Federal Court of Appeal Cour d'appel fédérale

Date: 20170719

Dockets: A-478-14
A-313-12
A-479-14

Citation: 2017 FCA 157

CORAM: **STRATAS J.A.**
BOIVIN J.A.
WOODS J.A.

BETWEEN:

MOHAMED ZEKI MAHJOUB

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Heard at Toronto, Ontario, on December 7 and 8, 2016 and Ottawa, Ontario, on December 13, 2016

Judgment delivered at Ottawa, Ontario, on July 19, 2017.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BOIVIN J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] The Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration signed a security certificate under subsection 77(1) of the

Immigration and Refugee Protection Act, S.C. 2001, c. 27 stating that Mr. Mahjoub—a refugee in Canada—is not admissible in Canada due to security grounds. The security certificate states:

> We hereby certify that we were of the opinion, based on a Security Intelligence Report received and considered by us, that Mohamed Zeki Mahjoub, a foreign national, is inadmissible on grounds of security for the reasons described in section 34(1)(*b*), 34(1)(*c*), 34(1)(*d*) and 34(1)(*f*) of the *Immigration and Refugee Protection Act*.

[2] In the security certificate, the grounds for Mr. Mahjoub's inadmissibility to Canada—in other words, the portions of section 34 mentioned in the security certificate—are "engaging in or instigating the subversion by force of any government," "engaging in terrorism," "being a danger to the security of Canada," and "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage" in conduct such as "an act of subversion against a democratic government, institution or process as they are understood in Canada," "the subversion by force of any government," or "terrorism."

[3] Under section 77 of the *Immigration and Refugee Protection Act*, the Ministers referred the security certificate to the Federal Court for a determination of its reasonableness.

[4] Acting under section 78 of the *Immigration and Refugee Protection Act*, the Federal Court (*per* Blanchard J.) determined that the security certificate was reasonable: 2013 FC 1092. It found that there were reasonable grounds to believe that two inadmissibility grounds were present: paragraph 34(1)(*d*) (being a danger to the security of Canada) and paragraph 34(1)(*f*)

(being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in espionage, subversion by force of a government or terrorism).

[5] The Federal Court's judgment declaring the security certificate to be reasonable (2013 FC 1092) was the culmination of several complex, interrelated decisions in this matter: 2012 FC 669, 2013 FC 1094, 2013 FC 1095, 2013 FC 1096, 2013 FC 1097, and an additional set of confidential reasons (2013 FC 1093) (all *per* Blanchard J.). Leading up to these are 53 orders, a number of which are supported by full reasons for order (most *per* Blanchard J.).

[6] When the Federal Court determined the security certificate to be reasonable, the security certificate became "conclusive proof" that Mr. Mahjoub is inadmissible to Canada. It also became "a removal order that is in force without it being necessary to hold or continue an examination or admissibility hearing." See section 80 of the *Immigration and Refugee Protection Act*.

[7] Mr. Mahjoub appeals to this Court. Specifically, three appeals are before us:

- File A-478-14, an appeal from the Federal Court's judgment upholding the reasonableness of the certificate (2013 FC 1092).

- File A-479-14, an appeal from an order of the Federal Court (2013 FC 1095). In this order, the Federal Court, among other things, refused to grant Mr. Mahjoub's request that the proceedings be stayed on account of abuse of process. The abuse

of process was said to arise from, among other things, alleged Charter breaches, instances of procedural unfairness, and substantive errors and unfairness in the Ministers' issuance of the certificate.

- File A-313-12, an appeal from an order of the Federal Court (2012 FC 669). In this order, the Federal Court, among other things, refused to grant Mr. Mahjoub's request that the proceedings be stayed on account of abuse of process. The abuse of process was said to arise from the commingling of the parties' courtroom materials following a hearing, resulting in the infringement of legal professional and litigation privilege.

[8] For the following reasons, I would dismiss the appeals. The various grounds asserted by the appellant against the security certificate are without merit. In particular, there are no grounds to set aside the Federal Court's finding that the security certificate is reasonable. Further, there are no grounds to set aside the Federal Court's refusal to stay the proceedings permanently on account of abuse of process.

[9] The evidentiary record, largely comprised of open-source, open-court information, demonstrates that there are reasonable grounds to believe that Mr. Mahjoub was a member of two terrorist organizations and that, by maintaining contact in Canada with other terrorists, he was a danger to the security of Canada: see paragraphs 107-151, below. As for the Federal Court's legal rulings on various issues raised by Mr. Mahjoub and the manner in which the

Federal Court applied the law, a summary appears at paragraphs 76-82, below. An overall conclusion is at paragraphs 353-355, below.

B. Procedural background

[10] Only a brief summary of the proceedings against the appellant is needed; a more comprehensive review of the facts appears in the seven, highly detailed decisions of the Federal Court in this matter.

[11] Mr. Mahjoub is an Egyptian national. He arrived in Canada on December 31, 1995 and claimed refugee status. Less than a year later, the Immigration and Refugee Board granted him this status.

[12] In the meantime, Mr. Mahjoub came to the attention of the Canadian Security Intelligence Service. An investigation of Mr. Mahjoub started.

[13] The investigation led to the issuance of a security certificate against Mr. Mahjoub in June 2000. Soon after, on the authority of the security certificate, he was arrested and detained.

[14] As required by law, the security certificate was automatically referred to the Federal Court for an assessment of its reasonableness. The Federal Court determined the security certificate to be reasonable: *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 2001 FCT 1095, [2001] 4 F.C.R. 644.

[15] All of this took place under the security certificate provisions of the *Immigration Act*, R.S.C. 1985, c. I-2. In 2001, the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 was enacted in its place. The security certificate provisions in the former *Immigration Act* were not substantially changed.

[16] In 2007, while deportation proceedings against Mr. Mahjoub were underway, the constitutionality of the security certificate provisions fell for decision in the Supreme Court of Canada.

[17] The Supreme Court held that the provisions violated sections 7, 9 and 10(c) of the Charter: *Charkaoui v. Canada*, 2007 SCC 9, [2007] 1 S.C.R. 350 (*Charkaoui I*). Section 7 was violated because the person named in the security certificate did not sufficiently know the case to meet and did not have the means to meet it, given the secrecy attaching to many aspects of the security certificate procedures. Sections 9 and 10(c) were violated because the detention provisions included a lengthy period of time in which subjects were barred from challenging the lawfulness of their detention. Neither violation was saved by section 1.

[18] The Supreme Court declared the unconstitutional provisions to be of no force or effect. But it suspended its declaration for one year in order to allow Parliament to amend the Act.

[19] For present purposes, the practical effect of *Charkaoui I* was to render invalid the first security certificate issued in 2000 against Mr. Mahjoub. Having been authorized under invalid provisions, it too was invalid.

[20] Before the expiry of the one-year suspension of the declaration of invalidity, Parliament amended the invalid security certificate provisions: *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3. These new provisions came into force on February 22, 2008.

[21] On that same day, the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration issued a new security certificate against Mr. Mahjoub. This is the one the Federal Court has determined to be reasonable. This is the one now before this Court.

[22] Shortly after the Ministers issued the new security certificate against Mr. Mahjoub, the Supreme Court released a second decision concerning the security certificate proceedings against Mr. Charkaoui: *Charkaoui v. Canada*, 2008 SCC 38, [2008] 2 S.C.R. 326 (*Charkaoui II*). The Supreme Court of Canada found that the Canadian Security Intelligence Service's policy of destroying notes from interviews and intercepts in the course of intelligence gathering breached section 7 of the *Charter* because it infringed Mr. Charkaoui's right to know the case against him.

[23] *Charkaoui II*, unlike *Charkaoui I*, did not automatically render the new security certificate against Mr. Mahjoub invalid. But, broadly speaking, *Charkaoui II* says much about substantive and procedural fairness obligations in security certificate proceedings. Whether the proceedings concerning the new security certificate have complied with these obligations is just one small cluster of trees in the larger forest of issues the Federal Court had to explore.

[24] Since 2008 the appellant has continuously received disclosure materials from the Ministers in purported compliance with the requirements of *Charkaoui II.* He has also received a revised summary of the Security Intelligence Report, which formed the primary basis for the security certificate.

[25] In 2009, Mr. Mahjoub was released from detention on strict conditions. These conditions have been relaxed over time. There are many decisions concerning this.

[26] The proceedings in the Federal Court concerning the new certificate—the one now before this Court—were most complex and challenging. Due to the manner in which the parties conducted the proceedings and due to other circumstances, many motions fraught with difficult issues were brought—many on extremely short notice, many often overlapping and interrelating with other motions and many requiring prompt determination. Faced with this chaos, it fell to the Federal Court to bring order. It did so. The end product is 1,021 pages and 2,160 paragraphs of tightly-written, crystal-clear reasons.

[27] Portions of the hearings in the Federal Court and this Court were closed to the public so that submissions could be made concerning national security and intelligence evidence. A provision added by the amendments in 2008, paragraph 83(1)(*c*) of the *Immigration and Refugee Protection Act*, allows this.

[28] In these closed hearings, the interests of Mr. Mahjoub were represented by two Special Advocates who are authorized and regulated under sections 85-85.5 of the *Immigration and*

Refugee Protection Act. They have a security clearance that allows them to make submissions in the closed hearing about the confidential material. Before us, I confirm that Mr. Mahjoub's interests were expertly represented, in complete fulfilment of the purposes behind the 2008 amendments.

[29] In some cases, the Court needs to explain its decision by going into the confidential material and must issue confidential reasons alongside public, expurgated reasons. However, given the status and importance of the open court principle— "a hallmark of a democratic society" (*Re Vancouver Sun*, 2004 SCC 43, [2004] 2 S.C.R. 332 at para. 23)—to the extent possible, the Court should try to express all of its reasons for judgment publicly.

[30] Confidentiality is not required here. This public document contains all of my reasons for proposing that these appeals be dismissed.

C. What appeals are properly before this Court?

(1) Introduction

[31] After the final decision of the Federal Court, Mr. Mahjoub brought a number of appeals in this Court. Owing to interlocutory proceedings in this Court and the strict limits on the ability to appeal to this Court from matters arising under the *Immigration and Refugee Protection Act*, some complexity has arisen.

[32] As will be seen, some of the appeals before this Court are improper and must be dismissed at the outset. Nevertheless, in the end this does not matter: all of the issues raised in all of the appeals, whether or not proper, have ended up before us. Some explanation is needed as to why that is so.

(2) Procedural history in this Court

[33] Mr. Mahjoub presented to this Court a total of five notices of appeal.

[34] The Registry accepted the first notice of appeal for filing (file A-313-12). This concerned the Federal Court's decision on the loss of legal professional and litigation privilege arising from the commingling of documents (2012 FC 669).

[35] Later, following the Federal Court's decisions in 2013 FC 1092, 2013 FC 1095, 2013 FC 1096 and 2013 FC 1097, Mr. Mahjoub presented four notices of appeal. The Ministers objected to the filing of the notices of appeal. This Court allowed in part their objection.

[36] Two of the four were not permitted to be filed. One concerned 2013 FC 1096 and another concerned 2013 FC 1097. As a result, these two notices of appeal are not before us.

[37] The remaining two notices of appeal were permitted to be filed. One concerned the Federal Court's judgment upholding the reasonableness of the certificate (2013 FC 1092). This is

file A-478-14. The other concerned the Federal Court's refusal to grant Mr. Mahjoub's request that the proceedings be stayed on account of abuse of process. This is file A-479-14.

[38] As a result of the foregoing—as mentioned at the outset of these reasons—three appeals are before this Court: files A-478-14, A-479-14 and A-313-12.

(3) This Court's jurisdiction to entertain these appeals

[39] In this Court, the Ministers did not object to this Court's jurisdiction to entertain these three appeals. However, this Court must always ensure that it has the subject-matter jurisdiction to determine matters placed before it: *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 300 at para. 16; *Canadian National Railway Company v. BNSF Railway Company*, 2016 FCA 284 at paras. 22-23. This is the case even if the parties do not raise any jurisdictional concerns: *Re McKittrick Properties Ltd.*, [1926] 4 D.L.R. 44, 59 O.L.R. 199 (C.A.); *Manie v. Ford (Town)* (1918), 14 O.W.N. 83 (H.C.), aff'd (1918), 15 O.W.N. 27 (C.A.). If this Court does not have the subject-matter jurisdiction over an appeal, it cannot determine it.

[40] Therefore, at the outset, two of the three notices of appeal—those in files A-479-14 and A-313-12—must be quashed for want of jurisdiction.

[41] Under section 79 of the *Immigration and Refugee Protection Act*, appeals to this Court are strictly limited. Only when the Federal Court has made a "determination" concerning the reasonableness of the certificate under section 78 of the Act can an appeal be brought. Under

section 79 an appeal can only be "from the determination" and only if the Federal Court "certifies that a serious question of general importance is involved and states the question." For good measure, section 79 adds that "no appeal may be made from an interlocutory decision in the proceeding."

[42] In this matter, the Federal Court certified only one question for this Court's consideration. Its reasons on the issue of certification appear at 2014 FC 200. The question it certified concerned one of the issues bound up in the Federal Court's judgment that the certificate was reasonable (2013 FC 1092), a matter now before this Court in file A-478-14.

[43] The certified question is as follows:

> Do Part 1, Division 4, Sections 33 and 34, and Part 1, Division 9 of the IRPA, as well as sections 4, 6 and 7(3) of *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act* breach section 7 of the Charter by denying the named person [here, Mr. Mahjoub] the right to a fair hearing? If so, are the provisions justified under section 1?

[44] This is a valid question. Accordingly, the appeal from the Federal Court's reasonableness decision (file A-478-14) is properly before us.

[45] The notice of appeal in file A-313-12 was the subject of an earlier ruling in this Court. The Ministers moved to strike the notice of appeal for want of jurisdiction due to the bar in section 79 of the *Immigration and Refugee Protection Act*. Mr. Mahjoub submitted, among other things, that the motion giving rise to the ruling concerning the loss of privilege arising from the

comingling of documents had nothing to do with the determination of the reasonableness of the certificate. This Court declined to decide the matter by way of preliminary motion and left it for this panel to determine: 2012 FCA 218. This notice of appeal can be considered alongside the one in file A-479-14 as they are similarly situated.

[46] Both of these notices of appeal concern, in the words of section 79 of the *Immigration and Refugee Protection Act*, “interlocutory decision[s] in the proceeding” arising under the *Immigration and Refugee Protection Act*. Section 79 prohibits them from being appealed.

[47] Therefore, I would dismiss the appeals in files A-479-14 and A-313-12 for want of jurisdiction.

[48] In the end, then, only one appeal properly remains before us: the appeal in file A-478-14 concerning the Federal Court’s reasonableness decision (2013 FC 1092).

(4) The issues before this Court

[49] As mentioned, the appeal in file A-478-14 arrives in this Court by way of a certified question. But the issues to be considered on appeal are not limited to those in the certified question.

[50] Once an appeal has been brought to this Court by way of certified question, this Court must deal with the certified question and all other issues that might affect the validity of the

judgment under appeal: *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 12; *Harkat v. Canada (Citizenship and Immigration),* 2012 FCA 122, [2012] 3 F.C.R. 635 at para. 6. The certification of a question "is the trigger by which an appeal is justified" and, once triggered, the appeal concerns "the judgment itself, not merely the certified question": *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 at para. 25. Simply put, "once a case is to be considered by the Federal Court of Appeal, that Court is not restricted only to deciding the question certified"; instead, the Court may "consider all aspects of the appeal before it": *Ramoutar v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 32, [1993] 3 F.C.R. 370 at pp. 379-380.

[51] The issues in the appeal in file A-478-14 are defined by the notice of appeal: *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 218, 141 C.P.R. (4th) 165 at para. 22. Originating documents such as this are to be construed in order to gain "a realistic appreciation" of their "essential character" by "reading [them] holistically and practically without fastening onto matters of form": *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 50.

[52] Mr. Mahjoub's notice of appeal clearly places in issue the validity of the Federal Court's decisions leading up to the judgment on the reasonableness of the certificate. Mr. Mahjoub alleges in his notice of appeal that the Federal Court's judgment on the reasonableness of the certificate "concerns or is linked" with the earlier decisions.

[53] Indeed it is. Just a few examples will illustrate this. If the Federal Court should have issued a permanent stay of proceedings in its earlier decisions (2013 FC 1095 and 2012 FC 669) on account of abuse of process or the violation of privilege arising from the commingling of documents, it could not have gone on to determine whether the certificate is reasonable. If the Federal Court wrongly decided (in its confidential reasons in 2013 FC 1093, and also in 2013 FC 1094 and 2013 FC 1096) to rely upon improperly-obtained evidence, for example by way of an improper warrant or unsourced intelligence, its conclusion that the certificate was reasonable may be vitiated. Finally, if the Federal Court wrongly dismissed certain constitutional challenges advanced by Mr. Mahjoub against the security certificate provisions (2013 FC 1097), the certificate must fall.

