

Date: 20090430

Docket: DES-7-08

Citation: 2009 FC 439

Ottawa, Ontario, April 30, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

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

Applicants

and

MOHAMED ZEKI MAHJOUB

Respondent

REASONS FOR ORDER AND ORDER

[1] The order attached to these reasons will provide for the terms and conditions of Mr. Mahjoub's return to detention following the withdrawal of his supervisors namely, Mona El Fouli and Haney El Fouli.

[2] I was designated by the Chief Justice to deal with the reasonableness of Mr. Mahjoub's certificate and related proceedings on January 20, 2009.

1. Background

[3] Mohamed Zeki Mahjoub is the subject security certificate who was released from detention on stringent terms and conditions pursuant to the December 24, 2007 order of Mr. Justice Mosley.

[4] By reasons for order dated March 9, 2009, Madam Justice Layden-Stevenson confirmed Mr. Mahjoub's release and modified certain conditions of release. In her reasons, the learned judge indicated that because the proceeding was on-going, the parties may wish: (a) an order containing a consolidation of the conditions of release incorporating the changes (arising from her reasons) into Schedule "A" (the consolidated conditions of release in existence prior to the review; or (b) an order detailing the conclusions of the hearing. In either case, counsel were to jointly prepare a draft order for submission to Justice Layden-Stevenson. No draft order has been submitted for Justice Layden-Stevenson's consideration.

[5] Mr. Mahjoub advised the Court on March 17, 2009 that his supervisors were withdrawing their undertakings and that he would surrender to Canada Border Services Agency (CBSA) on March 18, 2009. The Court convened an emergency hearing on March 18, 2009 at which time it heard evidence from Mona and Haney El Fouli and Mr. Mahjoub. The Court was satisfied that no additional supervisors were available and accepted the all-party understanding that Mr. Mahjoub will be returned to custody as a result of the withdrawal of the supervisors.

[6] The Court then terminated the responsibilities of the supervisors relating to Mr. Mahjoub's release and ordered CBSA to cease all intercepts relating to their mail and phone lines. The Court further invited the parties to provide their input on the contents of the draft order. The parties disagree on the contents of a draft order and provided written submissions on their respective positions. On April 27, 2009, I heard arguments by counsel for the parties in Toronto.

[7] I set out below the respective positions of Mr. Mahjoub and the Applicants on the contents of the draft order.

2. Position of the parties

[8] Mr. Mahjoub submits that Justice Noël's decision issued from the bench on March 18, 2009 was in the nature of an oral order and was effective immediately upon pronouncement. Mr. Mahjoub further submits that the effect of that order was to render all of the terms and conditions governing Mr. Mahjoub's release nullities, either expressly or by necessary implication, and thus to vacate the original release order of Justice Mosley as subsequently varied on motion and on review. The terms of the detention order as proposed by counsel for Mr. Mahjoub simply confirm and memorialize Justice Noël's oral pronouncement.

[9] In the alternative, should the Court find that Justice Noël's oral pronouncement did not have the effect of vacating the order granting Mr. Mahjoub's release subject to conditions, Mr. Mahjoub submits that that order cannot survive his return to custody, and must be set aside.

Mr. Mahjoub further submits that the order terminating Justice Mosley's release order as varied should be antedated to the date of his return to custody.

[10] The Applicants take the position that the previous order rendered by Justices Mosley and Layden-Stevenson must continue to stand. The Applicants further contend that Mr. Mahjoub cannot use his return to detention as a collateral attack on the decisions of Justice Mosley and Justice Layden-Stevenson and that vacating these decisions would amount to an abuse of process and would raise the issue of *res judicata*.

[11] Further, in any event, the parties agree that the Court may have regard and rely on the reasons and findings of fact made by Justices Mosley and Layden-Stevenson in a subsequent detention review.

3. Analysis

[12] Mr. Mahjoub's return to detention was necessitated by the withdrawal of his primary supervisor and supervising surety. Upon the withdrawal of the supervisors, Mr. Mahjoub would no longer be in compliance with the terms and conditions of his release.

