

Date: 20050224

Docket: DES-2-03

Citation: 2005 FC 295

Ottawa, Ontario, February 24, 2005

Present: The Honourable Mr. Justice Blais

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("Act");

AND IN THE MATTER OF the referral of that certificate to the Federal Court pursuant to subsection 77(1), sections 78 and 80 of the Act;

AND IN THE MATTER OF ERNST ZÜNDEL

DECISION ON THE REASONABLENESS OF THE CERTIFICATE

INTRODUCTION

[1] On May 1, 2003, the Minister of Citizenship and Immigration and the Solicitor General of Canada (the Ministers) signed a certificate stating that Ernst Zündel, a permanent resident of Canada, is inadmissible on grounds of security, specifically, that there are reasonable grounds to believe that Mr. Zündel is inadmissible pursuant to sections 33, 34(1)(c), (d), (e) and (f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (*Immigration Act* or IRPA).

[2] Sections 33 and 34 of IRPA:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

34(1) Security

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

- (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
- (b) engaging in or instigating the subversion by force of any government;
- (c) engaging in terrorism;
- (d) being a danger to the security of Canada;
- (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
- (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or c).

34(2) Exception

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

34(1) Sécurité

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

- a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
- b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
- c) se livrer au terrorisme;
- d) constituer un danger pour la sécurité du Canada;
- e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
- f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

34(2) Exception

(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[3] On May 1, 2003, the Ministers also signed a warrant for Mr. Zündel's arrest pursuant to subsection 82(1) of the IRPA. That same day, by teleconference, as a designated judge of the Federal Court, I commenced the hearing into the

reasonableness of the certificate and the reasons for detention, in accordance with paragraph 78(d) and subsection 83(1) of the IRPA.

78. The following provisions govern the determination:

...

(d) the judge shall examine the information and any other evidence in private within seven days after the referral of the certificate for determination;

83. (1) Not later than 48 hours after the beginning of detention of a permanent resident under section 82, a judge shall commence a review of the reasons for the continued detention. Section 78 applies with respect to the review, with any modifications that the circumstances require.

78. Les règles suivantes s'appliquent à l'affaire :

[...]

d) il examine, dans les sept jours suivant le dépôt du certificat et à huis clos, les renseignements et autres éléments de preuve;

83. (1) Dans les quarante-huit heures suivant le début de la détention du résident permanent, le juge entreprend le contrôle des motifs justifiant le maintien en détention, l'article 78 s'appliquant, avec les adaptations nécessaires, au contrôle.

[4] After reviewing the material filed in support of the certificate, I ordered on May 5, 2003, that Mr. Zündel be provided with a statement summarizing the information and evidence pursuant to paragraph 78(h) of the IRPA (the Summary) and that Mr. Zündel be provided with an opportunity to be heard. Five binders containing hundreds of documents were also provided to Mr. Zündel; these were the background documents referred to in the Summary. Other documents remained classified and were not disclosed to Mr. Zündel because I have determined that the information and the evidence contained in those documents would be injurious to national security or to the safety of any person if disclosed.

OVERVIEW

[5] The position of the Ministers is that the certificate is reasonable and that based on the information and evidence available, Mr. Zündel is inadmissible to Canada on security grounds. The basis of that belief is that Mr. Zündel's status within the White Supremacist Movement (the Movement) is such that he is a leader and ideologue who inspires, influences, supports and directs adherents of the Movement to actuate his ideology.

[6] It is important to note that Mr. Zündel's views on the Holocaust had been known for years, but were of no concern to the Canadian Security Intelligence Service (CSIS). They may well have been an irritant to many and may have been considered as vile and perverse, but they were not enough to label him as a security threat. Rather, the investigations only began when Mr. Zündel crossed the boundaries of free speech and pursuant to the Ministers' opinion, entered the realm of incitement to hatred and potential political violence in relation to the White Supremacist Movement.

[7] The Ministers also suggest that Mr. Zündel intends serious violence to be a consequence of his influence and to this extent, Mr. Zündel is engaged in the propagation of serious political violence to a degree commensurate with those who actually execute the acts. It is these alleged activities that the Ministers believe make Mr. Zündel inadmissible to Canada on security grounds.

[8] In his response, Mr. Zündel argues that he is merely a 65 year old man, who has lived peacefully in Canada from 1958 to 2000, that he has no criminal record in Canada and faces no criminal charges in Canada.

[9] Mr. Zündel suggests that CSIS has no evidence that during his stay in Canada, he ever:

- a) aided or abetted the commission of any criminal offence in Canada;
- b) conspired with anyone to commit any criminal offence in Canada; or
- c) counselled anyone to commit any criminal offence in Canada.

[10] Mr. Zündel firmly insists that there is nothing in the evidence that could lead him to be inadmissible on one of the grounds of inadmissibility provided by section 34 of the IRPA. He further suggests that not only does CSIS have no case against him, but that it decided to begin these proceedings on a vendetta against him which was in no way justified.

[11] Finally, Mr. Zündel suggests that he is thus at the mercy of a secret proceeding and of the judge conducting it. He is not aware of the evidence that is provided *in camera* and he cannot provide any response to the arguments that have been made *in camera*.

[12] The decision of the designated judge must be made with reference to sections 80 and 81 of the IRPA, which provide:

80. (1) The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision on the application for protection, if any, is lawfully made.

80(2) Determination that certificate is not reasonable

(2) The judge shall quash a certificate if the judge is of the opinion that it is not reasonable. If the judge does not quash the certificate but determines that the decision on the application for protection is not lawfully made, the judge shall quash the decision and suspend the proceeding to allow the Minister to make a decision on the application for protection.

80(3) Determination not reviewable
(3) The determination of the judge is final and may not be appealed or judicially reviewed.

81 Effect of determination — removal order

81. If a certificate is determined to be reasonable under subsection 80(1),
(a) it is conclusive proof that the permanent resident or the foreign national named in it is inadmissible;
(b) it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing; and
(c) the person named in it may not apply for protection under subsection 112(1).

80. (1) Le juge décide du caractère raisonnable du certificat et, le cas échéant, de la légalité de la décision du ministre, compte tenu des renseignements et autres éléments de preuve don't il dispose.

80(2) Annulation du certificat

(2) Il annule le certificat don't il ne peut conclure qu'il est raisonnable; si l'annulation ne vise que la décision du ministre il suspend l'affaire pour permettre au ministre de statuer sur celle-ci.

80(3) Caractère définitif de la décision
(3) La décision du juge est définitive et n'est pas susceptible d'appel ou de contrôle judiciaire.

81 Effet du certificat

81. Le certificat jugé raisonnable fait foi de l'interdiction de territoire et constitue une mesure de renvoi en vigueur et sans appel, sans qu'il soit nécessaire de procéder au contrôle ou à l'enquête; la personne visée ne peut dès lors demander la protection au titre du paragraphe 112(1).

[13] In *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 420, [2004] F.C.J. No. 509, at paragraphs 28-32 and 35, this Court decided that the jurisprudence applicable to the security certificate scheme under the former *Immigration Act*, R.S.C. 1985, c.I-2, also applies to determinations under the current IRPA scheme.

ISSUES

- [14]
1. Is the security certificate issued on May 1, 2003, by the Solicitor General of Canada and the Minister of Citizenship and Immigration certifying that Mr. Zündel is inadmissible to Canada on security grounds as described in paragraphs 34(1)c), (d), (e) and (f) of the *Immigration and Refugee Protection Act* reasonable?
 2. Is the Pre-Removal Risk Assessment decision rendered on October 28, 2003, stating that Mr. Zündel would not be subjected to a risk of torture or a risk to his life or a risk of cruel and unusual treatment or punishment, if he were returned to Germany, lawfully made?

STANDARD OF PROOF

[15] This Court, as well as the Federal Court of Appeal, have already determined the test to be applied in cases such as this (See *Baroud v. Canada*, [1995] F.C.J. No. 829, 98 F.T.R. 91, at paragraph 5; *Re Charkaoui*, [2004] 1 F.C.R. 528, [2003] F.C.J. No. 1119, at paragraphs 36-39; *Yao v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 741, [2003] F.C.J. No. 948, at paragraph 28; *Re Zündel*, 2004 FC 1295, [2004] F.C.J. No. 1564, at paragraph 26). To demonstrate that the certificate is reasonable, the Ministers must only demonstrate that there is a serious possibility, based on credible evidence, that Mr. Zündel is inadmissible on one of the grounds of inadmissibility provided by section 34 of the IRPA. In fact, the Ministers do not have to conclusively demonstrate any of the allegations of inadmissibility. As was stated at paragraph 60 of *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), [2000] F.C.J. No. 2043, leave to Supreme Court of Canada denied August 16, 2001, [2001] S.C.C.A. No. 71:

As for whether there were "reasonable grounds" for the officer's belief, I agree with the Trial Judge's definition of "reasonable grounds" (*supra*, at paragraph 27, page 658) as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes "a bona fide belief in a serious possibility based on credible evidence." See *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.).

[16] As for the requirement that the different paragraphs of subsection 34(1) of the IRPA be read disjunctively from one another, and as per *Almrei v. Canada (M.C.I.)*, *supra*, which permits jurisprudence under the previous law to be applied to

the current one, I would refer to *Canada (Minister of Citizenship and Immigration) v. Singh* (1998), 151 F.T.R. 101, [1998] F.C.J. No. 1147:

In this case, the certificate reads:

We hereby certify that we are of the opinion, based on a security intelligence report received and considered by us, that Iqbal Singh is a person described in paragraphs 19(1)(e)(ii), 19(1)(e)(iv)(B), 19(1)(e)(iv)C, 19(1)(f)(ii) and 19(1)(f)(iii)(B) of the Immigration Act.

The word "and" might be thought to imply that unless all of the grounds for the certificate are proven, the certificate would have to be found to be unreasonable. However, I think each of the grounds must be read disjunctively and if any one of them is proven, the certificate will have to be determined to be reasonable.

As support for this proposition, one need only look to subsection 40.1(1) pursuant to which the certificate is filed. Clearly the word "or" in subsection 40.1(1) indicates that the list of grounds for a certificate is to be read disjunctively. Within subsection 19(1), each paragraph and subparagraph is separate. If a person is described in any one of the subparagraphs under subsection 19(1), referred to in subsection 40.1(1), he or she is inadmissible and may be subject to the issuance of a certificate under section 40.1.