[54] Therefore, all issues raised by Mr. Mahjoub that potentially affect the Federal Court's determination that the certificate was reasonable are before us. In practical terms, this means that pretty much all of the issues determined in 2010 FC 989, 2012 FC 669, 2013 FC 1092, 2013 FC 1094, 2013 FC 1095, 2013 FC 1096, 2013 FC 1097 and another confidential matter (2013 FC 1093) are properly before this Court.

[55] All parties proceeded in this matter on this basis. Full argument was received on all issues.

D. Analysis

(1) The standard of review

[56] The Supreme Court has confirmed that the standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 apply when this Court reviews the Federal Court's finding that a security certificate is reasonable: *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 at paras. 107-109.

[57] Therefore, for questions of law, questions of legal principle and questions of mixed fact and law where there are extricable questions of law or legal principle, the Federal Court shall be reviewed for correctness. On all other questions, particularly questions of fact, the Federal Court shall be reviewed for palpable and overriding error.

[58] Everyone knows what correctness review is: if there is error, this Court can substitute its opinion for that of the Federal Court. But not everyone knows what palpable and overriding error is.

[59] On occasion during argument, it became apparent that Mr. Mahjoub's view of what constitutes palpable and overriding error diverges from our own. As well, as will be seen, the high threshold for finding palpable and overriding error plays a significant role in this matter. Thus, at the outset of my analysis, I wish to say a few words about palpable and overriding error.

[60] In this case, many of Mr. Mahjoub's submissions focus on the Federal Court's fact-finding and its factually suffused application of legal standards to the facts, particularly on the issue of the reasonableness of the security certificate. These matters can only be reviewed for palpable and overriding error.

[61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46, cited with approval by the Supreme Court in *St. Germain*, above.

[62] "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

[63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.

[64] "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this

palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.

[65] There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. So to speak, the tree is felled not by one decisive chop but by several telling ones.

[66] Often those alleging palpable and overriding error submit that a first-instance court forgot, ignored, misconceived or gave insufficient weight to evidence because it did not mention the evidence in its reasons. Before us, Mr. Mahjoub frequently makes that submission. But a non-mention in reasons does not necessarily lead to a finding of palpable and overriding error.

[67] For one thing, first-instance courts benefit from a rebuttable presumption that they considered and assessed all of the material placed before them: *Housen* at para. 46.

[68] Further, when an appellate court considers a submission of palpable and overriding error, often it focuses on the reasons of the first-instance court. But its reasons are to be viewed in context and construed in light of both the evidentiary record before it and the submissions made to it: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paras. 35 and 55. Although the reasons may not mention a particular matter or a particular body of evidence, the evidentiary record and the context may shed light on why the first-instance court did what it did. They may also confirm that although a matter is not mentioned in the reasons, it was nevertheless within the court's contemplation and considered by it.

[69] Sometimes counsel submit that gaps in the reasons of the first-instance court show palpable and overriding error. In considering this sort of submission, appellate courts must remember certain realities about the craft of writing reasons. It is an imprecise art suffused by difficult judgment calls that cannot be easily second-guessed. This Court has described the task of a first-instance court drafting reasons in the following way:

> Immersed from day-to-day and week-to-week in a long and complex trial such as this, trial judges occupy a privileged and unique position. Armed with the tools of logic and reason, they study and observe all of the witnesses and the exhibits. Over time, factual assessments develop, evolve, and ultimately solidify into a factual narrative, full of complex interconnections, nuances and flavour.
>
> When it comes time to draft reasons in a complex case, trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.
>
> Sometimes appellants attack as palpable and overriding error the non-mention or scanty mention of matters they consider to be important. In assessing this, care must be taken to distinguish true palpable and overriding error on the one hand, from the legitimate by-product of distillation and synthesis or innocent inadequacies of expression on the other.

(*South Yukon*, above at paras. 49-51.) These observations are particularly true in a case like this with a voluminous, complex and sprawling record scattered among numerous motions and proceedings.

[70] Palpable and overriding error is often best defined by describing what it is not. If an appellate court had a free hand, it might weigh the evidence differently and come to a different result. It might be inclined to draw different inferences or see different factual implications from

the evidence. But these things, without more, do not rise to the level of palpable and overriding error.

[71] Another point of confusion among counsel in this area is the standard of review for exercises of discretion by the first-instance court.

[72] An exercise of discretion involves applying legal standards to the facts as found. For the purposes of the *Housen* framework that governs the appellate standards of review, exercises of discretion are questions of mixed fact and law: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 at paras. 28 and 71-72; *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 F.C.R. 246 at para. 18.

[73] Sometimes people are confused because not all questions of mixed fact and law are alike. Some questions of mixed fact and law are binary in nature. For example, the question whether on the facts a professional has fallen below the legal standard of care is a question of mixed fact and law that admits of only a yes or no answer. Other questions of mixed fact and law allow for a whole range of possible answers. For example, consider the question of remedy for an abuse of process, a question very much before us. Governed by the legal standards set out in the case law, a court has a range of remedial options available to it. In cases where questions of mixed fact and law give rise to that range, we tend to speak of the court as having discretion. But it is still a question of mixed fact and law for the purposes of the *Housen* framework that governs the appellate standards of review.

[74] Under the *Housen* framework, questions of mixed fact and law, including exercises of discretion, can be set aside only on the basis of palpable and overriding error—the high standard described above—unless an error on an extricable question of law or legal principle is present. So, for example, if an appellate court can discern some error in law or principle underlying the first-instance court's exercise of discretion, it can reverse the exercise of discretion on account of that error. Another way of putting this is whether the discretion was "infected or tainted" by some misunderstanding of the law or legal principle: *Housen* at para. 35.

[75] Having canvassed these basic principles of appellate review and viewing this matter—as this Court must—through the prism of the standards of review, I turn now to a general description of the nature of the submissions made to in this Court. I also offer an overall assessment of the Federal Court's decisions in this matter.

(2) Applying the standard of review: a summary conclusion

[76] In the Federal Court, Mr. Mahjoub advanced dozens of legal issues, large and small. Except on one occasion, the Federal Court did not err in law or in legal principle. On that one occasion, the Federal Court did err—but, as we shall see, it erred in Mr. Mahjoub's favour.

[77] Further, the Federal Court did not commit palpable and overriding error.

[78] Thus, there are no grounds for this Court to interfere with the Federal Court's decision. As a matter of law, its decision must stand.

[79] In this Court, Mr. Mahjoub frequently invites this Court to reassess and reweigh the evidence before the Federal Court and to substitute its fact-finding and exercises of discretion for that of the Federal Court: see, *e.g.*, paras. 12-15, 15.2-15.3, 50-53 and 67 of Mr. Mahjoub's memorandum of fact and law. Sometimes he asks this Court to draw factual inferences the Federal Court declined to draw (see *e.g.*, *ibid.* at para. 19), to find more prejudice on the facts than the Federal Court was willing to find (see, *e.g.*, *ibid.* at para. 20), to assume the Federal Court disregarded evidence that it did not mention (see, *e.g.*, *ibid*. at paras. 45 and 69), to allege the Federal Court misconceived evidence in order to encourage this Court to substitute its own factual finding for that of the Federal Court (see, *e.g.*, *ibid*. at paras. 48, 55, 64-65 and 69), and to challenge credibility findings (see, *e.g.*, *ibid.* at para. 87).

[80] The invitations must be declined. They tempt us to travel down a road the law forbids to us. Unless we see legal error, the only road we can travel is one in the direction of palpable and overriding error.

[81] For the benefit of others who one day may have to decide a case as complex this and who seek guidance, the Federal Court's seven sets of reasons—1,021 pages and 2,160 paragraphs of tightly-written, crystal-clear reasons—are a model worthy of study and emulation, an example of the execution of the judicial craft at its finest. Repeatedly and without unnecessary duplication, the Federal Court set out its methodology for fact-finding on each particular issue before it, the admissibility of evidence relevant to each issue, and its assessments of credibility and weight. Its factual conclusions, clearly and firmly expressed, relate directly to the legal tests supplied by the governing law. Even-handedness, neutrality, logic and clinical analysis were on display

throughout. See, for example, the searching examination, lucid discussion, and fair rejection of a number of the allegations and evidence offered by the Ministers: 2013 FC 1092 at paras. 218-228, 230-231, 248-252, 254-259, 262, 268-269, 292, 294-295, 447, 450, 452-454, 456-457, 501-503, 528, 574-583, 595-596, 599, 600, 609, 614 and 615.

[82] To be sure though, in no way does this play into this Court's task in these appeals. When an appellant persuades this Court that a judgment must be quashed on account of legal error or palpable and overriding error, magnificently crafted reasons and otherwise-stellar judicial method count for naught: the responsibility of this Court is to quash the judgment. But here, as I have said, there is no legal error, other than the one instance that favoured Mr. Mahjoub, and there is no palpable and overriding error.

(3) The reasonableness of the security certificate

[83] In considering the reasonableness of the security certificate, the Federal Court had much evidence before it, both from open proceedings and closed proceedings. However, it was of the view that its ruling on the reasonableness of the certificate could be based largely on testimony received in open court and from other open, available sources—not evidence whose admissibility was subject to legal challenge. As can be seen from the following summary of facts and the citations supporting them, this is very much the case.

[84] The overall task of the Federal Court was to determine "whether the certificate is reasonable" and to "quash the certificate if [the Court] determines that it is not": *Immigration and Refugee Protection Act*, section 78.

[85] As mentioned at the outset of these reasons, several section 34 grounds for inadmissibility were set out in the security certificate. The grounds are read disjunctively; if any one ground is established, the certificate is reasonable: *Almrei (Re)*, 2009 FC 1263, [2011] F.C.R. 163 at para. 59. Under section 33 of the *Immigration and Refugee Protection Act*, the facts that constitute inadmissibility include "facts arising from omissions and … include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur." In this case, the Federal Court found that two grounds for inadmissibility were established.

[86] In this Court, Mr. Mahjoub submits that the security certificate was not reasonable. He submits that the Federal Court erred in identifying the legal standard for reasonableness. He also submits that the certificate is unreasonable on the evidence.

(a) The legal standard for reasonableness

[87] Mr. Mahjoub submits that each fact alleged by the Ministers in the security certificate must be proven on the balance of probabilities and then holistically assessed as to whether the facts so proven constitute reasonable grounds to believe.

[88] The Federal Court did not accept this submission (2013 FC 1092 at paras. 41-44) and neither do I. Each fact alleged that establishes inadmissibility need only be proven on a standard of "reasonable grounds to believe." This follows from *Mugesera v. Canada (Minister of Employment and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at paragraphs 114-116 and *Charkaoui I*, above at paragraph 39.

[89] The reasonable grounds to believe standard "requires the judge to consider whether 'there is an objective basis [for the belief],…which is based on compelling and credible information'": *Charkaoui I* at para. 39, citing *Mugesera*, above at para. 114. This is "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities": *Mugesera* at para. 114. If the "preponderance of the evidence" is contrary to the version of the facts alleged by the Minister, the security certificate cannot be upheld as reasonable: *Jaballah (Re)*, 2010 FC 79, [2011] 2 F.C.R. 145 at para. 45; *Almrei (Re)*, above. The Federal Court followed this jurisprudence and applied the substantive standards prescribed by it.

[90] I also agree with the reasons of the Federal Court on the meaning of the grounds of inadmissibility set out in paragraphs 34(1)(*d*) and 34(1)(*f*) of the *Immigration and Refugee Protection Act*, the two grounds on which the Federal Court found the certificate to be reasonable: 2013 FC 1092 at paras. 50-66 and 673. These two grounds are danger to the security of Canada and membership in organizations that engaged in subversion by force and terrorism. However, some specific submissions Mr. Mahjoub makes concerning these two grounds should be examined more closely.

[91] Mr. Mahjoub submits that the Federal Court applied too broad a definition of "membership" for the purposes of paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*. I reject this.

[92] Terrorist organizations do not issue membership cards or keep membership lists. Thus, as the Federal Court found (2013 FC 1092 at para. 63), formal membership, in the sense understood for lawful organizations, is not required. Rather, certain activities that materially support a terrorist group's objectives, such as providing funds, providing false documents, recruiting or sheltering persons, can be evidence of membership in a terrorist organization even though the activities do not directly link to terrorist violence.

[93] Mr. Mahjoub also submits that there must be some evidence of an "intention to participate or contribute" to an organization. I reject this.

[94] Paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act* does not specify a mental element that must be satisfied for membership; on its face it merely sets out the status of membership, nothing more.

[95] In any event, the Federal Court found that Mr. Mahjoub had a mental element of membership: he had "an institutional link with Al Jihad and knowingly participated in that organization" and there were reasonable grounds to believe "he knew about [the terrorist] training" at a Sudanese farm where he worked and was "complicit" in it. See 2013 FC 1092 at paras. 483, 504, 628-632.

[96] The appellant also submits that under paragraph 34(1)(*f*) the person named in a security certificate must have been involved in the terrorist activity of the organization before the person can be found to be a member. I also reject this.

[97] Involvement in acts of terrorism is a ground set out in paragraph 34(1)(*c*), a ground that, in the end, the Federal Court did not rely upon in this case. To require acts of terrorism before membership can be found in paragraph 34(1)(*f*) would make this paragraph and others in subsection 34(1) redundant: *Kanagendren v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86, [2016] 1 F.C.R. 428 at paras. 20-26.

[98] Thus, overall, the Federal Court properly identified the standard to be applied in determining the reasonableness of the certificate and properly understood the grounds for inadmissibility under section 34 of the *Immigration and Refugee Protection Act*. There are no grounds to interfere on these bases.

(b) The facts found by the Federal Court relating to the reasonableness of the security certificate

[99] As mentioned above, the Federal Court found that there were reasonable grounds to believe that two inadmissibility grounds were present: paragraph 34(1)(*d*) (danger to the security of Canada) and paragraph 34(1)(*f*) (membership in two organizations that engaged in subversion by force and terrorism).

[100] The Federal Court found that there were reasonable grounds to believe that Mr. Mahjoub was a danger to the security of Canada within the meaning of paragraph 34(1)(*d*) by virtue of his continuing contact with terrorists: 2013 FC 1092 at para. 673. It also found that there were reasonable grounds to believe that Mr. Mahjoub was a member of Al Jihad and the Vanguards of Conquest, two organizations that engaged in subversion by force and terrorism within the meaning of paragraph 34(1)(*f*): *ibid*.

[101] The facts as found by the Federal Court amply demonstrate the reasonableness of the security certificate on these grounds.

[102] Most of the facts found by the Federal Court are based on testimony received in open court and from other open, available sources—news articles, periodicals, books, encyclopaedias, online database entries, publications of non-governmental organizations, think tank publications, and both foreign and Canadian government publications. These materials are of the sort often used in immigration proceedings. The Federal Court specifically held these materials to be reliable in this case, in part based on the expert testimony before it. The Federal Court was sensitive also to the weight that should be accorded to the materials and examined them on an individual basis. See generally, 2013 FC 1092 at paras. 94-106. Expert testimony, used to some extent in the Court's analysis, and other testimony, used less, was carefully assessed for credibility: see, *e.g.*, 2013 FC 1092 at paras. 124-135 and 139-171.

[103] Other evidence relied upon in support of many of the facts included documentary evidence and physical evidence found in the possession of Mr. Mahjoub when he was arrested.

[104] To the Federal Court, this was "the most reliable evidence adduced by the Ministers": 2013 FC 1092 at para. 93. It was significant too—it formed the basis of several findings that linked Mr. Mahjoub to known terrorists and established his membership in terrorist groups: 2013 FC 1092 at paras. 271, 274, 308 and 668-669.

[105] The Federal Court also relied upon secret or closed evidence, primarily documents known as Bibliographic Reference System (BRS) and other intelligence reports but only after a careful assessment of their weight: see, *e.g.*, 2013 FC 1092 at paras. 107-122. However, in the end result it found very little of this evidence necessary.

[106] The Federal Court was also extremely solicitous about the use of much of the closed evidence. In accordance with the *Immigration and Refugee Protection Act*, it excluded closed evidence for which there are reasonable grounds to believe the evidence was obtained from torture or cruel, inhuman or degrading treatment or punishment: Orders dated June 9, 2010 and August 31, 2010 in file DES-7-08. Similarly, in another Order dated June 19, 2012 in file DES-7-08, the Federal Court excluded BRS reports concerning conversations to which Mr. Mahjoub was not privy, in accordance with this Court's decision in *Harkat*, above. It also refused to rely on information tendered in private from human sources in support of the Ministers' claims.

[107] The following is a summary of the evidence the Federal Court relied upon to support the reasonableness of the security certificate.

[108] Two terrorist organizations play a central role in this factual summary: Al Jihad and the Vanguards of Conquest. A third—Al Qaeda—lurks amongst them.

[109] First, Al Jihad. Overall, the Federal Court found that the evidence of Al Jihad's involvement in the subversion by force of the government of Egypt and terrorism, "including acts of terrorism resulting in the deaths of civilians," was "overwhelming [and] compelling": 2013 FC 1092 at paras. 178-182; testimony of professors and open source evidence.

