Federal Court  Cour fédérale

Date: 20170619

Docket: DES-7-08

Citation: 2017 FC 603

Ottawa, Ontario, June 19, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF Mohamed Zeki MAHJOUB

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a motion by Mr. Mohamed Zeki Mahjoub [the Applicant] for an Order removing all but the usual conditions of release currently imposed on him pursuant to subsection 82(4) and paragraph 82(5)(b) of the *Immigration and Refugee Protection Act* SC 2001, c 27 [*IRPA*].

II. Procedural background: judgment, orders and directions

[2] I considered and determined a motion for the same relief last year, in *Re Mahjoub*, 2016 FC 808 [July 20, 2016 Conditions of Release Order], at which time a number of his conditions of

release were relaxed; however, the Court was not persuaded it should dispense with all but the usual conditions as the Applicant had requested.

[3] Subsequently, by Judgment dated March 31, 2017, *Re Mahjoub*, 2017 FC 334 [Constitutional and Certified Questions Judgment], I determined requests by the Applicant to certify numerous questions allegedly of general importance and answered a number of constitutional questions propounded by the Applicant.

[4] By Order dated March 15, 2017, I advised the parties that I was seized of the Applicant's present motion to review his conditions of release. The record then before the Court included an e-mail and letter request by the Applicant that I not hear this motion; however, the Applicant had not filed any motion to that effect. Therefore, among other things dealt with in the motion, I declined to deal with the issue recusal. A copy of the March 15, 2017 Order is attached as Schedule "A".

[5] By case management Direction dated March 28, 2017, the present hearing was scheduled to be heard May 16, 2017. That Direction also required all materials "to be served and filed no later than May 4, 2017".

[6] On May 11, 2017, I heard and determined a motion brought by the Applicant that the Court neither receive nor review a redacted and an unredacted updated CBSA Risk Assessment concerning the Applicant [CBSA Risk Assessment Order]. By way of background, the redacted copy contained redactions considered appropriate by the Ministers. While neither party relied on either the redacted or unredacted report, the Court ordered the Ministers to have a redacted copy

prepared in consultation with the Special Advocates and delivered to Applicant's counsel; by subsequent Direction, changing the deadline for that to be done, the Court requested a copy of the unredacted copy. Later the same day, a Friday, the unredacted updated CBSA Risk Assessment was filed, without objection by the Applicant, but at a time when the Applicant's counsel team was not aware of the email exchanges.

[7] The Applicant's motion that the Court neither receive nor review redacted and unredacted updated CBSA Risk Assessment was argued in writing by the parties, including Special Advocates, who had agreed with the Ministers' redactions. I determined I would review the unredacted CBSA Risk Assessment to determine if the redactions proposed by the Special Advocates and Ministers' counsel were acceptable to the Court. A copy of the CBSA Risk Assessment Order of May 11, 2017, is attached as Schedule "B".

[8] Unhappy with this Order, Applicant's counsel sent an e-mail in effect asking for reconsideration of the May 11, 2017, CBSA Risk Assessment Order. Applicant's Counsel followed up with a more detailed e-mail on Saturday, May 13, 2017, indicating they would be filing what may be seen as a more detailed motion for reconsideration of the CBSA Risk Assessment Order. The Applicants, in their e-mail of May 13, 2017, also indicated they would be filing a motion for my recusal from the hearing set for May 16, 2017. However, that motion was not filed prior to the May 4, 2017 deadline set by the case management Direction referred to in paragraph 5, above.

[9] On Monday, May 15, 2017, the day before this condition of review hearing, I was provided with a copy of a bare motion to reconsider the CBSA Risk Assessment Order. I say

"bare" because only a notice of motion was filed: there was no supporting affidavit, cross-examination (if requested), record or memorandum as required, nor had any responding material been filed by the Ministers in accordance with their right to respond.

[10] At the commencement of the hearing on May 16, 2017, I provided the following oral case management Decision (edited for grammar and syntax):

> Before the hearing starts, I want to address the order of proceedings. Today's hearing was scheduled some time ago to hear the applicant's request for a review of the conditions of his release. On May 11th, 2017, I made an order concerning an unredacted CBSA risk assessment and a redacted copy of that risk assessment. By e-mail dated May 12th, 2017, the applicant sought what might be called reconsideration of that order, which request was reiterated by a bare motion served and filed by the applicant yesterday afternoon, May 15, 2017. Given, however, that neither party wishes to rely on either the unredacted or redacted risk assessment at today's hearing, and that I have reviewed neither the redacted nor the unredacted risk assessment, I have decided that I will not review either until after the Court renders its decision on the Applicant's current request for a review of the conditions of his release, and thereafter only after having considered the Applicant's request for reconsideration either in writing or at a hearing to be specially scheduled.

[11] After a brief adjournment, both parties accepted this decision; however, the Applicant asked that the redacted and unredacted CBSA material remain under seal, which has been the case. Counsel for the Applicant also gave a heads up that he might seek further relief (exclusion of evidence) under subsection 24(1) of the *Charter of Rights and Freedoms* regarding both the redacted and unredacted reports.

[12] Thereupon, the Applicant addressed a motion that I recuse myself, filed May 15, 2017. Again, the Applicant only filed a bare notice of motion for recusal, comprised of a short notice of

motion without supporting affidavit, cross-examination (if requested), record or memorandum of fact and law.

[13] As a preliminary matter, I asked for submissions on whether the recusal motion should be heard given that "all material from both parties is to be served and filed no later than May 4, 2017". After argument, I delivered an oral ruling from the bench dismissing the recusal motion because it was filed out of time, a copy of which is attached as Schedule "C" to these Reasons and Judgment (formal Order issued June 1, 2017).

[14] At that point, the parties made submissions on the matter at hand, namely the review of conditions of release.

[15] After the hearing, I invited submissions from the Special Advocates who had none to provide and advised: "[F]urther to this Honourable Court's Direction dated Friday, May 19, 2017, as the Ministers have not filed and do not rely upon any closed evidence and as they do not seek to make closed submissions on this detention review, the Special Advocates will, similarly, not be making any closed submissions".

[16] Judgment was reserved. These are my Reasons and Judgment for making limited changes to the conditions of release.

III. Background

[17] Part of the lengthy history of this case is outlined in my reasons on the July 20, 2016 Conditions of Release Order, which includes:

> [21] The Applicant has a long history with this Court. In addition, the relevant legislation has evolved over time. Important aspects of his original detention, subsequent release on conditions, the many subsequent reviews of his conditions of release, together with the evolving statutory framework are well summarized by Justice Noël at paras 5 to 20 in *Mahjoub (Re)*, 2015 FC 1232 (Conditions of Release decision, October 30, 2015). This decision is the most recent review of the Applicant's many reviews of his conditions of release.
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> [22] The Applicant is an Egyptian national, born in April 1960. He came to Toronto, Canada, in the last days of December 1995, having arrived here on a false Saudi Arabian passport. He claimed refugee status, which the Immigration and Refugee Board granted in1996. He became a subject of interest to the Canadian Security Intelligence Service ["CSIS"] sometime in 1996. As a result of this investigation, he became the named person in a certificate issued by the Ministers in June 2000 and was arrested on June 26, 2000. He was in detention from 2000 to 2007; he was released in February 2007, under stringent conditions.
>
> [23] Justice Nadon of the Federal Court of Canada (as he was then) determined that certificate to be reasonable on October 5, 2001. In the Reasons for Order, Justice Nadon noted that the Applicant admitted he had perjured himself by not admitting that he knew a certain individual. Justice Nadon concluded that he did not believe the Applicant's explanation for lying and added that the Applicant had lied before his Court on a number of occasions (see *Canada (Minister of Citizenship and Immigration) v Mahjoub*, 2001 FCT 1095, at paragraphs 57, 58, 68 and 70 (Nadon Decision).
>
> [24] After the original security certificate regime was held to infringe *Charter* rights in 2007 (see *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, [*Charkaoui I*]), a new statutory system was implemented which the Supreme Court of Canada subsequently upheld [*Canada (Minister of Citizenship and Immigration) v Harkat*, [2014] 2 SCR 33].

> [25] The Applicant began filing for conditions of release reviews under this new system in 2008.
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> [26] The new legislation also provides for security certificates that may be challenged in this Court on the basis of reasonableness. Such a certificate was issued against the Applicant. After very lengthy proceedings spanning several years, the late Justice Blanchard held the Applicant's security certificate was reasonable in October, 2013 (see *Mahjoub (Re)*, 2013 FC 1092 (Reasonableness Decision). The Applicant has appealed that decision to the Federal Court of Appeal, which appeal has not yet been heard.
>
> [27] Justice Blanchard found that there were reasonable grounds to believe that the Applicant was a member of the Al Jihad and its splinter or sub-group, the Vanguards of Conquest, and that the Applicant posed a danger to the security of Canada given his contacts with many known or suspected terrorists in Canada and abroad. Justice Blanchard found that Al Jihad and the Vanguards of Conquest are important terrorist groups that were active in Egypt and had direct links and relationships with Osama Bin Laden and Al Qaeda.
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> [28] Thereafter, on December 17, 2013, after hearing an application by the Applicant to be released from all his conditions of release of detention except for a few, the late Justice Blanchard concluded:
>
> > I am satisfied that Mr. Mahjoub poses a threat to the security of Canada as described in my Reasons for Order dated January 7, 2013.

IV. Summary of the positions of the parties

The position of the Applicant

[18] The Applicant correctly states that the last review of conditions of release was heard on June 8 and 9, 2016 and a decision on the terms and conditions of release was issued on July 20, 2016: *Re Mahjoub*, 2016 FC 808. He correctly submits that, according to section 82(4) of the *IRPA*, he has a right to a review of his conditions of release every six (6) months. He

submits that this review is a constitutional requirement per section 7 of the *Charter Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9at paras 117, 122, 123 [*Charkaoui I*]. I agree he has the right to this review.

[19] The Applicant submits that section 7 of the *Charter* and constitutional interpretation of the *IRPA*, after amendments made under C-3, require that conditions not be imposed and constitutional rights not be infringed without proof of a danger proved on balance of probability. In support of this position, the Applicant cites the Ontario Court of Appeal ruling on preventive measures under the earlier version of section 810 of the *Criminal Code* in *R v Budreo* 2000 CANLII 5628 at para 43 (ONCA), aff'g *R v Budreo*, 1996 CanLII 11800 at para 27 (ON SC), 1996 CarswellOnt 24, [1996] OJ No 3, which was recently followed in *Canada v Driver*, 2016 MBPC 3 at paras 26, 29. This "balance of probabilities" argument has been advanced many times by the Applicant and consistently rejected as, for example, most recently in the March 31, 2017, Constitutional and Certified Questions Judgment (at paras 43 to 53). I am not persuaded to depart from the jurisprudence on this point at this time.

[20] The Applicant asks the Court to apply his interpretation as outlined above and to repeal all terms and conditions of release, except the usual conditions (as detailed in his Notice of Application), in light of the fact that there is no such proven danger justifying the current conditions. Since the Applicant's interpretation is incorrect in this regard, in my respectful view, it may not be applied in this case.

[21] I agree with the Applicant's further submission that errors in previous rulings must not be continued for the sake of consistency (*Canada (Minister of Citizenship and Immigration) v*

Thanabalasingham, 2004 FCA 4 at para 18), although departures from otherwise binding jurisprudence, especially that of the Supreme Court of Canada, requires the application of the Supreme Court's guidelines in that regard.

[22] The Applicant concludes by arguing that if the Applicant's interpretation of subsection 82(5) of the *IRPA* is not adopted by the Court in this review, the same arguments as those set out in their recent submissions on constitutional questions (decided on March 31, 2017, Constitutional and Certified Questions Judgment) are repeated for purpose of determination and certification. In response at this time, there is no reason shown to depart from those determinations as set out in that Judgment itself.

Evidentiary Issue

[23] The Applicant filed a last-minute affidavit of Amelie Charbonneau, which concerned a CBSA sign-in sheet that was apparently erroneously signed in advance. The Applicant, by e-mail, described this error as "another big scandal". The Respondents objected to its admission. Upon review, while the evidence post-dates May 4, 2017, I am not persuaded it is relevant either to the danger assessment or the Applicant's conditions of release Therefore, the affidavit is not accepted.

The position of the Ministers

[24] The Ministers' position is that current conditions of release should be maintained with the exception that the Applicant needs to set his computer to save its history. They summarize their case by stating the following; my comments follow each:

- The Court has found there to be reasonable grounds to believe the Applicant is inadmissible to Canada on terrorism and security grounds. Court comment: this is not disputed;
- The Applicant was a member of the Al Qaeda predecessor, Al Jihad, and its splinter or sub-group, the Vanguards of Conquest. Court comment: this finding was made by the late Justice Blanchard in his Reasonableness Decision, which the Applicant has appealed to the Federal Court of Appeal. Judgment on appeal is now under reserve, until which time the late Justice Blanchard's decision binds the Applicant;
- The Applicant ran one of Osama Bin Laden's farms in Sudan while Al Qaeda terrorist training took place there. Court comment: this is an important and accurate finding made in the Reasonableness Decision of the late Justice Blanchard;
- Although he did not testify at his security certificate hearing, when recently cross-examined at his last conditions review hearing, the Applicant admitted to having met Bin Laden, the person behind the 9-11 terrorist attack on the World Trade Center, on several occasions. Court comment: this statement is correct. I would add that the Applicant testified before me that he was hired directly by Bin Laden to manage the previously mentioned farm in Sudan;
- The Applicant also conceded that he had used the alias "Shaker", despite having disputed this identity at every prior turn. Court comment: this is also correct; in cross-examination before me during the July 2016 review, the Applicant admitted he had used the alias "Shaker";
- Finally, the Applicant was forced to admit to having perjured himself in earlier proceedings before Justice Nadon when he claimed not to have known the notorious

terrorist, Essam Marzouk. Court comment: this statement is correct as that finding was made by Justice Nadon.

