Federal Court

Cour fédérale

Date: 20101209

Docket: DES-5-08

Citation: 2010 FC 1243

Ottawa, Ontario, December 9, 2010

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, as amended (the "Act")**

**IN THE MATTER OF the referral of that
Certificate to the Federal Court of Canada
Pursuant to subsection 77(1) of the Act;**

AND IN THE MATTER OF Mohamed HARKAT

AMENDED REASONS FOR ORDER AND ORDER

Introduction

[1] The present reasons for order and order deal with a motion brought by Mr. Harkat, seeking the exclusion of summaries of conversations as evidence, based on the doctrine of abuse of process. In the alternative, a stay of proceedings is also being sought in consideration of a number of breaches which, when considered cumulatively, create such an effect as to require such a remedy (see Reply submissions on remedy pursuant to subsection 24(1) of the Charter, May 18, 2010, para. 28). In addition, the special advocates also submitted during the closed hearings that a stay of

proceeding should be based on their dissatisfaction with a number of measures taken by the Ministers to obtain information in relation to Mr. Harkat (see communications dated May 13, 2009, December 11, 2009, May 5, 2010, May 12, 2010 and September 1, 2010 which dealt in part on this issue). Since such determination is based on closed evidence, a specific set of reasons is issued as part of Annex A of these reasons, but, for national security purposes, is only available to those authorized to access such information. The remedies sought are denied.

[2] As will be seen, a substantial portion of the relevant arguments made by Mr. Harkat have already been addressed in two other decisions, one dealing with the reasonableness of the certificate (*Harkat (Re)*, 2010 FC 1241), the other with the constitutional questions (*Harkat (Re)*, 2010 FC 1242). The summaries of conversations which Mr. Harkat seeks to exclude as evidence have been validated insofar as their content is concerned. Also, the new disclosure process with the participation of special advocates passed constitutional muster. Mr. Harkat alleges that some events or situations have given rise to *Charter* violations that call for a section 24(1) remedy. He is seeking remedies on an abuse of process theory. In these reasons, the Court will attempt not to repeat what has already been written on similar topics in the two other judgments, but some overlap might be inevitable.

History of Proceeding

[3] A certificate stating that Mr. Harkat was inadmissible on security grounds (the "2008 Certificate") was signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration and referred to the Federal Court under the new

Immigration and Refugee Protection Act (the "New *IRPA*" or "*IRPA*") legislation on February 22, 2008.

[4] Previously, on December 10, 2002, the Solicitor General of Canada and the Minister of Citizenship and Immigration ("the Ministers") had signed a certificate pursuant to then subsection 77(1) of the *Immigration and Refugee Protection Act* (the "previous legislation"), in which they stated that they were of the opinion that Mohammed Harkat is a foreign national who is inadmissible to Canada on security grounds (the "2002 certificate"). In accordance with the legislation, he was arrested and detained. Mr. Harkat was released from detention on May 23, 2006 under conditions, which were reviewed periodically thereafter.

[5] A hearing as to the reasonableness of the 2002 certificate was held before Justice Dawson in March 2005. Mr. Harkat challenged the constitutionality of sections 78 through 80 of the previous legislation on the grounds that it violated the principles of fundamental justice guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Justice Dawson upheld the constitutionality of the security certificate process based on the Federal Court of Appeal's decision in *Charkaoui (Re)*, 2004 FCA 421. Justice Dawson concluded that there were reasonable grounds to believe that Mr. Harkat had engaged in terrorism for a number of reasons, in particular by supporting terrorist activity as a member of the Bin Laden Network ("BLN") (*Harkat (Re)*, 2005 FC 393).

[6] Mr. Harkat appealed Justice Dawson's ruling with respect to the constitutionality of the certificate proceeding. On September 6, 2005, the Federal Court of Appeal dismissed this appeal on the grounds that he had not shown any manifest error requiring a departure from *Charkaoui (Re)*, *supra*, and *Almrei v. Canada (*Minister *of Citizenship and Immigration)*, 2005 FCA 54, where the constitutionality of the same provisions of the former *IRPA* were upheld (see *Harkat (Re)*, 2005 FCA 285). Mr. Harkat sought leave to the Supreme Court, which was granted.

[7] On February 23, 2007, the Supreme Court of Canada ruled that the disclosure procedure for certificates under the former *IRPA* violated section 7 of the *Charter* and declared the relevant provisions to be of no force or effect. Chief Justice McLachlin wrote that the disclosure made was such that the named person's right to know and answer the case against him or her was not satisfied. The Court ruled that this violation could not be saved by section 1 of the *Charter* because it did not minimally impair the rights in question (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 ("*Charkaoui #1*")).

[8] The Supreme Court also declared that former *IPRA* subsection 84(2) governing applications for judicial release violated sections 9 and 10(c) of the *Charter*, because it did not provide for a timely detention review to foreign nationals as it did for permanent residents.

[9] The Supreme Court suspended the declaration of invalidity of the impugned provisions of the previous legislation for one year, allowing Parliament to enact a constitutionally compliant

legislation. As a result, Mr. Harkat remained subject to the 2002 security certificate and the conditions of release as imposed by Justice Dawson on May 23, 2006.

[10] On February 22, 2008, Bill C-3, an *Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act* ("Bill C-3" or the "New *IRPA*"), came into force in response to the ruling of the Supreme Court of Canada in *Charkaoui #1*. Bill C-3 made substantial modifications to the procedure governing the judicial review of certificates as well as applications for detention release in that context. These amendments included a new disclosure process of national security information and the addition of special advocates to represent the interest of the named persons during the closed hearings. Bill C-3 also eliminated the distinction between permanent residents and foreign nationals for the purposes of the judicial interim reviews of detention and release with conditions. The Ministers also sought the *status quo* of the conditions of release of Mr. Harkat.

[11] On June 26, 2008, the Supreme Court of Canada rendered a second decision concerning the certificate process in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 ("*Charkaoui #2*"). In that appeal, Mr. Charkaoui sought a stay of proceedings based on the destruction of original notes taken by the Canadian Security Intelligence Service ("CSIS" or the "Service") during interviews with him. The Supreme Court allowed Mr. Charkaoui's appeal in part. While a stay of proceedings was deemed premature, the Court held that the destruction of operational notes was a serious breach of CSIS' duty to retain and disclose information in

accordance with section 12 of the *Canadian Security Intelligence Act*, R.S.C. 1985, c. C-23 (the "CSIS Act").

[12] On September 24, 2008, in conformity with this ruling, the Court ordered the Ministers and CSIS to "… file all information and Intelligence related to Mohammed Harkat including, but not limited to, drafts, diagrams, recordings and photographs in CSIS' possession or holdings with the designated proceedings section of the Court".

[13] The scope of disclosure required by *Charkaoui #2* resulted in the filing of thousands of documents, most of them redacted in part. The production of such documents took over six months. However, the process was ongoing and began as soon as some redacted documents were ready to be filed. The redactions were necessary since a good number of documents did not only deal with Mr. Harkat, but with other matters that were not related to the case. The special advocates had access to the information relating to Mr. Harkat in accordance with the legislation but to nothing else. The Court therefore assumed an additional task in reviewing the relevance of the redactions. This exercise was time-consuming. The review identified a few questionable redactions, but they were warranted in all other cases. The special advocates reviewed the *Charkaoui #2* disclosure and identified some information which they felt was relevant to the proceeding. As a result of the *Charkaoui #2* review, documents were entered as exhibits (see ex. M13, M15, M17, M18, M25 and M26). Except for the human source polygraph issue (which shall be dealt with separately), the Court and the special advocates did not find any smoking gun or substantive information that was not included in the initial disclosure. This disclosure process added months to the proceeding.

[14] In the fall of 2008, closed hearings were held concerning the *Charkaoui #2* disclosure issue. Also, evidence through a ministerial witness was presented in support of the allegations made against Mr. Harkat and as to the reasonableness of the certificate. Since the *Charkaoui #2* disclosure was ongoing, the cross-examination of the witness by the special advocates was limited to the issue of the danger associated with Mr. Harkat in relation to the review of conditions of release. The cross-examination concerning the reasonableness of the certificate was postponed to November 23, 2009. During those closed hearings, the Court dealt with other matters such as the request of the special advocates to access a CSIS employee file and human sources files. This resulted in the issuance of reasons for judgment in both cases (see *Harkat (Re)*, 2009 FC 203; and *Harkat (Re)*, 2009 FC 1050).

[15] In October 2008, the Ministers consented to a change of residence, and to the removal of a condition that required Mr. Harkat to reside with two supervising sureties. The Ministers' consent was conditional upon Mr. Harkat's agreement with a number of conditions, such as the installation of surveillance cameras by the Canada Border Services Agency ("CBSA"). The Ministers also agreed to have Mr. Weidemann removed as a supervising surety.

[16] In December 2008, an issue arose with regard to telephone intercepts and solicitor-client privilege. Closed and public hearings were held on the subject, and it was concluded that no conversation with counsel was listened to by CBSA and/or CSIS. This information was updated as of the end of August 2010. Again, no calls were listened to.

[17] In March 2009, this Court conducted a review of Mr. Harkat's release conditions in public hearings. It concluded that his release without conditions would be injurious to national security, but however confirmed his release under more appropriate conditions. In particular, Mr. Harkat could stay home alone between 8AM and 9PM provided he gave the CBSA a 36-hour notice and call them every hour on the hour (see *Harkat (Re)*, 2009 FC 241).

[18] On April 23, 2009, as a result of the ongoing closed hearings, the Ministers disclosed facts on which they relied upon that were not previously disclosed publicly, as well as a summary and further disclosure of *Charkaoui #2* documents (see ex. M15). It was agreed between counsel that only information relied upon in examination and cross-examination could be used for the purposes of the proceeding.

[19] On May 12, 2009, 19 days before the public hearings as to the reasonableness of the security certificate were to begin, the CBSA conducted a search of Mr. Harkat's residence. Sixteen law enforcement officers were involved, including three canine units. Searches were authorized under the conditions of release. Having become cognizant of how the search was done, this Court immediately cancelled such authority given to the CBSA in the conditions of release, and subjected them to a prior authorization by the designated judge (See Order dated May 12, 2009 amending the conditions of release). Upon request by Mr. Harkat, the search was reviewed by the Court. It was ruled that the search authorization granted by paragraph 16 of the conditions of release did not

authorize the intensive and broad nature of the search and seizure done on May 12, 2009 (see *Harkat (Re)*, 2009 FC 659). All items seized were ordered to be returned to Mr. Harkat.

[20] On May 26, 2009, a Ministers' letter was delivered to the Court providing new information in relation to the reliability of a human source that had provided information on Mr. Harkat (the "polygraph issue"). The Court ordered the Ministers to file, on a confidential basis, the human source file, as the Court had evidence that led it to question the completeness of the information provided by the Ministers. On June 16, 2009, the Court issued a public direction offering three CSIS witnesses an opportunity to explain their testimony and their failure to provide relevant information to the Court. The CSIS witnesses accepted the Court's invitation.

[21] In their submissions, the special advocates sought the exclusion of all information provided by the human source in question as a remedy pursuant to subsection 24(1) of the *Charter*. On October 15, 2009, the Court issued public reasons for order and an order (*Harkat (Re)*, 2009 FC 1050). The Court found that there had been no intent to filter or conceal the information concerning the human source on the part of the CSIS employees and that there were insufficient grounds to rule that Mr. Harkat's rights, as guaranteed by the *Charter* had been violated. However, the Court ordered that another human source file relied upon by the Ministers be made available to the special advocates and the Court, setting aside the human source privilege, to ensure that there was no further concern in relation to the special advocates' ability to fully test the evidence. This was found to be necessary to repair the damage done to the administration of justice and to re-establish a climate of trust and confidence in the proceeding. The review of the human source files by the

special advocates and the Court did not reveal any new evidence to the effect that the information presented to the Court was incomplete or not reflecting the information gathered. The Ministers filed a new classified exhibit which reflected more properly the content of the human source file related to the polygraph test. The other human source file reviewed by the special advocates and the Court was in accordance with the original ministerial exhibits filed on human sources. The remedy sought by the special advocates pursuant to subsection 24(1) of the *Charter* was not granted since remedies had been granted and the situation did not call for the exclusion of the information provided by the human source.

[22] On September 21, 2009, Mr. Harkat filed an application for an order reviewing his conditions of release. In light of a new threat assessment issued by the Ministers, an important number of restrictions were removed. Mr. Harkat could now go on outings without the presence of his sureties and was allowed to travel outside the Ottawa region under certain conditions (*Harkat (Re)*, 2009 FC 1008). Some restrictions remain, such as having to wear a GPS bracelet.

[23] During the closed hearing, which was prior to the beginning of the public hearing on the reasonableness of the certificate, an issue arose with regard to third party information that the special advocates considered necessary to be transmitted to Mr. Harkat. However, this information is protected from disclosure by a caveat in the Intelligence world: no disclosure is allowed unless permission is obtained. This sensitive issue was dealt with at length during closed hearings. The special advocates agreed that some of the information was such that permission should be sought from these specific sources of information. A process was established by the Ministers to seek such

permission in specific cases. Some of this information was eventually disclosed to Mr. Harkat through summaries.

[24] The special advocates and public counsel aimed to obtain updated information on Zubaydah and Wazir, two individuals alleged to have links with Mr. Harkat. Closed hearings were held and the matter was reviewed at length. When possible, public communications of the information was made (see communication dated May 12, 2010). At the end of the public hearings, the Court informed the parties that any new information concerning these two individuals could be filed with the Court until August 31, 2010. Other documents were filed in closed hearings and a summary of information was also issued (see Oral communication issued on September 1, 2010). Closed hearings began in September 2008 and finished with oral submissions in early summer 2010. Public hearings also began in the fall of 2008 and were concluded with oral submissions also in the early part of the summer 2010. Many witnesses were heard in both public and closed hearings, some of them as factual witnesses, others as experts.

[25] Many lawyers have been involved in this proceeding: five lawyers for the Ministers, three public counsels for Mr. Harkat, and two special advocates. The involvement of so many persons gave rise to a multitude of motions and requests which required months of preparation, hearings and writing. Other lawyers were involved in the polygraph issue, which generated more work.

