

**Date: 20090309**

**Docket: DES-7-08**

**Citation: 2009 FC 248**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION and  
THE MINISTER OF PUBLIC SAFETY**

**Applicants**

**and**

**MOHAMED ZEKI MAHJOUR**

**Respondent**

**REASONS FOR ORDER**

**LAYDEN-STEVENSON J.**

[1] Mohamed Zeki Mahjoub is the subject of a security certificate. He was released from detention on stringent conditions akin to house arrest. He now seeks the elimination of some conditions and the relaxation of others. I am satisfied that his release should be confirmed and that modifications to some of the conditions can and should be made. The threat Mr. Mahjoub poses to national security or the safety of any person can be neutralized by the imposition of the conditions as modified.

## Background

[2] A detailed compilation of Mr. Mahjoub's circumstances is well-documented and may be found in various decisions of this Court: *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2001] F.C. 644 (T.D.); *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2004] 1 F.C.R. 493 (F.C.); *Canada (Minister of Citizenship and Immigration) v. Mahjoub* (2005), 270 F.T.R. 101 (F.C.); *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2007] 4 F.C.R. 247 (F.C.); *Mahjoub v. Canada (Minister of Citizenship and Immigration)* (2007), 309 F.T.R. 72 (F.C.); *Mahjoub v. Canada (Minister of Citizenship and Immigration)* (2007), 318 F.T.R. (F.C.); *Canada (Minister of Citizenship and Immigration and Minister of Public Safety) v. Mahjoub*, 2009 FC 34.

[3] Synoptically, Mr. Mahjoub was detained on June 26, 2000, pursuant to a security certificate under the *Immigration Act*, R.S.C. 1985, c. I-2 (the former legislation). Mr. Justice Nadon, then of the Federal Court Trial Division, determined that the certificate was reasonable. When the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) came into force, in accordance with its transitional provisions, the IRPA (specifically Division 9) applied to Mr. Mahjoub and he remained in detention. On April 11, 2007, Mr. Justice Mosley ordered his release on stringent terms and conditions. The conditions were varied, but not materially altered, in June, September and December of 2007. The existing conditions of release are attached to these reasons as Schedule "A".

[4] On February 23, 2007, the Supreme Court of Canada released its decision in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (*Charkaoui 1*). The Supreme Court

held that the procedure in Division 9 of the IRPA infringed section 7 of the *Canadian Charter of Rights and Freedoms* (the Charter). The Court suspended its declaration of invalidity for one year to enable Parliament to amend the law. Bill C-3, *An Act to amend the Immigration and Refugee Protection Act*, 2<sup>nd</sup> Sess., 39<sup>th</sup> Parl., 2007-2008, came into force on February 22, 2008. The Minister of Citizenship and Immigration and the Minister of Public Safety (the Ministers) signed a new security certificate with respect to Mr. Mahjoub on that same day.

[5] The Division 9 regime was significantly altered by Bill C-3. Among other things, the new scheme provides for the appointment of a special advocate to protect the interests of the individual subject to the security certificate (the named person) during any part of the proceeding that is held in the absence of the public, the named person and the named person's counsel. The special advocate may challenge: (a) the Ministers' claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and (b) the relevance, reliability and sufficiency of information or other evidence provided by the Ministers (that is not disclosed to the named person and the named person's counsel) and the weight to be given to it. The complete text of the relevant legislation is attached to these reasons as Schedule "B".

[6] The transitional provisions of Bill C-3 stipulate that, if the Ministers sign a new certificate with respect to a named person who was released from detention under conditions, the person remains released under the same conditions (para. 7(3)(b)). The named person, within 60 days of the coming into force of Bill C-3, may apply to the Federal Court for a review of the reasons for continuing the conditions (subs. 7(4)). Alternatively, the named person may apply for a review of the reasons for continuing the conditions if a period of six months has expired since the coming into

force of Bill C-3 (subs.7(6)). The text of the transitional provisions is attached to these reasons as Schedule “C”. Mr. Mahjoub requested a review of the conditions of his release.

[7] This hearing began in September, 2008 and (with the exception of an *in camera* hearing on February 9<sup>th</sup> of this year to address the contents of Standard Operating Procedure (SOP) IC-7 – “Security Certificate Case Monitoring” (Exhibit R-46)), finished in mid-December 2008. Final submissions were made on February 10<sup>th</sup> and 11<sup>th</sup> of this year. As is evident from the next section of these reasons, the proceeding was not free of complications.

#### Conduct of the Proceeding

[8] As indicated, on February 22, 2008, the Ministers signed a new security certificate with respect to Mr. Mahjoub. His case and four other security certificate cases were placed in case management. Several case management conferences dealing with matters common to all cases were conducted by the Chief Justice and Mr. Justice Simon Noël. After my designation and assignment by the Chief Justice to Mr. Mahjoub’s case, in accordance with paragraph 83(1)(b), I appointed Messrs. Gordon Cameron and Anil Kapoor to act as special advocates in the proceeding. At that time, although Mr. Mahjoub’s chosen counsel participated, they were not prepared to go on record until such time as their motion with respect to funding had been determined by the Court. On June 13, 2008, with the concurrence of Mr. Mahjoub, his proposed counsel, his special advocates and the Ministers’ counsel, an order issued delineating a schedule within which the reasonableness of the certificate and the review of the conditions of release would be conducted. A copy of that order is attached to these reasons as Schedule “D”. In early July, 2008, the funding issue was resolved and Mr. Mahjoub’s counsel became the solicitors of record.

[9] On June 26, 2008, the Supreme Court of Canada issued its reasons in *Charkaoui v. Canada (Citizenship and Immigration)* (2008), 376 N.R. 154; 2008 SCC 38 (*Charkaoui 2*). Following the release of *Charkaoui 2*, Mr. Mahjoub's counsel and the special advocates contended that the Minister's disclosure did not comply with the ruling of the Supreme Court. On October 3, 2008, I ordered that all information and intelligence related to Mr. Mahjoub in the possession of the Canadian Security and Intelligence Service (CSIS) be filed with the court and provided to the special advocates.

[10] The special advocates (in the *in camera* hearings) and Mr. Mahjoub's counsel (in the public hearings) asserted they were not in a position to test the evidence in relation to the threat that Mr. Mahjoub is alleged to pose to national security or to the safety of any person. Specifically, they submitted it would be prejudicial to Mr. Mahjoub to conduct cross-examination on that issue in the absence of full "*Charkaoui 2* disclosure."

[11] During the *in camera* hearings, one CSIS witness testified regarding: (a) the threat that Mr. Mahjoub is alleged to pose; and (b) the conditions of his release. Cross-examination was restricted to an issue related to open-source documents that had not been disclosed. Other CSIS witnesses testified *in camera* regarding operations and disclosure. They were cross-examined only in relation to disclosure issues. In short, there was no cross-examination with respect to the nature of the alleged threat, the reasonableness of the certificate, or the terms and conditions of release.

[12] Similarly, in the public hearings, counsel declined to cross-examine the CSIS witness, Mr. Michel Guay, who testified with respect to the alleged threat and the conditions of release. Counsel maintained, in the absence of full disclosure, Mr. Mahjoub was in no position to test the evidence upon which Justice Mosley relied in finding that Mr. Mahjoub posed a danger to national security. Counsel reserved the right to cross-examine, following receipt of the “*Charkaoui 2* disclosure”.

[13] At this point, Mr. Mahjoub asks that the conditions of his release be reviewed within the boundaries of the following framework:

- (a) Mr. Mahjoub does not concede that he poses a threat to national security or the safety of any person, but is not able to challenge that finding at this time;
- (b) Mr. Mahjoub does not object to the court relying upon Justice Mosley’s factual conclusions. Put another way, Mr. Mahjoub accepts, solely for the purpose of the review of conditions, the factual determinations of Justice Mosley regarding the threat that Mr. Mahjoub poses to national security;
- (c) Mr. Mahjoub acknowledges and accepts that conditions of release are required. That is, he does not seek to terminate the conditions of release. Rather, he wants some conditions eliminated and others modified;
- (d) Mr. Mahjoub asserts that the passage of time and his near-perfect compliance with the existing conditions of release justify the granting of his requests;
- (e) Mr. Mahjoub submits that the proposed modified conditions of release will neutralize the threat Justice Mosley concluded he poses to national security or the safety of any person.

[14] Within this context, I ordered bifurcation of the issues of “reasonableness of the certificate” and “review of the conditions of release.” These reasons deal only with the review of the conditions of release under subsection 82(4). The reasonableness of the certificate will be determined by another judge of the Federal Court designated by the Chief Justice. I should add that the “*Charkaoui 2* disclosure” was provided on December 15, 2008 and was completed on January 15, 2009. The special advocates are currently examining and analyzing the disclosure material.

[15] Concurrent with this hearing, a parallel proceeding with respect to Mr. Mahjoub was conducted before Madam Justice Mactavish. That matter arose as a result of a motion by Messrs. Mahjoub and Jaballah wherein they sought clarification of their existing conditions of release. The named persons contended that the actions of Canada Border Services Agency (CBSA), the body responsible for monitoring Mr. Mahjoub’s compliance with the conditions of his release, went beyond what was authorized by Justice Mosley’s order and violated his rights under sections 7 and 8 of the Charter. Justice Mactavish’s decision in relation to the Charter challenges was released on January 15, 2009.

[16] Justice Mactavish was not able to determine whether the analysis of Mr. Mahjoub’s mail by the CBSA Counterterrorism Unit serves an intelligence-gathering purpose (in addition to monitoring compliance with conditions) because she did not have a complete evidentiary record upon which to make such a determination. Similarly, she considered that she was not well-positioned to determine whether the conduct of CBSA’s physical surveillance of Mr. Mahjoub is so

intrusive that it is disproportionate to the threat he poses. Mr. Mahjoub requests that I address these issues and that I impose conditions to restrict CBSA from engaging in certain activities.

### The Factual Underpinnings

[17] Mr. Mahjoub, for purposes of this review, acknowledges and does not challenge the determinations arrived at by Mr. Justice Mosley. Therefore, regard must be had to those findings because they provide the starting point for the analysis regarding the conditions of release. To avoid any uncertainty, paragraphs 119 – 121 of Justice Mosley's decision wherein he determined Mr. Mahjoub should be released on stringent conditions are reproduced here.

**119** As noted by Justice Dawson in *Mahjoub No. 2*, no challenge was made to the assertion that both the VOC and the AJ are terrorist organizations. Both were in fact among the first organizations banned in Canada under the *Anti-Terrorism Act*, S.C. 2001, c. 41. As to Mr. Mahjoub's involvement with the AJ and the VOC, Justice Dawson found:

**64** ... that the information before the Court gives rise, at the least, to an objectively reasonable suspicion that at the time of his detention and before that:

1. Mr. Mahjoub was a high-ranking member of the VOC, which is a faction of the AJ.
2. Mr. Mahjoub was a member of the Shura council of the VOC, and as such would normally participate in the decision-making process of that terrorist organization.
3. Mr. Mahjoub had engaged in terrorism. Sometime around 1996/1997 he became identified by the alias "Shaker".
4. Mr. Mahjoub had significant contacts with persons associated with international Islamic terrorism including Osama Bin Laden, Ahmad Said Khadr, Essam Hafez Marzouk, Ahmed Agiza, and Mubarak Al Duri. He also had contact with Mahmoud Jaballah. In view of the status of Mr. Jaballah's proceedings in this Court, I make no finding or comment with respect to Mr. Jaballah's alleged involvement in terrorist activities.

**120** Additionally, Justice Dawson highlighted public evidence that showed that Mr. Mahjoub had access to individuals who were very highly placed and influential in the Islamic extremist



movement. The Court also relied on information provided by the Ministers in private. The Court concluded that this evidence was sufficient to establish that at that time Mr. Mahjoub posed a danger to national security: *Mahjoub No. 2*, above at para. 74.

**121** Based on my own review of the public and private evidence, I accept and adopt the above noted findings of my colleague in relation to Mr. Mahjoub's background.

[18] Further, at paragraph 139, Justice Mosley concluded “it cannot be said on a balance of probabilities that Mr. Mahjoub has demonstrated that he no longer poses a danger to national security or the safety of any person.”

[19] I reiterate that these findings stand unchallenged although Mr. Mahjoub’s counsel indicate, because the underlying process has been determined to be constitutionally-deficient, the findings are inherently “frail”. I should also note the special advocates made no submissions in relation to the conditions of release.

[20] The Supreme Court of Canada has stated unequivocally (at paragraph 107 of *Charkaoui 1*), that the imposition of onerous conditions of release for an extended period under immigration law must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. The present conditions have been in place since April 2007. Accordingly, Mr. Mahjoub must be provided a meaningful opportunity to challenge his conditions of release. Various witnesses testified regarding the implementation and the actual functioning of the conditions.

Mr. Mahjoub's Proposed Changes to the Conditions of Release

[21] It is important to note Mr. Mahjoub's position regarding the relationship between his conditions of release and the purpose of the legislation. He claims, as do the Ministers, the requirement that his release from detention be subject to conditions is not unhinged from the purpose of the legislation. He states that although he, at some point in the future, may feel the link is severed, he does not suggest the current situation is indeterminate or indefinite.

[22] As indicated earlier, Mr. Mahjoub does not suggest the conditions of his release should be eliminated. Moreover, in some respects, he does not request any change or modification. Before examining the various factors that must be considered in a review of conditions, it is useful to precisely articulate the changes Mr. Mahjoub proposes.

[23] No changes are requested regarding the first five conditions. Mr. Mahjoub does not dispute or seek to alter the condition that he must wear a GPS monitoring device as required by condition number 2. Apparently, CBSA has a new GPS unit to replace the existing unit. Mr. Mahjoub and his counsel have identified some specific questions (primarily health-related) regarding the proposed unit. The Ministers are in the process of obtaining the requested information. Counsel agree there is no need for me to address this issue.

[24] Condition 6 requires Mr. Mahjoub not be left alone in his residence. At all times, he must be supervised by Mona El-Fouli, Haney El-Fouli, El Sayed Ahmed, Murray Lumley or another supervisor approved by the court. Mr. Mahjoub seeks to alter that condition so that he can remain at home alone (including in his backyard) without the necessity of a supervisor being present. He

proposes no visitors be permitted to enter the premises during the time he is alone, unless a supervisor is present.

[25] Condition 7 currently permits Mr. Mahjoub to leave his residence between the hours of 8:00 a.m. and 9:00 p.m., provided he remains within the boundary of any outside space associated with the residence (the backyard). He wants the curfew eliminated.

[26] Condition 8 comprises a number of elements. The first element relates to outings. In general terms, the existing restrictions mandate that, with prior CBSA approval, Mr. Mahjoub may leave his residence three times per week, but each absence is not to exceed four hours. Request for approval is to be made at least 72 hours in advance and must specify the location(s) Mr. Mahjoub wishes to attend as well as the estimated times when he will leave from and return to his residence. For approved absences, Mr. Mahjoub is to report as more specifically directed by a CBSA representative, prior to leaving and immediately upon his return. The CBSA may also consider special requests for Mr. Mahjoub to go on a family outing exceeding four hours if the request is made at least one week in advance. CBSA is vested with discretion to extend the time beyond 9:00 p.m.

[27] Mr. Mahjoub seeks to eliminate all restrictions on activities outside the home. He also requests that CBSA be authorized to permit travel outside the fixed perimeter, upon request being made one week in advance of the proposed travel.

[28] The second element of condition 8 permits Mr. Mahjoub to leave his residence every school day between the hours of 8:00 and 9:30 a.m. and 3:00 and 4:30 p.m., in the company of Mona or Haney El-Fouli, to deliver and pick up Ibrahim and Yusuf (the children) to and from school. There are a number of directions that apply to this condition. Mr. Mahjoub claims the condition is no longer necessary. His position is evidently premised on the basis that his proposal regarding the first element of condition 8 is successful.

[29] The third element of condition 8 relates to medical appointments, psychological appointments and the like. The specific requirements to be met in this regard are detailed in paragraph iii of the condition. Mr. Mahjoub takes the position that this element is no longer necessary, presumably for the same reason previously stated in relation to the second element.

[30] Similarly, the fourth element of this condition specifically addresses emergencies and the protocol to be followed should an emergency arise. Mr. Mahjoub maintains the restriction is no longer required. Again, his position is dependant upon success with respect to condition 6 and the first element of condition 8.

[31] Condition 9 addresses the issue of visitors to the Mahjoub residence. Specific exceptions are carved out of the general requirement for visitors to be pre-approved by CBSA. Mr. Mahjoub proposes to delete all restrictions regarding visitors other than the one requiring the presence of a supervisor when anyone is visiting.

[32] Mr. Mahjoub's movements are confined to pre-approved perimeters. Condition 10 prohibits him from attending at an airport, train station, bus depot or car rental agency and from entering upon any boat or vessel. Additionally, with the exception of his lawyers and pre-approved persons, he is barred from meeting any person by prior arrangement and from going to any location other than one that has been approved under condition 8 during approved hours. Mr. Mahjoub asks that this condition be amended to permit him, with prior CBSA approval, to travel outside the fixed perimeters. Further, he wishes to delete the restrictions on contacts with others outside the home and to delete the restriction on locations (excluding those proposed for outings outside the fixed perimeter requiring CBSA approval).

