

**Date: 20090114**

**Docket: DES-6-08**

**Citation: 2009 FC 279**

**Ottawa, Ontario, January 14, 2009**

**PRESENT: The Honourable Madam Justice Dawson**

**BETWEEN:**

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

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

**AND IN THE MATTER OF  
MAHMOUD ES-SAYYID JABALLAH**

**PUBLIC REASONS FOR ORDER**

**(Top Secret Reasons for Order issued January 14, 2009)**

**(Public Reasons for Order issued April 6, 2009)**

[1] The open court principle is a broad principle of general application. Included in this principle is the usual requirement that, prior to testifying, a witness should be identified by their proper legal name. See: *Named Person v. Vancouver Sun*, 2007 SCC 43 at paragraph 81 (in dissent, but not on this point). Thus, the use of a pseudonym by a witness is an exception to the

open court principle. These reasons explain why the Court allowed an employee of the Canadian Security Intelligence Service (Service) to testify in public under the name "David" without disclosing his proper legal name. The issue arose in the following context.

### **Procedural History**

[2] A new security certificate was issued in respect of Mr. Jaballah after the Supreme Court of Canada found, in February of 2007, that the then existing procedure for review of ministerial security certificates violated section 7 of the Charter, and could not be saved under section 1 of the Charter. The further certificate was signed by the then Minister of Public Safety and Emergency Preparedness and by the then Minister of Citizenship and Immigration. In it, the Ministers certified their opinion that Mr. Jaballah, a foreign national, is inadmissible to Canada on grounds of national security.

[3] Since the issuance of that security certificate, the Court has sat *in camera* to hear the confidential evidence adduced on behalf of the Ministers. This evidence concerned the reasonableness of the security certificate, the conditions under which Mr. Jaballah should continue to be released from detention, the additional confidential information to be disclosed to the Court and Mr. Jaballah's special advocates pursuant to *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 (Charkaoui #2) and the disclosure of additional information to Mr. Jaballah.

[4] On November 24, 2008, the Court commenced hearing evidence in public. It was agreed between the parties that the Ministers would adduce evidence both in support of the reasonableness of the security certificate and the conditions of Mr. Jaballah's release. Mr. Jaballah would not at this time cross-examine the Ministers' witnesses on evidence relating to the reasonableness of the certificate, but would cross-examine the Ministers' witnesses on the conditions of release. Additionally, Mr. Jaballah would adduce evidence, which would be subject to cross-examination, relevant to the conditions of his release. This agreement reflected the fact that until Mr. Jaballah has received the full disclosure mandated by the Supreme Court of Canada in *Charkaoui #2*, it would be unfair to require him to lead evidence or to cross-examine upon evidence relating to the reasonableness of the security certificate.

[5] On November 25, 2008, the Ministers called a witness employed by the Service to testify. Counsel for the Ministers advised that for "purposes of operational security reasons" the Service witness would "only be testifying by his first name." Counsel for Mr. Jaballah objected, stating that "it is of utmost importance that people who give this kind of evidence state who they are and their position, and unless there is some compelling reason to close the court or to deprive the public of knowing who is giving the evidence, then I would ask that he give his full name." Counsel for the Ministers then requested that the Court receive evidence *in camera*, in the absence of Mr. Jaballah and the public.

[6] Paragraph 83(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act)

requires the Court to hear evidence in confidence if so requested by the Ministers. Therefore, Mr. Jaballah, his counsel, the interpreter and members of the public left the courtroom. It was then ascertained that the security level of the evidence to be adduced required a secure courtroom. As it was 4:35 p.m., the Court adjourned to enable the necessary arrangements to be made.

[7] Unfortunately, it was not until November 27, 2008 that the required arrangements were completed. At that time, in the presence of the Court, counsel for the Ministers and Mr. Jaballah's special advocate, the proposed Service witness was affirmed and identified to the Court by his full legal name. He was then examined by counsel for the Ministers, cross-examined by the special advocate and questioned by the Court. After receiving a copy of a notice of discontinuance filed by Mr. Jaballah in proceedings he commenced in the Ontario Superior Court of Justice, which is discussed below, I ruled that I was satisfied that the witness' full name was information that should be protected pursuant to paragraph 83(1)(d) of the Act (which requires the designated judge to ensure the confidentiality of evidence provided by the Ministers if, in the judge's opinion, its disclosure would be injurious to national security or to the safety of any person). The Court then reconvened in public, Mr. Jaballah and his counsel were so advised and the Service witness was examined in chief by counsel for the Ministers.