[26] These proceedings are supposed to proceed as informally and as expeditiously as the circumstances and considerations of fairness and natural justice permit (see paragraph 83(1)(a) of

the *IRPA*). From February 2008 to June 2010, at the end of public hearings, more than thirty months have passed. It has been impossible for the Court to proceed more expeditiously. A substantial amount of work was generated by the numerous lawyers who have acted on behalf of their respective clients. Sufficient time had to be allowed for the Ministers to comply with *Charkaoui #2* and the reviewing process had to take place, including the evaluation of the pertinence of the redactions. The analysis of the search of Mr. Harkat's home and the polygraph issues also required time. The scheduling of public hearings for so many counsel involved was time-consuming as well and the process of public disclosure also created hurdles. These were lengthy proceedings considering the subject matter at play.

The submissions of the parties

a) The applicant on the exclusion of summaries of conversations as evidence

[27] The Applicant submits that the "wholesale destruction" of documents by CSIS under the former OPS-217 policy violated his rights under section 7 of the *Charter*. The Supreme Court in *Charkaoui #2* indeed stated that this policy ran counter to CSIS' duty of candour. However, the Applicant suggests that the past destruction of documents constitutes a "devastating assault" on his capacity to make a full legal argument.

[28] Because of the destruction of documents, it is argued that the Applicant, his public counsel and his special advocates, cannot adequately verify the assertions made by the Ministers. As he is deprived of the original notes and records relevant to the case, the Applicant argues that he has suffered an insurmountable prejudice to making full answer and defence.

[29] It is argued that CSIS' actions with regard to the destruction of original documents cannot be excused on the basis of good faith. The Applicant submits that such negligence or willful blindness on CSIS' part cannot be characterized as good faith. Furthermore, it is submitted that even the absence of bad faith cannot excuse a breach of the Applicant's section 7 *Charter* rights.

b) The applicant on the stay of proceeding

[30] In the alternative, the Applicant submits that the cumulative effect of several alleged *Charter* breaches calls for a stay of proceedings. These alleged *Charter* violations are said to be a "systemic violation" of the Applicant's section 7 rights and as such, constitute an overwhelming prejudice and an affront to the integrity of the administration of justice. The prejudices suffered by the Applicant are argued to be perpetuated by the continuation of the proceedings, thus making the Applicant's case one of the "clearest of cases" as recognized by the relevant case law. Because of the gravity of such cumulative breaches, the Court must clearly censure such conduct. The several alleged breaches are detailed as follows:

a. Destruction of original documents by CSIS according to the prevailing OPS-217 policy

[31] As described above, it is submitted that the destruction of documents by CSIS is a breach of the Applicant's section 7 rights, as he cannot mount a full and adequate defence. As such, the destruction of documents should be considered as one of the cumulative breaches calling for a stay of proceedings.

b. The impact of the destruction of documents on the special advocates' duty

[32] Because of the destruction of original documents, the special advocates' presence is not sufficient to ensure a fair hearing for the Applicant and they have not been able to assume their duties in the closed hearings.

c. The alleged breach of CSIS' duty of candour

[33] It is submitted that CSIS' collection and divulgation of information was skewed in favour of information prejudicial to the Applicant, with neutral or exculpatory information being excluded. The Applicant submits that, absent a complete verification of the information underlying the SIR, CSIS' filtering of information is a breach of its duty of candour. Because original source documents and records are not provided, recordings and summaries of intelligence provided are subjected to a lower standard of scrutiny, contrary to the Applicant's section 7 rights. It is argued that the Court cannot make meaningful inquiries into the reliability of conclusions drawn by CSIS.

d. Passage of time

[34] The Applicant argues that the lengthy duration of the proceedings has resulted in a breach of his section 7 rights. The right to be tried within a reasonable time is enshrined in the *Charter* in section 11(b), but section 7 of the *Charter* is also relevant, as delays affect the security of the person; an application of the principles of fundamental justice is called for. It is submitted that passage of time hinders the applicant's ability to respond to the case made against him, in view of the frailty of human memory. The passage of time further compromises the Applicant's ability to secure exculpatory evidence.

e. The search of the applicant's home

[35] A search undertaken by CBSA was deemed to have been unlawful and conducted in an unreasonable manner, in violation of the Applicant's rights (*Harkat (Re)*, 2009 FC 659). The search compounds the prejudice suffered by the Applicant and should be considered in the abuse of process claims made by the Applicant.

f. The alleged violation of solicitor-client privilege

[36] As a result of the aforementioned search of the Applicant's home, the Applicant argues that there was a seizure of documents protected under solicitor-client privilege. Furthermore, telephone conversations were recorded and retained, despite CSIS' claim to a practice of dissociation. The seriousness of the breach of solicitor-client privilege has not been fully appreciated. It is therefore a *Charter* breach to be examined under an abuse of process theory.

g. The human sources and polygraph issues

[37] These issues are related to both CSIS' duty of candour and the reliability of the information submitted by the Ministers in support of their claims. In effect, CSIS had been negligent in not disclosing that human sources had been proven unreliable by polygraph examination. This further adds to the Applicant's claim to an abuse of process affecting his *Charter* rights.

[38] The applicant argues that the cumulative effect of all these elements is such that a stay of proceedings should be granted.

The respondent on the exclusion of summaries of conversations as evidence

[39] The Ministers submit that it is not appropriate to exclude evidence before the Court. The Ministers' are of the opinion that no abusive conduct has been shown and that the Applicant's section 7 rights to a fair hearing have not been prejudiced.

[40] The Applicant has effectively been given sufficient disclosure. In accordance with the weight of the case law, individuals are not entitled to the most favourable procedures, but rather a procedure that is fair with regard to the context and interests at stake. Because the special advocates have fulfilled their mandate and in the light of the evolution of disclosure requirements, it is argued that the Applicant has effectively been given the information required to meet the case made against him.

[41] The Ministers argue that exclusion of evidence is not warranted. There is no evidence of an absence of good faith on CSIS' part with regard to their past policy as to the destruction of material. In this case, the destruction of documents was not deliberate and was not done in order to avoid disclosure. Furthermore, the destruction of the evidence occurred after sufficient steps had been taken, namely, the preparation of a summary. CSIS took reasonable steps in the circumstance to preserve evidence for disclosure, which satisfy the section 7 requirements in the context of security certificate proceedings. Furthermore, in view of the seriousness of the allegations and the need to protect national security, the Court should proceed without excluding evidence.

The respondents on the stay of proceeding

[42] The Ministers argue that a stay of proceedings must be granted in only the clearest of cases, which the Applicant's case is not. A stay of proceedings is designed to stop the perpetration of a wrong that would persist if the prosecution of the case were to continue. Societal interests can and should be taken into consideration. Such an interest could call for the completion of the Applicant's case as to the reasonableness of the security certificate. Furthermore, the Court has granted remedies in relation to several of the Applicant's claims of section 7 violations; hence, there is nothing to suggest that the continuation of the proceeding would offend society's sense of justice or that the integrity of the system would be put in jeopardy.

a. Destruction of original documents by CSIS according to the prevailing OPS-217 policy

[43] The Ministers argue that the destruction of documents by CSIS was not ruled by the Supreme Court in *Charkaoui #2* to be one of the "clearest of cases" where a stay of proceedings is warranted. In accordance with the Supreme Court's decision in *Charkaoui #2*, the designated judge is in a position to assess the impact of the destruction of notes, which the Ministers argue to be minimal. The previous arguments with regard to the exclusion of evidence remedy apply to the abuse of process theory as well. In sum, the Applicant has not shown that his ability to answer the case has been prejudiced to the point that the Court should rule that there has been an abuse of process.

b. The impact of the destruction of documents on the special advocates' duty

[44] The Ministers argue that the confidential nature of certain information does not mean that the Applicant is unable to provide a full answer to the allegations summarized to him. The procedural safeguard of special advocates protects the confidentiality of information and ensures that the Applicant can make full answer and defence. The mere protection of confidential information by the Ministers does not amount to an abuse of process. Furthermore, nothing stops the Applicant from truthfully disclosing all of his previous activities to the special advocates, prior to their review of confidential information. His ability to do so is not impeded. Through his special advocates and his public counsel, the Applicant can effectively know and meet the case made against him.

c. The alleged breach of CSIS' duty of candour

[45] Under subsections 77(1) and 77(2) of the *IRPA*, the Ministers are to file all information and evidence on which the certificate is based, as well as a summary of all other information so that the named person can reasonably be informed of the case made against him. It is normal that further information is to be provided as the proceedings evolve, as more information may become available. Consequently, since CSIS and the Ministers have complied with the disclosure requirements set out in *Charkaoui #2*, there has been no breach of the duty of candour in these proceedings.

d. Passage of time

[46] Passage of time in this case does not give rise to an abuse of process. Delay, without more, cannot warrant a stay of proceedings; it must be shown that a prejudice has resulted from the alleged

unacceptable delay. The Applicant's detention was ordered and previous procedures were conducted pursuant to the law in effect at the time. Even though the Applicant's successfully challenged the previous statutory regime, that does not make the previous proceedings and delays an abuse of process. Furthermore, time taken up in legal challenges should not count against either party in assessing passage of time. Also, because the Applicant has just flatly denied the allegations, it is difficult to imagine that passage of time prejudices his ability to make a defence. Passage of time should thus not be considered in assessing the abuse of process motion.

e. The search of the Applicant's home

[47] Shortly after the search, the Ministers advised the Court that all documents and material seized would be sealed pending a further order of the Court. Through the intervention of Prothonotary Tabib, a small number of documents were found to be privileged and were returned to the Applicant. Following the Court's decision regarding the search, CBSA complied with the order. Hence, the Applicant has been granted a remedy and there is no evidence that the search resulted in a breach of the Applicant's solicitor-client privilege.

f. The alleged violation of solicitor-client privilege

[48] The Ministers submit that a completely adequate remedy has been granted to the Applicant with regard to the breach of solicitor-client privilege. There is no ongoing concern calling for a stay of proceedings. No prejudice has resulted from interceptions of solicitor-client communications, as no reports were generated as a result thereof. The Court has already granted a remedy and no wrong will be perpetuated.

g. The human sources and polygraph issues

[49] As decided by the Court in *Harkat (Re)*, 2009 FC 1050 and *Harkat (Re)*, 2009 FC 553, there was no deliberate effort by CSIS to mislead the Court. Institutional shortcomings deprived the Court of relevant information, but were remedied by the exceptional disclosure of the sources files to the Court and the special advocates. Hence, a remedy has been provided to the Applicant with regard to human sources and polygraph issues.

The issues

[50] The present motion raises questions with regard to the conduct of the Ministers, CSIS and, in some way, the Court in relation to the security certificate proceedings. The questions can be broken down as follows:

1) Does the destruction of originals of conversations which were summarized in accordance with a CSIS policy call for the exclusion of the summaries of evidence based on the doctrine of abuse of process and subsection 24(1) of the *Charter*?

2) Do any of the following events or situations, cumulatively, amount to an abuse of process which would call for a stay of proceeding:

   a) Has the destruction of originals of conversations (which were summarized) by CSIS in accordance with the CSIS policy OPS-217 impaired Mr. Harkat's right to disclosure?

b) The impact of the destruction of originals of conversations (which were summarized) on the special advocates' duties?

c) The alleged breach of CSIS's duty of candour;

d) The passage of time;

e) The search of Mr. Harkat's home;

f) The alleged violation of the solicitor-client privilege;

g) The human source and polygraph issues.

The applicable law

On the exclusion of evidence

[51] The exclusion of the summaries of conversations sought is based on an abuse of process doctrine. Mr. Harkat invokes subsection 24(1) of the *Charter*. To grant that remedy, a court must be convinced that the remedy sought is just and appropriate (*R. v. O'Connor*, [1995] 4 S.C.R. 411, para. 68 ("*O'Connor*"). The applicable criterion in determining the exclusion based on abuse of process is 1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and 2) no other remedy is reasonably capable of removing that prejudice (*O'Connor*, at para. 75).

[52] The approach developed in the criminal law context with regard to the exclusion of evidence is informative in that it identifies the relevant criteria and factors. In *R. v. Grant*, 2009 SCC 32 ("*Grant*"), the Supreme Court indicated that the remedy of exclusion of evidence was to be used while considering the purpose of subsection 24(2) of the *Charter* which is to maintain the good

repute of the administration of justice. In *Grant*, at paragraph 85, three criteria were identified for considering the exclusion of evidence when considering a *Charter* violation:

- Society's interest in the adjudication of the case on its merits;
- The impact of the breach on the *Charter* protected interests of the accused;
- The seriousness of the *Charter* infringing state conduct.

These three criteria "encapsulate consideration of "all the circumstances" of the case" (*Grant*, at para. 85) and enable a judge to determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute.

[53] Mr. Harkat seeks the exclusion of the summaries of conversations based on subsection 24(1) of the *Charter* and an abuse of process doctrine. While the exclusion of evidence typically flows from subsection 24(2), it can also be granted under subsection 24(1), but only in cases where "a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system" (*R. v. Bjelland*, 2009 SCC 38, at para 19 ("*Bjelland"*)). Then, the accused must show one of two elements: 1) that the prejudice suffered affects the fairness of the trial, where fairness is to be considered both from the accused's perspective and that of society; or 2) the admission of the evidence would compromise the integrity of the justice system (see *Bjelland*, at paras. 19, 22 and 23). The Court has to analyze the exclusion remedy through the prism of subsection 24(1) of the Charter, as Mr. Harkat's submissions indicate. However, as both parties have readily done in their written submissions, the Court will also draw principles from case law

arising under subsection 24(2) in order to fully assess Mr. Harkat's claims. This approach is also taken in the context of the stay of proceedings. It is useful here to remind the content of section 24 of the Charter:

Enforcement of guaranteed rights and freedoms	*Recours en cas d'atteinte aux droits et libertés*
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.
Exclusion of evidence bringing administration of justice into disrepute	*Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice*
(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.	(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

<u>On the stay of proceeding</u>

[54] The Supreme Court has very clearly set out the applicable test for granting a stay of proceedings and how the Court faced with a motion for a stay under subsection 24 (1) must consider its decision. In *O'Connor*, at paragraph 68 (*O'Connor*), the Supreme Court stated that:

> It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1). The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases. In this way, the threshold for obtaining a stay of proceedings remains, under the *Charter* as under the common law doctrine of abuse of process, the "clearest of cases".