A disjunctive reading is also consistent with section 38.1 of the Immigration Act which explains the purposes of section 40.1. Clearly, if a person is described in any one of the subparagraphs of subsection 19(1) referred to in subsection 40.1(1), he or she may constitute a threat to the security interest of Canada or may be a person whose presence may endanger the lives or safety of persons in Canada. It would not be consistent with section 38.1 or subsection 40.1(1) to require proof that there are reasonable grounds to believe a person is described in more than one class named in subsection 19(1) referred to in subsection 40.1(1). I am satisfied, notwithstanding the wording of the certificate, that if any one of the grounds for the certificate is proven, the certificate must be determined to be reasonable. (*Canada (M.C.I.) v. Singh, supra*, at paragraphs 4-6)

[17] It should be noted that although I cite the *Almrei* case in applying jurisprudence relating to the previous immigration law, the new legislation is very similar in that subsection 77(1) of the IRPA clearly uses the conjunction "or" in listing the grounds for a certificate. Furthermore, subsection 34(1) lists the inadmissible security grounds as different paragraphs separated with the conjunction "or", as did subsection 19(1) of the previous law.

[18] Contrary to counsel for Mr. Zündel's submissions that the Ministers must demonstrate Mr. Zündel's current or future wrongdoings, pursuant to section 33 of the IRPA, the Ministers can provide evidence or information of past, present or anticipated future circumstances of Mr. Zündel's inadmissibility on security grounds. In *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482, [2003] F.C.J. No. 1931, leave to Supreme Court of Canada denied August 26, 2004, [2004] S.C.C.A. No. 62, the Federal Court of Appeal recognized that the past conduct of individuals, particularly those who have engaged in activities which constitute a threat to the security of Canada, must be considered in the determination concerning inadmissibility:

With respect, I think it is hard to conceive of many allegations more serious than one involving terrorism or membership, past or present, in a terrorist organization. Terrorist organizations by their nature are unpredictable. The existence of sleeper cells is widely recognized and the mere fact someone has lived peacefully in Canada for many years does not preclude them from being a threat to the security of Canadians. Contrary to the appellant's arguments, 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. (...) (*Al Yamani v. Canada (M.C.I.)*, *supra*, at paragraph 38)

[19] Counsel for Mr. Zündel has insisted that Mr. Zündel was never involved in acts of violence. I would point out that there is no requirement that an individual who is inadmissible to Canada on security grounds be personally involved in acts of violence. Such an interpretation is short-sighted and not in keeping with the ruling of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, that danger to the security be given a "fair, large and liberal interpretation". There is therefore no requirement that criminality

be determined in order for a permanent resident or a foreign national to be found to be a danger to the security of Canada (*Suresh v. Canada (M.C.I.)*, *supra*, at paragraph 85; see also *Almrei v. Canada (M.C.I.)*, *supra*, at paragraphs 99 and 100). Rather, as mentioned earlier, the threat that a person may constitute a danger to the security of Canada must be substantial and based on an objectively reasonable suspicion.

These considerations lead us to conclude that a person constitutes a “danger to the security of Canada” if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependant on the security of other nations. The threat must be “serious”, in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible. (*Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3 at paragraph 90)

[20] In *Suresh*, the Federal Court of Appeal held that activities which are undertaken in support of a furtherance of terrorist activities such as funding, are reprehensible and not worthy of constitutional protection:

As violent forms of expressions do not receive constitutional protection, neither can fundraising in aid of terrorism. It is true that there are no allegations of criminal activity against the appellant, nor allegations that he engaged in terrorism in Sri Lanka or was involved directly in the procurement and supply of weapons for the LTTE. However, activities which are undertaken in support of and in furtherance of terrorist activities constitute reprehensible conduct outside the protections offered by the Charter. In my view, those who freely choose to raise funds used to sustain terrorist organizations bear the same guilt and responsibility as those who actually carry out the terrorist acts. Persons who raise funds for the purchase of weapons, which they know will be used to kill civilians, are as blameworthy as those who actually pull the triggers. Clearly, freedom of association and expression are rights accorded [to] those who seek political goals. But those rights do not enure to the benefit of those who seek to achieve political goals through means which undermine the very freedoms and values which the Charter seeks to promote. Contrary to the argument advanced by the appellant’s counsel, the values underlying section 2 of the Charter, such as the pursuit of “truth”, “social participation in the community” or “individual fulfilment” simply do not come into play in the present case.

In summary, fundraising in the pursuit of terrorist violence must by necessity fall outside the sphere of protected expression. This conclusion is also fatal to the argument that those provisions of section 19 of the *Immigration Act* that render a person inadmissible to Canada because of membership in a terrorist organization violate an individual right of free association. Those who express their beliefs through active participation with organizations engaged in terrorist activities can find no solace in paragraph 2(d) of the Charter. (*Suresh v.*

Canada (Minister of Citizenship and Immigration), [2000] 2 F.C. 592, at paragraphs 43-44 (C.A.), rev'd on other grounds [2002] 1 S.C.R. 3)

[21] The Federal Court of Appeal also held that consideration of what constitutes a danger to the security of Canada must include consideration of Canada's international relations:

Applying a contextual analysis, it is clear that what presents a danger to the security of Canada is informed by the provisions of the *Immigration Act* and the *Canadian Security Intelligence Service Act*, R.S.C., c. C-23. Generally stated, the purpose of this legislation is to exclude from Canada persons who are or were members of a terrorist organization and who may engage in nefarious activities either in Canada or abroad using Canada as a base. That terrorists acts have been committed in Canada is a matter of public record; e.g. Air India disaster. That terrorist organizations might use Canada as a base from which to operate is not simply a theoretical possibility as will be explained below; see discussion *infra*, paragraph 109. Moreover, the "security of Canada" cannot be limited to instances where the personal safety of Canadians is concerned. It should logically extend to instances where the integrity of Canada's international relations and obligations are affected. It must be acknowledged that only through the collective efforts of nations will the threat of terrorism be diminished. The efficacy of those collective efforts is undermined each time a nation provides terrorist organizations with a window of opportunity to operate off-shore and achieve indirectly what cannot be done as efficiently and effectively in the country targeted for terrorist attacks. (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592, at paragraph 61 (C.A.), rev'd on other grounds [2002] 1 S.C.R. 3)

[22] This is also supported by paragraph 3(1)i) of the IRPA, which lists as an objective of the Act:

3(1) Objectives - Immigration - The objectives of this Act with respect to immigration are
...
i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;
...

3. (1) En matière d'immigration, la présente loi a pour objet :
[...]
i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;
[...]

ANALYSIS

[23] Pursuant to the Security Intelligence Report of which Mr. Zündel was provided a summary, White Supremacists are defined as racists, neo-Nazis and anti-Semites who use violence to achieve their political objectives. Leading White Supremacists may inspire others to use or threaten use of violence. Mr. Zündel is viewed by White Supremacists as a leader of international significance and was viewed as the patriarch of the Movement in Canada for decades. Mr. Zündel is one of the world's most prominent distributors of revisionist neo-Nazi propaganda through the use of facsimiles, courier, telephone, mail, media, shortwave radio transmissions, satellite videos and the Internet, through his website the Zundelsite, which is a platform for financing and contains White Supremacist documents as well as hyperlinks to other White Supremacist websites. The Security Intelligence Report concludes that based on the evidence that has been provided, Mr. Zündel is playing a critical role in the Movement, both in Canada and internationally.

[24] Documents issued by Mr. Zündel over the years show his intention to destabilize the legal and legitimate democratic government of Germany. The evidence also demonstrates a clear determination to disseminate copious amounts of documentation and information from Canada to Germany, using Canadian soil to advance his goal of undermining the German government.

[25] Furthermore, the Ministers have provided public and *in camera* evidence that Mr. Zündel has extensive involvement with contacts within the violent, racist, right

wing movement. These contacts encompass individuals and organizations in Canada and abroad.

[26] Mr. Zündel has always supported the ideology of the White Supremacist Movement, one which is based on the fundamental belief that the white race is an endangered species in need of protection as a result of non-Whites and Jews seeking to attack the foundation of western civilization. Blacks in particular are seen as intellectually inferior, while Jews are viewed as conspiring to gain control of the world through manipulation of financial markets, the spread of communism, pornography and general moral degeneracy. The government is viewed with suspicion as it is seen to be controlled by a Jewish conspiracy referred to as Zionist Occupation Government (ZOG). These fundamental beliefs lead to antisemitic, racist, anti-immigration, anti-democratic, anti-human rights and anti-homosexual attitudes.

[27] The Nazi Party under Adolf Hitler in Germany in the 1930s and 1940s is notoriously well known; what is less known, is the Canadian version which was developed over the 1940s and the 1950s under Adrien Arcand, who promoted Hitler as a saviour of Christianity and formed the *Parti national social chrétien* in the 1930s. That party then merged with the Canadian Nationalist Party from the West to form the National Unity Party. Later in the 1960s, the Canadian Nazi Party became the National Socialist Party and Mr. Zündel explained how he was

influenced by Mr. Arcand himself whom he met when he arrived in Canada in the 1950s. At the conclusion of World War II, the enthusiasm of those Nazi parties around the world was greatly reduced; nevertheless, there still remained some desire to support this neo-Nazi approach. Mr. Zündel is among the few people that worked hard to maintain that support and who went to great lengths to try and establish some credibility to the neo-Nazi movement. He also tried by all means possible to develop and maintain a global network of all groups that have an interest in the same right wing extremist neo-Nazi mind-set.

[28] The Ministers filed as evidence a document by the Security Intelligence Review Committee (SIRC), entitled *The Heritage Front Affair Report*. The Ministers zeroed in on a particular part of this report and I quote:

Finally, we would like to put on the record our unshakeable conviction that the Government of Canada, through all means at its disposal, should continue to ensure that it is always aware of what is going on within extreme right wing racist and Neo-Nazi groups. Canadians should never again repeat the mistakes of the past by underestimating the potential for harm embodied in hate-driven organizations. (Section 13.12 of the SIRC document)

[29] In my decision on the detention review rendered January 21, 2004, I mentioned at paragraph 27:

...The Ministers have provided considerable evidence, that cannot be disclosed for reasons of national security, that Mr. Zündel has extensive contacts within the violent racist and extremist movement. Mr. Zündel stated in his testimony that he knew the following people slightly, or had professional contacts with them, or had interviewed them as a reporter. Information showed, rather, that he had dealt with them a great deal more, in some cases had funded their activities, and generally had maintained much closer ties than what he had admitted to in his examination or cross-examination. These contacts include Tom Metzger, Richard Butler, Dennis Mahon and William Pierce in the United States, Christian Worch, Ewald Althans, Gottfried Kuessel and Oliver Bode in Germany, Siegfried Verbeke in Belgium, Terry Long, Christopher Newhook, Tony McAleer, Bernard Klatt, Wolfgang Droege and Marc Lemire in Canada, Nick Griffin in Great Britain and members of South Africa's Afrikaner Resistance Movement. (*Re Zündel*, 2004 FC 86, [2004] F.C.J. No. 60, at paragraph 27)

[30] Mr. Zündel was given the opportunity to respond to these findings; he also had the possibility of providing witnesses that could address, explain and give a more adequate and real picture of his true relationship with these people. Mr. Zündel opted to pass up this opportunity and to keep the nature of his affiliation with these people private. Although for reasons of national security, I cannot expose in detail the discrepancies between what Mr. Zündel said and the information that I have received *in camera* from different sources, I will revisit some of these inconsistencies later in my analysis.