[25] Thus, the Ministers argue that the Applicant has lied to the Court and to immigration and intelligence officials about his terrorist contacts and has refused to acknowledge or disavow his terrorist engagements. In my respectful view, this is an accurate reflection of the Applicant's situation.

[26] The Ministers also submit that the conditions that remain are limited and focus on neutralizing the danger that the Applicant will acquire, re-acquire, or communicate with terrorist contacts. They say this is entirely appropriate given the Court's findings in this case. What would not be appropriate, they argue, is the removal of all conditions as the Applicant proposes. They argue that his evidence on this review and his past conduct does not support such a request and does not support the Court placing greater trust in him. They also argue that targeted conditions allowing for verification of his communications and contacts remains appropriate.

[27] The Ministers criticize the Applicant's attempt to re-litigate many of the issues he raises as abusive and a waste of judicial resources because they have been raised and decided before. I do not accept this argument. While it is abusive for a litigant to repeatedly raise the same issues, in this case, I excuse the Applicant because he has raised some of these issues to the Federal Court of Appeal for consideration in his appeal of the Reasonableness Decisions (which judgment is now reserved). As I see it, his purpose in raising them here is protective only.

[28] In addition, the Applicant has not provided a valid reason to depart from the Court's recent conclusions, set out in the Constitutional and Certified Questions Judgment, although I will address material points he raises now that were not previously addressed. These include the following three additional questions the Applicant asks the Court to certify, which I will deal with later in the course of these reasons:

1. Whether conditions of release, such as the ones imposed on Mr. Mahjoub, become abusive and arbitrary in violation of sections 7, 8 and/or 12 of the *Charter* when the person is not deportable in fact and in law and such deprivation has been ongoing for over 16 years and therefore have become unjustified and/or unhinged from their underlying purpose of removal under *IRPA* (section 80 of the *IRPA*)?
2. Whether conditions of release, such as the ones imposed on Mr. Mahjoub become abusive and arbitrary in violation of sections 7, 8 and/or 12 of the *Charter* in face of a no-threat conclusion from CSIS and in face of a no flight risk admission?
3. Whether the conditions of release, such as the ones imposed on Mr. Mahjoub, become abusive and arbitrary contrary to sections 7, 8 and/or 12 of the *Charter* in the above-mentioned circumstances in addition to the recognised negative impact on one's health?

[29] The Applicant also asks for leave to make submissions regarding additional certified questions after the release of this decision. I will deal with this now. While such leave has been granted in the past, and while I granted such leave prior to hearing the motion concerning conditions of release in June 2016, such practice is contrary to the jurisprudence of the Federal Court of Appeal. Justice Pelletier, writing for the Federal Court of Appeal in *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 [*Varela*], criticized the practice of

allowing requests to certify questions after reasons are provided, stating on behalf of a unanimous Court of Appeal:

> [29] Additionally, a serious question of general importance arises from the issues in the case and not from the judge's reasons. The judge, who has heard the case and has had the benefit of the best arguments of counsel on behalf of both parties, should be in a position to identify whether such a question arises on the facts of the case, without circulating draft reasons to counsel. Such a practice lends itself, as it did in this case, to a "laundry list" of questions, which may or may not meet the statutory test. In this case, none of them did.
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> [emphasis added]

[30] The finding that such serious questions of general importance arise from the issues in the case and not from the judge's reasons is in my view conclusive on this point. The fact that such a practice lends itself to a "laundry list" of questions was the case in *Varela* and, it is worth noting, was also the case in the recently decided Constitutional and Certified Questions Judgment issued in respect of this Applicant on March 31, 2017, in which none of the numerous proposed questions had merit. In my view, the practice should not be encouraged and the Applicant's request in this regard is denied.

V. Summary of disposition

[31] In my respectful view, given his past history with violent terrorists, including his direct relationship with Osama Bin Laden and Al Qaeda and other factors referred to above and subsequently in these Reasons, the Applicant continues to be a danger under the *IRPA*. Therefore, I confirm his release on conditions which shall continue to be as set out in the July 20, 2016 Conditions of Release Order. However, as set out in the Judgment which follows

these Reasons, the conditions should be clarified such that, regarding the use of Skype, notice need only be given once in respect of the same person. Additionally, the Applicant is required to set his computer so that it keeps its cache forever; neither manual nor automatic deletions may be made at any time. I also wish to clarify, by way of a condition of release, that while the Applicant may obtain and use a cell phone, he may not use a mobile phone to access the internet.

[32] As noted previously, it is very important that the Applicant not delete Internet tracking information from his computer. I also wish to reiterate that the Ministers are at liberty to apply to vary these conditions of release and perhaps others as required if there is evidence of non-compliance in this regard.

[33] At the last condition of release review, as set out in the July 20, 2016 Conditions of Release Order, the Applicant made specific requests to visit both gun stores/shooting clubs and internet cafés. These requests were not specifically reiterated on this review. However, the sweeping change requested would allow the Applicant to do both. In my view, neither change is any more acceptable now than it was in July 2016: the first request, regarding attendance at gun stores and/or shooting clubs, because of the combination of the Applicant's danger and his army background, which included training in automatic weapons; and the second, regarding attendance at internet cafés, because such visits would allow open passage to circumvent the Court's long-standing restrictions on unsupervised internet access be it by computer or mobile phone.

[34] In my respectful view, these conditions are necessary under paragraph 85(2)(b) of the *IRPA* to neutralize the danger the Applicant continues to present. In my view, they are

proportionate and reasonable in the circumstances. They take into account that his circumstances have not evolved materially since July 20, 2016. I wish to emphasize that they also take into account that CSIS no longer considers the Applicant a threat to national security, as well as the fact that CSIS has advised domestic and international agencies of this and requested they take appropriate action.

[35] In coming to these conclusions, and at the Applicant's request, I confirm that I have not reviewed either the redacted or unredacted updated CBSA Risk Assessment, which neither party relied on in any event.

VI. Framework for analysis

Relevant Provisions

[36] Subsection 82(5) of the *IRPA* states:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
82(5) On review, the judge :	82(5) Lors du contrôle, le juge :
(a) shall order the person's detention to be continued if the judge is satisfied that the person's release under conditions would be injurious to national security or endanger the safety of any person or that they would be unlikely to appear at a proceeding or for removal if they were released under conditions; or	a) ordonne le maintien en détention s'il est convaincu que la mise en liberté sous condition de la personne constituera un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi si elle est mise en liberté sous condition;
(b) in any other case, shall order or confirm the person's	b) dans les autres cas, ordonne ou confirme sa mise en liberté

release from detention and set any conditions that the judge considers appropriate.	et assortit celle-ci des conditions qu'il estime indiquées.

What is danger and how is it defined?

[37] As seen from paragraph 82(5)(a), a key issue on the matter of conditions of release is whether the Applicant is a danger. The Applicant repeated his argument that, because CSIS no longer considers him a threat to the security of Canada pursuant to the *CSIS Act*, this Court must, as a matter of law, conclude that the Applicant is not a danger pursuant to the *IRPA*. I remain unpersuaded because, in my view, the objects and purposes of the two statutes (*CSIS Act* and *IRPA*) are very different. Danger in the sense of endangering others is a requirement of the *IRPA* and specifically of paragraph 85(2)(a) of the *IRPA*. While a CSIS threat assessment may ground a finding of danger under the *IRPA*, the absence of a threat assessment under the *CSIS Act* does not preclude the Court from finding danger under the *IRPA*.

[38] In other words, danger under *IRPA* may be found in the absence of a finding that a person is a threat to the security of Canada under the *CSIS Act*.

[39] I am also not persuaded to reject the definition of danger established by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] SCJ No 3 [*Suresh*]. There, the Supreme Court of Canada held that, to constitute danger, there must be a serious threat, grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible:

> 90. […] 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 dependent 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.
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> [emphasis added]

Type of review to be conducted

[40] In *Charkaoui I*, the Supreme Court of Canada set out the requirement for a robust review of detention, which I consider applicable to a review of conditions of release:

> 123 In summary, the *IRPA*, interpreted in conformity with the *Charter*, permits robust ongoing judicial review of the continued need for and justice of the detainee's detention pending deportation. On this basis, I conclude that extended periods of detention pending deportation under the certificate provisions of the *IRPA* do not violate s. 7 or s. 12 of the *Charter*, provided that reviewing courts adhere to the guidelines set out above. Thus, the *IRPA* procedure itself is not unconstitutional on this ground. However, this does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under s. 24(1) of the *Charter*.
>
> [emphasis added]

[41] I agree with Justice Noël, who stated in his Conditions of Release Decision) that robust reviews are required with a complete understanding of the state of the file including past reasons of this Court:

> [21] … The Supreme Court of Canada calls for robust reviews. Part of meeting this obligation is met when the designated judge reviewing the application has a complete understanding of past reasons and their underlying motives. Robust review demands not only to consider factors favourable to the named person. All other factors associated to the named person, as found in previous

> decisions, must also be considered. Notably, findings of danger, findings of non-compliance or near non-compliance, and findings of an overall uncooperative attitude are factors that militate against easing conditions of release. For the purpose of reviews, the designated judge, equipped with such factual knowledge of the past and of the present, must assess the different legal issues and ultimately render a decision.
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> *Re Mahjoub*, 2015 FC 1232

Factors to be considered

[42] Factors that have been applied on previous condition of release reviews will be applied in the present review. These were summarized by Justice Noël in *Mahjoub (Re)*, 2014 FC 720. The Court followed this format in its July 20, 2016 Condition of Release Order. I follow these points, despite the Applicant's objections, because they derive from *Harkat v Canada (Minister of Citizenship and Immigration)*, 2013 FC 795 at para 26, [2013] FCJ No 860, and flow from the non-exhaustive summary set out by the Supreme Court of Canada in *Charkaoui I*:

> 1. Past decisions relating to the danger and the history of the proceedings pertaining to reviews of detention, release from detention with conditions and the decisions made;
>
> 2. The Court's assessment of the danger to the security of Canada or to other persons associated with the Applicant in light of all the evidence presented;
>
> 3. The decision, if any, on the reasonableness of the certificate;
>
> 4. The elements of trust and credibility related to the behaviour of the Applicant after having been released with conditions and his compliance with them;
>
> 5. The uncertain future as to the finality of the procedures;
>
> 6. The passage of time (in itself, not a deciding factor – see *Harkat v Canada (Minister of Citizenship and Immigration)*, 2007 FC 416 at para 9, [2007] FCJ No 540);

7. The impact of the conditions of release on the Applicant and his family and the proportionality between the danger posed by the Applicant and the conditions of release.

[43] I now turn to reviewing this application in terms of these factors.

1. Past decisions relating to danger and the history of the proceedings pertaining to reviews of detention and release from detention with conditions and the decisions made

[44] My starting point in this respect is the summary of the history of proceedings set out by Justice Noël in *Mahjoub (Re)*, 2015 FC 1232:

> [5] Mr. Mahjoub, an Egyptian national, was born in April 1960. He came to Toronto, Canada, in the last days of December 1995. He travelled on a false Saudi Arabian passport and claimed refugee status, which the Immigration and Refugee Board granted on October 24, 1996. He became a subject of interest to the Canadian Security Intelligence Service ["CSIS"] sometime in 1996. As a result of this investigation, he became the named person in a certificate issued by the Ministers in June 2000 and was arrested on June 26, 2000.
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> [6] Justice Nadon of the Federal Court of Canada (as he was then) determined that certificate to be reasonable on October 5, 2001. In the Reasons for Order, the judge noted that Mr. Mahjoub admitted he had perjured himself by not admitting that he knew a certain individual. Justice Nadon wrote that he did not believe Mr. Mahjoub's explanation for lying and added that Mr. Mahjoub had lied on a number of counts (see *Canada (Minister of Citizenship and Immigration) v Mahjoub*, 2001 FCT 1095, at paragraphs 57, 58, 68 and 70 [2001 Nadon J. (October)]).
>
> [7] Justice Eleanor Dawson, now of the Federal Court of Appeal, twice dismissed (in 2003 and 2005) Mr. Mahjoub's applications to be released from detention. Justice Nadon's above-mentioned findings of untruthfulness were relied upon by Justice Dawson in her first decision (see *Canada (Minister of Citizenship and Immigration) v Mahjoub*, 2003 FC 928, at paragraph 76 [2003 Dawson J. (July)]). In her second review of detention, Justice Dawson refused to grant the release of detention

because she did not think the conditions of release of detention could neutralize the danger. She added that the trust factor related to Mr. Mahjoub was not there and that she was not convinced he would abide by the conditions discussed at the time (see *Canada (Minister of Citizenship and Immigration) v Mahjoub*, 2005 FC 1596, at paragraph 101 [2005 Dawson J. (November)]).

