Date: 20091211

Docket: DES-5-08

Citation: 2009 FC 1266

Ottawa, Ontario, December 11, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BEFORE THE COURT:

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), section 83(1) of the *Act*;

AND IN THE MATTER OF Mohamed HARKAT

REASONS FOR ORDER

NOËL S. J.

[1] These are reasons for order in relation to the motion for disclosure filed by Mr. Harkat (the "applicant") on April 9, 2009. Submissions were heard on April 15 and April 16 in public.

[2] An order granting in part the motion of April 9, 2009, was issued on April 21, 2009, with reasons to follow.

[3] Shortly after the April 21, 2009 order was issued, the Court was informed of the failure of the Ministers to disclose some information relating to one of the human sources relied on to support the allegations in the Security Information Report (SIR) (see 2009 FC 204). The intervening procedures, which came to a close on October 15, 2009, as well as the most recent closed hearings on the reasonableness of the certificate, which also addressed further disclosure, have delayed the issuance of these reasons for the Order of April 21, 2009.

The requests for disclosure brought by counsel for the applicant, Mr. Harkat, from August 2008 to April 2009

[4] On August 28, 2008, counsel for the applicant sought full disclosure of the information regarding Mr. Harkat in the possession of the Ministers and the Canadian Security and Intelligence Service (CSIS) subject only to the assertion of a national security privilege. If a national security privilege was asserted over such information, counsel wished to be informed of the basis of the privilege so that the assertion could be challenged by the Special Advocates. (Letter from Mr. N. Boxall dated August 28, 2008). In an appendix to his letter, counsel listed the information he was seeking to be disclosed which included but was not limited to:

- CSIS interviews;
- Human source information including information about the source's relationship with CSIS, motivation, payment, other targets, citizenship immigration status, criminal record etc.;
- Definitions of specific terms used in the Security Intelligence Report ("SIR");
- Information about employees involved in the preparation of the SIR;
- Background information about various individuals and organizations named in the SIR, e.g. FIS, GIA, Ibn Khattab, AGAI;

- The number of Islamic extremists that entered Canada on false Saudi passports; and,
- Original material of any interviews conducted.

[5] On March 20, 2009, counsel for Mr. Harkat wrote to the Court concerning potential disclosure to Mr. Harkat. In his letter, counsel noted that the requests made in August 2008 were still unanswered. In addition to the earlier requests, counsel requested the following information:

- declassified versions of all reports generated concerning the reliability and/or corroboration of human sources;
- a list of which of the conversations summarized and provided to Mr. Harkat are the result of technical intercepts and which emanate from human sources;
- transcripts of the summarized conversations if available;
- release of further summarized conversations between Mr. Harkat and his family; and,
- a detailed accounting or inventory of all information that has been lost or destroyed.

[6] Given the numerous demands for disclosure made by Mr. Harkat, on April 3, 2009, this Court ordered that his requests be made the subject of a motion for disclosure. This motion was filed on April 9, 2009 and sought an order requiring that:

- the Ministers release evidence regarding two named individuals; Mohamed El Barseigy and Ahmed Derbas;
- the Ministers release items of disclosure referred to in the disclosure request of counsel dated March 20, 2009;
- the Ministers provide the fullest possible disclosure of material relied upon under subsection 83(1)(e) of the IRPA to public counsel, such that public counsel know the case to be met;

- the Ministers meet their Charkaoui II disclosure obligations by complying with the *Stinchcombe* standard of disclosure of "all information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged." and

- the Ministers comply with the Supreme Court's holding in Charkaoui II, by providing a full inventory of destroyed and lost operational materials to date.