[33] Condition 12 is lengthy. Distilled, it relates to restrictions regarding access to the Internet, cell phones, electronic and radio communication devices. It seeks to establish parameters, the objective of which (to the extent possible) is to guarantee Mr. Mahjoub is without access to any of these devices. It is sufficient for present purposes to simply recite the changes proposed by Mr. Mahjoub. Mr. Mahjoub wishes to delete the requirement to provide "computer use" records, to eliminate the necessity for Haney El-Fouli to provide monthly records of cell phone usage and for Mona El-Fouli to consent to the interception of her cell phone. He further seeks permission for either Skype or another VOIP (voice over Internet protocol) software or system to be permitted in the locked computer room in order that Mona El-Fouli may visually communicate with her family, especially her sick father, in Egypt.

[34] Condition 13 requires Mr. Mahjoub, all adult residents and any new occupants of the Mahjoub home to consent in writing to the interception of incoming and outgoing written

communications by mail, courier, or other means. Mr. Mahjoub proposes to eliminate the interception of mail for everyone but himself. He seeks to exempt, from the intercept, correspondence from government agencies and known, credible financial institutions or companies. He suggests the intercept include only correspondence for which there are reasonable and probable grounds to believe the information contained in the communication may be of assistance in monitoring compliance with the terms of release or the threat he poses.

[35] Further, absent reasonable and probable grounds to believe the information is of assistance in monitoring compliance with the terms of release or the threat he poses, he wants the copying of intercepted mail to be prohibited and any copies, made to date, destroyed if they do not satisfy this test. I note, during oral argument, counsel requested sequestration rather than destruction of such copies. Last, he asks for the imposition of a 24-hour time limitation between the time of interception and delivery of the mail.

[36] Travel restrictions are located in condition 16. Mr. Mahjoub is content with those restrictions except he wishes to use city transit, including the subway. On my reading of the condition, he is permitted to travel by public city bus transit within the fixed perimeter. However, he is prohibited from using the subway.

[37] Finally, Mr. Mahjoub seeks an amendment to the present conditions of release such that he be permitted to video and audio record CBSA officers if he, or one of his family members, has reasonable grounds to believe the officer is acting in excess of lawful authority.

[38] This marks the end of Mr. Mahjoub's sought-after changes or amendments. I shall return to his requests later.

[39] The Ministers also seek amendments to certain conditions. It is said these requests are "intended to streamline procedures, improve operations, increase safety and address unanticipated problems."

[40] First, there is a request to amend condition 13 (mail interception) by striking the word "written" from the phrase "written communication". The Ministers claim, prior to implementation of the conditions, CBSA did not foresee the possibility of delivery of forms of communication other than written. However, the intent of the conditions was that all forms of communication would be monitored.

[41] Secondly, if Mr. Mahjoub does not leave his residence within 30 minutes of the scheduled time for an approved outing, the Ministers say that condition 8(i) should be amended to specify the outing will be cancelled, unless Mr. Mahjoub notifies CBSA of a later departure time. The Ministers take issue with the fact that Mr. Mahjoub "often does not attend the outings he has requested and that were approved by the CBSA." The failure to notify results in a resource management issue for CBSA because, when an approved outing is scheduled, CBSA officers are dispatched to the residence to await his departure and to follow him to monitor compliance.

[42] Mr. Mahjoub responds he is often not feeling well enough to go on the outings. However, should he rest and later feel better, he might then wish to go. Mr. Mahjoub says he is not able to

predict how he will feel in an hour. Further, the conditions do not require he notify CBSA, therefore it has no cause for complaint.

[43] Thirdly, the Ministers ask that requests for religious outings be made on 90 minutes notice. The stated reason is there have been instances where Mr. Mahjoub has called CBSA to advise he was going to mosque just as he was leaving the house. This provides little or no time for CBSA officers to be deployed. Additionally, it does not allow time to program the GPS. CBSA's ability to effectively monitor Mr. Mahjoub and ensure compliance with the conditions of release is thereby compromised. CBSA did not anticipate Mr. Mahjoub would proceed in this manner and therefore did not realize, when the conditions were drafted, it would be necessary to specify a timeline for notice.

[44] Fourth is a request to prohibit call-forwarding from the Mahjoub household landline to any cell phone. The Ministers say, at the time the conditions were drafted, although the interception of the landline was addressed, no consideration was given to the possibility that calls could be forwarded from the landline to a cell phone. The Ministers characterize this request as "simply a refinement of the existing condition that requires that all of Mahjoub's telephone communications are intercepted."

[45] Last, the Ministers seek to formalize Justice Mosley's comments at paragraph 101 of his December 24, 2007 Reasons for Order. There, Justice Mosley observed that Mr. Mahjoub, or anyone in his home, "should not be video-taping or audio-taping the officers as they are carrying out their duties." The Ministers wish to formalize this observation as a condition.



[46] I propose to deal with the Ministers' requests when I address those of Mr. Mahjoub. I turn now to the factors to be considered when conducting a review of the conditions of release.

#### Factors Governing the Review of Conditions of Release

[47] In *Charkaoui 1*, the Supreme Court of Canada held that regular reviews of detention must take into account the five factors delineated by Justice Rothstein, then of the Federal Court, Trial Division, in *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 (T.D.). At paragraph 117 of *Charkaoui 1*, the Court decreed that there must be detention reviews on a regular basis, at which times the reviewing judge should be able to look at all factors relevant to the justice of continued detention, including the possibility of the IRPA's detention provision being misused or abused.

[48] Significantly, the Supreme Court stipulated that analogous principles apply to extended periods of release subject to onerous or restrictive conditions. It stated that these conditions must be subject to ongoing, regular review under a review process that takes into account all the above factors, including the existence of alternatives to conditions. Given Mr. Mahjoub's concession that his present circumstances are not unhinged from the purpose of the legislation, I do not think it can be said that the IRPA is being misused or abused. The obligatory factors for consideration are:

- (1) the reasons for detention;
- (2) the length of detention;
- (3) the reasons for the delay in deportation;
- (4) the anticipated future length of detention; and

- (5) the availability of alternatives to detention.

These factors are to be contextualized to a review of the conditions of release for Mr. Mahjoub.

*Reasons for Stringent Conditions*

[49] It is common ground that Justice Mosley's determination that Mr. Mahjoub poses a danger or threat to national security or the safety of any person is the reason for the imposition of Mr. Mahjoub's stringent conditions of release. In addressing the issue of conditions, Justice Mosley affirmed that the conditions must be sufficient to neutralize or contain the threat. He specifically noted the need to examine: "the nature of the acts that it is believed Mr Mahjoub would engage in; the nature of the threat that would result from those acts; and an analysis of why it is believed that conditions would or would not neutralize or contain the threat" (para. 141).

[50] Justice Mosley turned his mind to the need for "terms and conditions to be specific and tailored to Mr. Mahjoub's precise circumstances, keeping in mind that to be appropriate they 'must be designed to prevent [his] involvement in any activity that commits, encourages, facilitates, assists or instigates an act of terrorism, or any similar activity' and that they 'must be proportionate to the risk posed by [him]'" (para. 142).

[51] As for the specific threat, Justice Mosley was satisfied that it was accurately stated in the public summary dated November 28, 2006. That document, prepared for the purpose of a detention review, states that Mr. Mahjoub "continues to be a well-connected member of an international network of extremist individuals who support the Islamic extremist ideals espoused by Osama Bin

Laden, including those which condone the use of serious violence.” The Ministers were opposed to Mr. Mahjoub’s release on the basis that it would “place him in a position to recommence his contacts with members of the Islamic extremist network, allowing them to be involved in the planning and execution of terrorist acts.”

[52] As stated previously, for the purpose of this review, the parties agree to be bound by Justice Mosley’s findings. Mr. Mahjoub qualifies his position by noting the findings arose from a constitutionally-deficient process.

#### *Length of Detention and Release on Stringent Conditions*

[53] The Ministers take the view that, on a review of conditions of release, this factor enables the court to consider the length of time Mr. Mahjoub has been under stringent conditions. While I do not disagree, it seems to me the entire context must be considered. The Supreme Court has determined both detention and onerous conditions of release engage section 7 liberty interests. Thus, in my view, Mr. Mahjoub’s detention for nearly seven years is not to be ignored.

[54] The Ministers further argue, since the length of detention alone is insufficient to warrant release, the length of time the person has been subject to stringent conditions of release is also insufficient, on its own, to warrant a lessening of those conditions. Mr. Mahjoub does not take issue with those general propositions. However, he points to the summary of the evidence of a CSIS witness who testified *in camera* with respect to the telephone interceptions. Specifically, Mr. Mahjoub refers to the testimony that “no potential breaches of the terms of release have been identified” and the statement that “CSIS as agent for CBSA had no concerns regarding the content

of intercepted communications.” Similarly, no potential breach has been identified in the intercepted mail. Further, Mr. Mahjoub says there is a total lack of evidence that he attempted to gain access to or use any of the prohibited communications devices. Nor is there any evidence that he has sought to take advantage of any opportunity to contact anyone who supports terrorism or violent *jihad* (or that any such person has attempted to contact him).

[55] Both the Ministers and Mr. Mahjoub acknowledge the longer the detention (and by analogy the imposition of conditions of release), the greater the evidentiary burden on the Ministers to establish the nature of the threat posed.

[56] From Mr. Mahjoub’s perspective, the allegations advanced in 2008 are not materially different from those advanced at the time of his detention in June 2000. There is nothing new. Indeed, he refers to Justice Mosley’s findings that the investigation was essentially complete when Mr. Mahjoub was detained and there has been no effort by the security agencies to interview him again. Moreover, Mr. Mahjoub says neither CSIS nor CBSA has conducted a dynamic and individualized threat assessment in relation to him. He asserts the evidence demonstrates his consistent and scrupulous compliance with the conditions of release.

[57] The Ministers respond that Mr. Mahjoub’s submissions in this respect are mitigated by the fact Mr. Mahjoub has agreed to be bound by Justice Mosley’s findings as to the threat or danger he poses (for the purpose of this review).

[58] Prior to being released, Mr. Mahjoub was detained for nearly seven years. The Supreme Court of Canada has observed that lengthy detention results in a disruption of contact and communication with extremist individuals or groups. The conditions of release have been in effect for a period of 22 months. There is no evidence of serious breach. I will have more to say about “technical” breaches and the Ministers’ failure to conduct an individualized risk assessment later. On balance, and notwithstanding the agreement between the parties with respect to Justice Mosley’s findings, this factor militates in favour of Mr. Mahjoub.

#### *Reasons for Delay in Deportation*

[59] Until such time as the reasonableness of the security certificate has been determined, Mr. Mahjoub cannot be deported. The Ministers maintain both parties have proceeded in good faith and the court has proceeded in a timely fashion. Mr. Mahjoub states he “does not submit that the government has unduly delayed this proceeding.” His written submissions state it is unlikely he will ever be deported and the Ministers have not proffered evidence to suggest removal can be accomplished within an identifiable timeframe. Be that as it may, as noted earlier, Mr. Mahjoub does not suggest his release on restrictive conditions is unhinged from the purpose of the legislation (deportation). To the contrary, he states it is not (transcript, volume 20, p. 162, lines 3-12). In the circumstances, I consider this factor to be neutral.

#### *Anticipated Future Length of Release Subject to Stringent Conditions*

[60] Mr. Mahjoub submits it will be a number of months before the hearing into the reasonableness of the certificate is underway. When the determination is made, it will likely be appealed, including to the Supreme Court of Canada. Further, it is nearly certain there will be

motions to challenge the constitutionality of the process established under the revised IRPA as well as a request for a stay of proceedings for abuse of process. In all likelihood, determinations on those motions will also be subject to appeal. It could be many years before these proceedings are concluded. Mr. Mahjoub avers, even then, the issue of whether he can be subject to *refoulement* to Egypt remains ripe for adjudication. Consequently, although the period of time for stringent conditions of release cannot be ascertained with precision, it will undoubtedly be lengthy. Mr. Mahjoub contends lengthy subjection to stringent conditions is a factor that weighs in favour of a progressive relaxation of those conditions.

[61] For their part, the Ministers say detention for prolonged periods, in and of itself, does not violate the Charter provided there is a robust process of detention review. Contextualized to a review of conditions, it follows there must also be a robust process for reviewing the conditions. Clearly, say the Ministers, the present proceeding has been robust. Moreover, the conditions of release will be subject to further review in accordance with the legislation. This robust review process, from the Ministers' perspective, favours the Ministers' position.

[62] A party's recourse to statutory remedies is to be regarded as a neutral factor: *Charkaoui 1*. The delay with respect to the determination of the reasonableness of the security certificate is partially due to the Ministers' failure to move toward "*Charkaoui 2* disclosure" in a timelier manner. However, delay is also precipitated by the fact that Messrs. Mahjoub and Jaballah have chosen to be represented by the same counsel. Although both are entitled to counsel of their choice, the hearings to determine the reasonableness of their security certificates, in these circumstances, cannot proceed concurrently in the Federal Court.

[63] The process of robust detention reviews (and by analogy reviews on conditions of release) is a significant constituent of this factor.

[64] Although Mr. Mahjoub's projected time frame weighs in his favour, it is founded on a basis I believe to be flawed. It assumes that the conditions of release will remain static. If that were so, in my view, the purpose and the objective of the reviews would be rendered nugatory. The length of time Mr. Mahjoub is subject to restrictive conditions of release is mitigated by the availability of robust, regular and ongoing judicial reviews. Consequently, although the projected time frame is to be accorded considerable weight, it must be assessed in conjunction with the other factors and does not trump them. It is by no means determinative.

#### *Availability of Alternatives*

[65] Counsel agree, and I concur, the conditions of release must be a proportionate response to the threat. As the Ministers put it, the conditions of release must be subject to a carefully tailored proportionality analysis.

[66] Mr. Mahjoub analogizes the review process in the revised IRPA to that set out in the Criminal Code governing the review of a disposition with respect to a not-criminally-responsible accused. Relying upon *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, he submits that, here, a proportionate response is "the least onerous and least restrictive one that can be maintained while ensuring that public safety is protected."

[67] Mr. Mahjoub claims he has demonstrated the strength and sincerity of his commitment to comply with the imposed conditions. The Ministers' suggestion that breaches have occurred refers to those of a purely technical nature that do not give rise to national security concerns. There has been no evidence of conduct that could reasonably be construed as a threat to national security or the safety of any person. Rather, the evidence shows a high degree of compliance over an extended period of time.

[68] Further, Mr. Mahjoub professes he has adhered, nearly perfectly, to electronic monitoring and profoundly restrictive conditions. This, he says, demonstrates the threat found by Justice Mosley has been substantially attenuated thereby necessitating that the conditions of release "should be relaxed in equal degree."

[69] Last, he argues, in fashioning a proportionate response, I must have regard to the best interests of his children. This is because the nature of his family unit is part of the "context and circumstances" of his individual case which must be taken into account on this review.

[70] The Ministers argue it is the cumulative effect of the conditions of release that must continue to neutralize the threat posed by Mr. Mahjoub's release. Any requested amendment must be viewed in this context. Justice Mosley's decision was informed by the same factors considered by the Supreme Court in its analysis. The Ministers assert application of the *Charakaoui* factors to the evidence confirms the requirement for stringent conditions of release in order to neutralize the threat posed by Mr. Mahjoub. Moreover, from the Ministers' perspective, the dearth of evidence with



respect to breach is not an indication time has attenuated the threat. Rather it demonstrates the conditions have contained the threat, as intended by Justice Mosley.

[71] In my view, the parties do not disagree on the law, specifically the requirement for a proportionality analysis. They disagree as to the extent to which the existing conditions should be modified, if at all, in response to Mr. Mahjoub's requests. This necessitates a much closer examination of each of the proposed changes. However, it is fair to say that when conditions of release are initially drafted, it is simply not possible to foresee precisely how their implementation will operate. Judges do not have crystal balls. Conditions that do not achieve their objectives will require adjustment.

[72] As I understand the Supreme Court's reasoning, the underlying purpose of the robust, ongoing judicial reviews is to arrive at a solution that will strike a balance between the liberty interests of the individual and the security interests of Canada and its people. The conditions of release must not be a disproportionate response to the nature of the threat: *Charkaoui 1*. Consequently, if it appears from the evidence the conditions of release are more stringent than is required to neutralize the threat posed by the named person, it necessarily follows they must be relaxed. It falls to the court to determine the appropriate balance.

[73] That said, in view of Justice Mosley's findings (which constitute the factual underpinnings of this review), in my opinion, it is readily apparent that Mr. Mahjoub must be subject to restrictive conditions. I reiterate there is no suggestion on Mr. Mahjoub's part that the conditions of release should be abolished.

*Best Interests of the Child*

[74] Much time was devoted to argument regarding the question whether the best interests of Ibrahim and Yusuf (the children) should factor into my consideration of the various requests for modifications or amendments to the conditions of release.

[75] Mr. Mahjoub asserts there is a positive obligation to have regard to the best interests of his children as part of the “context and circumstances” of his situation. In support of this position, he maintains that both the common law, as expressed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*), and the provisions of IRPA, specifically paragraphs 3(3)(d) and 3(3)(f), require such consideration. Reliance is also placed on Article 3 of the *Convention on the Rights of the Child (CRC)* and Articles 17, 23 and 24 of the *International Covenant on Civil and Political Rights (ICCPR)*. Further, he claims that *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (*J.G.*) stands for the proposition that individuals within a family unit may claim an individual interest protected by section 7 of the Charter in relation to the others in the unit because the parental relationship with a child engages the security of the person.