### **Applicable Principles of Law**

[8] As noted above, the open court principle requires a witness to be identified by their proper

legal name. However, in section 83 of the Act, Parliament has evidenced its intent that the open court principle be infringed to the extent necessary to protect Canada's national security and the safety of persons. Such infringement is only warranted, however, where the designated judge forms the opinion that the disclosure of information that the Ministers seek to protect would be injurious to national security or endanger the safety of any person. In order to ascertain the need to protect information, the designated judge may hold a hearing in the absence of the person concerned and the public to hear pertinent evidence and submissions.

[9] It is the Ministers who bear the burden of establishing that disclosure not only could but would be injurious to national security, or endanger the safety of any person. See: *Ahani v. Canada*, [1995] 3 F.C. 669 at paragraphs 18 and 19; aff'd (1996), 201 N.R. 233; application for leave dismissed [1996] S.C.C.A. No. 496 (and see *Harkat (Re)* (2003), 231 F.T.R. 19 at paragraph 10 for the application of this jurisprudence to the current legislative scheme). This conclusion as to the Ministers' onus is consistent with case law that has developed in other contexts. See, for example, *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paragraph 31.

[10] Once satisfied that disclosure would be injurious to national security, or endanger the safety of any person, the designated judge must, pursuant to paragraph 83(1)(d) of the Act, ensure the confidentiality of the information. The designated judge is given no discretion in this regard. This renders irrelevant the balancing of interests test, described in cases such as *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442. See:

*Named Person v. Vancouver Sun*, cited above, at paragraphs 34-37.

### **The Evidence before the Court**

[11] The Ministers based their request that the identity of the Service witness, David, not be disclosed in public upon subsection 18(1) of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (CSIS Act), and upon paragraph 83(1)(d) of the Act. Section 18 of the CSIS Act and subsection 83(1) of the Act are set out in the appendix to these reasons.

[REDACTED]

[12] The Ministers submitted that the witness' identity could not be disclosed without jeopardizing both the safety of certain individuals [REDACTED]. The witness' evidence, given in camera in support of the Ministers' application, included the following testimony:

1. He is an intelligence officer, and has been so since he was first employed by the Service in 1991.
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]
6. In the early summer of 1998, the officer was assigned to the Jaballah investigation. In the course of the investigation he interviewed Mr. Jaballah twice.

7. The officer testified in public before this Court in 1999 in respect of the first security certificate issued in respect of Mr. Jaballah. On that occasion he testified only under the name "David".
8. [REDACTED]
9. [REDACTED]
10. [REDACTED]
11. When the officer met with Mr. Jaballah, he would have identified himself by his real name and shown his Service warrant card. He did not leave any business card with Mr. Jaballah, but would have left his office telephone number. The officer did not use any business cards that showed his full name. If he had voicemail at the time, the voicemail would not have identified the officer by his full name.
12. [REDACTED]
13. [REDACTED]
14. [REDACTED]
15. [REDACTED]
16. [REDACTED]
17. [REDACTED]
18. The Service's department of legal services informed him that Mr. Jaballah had sued a number of individuals related to his case, including him. He was further advised that in the lawsuit he was simply described as "David", an officer of the Service.

19. [REDACTED]

[13] On this evidence, counsel for the Ministers submitted that:

- a. The disclosure of the officer's name as an intelligence officer would endanger [REDACTED]; and
- b. [REDACTED]

[14] In response, the special advocate submitted that:

- a. The fact that the officer identified himself to Mr. Jaballah on two occasions (and identified himself to others) weighed heavily against the Ministers' application.
- b. Little would be gained through publication of the officer's name.
- c. A significant benefit provided by the witness is that he is very knowledgeable, and will be able to provide important evidence. This avoids the frustration caused when a witness is produced who has only superficial knowledge of the case. The Service should be encouraged to produce knowledgeable witnesses.
- d. [REDACTED]
- e. [REDACTED]
- f. On all of the evidence, the disclosure of the officer's full name was not pressed.

**Have the Ministers established that disclosure of the officer's name would be injurious to national security or endanger the safety of any person?**



[15] At the outset, I note that in her submissions counsel for the Ministers did not make detailed submissions with respect to subsection 18(1) of the CSIS Act, (although reference was made to that provision). I agree that this application is better determined under paragraph 83(1)(d) of the Act. [REDACTED]

[16] In the present case, I am satisfied that it would be injurious to Canada's national security if the officer's name was made public [REDACTED].

[17] The significance of this is two-fold. First, [REDACTED]. This would be injurious to Canada's national security.

[18] Second, and more importantly, [REDACTED].

[19] In view of my conclusion on this point it is not necessary for me to consider the stated concerns with respect to the safety of individuals [REDACTED].