[7] To date, Mr. Harkat has been provided with:

- all publicly available material relied on in the confidential Security Intelligence Report (the "SIR") including news articles etc.;
- all information provided by other Canadian government agencies relied on in the confidential SIR;
- summaries of all conversations in which Mr. Harkat was a participant relied on in the confidential SIR;
- further information on the MAK;
- more detail concerning previously known allegations as well as previously undisclosed allegations made in the confidential SIR. Supplementary information may be disclosed as the proceedings are unfolding;
- A summary of the information contained in the *Charkaoui 2* disclosure material;
- some original information that was produced as part of the *Charkaoui 2* disclosure;
- Summaries of other conversations, not relied on in the SIR, between Mr. Harkat and others;

- Summaries of 22 documents in the *Charkaoui 2* material that were identified as essential by the Special Advocates;

[8] The bulk of the information disclosed to the applicant, over the course of the closed hearings of the proceeding, has been in the form of summaries. Some limited original material has also been provided to the applicant.

[9] Mr. Harkat has received substantial disclosure of the allegations made against him including some of the information on which those allegations are based. Special advocates have been permitted to communicate with counsel for Mr. Harkat (order of May 6, 2009) who was, as a result of the authorized communication, able to forward instructions to the Special Advocates.

[10] On November 10, 2009, this Court authorized a further oral communication between the Special Advocates and counsel for Mr. Harkat. The object of the communication was to allow Mr. Harkat to give instructions to the Special Advocates for the purpose of their cross-examination of the witnesses during the closed hearings of November and December 2009, on the following matters:

- The guesthouse in Babi.
- Mr. Harkat's relationship with Ibn Khattab.
- Mr. Harkat's relationship and contacts with Ahmed Said Khadr before and after he came to Canada.
- Mr. Harkat's relationship with Wael.

- Mr. Harkat's relationship with Al Shehri.
- Mr. Harkat's presence in Afghanistan and any activities there.
- Mr. Harkat's relationship with Abu Zubayda.
- Mr. Harkat's relationship with Bin Laden and any contacts with him.
- Mr. Harkat's access to large sums of money while in Canada.

[11] Both of these authorized communications were subject to conditions designed by the Court to prevent any inadvertent disclosure of confidential information.

[12] I note that these reasons for order do not address the constitutional sufficiency of the disclosure mandated by paragraph 83(1)(e) IRPA; this issue, among others, is the subject of an omnibus motion brought by counsel for Mr. Harkat which is to be argued at the end of the reasonableness hearings. I agree with Mosley J. that to determine these issues prior to the reasonableness hearing would be premature: *Re Almrei* 2009 FC 322 para. 54.

[13] I will first address the scope of the disclosure which is mandated by IRPA and by the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)* 2008 SCC 38 (*Charkaoui 2*)

The scope of the information that must be filed with the Court and provided to the Special Advocates: must the Ministers comply with a Stinchcombe standard of disclosure?

[14] In his motion record, Mr. Harkat takes the position that in the absence of the assertion of a privilege, all of the information concerning him should be disclosed. His counsel refers to the decisions of the Supreme Court of Canada in *Charkaoui* v. *Canada (Citizenship and Immigration)* 2007 SCC 9 (*Charkaoui 1*) and *Charkaoui 2* as authority for this assertion.

[15] Counsel for Mr. Harkat submits that the gravity of the consequences facing Mr. Harkat, namely, possible removal from Canada or indefinite detention, elevates the required level of procedural fairness pursuant to section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). He submits that regardless of the non-criminal nature of the proceeding, the consequences for Mr. Harkat's life, liberty and security of the person require that standards of procedural fairness equivalent to those applied in the criminal context must be met in a security certificate proceeding. Counsel further submits that summaries of information are not sufficient to meet the disclosure requirements mandated by section 7 and the *Charkaoui* cases. Mere summaries do not, according to counsel, allow counsel to verify or test the allegations made against Mr. Harkat. The presence of Special Advocates is not, in the applicant's opinion, sufficient to replace the role of counsel because of the prohibition on communication between the applicant and the Special Advocates. In the end analysis, only Mr. Harkat is in a position to effectively instruct his counsel in relation to the information relied on by the Ministers.