[76] Mr. Mahjoub, his wife, Mona El-Fouli, and his step-son, Haney El-Fouli, testified as to the “profoundly deleterious effects” the conditions of release have had on the children. Although the family agreed to the conditions when he was released, they could not have appreciated, then, the impact living with the conditions would have on the children. According to Mr. Mahjoub, CBSA has not been sensitive to the needs of the children. Further, its practices, such as overt “eyes-on

surveillance”, without an individualized assessment of the risk, can be seen as arbitrary interferences with their rights under international law. The children did not testify and no educational or psychological assessments regarding them were offered.

[77] In response, the Ministers claim Mr. Mahjoub has not demonstrated, on the facts, that I must have regard to the best interests of the children. Relying on *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655 (C.A.) (*de Guzman*), the Ministers argue that IRPA as a whole, rather than each individual provision, must comply with paragraph 3(3)(f). Pointing to *Canadian Foundation for Children and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 (*Canadian Foundation*), the Ministers state the best interests of the child is not a principle of fundamental justice “since it is not a legal principle and does not have societal consensus.”

[78] Ultimately, the Ministers submit the best interests of the child is but one of a myriad of factors to be considered on this review. It is not the primary factor and may be trumped by others. Specifically, the best interests of the child cannot trump national security interests. The Ministers indicate CBSA has been sensitive to the needs of Mr. Mahjoub’s children. Reliance is placed on the evidence of Mr. Al-Shalchi to the effect that officers have been told to keep a safe and respectful distance from the family and to approach Mr. Mahjoub away from the children.

[79] On reply, the position of Mr. Mahjoub had crystallized. As Ms. Jackman put it, the task is to “consider the interests of the children and, to the extent possible, if you can accommodate those interests and still protect security, it is a relevant factor in trying to frame the terms...it is not determinative, but it is relevant” (transcript, volume 20, p. 174, lines 16-25 and p. 175, lines 1-7).

[80] I have strong reservations regarding what I consider to be the over-breadth of Mr. Mahjoub's submissions. However, given his clarification on reply, I do not see any material difference between his position and that of the Ministers. I am prepared to assume, for the purpose of this review, that the best interests of the child is one factor, among others, to be considered when determining whether the conditions of release require modification or amendment. In short, in balancing Mr. Mahjoub's liberty interests and national security interests, I will be mindful of the best interests of his children.

#### The Requests for Modification or Amendment

[81] I shall address each of the requests in turn. However, it is important to note the conditions of release are aimed, in general terms, at ensuring that Mr. Mahjoub does not engage in any act that threatens national security, does not communicate with persons in a manner that could threaten national security, and does not abscond. There is no evidence that Mr. Mahjoub has engaged in any of the foregoing activities over the past 22 months. Accordingly, pursuant to paragraph 82(5)(b), I confirm his release on conditions. I turn now to the specific requests before me.

#### *Home Alone*

[82] Mr. Mahjoub asks that he be permitted to be at home alone (including his backyard). He testified as to the tremendous strain the requirement of constant supervision has put on Mona and Haney El-Fouli, his primary supervisors. It is said that his wife is frequently unable to perform simple but vital tasks, such as purchasing groceries, because she cannot leave him unsupervised. He also claims the requirement of constant supervision has a detrimental impact on the two young boys.

They cannot participate in after-school activities because no one is available to transport them.

Mona El-Fouli is unable to be involved at the children's school and occasionally has not been able to meet with teachers when requested.

[83] Mr. Mahjoub believes, if permitted to be at home alone, any risk he might otherwise pose can be entirely neutralized through other conditions, both existing and new. He states that the telephone line is intercepted, the computer room is locked and the computers are password-protected. He cannot, whether supervised or not, engage in unauthorized communication using any of those devices. He proposes to have visitors only when a supervisor is present.

[84] The Ministers argue this evidence was before Justice Mosley. The request constitutes a "wholesale amendment" that is inconsistent with Justice Mosley's order. Regarding the evidence of the burden on Mona and Haney El-Fouli, the Ministers note Justice Mosley's response in granting permission for Matthew Behrens to be added as an additional supervisor in order to provide some flexibility to the family. However, Mr. Mahjoub and Ms. El-Fouli determined they would not use Mr. Behrens as a supervisor because he is more beneficial to them as an activist. Further, the Ministers point to Ms. El-Fouli's testimony that she rarely asks the other two supervisors to assist with the supervision. Haney El-Fouli testified that the extent of the supervision by the other approved supervisors is minimal, approximately one percent.

[85] The Ministers rely on Mr. Guay's evidence that, if Mr. Mahjoub were allowed to be at home alone, he would be able to ascertain ways to contact people, or have them contact him. He claimed "there are a number of ways for people to gain access to the house, or at least gain access to a

communication device that is unmonitored.” The Ministers note Mr. Guay’s belief that Mr. Mahjoub, once in communication, would be able to provide “support, encouragement and *gravitas* to the issue [Islamist extremism] based on his previous activities and connections”. Similarly, Mr. Mohammed Al-Shalchi, Enforcement Supervisor of the Greater Toronto Enforcement Centre (GTEC) of CBSA, testified that altering the conditions would increase the opportunity for Mr. Mahjoub to engage in prohibited activity.

[86] The Ministers argue the layout of the Mahjoub residence is such that it would be easy for an unapproved visitor to contact or communicate with Mr. Mahjoub and it would be difficult, if not impossible, for CBSA to monitor whether he is complying with the conditions of release. I note there was evidence with respect to the layout. However no witness testified regarding specific monitoring difficulties. In sum, the Ministers claim trust should not be placed solely in Mr. Mahjoub to comply with the conditions of release.

[87] The principal reason advanced to support the request to remain at home alone is the lessening of the impact on the family of the requirement that Mr. Mahjoub be supervised at all times. Mr. Mahjoub labels it a “serious negative impact” and says the family needs some flexibility. Specifically, if he were to remain at home alone: his wife could accompany the children to their medical appointments; she could attend her own medical appointments; the children would re-enrol in recreational activities and Sunday Arabic school (which has not been possible since his release); the family could go on outings even if he is not well; and, his wife could do the shopping for the household. Mr. Mahjoub elaborated on past incidents and claims being at home alone would have made incidents in relation to hospital visits and emergencies easier.

[88] The past incidents, for the most part, have been canvassed in previous decisions of Justice Mosley. Except to the extent that a revisiting is essential to address a specific request, I see no benefit in repeating what has been dealt with earlier by my colleague.

[89] Haney El-Fouli is Mona El-Fouli's 25-year-old son from a previous marriage. He holds a diploma from Humber College in the field of chemical engineering and microbial analysis. Since April, 2007, he has been employed at Humber River Regional Hospital where he remotely monitors, in real time, dialysis patients located in Ontario, Montreal and British Columbia. When Haney testified at the hearing, his application to return to school was outstanding. During final submissions, counsel advised he is now a full-time engineering student and continues to maintain his employment at the hospital.

[90] Aside from a few months, Haney has lived with his mother and half-brothers throughout Mr. Mahjoub's detention and since Mr. Mahjoub's release. He is an approved supervisor. He accompanies Mr. Mahjoub to mosque on Fridays. He also supervises him during the day whenever his mother is not present. He estimated that Ms. El-Fouli supervises 70-80 % of the time, the other supervisors perhaps 1 %. He does the remainder.

[91] Haney testified that, previously, his mother took the children to entertainment, swimming classes, after-school soccer, and Tae Kwon Do. None of these activities have been possible since Mr. Mahjoub's release. He claimed he is concerned about his half-brothers' mental health and well-being. He worries they will grow to be troubled adults because they do not have the sense that they

are normal. Although it had been suggested the children see a counsellor, he is not sure it has been done.

[92] Mona El-Fouli testified that Haney has been available to supervise in the evenings to enable her to go shopping. Additionally, he sometimes comes home “in between [school and work] to supervise”, if required. Ms. El-Fouli stated the children cannot enjoy vacations because of her supervisory duties and the restrictions on outings. In the past, she volunteered at the school. The children have not participated in extra-curricular activities since their father’s release. She testified they are frustrated and uncomfortable because they are not able to do what other children of their ages do.

[93] Undoubtedly, Mr. Mahjoub’s conditions of release have had negative repercussions on his family. While unfortunate, the impact is insufficient, in and of itself, to warrant granting Mr. Mahjoub’s request to remain at home alone. There are other factors to consider.

[94] Further, Mr. Mahjoub and Ms. El-Fouli are partially responsible for their plight. I appreciate Mr. Ahmed and Mr. Lumley have limited availability to supervise. Ms. El-Fouli testified that Mr. Ahmed works six days per week. Mr. Lumley does not have a vehicle and uses public transit to attend the Mahjoub residence. The round trip takes him 2 ½ hours. He testified he is available once, perhaps twice, a month and finds that to be a comfortable level.

[95] The situation of Mr. Behrens is another matter. Mr. Mahjoub successfully applied (to Justice Mosley) to have Mr. Behrens approved as a supervisor. Subsequently, Mr. Mahjoub and



Ms. El-Fouli made a conscious decision not to utilize his services. At this hearing, Ms. El-Fouli testified Mr. Behrens's availability is limited. That statement stands in sharp contrast to the evidence presented to Justice Mosley (Decision of December 24, 2007, para. 60). Had Mr. Behrens been available to supervise, as he told Justice Mosley he would be, the disadvantage of Ms. El-Fouli bearing the brunt of the supervisory duties (with consequences for the children) might well have been abated. I have some difficulty with Mr. Mahjoub's position that the children's best interests are compromised by their mother's lack of availability when the situation might have been alleviated through utilization of a supervisor (approved to provide flexibility).

[96] I return to Justice Mosley's factual findings as a starting point. As stated earlier, the object of the conditions is the neutralization of Mr. Mahjoub's ability to engage in any act that threatens national security, to communicate with persons in a manner that could threaten national security and to abscond.

[97] From Mr. Al-Shalchi's perspective, Mr. Mahjoub's co-operation with CBSA is sadly lacking. However, he also testified that he believes Mr. Mahjoub is making best efforts to comply with the conditions of release. Mr. Al-Shalchi stated CBSA's opposition to Mr. Mahjoub being at home alone is "because he poses a risk to the national security of Canada." When pressed for specificity, he said it is possible: someone could come over and talk to Mr. Mahjoub; the phone interception could be thwarted; Mr. Mahjoub could gain access to the locked room; or, the password on the computer in the children's room could be defeated.

[98] Mr. Philip Whitehorn, CBSA Chief of Operations, Northern Ontario Region, was called by the Ministers to address the question of electronic monitoring. Mr. Whitehorn discussed the purpose of the electronic monitoring bracelet (determination of the latitudinal and longitudinal position of the person). When Mr. Mahjoub is at home, the GPS receiver would be blocked by the roof. However, CBSA has a clear determination of his location through cellular and radio signals if the hand-held unit is connected to the dock, which is connected to the phone line. The monitoring is reliable unless there is a phone or electricity failure in which case CBSA monitors the alarm to determine the problem. Depending on the situation, CBSA either contacts the individual or attends the residence.

[99] Mindful of the need to engage in a proportionality analysis (the conditions must not be a disproportionate response to the nature of the threat), the question is whether it is feasible to allow Mr. Mahjoub to remain at home alone. I am satisfied, on the evidence, that the electronic monitoring system will go a long way in detecting any effort by Mr. Mahjoub to abscond. I also recognize his contacts have been disrupted during the period of his detention and his release on conditions. However, the possibility of re-instituting contacts remains.

[100] It is the potential for access to the Internet, cell phone, electronic and radio communication devices that looms large. The existing conditions address this issue. Other than the Wii incident (I will have more to say about the Wii later), there is no allegation that Mr. Mahjoub has attempted to gain access to or use any of the prohibited communications devices. However, the conditions contemplate the presence of a supervisor at all times. Do less restrictive safeguards exist to neutralize the threat? As Mr. Mahjoub put it, “any risk he might otherwise pose if permitted to

remain home can be entirely neutralized through other conditions, both existing and new” (my emphasis).

[101] I am satisfied that safeguards can be imposed to neutralize the threat Mr. Mahjoub poses in order that he may remain at home alone. I am prepared to allow Mr. Mahjoub to remain home alone (including the backyard), on weekdays from 8:00 a.m. to 6:00 p.m., provided that he adheres to the requirements set out below. I am satisfied that these provisions will contain the threat Mr. Mahjoub poses to national security or the safety of any person and, at the same time, will enable Mona El-Fouli and the children to engage in the activities that were allegedly aborted upon Mr. Mahjoub’s release. The requirements are:

- (a) The video-conferencing device is to be connected in the living room during the times Mr. Mahjoub is at home alone. Mr. Mahjoub must notify CBSA forthwith (by using the video-conferencing device) that he is alone. CBSA, periodically, may contact Mr. Mahjoub on the video-conferencing device and Mr. Mahjoub must respond. When a supervisor is present, the video-conferencing machine may be disconnected. CBSA, in its discretion, may require verification of the supervisor’s presence before the video-conferencing device is disconnected;
- (b) When Mr. Mahjoub is at home alone, the ethernet wire from the computer in the children’s room must be disconnected from the modem in Haney El-Fouli’s room. A sensor alarm is to be installed, at the Ministers’ expense, on the door to Haney El-Fouli’s room. The sensor alarm is to be activated prior to Mr. Mahjoub being at home alone. It may be disabled when a supervisor is present. Only Mona and

Haney El-Fouli will have the password or other means to activate or disable the sensor alarm;

- (c) Unless specifically stated otherwise, no existing conditions are affected by this amendment. In all cases when anyone other than Mr. Mahjoub is in the Mahjoub residence (including his children), a supervisor must be present.

It remains open to CBSA to conduct random spot checks of the residence, as provided in condition 14.

[102] For completeness, condition 8(ii) remains in effect if Mr. Mahjoub takes his children to school or picks them up from school. He may choose to remain at home. In either case, he is required to notify CBSA. No modification is required with respect to condition 8(iii) and none was requested. The last sentence of condition 8(iv) is no longer required and is deleted.

#### *Elimination of Curfew*

[103] The existing conditions permit Mr. Mahjoub to leave the residence between the hours of 8:00 a.m. and 9:00 p.m. CBSA has discretion to extend the 9:00 p.m. deadline. Mr. Al-Shalchi testified Mr. Mahjoub has requested extensions during the month of Ramadan on approximately two occasions in 2007 and five times in 2008. All requests were approved. He voiced CBSA's objection to the elimination of the curfew on the basis that it would impact on CBSA resources and would allow for "more variables and risk."

[104] Mr. Mahjoub's position is that he is not a child and should not be treated as one. He should not have to ask permission to remain outside after 9:00 p.m. Ms. El-Fouli stated extensions had been requested of CBSA for the backyard and were refused. She related an experience during the summer when the family was sitting outside in the yard. After 9:00 p.m., Mr. Mahjoub sat in the house and pulled his chair to the doorway at the edge of the room in order to be able to communicate with the family. Ms. El-Fouli also claimed Justice Mosley indicated Mr. Mahjoub could raise this issue in the summer.

[105] I am reticent to eliminate the curfew. Again, I refer to Justice Mosley's factual findings. Clearly, Justice Mosley felt a curfew was required. Moreover, he declined to modify it when he was requested to do so. In this respect, Mr. Mahjoub's comment about being treated as a child overshoots the mark. That said, I see no menace, particularly since summer will soon be upon us, in extending the curfew to 11:00 p.m. That should suffice for Mr. Mahjoub's purposes. It remains open to Mr. Mahjoub to revisit this issue during a subsequent review.

#### *Outings*

[106] As earlier noted, generally, condition 8(i) permits Mr. Mahjoub, with the prior approval of CBSA, to leave his residence three times per week (with provision for a specified number of extended outings). Requests for CBSA approval of outings are to be made on a weekly basis with not less than 72 hours notice prior to a given outing. Mr. Mahjoub wants all restrictions removed, provided he remains within the fixed perimeter. Additionally, he asks for permission to travel outside the fixed perimeter, with CBSA authorization, on a one-week notice of the request.

[107] The Ministers oppose any changes and seek to amend the existing condition to provide that, if Mr. Mahjoub does not leave his residence within 30 minutes of the scheduled outing, the outing will be cancelled. Further, the Ministers request that CBSA be given 90 minutes notice with respect to religious functions Mr. Mahjoub plans to attend.

[108] The issue of overt “eyes-on surveillance” was a topic of much debate. In my view, it can be characterized as a subsidiary issue relevant to “outings” and may be appropriately addressed under this section of these reasons. The question is whether CBSA should be prohibited from conducting overt “eyes-on surveillance.”

[109] Mr. Mahjoub testified that although he wants the limit on the number of outings and the requirement for CBSA approval of outings eliminated, he would still submit the “outing request form.” The form provides details regarding the outing and is submitted to CBSA at least 72 hours in advance of the outing. Additionally, he claims he would continue to advise CBSA when leaving from and returning to his residence, wear the GPS, and be accompanied by a supervisor. From Mr. Mahjoub’s perspective, removing the necessity for approval of outings would reduce the problems with CBSA.

[110] The Ministers refer to the fact Justice Mosley tailored the conditions to neutralize the risk posed by Mr. Mahjoub’s release. Further, Justice Mosley described the conditions of release as being “akin to house arrest”. By his own admission, Mr. Mahjoub cancelled approximately 40 approved outings in the last year, due to his health. Yet, he now wants to be granted the right to go wherever he wants, whenever he wants. According to the Ministers, the factual underpinnings and

the evidence provided by Mr. Mahjoub do not support such a substantive amendment and his request should be denied.