[8] On February 15, 2007, Mr. Mahjoub was released from detention with stringent conditions which included GPS monitoring, house arrest, supervision, surety, no access to communications devices, etc. (see *Mahjoub v Canada (Minister of Citizenship and Immigration)*, 2007 FC 171 [2007 Mosley J. (February)]).

[9] On February 23, 2007, the Supreme Court of Canada declared the security certificate regime to be unconstitutional and suspended its declaration of invalidity for one (1) year to permit Parliament to amend the IRPA (see *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 ["Charkaoui n° 1"]).

[10] A new security certificate regime, involving special advocates among other matters, came into force in February 2008. A new security certificate was signed against Mr. Mahjoub by the Ministers on February 22, 2008.

[11] Justice Layden-Stevenson, the designated judge in charge of this new certificate proceeding prior to her appointment to the Federal Court of Appeal, rendered two (2) decisions on the conditions of release of detention in late December 2008 and March 2009. In her first decision, she modified a condition of release from an earlier Order (April 11, 2007). In her second decision, she noted that Mr. Mahjoub's insistence on strict adherence to the conditions of release in the literal sense hampered the CBSA's effort to accommodate his family (see *Canada (Minister of Citizenship and Immigration) v Mahjoub*, 2009 FC 248, at paragraph 150 [2009 Layden-Stevenson J. (March)]).

[12] About ten (10) days after the issuance of Justice Layden-Stevenson's Reasons for Order, two (2) of Mr. Mahjoub's sureties, his wife and stepson, renounced their role as sureties. As a result, Mr. Mahjoub consented to return to detention on March 18, 2009.

[13] He was then released from detention with conditions by Justice Blanchard, the new designated judge in charge of this second security certificate proceeding, on November 30, 2009 (*Mahjoub (Re)*, 2009 FC 1220 [2009 Blanchard J. (November)]).

[14] In a new application to dismiss the majority of the conditions of release of detention, Justice Blanchard amended the conditions such as eliminating the requirement for GPS tracking (see *Mahjoub (Re)*, 2011 FC 506 [2011 Blanchard J. (May)]).

[15] In two successive sets of Reasons for Order dated February 1, 2012, and January 7, 2013, Justice Blanchard again lifted some conditions and considerably modified others as he found the threat Mr. Mahjoub posed had diminished (see *Mahjoub (Re)*, 2012 FC 125, at paragraphs 66, 90-93; and *Mahjoub (Re)*, 2013 FC 10) [2012 Blanchard (February)] [2013 Blanchard J. (January)]). In this last decision, at paragraph 47, Justice Blanchard expressed concerns about ensuring Mr. Mahjoub does not communicate with terrorists and re-acquire terrorist contacts.

[16] On October 25, 2013, Justice Blanchard issued his Reasons for Judgment and Judgment on the reasonableness of the security certificate (see *Mahjoub (Re)*, 2013 FC 1092 ["2013 Blanchard J. (October)" or "Reasonableness Decision"]). He found:

> [618] The following is a summary of my earlier findings relating to the credibility of Mr. Mahjoub's various accounts:
>
> > a. Mr. Mahjoub was not truthful when he denied knowing Mr. Marzouk, Mr. Khadr, Mr. Jaballah or their aliases. In particular, during his fourth interview in October 1998, he denied knowing Mr. Khadr despite having admitted to knowing him in an earlier interview. When confronted with the fact that he had resided with the Elsamnahs, Mr. Khadr's in-laws, another fact he did not disclose to the Canadian authorities, he then admitted knowing Mr. Khadr.
> >
> > b. Mr. Mahjoub was not truthful when he denied ever using an alias. I found Mr. Mahjoub's explanation of how he came to use the alias "Ibrahim" when he admitted to using it, not credible for the reasons expressed at paragraph 539 above.
> >
> > c. Mr. Mahjoub's explanation that he did not provide the names of individuals who knew him by the alias Ibrahim to the Service for fear that the Egyptian authorities would

> target him and these individuals was not credible as explained at paragraph 540 above.
>
> d. Mr. Mahjoub omitted to disclose to Canadian authorities the true nature of his occupation and his employer at the Damazine Farm while in Sudan, indicating only that he was employed as an agricultural engineer at the Farm. This omission further impugns his credibility.
>
> e. Mr. Mahjoub's explanation for leaving the Farm to buy and sell goods in the market was not credible, given the salary he was likely earning at the time in comparison to average wages in Sudan as explained at paragraphs 484-486 and 490 above.

[619] In my view, the above omissions and lies by Mr. Mahjoub are crafted and designed to consistently conceal any facts that could connect Mr. Mahjoub to known terrorists, terrorist activities or known terrorist related enterprises such as Althemar. The fact that Mr. Mahjoub would lie about the use of aliases is of particular concern. The use of aliases is well known in the terrorist milieu and serves to conceal the true identify of individuals involved.

[620] The above omissions and lies by Mr. Mahjoub in the circumstances lead me to conclude that his innocent account of events and activities in Sudan and in Canada is not credible. This finding lends support to the Ministers' allegations.

[…]

iii. *The timing of Mr. Mahjoub's travels*

[623] Mr. Mahjoub's travels to Sudan in September 1991 coincide with the movement of AJ and Al Qaeda elements to Sudan. Mr. Mahjoub's departure from Sudan to Canada also coincides with the exodus of those elements from Sudan to the West and other countries in the Muslim world. I

accept that during this period terrorist organizations were intent on finding a base abroad and their membership scattered to places including Europe and North America. I find that the timing of Mr. Mahjoub's travels supports the Ministers' allegation that Mr. Mahjoub was a member of the AJ.

iv. *Mr. Mahjoub's terrorist contacts*

[624] A number of Mr. Mahjoub's contacts are important players in the terrorist milieu. Mr. Mahjoub's contacts with Mr. Al Duri, Mr. Khadr and Mr. Marzouk have been close and enduring. A number of these individuals were still demonstrably active in the militant AJ and associated Al Qaeda milieu when Mr. Mahjoub was in contact with them. The frequent use of aliases, lies and omissions to conceal these relationships from the authorities is indicative of the terrorist nature of these contacts. I find that these contacts support the Minister's allegations of Mr. Mahjoub's membership in the AJ and the VOC. In addition, Mr. Mahjoub XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX contacted a telephone number associated with the VOC.

v. *Mr. Mahjoub's security consciousness*

[625] There is evidence that Mr. Mahjoub exhibited security consciousness related to terrorism on occasion while in Canada. For instance, anti-surveillance tactics when making phone calls or being followed by the Service, his use of aliases, and his lack of cooperation with Canadian authorities is consistent with an individual concerned with concealing his activities and contacts. I find that this behaviour supports the Ministers' allegations of Mr. Mahjoub's membership in the AJ and the VOC.

vi. *The direct evidence affirming or denying that Mr. Mahjoub is a terrorist and member of the VOC Shura Council*

[626] As indicated above, the direct evidence relating to the Ministers' allegations that Mr. Mahjoub is a member of the VOC and its Shura Council or a member of the AJ, consist of:

XXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXX

c. XXXXXXXXXXXXXXXX [certain classified evidence] and

d. an intercepted conversation.

I found that the [classified] reports XXXXXXXXXXXXX were not sufficiently persuasive to support the Minister's allegation of membership; however, I found that XXXXXXXXXXXXXXX [one piece of evidence indicating that Mr. Mahjoub was an AJ leader] and Mr. Mahjoub's self-identification as a "member" in the context of the Returnees of Albania Trial lends support to the allegation of membership.

c) *Conclusion on membership*

[627] Upon considering the evidence holistically, and on the basis of substantiated and reasonable inferences, I find that the Ministers have established reasonable grounds to believe that Mr. Mahjoub is a member of the AJ and its splinter or sub-group, the VOC.

[628] In so determining, I rely on my findings set out above which include:

a. That the AJ and VOC existed as terrorist organizations at the relevant times;

b. Mr. Mahjoub had contact in Canada and abroad with AJ and VOC terrorists;

c. Mr. Mahjoub used aliases to conceal his terrorist contacts;

d. Mr. Mahjoub was dishonest with Canadian authorities to conceal his terrorist contacts;

e. Mr. Mahjoub worked in a top executive position in a Bin Laden enterprise alongside terrorists in Sudan at a time when key terrorist leaders were in Sudan;

f. Mr. Mahjoub was dishonest in concealing from Canadian authorities the nature of his position at Damazine Farm;

g. Mr. Mahjoub travelled to and from Sudan at the same time as AJ and Al Qaeda elements; and

h. XXXXXXXX [Some of the direct evidence] that Mr. Mahjoub was a member of the AJ and Mr. Mahjoub's intercepted conversation support the Minister's allegation.

[629] In my determination, I have also relied upon the following inferences relating to Mr. Mahjoub's travels and activities. These include:

a. Mr. Mahjoub's contacts were of a terrorist nature;

b. Mr. Mahjoub had a close and long-lasting relationship with a number of his terrorist contacts;

c. Mr. Mahjoub was trusted by Mr. Bin Laden on the basis of his ties to the Islamic extremist community;

d. Mr. Mahjoub was aware of and complicit in Al Qaeda weapons training occurring at Damazine Farm; and

e. Mr. Mahjoub's travels to and from Sudan at the same time as AJ elements were not coincidental.

[630] I am satisfied that even without the direct evidence XXXXXXX and from the intercepted conversation, my decision would not change.

[631] On the basis of the above findings, I am satisfied that Mr. Mahjoub had an institutional link

with the AJ and knowingly participated in that organization. While there is a dearth of compelling and credible evidence explicitly linking Mr. Mahjoub with the VOC, I am satisfied that the evidence establishes an institutional link and knowing participation in the faction of the AJ led by Dr. Al Zawahiri, which eventually aligned itself with Al Qaeda and continued to be militant after many members of the AJ had declared a ceasefire. I have found that this faction was likely known as the VOC, at least at some point in its history. Mr. Mahjoub was linked with this faction of the AJ and Al Qaeda through his employment at Althemar, his travels, and his terrorist contacts in Canada. This link was active and enduring for many years. He knowingly participated in this network through his involvement in the Damazine weapons training, whether passive or active, and in maintaining contact with individuals who were active terrorists who were connected to either Mr. Bin Laden or Dr. Al Zawahiri. Although actual format membership has not been established, which would require proof that Mr. Mahjoub swore allegiance to the group, such proof is not necessary in the context of a security certificate proceeding. I am satisfied that Mr. Mahjoub's links and participation fit within the unrestricted and broad interpretation of "member" for the purposes of paragraph 34(1)(f) of the IRPA.

[632] On the basis of the above evidence as reflected in my finding, applying the principles of law discussed in the legal framework section of these reasons, I find that the Ministers have established reasonable grounds to believe that Mr. Mahjoub was a member of the AJ and its splinter or sub-group the VOC. Consequently, the Ministers have satisfied the requirements of paragraph 34(1)(f) of the IRPA.

[633] Since the requirements provided for in section 34 of the *IRPA* are disjunctive, my above finding is determinative of the reasonableness of the certificate. I therefore find, on the basis of the above conclusion, that the security certificate issued against Mr. Mahjoub pursuant to subsection 77(1) of the IRPA is reasonable.

> […]
>
> [668] During the 1996-1997 period, when terrorists associated with the groups at issue seemed to be accumulating in Canada, and during the 1998-2000 period after the AJ became a member of the Islamic Front with Al Qaeda and the fatwa against Americans and their allies was issued, Mr. Mahjoub maintained contact from Canada with established or suspected terrorists either in Canada or abroad: Mr. Khadr, Mr. Al Duri, Mr. Jaballah, and in particular Mr. Marzouk XXXXXXXXXX. Importantly, the contacts abroad, Mr. Khadr and Mr. Al Duri, were Canadian citizens. I have found that there are reasonable grounds to believe that all of these individuals with the exception of XXXXXXXXX Mr. Jaballah, including Mr. Mahjoub himself, were present in Canada or had free access to Canada and were involved with terrorist groups committed to killing US allies including Canadians. These facts establish that AJ members in Canada were a threat to Canadians.
>
> [669] I find that these facts establish reasonable grounds to believe that prior to his arrest, as a member of the AJ and its splinter or sub-group the VOC, Mr. Mahjoub was a danger to the security of Canada.
>
> [Note: The redactions are the ones appearing on the public reasons.]

[17] As the above reference to the Reasons for Judgment and Judgment indicate, the AJ (Al Jihad) and VOC (Vanguards of Conquest) are described by Justice Blanchard as important terrorist groups which were active in Egypt and had direct links and relationships with Osama Bin Laden and Al Qaeda (see also paragraph 177 and following of the Reasonableness Decision).

[18] On December 17, 2013, as a result of an application filed by Mr. Mahjoub to remove all conditions of release of detention except for a few, Justice Blanchard concluded: "I am satisfied that Mr. Mahjoub poses a threat to the security of Canada as described in my Reasons for Order dated January 7, 2013" and concluded that the conditions of release should not change except for small adaptations towards the use of calling cards. He also took note that Mr. Mahjoub was in technical breach of his conditions of release

by not informing CBSA that he had acquired a mobile phone, but it was not a significant breach as Mr. Mahjoub had not used it. He also found that when Mr. Mahjoub opted to cut off the GPS bracelet himself instead of letting CBSA remove it without destroying it, Mr. Mahjoub did not breach any conditions but indicated an "unwillingness" to cooperate with the CBSA (see *Mahjoub (Re)*, 2013 FC 1257, at paragraphs 5, 6, 16, 17 and 18 [2013 Blanchard J. (December)]).