[16] The Ministers object to the disclosure of most of the information sought by the applicant on the grounds that the disclosure of the information would be injurious to national security. They rely on section 83 of the *Immigration and Refugee Protection Act* ("IRPA") which they assert is clear on its face.

[17] There are two statutory mechanisms designed to provide disclosure to the subject of a security certificate. The first is found in subsection 77(2) of IRPA which requires the Ministers to file the information and evidence on which the certificate is based in the Court. A public summary of this information must be provided to the subject of the certificate. The second is found in paragraph 83(1)(e) of IRPA which puts a dual obligation on the designated judge to maintain the confidentiality of information, the disclosure of which would injure national security, and to ensure that the subject of the certificate is reasonably informed of the case made by the Ministers.

[18] A further duty to disclose information to the designated judge was established by the Supreme Court of Canada in *Charkaoui 2*.

[19] This further duty to disclose in *Charkaoui 2* has been interpreted by this Court as imposing an obligation on the Ministers to provide the Court, and subsequently the Special Advocates, with all information in CSIS' possession or holdings relating to the named person, in this case Mr. Harkat: *Re Harkat* 2009 FC 203 at paras 10 and 11.

[20] In *Re Harkat* 2009 FC 340, this Court concluded that CSIS is not required to disclose all of its holdings regarding every person or organization that is alleged to have a connection with Mr. Harkat; it must provide such information where the Special Advocates have established that access to the information is necessary for them to fulfill their legislative role: see paragraph 17.

[21] The focus of the *Charkaoui 2* exercise is to ensure that the designated judge, and now the Special Advocates, has all of the information relevant to the verification of the allegations made against the named person and all of the information relied on to support those allegations: *Re Almrei* 2009 FC 240 at paras. 19-20 per Dawson J.

[22] When discussing how this new duty to disclose is to be discharged, the Supreme Court observed at paragraph 62 of *Charkaoui 2:*

> To uphold the right to procedural fairness to people in Mr. Charkaoui's position, CSIS should be required to retain all information in its possession and to disclose it to the ministers and the designated judge. The ministers and the designated judge will in turn be responsible for verifying the information they are given. […] The designated judge, who will have access to all the evidence, will then exclude any evidence that might pose a threat to national security and summarize the remaining evidence – which he or she will have been able to check for accuracy and reliability – for the named person. (Emphasis added)

[23] I take from this statement that the Supreme Court did not contemplate that the named person, the subject of a security certificate, would be granted access to all of the information or records retained by CSIS. Nor did the Supreme Court contemplate that the entire intelligence file relating to the named person would necessarily be provided to him or her. Consistent with s.

83(1)(e) IRPA, the Supreme Court held that a judge must exclude evidence that "poses a threat to national security" and determine which of the original information may be provided to the named person or summarized without harming national security.

[24] The ultimate obligation to protect information that would injure national security, is placed on the designated judge: 83(1)(d) IRPA. Indeed, in *Re Almrei* 2009 FC 240 Dawson J. concluded that even where the Ministers consent to the disclosure of information, the designated judge has an obligation, as set out in paragraph 83(1)(d) IRPA, to assess whether the information would, in the judge's opinion, cause injury to national security or endanger any person.

[25] Again, it is important to note that the constitutionality of paragraph 83(1)(e) IRPA is not at issue in this motion, nor is the sufficiency of the special advocate model set out in IRPA; these issues will be argued as part of the final submissions on the reasonableness of the certificate. I am consequently bound to refuse to disclose information where such information would, in my opinion, cause injury to national security or endanger the safety of any person.

[26] The designated judge's duty to protect information is not discretionary. Where I have come to the opinion that disclosure would injure national security or endanger any person I must refuse to disclose that information.