Mr. Zündel's Associations

[31] The relationships that Mr. Zündel has with the people identified in the Summary and in my decision rendered January 21, 2004, as well as the precise role that Mr. Zündel played within the White Supremacist Movement in Canada, spans a period of more than two decades.

[32] The analysis of the public documents provided by the Ministers and the evidence that was heard over the 43 days of public hearings in this case, depict a man who publicly, has always tried to demonstrate his opposition to violence.

[33] Nevertheless, for more than 20 years, Mr. Zündel continuously maintained close relationships with individuals around the world who are clearly identified as members of the White Supremacist Movement. Mr. Zündel admitted in his own testimony that through different means of communication, he is in touch with people in 42 countries.

[34] Mr. Zündel maintained a close association with Wolfgang Droege and even admitted that he believed Mr. Droege was involved in terrorist activities in the United States, including attempting to invade the small Republic of Dominica to establish a White Supremacist Government. Mr. Zündel's house on Carlton Street in Toronto was akin to a revolving door for Mr. Droege, as well as every other

member of the White Supremacist Movement in Canada or from abroad. These members were always welcome at his house, which had transformed from a residence, into a command centre for people and organizations worldwide involved in the White Supremacist Movement.

[35] Furthermore, Wolfgang Droege and Marc Lemire, two successive presidents of the Heritage Front, spent a lot of time in Mr. Zündel's house. Mr. Lemire, the last known president of the Heritage Front, was working for Mr. Zündel part-time, and then full-time for many years until Mr. Zündel left for the United States.

[36] Mr. Zündel also maintained a close association with Terry Long and the Aryan Nations. Mr. Long was a very zealous activist in Canada, and was depicted as one of the most extreme of the leaders of the Aryan Nations, an organization founded by Richard Butler in 1974 that has among its goals, the elimination of Jews and all minorities, as well as the creation of a White homeland in the North Western United States.

[37] It is troubling to hear Mr. Zündel proclaim that he is defending freedom of expression and advocating the use of non-violence, while at the same time, spending most of his time working in close quarters with the most extreme individuals and organizations in the White Supremacist Movement.

[38] If, as Mr. Zündel claims, he is not on side with extremists, is not on side with people claiming that the Jews should be eliminated and is not on side with Canadian members of the Heritage Front that wanted to create a list of members of the Jewish Movement for future retaliation, then how can he agree to participate in a meeting of the Heritage Front as a guest speaker, surrounded and supported by members of extremist White Supremacist groups in Canada?

[39] If, as Mr. Zündel said, the Heritage Front, a group described as the most powerful racist gang to hit Canada since the real Nazis back in the Dirty Thirties, was not a good idea, then why would he hire the president of that organization, Mr. Lemire, as a part-time and then full-time employee in his own personal residence?

[40] If, as Mr. Zündel stated, Mr. Droege is a terrorist and was totally ill-advised with everything he has done, be it in the United States or as leader of the Heritage Front, then how can he allow him to enter his house on a daily basis?

[41] If, as Mr. Zündel claims, it is not a good idea to use websites to disseminate messages of racial hatred and incite violence in the pursuit of White Supremacist objectives and that it is not a good idea to post on the Internet a practical guide to Aryan revolution which included chapters on assassinations, terror bombings, sabotage and racial wars, then why would he qualify Bernard Klatt, the man

responsible for posting this guide, as a gentle person, and maintain contact with Mr. Klatt over the years?

[42] If, as Mr. Zündel believes, Tom Metzger is a violent person involved in criminal activities and in promoting a campaign of hatred which led to the beating death of an Ethiopian immigrant by two skinheads in the United States, for which Mr. Metzger had to subsequently pay a \$12.5 million judgment after being found responsible by a civil court of that beating, and if he disagrees with the kind of racist cartoons made by and promoted by Mr. Metzger, and if he thinks that the White Aryan Resistance Hate Page website, which depicted grotesque and disgusting pictures of Negro and Jewish cartoons is not a good idea, then why does he cooperate with Mr. Metzger, Mr. Butler and the Aryan Nations?

[43] If, as Mr. Zündel was well aware, Bela Ewald Althans was convicted, among other things of incitement to hatred under German law, and imprisoned after being found guilty of denying the Holocaust and insulting the state and the memory of the dead and if Mr. Zündel knew that the presiding judge has called Mr. Althans “a moral arsonist” who is not a violent man but is still just as dangerous to the community, then why did he keep Mr. Althans as his personal representative in Europe and in Canada to disseminate his publications and organize tours for him in Europe?

[44] If, as Mr. Zündel acknowledged, Dennis Mahon and the *Oklahoma Excalibur* were involved in extremist comments, even advocating revolution and a violent overthrow of the Canadian Government in a meeting in Canada in 1992, then why did he agree to assist Mr. Mahon in designing a cover page for his publication?

[45] These serious contradictions required explanation; if Mr. Zündel did not subscribe to the views expressed by all those people and organizations, then he should have clearly expressed, both publicly and privately, his total opposition to the kind of material, propaganda, violence and hatred promoted by those individuals and associations. I simply cannot accept the proposition that Mr. Zündel is a pacifist, while at the same time, he continues to maintain a close association and to support the above-mentioned extremists.

[46] In my view, although Mr. Zündel was not impressed by the lack of subtlety of those people and organizations, he nevertheless cooperated with them, feeling it was better to have some support, than to go it alone. But he simply cannot depict himself as a champion of free speech and of non-violence, while spending most of his time in touch with people who promote the opposite. Mr. Zündel could not forever sit on the fence, and in my view, he fell to one side. He decided to associate himself with all those people, including extremists and members of the White Supremacist Movement. The evidence spanning over more than two decades shows me that only one person, George Burdi, a prominent figure in the

Canadian Movement, was excluded from Mr. Zündel's house; if Mr. Zündel had seriously intended to distance himself from those people and those organizations, all of them would have been excluded from his house. Maybe, rather than being an open and welcoming atmosphere, 280 Carlton Street would have been a revolving door to throw out those violent and extremist individuals, and to demonstrate a clear intention to distance himself from them.

[47] Rather, Mr. Zündel decided to keep a veil of uncertainty over the situation and lead the people in the White Supremacist Movement to believe that he was on their side, while leading all others to believe that he was opposing their extremist incitations to violence and hatred.

[48] That being said, a more in-depth look at the evidence is necessary. Mr. Zündel did not expose his real relationship with Mr. Droege. On the one hand, Mr. Zündel's testimony was that he never discussed Heritage Front matters with Mr. Droege, but that he was simply consulted by Mr. Droege on questions of history. On the other hand, Mr. Christie, former counsel for Mr. Zündel and a long-time friend, testified that when Mr. Zündel was with Mr. Droege, he spent much of his time admonishing him over his involvement with violent activities. I am convinced that Mr. Zündel was involved with Mr. Droege to a much larger extent than was presented by him and his witness. He knew very well that Mr. Droege was involved in the Heritage Front and other similar activities, yet Mr. Zündel still supported and

provided him with advice on a continuous basis. In fact, I strongly believe that Mr. Zündel needed someone like Mr. Droege to maintain contact with the most extremist members of the Movement, while keeping for himself the more prestigious television program appearances, interview requests and podium speeches.

[49] I also have reservations concerning the scope of Mr. Zündel's knowledge of Mr. Lemire and his involvement in the Heritage Front. I believe that Mr. Zündel was well aware of Mr. Lemire's presidency and particularly of the efforts of Mr. Lemire, a computer expert, to develop websites to disseminate messages of racial hatred and to incite violence. Based on reliable evidence provided to me *in camera*, I believe that Mr. Zündel was in close association with Mr. Lemire, who was working full-time in Mr. Zündel's house until his departure for the United States in 2000. Furthermore, I also believe that Mr. Lemire had access to Mr. Zündel's website. Mr. Christie testified that Mr. Lemire was constantly admonished by Mr. Zündel about his behaviour; should I therefore believe Mr. Zündel's testimony that he never discussed Heritage Front business in his house with Mr. Lemire? In my view, Mr. Zündel and Mr. Lemire did in fact discuss Heritage Front matters in his house but most probably in Mr. Christie's absence.

[50] I am far from being convinced that the relationship between Mr. Long, Leader of the Aryan Nations, and Mr. Zündel, consisted of a single meeting during

the past 15 years and was limited to a 10 minute encounter in Calgary. Rather, based on reliable evidence provided to me *in camera*, I believe that Mr. Zündel maintained a much closer association with Mr. Long over those years and that Mr. Zündel simply decided not to elaborate, nor to provide a truthful description of his real relationship with Mr. Long.

[51] In cross-examination, Mr. Zündel tried to reduce the importance of his relationship with members of the White Supremacist Movement such as Terry Long and John Ross Taylor. I think it is interesting to quote from the *Kane v. Church of Jesus-Christ Christian-Aryan Nations*, Alberta Board of Inquiry, February 29, 1992 decision, in which the Board examined events in Provost, Alberta. In its findings regarding Mr. Long and others, the Board stated:

This Board had the opportunity of observing and listening to Mr. Long, as assisted by Mr. John Ross Taylor, and Mr. Nerland over several days. There is no doubt about the strength of the hatred these men feel for Jews, Native Canadians and Non-White people. We also have no doubt about the lengths they would be prepared to go, given the opportunity, to implement their evil plans. The hatred in the courtroom was palpable. It was patently clear to us these are not simply misguided eccentrics. They are dedicated Nazis. Their creed is racial hatred and their goal is the destruction of our multicultural society.

