

In the unanimous judgment of *Charkaoui v. Canada (Citizenship and Immigration)* 2007 SCC 9 <http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html>, rendered on February 23rd, the Supreme Court of Canada delivered the first blow to Parliament's *Anti-Terrorism Act* and its legislative counterparts under the *Immigration and Refugee Act*. The case involved three detainees suspected of links to terrorist activities, who were being held for an indefinite period of time after having been denied an appeal of detention by the Federal Court; one of whom had been in custody since October of 2001. The decision declared unconstitutional the provisions that allowed a detainee to be held pursuant to a Security Certificate, without being able to review or respond to the evidence used to issue the Certificate.

The controversial provisions required that a review of validity of the Certificate and detention itself, be held in secret as it concerned matters of national security, and did not allow participation by a detainee or detainee's counsel; with the reviewing Court hearing from counsel for the Federal Minister alone, and without any guarantee of a defined standard of proof or rules of evidence. The Supreme Court found that these provisions violated sections 7, 9 and 10 of the *Charter*; in finding that such a system of detention and review were contrary to the principles of due process, leaving the presiding judge to make decisions without the benefit of full legal argument, and the detainee without a complete knowledge of the case to be met.

The Court specifically noted that a violation of section 9 and 10 of the *Charter* and *habeus corpus* occurs under the impugned legislation where the detainee was simply unable to access a review of detention in a timely manner; with the review provisions only triggering after a decision is rendered by the Federal Court on whether the Security Certificate is reasonable in the first instance – a process which could take years. The Supreme Court determined that the provisions were not saved under section 1 of the *Charter*, as the enactments did not impair an individual's rights to a minimal degree. Ultimately the Court gave Parliament a one-year grace period to amend the legislation in keeping with the *Charter* before the provisions are declared unlawful.

It is unclear what the Federal Government will do in amending the legislation, though the Supreme Court's judgement noted with approval, a system currently employed in the United Kingdom in which a select group of lawyers with security clearance, are allowed to attend detention hearings and test the evidence on behalf of the detainee. Even this system is not without fault, where a detainee remains unable to directly participate in the process, however, the Court found that it would afford some protection for an individual's rights to life, liberty and security of the person.

Following the decision in *Charkaoui*, on February 27th opposition parties in Parliament voted against extending two controversial anti-terrorism provisions in the *Criminal Code*. Though the provisions had never been used, the legislation had been the source of great constitutional debate regarding an individual's *Charter* rights. The enactments granted special powers to police to arrest without warrant and hold an individual for up to three days without laying charges, if it was believed a terrorist act may be committed. The

legislation also allowed a judge to compel a witness to testify in secret regarding illegal associations and acts, and could sentence an individual to jail for non-compliance. The two provisions were enacted, like the *Anti-Terrorism Act*, in the wake of the 9/11 attacks in 2001, and had a five-year sunset clause with an option to renew by majority vote.

It is clear from these latest developments, that the powers of the state have become more limited in justifying an infringement of civil liberties on the basis of suspected terrorist activities.

Sarah DeSouza
Research Associate
Dawson Stevens & Shaigec
Barristers