[27] I will now deal with the specific requests made by Mr. Harkat which may, for the most part, be divided into two categories. First, I will address requests for information filed with the Court pursuant to section 77(2) IRPA or, in accordance with the Ministers' disclosure obligations as established by *Charkaoui 2* ("information that is filed with the Court"). Second, I will address requests for information that is not currently before the Court. Last, I will deal with the request for the disclosure of information concerning two individuals who Mr. Harkat wishes to call as witnesses in this proceeding, and the request for the disclosure of a list of all original material that has been destroyed.

1. Mr. Harkat's specific requests for information filed with the Court

[28] Mr. Harkat (by way of letters dated March 20, 2009 and August 28, 2008) made specific requests for the disclosure including:

- declassified versions of all reports generated concerning the reliability and/or corroboration of human sources;
- Human source information including information about the source's relationship with CSIS, motivation, payment, other targets, citizenship immigration status, criminal record etc.;
- Information regarding foreign agencies;
- a list of which of the conversations summarized and provided to Mr. Harkat are the result of technical intercepts and which emanate from human sources;
- transcripts of the summarized conversations if available;
- a detailed accounting or inventory of all information that has been lost or destroyed;
- CSIS interviews.

(a) Reports concerning covert human sources

[29] Mr. Harkat is requesting declassified versions of all reports generated concerning the reliability and/or corroboration of human sources.

[30] The Ministers object to the disclosure of this information. They assert that disclosure of the information requested would identify covert human intelligence sources and consequently, would injure national security and potentially endanger the safety of individuals. In their submission, there is no meaningful way to redact these reports.

[31] Having reviewed the reports provided to the Court concerning the reliability and/or corroboration of human sources in this proceeding, this Court concludes that it would be injurious to national security to provide them to counsel for Mr. Harkat: *Re Harkat* 2009 FC 204. The reports are highly sensitive, would identify human sources and at times include foreign agency information provided to CSIS in confidence.

[32] I agree that there is no way to meaningfully redact the reports in a way that would allow them to be declassified and disclosed to Mr. Harkat. However, the information is available to the Court and has been given to the Special Advocates who may use it to test the evidence and information relied on by the Ministers.

[33] The applicant's request is denied.

(b) Human source information including information about the source's relationship with CSIS, motivation, payment, other targets, citizenship immigration status, criminal record etc.

[34] In Mr. Boxall's letter dated August 28, 2009 he requests human source information including information about the source's relationship with CSIS, motivation, payment, other targets, citizenship immigration status, criminal record, etc.

[35] The Ministers object to the applicant's request that the Ministers disclose reports concerning human sources "on the grounds of national security and danger to the security of persons." They note that the Special Advocates have access to some, if not all, of this information and are able to test the evidence with it. According to the Ministers, it would be impossible to redact such documents "…without removing any meaningful content."

[36] Information about covert human intelligence sources is privileged and may not be publicly disclosed without permanent damage to the national security of Canada. (*Re Harkat* 2009 FC 204).

[37] I conclude that disclosure of the requested information would injure national security and therefore deny the request to provide the applicant with any information concerning a human source or that might lead to the identification of such an individual. This information cannot be summarized in any meaningful way.

(c) A list of which of the conversations summarized and provided to Mr. Harkat are the result of technical intercepts and which emanate from human source.

[38] The applicant also seeks a list of which of the conversations provided to Mr. Harkat are the results of technical intercepts and which emanate from the reports of human sources.

[39] The Ministers object to this request since to identify the source of the conversation as a technical intercept or as a human source report would disclose the identity of human sources and methods of operation.

[40] In my opinion, the disclosure of this information would also be injurious to national security. Given the relatively small number of conversations summarized and provided to Mr. Harkat, any indication of which conversations, if any, are the result of a human source report would likely reveal the identity of a source to the applicant. As noted in *Re Harkat* 2009 FC 204, the protection of covert human intelligence sources is paramount to the national security of Canada and to the safety of its residents.

[41] The applicant's request is denied.