[55] Thus, when a breach of the *Charter* has been found, a stay of proceedings is not automatic. The applicable standard is that of the "clearest of cases" where a stay is warranted and as such, a stay of proceedings is a remedy of last resort (*Canada v. Tobiass,* [1997] 3 S.C.R. 391 ("*Tobiass*")). In any other case, the Court may fashion a remedy pursuant to subsection 24(1) in order to address the *Charter* breach. As stated earlier, the Supreme Court has accepted that, when an abuse of process is alleged, it must be shown that (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice (*O'Connor*, at para. 75). On many occasions, the underlying justification has been stated as "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings, and only in clearest of cases should a stay be granted" (see, for example, *R. v. Potvin*,

[1993] 2 S.C.R. 880; *R. v. Scott*, [1990] 3 S.C.R. 979; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 ("*Blencoe"*)). A stay of proceedings is granted when the proceedings are tainted to such a degree that allowing the case to continue would tarnish the integrity of the court (*R. v. Conway,* [1989] 1 S.C.R. 1659). This test for a stay of proceedings is derived from criminal law and common law, but is wholly applicable to administrative law (*Blencoe*, at para. 120). Not every breach of a *Charter* right will amount to an abuse of process: the abuse "must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (*Blencoe*, at para. 133).

[56] When it is still uncertain whether the conduct in issue is sufficiently blameworthy to warrant a stay of proceedings, a third criterion is used: society's interest in proceeding with a full hearing leading to a final decision on the merits of the case (*R. v. Regan*, 2002 SCC 12, at para. 57 ("*Regan*"); *Tobiass*, at para. 92). This includes, as cited by the Ministers, the prosecution of immigration cases against a person accused of crimes against humanity (*Lopes v. Canada (M.C.I.)*, 2010 FC 403). In *Al Yamani v. Canada (M.C.I.)*, 2003 FCA 482, allegations of terrorism were deemed of the most serious kind and their gravity called for a continuation of the proceedings. Furthermore, a final determination of the validity of the terrorism charges was deemed to be a compelling societal interest, as it was clearly stated at paragraphs 38 and 39:

> Terrorist organizations by their nature are unpredictable. The existence of sleeper cells is widely recognized and the mere fact someone has lived peacefully in Canada for many years does not preclude them from being a threat to the security of Canadians. Contrary to the appellant's arguments, an allegation that someone is a former member of a terrorist organization therefore is a very serious one. Therefore, the gravity of the allegations argues in favour of continuing the proceedings.

> (…)
> Finally, the appellant argues that it is necessary to "consider the entire context of the circumstances" and not dissect each argument one by one. I acknowledge that some of the issues raised by the appellant could, in some circumstances, support an abuse of process argument. However, in the context of proceedings concerning an allegation there are reasonable grounds to believe that the appellant is or was a member of an organization that there are reasonable grounds to believe is or was engaged in terrorism, there is a compelling societal interest in obtaining a decision on the merits.

[57] When no breach of the *Charter* is found, an abuse of process theory can still be applied since it is recognized by the common law, even if a "strong convergence" between the two is noted (*O'Connor*; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, at para. 36 ("C.*U.P.E.*"); *United States of America v. Shulman*, 2001 SCC 21). The Supreme Court notes, at paragraph 70 of *O'Connor*, "that the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the *Charter*, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process". Essentially, abuse of process is recognized at common law, but it is essentially subsumed into the principles of the *Charter* (*Regan*; *C.U.P.E.*, at para. 36).

[58] The Court's authority to declare that there has been an abuse of process is "an inherent and residual discretion to prevent an abuse of the court's process" (*C.U.P.E.*, at para. 35). In striking similarity to the tests applied when abuse of process is considered as a remedy provided by subsection 24(1) of the *Charter*, the Supreme Court noted that a stay can be granted where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's

process through oppressive or vexatious proceedings: only in clearest of cases should a stay be granted (*R. v. Jewitt*, [1985] 2 S.C.R. 128).

The Analysis

Does the destruction of originals of conversations, which were summarized in accordance with CSIS policy, call for the exclusion of the summaries as evidence on the doctrine of abuse of process and under subsection 24(1) of the *Charter*?

[59] It is Mr. Harkat's submission that the summaries of conversations (see ex. M7 at Appendix K) should be excluded as evidence since the originals of these conversations have been destroyed in accordance with CSIS policy OPS-217. The Supreme Court declared that this policy was inappropriate since, in the Court's opinion, CSIS is bound to retain the information it gathers within the limits established by the legislation governing its activities (see *Charkaoui #2*, at para. 2).

[60] The public evidence filed by the Ministers includes both summaries of six interviews between Mr. Harkat and intelligence officers and summaries of conversations involving Mr. Harkat. Both intelligence officers' notes and originals of conversations were destroyed after summaries were made in accordance with the CSIS policy. These conversations involve key individuals related to Mr. Harkat, either as individuals he met or family members such as his father, brother or his Algerian fiancée and her mother. Mr. Harkat is only seeking the exclusion of these summaries of conversations as evidence. He is not seeking the exclusion of the summaries of six interviews with intelligence officers.

[61] In order to understand what is sought to be excluded, it is important to cite them as they were disclosed to Mr. Harkat. The summaries of conversations are the following:

> 1) In September 1996, HARKAT discussed the date and time of an individual's, believed to be Mohammed Aissa Triki (also known as Wael) arrival at the Montreal Airport. HARKAT counseled Triki on his processing through Canadian Immigration: Triki was to tell his story as it is, not lie and call HARKAT when he has left the airport. HARKAT would pick him up. HARKAT also told Triki that the interview at the airport was brief and that he should give them photocopies of his papers but keep the originals for his lawyer. HARKAT further told Triki to deny knowledge of anyone in Canada. Triki told HARKAT to not inform "the guys from Peshawar" of his arrival.
>
> 2) In September 1996, HARKAT received a message from Wael also known as Mohammed Aissa Triki indicating that the latter could be reached at a hotel in Montreal.
>
> 3) In September 1996, Wael (also known as Mohamed Aissa Triki) advised HARKAT that he was staying at a hotel in Montreal. Wael and HARKAT discussed whether or not the latter would be picking Wael up in Montreal. If HARKAT was not available, Wael had a friend in Toronto who was willing to pick him up. Wael planned to stay in Ottawa, get to see "the guys" and possibly go to Toronto later. Wael indicated that he would take the bus and asked HARKAT to wait for him at the bus station in Ottawa. HARKAT indicated that he would send his friend to pick Wael up and drive him to HARKAT's house. HARKAT would meet Wael at the house later that day. Later, a friend advised HARKAT that Wael had arrived in Ottawa. HARKAT asked the friend to drive Wael to HARKAT's house.
>
> 4) In November 1996, Al Shehre spoke to HARKAT from London, United Kingdom. Al Shehre addressed HARKAT as "Abu Muslim" and asked how the "brothers" were doing. When Al Shehre said that HARKAT might remember him as "Abu Messab Al Shehre of Babi", HARKAT quickly said that Abu Muslim was not there and identified himself as Mohamed. When asked, HARKAT told Al Shehre that he did not know where Abu Muslim was, and said he did not know when Abu Muslim would be returning.

5) In November 1996, HARKAT received an apology on behalf of Abu Messab Al Shehre for the use of HARKAT's alias, Abu Muslim. HARKAT tried to avoid being called Abu Muslim.

6) In February 1997, HARKAT identified himself to Hadje Wazir as "Muslim" from Canada. HARKAT inquired about Khattab or any of Khattab's 'people'. Hadje Wazir had not seen Khattab for a long time but he did see 'his people'. HARKAT also inquired about Wael, also known as Mohamed Aissa Triki. HARKAT furnished his telephone number and asked that it be provided to Wael and 'any brother who showed up at Wazir's Centre to do transaction'. HARKAT also used to do "transactions" at Hadje Wazir's Centre. HARKAT's number could also be provided to Abu Baseer who used to visit Hadje Wazir's Center for transaction purposes. Hadje Wazir had not seen Abu Baseer for a while but was seeing Abu Mazen and Abu Maher. HARKAT was pleased with this news and asked for Abu Maher's phone number. Hadje Wazir promised to have Abu Maher contact HARKAT. HARKAT also inquired about Al Dahhak and Dr. Abdelsamad. Further, HARKAT asked for Wael's telephone number. Hadje Wazir did not have Wael's cellular phone number 'on the list'.

7) In March 1997, HARKAT indicated that Ahmed Khadr was in Ottawa. HARKAT had met with him at the Centre and would be meeting him again on Monday.

8) In March 1997, HARKAT discussed some financial arrangements with an acquaintance in Ottawa who stated that he contacted Abu Zubaydah, at the "place" (believed to be a country) where HARKAT "used to be". Abu Zubaydah wanted HARKAT to help pay Abu Messab Al Shehre's legal fees, and HARKAT was asked if he could come up with $1,000.00 dollars. HARKAT replied that he was ready to pay that amount if he was contacted by Abu Zubaydah. When asked, HARKAT said he did not fear being contacted at home by Abu Zubaydah, and that he knew Abu Zubaydah personally.

9) In August 1997, HARKAT was provided with the telephone number for Al Dahak and Zuhair. HARKAT also discussed how the Ad Daawah Center invited all Muslims to purchase gas from Mohamed, the Moroccan. HARKAT indicated that he had spent the $30,000.00 dollars he had on the side. It was his intention to travel where Hadje Wazir was residing, and ask him for money. HARKAT could easily get money from Hadje Wazir.

10) In November 1997, two individuals (1 and 2) discussed how HARKAT had strayed from Islam. HARKAT was a practising Muslim who had become addicted to gambling and accustomed to Western life. Individual 2 noted that HARKAT had lived in Pakistan. When Individual 1 asked whether HARKAT was committed to Al Gamaa Al Islamiya (AGAI), in Pakistan, Inidividual 2 indicated that HARKAT was “one of them” but he was not tasked to do “great things” due to his leg problems.

11) In January 1998, two of HARKAT’s acquaintances had a discussion about HARKAT. When one inquired about the whereabouts of Abu Muslim, the other said to ignore HARKAT because he was frequenting the casino, disco bars and drinking alcohol. One acquaintance told the other to inform HARKAT’s contacts in Saudi Arabia to stop wiring money to him because “he (HARKAT) had changed drastically”, and the money he was receiving was not used properly. One acquaintance asked the other to cover up HARKAT’s story and he would see what he could do to get HARKAT back to his Islamic faith.

12) In February 1998, HARKAT told Fahad Al Shehri that he had to keep a “low profile” as he needed status in Canada. HARKAT mentioned that he had at the very least managed to send a friend to visit and help Al Shehri while he was in prison. HARKAT told Al Shehri that as soon as he received Canadian status, he would be “ready”. HARKAT advised that he was not in a position to say what he wanted to say.
In February 1998, HARKAT discussed his immigration case with Al Shehri. HARKAT’s problems with Immigration erupted following Al Shehri’s visit to Canada and the confirmation that HARKAT and Al Shehri were associated. HARKAT asked Al Shehri to send him $1500.00 dollars to cover the legal fees for his immigration process. Al Shehri promised to send the money as soon as possible. HARKAT asked Al Shehri to get the money from “the group” if he could not get it on his own.

13) In September 1998, an acquaintance of HARKAT told him that a female investigator from CSIS had interviewed him in relation to HARKAT’s nationality, his past activities in Afghanistan and Pakistan, and his relationship with Algerian community members in Ottawa. The acquaintance told the CSIS investigator that HARKAT was an Algerian from the province of Tirat (sic) and that HARKAT was known to Algerians as Mohamed, the Tiarti. HARKAT indicated that CSIS checked on him with many members of the

Algerian community in Ottawa and was watching him due to contradictory information CSIS had received on him. HARKAT indicated that he was questioned by CSIS in relation to possible aliases and whether or not he entered Canada using a false passport. He furthered that he tried to tell CSIS the truth but, according to him, CSIS was not listening. HARKAT told CSIS that they should check on him with the Algerian government. HARKAT also commented that if CSIS possessed strong evidence against him, he would have been deported by now.

14) March 12, 2009 – In May 2001, Harkat spoke with his brother Badrani in Algeria. Harkat reprimanded Badrani for giving money to an Algerian who had promised to procure immigration papers for 385. Harkat explained to his brother that this was a ploy to obtain money from naïve people. Harkat said he knew people who were married in Canada and still could not get their status in Canada so why would anyone believe it would be possible to obtain Canadian immigration papers in Algeria for uneducated Algerians like Badrani. Harkat was angry and told Badrani not to waste the money he had sent him in this way. Harkat then spoke with his mother and told her he had sent 40 million. Harkat spoke with his brother Badrani again and asked him to send him a copy of his police record and also to forget about coming to Canada. Badrani promised to look into it. Harkat then spoke with his sister Jamaa and told her he was not hurt following his car accident but he had lost his job. Harkat told Jamaa that he often viewed Algerian web sites and was aware of what was going on there.

15) In May 2001, Harkat told a friend that the imam never sent him the registration papers for his marriage. Harkat said he needed proof of his marriage because he was meeting with his lawyer to cancel his refugee application and replace it with an immigration process based on marriage. Harkat explained he needed these papers because his father was 80 years old and sick. Harkat and the friend would visit the imam later that night.

16) In June 2001, Harkat spoke with a friend who said she would have to submit a new immigration request within two months or leave Canada, unless her brother sponsored her and her family. Harkat said the brother had not received his own immigration papers yet. The friend said her brother's immigration case was being blocked by CSIS and added that she should not talk about it and said that CSIS was looking for people. Harkat suggested she should get married to which she replied that her brother was seeing if one of his

friends wanted to marry her for money. Harkat told his friend he could no longer see her because he did not want to create any further problems with his marriage. Harkat said he would like to see her to talk and suggested she call him when he was finished work.

17) In June 2001, Harkat spoke with Badrani in Algeria and asked him to find a house for him to buy in Algeria. Harkat said he would go to Algeria soon. Harkat spoke to his father and asked for news about the political and economic situation in Algeria. His father said the situation was very calm. Harkat said he was thinking of going to Algeria in the following two months.

18) In May 2001, HARKAT had a conversation with his fiancée Khaira Abdel Khader and her mother Yamina in Algeria. HARKAT indicated that he was still waiting for a copy of his police record and once he received this, he would be able to prepare his papers to at last be able to go to Algeria and marry Khaira. Khaira told HARKAT that she was not able to pass her baccalaureate and pleaded with HARKAT to send her 500,000 so she could buy the baccalaureate.

