

Date: 20100315

Docket: DES-7-08

Citation: 2010 FC 300

Ottawa, Ontario, March 15, 2010

PRESENT: The Honourable Mr. Justice Blanchard

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 Mohamed
Zeki Mahjoub.**

REASONS FOR ORDER AND ORDER

Introduction

[1] On February 22, 2008, a certificate naming Mohamed Zeki Mahjoub as a person inadmissible to Canada on grounds of national security was referred to the Federal Court pursuant to section 77 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA). These reasons address a preliminary motion brought by Mr. Mahjoub in the reasonableness hearing.

[2] The motion is for the exclusion of certain summaries of conversations between Mr. Mahjoub's wife, Mona El-Fouli, and her acquaintances, on which the Ministers rely in their case against Mr. Mahjoub. These summaries were sealed on privacy grounds until the beginning of the reasonableness hearing by order of the Court dated May 27, 2009 ("the sealed summaries").

Background

[3] On November 20, 2008, the Special Advocates requested disclosure to Mr. Mahjoub of conversations and surveillance reports that were relied upon by the Ministers in the confidential Security Intelligence Report (SIR). Summaries of the conversations, prepared by the Ministers and reviewed by the Special Advocates, were filed for the Court's approval on March 25, 2009. The Court ordered that three of the summaries of conversations be kept confidential on an interim basis, on privacy grounds, and only be disclosed to Mr. Mahjoub and his counsel (*Mahjoub (Re)*, 2009 FC 316). Mr. Mahjoub was afforded ten days to bring a motion for a confidentiality order.

[4] Mr. Mahjoub filed a motion on April 27, 2009 pursuant to Rule 151 of the *Federal Courts Rules*, S.O.R./98-106, in respect of the three summaries, seeking an order that they be sealed until the commencement of the public hearing on the reasonableness of the certificate. Such an order was granted by the Court on May 27, 2009. The Confidentiality Order is to expire upon the commencement of the reasonableness hearing.

[5] Mr. Mahjoub has now filed a motion for the exclusion of the sealed summaries. The motion seeks to have the summaries removed from the record. It is *not* a motion for the continuation of the

Confidentiality Order, on the basis of privacy concerns and pursuant to Rule 151 of the *Federal Courts Rules*.

[6] The parties were heard on the motion on February 22, 2010. Submissions from the Ministers and the Special Advocates were also received by the Court in closed session on February 22, 2010. Mr. Mahjoub submitted further written submissions on March 8, 2010, following disclosure by the Ministers of a document cross-referencing the allegations in the public SIR with the evidence relied on by the Ministers. In response to the Court's inquiry during oral submissions, Mr. Mahjoub's counsel specified that the motion for exclusion was aimed at specific portions of the sealed summaries which were characterized by counsel as dealing with familial discord issues. The portions of the sealed summaries at issue shall hereafter be referred to as the sealed information.

Legislative Framework

[7] The relevant statutory provisions are found in Annex 1 to these reasons.

Issue

[8] The issue to be determined in the present motion is the following:

Should the sealed information be excluded from the evidence?

Mr. Mahjoub's Position

[9] Mr. Mahjoub submits two grounds for the exclusion of the sealed information. First he argues the sealed information is not relevant and should therefore be excluded by the Court pursuant

to paragraph 83(1)(j) of the IRPA. In the alternative, Mr. Mahjoub argues that the sealed information does not meet the threshold of reliability and appropriateness, as required by paragraph 83(1)(h) of the IRPA, and should be excluded on that basis. The issue of reliability was raised in Mr. Mahjoub's written submissions, but in oral submissions counsel for Mr. Mahjoub focused on appropriateness.

[10] In support of these arguments, Mr. Mahjoub begins with his interpretation of the IRPA's evidentiary regime, with respect to security certificate proceedings. Mr. Mahjoub argues that the standard for admissibility of evidence for such proceedings is set out in paragraphs 83(1)(h) and 83(1)(j) of the IRPA, which requires evidence to be reliable, appropriate and relevant. According to Mr. Mahjoub, the legislative scheme confers on the designated judge a gatekeeper function with discretion to exclude evidence at the outset of the reasonableness hearing that is not reliable, appropriate and relevant. Further, as the burden of proof lies with the Ministers, it is the Ministers who also bear the burden of proving the admissibility of evidence.

[11] With respect to the standard of relevance, Mr. Mahjoub argues that to be relevant the sealed information must support the Ministers' allegations against him, found in the public SIR. According to Mr. Mahjoub, the sealed information is irrelevant because there is no logical or experiential connection between the sealed information, which relates to familial discord, and the allegations found in the public SIR, nor does the sealed information render more probable the factual matters described in the public SIR. Mr. Mahjoub relies on the definition of relevance as set out in *R. v. Watson*, (1996), 50 C.R. (4th) 245 (Ont. C.A.), at p. 16. Mr. Mahjoub contends that no cogent

argument has been advanced by the Ministers on the relevance of the sealed information, and therefore the Ministers have not met their burden of establishing that such information is admissible.

[12] Alternatively, should the sealed information be found to be relevant, Mr. Mahjoub argues that it should be excluded pursuant to paragraph 83(1)(h) of the IRPA because it is not appropriate. In essence, Mr. Mahjoub argues that the information is inappropriate because its limited probative value is far outweighed by the prejudice it could cause. For this position Mr. Mahjoub relies on the general evidentiary rule, in criminal law, that bad character evidence be excluded, as discussed in *R. v. Handy*, 2002 SCC 56, at para. 139. Mr. Mahjoub further submits that this rule also finds application in civil matters.