[52] Based on reliable evidence provided to me *in camera*, I also believe that Mr. Zündel maintained close contacts with Mr. Klatt who ran Fairview Technology Centre Limited, an Internet service provider which offered access to at least 12 White Supremacy and hate groups. Among the groups that utilized the service were the Heritage Front, the Euro Canadian Defence League - both members of

Mr. Lemire's freedom site - the U.S. Nazi Party and the Charlemagne Hammerskins.

[53] I believe that Mr. Zündel maintained a relationship over the years with Mr. Metzger, who is the founding leader of White Aryan Resistance (WAR), a violent skinhead group. Mr. Metzger distributed instructional handbooks on terrorism and guerilla warfare to his White American Political Association which included titles such as *The Anarchist's Cookbook*, *The White Man's Bible*, *White Power* and the *Turner Diaries*.

[54] Mr. Zündel also worked in cooperation with Mr. Mahon and the *Oklahoma Excalibur*. Mr. Mahon is the former Grand Wizard of the Oklahoma White Knights of the Ku Klux Klan and publisher and editor of the White Supremacist publication the *Oklahoma Excalibur*. Mr. Mahon attempted to enter Canada in 1993 but was arrested at the airport and deported on the belief that his presence would incite racial hatred. Mr. Zündel contacted him and offered to redesign the front page of the *Oklahoma Excalibur* in exchange for rare World War II documents. Mr. Zündel's assistance to Mr. Mahon regarding the *Oklahoma Excalibur* was done without regard to the content of that publication. One of the sections in the *Oklahoma Excalibur* titled *The Last Chance* stated:

If Randy Weaver and Kevin Harris do not get justice in their Court trials, and if the murderers of Sam and Vicky Weaver are not convicted or sued successfully for the wrongful deaths of same, it is your editor's opinion that the time for talking and writing newsletters are over. A war of extinction against our people has been declared by ZOG, and they have drawn "First Blood" against an innocent mother and child. WE BURY OUR DEAD DAY AFTER DAY,

WHO WILL BURY THE SYSTEM?? We, for our survival's sake must overthrow or destroy this gov't. And Yes, you phoney, pretending peace of shit con\$ervative [sic] assholes; we are going to have to KILL hundreds of thousands of the Bastards. It's time for men with hearts and bodies of steel to prepare for Ragnarok. The blood will soon start to flow with the shouts of "REMEMBER THE WEAVERS" on your lips. As Louis Beam has said, "Bring large Toe-Sacks to put the enemies heads in".

[55] Another portion from the same edition of the *Oklahoma Excalibur* in the section titled *White Revolution* stated:

"Demoralize the enemy from within by surprise, terror, sabotage, and assassination. That is the war of the future." So said Adolf Hitler, and so shall we wage war. A war against all of those things that threaten the future of our Aryan Race. Homosexuality, race-mixing, and the destruction of the environment. Plus, Black on White violence, out of control immigration, and most of all the federal gov't. This is a war waged on many fronts and in many guises. The Aryan Revolution uses the most effective means at his or her disposal to undermine the Jew controlled, anti-White system. With books, pamphlets, music, and TV, we shall plant the seeds of Racial Revolution. With bombs and bullets, fire and steel, we shall crush your rotting system, ZOG.

This is a war without mercy. Where the winner takes all and the loser is exterminated. This may seem like an extreme position to take, but the potential destruction of our Race mandates a fanatical position in it's [sic] defense. Whoever stands against our Racial survival, whether they be Jews, Negroes, or other non-Whites or White Race traitors, must be exterminated without remorse. Whether it takes five years or five hundred, ten lives or ten million, we must never rest until the Aryan Race regains control of it's [sic] future. White power. – Author unknown.

[56] In my view, Mr. Zündel's acceptance to work on the design of the *Oklahoma Excalibur* was an opportunity to improve the quality of the media presentation. Nevertheless, he did nothing to improve or to change the quality of the content which is extremely racist and a clear incitation to violence and hatred against Jews, Blacks and homosexuals.

[57] Along with Mr. Mahon, Mr. Butler was also an editor for the *Oklahoma Excalibur*. In 2000, a civil jury awarded a \$6.3 million dollar judgment against Mr.

Butler in connection with an assault against a woman and her son. He was forced to sell his 20 acre compound in Hayden Lake, Idaho, to pay the judgment.

[58] Mr. Zündel stayed in touch with Mr. Butler, the founder of the Aryan Nations.

As recently as July 2002, the Aryan Nations' website defined its ideology as follows:

Aryan Nations supports any and all efforts that disrupt the system and lead to system breakdown. Worse is better for now, and societal breakdown is absolutely necessary... We are not a non-violent organization. We support the coming of a New Dawn in which white power will be a fact of life. Our soil will be cleansed, of this there is zero doubt. [my emphasis]

[59] Regarding Mr. Zündel's relationship with Mr. Althans, based on conclusive evidence provided to me in public and *in camera*, I believe it is much more extensive than presented during the hearings; in fact, Mr. Althans worked for Mr. Zündel for many years and was provided funds to work for him and to distribute his material in Europe, particularly in Austria and Germany.

[60] As I mentioned earlier, Mr. Althans was charged, convicted and incarcerated. What should be noted is that Mr. Zündel was using Canada as a safe haven to distribute and disseminate hate propaganda and revisionist material in Europe through Mr. Althans, fully aware that this was a crime in countries like Austria and Germany.

[61] I have also reviewed conclusive evidence that Mr. Zündel maintained close ties with Sweden-based revisionist Ahmed Rami and his Radio-Islam Internet page, website to which the Zundelsite kept a hyperlink. In 1990, Mr. Rami was sentenced to six months of imprisonment in Sweden for anti-Semitism. Regardless of Mr. Rami's criminal record, as well as his notoriety as one of the most virulent Islamic voices against Israel and being labelled as the most dangerous anti-Semite in Sweden, Mr. Zündel used Mr. Rami and Radio-Islam to propagate his anti-Semitic views.

Mr. Zündel as the Guru of the Right

[62] Mr. Zündel seems to thrive in this troubled sea surrounded by ambiguity and hypocrisy. The most flagrant example of this hypocrisy is when he paid to bring two Black witnesses from Florida to the United Kingdom to testify at the trial of his friend Nick Griffin, National Chairman of the neo-Nazi group the British National Party, in hopes of demonstrating that he and Mr. Griffin were not racists and were totally opened to multiculturalism.

A. ...I had never seen the article, but he [Nick Griffin] said he wanted to turn his trial into a media bonanza, as he called it. He said, "You did marvellously well with it during your Holocaust trials. How did you do it? Could you advise me."

That is what I did for him. A few weeks later he called me back and he said that he had trouble getting two witnesses from the United States to his trial and could I help him with that. These were two black men from Florida. Apparently they either lacked the wherewithal or the means or had problems with credit cards, and he said could I get to a travel agent and get these two witnesses to the place where he was having this trial. I tried and I succeeded, and these two men testified. That was over –

Q. Let me clarify. You actually paid the money for two black men to testify at his trial?

A. That's right; I did.

...

A. Then he gave me back the money after they had testified.

[my emphasis] (Pages 504 and 505 of the transcript dated July 28, 2003)

[63] His friend Mr. Douglas Christie, who testified on Mr. Zündel's behalf after having acted as counsel in this very case for more than a year, expressed his views on the general atmosphere in the Zündel's house and about Mr. Zündel's beliefs:

There was no animosity toward people of race. There were discussions about race, and he had a high expectation of white people. It was kind of like Rudyard Kipling's "White Man's

Burden." He thought that white men should behave according to a higher moral standard. That was his view. When white men fell below that standard, he was critical and, I would say, disappointed. He condemned them for being a disgrace to their race. (Page 5321 of the transcript dated August 30, 2004)

[64] I am not even sure that Mr. Christie, when he was quoting his friend Mr. Zündel, realized how cynical and racist that particular sentence was; how can you think that only White men should have high standards? No one should doubt that every person should strive to be at the highest standard, not only the White people.

[65] As Mr. Zündel himself said in an interview on a segment of the Fifth Estate aired on February 3, 1993:

I sow the seeds and other people then build on those ideas.

Mr. Zündel also mentioned that:

Adolf Hitler was not the demon that modern propaganda made him out to be. He was a very decent man and a very peaceful man.

[66] Further on in the Fifth Estate segment, Mr. Althans was also interviewed:

Althans: I said to Mr. Zündel, I want to help you t spread what you think in Germany.

Malorek (interviewer): You wanted to be Ernst Zündel's P.R. man in Germany.

Althans: Right exactly.

Malorek (interviewer): And how did he respond?

Althans: He was pretty interested in that because he said he needs somebody who will do this in Germany.

Zündel: A young 25 year old photogenic German who is bright, who speaks three or four languages. Althans is one amongst many hopeful future leaders in Germany.

...

Althans: And I think I was pretty successful because I said: but Mr. Zündel, I only can spread your thesis if I am known because if I, as a young person open my mouth, nobody is listening to me, so I have to work up my own image, to be important, to be known, to be very provocative.

Malorek (interviewer): And provocative he was. Wherever there was a neo-Nazi rallye, Althans seen here and Zündel videos, was likely to be one of the organizers, one of the speakers, one of the people firing up the crowds. The strategy worked. Althans quickly became one of the German media's favourite neo-Nazi starts. Back in Toronto, Zündel was busy fuelling Althans, and the rest of the movement, with a steady supply of literature. While he was out on bail fighting his court battles, Zündel had to watch what he said about the Holocaust, in Canada. But that didn't stop him from exporting his material to Germany. Hundreds of packages; three mailings a week. Books that claimed the gas chambers were a hoax; videos praising Adolf Hitler's "Germania", a Zündel newsletter announcing his speaking tours; even Zündel stickers. And there was plenty of demand for the stuff within Germany's burgeoning Nazi Movement. By official estimate there are at least 42,000 right wing extremists in the country, including over 8,000 violent militants and organized neo-Nazis and 70% of them are under 30. Christian Worch of Hamburg is a young neo-Nazi leader who buys Zündel's material. Worch was once jailed for his Nazi activities. He is touted as one of the movements most capable organizers.

...

Malorek (interviewer): Why do you have to turn to Ernst Zündel in Canada to get this material? Why can't you just simply get it here, publish it here?

Worch: Because of the legal situation in Germany. In Germany it is forbidden, it is banned to say there was no gassing, no mass murdering of six million of Jews. You can be imprisoned if you say so.