[110] Al Jihad is "a militant Egyptian Sunni Islamist organization with a blind cell structure and a strict policy of secrecy" that is involved in terrorism: 2013 FC 1092 at para. 178; testimony of Professor F. Gerges. In 1998, it became part of the "World Islamic Front for the Destruction of Jews and Crusaders": 2013 FC 1092 at para. 180; testimony of Professor Wark; publication called *Al-Quds al'-Arabi*. Al Jihad was in part responsible for the assassination of Egyptian President Anwar Sadat in October 1981 and was fully responsible for terrorism against other public officials, including car bombings, attacks on embassies, and so on: 2013 FC 1092 at para. 179; testimony of Professor Byman; testimony of M. Guay; *Al-Hayah* newspaper, August 9, 1998.

[111] Al Jihad also existed "as an independent entity or closely associated with Al Qaeda" or, put another way, they were "overlapping organizations" that "engaged in terrorism and subversion related activities": 2013 FC 1092 at paras. 180, 182, 464, 593 and 622. In the view of some, it was a "carbon copy" of Al Qaeda and adopted Al Qaeda's structure: 2013 FC 1092 at para. 180; testimony of Professor Gerges. Al Qaeda is culpable for the 1998 U.S. Embassy

bombings in Tanzania and Kenya, the bombing of the U.S.S. Cole in Yemen, the September 11, 2001 attacks in the United States, the 2002 Bali bombings, and other acts of terror.

[112] One of the contributions of Al Jihad to the terrorist repertoire—later adopted by Al Qaeda—was the idea of having two explosions, the first a small one that would kill few but draw uninjured, curious people to their windows to see what happened, the second, a bigger one designed to kill or maim them. See 2013 FC 1092 at para. 180; testimony of Professor Gerges; Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11* (Vintage: New York, 2006).

[113] Al Jihad "trained in a cell structure in the late 1980s and early 1990s" and "conducted violent attacks on Egyptian officials and embassies" under the leadership and "dictatorial rule" of Dr. Ayman Al Zawahiri: 2013 FC 1092 at paras. 178 and 188; testimony of Professor Gerges. Dr. Al Zawahiri is a member or senior official of radical Islamist organizations which have orchestrated and carried out terrorist attacks around the world, one of the founders of Al Qaeda, and the current leader of Al Qaeda: 2013 FC 1092 at para. 464. Dr. Al Zawahiri has also warned of 9/11-style attacks against Canadians, whom he regards as "second-rate Crusaders": 2013 FC 1092 at para. 667: *National Post,* 28 October 2006.

[114] The second relevant terrorist group is the Vanguards of Conquest. It "overlapped significantly in terms of personnel and leadership with Al Jihad" and formed a "combined front" with others. It "shares the same terrorist goals adopted by the [Al Jihad] which involve the violent subversion of the government of Egypt and terrorism." At "a minimum, [it is] a name

used in the media for a sub-group of [Al Jihad] or an organization used by Dr. Ayman Al Zawahiri as a front for the [Al Jihad]"; it emerged before 1993: see 2013 FC 1092 at paras. 177, 189-208, based on the testimony of Professors Gerges and Byman, the expert report of Professor Wark, and open source evidence, including the books, *The Road to Al-Qaeda* and *The Spectrum of Islamist Movements*. The Vanguards of Conquest claimed responsibility for the assassination attempts on the Egyptian Interior Minister in 1993 and Egyptian President Hosni Mubarak in 1995: 2013 FC 1092 at paras. 199 and 204, citing Professors Gerges and Byman.

[115] On the basis of the admissible evidence before it, the Federal Court found Mr. Mahjoub to be a member of these two terrorist organizations, Al Jihad and the Vanguards of Conquest.

[116] The Federal Court based this on, among other things, Mr. Mahjoub's communications, his associations with certain known terrorists and their organizations, his travels, and some false explanations he gave when questioned.

[117] As far as Mr. Mahjoub and this case are concerned, the story begins in 1991.

[118] In that year, Mr. Mahjoub moved to Sudan according to the personal information form he filled out upon arriving in Canada in 1995: Mr. Mahjoub's personal information form (Exhibit A2, Tab 3); 2013 FC 1092 at para. 460.

[119] Mr. Mahjoub's move to Sudan was "an unusual choice if your motive was economic": testimony of Professor Byman, October 28, 2010 (Appeal Book, Doc. 506.2, p. 139); 2013 FC

1092 at para. 460. As Mr. Mahjoub himself stated, “it was very difficult to obtain a job in Sudan, even for Sudanese”: 2013 FC 1092 at para. 460: Mr. Mahjoub’s personal information form. By 1992, Mr. Mahjoub was “without status as an illegal migrant in a difficult job market” in Sudan: 2013 FC 1092 at para. 621. But despite that status, he remained in Sudan: Mr. Mahjoub’s personal information form.

[120] Also in 1991—the same year that Mr. Mahjoub moved to Sudan—Al Qaeda and Al Jihad moved from Afghanistan, “where the jihad was winding down” to Sudan “whose National Islamic Front-backed regime harboured them”: 2013 FC 1092 at paras. 458 and 597; testimony of Mr. Al Fadl from the trial in *United States v. Bin Laden*, decision reported at 146 F. Supp. 2d 373 (S.D.N.Y. 2001) (Exhibit A12); testimony of Professors Byman, Gerges and Wark. Around this time, Mr. Bin Laden and other “[Al Jihad] and Al Qaeda elements” also moved to Sudan: Expert Report of Professor Wark, Exhibit R24, at p.14; 2013 FC 1092 at paras. 458-459 and 623. “Direct and indirect terrorist contacts of Mr. Mahjoub” also moved to Sudan at this time: 2013 FC 1092 at para. 459.

[121] Despite the economic situation in Sudan, the difficulty of anyone getting a job in Sudan and Mr. Mahjoub’s status as an illegal immigrant in Sudan, Mr. Mahjoub nevertheless was able to find a job. In his personal information form supporting his claim for refugee status upon arrival in Canada some years later, Mr. Mahjoub said he was an agricultural engineer on the Al-Damazin farm while in Sudan: 2013 FC 1092 at paras. 462-463.

[122] In fact, Mr. Mahjoub was much more than an ordinary agricultural engineer.

[123] Although Mr. Mahjoub had just arrived in Sudan as an illegal migrant and although he had “no prior experience in managing an enterprise,” suddenly he was given a “top executive position” as the Deputy Director-General or “second-in-command” of an entire company, the Althemar Almubarakah Agriculture Company, and manager of the Damazin Project for Pluvial Agriculture on the Al-Damazin farm: 2013 FC 1092 at paras. 75, 462-463, 477, 481, 490 and 621; October 17, 1993 reference letter from Mr. Al Duri to Mr. Mahjoub providing details of his employment for Althemar (Exhibit A2, Tab 10). Mr. Mahjoub omitted this information in his personal information form when claiming refugee status in Canada.

[124] While the wages for the average Sudanese employee were less than $50 U.S. monthly, Mr. Mahjoub was earning “in the range of $600.00 U.S. monthly excluding any…top-up”: 2013 FC 1092 at paras. 484-486; testimony of Mr. Al Fadl in *United States v. Bin Laden*, above. This was a “conservative estimate” and in fact his salary could have been double that: 2013 FC 1092 at para. 485; testimony of Mr. Al Fadl in *United States v. Bin Laden*; *The Looming Tower*, above.

[125] The company and the farm were far from ordinary.

[126] Both were owned by the then-leader of Al Qaeda, Mr. Osama Bin Laden: 2013 FC 1092 at paras. 75 and 464; testimony of Professor Wark, confirmed by the testimony of Mr. Al Fadl. No one disputes this fact: 2013 FC 1092 at para. 464. Al Qaeda maintained contact with the farm by radio: 2013 FC 1092 at para. 478; testimony of Mr. Al Fadl.

[127] Mr. Mahjoub's immediate supervisor was Mr. Al Duri, a member of Al Jihad: 2013 FC 1092 at paras. 75, 402, 464. Mr. Mahjoub would have "worked closely" with him: 2013 FC 1092 at paras. 75, 86, 380, 401-402, 483, 613 and 621; October 17, 1993 reference letter from Mr. Al Duri to Mr. Mahjoub; testimony of Professors Wark and Byman.

[128] Mr. Mahjoub's rank and responsibility in the company were similar to that of Mr. Salim, one of Mr. Bin Laden's most trusted associates, a founding member of Al Qaeda and a member of Al Jihad: 2013 FC 1092 at paras. 390 and 483; *New York Times* article, December 3, 2008; Mr. Al Fadl transcript.

[129] When it came to hiring employees—particularly senior officers like Mr. Mahjoub—Mr. Bin Laden "had a preoccupation with the ideological purity of his associates," "took great care in screening" them and "adopted significant security measures" in doing so: 2013 FC 1092 at para. 478; testimony of Professor Byman; transcript of the evidence of Mr. Al Fadl from *United States v. Bin Laden*, above. Thus, in part using intelligence information from Sudanese authorities, employees were vetted for trustworthiness, a component of which was commitment to Mr. Bin Laden's views and ideology and a known history within the extremist movement: 2013 FC 1092 at paras. 478 and 480; Mr. Al Fadl transcript; testimony of Professor Byman.

[130] Mr. Bin Laden was especially wary of Egyptian nationals like Mr. Mahjoub: many were employed by the Egyptian security or intelligence services and could be infiltrators: 2013 FC 1092 at para. 479; testimony of Mr. Al Fadl and Mr. Al Ridi in *United States v. Bin Laden*, above.

[131] In these circumstances, Mr. Mahjoub, an Egyptian national, must have been "thoroughly vetted to establish" his "identity and orientation," to prove he was "trustworthy" and to confirm he was committed "to [Bin Laden's] views and ideology": 2013 FC 1092 at para. 480; testimony of Professor Byman. And given his "top executive position," Mr. Mahjoub must have passed with flying colours: 2013 FC 1092 at paras. 480-481. He was "known and trusted by Mr. Bin Laden." This trust could have only been gained if Mr. Mahjoub demonstrated "an ideological commitment to jihad" and "a known participation within the Islamic extremist community": 2013 FC 1092 at paras. 598 and 621.

[132] Mr. Mahjoub must have been committed to the cause. He accepted his top position in Mr. Bin Laden's company despite some personal risk. If the authorities of his country of nationality, Egypt, had become aware of his association with Mr. Bin Laden, he would have been in danger: 2013 FC 1092 at para. 482; testimony of E. Al Ridi in *United States v. Bin Laden*, above. Further, he only associated with Egyptians on the farm, not elsewhere in Sudan: 2013 FC 1092 at para. 482. To the Federal Court this meant that Mr. Mahjoub "trusted the other Egyptians working for Mr. Bin Laden because he knew about Mr. Bin Laden's vetting process" and that it "would prevent foreign government infiltration": *ibid*.

[133] Was the farm on which Mr. Mahjoub was working just a farm? At one level, some might see it as a peaceful, bucolic place: it grew sesame, peanuts and white corn: transcript of Mr. Al Fadl in *United States v. Bin Laden*, above; 2013 FC 1092 at para. 384. But peaceful and bucolic it was not. The farm grew another type of crop: trained terrorists.

[134] On “the back one-third” of the farm, “general weapons and…explosives” training and refresher training took place, supervised by Al Qaeda members. One such member was Al Qaeda explosives expert Salem el-Masry. See transcript of Mr. Al Fadl in *United States v. Bin Laden*, above; 2013 FC 1092 at paras. 384, 464, 474 and 482.

[135] The Federal Court found that this took place in part while Mr. Mahjoub was in his top executive position at the farm: testimony of Professor Wark; testimony of Mr. Al Fadl in *United States v. Bin* Laden; 2013 FC 1092 at para. 476. And “in his position of authority over the company and the farm,” Mr. Mahjoub was “aware of these [explosives and weapons training] activities,” was “complicit in these activities” and “knew of the ongoing weapons training” on the farm: testimony of Mr. Al Fadl in *United States v. Bin Laden*, above; testimony of Professor Byman; 2013 FC 1092 at paras. 466, 474, 476, 482-483 and 621.

[136] In reaching its conclusion about Mr. Mahjoub’s knowledge, the Federal Court carefully considered the credibility of the testimony of Mr. Al Fadl. While noting that he had a tendency to exaggerate, the Federal Court found that on this aspect of his testimony Mr. Al Fadl guarded against exaggeration: 2013 FC 1092 at para. 388. It found his testimony on this to be credible.

[137] Despite Mr. Mahjoub’s high position in the company and the farm and despite a fairly high salary for an illegal migrant in Sudan, Mr. Mahjoub left the company and the farm in May 1993: Mr. Mahjoub’s personal information form; 2013 FC 1092 at para. 484. Soon afterward, in December 1995, he came to Canada and claimed refugee status.

[138] Exactly why Mr. Mahjoub left is unclear. But the evidence suggests some reasons. The Federal Court found some corroboration for the Ministers' allegation that Mr. Mahjoub left Sudan due to increased cooperation between the Egyptian and Sudanese governments, the fact that Egyptian nationals were becoming increasingly unwelcome in Sudan in late 1995, and Sudan's shift in policy towards harbouring terrorists: Mr. Mahjoub's personal information form; 2013 FC 1092 at paras. 494 and 601. Also due to high profile Al Jihad and Vanguards of Conquest attacks occurring at this time—in particular the attempted assassination of President Mubarak and the deaths of several young Egyptians executed by Al Jihad as spies—many Egyptians left or were expelled from Sudan: 2013 FC 1092 at para. 495.

[139] As well, "other individuals in Sudan associated with terrorism, some with direct or indirect connections to Mr. Mahjoub, traveled or moved abroad around this time" to "[find] a base abroad": 2013 FC 1092 at paras. 499 and 623, relying upon the Security Intelligence Report offered in support of the security certificate. These included "prominent members" of Al Jihad and Al Qaeda: 2013 FC 1092 at paras. 499 and 504; Expert Report of Professor Byman; affidavit of J. Dratel (Exhibit R39, at para. 27). Mr. Mahjoub's departure from Sudan "coincided with the departure of these terrorist groups and many of their leading members," lending "support to the Ministers' allegations of Mr. Mahjoub's association with these groups": 2013 FC 1092 at paras. 500 and 601; classified evidence in support.

[140] Mr. Mahjoub entered Canada on a false Saudi Arabian passport and claimed refugee status: 2013 FC 1092 at para. 506. This, along with Mr. Mahjoub's timing in entering and leaving Sudan, was behaviour coinciding with or paralleling that of other individuals the Federal Court

found to be terrorists, including some contacts of Mr. Mahjoub: 2013 FC 1092 at paras. 507 and 601-602.

[141] Upon arrival in Canada, Mr. Mahjoub filled out a personal information form in support of his claim to refugee status. In it, Mr. Mahjoub stated that he left the company and the Al-Damazin farm to buy and sell goods in a market in Sudan. The Federal Court found this explanation not to be credible given the salary Mr. Mahjoub was making at the farm and given the concern he expressed elsewhere in his personal information form about “severe surveillance by the Egyptian people, especially when [he] was in the market”: 2013 FC 1092 at paras. 485-490.

[142] The evidence of Mr. Mahjoub’s activities and contacts in Canada from the time of his arrival until his arrest in 2000 under the first certificate is very detailed. The Federal Court summarized this evidence as follows:

> Most of the inculpatory evidence that the Ministers have adduced in relation to Mr. Mahjoub's residence in Canada is evidence of his ongoing associations with established or suspected members of the [Al Jihad], [Vanguards of Conquest], Al Qaeda, and [a related terrorist group]. This evidence is compelling, and it establishes that Mr. Mahjoub maintained contact with Al Qaeda terrorist Mr. [Ahmed] Khadr, a friendship with established Al Qaeda terrorist Mr. Al Duri [text omitted] [*], and a close and active association with established Al Qaeda/[Al Jihad] terrorist Mr. Marzouk, and contact with a telephone number linked to the [Vanguards of Conquest] in Kuwait [*]. A number of these contacts were still active in the terrorist milieu, particularly Mr. [Ahmed] Khadr and Mr. Marzouk. These contacts were routinely concealed by the use of aliases. Mr. Mahjoub also concealed these contacts from the Service in one or more interviews [text omitted]. Mr. Mahjoub’s fear of the Egyptian authorities and belief that the Service was conspiring with them does not explain his dishonesty. Mr. Mahjoub’s denials are insufficient to rebut the Ministers’ evidence of his terrorist contacts. I conclude that there are reasonable grounds to believe that Mr. Mahjoub’s contact,

> given the individuals' backgrounds and Mr. Mahjoub's unwillingness to be candid about his contact with them, related to the terrorist network to which these individuals were associated.

(2013 FC 1092 at para. 568.)

[143] Only two sentences in this passage are supported by classified evidence and they are marked with a "[*]". The remainder is drawn from the testimony of Ms. El Fouli in the first security proceedings, the reference letter from Mr. Al Duri to Mr. Mahjoub, an address book found in Mr. Mahjoub's possession when he was arrested, telephone toll records obtained from telephone companies via a subpoena from the Department of Justice, and open source and expert testimony, much of which is summarized at 2013 FC 1092 at paragraphs 286, 297-298, 329, 340, 342-343, 345, 359, 365, 370, 373-374, 543 and 544.