[111] I am not persuaded that the first prong of Mr. Mahjoub's request (elimination of CBSA authorization for outings) should be granted. First, Mr. Mahjoub has accepted Justice Mosley's factual findings for the purpose of this hearing. The conditions of release were regarded as appropriate at the time they were fashioned. Indeed, for the most part, the conditions were proposed to Justice Mosley by Mr. Mahjoub's counsel in conjunction with the Ministers' counsel. Second, and most importantly, I have not heard any evidence that would lead me to conclude that the objectives of the conditions I have delineated earlier at paragraphs 81 and 96 of these reasons would, or could, be achieved if I were to accede to this request. Consequently, the request will not be granted.

[112] The second prong of the request is a different matter. Considering Mr. Mahjoub's record of compliance with the conditions over the past 22 months, I see no reason in principle why CBSA should not be granted discretion to approve requests for outings outside the fixed perimeter. Each request would require the assessment of a number of factors including, but not limited to: the distance involved; the nature of the location; the purpose of the outing; the proposed method of transportation; proximity to prohibited items (at the proposed location); and potential for CBSA response in the event of a serious breach. I am not at all certain that the proposed one-week notice period is sufficient to enable CBSA to properly consider a request. Therefore, I conclude that the notice should be two weeks, rather than one.

[113] I acknowledge there are problems between Mr. Mahjoub and CBSA officials. The Ministers attribute the difficulty to Mr. Mahjoub's "volatile and unpredictable behaviour coupled with his unwillingness to work productively with the CBSA." As noted previously, Mr. Al-Shalchi described Mr. Mahjoub's co-operation as "sadly lacking." Yet, in Mr. Mahjoub's view, he previously had been co-operative and paid a price for it. He claims when CBSA made requests of him that were not mandated by Justice Mosley's order, he initially complied. CBSA responded by asking for the conditions to be amended to reflect "practice". Subsequently, Mr. Mahjoub took the position that he would comply to the letter with the provisions of the order, no more, no less.

[114] I do not wish to dwell unnecessarily on this aspect of the matter as many of Mr. Mahjoub's complaints regarding the timing of CBSA's responses to his outing requests have since been resolved. Similarly, his complaints regarding CBSA inquiries with respect to his attendance on outings have been resolved. However, in fairness to Mr. Mahjoub, CBSA has demonstrated a tendency to overreach on more than one occasion. The Ministers conceded the impropriety (regarding the confusion surrounding the paddle boat and rink incidents) of CBSA's cancellation of all outings until further notice. In my view, neither the paddle boat incident at Ontario Place nor the rink incident (characterized by the Ministers as technical breaches), on a reasonable interpretation of the conditions of release, could be regarded as a breach. The reaction of CBSA's Chief of Operations can only be described as high-handed. Additionally, Mr. Al-Shalchi acknowledged that CBSA had failed to respond to outing requests due to "paper mismanagement." An objective observer would understand Mr. Mahjoub's frustration.



[115] However, it is the overt “eyes-on surveillance” that has proven to be the most insidious aspect of the outings for Mr. Mahjoub and his family. The undisputed evidence is that CBSA officers maintain overt “eyes-on surveillance” when Mr. Mahjoub is on an outing with his family. This means the officers overtly maintain “a visual on the client at all times.” If the Mahjoub family is in a vehicle, the vehicle is followed. If the Mahjoub vehicle is parked, the officers (normally in teams of two) park their vehicle as close to the Mahjoub vehicle as possible, or at least close enough to “ensure a visual” from the officers’ vehicle. Overt physical surveillance is conducted on all outings except for exercise walks, the delivery and pick-up of the children to and from school and religious outings to the mosque. When Mr. Mahjoub goes to mosque, the officers remain outside. During overt “eyes-on surveillance”, the officers are as visible to Mr. Mahjoub as he is to them.

[116] Mr. Al-Shalchi testified that SOPs for monitoring security certificate cases exist at both the national and local levels. The local SOPs were tendered as evidence (exhibits R-1, R-2 and R-3). The national SOP (IC-7) was tendered in redacted form (exhibit R-46). Initially, the redactions (based on the CBSA position that because the document was labelled “secret” its release would be injurious to national security) were so extensive that little remained of the document. Consequently, at the eleventh hour, the Ministers submitted a paragraph 83(1)(c) request for an *in camera* hearing. The hearing resulted in the disclosure of a far more extensive document than that initially proposed by CBSA. In my view, CBSA conflates the issues of government information security requirements (the classification of the document as “secret”) and a legitimate concern that the release of the information could be injurious to national security or endanger the safety of any person.

[117] In any event, Mr. Al-Shalchi testified he did not have full knowledge of Mr. Mahjoub's history. National Headquarters (NHQ) would have the "global history." He believed the policy on surveillance likely emanated from the Director of Inland Enforcement and the President of CBSA. He stated he and the officers completed the local SOP for surveillance on outings and it was approved by the Chief of Operations, GTEC, in April 2008. He said the national manual covers the same issues. In many respects, that is correct. However, it is not always the case.

[118] Specifically, Mr. Al-Shalchi explained all surveillance is overt as opposed to covert. CBSA considers it "important [the named person] knows surveillance is being conducted." Yet, the national SOP (IC-7) defines "surveillance" as "the act of covertly monitoring, following and observing the [individual subject to security certificate] ISSC." Mr. Al-Shalchi testified that CBSA offers a covert surveillance course. However, no more than six GTEC officers have had the training. No training is provided for overt surveillance. Section 9.4 of IC-7 discusses physical monitoring, vehicular physical monitoring and interaction with the ISSC. The first paragraph of the physical monitoring section reads:

The purpose of physical monitoring, where officers watch and listen to the ISSC during outings, is to ensure the ISSC's compliance with the conditions of release. This tool may also be used to maintain an overt physical presence at the residence to discourage the ISSC from breaching the conditions.

The following statement appears under "vehicular physical monitoring":

A full surveillance team is not required for physical monitoring. Vehicles used for physical monitoring do not need to be covert and should not be the same vehicles used for surveillance.

Section 9.6 of IC-7 deals with spot checks. It states:

A spot check may also be used to verify ISSC compliance and is not as labour intensive as physically monitoring an entire outing or a long-term situation at the residence. A spot check may involve stationing officers along a pathway the ISSC will use or at a location they intend to visit. It could involve a short period of following the ISSC, or simply visual confirmation of their location and activity before moving on.

The strategic benefit of using this tool is that the ISSC will know that the officers were there, but not why or when they will come again. When applied properly, this tool may be more effective than continuous physical monitoring.

[119] All of which is to say, IC-7 does not mandate overt “eyes-on surveillance.” It does not preclude it, but it does not require it. Indeed, IC-7 also states “the deemed level of risk and choice of tool should be based on regional discretion and the risk management framework.”

Significantly, section 5.3 of IC-7 reads:

The foundation of the CBSA security-certificate monitoring program is the risk-management framework which assesses risk so that the appropriate tool can be used to neutralize or contain that risk.

Risk is the chance that something bad will occur. It is based on the likelihood of something happening and the amount of damage that will occur if it does happen. When dealing with ISSC monitoring this implies a negative impact on national security and/or officer and public safety.

[120] Detailed guidance for the preparation of an individualized risk assessment follows and encompasses several pages. Section 9.9 of IC-7 addresses “outing approval”. The penultimate paragraph of that section is reproduced here.

The ISSC may be required to contact the CBSA prior to the start of the outing and upon return. The decision about whether to conduct

physical monitoring or surveillance of an outing will depend on the level of risk. (my emphasis)

[121] These excerpts from IC-7 stand in contradistinction to the manner in which GTEC consistently conducts its monitoring of Mr. Mahjoub's outings. In this respect Mr. Al-Shalchi's testimony before Justice Mactavish on November 18, 2008 is disturbing. On consent, the transcript of his evidence was tendered at this hearing. Mr. Al-Shalchi was asked if an individualized risk assessment had been conducted with respect to Mr. Mahjoub. His response was "[n]ot that I am aware of" (transcript of proceedings before Justice Mactavish, November 18, 2008, p. 613, lines 13-22). In answering questions as to whether there is a procedure at GTEC to assess risk, Mr. Al-Shalchi stated, "I don't know if there is. I don't think there is" (p. 614, lines 11-20). Since Mr. Al-Shalchi is the Ministers' witness and is the supervisor of the field officers who monitor Mr. Mahjoub, I presume if an individualized risk assessment had been completed, he would be aware of it. Since he is not, I conclude there is no such assessment.

[122] I appreciate that IC-7 constitutes guidelines. As such, it is not binding and does not have the force of law. Further, as Justice Mactavish concluded, and I concur with her conclusion, Justice Mosley's reasons "make it clear that he has vested considerable discretion in the CBSA in relation to the issue of physical surveillance as an adjunct to other means of monitoring the compliance of Mr. Mahjoub with the terms and conditions of his release."

[123] I am loath to interfere with the operational determinations of CBSA. The modality of surveillance is a matter within its expertise. The court is ill-equipped in this regard and it relies heavily upon CBSA to monitor Mr. Mahjoub's activities.

[124] That said, I am unable to comprehend (nor was there evidence to assist me) how GTEC can determine the appropriate method of monitoring or surveillance in the absence of an individualized risk assessment regarding Mr. Mahjoub. I consider CBSA's failure to conduct such assessment to be a serious omission. This shortcoming places the field officers and their supervisors in an untenable position. They are left to monitor Mr. Mahjoub's compliance with the conditions without the benefit of the risk assessment.

[125] Mr. Al-Shalchi impressed me as a candid and forthright person. His efforts to communicate and negotiate with Mr. Mahjoub are commendable. However, he has little decision-making power.

[126] Mr. Mahjoub maintains that the overt "eyes-on surveillance" is excessive and detrimental to the children. Mr. Al-Shalchi claims he and his officers do consider the children. I see no need to address this conflict at this time. Absent the benefit of an individualized risk assessment, I am not well-positioned to determine whether the overt "eyes-on surveillance" that has been conducted was an appropriate response to the risk. In any event, past conduct cannot be reversed. I am in no better position with respect to prohibiting CBSA from conducting overt "eyes-on surveillance" in the future for essentially the same reason. However, I hasten to add that an individualized risk assessment regarding Mr. Mahjoub should be conducted forthwith. Justice Mosley's factual findings, combined with the *Charkaoui I* factors, demand no less.

[127] Turning to the remainder of the issues in relation to condition 8(i), the Ministers request that an outing be cancelled if Mr. Mahjoub does not leave within 30 minutes of the scheduled departure time. Mr. Al-Shalchi testified that it would be acceptable if Mr. Mahjoub notified CBSA that his departure would be delayed. If Mr. Mahjoub is not well enough to go on an approved outing, or if he intends to delay his departure, he should notify CBSA before the scheduled departure time. It is reasonable to assume Mr. Mahjoub will know 30 minutes before he is scheduled to depart whether he will be well enough to go as scheduled, later than scheduled, or at all. Consequently, he should notify CBSA, as noted, at least 30 minutes before the scheduled departure time.

[128] The Ministers' request that Mr. Mahjoub provide 90 minutes notice to CBSA of his intention to go on religious outings is legitimate. The suggested notice period relates directly to the programming of the GPS. Mr. Al-Shalchi testified that CBSA, during business hours, requires 30 minutes to complete the programming whereas, after business hours, 90 minutes is necessary (although more than 90 minutes would provide a more comfortable window). It is unacceptable for Mr. Mahjoub to notify CBSA he is going to mosque when he is about to leave the residence. The notice to CBSA should be commensurate with the time it requires. Accordingly, if Mr. Mahjoub is going on a religious outing on a weekday during business hours, he shall provide 30 minutes notice to CBSA. After business hours and on weekends, he shall provide 90 minutes notice to CBSA.

#### *Visitors*

[129] Mr. Mahjoub argues that the requirement that visitors be approved in advance is unnecessary in light of the fact that he must have a supervisor present whenever someone visits and because it unduly restricts the social life of his family members. Haney El-Fouli indicated most of

his friends are not aware of the situation [Haney's responsibilities regarding the conditions]. He would be reluctant to subject them to the approval process. It was also mentioned some of Ibrahim's and Yusuf's friends, who have exceeded 15 years of age, now require approval notwithstanding that they have been visiting, without such approval, in the past. No specificity was provided in this respect nor was any satisfactory response provided to my question as to whether the children (who ages are 9 and 11) would socialize with children four or six years their seniors.

[130] Given the factual underpinnings upon which this hearing proceeded and the absence of a risk assessment, with one exception, I am not inclined to amend this condition at this time. The exception relates to the friends of Haney El-Fouli. Having heard his evidence, I am left with the distinct impression that, except on the rarest of occasions, Haney would not be inclined to bring his friends home. Should he choose to do so, his visitors need not be pre-approved. The Ministers offered no evidence to support the preservation of such a restriction. I am satisfied Haney El-Fouli would not risk his credibility as a supervisor, or as a person, by permitting interaction between his friends and Mr. Mahjoub.

#### *Contact with Others Outside the Home*

[131] This request falls primarily under condition 10 although it may relate to other conditions as well. Condition 10 relates largely to pre-approved perimeters, a matter that has been disposed of earlier in these reasons. One issue remains outstanding in relation to this condition. Mr. Mahjoub is concerned that when he encounters someone outside the residence, he is restricted to a casual greeting, such as "hello", and is unable to speak beyond that greeting. Mr. Mahjoub would like to be able to "pass the time of day" with persons he encounters "happenstance." For example, he

would like to be able to inquire if the individual's wife and family are well. The Ministers do not object to Mr. Mahjoub passing the time of day with an individual whom he encounters "happenstance." Existing conditions which prohibit such dialogue should be amended. To be clear, this amendment does not authorize Mr. Mahjoub to engage in conversation. The permissible exchanges are to be brief (in passing) and superficial in nature.

### *Communication Devices*

[132] All requests relating to communication devices will be addressed under this section of these reasons. I begin with those of Mona El-Fouli.

[133] Ms. El-Fouli's family is in Egypt. She testified that her father is gravely ill. She is not able to visit him because it is not safe for her to go to Egypt and she is obligated to remain here to supervise her husband. Before Mr. Mahjoub's release, Ms. El-Fouli had a VOIP program that enabled her to communicate with her family, both orally and visually. She seeks permission to re-install such a system.

[134] The Ministers claim this issue was previously considered by Justice Mosley "albeit perhaps not in a fulsome manner." Justice Mosley was not prepared to allow access to such a program without hearing evidence and submissions on the issue. The Ministers provided their evidence *in camera* and Mr. Mahjoub was given the opportunity to make submissions on the issue. No submissions were made. Justice Mosley's order permitting an internet connection to the house was made under the *proviso* that no such programs (VOIP) were to be permitted.



[135] The Ministers propose, if Ms. El-Fouli wishes to communicate with her family through the use of such a program, she should do so from an internet café or from the library. The Ministers state that the need for the installation of a VOIP program in the residence has not been established.

[136] Justice Mosley's order prohibited the installation of such a system in the interim (my emphasis). He reserved a final ruling on the issue pending receipt of Mr. Mahjoub's submissions. I am satisfied the failure to make those submissions was inadvertence on the part of counsel and the issue was overlooked, unintentionally. Further, I reject the submission Ms. El-Fouli must demonstrate need in order to succeed. She has explained why she would prefer to have the program installed at home. The conditions seek to neutralize the threat posed by Mr. Mahjoub. Thus, the question is whether the condition prohibiting the installation of a VOIP program is required to accomplish that task.

[137] Other than the reference to Justice Mosley's reasons, which I do not find militates in the Ministers' favour to the extent suggested, I have no evidence as to why such a restriction should be ordered. Whatever evidence the Ministers chose to lead before Justice Mosley was not tendered at this hearing. In the absence of any evidence as to why the installation of a VOIP program should not be permitted and, in view of the existing arrangements for the housing of the computer systems in the Mahjoub residence, I am prepared to grant Ms. El-Fouli's request. The caveat is that the system is to be installed on the computer in Haney El-Fouli's bedroom, which is under lock and key, and in accordance with these reasons (if Mr. Mahjoub wishes to be at home alone), will be equipped with a sensor alarm. The VOIP program is not to be installed on the computer in the children's room.

[138] Next, Ms. El-Fouli requests that the requirement she consent to the interception of her cellular telephone be deleted. I have no reservation in granting that request. Ms. Snow, the Manager of the Counter-terrorism Unit of CBSA at NHQ, testified that Ms. El-Fouli's cellular telephone has never been intercepted. Since 22 months have passed without interception and, since no evidence was tendered to justify the necessity of an interception being initiated at this time, I am unable to conclude that such a condition is required to neutralize the threat posed by Mr. Mahjoub. The provision requiring Ms. El-Fouli to consent to the interception of her cellular telephone is deleted.

[139] It is convenient at this time to discuss the Ministers' request that call forwarding be prohibited from the landline telephone at the Mahjoub residence. The purpose of the landline intercept is to monitor Mr. Mahjoub's communications. The purpose is defeated if incoming calls are forwarded to another telephone line. Although there is no suggestion that anyone in the Mahjoub household has used the call-forwarding feature, the request that such a prohibition be specifically articulated is legitimate and is granted.

[140] There are also requests regarding conditions applicable to Haney El-Fouli, specifically to remove the requirements that he keep his cell phone only in his room (while in the residence) and submit detailed monthly records regarding his cell phone use. The Ministers response is that the conditions were intended to ensure that Mr. Mahjoub did not indirectly communicate with prohibited contacts.