...

Malorek (interviewer): How would you rank Ernst Zündel in the neo-Nazi movement in Germany today?

Wertebach: He is one of the six most important distributors of such material to Germany.

Malorek (interviewer): Wurtoback says that means big business for Zündel.

Wertebach: He is a clever fund raiser. I estimate that he raises between 100,000 and 160,000 Marks a year for his activities. You can imagine what he can do with that kind of money. It is a considerable sum.

Malorek (interviewer): Do you earn that much?

- Zündel: 160,000 Marks that would be \$120,000 that would hardly pay for the electricity for this building.
- Malorek (interviewer): So you earn much more than that, have you given money to the neo-Nazi movement in Germany?
- Zündel: I have supported young groups in Germany, yes absolutely, I have organized speaking tours for what I call Ernst Zündel's foreign legion; the intellectual foreign legions-that's where the money went, information campaigns.
- ...
- Malorek (interviewer): Do you see yourself as a rallying point?
- Zündel: I certainly am.
- Malorek (interviewer): And how many people are rallying around Ernst Zündel?
- Zündel: Sufficient to keep my operation going, **and for me to become the guru of the right you know**. You wouldn't be here if you hadn't known that there are some people in Germany getting mail from Ernst Zündel and watching Zündel videos and young people are kind of orienting themselves along my lines. [my emphasis]
- Malorek (interviewer): The Canadian publisher is becoming a major headache for the German government. Edward Lintner is the Deputy Interior Minister in charge of security.
- Lintner: Whenever the Post Office determines that this is illegal material, they confiscate it and stop its distribution, but really they can't do more than that so we have to refer to Canadian authorities to act.
- Malorek (interviewer): What would you like the Canadian government to do?
- Lintner: Well my opinion is the Canadian government should do everything they can within their laws to stop the actions of Mr. Zündel. Especially to prevent him from sending this propaganda from Canada.

[67] And at the conclusion of the interview:

- Malorek (interviewer): Some of your most vociferous critics have said that you planted the seeds of hate and now the harvest is being reaped.
- Zündel: I have acted within the constitution of this country. I also have the right to export these ideas to Germany. I am a gift to this world, if people don't want to agree with it or not [sic] I frankly don't give a damn.

[68] It seems obvious that Mr. Zündel needs a support base. Mr. Zündel might prefer to have more credible people such as university professors and academics supporting his views and ideas regarding the Holocaust and Adolf Hitler; in the absence of such support, he has no choice but to gather around him people like Mr. Droege, Mr. Lemire, Mr. Newhook, Mr. Althans, Mr. Metzger, Mr. Butler, Mr. McAleer and others. Mr. Zündel, even if he is not supportive of their more radical and demonstrative ideas, recognizes the efforts of organizations such as the Aryan Nations and the White Aryan Resistance (Mr. Metzger's group). Mr. Zündel believes that the White Supremacist Movement needs them to survive.

[69] Mr. Zündel has himself admitted that he has a large ego. He tried to diminish the importance of his admission that he was somehow a "guru of the right". Nevertheless, he is proud of the influence he has on all the people and organizations that are mentioned in the Summary. He always tries to distance himself from the violence and extremist views proliferated by those people and organizations, but he does not want to sever these ties; he wants to maintain his influence on them. He did not want to be seen as a leader of the Heritage Front, he even mentioned that he was not a member of that organization. But the leaders of this organization were spending most of their time in his house to hear his suggestions and to follow his advice. I remember how proud he was when he mentioned in cross-examination that his Zundelsite received hits from 400,000 people a month, and that after his arrest, the number grew to 1.2 million people

accessing his website every month; his tone and body language were more telling than anything of the proudness he had, realizing that after decades, more than a million people every month were in touch with his writings.

The Zundelsite

[70] Regarding his relationship with the Zundelsite, Mr. Zündel tried to explain that he had no control whatsoever over this website. He mentioned that his wife, Ingrid Rimland, had access to the site through passwords, which were unknown to him:

BY MR. CHRISTIE:

Q. Who has a website called the Zundel Site; whose is that?

A. My wife, my current wife.

Q. Who has the password to it?

A. She had it from day one, before we got married, many years before we were married.

Q. Do you ever dictate what goes up there?

A. I do not.

Q. Who determines what goes onto the —

A. She does.

Q. Who determines what comes off of it?

A. She does. I never had the password, I wouldn't know what to do if I had it.

...

BY MR. MacINTOSH

Q. I take it that you don't have the password to the Zundelsite. Is that what you are saying?

A. I don't have it and I never had it.

Q. But you could, if you wanted to, have employees of yours access material on the Zundelsite, couldn't you, Mr. Zündel?

A. If Ingrid agreed to share the password with them, yes, but she is very jealous about the password. I don't know anybody else that would have the password; she is extremely jealous about it.

(Pages 196 and 705 of the transcript dated May 9, 2003 and July 29, 2003 respectively)

[71] Mr. Zündel would have me believe that his own wife refused to divulge to him the password to the Zundelsite. I am not the only one to doubt his wife's monopoly; the Canadian Human Rights Commission (CHRC) also found that Mr. Zündel was in control of the Zundelsite (*Citron v. Zündel*, [2002] C.H.R.D. No. 1). The CHRC determined that Mr. Zündel and his Zundelsite were in violation of the *Canadian Human Rights Act* for disseminating material fostering hatred and contempt in Canada, and Mr. Zündel was ordered to remove the offending sections from his website.

[72] Mr. Zündel described the CHRC as a Canadian "hick" Tribunal, mentioning that it had no control over him when he was living in the United States. So, what happens now, since the United States has deported him and he now wants to stay and live in Canada? His answer today is that he has no control over the website but that his wife is managing it from Tennessee and that we should therefore believe his suggestion that he is not involved in the management of the Zundelsite. In my view, this is yet another attempt by Mr. Zündel to exploit Canada as a safe haven.

[73] One of the Zundelsite documents presented to the Court bore Mr. Zündel's electronic signature; he mentioned that he was not aware of that, that he never put his name at the bottom of the article on the website. Nevertheless, after further querying by myself, he finally admitted that he agreed with the content of the article and that he would not do anything to distance himself from it. Again, his evidence is internally inconsistent: his wife posts articles on the website under the name of Ernst Zündel, she has full authority over the website, he maintains that he has no control nor knowledge of the material posted, but in the end, he says that he agrees with the articles posted by his wife on the Zundelsite. In my view, if Mr. Zündel disagreed with the content, he would never let anyone use a website bearing his name to disseminate information and propaganda worldwide.

The Pipe Bomb Affair

[74] Mr. Zündel has suggested that CSIS has a vendetta against him. Mr. Zündel advanced the theory that CSIS has deliberately put together a case to trap him and deport him from Canada. Among various allegations, there is a serious one referring to a bomb that was delivered through the mail, to Mr. Zündel's Toronto home. Mr. Zündel also relied on Andrew Mitrovica's book, *Covert Entry*, particularly at pages 138-140 in which the author quoted John Farrell, who testified in the present case. In fact, what is written in the book and what was said by Mr. Farrell while in the box are considerably different. It is obviously true that Mr. Zündel received a bomb. It is also true that Mr. Farrell was a Canada Post employee who testified that he was working at a Canada Post office in Toronto, intercepting a portion of the mail addressed to Mr. Zündel.

[75] However, Mr. Farrell clearly explained that he was told by a CSIS employee in Toronto to temporarily stop intercepting parcels addressed to Mr. Zündel after it had been known that a bomb had been sent to Mr. Zündel. This notice was provided for the personal protection of the mail handlers. CSIS did not know that bombs were sent to different people in Alberta and in Ontario, until they were received by the different recipients, including Mr. Zündel.

[76] It has been clearly demonstrated by evidence provided in public and also partly *in camera* that there is no merit to the allegation that CSIS knowingly allowed a bomb to be delivered to Mr. Zündel. There was no information supporting the contention that CSIS either assisted, permitted or was active in trying to harm Mr. Zündel with a bomb. Mr. Farrell clearly confirmed this in his testimony. CSIS had no knowledge of Mr. Zündel being a specific target prior to his receipt of a package bomb in the mail, which was then turned over to the police.

[77] Through his counsel, Mr. Zündel asked many questions of Mr. Farrell regarding his work for CSIS. Objections to many of those questions were sustained because the answers would have been injurious to national security, or because the questions had no relation to Mr. Zündel, or because they were quite simply irrelevant. Nonetheless, the mainstay of Mr. Zündel's witness, Mr. Farrell, was that he had not seen anything wrong with the way CSIS was dealing with Mr. Zündel.

MR. LINDSAY

Q. Sir, can you give us an example of why it was typical of CSIS to "lie, deny, then act surprised?"

MR. MacINTOSH: unless he can provide a specific example related to M. Zündel, I will make an objection.

THE COURT: He is asking the question.

MR. MacINTOSH: The question was overly broad.

THE COURT: I personally told counsel and the witness about where we are, so he understands.

THE WITNESS: In relation to Mr. Zündel? I can't give an example.

THE COURT: You cannot?

THE WITNESS: No, I am not able to. I have no knowledge about that.

MR. LINDSAY:

Q. You said a moment ago that it is typical that that happened with CSIS. Why did you say it was typical that that happened with CSIS?

MR. RODYCH: Objection again, my lord. It is the same question in different terms. It is not relevant to Zündel and it is not relevant to this case. CSIS is not on trial.

MR. LINDSAY: Could I make submissions in the absence of the witness?

THE COURT: No. I understand the objection, but I think you refreshed the memory of the witness about what he said before and you repeated the question. It happens from time to time that we refresh the memory of the witness. I think it is acceptable in this kind of examination.

THE WITNESS: **There is nothing relating to lying, denying and acting surprised with relation to Mr. Zündel.** [my emphasis]

(Page 5819 of the transcript dated September 16, 2004)

[78] I have carefully reviewed the testimony of Mr. Farrell and it is quite apparent that he was unhappy with the termination of his employment, and tried to get a better deal when he left. In fact, he filed a statement of claim in Federal Court asking for hundreds of thousands of dollars, which was eventually struck out and his action dismissed. Mr. Farrell testified that he apparently reached a settlement before the Small Claims Court for an undisclosed amount of money.

