Federal Court  Cour fédérale

Date: 20120106

Docket: DES-6-08

Citation: 2012 FC 21

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF MAHMOUD ES-SAYYID JABALLAH

REASONS FOR ORDER

HANSEN J.

[1] This motion concerns the admissibility of information relied on by the Ministers in the within proceeding against Mr. Jaballah (Respondent). In particular, the Respondent seeks an order pursuant to paragraph 83(1)(h) and section 83(1.1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA) excluding any

information relied on by the Ministers in this proceeding including any proceeding in relation to his release by reason of there being reasonable grounds to believe that the information was obtained either directly or indirectly as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code of Canada,* R.S.C. 1985, c. C-46, or cruel, inhuman or degrading treatment or punishment (CIDT) within the meaning of the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* December 10, 1984, [1987] Can. T.S. No. 36.

[2] Earlier, in Court file DES-7-08, also a security certificate proceeding, the person named in the certificate, Mr. Mahjoub, brought the same motion in that case. Justice Blanchard rendered two decisions in relation to the Mahjoub motion, the first on June 9, 2010, (2010 FC 787) (373 F.T.R. 36) and the second on August 31, 2010, (2010 FC 937). In the present motion on the basis of the principle of judicial comity, the Ministers urged the Court to follow Justice Blanchard's decisions. Alternatively, the Ministers asked the Court to reject the approach advanced by the special advocates and the Respondent in relation to section 83(1.1).

[3] On July 18, 2011, I issued an order stating that by reason of the principle of judicial comity I adopted and would apply Justice Blanchard's decisions in relation to the information challenged in this proceeding. On August 2, 2011 I issued top secret reasons in which I considered the specific items of information whose admissibility was

challenged by the special advocates. A public version of these reasons was issued on August 12, 2011

[4] These reasons deal only with the submissions of the parties and the special advocates on the issue of the application of the principle of judicial comity. Although the special advocates and the Respondent agree in many respects with Justice Blanchard's approach to determine the admissibility of the evidence in question, they take issue with certain aspects of his approach. To provide a context for the submissions of the special advocates and the Respondent, a summary of the relevant findings from the decisions of June 9, 2010 and August 31, 2010 is necessary. At paragraph 230 of his June 9, 2010 reasons, Justice Blanchard provided the following summary of his findings:

> Based on the evidence before me and for the above reasons, I summarize below my findings on the motion:
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> > 1. The Ministers bear the burden of establishing that information they rely upon is reliable and appropriate. They must establish that this information is admissible. Where torture or CIDT is alleged by the named person, it is for the named person to raise the issue that information relied upon by the Ministers is obtained as a result of the use of torture or CIDT. To meet this initial burden, the named person need only show a plausible connection between the use of torture or CIDT and the information proffered by the Ministers. Depending on the cogency of the evidence of the named person, the Ministers may adduce responding evidence. The Court will then, after hearing submissions, decide on all of the evidence before it whether the proposed evidence is believed on reasonable grounds to have been obtained as a result of the use of torture or CIDT;

> 2. On the record before the Court, notwithstanding the policies and practices implemented by the Service, the approach adopted by the Service in [XXX] [filtering] information collected in compliance with its mandate is insufficient to ensure that all the information obtained from countries with a poor human rights record and relied upon by the Ministers in this proceeding meets the admissibility criteria of paragraph 83(1)(h) and subsection 83(1.1) of the IRPA;
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> 3. Paragraph 83(1)(h) and subsection 83(1.1) exclude from the security certificate proceedings both primary and derivative evidence believed on reasonable grounds to have been obtained as a result of the use of torture or CIDT;
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> 4. On the record, there are not reasonable grounds to believe that all unsourced information which originates from [XXX] was obtained by torture or CIDT;
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> 5. There are reasonable grounds to believe that the information collected from the interrogation of [XXX] was obtained by the use of torture. It follows that the information is inadmissible pursuant to paragraph 83(1)(h) and subsection 83(1.1) of the IRPA; and
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> 6. There are reasonable grounds to believe that the convictions of Mr. Mahjoub, [XXX] [and others referred to in the public SIR] from the Returnees of Albania trial were obtained as a result of the use torture. It follows that the information is inadmissible pursuant to paragraph 83(1)(h) and subsection 83(1.1) of the IRPA.