[144] In Canada, Mr. Mahjoub associated or had contact with a number of persons who are or were (at least at the time) "important players in the terrorist milieu," such as Mr. Al Duri, Mr. Ahmed Khadr, who was "a senior…Osama Bin Laden network aide and fundraiser" and Mr. Marzouk: 2013 FC 1092 at paras. 270-311, 314-428 and 624. In the case of Mr. Al Duri, the Al Qaeda member who was Mr. Mahjoub's immediate supervisor on the farm in Sudan used for terrorists' weapons training, the Federal Court concluded from materials found on Mr. Mahjoub's person at the time of arrest that they had "a close association or friendship": 2013 FC 1092 at para. 612.

[145] Much of the evidence underlying the Federal Court's findings in the preceding paragraph was closed evidence. If this paragraph is deleted and if those portions of the paragraph preceding that one that refer to closed evidence are deleted, one can see that there is still a mountain of open source and open court evidence supporting the reasonableness of the security certificate.

[146] In finding the above facts, the Federal Court relied in part on the testimony given by Mr. Al Fadl in *United States v. Bin Laden*, above. The Federal Court was extremely cautious concerning this evidence and assessed it most carefully: see, e.g., 2013 FC 1092 at paras. 152-156 and 465-474. It found that this evidence met the "reliable and appropriate" standard for admissibility under paragraph 83(1)(*h*) of the *Immigration and Refugee Protection Act*. In particular, the Federal Court considered Mr. Al Fadl's evidence concerning the "farm" to be "compelling and credible": 2013 FC 1092 at para. 474.

[147] The Federal Court confirmed that there was no believable exculpatory evidence, even in the top secret evidence disclosed to the Special Advocates and considered in the closed hearing: 2013 FC 1095 at para. 162. In its view, no believable evidence existed in Mr. Mahjoub's direct evidence: 2013 FC 1092 at paras. 586-589. Having examined the evidentiary record, both open and closed, on this I agree with the Federal Court.

[148] Much of the Federal Court's fact-finding is supported by its assessments of Mr. Mahjoub's credibility, assessments that withstand scrutiny under the palpable and overriding error standard.

[149] Although Mr. Mahjoub did not testify, several of his prior statements were properly before the Federal Court. At various times, the Federal Court found instances where Mr. Mahjoub's statements were simply "not credible" or "deceptive" or Mr. Mahjoub was being "evasive," "likely untruthful," "untruthful," deliberately "imprecise," "motivated to conceal" or concealing, and lacked "credibility and candour": see, *e.g.*, 2013 FC 1092 at paras. 263, 266, 284, 309-311, 444-445, 486-487, 490-491, 514-515, 529, 532-533, 550-551, 566, 568, 588, 599, 603-605, 607-608, 614, 617-620, 624-625 and 645. For example, in the face of all of the evidence about the farm, above, Mr. Mahjoub wrote in his personal information form given to the authorities in support of his refugee claim when he arrived in Canada that he was just a fellow in Sudan who was on a farm and left that job to "buy and sell goods in the market." He said he especially feared the market, as he felt he was under "severe surveillance by the Egyptian people" there: Mr. Mahjoub's personal information form; 2013 FC 1092 at para. 484-487 and 490.

[150] In the view of the Federal Court, a number of "lies and omissions" on the part of Mr. Mahjoub were "crafted and designed to consistently conceal any facts that could connect Mr. Mahjoub to known terrorists, terrorist activities or known terrorist-related enterprises such as Althemar": 2013 FC 1092 at para. 619. Further, the Federal Court observed that the fact that Mr. Mahjoub "would lie about the use of aliases [was] of particular concern" given the frequent use of aliases "in the terrorist milieu" and the fact that the "use of aliases…serves to conceal the true identity of individuals involved": 2013 FC 1092 at para. 619. In part, the lies and omissions by Mr. Mahjoub led the Federal Court to conclude that his innocent account of events and his activities in Sudan and in Canada "is not credible": 2013 FC 1092 at paras. 619-620.

[151] The Federal Court did not uphold the reasonableness of the security certificate merely because Mr. Mahjoub's statements were not credible. Rather, his lack of credibility was just one of many, many elements underscoring the reasonableness of the certificate.

[152] Before leaving the issue of the reasonableness of the certificate, certain submissions made by the Special Advocates should be addressed.

[153] First, on the issue whether one of Mr. Mahjoub's contacts was Mr. Marzouk, the Special Advocates suggest that the Federal Court ignored key evidence from intelligence reports. But, as explained above, the non-mention of evidence in reasons alone does not mean that there is palpable and overriding error. This is especially so in a case as large and sprawling as this. Palpable and overriding error is a high standard of review that is difficult to meet. Given the detailed and comprehensive manner in which the Federal Court dealt with this issue, I am not persuaded that the Federal Court committed palpable and overriding error in this respect. It had much other evidence before it supporting Mr. Mahjoub's contact with Mr. Marzouk: 2013 FC 1092 at paras. 306-311, 529-531, 566 and 568. And there was plenty of evidence supporting Mr. Marzouk's involvement in terrorism: paras. 339-340. Even if there was an error here, I consider it neither "palpable" in the sense of obvious, or "overriding," in the sense that it will affect the outcome of the appeal—here the overall finding that the security certificate is reasonable.

[154] In discussing the evidence supporting Mr. Mahjoub's connection with Mr. Marzouk, the Special Advocates expressed concern that such a finding, made with inadequate evidence in support, could taint Mr. Mahjoub with "guilt by association." In the abstract, I agree that not

much, if anything, can be proven by the fact that person A has dealings with person B who happens to be a terrorist. But here, as explained at paragraphs 107-151 above, there was much, much more that proves that the security certificate is reasonable.

[155] The Special Advocates also challenged one intercepted conversation that the Federal Court used to link Mr. Mahjoub to the Vanguards of Conquest: 2013 FC 1092 at para. 585; summary of intercept (Exhibit A8, Tab 6). They submit that the Federal Court misinterpreted it as an admission by Mr. Mahjoub that he was a member of the Vanguards of Conquest.

[156] Here we are dealing with a factually suffused question of mixed fact and law. I am not persuaded that the high threshold for palpable and overriding error was met. It was open to the Federal Court to find that the intercepted conversation contained an admission of membership. The fact that another court might have ruled differently or might have attached less significance to a piece of evidence does not establish palpable and overriding error. Finally, even if the finding of Mr. Mahjoub's membership in the Vanguards of Conquest falls, he was still found to be a member of the terrorist organization, Al Jihad. Membership in one terrorist organization is enough for the Federal Court to uphold the reasonableness of the security certificate.

[157] To summarize, the standard for assessing the security certificate is "reasonable grounds to believe" that the security grounds for inadmissibility under section 34 of the *Immigration and Refugee Protection Act* are present. The Federal Court found reasonable grounds. Far from there being palpable and overriding error on this point, the Federal Court's conclusions are impeccably sourced and well-supported by admissible evidence—often considerable evidence.

(c) Implications for the legal issues that follow

[158] On appeal, Mr. Mahjoub raised a number of issues concerning the admissibility of evidence. I need not consider these. Even if the evidence that Mr. Mahjoub challenged were excluded, the remaining admissible evidence supporting the reasonableness of the security certificate would remain in place. The security certificate would remain reasonable.

[159] Given this, I see only two ways in which Mr. Mahjoub can still prevail in this appeal.

[160] The first way is if he establishes a legal objection that strikes at the heart of the issuance of the security certificate. Here, Mr. Mahjoub raises two such legal objections: the legislative scheme for security certificates is constitutionally invalid; and the issuance of the security certificate is invalid because necessary legal prerequisites were not fulfilled in this case. If either of these submissions is accepted, then the security certificate must be quashed.

[161] The second way is if the Federal Court committed reversible error in deciding not to stay the proceedings permanently on account of an abuse of process. Mr. Mahjoub also makes this submission. He submits that given various instances of misconduct, errors and incidents, including instances of wrongful acquisition and wrongful use of evidence, violations of solicitor-client privilege and violations of Charter rights, the Federal Court committed reversible error in not staying the proceedings permanently. Put another way, no matter how reasonable the security certificate may be, the assault on the reputation and integrity of the administration of justice in this case is so great that these proceedings should have been stayed permanently.

[162] Accordingly, I shall examine each alleged error and incident raised by Mr. Mahjoub and assess the issue of whether a stay was justified for any of those errors and incidents. And then I shall consider whether, taken together, these errors and incidents warranted a permanent stay of the proceedings for abuse of process.

[163] Of course, these matters must be considered within the rubric of *Housen* appellate review—correctness for errors of law and legal principle and palpable and overriding error for all other matters.

(4) Legal objections that potentially strike at the heart of the issuance of the security certificate in this case

(a) The constitutionality of the legislative regime for security certificates

[164] Mr. Mahjoub challenges the constitutionality of sections 2, 12, 17 and 21 to 24 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 and Division 9 of the *Immigration and Refugee Protection Act* which largely concerns the security certificate regime followed in this case. If Mr. Mahjoub were to succeed in these constitutional arguments, the security certificate must fall, just as the first security certificate fell after the Supreme Court's decision in *Charkaoui I*, above.

[165] In the Federal Court, some of the bases for Mr. Mahjoub's constitutional challenge were of no merit whatsoever. They had been previously decided by *Charkaoui I* and their reassertion

before the Federal Court could have been seen as an abuse of process. Nevertheless, the Federal Court considered Mr. Mahjoub's constitutional challenge in its entirety.

[166] In detailed reasons, the Federal Court dismissed Mr. Mahjoub's constitutional challenge: 2013 FC 1097. I see no basis for intervening with its decision on this issue.

[167] The Federal Court found that the impugned provisions of the *Immigration and Refugee Protection Act* did not violate Charter rights and so there was no need to consider the issue of justification under section 1 of the Charter. I agree.

[168] Key parts of the Federal Court's findings are as follows. The provision in the 2008 amendments for Special Advocates was constitutional and did not impair Mr. Mahjoub's right to choose his counsel. Closed proceedings in circumstances such as these are constitutional. Judges presiding over security certificate proceedings are independent and impartial. The standard of "reliable and appropriate" for the admissibility of evidence under paragraph 83(1)(*h*) of the *Immigration and Refugee Protection Act* was capable of definition and was not arbitrary. The legislative regime required the named person to be informed of the case to meet and, thus, was constitutionally adequate in that regard. Further, the named person, here Mr. Mahjoub, had enough information under this legislative regime to know whether or not to testify. The standard of "reasonable grounds to believe" for assessing the reasonableness of the security certificate was constitutional. And the legislative scheme did not authorize arbitrary detention. See generally 2013 FC 1097 at paras. 15, 24, 47, 57-61, 87, 95, 122, 128, 144, 152, 156-162, 164 and 171-174. These findings were informed by a careful and correct reading of the applicable

jurisprudence, including *Charkaoui I*, *Charkaoui II*, this Court's decision in *Harkat*, above, *Almrei (Re)*, above, and *Jaballah (Re)*, above.

[169] Indeed, in *Harkat*, decided after the Federal Court's decision, the Supreme Court rejected a similarly broad constitutional challenge against the security certificate provisions in issue in this case.

[170] In *Harkat*, the Supreme Court held that the security certificate regime in the *Immigration and Refugee Protection Act* was constitutional (at para. 4):

> I conclude that…the [*Immigration and Refugee Protection Act*] scheme [concerning security certificates] is constitutional. Crafting a regime that achieves a fundamentally fair process while protecting confidential national security information is a difficult task. The scheme must apply to a broad range of cases, implicating a variety of national security concerns. Parliament's response to this challenge has been to confer on judges the discretion and flexibility to fashion a fair process, in the particular case before them. If this is impossible, judges must not hesitate to find a breach of the right to a fair process and to grant whatever remedies are appropriate, including a stay of proceedings.

In my view, these words apply equally to Mr. Mahjoub's sweeping attack against the constitutionality of the security certificate regime.

[171] Before us, Mr. Mahjoub makes arguments that differ in some respects from those raised before the Supreme Court in *Harkat*. For this reason, I considered the constitutional question certified by the Federal Court to be proper and not foreclosed by *Harkat*. Nevertheless, the reasoning of the Supreme Court in *Harkat* still governs. *Harkat* means that Mr. Mahjoub's constitutional arguments must fail.

[172] On the issue of the constitutionality of *ex parte* or closed proceedings in portions of security certificate proceedings, the Supreme Court has confirmed in *Harkat* that closed proceedings are constitutional as long as the named person is given sufficient disclosure to know and meet the case. This is a case-specific inquiry. See *Harkat*, above at paras. 4, 51-60 and 77.

[173] Without the benefit of the Supreme Court's decision in *Harkat* before it, the Federal Court carried out this case-specific inquiry. As a result of that inquiry, it found that "upon consideration of all of the evidence, including summaries, available to Mr. Mahjoub, I find that Mr. Mahjoub was reasonably informed as to the case to meet and was able to meet that case": 2013 FC 1092 at para. 173. Throughout the proceedings, Mr. Mahjoub could make informed choices about how to meet that case: 2013 FC 1097 at para. 152. The Federal Court found that from time to time there were gaps in the disclosure—*e.g.*, the failure to give Mr. Mahjoub summaries of certain foreign agency reports—but also found that those gaps did not violate his right to know the case to meet, in part because of the existence of other evidence, often open-source evidence, that gave the same information: see, *e.g.*, 2013 FC 1092 at paras. 213-217.

[174] I note that to the extent that Mr. Mahjoub or his counsel were not personally aware of all the details of the classified information, the Special Advocates were aware. I confirm that they made use of it in a way that maximized Mr. Mahjoub's chances of success in challenging the reasonableness of the security certificate.

[175] I wish now to deal with specific submissions made by Mr. Mahjoub concerning the constitutionality of some of the specific sections of the *Canadian Security Intelligence Service Act*.

[176] I agree with the reasons of the Federal Court concerning the constitutionality of the *Canadian Security Intelligence Service Act*: 2013 FC 1096. Section 12 of that Act empowers the collection of information and intelligence on activities that may on reasonable grounds be suspected of constituting threats to the security of Canada. Contrary to Mr. Mahjoub's submission, that power is not untrammelled: investigations may be undertaken only if there are "reasonable grounds to suspect" that activities constitute "threats to the security of Canada" and then only "to the extent that is strictly necessary." I agree with the Federal Court that section 12 is neither vague nor overbroad. Section 12 is limited by section 2, which defines in detail what constitutes a "threat to the security of Canada" in a manner that conforms to the standards set by the Supreme Court of Canada in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36 (vagueness) and *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (overbreadth).

[177] Similarly, I am not convinced that the Federal Court erred in assessing the constitutionality of section 12 and related warrant provisions (*e.g.*, section 21) on the basis of Mr. Mahjoub's Charter right under section 8 to not be subject to unreasonable search and seizure. The Federal Court considered and applied the principles in the Supreme Court of Canada's relevant search and seizure jurisprudence and correctly concluded that the lower "reasonable grounds to suspect" standard for investigations complied with section 8 given the

"minimally intrusive" nature of the searches and the fact that any investigative warrants under section 21 must be based on the "reasonable grounds to believe" standard: 2013 FC 1096 at paras. 35-36. All of this is consistent with this Court's decision in *Atwal v. Canada*, [1988] 1 F.C. 107, 79 N.R. 91.

[178] In this Court, Mr. Mahjoub submits that sections 21-24 of the *Canadian Security Intelligence Service Act* violate section 8 of the Charter to the extent that they allow the systematic interception of and listening to solicitor-client communications. I disagree. On their face, the sections are broad warrant-authorizing provisions, just like any other search warrant provisions. To the extent the sections are used improperly, for instance to authorize the interception of solicitor-client communications, that is a question concerning the validity of the warrant issued under these provisions or the manner in which an interception is carried out. The provisions themselves are not invalid.

[179] Section 17 allows for intelligence sharing. Mr. Mahjoub submits that this section also violates his right against unreasonable search and seizure under section 8 of the Charter. On this, again I agree with the conclusion of the Federal Court: 2013 FC 1096 at para. 65. The intelligence-sharing scheme under the *Canadian Security Intelligence Service Act* is subject to various safeguards and oversight and does not in principle or on the facts of this case result in unreasonable searches in violation of the Charter, in accordance with the Supreme Court of Canada's decision in *Wakeling v. United States of America*, 2014 SCC 72, [2014] 3 S.C.R. 549.

[180] In this Court, Mr. Mahjoub advances an additional cluster of Charter arguments against the security certificate legislative regime without any relevant cases directly on point. These arguments are foreclosed by the Supreme Court's general blessing of the security certificate review regime in paragraph 4 of its decision in *Harkat*, above. Nevertheless, I will focus on a couple of them.

[181] In this Court, Mr. Mahjoub challenges the legislative regime and its provision for Special Advocates on the basis of the right to counsel in section 10 of the Charter. I see no violation. The Supreme Court has upheld the separate roles of counsel for the named person and the Special Advocates and I also agree with the Federal Court's rejection of this argument for the reasons it gave: 2013 FC 1097 at paras. 116-122; *Harkat*, above at paras. 67-73.