[141] Haney El-Fouli is not prohibited from carrying his cell phone with him in a vehicle, even if Mr. Mahjoub is also present. I acknowledge that the current restriction is inconvenient for Haney. The concern I have is the possibility that Haney will inadvertently leave the cell phone elsewhere in the residence. I am not opposed to deleting the current restriction provided Haney El-Fouli keeps his cell phone on his person at all times. Under no circumstances is Mr. Mahjoub to have access to Haney El-Fouli's cell phone.

[142] As for the cell phone records, I appreciate Haney El-Fouli's concerns regarding CBSA's practice of photocopying and forwarding mail to the Counter-terrorism Unit. In view of his evidence (not available to Justice Mosley), I consider the restriction to be unnecessarily intrusive. Further, I am satisfied that Haney El-Fouli will not facilitate contact between Mr. Mahjoub and prohibited individuals. The restriction is deleted from the conditions of release.

[143] Mr. Mahjoub also wants to eliminate the requirement that the family provide CBSA computer-use records. I have not been persuaded that the elimination of this condition is appropriate. I reiterate that we are proceeding on the basis of the factual findings of Justice Mosley. When the risk assessment is available, the condition can be revisited in light of that assessment.

[144] This leaves only the Wii gaming machine. Some context is required. Haney El-Fouli, with his first paycheque, bought the Wii for his half-brothers. He chose the Wii over PSP (Playstation Portable) and other gaming systems, in part, because he understood that wireless internet capability for the Wii required a SIM card, which he did not intend to purchase. He was mistaken. I see no useful purpose in relating the details of the seizure of the Wii gaming device and the children's

devastation over losing it. Suffice it to say Mr. Mahjoub proposes that the Wii be returned to the Mahjoub residence, provided it is kept in the secured computer room. The Ministers consent to such an arrangement.

[145] Although I was initially inclined to accept this proposal, upon reflection, I do not think that the children's use of the Wii should be restricted to the secured computer room. CBSA completed forensic testing of the gaming device. It seems to me that the children, or indeed the whole family, should be permitted to use the gaming device in any part of the house, provided:

- (a) it is not used to access the internet;
- (b) it is stored in the secured computer room (Haney El-Fouli's room) at all times when it is not in use and whenever a supervisor is not present; and
- (c) it is submitted to CBSA, from time to time as CBSA may request, for forensic testing.

#### *Mail Interception*

[146] This topic was the subject of intense debate before Justice Mactavish and is described in her reasons at paragraphs 14 through 103. I do not intend to revisit issues that have been determined by my colleague.

[147] In accordance with Justice Mosley's order, Mr. Mahjoub, Mona El-Fouli and Haney El-Fouli provided written authorizations consenting to the interception of their mail. Justice Mactavish concluded that CBSA has the authority to intercept and to make and retain copies of the mail. She further held Mr. Mahjoub could have no "reasonable expectation of privacy in relation to his mail,

to the extent the information contained in the correspondence is being utilized by the CBSA for the purpose of monitoring the threat posed... and [his] compliance with the terms and conditions of [his] release.”

[148] Ms. Snow testified that the Counter-terrorism Unit receives copies of the intercepted mail for analysis. She indicated that the core principle associated with the interception of the mail is to analyze it for potential breaches of the terms and conditions. Mr. Mahjoub argues the contents of IC-7 belie this assertion. He urges me to conclude CBSA exceeded its authority in the way it has handled the mail. I see no need to make such a determination. If CBSA has, in the past, exceeded its authority (and I make no finding in this respect) it is now bound by Justice Mactavish’s ruling. CBSA is not authorized to use the mail interception for the purpose of intelligence gathering.

[149] The Ministers do not dispute that there have been problems in relation to the interception of the mail. There have been occasions when Canada Post has delivered the redirected mail late to CBSA. This, in turn, resulted in delayed delivery to the Mahjoub residence. Additionally, CBSA, through inadvertence, failed to renew the mail direction request. Apparently, CBSA personnel expected a reminder notice from Canada Post. It seems that issue has since been addressed and “fail-safe reminder mechanisms” have been built into the administrative processes. Some agencies, such as ODSP, do not permit mail to be re-directed. Consequently, some mail was not delivered at all. More recently, during a “work to rule”, Canada Post was sending mail directly to the Mahjoub household in spite of the redirection request. To his credit, Mr. Mahjoub notified CBSA of the state of affairs. The matter has since been rectified.

[150] However, Mr. Mahjoub's insistence on strict adherence to the conditions of release in the literal sense has hampered CBSA efforts to accommodate the family. For example, other security certificate subjects have used CBSA's address as the direct mailing address to alleviate the ODSP problem. Mr. Mahjoub refused to follow suit. He was not required to do so, but it would have attenuated the problem if he had. Further, Mr. Mahjoub, many times, insisted CBSA deal directly with him (because he is the subject of the security certificate). When CBSA delivered all mail to him, he called it "harassment" and refused to accept mail addressed to anyone other than himself. By his own admission, the quantity of mail that is addressed to him personally is negligible.

[151] I am somewhat confused as to the precise nature of Mr. Mahjoub's request in relation to the mail. On the one hand, he proposes various restrictions regarding what can or cannot be opened and what can or cannot be photocopied. On the other hand, he proposes that only his mail should be subject to interception.

[152] The condition seeks to prevent unmonitored communication between Mr. Mahjoub and prohibited persons. It applies to other members of the household, by virtue of their consents, to safeguard against the possibility that a prohibited person could avoid detection by addressing an envelope, for example, to Ms. El-Fouli. The proposals presented by Mr. Mahjoub would result in a completely unwieldy situation. Mail is redirected based on address and addressee. It is not redirected on the basis of the sender.

[153] I am not satisfied that the condition with respect to the mail interception should be amended as requested. I will prohibit CBSA from opening the mail of Haney El-Fouli in the absence of

reasonable and probable grounds to believe that the mail contains information that may be of assistance in monitoring compliance with the conditions of release or the threat Mr. Mahjoub poses. I will not prohibit CBSA from opening, or photocopying, the mail of Mona El-Fouli. As indicated, the amount of mail addressed to Mr. Mahjoub is negligible. Most of the mail is addressed to Ms. El-Fouli. Consequently, effective monitoring in this respect necessitates that her mail be subject to the condition. The consents to the mail interception must remain operative.

[154] I accept that this determination presents some inconvenience with respect to the timing of Ms. El-Fouli's receipt of the mail. I reject the suggestion that alternatives are not available to alleviate the alleged consequences in this regard. Ms. El-Fouli can seek direct deposit of her ODSP cheques. That avenue is timelier than direct delivery. Credit card charges, balances and statements can be accessed on-line or by telephone inquiry. Reasonable options are available to eliminate the consequences of late mail delivery. CBSA should make best efforts to deliver the mail to the Mahjoub residence within 24 hours of its receipt at CBSA.

[155] Finally, I see no reason, on the basis of the evidence adduced at this hearing, to delete the word "written" from the phrase "written communication" in condition 13.

### *Subway*

[156] Mr. Mahjoub wishes to be permitted to use city transit, including the subway. He states that subway transport is cheaper and faster. Much was made of the cost associated with parking in downtown Toronto. No concrete evidence was tendered in this respect. Mr. Mahjoub's and his counsel's generalized statements do not allow for precise calculations. For example, there was no

mention of the cost of subway transportation for more than one individual, or at all. The argument, by implication, is premised on one round trip. During the hearing, Ms. El-Fouli generally left the courtroom for a period of time and returned later. This occurred at least once, often twice, each day. I assume, without knowing, that she was attending to the children. If that is so, and admittedly it is speculative on my part, Ms. El-Fouli could make as many as three round-trips per day.

[157] Further, Mr. Mahjoub is not restricted from using city transit. He is prohibited from using the subway. It is common ground that his location and movements cannot be monitored in the underground. Referring once more to the objectives of the conditions delineated earlier at paragraphs 81 and 96 of these reasons, in my view, the objectives could not be achieved if Mr. Mahjoub were permitted to use the subway.

[158] Mr. Mahjoub's counsel alternatively requested CBSA be ordered to pay for Mr. Mahjoub's parking when his presence is required in court in relation to these proceedings. I will not make such an order. Even if I were so inclined (and I am not), there is an insufficient evidentiary basis upon which such an order could issue.

#### *Video and Audio Recording*

[159] The Ministers asked that the comments of Justice Mosley, at paragraph 101 of his reasons dated December 24, 2007, where he stated "Mr. Mahjoub, or anyone else at the home, should not be video-taping or audio-taping the officers as they are carrying out their duties" be formalized as a condition.



[160] Mr. Mahjoub states he has abided by that direction notwithstanding that it was contained “only in Justice Mosley’s reasons.” He opposes the Ministers’ request and says he should be permitted to video or audio tape interactions between CBSA and him in order that the court might have the best and most reliable evidence upon which to make its determinations. Any concerns about the possibility of CBSA’s officers’ identities and actions being publicized could be neutralized by the imposition of a further condition that such recordings be used solely for court proceedings and no other purpose.

[161] In fact, Justice Mosley did not simply comment about this matter in his reasons. Reference to his order dated December 24, 2007 indicates he ordered the revised order of April 11, 2007 as varied by the order of June 14, 2007 and the order of September 27, 2007 be further amended.

Paragraph 10 of his order provides:

10. The following paragraph shall be added:

Neither Mr. Mahjoub nor any person in his residence shall make a recording of CBSA officers by video or recording device, while they are carrying out their duties in monitoring compliance with the terms and conditions of this order.

[162] Schedule “A” to Justice Mactavish’s reasons of January 15, 2009, is a consolidated version of Mr. Mahjoub’s “release terms and conditions.” The above-noted paragraph 10 appears at paragraph 25 of her document. Schedule “A” to these reasons is identical to Justice Mactavish’s Schedule “A”. Since the condition was ordered, the Ministers’ request need not be addressed. Mr. Mahjoub’s position is premised, in part, on the basis that no order in this respect was made.

[163] I am not inclined to vacate Justice Mosley's condition. The relationship between Mr. Mahjoub and CBSA was described by Ms. Al-Shalchi as "fractious and tense." I am hopeful that the amendments and modifications I have made to the existing conditions will assist in easing some of the tension and things will settle down. It is to the benefit of all that there be co-operation, insofar as it is possible, between Mr. Mahjoub and CBSA. For the moment, that is not the case. I have little confidence that the word "reasonable" would be appropriately interpreted. This is not the proper time to eliminate Justice Mosley's condition.

[164] This completes the review of the conditions of release. If the parties wish an order incorporating the amendments and modifications discussed in these reasons, counsel shall jointly prepare an order containing a consolidation of the conditions of release, incorporating the changes, for submission to me. Schedule "A" to these reasons may be utilized as the conditions of release in existence immediately prior to the release of these reasons. Because this proceeding is ongoing, counsel may wish an order that merely details the conclusions of this hearing. Should that be the case, counsel shall jointly prepare a draft order for submission to me.

[165] My conclusions in relation to the amendments and modifications of the existing conditions are summarized below.

#### Conclusions

(1) Mr. Mahjoub may remain at home alone (including the backyard) on weekdays from 8:00 a.m. – 6:00 p.m., provided:

- (a) The video-conferencing device is connected in the living room during the times Mr. Mahjoub is at home alone. Mr. Mahjoub must notify CBSA forthwith (by using the video-conferencing device) that he is alone. CBSA, periodically, may contact Mr. Mahjoub on the video-conferencing device and Mr. Mahjoub must respond. When a supervisor is present, the video-conferencing machine may be disconnected. CBSA, in its discretion, may require verification of the supervisor's presence before the video-conferencing device is disconnected;
  
- (b) When Mr. Mahjoub is at home alone, the ethernet wire from the computer in the children's room must be disconnected from the modem in Haney El-Fouli's room. A sensor alarm is to be installed, at the Ministers' expense, on the door to Haney El-Fouli's room. The sensor alarm is to be activated prior to Mr. Mahjoub being at home alone. It may be disabled when a supervisor is present. Only Mona and Haney El-Fouli will have the password or other means to activate or disable the sensor alarm;
  
- (c) Unless specifically stated otherwise, no existing conditions are affected by this amendment. In all cases when anyone other than Mr. Mahjoub is in the Mahjoub residence (including his children) a supervisor must be present.

(2) Condition 8(ii) remains in effect if Mr. Mahjoub takes his children to school or picks them up from school. He may choose to remain at home. In either case, he is required to notify CBSA.

The last sentence of condition 8(iv) is deleted.

(3) The existing times within which Mr. Mahjoub may leave the residence (8:00 a.m. – 9:00 p.m.) are modified to extend the times from 8:00 a.m. – 11:00 p.m.

(4) CBSA is granted discretion to approve requests for outings outside the fixed perimeter. Requests are to be submitted to CBSA not less than two weeks in advance of the proposed outing.

(5) Mr. Mahjoub must notify CBSA, at least 30 minutes before the scheduled departure time for an approved outing, if he intends to go on the outing as scheduled, later than scheduled, or at all.

(6) If Mr. Mahjoub is going on a religious outing on a weekday during business hours, he shall provide 30 minutes notice to CBSA. After business hours and on weekends, he shall provide 90 minutes notice to CBSA.

(7) CBSA approval is not required for friends of Haney El-Fouli to visit Haney El-Fouli at his home.

(8) It is permissible for Mr. Mahjoub to “pass the time of day” with persons he encounters “happenstance.” The permissible exchanges are to be brief (in passing) and superficial in nature.

- (9) A VOIP program is permissible, provided:
  - (a) It is installed on the computer in Haney El-Fouli's room;
  - (b) It is not installed on the computer in the children's room.
  
- (10) The condition requiring Mona El-Fouli to consent to the interception of her cell phone is deleted.
  
- (11) Call forwarding from the landline telephone in the Mahjoub residence to another telephone, cellular or landline, is strictly prohibited.
  
- (12) The provision requiring Haney El-Fouli to use and store his cell phone in his bedroom is deleted. When in the Mahjoub residence, Haney must ensure that his cell phone is on his person at all times. Under no circumstances is Mr. Mahjoub to have access to Haney El-Fouli's cell phone.
  
- (13) The requirement for the production of Haney El-Fouli's cell phone records is deleted.
  
- (14) The Wii gaming device may be used anywhere in the Mahjoub residence provided:
  - (a) it is not, at any time, used to access the internet;
  - (b) it is stored in the secured computer room (Haney El-Fouli's room) at all times when it is not in use and whenever a supervisor is not present; and
  - (c) it is submitted to CBSA, from time to time as CBSA may request, for forensic testing.

(15) The consents to the mail interception remain operative. CBSA is prohibited from opening Haney El-Fouli's mail unless it has reasonable and probable grounds to believe that the mail contains information that may be of assistance in monitoring compliance with the conditions of release or the threat Mr. Mahjoub poses.

(16) CBSA is to use its best efforts to deliver the mail to the Mahjoub residence within 24 hours of its receipt by CBSA.

(17) CBSA is to conduct a risk assessment regarding Mr. Mahjoub forthwith.

[166] Section 82.3 of the IRPA provides for an appeal of my decision, if a serious question of general importance is certified. Counsel will have seven days, from the date of these reasons, within which to advise whether a question for certification is proposed. If a question is proposed for certification, supporting submissions, not exceeding two pages double-spaced, are to be served and filed within the same time period (seven days from the date of these reasons).

“Carolyn Layden-Stevenson”  
A Judge of the Federal Court  
designated by the Chief Justice for the  
purposes of the *Immigration and  
Refugee Protection Act*

Ottawa, Ontario  
March 9, 2009

**SCHEDULE "A"**  
to the  
**Reasons for order dated March 9, 2009**  
in  
**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION and  
THE MINISTER OF PUBLIC SAFETY  
and  
MOHAMED ZEKI MAHJOUR  
DES-7-08**

**CONSOLIDATED RELEASE TERMS AND  
CONDITIONS FOR MR. MAHJOUR**

1. Mr. Mahjoub is to be released from detention on condition that he sign a document, to be prepared by his counsel and to be approved by counsel for the Ministers, in which he agrees to comply strictly with each of the following terms and conditions.
  
2. Mr. Mahjoub, before his release from custodial detention, shall be fitted with an electronic monitoring device as will be, from time to time, arranged by the CBSA, along with a tracking unit. Mr. Mahjoub shall thereafter at all times wear the monitoring device and at no time shall he tamper with the monitoring device or the tracking unit or allow them to be tampered with. Where, for necessary medical reasons and at the direction of a qualified medical doctor, the electronic monitoring device must be removed, the CBSA shall be notified of this beforehand and shall arrange for its removal and Mr. Mahjoub's supervision while it is removed for medical treatment. Mr. Mahjoub shall permit CBSA to arrange at its own expense for the installation in the residence specified below of a separate dedicated land based telephone line meeting the CBSA's requirements to allow effective electronic monitoring. Mr. Mahjoub shall consent to the disabling as necessary of all telephone features and services for such separate dedicated land-based telephone line. Mr. Mahjoub shall follow all instructions provided to him regarding the use of the monitoring equipment and any other requirement necessary for the proper and complete functioning of the electronic monitoring equipment and system.