[5] Some further elaboration is necessary in relation to his analysis with respect to derivative evidence. In his June 9, 2010 reasons, at paragraph 60 Justice Blanchard defined derivative evidence as "information or evidence discovered as a result of the information obtained from torture or CIDT". At paragraph 72 of the same reasons, Justice Blanchard observed that a determination as to whether evidence is derivative evidence is a question of fact. On the question of the burden of proof, he concluded that

if the evidence alleged to be derivative of torture is evidence upon which the Ministers rely, the Ministers bear the burden of establishing its admissibility. The named person "need only offer a plausible connection between the previously excluded evidence and the proffered evidence." Once a plausible connection has been shown, the same approach used to determine the admissibility of primary evidence is applied to determine the admissibility of the evidence alleged to be derivative of torture.

[6] In his August 31, 2010 reasons at paragraph 7, Justice Blanchard framed the issue as "… whether the information identified by the SAs needs to be excluded for the revised SIR to be in compliance with the June 9, 2010 decision." Of particular relevance to the present motion is his consideration of the issue of at paragraph 44 "… whether information obtained by investigative procedures authorized by a warrant is derivative of torture in cases where the warrant was authorized on the basis of information that was obtained by the use of torture or CIDT."

[7] Justice Blanchard compared and contrasted the purpose of the relevant provisions in the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23 and IRPA and the Court's role in relation to each. Justice Blanchard rejected the Ministers argument that information obtained from legally valid warrants is admissible and the Court should not engage in an *ex post facto* review of the reasons of the authorizing judge. In his view, this position would not give effect to subsection 83(1.1) and his earlier finding that

evidence derived from torture is inadmissible. As well, a failure to consider the information relied upon in support of the warrant application could have the effect of the Court admitting into evidence information that is derivative of torture or CIDT.

[8] Justice Blanchard found that if certain information in the supporting affidavit to the warrant was found by the Court to be inadmissible pursuant to section 83(1.1) then the threshold burden of showing a plausible connection between the previously excluded evidence and the evidence proffered by the Ministers would have been met. The judge then had to consider all of the evidence to determine whether there are reasonable grounds to believe that the information obtained from the warrant powers was obtained as a result of torture or CIDT.

[9] In the situation where the warrant is authorized on the basis of information that was not obtained as a result of the use of torture or CIDT and information that was obtained as a result of the use of torture or CIDT, Justice Blanchard articulated the test as at paragraph 51 "… But for the evidence obtained as a result of torture or CIDT, would the impugned information have been obtained? More specifically: But for the evidence obtained from torture or CIDT in the supporting affidavit to the warrant, would the warrant have issued and the information from the interceptions have been obtained? If so, it cannot be said that there are reasonable grounds to believe that the information obtained from the warrant was obtained as a result of the use of torture or CIDT."

[10] He added at paragraph 53, "… the judge considering the affidavit evidence submitted in support of the warrant must be satisfied that but for the information believed on reasonable grounds to have been obtained from the use of torture or CIDT, there was sufficient evidence remaining to justify the issuance of the warrant." That is satisfy the statutory requirements for the issuance of the warrant. If there was sufficient evidence to justify the issuance of the warrant, then it cannot be said that the warrant was issued on the basis of information obtained as a result of the use of torture or CIDT. There would be untainted information to justify the issuance of the warrant.

[11] Before turning to the specific areas of dispute, it should be noted that by agreement of the parties, the open and closed records in the Mahjoub motion form part of the record in this motion. As well, the Respondent did not submit any additional evidence on this motion.

