this application because it would be premature to do so.

3. Analysis

a) Mootness

[25] Counsel for the Minister argued that the application for judicial review is now moot as a result of the decision reached by the Immigration Division on May 12, 2011. It is suggested that the Applicant's original complaint was with respect to the delay in having the Immigration Division

determine whether her s. 7 *Charter* rights were engaged in the proceedings. Member Funston having since found that the Applicant's s. 7 *Charter* rights are engaged in the ss. 34(1)(f) proceeding and that the *Charkaoui #2* decision should apply in the circumstances of this case, it is argued that the Immigration Division has made a decision on the *Charter* engagement issue, and that it is therefore moot for all intents and purposes.

[26] Of course, a Court is always left with the discretion to hear a case even if the required tangible and concrete dispute has disappeared and the issues have become academic (see *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at pp 358-ff [*Borowski*]). According to the Respondent, however, the Court should not exercise its discretion to hear this moot judicial review, because the question in issue is specific to the Applicant in this context and is not one of public importance. The Respondent argues that the issue at bar arises sparingly, and is not one that is of a short duration and escapes review.

[27] I cannot agree with the Respondent. It is true that, at some level, the latest decision of the Immigration Division does answer the Applicant's claim that her admissibility hearing engages her section 7 rights. However, the argument she is making is at a more fundamental level. Her position is not only that the *Charter* is applicable to her case and that she is entitled to some procedural guarantees, which is the position that the special advocates seem to have taken in requesting full disclosure in accordance with *Charkaoui #2*; what she claims, in essence, is that the entire proceeding is in violation of the *Charter* because there is no valid basis for relying on secret evidence in her admissibility hearing.

[28] The main thesis of the Applicant is that reliance on secret evidence in the context of an admissibility hearing before the Immigration Division breaches her right to full answer and defence and infringes her s. 7 *Charter* rights. She further contends that the introduction of a special advocate regime was suggested as a possible cure to this *Charter* breach in *Charkaoui #1*, because the Supreme Court accepted that the protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective. It is in that context that the Supreme Court was prepared to accept that special advocates appointed to represent the interests of a named person would strike a better balance between the protection of sensitive information and the procedural rights of an individual; in other words, a revamped security certificate regime with the introduction of special advocates could be found to minimally impair a named person's right. In the absence of a security threat, argues the Applicant, a breach of her right to full answer and defence cannot be saved under section 1, even if she is represented in the closed proceedings by special advocates.

[29] One need not assess the strength of this argument, let alone rule on it, to determine whether the May 12, 2011 decision of the Immigration Board completely settles the argument put forward by the Applicant. It clearly does not. The Board Member accepted that the Applicant's s. 7 rights were engaged by virtue of the fact that she could be removed to a country where it has been established, she has a well-founded fear of persecution. The Board Member was also prepared to accept that the denial of her right to know the entire case to meet infringes the principles of fundamental justice, just as in the context of a security certificate. She clearly did not go as far as saying that the use of secret evidence in admissibility hearings irremediably vitiates her *Charter*

rights, in a manner that cannot be justified under s. 1, irrespective of the procedural safeguards that are found in *IRPA* and the *Rules* and that can be ordered by the Immigration Division.

[30] It cannot be said that the issue raised initially by the Applicant has become academic, or that the concrete and tangible dispute between the parties has disappeared. There is still an existing controversy between the Applicant and the Respondent with respect to the fundamental question that lies at the core of the Applicant's thesis. The latest decision of the Immigration Division has partially addressed the Applicant's argument, but it has not drawn the full consequences from the application of s. 7 that the Applicant would like it to draw – i.e., that the whole inadmissibility proceeding violates her constitutional rights given her particular circumstances, irrespective of any procedural safeguards she may benefit from.

[31] Before bringing this discussion to a close, it is worth quoting the following excerpt of *Borowski*, above, at p 358, where the Supreme Court articulates the rationale underlying the concept of mootness:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[32] As I have demonstrated, despite the decision reached by the Immigration Division on May 12, 2011, there remains a real controversy between the parties. The overall conformity of this admissibility hearing with the values enshrined in the *Charter* is still very much at issue. Accordingly, mootness is not a valid basis upon which this Court ought to or may decline to rule on this application for judicial review.

b) Prematurity

[33] Counsel for the Applicant has argued since the inception of the proceedings before the Immigration Division that these proceedings are in violation of s. 7 of the *Charter* and must therefore be stopped immediately. The gist of this argument is best captured by the following grounds raised in this application for leave and judicial review:

> 2. The Supreme Court of Canada has held, in *Charkaoui*, that reliance on undisclosed evidence in certificate proceedings in the Federal Court contravened section 7 of the *Charter*, and that the specific procedure was not justified under s. 1 of the Charter. Section 86 of the current IRPA permits the Immigration Division to rely on the same powers the Federal Court holds under s. 83 of the IRPA in the Applicant's admissibility hearing. The Court is asked to declare that section 86 contravenes the *Charter* as the proceeding before the Immigration Division violates her rights under s. 7 of the *Charter* and is not justified under s. 1 of the *Charter*.
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> 3. The Applicant's section 7 *Charter* right to security of the person is at stake in the admissibility hearing. The Supreme Court has determined in *Singh* that the right to security of the person is at stake in a refugee determination hearing. As the Board Member could ultimately rule that the Applicant, who is a Convention refugee and permanent resident, be ordered removed to her country of origin, her security is likewise at stake in the hearing. Furthermore, for a victim of torture who has been determined a Convention refugee, the threat of deportation is serious state-imposed psychological stress.
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> 4. The Applicant is not alleged to be a security threat. There is no justification under s. 1 of the Charter, for refusal to apply s. 7 of the Charter in the context of her admissibility hearing.

