

**CASE COMMENTARY**

**A BEACON AGAINST THE PASSAGE AND  
IMPLEMENTATION OF REPRESSIVE LAW**

***Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 (23 February 2007), Docket 30762, 30929, 31178**

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**FACTS**

Following the felling, by aircraft, of the twin towers of the New York World Trade Centre on 11 September 2001, Western democracies have each passed a raft of ‘anti-terrorist’ or security legislation consistently criticised for breaching human and civil rights. On February 23<sup>rd</sup> 2007 the Canadian Supreme Court unanimously determined that provisions of *Immigration and Refugee Protection Act* 2001 (Canada) purporting to protect citizens from terrorism and terrorists infringe the Canadian Charter of Rights and Freedoms ‘the Charter’).<sup>1</sup> Albeit not going as far as the Applicants wished, the decision is an affirmation that governments and parliaments do not have carte blanche for restricting the rights of persons within a state’s borders in the name of protection and security.

In *Charkaoui and others*,<sup>2</sup> Adil Charkaoui, a Moroccan national, spent 21 months in jail under a ministerial security certificate as a suspected terrorist.<sup>3</sup> The Supreme Court denied constitutional validity of elements of a scheme established by the Immigration and Refugee Protection Act (‘the Act’) giving the Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness power to issue certificates

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<sup>1</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 (23 February 2007), Docket 30762, 30929, 31178.

<sup>2</sup> *Ibid.*

<sup>3</sup> ‘Adil Charkaoui was a permanent resident when, in May 2003, he was arrested and stated to be inadmissible under a certificate issued by the authorized ministers, and upheld by the designated judge of the Federal Court, on the basis of information that was partly secret. The portion of the evidence that was disclosed included an identification of Mr Charkaoui by persons who were probably involved in the Al-Qaeda network’ (*Adil Charkaoui v Minister of Citizenship and Immigration*, et al).

declaring foreign nationals or permanent residents inadmissible to Canada on security grounds. A person named in such a certificate could be detained indefinitely, albeit the detention was subject to review. For a permanent resident, the review was required within 48 hours. For a foreign national, automatic detention was subject to review but only after (a) a judge had determined that the certificate was ‘reasonable’; and (b) 120 days had elapsed after that judicial determination was made. No appeal or judicial review of the judge’s determination on the reasonableness of the certificate was allowed. Further, if the judge found the certificate to be reasonable, it became a removal order unable to be appealed against and immediately enforceable.

## **SUPREME COURT OF CANADA**

Under the certificate and detention review process, a person could be deprived of some or all information on the basis of which the certificate was issued or detention ordered. This was the first basis for the Court’s determination of breach of the Charter. Chief Justice McLachlin, with whom Justices Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein agreed, commenced by observing that one of “the most fundamental responsibilities of a government is to ensure the security of its citizens.”<sup>4</sup> This may mean a government must “act on information that it cannot disclose and ... detain people who threaten national security.”<sup>5</sup> However, added McLachlin, in a constitutional democracy “governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees.”

“These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.”<sup>6</sup>

McLachlan determined that the Act ‘unjustifiably’ violated sections 7, 9 and 10 (c) of the Charter:

- by allowing issuances of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person’s interests;

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<sup>4</sup> Ibid, para 1.

<sup>5</sup> Ibid, para 1.

<sup>6</sup> Ibid, para 1.

- by incorporating arbitrary time limits in the provisions for continuing detention of a foreign national.

Neither the equality right (s. 15) nor section 12 (‘cruel and unusual punishment’) of the Charter was determined to be violated, “since a meaningful detention review process offers relief against the possibility of indefinite detention.”<sup>7</sup>

### *Charter Violation – Section 7*

Section 7 of the Charter provides that everyone “has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Both the procedure for determining whether a certificate is reasonable, and that in relation to the detention, were held to ‘fail to ensure the fair hearing’ required by section 7 before the state deprives a person of the right to life, liberty and security.

The Court held, amongst other matters, that albeit deportation of a non-citizen may not in itself breach section 7, features relating to the deportation may. A feature breaching section 7 was the restriction on disclosure of information to the person against whom a certificate was issued:

“Under the [Act], the government effectively decides what can be disclosed to the named person. Not only is the named person not shown the information and not permitted to participate in proceedings involving it, but no one but the judge may look at the information with a view to protecting the named person’s interests.”<sup>8</sup>

McLachlan questioned why drafters of the Act “did not provide for special counsel to objectively review the material with a view to protecting the named person’s interests,” pointing out that this was formerly done for review of security certificates and is presently done in the United Kingdom:

“The special counsel system may not be perfect from the named person’s perspective, given that special counsel cannot reveal confidential material. But, without

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<sup>7</sup> Ibid, para 3.

<sup>8</sup> Ibid, para 86.

compromising security, it better protects the named person's s. 7 interests."<sup>9</sup>

This was not, however, the only issue. The scheme of the Act not only circumscribed the person, the subject of the certificate, or detention. As well, it placed judges in an invidious position, limiting their capacity for decision-making. Judges were required to make determinations without the benefit of the adversary system, albeit it is that system which purportedly governs the review process and is fundamental to the justice system. If full information is not disclosed to the subject person, or at least to special counsel as the Court decided it should be, the judge is deprived of any critical analysis or questioning of the material put forward to justify issue of a certificate or imposition of detention. There will be no cross-examination of those providing the information, no countering evidence, and no possibility for contradiction. There can be no useful challenge to it. Hence, both the rights of the subject person and proper operation of the justice system in itself could not sustain the procedure. The Court determined that the government and Parliament should have 12 months in which to review this aspect and amend the legislation so as to comply with the requirements of section 7 of the Charter.

