

Date: 20091007

Docket: DES-5-08

Citation: 2009 FC 1008

Ottawa, Ontario, October 7, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

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

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

AND IN THE MATTER OF Mohamed HARKAT

REASONS FOR JUDGMENT AND JUDGMENT

The 6 months review of conditions of release (“the issue”)

[1] Mohamed Harkat is the subject of a security certificate. He was released from detention under stringent conditions, but those conditions were substantially modified in favour of Mr. Harkat as a result of a request to the Ministers with the agreement of Mr. Harkat and consent of this Court on September 21, 2009, in accordance with substantial changes contained in new information found in a threat assessment. The remaining conditions can be found in an Amended Order (the “Order”) from this Court dated September 22, 2009. Mr. Harkat contests a number of the conditions remaining in the Order as part of the six-month review of conditions provided for by section 82(4) of the *Immigration and Refugee Protection Act* (“IRPA”).

History of the proceedings

[2] A detailed compilation of Mr. Harkat's conditions may be found in the last Reasons for Judgment relating to his release conditions in *Harkat (Re)*, 2009 FC 241. The present Reasons for Judgment should be read as a follow-up to the first review of conditions referred to in the present paragraph.

New developments

[3] Section 82(4) of *IRPA* states that:

82(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.

82(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

In accordance with this section, Mr. Harkat filed an application on September 21, 2009 for an order reviewing his conditions of release from detention. In the meantime, for the purpose of this review, the Canadian Security Intelligence Service (“CSIS”) on behalf of the Minister of Citizenship and Immigration and the Minister of Public Safety (the “Ministers”) assessed the current threat posed by Mr. Harkat in both July and September 2009. It provided a top secret copy of its assessment to the special advocates and to this Court on September 18, 2009. After consultation and agreement with the Ministers counsel and the special advocate, a public summary of the threat assessment was released on September 23, 2009.

[4] In light of this new threat assessment, the Ministers recommended that a number of release conditions be removed. The Court agreed. Among the changes, Mr. Harkat can now go on outings in the city of Ottawa/Gatineau without the presence of his sureties; he can do so without calling the Canada Border Services Agency (“CBSA”); the video surveillance equipment installed at his house by CBSA was removed; Mr. Harkat no longer needs the approval of the CBSA to meet or talk to people if they do not constitute a threat to national security and do not have a criminal record; no more log of visitors is needed; and no more interception of mail or phone calls will be done.

[5] However, according to Appendix “A” of the September 22, 2009 Order, some terms and conditions of release still apply to Mr. Harkat, such as: the use of a Global Positioning System (“GPS”) electronic monitoring device; the execution of performance bonds by eight individuals to be forfeited to Her Majesty the Queen in Right of Canada should Mr. Harkat breach any terms or conditions of release; reporting in person to CBSA once a week; only travelling to locations inside the National Capital Region; not to associate or communicate with people possessing a criminal record or people posing a threat to national security; not to possess or use a cellular phone; not to access the Internet; and not to possess weapons. A CBSA representative continues to hold Mr. Harkat’s passport.

[6] Following the hearing on September 21, 2009, this Court held a closed hearing in the presence of the Ministers’ lawyers and of Mr. Cavalluzzo, special advocate for Mr. Harkat, to examine the public summary of the threat assessment with the help of a witness. The public summary was delivered to the parties on September 23, 2009. According to the assessment, CSIS

determined that “in regards to Mr. Harkat the threat to national security has diminished over time but remains a concern for the Ministers.” (See Public Summary of Threat Assessment on Mohamed Harkat).

Mr. Harkat’s most recent proposed changes to the conditions of release

[7] On September 25, 2009, counsel for Mr. Harkat addressed this Court on a number of the remaining conditions and made oral submissions without *viva voce* evidence. Mr. Harkat submits that, as a consequence of the new threat assessment, further changes should be made. However, Mr. Harkat does not suggest that all conditions of his release should be eliminated. He articulates a number of considerations that will be explained below.