[Condition 3 has now been deleted]

4. Prior to Mr. Mahjoub's release from detention, the sum of \$32,500.00 is to be paid into Court pursuant to Rule 149 of the *Federal Courts Rules*, S.O.R./98-106 from the following persons:
  - i) Mona El Fouli 10,000.00 \$
  - ii) Omar Ahmed Ali 15,000.00 \$
  - iii) Rizwan Wancho 2,500.00 \$
  - iv) John Valteau 5,000.00 \$

5. Prior to Mr. Mahjoub's release from custodial detention, the following individuals shall execute performance bonds by which they agree to be bound to Her Majesty the Queen in Right of Canada in the amounts specified below. The condition of each performance bond shall be that if Mr. Mahjoub breaches any terms or conditions contained in the order of release, as it may from time to time be amended, the sums guaranteed by the performance bonds shall be forfeited to Her Majesty. The terms and conditions of the performance bonds shall be provided to counsel for Mr. Mahjoub by counsel for the Ministers and shall be in accordance with the terms and conditions of guarantees provided pursuant to section 56 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). Each surety shall acknowledge in writing having reviewed the terms and conditions contained in this order, and shall indicate in particular their understanding with respect to this condition.

i)	El Sayed Ahmed	5,000.00 \$
ii)	Murray Lumley	5,000.00 \$
iii)	Maggie Panter	10,000.00 \$
iv)	Elizabeth Block	1,000.00 \$
v)	Laurel Smith	10,000.00 \$
vi)	Dwyer Sullivan	20,000.00 \$
vii)	Elizabeth O'Connor	1,000.00 \$
viii)	Patricia Taylor	1,000.00 \$
ix)	John Valleau	5,000.00 \$

6. Upon his release from detention, Mr. Mahjoub shall be taken by the RCMP (or such other agency as the CBSA and the RCMP may agree) to, and he shall thereafter reside at, in the City of Toronto, Ontario (residence) with Mona El Fouli, his wife, Haney El Fouli, his step son, and Ibrahim and Yusuf, his sons. In order to protect the privacy of those individuals, the address of the residence shall not be published within the public record of this proceeding. Mr. Mahjoub shall remain in such residence at all times, except for a medical emergency or as otherwise provided in this order. While at the residence Mr. Mahjoub is not to be left alone in the residence. That is, at all times he is in the residence either Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens or Murray Lumley must also be in the residence. The term "residence" as used in these reasons encompasses only the dwelling house and does not include any outside space associated with it.
7. Between the hours of 8:00 a.m. and 9:00 p.m., Mr. Mahjoub may exit the residence but he shall remain within the boundary of any outside space associated with the residence (that is, the front or backyard). He must at all times be accompanied by or remain in direct view of either Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens or Murray Lumley. While in the backyard, he may only meet or communicate with persons referred to in paragraph 9, below. This restriction does not apply to casual greetings to the neighbours who live immediately adjacent to the backyard. He may not speak to any other person who may be visiting these neighbours unless they are persons otherwise authorized to visit with or supervise Mr. Mahjoub.
8. Mr. Mahjoub may, between the hours of 8:00 a.m. and 9:00 p.m.,



- i) With the prior approval of the CBSA, leave the residence three times per week, for a duration not to exceed 4 hours on each absence, so long as he remains within the perimeter determined pursuant to paragraph 10 i) below. Requests for such approval shall be made on a weekly basis with not less than 72 business hours notice for the following week's absences and shall specify the location or locations that Mr. Mahjoub wishes to attend as well as the times when he proposes to leave and return to the residence. If such absences are approved, Mr. Mahjoub shall, prior to leaving the residence and immediately upon his return to the residence, report as more specifically directed by a representative of the CBSA. The CBSA may consider special requests by Mr. Mahjoub to extend one of the weekly absences go on a family outing that exceeds 4 hours, so long as such an outing would be within the perimeter determined pursuant to paragraph 10 i). Mr. Mahjoub may be permitted to go on such an outing up to 3 times per month. Such requests must be made to the CBSA at least one week in advance of the proposed family outing. CBSA, in its discretion and where it considers it appropriate to do so, may extend the above-noted hours beyond 9:00pm.
- ii) Leave the residence every school day between the hours of 8:00 and 9:30 a.m. and 3:00 and 4:30 p.m. in the company of Mona El Fouli or Haney El Fouli to take Ibrahim and Yusuf, Mr. Mahjoub's sons, to school in the morning and to pick them up after school. Mr. Mahjoub must go directly to and from the public elementary schools, with the exception of a one-hour period every day for exercise. He must provide CBSA with prior notice of his intended route and location where he will exercise. Mr. Mahjoub may not enter into contact with any other person en route to or from his home. He will provide the name and address and yearly school calendar to the CBSA for each school. Should the children need to leave school for a legitimate and unexpected reason outside of these times, Mr. Mahjoub would be permitted to accompany Mona El Fouli or Haney El Fouli to pick them up, provided CBSA is notified before he leaves of the circumstances, and is notified once he returns home. Mr. Mahjoub shall be permitted to continue with one hour of exercise each day on weekdays between Monday and Friday, when the children are not in school, at times to be specified with CBSA.
- iii) With the prior knowledge of the CBSA, leave the residence as required and for the duration required for the purpose of medical or psychological appointments and related tests, treatment or operations. Notification shall be given at least 48 hours in advance of the intended absence and shall specify the location or locations Mr. Mahjoub must attend and the time when he shall leave and the estimated time when he shall return to the residence. Proof of attendance following the completion of the appointment must also be provided to CBSA. Mr. Mahjoub shall, prior to leaving the residence and immediately upon his return to the residence, report as more specifically directed by a representative of the CBSA. If Mr. Mahjoub experiences a medical emergency requiring hospitalization, the CBSA shall be notified of this as soon as possible by Mr. Mahjoub, Mona El Fouli or Haney El Fouli and shall be advised of the location where Mr. Mahjoub has been taken and shall be advised immediately upon his return to the residence.

- iv) Should an emergency arise in which Ibrahim, Yusef, Haney El Fouli, or Mona El Fouli is required to be taken to the hospital, and no one is available to supervise Mr. Mahjoub in the residence, Mr. Mahjoub is permitted to go to the hospital with Mona El Fouli or Haney El Fouli, regardless of the time of the occurrence, until such time as another individual is available to supervise him. Mr. Mahjoub will notify the CBSA of the circumstances as soon as is reasonably practicable, and will again notify them as soon as he has returned to the residence. Should Mr. Mahjoub be too unwell to leave the home in the context of such an emergency, and should no other supervisor be available, CBSA must be contacted immediately.

During all approved absences from the residence, Mr. Mahjoub shall at all times have on his person the tracking unit enabling electronic monitoring and shall be accompanied at all times by either Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens or Murray Lumley who shall bear responsibility for supervising Mr. Mahjoub and for ensuring that he complies fully with all of the terms and conditions of this order. This requires them to remain continuously with Mr. Mahjoub while he is away from the residence, but for the times that he is actually in consultation with his doctors or taking tests or undergoing treatment or therapy. In such cases Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens or Murray Lumley will remain as close as is reasonably possible to the room in which Mr. Mahjoub is receiving his consultation, treatment or therapy. Should Mona El Fouli need to visit a public restroom while supervising Mr. Mahjoub away from the home, Mr. Mahjoub must remain as close as is reasonably practicable to the restroom. Prior to Mr. Mahjoub's release from detention, Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens and Murray Lumley shall each sign a document in which they acknowledge and accept such responsibility, specifically including their obligation to immediately report to the CBSA any breach of any term or condition of this order. The document shall be prepared by Mr. Mahjoub's counsel and shall be submitted to counsel for the Ministers for approval.

9. No person shall be permitted to enter the residence except:
- a) Mona, Haney, Ibrahim and Yusuf El Fouli.
  - b) the other individuals specified in paragraphs 4 and 5 above.
  - c) his legal counsel, Barbara Jackman, Marlys Edwardh, and Adriel Weaver.
  - d) in an emergency, fire, police and health-care professionals.
  - e) children under the age of 15 years who are friends of Ibrahim and Yusuf, Mr. Mahjoub's sons.
  - f) the building superintendent and such authorized and qualified repair persons as are employed by the building superintendent. 24 hour notice of any repairs must be given to the CBSA, except in the case of an emergency. Mr. Mahjoub is to have no contact with such persons while they are in the residence.
  - g) a person approved in advance by the CBSA. In order to obtain such approval, the name, address and date of birth of such person and such additional information as may be deemed necessary by the CBSA, must be provided to the CBSA at least 48

hours prior to the initial visit. CBSA shall be given 48 hours' notice of any subsequent visits by a previously approved person but may waive that requirement in the discretion of its officials. The CBSA may withdraw its approval of previously approved visitors at any time.

Those persons set out above, who are permitted to enter the residence, may not bring in with them any electronic device which is wireless or capable of being connected to the internet nor a cell phone. The applicant must maintain a log of visitors to the home in a format to be provided by the CBSA, and must make such log available for inspection on request by CBSA.

10. When, Mr. Mahjoub leaves the residence, in accordance with paragraph 8 above, he shall not:
  - i) leave the area bordered by streets or geographic features set out as follows:

City of Toronto:  
West – Etobicoke Creek/HWY 427  
East – Rouge River and Rouge River Park  
North – Steeles Avenue  
South – Lake Ontario and the Lakeshore. The City of Toronto also includes the Toronto islands.

City of Mississauga:  
West – 9<sup>th</sup> Line, Dundas and Winston Churchill Blvd.  
East – 427 down to Eglinton to Etobicoke Creek  
North – 407  
South – Lakeshore
  - ii) be on the property of, or attend at any airport, train station, subway station or bus depot or car rental agency, or enter upon any boat or vessel.
  - iii) meet any person by prior arrangement other than:
    - a) his counsel Barbara Jackman, Marlys Edwardh and Adriel Weaver, and members of their staff assisting in respect of the case;
    - b) members of his family, including Mona El Fouli, his wife, Haney El Fouli, his step son, and Ibrahim and Yusuf, his sons;
    - c) friends of his sons, Yusef and Ibrahim, who are children under the age of 15, on approved outings;
    - d) the bond signers named in paragraphs 4 and 5 above and any other person appointed by the Court to act as a supervisor in accordance with paragraph 6 above; and

- e) any person approved in advance by the CBSA. In order to obtain such approval, the name, address and date of birth of such person must be provided to the CBSA.
  - iv) go to any location other than that or those approved pursuant to paragraph 8 above, during the hours approved.
11. Mr. Mahjoub shall not, at any time or in any way, associate or communicate directly or indirectly with:
- i) any person whom Mr. Mahjoub knows, or ought to know, supports terrorism or violent Jihad or who attended any training camp or guest house operated by any entity that supports terrorism or violent Jihad;
  - ii) any person Mr. Mahjoub knows, or ought to know, has a criminal record, but for Matthew Behrens; or
  - iii) any person the Court may in the future specify in an order amending this order.
12. Except as provided herein, Mr. Mahjoub shall not possess, have access to or use, directly or indirectly, any radio or radio device with transmission capability or any communication equipment or equipment capable of connecting to the internet or any component thereof, including but not limited to: any cellular telephone; any computer of any kind that contains a modem or that can access the internet or a component thereof; any pager; any fax machine; any public telephone; any telephone outside the residence; any internet facility; any hand-held device, such as a blackberry.
- i) The internet connection for the home computers used by Mr. Mahjoub's step son and his two sons shall be kept in a locked portion of the residence that Mr. Mahjoub cannot access, to which only Mona El Fouli and Haney El Fouli shall have keys. Each computer in the residence shall have a password to access it and such passwords shall be held by Mona El Fouli and Haney El Fouli and shall not be provided to Mr. Mahjoub or to his sons, Ibrahim and Yusuf. The internet connection to the computer in Ibrahim and Yusuf's room shall be by means of a manually activated connection in Haney's room and activated only when Mona El Fouli or Haney El Fouli are present. CBSA is authorized to obtain from the internet service provider information regarding the internet connection, including the addresses of websites visited and email addresses to which messages are sent or from which they are received using the connection. Until further Order, no internet-based phone service software or microphones may be installed on computers in the residence which are or may be connected to the internet and if such programs or microphones are presently installed, they must be removed or disabled.
  - ii) A fax machine connected to the landline telephone service to the home is permitted. It shall be used only by Mona El Fouli or Haney El Fouli and kept in the locked room as provided for in subparagraph i). CBSA is authorized to intercept

transmissions to and from this machine. A list of people and offices to whom faxes will be sent from the residence, along with their facsimile numbers, shall be provided to CBSA by Mona El Fouli and updated as necessary.

- iii) The cell phones owned, registered to or used by Mona El Fouli and Haney El Fouli shall remain with them at all times and they must ensure that Mr. Mahjoub does not have access to them. The numbers of these cell phones must be provided to the CBSA, and their use while within the residence must be confined to the room in which the computer with access to the internet is situated. Mona El Fouli shall provide written consent to the interception by or on behalf of the CBSA of all communications involving the cell phones which she uses. Haney El Fouli shall agree to provide CBSA with monthly billing records reflecting calls made from and received by his cell phone. Mr. Mahjoub may use a conventional land-based telephone line located in the residence (telephone line) other than the separate dedicated land-based telephone line referred to in paragraph 2 above upon the following condition. Prior to his release from detention, both Mr. Mahjoub and the subscriber to such telephone line service shall consent in writing to the interception, by or on behalf of the CBSA, of all communications conducted using such service. This shall include allowing the CBSA to intercept the content of oral communication and also to obtain the telecommunication records associated with such telephone line service. The form of consent shall be prepared by counsel for the Ministers. Mr. Mahjoub is also permitted to place a call to CBSA to inform them of the situation and his whereabouts using a land-line telephone outside his residence, should a medical emergency arise outside of the home and no one is able to make the call on his behalf. In the alternative, Mr. Mahjoub may also call 911.
13. Prior to his release from detention, Mr. Mahjoub and all of the persons who reside at the residence shall consent in writing to the interception, by or on behalf of the CBSA, of incoming and outgoing written communications delivered to or sent from the residence by mail, courier or other means. Prior to occupying the residence, any new occupant shall similarly agree to provide such consent. The form of consent shall be prepared by counsel for the Ministers.
14. Mr. Mahjoub shall allow employees of the CBSA, any person designated by the CBSA and/or any peace officer access to the residence at any time (upon the production of identification) for the purposes of verifying Mr. Mahjoub's presence in the residence and/or to ensure that Mr. Mahjoub and/or any other persons are complying with the terms and conditions of this order. For greater certainty, Mr. Mahjoub shall permit such individual(s) to search the residence, remove any item of concern, and/or install, service and/or maintain such equipment as may be required in connection with the electronic monitoring equipment and/or the separate dedicated land-based telephone line referred to in paragraph 2 above. Prior to Mr. Mahjoub's release from detention all other adult occupants of the residence shall sign a document, in a form acceptable to counsel for the Ministers, agreeing to abide by this term. Prior to occupying the residence, any new adult occupant shall similarly agree to abide by this term.

15. Prior to his release, Mr. Mahjoub and his supervising sureties will consent in writing to being interviewed by or on behalf of the CBSA, individually or together, as is deemed required, in order to ascertain whether Mr. Mahjoub and/or other persons are complying with the terms and conditions of this order. The Court may also request a periodic report from Mona El Fouli, Haney El Fouli and/or El Syed Ahmed as to how the terms and conditions are functioning.
16. Prior to his release, Mr. Mahjoub shall surrender his passport and all travel documents, if any to a representative of the CBSA. Without the prior approval of the CBSA, Mr. Mahjoub is prohibited from applying for, obtaining or possessing any passport or travel document, or any bus, train or plane ticket, or any other document entitling him to travel. This does not prevent Mr. Mahjoub from travelling on public surface transit within the City of Toronto, including the Toronto Island Ferry, or the City of Mississauga as authorized in paragraph 8 above.
17. If Mr. Mahjoub is ordered to be removed from Canada, he shall report as directed for removal. He shall also report to the Court as it from time to time may require.
18. Mr. Mahjoub shall not possess any weapon, imitation weapon, noxious substance or explosive, or any component thereof.
19. Mr. Mahjoub shall keep the peace and be of good conduct.
20. Any officer of the CBSA or any peace officer, if they have reasonable grounds to believe that any term or condition of this order has been breached, may arrest Mr. Mahjoub without warrant and cause him to be detained. Within 48 hours of such detention a Judge of this Court, designated by the Chief Justice, shall forthwith determine whether there has been a breach of any term or condition of this order, whether the terms of this order should be amended and whether Mr. Mahjoub should be detained in custody.
21. If Mr. Mahjoub does not strictly observe each of the terms and conditions of this order he will be liable to detention upon further order by this Court.
22. Mr. Mahjoub may not change his place of residence without the prior approval of this Court. Sixty days' prior notice must be provided to the CBSA, in order for the Agency to conduct a prior risk assessment. No persons may occupy the residence without the approval of the CBSA.
23. A breach of this order shall constitute an offence within the meaning of section 127 of the *Criminal Code* and shall constitute an offence pursuant to paragraph 124(1)(a) of the *Immigration and Refugee Protection Act*.
24. The terms and conditions of this order may be amended at any time by the Court upon the request of any party or upon the Court's own motion with notice to the parties. The Court will review the terms and conditions of this order at the earlier of: (i) the rendering of a decision of the Minister's delegate as to whether Mr. Mahjoub may be removed from

Canada; and (ii) four months from the date of this order. Thereafter, the Court will direct the frequency of the review of the terms and conditions of this order.

25. Neither Mr. Mahjoub nor any person in his residence shall make a recording of CBSA Officers by video or audio device, while they are carrying out their duties in monitoring compliance with the terms and conditions of this Order.

**SCHEDULE "B"**  
**to the**  
**Reasons for order dated March 9, 2009**  
**in**  
**THE MINISTER OF CITIZENSHIP**  
**AND IMMIGRATION and**  
**THE MINISTER OF PUBLIC SAFETY**  
**and**  
**MOHAMED ZEKI MAHJOUR**  
**DES-7-08**

*Immigration and Refugee Protection Act*  
S.C. 2001, c. 27

*Loi sur l'immigration et la protection des*  
*réfugiés, L.C. 2001, ch. 27*

Division 9

Certificates and Protection of Information

Section 9

Certificats et protection de renseignements

76. The following definitions apply in this Division.

"information"

«renseignements »

"information" means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization.