[20] [REDACTED] I am satisfied that, as a matter of general principle, Canada's national security does require that CSIS officers who engage, or will engage, in operational activities not be hindered or prevented from continuing such activities, or be put at risk, because their identities are disclosed in court proceedings. [REDACTED]

[21] As I advised counsel during the *in camera* hearing, my most significant concern about protecting the identity of this witness was the fact that his identity had previously been disclosed to Mr. Jaballah. One cannot protect information as being confidential if the information has lost the necessary quality of confidentiality. Thus, of particular importance was the officer's evidence that, notwithstanding the fact that he had identified himself to Mr. Jaballah on two occasions, Mr. Jaballah was unable to properly name the officer in the lawsuit Mr. Jaballah commenced in the Ontario Superior Court of Justice.

[22] This evidence was of such importance that I adjourned the proceeding to allow counsel for the Ministers to obtain copies of any documents filed in that suit. Ultimately, counsel were able to file with the Court as an exhibit a notice of discontinuance filed in the lawsuit. Such discontinuance established that, after a case expiry notice was issued by the Court, a discontinuance of the claim was filed. The discontinuance stated that the claim had never been served on any defendant. The style of cause was consistent with the officer's testimony in that he was described as " 'David' (A CSIS officer)". A copy of the exhibit was provided to counsel for Mr. Jaballah.

[23] On the basis of this evidence, which supported the conclusion that Mr. Jaballah did not know the officer's identity, I concluded that the officer's identity retained the necessary quality of confidentiality such that it was appropriate to protect it.

[24] For these reasons, an order issued permitting the officer to testify publicly in Court identifying himself only by the name "David."

“Eleanor R. Dawson”

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Judge

### **APPENDIX**

Section 18 of the *Canadian Security Intelligence Service Act* and subsection 83(1) of the *Immigration and Refugee Protection Act* read as follows:

18.(1) Subject to subsection (2), no person shall disclose any information that the person obtained or to which the person had access in the course of the performance by that person of duties and functions under this Act or the participation by that person in the administration or enforcement of this Act and from which the identity of (a) any other person who is or was a confidential source of information or assistance to the Service, or

18.(1) Sous réserve du paragraphe (2), nul ne peut communiquer des informations qu’il a acquises ou auxquelles il avait accès dans l’exercice des fonctions qui lui sont conférées en vertu de la présente loi ou lors de sa participation à l’exécution ou au contrôle d’application de cette loi et qui permettraient de découvrir l’identité :  
a) d’une autre personne qui fournit ou a fourni au Service des informations ou une aide à titre confidentiel;

(b) any person who is or was an employee engaged in covert operational activities of the Service can be inferred.

b) d'une personne qui est ou était un employé occupé à des activités opérationnelles cachées du Service.

(2) A person may disclose information referred to in subsection (1) for the purposes of the performance of duties and functions under this Act or any other Act of Parliament or the administration or enforcement of this Act or as required by any other law or in the circumstances described in any of paragraphs 19(2)(a) to (d).

(2) La communication visée au paragraphe (1) peut se faire dans l'exercice de fonctions conférées en vertu de la présente loi ou de toute autre loi fédérale ou pour l'exécution ou le contrôle d'application de la présente loi, si une autre règle de droit l'exige ou dans les circonstances visées aux alinéas 19(2)a) à d).

(3) Every one who contravenes subsection (1)  
(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or  
(b) is guilty of an offence punishable on summary conviction.

(3) Quiconque contrevient au paragraphe (1) est coupable :  
a) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;  
b) soit d'une infraction punissable par procédure sommaire.

[...]

[...]

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

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

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

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

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 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

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;

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

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.

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) 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 information or other evidence.

(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 inadvertance.

(2) For greater certainty, the judge's power to appoint a

(2) Il est entendu que le pouvoir du juge de nommer

person to act as a special  
advocate in a proceeding  
includes the power to  
terminate the appointment and  
to appoint another person.

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.



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** DES-6-08  
**STYLE OF CAUSE:**

**IN THE MATTER OF a certificate signed pursuant  
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MAHMOUD ES-SAYYID JABALLAH**

**PLACE OF HEARING:** Toronto, Ontario

**DATES OF HEARING:** November 27, 2008

**REASONS FOR ORDER BY  
THE HONOURABLE MADAM JUSTICE DAWSON**

**DATED:** January 14, 2009

**APPEARANCES:**

Mr. Donald MacIntosh	For the Minister of Citizenship and
Ms. Caroline J. Carrasco	Immigration and the Minister of Public
Ms. Angela Marinos	Safety and Emergency Preparedness
Mr. David Knapp	

Mr. John Norris	Special Advocate
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