[8] Mr. Harkat is contesting the use of the GPS. According to him, the use of such a device is a physical intrusion and should be removed. It is also noted that this specific GPS needs to be plugged into an electrical outlet for two hours every day, which makes its use inconvenient. According to the Ministers, the GPS should not be removed as it is appropriate considering the threat posed by Mr. Harkat. The Ministers also point out that Mr. Harkat has never complained about the device and they conclude that this demonstrates that the effect on the person involved is not as substantial as described above. Counsel for Mr. Harkat submits that the fact that he never complained about the GPS reflects Mr. Harkat’s respect for the Court, but that this fact cannot be used to prove that such a device is not intrusive to him.

[9] As for the performance bonds, Mr. Harkat is proposing one of two options. Mr. Philippe Parent would still be liable for the performance bond of \$50,000.00 for Mr. Harkat not to breach any terms and conditions contained in the order, while Ms. Pierrette Brunette would reduce hers to the amount of \$5,000.00; or both Mr. Parent and Ms. Brunette reduce their respective performance bonds to \$25,000.00 each. The Ministers oppose the proposed changes to the performance bonds because they have been a great incentive for Mr. Harkat to comply with his conditions. Counsel for Mr. Harkat stated that although Mr. Harkat understands the financial incentive of the sureties who execute performance bonds, the amount of the performance bonds is unnecessarily large.

[10] Mr. Harkat also contests the requirement that he report in person to CBSA once a week. He is willing to report in person every week if the GPS device is removed. However, since the GPS gives CBSA an idea of where he is at all times, CBSA should be content with Mr. Harkat reporting to the Agency by phone every week, and not in person. According to the Ministers, the purpose of the weekly report to CBSA is to monitor him. This measure is not disproportionate to the allegations made against Mr. Harkat and it is not unreasonable to ask him to report in person on a weekly basis.

[11] Mr. Harkat asserts that he has family living outside of the National Capital Region. He is willing to give 24 to 48 hours' notice to CBSA, and provide the destination of any travel to be made outside the region. These trips would be limited to Ontario and Québec, and if he needed to travel outside of these provinces, Mr. Harkat is willing to come back to this Court for a ruling on the matter. The Ministers are not opposed to travel outside of the National Capital Region, as long as: notice is provided 2 business days before each trip; the route is provided; and, the Ministers are

given the expected duration of the trip as well as the expected time of arrival. However, the Ministers are worried that the GPS device may not function in all the areas that Mr. Harkat would like to visit.

[12] Mr. Harkat is also concerned with the condition stating that he shall not communicate or associate with people that have a criminal record. Many people have criminal records because of offences that are not related in any way to national security. Such people should be allowed to communicate with Mr. Harkat. Mr. Harkat does not contest the fact that he cannot communicate or associate with any person who poses a threat to national security. He is also willing to leave it to the discretion of CBSA to allow certain people with criminal records to communicate with Mr. Harkat. The Ministers contest this as they believe that leaving a condition to the discretion of the CBSA has created conflicts in the past.

[13] An objection has been made with regards to the possession of cellular phones and the use of computers. Mr. Harkat is offering to obtain a cellular phone without Internet access. He is also prepared to supply CBSA with his cell phone number. As well, he points out that the ban on cellular phones in his residence has created many problems for visitors in the past, and he would like that condition removed.

[14] With regards to the restrictions on the use of computers, Mr. Harkat can now look for employment as a result of the lifting of a number of previous restrictions. Mr. Harkat may have to use a computer at work should he obtain employment.

[15] Mr. Harkat is requesting that he be allowed to use the computer in his house in the presence of one of his sureties, and asks the Court to lift the requirement that the computer be locked in a separate room in his house.

[16] The Ministers state that the ban on the use of cellular phones and computers is proportional to the threat that Mr. Harkat poses to national security. With the evolution of Internet technology it has become easier to erase traces of its use and the Ministers are not convinced that the monitoring of such devices would be sufficient. Any possible requirement to use a computer which may arise from Mr. Harkat's future employment can be dealt with, according to the Ministers, if and when required.