[182] On the Charter right to be free from arbitrary detention, the Supreme Court has confirmed that the impugned provisions in principle do not violate section 9 of the Charter. This scheme has standards that, in the words of *Charkaoui I*, "are rationally related to the purpose of the power of detention" (at paras. 89 and 93). As the Federal Court noted (at paras. 171-173 of 2013 FC 1097), under section 81 of the *Immigration and Refugee Protection Act* the Ministers must have reasonable grounds to believe that the named person poses a threat to national security or to the safety of any person, or is unlikely to appear for removal proceedings. Under section 82 of the Act, when reviewing the named person's detention or conditions of release, the Federal Court must carefully examine the individual's circumstances and assess the appropriateness of the detention. This is a proportionate response and an appropriate safeguard that ensures non-arbitrary detention and, thus, it is constitutional.

[183] In summary, I reject the constitutional submissions advanced by Mr. Mahjoub, substantially for the reasons given by the Federal Court. Given that the Federal Court correctly found that none of the impugned provisions infringed Mr. Mahjoub's Charter rights, there was no need for it to consider section 1 of the Charter. The legislative regime at issue in this case is constitutional.

(b) Legal prerequisites for the issuance of security certificates

[184] Mr. Mahjoub submits that the Ministers failed to exercise their powers properly in issuing the security certificate in this case.

[185] The Federal Court carefully examined this allegation and rejected it. It found that the Ministers conducted their own reviews of the Security Intelligence Report, appropriately relied on the advice and recommendations of their officials, and personally considered and signed the security certificate: 2013 FC 1095 at paras. 114 and 119. They were given briefings and were given all of the supporting documents: 2013 FC 1095 at paras. 109 and 114-115. The Federal Court reached these conclusions relying in part upon the personal testimony of one of the Ministers and the testimony of several officials. There is no basis to reject these findings.

[186] In this Court, Mr. Mahjoub seems to suggest that before signing the security certificate the Ministers had to read and consider every last bit of evidence. I reject this.

[187] Section 77 of the *Immigration and Refugee Protection Act* states that the Ministers "shall sign" a security certificate stating the person named in the certificate is inadmissible. This is a broad potential power seemingly unqualified by statutory wording. But the section does not give the Ministers an untrammelled discretion.

[188] The potential power to do something is one thing; the discretion to exercise it is another: *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304 at para. 21. In other words,

> …there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute….[T]here is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is…objectionable….

(*Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 at p. 140 S.C.R.; see also *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] UKHL 1, [1968] A.C. 997 (H.L.).)

[189] To discern the "perspective within which a statute is intended to operate," we must consider the text, context and purpose of the security certificate provisions of the *Immigration and Refugee Protection Act*: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. Having done so, I conclude it is not necessary for the Ministers to have reviewed every last bit of information and to satisfy themselves that a certificate is reasonable before signing it. If that

were the standard, the later assessment by the Federal Court of the reasonableness of the security certificate would be somewhat redundant. In no way does the Act require a double assessment of reasonableness of the security certificate.

[190] In this regard, I also agree with the Federal Court's observation that "the executive could not function if Ministers were required to personally conduct an investigation into every decision or even to read every facting document relevant to the decision, particularly if, as here, the case involves a large volume of material": 2013 FC 1095 at para. 109.

[191] This being said, the issuance of a security certificate against a named person is no small thing. It has drastic consequences. As Mr. Mahjoub points out to us, and as happened here, it can result in the arrest and detention of the named person, to say nothing of the protracted nature of the proceedings that follow and the ultimate consequence of inadmissibility. The Ministers cannot just autograph the certificate blithely; far from it. And, in the case of the Minister of Citizenship and Immigration, the Minister must personally sign the certificate: subsection 6(3) of the *Immigration and Refugee Protection Act*.

[192] I note subsection 77(2) of the *Immigration and Refugee Protection Act*. Under this section, "the Minister," in this case the Minister of Public Safety, shall file with the Court the information and other evidence that is relevant to the ground of inadmissibility stated in the certificate and on which the certificate is based, as well as a summary of information and other evidence that enables the person named in the certificate to be reasonably informed of the case made. This is not necessarily the Minister in her personal capacity. Typically, this is done by the

Minister's officials, acting under the principle in *Carltona Ltd v. Commissioners of Works*, [1943] 2 All E.R. 560 (C.A.). There is no necessary relationship between the information disclosed under subsection 77(2) and the information that the Ministers must have before them when considering whether to sign a security certificate under subsection 77(1) of the Act.

[193] In light of the foregoing, I conclude that the Ministers do not need to review all of the information to be disclosed under subsection 77(2) to the named person before signing a security certificate. Instead, they need to review enough material in order to be satisfied that they can express an opinion in the security certificate that the named person is inadmissible under one of the grounds in subsection 34(1) of the Act and that the opinion is sufficiently well-founded as to justify the consequences set in motion by the issuance of the certificate. This requires supporting evidence that is cogent and credible.

[194] In this case, that threshold was easily met. The Ministers were given the Security Intelligence Report, in this case a very detailed document. That document gave the Ministers enough information to sign the security certificate. For good measure, aside from the Security Intelligence Report, the Ministers had access to the advice and recommendations of their officials, briefings, and all the supporting documents.

[195] The security certificate the Ministers signed itself qualifies as a "certificate" within the meaning of subsection 77(1) of the Act. It states that the Ministers have "an opinion…based on a Security Intelligence Report received and considered by [them]" that Mr. Mahjoub is inadmissible. They are warranting that they received and considered the Security Intelligence

Report, nothing more, and that they have formed "an opinion," nothing more. From there, the reasonableness of the security certificate can be tested by referring it to the Federal Court and, as is well known, all evidence bearing upon the reasonableness of the security certificate may be admitted in support of it.

[196] Mr. Mahjoub also submits that he should have been entitled to bring a judicial review against the issuance of the certificate right after it was issued. I reject this. Under this legislative regime, judicial review of the issuance of a security certificate is ousted. In its place is an automatic referral of the certificate to the Federal Court for an assessment of its reasonableness. In these circumstances, it is open to Parliament to oust judicial review by enacting another form of meaningful review by a court; in no sense is immunization of executive action from review taking place: *J.P. Morgan*, above; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 51 and 77-78. For example, as *J.P. Morgan* shows, while tax assessments issued by the Minister of National Revenue are decisions of the Minister, Parliament has ousted judicial review. It has provided an alternate form of meaningful review of the Minister's decision through administrative review and, ultimately, an appeal to the Tax Court of Canada and beyond.

[197] Finally, the Special Advocates submit that the Canadian Security Intelligence Service owes a duty of candour—a duty to make full, fair and frank disclosure—to the Ministers so that they can properly assess whether to sign the security certificate.

[198] The Federal Court rejected this submission. It found that there was no legal basis for the Court reaching behind the Ministers and enforcing a duty owed to them by their subordinate

agencies and officials: 2013 FC 1095 at para. 142. The role of the subordinate agencies and officials was to provide their expert recommendation to the Ministers: 2013 FC 1095 at para. 160. The implication of such a duty was unnecessary. If the Ministers relied on misleading or incomplete information when they signed the security certificate, the Federal Court could find the certificate unreasonable: 2013 FC 1095 at para. 140.

[199] The legal validity of this finding need not be determined. The Federal Court found that to the extent there was a duty of candour, it was met. It found no misleading information or omissions in the Security Intelligence Report that formed the basis of the certificates: 2013 FC 1095 at paras. 160-161. As well, it found that the Canadian Security Intelligence Service did take into account exculpatory information when preparing the Security Intelligence Report: 2013 FC 1095 at paras. 160-161. And having reviewed the facting documents behind the Security Intelligence Report, the Federal Court was well-positioned to assess this: 2013 FC 1095 at para. 155. There is no palpable and overriding error in these findings.

[200] The Special Advocates submit that there was undisclosed information withheld from the Ministers that is confidential in nature. In the closed hearing it made submissions on this. The Federal Court was aware of this undisclosed information but still made the findings it did. However, this undisclosed information could not have plausibly affected the issuance of the certificate. As well, its non-disclosure is not of such significance that the values that underlie our system of justice are offended in a manner that might attract the remedy of a permanent stay.

(5) Should the security certificate proceedings have been stayed permanently on account of an abuse of process?

[201] Mr. Mahjoub submits that various instances of misconduct, violations of legal rights and Charter breaches took place and that, individually and collectively, these should have resulted in a permanent stay of the security certificate proceedings.

[202] Often the Federal Court found no misconduct, no violations of legal rights or no infringements of the Charter. Sometimes it found misconduct, violations of legal rights and Charter breaches but held that none of them by themselves warranted a permanent stay of the security certificate proceedings. And it also found that collectively any misconduct, violations of legal rights and Charter breaches did not warrant a permanent stay of the security certificate proceedings.

[203] These points are developed below. Overall, on almost all of these points, I agree with the results reached by the Federal Court substantially for the reasons it gave.

[204] At the outset, I wish to examine the legal principles governing abuses of process and the remedies available for them, particularly the remedy of a permanent stay.

[205] On this, I see no error in law or in legal principle on the part of the Federal Court.

[206] The remedy of a permanent stay for abuse of process exists in the Federal Court system by virtue of its statute, its plenary powers and, where Charter rights have been infringed, the

remedial provisions of the Charter: *Federal Courts Act*, R.S.C. 1985, c. F-7, section 50; *Philipos v. Canada (Attorney General)*, 2016 FCA 79 at para. 23; *Mazhero v. Fox*, 2014 FCA 219 at para. 4; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, [2013] 3 C.T.C. 126; subsection 24(1) of the Charter ("just and appropriate remedy").

[207] As the Federal Court noted, abuses of process are often said to arise in two situations. Some abuses center on the effect of a proceeding on the person to whom it is directed and concern the fairness of the proceeding to that person. Others "[contravene] fundamental notions of justice" and "thus [undermine] the integrity of the judicial process": 2012 FC 669 at para. 68, citing *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235 at para. 73; see also *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566 at para. 36. The roots of these two categories are to be found in the classic statement in *R. v. Jewitt*, [1985] 2 S.C.R. 128, 20 D.L.R. (4th) 651 at pp. 136-137 S.C.R. concerning when an abuse of process will be found: "where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings."

[208] Also, as the Federal Court noted, there is no single remedy for abuse of process. In fact, there are many possible remedies available to redress instances of misconduct, violations of legal rights and Charter breaches. In *O'Connor*, above at paragraph 69, the Supreme Court spoke of a range of tools existing under the Charter and the common law ranging from a scalpel to an axe that could be used to "fashion, more carefully than ever, solutions taking into account the

sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system."

[209] The most drastic remedy—perhaps the sledgehammer in the judicial workshop—is the permanent stay of proceedings. It is warranted only in the "clearest of cases": *O'Connor* at para. 68; *Jewitt* at p. 137; *Nixon* at para. 37; *R. v. Power*, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1 at p. 616 S.C.R.

[210] The most recent word of the Supreme Court on the "clearest of cases" threshold is in *R. v. Babos,* 2014 SCC 16*,* [2014] 1 S.C.R. 309 at para. 32. There, the Supreme Court laid out the three-part test for a stay, citing *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297:

> The test used to determine whether a stay of proceedings is warranted is the same for both [situations] and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid*., at para. 57).

[211] This is consistent with the passage from *Nixon* at paragraph 42 adopted by the Federal Court at paragraph 42 of 2013 FC 1095:

> The test for granting a stay of proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused's fair trial interests or to the integrity of the justice system, is that set out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297. A stay of proceedings will only be appropriate when: "(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice" (*Regan*, at para. 54, citing *O'Connor*, at para. 75).

[212] In some of its decisions, the Supreme Court has not only explained that there is a high threshold ("clearest of cases") but also has required that there be a balancing of the need for the remedy against the societal interests of the proceeding continuing, as captured in the third step of the test outlined in *Babos*, above. Under this balancing, a stay is warranted only where the former is disproportional to the latter.

[213] For example, in *Nixon* at paragraph 38, the Supreme Court suggested that "[a]chieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process."

[214] The Supreme Court in *R. v. Conway*, [1989] 1 S.C.R. 1659, 49 C.C.C. (3d) 289 at p. 1667 S.C.R. (quoted by the Federal Court at paragraph 36 of 2013 FC 1095) explained it this way:

> Under the doctrine of abuse of process [in the criminal context], the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, *supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.) It

> acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [emphasis added]

[215] And in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 (quoted by the Federal Court at 2013 FC 1095 at paragraph 37), the Supreme Court suggested the following (at para. 120):

> In order to find an abuse of process [in the administrative context], the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if there proceedings were halted" (Brown and Evans, [*Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998) (loose-leaf)] at p. 9-68).

[216] As the Federal Court noted (2013 FC 1095 at para. 38), the Supreme Court has spoken of this balancing in other cases too: see, *e.g.*, *R. v. Morin*, [1992] 1 S.C.R. 771, 71 C.C.C. (3d) 1 at pp. 811-812 S.C.R.; *Regan,* above, at para. 57; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 200.

[217] Before the Federal Court and before us, Mr. Mahjoub submitted that this balancing should be done in only close cases. I agree with the Federal Court when it held (2013 FC 1095 at para. 38) that where it is certain that the "clearest of cases" threshold for a permanent stay is met—for example where the conduct is particularly egregious—a balancing is not required. I also agree with the Federal Court (2013 FC 1095 at para. 38) that short of that, balancing "the

interests in maintaining the integrity of the judicial system and individual rights on the one hand and the public interest in proceeding with the case on the other" is a "useful tool in the exercise of…discretion." I also agree with the Federal Court's earlier use of this same balancing tool in *Re Harkat*, 2010 FC 1243, 380 F.T.R. 255 at paragraph 56.

[218] The Federal Court was appropriately alive to the possibility that there can be conduct that is "so egregious that the mere fact of going forward in the light of it will be offensive" and so the party moving for a stay "need not prove that prejudice to either the administration of justice or the [moving party] will be perpetuated or aggravated": 2013 FC 1095 at paras. 43 and 492.

[219] Having canvassed these considerations, the Federal Court concluded that the decision whether or not to grant a stay was a discretionary one guided by the above factors. The Federal Court formulated the following test and applied it in this case (at para. 44):

> (a) Did the Ministers, their departments, the [Canadian Security Intelligence] Service or the [Canada Border Services Agency] engage in conduct that violated Mr. Mahjoub's right to a fair trial or undermined society's expectations of fairness in the administration of justice?
>
> (b) Will the prejudice to Mr. Mahjoub or to the administration of justice caused by the violation or abuse in question be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome? Or is this an exceptional case where the past conduct is so egregious that the mere fact of going forward in the light of it will be offensive?
>
> (c) Is this the clearest of cases in which no other remedy is reasonably capable of removing that prejudice? In other words, if it is not obvious that this is the clearest of cases, is the public and individual interest in a permanent stay of proceedings greater than the public interest in a decision on the merits?

[220] I agree with this test with one small qualification. Under branch (c), passages from cases like *Conway*, quoted above and *Babos*, above at paragraph 44 suggest that for a stay to be granted the outcome of the balancing must show that the public and individual interest in a permanent stay of proceedings is disproportionately greater than the public interest in a decision on the merits. The concept of disproportionality reflects the classic, oft-stated threshold that a permanent stay of proceedings is available only in the "clearest of cases."

[221] As it turns out, then, under branch (c) of its test, the Federal Court applied a test that was more favourable to Mr. Mahjoub than was perhaps warranted in law. And in applying that more favourable test, the Federal Court still found that the security certificate proceedings should not be stayed permanently.

[222] Thus, with the small exception in Mr. Mahjoub's favour mentioned in the preceding paragraph, the Federal Court's analysis of the law is accurate.

[223] It follows, then, that in order to succeed in the area of abuse of process, Mr. Mahjoub must undercut the Federal Court's finding that a stay of proceeding is not warranted. And that can be done only by demonstrating palpable and overriding error.

[224] This, Mr. Mahjoub has not done. In many of the matters he identifies, he has not established in law instances of misconduct, violations of legal rights or Charter breaches. And in others, while there was misconduct, violations of legal rights or Charter breaches, Mr. Mahjoub

has not established that the Federal Court committed palpable and overriding error in refusing to stay the security certificate proceedings.

[225] Mr. Mahjoub raises a panoply of issues, many that inter-relate and tend to overlap, sometimes substantially, sometimes resurfacing with slight variation. In such circumstances, it is folly to try to deal with them by replicating how counsel presented them. Instead, the focus can only be on the essence and the substance of the arguments advanced, overlooking their particular form. To do otherwise is to immerse this Court in "tens of closely related, confusingly stated, overlapping questions" running the risk of "miss[ing] one" but only in "a purely technical sense": *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144 at para. 17. Thus, I took the panoply of issues presented and translated them into a manageable set of topics.

[226] When the substance and essence of this matter is considered in light of all of the written and oral submissions made, the following topics have been raised by Mr. Mahjoub and, in some instances, the Special Advocates:

(a) Violation of the right to know the case to meet: late disclosure, inability to decide whether to testify; the destruction of original evidence by the Canadian Security Intelligence Service and the admission of summaries thereof;

(b) Unfair interviews: violations of the right to silence and right to counsel of choice;

(c) The challenged warrant under section 21 of the *Canadian Security Intelligence Service Act*;

(d) The use of hearsay evidence and unsourced intelligence evidence;

(e) The use of information derived from torture or cruel, inhuman and degrading treatment;

(f) Breaches of solicitor-client privilege and litigation privilege: the commingling of documents;

(g) Breaches of solicitor-client privilege: the interception of privileged calls;

(h) The overall delay;

(i) The cumulative effect of the foregoing: whether a stay of proceedings should have been granted.