[79] Faced with the discrepancies between Mr. Farrell's version of the events in the book *Covert Entry* and those given in his sworn testimony before me, I have no hesitation in relying on his *viva voce* testimony, rather than his hearsay in Mr. Mitrovica's book, in determining that there was no truth in the allegations that CSIS had knowingly allowed the delivery of a bomb to Mr. Zündel.

[80] I did however express concern with the facts brought to my attention during the examination in chief of Mr. Zündel. I asked counsel for the Ministers to look for information surrounding the receipt by Mr. Zündel, of that pipe bomb.

THE COURT: This [the pipe bomb incident] is a very serious matter. Mr. MacIntosh, I will ask you to look for information on that. If there are any documents, they have to be provided now.

MR. MacINTOSH: We will try to obtain some information in respect of this.

THE COURT: I don't like that. Mr. Zündel, like anybody in this country, deserves to be provided with that. I can't imagine anybody who would be subject – we are talking about an attempt to murder Ernst Zündel and manufacturing and mailing explosive devices. It is a serious matter. Not to tell anybody about that – we don't know whether those people are still walking in the streets and being after anybody else or Mr. Zündel. I can't believe that kind of thing.

If there are valid reasons, provide them to me.

(Page 3482 of the transcript dated February 19, 2004)

[81] Many documents relating to the trial of those accused of sending the bombs were subsequently entered into evidence. The list included:

- P-16 and D-61: Information to obtain search warrant re: Darren Thurston and David Barbarash;
- D-63: Newspaper articles dated September 26, 2000 and September 28, 2000;
- P-15 and D-64: *R. v. Thurston* dated January 13, 2000;
- D-65: *R. v. Thurston* dated June 30, 2000;
- D-66: *R. v. Thurston* dated July 6, 2000;
- D-67: *R. v. Thurston* supplementary judgment dated June 30, 2000;
- P-17: Indictment re: *Darren Todd Thurston et. al.*

[82] The judge hearing the case rendered many decisions, one of which ordered the disclosure of certain Royal Canadian Mounted Police (RCMP) master files. However, RCMP spokesperson Manon Eburne stated that the RCMP had collaborated with several outside agencies on the case and that they had an

obligation not to release any information which "would compromise the identity of any information source or any international partner agencies." The RCMP therefore felt it would be contrary to public interest to reveal the sources and decided to withdraw some of the charges, including among others, the one concerning Mr. Zündel. Ms. Eburne added that "the decision was made after the RCMP was directed by a B.C. Supreme Court order to disclose information relating to the investigation which the RCMP felt must remain confidential." (exhibit D-63) This file speaks for itself, it is not under my jurisdiction and I will not comment on it any further, except to say that it adds little, if anything of value, in determining if the certificate issued is reasonable.

The FBI's Case Against Mr. Zündel

[83] Sometime in November 2004, counsel for Mr. Zündel provided new evidence from the United States Federal Bureau of Investigation (FBI). This report is of little probative value and cannot in any way displace the huge amount of evidence pointing to Mr. Zündel's involvement with right wing extremists around the world over a period of almost 20 years before his departure from Canada.

[84] I have included the most relevant parts of the report below:

The Knoxville source does not believe the subject has any direct connections to the National Alliance or the Aryan Nations and that the subject is a "Revisionist" not a White Supremacist per se. The source has never heard the subject [deleted in original] espouse any hatred toward any minority groups or discuss or encourage any type of violent activity against anyone, including Jews.

...

SA [deleted in original] advised the subject was “out of status”, meaning he came to the United States as a visitor but overstayed his six-month visit window. SA [deleted in original] advised he would send the subject a letter asking the subject to come in for an interview.

SA [deleted in original] stated the [deleted in original] could file paperwork to make [deleted in original] legal and that such paperwork would most likely be approved by INS.

...

In view of the fact that there is no indication that the subject is, or ever has been, involved in any acts of violence, acts of domestic terrorism, or any other criminal activity within the United States, recommend this case be closed administratively.

(Federal Bureau of Investigation Report dated April 9, 2001)

[85] Although the report’s lack of evidence implicating Mr. Zündel in any criminal or subversive activities in the United States may seem compelling, it covers a period of only four months, from February 2001, until May 2001. It should be noted that the majority of the report is based on the information and belief of a single source that “is not in a position to testify”, and that no interview was conducted with Mr. Zündel until after the FBI’s investigation was closed. Furthermore, the report makes mention of the fact that Mr. Zündel was “out of status”, meaning that he had come to the United States as a visitor, but overstayed his six-month visit window. Mr. Zündel was informed of this and advised to come in for an interview to try and rectify the situation.

[86] One would be very ill advised to be involved in any criminal or seditious activities while already having been flagged by the FBI as being in the United States illegally, not to mention the fact that Mr. Zündel was in the process of acquiring his U.S. citizenship. Mr. Zündel is well aware of the difficulties he

encountered in Canada while trying to acquire his citizenship and probably thought it wiser to stay out of the limelight in the mountains of Tennessee for that period. It is for these reasons that I accord little weight to the FBI report.

The Security Certificate Process

[87] As I mentioned publicly during the hearing, I understand Mr. Zündel's frustration regarding his inability to access the classified information; nevertheless, I carefully reviewed the classified material and decided that it was not possible to provide more information than was provided in the Summary, as the classified information would be injurious to national security and to the safety of persons if disclosed.

[88] Counsel for Mr. Zündel made reference to an article by my colleague Justice Hugessen. I find that the context of that article was aptly framed by my colleague Justice Dawson, and I am content to quote and adopt as my own her analysis in *Re Harkat, supra*, at paragraph 47:

Mr. Harkat placed some relevance upon a speech delivered at a conference organized by the Canadian Institute for the Administration of Justice entitled "Terrorism, Law and Democracy" by my colleague Mr. Justice Hugessen. There, Mr. Justice Hugessen observed that designated judges "do not like the process of having to sit alone hearing only one party, and looking at the material produced by only one party". However, judges are not parliamentarians. Parliament, when dealing with security certificates, has chosen not to follow the SIRC model (where independent counsel performed the functions described by Mr. Horton). Justice Hugessen's comments I believe reflect the difficulty of the task entrusted to designated judges and the keen awareness with which they face the task of balancing the rights of a person named in a security certificate against Canada's need to preserve the confidentiality of information protected for reasons of national security.

[89] The role of the designated judge is not to make the law, but simply to apply it in respect of everybody's rights, including the fundamental rights of a country like Canada to look after its security and the security of its citizens. I have been and am still guided by my statement made at paragraph 12 of the order on detention dated January 21, 2004, in this same case:

The nature of the evidence, kept partly secret, and the fact that no cross-examination was possible for Mr. Zündel mean that I must be particularly careful in assessing the evidence presented and determining what weight it should be given. In addition to his usual role of impartiality, the judge in such a situation must examine with particular thoroughness all the evidence which is presented to him without the benefit of the other party testing its credibility. Other judges of this Court have been placed in a similar discomfoting position, where the public interest of an open court collides with the needs of national security. **I wish to make it clear that the additional burden placed on the judge is not taken lightly. The information that was presented to me *in camera* was reviewed with intense scrutiny, and was carefully weighed, with an eye to the quality and number of sources of information.** (*Re Zündel*, 2004 FC 86, 2004 F.C.J. No. 60, at paragraph 12) [my emphasis]

[90] It would be a mistake to compare or to try to identify the Canadian immigration legislation with legislation in other countries which deprive individuals of rights seen as fundamental in Canada, such as the right to counsel, the right to be heard, the right to be brought before the court or the right to have one's detention reviewed by an independent court. In fact, the Federal Court of Appeal found that the sections of the IRPA dealing with the security certificate process were constitutional (*Re Charkaoui*, 2004 FCA 421, [2004] F.C.J. No. 2060):

Parliament weighed the interests at stake, those of the litigant and those of the community. It made a choice that recognizes the right to collective security while prescribing a procedure in which a judge, endowed with the necessary independence and impartiality, decides whether the disclosure of information or evidence would be injurious to national security or to the safety of any person. The appellant's arguments based on factors c) [that the decision of the designated judge is made on the basis of secret evidence to which the appellant does not have access], (d) [that the appellant does not obtain a summary of the information that is not disclosed to him] and (e) [that there is no means for the appellant to test the validity and credibility of this information and thus it is difficult if not impossible for him to refute it] do not,

in our opinion, have a cumulative impact that would enable us to conclude that the process established by Parliament is constitutionally invalid.

...

But the appellant has been unable to demonstrate that the procedure for reviewing the reasonableness of the security certificate issued against him, and for reviewing the reasons for the continuing detention as well as the procedure for reviewing protected information under sections 76 et seq. of the IRPA, do not meet the requirements of the Charter and the three international instruments [The International Covenant on Civil and Political Rights of 1966, the Universal Declaration of Human Rights of 1948 and the European Convention on Human Rights] to which he referred. (*Re Charkaoui, supra*, at paragraphs 101 and 144)

[91] Section 40.1 of the former *Immigration Act* R.S.C. 1985, c.I-2, was also found to be constitutional (*Ahani v. Canada*, [1996] F.C.J. No. 937, 201 N.R. 233 (C.A.):

As to the second proposition, we are of the view that the section 40.1 context is, in no way, akin to a criminal context. In a criminal law context, we have an individual charged with breaking the criminal law of the land who faces punishment if the state succeeds in overcoming his presumption of innocence. In a section 40.1 context, we have an alien who may lose the qualified right to stay in Canada that he gained by being given refugee status, but whose liberty will not then be otherwise impeded. The principles and policies underlining both contexts are obviously totally different, and the standards of procedural safeguards required to satisfy the Charter must necessarily differ. It is true that the filing of the certificate has the immediate unfortunate effect of leading to the arrest and detention of the person concerned, a fate normally reserved to criminals, and this is, no doubt, the most sensitive aspect of the scheme. It must not be forgotten, however, that this detention is not imposed as a punishment, nor is its sole function to assure the presence of the person. Rather, it is principally a means of providing preventive protection to the Canadian public. And, in view of the test for the issuance of the certificate, that is to say the reasoned opinion of two ministers based on security information; in view of the fact that the scheme provides for the obligatory judicial scrutiny of the reasonableness of those opinions within an acceptably short period of time; in view, also, of the possibility given to the detained to put an end to the detention at any time by agreeing to leave the country; and in view, finally, of the type of prohibited class of individuals there are reasons to believe we are dealing with, that is to say individuals somehow associated with terrorism, it appears to us, as it appeared to the learned trial judge, that such preventive detention is not arbitrary, nor excessive. (*Ahani v. Canada, supra*, at paragraph 4)

[92] I apologize in advance for some of the repetition which I will now undertake, but feel that the context justifies the task of ensuring that the process was made while respecting all safeguards afforded to Mr. Zündel under the law.