[19] In May 2014, I stipulated that Mr. Mahjoub must give his computer password to the CBSA as the conditions of release granted CBSA access to it (see *Mahjoub (Re)*, 2014 FC 479 [2014 Noël J. (May)]). To this Court, it was evident that Mr. Mahjoub's attitude was indicative of a lack of collaboration and cooperation. His attitude does not help the CBSA fulfil its supervisory mandate as required by this Court's Order.

[20] A little more than six (6) months after Justice Blanchard's last set of reasons on the review of conditions of detention, Mr. Mahjoub filed another application to review the conditions of release. He essentially requested the same outcome, namely that all conditions be repealed except for a few usual ones. This Court then made the following findings (see *Mahjoub (Re)*, 2014 FC 720 [2014 Noël J. (July)]):

> D. *The elements of trust and credibility related to the behaviour of the Applicant after having being released with conditions and his compliance with them*
>
> **57** The behaviour of an individual with respect to the conditions of his release is an important factor to consider when considering amending them or some of them. In *Harkat (Re)*, 2009 FC 241 at para 92, [2009] FCJ No 316, the Court had this to say on this factor:
>
> > **[92]** Credibility and trust are essential considerations in any judicial review of the appropriateness of conditions. When considering whether conditions will neutralize danger, the Court must consider the efficacy of the conditions. The credibility of and the trust the Court has in a person who is the subject of the conditions will likely govern what type of conditions are necessary.

58 Mr. Mahjoub's record regarding his most recent conditions of release has not been exemplary, as noted by the Court in its December 17, 2013 review of conditions order, when it concluded that Mr. Mahjoub had breached his condition of release by not giving proper notice of the acquisition and use of the telephone and fax services. It was found that: "[...] Mr. Mahjoub cannot be relied upon to respect his conditions of release." (December 17, 2013 review of conditions order at para 18).

59 In that same decision, again as recently as December 2013, the Court also found that in relation to the cutting of the GPS bracelet and not permitting the CBSA to remove the bracelet without being damaged, Mr. Mahjoub's actions were: "[...] indicative of an unwillingness to cooperate with the CBSA." (see para. 17)

60 Mr. Mahjoub's recent attitude, action and behaviour are also indicative of an unwillingness to collaborate and cooperate with the supervision duty of the CBSA that the Court has imposed. Here are a few examples of this:

> A. January 2014 - Mr. Mahjoub, although obligated to do so by section 7 of his conditions of release, did not give correct information to the CBSA concerning his travel from Toronto to Ottawa. Through counsel, the Applicant gave the wrong departure time which prevented the CBSA from assuming its supervisory role. The reasons given to explain this failure, to the effect that it was the error of counsel and that the CBSA should have informed Mr. Mahjoub of the discrepancy, are not accepted. Mr. Mahjoub was required by section 7 of his conditions of release to give accurate information when traveling, and it is not for the CBSA to compensate for a lack of accuracy. Still, because of that blatant failure by Mr. Mahjoub to provide accurate factual information, the CBSA was rendered unable to assume its supervisory role as the Court so required. This is another indication

showing a lack of collaboration and cooperation on his part.

B. Mr. Mahjoub has failed to provide the Startec toll records as requested by the CBSA pursuant to paragraph 11(b) of the conditions of release for the period of use between January 31, 2014 and February 21, 2014, and he has yet to do so. This matter was submitted to the Court sometime in late spring 2014. Paragraph 11(b) of the conditions of release is clear: Mr. Mahjoub has the obligation to supply the Startec toll records for this three-week period. Again, this is another example of Mr. Mahjoub's lack of collaboration and cooperation. As for the Startec toll records for the year 2013, pursuant to paragraph 11(a) of the January 31, 2013 conditions of release, even though being asked to consent, Mr. Mahjoub still has not given consent. The reason he gives is that the CBSA should not gain retroactive access to these toll records. Furthermore, the Applicant has not given notice that he was using Startec as required by that condition of release. He argues that the CBSA knew of this account and should have asked them earlier. This argument does not relieve Mr. Mahjoub of his obligation to consent to the release of these toll records as required by the Court pursuant to paragraph 11(a) of his conditions of release. Again, this is not an attitude that shows collaboration and cooperation as the conditions of release so require. By acting in such a way again, Mr. Mahjoub decides that the CBSA will not assume its supervisory role as requested by the Court.

C. Pursuant to paragraph 10(f) of the 2014 conditions of release, Mr. Mahjoub must give full access to his computer to the CBSA without notice, which includes the hard drive and the peripheral memory, and the CBSA may seize the computer for such purpose. On April 24, 2014, when requested by the CBSA, Mr. Mahjoub did not give the

> immediate access. He had the CBSA representative wait at the door and, as he went back to his computer, he appeared to be seen for a period of two minutes to be doing something to his computer. The condition compels Mr. Mahjoub to give access and control to the CBSA without notice. He did not. He also objected to the taking of photographs by the CBSA, when the purpose of the picture is to wire the computer in the same way when it is brought back and to document any damage on the computer. This is standard procedure for the CBSA and an understandable policy to be followed. In addition, Mr. Mahjoub refused to provide any USB devices for inspection as required by paragraph 10(f) of his conditions of release which stipulates not only the examination of the computer but also all peripheral memory devices. This is very close to a breach of the condition if not a breach. Finally on this matter, Mr. Mahjoub objected to giving his password to access his computer. This Court wrote Reasons for Order and Order obligating Mr. Mahjoub to do so (see *Mahjoub (Re)*, 2014 FC 479 and more specifically paragraph 21). To this Court, it was evident that the password had to be given for the purpose of examining the computer. What was evident to this Court, however, was not to Mr. Mahjoub. This type of attitude can only show a lack of collaboration and cooperation, and not only is this is not helpful to Mr. Mahjoub's interest, but it also complicates and possibly makes it impossible for the CBSA to assume its supervisory role as the Court requires in the *Conditions of Release* of both 2013 and 2014.

61 Mr. Mahjoub explains that his attitude is intended to ensure that his conditions of release are limited to what they are and that his privacy is respected. These are, to some degree, valid grounds, but they must not be used to the point of taking the essence of the conditions of release away from their purposes and preventing the supervision of the use

> of communication devices, computers and other modes of transmission of data, information and images. Without proper supervision by the CBSA, conditions of release become useless.

[45] I add that, in the July 20, 2016 Conditions of Release Order, the Court relaxed a number of restrictions on Mr. Mahjoub. It also agreed with the Ministers that the Applicant presented no difficulties in terms of compliance.

[46] That said, his past history and the conclusions of so many release reviews conducted by so many Designated Judges continue to weigh on me and count against changing the conditions of release. I appreciate these previous findings are not determinative; this Court is not a rubber stamp of previous decisions. But neither may the Court or the Applicant ignore the many negative findings against him. Cumulatively, even given the changes made last year, this factor militates in favour of maintaining the status quo.

[47] This is all the more so given my credibility findings in the July 20, 2016 Conditions of Release Order, where the Applicant, for the first time since he appeared before Justice Nadon (as he then was), was cross-examined. I held, at paras 86 to 95:

> 86. And I note that the statements at issue before Justice Dawson were made under the regime that was subsequently declared unconstitutional according to the Charter in *Charkaoui I*. Justice Blanchard in a related proceeding involving the Applicant, adopted "… Justice Dawson's findings relating to any and all legal determinations in the Reasons for Order and Order, dated February 26, 2010", to which I have just referred.
>
> 87. Frankly, I was not impressed with the Applicant's evidence and attach little weight to it. His strategy, as implemented by his counsel, was to repeatedly interrupt Ministers' counsel during his cross-examination. Each interruption, some of which not even

framed as objections, had the effect of buying time for the Applicant to reply and sheltering him from legitimate cross-examination. At various times his counsel's many interruptions bordered on suggesting strategies and even answers to the Applicant.

88. These interruptions were continued notwithstanding the wide scope afforded to a cross-examiner, the stringent limits that are placed on interruptions during cross-examination, and even the Court's admonitions.

89. Eventually the Applicant through counsel moved from interruptions that were expressly not objections to interruptions framed as objections, and did so repeatedly. These interruptions intensified as the Ministers' counsel moved into each new area. In my view, most if not almost all of the Applicant's objections were without merit.

90. I also note the Applicant testified through a translator, although he quite frequently answered in English, and in what I consider very good English.

91. In my view, multitudinous meritless interruptions during cross-examination and being led in re-direct had the cumulative effect of greatly diminishing the Applicant's credibility. These strategies made it difficult for the Court to find and assess the real Mr. Mahjoub before it. Justice Noël at one point observed that the Applicant might have 'something to hide'. The Applicant's testimony at the hearing taken as a whole also had the effect of again hiding the Applicant from the Court; my concerns about his being a danger were not tempered in any way.

92. In his factum the Applicant specifically asked to be allowed to visit gun stores. When cross-examined, his answers were defensive and argumentative. He betrayed a profound misunderstanding of his reality. He asked to be treated like any other person in Canada. However he is not like any other person ("any other citizen" according to his counsel): he is not a Canadian citizen, he is a foreign national who is inadmissible under the *IRPA*. He is a person against whom a security certificate has been issued, which security certificate was issued under legislation found constitutional by the Supreme Court of Canada. And his security certificate was upheld as reasonable after a very lengthy review conducted by Justice Blanchard which stands unless and until it is contradicted on appeal.

> 93. Further, when questioned about his admitted lying before Justice Nadon (as he then was), the Applicant forcefully took the position that he had a good reason to lie to this Court, i.e., he lied to protect someone else. The Applicant does not accept that lying is not allowed. He showed no real remorse. His answers show he does not fully accept his duties as a witness. In my respectful opinion his testimony confirmed he would perjure himself again if he thought he had a good reason to do so; the Applicant mistakenly sees himself as the arbiter of when he may lie and when he tells the truth to this Court. That is a disturbing flaw in his relationship with this Court which casts further doubt on his credibility.
>
> 94. The Applicant also admitted in cross-examination that he used the alias Shaker in connection with the activities discussed in Justice Blanchard's Reasonableness Decision. On multiple occasions prior to that decision, the Applicant had denied using the alias Shaker in CSIS interviews, and disputed that point before Justice Blanchard. In the end, Justice Blanchard concluded there was "insufficient evidence to establish that Mr. Mahjoub used the alias Shaker". Justice Blanchard said of this finding that it was "critically important that no basis whatsoever is provided by [the Ministers] XXXXXXXXXXX for connecting Mr. Mahjoub with the alias "Shaker", at para 248. We now know that the Applicant did use the alias Shaker. This admission was not made before Justice Blanchard. In my view, based on the public record, this admission supports the allegation that the Applicant was at the very least a Mujahideen fighter. In my view this admission, had it been before Justice Blanchard, could have made a significant difference to the Reasonableness Decision: Justice Blanchard himself ruled that his inability to find the Applicant used the Shaker alias was "critically important."
>
> 95. The evidence leads me to conclude not that the Applicant has ceased to be a danger, but that the danger remains. His danger to the extent it has been reduced came about not by any transformation on his part, but by the conditions of his release. That is not an argument to do away with those conditions but instead, and in my respectful view, is an argument to maintain them to neutralized the danger, as intended by section 85 of the *IRPA*.

[48] Despite his urgings that they in effect be ignored, these findings do not support the Applicant's request to remove all but the usual conditions of release.

2. The Court's assessment of the danger to the security of Canada or to other persons associated to the Applicant in light of the evidence presented

[49] In law, the Ministers have the initial burden to establish danger. The facts must show that the danger is serious, grounded in an objectively reasonable suspicion and that the potential harm resulting from the said danger is substantial rather than negligible, as set out by the Supreme Court of Canada in *Suresh*.

[50] The evidence in this respect has not materially changed since that of the last review, except for the fact of the Applicant's compliance with the relaxed conditions. But it is a common sense inference, and one that I draw, that because the conditions were less onerous, the Applicant would have a less difficulty complying with them. This alone does not warrant the relief sought in this application. I come to this conclusion without the benefit of whatever findings may have been made in the most recent CBSA Risk Assessment, which the Applicant has asked the Court not to read; I do not know if it assists or hurts the Applicant's case in this respect.

[51] The Applicant says that meeting the conditions of release means he is no longer a danger. That raises the issue of whether he is of himself no longer a danger, or whether the conditions of release have neutralized that danger. The Applicant argues that the Court, as a matter of law, may not find that the conditions of release have neutralized his danger without "proof". He seems to insist that this "proof" cannot be based on inference drawn from the evidence before the Court.

[52] In this, and with respect, the Applicant is incorrect. The Court is entitled on review of the record to infer from the evidence, as it does now, that the fact the Applicant is not currently involved in activities that endanger Canadians is contributed to, if not caused by, the conditions of his release.