The analysis of each now follows.

(a) Violation of the right to know the case to meet: late disclosure, inability to decide whether to testify; the destruction of original evidence by the Canadian Security Intelligence Service and the admission of summaries thereof

[227] The Federal Court recognized that while there is no right to full answer and defence in security certificate proceedings, there is an analogous right to know the case to meet and the opportunity to meet it: see 2013 FC 1095 at para. 402; *Charkaoui I* at para. 53. This was a correct statement of law.

[228] The Federal Court considered the issue of delayed or omitted disclosure and the governing case of *Charkaoui II*. In assessing delayed or omitted disclosure, the Court is to focus on the prejudice caused to the person named in the security certificate: 2013 FC 1095 at paras. 399-400.

[229] In the Federal Court, Mr. Mahjoub raised many instances of alleged delay or omitted disclosure. The Federal Court carefully considered each one and found that adequate remedies had been granted, including orders for further disclosure, the granting of extensions of time, and adjournments of the proceedings: 2013 FC 1095 at paras. 424, 426, 429 and 438.

[230] I am not persuaded that the Federal Court erred in law or in extricable legal principle on any of these issues. Nor did it commit palpable and overriding error. There was no basis in law or in fact for the award of a permanent stay of proceedings based on these issues.

[231] The primary document acquainting Mr. Mahjoub with the case to meet was the Public Summary of the Security Intelligence Report, first given to him at the same time the second security certificate was issued. It was regularly updated. In my view, upon the disclosure of the updated Supplementary Public Summary of the Security Intelligence Report on January 22, 2010, the disclosure of the Ministers' case was substantially complete and gave him knowledge of the case he had to meet. There were amendments after that time, but these did not disclose new allegations against Mr. Mahjoub.

[232] Paragraph 83(1)(*e*) of the *Immigration and Refugee Protection Act* requires that the named person, here Mr. Mahjoub, be provided "throughout the proceeding…with a summary of information and other evidence" so that he is "reasonably informed of the case made by the Minister." After January 22, 2010, Mr. Mahjoub did receive additional disclosure, but in my view any information held by the Ministers was at the level of particulars, not new allegations that affected Mr. Mahjoub's knowledge of the case to meet.

[233] Given these circumstances, Mr. Mahjoub does not seriously contest in this Court that he did not know the case to meet: see Mr. Mahjoub's memorandum of fact and law at paras 72-76. Instead, he challenges a number of issues relating to procedural fairness that he argued before the Federal Court.

[234] Before the Federal Court, Mr. Mahjoub advanced a long list of issues related to the fairness of the proceedings. On appeal, Mr. Mahjoub takes issue with the Federal Court's handling of these issues. These issues concern the Federal Court's refusal to grant certain

adjournments, the Federal Court's ruling that the Ministers, in complying with an order concerning the presentation of *in camera* evidence did not improperly split their case, and the Federal Court's holding that *Charkaoui II* provided a complete remedy for alleged deficiencies in disclosure in the previous security certificate proceedings: *Re Mahjoub*, 2010 FC 989; see also 2013 FC 1095 at paras. 258 and 464.

[235] In these refusals, rulings and holdings, there are no errors of law or of extricable legal principle. Nor do I see any palpable and overriding error. Further, there was no basis in law or in fact for the award of a permanent stay of proceedings based on these matters.

[236] Mr. Mahjoub also challenges the destruction of some original notes taken by the Canadian Security Intelligence Service. The Federal Court found that this did not warrant a permanent stay of proceedings: 2013 FC 1095 at paras. 75-77 and 84.

[237] The Service destroyed original operational materials in accordance with its internal policy, OPS-217. Under that policy, original materials were to be systematically destroyed after operatives completed their final reports and summaries. In this case, the reports and summaries were disclosed to Mr. Mahjoub.

[238] In both *Charkaoui II* at paragraph 38 and *Harkat* at paragraph 93, the Supreme Court held that this systematic destruction violated the named person's section 7 rights. Importantly, however, in neither case did the Supreme Court find that the destruction warranted a permanent stay of proceedings.

[239] In *Charkaoui II* at paragraph 46, the Supreme Court emphasized that each case must be looked at on its facts and that the court must consider the prejudicial effect of the destruction on the named person's case. With *Charkaoui II* before it, the Federal Court did just that.

[240] In the Supreme Court's decision in *Harkat*, decided after the Federal Court's decision in this case, these principles were reaffirmed. The Supreme Court added that summaries of destroyed materials should only be excluded if their admission "would result in an unfair trial or would otherwise undermine the integrity of the justice system": *Harkat* at para. 95.

[241] Although the Federal Court did not have the benefit of the Supreme Court's decision in *Harkat*, it carried out its task presciently, in a way that mirrored what the Supreme Court did. The Federal Court carefully assessed the reliability of the summaries of intelligence information captured in the BRS reports. It considered these reports to be reliable: they were authored by Service employees, were subject to verification by any other personnel who were witnesses to what happened and by supervisors, and they contained direct information from interviews, physical surveillance and intercepted communications. See 2013 FC 1092 at paras. 107-122; testimony of Mr. Guay dated October 15, 2010 (Appeal Book, Doc. 505.2, at pp. 140-142, 192-210). In the view of the Federal Court, the large number of people involved tended to ensure quality control: 2013 FC 1095 at paras. 81 and 83.

[242] Mr. Mahjoub also attempts to undercut the reliability of this material by suggesting that those preparing the summaries had inadequate translation support. The record shows that those involved had ample translation support if they needed it; at least two witnesses testified as to

their own extensive knowledge of the Arabic language: 2013 FC 1095 at para. 83, relying upon the testimony of Mr. Guay, dated October 12, 2010 (Appeal Book, Doc. 505, at pp. 122-128) and the testimony of CSIS Witness #2 and CSIS Witness #2B, dated July 6, 2012 (Appeal Book, Doc. 536, at p. 9) and August 7, 2012 (Appeal Book, Doc. 540, at pp. 3-4) respectively.

[243] In the Federal Court and in this Court, Mr. Mahjoub places great weight on an answer given by a Service witness on cross-examination. Mr. Mahjoub contends that the witness testified that it was the Service's practice to destroy transcripts of intercepted communications in order to avoid testifying in Court.

[244] The Federal Court examined all of the testimony leading up to this answer and construed the witness as saying that the Service did not want its officials to testify in court about its work as an agent of the Canada Border Services Agency: 2013 FC 1095 at para. 82. The Federal Court concluded that "[o]n the basis of [the witness'] testimony read in its entirety and considered in the context of the evidence of other witnesses on the subject, I am not persuaded that the Service deliberately set out to frustrate the judicial process by destroying the intercepts…": 2013 FC 1095 at para. 82. The Federal Court explicitly distinguished the situation before it from that in the Supreme Court abuse of process case of *R. v. Carosella*, [1997] 1 S.C.R. 80, 142 D.L.R. (4th) 595. In *Carosella*, a sexual assault centre deliberately destroyed evidence to frustrate the judicial process. That was not the case here.

[245] All of these findings of the Federal Court are supported by the law and the evidence before it. They are not vitiated by any palpable and overriding error. Nor are there grounds in law or in fact for the award of a permanent stay of proceedings based on these matters.

[246] Despite its finding that the summaries and reports had a high degree of reliability, the Federal Court gave Mr. Mahjoub the benefit of the doubt and thereby minimized any prejudice caused by gaps in disclosure. It did not rely upon any portions of the summaries and reports that went to Mr. Mahjoub's demeanour and subjective behaviour: 2013 FC 1092 at para. 119. This underscores the high degree of solicitude on the part of the Federal Court for the rights of Mr. Mahjoub, solicitude repeatedly demonstrated throughout the seven decisions before us.

[247] The Federal Court gave Mr. Mahjoub the benefit of the doubt concerning destroyed intercepted communications in another respect. He excluded all communications to which Mr. Mahjoub was not privy. In doing so, he was following this Court's decision in *Harkat*. This meant that the only summaries of conversations that were admissible were those which Mr. Mahjoub could personally address: 2013 FC 1092 at para. 120; 2013 FC 1095 at paras. 84 and 88. On appeal, the Supreme Court reversed this Court on that point, in effect finding this too rigid a threshold for the exclusion of this type of evidence.

[248] The Federal Court held that even without any evidence from interceptions of communications, it still would have found Mr. Mahjoub to be a member of a terrorist organization: 2013 FC 1092 at paras. 570, 585 and 630. Given the summary of facts and the sourcing for these facts at paragraphs 107-151, above, this is indisputably so.

[249] Overall, the Federal Court found that while the destruction of the original interception evidence violated Mr. Mahjoub's rights under section 7 of the Charter, the evidence fell well short of establishing an entitlement to a stay of the proceedings. This conclusion is amply supported by the facts and the law. There is no error of law or palpable and overriding error in the Federal Court's assessment.

[250] Some other evidence was destroyed: certain interview notes, a letter in a briefcase and items found on Mr. Mahjoub when he was arrested. Only photocopies were retained and presented as evidence. The Federal Court ruled on this evidence early on (October 22, 2010). Mr. Mahjoub attempted to challenge its admissibility on other grounds and the Federal Court said he was too late. Nevertheless, the Federal Court considered the matter anew and rejected the challenge on the basis that minimal prejudice had been caused; Mr. Mahjoub could still test the authenticity and the content of the evidence: 2013 FC 1092 at paras. 92-93. Again, this ruling is not vitiated by an error of law or palpable and overriding error, nor are there any grounds for a permanent stay of proceedings founded upon these matters.

(b) Unfair interviews: violations of the right to silence and right to counsel of choice

[251] The Canadian Security Intelligence Service conducted interviews of Mr. Mahjoub. Mr. Mahjoub alleges that the interviews breached his Charter rights and the Service's own policies.

[252] Certain facts found by the Federal Court determine these issues against Mr. Mahjoub. And these factual findings stand unless set aside by palpable and overriding error. There is none.

[253] The Federal Court found that Mr. Mahjoub had received sufficient notice to meet any requirements of procedural fairness: 2013 FC 1095 at paras. 65-67; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, 101 D.L.R. (4th) 654 at p. 1076 S.C.R. This factually-suffused finding of mixed fact and law is amply demonstrated by the evidence before the Federal Court.

[254] Before the Federal Court, Mr. Mahjoub did not lead evidence suggesting that the interviews were involuntary or that he did not understand the purpose of the interviews. Indeed, there was much evidence before the Federal Court to the contrary.

[255] The Federal Court found that the Canadian Security Intelligence Service notified Mr. Mahjoub of the purpose and the potential consequences of the interviews, namely security and counter-terrorism, and advised him that the interviews were voluntary. The Service told Mr. Mahjoub that it had no power to force him to speak. Given this, the Federal Court heard the evidence of an officer with the Service who advised that “had [Mr. Mahjoub] not wanted to answer a question, he could simply have said I don’t want to answer the question”: testimony of Mr. Guay, dated October 18, 2010 (Appeal Book, Doc. 505.3 at pp. 65-66).

[256] The evidence before the Federal Court shows that the Service was mindful of Mr. Mahjoub’s rights. It is apparent that Mr. Mahjoub was well aware that the interviews were voluntary and was aware of his rights. In fact, on one occasion, the Service offered to end an interview after Mr. Mahjoub asked whether he should obtain counsel. But Mr. Mahjoub invited the Service to press on with the interview. See 2013 FC 1095 at paras. 59 and 62-63. As well,

Mr. Mahjoub was offered an interpreter but he chose to use his wife and a friend: 2013 FC 1095 at para. 70.

[257] In this Court, some of the submissions of Mr. Mahjoub seem aimed at suggesting that in circumstances such as these, state authorities cannot speak to Mr. Mahjoub at all. There is no authority supporting such a proposition in the national security context. Neither is there one in the criminal context. There, the essence of the right to silence is the right to choose, with voluntariness at its core: see, *e.g.*, *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3 at para. 27; *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405 at para. 37.

[258] Overall, the Federal Court found that Mr. Mahjoub's rights were fully respected in the interviews and his participation and statements made during the interviews were voluntary. This fact-based finding is not vitiated by palpable and overriding error. In fact, it is fully supported by the evidence. Here, there is no ground for the issuance of a permanent stay of proceedings.

(c) The challenged warrant under section 21 of the *Canadian Security Intelligence Service Act*

[259] The Special Advocates submit that a warrant issued under section 21 of the *Canadian Security Intelligence Service Act* should have been struck out because of a failure to make full, frank disclosure in support of the warrant, in particular the failure to disclose exculpatory information.

[260] Had the warrant been struck, they say that the Federal Court's finding that Mr. Mahjoub was a member of the Vanguards of Conquest would fall. The finding that Mr. Marzouk was one of Mr. Mahjoub's contacts would also be undermined.

[261] The short answer to all these grounds is that even if the Special Advocates are correct and this evidence is ignored, the reasonableness of the security certificate remains amply confirmed by the facts set out at paragraphs 107-151 above. Further, even if it were unreasonable to find that Mr. Mahjoub was a member of the Vanguards of Conquest, the facts establish that he was a member of Al Jihad. For the purposes of the reasonableness of the security certificate, membership in only one terrorist organization is enough.

[262] Further, in issue here is the Federal Court's review of a decision of a designated judge to authorize a warrant. The standard of review is deferential: see, *e.g.*, *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161; *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321; *R. v. Nero*, 2016 ONCA 160, 334 C.C.C. (3d) 148. The overall question is whether there were grounds upon which the issuing justice "could" grant the warrant. The reviewing court evaluates this through a "contextual analysis of the record, not a piecemeal dissection of individual items of evidence shorn of their context in a vain search for alternate exculpatory inferences": *Nero* at para. 68.

[263] This is far from a rehearing of the original application to obtain the warrant. The reviewing court is not entitled to substitute its views or discretion for those of the court that issued the warrant.

[264] In confidential reasons concerning the validity of the warrant, the Federal Court identified and applied these standards. Citing *Garofoli*, above at page 1452, the Federal Court stated that "[i]f, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge *could* have granted the authorization, then he or she should not interfere" [emphasis in original]: 2013 FC 1096 at para. 129. It concluded that even with problematic parts removed from the warrant, there still would have been sufficient evidence to satisfy the designated judge that there were reasonable grounds for the issuance of the warrant: 2013 FC 1096 at para. 133.

[265] The Special Advocates urge that warrants issued under section 21 of the *Canadian Security Intelligence Service Act* should be treated differently from criminal law warrants. Section 21 warrants need only relate to a threat to the security of Canada. And they can only be reviewed when the evidence obtained by the warrant happens to be needed in a legal proceeding. Accordingly, the Special Advocates say, there is reason—even more than in the normal criminal search warrant context—for the Service to make full, frank and fair disclosure to the issuing justice when seeking these warrants, even disclosure of material that the Service itself may not accept as accurate or truthful.

[266] Thus, the Special Advocates submit that this Court should depart from the usual approach applied to the review of criminal search warrants. As noted above, under that approach, the reviewing court asks whether the warrant could have issued notwithstanding the suppression of exculpatory evidence. At paragraph 65 of their memorandum of fact and law, they submit that

when there has been any failure to disclose material evidence, "the warrant should not issue or should be set aside."

[267] In my view, the different nature of section 21 warrants does not justify a different legal standard. The fact that a section 21 warrant may be hard to challenge in some contexts does not logically lead to the conclusion that when it is challenged in court for omissions or inaccuracies — exactly like a criminal law search warrant —it should be subject to a different legal test. In terms of legal policy, it is hard to understand why a section 21 warrant that could have issued despite omissions or inaccuracies should be treated differently from a criminal law warrant. In fact, given the ever-increasing need to guard against terrorism and other threats to national security it is difficult to understand why admissibility standards in the national security context should be more stringent than those in the criminal law context.

[268] The Special Advocates also submit that paragraph 21(2)(*b*) of the Act should have been interpreted to require an evidentiary showing of investigative necessity and there was no investigative necessity here.

[269] I reject this. Paragraph 21(2)(*b*) requires a deponent seeking a warrant to depose that "other investigative procedures have been tried and have failed" or "that the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures." But an alternative ground is where, without a warrant, "it is likely that information of importance with respect to the threat to security of Canada…would not be obtained." This third ground provides an independent basis for obtaining a warrant and does not

require a demonstration of investigative necessity: *R. v. Alizadeh*, 2014 ONSC 1624 at paras. 20-29.

[270] In particular, I agree with the following passage from *Alizadeh* (at para. 29):

> …Under the third rubric of s. 21(2)(*b*) of the [*Canadian Security Intelligence Service Act*], there is no need to demonstrate that other investigative procedures have been tried and exhausted. Rather, taking into account the practical and complex realities required for CSIS to fulfil its mandate to investigate ongoing and future national security threats, the likelihood of loss of important information with respect to these future threats is a distinct, legitimate, and necessary ground upon which a justice can issue a warrant. There are internal limitations found in the wording of this provision, namely, that the information must be "important" and that there must be a "likelihood" that the information would not otherwise be obtained. These words must be interpreted in a meaningful way so as to protect the important privacy interests of Canadian citizens and residents.