> 5. Sections 86 and 83 of the IRPA do not permit her to engage in full answer and defence. The provision of a Special Advocate is not a substitute for permitting full answer and defence. As the Applicant's right to security of the person is at stake, and limitation of her rights is not made out under s. 1 of the Charter, there should be no derogation of her right to full answer and defence.

[34] Counsel for the Applicant also initially argued that another important distinction between an inadmissibility proceeding and a security certificate lies in the fact that the adjudicator of an inadmissibility proceeding is not necessarily a lawyer or law school graduate. The implication being, of course, that a ruling by an Immigration Division member with no legal training would violate the Applicant's right to natural justice. Subsequently, counsel abandoned this argument.

[35] As previously mentioned, the Board Member refused to rule on that broad submission in her March 4, 2011 decision, preferring to leave it until she had heard all the evidence and submissions with respect to the Applicant's admissibility.

[36] Counsel for the Applicant forcefully submitted before this Court that there is no reason to wait any longer before ruling on this issue. It was argued that the Applicant has already been trapped in endless litigation for the past six years, enduring the severe stress of such a situation, and that her psychological well-being will be profoundly affected by a determination stripping her of Canada's protection, branding her as a "terrorist" and threatening her with potential removal. It is also contended that the Applicant has been financially drained of any means she had to pay for her legal fees, and that it would be a waste of energy and resources to go through the admissibility proceedings if ever the Board Member or this Court eventually agrees with the Applicant.

[37] As much as the Court sympathizes with the Applicant's plight, and despite the skilful arguments put forward by her counsel, there is no legal justification for this Court to intervene at this stage of the proceedings before the Immigration Division. I feel bound to agree with the Respondent that the Board's decision of March 4, 2011 is an interlocutory decision that it is not, as such, reviewable on judicial review (see, for example: *CB Powell Ltd v Canada (Border Services Agency)*, 2010 FC 61 at para 31, [2011] 2 FCR 332).

[38] The Immigration Division undoubtedly possesses the jurisdiction both to determine the *Charter* issues raised by the Applicant and to grant relief if it determines that there has been an infringement to the Applicant's rights. Not only is it a court of competent jurisdiction pursuant to ss. 24(1) of the *Charter*, but ss. 162(1) of *IRPA* grants each Division of the Board sole and exclusive jurisdiction to hear and determine questions of law and fact, including questions of jurisdiction. Moreover, Rule 47 of the *Rules* specifically addresses the procedure for challenging the constitutional validity, applicability or operability of any legislative provision under *IRPA*. The Immigration Division is clearly empowered to deal with the *Charter* arguments raised by the Applicant, in light of the seminal decisions of the Supreme Court (see, *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5; *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 and *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22). According to these decisions, administrative tribunals endowed with the power to decide questions of law, have the authority to resolve constitutional questions that are inextricably linked to matters properly before them, unless such questions have been explicitly withdrawn from their jurisdiction.

[39] Recently confronted with the same issue, I held that it is preferable for this Court, as a matter of policy, to rule on *Charter* issues on the basis of a full evidentiary record and of an informed decision by the administrative tribunal tasked with the responsibility to make findings of fact and law (see, *Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319). I reiterate what I then said in this respect:

> [27] The Supreme Court has held that tribunals with expertise and authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions, and should play a primary role in determining Charter issues within their jurisdiction. Writing for the majority in *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at para 16, Justice LaForest captured the usefulness and the value of a tribunal's factual findings when considering a constitutional question in the following terms:
>
> > It must be emphasized that the process of Charter decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical…The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance.
> >
> > (Quoted with approval by Mr. Justice Gonthier, for a unanimous Court, in *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 30, [2003] 2 SCR 504).

[40] This approach is all the more appropriate in the context of an application for judicial review, where the Court's mandate is to assess the propriety of the Immigration Division's decision on the issues that it has decided. It would be contrary to the rationale underlying judicial review for a court to pronounce on an issue before the administrative decision-maker had the opportunity to consider it.

[41] The March 4, 2011 decision of the Immigration Division is an interlocutory decision, which does not purport to rule definitively either on the merits of the ss. 34(1)(f) allegation nor on the issue of the *Charter* applicability to those proceedings. Moreover, there are no special circumstances warranting the immediate judicial review of this interlocutory decision. It does not cause the Applicant immediate prejudice that is not capable of being remedied by the administrative tribunal at some later juncture or by this Court, on judicial review of the final decision.