[12] The special advocates disagree with Justice Blanchard's analysis in two respects. Their first disagreement centres on his approach in relation to unsourced information. They agree the Ministers bear the burden of satisfying the Court that the information upon which they rely is reliable and appropriate and is, therefore, admissible; that the burden of establishing that there are reasonable grounds to believe that the information was not obtained by the use of torture or CIDT is on the Ministers; and that the named

person need only show a plausible connection between the use of torture or CIDT and the information adduced by the Ministers.

[13] They also agree with the finding that based on the record there was no objective basis for the belief that all unsourced information in question was obtained by the use of torture or CIDT. However, they maintain that in his application of the principles he articulated in relation to the unsourced information, in effect, Justice Blanchard permitted the burden to be lifted from the Ministers. Specifically, they take issue with his "implicit" finding that the burden of proof is not on the Ministers to prove that the unsourced information being relied upon in the proceeding was not obtained by torture or CIDT. Further, the special advocates maintain that by inference Justice Blanchard placed the burden of proving that the unsourced information is believed on reasonable grounds to have been obtained by the use of torture or CIDT on the named person or the special advocates.

[14] The special advocates propose the following approach. To ensure the burden in relation to unsourced information does not revert back to the named person, the special advocates submit that once the named person has, based on the general practices of the particular agency in question, shown a plausible connection between the use of torture or CIDT and the information adduced by the Ministers, there is a presumption that all of the information originating from that agency was obtained by or involved the use of torture

or CIDT. To rebut the presumption, the Ministers must show that there are no reasonable grounds to believe that a particular item of information originated from or involved the use of torture or CIDT. In the absence of evidence to the contrary, the presumption compels a finding of fact that there are reasonable grounds to believe that the information was obtained by the use of torture or CIDT.

[15] The special advocates submit their approach simply adds to or further develops the principles articulated by Justice Blanchard and provides a mechanism that is consistent with his reasons to ensure the burden of establishing the admissibility of the evidence remains with the Ministers. For this reason, the special advocates say that their rebuttable presumption approach does not engage the principle of judicial comity.

[16] The special advocates' second area of disagreement which they acknowledge engages the principle of judicial comity concerns Justice Blanchard's analysis in relation to derivative evidence. Before going further, some clarification is necessary in relation to terminology. In Justice Blanchard's reasons he used the terms "primary" evidence and "derivative" evidence. Instead of "derivative" evidence, the special advocates and the Respondent refer to this evidence as "secondary" or "indirectly" obtained evidence.

[17] The special advocates agree with Justice Blanchard's conclusion that section 83(1.1) was intended to exclude both primary and indirectly obtained evidence.

However, they take issue with his definition of indirectly obtained evidence which grounds his test for the exclusion of indirectly obtained evidence. They submit that his definition of indirectly obtained evidence, namely, that "derivative evidence is information or evidence discovered as a result of the information obtained from torture or CIDT" is taken from the definition of derivative evidence found in section 24(2) *Charter* jurisprudence that has no application in the context of section 83(1.1) of the IRPA. Based on this restrictive definition of indirectly obtained evidence, that is, evidence obtained *as a result of*, Justice Blanchard framed the test for the exclusion of such evidence as "[b]ut for the evidence obtained as a result of torture of CIDT, would the impugned information have been obtained". The special advocates argue that this "but for" test contemplates a very strong causal connection and in the absence of such a connection the indirectly obtained evidence would be admissible. Having regard to the purpose of section 83(1.1) and its underlying rationales, the special advocates submit that the definition of evidence indirectly obtained from the use of torture or CIDT should be more broadly defined as any evidence obtained in reliance on evidence obtained from the use of torture or CIDT.