[271] The Federal Court, in rather conclusory reasons, considered that in any event, investigative necessity was present. Upon review of both the open record and the closed record, I see no palpable and overriding error in that finding.

(d) The use of hearsay evidence and unsourced intelligence evidence

[272] Mr. Mahjoub makes many submissions that, broadly, can be seen as an attack against the alleged unfairness of paragraph 83(1)(*h*) of the *Immigration and Refugee Protection Act*. This paragraph provides that "the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence."

[273] To the extent that these unfairness arguments go to constitutionality, they do not succeed.

[274] The Supreme Court in *Harkat* has upheld the constitutionality of paragraph 83(1)(*h*), effectively vindicating the manner in which the Federal Court proceeded.

[275] In *Harkat*, the Supreme Court considered the use of hearsay in unsourced evidence. It held that "[w]hile [paragraph] 83(1)(h) of the [*Immigration and Refugee Protection Act*] may result in the admission of hearsay evidence and deny the [S]pecial [A]dvocates the ability to cross-examine sources, it does not violate s. 7 of the Charter": *Harkat* at para. 76. The Supreme Court rejected the idea that the traditional rules of evidence, such as hearsay, have "been constitutionalized into unalterable principles of fundamental justice": *Harkat* at para. 76; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, 85 C.C.C. (3d) 289 at p. 453 S.C.R. per L'Heureux-Dubé J.

[276] Instead, according to the Supreme Court, the constitutionally salient consideration is reliability, though considerations of appropriateness, including fairness in the proceedings, must come to bear on admissibility: *Harkat* at para. 76; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 at para. 48. This includes the discretion to exclude evidence whose probative effect is outweighed by its prejudicial effect: *Harkat* at para. 76. Paragraph 83(1)(*h*) confirms these considerations, providing that the standard for admissibility is reliability and appropriateness.

[277] Without the benefit of the Supreme Court's decision in *Harkat*, the Federal Court, again quite presciently, upheld the constitutionality of paragraph 83(1)(*h*) and made reliability and

appropriateness, in the sense discussed in the Supreme Court's *Harkat* decision, its guiding star in navigating through the evidentiary issues, including hearsay issues.

[278] In particular, the Federal Court held that hearsay evidence could be admitted under the paragraph without compromising the fairness of the proceedings. In *Harkat* at paragraphs 75 and 76, the Supreme Court upheld that proposition, noting that the court has a broad discretion to screen out unreliable evidence after a searching review. This is exactly how the Federal Court proceeded and frequently it screened out evidence it considered hazardous to rely upon: 2013 FC 1092 at paras. 218-228, 230-231, 248-252, 254-259, 262, 268-269, 292, 294-295, 447, 450, 452-454, 456-457, 501-503, 528, 574-583, 595-596, 599, 600, 609, 614 and 615.

[279] In assessing evidence using the reliability and appropriateness standard under paragraph 83(1)(*h*) of the *Immigration and Refugee Protection Act*, the Federal Court was appropriately cautious. Although the paragraph allows evidence to be admitted "even if it is inadmissible in a court of law," the Federal Court observed that the traditional rules of evidence are not to be disregarded in their entirety, observing that many of them grew out of a concern about reliability and fairness. Overall, the Federal Court considered itself to be bound by standards of reliability and fairness or, broadly put, the guarantee of trial fairness under the principles of fundamental justice in section 7 of the Charter: 2013 FC 1097 at paras. 131-134. I agree with the Federal Court's reasons on this point.

[280] In the Federal Court and before us, Mr. Mahjoub attacked the use of "unsourced evidence" in the case against him. "Unsourced evidence" is evidence or information obtained

from a foreign agency where the agency's source for the evidence or information is not provided. Mr. Mahjoub submits that unsourced evidence should not have been used at all.

[281] The Federal Court rejected this argument. I agree with this for the reasons it gave.

[282] The Federal Court observed that in the intelligence context, inquiring about the source of information would be a "fundamental transgression of the [intelligence-sharing] relationship" and, thus, would place Canada's intelligence-sharing relations in jeopardy and would result in danger to national security: 2013 FC 1094 at paras. 18-19; testimony of Mr. Brooks in the closed hearing. In its view, unsourced evidence cannot be categorically inadmissible. However, it does not automatically go into evidence either. It must be shown to be reliable and appropriate in all the circumstances—in other words, admissible under the statutory standards of paragraph 83(1)(*h*).

[283] Further, under subsection 83(1.1), it cannot be "information that is believed on reasonable grounds to have been obtained as a result of the use of torture…or cruel, inhuman or degrading treatment or punishment." I deal with this specific ground in the next section of these reasons.

[284] In considering unsourced evidence given by a foreign agency, the Federal Court considered a number of factors (at 2013 FC 1094 at paras. 21 and 26-27) such as evidence of methodologies used by the foreign agency and its human rights record, the nature and duration of the relationship between the foreign agency and the Service, past experiences of the Service with

the foreign agency, the foreign agency's international reputation and the credibility of the foreign agency, including its motivations, inconsistencies or exaggerations. To the Federal Court, this was not a closed list.

[285] The Special Advocates suggest that the test used by the Federal Court for unsourced evidence reads subsection 83(1.1) of the *Immigration and Refugee Protection Act* too narrowly as it fails to adequately guard against evidence tainted by torture or other unacceptable methods and fails to take into account the reality that many states do not source their information when sharing. In other words, the unsourced nature of the evidence makes it impossible for Special Advocates to challenge it on the basis that it is derived from torture or cruel, inhuman or degrading treatment or punishment, or is otherwise unreliable or inappropriate. The Special Advocates also raise issues as to whether the test proposed by the Federal Court, as a practical matter, can be applied meaningfully.

[286] I do not share the Special Advocates' concerns. The test respects the principles of what constitutes reliable evidence set out in the jurisprudence, such as the Supreme Court's decision in *Harkat*. And, as deployed in this case, the approach seems to have worked. In some instances, the Federal Court gave unsourced evidence no weight, required it to have "truly independent corroboration," or exercised caution: 2013 FC 1092 at paras. 62, 115, 575, 582 and 589.

[287] In this area, the Federal Court was assisted by testimony relating to the Canadian Security Intelligence Service's approach to foreign agency information, particularly in assessing its value. Since intelligence sharing relies on the "give to get" principle, a foreign agency that continually

provides inaccurate or misleading information could endanger its reputation in the intelligence community and impair its ability to successfully interact with other agencies. As a result, the Canadian Security Intelligence Service has developed a detailed metric for evaluating the information it receives and it carefully evaluates the agencies it deals with to ensure they provide sufficiently reliable information. Accordingly, it is a mistake to assume, as Mr. Mahjoub seems to assume, that all unsourced evidence is inherently unreliable and should be excluded.

[288] The test the Federal Court has formulated is correct. As well, in the end, the reasonableness of the security certificate is amply confirmed by evidence other than unsourced evidence.

[289] There is no error of law or palpable and overriding error in the Federal Court's consideration of the evidence under paragraph 83(1)(*h*), including the evidence said to be hearsay and unsourced. There are no grounds for awarding a permanent stay of proceedings.

(e) The use of information derived from torture or cruel, inhuman and degrading treatment

[290] It will be recalled that "information that is believed on reasonable grounds to have been obtained as a result of the use of torture…or cruel, inhuman or degrading treatment or punishment" is inadmissible: subsection 83(1.1) of the *Immigration and Refugee Protection Act*.

[291] In a motion in 2010, the Federal Court excluded some evidence relied upon by the Ministers in the Security Intelligence Report because there were reasonable grounds to believe it

had a plausible connection to torture or cruel, inhuman or degrading treatment or punishment: 2010 FC 787. The Federal Court was persuaded that “significant information” had been gathered “by methods that [did] not include the use of torture or [cruel, inhuman or degrading treatment or punishment]”: *Mahjoub (Re)*, 2010 FC 787 at paras. 116-17, 160-168, 207 and 229.

[292] In a general abuse of process motion, Mr. Mahjoub raised this issue again. The Federal Court found that its earlier order had remedied any violation of Mr. Mahjoub’s section 7 rights and so no further remedy was warranted to protect trial fairness or to vindicate the interests of justice: 2013 FC 1095 at paras. 120-132. The Federal Court found that the Service intended to exclude information obtained by torture or cruel, inhuman or degrading treatment or punishment. At no time was it acting in ignorance of Charter standards or in wilful and flagrant disregard of the Charter.

[293] Mr. Mahjoub submits that in rejecting its arguments in the abuse of process motion, the Federal Court ignored relevant criteria. I am not persuaded that this is so. The Federal Court cited all relevant authority and applied it faithfully to the evidence before it. There is no error in law, nor any palpable and overriding error.

[294] In assessing this issue, the Federal Court employed a two-step approach for assessing the admissibility of evidence under subsection 83(1.1). It drew this approach substantially from the House of Lords decision in *A. and Others v. Secretary of State for the Home Department*, 2005 UKHL 71, [2006] 2 A.C. 221 and the Supreme Court’s analysis in *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451, 121 D.L.R. (4th) 589 at pages 565-566 S.C.R. First, the named person or, more typically,

Special Advocates acting on the named person's behalf, must demonstrate a "plausible connection" between the use of torture or cruel, inhuman or degrading treatment or punishment and the information to be used against him or her. This preliminary burden can be met: there is plenty of information available to the public regarding the human rights practices of different regimes around the world. As a result, the House of Lords called this a "low bar": *A. and Others* at para. 116. Once this low standard is met, the onus shifts to the Ministers to adduce evidence that will satisfy the court on the issue of admissibility.

[295] The Court of Appeal for Ontario has approved and adopted the Federal Court's two-step approach in *France v. Diab*, 2014 ONCA 374, 120 O.R. (3d) 174 at paragraphs 261-264, and so do I.

[296] The Special Advocates argue that for the information to be admissible under subsection 83(1.1), the Ministers should be required to prove a negative, namely that the "information could not have come from" torture or cruel, inhuman or degrading treatment or punishment, even in the absence of any evidence that the information was derived from torture or cruel, inhuman or degrading treatment or punishment.

[297] This is inconsistent with the wording of paragraph 83(1)(*h*) and subsection 83(1.1) of the *Immigration and Refugee Protection Act*. The framework under those provisions is "admissibility absent reasonable grounds," not "inadmissibility unless torture and cruel, inhuman or degrading treatment or punishment has been negatived." In particular, paragraph 83(1)(*h*) states a presumptive rule that information that is reliable and appropriate is admissible. And

subsection 83(1.1) specifically refers to paragraph 83(1)(*h*) and excepts information from it where it is "believed on reasonable grounds to have been obtained as a result of the use of torture…or cruel, inhuman or degrading treatment or punishment."

[298] Therefore, the approach applied by the Federal Court in this matter is consistent with both other national security jurisprudence and the text of the operative provisions themselves. There is no basis upon which this Court should intervene.

(f) Breaches of solicitor-client privilege and litigation privilege: the commingling of documents

[299] A full summary of the facts relevant to this issue can be found in the Federal Court's decision at 2012 FC 669.

[300] In July 2011, the Federal Court's hearing into the reasonableness of the certificate was adjourned for the summer. Assistants from the Department of Justice attended at the Federal Court in Toronto to retrieve the Ministers' documents from the courtroom and from a breakout room. The plan was to collect the material, return to the offices of the Department of Justice and organize the materials.

[301] Inadvertently, the assistants also collected materials stored in Mr. Mahjoub's breakout room. Both parties' materials were placed, commingled, in an unoccupied office at the Department of Justice. The assistants began to sort the documents. Upon suspecting that some of

the materials did not belong to the Ministers, they ceased their sorting. Inadvertently, the Ministers' materials had been commingled with Mr. Mahjoub's materials.

[302] Mr. Mahjoub feared that some of his materials—confidential and subject to litigation privilege and solicitor and client privilege—had been acquired by the Ministers and had been reviewed. He brought a motion for an immediate stay of the proceedings.

[303] Before ruling on Mr. Mahjoub's motion for a stay, the Federal Court established a process for separating the commingled documents. A Prothonotary presided over the separation process and prepared a report on the results.

[304] Taking into account all that had transpired and the Prothonotary's report, the Federal Court dismissed the motion for a permanent stay. It termed the Ministers' conduct in taking Mr. Mahjoub's documents as "unintentional and negligent": 2012 FC 669 at para. 149. It held that the Ministers had adduced enough evidence showing that Mr. Mahjoub's materials were not reviewed by anyone on the Minister's team: 2012 FC 669 at paras. 122-133. Overall, it held that Mr. Mahjoub was not actually prejudiced. In its view, the actual fairness of the proceedings had not been affected.

[305] However, the Federal Court found that the seizure itself was a violation of Mr. Mahjoub's right against unreasonable search and seizure: 2012 FC 669 at paras. 157-158. It also found that the appearance of the fairness of the proceedings had suffered. As a result, he found that there was an abuse of process under the so-called residual category—an abuse that does not threaten

trial fairness but risks undermining the integrity of the judicial process and the administration of justice.

[306] However, the Federal Court considered that the most extreme remedy of staying the proceedings was not warranted on the facts. In its words, this was not the "clearest of cases that would warrant a permanent stay of proceedings": 2012 FC 669 at para. 145. In doing so, it applied a correct understanding of the law to the facts before it.

[307] Applying the jurisprudence of the Supreme Court concerning permanent stays of proceedings, the Federal Court conducted a balancing exercise, weighing the interests that would be served in granting a stay of proceedings against society's interest in having a final decision on the merits: 2012 FC 669 at para. 146. In doing so, it examined the particulars of the case and the nature of the proceedings, Mr. Mahjoub's circumstances, the seriousness of the Ministers' conduct and its impact on the integrity of the administration of justice, and society's interest in the adjudication of the case on its merits. The Federal Court concluded (at para. 147) that the "affront to fair play and decency caused by the Ministers' taking and co-mingling of Mr. Mahjoub's privileged documents is not disproportionate to the societal interest of having the underlying proceeding continue and be ultimately decided on the merits."

[308] The Federal Court was mindful of the fact that lesser remedies for misconduct are available to address the appearance of injury to the administration of justice. So here it ordered a lesser but still significant remedy. Its aim—appropriate given the law on point—was "to ensure that the Ministers' conduct does not undermine society's expectation in the administration of

justice” and “to ensure that any affront to the appearance of fairness will not be manifested, perpetuated or aggravated through the conduct of the proceedings or by their outcome”: 2012 FC 669 at para. 145.

[309] To this end, it stated that “[i]n order to dispel any lingering perception that counsel for the Ministers may have reviewed privileged materials belonging to Mr. Mahjoub and to ensure that public confidence in the system of justice is maintained,” it would order that relevant members of the Ministers’ litigation team be removed from the file, be barred from working on the proceedings or having any further access to any of the materials or information related to the file, and be prohibited from discussing the file with anyone: 2012 FC 669 at paras. 136, 143-144, 148 and 155; 2013 FC 1095 at para. 26. In fashioning this remedy, it was mindful of the law concerning the removal of solicitors discussed by the Supreme Court in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189 and applied the factors discussed in that case.

[310] Here again, the Federal Court applied correct legal principles to the facts before it. And in making a large number of factual findings and in applying the law to the facts before it, the Federal Court did not commit any palpable and overriding error. Here again, there are no grounds for the granting of a permanent stay of proceedings.

(g) Breaches of solicitor-client privilege: the interception of privileged calls

(i) Interceptions under section 21 of the Canadian Security Intelligence Service Act until October 2001

[311] Certain solicitor-client communications were intercepted under national security warrants authorized by section 21 of the *Canadian Security Intelligence Service Act*. All of the interceptions of solicitor-client communications took place following Mr. Mahjoub's arrest: 2013 FC 1095 at paras. 183-184. Mr. Mahjoub submits that the interception of the solicitor-client communications constitutes an abuse of process warranting a stay of the security certificate proceedings.

[312] Here, it must be kept front of mind that the central issue before this Court is the reasonableness of the security certificate. The interceptions did not lead to evidence that was used to support the reasonableness of the security certificate. The Ministers did not attempt to use any of the communications as evidence. None of the communications forms part of the information, above, that supports the reasonableness of the certificate. Thus, the interceptions have nothing to do directly with the certificate proceedings before us.

[313] The only issue is whether the interception of solicitor-client communications was so abhorrent to our system of justice that the security certificate proceedings should be stayed. On this, charging itself correctly on the legal principles relating to a stay and applying these principles to the facts before it, the Federal Court declined to grant a stay. There is no reviewable error in this.

[314] All of the interceptions were carried out under section 21 of the *Canadian Security Intelligence Service Act* or by way of judicial authorization and were conducted in good faith.

[315] At the outset, one must recognize that it is inevitable that national security warrants authorizing the interception of communications sent and received using Mr. Mahjoub's phone will result in the interception of solicitor-client communications. When a lawyer phones Mr. Mahjoub and discusses the proceedings, those discussions will inevitably be intercepted. This sort of "initial interception," an inevitable one, is not fodder for an abuse of process complaint in itself: *Atwal*, above at paras. 15 and 30. The key is what happens to those interceptions afterwards.