[93] Mr. Zündel has not been deprived of any of his fundamental rights. Mr. Zündel, a landed immigrant in Canada who still has his German citizenship, left Canada in 2000 claiming that he was somehow abandoning or leaving the country forever in hopes of obtaining American citizenship.

[94] For reasons that are not completely clear to this Court, there were some problems with the U.S. authorities in the process of obtaining his citizenship and Mr. Zündel was deported to the Canadian border on February 18, 2003.

[95] He was detained at the border as soon as he entered Canadian territory and has since had full access to counsel as well as regular detention reviews pursuant to the process established by the Canadian immigration legislation.

[96] Two months after his return to Canada, the Minister of Immigration and the Solicitor General of Canada signed a certificate establishing that Mr. Zündel is inadmissible to Canada on grounds of security pursuant to subsection 77(1) of the *Immigration Act*.

[97] The certificate was signed on April 30, 2003 and as a designated judge, I was assigned to the case the same day to review the detention and the certificate.

[98] Unfortunately, over the next two weeks, counsel for Mr. Zündel was only available on May 9 and May 16, 2003, even though the Ministers' counsel were available to start the detention review process right away. After those hearings, counsel for Mr. Zündel remained unavailable until July 2003.

[99] Nonetheless, on May 1, 2003, I promptly began a review of the Security Intelligence Report that was provided by CSIS to the Ministers, which served as the basis to issue the certificate. I also started to review the hundreds of documents that were provided in support of the Security Intelligence Report. On May 5, 2003, I provided the Summary of the evidence presented to me *in camera* to enable Mr. Zündel to be reasonably informed of the circumstances giving rise to the certificate. The evidence provided by the Ministers which would be injurious to national security or to the safety of any person if disclosed, was kept confidential, in accordance with paragraph 78(h) of the IRPA. It was an important decision because this is where and how the immigration legislation departs from the usual method of full disclosure to the parties. At the very beginning of the hearing, it was also decided that the evidence provided under the detention review process would also be used for the certificate review.

[100] The process under the Canadian *Immigration Act* has been and is respectful of Mr. Zündel's rights. His detention has been reviewed when he was detained upon his arrival to Canada, the very day after the certificate was issued and every

six months after the first decision. There could be future detention reviews and Mr. Zündel was and is still capable of providing new evidence that could justify his release from detention.

[101] Although there were many delays due to numerous last minute motions by Mr. Zündel, different requests for witnesses during the first eight months and a last minute withdrawal of constitutional issues from the jurisdiction of the Federal Court in order to introduce them in Ontario Superior Court, the review decision was still rendered on January 21, 2004. A new detention review was supposed to take place in July 2004, but at the request of Mr. Zündel, it was postponed until later that year to allow Mr. Zündel to provide a new witness. This new witness was Mr. Christie, who represented Mr. Zündel at the time, but was removed as solicitor of record very shortly before testifying in this case. A detention review decision was rendered on September 24, 2004.

[102] Mr. Zündel was entitled to provide any witnesses or documents that he wanted. Mr. Burdi was provided to testify that he was indeed thrown out of Mr. Zündel's house because his behaviour and the language of his songs were seen as being disgusting by Mr. Zündel. Dr. Lorraine Day testified on Mr. Zündel's health during his detention and Bruce Leichty, an American lawyer, testified on the status of Mr. Zündel's immigration file in the United States. Furthermore, Karen Kruger

and Gerhardt Haas were called on the first day of hearings, solely to present themselves as possible sureties.

[103] Mr. Zündel also called Dave Stewart who testified for a period of eight days and was examined on the documents that were filed by CSIS and also by Mr. Zündel. Mr. Stewart identified himself as being one of the few people that gathered all the information that was provided to the Ministers when they made their decision on the certificate. Mr. Stewart mentioned that there was a vast quantity of documents gathered over a 25 year span regarding Mr. Zündel and that CSIS provided documents they believed were relevant to the certificate. Although there were many interruptions and many objections during the testimony, Mr. Zündel was allowed to ask questions regarding the unclassified information provided by CSIS.

[104] Mr. Zündel also testified at length before me, and I had the opportunity and the privilege of examining first-hand his reactions and responses to the questions that were posed to him. Over the last two decades, Mr. Zündel has gained extensive experience in asking and answering questions. He qualifies himself as a "media man", having conducted hundreds of interviews around the world; he is quite comfortable in an interrogative setting.

[105] Even though Mr. Zündel seemed forthcoming in answering the questions put to him, he nevertheless deliberately decided not to clarify his relationship with the individuals and organizations mentioned and described in the Summary. The questions were clear, but the answers were shrouded in ambiguity.

[106] Based on what I saw, what I heard, and what was presented to me during the hearings, I have no hesitation in concluding that his testimony lacked credibility on several crucial elements of the case.

[107] I have already mentioned that some of the evidence was kept confidential, because its disclosure would be injurious to national security. This notion encompasses a multitude of elements and sources. Among them, there could be different human and documentary sources arising outside the country, as well as similar sources of a local nature. As previously mentioned, it is the designated judge who is responsible for the decision to keep information classified if its disclosure would be injurious to national security.

[108] This is where national security transcends the individual rights of a person who is the subject of a security certificate and who is therefore deemed to be a threat to the security of Canada. In *Re Charkaoui, supra*, the Federal Court of Appeal held:

If we were to accept the appellant's position that national security cannot justify any derogations from the rules governing adversarial proceedings we would be reading into the

Constitution of Canada an abandonment by the community as a whole of its right to survival in the name of a blind absolutism of the individual rights enshrined in that Constitution. We fail to discern any legislative intention along those lines, quite the contrary. We adopt the words of the Court of Appeals for the third circuit in *Kiareldeen v. Ashcroft and the Immigration and Naturalization Service*, *supra*, at page 21:

Few interests can be more compelling than a nation's need to ensure its own security. It is well to remember that freedom as we know it has been suppressed in many countries. Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning.

The individual right to liberty and the security of the person can only be exercised within an institutional framework or social order that commands respect and is respected. It no longer has much meaning or scope when, collectively, the society charged with ensuring its protection has lost its own right to liberty and security as a result of terrorist activities that it was powerless to prevent or eradicate owing to this individual right that it was to protect and intended to protect. The choice, as Justice Jackson said in *Terminiello v. Chicago*, 337 U.S. 1 (1949), at page 37, "is not between order and liberty. It is between liberty with order and anarchy without either." (*Re Charkaoui*, *supra*, at paragraph 100)

[109] The decision is made by the judge and not by the Ministers. If the judge arrives at the conclusion that part of the evidence should be disclosed and the Ministers still believe that its disclosure would be injurious to national security, the Ministers may withdraw the evidence that is proposed. Sometimes, this is a difficult task because the disclosure of one part of the evidence could divulge information that would make possible the identification of the sources which not only would be injurious to national security but also to the security of persons. This problem is described as the "mosaic effect" and it is referred to numerous times by this and other courts (*Cemerlic v. Canada (Solicitor General)*, [2003] F.C.J. No. 191, 2003 FCT 133; *Canada (Minister of Citizenship and Immigration) v. Singh*, [1998] F.C.J. No. 978; *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229, *aff'd* [1992] F.C.J. No. 100 (C.A.); *Re Jaballah*, [2003] 4 F.C. 345, [2003] F.C.S. No.

822, 2003 FCT 640; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75).

This means for instance that evidence, which of itself might not be of any particular use in actually identifying the threat, might nevertheless require to be protected if the mere divulging of the fact that CSIS is in possession of it would alert the targeted organization to the fact that it is in fact subject to electronic surveillance or to a wiretap or to a leak from some human source within the organization.

It is of some importance to realize than [*sic*] an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security. He might, for instance, be in a position to determine one or more of the following: (1) the duration, scope intensity and degree of success or of lack of success of an investigation; (2) the investigative techniques of the service; (3) the typographic and teleprinter systems employed by CSIS; (4) internal security procedures; (5) the nature and content of other classified documents; (6) the identities of service personnel or of other persons involved in an investigation. (*Henrie v. Canada (SIRC)*, *supra*, at paragraphs 29 and 30)

[110] This risk must be weighed by the designated judge who has a duty to make sure that the disclosure of any information and of any other evidence would not be injurious to national security or the security of any person pursuant to section 77 of the IRPA.

CONCLUSION ON THE REASONABLENESS OF THE CERTIFICATE

[111] Faced with the evidence that was provided by the Ministers, I have no hesitation in concluding that pursuant to section 33 and to paragraph 34(1)(d) of the IRPA, there are reasonable grounds to believe that Mr. Zündel is inadmissible on security grounds for being a danger to the security of Canada.

[112] Mr. Zündel has associated, supported and directed members of the Movement who in one fashion or another have sought to propagate violent messages of hate and have advocated the destruction of governments and multicultural societies. Mr. Zündel's activities are not only a threat to Canada's national security but also a threat to the international community of nations. Mr. Zündel can channel the energy of members of the White Supremacist Movement from around the world, providing funding to them, bringing them together and providing them advice and direction.

[113] It would be illusory to believe that the White Supremacist Movement is receding. While it is true that the detention of Mr. Zündel may have taken the wind out of the sails of his followers, the White Supremacist network is still very much alive and active. The use of the Internet has created new methods of communication which have replaced traditional ones. No longer must halls or pubs be rented in order to have meetings; rather, communication can now take place easily and anonymously between adherents of the White Supremacist Movement, as well as anyone else curious enough to visit websites or log onto chat rooms dedicated to keeping this network alive.

[114] Although not all of the 1.2 million monthly visitors, as mentioned by Mr. Zündel, to the Zundelsite are members of the White Supremacist Movement, that

volume, on only one website, is an indication of the potential influence this means of communication holds. Many of those actively involved in maintaining this network, individuals such as Mr. Klatt, Mr. Rami, Mr. Lemire, Mr. McAleer and particularly his spouse, Mrs. Rimland, are close associates of Mr. Zündel.

[115] The physical presence of Mr. Zündel is not necessary to maintain the sustenance of this network. Nonetheless, Mr. Zündel's freedom following two years of incarceration, would no doubt galvanize the White Supremacist Movement. Mr. Zündel has the funding, the support, an established infrastructure, a means of communication to the masses via his Zundelsite as well as numerous individuals who are prepared to do his bidding. Mr. Zündel is capable of bringing all this back together and once again spurring the White Supremacist Movement.