The new legislative regime

[17] The new *IRPA* legislation on the review of conditions (see section 82(4) and paragraph 82(5b)) requires the judge to review the reasons for continuing the conditions of release, to order and confirm or not the person's release, as well as to set any conditions that are considered appropriate in the circumstances.

[18] In *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, (Charkaoui #1) which dealt with the former *IRPA* legislation, the Chief Justice noted that detention is justified if the threat related to the individual was perceived to be a serious one (see para. 111). However, a release from detention can be considered if imposing some terms and conditions of release would neutralize the threat posed by the individual or if that threat would be longer

neutralized (see para. 119). The Chief Justice added that conditions of release had to be a proportional response to the threat (para. 116). Although the wording of *IRPA* has been amended it seems that the principles related to detention, conditions of release and the assessment of threats established in *Charkaoui #1*, remain applicable under the current legislation. It mentions that a person's release under conditions will not be ordered if such release with conditions would be injurious to national security or endanger the safety of any person, or if such person would be unlikely to appear at a proceeding or for removal if such person is released with conditions (see paragraph 82(5)a) of *IRPA*).

[19] Keeping in mind these principles, and the approach proposed in *Charkaoui #1*, and having had the benefit of hearing oral submissions from both parties, this six-month periodic review of the release with conditions of Mr. Harkat can now be assessed and determined.

The new threat assessment

[20] As noted earlier, the Ministers, through information found in a recent CSIS threat assessment of Mr. Harkat filed in September 2009, consider that the threat posed by him has diminished over time but has not disappeared completely. They submit that mitigating factors such as Mr. Harkat's significant public profile and the terms and conditions of his release, established primarily in May 2006 by Dawson J., have succeeded in reducing the threat.

[21] Under the new legislative regime, my first judicial obligation is to confirm whether or not Mr. Harkat should continue to be released from detention. I do. My second obligation is to consider the necessary conditions of release that are required to neutralize the threat posed by Mr. Harkat.

[22] In order to do this properly, the Court must assess the threat in light of the evidence presented, the respective positions of the parties and the stage at which the underlying proceeding is at.

[23] For the first time since Mr. Harkat's arrest and detention in relation to a certificate proceeding (December 10, 2002), the Ministers, through a CSIS threat assessment, now consider that the threat posed by him has diminished.

[24] In the previous reasons for judgment on the review of the release with conditions, the Court had noted that, at least since December 10, 2002, the evidence was such that Mr. Harkat had not associated or communicated directly or indirectly with persons who support terrorism, violent jihad or have a serious criminal record (para. 62). Further, it was also mentioned that it appeared that the conditions of release had neutralized the threat (para. 63). The passage of time also helped in controlling, assessing and diminishing the threat (see paras. 80 to 87). In addition, the high profile of Mr. Harkat was considered as an element (para. 86), as was the lengthy nature of certificate proceedings. Finally, the Court indicated that the burden of evaluating conditions in light of the threat and the objective of neutralizing it was a heavy workload for the judiciary to assume.

[25] Not having had the benefit of hearing Mr. Harkat's position on the reasonableness of the certificate, this Court is not in an ideal position to make a proper assessment of the threat. It is to be remembered that the Ministers have presented their case in closed and public hearings on the reasonableness of the certificate, but neither Mr. Harkat, through his counsel, nor the special advocates have cross-examined the Ministerial witnesses, nor has Mr. Harkat presented his evidence. This process is scheduled to begin in the late fall of 2009 in closed hearings, and public hearings are scheduled to be held in January and February 2010.

[26] The present reasons are therefore being written without access to a complete record. It is only with a complete record that proper final determinations can be made on the threat or danger associated with Mr. Harkat and the reasonableness of the certificate.

[27] This Court has reviewed the new threat assessment and has had the benefit of hearing a witness explain it. He was also cross-examined by a special advocate and questioned by the Court. Having heard the evidence from the first review of conditions and the 6 months review, the Court can only agree with the new threat assessment when it says that "...the threat to national security has diminished over time...". The Ministers still consider that a threat remains. On the basis of the evidence at this point in the proceeding, the Court is not in a position to contradict this assertion.