[18] As to the application of the principle of judicial comity, they refer to Justice Lemieux's decision in *Re Almrei*, 2007 FC 1025. At paragraphs 61 and 62, he stated:

> [61] The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court,

the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law. I cite the following cases:

- *Haghighi* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 272;

- *Benitez* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 461;

- *Pfizer Canada Inc.* v. *Canada (Minister of Health)*, 2007 FC 446;

- *Aventis Pharma Inc*. v. *Apotex Inc*., 2005 FC 1283;

- *Singh* v. *Canada (Minister Citizenship and Immigration)*, [1999] F.C.J. No. 1008;

- *Ahani* v. *Canada(Minister Citizenship and Immigration)*, [1999] F.C.J. No. 1005;

- *Eli Lilly & Co.*v. *Novopharm Ltd.*, (1996), 67 C.P.R. (3d) 377;

- *Bell* v. *Cessma Aircraft Co*., [1983] 149 DLR (3d) 509 (B.C.S.C.)

- *Glaxco Group Ltd. et al*. v. *Minister of National Health and Welfare et al.* 64 C.P.R. (3d) 65;

- *Steamship Lines Ltd*. v.*M.N.R.*, [1966] Ex. CR 972.

[62] There are a number of exceptions to the principle of judicial comity as expressed above they are:

1. The existence of a different factual matrix or evidentiary basis between the two cases;

2. Where the issue to be decided is different;

> 3. Where the previous [decision] failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and
>
> 4. The decision it followed would create an injustice.

[19] The special advocates take the position that the exceptions articulated by Justice Lemieux should not be viewed as exhaustive. In this regard, they submit that under the third exception a decision could be manifestly wrong for reasons other than a failure to consider relevant legislation or to follow binding authorities. In particular, the third exception in *Almrei* may also be framed as "the previous decision failed to consider… 'persuasive authority'". The special advocates argue that if the earlier judge in reaching the decision did not consider persuasive authority, then a judge of co-ordinate jurisdiction should refuse to follow the decision if the persuasive authority renders a preferable result in terms of the development of the law. The special advocates submit that the overarching consideration should be whether the judge is persuaded that the earlier decision is clearly wrong. The ultimate objective is to do justice in the case currently before the Court.

[20] The special advocates submit that Justice Blanchard's decision is clearly wrong for two reasons: he failed to consider persuasive international authorities and his decision is internally inconsistent. They note that on the question of the allocation of the burden of proof, in effect, Justice Blanchard adopted the approach of the majority of the House of Lords in the *A and Others v. Secretary of State for the Home Department*,

[2005] UKHL 71, decision. In their view, this is especially evident with respect to the very high threshold he established for the exclusion of evidence indirectly obtained as a result of the use of torture or CIDT.

[21] The special advocates point out that in the 2006 Report of the Special Rapporteur to the United Nations General Assembly on torture and CIDT, the Special Rapporteur was critical of the allocation of the burden of proof in the application of Article 15 of the *Convention Against Torture* by the majority of the House of Lords in *A and Others*. The Special Rapporteur endorsed the approach in the minority opinion noting that it was the Committee Against Torture's approach in its application of Article 15 of the *Convention Against Torture*. The special advocates claim that Justice Blanchard did not consider these international authorities, the experts in the application of the *Convention Against Torture*. In their view, a consideration of these authorities would likely have led to a different result.

[22] As to the internal inconsistencies in the decision, the special advocates argue the implicit finding that the burden of proof is not on the Ministers to prove that the unsourced information in the Service Intelligence Report is not the product of torture or CIDT and by inference placing the burden of proving that the unsourced information is believed on reasonable grounds to have been obtained as a result of the use of torture or

CIDT on the named person or the special advocates is inconsistent with the principles Justice Blanchard articulated in his decision.

[23] The special advocates note that their submissions in relation to the third exception overlap their position concerning the fourth exception on which they primarily rely. That is, the decision, if followed, would create an injustice. The special advocates argue that even if the failure to consider persuasive authorities does not amount to a manifest error, an injustice nonetheless arises. The special advocates submit that the test for the admissibility of secondary evidence that Justice Blanchard articulated is one that unfairly places the burden on the named person which he could not discharge and is contrary to the general principles upon which the burden to prove admissibility is placed on the Ministers. That burden is placed on the Ministers not only by the statute itself, but also for reasons of practicality and, more importantly, also for reasons of fundamental fairness.

