

Editorial

After Harkat: The No Win “Solution” of Deportation

The Supreme Court’s recent decision in *Harkat, Re*, 2014 SCC 37, 374 D.L.R. (4th) 193, 458 N.R. 67, has decided that security certificates, supplemented by special advocates and requirements for minimum disclosure, are constitutional. The Court refused to stay proceedings or exclude evidence. It affirmed the reasonableness of the Ministers’ determination that Mr. Harkat is a threat to national security. Accepting these realities, what will now happen to Mr. Harkat and the two other men detained on security certificates?

Mr. Harkat has been clear about what he fears will happen. He believes he will be tortured if deported to Algeria. Algeria has ended its state of emergency but concerns about trials and torture remain with the Red Cross being denied access to some detention facilities. The two other men suspected of terrorism have also expressed fears that they will be tortured in Egypt. The political situation in Egypt is volatile, but the recent clamp down on the Muslim Brotherhood and Egypt’s atrocious human rights record suggest that the concern about torture is real.

The likely scenarios of what will happen in the remaining security certificate cases underline why it is both unfair and ineffective to use immigration law as a form of anti-terrorism law. If the courts allow deportations to Algeria and/or Egypt, they will do so by (1) finding that the Ministers’ determination that there is no substantial risk of torture is reasonable or (2) by invoking the infamous exception in *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, 208 D.L.R. (4th) 1, that would allow Canada to deport someone in breach of its international law obligations against deportation to torture.

The use of the *Suresh* exception would be candid, but it would also bring international shame on Canada. The government will try to avoid this outcome by arguing that the court should defer to its judgment that there will be no substantial risk of torture and it will perhaps try to strengthen its

case by obtaining diplomatic assurances that Algeria and Egypt will not torture the security certificate detainees.

The Court's suggestion in *Suresh* that courts should defer to Ministerial assessments of whether a non-citizen will be tortured because they are fact specific and "outside the realm of expertise of reviewing courts and possess a negligible legal dimension", *ibid.*, at para. 39, is not convincing. The issue is compliance with human rights and that is squarely within the judicial realm. The Ministers have every incentive to minimize the rights claims of non-citizens they have spent decades seeking to detain and deport as security threats and the protection of unpopular groups such as non-citizen security threats should be a core responsibility of the independent judiciary.

The patent unreasonableness standard used in *Suresh* can undermine the commitment against torture. It established a low bar albeit one the government failed to pass in one security certificate case when it tried to rely upon unconvincing assurances and arguments that Egyptian authorities would not use torture. *Mahjoub v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1503, 2006 CarswellNat 4312, 2006 CarswellNat 5121, at paras. 87-94. Hopefully, the Court's decision in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, 2012 SCC 12, 343 D.L.R. (4th) 193, will lead to more robust review of the Ministers' determination. The risk of torture should play an important role in the proportionality balance.

There are many reasons to be suspicious of deportation with assurances. In *Suresh*, the Court expressed reservations about assurances. The Court stated: "We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past . . . Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter." *Suresh, supra*, at para. 124.

The Arar Commission referred to apparent assurances that the US had obtained from Syria that Maher Arar would not be tortured but heard and accepted evidence that such assurances "are always negotiated at the diplomatic level, by officials who must take a number of competing considerations into account, and that human rights concerns may not be a priority." It also accepted that once assurances were negotiated, "neither the sending or the receiving country has any incentive to find that the diplomatic assurance had been breached." Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar Factual Report Vol. 2 (2006), at p. 526. Assurances can only work if there is both effective monitoring and real consequences for their breach.

Some may argue that the Arar Commission's conclusions are out of date and that they should not be applied to nations less notorious than Syria for their brutality. The European Court of Human Rights has in the Abu

Qatada case seemed more receptive to assurances. *Othman (Abu Qatada) v. The United Kingdom*, [2012] ECHR 56. This has encouraged the UK and the Jordan to negotiate a treaty containing assurances. Supporters of deportation with assurances will point to Abu Qatada's subsequent acquittals in Jordanian courts as signs that assurances work.

Such arguments, however, discount that Abu Qatada left voluntarily and not with judicial approval. Moreover, the Jordanian courts did not fully comply with the terms of the treaty and their acquittals may be related to the shifting sands of politics as Jordan faces a greater threat from the Islamic State.

Canada continues to have an unhappy experience with more recent and elaborate assurances. By 2007, Canada had elaborate assurances from the Afghan government that detainees would be held at a limited number of locations and that Canadian officials, representatives of the International Red Cross and the Afghan Independent Human Rights Commission would be able to enter these detention facilities and interview detainees without Afghan officials being present. Afghan authorities were to inform Canada and investigate any non-compliance. We know, however, that while the assurances looked good on paper, they failed to prevent the torture of detainees. This affirms the wisdom of the Court's observation in *Suresh* that countries with poor human records are often simply incapable of enforcing assurances that their officials will not engage in mistreatment.

Most of the emphasis in debates about deportation with assurances is on monitoring and not the even more difficult issues of enforcement. The Afghan detainee affair underlines the difficulty of accountability for breach of assurances. The courts were prepared to assume that the Afghan detainees were being tortured, but rejected their Charter claims. *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FCA 401, 305 D.L.R. (4th) 741, 2008 CarswellNat 5272. The Military Police Complaints Commission was not able to get to the bottom of the matter because of restrictions on its jurisdiction and because of governmental claims of secrecy. The government refused to appoint an inquiry and prorogued Parliament in 2009 to avoid handing over documents to Parliamentarians. There was agreement by some parties to a compromise redaction process in 2010, but Parliamentary and media attention quickly faded.

There is something to be said for the optimistic idea that nations can improve their human rights records and that monitoring mechanisms may help promote the rule of law. But we must be careful before risking humans in the pursuit of these laudable goals. Mistreatment or the threat thereof can take place in an instant and without necessarily leaving evidence. As the Supreme Court reminded us in *Suresh*, torture is illegal and hence takes place in secret and is constantly denied.

Even assuming that monitoring is able to reveal mistreatment, there are still problems of a lack of an effective remedy. The Canadian government could complain to the country that provided the assurances, but Canada does not enjoy particularly good relationships with Algeria or Egypt. Even if it had good relations, it might not be willing to spend political capital on non-citizens that it has maintained for over a decade are a threat to Canada's security.

The Supreme Court's decision in *Khadr v. Canada (Prime Minister)* (2010), 251 C.C.C. (3d) 435, [2010] 1 S.C.R. 44, 71 C.R. (6th) 201, suggests that the court would be extremely reluctant to order the government to make diplomatic representations. Even if a court did do so, Algeria and Egypt retain their sovereign rights to deny Canada's request.

Some have speculated that the security certificate detainees will have to remain in Canada as apparently is the case with Mr. Suresh. They may be left in a kind of immigration limbo. This is better than deportation to torture but the men will struggle to escape the taint and the experience of their prolonged security certificate proceedings.

The government has won the latest battle in the never ending security certificate saga. Nevertheless, the dilemmas of deportation reveal the no win nature of the use of immigration law as anti-terrorism law.

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