[116] In this case, I have no doubt regarding the fairness and legality of the process and I have no doubt that the evidence in support of the certificate conclusively established that Mr. Zündel represents a danger for the security of Canada and that the certificate signed by the Minister of Citizenship and Immigration and the Solicitor General of Canada is reasonable.

REVIEW OF THE PRE-REMOVAL RISK ASSESSMENT DECISION

[117] In addition to the review of the security certificate which I am required to do, the IRPA has built in a safeguard for those who make an application for protection

pursuant to subsection 112(1) of the Act. In such cases, subsection 80(1) provides for an automatic review of the Pre-Removal Risk Assessment (PRRA) decision, in order to determine whether such decision was lawfully made.

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

112(2) Exception

(2) Despite subsection (1), a person may not apply for protection if

- (a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;
- (b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;
- (c) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or
- (d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

112(3) Restriction

(3) Refugee protection may not result from an application for protection if the person

- (a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;
- (b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

112(2) Exception

(2) Elle n'est pas admise à demander la protection dans les cas suivants :

- a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la Loi sur l'extradition;
- b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);
- c) si elle n'a pas quitté le Canada après le rejet de sa demande de protection, le délai prévu par règlement n'a pas expiré;
- d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif soit au rejet de sa demande d'asile ou de protection, soit à un prononcé d'irrecevabilité, de désistement ou de retrait de sa demande d'asile.

112(3) Restriction

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

- a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;
- b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du

under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or
(d) is named in a certificate referred to in subsection 77(1).

113 Consideration of application

113. Consideration of an application for protection shall be as follows: (a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;
(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;
(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
d) il est nommé au certificat visé au paragraphe 77(1).

113 Examen de la demande

113. Il est disposé de la demande comme il suit :
a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et d/e la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

[118] Mr. Zündel submitted his application for protection on May 8, 2003. Mr. Zündel's application was reviewed, including the more than 25 pieces of evidence submitted, as well as outside sources of information. A preliminary assessment

was delivered to Mr. Zündel on July 8, 2003, to allow him to present further documents or submissions, which were received on July 30, of that same year.

[119] The Act then required the Minister to firstly determine if upon his deportation to Germany, Mr. Zündel would face a personalized risk of torture, or a risk to his life or to a risk of cruel and unusual treatment or punishment, as per subsection 97(1) of IRPA. If it was determined that there did exist a risk of any of the above, then that risk needed to be weighed against the risk the applicant posed to the security of Canada.

[120] After carefully reading the submissions of Mr. Zündel, as well as all the relevant documents submitted in this assessment, the Minister was of the opinion that there were insufficient elements present in the case which would indicate that Mr. Zündel would be subjected to torture or risk of life or cruel and unusual treatment or punishment if he were to be returned to Germany.

[121] In essence therefore, I have a judicial review before me of the decision of the Minister dated October 28, 2003. The standard of review to be applied to such a decision was canvassed in the Supreme Court decision of *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraphs 39 and following:

This brings us to the question of the standard of review of the Minister's decision on whether the refugee faces a substantial risk of torture upon deportation. This question is

characterized as constitutional by Robertson J.A., to the extent that the Minister's decision to deport to torture must ultimately conform to s. 7 of the Charter: see *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, per La Forest J.; and *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 32. As mentioned earlier, whether there is a substantial risk of torture if [the claimant] is deported is a threshold question. The threshold question here is in large part a fact-driven inquiry. It requires consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. It may also involve a reassessment of the refugee's initial claim and a determination of whether a third country is willing to accept the refugee. Such issues are largely outside the realm of expertise of reviewing courts and possess a negligible legal dimension. **We are accordingly of the view that the threshold finding of whether Suresh faces a substantial risk of torture, as an aspect of the larger s. 53(1)(b) opinion, attracts deference by the reviewing court to the Minister's decision.** The court may not reweigh the factors considered by the Minister, but may intervene if the decision is not supported by the evidence or fails to consider the appropriate factors.

[...]

We conclude that in reviewing ministerial decisions to deport under the Act, courts must accord deference to those decisions. **If the Minister has considered the correct factors, the courts should not reweigh them. Provided the s. 53(1)(b) decision is not patently unreasonable -- unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures -- it should be upheld.** At the same time, the courts have an important role to play in ensuring that the Minister has considered the relevant factors and complied with the requirements of the Act and the Constitution. [my emphasis]

[122] I would add to that, the comments made by my colleague Justice Lemieux in *La v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 649, in regard to the weight accorded to the evidence relied upon by the Minister:

In *Suresh, supra*, the Supreme Court commented on its previous decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, and said this at paragraph 37:

par. 37 The passages in *Baker* referring to the "weight" of particular factors (see paras. 68 and 73-75) must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, **but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors: see *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.); *Re Sheehan and Criminal Injuries Compensation Board* (1974), 52 D.L.R. (3d) 728 (Ont. C.A.); *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at paras. 111-12, per La Forest J. (dissenting on other grounds).** [emphasis that of Lemieux J.]

The reference to *Maple Lodge Farms*, [1982] 2 S.C.R. 2, is important because, in that case, Justice McIntyre, on behalf of the Supreme Court of Canada, stated the following at page 7:

It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

From this jurisprudence, it is clear that, **if in exercising a discretion or in formulating a view, the statutory authority relied upon irrelevant considerations or irrelevant factors, the resultant decision is patently unreasonable.** [my emphasis]

[123] This imposes a high threshold and accords much deference to the PRRA decision. In light of this standard, counsel for Mr. Zündel submits that the Minister failed to consider uncontradicted evidence of Germany's hostility towards Mr. Zündel and failed to take into consideration the enthusiasm of Germany at the prospect of capturing Mr. Zündel as soon as Canada places him in German hands, ultimately leading to a decision that cannot be supported on the evidence.

[124] Unfortunately, the extent of Mr. Zündel's arguments fall well short of establishing patent unreasonableness of the Minister's decision. Mr. Zündel describes in very broad terms that there was ample evidence before the Minister supporting his view, and that no consideration was given to these documents, but provides no detailed submissions to support his claims.

[125] Mr. Zündel asserts that the Minister made repeated references to a single document, the U.S. Department of State publication entitled "Country Reports on

Human Rights Practices: Germany”, while virtually ignoring all others. Mr. Zündel claims that this document provided ample evidence to support his view of torture and of a risk of cruel and unusual punishment.

[126] It is not my place to review and reweigh the factors used to make the decision; however, I must ensure that there was no failure to consider appropriate factors, and no reliance on irrelevant considerations. That being said, after a lengthy and thorough review of the evidence presented, I cannot find any grounds for concluding that the decision is patently unreasonable.

[127] Nowhere in the evidentiary documents placed before the Minister did I find anything which would allow me to conclude, as Mr. Zündel put it, that “the assessment he arrives at could only be the result of a poor job performance, laziness or, what is far more likely, a politically-correct report about a well-known, albeit, media-demonized, therefore unpopular dissident”.

[128] Among the documents submitted by Mr. Zündel, I have found fan mail supporting him in his views, a letter condemning modern day Germany (written by Mr. Zündel himself), letters from Canadian war veterans supporting Mr. Zündel, a copy of a German arrest warrant for Mr. Zündel dated February 17, 2003, an affidavit by his wife, Ingrid Rimland, numerous character references from friends of Mr. Zündel, as well as many newspaper articles relaying the current state of Mr.

Zündel's hearings in Canada and the United States. It is interesting to note that these articles in no way support Mr. Zündel's claim for protection, but are used by him to add a few personal comments such as:

- "Always Jewish Groups - not Italians, French Canadians, Sri Lankans, always Jewish Groups! Bitching!" (Boston Globe article, *Denier of Holocaust is deported to Canada; US move sparks anger* dated 2/21/2003)
- "Note always the government in League with my Jewish Enemies!" (Copy of the first 4 pages of Ernst Zündel v. Her Majesty the Queen, No. 21811, Supreme Court of Canada judgment)

[129] The only remark made by Mr. Zündel's counsel in reference to a credible document which can be relied on as a source of unbiased information, is the unfounded and unbacked assertion that the U.S. Department of State document cited numerous times by the Minister, contained the following concerns about Germany, none of which were mentioned in the PRRA decision:

- there have been instances in which police committed human rights abuses (p.1)
- instances of societal violence and harassment directed at minority groups and foreign residents continued (p.1)
- in 2001, the U.N. Committee for the Elimination of Racial Discrimination expressed concern about "repeated reports of racist incidents in police stations as well as ill-treatment by law enforcement officials against foreigners" in the country (p.2)

(Zündel Submissions (Pre-Removal Risk Assessment s.80 Review) paragraph 10)

[130] An attentive reading of the Minister's decision, reveals that the above concerns were dealt with specifically, near the bottom of page 6 of the reasons for decision:

I note that, according to the aforementioned U.S. Department of State publication [U.S. Department of State publication entitled "Country Reports on Human Rights Practices: Germany"], there were no reports during the last year of the "arbitrary or unlawful deprivation of life committed by the Government or its agents". Certain of the materials before me made

mention of racist incidents in police stations and ill treatment of foreigners. But even when taking these individual events into account, the totality of the material before me strongly supports the conclusion that the German state affords exemplary protection from risk to life or cruel and unusual treatment or punishment to those within its jurisdiction. (PRRA Decision rendered by the Minister, dated October 28, 2003)

[131] The above reasons make it quite clear that not only did the Minister take Mr. Zündel's concerns into consideration, but also gave reasons for which they were not given more weight.

CONCLUSION ON THE PRE-REMOVAL RISK ASSESSMENT DECISION

[132] All matters considered, I find that the Minister acknowledged and properly applied the test of determining whether, based on the factors set out in subsection 97(1) of the Act, Mr. Zündel was a person in need of protection. I am satisfied that all of the relevant evidence was examined thoroughly, and that all proper procedure was followed in allowing Mr. Zündel to make submissions after the preliminary decision was made and delivered to Mr. Zündel on July 8, 2003. I therefore find that the PRRA decision is lawfully made.

ORDER

On the basis of the information and evidence available to me, I have determined that the certificate signed by the Minister of Citizenship and Immigration and the Solicitor General of Canada on May 1, 2003, is reasonable and that the Pre-Removal Risk Assessment decision dated October 28, 2003, is lawfully made.

"Pierre Blais"

J.F.C.