[24] The special advocates maintain that Justice Blanchard's "but for" test to determine the admissibility of indirectly obtained evidence runs contrary to the principles of fairness he recognized in his reasons. As such, if applied in the present case, it would create an injustice in that it would undermine the fairness of this proceeding. As a result, the Respondent could be deprived of his liberty and security on the basis of evidence condemned internationally and in Canadian law.

[25] The Respondent adopts and relies on the submissions of the special advocates on the question of judicial comity and makes the following additional submissions. Relying on the case of *Zuria and Mission Institution*, 2010 BCSC 970, the Respondent submits that the principle of judicial comity is not a rule of law. Instead, it provides a structure for the exercise of judicial discretion informed by the overarching principle of the best interests of justice in the context of the particular case before the Court. While these interests clearly include consistency, certainty and predictability in the law and its application, it includes other interests as well.

[26] The Respondent stresses that the principle of judicial comity and the enumerated exceptions to the application of the principle should not be mechanically or restrictively applied or viewed as exhaustive. He submits that this Court may depart from Justice Blanchard's decision if the Court is persuaded that the decision is clearly wrong or that the interests of justice in this case require the Court to do so. In this latter regard, the interests of justice require an assessment of the relevant factors on a case-by-case basis.

[27] As well, in considering whether the principle of judicial comity finds application in the present case, the Court must be mindful of the context within which the case unfolds, in particular, the impact of the security certificate process on a person's security and liberty interests and the existence of egregious human rights breaches involving the

use of torture or CIDT that are abhorred by society and condemned by the administration of justice. As well, the Respondent notes the *sui generis* nature of security certificate proceedings and that the application of the principle of judicial comity in this context has not been previously considered in the jurisprudence.

[28] At this juncture, it is noted that the Respondent's submissions on the application of the principle of judicial comity only concern Justice Blanchard's approach to the admissibility of derivative evidence, that is, secondary or indirectly obtained evidence. The Respondent points to the three exceptions to the application of the principle of judicial comity identified by Justice Wilson in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 at 591, namely: "(a) subsequent decisions have affected the validity of the impugned judgment; (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered; (c) the judgment was unconsidered, *a nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority." The Respondent states that the third exception is of particular relevance in the present case.

[29] The Respondent takes the position that the events that transpired in the Mahjoub case put the present case squarely within the third exception or, alternatively, are so analogous to the circumstances upon which the exception is grounded that they ought similarly to relieve against the principle of comity. The Respondent claims that the

circumstances surrounding the hearing of the motion in the Mahjoub case effectively precluded a full consultation of relevant authorities by Justice Blanchard and deprived him of the benefit of full and reasonably informed submissions by public counsel. As well, the circumstances in that case impacted adherence to the open court principle.

[30] The Respondent disputes the Ministers' claim that in the motion before Justice Blanchard in which his counsel participated was exhaustive and that all of the issues raised in the present motion could have been raised at that time. The Respondent points out that, unlike in the present case, the motion in the Mahjoub case was bifurcated and resulted in two related but discreet decisions. In his June 9, 2010 decision, Justice Blanchard dealt with the admissibility of primary evidence and also held that section 83(1.1) also extended to derivative or secondary evidence. In his August 31, 2010 decision, he determined the admissibility of secondary evidence.