(d) Transcripts of the summarized conversations provided to Mr. Harkat

[42] Mr. Harkat is also seeking transcripts of the conversations that have been summarized and provided to him by the Court pursuant to paragraph 83(1)(e) IRPA.

[43] There are no remaining original recordings or transcripts of the conversations relied on in the confidential SIR and provided in summarized form to Mr. Harkat; the only remaining record of these summarized conversations are found in reports filed in the CSIS database.

[44] A full accounting of the remaining original material was provided to the applicant on April 24, 2009.

[45] The Court is therefore unable to grant this request.

(e) CSIS interviews of Mr. Harkat

[46] Mr. Harkat has been provided with the reports of all of his interviews conducted by CSIS. One audio recording of an Immigration and Refugee Board proceeding was disclosed to Mr. Harkat on April 24, 2009.

[47] There is no further information to be disclosed. There are no remaining notes or recordings of any interview with Mr. Harkat.

3. Requests for other information

[48] A number of the other requests made by the applicant have been characterized by the Ministers as falling within the realm of discovery and not disclosure. For example, counsel for Mr. Harkat has requested:

- Disclosure of the identity of CSIS employees who assisted in the preparation of the SIR,
- definitions of terms used in the SIR,
- information concerning the number of Islamic extremists that entered Canada on false Saudi passports,
- information about various organizations mentioned in the SIR.

[49] The Ministers take the position that they are not required to answer or disclose information that would be the equivalent of information that would be the product of examinations for discovery. (Letter from D. Tyndale dated April 7, 2009). They rely on the decision of the Ontario Court of Appeal in *R.* v. *Girimonte* for the proposition that the obligation to disclose the Crown's case against an accused does not extend to discovery of that case by the accused (*R.* v. *Girimonte* (1997), 37 O.R. (3d.) 617 at para. 37).

[50] They assert that an obligation to disclose information does not necessarily entail a right to discover the Crown's case. Nor does the obligation to disclose, set out in *Charkaoui 2*, extend as far as the obligations imposed on the Crown in the context of a criminal prosecution. Even in the context of a criminal prosecution, an accused is not entitled to discovery of the Crown's case. He or she is simply entitled to disclosure of all relevant material in the Crown's file.

[51] Mr. Harkat asserts that this information is relevant to his defence and is within the control of the Ministers and should therefore be disclosed.

[52] I conclude that most of the information requested by Mr. Harkat in the letter of August 28, 2008 does not fall within the disclosure obligations placed on the Ministers by *Charkaoui 2* and need not be provided to the Court or to Mr. Harkat except where the questions have been put in the context of an examination of a witness.

[53] In *R.* v. *Hynes* (2001 SCC 82 at para. 31) the majority of the Supreme Court held that the discovery mechanism provided by a preliminary inquiry is not the primary purpose of that proceeding (see also *R.* v. *Huynh* [2008] O.J. No. 2466). In *Hynes, supra*, Chief Justice McLachlin observed:

> Over time, the preliminary inquiry has assumed an ancillary role as a discovery mechanism, providing the accused with an early opportunity to discover the Crown's case against him or her: Skogman, supra, at pp. 105-6. Nonetheless, this discovery element remains incidental to the central mandate of the preliminary inquiry as clearly prescribed by the Criminal Code; that is, the determination of whether "there is sufficient evidence to put the accused on trial" (s. 548(1)(a)).

[54] Thus, even in the criminal context, the accused is not entitled to benefit from the discovery permitted by the holding of a preliminary inquiry. The Crown has the discretion to proffer a direct indictment and proceed directly to trial (see section 577 of the *Criminal Code*). I therefore conclude that section 7, in the context of this proceeding, does not require me to give the applicant an opportunity to discover the Ministers' case by requiring the Ministers to answer written inquiries.

[55] The applicant will have an opportunity to explore the questions raised by his requests for information during the cross-examination of the witnesses presented by the Ministers in support of the reasonableness of the certificate.