[53] The Applicant further submits that the previous decisions of this Court relying upon and the Reasonableness Decision cannot establish the Applicant's dangerousness. In this, he is mistaken. While I agree the Reasonableness Decision in essence assessed the Applicant's conduct in terms of the Security Certificate and thus focussed on past conduct, that is not the end of the matter. This Court is entitled to assess both present and future danger with reference to the Applicant's past conduct as found in the Reasonableness Decision. If it were otherwise, release from detention and removal of conditions of release would be almost if not automatic in all cases. Past conduct is very relevant in assessing present and future dangerousness and I see no merit in the Applicant's suggestion otherwise.

[54] No one suggests the Applicant is currently engaged in activities dangerous to Canadians; however, his previous active and material support for terrorists, including Mr. Bin Laden, Al Qaeda and others, are facts that lead me to find that his danger is serious, that it is grounded in an objectively reasonable suspicion and that the potential harm resulting from that danger is substantial rather than negligible, as required by the *IRPA* and by the Supreme Court of Canada in *Suresh*.

[55] In this connection, it should be noted that his conditions of release are, in many ways, designed to neutralize the danger that the Applicant will acquire, re-acquire, or communicate

with terrorist contacts as he did in the past, as found by this Court in the Reasonableness Decision.

[56] Therefore, this factor supports continuing the existing conditions of release notwithstanding that CSIS no longer considers the Applicant a threat to the security of Canada pursuant to the *CSIS Act*.

[57] In this connection, the Applicant drew the Court's attention to a decision of the Ontario Superior Court of Justice in *Ali v Canada (Minister of Public Safety and Emergency Preparedness) et al*, 2017 ONSC 2660 [*Ali*], where, acting under its *habeas corpus* jurisdiction, the Superior Court reviewed the detention of Mr. Ali under the *IRPA*. I was also referred to another Superior Court of Justice decision, namely, *Wang v Canada (Minister of Public Safety and Emergency Preparedness) et al*, 2017 ONSC 2841. Finally, I was referred to the Ontario Court of Appeal decision in *R v Panday*, 2007 ONCA 598, leave to appeal to SCC refused, 32434 (3 April 2008).

[58] Counsel relied on several points made in *Ali*:

- A detention cannot be justified if it is no longer reasonably necessary to further the machinery of immigration control;
- The purpose under the *IRPA* is not the punishment of uncooperative detainees; and,
- The authorities cannot discharge the onus that rests on them to demonstrate that the continued detention of Mr. Ali is justified, for immigration purposes, based on skepticism and speculation.

[59] Accepting these as legitimate concerns, I am not persuaded they assist the Applicant in the circumstances of this case. Generally, *Ali* involved a detention whereas the present case involves conditions of release. The Applicant's conditions of release have been relaxed over a number of successive reviews over a number of years. We are, at this time, far removed from the stringent conditions originally imposed when the Applicant was released from detention, at which time the Applicant was subjected to GPS ankle bracelet monitoring, supervising sureties and the interception of telephone communications and mail, as well as many other conditions that have since been removed. The Applicant is no longer incarcerated; his conditions of release are the result of evolving fact-driven determinations made by Designated Judges of this Court based on the evidence before them.

[60] The Applicant argues that conditions of release cannot go on forever. The flaw with this argument is that is not what has happened in his case: his conditions have been reviewed regularly and adjusted and relaxed over time, although on occasion they have been tightened in response to the Applicant's conduct.

[61] This case involves the release of a person named in a Security Certificate issued on national security grounds under a constitutionally valid legislative scheme: *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 4. Further, that Security Certificate has been tested and found reasonable by this Court in its Reasonableness Decision. Mr. Mahjoub was a high-ranking associate of Mr. Bin Laden. He was actively involved in serious terrorist communities. Indeed, the Reasonableness Decision found that "Mr. Mahjoub was aware of and complicit in Al Qaeda weapons training occurring at Damazine Farm" in Sudan. While the Applicant did not give evidence on the reasonableness review, as was his right, he did admit his

work for Mr. Bin Laden as manager of the farm in Sudan when cross-examined before this Court at the hearing leading to the July 20, 2016 Conditions of Release Order. His involvement with terrorists is therefore not a matter of skepticism or speculation, but a determination of fact made after a lengthy multi-year proceeding conducted before this Court and decided by the late Justice Blanchard. The Court is unable to ignore these and other findings in this respect as set out in the Reasonableness Decision.

[62] There is no evidence to suggest that the Applicant is being punished for lack of cooperation; the record demonstrates that his conditions of release have been reviewed regularly and adjusted in an ongoing effort to balance his rights against the objectives and purpose of the *IRPA*.

[63] The Applicant also relies on an affidavit one Vaughan Barrett dating from 2012 that the Applicant filed in a previous hearing several years ago. However, I am unable to give it much weight because of its generality and because of Mr. Barrett's lack of relevant expertise and expert knowledge, both of the Applicant and his present circumstances. Mr. Barrett does not appear to have any expertise relating to detention proceedings in a Security Certificate context. Moreover, his professional experience in this regard consists of assisting at parole hearings prior to 2003. Further weakening his evidence is the fact that his opinions are not based on any interviews with or knowledge of the Applicant's circumstances. These findings were made by the late Justice Blanchard in this very matter some four-and-a-half years ago (*Re Mahjoub*, 2013 FC 10 at paras 26-27), at which time the Court added that Mr. Barrett's evidence had little relevance because "it has not been established that his dated expertise has any application to current circumstances." In these circumstances, I give it little weight on this application.

[64] In this connection, the Applicant asks that the following question be certified:

> 2. Whether conditions of release, such as the ones imposed on Mr. Mahjoub become abusive and arbitrary in violation of sections 7, 8 and/or 12 of the *Charter* in face of a no threat conclusion from CSIS and in face of a no flight risk admission?

[65] As reported in the July 20, 2016 Conditions of Release Order, CSIS has advised the Court that it no longer considers the Applicant to be a threat to national security. It has so advised domestic and international agencies and has requested they take appropriate action. It is also the case that the Applicant does not appear to be a flight risk.

[66] However, this proposed question is not a proper candidate for certification for several reasons. First, it is fact-specific and therefore does not rise to a matter of general importance. Second, it would not be dispositive of an appeal. Third, in that it does not identify which condition(s) infringe the listed rights provided by the *Charter of Rights and Freedoms*, the proposed question is an impermissible attempt to obtain a general right to appeal against all conditions of release in the face of the contrary legislative provision set out in section 82.3 of the *IRPA*. For these reasons, this question is not certified.

3. The decision, if any, on the reasonableness of the certificate

[67] The Reasonableness Decision on the Security Certificate was the result of a very lengthy hearing process in which the Applicant was successful on some points, but unsuccessful on many others, and unsuccessful overall. While he emphasizes the points on which he was successful, he cannot ignore the facts found by this Court in the course determining that the Security Certificate

was reasonable. There is nothing in the evidence on today's application to suggest a change is warranted on this basis. This counts against the Applicant.

4. The elements of trust and credibility related to the behaviour of the Applicant after having been released with conditions and his compliance with them

[68] These points have been canvassed before. I refer to my July 20, 2016 Conditions of Release Order findings in this respect. At that time, I had the benefit of hearing the Applicant give evidence and found it did not allay my concerns but, instead, concerned me that he had something to hide.

[69] That said, the Applicant is earning some credit as a result of his compliance with the conditions of release under which he now lives. I have no evidence of CBSA's current position or concerns in this respect - whether the CBSA Risk Assessment cuts one way or the other is not known to me, as indicated above.

[70] Nevertheless, complying with decreasingly onerous conditions as the Applicant has in this case does not, in my view, warrant the removal of all but the usual conditions as the Applicant seeks. This factor militates but only slightly in the Applicant's favour, given the danger he continues to present.

5. The uncertain future as to the finality of the procedures

[71] The Applicant maintains that his status as a convention refugee is a relevant factor to take into consideration for the review of conditions, notably in determining the length of time that

conditions are likely to continue as per subrule 248(c) of the *Immigration and Refugee Protection Regulations*, SOR/93-22 and paragraphs 114-115 of *Charkaoui I*.

[72] I considered and found this to be premature in my July 20, 2016 Conditions of Release Order and conclude the same way today. There I stated:

> 105. Justice Noël commented on this in his July 2014 review of conditions of release from detention:
>
> > [63] As long as there are robust, periodic reviews of detention or of conditions of release, long periods of detention or of release with conditions that impact on the life and rights of an individual do not constitute violations of the *Charter* (see *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 123, [2007] SCJ No 9).
> >
> > [64] The Court has rendered the Reasonableness Decision as well as other decisions concerning the Applicant, including on the abuse of process and a permanent stay of the proceedings. The procedures have now been moved in good part to the appeal level, and the Federal Court of Appeal will be dealing eventually with any issues arising from the Notice of Appeal or from the appeal itself. The Applicant is benefiting from the appeal procedure and time has to be reserved for such process.
> >
> > [65] There have been and continues to be ongoing reviews of the conditions of release of Mr. Mahjoub. Reviews of the conditions of release were held and decisions were rendered in January 2013, December 2013 and January 2014 and in the summer 2014 (the current decision). Over a period of a little more than 18 months, Mr. Mahjoub has had three hearings dealing with reviews of the conditions of release and three decisions.
> >
> > [66] Undertaking robust reviews of the conditions of release from detention does not necessarily mean granting Mr. Mahjoub what he wants. It requires a careful examination of the conditions of release and their necessity, i.e.

> ensuring not only that they are required to neutralize the assessed danger but that they impact minimally on the rights and freedom of the Applicant. In order to go along with less invasive conditions, it must be shown (1) that the danger has diminished and (2) that the conditions neutralize the lessened danger. In this regard, the Applicant has a strong interest in collaborating and cooperating so that the supervision of the conditions shows that they are respected. With such evidence, then it can be argued that the conditions are not necessary. This is what a robust review is all about.

[73] In his Conditions of Release Decision, dated October 30, 2015, Justice Noël repeated these comments, adding:

> [100] Counsel for Mr. Mahjoub argues that the conditions existing in Egypt which may subject him to torture or other inhumane treatment renders non enforceable the removal order issued against him as a result of the certificate being found reasonable. As a result, the conditions of release should be lifted for being unreasonable and arbitrary.
>
> [101] The appeal process is unfolding as it should and no final, determinative decision has been rendered. This argument may perhaps be relied upon in the future, but it is not appropriate at this stage; it therefore cannot be retained.

[74] The Applicant relied on the European Court of Human Rights, recalling the decision of the United Kingdom's House of Lords in *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* - 3455/05 [2009] ECHR 301 (19 February 2009):

> 17. The applicants were granted leave to appeal to the House of Lords, which delivered its judgment on 16 December 2004 ([2004] UKHL 56). A majority of the Law Lords, expressly or impliedly, found that the applicants'detention under Part 4 of the 2001 Act did not fall within the exception to the general right of liberty set out in Article 5 § 1(f) of the Convention (see Lord Bingham, at paragraphs 8-9; Lord Hoffman, at paragraph 97; Lord Hope, at paragraphs 103-105; Lord Scott, at paragraph 155; Lord Rodger, at

> paragraph 163; Baroness Hale, at paragraph 222). Lord Bingham summarised the position in this way:
>
> > 9. ... A person who commits a serious crime under the criminal law of this country may of course, whether a national or a non-national, be charged, tried and, if convicted, imprisoned. But a non-national who faces the prospect of torture or inhuman treatment if returned to his own country, and who cannot be deported to any third country, and is not charged with any crime, may not under article 5(1)(f) of the Convention and Schedule 3 to the Immigration Act 1971 be detained here even if judged to be a threat to national security.
> >
> > [Applicant's emphasis]

[75] This case is not applicable in the Applicant's situation because it applies particular legislative provisions enacted in the United Kingdom. The Applicant was not able to point to any similar provision in Canadian law; therefore, I reject his submissions on this point.

[76] The Applicant also advanced an argument concerning danger under the *IRPA* and the nonexistence of a danger opinion under the *IRPA*. As I understand it, his argument reflects the fact that while there are successive findings of this Court, that the Applicant is a danger under subsection 82(5) of the *IRPA*, the Minister has not filed a danger opinion under paragraph 115(2)(b) of the *IRPA*. In my view, there is no inconsistency; the former deals with conditions of detention or, as in this case, conditions of release, while section 115 enacts an exception to the principle of non-refoulement for protected persons. Paragraph 115(2)(b) allows the Minister to remove a protected person if, among other things, the Minister is of the opinion that the protected person is a "danger to the security of Canada". That said, I do not see how the fact that the Minister hasn't proceeded under paragraph 115(2)(b) counts in Mr. Mahjoub's favour, as he

argued. The power under paragraph 115(2)(b) is separate from a review of conditions under subsection 82(5). After consideration, I am not persuaded that the absence of a removal order is a ground to relax the conditions of release.

6. The passage of time (which in itself is not a deciding factor – see *Harkat v Canada (Minister of Citizenship and Immigration*), 2007 FC 416 at para 9, [2007] FCJ No 540)

[77] This favours the Applicant, but alone is not a deciding factor. It will be assessed in the balance overall, along with his continued compliance with conditions of release.

7. The impact of the conditions of release on the Applicant and his family and the proportionality between the danger posed by the Applicant and the conditions of release

[78] This is the issue focussed upon in this application. The Applicant filed two reports concerning his mental health and an alleged impact the conditions of release have on him and his family. These feature in his request for removal of all but the usual conditions of release and also in the questions he proposes to certify.