[13] Finally, should the Court find that the relevance, appropriateness and reliability of the sealed information is to be determined at a later stage in the proceedings, Mr. Mahjoub requests that this information be sealed until such a determination is made.

Position of the Special Advocates

[14] The Special Advocates agree with Mr. Mahjoub's position that the sealed information is irrelevant. They argue that the sealed information relating to Mr. Mahjoub has no connection with the allegations made against him by the Ministers.

The Ministers' Position

[15] The Ministers argue that all information and evidence upon which they rely in the certificate proceeding against Mr. Mahjoub, must be filed (section 77(2) of the IRPA). The Ministers further submit that the sealed summaries are based on confidential information, which they rely upon and which has already been filed with the Court in accordance with the requirements of section 77(2) of the IRPA.

[16] The Ministers note that the summaries were released as a result of a request made by the Special Advocates, and after the Court determined that the release of the summaries would not be injurious to national security or endanger the safety of any person. The Ministers submit that the IRPA, as well as the open court principle, require that such summaries be placed on the public record. According to the Ministers, Mr. Mahjoub cannot, unless he moves for a confidentiality order under Rule 151 of the *Federal Courts Rules*, veto the placement of these summaries, or any information they contain, on the public record. The Ministers rely on *Harkat (Re)*, 2009 FC 167, at para. 11; *Charkaoui (Re)*, 2009 FC 342, at paras. 15 to 17, and *Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration v. Almrei, Harkat, Jaballah, and Mahjoub*, 2009 FC 240, at para. 60 (*Minister of Public Safety*).

[17] The Ministers further contend that Mr. Mahjoub's motion for the exclusion of the sealed information is premature. The Ministers argue that they are not required by the IRPA to address the relevance, appropriateness and reliability of the sealed information in advance of the reasonableness hearing. The Ministers contend that the assessment of the appropriateness, reliability and relevance

of any evidence, by the designated judge, can only be made once all the evidence has been presented and the parties have been given an opportunity to test it.

Analysis

[18] Evidence relied on by the Ministers that is not protected on the grounds of national security privilege, is evidence that is disclosed to the named person and placed on the public record. This is consistent with the statutory scheme which requires that information relied on by the Ministers, or a summary thereof, be disclosed to the named person (paragraph 83(1)(e) of the IRPA). The open court principle requires that such evidence be placed on the public record (See: *Minister of Public Safety*, at para. 60; *Charkaoui*, at paras. 16 and 17). It is only through the operation of a confidentiality order pursuant to Rule 151 of the *Federal Courts Rules* that such information can be kept from the public record and disclosed only to the named person (See: *Harkat*, at para. 13).

[19] Pursuant to paragraph 83(1)(h) of the IRPA the designated 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. The provision reflects Parliament's intention to alleviate the strict application of the rules of evidence in such proceedings. The provision confers broad discretion upon the designated judge to control, on a principled basis, the information and evidence received by the Court (See: *Jaballah (Re)*, 2010 FC 224, at para. 63). In my view, it would therefore be open to a designated judge to decline to receive evidence at the outset of the reasonableness hearing, or at any time, that is determined to be unreliable or inappropriate. Further, the designated judge shall not base a decision

on information or other evidence provided by the Ministers, and shall return it to the Ministers, if the judge determines that it is not relevant (paragraph 83(1)(j) of the IRPA).

[20] I have not been persuaded that, on its face, the sealed information is irrelevant, unreliable or inappropriate, and should be excluded at this stage of the proceeding. In the present circumstances, a final determination as to the relevancy, reliability or appropriateness of the sealed information at issue can only be made after the Ministers have been afforded the opportunity to lead evidence. It will be for the Ministers to establish the nexus between the impugned evidence and the allegations in the SIR. Further, it will be open to Mr. Mahjoub to object on the same grounds advanced in this motion that I regard as premature. It would then be open to the Court, having heard from both parties to disregard the information should it be found to be unreliable and/or inappropriate. Similarly, it would be open to the Court to return the evidence to the Ministers should it be found to be irrelevant.

[21] I therefore find that the motion to have the sealed information removed from the record, for the stated grounds, to be premature. As a consequence the motion will be dismissed. The appropriate rulings will be made at the appropriate time.

[22] It would have been open to Mr. Mahjoub to bring a motion for the continuation of the current Confidentiality Order on privacy ground, pursuant to Rule 151 of the *Federal Courts Rules*. This was not done.

ORDER

THIS COURT ORDERS that:

1. The motion for the exclusion of the sealed information is dismissed.

“Edmond P. Blanchard”

Judge

ANNEX 1

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

Est-ce qu'il y a un (a)

(b) engaging in or instigating the subversion by force of any government;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

...

77(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.

...

83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:

...

(e) throughout the proceeding, the judge

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

[...]

77 (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.

[...]

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

[...]

e) il veille tout au long de l'instance à ce que

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 disclosed;

...

(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;

...

(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.

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;

[...]

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;

[...]

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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-7-08

STYLE OF CAUSE: The Minister of Citizenship and Immigration
and The Minister of Public Safety v.
Mohamed Zeki Mahjoub

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 22, 2010

REASONS FOR ORDER: BLANCHARD J.

DATED:

APPEARANCES:

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