[13] Mr. Justice Noël's March 18, 2009 order had the effect of acknowledging the circumstances which necessitated Mr. Mahjoub's return to detention and releasing the supervisors of their responsibilities. It further provided the CBSA cease all intercepts in respect to these supervisors. The order did not expressly or otherwise vacate the release order of Mr. Justice Mosley or the decision of Madam Justice Layden-Stevenson.

[14] The terms and conditions which relate to Mr. Mahjoub's release are essentially spent and are no longer of any force and effect for reasons that are obvious and need not be stated. While both the order of Mr. Justice Mosley and the decision of Madam Justice Layden-Stevenson deal essentially with terms and conditions of release, this is not a basis upon which to declare either vacated. Certain terms may find application notwithstanding Mr. Mahjoub's return to detention such as the risk assessment directed by Madam Justice Layden-Stevenson.

[15] As indicated in a communiqué by Mr. Justice Noël dated March 20, 2009, the Court has commenced a review of reasons for the continued detention of Mr. Mahjoub. On consent of the parties, I now adjourn the review *sine die* on the understanding that the parties may on 48 hours notice request that the review be brought back before the Court.

[16] It should be understood that the detention review commenced by Order of Mr. Justice Noël on March 18, 2009, is not a review contemplated by subsection 82.(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (the Act) since that subsection provides for the initial review detention within 48 hours after the detention begins following the issuance of the warrant for arrest and detention pursuant to section 81 of the Act.

ORDER

THIS COURT ORDERS that:

1. Mr. Mahjoub's return to detention is confirmed.
2. All consents entered into by Mohamed Zeki Mahjoub, Mona El Fouli and Haney El Fouli to permit the Canada Border Services Agency or persons acting on its behalf to do or direct to be done anything to implement or monitor compliance with the Order of Mr. Justice Mosley issued April 11, 2007 as revised are hereby vacated.
3. For greater certainty, the Canada Border Services Agency or persons acting on its behalf must cease effective March 18, 2009, all interception of the mail addressed to Mona and Haney El Fouli and Mohamed Ibrahim and Yusuf Mahjoub and of the landline providing telephone service to their residence.
4. If it has not already done so, the Canada Border Services Agency or persons acting on its behalf must remove all equipment and devices installed in the Mahjoub family residence pursuant to the Order of Mr. Justice Mosley issued April 11, 2007 as revised.

5. The monies paid into Court pursuant to Rule 149 by the following sureties and in the following amounts are ordered returned:

(a)	Mona El Fouli	\$10,000
(b)	Omar Ahmed Ali	\$15,000
(c)	Rizwan Wancho	\$ 2,500
(d)	John Valleau	\$ 5,000

6. The performance bonds executed by the persons and in the amounts set out below are vacated:

(a)	El Sayad Ahmed	\$5,000
(b)	Murray Lumley	\$5,000
(c)	Maggie Panter	\$10,000
(d)	Elizabeth Block	\$1,000
(e)	Laurel Smith	\$10,000
(f)	Dwyer Sullivan	\$20,000
(g)	Elizabeth O'Connor	\$1,000
(h)	Patricia Taylor	\$1,000
(i)	John Valleau	\$5,000

7. A review of Mr. Mahjoub continued detention has commenced as of March 20, 2009.

8. Mr. Mahjoub's detention review is adjourned *sine die* on the understanding that the parties may on 48 hours notice request that the review be brought back before the Court in which case, the parties agree that the Court may have regard to and rely upon the reasons and findings of fact made by Justices Mosley and Layden-Stevenson.

"Edmond P. Blanchard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-7-08

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

PLACE OF HEARING: Toronto, Ontario

DATE OF PUBLIC HEARING: April 27, 2009

**REASONS FOR ORDER
AND ORDER:** Blanchard J.

DATED:

APPEARANCES:

Mr. Donald MacIntosh
Ms. Dupe Oluyomi
Mr. David Knapp

FOR THE APPLICANTS

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FOR THE RESPONDENT

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