19) In May 2001, during another conversation with Khaira Abdel Khader and her mother Yamina in Algeria, Yamina suggested to HARKAT that he buy a house. HARKAT said that he was thinking of sending money to Algeria so that when he arrived there he would have enough money to buy a house. HARKAT explained that he was on employment insurance for a 6 month period and would not work until his papers were ready. HARKAT added that once his papers were ready, before the end of the year, he would travel to Algeria and get married.

20) In June 2001, in another conversation with his fiancée Khadija (another name for Khaira Abdel Khader) and her mother Yamina in Algeriga (sic), HARKAT told Yamina that if he did not have a response for his papers, he would go to Algeria and he would buy a house and stay there for six months. HARKAT explained to Khadija that he did not understand why things were not working out for him, and that his lawyer told him that he had bad luck in his file because his file was controlled by a lazy person. HARKAT added that his lawyer was doing everything necessary to solve the problem. In response to Khadija, HARKAT said that he did not think he would bring her to Canada to live with him. Khadija said that she would like to come to Canada but HARKAT explained he would like her to remain in Algeria to raise their future children.
(see ex. M7 at Appendix “K”)

[62] Mr. Harkat asks the Court to exclude all the 20 summaries of conversations, including the ones involving his family (conversations 14 to 20). However, he did admit having had conversations with family members and did not disagree with the content of the summaries made in relation to them (see Transcript of Proceedings, Vol. 15 (Feb. 5, 2010) at 41). Concerning the other summaries of conversations, he rejects a good number of them (see K5, K6, K7, K8, K9 and K12 and written submissions of public counsel, Annex B); he acknowledges that he may have had other conversations (K1, K3, K4, K13), but gave them some context. He also disagreed with what two acquaintances said about him (K10) and other conversations were nuanced (K1, K2).

[63] The originals of these conversations were destroyed once transcribed into a report in accordance with CSIS policy OPS-217. This policy was invoked by CSIS in response to what it considered the applicable legislative requirement (section 12 of the *CSIS Act*), on the use and retention of operational notes. The policy included operational notes, handwritten notes, audio and video recordings. The policy made it clear that operational notes were temporary in nature, and had to be destroyed once transcribed into a report (see *Charkaoui #2* at paras. 29 and following). The summaries of conversations were made accordingly and are part of reports made by intelligence officers in accordance with other policies of CSIS for the purposes of disclosure in the present proceeding. The summaries of conversations were derived from these reports which, if disclosed publicly, would be injurious to national security. As noted earlier, in *Charkaoui #2* (see para. 64), the Supreme Court invalidated policy OPS-217 on the basis that CSIS must retain operational notes for disclosure to the Ministers, the Court and the special advocates when issuing security

certificates. It is then the duty of the designated judge, with the help of Ministers' counsel and the special advocates, to disclose non-privileged information to the named person without causing injury to national security or endanger the safety of any person.

[64] Therefore, at the time, the destruction of originals took place in accordance with CSIS policy only after a report had been created and therefore ensuring that the information was preserved. There was no malicious intent whatsoever.

[65] John, the intelligence officer who testified in public in support of the Ministers' allegations against Mr. Harkat, explained the process followed by CSIS personnel to ensure the quality of the summaries of audio recordings. There was also closed evidence on that topic.

[66] Having fully reviewed the confidential information in support of the allegations, and having gained a knowledge of the factual situation surrounding Mr. Harkat's life at the time, each summary of conversation, including the ones with his family or fiancée, is supported by the evidence, whether public or confidential, which further supports the content of the summaries. It is significant that the individuals involved in these conversations are related to Mr. Harkat's past life and the contents of the conversations are related thereto. The summaries accurately reflect Mr. Harkat's life at the time and I therefore find them reliable.

[67] They are redacted in such a way as to give Mr. Harkat more information in support of the allegations made against him. They allow him to better understand the case made and respond to it if he so chooses. In most cases, he denied having them.

[68] As noted in *R. v. La*, [1997] 2 S.C.R. 680 ("*R. v. La*"), there is no absolute right to the production of originals of documents, but when relevant material once available becomes non-existent, then that calls for a proper explanation. Such was the case in the present proceeding. If originals of documents are not available, then we must determine whether or not the failure to have the originals has prevented the named person from making a full answer and defence, and whether or not the circumstances as described violated the fundamental principles underlying the community's sense of decency and fair play and cause prejudice to the integrity of the judicial system. If that is the case, violation of section 7 will have been shown and a remedy pursuant to subsection 24(1) will be fashioned.

[69] In the present circumstances, the originals were summarized as part of confidential reports from which summaries of conversations were made and disclosed to Mr. Harkat. The effect of disclosing such summaries was to give Mr. Harkat further disclosure to make a full answer and defence. Furthermore, the loss of the originals of the conversations did not occur as a result of a dishonest intent to destroy valid evidence, but rather as a result of the application of CSIS policy.

[70] The disclosure made to Mr. Harkat as a result in part of the special advocates' work in protecting his interests in closed hearings, gave him better access to the intelligence information

gathered by CSIS on him. Through the persistent work of all concerned, more information was disclosed to Mr. Harkat and his counsel.

[71] Mr. Harkat submits that the originals of these conversations would have enabled him to challenge them on the basis of faulty voice identification, inaccurate translation, etc. There is no evidence that these challenges would have been successful. On the contrary, the evidence presented in public and closed hearings supports the facts and substance of these summaries.

[72] As noted earlier, following *O'Connor,* a stay can be granted if prejudice caused by the alleged abuse will be perpetuated or aggravated through the conduct of the trial or its outcome and no other remedy is available. As the summaries and the information provided to Mr. Harkat show, the alleged prejudice, even if found to be existent (which in my view is dubious), it would not be perpetuated or aggravated should the proceedings continue. If anything, the proceedings have resulted in additional relief. Without a doubt, Mr. Harkat has benefited from more substantive disclosure. As well, the assessment of secret evidence was made by his special advocates in the defense of his interests.

[73] In both *Grant* and *Bjelland*, the Supreme Court clearly shows a concern in ensuring that the administration of justice is well preserved and the integrity of the justice system is protected. Depending on the seriousness of the *Charter* breach, the remedy must be such that a sound administration of justice prevails. The chosen remedy must ensure that the trial is fair both from the accused's perspective and that of society.

[74] Whether considered through the prism of "the integrity of the justice system" or through the concept of "bringing the administration of justice into disrepute", it is clear that the impact of admitting or excluding the evidence on the justice system's repute must be considered. As such, the circumstances of this case do not suggest that there has been an abuse of process, nor that prejudice was suffered by Mr. Harkat. The fairness of the trial, from the Applicant and society's perspective, has not been affected by the destruction of source documents or the admission of evidence spawned from destroyed documents. As required by *Bjelland*, the Court must assess if a less drastic remedy cannot be fashioned. In the present case, remedies were indeed granted, following *Charkaoui #2* and the disclosure orders issued by this Court.

[75] As illustrated, substantial disclosure was given with regard to the summaries and while the source documents have been destroyed, this destruction was subsequent to an effort to preserve their content. It is important to recall the Supreme Court's findings in *Charkaoui #2*, at paragraph 77, with regard to the admission of documents the sources of which have been destroyed:

> Consequently, it would be premature at this stage of the proceedings for the Court to determine how the destruction of the notes affects the reliability of the evidence. The designated judge will be in a position to make that determination, as he will have all the evidence before him and will be able to summon and question as witnesses those who took the interview notes. If he concludes that there is a reasonable basis for the security certificate but that the destruction of the notes had a prejudicial effect, he will then consider whether Mr. Charkaoui should be granted a remedy. (emphasis added)

[76] Therefore, in order to assume this duty, the Court will not exclude the summaries of conversations as evidence for the reasons mentioned above. It is also in the best interest of justice which includes the best interest of society that this certificate case be decided on all the evidence adduced. With the disclosure of these summaries of conversations, Mr. Harkat was in a better position to understand the case made against him and respond to it. The destruction of originals of conversations replaced by summaries of conversations has not caused a prejudice constituting a *Charter* breach based on an abuse of process theory. No section 24 *Charter* remedy is called for.

Do any of the following events or restrictions, cumulatively, amount to an abuse of process which would call for a stay of proceeding?

Did the destruction of originals by CSIS in accordance with the policy OPS-217 impair Mr. Harkat's right to disclosure?

[77] For the reasons mentioned above concerning the exclusion of evidence of summaries of conversations, Mr. Harkat's right to disclosure has not been impaired. In addition, I would refer to *Harkat (Re)*, 2010 FC 1241 and *Harkat (Re)*, 2010 FC 1242, which explain at length the new disclosure process with the participation of special advocates. I would like to make additional comments.

[78] Mr. Harkat submits that "it may be just impossible" to establish a procedural mechanism that would result in sufficient disclosure and ensure that the named person will be properly informed of the case made against him and able to respond to it because of national security imperatives. As can be seen from the current legislation, Parliament has adopted a disclosure process which facilitates the named person's ability to know the case made against him and respond to it.

[79] Substantial and relevant evidence was disclosed to Mr. Harkat, which apprised him of the case made against him. The responses presented to refute the allegations reveal that he has been informed satisfactorily. A review of his testimony is also informative in that regard.

[80] To be explicit as to the allegations made and some of the evidence disclosed to Mr. Harkat, it is useful to describe and point out some elements disclosed to Mr. Harkat.

[81] The security certificate is supported by a Classified Security Intelligence Report ("CSIR" or "TS SIR") from which a Public Security Intelligence Report ("PSIR" – ex. M5) was filed on February 22, 2008, and provided to Mr. Harkat. The public document was available at the time the two special advocates were appointed and they disposed of one month to discuss it with Mr. Harkat and his public counsel prior to the time when the special advocates became privy to the classified information. At that point, the special advocates needed to obtain judicial authorization to communicate since they had received access to the TS SIR. A Revised Public Security Intelligence Report ("RPSIR" – ex. M7), the result of an ongoing process of reviewing the classified information in closed hearings with all involved which brought the disclosure of additional information, was provided on February 6, 2009. Generally, the RPSIR alleges that, prior to and after arriving in Canada, Mr. Harkat engaged in terrorism by supporting terrorist activity as a member of the terrorist entity known as the Bin Laden Network ("BLN"). The allegations and evidence disclosed by the Ministers are as follows:

(a) Prior to arriving in Canada in October 1995, Harkat was an active member of the Bin Laden Network and was linked to individuals believed to be in this Network. He was untruthful about his occupation in Pakistan as he had concealed from Canadian authorities his activities in support of Islamist extremist organizations;

(b) In Algeria, Harkat was a member of the Front Islamique du Salut ("FIS"), a legal political party at the time. Harkat acknowledged his support for the FIS from 1989. After being outlawed in 1992, the FIS created a military wing, the Armée islamique du salut, which supported a doctrine of political violence, and was linked with the Group islamique armé ("GIA"). The GIA supported a doctrine of depraved and indiscriminate violence, including against civilians. When the FIS severed its links with the Group islamique armé ("GIA"), Harkat indicated that his loyalties were with the GIA. Harkat's decision to align himself with the GIA is an indication of support for the use of terrorist violence;

(c) Harkat was associated with Ibn Khattab;

(d) The Algerian Mohammad Adnani (a.k.a. Harkat), a former soldier in Afghanistan, was a member of the Egyptian terrorist organization Al Gamaa al Islamiya ("AGAI");

(e) After arriving in Canada, Harkat engaged in activities on behalf of the Bin Laden Network using methodologies typical of sleepers;

(f) In support of clandestine activities, members of the Bin Laden Network use false documents. When Harkat arrived in Canada he was in possession of two passports, a Saudi Arabian passport and an Algerian passport. The Saudi Arabian passport bearing the name Mohammed S. Al Qahtani was declared and was verified as fraudulent. Saudi passports were determined to be the passports of choice for Muslim extremists entering Canada because prior to 2002, Saudi passport holders did not require a visa to travel to Canada;

(g) Harkat used aliases such as Mohammed M. Mohammed S. Al Qahtani Abu Muslim, Abu Muslima, Mohammad Adnani, Mohammed Adnani, Abu Muslim, Mohammed Harkat, and Mohammed – the Tiarti, and concealed them in order to hide his identity and his real activities on behalf of the Bin Laden Network;

(h) Harkat kept a low profile as he needed status in Canada following which he would be "ready". He was a sleeper who entered Canada to establish himself within the community to conduct covert activities in support of Islamist extremism;

(i) Harkat used security techniques and displayed a high level of security consciousness to avoid detection;

(j) Harkat concealed his previous whereabouts, including the period that he spent in Afghanistan. Harkat also concealed his links with Islamist extremists, including his relationship with persons in Canada, in part to disassociate himself from individuals or groups who may have supported terrorism;

(k) Harkat maintained links to the financial structure of the Bin Laden Network and concealed these links. He had access to and received, held or invested money in Canada originating from the Bin Laden Network. He also had a relationship with Hadje Wazir, a banker Harkat knew from Pakistan, who is believed to be the same individual as Pacha Wazir – an individual involved in terrorist financing through financial transactions for Ibn Khattab and the Bin Laden Network;

(l) Harkat assisted Islamist extremists in Canada and their entry into Canada, and concealed these activities. Harkat counselled Wael (a.k.a. Mohammed Aissa Triki) on his processing through Canadian immigration including denying knowledge of anyone living in Canada, and contacting Harkat once cleared through immigration. Harkat spoke to Abu Messab Al Shehre while he was in London, U.K. Al Shehre was searched upon arrival in Canada and found to be in possession of various documents (i.e. a shopping list of munitions and weapons) and paraphernalia (i.e. weapons or parts thereof), including a head banner usually worn by Islamist extremists when in combat, and believed to be covered with written Koranic verses. Al Shehre was detained and Harkat visited him in jail, but denied any previous contact; and

(m) Harkat had contacts with many international Islamist extremists, including those within the Bin Laden Network, and other numerous Islamist extremists, including Ahmed Said Khadr and Abu Zubaydah.

[82] As part of the RPSIR, the appendices contain a brief description of organizations or individuals such as Al-Qaeda, the Groupe Islamique Armé ("GIA"), Ibn Khattab and Ahmed Said Khadr. It also includes six CSIS summary interviews with Mr. Harkat from May 1, 1997 to September 14, 2001, as well as 13 summaries of conversations (the "K conversations") (see paragraph 61 of the present reasons). These summaries relate to Mr. Harkat, either as a participant

in, or as the subject of, the conversation, from September 1996 to September 1998. They are used by the Ministers as support evidence to the allegations. Such disclosure of evidentiary information had never taken place before. The substance of these conversations was carefully set out on the basis of CSIS's book of information and became exhibits. All counsel involved in the closed hearings made that possible. Finally, the RPSIR also has public information relied upon and immigration documents concerning Mr. Harkat. This type of evidence explains the Ministers' view of Mr. Harkat's situation.