"judge"

«juge »

"judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.

77.(1) The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court.

76. Les définitions qui suivent s'appliquent à la présente section.

«juge »

"judge"

«juge » Le juge en chef de la Cour fédérale ou le juge de cette juridiction désigné par celui-ci.

«renseignements »

information"

«renseignements » Les renseignements en matière de sécurité ou de criminalité et ceux obtenus, sous le sceau du secret, de source canadienne ou du gouvernement d'un État étranger, d'une organisation internationale mise sur pied par des États ou de l'un de leurs organismes.

77. (1) Le ministre et le ministre de la Citoyenneté et de l'Immigration déposent à la Cour fédérale le certificat attestant qu'un résident permanent ou qu'un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée.



(2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.

(3) Once the certificate is referred, no proceeding under this Act respecting the person who is named in the certificate — other than proceedings relating to sections 82 to 82.3, 112 and 115 — may be commenced or continued until the judge determines whether the certificate is reasonable.

78. The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not.

79. An appeal from the determination may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.

80. A certificate that is determined to be reasonable is conclusive proof that the person named in it is inadmissible and is a removal order that is in force without it being necessary to hold or continue an examination or admissibility hearing.

81. The Minister and the Minister of Citizenship and Immigration may issue a warrant for the arrest and detention of a person who is named in a certificate if they have reasonable grounds to believe that the person is a danger to national

(2) Le ministre dépose en même temps que le certificat les renseignements et autres éléments de preuve justifiant ce dernier, ainsi qu'un résumé de la preuve qui permet à la personne visée d'être suffisamment informée de sa thèse et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon le ministre, à la sécurité nationale ou à la sécurité d'autrui.

(3) Il ne peut être procédé à aucune instance visant la personne au titre de la présente loi tant qu'il n'a pas été statué sur le certificat. Ne sont pas visées les instances relatives aux articles 82 à 82.3, 112 et 115.

78. Le juge décide du caractère raisonnable du certificat et l'annule s'il ne peut conclure qu'il est raisonnable.

79. La décision n'est susceptible d'appel devant la Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci; toutefois, les décisions interlocutoires ne sont pas susceptibles d'appel.

80. Le certificat jugé raisonnable fait foi de l'interdiction de territoire et constitue une mesure de renvoi en vigueur, sans qu'il soit nécessaire de procéder au contrôle ou à l'enquête.

81. Le ministre et le ministre de la Citoyenneté et de l'Immigration peuvent lancer un mandat pour l'arrestation et la mise en détention de la personne visée par le certificat dont ils ont des motifs raisonnables de croire qu'elle constitue un danger pour la sécurité nationale ou la

security or to the safety of any person or is unlikely to appear at a proceeding or for removal.

82. (1) A judge shall commence a review of the reasons for the person's continued detention within 48 hours after the detention begins.

(2) Until it is determined whether a certificate is reasonable, a judge shall commence another review of the reasons for the person's continued detention at least once in the six-month period following the conclusion of each preceding review.

(3) A person who continues to be detained after a certificate is determined to be reasonable may apply to the Federal Court for another review of the reasons for their continued detention if a period of six months has expired since the conclusion of the preceding review.

(4) A person who is released from detention under conditions may apply to the Federal Court for another review of the reasons for continuing the conditions if a period of six months has expired since the conclusion of the preceding review.

(5) On review, the judge  
(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  
(b) in any other case, shall order or confirm the person's release from detention and set any conditions that the judge considers appropriate.

82.1 (1) A judge may vary an order made under subsection 82(5) on application of the Minister or of the person who is subject to the order if the judge is satisfied that the variation is desirable

sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi.

82. (1) Dans les quarante-huit heures suivant le début de la détention, le juge entreprend le contrôle des motifs justifiant le maintien en détention.

(2) Tant qu'il n'est pas statué sur le certificat, le juge entreprend un autre contrôle des motifs justifiant le maintien en détention au moins une fois au cours des six mois suivant la conclusion du dernier contrôle.

(3) La personne dont le certificat a été jugé raisonnable et qui est maintenue en détention peut demander à la Cour fédérale un autre contrôle des motifs justifiant ce maintien une fois expiré un délai de six mois suivant la conclusion du dernier contrôle.

(4) La personne mise en liberté sous condition peut demander à la Cour fédérale un autre contrôle des motifs justifiant le maintien des conditions une fois expiré un délai de six mois suivant la conclusion du dernier contrôle.

(5) Lors du contrôle, le juge :  
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) dans les autres cas, ordonne ou confirme sa mise en liberté et assortit celle-ci des conditions qu'il estime indiquées.

82.1 (1) Le juge peut modifier toute ordonnance rendue au titre du paragraphe 82(5) sur demande du ministre ou de la personne visée par l'ordonnance s'il est convaincu qu'il est

because of a material change in the circumstances that led to the order.

(2) For the purpose of calculating the six-month period referred to in subsection 82(2), (3) or (4), the conclusion of the preceding review is deemed to have taken place on the day on which the decision under subsection (1) is made.

82.2 (1) A peace officer may arrest and detain a person released under section 82 or 82.1 if the officer has reasonable grounds to believe that the person has contravened or is about to contravene any condition applicable to their release.

(2) The peace officer shall bring the person before a judge within 48 hours after the detention begins.

(3) If the judge finds that the person has contravened or was about to contravene any condition applicable to their release, the judge shall

(a) 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;

(b) confirm the release order; or

(c) vary the conditions applicable to their release.

(4) For the purpose of calculating the six-month period referred to in subsection 82(2), (3) or (4), the conclusion of the preceding review is deemed to have taken place on the day on which the decision under subsection (3) is made.

82.3 An appeal from a decision made under any of sections 82 to 82.2 may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question.

souhaitable de le faire en raison d'un changement important des circonstances ayant donné lieu à l'ordonnance.

(2) Pour le calcul de la période de six mois prévue aux paragraphes 82(2), (3) ou (4), la conclusion du dernier contrôle est réputée avoir eu lieu à la date à laquelle la décision visée au paragraphe (1) est rendue.

82.2 (1) L'agent de la paix peut arrêter et détenir toute personne mise en liberté au titre des articles 82 ou 82.1 s'il a des motifs raisonnables de croire qu'elle a contrevenu ou est sur le point de contrevenir à l'une ou l'autre des conditions de sa mise en liberté.

(2) Le cas échéant, il la conduit devant un juge dans les quarante-huit heures suivant le début de la détention.

(3) S'il conclut que la personne a contrevenu ou était sur le point de contrevenir à l'une ou l'autre des conditions de sa mise en liberté, le juge, selon le cas :

a) ordonne qu'elle soit maintenue en détention s'il est convaincu que sa mise en liberté sous condition 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) confirme l'ordonnance de mise en liberté;

c) modifie les conditions dont la mise en liberté est assortie.

(4) Pour le calcul de la période de six mois prévue aux paragraphes 82(2), (3) ou (4), la conclusion du dernier contrôle est réputée avoir eu lieu à la date à laquelle la décision visée au paragraphe (3) est rendue.

82.3 Les décisions rendues au titre des articles 82 à 82.2 ne sont susceptibles d'appel devant la Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci; toutefois, les

However, no appeal may be made from an interlocutory decision in the proceeding.

82.4 The Minister may, at any time, order that a person who is detained under any of sections 82 to 82.2 be released from detention to permit their departure from Canada.

83.1 The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:

- (a) the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;
- (b) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;
- (c) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;
- (d) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;
- (e) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if

décisions interlocutoires ne sont pas susceptibles d'appel.

82.4 Le ministre peut, en tout temps, ordonner la mise en liberté de la personne détenue au titre de l'un des articles 82 à 82.2 pour lui permettre de quitter le Canada.

83. (1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :

- a) le juge procède, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et selon la procédure expéditive;
- b) il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à titre d'avocat spécial dans le cadre de l'instance, après avoir entendu l'intéressé et le ministre et accordé une attention et une importance particulières aux préférences de l'intéressé;
- c) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
- d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
- e) il veille tout au long de l'instance à ce que soit fourni à l'intéressé un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui et qui permet à l'intéressé d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

disclosed;

(f) the judge shall ensure the confidentiality of all information or other evidence that is withdrawn by the Minister;

(g) the judge shall provide the permanent resident or foreign national and the Minister with an opportunity to be heard;

(h) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;

(i) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national; and

(j) the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it.

(1.1) For the purposes of paragraph (1)(h), reliable and appropriate evidence does not include information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the Criminal Code, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture.

(1.2) If the permanent resident or foreign national requests that a particular person be appointed under paragraph (1)(b), the judge shall appoint that person unless the judge is satisfied that

(a) the appointment would result in the proceeding being unreasonably delayed;

(b) the appointment would place the person in a conflict of interest; or

(c) the person has knowledge of information or other evidence whose disclosure would be injurious to national security or endanger the safety of any person and, in the circumstances, there is a risk of inadvertent disclosure of that

f) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance;

g) il donne à l'intéressé et au ministre la possibilité d'être entendus;

h) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

i) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'intéressé;

j) il ne peut fonder sa décision sur les renseignements et autres éléments de preuve que lui fournit le ministre et les remet à celui-ci s'il décide qu'ils ne sont pas pertinents ou si le ministre les retire.

(1.1) Pour l'application de l'alinéa (1)h), sont exclus des éléments de preuve dignes de foi et utiles les renseignements dont il existe des motifs raisonnables de croire qu'ils ont été obtenus par suite du recours à la torture, au sens de l'article 269.1 du Code criminel, ou à d'autres peines ou traitements cruels, inhumains ou dégradants, au sens de la Convention contre la torture.

(1.2) Si l'intéressé demande qu'une personne en particulier soit nommée au titre de l'alinéa (1)b), le juge nomme cette personne, à moins qu'il estime que l'une ou l'autre des situations ci-après s'applique :

a) la nomination de cette personne retarderait indûment l'instance;

b) la nomination de cette personne mettrait celle-ci en situation de conflit d'intérêts;

c) cette personne a connaissance de renseignements ou d'autres éléments de preuve dont la divulgation porterait atteinte à la sécurité nationale ou à la sécurité d'autrui et, dans les circonstances, ces renseignements ou autres éléments de preuve risquent d'être divulgués par

information or other evidence.

(2) For greater certainty, the judge's power to appoint a person to act as a special advocate in a proceeding includes the power to terminate the appointment and to appoint another person.

84. Section 83 — other than the obligation to provide a summary — and sections 85.1 to 85.5 apply to an appeal under section 79 or 82.3, and to any further appeal, with any necessary modifications.

85. (1) The Minister of Justice shall establish a list of persons who may act as special advocates and shall publish the list in a manner that the Minister of Justice considers appropriate to facilitate public access to it.

(2) The Statutory Instruments Act does not apply to the list.

(3) The Minister of Justice shall ensure that special advocates are provided with adequate administrative support and resources.

85.1 (1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

(2) A special advocate may challenge

- (a) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and
- (b) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the

inadvertance.

(2) Il est entendu que le pouvoir du juge de nommer une personne qui agira à titre d'avocat spécial dans le cadre d'une instance comprend celui de mettre fin à ses fonctions et de nommer quelqu'un pour la remplacer.

84. L'article 83 — sauf quant à l'obligation de fournir un résumé — et les articles 85.1 à 85.5 s'appliquent, avec les adaptations nécessaires, à l'appel interjeté au titre des articles 79 ou 82.3 et à tout appel subséquent.

85. (1) Le ministre de la Justice dresse une liste de personnes pouvant agir à titre d'avocat spécial et publie la liste de la façon qu'il estime indiquée pour la rendre accessible au public.

(2) La Loi sur les textes réglementaires ne s'applique pas à la liste.

(3) Le ministre de la Justice veille à ce que soient fournis à tout avocat spécial un soutien administratif et des ressources adéquates.

85.1 (1) L'avocat spécial a pour rôle de défendre les intérêts du résident permanent ou de l'étranger lors de toute audience tenue à huis clos et en l'absence de celui-ci et de son conseil dans le cadre de toute instance visée à l'un des articles 78 et 82 à 82.2.

(2) Il peut contester :

- a) les affirmations du ministre voulant que la divulgation de renseignements ou autres éléments de preuve porterait atteinte à la sécurité nationale ou à la sécurité d'autrui;
- b) la pertinence, la fiabilité et la suffisance des renseignements ou autres éléments de preuve fournis par le ministre, mais communiqués ni à

permanent resident or foreign national and their counsel, and the weight to be given to it.

(3) For greater certainty, the special advocate is not a party to the proceeding and the relationship between the special advocate and the permanent resident or foreign national is not that of solicitor and client.

(4) However, a communication between the permanent resident or foreign national or their counsel and the special advocate that would be subject to solicitor-client privilege if the relationship were one of solicitor and client is deemed to be subject to solicitor-client privilege. For greater certainty, in respect of that communication, the special advocate is not a compellable witness in any proceeding.

85.2 A special advocate may

- (a) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;
- (b) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel; and
- (c) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.

85.3 A special advocate is not personally liable for anything they do or omit to do in good faith under this Division.

85.4 (1) The Minister shall, within a period set by the judge, provide the special advocate with a copy of all information and other evidence that is provided to the judge but that is not disclosed

l'intéressé ni à son conseil, et l'importance qui devrait leur être accordée.

(3) Il est entendu que l'avocat spécial n'est pas partie à l'instance et que les rapports entre lui et l'intéressé ne sont pas ceux qui existent entre un avocat et son client.

(4) Toutefois, toute communication entre l'intéressé ou son conseil et l'avocat spécial qui serait protégée par le secret professionnel liant l'avocat à son client si ceux-ci avaient de tels rapports est réputée être ainsi protégée, et il est entendu que l'avocat spécial ne peut être contraint à témoigner à l'égard d'une telle communication dans quelque instance que ce soit.

85.2 L'avocat spécial peut :

- a) présenter au juge ses observations, oralement ou par écrit, à l'égard des renseignements et autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil;
- b) participer à toute audience tenue à huis clos et en l'absence de l'intéressé et de son conseil, et contre-interroger les témoins;
- c) exercer, avec l'autorisation du juge, tout autre pouvoir nécessaire à la défense des intérêts du résident permanent ou de l'étranger.

85.3 L'avocat spécial est déchargé de toute responsabilité personnelle en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans le cadre de la présente section.

85.4 (1) Il incombe au ministre de fournir à l'avocat spécial, dans le délai fixé par le juge, copie de tous les renseignements et autres éléments de preuve qui ont été fournis au juge,

to the permanent resident or foreign national and their counsel.

(2) After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.

(3) If the special advocate is authorized to communicate with a person, the judge may prohibit that person from communicating with anyone else about the proceeding during the remainder of the proceeding or may impose conditions with respect to such a communication during that period.

85.5 With the exception of communications authorized by a judge, no person shall

(a) disclose information or other evidence that is disclosed to them under section 85.4 and that is treated as confidential by the judge presiding at the proceeding; or

(b) communicate with another person about the content of any part of a proceeding under any of sections 78 and 82 to 82.2 that is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

85.6 (1) The Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court may each establish a committee to make rules governing the practice and procedure in relation to the participation of special advocates in proceedings before the court over which they preside. The rules are binding despite any rule of practice that would otherwise apply.

(2) Any committee established shall be composed of the Chief Justice of the Federal Court of Appeal or the Chief Justice of the Federal Court, as the case may be, the Attorney

mais qui n'ont été communiqués ni à l'intéressé ni à son conseil.

(2) Entre le moment où il reçoit les renseignements et autres éléments de preuve et la fin de l'instance, l'avocat spécial ne peut communiquer avec qui que ce soit au sujet de l'instance si ce n'est avec l'autorisation du juge et aux conditions que celui-ci estime indiquées.

(3) Dans le cas où l'avocat spécial est autorisé à communiquer avec une personne, le juge peut interdire à cette dernière de communiquer avec qui que ce soit d'autre au sujet de l'instance, et ce jusqu'à la fin de celle-ci, ou assujettir à des conditions toute communication de cette personne à ce sujet, jusqu'à la fin de l'instance.

85.5 Sauf à l'égard des communications autorisées par tout juge, il est interdit à quiconque :

a) de divulguer des renseignements et autres éléments de preuve qui lui sont communiqués au titre de l'article 85.4 et dont la confidentialité est garantie par le juge présidant l'instance;

b) de communiquer avec toute personne relativement au contenu de tout ou partie d'une audience tenue à huis clos et en l'absence de l'intéressé et de son conseil dans le cadre d'une instance visée à l'un des articles 78 et 82 à 82.2.

85.6 (1) Les juges en chef de la Cour d'appel fédérale et de la Cour fédérale peuvent chacun établir un comité chargé de prendre des règles régissant la pratique et la procédure relatives à la participation de l'avocat spécial aux instances devant leurs cours respectives; ces règles l'emportent sur les règles et usages qui seraient par ailleurs applicables.

(2) Le cas échéant, chaque comité est composé du juge en chef de la cour en question, du procureur général du Canada ou un ou plusieurs de ses représentants, et d'un ou de plusieurs avocats membres du barreau d'une province



General of Canada or one or more representatives of the Attorney General of Canada, and one or more members of the bar of any province who have experience in a field of law relevant to those types of proceedings. The Chief Justices may also designate additional members of their respective committees.

