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When liberties fall in security's name

Counterterrorism doesn't fit neatly into the traditional course of criminal justice. Intelligence comes from shadowy places, suspects need to be stopped before the commission of a crime and evidence must be kept secret to protect sources.

Because of those constraints, what used to be a little-known, little-used implement in the repertoire of judicial tools is being invoked more and more often in the post-9/11 world: the practice of signing ministerial certificates to designate suspects who are immigrants or refugees as threats to national security, leading to their removal from Canada.

A Federal Court judge this week upheld one such certificate against a Toronto-area refugee claimant, Mahmoud Jaballah. Tomorrow, another judge in Montreal will begin reviewing a certificate against Adil Charkaoui, a Moroccan immigrant the Canadian Security Intelligence Service claims is a sleeper agent for al-Qaeda.

The certificate is a powerful tool, and its use raises concerns of Star-Chamber-like secret court proceedings. The crucial evidence is heard behind closed doors. The suspect's defence lawyer has no access to that information and is left like a boxer swinging in the dark.

On top of that, because it isn't criminal law, the procedure doesn't require as heavy a burden of proof. The government needs only to show that there are reasonable grounds to believe suspects have ties to terrorist groups to rule them ineligible to remain in Canada.

In the Jaballah case, a first judge had quashed a first certificate filed in 1999. Ottawa then submitted a second certificate with more evidence. Because of the laborious way information is gathered in terrorism cases, Mr. Justice Andrew MacKay ruled, the government isn't bound by the principle that it can initiate only one proceeding against a defendant.

Although Judge MacKay upheld the certificate, Mr. Jaballah will remain in legal limbo until Canada gets assurances from his native Egypt that it won't treat him harshly if he is sent back. He remains in solitary confinement even though he hasn't been charged with a crime.

Little of this reassures those con-

cerned about civil liberties. While we want to presume the good faith of the authorities, they are not immune to overzealous, misguided actions. The minor cases that have trickled into the criminal, and thus public, courts are instructive.

Consider Tarek Adealy Khafagy, a hapless Montreal baker of Egyptian origin arrested in 2000 by RCMP agents acting on a tip. He was accused of plotting to blow up the Israeli consulate. Mr. Khafagy spent five months behind bars until he was acquitted. It turned out that the Mounties' informant owed \$6,000 (U.S.) to Mr. Khafagy and thought framing him would be a way to get rid of a creditor.

In Mr. Jaballah's case, Justice MacKay's ruling repeatedly spoke of an abuse of process because of the way the Immigration Department didn't respond promptly to his application for protection from possible torture or death if he were deported to Egypt.

The lack of safeguards when secret evidence is heard is troubling enough that Mr. Justice James Hugessen last year went public about the way he and others on the Federal Court feel. "We hate it," he said. "We do not like this process of having to sit alone, hearing only one party and looking at the materials produced by only one party."

Judges benefit from hearing from both sides, he said. Vigorous research and cross-examination by well-prepared defence lawyers provide a magistrate with further insight when parsing the evidence.

One improvement Judge Hugessen has suggested is a system of court-appointed public defenders, in which mandated defence lawyers have security clearance that enables them to consult classified evidence and represent clients who themselves have no access to that information.

The idea deserves further thought. The challenge, as we try to separate the innocent from those who have adopted al-Qaeda's homicidal creed, is to remain true to our democratic values. Otherwise, our judges will be saddled with the thankless burden that left Judge Hugessen complaining that he felt "like a fig leaf."