[83] As a result of ongoing reviews of the classified information during closed hearings, more detailed factual allegations and evidence were provided to Mr. Harkat and filed publicly on April 23, 2009 (see ex. M10):

> (a) Harkat operated a "guesthouse" in a suburb of Peshawar, Pakistan. There is information to suggest that the guesthouse may be linked to Ibn Khattab, and was used by mujahideen who were on their way to or from training camps in Afghanistan with the facilitation of Harkat;
>
> (b) There is information that demonstrates that Harkat had access to sums of money when he required it. After he arrived in Canada, Harkat received money from contacts abroad; and
>
> (c) There is information to the effect that Harkat worked for the same organization (Human Concern International) as Ahmed Said Khadr and was acquainted with Khadr before Harkat came to Canada. Also, there is information to suggest that Harkat was entrusted with specific tasks on behalf of Khadr.

[84] The special advocates took the position that such information had to be disclosed in order to properly inform Mr. Harkat. This was done with documents prepared on the basis of sensitive

information. On February 10, 2009, the Ministers filed a Supplementary Classified SIR, from which a Supplementary Public SIR (ex. M11) was extracted, which alleges that:

(a) From 1994 to 1995 Abu Muslim (a.k.a. Harkat) was an active jihadist in Peshawar who was in the service of Ibn Al Khattab, not Al-Qaeda, for whom he ran errands and worked as a chauffeur;

(b) From 1994 to 1995 one of HARKAT's friend's was Dahhak. In February 1997, HARKAT contacted an individual in Pakistan whom he addressed as Hadje Wazir. Identifying himself as Muslim from Canada, HARKAT asked Wazir whether he knew Al Dahhak. Wazir advised in the negative. It is believed that Dahhak, Al Dahhak and Abu Dahhak (aka Ali Saleh Husain) are the same person, and that this person is associated to Al-Qaeda; and

(c) While in Pakistan, HARKAT was known to have had shoulder length hair and a noticeable limp.

[85] This information became public as a result of numerous requests made by the special advocates and eventually with the cooperation of the Ministers' counsel. As a result of a review of the Intelligence files as a consequence of the *Charkaoui #2* disclosure, more detailed information was disclosed to Mr. Harkat:

> **1996**
>
> **Contacts with Mohammed Aissa Triki:**
>
> In September 1996. Harkat discussed with acquaintances the upcoming visit to Canada of his Tunisian friend, Wael who used the name of Mohamed Issa for his visit to Canada. (Wael is believed identical to Mohammed Aissa Triki). Harkat counselled "Wael" on his processing through Canadian Immigration. Harkat advised Triki to tell his story as it is and not to lie. Then, Harkat advised Triki to deny knowledge of anyone in Canada and instructed Triki to contact Harkat once he had cleared Canadian immigration. Triki, who claimed to have $45,000.00 dollars when he arrived in Montreal in September 1996, travelled directly to Ottawa, and took up residence with Harkat.

Triki left Toronto on October 23, 1996, carrying a false Saudi passport bearing the name Mohamed Sayer Alotaibi. Later, in November 1996, it was learned that Harkat would reimburse an individual for any out standing telephone call bills made by Triki while in Canada.

Immigration process:

In October 1996, it was learned that Harkat did not want to be associated with anybody until he had finished with his Immigration process.

Finance:

In November 1996, during a conversation between Harkat and an individual, the latter asked how much Harkat was willing to pay to purchase a car. Harkat advised that money was not an issue for him. He furthered that he would pay up to $8,000.00 dollars for a car in good shape. In December 1996, Harkat advised an individual that he would pay $7,650.00 for the car. When asked if he had the money ready, Harkat replied that his friend at the school where he learns English had guaranteed the money for him. Harkat furthered that the money was in the States, and he would be transferring the money.

Contacts with Abu Messab Al Shehre:

In November 1996, Abu Messab Al Shehre spoke to Harkat from London, United Kingdom. Al Shehre addressed Harkat as "Abu Muslim" and asked how the "brothers" were doing. When Al Shehre said that Harkat might remember him as "Abu Messab Al Shehre of Babi", Harkat, who identified himself as Mohamed, quickly said that Abu Muslim was not there. When asked, Harkat told Al Shehre that he did not know where Abu Muslin was, and said he did not know when Abu Muslim would be returning. In concluding, Al Shehre said sorry to bother you, Sheikh Mohamed. Later, in November 1996, Harkat received an apology on behalf of Abu Messab Al Shehre for the use of Harkat's alias, Abu Muslim. Harkat tried to avoid being called Abu Muslim. In December 1996, Harkat revealed to an individual that he knew Al Shehre very well and that Al Shehre was his friend.

On his arrival in Canada in December 1996, Al Shehre's effects were searched by officials of Revenue Canada Customs and Excise (RCCE), now known as the Canada Border Services Agency

(CBSA). In his possession were various documents and paraphernalia, including a shopping list of munitions and weapons (for example, Kalashnikov rifle, RPG (rocket propelled grenade)) and instructional documents on how to kill. Among the weapons seized by RCCE during their search were a nanchuk (a prohibited weapon under the *Criminal Code* (of Canada)), a garrotte, and a samurai sword (Wazi). Also found were a shoulder holster (reported to be for a Russian-made gun), a balaclava and a head banner usually worn by Islamist extremists when in combat, believed to be covered with written Koranic verses. As a result, Al Shehre was detained by RCCE.

Throughout this period, Harkat was regularly in contact with certain acquaintances in order to keep abreast of Al Shehre's situation. Harkat urged one of them to find money to pay Al Shehre's lawyer, and suggested that that person contact Al Shrehre's brother abroad and ask him for money. Harkat kept himself abreast of Al Shehre's situation until the latter's deportation on May 29, 1997, to Saudi Arabia, where he was arrested on May 30, 1997.

1997

Immigration process:

In February 1997, Harkat informed some acquaintances that he had been accepted as a refugee, and that he was now able to apply for landed immigrant status.

Contact with Hadje Wazir:

In February 1997, Harkat contacted an individual in Pakistan whom he addressed as Hadje Wazir. Identified himself as "Muslim" from Canada. Harkat proceeded to inquire about "Khattab" (believed to be identical to Ibn Khattab) or any of his "people". Wazir replied that Khattab had not shown up for a long time but his people had. At this point, Harkat asked if Wael (believed to be identical to Mohammed Aissa Triki) was visiting Wazir on a regular basis. Wazir advised in the positive. Harkat furnished his telephone number and asked to be contacted by Wael. Harkat further asked that his telephone number be provided either to Wael or any brother who showed at Wazir's Centre to do transactions. Harkat went on to explain that he also used to do transactions at Wazir's Centre.

In August 1997, Harkat said that he intended to travel to where Hadje Wazir was residing and ask him for money. Harkat added that he could easily get money from Hadje Wazir.

Contacts with Ahmed Said Khadr:

In March 1997, Harkat said he had met Ahmed Said Khadr at the Islamic Information and Education Centre (IIEC) in Ottawa and would meet him again shortly.

Links with Abu Zubaydah:

In March 1997, Harkat discussed financial arrangements with an acquaintance in Ottawa who stated that he contacted Abu Zubaydah, at the "place" where Harkat "used to be". Abu Zubaydah wanted Harkat to help pay Abu Messab Al Shehre's legal fees, and Harkat was asked if he could come up with $1,000.00 dollars. Harkat replied that he was ready to pay that amount if he was contacted by Abu Zubaydah. When asked, Harkat said he did not fear being contacted at home by Abu Zubaydah, and that he knew Abu Zubaydah personally. At one point during the discussion, the acquaintance referred to Abu Zubaydah as Addahak / Aldahak

Employment

In March 1997, Harkat discussed with a potential business partner the possibility of getting into a business venture together. Harkat revealed that he would travel and get funds from a mutual friend. Harkat explained that he would open a franchise for their mutual friend's business in Canada. Harkat further said that he would travel to Saudi Arabia to get the money if his future partner was serious about getting into a partnership business. The partner stated that the best business he and Harkat could do was to run a gas station. This business would require $45,000.00 dollars from each partner. Harkat replied that money was not an issue for him.

In October 1997, Harkat began working as a delivery person for a pizzeria in Orleans but quit two days later.

Attending school:

In September 1997, Harkat registered as a full time student at an adult high school located in Ottawa. Harkat wanted to continue his studies in English, physics and chemistry.

Past activities:

In October 1997, Harkat indicated to an acquaintance that CSIS interviewed Mohamed Elbarseigy for six hours, and the latter told CSIS every thing he knew about him, including that he worked in Amanat.

1998 to 1999

Contact with Abu Messab Al Shehre:

In February 1998, in a conversation with Abu Messab Al Shehre, in Saudi Arabia at that time, Al Shehre, who addressed Harkat as our Sheikh, asked Harkat how he viewed his friendship with him. Harkat described it as a kind of brotherhood. Al Shehre replied that it is more than brotherhood. Harkat stated that since he needed status in Canada, he tried to keep a low profile during Al Shehre's detention, but he managed to send an acquaintance of his to prison and provide Al Shehre with all kinds of help. Harkat asked Al Shehre to send $1,500.00 to cover Al Shehre's legal fees. Harkat advised Al Shehre to acquire the funds from the "group" if he could not get it on his own. Harkat openly stated that he had to keep a "low profile" as he needed status in Canada. Further, Harkat told Al Shehre that as soon as he received his "status" he would be "ready".

Plans to get married:

In June 1998, Harkat indicated to an acquaintance that he feared being expelled by Canadian authorities, so he decided to marry a Muslim Canadian woman to avoid deportation.

In February 1999, Harkat advised his girlfriend in Ottawa that he would be coming over to her place the following day to seek her hand in marriage.

In July 1999, Harkat revealed to an acquaintance that his parents had also found him a bride in Algeria. When it was suggested that Harkat bring the bride to Canada, Harkat stated that his current girlfriend in Ottawa would not accept that."

Employment

In 1998 and 1999, Harkat held jobs at various gas stations and at a pizzeria.

In October 1998, Harkat revealed to an acquaintance that he planned to purchase the lease of a gas station if he was granted status. Harkat revealed that he had no problem finding the money. He only needed $25,000.00 dollars deposit.

In August 1999, Harkat made an appointment with Canada Trust to discuss a potential loan of $30,000.00 dollars to invest in a gas station.

Plans to Visit Algeria and Tunisia:

In December 1998, Harkat revealed that he would be visiting his family in Algeria in the summer of 2001. In August 1999, Harkat told an acquaintance that his family had advised him against returning to Algeria and suggested they meet them in Tunisia. Harkat revealed that if he went to Algeria, he risked being arrested simply because he was someone of importance within the Front.

Taking courses:

In August 1999, Harkat revealed that he would register at an adult high school to take an English as a second language course.

In December 1999, Harkat was looking for someone to pass his taxi driver's test on his behalf. In February 2000, an acquaintance of Harkat told him that he had found someone to pass Harkat's taxi driver's test on his behalf.

Finance:

In October 1999, Harkat confided to his girlfriend that he had made a mistake in quitting his other job. He added that he could not afford to not have two jobs because he had large bills to pay. He further revealed that he had argued with the owner of the pizza store over a pay increase and over his schedule and the man had let him go. With two jobs, Harkat related, he used to make $2,500.00 dollars a month and now with only one job at the gas station and working seven days a week, he was making $1,5000.00 dollars a month. Harkat further concluded that his situation would be better if he could pass the taxi

driver test in November 1999. However, by the end of the same month he was back working at the pizza store doing the same shift as before. He justified his return to work at the pizza store by noting that he had to pay his debts.

2000 to 2002

Immigration process:

From 2000 to 2002, Harkat was very preoccupied with the status of his permanent resident application and often discussed his predicament with his friends. Moreover, during this period, Harkat was in regular contact with Citizenship and Immigration Canada (CIC) to find out the status of his application.

Getting married:

In March 2000, Harkat believed that the only solution to his problems with immigration was to get married. In April 2000, Harkat found a new girlfriend, Sophie Lamarche. Harkat did not want to put pressure on her in order to get married, however, he was thinking of keeping her as an alternative.

In April 2000, Harkat revealed that he talked to Sophie about his situation who in turn told him that she promised to help him at the appropriate time. Harkat revealed that if something happened, he would marry her.

In May 2001, it was learned that Harkat had married Sophie in January 2001. Later in May 2001, Harkat revealed that his marriage with Sophie was not serious and he could leave her at any time.

Plans to travel to Algeria:

In March 2000, Harkat was planning to travel to Algeria in August 2000. In May 2001, Harkat said that once he received his permanent resident status, he would go to Algeria. In June 2001, Harkat indicated that he would like to receive his permanent resident status soon so he could travel to Algeria. In July 2001, Harkat indicated that he was planning to go to Algeria in January 2002.

Taking a course:

In July 2001, Harkat began a truck driving course.

> **Gambling at the casino:**
>
> In December 2001, Harkat revealed that he had been going to the casinos for five years and was still going. From1997 to 2002, Harkat regularly went to the Lac Leamy Casino in Hull (Gatineau), and to a lesser extent the Montreal Casino. During this period, Harkat won and lost large amounts of money. According to Harkat, in June 2001, the casino gave him a pass in the first row of the theatre for all the shows at the casino because they knew that he had lost $100,00.00 dollars while gambling. Thus, over the years, Harkat often had to borrow money from his girlfriend and her brother. During his testimony before the Federal Court on October 27, 2004, Harkat acknowledged that he had a gambling problem.
>
> **Employment:**
>
> In February 2000, Harkat had three jobs: gas station attendant, pizza delivery man and car parts deliveryman. In March 2000, Harkat resigned from the pizzeria and lost his two other jobs, but found two other jobs, including one at a gas bar.
>
> In December 2001, Harkat was receiving unemployment insurance while working for a pizzeria. Harkat indicated that the manager at the pizzeria had agreed to sign a letter stating Harkat had begun to work on the 15th of that month and if asked, Harkat would claim he had worked at the pizzeria on a voluntary basis when he was bored at home or as a favour when the manager needed some help. Harkat was never paid by cheque therefore they could not prove anything.
>
> **Previous employment:**
>
> In September 2001, Harkat indicated that he had worked for Human Concern International (HCI) in Saudi Arabia and for the company 'Muslim'.