The remaining conditions

[28] As a consequence of the new threat assessment, the Ministers have reviewed the conditions and have recommended that a good number of them be dropped (see para. 4 of the present Reasons). Some remain (see para. 5 above).

The questions concerning the conditions

[29] Are the remaining conditions sufficient to neutralize the threat and if so, are they proportional in light of this new threat assessment?

[30] Without having to go through some lengthy explanation in response to the first question, this Court is of the opinion that the conditions proposed neutralize the threat associated with Mr. Harkat.

[31] At this time, after having heard the witness on the new threat assessment, and having Mr. Harkat's point of view on some of the conditions, and considering all the evidence and reviewing the remaining conditions, this Court considers them to be proportional to the current assessment of the threat. Without wanting to simplify any of them, they constitute a drastic change from the restrictions that were considered by the Court during the last condition review. They still limit the life and liberty of Mr. Harkat substantially, but they are no longer as stringent and onerous as they were before.

[32] This proportionality analysis was done keeping the current factual reality of Mr. Harkat in mind. If his circumstances change (such as a new working environment for both Mr. and Mrs. Harkat for example), this Court will have to reconsider the conditions and adapt them to new realities. The Court will have to reassess the threat at that time.

[33] Having said that, the Ministers are ready to accommodate Mr. Harkat whenever he wishes to travel outside the National Capital Region in the Province of Ontario and Quebec subject to certain conditions and proper notice. The Court has noted this offer and invites the parties to suggest an agreed amendment to the conditions.

[34] The recent changes sought by Mr. Harkat were argued by way of oral submissions from both parties; no witnesses were heard.

[35] The changes requested do not require immediate implementation. The Court has already noted that it is dealing with these matters on the basis of an incomplete record. There will be a better time to deal with the changes sought in the future.

[36] For the moment, this Court is not convinced by the arguments made to justify changes to the remaining conditions. It is understandable that Mr. Harkat would like all the conditions removed. However, there is an ongoing security certificate procedure which has not yet dealt with the substantive issue of the reasonableness of the certificate. The Court does not yet have evidence from both sides to consider. This will be remedied in the near future. Meanwhile, as Ministers'

counsel said during oral submissions, the Court will deal with new circumstances, such as future work scenarios, as they arise.

The credibility and trust factors

[37] The issues of trust and credibility were discussed in my Reasons for Judgment and Judgment in relation to the first review of conditions (at para. 88 and following) with respect to the importance of Mr. Harkat’s supervisors. At para. 92 of this last review of conditions, I state that:

“[92] Credibility and trust are essential considerations in any judicial review of the appropriateness of conditions. When considering whether conditions will neutralize danger, the Court must consider the efficacy of the conditions. The credibility of and the trust the Court has in a person who is the subject of the conditions will likely govern what type of conditions are necessary.”

[38] These comments are as important today as they were then. Trust and credibility are factors that only Mr. Harkat can change. The sooner these issues can be clarified, the better the evidence will be. The Court needs to weigh these factors before making the necessary determinations.

Suggestion of a certified question

[39] The parties are invited to submit a serious question of general importance for certification in accordance with section 82.3 of *IRPA* within ten (10) days of the date of these Reasons for Judgment.

ORDER

THIS COURT ORDERS THAT:

- The requests made by Mr. Harkat to cancel, amend or change the conditions of release issued in an Order dated September 22, 2009 as Appendix “A” are dismissed;
- The Court will amend the conditions when the parties submit a paragraph in writing that will permit Mr. Harkat to travel outside of the National Capital Region in the Provinces of Ontario and Québec if an agreement to that effect is reached between them.

**“Simon Noël”
Judge**

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-5-08

STYLE OF CAUSE: **In the matter** of a Certificate pursuant to Section 77(1) of the *Immigration and Refugee Protection Act* and **In the matter** of Mohamed Harkat

PLACE OF HEARING: Ottawa, Ontario

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REASONS FOR JUDGMENT: NOËL S. J.

DATED: October 7, 2009

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