(3) The Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court — or a member designated by them — shall preside over their respective committees.

86. The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, apply for the non-disclosure of information or other evidence. Sections 83 and 85.1 to 85.5 apply to the proceeding with any necessary modifications, including that a reference to “judge” be read as a reference to the applicable Division of the Board.

87. The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to appoint a special advocate and to provide a summary — applies to the proceeding with any necessary modifications.

87.1 If the judge during the judicial review, or a court on appeal from the judge’s decision, is of the opinion that considerations of fairness and natural justice require that a special advocate be appointed to protect the interests of the permanent resident or foreign national, the judge or court shall appoint a special advocate from the list referred to in subsection 85(1). Sections 85.1 to 85.5 apply to the proceeding with any necessary modifications.

87.2 (1) The regulations may provide for any

ayant de l’expérience dans au moins un domaine de spécialisation du droit qui se rapporte aux instances visées. Le juge en chef peut y nommer tout autre membre de son comité.

(3) Les juges en chef de la Cour fédérale d’appel et de la Cour fédérale président leurs comités respectifs ou choisissent un membre pour le faire.

86. Le ministre peut, dans le cadre de l’appel devant la Section d’appel de l’immigration, du contrôle de la détention ou de l’enquête, demander l’interdiction de la divulgation de renseignements et autres éléments de preuve. Les articles 83 et 85.1 à 85.5 s’appliquent à l’instance, avec les adaptations nécessaires, la mention de juge valant mention de la section compétente de la Commission.

87. Le ministre peut, dans le cadre d’un contrôle judiciaire, demander l’interdiction de la divulgation de renseignements et autres éléments de preuve. L’article 83 s’applique à l’instance, avec les adaptations nécessaires, sauf quant à l’obligation de nommer un avocat spécial et de fournir un résumé.

87.1 Si le juge, dans le cadre du contrôle judiciaire, ou le tribunal qui entend l’appel de la décision du juge est d’avis que les considérations d’équité et de justice naturelle requièrent la nomination d’un avocat spécial en vue de la défense des intérêts du résident permanent ou de l’étranger, il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à ce titre dans le cadre de l’instance. Les articles 85.1 à 85.5 s’appliquent alors à celle-ci avec les adaptations nécessaires.

87.2 (1) Les règlements régissent l’application de la présente section et portent notamment sur

matter relating to the application of this Division and may include provisions respecting conditions and qualifications that persons must meet to be included in the list referred to in subsection 85(1) and additional qualifications that are assets that may be taken into account for that purpose.

(2) The regulations

(a) shall require that, to be included in the list, persons be members in good standing of the bar of a province, not be employed in the federal public administration, and not otherwise be associated with the federal public administration in such a way as to impair their ability to protect the interests of the permanent resident or foreign national; and

(b) may include provisions respecting those requirements.

les exigences — conditions et qualités — auxquelles doit satisfaire toute personne pour que son nom figure sur la liste dressée au titre du paragraphe 85(1), ainsi que sur les autres qualités qui constituent des atouts et dont il peut être tenu compte à cette fin.

(2) Les règlements :

a) prévoient que, pour que le nom d'une personne puisse figurer sur la liste, celle-ci doit être membre en règle du barreau d'une province et ne pas occuper un emploi au sein de l'administration publique fédérale ni par ailleurs être associée à celle-ci de manière que sa capacité de défendre les intérêts du résident permanent ou de l'étranger serait compromise;

b) peuvent préciser ces exigences.

**SCHEDULE “C”**  
**to the**  
**Reasons for order dated March 9, 2009**  
**in**  
**THE MINISTER OF CITIZENSHIP**  
**AND IMMIGRATION and**  
**THE MINISTER OF PUBLIC SAFETY**  
**and**  
**MOHAMED ZEKI MAHJOUR**  
**DES-7-08**

TRANSITIONAL PROVISIONS

6. In sections 7 to 10, “the Act” means the *Immigration and Refugee Protection Act*

7. (1) A proceeding relating to the reasonableness of a certificate referred to the Federal Court under subsection 77(1) of the Act is terminated on the coming into force of this Act.

(2) A removal order made against a person who is named in a certificate referred to the Federal Court under the Act, or under the *Immigration Act*, chapter I-2 of the Revised Statutes of Canada, 1985, before this Act comes into force and who is in Canada when this Act comes into force ceases to have effect on that coming into force.

(3) If, on the day on which this Act comes into force, the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration sign a new certificate and refer it to the Federal Court under subsection 77(1) of the Act, as enacted by section 4 of this Act, the person who is named in the certificate  
(a) shall, if they were detained under Division 9 of Part 1 of the Act when this Act comes into force, remain in detention without a new warrant for their arrest and detention having to be issued

DISPOSITIONS TRANSITOIRES

6. Aux articles 7 à 10, « Loi » s’entend de la *Loi sur l’immigration et la protection des réfugiés*

7. (1) Dès l’entrée en vigueur de la présente loi, il est mis fin à toute instance relative au caractère raisonnable du certificat déposé à la Cour fédérale au titre du paragraphe 77(1) de la Loi.

(2) Est sans effet à l’entrée en vigueur de la présente loi la mesure de renvoi dont est l’objet la personne qui est visée par le certificat déposé à la Cour fédérale au titre de la Loi ou de la *Loi sur l’immigration*, chapitre I-2 des Lois révisées du Canada (1985), avant cette entrée en vigueur et qui se trouve au Canada à cette entrée en vigueur.

(3) Dans le cas où, à la date d’entrée en vigueur de la présente loi, le ministre de la Sécurité publique et de la Protection civile et le ministre de la Citoyenneté et de l’Immigration déposent à la Cour fédérale un nouveau certificat au titre du paragraphe 77(1) de la Loi, édicté par l’article 4 de la présente loi, la personne visée par le certificat qui est détenue au titre de la section 9 de la partie 1 de la Loi à l’entrée en vigueur de la présente loi demeure en détention sans que les ministres aient à lancer un mandat pour son arrestation et sa détention au titre de l’article 81

under section 81 of the Act, as enacted by section 4 of this Act; or

(b) shall, if they were released from detention under conditions under Division 9 of Part 1 of the Act when this Act comes into force, remain released under the same conditions unless a warrant for their arrest and detention is issued under section 81 of the Act, as enacted by section 4 of this Act.

(4) A person referred to in subsection (3) may apply to the Federal Court for a review of the reasons for their continued detention or of the reasons for continuing the conditions, as the case may be, within 60 days after the day on which this Act comes into force

(5) If a person who is detained and who is entitled to make an application under subsection (4) does not do so, a judge shall commence a review of the reasons for the person's continued detention at least once in the six-month period following the day on which this Act comes into force.

(6) If a person who is released from detention under conditions and who is entitled to make an application under subsection (4) does not do so, they may apply to the Federal Court for a review of the reasons for continuing the conditions if a period of six months has expired since the day on which this Act comes into force.

(7) For the purpose of calculating the six-month period referred to in subsection 82(2), (3) or (4) of the Act, as enacted by section 4 of this Act, the conclusion of the preceding review is deemed to have taken place on the day on which a judge makes a decision under this section.

8. (1) Any proceeding that involves a person who is named in a certificate and that relates to section 112 or 115 of the Act is terminated on the coming into force of this Act.

de la Loi, édicté par l'article 4 de la présente loi; celle qui est en liberté sous condition au titre de la section 9 de la partie 1 de la Loi à l'entrée en vigueur de la présente loi demeure en liberté aux mêmes conditions, à moins que les ministres ne lancent un mandat pour son arrestation et sa détention au titre de l'article 81 de la Loi, édicté par l'article 4 de la présente loi.

(4) Toute personne visée au paragraphe (3) peut, dans les soixante jours suivant la date d'entrée en vigueur de la présente loi, demander à la Cour fédérale de contrôler les motifs justifiant le maintien en détention ou le maintien des conditions, selon le cas.

(5) Si la personne détenue ne se prévaut pas de son droit au titre du paragraphe (4), le juge entreprend le contrôle des motifs justifiant le maintien en détention au moins une fois au cours des six mois suivant la date d'entrée en vigueur de la présente loi.

(6) La personne en liberté sous condition qui ne se prévaut pas de son droit au titre du paragraphe (4) peut demander à la Cour fédérale de contrôler les motifs justifiant le maintien des conditions une fois expiré un délai de six mois suivant la date d'entrée en vigueur de la présente loi.

(7) Pour le calcul de la période de six mois prévue aux paragraphes 82(2), (3) ou (4) de la Loi, édictés par l'article 4 de la présente loi, la conclusion du dernier contrôle est réputée avoir eu lieu à la date à laquelle une décision judiciaire est rendue au titre du présent article.

8. (1) Dès l'entrée en vigueur de la présente loi, il est mis fin à toute instance relative aux articles 112 et 115 de la Loi et touchant une personne visée par un certificat.

(2) A person who is named in a certificate referred to the Federal Court under subsection 77(1) of the Act, as enacted by section 4 of this Act, is not required to apply for protection under section 112 of the Act after the day on which this Act comes into force if a removal order made against them was stayed under subsection 114(1) of the Act when this Act comes into force unless the stay is cancelled under subsection 114(2) of the Act.

(2) La personne visée par le certificat déposé à la Cour fédérale au titre du paragraphe 77(1) de la Loi, édicté par l'article 4 de la présente loi, qui, à l'entrée en vigueur de la présente loi, bénéficie, au titre du paragraphe 114(1) de la Loi, d'un sursis à la mesure de renvoi dont elle était l'objet n'est pas tenue de faire une demande de protection au titre de l'article 112 de la Loi après cette entrée en vigueur, à moins que le sursis ne soit révoqué au titre du paragraphe 114(2) de la Loi.

9. (1) A removal order made against a person in a proceeding in which an application was made for the non-disclosure of information under section 86 of the Act, as it read immediately before the coming into force of this Act, ceases to have effect when this Act comes into force if the person is in Canada on that coming into force.

9. (1) Est sans effet à l'entrée en vigueur de la présente loi la mesure de renvoi qui est prise dans le cadre de toute instance au cours de laquelle est faite une demande d'interdiction de la divulgation de renseignements au titre de l'article 86 de la Loi, dans sa version antérieure à cette entrée en vigueur, et qui vise une personne se trouvant au Canada à cette entrée en vigueur.

(2) If the Minister of Public Safety and Emergency Preparedness refers a report to the Immigration Division under subsection 44(2) of the Act on the day on which this Act comes into force, then the person who is named in the report (a) shall, if they were detained under Division 9 of Part 1 of the Act when this Act comes into force, remain in detention without a new warrant for their arrest and detention having to be issued under Division 6 of Part 1 of the Act; or (b) shall, if they were released from detention under conditions under Division 9 of Part 1 of the Act when this Act comes into force, remain released under the same conditions unless a warrant for their arrest and detention is issued under Division 6 of Part 1 of the Act.

(2) Dans le cas où, à la date d'entrée en vigueur de la présente loi, le ministre de la Sécurité publique et de la Protection civile défère un rapport d'interdiction de territoire à la Section de l'immigration au titre du paragraphe 44(2) de la Loi, la personne visée par le rapport qui est détenue au titre de la section 9 de la partie 1 de la Loi à l'entrée en vigueur de la présente loi demeure en détention sans que l'agent ait à lancer un mandat pour son arrestation et sa détention au titre de la section 6 de la partie 1 de la Loi; celle qui est en liberté sous condition au titre de la section 9 de la partie 1 de la Loi à l'entrée en vigueur de la présente loi demeure en liberté aux mêmes conditions, à moins que l'agent ne lance un mandat pour son arrestation et sa détention au titre de la section 6 de la partie 1 de la Loi.

(3) If the Minister of Public Safety and Emergency Preparedness refers a report to the Immigration Division under subsection 44(2) of

(3) Si un rapport est déféré au titre du paragraphe 44(2) de la Loi à la date d'entrée en

the Act on the day on which this Act comes into force, then, for the purpose of calculating the 30-day period referred to in subsection 57(2) of the Act, the previous review is deemed to have taken place on that day.

(4) On the coming into force of this Act, section 86 of the Act, as enacted by section 4 of this Act, applies to a proceeding that is pending or in progress immediately before that coming into force and in which an application was made for the non-disclosure of information under section 86 of the Act, as it read immediately before that coming into force.

10. On the coming into force of this Act, sections 87 and 87.1 of the Act, as enacted by section 4 of this Act, apply to a proceeding that is pending or in progress immediately before that coming into force and in which an application was made for the non-disclosure of information under section 87 of the Act, as it read immediately before that coming into force.

vigueur de la présente loi, le contrôle précédent est réputé avoir eu lieu, pour le calcul de la période de trente jours prévue au paragraphe 57(2) de la Loi, à cette date.

(4) Dès l'entrée en vigueur de la présente loi, l'article 86 de la Loi, édicté par l'article 4 de la présente loi, s'applique à toute instance instruite avant cette entrée en vigueur et à l'égard de laquelle aucune décision n'a été prise et au cours de laquelle est faite une demande d'interdiction de la divulgation de renseignements au titre de l'article 86 de la Loi, dans sa version antérieure à cette entrée en vigueur.

10. Dès l'entrée en vigueur de la présente loi, les articles 87 et 87.1 de la Loi, édictés par l'article 4 de la présente loi, s'appliquent à toute instance instruite avant cette entrée en vigueur et à l'égard de laquelle aucune décision n'a été prise et au cours de laquelle est faite une demande d'interdiction de la divulgation de renseignements au titre de l'article 87 de la Loi, dans sa version antérieure à cette entrée en vigueur.

**SCHEDULE “D”  
to the  
Reasons for order dated March 9, 2009  
in  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION and  
THE MINISTER OF PUBLIC SAFETY  
and  
MOHAMED ZEKI MAHJOUR  
DES-7-08**

**Date: 20080613  
Docket: DES-7-08**

**Ottawa, Ontario, June 13, 2008**

**PRESENT: The Honourable Madam Justice Layden-Stevenson**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION  
and THE MINISTER OF PUBLIC SAFETY**

**Applicants**

**and**

**MOHAMED ZEKI MAHJOUR**

**Respondent**

**ORDER**

**WHEREAS** the provisions of paragraph 83(1)(a) of the IRPA mandate that the “judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit” with respect to this proceeding;

**AND WHEREAS** by separate order of today's date, Messrs. Gordon Cameron and Anil Kapoor are appointed Special Advocates for this proceeding;

**AND WHEREAS**, by teleconference on today's date, in the presence of Mr. Mahjoub, Ms. B. Jackman, Mr. D. MacIntosh, Ms. A. Marinos, Ms. R. Marquis, Mr. J. Mathieson, Mr. G. Cameron and Mr. A. Kapoor, the availability of counsel and the Special Advocates was canvassed;

**AND WHEREAS** all those concerned have agreed to the schedule set out below;

**IT IS ORDERED THAT:**

1. Counsel for the Ministers will prepare a list of publicly available material and will provide it to the Special Advocates by June 30, 2008. The list will include, but is not limited to, the dates of all prior public hearings, all prior public summaries and all prior statements given by Mr. Mahjoub. The Ministers' counsel will facilitate the Special Advocates' access to any open material not readily available to them;
2. Special Advocate Mr. Cameron will complete briefing by Mr. Mahjoub and his counsel by August 1, 2008;
3. Special Advocate Mr. Cameron will be provided access to the closed material as of August 5, 2008, at the Court's designated proceedings registry in Ottawa;



4. Special Advocate, Mr. Kapoor, having acted as one of several Special Advocates on a preliminary motion related to the security certificate matters, has had previous disclosure to closed material. Mr. Kapoor will be provided access to the closed material in relation to Mr. Mahjoub, at the Court's designated proceeding registry in Ottawa, forthwith;
5. The closed hearings will be conducted during the week of September 29, 2008 and on October 15, 16 and 17, 2008 at Ottawa;
6. The public hearings will be conducted during the weeks of October 27<sup>th</sup>, November 3<sup>rd</sup> and December 8<sup>th</sup>, 2008, at Toronto;
7. Further closed hearings, if required, will be conducted December 15, 16, 17 at Ottawa;
8. Final submissions (closed and public) will be made on December 18, 19 and 22. The allocation of time and place with respect to closed and public submissions will be determined at a later date.

“Carolyn Layden-Stevenson”  
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** DES-7-08

**STYLE OF CAUSE:** MCI and MPS  
v. MOHAMED ZEKI MAHJOUB

**PLACE OF HEARING:** Toronto, Ontario

**DATES OF PUBLIC HEARING  
& IN-CAMERA HEARING:** September 29, 30, 2008  
October 1, 2, 3, 15, 17, 20, 27, 28, 29, 30, 31, 2008  
November 3, 4, 5, 6, 7, 20, 21, 27, 2008  
December 8, 9, 10, 11, 12, 17, 18, 2008  
February 9, 10, 11, 2009

**REASONS FOR JUDGMENT:** LAYDEN-STEVENSON J.

**DATED:** March 9, 2009

**APPEARANCES:**

Mr. Donald MacIntosh  
Mr. James Mathieson  
Ms. Angela Marinos  
Ms. Rhonda Marquis  
Ms. Judy Michaely

FOR THE APPLICANTS

Ms. Barbara Jackman  
Ms. Marlys Edwardh  
Ms. Adriel Weaver

FOR THE RESPONDENT

**Special Advocates:**

Mr. Gordon Cameron  
Mr. Anil Kapoor

**SOLICITORS OF RECORD:**

John H. Sims, Q.C.  
Deputy Attorney General of Canada

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FOR THE RESPONDENT

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