TOP FIVE 2014

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

CANADA (CITIZENSHIP AND IMMIGRATION) v HARKAT, 2014 SCC 37, [2014] 2 SCR 33.

Date Released: May 14, 2014

https://www.canlii.org/en/ca/scc/doc/2014/2014scc37/2014scc37.html

Facts

In 2001, Parliament enacted Division 9 of Part I of the *Immigration and Refugee Protection Act (IRPA)* in response to the September 11 attacks in the United States. The scheme grants authorities extraordinary and controversial powers to detain suspected terrorists and deport them from Canada. Under Division 9, the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness can issue a certificate declaring that a foreign national or permanent resident is inadmissible to Canada. This declaration is based on security grounds that are determined through evidence gathered by the Canadian Security and Intelligence Service (CSIS) The person is then detained for an undefined time period while the grounds for the certificate and the detention is reviewed by a judge of the Federal Court. During this period, the detainee may never actually be charged with any offense. The Federal Court review is held in a private hearing, which is closed to the public, and if the judge finds the certificate to be reasonable, the certificate becomes a removal order which cannot be appealed and which may be immediately enforced. All or part of the evidence can be withheld from the person and his or her lawyer and all or part of the hearing itself may be conducted with neither the accused nor counsel present.

In 1995, Mohamed Harkat entered Canada on a forged Saudi Arabian passport and sought refugee status due to the risk of political persecution in his native Algeria. His refugee claim was assessed by Canadian authorities, and was found to be valid. Mr. Harkat was granted refugee status in 1997, and lived and worked in Ottawa until 2002.

In 2002, the Minister of Citizenship and Immigration issued a national security certificate against Mr. Harkat on the basis of information from CSIS. The allegation was that he was affiliated with members of al Qaeda, an international, militant radical-Islamist organization, and that he was in Canada acting as a "sleeper agent" on the group's behalf. Mr. Harkat was in custody without being charged with a crime for over three years, including a year in solitary confinement. He was eventually released in 2006 on strict bail conditions, but remained under continuous surveillance.

> ***Canadian Charter of Rights and Freedoms***
>
> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Simply put, s. 7 of the *Charter* means that any state infringement upon a person's life, liberty or security rights must be done in a way that is consistent with certain basic ideas about fairness. One of these "principles of fundamental justice" is the well-established right to a fair hearing, in which individuals can know what evidence the government is relying upon, challenge that evidence and instruct their own lawyers about how to represent their interests.

Mr. Harkat, along with two others, challenged the constitutionality of the *IRPA* scheme (see *Charkaoui v. Canada*, 2007 SCC 9, [2007] 1 SCR 350). In 2007, the Supreme Court of Canada (SCC) found that the scheme breached s. 7 of the *Charter*. According to the SCC, the *IRPA* scheme was unconstitutional since parts of the court proceedings are closed to the alleged terrorist (the named person), the named person was not represented in the closed proceedings, and the government did not have to disclose its case against the named person to him or her. The Court found that these conditions were not consistent with the principles of fundamental justice and that they were unjustifiable violations of the accused's liberty rights.

In response to *Charkaoui*, the government amended the *IRPA* process so that one or more "special advocates" could represent the named person during the closed hearing. This special advocate is able to meet the accused and have access to all the government's information against the accused, but is not able to share it publically or fully with the accused[1]. Further, the named person is entitled to receive a summary of the case against him or her that can also be disclosed publicly where it would not harm national security. The Ministers issued a second security certificate against Mr. Harkat, and Mr. Harkat again challenged the constitutionality of the amended *IRPA* scheme.

Procedural History

After considering evidence presented in both public and closed hearings, the Federal Court found the *IRPA* scheme and the certificate declaring Mr. Harkat inadmissible to Canada to be constitutional. Mr. Harkat appealed to the Federal Court of Appeal, where the appeal was allowed in part. The Federal Court of Appeal agreed that the *IRPA* scheme is constitutional, but excluded certain evidence from the record and sent the case back to the lower court to re-examine whether the issuance of the certificate was reasonable. The Ministers appealed to the SCC to restore the Federal Court's original finding that the security certificate was reasonable. Mr. Harkat cross-appealed, claiming once again that the amended *IRPA* scheme is unconstitutional.

[1]In June 2015, the Canadian Senate passed Bill C-51, the *Anti-Terrorism Act*, 2015. Notably, this more recent legislation limits the information and evidence that must be disclosed to the special advocate in security certificate cases.

Issues

Does the *IRPA* scheme as amended by the Federal Government still violate s. 7 of the *Charter*?

Decision

The provisions of the *IRPA* scheme challenged by Mr. Harkat are constitutional. The SCC found that the rules do not violate the named person's right to know the case being made against him or her or prevent the named person from having a decision made based on the facts and the law.

Ratio

Although it found the impugned provisions of the *IRPA* constitutional the SCC also found that the special advocate scheme is still an imperfect substitute for full disclosure in an open court. There may still be cases under the *IRPA* where the seriousness of the allegations and the nature of the evidence result in an unfair process. Therefore, the designated judge has an ongoing responsibility to assess the allegations, evidence and tactics of the Minister, to keep the accused reasonably informed about the process so that he or she can instruct lawyers and special advocates and to exercise discretion under the *IRPA* to ensure a fair process.

Reasons

Mr. Harkat argued that, in spite of the changes, the process was still unfair and violated s. 7 of the *Charter*. He submitted that the process did not allow the special advocate to communicate freely with him, did not provide him with enough disclosure of the Ministers' case to adequately defend himself, and permitted the government to use hearsay evidence against him (i.e. things people said or wrote about him outside of court).

Writing for the majority, Chief Justice McLachlin dismissed each of Mr. Harkat's arguments. First, she wrote that the *IRPA* scheme provides sufficient disclosure to the named person to be constitutionally valid. The Minister can only withhold information or evidence that would raise a serious risk of injury to national security or danger to the safety of a person if it was disclosed. Although "serious risk" is not defined, the Court noted the government's tendency to exaggerate claims of national security confidentiality. Thus, the SCC clarified that the judge has a legal duty to ensure that the named person is reasonably informed of the Minister's case throughout the proceedings. To do so, the judge must be vigilant and skeptical about the Minister's claims that information cannot be disclosed.

The SCC found that the special advocates in a closed hearing are a "substantial substitute" for direct participation by the named person. While the communication between the named person and the special advocate is significantly limited, these restrictions can be lifted with judicial authorization. The designated judge has enough discretion to allow all communications that are necessary for the special advocates to perform their duties. Accordingly, the restrictions on communication cannot be considered unconstitutional.

Finally, the *IRPA* scheme provides the designated judge with the ability to exclude

evidence that he or she finds is not "reliable and appropriate". This broad discretion allows the judge to exclude not only the evidence that is unreliable, but also any evidence that may unreasonably weigh against the named person. The *IRPA* scheme is therefore constitutionally sound.

DISCUSSION

1. Why is it important to have access to all the evidence against you in court proceedings?

2. With very few exceptions, the Crown is required to disclose all evidence against an accused in a criminal trial. Why do you think the rule is different for immigration proceedings under the *IRPA*?

3. Does it make sense to give the government the power to remove people who are suspected of being involved with terrorism, or should it be required to bring criminal charges in response to actual criminal acts?

4. In *Harkat*, the SCC relies heavily on the hearing judge's ability to ensure the process is fair. What are some strengths or weaknesses with this obligation?

5. Due to recent changes under the *Citizenship Act*, the federal government has the ability to strip the citizenship of naturalized Canadian citizens (those who are born elsewhere but become Canadian citizens). How do you think this could interact with the *IRPA* rules?