[79] As reported in the July 20, 2016 Conditions of Release Order, the Court has underscored the rationale for restricting and monitoring the Applicant's activities as set out in many of the conditions, including communications and travel. An underlying concern has been to prevent the Applicant from acquiring or re-acquiring terrorist contacts: *Mahjoub (Re)*, 2013 FC 10 at para 47; *Mahjoub (Re)*, 2014 FC 720 at para 76; *Mahjoub (Re)*, 2015 FC 1232 at paras 94, 113. In my respectful view, these remain relevant considerations.

[80] I again agree with the Ministers that there remains a need to prevent the Applicant from acquiring or re-acquiring terrorist contacts; he had them in the past and has not since disavowed them or their aims and objectives. As such, I agree with the Ministers' submission that it is important that the Court continue to provide CBSA with a supervisory role to ensure that the Applicant's activities are subject to ongoing monitoring, particularly his communications on the internet (to which he has access) and mobile phone (which he may possess but has not yet acquired).

[81] The Applicant's health concerns were reviewed and commented upon by Justice Noël in his Conditions of Release Decision dated October 30, 2015:

> [103] In this section, I intend to comment on the perceived impact of the conditions of release of detention on Mr. Mahjoub. I shall also address the proportionality between the danger posed by Mr. Mahjoub and the conditions of release, therefore attempting to minimize the encroachment on his privacy but at the same time keeping in perspective the goal of neutralizing the said danger.
>
> [104] Going back to his first period of detention and up to now, Mr. Mahjoub's health has often been a factor that designated judges dealt with. Whether it was a short period of detention, a long period of detention, release from detention with conditions as strict as house arrest, or conditions that have lessened with time and as the danger evolved, the matter of the health of Mr. Mahjoub and the impact of the detention or the conditions of release of detention had on his overall well-being was constantly assessed as past decisions have shown (see *Mahjoub* – November 2005, supra, at paragraphs 11, 37; *Mahjoub* – February 2007, supra, at paragraphs 76-82; *Mahjoub (Re)* – November 2009, supra, at paragraphs 115 and following; *Mahjoub (Re)* – January 2013, supra, at paragraphs 22-28; *Mahjoub (Re)* – December 2013, supra, at paragraph 11; *Mahjoub (Re)* – July 2014, supra, at 70-72).
>
> [105] The last set of Reasons for Order of July 2014 was shown to Dr. Donald Payne for his most recent report of May 14, 2015, which is part of the evidence of Mr. Mahjoub for the present review. The reasons disqualifying his last report, as noted in July 2014 at paragraphs 70 to 72, will not be reproduced, but are

referred to because Dr. Payne replies to them in his new report. For the purposes of the May 2015 report, Dr. Payne saw Mr. Mahjoub once for one hour and 45 minutes; no specific tests were done.

[106] In response to the comments made on his prior reports filed for the past reviews, Dr. Payne explains that the purpose of his reports is "[…] to show the degree of his [Mr. Mahjoub's] frustrations and demoralization around the limitation in his life" and he says that: "[...] I cannot make any comment on the factuality of his concerns".

[107] I do agree with Dr. Payne when he expresses how Mr. Mahjoub describes himself in his way of dealing with the conditions during his daily life and the frustrations that he gets from their actualization. As for the diagnosis made, this Court had taken them in consideration at the earlier review.

[108] There is no doubt the daily life of Mr. Mahjoub is affected by the actualization of the conditions of release of detention; it is easily understandable. That being said, first, the undersigned simply does not understand the doctor's writings where Mr. Mahjoub related that he considers his conditions of release of detention "worse" than the ones when he was "[…] in house arrest". The conditions of release being reviewed are in no way comparable to the "house arrest" of 2007. Second, Dr. Payne's comments recognize that Mr. Mahjoub has approached the conditions of release and their supervision by the CBSA with a "[…] longstanding adversarial relationship with CBSA, with the conflicts around the conditions perpetuating the adversarial relationship". The doctor went on to say that this may "[…] lead to him being seen as uncooperative". This surely does not help Mr. Mahjoub's own situation and also does not make it any easier for everyone involved such as the CBSA and the designated judges that have been involved in these reviews. In the submissions of counsel for Mr. Mahjoub at paragraph 56, it is recognized that: "[…] The conditions imposed on Mr. Mahjoub have been significantly changed by the Federal Court […]". Surely this must also be taken in consideration by Mr. Mahjoub and should have been by Dr. Payne in his report. This important statement is not considered at all.

[109] This last comment on being seen "uncooperative" is also reflected in past decisions and reviews, going back as early as 2009 and as recently as 2013-2014 (see *Mahjoub* – March 2009, supra, at paragraph 150; and *Mahjoub (Re)* – December 2013, supra, at paragraph 17; and *Mahjoub (Re)* – May 2014, at paragraphs 18-21).

> [110] If I were to follow what Dr. Payne proposes as a result of his diagnostic, but also as he reads Mr. Mahjoub, I would cancel all of the conditions of release of detention. No other proposition was made. But, where does such an approach leave the objective of identifying conditions that would help neutralize the danger as it is assessed? Surely, it cannot be that because of his health as the doctor perceives it to be, the danger as assessed is to be left aside. There must exist, in the medical field, tools that could alleviate health concerns while maintaining a balance with the societal issues and goals that are legislatively required to be taken into account. Contrary to what I have seen in other medical reports of a similar nature, this doctor's report does not prescribe, suggest, nor discuss any medical therapies that would be called for in such a situation. It would have been helpful.
>
> [111] Having defined the danger and analysed proportionality in light of it, the second step is to determine appropriate conditions of release. These conditions must proportionally address the said danger in such a way as to minimally intrude on the privacy of Mr. Mahjoub. I refer the reader to paragraphs 67-79 of this present review in regards to the danger as assessed and also to paragraphs 57-66 concerning proportionality of the concept of danger to conditions minimally impairing the right to privacy of Mr. Mahjoub.

[82] I noted that the Applicant had filed two letters: one from a psychiatrist, Dr. Payne, and, one from a family doctor, Dr. Shabash. Neither initially provided an affidavit in support of their evidence. When the Ministers asked to cross-examine Dr. Shabash, Applicant's counsel withdrew Dr. Shabash's letter because his records might contain irrelevant material; accordingly, there was no cross-examination of Dr. Shabash. As a consequence, I will not comment on the evidence of Dr. Shabash.

[83] Dr. Payne, in his letter in support of the Applicant, dated February 8, 2017, mostly "reported" (Dr. Payne's choice of word, which was repeated multiple times in his letter) what the

Applicant told him. As such, Dr. Payne's letter was, to a very considerable extent, based on hearsay statements. This, in my view, weakens it.

[84] Dr. Payne's letter went on to say that, on examination, the Applicant "was anxious and pressured in talking about his experiences. He was emotionally numbed with no expression of emotion other than expressing the pressure he was under. He was obsessively preoccupied with his legal situation and the restrictions associated with it." Dr. Payne offered his opinion that "the legal restrictions in his life have had and will continue to have a cumulative effect in causing and perpetuating his depression and demoralization, and in extremely limiting his quality of life. The legal restrictions make him more vulnerable to reacting strongly to incidents in his life associated with past abuse, with mark [*sic*] increase in his psychological symptoms. The shootings incident in Quebec has greatly intensified his symptoms along with feelings of vulnerability as a Muslim and the lack of justice to him."

[85] Dr. Payne's letter did not specifically refer to the Applicant's psychological symptoms, although it reported that the Applicant had said that he had "trouble sleeping, feels anxious and depressed, continues to be socially isolated, is preoccupied with his problems with CBSA and thoughts of injustice to him, and has difficulty with concentrating and memory." Dr. Payne's letter also stated that the Applicant is being seen for several chronic physical problems.

[86] Dr. Payne closed by reporting that: "[H]e [Mr. Mahjoub] would have to be seen again for a more detailed report on the effect of the present conditions of release on his mental state." However, and significantly in my view, the Applicant filed no evidence that any such follow up had taken place.

[87] Taken as a whole, Dr. Payne's letter does not support the Applicant's request that all but the usual conditions be removed, particularly given its conclusion that the Applicant "would have to be seen again for a more detailed report on the effect of the present conditions of release on his mental state."

[88] In my respectful view, this conclusion deprives Dr. Payne's report of most of its value, given the very purpose of Dr. Payne's evidence and the essence of the Applicant's case is that the present conditions of release are negatively affecting his mental state. I note Dr. Payne's letter was sent more than three months before the hearing on May 16, 2017.

[89] Dr. Payne was cross-examined, at which time he conceded that he had not done a full psychiatric history of Mr. Mahjoub to establish the baseline facts.

[90] Dr. Payne testified that any post-traumatic stress disorder [PTSD] the Applicant suffered was "in remission during most of the time and not a consequence of things other than the Quebec shooting." I conclude there that to the extent the Applicant has PTSD, it is unrelated to the current conditions of his release.

[91] As to the Applicant's depression, Dr. Payne said that there was "an indirect connection but no direct connection" to the conditions of release. This is hardly an adequate medical basis for the removal of all but the usual conditions.

[92] Dr. Payne based his opinion, as already noted, on what the Applicant "reported" to him. Yet his cross-examination revealed that Dr. Payne himself concluded that the Applicant's

"interpretation of the conditions may not be always entirely accurate" and further, that the Applicant might exaggerate about the relationship between the conditions of release and his reported symptoms:

> 122 Q. Are you aware of circumstances where you might have perhaps exaggerated what the conditions require?
>
> A. His interpretation of the conditions may not be always entirely accurate.
>
> 123 Q. Right.
>
> A. But...
>
> 124 Q. Okay. And that would be a factor, would it?
>
> A. But I don't have the sense he's consciously trying to, but in terms of saying the conditions as the bad guys that are limiting him, there's a possibility that he can, you know, exaggerate a little bit around that.
>
> 125 Q. Okay. So, we can agree he may exaggerate at times about the --
>
> A. Mm-hmm.

[93] Further on in his testimony, Dr. Payne said that the Applicant: "… is obsessed about the conditions, which fits into his character of being a very - being an obsessive person, as was noted in the Bagby report. … He's obsessive. He broods about things."

[94] I find that the Applicant's conditions of release are not linked to any PTSD that the Applicant might suffer. Dr. Payne witness testified the Applicant might exaggerate with respect to a causal connection between his self-reported conditions and the conditions of release. Dr. Payne gave evidence that the Applicant "may not be always entirely accurate" in interpreting the

impact on him of the conditions of release. On balance, the record does not persuade me that the Applicant's conditions of release are linked to his depression.

[95] Instead, in my respectful view, part of the difficulty the Applicant encounters with these conditions of release results from his admittedly obsessive view of how he wants things to be. This was the evidence of Dr. Payne, as I understand it. In my view, this is not a sufficient reason for the Court to remove conditions that are neutralizing the danger he presents. I also note the absence in the Applicant's evidence of both baseline reporting, together with the absence of evidence of a causal relationship between the self-reported symptoms and the conditions of release.

[96] Therefore, on balance, the impact of the conditions of release factor does not favour the Applicant on this review. In my respectful view, there is no merit to the Applicant's submissions that the conditions of release have had and continue to have a disproportional and negative impact on Mr. Mahjoub's health.

[97] The Applicant asks to certify the following questions in this connection:

> 1. Whether conditions of release, such as the ones imposed on Mr. Mahjoub, become abusive and arbitrary in violation of sections 7, 8 and/or 12 of the *Charter* when the person is not deportable in fact and in law and such deprivation has been ongoing for over 16 years and therefore have become unjustified and/or unhinged from its underlying purpose of removal under *IRPA* (s. 80 of the *IRPA*)?
>
> 3. Whether the conditions of release, such as the ones imposed on Mr. Mahjoub, become abusive and arbitrary contrary to sections 7, 8 and/or 12 of the *Charter* in the above-mentioned circumstances in addition to the recognised negative impact on one's health?

[98] Given my findings, these questions do not arise on the evidence; they are hypothetical questions only. There is an absence of evidence of a causal link between the conditions of release and any hardship that the Applicant reportedly suffers. The Applicant's expert witness, Dr. Payne, declined to provide an opinion on this matter notwithstanding its importance. It is well-known that a question to be certified must arise from the case: *Varela*, above at para 29. In my view and on these facts, these questions do not arise "in this case"; therefore, they are not proper questions to certify. Moreover, the questions are fact-specific, and do not raise an issue of "general importance" as required by section 82.3 of the *IRPA*. Therefore, these questions are not certified.

8. Pending Appeal has Merit

[99] The Applicant argued that the merits of his pending appeal to the Federal Court of Appeal should be a factor the Court should consider. The appeal referred to is against the Reasonableness Decision of the late Justice Blanchard. It was argued in December 2016, with judgment reserved. The Applicant says that his appeal entitles him "to be released based on the usual conditions pending a decision on the appeals". As I understand it, the Applicant argues by way of analogy to paragraph 679(3)(a) of the *Criminal Code*, which provides that, in criminal cases, one condition to be considered on judicial interim release (bail) pending an appeal is whether the appeal is "frivolous".