4. Request for disclosure of information regarding two named individuals; Mohamed El Barseigy and Ahmed Derbas

[56] Counsel for Mr. Harkat would like to call these individuals as witnesses. They point to the evidence in the previous certificate proceeding before Dawson J. to illustrate that the two individuals are important witnesses and have filed an affidavit in support of this motion indicating that they have not been able to contact these individuals. They believe that CSIS has files relating to Mr. Barseigy and Mr. Derbas and, in the absence of being able to contact them directly, they are seeking disclosure of any such file.

[57] The Ministers refuse to confirm or deny the existence of any file in relation to the two named individuals. They assert that to do so would harm national security.

[58] Requiring CSIS to provide Mr. Harkat with information concerning these two individuals would result in a confirmation or denial of the existence of such information. To do so could identify persons of interest (or not) to CSIS and jeopardize on-going investigations and would, in my opinion, be injurious to national security. The request is denied.

5. Request that the Ministers comply with the Supreme Court's holding in Charkaoui II, by providing a full inventory of destroyed and lost operational materials to date.

[59] The Ministers have provided the applicant with a list of original materials that remain in existence. The applicant is aware that the amount of relevant original material is limited.

[60] Any argument relating to the sufficiency and reliability of the remaining evidence can be effectively made by the special advocates and possibly by counsel for Mr. Harkat who are aware that there are several thousands of pages of *Charkaoui 2* information. I conclude that such a disclosure would be harmful to national security since it would necessitate that Mr. Harkat be provided with an index of much of the information that has been provided to the Court. As such, the disclosure would clearly tend to identify informants, reveal third party communication, relationships and information and methods of operation.

[61] Both the Court and the special advocates have vigorously reviewed the Ministers' claim that the remaining closed material should be withheld from the applicant. Indeed, further disclosure will be made as a result of the most recent closed hearing on the reasonableness of the certificate.

[62] The role of the Special Advocates is essential to the proper operation of paragraph 83(1)(e) IPRA. They have a statutory duty to test the Ministers' claim that the disclosure of information would be injurious to national security or endanger any person. To this end, the Special Advocates have been given access to all of the information filed with the court both in support of the certificate and pursuant to the requirements of *Charkaoui 2*. The Special Advocates are aware of the grounds

on which the Ministers have refused disclosure. They have vigorously contested the non-disclosure where they have concluded that the undisclosed information is necessary to ensure that Mr. Harkat is "reasonably informed" of the case against him.

[63] A substantial amount of new information has been disclosed as a result of the Special Advocates' thorough examination of the information filed both in support of the certificate and pursuant to *Charkaoui 2*.

Conclusion

[64] This Court is of the opinion that the information that Mr. Harkat seeks to have disclosed to him, that has already been filed with the Court may not be disclosed pursuant to paragraphs 83(1)(d) and (e) IRPA. Where possible, summaries of this information have been provided to Mr. Harkat. The other information requested by Mr. Harkat is not information which falls within the obligation to disclose set out in *Charkaoui 2*.

[65] This motion was granted in part on April 21, 2009. The Ministers were ordered to provide a summary of the *Charkaoui 2* disclosure to Mr. Harkat including a list of the number and type of remaining original records. The Ministers complied with this Order by serving and filing a "Summary and further disclosure of *Charkaoui II* documents" on April 23, 2009. Further disclosure was also made and may also be made as the proceedings are unfolding.

"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
DATE OF HEARING:	April 15-16, 2009
REASONS FOR ORDER:	NOËL S. J.
DATED:	December 11, 2009

APPEARANCES:

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Mr. D. Tyndale, Mr. A. Seguin	FOR THE RESPONDENT (The Ministers)
Mr. P. Cavalluzzo, Mr. P. Copeland	SPECIAL ADVOCATES

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Mr. P. Cavalluzzo Mr. P. Copeland	SPECIAL ADVOCATES