[42] Moreover, it is a well established principle that Courts should refrain from deciding constitutional issues when it is not strictly required in order to determine a case (see, for example: *Borowski*, above, at pp 363-365; *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572 at pp 1579-1580; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at pp 1099-1102). Not only should courts avoid ruling on allegations of *Charter* infringements in a factual vacuum, but the ultimate decision on the merit may well render an assessment of the *Charter* issues unnecessary.

[43] This is precisely the approach that has been followed by this Court in the comparable security certificate context. As pointed out by counsel for the Respondent, this Court has refused to assess s. 7 *Charter* claims when insufficient facts to properly assess them are not present. In *Re Almrei*, 2008 FC 1216, [2009] 3 FCR 497, Chief Justice Lutfy found that it would be premature to rule on a motion challenging the requirement that communications among special advocates and other persons must be judicially authorized for lack of conformity with the *Charter*. Having quashed the security certificate, Justice Mosley eventually found it unnecessary to consider the issue (*Re Almrei*, 2009 FC 1263, [2011] FC 1241). In *Re Harkat*, 2010 FC 1242, 380 FTR 163, Justice

Noël followed the same course of action ruling on the *Charter* issues only after having decided on the merits of the security certificate (*Re Harkat*, 2010 FC 1241, 380 FTR 61 [*Re Harkat*]).

[44] On the basis of the foregoing, the Immigration Division Member was similarly justified to reserve her decision on the broad *Charter* issue until she had the necessary factual foundation to rule on it. She did not close the door on that argument, but merely postponed its assessment until the entirety of the process pursuant to which the Applicant's admissibility had run its course. Such an approach was entirely legitimate and sensible. Section 85.4 of *IRPA* grants the Member some flexibility in the administration of the non-disclosure regime, and it is only upon completion of the process mandated by s. 83, that it will be possible to assess whether the Applicant's right to a fair hearing is compromised. To rule on the constitutionality of the scheme in the abstract would allow an interlocutory motion to take on a life of its own. This in turn may be totally unnecessary and unwarranted if the Immigration Division dismisses the allegation advanced by the Minister on the merit.

[45] Finally, it is worth mentioning that the Applicant devotes most of her submissions to the issue of section 7 applicability. The Applicant says very little as to why the use of the non-disclosure regime pursuant to s. 86 of *IRPA*, in the context of an admissibility hearing, would infringe the principles of fundamental justice. Beyond stating boldly that the Supreme Court in *Charkaoui #2*, above, accepted a limitation on the right to make full answer and defence in the context of security certificates on the basis of a security threat, counsel for the Applicant offers very little explanation as to why the non-disclosure regime revamped by Parliament in the wake of that decision, which has been found to be in compliance with the *Charter* in *Re Harkat*, above, and in *Re*

Jaballah, 2010 FC 79, [2011] 2 FCR 145, would run afoul of the principles of fundamental justice in the context of admissibility proceedings. Without prejudging the issue, the alternative rationale suggested by the Respondent – that the need to protect sensitive information is the pressing objective of s. 86 – cannot be ruled out as a possible justification of any impairment to the right to full answer and defence. The Respondent has not put forward any evidence pertaining to section 1 of the *Charter*, as no infringement of s. 7 has yet been found. This Court therefore should refrain from ruling on this issue, even if the declaration sought by the Applicant is limited to her specific fact situation.

[46] This application for judicial review is therefore dismissed.

[47] As agreed at the hearing, the parties are invited to submit serious questions of general importance. They shall have fifteen (15) days to do so and an additional five (5) days to comment on the questions submitted, if any.

[48] As for the Applicant's request that the non-publication Order of my colleague Justice MacTavish be maintained, it has not been opposed by the Respondent and shall be granted. As a result, the following pages of the Certified Tribunal Record shall not be published:

1547-1551	2272-2275	2766-2776
1561-1584	2317-2323	2805-2811
1599-1600	2325	2830-2832
1609-1620	2396-2399	3197-3241
1648	2666-2687	3366-3381
1654	2688-2689	3788-4004
1656	2698-2699	4340-4356
1699-1717	2703-2714	4369-4373
2061-2063	2724-2725	4751-4769
2078-2084	2728-2758	

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed. The parties shall have fifteen (15) days to submit questions of general importance for certification purposes, and an additional five (5) days to comment on the questions submitted, if any.

THIS COURT ALSO ORDERS THAT the following pages of the Certified Tribunal Record shall not be published:

1547-1551	2272-2275	2766-2776
1561-1584	2317-2323	2805-2811
1599-1600	2325	2830-2832
1609-1620	2396-2399	3197-3241
1648	2666-2687	3366-3381
1654	2688-2689	3788-4004
1656	2698-2699	4340-4356
1699-1717	2703-2714	4369-4373
2061-2063	2724-2725	4751-4769
2078-2084	2728-2758	

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1862-11
STYLE OF CAUSE:	AMPARO TORRES VICTORIA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	September 20, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	November 30, 2011

APPEARANCES:

Raoul Boulakia	FOR THE APPLICANT
Martin Anderson	FOR THE RESPONDENT

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