[100] In my view, this has little, if any, merit. There is no such statutory provision in the *IRPA*. Second, to continue the bail analogy, this is not a decision as to whether or not bail should be granted, but one where, in effect, bail has already been granted and only conditions of bail are at

issue. Third, the determination of the merits or lack of merits of the Applicant's appeal is for the Federal Court of Appeal to decide. I also fail to see the logic in the proposition that a non-frivolous exercise of an appeal right in respect of the Reasonableness Decision gives the Applicant a right to have conditions of release relaxed, whether in whole or in part.

[101] With respect, this factor does not favour the Applicant, nor does it count against him.

Review of specific conditions in issue on this review

[102] The Applicant came to Court with the general request that the conditions of release be removed except for the peace bond conditions. In my respectful view, it would not be responsible to grant that request having regard to my findings above.

[103] In particular, given his past and present danger and the need to neutralize his ability to resume communications with the terrorists with whom he previously associated, I accept that restrictions on internet access, whether on his laptop or desktop or mobile phone or otherwise, remain necessary, as does the ability of CBSA to obtain phone records. It is also necessary and proportionate that CBSA have the ability to verify, in-person, both communications and activities and to prohibit access to certain individuals, all as currently provided. It appears that bi-weekly reporting is working and, in my view, continues to be necessary to ensure the Applicant's whereabouts in Canada; it is both balanced and proportionate. I note it was reduced from weekly to bi-weekly reporting in 2015. All of these conditions are further required, in my view, based on the Applicant's past history of dealings with the CBSA and the fact that many of his conditions of release are based on trust and self-reporting. I am unable to ignore, any more

than the Applicant may, that, in the past, the Applicant has been found to be casual with the truth. Indeed, on this review, the Applicant's expert witness indicated he was sometimes not accurate and exaggerated in relation to the conditions of his release. This Court has also found him, on various occasions, to be untruthful (for example, the finding(s) by Justice Nadon), unreliable and uncooperative.

[104] The Applicant complained of the requirement that he give CBSA four weeks notice before contacting anyone on Skype, but on the evidence, I am not prepared to reduce that. It should be made clear, however, that once CBSA gives approval to contact an individual via Skype, the Applicant does not need to obtain that permission again when subsequently contacting that same individual that has already been approved. This is a position the Respondents stated at the hearing.

[105] The Applicant also asked to be allowed to check in with CBSA by way of its voice recognition program; however, this is not available in respect of persons presenting security concerns. Therefore, the Applicant is not eligible and his request in this respect is not supportable.

[106] The Ministers sought to clarify that the Applicant is not permitted to access the internet with a mobile phone should he exercise his right to obtain a cell phone. That clarification is warranted and was indeed included in his conditions of release. My comment to the contrary was in error; the Judgment is what operates in this connection.

[107] The Ministers also requested an amendment to the effect that the Applicant set his computer to never delete or empty its web browsing history. I made substantially the same point in my reasons for the July 20, 2016 Conditions of Release Order and agree it should be made a condition of release.

Review of other conditions of release

[108] With the above in mind, I will review the other conditions of release currently operating on the Applicant. I caution that I am dealing in shorthand form only; the specific wording of each provision and conditions attached thereto forms part and parcel of this Order and are specifically detailed in Schedule "A" to the July 20, 2016 Conditions of Release Order, which must be read with this summary as it is the Order that sets out the actual conditions in legal terms.

(1) *Agreement to comply with each of the conditions*

[109] This is not in dispute because the Applicant would likely be obliged to accept this condition even if he only had to be of good behaviour and keep the peace.

(2) *Sureties and performance in case of breach*

a) $20,000.00 paid in Court by three (3) individuals; and,

b) Performance bonds signed by six (6) individuals varying between $1,000.00 and $20,000.00 for a total amount of $46,000.00.

[110] This is not objectionable because similar conditions would be required in any case given the seriousness of the matter i.e., the danger he presents and the need for its effective neutralization.

(3) *Reporting on a bi-weekly basis to the CBSA, Mississauga*

[111] This condition was reduced from weekly to bi-weekly in October 2015. It appears to be working little disadvantage to the Applicant. In my view, it is balanced and proportionate and therefore will remain in place because a change is not warranted at this time.

(4) *Residence to be a dwelling house or an apartment unit without outside space*

[112] Once again, this was not a matter of contention; in any event, it should remain to better enable compliance.

(5) *Outings without pre-approval by the CBSA in the Greater Toronto Area* [*GTA*] *but not to visit a retail establishment store that has as its primary function the supplying of internet access or the selling or firearms or weapons*

[113] While the Applicant did not make specific requests to remove with these two conditions, his general request would remove them. In my view neither should be changed. I see no rationale to allow the Applicant to visit gun stores given his military training in the Egyptian army; the ban on internet cafés is of obvious usefulness in terms of monitoring and compliance regarding use of his laptop and cell phone.

[114] The Applicant may travel without CBSA approval throughout the entirety of the GTA; in my respectful view, travel within the GTA affords the Applicant more than enough scope to pursue legitimate activities.

(6) *As for outings outside the GTA area and only within Canada, a notice of seven (7) days be given to CBSA containing a detailed itinerary*

[115] This was changed from 7 to 5 on July 20, 2016. This condition is useful to allow CBSA and other agencies to take the necessary steps in terms of ensuring they have to ability to staff and make appropriate arrangements. This should entail less stress on the Applicant should he wish to resume his activities outside the GTA. The evidence does not support a change and I am persuaded it should remain at 5.

(7) *Physical surveillance by the CBSA of his residence or during outings can be done but conducted with the least intrusive manner possible*

[116] This continues to be necessary given the danger and the need to neutralize it through conditions.

(8) *No communication with a person that Mr. Mahjoub knows is a supporter of terrorism or violent jihad or a person that has a criminal record*

[117] I am unable to see any reason why this should be amended, nor why the Applicant would want to engage in such conversations in the first place. It will not be changed; in my view, it is reasonable and proportionate.

(9) *Mr. Mahjoub can use a desk computer with internet connection at his residence as long as he provides information about the internet provider*

[118] This was changed to eliminate supervising sureties in the July 20, 2016 Conditions of Release Order. I reiterate now how important it is that the Applicant neither manually nor automatically erase internet tracking information from his computer or laptop, as discussed above.

[119] In this manner, the Applicant now has access to social medial sites such as Facebook and Twitter, as well as Skype and other websites. I have addressed and declined to accept his request to modify the notification time relating to Skype-type communications but am ordering the Ministers to clarify the notice provision, as discussed above.

(10) *Mr. Mahjoub may use conventional land-based telephone and facsimile transmissions but shall give to the CBSA all pertinent information for inspection purposes. He may also have a mobile phone with voice capability and voicemail only, subject to pertinent information given to the CBSA for inspection and supervision*

[120] Since July 20, 2016, the Applicant has had the option of having a laptop computer with internet, social media, Skype and website access, with conditions. I also held that he should have access to a cell phone; in my view, should he exercise this option (to date, he has not) then the cell phone must not have internet access and in this respect, I clarify my previous reasons. I note that the Order already has that limitation, which I consider balanced and proportionate.

(11) *Mr. Mahjoub may use another landline, telephone or mobile phone in an emergency, if required*

[121] This is reasonable and proportionate given the above and will therefore continue.

(12) *On reasonable grounds only that the conditions have been breached, the CBSA may enter and search Mr. Mahjoub's residence*

[122] This is reasonable and proportionate and will continue, given my findings.

(13) *No video of the CBSA shall be taken by Mr. Mahjoub or his representative when assuming their responsibilities pursuant to the conditions of release*

(14) *Any photographs or information gathered pursuant to the conditions by the CBSA are to be safeguarded and not be returned to third parties*

[123] These two conditions are reasonable and proportionate and will continue to protect the identities of those responsible for administering the conditions or release and, in the latter case, also protect the Applicant and his privacy rights.

(15) *The Applicant's passport and travel documents shall remain with the CBSA but Mr. Mahjoub may travel across Canada, as long as a notice is given*

[124] This is an ordinary condition regarding travel documents and is both reasonable and proportionate. In terms of travel across Canada, however, this will change. The Applicant may now travel outside the GTA on only 5 days' notice, instead of the 7 days' notice that was required before July 20, 2016. This will give the Applicant more freedom while maintaining an ability to ensure compliance with these conditions.

(16) *Mr. Mahjoub shall report if ordered to be removed from Canada*

(17) *Mr. Mahjoub shall not possess any weapons and keep the peace and be of good conduct*

(18) *If Mr. Mahjoub breaches any conditions, he may be arrested and brought in front of a Designated Judge*

[125] I consider these to be normal and usual conditions for a person in the Applicant's position, even in a peace bond situation. The provisions respecting arrest and appearance are reasonable and proportionate given that these conditions are made under the *sui generis IRPA* and its provisions.

(19) *If Mr. Mahjoub changes residence, prior notice must be given*

[126] Prior to July 20, 2016, the Applicant was required to give 10 days' notice of change of residence, which was then reduced to 3 days' notice. This will make moving more normalized and reduce stress and delay; it is also balanced and proportionate.

(20) *A breach of the conditions shall constitute an offence within the meaning of section 127 of the Criminal Code, RSC 1985, c C-45 and an offence pursuant to paragraph 124(1)(a) of the IRPA*

[127] This is self-evident and is both reasonable and proportionate. It will continue.

(21) *The conditions can be amended by a designated judge*

[128] This is for clarity and the benefit of both parties and is both proportionate and reasonable.

VII. Certified Questions

[129] No question is certified for the reasons set out above.

VIII. Conclusion

[130] The Ministers shall prepare an amended set of conditions of release reflecting the above and file same with the Court as soon as practicable. The Applicant shall have 7 business days to comment, the Respondents shall be given 7 business days to reply and, upon approval of the amendments, the Applicant's conditions of release shall be amended to take effect on the date of the Court's said approval and not before. The existing conditions of release shall remain in place until the Court approves the said amendments.

[131] Otherwise, the motion to review conditions of release is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's request to file the affidavit of Amelie Charbonneau sworn May 15, 2017, is dismissed.
2. The Applicant's motion to review conditions of release is dismissed except to the extent identified in these Reasons for Judgment.
3. The conditions of release from detention set out as Schedule "A" to the Court's July 20, 2016 Conditions of Release Order shall continue in force until such time as the Court approves an amended version of the same pursuant to paragraph 4 of this Judgment.
4. The Ministers shall prepare an amended set of conditions of release reflecting the Reasons for Judgment and shall and file same with the Court as soon as practicable. The Applicant shall have 7 business days to comment, the Respondents shall be given 7 business days to reply and, upon approval of the amendments, the Applicant's conditions of release shall be amended to take effect on the date of the Court's approval and not before.
5. The existing conditions of release shall remain in place until the Court approves amendments as set out in paragraph 4 of this Judgment.
6. No questions are certified.
7. The Applicant's request for leave apply to certify additional questions after release of these reasons is dismissed.

"Henry S. Brown"
Judge

Federal Court  Cour fédérale

SCHEDULE "A" **Date: 20170315**

Docket: DES-7-08

Ottawa, Ontario, March 15, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (IRPA);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF Mohamed Zeki MAHJOUB

ORDER

WHEREAS THE COURT has reviewed e-mails, correspondence and material filed by the Applicant and Respondents raising issues concerning the hearing of a motion dated February 17, 2017, by the Applicant for a new review of the conditions of his release;

AND WHEREAS the Applicant, on May 10, 2016, filed a motion to review his conditions of release, followed by a Notice of Constitutional Questions dated May 25, 2016. He elected to split his case, arguing the conditions of release June 9 and 10, 2016. At that time, the Applicant chose not to make submissions on his proposed constitutional questions; further, he had no proposed questions to certify. At the hearing, I advised the parties that I wanted a relatively early resolution of the constitutional questions. That did not take place. Some six

weeks later, on July 20, 2016, because the Applicant still had not made submissions on either his proposed constitutional questions or questions to certify, and because I did not want to further delay a decision on his conditions of release, I ordered the relaxation of a number of the Applicant's conditions of release. At that time, I stated: "I am certainly not prepared to delay a decision on his conditions of release into the mid to late Fall of 2016", as the Applicant was then proposing;

AND WHEREAS the Applicant filed submissions on constitutional questions and questions to certify on September 30, 2016, and a hearing to determine the Applicant's proposed constitutional issues and questions to certify took place March 1 and 2, 2017, in Toronto, the decision in respect of which is now under reserve;

AND WHEREAS on February 10, 2017, the Applicant filed a motion for a new review of his conditions of release. The Minister opposes this motion, arguing that until the proposed constitutional and certification issues are determined and concluded in respect of the motion to review conditions of release dated May 19, 2016, the Applicant is not entitled to a further review of his conditions of release due to subsection 82(4) of *Immigration and Refugee Protection Act's* condition that a new review may take place "if a period of six months has expired since the conclusion of the preceding review." I have reviewed the submissions of the parties and have concluded for these purposes and in these circumstances, that my Order and Reasons dated July 20, 2016 effectively concluded the "preceding review" referred to in subsection 82(4) of the *IRPA*;

AND WHEREAS the Court notes that counsel for the Applicant requested by e-mail dated February 9, 2017, that a judge other than the undersigned determine the fresh motion to

review conditions of release, which request was reiterated by letter from counsel for the Applicant dated February 13, 2017;

AND WHEREAS the undersigned is seized of the motion for a new review of conditions of release dated February 10, 2017, and whereas there is no motion to recuse in this regard, i.e., no motion supported by affidavit(s), cross-examination(s) if demanded, motion records, scheduled oral argument etc., thereby leaving the Court with nothing to decide in this regard;

ORDER

THEREFORE THIS COURT ORDERS that

1 The Ministers' objection to the hearing of the motion to review conditions of release dated February 10, 2017, is dismissed.