[316] In *Atwal*, this Court held that solicitor-client communications can be intercepted and reviewed by a Director or Regional Director General of the Security Service to ascertain whether the communication relates to a "threat to the security of Canada." If not, the communication is destroyed and no further disclosure is made: *Atwal* at paras. 15 and 30. This has been incorporated into a policy that requires an analyst to disengage from the communication once it is known to be a solicitor-client communication. This policy then requires the destruction of the communication. Except for a small number of calls in which Mr. Mahjoub's wife acted as an agent, this policy was followed.

[317] The Federal Court found as a fact that the Ministers had rebutted all of the presumed prejudice flowing from the interception of solicitor-client communications, other than minimal prejudice resulting from the interception of calls involving Mr. Mahjoub's family members who,

on occasion, were conveying information as agents of his solicitors. In its view, any prejudice resulting from this was "contained if not neutralized completely" by Mr. Mahjoub's hiring of new counsel in 2008, his adoption of a new legal strategy, and the lack of advantage gained by the Ministers: 2013 FC 1095 at paras. 191-202.

[318] The Federal Court neither erred in law nor did it commit palpable and overriding error in reaching these factually suffused conclusions. I reiterate that there was no evidence before the Federal Court suggesting that any intercepted information was used, directly or indirectly.

[319] Mr. Mahjoub also submits that the Federal Court erred in applying *Atwal*, above, to certain intercepts during the pre-arrest period. But this submission fails because no solicitor-client communications were intercepted during this period.

(ii) Interceptions under the Federal Court release order

[320] Mr. Mahjoub was detained after his arrest until June 2007. The Federal Court issued an order that set out release terms: Order dated April 5, 2011 in file DES-7-08.

[321] One of these terms allowed for the interception of Mr. Mahjoub's telephone communications. Roughly eighteen months later a clarification was made: Order dated December 19, 2008 in file DES-7-08. Under that clarification, "the analyst, upon identifying the communication as one between solicitor and client, shall cease monitoring the communication and shall delete the interception."

[322] Between the date of the release order and the clarification order, the Canadian Security Intelligence Service believed that it could listen to all calls, including calls containing solicitor and client communications, to determine whether there was information that constituted a breach of conditions or a threat. The Federal Court found that the analysts "honestly believed" that they could do this. However, in compliance with the policy described above, all copies of the solicitor-client communications were destroyed as soon as possible. See 2013 FC 1095 at paras. 204-216.

[323] While the clarification order was in place, certain communications containing solicitor-client discussions were inadvertently forwarded to the Canada Border Services Agency. But the Federal Court found as a fact that no one listened to the communications beyond the extent permitted by the clarification order: 2013 FC 1095 at paras. 224-226. As for calls properly forwarded to the Canada Border Services Agency, the Federal Court found that analysts would listen to calls forwarded by the Security Service only long enough to establish they were solicitor-client communications and then would promptly disengage and lock the communications in a safe.

[324] As a result of policies in place, no one other than a few personnel within the Security Service and the Canada Border Services Agency accessed the communications. The Federal Court found that the policies contained sufficient safeguards and were followed throughout. Thus, in the view of the Federal Court, the presumption of prejudice from the interception of solicitor-client calls was rebutted and there was no prejudice to Mr. Mahjoub's fair trial rights: 2013 FC 1095 at paras. 217-220.

[325] The Federal Court added that there was no “specific evidence” that Mr. Mahjoub had discussed any solicitor-client information with his counsel or counsel’s staff in the period between the release order and the clarification order: 2013 FC 1095 at para. 208. Had the Federal Court so found, its analysis concerning the adherence to policies by the Security Service and the Canada Border Services Agency would have sufficed to eliminate any prejudice.

[326] Overall, given these facts, the Federal Court did not find that this was the “clearest of cases” warranting a stay.

[327] On all these matters, the Federal Court did not commit palpable and overriding error or an error in law or of extricable principle.

(iii) The allegation of bias against the Federal Court arising from the breach of solicitor-client privilege

[328] In the Federal Court, Mr. Mahjoub submitted that the Canadian Security Intelligence Service’s breach of solicitor-client privilege acting under warrants issued by the Federal Court called into question the appearance of impartiality of the Court. The Court was said to have been tainted as a result of its “failure to adequately protect potential privileged solicitor client communications in the authorized interception by failing to apply proper safeguards required by law” which “breached the impartiality or appearance of impartiality and created the impression of the court giving the other side an advantage in hearing strategy and information”: Mr. Mahjoub’s memorandum of fact and law at para. 60. Further, the impression was created that “if [the Canadian Security Intelligence Service] continued its proceedings, it was for reasons derived

from the solicitor client interceptions that the court knew was happening, which was a further disadvantage": *ibid*.

[329] The Federal Court rejected this submission: 2013 FC 1092 at para. 481.

[330] There is no reviewable error here. The standard is the assessment of the informed, reasonable person viewing the matter realistically and practically: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716. Against that standard, the mere fact that a court has issued a warrant to allow security agencies or law enforcement to do certain things does not implicate that court in the conduct of persons acting under that warrant and, thus, render it biased and disqualified from proceeding further.

[331] This point is so devoid of merit that the words of this Court in *Es-Sayyid v. Canada (Minister of Public Security and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3 at paragraph 50 need to be repeated:

> …[T]he Supreme Court has said that alleging bias is "a serious step that should not be undertaken lightly": [*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193]. Given the harm caused to the administration of justice when unsubstantiated allegations are made, and given the serious shortcomings of the opinion tendered in this case, we cannot help but express our deep disappointment.

(h) The overall delay

[332] In the Federal Court, Mr. Mahjoub submitted that delays in the security certificate proceedings violated his rights under sections 7 and 11(*b*) of the Charter and the obligation of the Court to proceed informally and expeditiously under paragraph 83(1)(*a*) of the *Immigration and Refugee Protection Act*.

[333] The Federal Court considered this issue in great depth. It considered the leading jurisprudence of the Supreme Court on delay, including *Morin*, above, *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3 and *Blencoe*, above. It correctly identified and applied the principles in these cases. Its decision is also supported by other cases to similar effect. The Federal Court did not err in law or in extricable legal principle.

[334] In applying the law to the evidence before it, the Federal Court did not commit palpable and overriding error. It examined the period from the signing of the second security certificate in February 2008 and the end of the reasonableness hearing in January 2013. On the evidence, it found four periods of delay attributable to the Ministers. The Federal Court found that any prejudice attributable to the Ministers was largely mitigated during the course of the proceedings. For example, the release of critical new disclosure coincided with the adjournment when Mr. Mahjoub changed counsel.

[335] In this Court, Mr. Mahjoub submits that "all the delays in this case were created or caused by the Ministers' failure to meet their duty to disclose under section 7 of the Charter":

Mr. Mahjoub's memorandum of fact and law at para. 72. This bald statement ignores the evidence in the case, painstakingly reviewed and enumerated by the Federal Court in its 186 paragraph decision on this point, to say nothing of the fact that it ignores the standard of palpable and overriding error.

[336] Mr. Mahjoub also submits that in assessing delay, the Federal Court should have taken into account the Ministers' decision to proceed from 2000-2007 under the first certificate under an unconstitutional scheme and the inadequate disclosure during that time.

[337] The Federal Court rejected this argument on the basis that Mr. Mahjoub did not identify any specific delays that could have affected the proceedings: 2013 FC 1095 at para. 258. There is no palpable and overriding error in this finding. This being said, it is worth observing that much of the activity under the first certificate inured to the benefit of the proceedings under the second certificate and likely reduced the time necessary for the issuance and assessment of the second certificate.

[338] Overall, the Federal Court's rejection of Mr. Mahjoub's allegations of unreasonable delay is based on a correct understanding of law. The Federal Court did not commit palpable and overriding error in applying the law to these facts.

[339] In support of the Federal Court's finding that there are no legitimate grounds for complaint, much more can be said. This was an exceptionally large and very challenging matter, rare if not unique in Canadian legal history: the nature and volume of disclosure, the word-by-

word level of care needed to manage it because of the need to protect national security while ensuring fairness to Mr. Mahjoub, the disruption caused by the replacement of counsel on both sides, the deluge of issues, arguments and evidence that rained down upon the Federal Court, the frequent relitigation of issues or litigation of issues again but in modified form, the tens of thousands of pages of legal submissions and evidence—sometimes difficult and mind-numbing in their detail—and the constantly evolving law in this new, relatively underdeveloped area. Looming throughout was the spectre of chaos and error. This, the Federal Court, to its credit, avoided. In the end, the Federal Court issued 53 orders, many supported by full reasons for order—to say nothing of the seven complex and intricate reasons for judgment under direct review here. All this supports the Federal Court's finding that there was no unreasonable delay.

(i) The cumulative effect of the foregoing: whether a permanent stay of proceedings should have been granted

[340] Before the Federal Court, Mr. Mahjoub sought a stay of the security certificate proceedings against him based on the violations of his rights as outlined above and the overall alleged abuse of process. He submits that the Federal Court misdirected itself on the availability of a stay. Further, on these facts, the Federal Court should have stayed the security certificate proceedings.

[341] At the outset, Mr. Mahjoub submits that the Federal Court never considered whether an abuse of process should be granted because of the cumulative effect of instances of misconduct, errors and other incidents, including instances of wrongful acquisition and wrongful use of evidence, violations of solicitor-client privilege and violations of Charter rights: see Mr.

Mahjoub's memorandum of fact and law at para. 26. The Federal Court is said to have "ignored" cumulative effects.

[342] This submission is flatly wrong, so wrong it should never have been advanced. The Federal Court discusses this at paragraphs 494 and 506 to 510 of 2013 FC 1095. At paragraph 494 of 2013 FC 1095, the Federal Court referred to the "cumulative Charter rights violations and abuse of process." The heading just before paragraph 496 of 2013 FC 1095 is: "Are the remedies that have been afforded on an ongoing basis sufficient to address the cumulative prejudice?" The heading just before paragraph 506 of 2013 FC 1095 is: "Taking into account all of the Charter violations and abuses holistically and cumulatively, is this the clearest of cases in which no other remedy is reasonably capable of removing that prejudice?" As well, the conclusion in paragraph 510 of 2013 FC 1095 specifically speaks of the "cumulative effect[s]."

[343] The Federal Court properly instructed itself on the general principles governing the granting of a permanent stay for an abuse of process: see the analysis at paras. 204-222, above; see 2012 FC 669 at paras. 67-68, 76-79, 138-41 and 144 and 2013 FC 1095 at paras. 38-44 and 477-478.

[344] Mr. Mahjoub submits that the Federal Court improperly required the presence of *mala fides* before granting a permanent stay. He points to 2013 FC 1095 at paragraphs 479 and 486. I disagree. At paragraph 493, the Federal Court was discussing cases where *mala fides* was present but it was not suggesting that *mala fides* is a necessary precondition for a permanent stay. And at paragraph 500, the Federal Court observed that there was no evidence that the interception of

solicitor-client communications was "committed in bad faith, negligently or with intent to secure litigation advantage," but in no way was the Federal Court suggesting that *mala fides* is a necessary precondition for a stay. As was mentioned in the preceding paragraph, the Federal Court directed itself correctly on the law.

[345] The Federal Court found that the cumulative Charter rights violations and abuse of process it had identified earlier in its reasons did not approach the level of severity found in the "very rare" cases—cases of egregious and intentional misconduct—mentioned in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, 151 D.L.R. (4th) 119: 2013 FC 1095 at paras. 492-494. Thus, this was "not one of those rare cases described in the jurisprudence that calls for an immediate and permanent stay of proceedings without further consideration": 2013 FC 1095 at paras. 43, 492 and 494.

[346] The Federal Court then considered the cumulative prejudice to the fairness of the proceedings. It found that this was not significant because the remedies it had awarded or other circumstances had alleviated or mitigated any prejudice: 2013 FC 1095 at paras. 496-505.

[347] There was only one small exception to this, a period of a few months' delay that would have affected Mr. Mahjoub's liberty interest as a person in detention or subject to stringent conditions of release: 2013 FC 1095 at para. 505. Given the "complex case which required consideration of many novel issues," the complexity added by the involvement of "public and closed evidence and proceedings," a "multitude of counsel", "exhaustive constitutional and

procedural challenges," "ongoing disclosure obligations," and "periodic detention reviews," the overall prejudice must be seen as "relatively minor": 2013 FC 1095 at paras. 506.

[348] Although the overall prejudice was "relatively minor," the Federal Court decided to weigh the public interest in a decision on the merits against the public interest in granting a stay: 2013 FC 1095 at para. 507.

[349] In conducting this weighing, the Federal Court (at paragraph 508 of 2013 FC 1095) cited this Court's observations in *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482, 314 N.R. 347 at paragraphs 38-39:

> …Terrorist organizations by their nature are unpredictable…an allegation that someone is a former member of a terrorist organization therefore is a very serious one. Therefore, the gravity of the allegations argues in favour of continuing the proceedings.
>
> …I acknowledge that some of the issues raised by the appellant could, in some circumstances, support an abuse of process argument. However, in the context of proceedings concerning an allegation there are reasonable grounds to believe that the appellant is or was a member of an organization that there are reasonable grounds to believe is or was engaged in terrorism, there is a compelling societal interest in obtaining a decision on the merits.

[350] Then the Federal Court turned to the case before it (2013 FC 1095 at paras. 509-510):

> The gravity of the allegations against Mr. Mahjoub, that he was a leading member of terrorist organizations and a danger to the security of Canada, weighs in favour of a determination of the reasonableness of the security certificate on the merits of the case. On the other hand, the above-discussed Charter violations and abuses of the Court's process by the Ministers have resulted in potential unfairness to Mr. Mahjoub.

> Balancing these two factors, I conclude that the importance of the adjudication on the merits of these grave allegations that impact on the security of all Canadian outweighs the procedural injustices to Mr. Mahjoub and their cumulative effect caused by the Ministers. This is far from the clearest of cases where justice demands a stay.

[351] For these reasons, applying the correct law to the facts before it, the Federal Court exercised its discretion against staying the security certificate proceedings permanently.

[352] On all of this, Mr. Mahjoub has failed to demonstrate any error of law or any palpable and overriding error. Far from it: on this factual record, I would have made the same decision the Federal Court did. Indeed, given the Supreme Court's jurisprudence concerning when a permanent stay of proceedings should be granted, it does not seem to be available at all on this evidentiary record.

E. Conclusion

[353] The legislative regime concerning security certificates, including the procedures for assessing the reasonableness of a security certificate, is constitutional. It manifests a commitment to fundamental fairness—a commitment worthy of a free and democratic society—to the person named in the certificate, here, Mr. Mahjoub. Viewed alongside other fairness features, such as state-funded counsel for Mr. Mahjoub throughout, these particular security certificate proceedings can only be seen as fundamentally fair in their execution. True, occasionally mistakes and faults happened and often remedies were needed to redress them. But individually or collectively, there is no factual and legal basis upon which the Federal Court could have

permanently stayed these proceedings. They properly ran their course to a final decision on the merits.

[354] In its final decision on the merits (2013 FC 1092), the Federal Court found that there are reasonable grounds to believe that Mr. Mahjoub is inadmissible to Canada on two grounds: by being a danger to the security of Canada (paragraph 34(1)(*d*) of the *Immigration and Refugee Protection Act*) and by being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in espionage, subversion by force of a government or terrorism (paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*). In finding this, the Federal Court committed no reviewable error.

[355] As a result, under section 80 of the *Immigration and Refugee Protection Act*, the security certificate continues to be "conclusive proof" that Mr. Mahjoub is inadmissible to Canada and, in the words of section 80, continues to be "a removal order that is in force without it being necessary to hold or continue an examination or admissibility hearing."

F. Disposition

[356] For the foregoing reasons, I would dismiss the appeals. In file A-478-14, I would answer the question the Federal Court certified for this Court's consideration as follows:

> Question: Do Part 1, Division 4, Sections 33 and 34, and Part 1, Division 9 of the *Immigration and Refugee Protection Act*, as well as sections 4, 6 and 7(3) of *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act* breach section

7 of the Charter by denying the named person [here, Mr. Mahjoub] the right to a fair hearing? If so, are the provisions justified under section 1?

Answer: Section 7 of the Charter is not infringed. It is not necessary to answer the question regarding section 1 of the Charter.

"David Stratas"

J.A.

"I agree
Richard Boivin J.A."

"I agree
Judith Woods J.A."

<u>FEDERAL COURT OF APPEAL</u>

<u>NAMES OF COUNSEL AND SOLICITORS OF RECORD</u>

DOCKETS:	A-478-14, A-313-12 and A-479-14

APPEALS FROM JUDGMENTS AND ORDERS OF THE HONOURABLE MR. JUSTICE BLANCHARD IN FILE DES-7-08

STYLE OF CAUSE:	MOHAMED ZEKI MAHJOUB v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO and OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 7 AND 8, 2016 AND DECEMBER 13, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BOIVIN J.A. WOODS J.A.
REASONS DATED:	JULY 19, 2017

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