(See ex. M15 –the underlined portions show what was previously disclosed to Mr. Harkat. Both groups of lawyers agreed that not all that information could be used as evidence before the Court. It is only reproduced here as an example, among

others, to indicate the scope of disclosure made to Mr. Harkat and public counsel as part of the *Charkaoui #2* disclosure, but the exhibit number only pertains to the part of the document that was offered in evidence).

[86] Further Summaries of Conversations he had in May and June 2001 with members of his family, friends and a fiancée and her mother in Algeria were made available to Mr. Harkat and added to the Public SIR following the judgment in *Harkat (Re),* 2009 FC 167 (see paragraph 61 of the present reasons). Those summaries were disclosed to Mr. Harkat and his counsel, who then had ten days to serve and file a motion asking the Court to treat these summaries of conversations confidentially. Since Mr. Harkat did not file such motion, the summaries became part of the public amended security intelligence report (see ex. M7 at Appendix K).

[87] The disclosure made to Mr. Harkat also included further documentation which cannot be included as it is too voluminous (see the annexes to the PSIR, and the RPSIR).

[88] Mr. Harkat discussed the quality of the evidence disclosed. He argued that only evidence of lesser importance was disclosed. I disagree. What was disclosed to Mr. Harkat was substantial and directly relevant to the allegations made against him. It was informative and shed light on important facts.

[89] To illustrate the scope of disclosure and its effect on the Applicant’s ability to answer the case made against him, the Ministers allege that Mr. Harkat knew Ahmed Said Khadr (a deceased Canadian who was alleged to have been a close associate of Osama bin Laden), worked for him

while in Peshawar and met him in Canada after his arrival. Mr. Harkat responded that he only met him once a few days after his arrival in Ottawa and that he did not know him while in Pakistan, nor did he meet him again in Canada. What is unknown in public is how such evidence was gathered, by whom and from what source(s). The non-disclosed information does not add to the substance of the information. Therefore Mr. Harkat had a substantial knowledge of the allegation made against him and was in a position to respond to it. The special advocates were in a position to test and question what was not disclosed on behalf of the Applicant. Mr. Harkat's interest was fully represented by what was disclosed publicly and the actions of the special advocates on his behalf in closed hearing. Leave was granted to the special advocates to communicate with Mr. Harkat on this matter (see Order dated November 10, 2009). Specific findings were made in reference to this allegation, some favourable to Mr. Harkat, some not (see the reasonableness decision, *Harkat (Re)*, 2010 FC 1241, at para 484). This example is also applicable to other allegations as well.

[90] The process of disclosure requires that the named person be "reasonably informed of the case made by the Minister" (see subsections 77(2) and 85.4(1) of the *IRPA*). Furthermore, the Supreme Court held in *Charkaoui #1* that fundamental justice requires that the named person be able to know and meet the case made against him. However, information that could be injurious to national security should not be disclosed. In *Charkaoui #1*, at paragraph 61, the Supreme Court of Canada's Chief Justice made it clear that the disclosure made must be sufficient to enable the named person to know the case to be met and respond to it. In *Charkaoui #2*, at paragraph 47, the Supreme Court stated that a more nuanced approach was required "than simply importing the model developed by the Courts in criminal law". However, in the context of section 7 rights and

disclosure, although no particular process is required and the named person is not necessarily entitled to the most favourable procedure available, the process must be fair with regard to the nature of the proceedings and the context (*Charkaoui #1*, at para. 20 and case law cited therein).

[91] It was held in *Charkaoui #2* that CSIS' policy OPS-217 pertaining to the destruction of operational notes was in violation of CSIS' duty of disclosure. However, the Court did not find it necessary to order a stay of proceedings, as it was deemed premature. It is for the designated judge to determine the impact of the destruction of documents on the credibility of the evidence (*Charkaoui #2*, at para. 77). While it declined to order a stay, the Supreme Court confirmed CSIS' disclosure duty towards the Court, which, in turn, provides the named person with filtered, yet relevant information. As such, the orders of disclosure can be seen as a remedy granted with regard to the destruction of operational notes or originals of conversations.

[92] While it is true that national security proceedings must adopt a more nuanced approach than strictly importing the approaches developed in criminal law (*Charkaoui #2*, at para. 47), disclosure does not necessarily extend to all original documents in one's possession; indeed, even criminal law does not go that far. In *R. v. La*, at paragraph 18, the Supreme Court stated that:

> the Crown can only produce what is in its possession or control. There is no absolute right to have originals produced. If the Crown has the originals of documents which ought to be produced, it should either produce them or allow them to be inspected. If, however, the originals are not available and if they have been in the Crown's possession, then it should explain their absence. If the explanation is satisfactory, the Crown has discharged its obligation unless the conduct which resulted in the absence or loss of the original is in itself such that it may warrant a remedy under the Canadian *Charter* of Rights and Freedoms.

[93] Furthermore, the Supreme Court determined that the main consideration in assessing the Crown's conduct in such a case is to consider the circumstances surrounding the loss of the evidence, particularly if steps were taken to preserve the evidence for disclosure (*R. v. La*, at para. 21). However, the more relevant the evidence, the stronger the degree of care for its preservation is expected of police (*R. v. La*, at para. 21 *in fine*). In *R. v. La*, the Supreme Court also states the obvious case of deliberate destruction of material in order to circumvent the Crown's divulgation duties. This is clearly an abuse of process (*R. v. La*, para 22). In *R. v. Carosella*, [1997] 1 S.C.R. 80 ("*Carosella*"), a third party deliberately destroyed the only source of information that could be of use to the accused in preparation for his defence. No summaries or other forms of conservation attempts were made, and the impugned destruction was made with the clear motive to avoid disclosure at an eventual trial. In *Carosella*, as no substitute or summary of the destroyed documents was provided, a stay of proceedings was ordered, as the accused suffered a clear prejudice in his ability to mount a full answer and defence.

[94] The Supreme Court quite aptly stated that:

> a challenge based on non-disclosure will generally require a showing of actual prejudice to the accused's ability to make full answer and defence (…) It goes without saying that such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot possibly be a violation of the *Charter* in this respect. I would note, moreover, that inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned actions on the fairness of the accused's trial" (*O'Connor*, at para. 74).

[95] Hence, the Court must assess the effect of the non-disclosure on the named person's capacity to know and meet the case made against him. In any event, that does not necessarily mean that he must have access to all original materials, so long as adequate substitutes are found, because not all documents may be divulged for confidentiality, national security or other reasons (*Charkaoui #1*, at para. 61).

[96] The probative value of originals is obviously higher than that of summaries, and the Supreme Court has said that the assessment of the reasonableness of a security certificate may be compromised by the destruction of original documents (*Charkaoui #2*, at para. 42).

[97] Most importantly, the Supreme Court explicitly said that its opinion "on the interpretation of s.12 of the CSIS Act and operational policy OPS-217 should not be taken to signify that we consider investigations conducted pursuant to s.12 and proceedings in which the policy was applied to be unlawful" (*Charkaoui #2*, at para. 46). As such, and in the light of the above, the Applicant has to show actual prejudice in his capacity to make a full answer and defence in order for this element to be considered as an element of abuse of process.

[98] In *Jaballah (Re)*, 2010 FC 224 ("*Jaballah (Re)*"), Justice Dawson (as she then was), recognized that the right to know the case as explained in *Charkaoui #1*, was not absolute as long as proper substitutes were found:

> "[32] To summarize, in Charkaoui 1 the Supreme Court found that section 7 of the *Charter* requires that either a person named in a

> security certificate be given the opportunity to know and meet the case, or that a substantial substitute for the provision of sufficient information must be found.
>
> …
>
> [41] The final difficulty I see with the establishment of causal connection between the section 7 violation and Mr. Jaballah's testimony is that the Supreme Court in Charkaoui 1 was careful to recognize that the right to know the case is not absolute. National security considerations can limit the extent of disclosure of information to an effected individual. It appears that the Supreme Court contemplated that a person named in a security certificate may in future have to proceed in the absence of full disclosure of the case to be met, so long as a substantial substitute is provided for that missing disclosure (for example, a Special Advocate) …"

[99] In addition, my colleague, Justice Mosley, in *Almrei (Re)*, 2009 FC 1263 ("*Almrei (Re)*") at para. 484, concluded that Mr. Almrei was cognizant of the Ministers' allegations against him, although he was not given full disclosure. He noted that the Canadian *IRPA* disclosure process results in the production of more substantial evidence than in the United Kingdom under a similar procedure (see *Almrei (Re)*, at para. 487). He explained that Parliament, in establishing the new *IRPA* disclosure and special advocates' provisions, was successful for two reasons. The first being that sufficient understanding of the allegations had been made through public summaries and further disclosure. The second is that the special advocates very effectively performed their role to protect the interests of Mr. Almrei, questioned the undisclosed information and challenged the relevance, reliability and appropriateness of what had not been disclosed (see para. 489). Again in *Almrei (Re)*, the destruction of original interviews notes was not deemed an "issue of major concern", as the Court was satisfied with the contemporaneous reports that were prepared (*Almrei (Re)*, at para. 492). I agree, and his comments also apply to the present certificate proceeding.

[100] For these reasons, it is impossible to conclude that the *IRPA* disclosure process and the disclosure made (some of it disclosing summaries of originals) have resulted, in this case, in an abuse of process. Substantial, important disclosure took place in the interest of Mr. Harkat which in my opinion gave him good knowledge of the case and he was able to respond to it. There was not full disclosure since national security concerns needed to be addressed, but the classified information was known by the special advocates and they actively tested it on behalf of Mr. Harkat. In any event, since there was ample disclosure, Mr. Harkat did not show or suffer an actual prejudice in his capacity to answer the case made against him.

The impact of the destruction of documents on the special advocates' duty to represent the interest of Mr. Harkat

[101] Mr. Harkat submits that, since he was not apprised of all the evidence submitted, he is not in a position to properly instruct his public counsel and special advocates, and therefore is not in a position to properly rebut the case made against him. The Applicant argues that the special advocates must receive disclosure based on *Stinchcombe* standards. As such, the destruction of source documents is argued to have irreparably hindered the special advocates' ability to fulfill their legal mandate with regard to the assessment of the evidence. As recognized in *Charkaoui #1*, the statute in force before the subsequent creation of the special advocates was unconstitutional and violated the named person's section 7 rights.

[102] However, the comments outlined in *Charkaoui #1* at paragraph 20 remain relevant:

> Section 7 of the *Charter* requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake: *United States of America v. Ferras*, 2006 SCC 33 (CanLII), [2006] 2 S.C.R. 77, 2006 SCC 33, at para. 14; *R. v. Rodgers*, 2006 SCC 15 (CanLII), [2006] 1 S.C.R. 554, 2006 SCC 15, at para. 47; *Idziak v. Canada (*Minister *of Justice)*, 1992 CanLII 51 (S.C.C.), [1992] 3 S.C.R. 631, at pp. 656-57. The procedures required to meet the demands of fundamental justice depend on the context (see *Rodgers*; *R. v. Lyons*, 1987 CanLII 25 (S.C.C.), [1987] 2 S.C.R. 309, at p. 361; *Chiarelli*, at pp. 743-44; *Mount Sinai Hospital Center v. Quebec (*Minister *of Health and Social Services)*, 2001 SCC 41 (CanLII), [2001] 2 S.C.R. 281, 2001 SCC 41, at paras. 20-21). Societal interests may be taken into account in elucidating the applicable principles of fundamental justice: *R. v. Malmo-Levine*, 2003 SCC 74 (CanLII), [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 98

[103] Following *Charkaoui #1*, which decided that the right to full disclosure is not absolute, Justice Dawson stated in *Jaballah (Re)*, at paragraph 41:

> National security considerations can limit the extent of disclosure of information to an affected individual. It appears that the Supreme Court contemplated that a person named in a security certificate may in future have to proceed in the absence of full disclosure of the case to be met, so long as a substantial substitute is provided for that missing disclosure (for example, a special advocate).

[104] Furthermore, the legislation runs counter to the Applicant's arguments with regard to the special advocates' role: firstly, the designated judge has a duty to ensure that the named person is reasonably informed of the case made against him, while avoiding the disclosure of national security information that could be injurious. Secondly, a summary of the SIR is made available to the named person at the beginning of the hearing. His public counsel and special advocates have a

reasonable period of time to review the PSIR prior to giving the special advocates access to the SIR. Once that is done, the special advocates review, test and challenge the claims of non-disclosure and the evidence supporting the SIR. As it is the case here, more substantial disclosure was made as a result of the special advocates' work and the Ministers' counsel throughout the proceeding.

[105] Mr. Harkat and his public counsel have been able to communicate in writing with the special advocates throughout the proceeding without the intervention of the designated judge. If at any time, the special advocates wished to communicate with Mr. Harkat and his public counsel, they could do so with a court authorization. Under the *IRPA* process, Mr. Harkat has often been able to instruct his public counsel and special advocates.

[106] The PSIR gives relevant information as to the allegations made, and it includes some of the evidence in support thereof. This did allow Mr. Harkat to inform his public counsel and special advocates of his past activities in Algeria, Pakistan, and Canada. Names of key individuals are mentioned and also organizations that, in the Ministers' opinion, he was tied to. As the disclosure evolved, he was also in a position to update his instructions to his public counsel and special advocates. In good part, the Court gave permission, with certain conditions, to the Special Advocates for them to speak to Mr. Harkat and his public counsel. An authorization is given if the designated judge is satisfied that the format and the topics of discussion will not facilitate an inadvertent disclosure of national security information.

[107] The specific information that he is not privy to is known to the special advocates. They have the power to question the relevance, reliability and sufficiency of such classified evidence. The *IRPA* provisions even provide them with more powers to test this evidence with a court authorization. With their important input, as was seen during the course of the proceedings and also with the collaboration of Ministers' counsel, appropriate summaries of information containing substantial information were made, but sensitive national security information was omitted.

[108] Hence, the special advocates have the statutory mandate to "protect the interests" of the named person (subsection 85.1(1) of the *IRPA*) by challenging the Ministers' refusals to disclose information on national security grounds and the sufficiency, reliability and relevance of the information submitted (subsection 85.1(2) of the *IRPA*). Communication between the special advocate and the named person benefits from a protection comparable to that of solicitor-client privilege, but the relationship between the special advocates and the named person falls short of a solicitor-client relationship (subsections 85.1(3), (4) of the *IRPA*). While communication emanating from the special advocates to the named person are subject to court authorization (subsection 85.4(2) of the *IRPA*), the named person is under no restriction as to the information he may submit to the special advocates, to enable them to better fulfill their legal mandate.