2 The Ministers shall have 20 days from the date of this Order to serve responding material to the Applicant's motion to review conditions of release dated February 10, 2017.

3 A date for the hearing of the motion shall be set by the Trial Coordinator.

"Henry S. Brown"
Judge

Federal Court  Cour fédérale

SCHEDULE "B" **Date: 20170511**

Docket: DES-7-08

Ottawa, Ontario, May 11, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF Mohamed Zeki MAHJOUB

ORDER

UPON MOTION by the Applicant that the Court not receive or review an unredacted Risk Assessment prepared by Canada Border Services Agency [CBSA], and upon reading the submissions of the parties and the Special Advocates, the Court has concluded that the motion should be dismissed for the following reasons:

1. The Court was advised by the Ministers on Thursday May 4, 2017, of a recent CBSA Risk Assessment of the Applicant, which Ministers' counsel stated they would not rely on in the upcoming conditions of release review scheduled for May 16, 2017. Also on May 4, 2017, the Court directed Ministers' counsel and the Special Advocates to prepare a redacted copy and deliver it to Public Counsel by

close of business May 8, 2017. The Special Advocate asked for additional time, because of court calendar issues. Therefore and as requested by the Applicant, the Court extended that delivery deadline to May 10, 2017.

2. Ministers' Counsel also undertook to provide Public Counsel with a draft redacted copy to Public Counsel on May 5, 2017.

3. On Friday, May 5, 2017, the Court asked for the position of the Applicant on the unredacted copy, and also asked for the unredacted report itself. The unredacted report was delivered to the Court on May 5, 2017.

4. On Saturday afternoon, May 6, 2017, Public Counsel for the Applicant, having become aware of the correspondence in this matter, emailed the Court and counsel and submitted that the disclosure of the redacted CBSA Risk Assessment was party-to-party, and requested that it remain so pending discussions with the Applicant. It also asked the Court not to receive the unredacted Risk Assessment.

5. On Monday, May 8, 2017, Ministers' counsel reiterated that while they did not rely on it, the issue of not receiving the Assessment was moot because the unredacted Risk Assessment had already been filed with the Court on May 5, 2017. The Ministers did not object to the Court not reviewing the unredacted assessment, but noted the Court might be obligated to do so under ss. 83(1)(d) of *IRPA*.

6. The Special Advocates having been asked for their views, submitted on May 8, 2017, that the unredacted version of the document ought to be sealed and not reviewed by the Court unless the redacted document was put into evidence.

7. Given the submissions of the parties, the Court ordered that the unredacted Risk Assessment be placed in a sealed envelope in the Court file.

8. On May 10, 2017, the Special Advocates attended on Ministers Counsel and thereafter reported to the Court that the redactions were properly claimed. They also submitted that the unreacted CBSA Risk Assessment filed with the Court ought to remain under seal. Minister's counsel confirmed their meeting with the Special Advocates, and advised that there are no changes to be made to the final public version of this Risk Assessment.

9. The parties have the redacted version of the Assessment and are content with the redactions as are the Special Advocates.

10. It therefore appears that the Applicant takes the position that the redactions should not be approved by the Court, and further, that the Court should not even see the unredacted CBSA Risk Assessment. As I understand it, neither the Ministers nor the Applicant will rely on the unredacted or redacted Assessment.

11. However, the redacted version is now on the Court file, and under the open court principle the redacted version may be viewed by the public subject to the confidentiality provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 including ss 83(1)(d) to which Ministers' counsel has referred.

12. In my respectful view, this is not a satisfactory manner in which to leave this matter for several reasons. The Court plays a central and critical role in what is and what is not disclosed to Public Counsel, and the public at large, in matters such as this. It was the Court that directed the Ministers to provide a copy of the unredacted report to and to consult with the Special Advocates. The Court is not bound by the positions or agreement of the parties or Special Advocates on what may or may not be placed on the public record regarding a classified document that contains protected information filed by the Ministers. The Supreme Court of Canada is clear that Designated Judges are not "mere rubber stamp": *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 generally and at para 41.

13. Moreover, the time to deal with what should be disclosed to Public Counsel and by extension, what should be disclosed to the public and placed on the public files of this Court, is now while it is fresh and not at some indeterminate time in the future.

14. The public have a right to expect that redactions to a government document placed in this Court's public files have been judicially approved, that would not be the case if this motion is granted.

15. Finally, I note that I am being asked to give the Court's imprimatur to the final public version of the CBSA Risk Assessment without comparing it to the original; this is not possible.

16. Therefore I will review the unredacted Risk Assessment and compare it with the redacted version and advise if the redactions are acceptable to the Court for placing on the public file and delivery to Public Counsel.

ORDER

THIS COURT ORDERS THAT the Applicant's motion that the Court not receive or review the unredacted Risk Assessment prepared by Canada Border Services Agency is dismissed.

"Henry S. Brown"
Judge

Federal Court  Cour fédérale

SCHEDULE "C" **Date: 20170601**

Docket: DES-7-08

Ottawa, Ontario, June 1, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (IRPA);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF Mohamed Zeki MAHJOUB

ORDER
(Delivered from the Bench at Toronto, Ontario, on May 16, 2017)

UPON motion filed by the Applicant the day before this hearing, namely May 15, 2017, that I recuse myself from hearing the Applicant's motion to review his conditions of release;

AND UPON the Court requesting submissions on whether, as a preliminary matter, the motion should be heard or whether it is out of time having regard to the Court's case management directive of March 28, 2017, requiring that "all materials from both parties is to be served and filed no later than May 4, 2017", I ruled as follows (edited for grammar and syntax):

1. Thank you. I think in the circumstances, today having been set aside to deal with what the Applicant, Mr. Mahjoub, indicates to be relatively serious changes or circumstances concerning his psychological well-being, etcetera., as a result of the

existing conditions of release, I should decide this motion now and the move on to the next aspect of today's proceeding, whatever that will be.

2. I have before me a bare Notice of Motion which came to my attention during the matter of another motion this morning. I had not been provided a copy of it prior to the hearing although counsel for the applicant in fairness indicates that it was filed.

3. The motion asked for the recusal of myself as the Judge in this matter and is based on four grounds.

4. The first ground is that there is a reasonable apprehension of bias which is the well-known *Committee for Justice and Liberty* test for this sort of matter and is not at issue because at the present time, I'm simply dealing with a preliminary objection to the bringing of this motion in the first place.

5. The second ground for the motion is that the Court of Appeal directed the Court of Appeal registry, that is to say Justice Nadon of the Court of Appeal on May 10th directed that the Federal Court of Appeal Registry accept Notices of Appeal from decisions made by this Court by myself dated March 31, 2017 and July 20th, 2016 "which allege errors of law by Justice Brown on the same questions that arise in the forthcoming review of release conditions."

6. I will deal with that now. It is true that a direction was issued on May 10, 2017 by Justice Nadon which says, and I quote: "You may accept for filing Mr. Mahjoub's Notices of Appeal dated May 1, 2017 from the judgments of Justice Brown dated July 20, 2016, and March 31, 2017. However, you are to point out to counsel for the

parties that the notices of appeal are accepted for filing without prejudice to the respondents' right to challenge Mr. Mahjoub's right to appeal either judgment."

7. The next ground of appeal alleges that the appeal that is referred to "has a direct impact on the upcoming / future reviews of conditions of release", and the fourth ground of appeal alleges that "the facts alleged in the notice of motion for the withdrawal of the CBSA risk assessment, such as the steps taken by Justice Brown vis-à-vis the CBSA risk assessment dated January 7, 2017 and his May 11, 2017 order indicating that he will view the documents in order to rule on the redactions pursuant to the s. 83(1) (d) of the IRPA raise a reasonable apprehension of bias", and I will call that the CBSA issue.

8. So those are the four grounds of appeal.

9. Now, on March the 28th 2017, I issued a direction to the parties which set today as the hearing for this matter, so this hearing was set about, a little short of two months ago.

10. In that direction, I stated and directed: "… that all material from both parties is to be served and filed no later than May 4, 2017."

11. That direction was made with a number of circumstances in mind, including the receipt by the Court of an e-mail from counsel from Mr. Mahjoub dated February 9, 2017 to the Registry, which asks that the motion to review conditions of release: "… which we respectfully submit should be heard by a judge other than the Honourable Justice Brown given the content of the motion record."

12. So there was an e-mail of February 9th indicating that the applicant wished someone else to hear the matter than myself. That was followed up on February the 13th by a letter from counsel which among other things stated that the Applicant's "request that the new application be heard by a judge other than Mr. Justice Brown is based on the principle", etcetera.

13. There were two notices that were given some three [two] months ago by Mr. Mahjoub's counsel indicating some dissatisfaction or some wish or some concern with my hearing the matter. In that context, the Court issued a direction that all materials be served and filed no later than May the 4th.

14. So turning to the grounds of appeal, the first one deals with the orders which were delivered on March the 31st and July - 2017 and July 20th, 2016. In my respectful view, those are not new matters. They are quintessentially old matters, and they are not matters which justify departure from the direction issued on March 28th that all material should be served and filed. With respect to the fact that the Court of Appeal has accepted the Notices of Appeal, that is a decision which it is free to make, but it is, in my view, heavily qualified. It is not as if the appeal has been accepted, period. The order is very explicit in giving the Respondents the right to challenge the right to appeal either judgment, and I quote: "… the notices of appeal are accepted for filing without prejudice to the respondent's right to challenge Mr. Mahjoub's right to appeal either judgment." That again does not, in my view, warrant a departure from the schedule of filing set requiring everything to be filed by May 4, 2017.

15. The Applicant says that the Minister mistakenly or erroneously said there was no further disclosure at some point prior to May 4th, but on May 4th, in fact indicated that there was further disclosure. I don't see how that is relevant to the bringing of a motion to recuse.

16. And as counsel properly conceded, the general issue of the CBSA risk assessment was also put before the Court as an issue warranting a departure from the scheduling order, but that in my respectful view is off the table. It's been deferred. The consideration for that matter is deferred until after I have given judgment in this case. I reiterate that I have not read the redacted copy. I have not read the unredacted copy and will not do so after the Applicant files - completes his filing with respect to the motion that those documents not be received and/or be removed from the court file. That again, so in my respectful conclusion does not warrant a variance of my order setting May 4th as the deadline.

17. Counsel for the applicant then said that the order that I made on May 11th was wrong because the Court has not been asked for it imprimatur. That, with respect, goes to the merits of the motion to withdraw, which as I've already indicated, I will be deciding after I decide this motion and cannot therefore assist my friend in this motion to depart from the case management order that I made.

18. I have dealt with the Federal Court of Appeal's acceptance of the appeal, and my friend's - Mr. Slansky's argument that the appeals will be processed. The caveats placed on that by Justice Nadon render that of no impact in terms of departing from the case management order.

19. Mr. Mahjoub's counsel then makes what I consider a - it's difficult to characterize this - an unusual and unwarranted suggestion that I as a judge of this court will attenuate the reasons that I give in terms of the motion to review the conditions of release with the view to addressing purported errors identified or alleged in Mr. Mahjoub's two Notices of Appeal. That, I think, to state that as an argument is to reject it. I won't say anything more.

20. The argument that recusal should be raised as soon as possible, I accept. However, in the circumstances of this case, it does not apply. I believe, just checking my notes to see if there is anything else that I wanted to deal with.

21. Counsel for the respondent noted that in my previous order, I believe it is March 15, 2017, I had advised the parties that I would be seized of this case, so that is when the time started to run in my view to bring a proper motion which has not yet been filed, and I said at that time and I agree, and I maintain the position that a Notice of Motion to recuse, particularly when it's been raised February 9th and February 13th, etcetera, should be provided with an appropriate Notice of Motion, affidavit and support, cross-examinations if requested, and etcetera, not walked into court as has happened, at least from my perspective, today.

22. Mr. Slansky agreed and I have to agree as well that the fact that a judge is asked to deal with the same issues is not a proper ground to ask that the judge recuse himself.

23. I believe all submissions by the parties are covered in that. Therefore, my decision is not to accept the motion to recuse and we should now proceed with the hearing that

brings us here scheduled back in March, and that is the motion to deal with Mr. Mahjoub's conditions of release.

THEREFOR THIS COURT ORDERS that the motion to recuse is dismissed as brought out of time.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-7-08
STYLE OF CAUSE:	**IN THE MATTER OF** a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*); **AND IN THE MATTER OF** the referral of a certificate to the Federal Court pursuant to section 77(1) of the IRPA; **AND IN THE MATTER OF** Mohamed Zeki MAHJOUB ["Mr. Mahjoub"]
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 16, 2017
JUDGMENT AND REASONS:	BROWN, J.
DATED:	JUNE 19, 2017

APPEARANCES:

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John Provart Christopher Ezrin Christopher Crighton Marianne Zoric	FOR THE RESPONDENT (THE MINISTER)
Anil Kapoor	SPECIAL ADVOCATES

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