*Charter Violation – Sections 9 and 10(c)*

Section 9 of the Charter says: "Everyone has the right not to be arbitrarily detained or imprisoned." Section 10(c) provides that everyone "has the right on arrest or detention ... to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."

The Court held that automatic detention of foreign nationals was not arbitrary on the ground of its being effected without regard to the personal circumstances of the detainee:

"Detention is not arbitrary where there are 'standards that are rationally related to the purpose of the power of detention' ... The triggering event for the detention of a foreign national is the issuing of a certificate stating that the foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organised criminality. The security ground is based on the danger posed

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<sup>9</sup> Ibid, para 86.

by the named person, and therefore provides a rational foundation for the detention.”<sup>10</sup>

However, the Court held that the 120 day limitation imposed on foreign nationals was arbitrary, so breaching the Charter. The Court made the obvious point that if permanent residents against whom a certificate has issued have a right to an automatic review within 48 hours, there could be no justification for setting 120 days for foreign nationals. The Court said it was clear “there may be a need for some flexibility in regarding the period for which a suspected terrorist may be detained”:

“Confronted with a terrorist threat, state officials may need to act immediately, in the absence of a fully documented case. It may take some time to verify and document the threat. Where state officials act expeditiously, the failure to meet an arbitrary target of a fixed number of hours should not mean the automatic release of the person, who may well be dangerous. However, this cannot justify the complete denial of a timely detention review. Permanent residents who pose a danger to national security are also meant to be removed expeditiously. If this objective can be pursued while providing permanent residents with a mandatory detention review within 48 hours, then how can a denial of review for foreign nationals for 120 days after the certificate is confirmed be considered a minimal impairment?”<sup>11</sup>

The Court struck the 120-day provision, and modified the Act so as to allow for review of the detention of a foreign national both before and after the certificate has been deemed reasonable.

#### *No Charter Violation – Sections 12 and 15*

Section 12 provides that everyone has “the right not to be subjected to any cruel and unusual treatment or punishment”. Section 15 holds every individual as “equal before and under the law” with the right to “the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”. Like the UN Convention on the Elimination of All Forms of Racial Discrimination, the

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<sup>10</sup> Ibid, para 89.

<sup>11</sup> Ibid, para 93.

Charter specially allows for differential treatment of citizens and non-citizens in matters relating to immigration: unlike the UN Convention, section 6 of the Charter limits this to deportation matters: only citizens are accorded the right to enter, remain in and leave Canada. Therefore, the Court held that a deportation scheme applying to non-citizens and not to citizens “does not, for that reason alone, violate s 15 of the Charter ...”<sup>12</sup>

The argument was that the Act could in some circumstances result in discrimination:

- Detention may become indefinite with deportation being put off or becoming impossible if, for example, there is no country to which a person can be deported;
- The government could ‘conceivably use the [Act] not for the purpose of deportation, but to detain the person on security ground’.<sup>13</sup>

In both situations, detention would no longer be related, “in effect or purpose, to the goal of deportation.”<sup>14</sup>

The court acknowledged the decision in *A v Secretary of State for the Home Department*,<sup>15</sup> where the English House of Lords considered legislation expressly providing for indefinite detention, which was held to go beyond the concerns of immigration legislation, so wrongfully discriminating between nationals and non-nationals.

In the present case, however, the Court decided that albeit some appellants had been held for a long time in detention, and detention was continuing for one, “the record on which we must rely does not establish that the detentions at issue have become unhinged from the state’s purpose of deportation.”<sup>16</sup> Further, the Court said that ‘more generally’, the concerns here raised would be answered in an effective review process permitting all relevant matters to be considered by the judge. This was dealt with by the Court’s earlier holding as to this aspect.

As to section 12 of the Charter, the Court held that extended periods of detention under the Act’s certificate provisions would not be cruel and unusual punishment so long as accompanied by “a process that provides regular opportunities for review of detention, taking into account all relevant factors,”<sup>17</sup> including:

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<sup>12</sup> Ibid, para 4.

<sup>13</sup> Ibid, para 130.

<sup>14</sup> Ibid, para 130.

<sup>15</sup> [2005] 3 All ER 169, [2004] UKHL 56.

<sup>16</sup> *Charkaoui*, ibid, para 131.

<sup>17</sup> Ibid, para 3, 110.

- reasons for detention;
- length of detention;
- reasons for delay in deportation;
- anticipated future length of detention; and
- availability of alternatives to detention:

*Breach of Rule of Law – Subsumed within Charter Breach/Non-Breach*

As to arguments that the Act breached the rule of law, the Court held that the provisions of the Charter covered any principle that might be characterised as a breach of the rule of law. No breach of the rule of law beyond the breaches of the Charter had occurred. It was ‘hard to see’, said the Court, ‘what rule of law could add to’ the Charter provisions, insofar as relating to the issues in the case.

**CONCLUSION**

In the past, during the glory days of the Warren Court, the United States Supreme Court could be looked to in the advancement and protection of civil rights. The European Court of Justice now plays a more significant role. The Canadian Supreme Court, too, is rapidly overtaking its neighbour in providing hope to litigants and lawyers concerned about the rapid rise of restrictive and human and civil rights denying laws and policies in countries which once moved forward progressively on these fronts. Albeit the outcome could have been more favourable to the appellants, the decision stands as a beacon against the passage and implementation of repressive laws denying just processes and, hence, just outcomes, to non-citizens. In so doing, it affirms also that even if governments and Parliaments (increasingly under the control of the executive) renounce civil liberties and human rights, the judiciary may retain the capacity for travelling in the other direction.