[109] An example of the wide-ranging powers and duties of special advocates is detailed in *Jaballah (Re)*, at paragraph 23:

> Additionally, a person named in a security certificate has the right to have his or her interests protected in closed proceedings by a special

> advocate. As the public communications that have been released to Mr. Jaballah show, in the present case the special advocates have cross-examined Service witnesses, sought and obtained disclosure of further information to Mr. Jaballah, directed inquiries seeking further information from counsel for the Ministers, and moved on the closed record for an order staying the proceeding on grounds of abuse of process and *res judicata*

[110] Furthermore, the ability of the special advocates to protect the named person's section 7 rights seems to have been accepted by Justice Mosley in *Almrei (Re)*, at paragraph 489:

> This is essentially the same conclusion as that reached by the Supreme Court of Canada in *Charkaoui 1* in 2007. The individual must be provided with full disclosure or a "substantial substitute" to full disclosure. In my view, Parliament's effort to craft a suitable alternative was successful in this case for two reasons. The first is that the respondent was provided with a sufficient understanding of the allegations that were made against him in the SIR through the public summary and the further information that was ordered disclosed. The second is that the special advocates very effectively performed the roles for which they were given a statutory mandate: to protect the interests of the respondent in the closed proceedings; to question the withholding of information; and to challenge the relevance, reliability and appropriateness of the non-disclosed information and other evidence relied upon by the Ministers.

[111] In view of their broad powers and duties as well as their far-reaching access to the underlying information to the Ministers' documents regarding the named person, the special advocates have had substantial access to the Ministers' file. The special advocates have adequately represented the named person, as mandated by the legislation. While the destruction of source material is not an ideal development, the subsequent disclosure of documents ordered by the Court, and the involvement of the special advocates has ensured that the named person's section 7 rights have been safeguarded throughout the proceedings. There has been "substantial substitute", as dictated by *Charkaoui #1*. The active participation of the special advocates and their far-reaching

access to information gave them, and the Court, full knowledge of the case which resulted in additional disclosure. No prejudice to Mr. Harkat was caused by the destruction of original documents.

[112] Nothing prevents the named person from giving all of the relevant information he possesses to the special advocates to enable them to defend him. The destruction of some originals has not hindered the special advocates' work and the named person's section 7 rights have been safeguarded. In any event, no prejudice to Mr. Harkat's ability to make a full answer and defence has been shown, other than in general terms. That has not resulted in an abuse of process.

[113] Therefore, with the involvement of the special advocates, the *IRPA* process for disclosure of evidence did give Mr. Harkat the ability to instruct both his public counsel and special advocates. Under the *IRPA* regime, the named person is able to know the case made against him and to respond to it. Proper instructions can be given within such a system.

The alleged breach of CSIS' duty of candour

[114] It will be useful at this stage to define what is the Ministers and CSIS' duty of candour, its sources and how it pertains to the case at bar. The notion of duty of candour was set out by the Supreme Court in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 ("*Ruby*"). The duty applies to *in camera* and *ex parte* proceedings, where the party making submissions privileged and exclusive access to the court, and is therefore in a position with potential for abuse. The party also has full control over the bank of information from which the facts used to support the allegations are taken. One of its duties is to ensure that a complete review of the information will be made, including that

which might be detrimental to the case. This information must be disclosed so that it can be reviewed by the designated judge and the special advocates. Generally, the Supreme Court stated that:

> In all cases where a party is before the court on an *ex parte* basis, the party is under a duty of utmost good faith in the representations that it makes to the court. The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld
> (…)
> when making ex parte submissions to the reviewing court, the government institution is under a duty to act in utmost good faith and must make full, fair and candid disclosure of the facts, including those that may be adverse to its interest (*Ruby*, at paras 27 and 47)

[115] Under *Ruby*, the duty of candour is thus first and foremost a duty of good faith in the representations made and the evidence presented. The qualification of the existence of duty of candour *per se* in relation to security certificate proceedings arises from Justice Mosley's decision in *Almrei*, at paragraph 500: "The duties of utmost good faith and candour imply that the party relying upon the presentation of ex parte evidence will conduct a thorough review of the information in its possession and make representations based on all of the information including that which is unfavourable to their case".

[116] It is obvious that the duty of candour can and should be assimilated in fact, and in language, to the duty of utmost good faith as defined in *Ruby*. The duty of utmost good faith must also be considered in the light of the particular circumstance of security certificate proceedings. The nature of security certificate proceedings requires ongoing disclosure, provided that further disclosure is not sought on tactical grounds and in bad faith (*Charkaoui #2*, at paras. 71-73). A functional

definition of what constitutes an *ex parte* hearing will be useful. In such a proceeding, there are no procedural safeguards and no accountability as to what is submitted by a party; it is simply governed by a duty of good faith, as per *Ruby*. Can the closed hearings necessary to address sensitive and protected information be qualified as a true *ex parte* proceeding? In a formal sense, it is an *ex parte* proceeding: the named person and his public counsel are absent. However, in a functional sense, the *in camera* certificate hearings require, in the wake of *Charkaoui #1* and the subsequent amendments to *IRPA*, the presence of the special advocates. In addition, the judge plays an active role in assessing the evidence and the required steps to take to address the fairness of the procedure towards the named person (*Charkaoui v. Canada*, 2004 FCA 421, at para 80: "Furthermore, throughout the process, the designated judge plays a pro-active role in the interest of ensuring fairness"). In *Charkaoui #1*, this role was accepted by the Supreme Court of Canada (see paras. 32 and following). The special advocates have started to participate in closed hearings, and the Court has adjusted accordingly. Therefore, the process must unfold according to the parameters set by this new adversarial system.

[117] The duty of good faith is meant to ensure that a judge is not given a distorted account of the facts. Hence, it must be recognized that: *Charkaoui #2* disclosure, the presence of the special advocates and the role and duties of the designated judge, greatly reduce the risks of CSIS and the Ministers acting in violation of their duty of full, frank and fair disclosure, in other words their "duty of candour". The so-called "duty of candour" is nothing more than the utmost good faith duty as per *Ruby*, which applies in security certificate proceedings, as was held in *Harkat (Re)*, 2009 FC 1050 and *Charkaoui v. Canada*, 2004 FCA 421. The nature of the security certificate proceedings and the

legal requirements of disclosure further reinforce this duty of candour. Hence, the role of the special advocates and the nature of *Charkaoui #2* disclosure have provided safeguards with regard to the Ministers and CSIS' duty to act in good faith.

[118] In *Almrei*, at paragraph 499, Justice Mosley concluded that Bill C-3, including the participation of special advocates in the closed hearings, did not abolish the duties of utmost good faith and candour. These duties still stand since national security evidence is dealt with in closed hearings and the named person and public counsel are not present. I agree. The duties of utmost good faith and candour still apply to both the Ministers and CSIS. Mosley J. also found that, in the Almrei case, such duties were breached in that a thorough review of the information had not been made and, as a result, the SIR was assembled with information that could only be construed as unfavorable to Mr. Almrei. He decided not to grant a stay of the proceeding and opted for a determination on the reasonableness of the certificate as the proper remedy (see paras. 500 and 503).

[119] Additional comments are called for with regard to the prospective impact of *Charkaoui #2* disclosure and its relation with the duty of good faith. While present cases overlap with the *Charkaoui #2* ruling and disclosure rules, future cases will not result in such an overlap. Files and cases constructed by CSIS will have original materials, in keeping with *Charkaoui #2*'s findings on the Ministers and CSIS' duties. Accordingly, the duty of good faith arising from *Ruby* will also apply to security certificate proceedings, and the Ministers and CSIS will not be exempted of their duty of good faith even if the files will contain the original material. The Ministers' will always have a duty to report it faithfully in *ex parte* and *in camera* proceedings.

[120] Each case has to be assessed on its own facts and my review of the *Charkaoui #2* disclosure allows me to say that the recent SIR did present a proper view of all the evidence and that nothing of a favourable nature for Mr. Harkat's case could have been found and required to be included. There was the issue of a human source and polygraph results (which were not properly disclosed initially) but that was dealt with specifically as seen in these reasons. A remedy was granted. In general, the duties of utmost good faith and candour were respected by both the Ministers and CSIS. No finding under an abuse of process theory can be made in this respect.

The passage of time

[121] It is the view of Mr. Harkat that the passage of time, the time associated with the previous first certificate proceeding, delays attributed to the Ministers and an undefined prejudice amount to an abuse of process. Again, I disagree.

[122] The certificate in issue herein was filed on February 28, 2008. Public and closed hearings were held beginning in September 2008 and final submissions were heard in the early summer of 2010. All judgments pertaining to the hearings were issued in fall 2010. Taking into consideration the great number of lawyers involved (their work was substantial and it has been difficult to schedule the hearings for all of them), the disclosure process which included thousands of documents produced as a result of *Charkaoui #2*, the participation of a number of witnesses in public and closed hearings, it took a little more than 32 month for the Court to render three substantive judgments; which is not unreasonable.

[123] The previous proceeding under the former *IRPA* was commenced in December 2002. This legislation was declared in part to be unconstitutional by the Supreme Court in *Charkaoui #1* and gave the government one year to correct the flaws identified. Meanwhile, the status quo remained and Mr. Harkat remained subjected to the same conditions of release of his detention. Surely, the delay incurred as a result of the rulings of the Supreme Court cannot be used as an argument in support of an abuse of process theory.

[124] This proceeding did raise many issues, the resolution of which took time: the disclosure process, the motions to access human sources files, employee file, solicitor-client communication issues, reviews of conditions of release, ongoing specific matters, the search of Mr. Harkat's home, the human source and the polygraph issue. Delays are inevitable since they are the product of human interactions and systems in constant evolution. While circumstances may vary, no actions which resulted in further delays were intentional or deliberate, designed to slow down the process. Therefore, no party is to be blamed for any uncontrollable delay.

[125] Passage of time did not result in a prejudice impairing Mr. Harkat's ability to make a full answer and defence.

[126] The facts of the present case go back to the early 1990's. Because of his application to obtain refugee and permanent resident status, Mr. Harkat has documented his past life. This information is part of the evidence of this proceeding. Beginning in 1997, Mr. Harkat was

interviewed by intelligence officers on his past life. He was arrested in December 2002 and this is when he became officially cognizant of the specific allegations made against him. Since then, with the help of counsel, he has been in a position to prepare his defence. His most recent testimony did indicate that he had a good knowledge of the facts in issue and his narrative concerning his past life did not reveal any memory lapse, on the contrary. Passage of time did not decrease the quality of the evidence, nor did it impact on his ability to challenge the allegations made. Factual witnesses (including himself), and expert witnesses did testify on his behalf. His public counsel produced professional submissions of a high quality, which clearly show a very good knowledge of the legal issues.

[127] In *Blencoe*, the Supreme Court noted that "delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period" (*Blencoe*, at para. 101). The Supreme Court further considered several criteria to be considered when assessing if a delay is excessive:

> The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay. (*Blencoe*, at para. 121)

[128] It is not my intention to review each factor. It seems to me that a period of less than three years was reasonable considering the nature of the proceeding, the new *IRPA* procedure to follow, the complexity of the issues, the creation of special advocates, the thousands and thousands of documents produced as a result of *Charkaoui #2*, and the involvement of 14 lawyers in the course of these proceedings. On a number of occasions, this Court reminded all counsel that the legislation required the judge to proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permitted (see paragraph 83.1(a) of the *IRPA*). With that legislative objective in mind, the proceeding arrived at some finality within a reasonable time.

[129] In addition to the detailed account of the proceedings and the inherent delays they generated, let us outline the most relevant contextual factors to be considered in the case at bar:

- These proceedings were taken pursuant to a regime that has been assailed in almost every respect through *Charter* challenges and various motions. Some of these challenges were eventually decided by the Supreme Court. As such, the context of the proceedings is that of an evolving body of law, refined by the Court and modified by Government in order to comply with the Court's ruling.
- The case itself revolves around a complex factual picture that spans over several years.
- *Charkaoui #2* disclosure resulted in the disclosure of several thousand pages of documents, which were reviewed for redaction purposes. Then, the special advocates identified some of the *Charkaoui* #2 information for disclosure purposes.
- As recognized in *Harkat (Re)*, 2004 FC 1717 and *Harkat (Re)*, 2005 FC 393, the Applicant contributed to the delays in the proceedings.

- The nature of the evidence is a factor to be considered (*Lopes v. Canada (M.C.I.)*, 2010 FC 403). However, the Applicant's submissions are to the effect that he suffered prejudice from the delays as a result from "the limitations of human memory". But the Applicant's attitude towards the evidence is that of a general, broad denial of the evidence, of conversations and of knowing some people. Passage of time cannot be said to be prejudicial when one responds with a general denial. If a named person was to counter evidence with nuanced, fact-based contentions, then passage of time could be said to have caused prejudice. Such is not the case here.
- The previous proceedings to contest the constitutionality of the previous *IRPA* regime cannot be counted as constituting an unreasonable and prejudicial delay, as their sole purpose was to uphold the named person's Charter rights and were not vexatious in any manner.

[130] Consequently, in keeping with the contextual analysis presented in *Blencoe*, passage of time in this case has not resulted in abuse; it has not caused prejudice. The community's sense of justice and decency cannot be said to have been offended by the delays in the present proceedings.

The solicitor-client communications

[131] Mr. Harkat submits that some solicitor-client conversations were recorded and retained even though it has been claimed by the CBSA that a practice of disassociation is followed. It is true that such conversations were recorded, but they were not listened to. A practice of disassociation was followed.

[132] This ambiguity arose as a result of the initial conditions of release of Mr. Harkat which included the monitoring of Mr. Harkat's conversations and did not address the issue of conversations with counsel. Such conditions were drafted by counsel for the parties.

[133] When this issue arose in the fall of 2008, this court amended the conditions to clarify the matter:

> "For greater certainty, when the content of intercepted oral communications associated with the land-based telephone line in the Harkat residence involves solicitor-client communications, the analyst, upon identifying the communication as one between solicitor and client, shall cease monitoring the communication and shall delete the interception."
>
> (see Order, December 23, 2008, adding paragraph 13.1 to the Order dated December 5, 2008)

[134] The Court also dealt with the matter of intercepts of communications which would relate to solicitor-client in public and closed hearings. At the public hearing held on December 15, 2008, the following summary of the closed hearing was read by the Court:

> "Telephone calls to and from Mr. Harkat's house are intercepted pursuant to the Court's orders and the consents provided by the parties. CSIS does the actual interception of the calls as an agent for CBSA.
>
> CBSA analysts listen to the intercepted conversations. Some of that material contains recording of telephone calls between Mr. Harkat and his solicitors. Once a CBSA analyst realizes that a communication is subject to solicitor-client privilege, the analyst disengages, which is to say that they stop listening to that call and do not listen to any further part of that call. Sometimes the analyst will have to listen to the beginning of a call to determine that a lawyer or one of their staff is on the line.

The CBSA adopts a broad definition of solicitor-client privilege communication. Any call from a lawyer or anyone in that lawyer's office is treated as privileged. This policy of disengaging from privilege calls is not set out in writing. CBSA analysts are advised of the policy verbally when they begin to work on these files. Mrs. Snow is not aware of anyone communicating this policy to counsel or to CSIS.

The material is stored in a secure manner. Mrs. Snow is aware of evidence given by Mr. Philip Whitehorne in the Mahjoub case regarding intercepted communications. Mr. Whitehorne is a manager with Northern Ontario Regional Office, NORO, of the CBSA. He is not part of Mrs. Snow's unit and does not report to her.

Mrs. Snow's understanding is that CSIS contacted NORO directly about one conversation between Mr. Harkat and his counsel which raised urgent issues regarding the safety of persons. It was a privacy matter. I am the one adding this: It was a private matter.

This communication was outside of the usual delivery of material to the CBSA referred to above. The information was communicated directly to NORO in this case because of a perceived urgency of the situation. NORO deals directly with supervision of the conditions, outings, visitors.

NORO contacted the Counter-Terrorism Unit. The information was not acted upon in an operational way and was not sued for any other purpose. The urgent situation ultimately resolved itself.

Mrs. Snow heard from someone at NORO that the situation was resolved, but she is not sure how that information was obtained. The details of that personal matter was communicated to counsel for Mr. Harkat a few moments ago in my chambers.

Apart from the phone call referred to above and the short portions of calls in which analysts determine that a call is privileged, the CBSA has not been made aware of the content or any other solicitor-client telephone call. No e-mail has been intercepted between Mr. Harkat's lawyers and anyone living with Mr. Harkat."

(see Transcript of Proceedings, December 15, 2008, at 2 to 5 and see Transcript of Proceedings, December 16, 2008, at 163-164)

This was the situation up to the end of 2008.

[135] Recently, a letter dated August 30, 2010 from Mr. Michael Pierce, Ministers' counsel dealing with solicitor-client matters, updated the situation. No solicitor-client information dealt with during communications was listened to beyond the point of identification.

[136] As soon as some indications were made in relation to a potential issue concerning solicitor-client communications, this Court intervened to clarify the matter, analyzed it and reported on it in public. No issue has arisen since the matter was clarified in December 2008. Therefore, no facts that could suggest an abuse of process have been shown.

The search of Mr. Harkat's residence

[137] On May 12, 2009, the Canadian Border Safety Agency (CBSA) conducted a search of Mr. Harkat's residence. When hearing about this search and the way it was conducted, this Court amended the conditions of release to ensure that its authorization would be obtained prior to any future search (see Order dated May 12, 2009). Of their own initiative, the Ministers kept the items seized in a sealed envelope until the decision of the Court.

[138] In addition, the Court ordered a hearing into the search and referred the solicitor-client privilege issue arising from the material seized to Prothonotary Tabib to determine any issues related to the privilege, if any. The prothonotary ordered the return of some privileged material to Mr. Harkat (see Order dated May 21, 2009). Therefore, no breach of solicitor-client privilege resulted from this search.

[139] As a result of the hearing, the search was found to be unreasonable and it was ordered that all information, items and records seized be returned to Mr. Harkat (see *Harkat (Re)*, 2009 FC 659). Full relief has been granted with regard to the search of the Applicant's home. The Court did not condone CBSA's conduct and highlighted the unlawful and abusive character of the search without hesitation and without ambiguity. For example, the Court stated at paragraph 59:

> On reviewing the evidence before the Court, I conclude that paragraph 16 of the former order did not authorize the intrusive and over broad nature of the search and seizure undertaken by CBSA on May 12, 2009. A judicial authorization to search must be interpreted reasonably, using common sense, in light of the obligations of all state actors to comply with the *Charter*. The broad and liberal interpretation given to paragraph 16 by the CBSA, as evidenced in the testimony of the witnesses, is unacceptable when dealing with the privacy rights of persons living in Canada.

Thus, a *Charter* breach for which a remedy has been granted cannot call for a stay of proceedings.

<u>The human source and polygraph issues</u>

[140] The human source and the polygraph issue was raised in a letter dated May 26, 2009, whereby the Ministers' counsel informed the Court that some information of importance concerning a human source and a polygraph result had not been disclosed. Immediately, the Court ordered exceptionally that a complete human source file be disclosed to the Court and the special advocates (see *Harkat (Re)*, 2009 FC 553). After a thorough closed hearing on the matter, it was found that there had been no deliberate effort to mislead the Court on any witnesses' part. A series of institutional shortcomings had the effect that some relevant information was not presented before the Court and that it could have resulted in a serious prejudice to Mr. Harkat if not disclosed.

Exceptionally, it was ordered that another human source file be made available to the Court and the special advocates. Such a remedy was called for to restore trust and confidence in the process while at the same time to protect human sources for the sake of national security (see *Harkat* (Re), 2009 FC 1050). The special advocates had asked for a *Charter* section 24 remedy, seeking the exclusion of any evidence originating from the first human source. This remedy was denied.

[141] The Court further found, in *Harkat (Re)*, 2009 FC 1050, that the deficiencies of disclosure with regard to the reliability of certain human sources was the result of institutional shortcomings, and not of bad faith or otherwise malicious attitude on the part of CSIS.

[142] As the Court noted, serious prejudice could have resulted had the findings not been made with regard to the reliability of human sources. However, such findings were made and an efficient remedy was granted by the Court. Hence, it is not necessary to relitigate this issue.

[143] In both circumstances, remedies were granted to rectify the situation created. These remedies were significant: the return of all material seized to Mr. Harkat as a result of the search and the new requirement of a court authorization prior to future search, the production of two human source files viewed by the Court and the special advocates. Important remedies have been granted, and nothing warrants another intervention of this Court.

<u>The cumulative effect</u>

[144] It is useful here to recall the three applicable criteria in assessing whether there has been an abuse of process calling for a stay of proceedings: (1) the prejudice caused by the abuse in question

will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; (2) no other remedy is reasonably capable of removing that prejudice (*O'Connor*, at para. 75); and (3) society's interest in proceeding with a full hearing and a final decision on the merits of the case is put in the balance and assessed (*Regan*, at para. 57).

[145] In the case at bar, the constituting elements of an abuse of process are to be considered as to their cumulative impact. The submissions made simply dwell on past and alleged breaches, most of which have been remedied by the Court. The possible grounds that have not been dealt with, for example the passage of time and the alleged breach of the duty of candour, do not suggest in any way that there has been an abuse of process, much less one that would call for a stay of proceedings. If anything, the conduct of the proceedings has not perpetuated or aggravated the impugned conduct, but have remedied it. On numerous occasions, the Court has been attentive and responsive to the Applicant's *Charter* rights. Hence, as proceeding with the closed and public hearings does not satisfy the first criterion and as other remedies have already been granted, a stay of proceedings is not called for.

[146] Furthermore, for the sake of greater clarity, in view of the third "public interest" criterion, the public interest calls for the prosecution of the case. It is alleged that a considerable time has passed. Substantial public resources have been allocated to the proceedings against the Applicant. To stay the proceedings, without adjudication on the Ministers' claim that Mr. Harkat's certificate is reasonable based on security grounds, would offend the general public's sense of justice, rather than enhance it. The seriousness of the charges and the public interest in seeing them adjudicated on their

merits have been recognized (*Al Yamani v. Canada*, 2003 FCA 482). In addition to the best interest of the community, Mr. Harkat himself has a personal interest in a decision on the merits, regardless of the outcome. One cannot stay the proceedings and leave a cloud of uncertainty on Mr. Harkat's reputation. A stay of proceedings is not meant to punish public authorities (*Tobiass*). Consequently, it is in the public interest to see the issues decided on the merits.

[147] The cumulative effect of different factors have not resulted in an abuse of process. A stay of proceedings is not an appropriate remedy.

Certified questions

[148] The parties are invited to submit questions for certification. They have fifteen (15) days to do so. Upon receipt of the questions submitted for certificate, the parties shall have five (5) days to comment on them if required.

ORDER

THIS COURT ORDERS AND ADJUDGES that :

- The motion based on abuse of process requesting the exclusion of summaries of conversations or a stay of proceedings is dismissed.

"Simon Noël"

Judge

Date: 20110114

Docket: DES-5-08

Ottawa, Ontario, January 14, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

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

Redacted Top Secret Annex A to the Public Reasons for Order and Order concerning the abuse of process motion. Neutral citation No. 2010FC1243

"Simon Noël"

Judge

~~**TOP SECRET**~~

ANNEX "A"

[1] The special advocates brought a motion during the *in camera* submissions, stating that the Ministers had breached their duty of candour and utmost good faith as they did not bring their best efforts to gather the information for the Court in order for it to reach an informed decision. They are seeking a stay of the proceeding. The Ministers submit that such duty does not apply to *in camera* proceedings. Assuming it does, they suggest that it has been met. In order to fully understand the present order, these reasons should be read in conjunction with the public reasons issued on the matter.

Special Advocates' submissions

[2] During the *in camera* submissions, the special advocates argued that the Ministers and the Service breached the duty of candour and utmost good faith required in security certificate proceedings as they did not make their best efforts to gather all available information to assist the Court in reaching a proper and informed decision. They rely only upon *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 ("*Ruby*") as authority for the existence of the duty of utmost good faith. Moreover, the special advocates submit that the Ministers and CSIS failed to obtain all information and opinions [redacted] they failed to attempt to obtain a meaningful update or assessment of Abu Zubaydah [redacted] they failed to seek to obtain additional information on Triki [redacted] and they never sought to obtain information concerning Wazir until extremely late in the proceedings and

only after it was learned that Wazir had been released from custody. The special advocates submit that the duty of utmost good faith as defined in *Ruby* (which obliges the Ministers to disclose pertinent information including information not favourable to their position) should be enlarged to include an obligation to update the evidence as the proceeding evolves.

[3] The special advocates made reference to the open counsel and Ministers' argument regarding the abuse of process, as well as to the arguments and case law cited in the Ministers' written submissions in response to the abuse of process motion, more specifically with regards to the part on the stay of proceedings. Except for the reference to *Ruby*, the special advocates did not submit any other jurisprudence to support the submission that the duty of utmost good faith should be enlarged to include a duty to update the evidence as the procedure is ongoing.

Ministers' submissions

[4] The Ministers replied that the duty of utmost good faith does not apply as general rule to security certificate proceedings. They argued that the special advocates are not referring to the duty of utmost good faith applied to counsel's obligations in *ex parte* proceedings where the decision maker can be misled by a one-side presentation of relevant facts. Rather they seem to be referring to the duty to inquire applicable to a Crown prosecutor in a criminal proceeding. The Ministers submit that such duty does not exist, or assuming it does, the Ministers fully satisfied it and acted reasonably in the circumstances.

Analysis

[5] Without having to pronounce myself as to the scope of the duty of utmost good faith in *in camera* hearings, the facts of this case show that the Ministers and CSIS made efforts to obtain the information and update it. In the present proceedings, the Court and the parties have had the privilege to have the complete disclosure of [redacted] human source files. An evaluation was done accordingly. This information is usually protected by a covert intelligence human source privilege (see *Harkat (Re)*, 2009 FC 204). Having reviewed the entire evidence concerning the human sources, including [redacted], the Court finds that there was no obligation to update the information with [redacted]. CSIS reported all the information they received from [redacted] to the Court and the special advocates. [redacted]

In any event, the Service has provided the information and it is to the Court to determine the significance of such evidence. The special advocates' wish to have some information updated [redacted] is therefore not necessary since the Court considers that it had information to make findings [redacted].

[6] The duty of the Ministers to get updated information was brought up during the public hearings. The Court made it clear that, although it could not force the Ministers to go back to their sources and ask for updates, it would help the Court if something was done (see Transcript of public Proceedings, Vol. 24 at 145, 146 and 147) However, as stated by counsel for the Ministers during the public hearing, public counsel has been made aware of the efforts made by the Ministers to get more information on both Mr. Zubaydah and Mr. Wazir (see Transcript of public Proceedings, Vol. 25 at 2). In response, the Ministers sent a request and received their answer regarding Abu Zubaydah (see ex. M65). They also sent a request concerning Hadje Wazir. Since they had not received new information and that the Court allowed the parties to file any new information until August 31, 2010, the Ministers contacted in early August 2010 to inquire about any new information regarding Hadje Wazir. As of August 31,2010, no information has been received regarding Mr. Wazir (see ex. M73). The Ministers therefore discharged themselves of their duty and made reasonable efforts to get updated information . Whether the response was adequate or not cannot be controlled or dictated by the Ministers. It may not be to the satisfaction of the special advocates but it is the Court's responsibility to assess the evidence as it is presented.

[7] In relation to Triki, the evidence indicates that the information as presented was sufficient, as illustrated by the reasonableness decision. Considering the evidence on this individual, there was no need to inquire further.

Conclusion

[8] For the reasons mentioned above, the special advocates' request for a stay of the proceedings based on the Ministers and CSIS' duty of candour and utmost good faith is dismissed.

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:	Public hearings:	November 3, 4, 5, 6, 2008 January 18, 19, 20, 21, 22, 2010 January 25, 26, 27, 28, 29, 2010 February 1, 2, 3, 4, 5, 2010 February 8, 9, 10, 11, 12, 2010 March 8, 9, 10, 11, 2010 March 30, 31, 2010 May 31, 2010 June 1, 2, 2010
	Closed hearings:	September 10, 11, 12, 15, 16, 17, 18, 19, 2008 November 23, 24, 25, 26, 2009 December 1, 2, 2009 March 30, 2010 May 26, 27, 2010
REASONS FOR JUDGMENT:	SIMON NOËL	
DATED:	December 9, 2010	

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