[31] The Respondent notes it is clear that at the time of public counsel's written submissions in the Mahjoub motion the issue of secondary evidence was not contemplated. The question of secondary evidence was first raised in oral argument in the context of the discussion of whether section 83(1.1) encompassed secondary evidence. At the invitation of the Court, public counsel made submissions on the inapplicability of the section 24(2) *Charter* jurisprudence developed in the criminal law context and later provided written submissions on the legislative history of the provision

with a view to addressing the question whether the provision encompassed not only information and evidence directly obtained but also information and evidence indirectly obtained as a result of the use of torture or CIDT. However, these submissions did not address the nature of indirectly obtained evidence or the test for the admissibility of indirectly obtained information or evidence. At the hearing in which Mr. Mahjoub's former counsel participated, their submissions were confined to how indirectly obtained evidence or secondary evidence should not be defined and a brief statement that indirectly obtained evidence should be excluded unless the Ministers could establish that it is sufficiently separate from or is shown to be attenuated in a causal chain to satisfy the Court that it arises from an independent source that is not tainted by torture or CIDT. Subsequently, at the time the Court was confronted with the question of the test for the admissibility of indirectly obtained evidence, the Court, for reasons entirely beyond its control, did not have the opportunity to invite and consider submissions on that question from public counsel. The Respondent stresses that the position being taken on the present motion should not be construed in any way as being critical of Justice Blanchard's conduct of the Mahjoub case.

[32] Before considering whether the principle of judicial comity should be applied in the present case, the first question is whether the rebuttable presumption approach advanced by the special advocates engages the principle of judicial comity. In my view, it does. The special advocates acknowledge that this approach requires reading a

presumption of law into section 83(1.1). This is at odds with the interpretation of the provision that it simply serves "to clarify that reliable and appropriate evidence does not include information believed on reasonable ground to have been obtained by torture" articulated by Justice Dawson in *Jaballah II*, 2010 FC 224, at para. 65, adopted by Justice Blanchard in his decision. As well, in his June 9, 2010 decision, Justice Blanchard observed that as the party adducing the evidence, the burden rests with the Ministers to establish its admissibility. However, he pointed out that "the named person has an obligation to raise the issue" by showing a plausible connection between the use of torture or CIDT and the evidence upon which the Ministers wish to rely. It is not disputed that this is a low threshold to meet. Indeed, it is the means by which the named person challenges the admissibility of the evidence on the basis of section 83(1.1) and requires the Ministers to discharge their burden of establishing the admissibility of the evidence. In contrast, the rebuttable presumption approach, in effect, would require nothing more than meeting the low threshold of the plausible connection to compel the trier of fact, in the absence of evidence to the contrary, to find that the evidence is inadmissible under 83(1.1). As the Ministers point out, the rebuttable presumption approach would overtake the statutory standard of proof of "reasonable grounds to believe". In my opinion, the rebuttable presumption approach is more than a mechanism to ensure that the burden of proof remains with the Ministers and represents a significant departure from the analytical framework articulated by Justice Blanchard.

[33] Turning to the application of the principle of judicial comity, in particular, the first two exceptions identified by Justice Lemieux in *Almrei*, above, it is not disputed that the issues raised in this motion are the same as those raised in the Mahjoub motion. Additionally, although the facts and evidentiary basis in the underlying security certificate proceeding in this case are not the same as those in the Mahjoub case, the section 83(1.1) motions in the two cases are based on the same evidentiary record and there are no material distinguishable facts.

[34] With respect to the third exception, as set out above, the special advocates submit that a decision may be manifestly wrong because a persuasive authority was not followed. It is not necessary for the purpose of these reasons to deal with the question of whether the two international authorities referred to by the special advocates are persuasive authorities. The third exception permits a judge to depart from an earlier decision of a judge of co-ordinate jurisdiction because it is manifestly wrong. Throughout the appellate and trial level jurisprudence, a manifestly wrong decision is one involving a failure to apply relevant legislation or binding authority was not followed: see, for example, *Miller v. Canada (Attorney General)*, 2002 FCA 370; 220 DLR (4th) 149; *Janssen Pharmaceutical Inc. v. Apotex Inc.* (1997), 208 N.R. 395; *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2007] 1 F.C.R. 107. The special advocates do not cite nor have I been able to find any authority for the proposition that a failure to follow persuasive authority will result in a manifestly wrong decision.

[35] As to the argument that the Mahjoub decision is manifestly wrong because it is internally inconsistent, I note that this argument is premised on the assertion that in relation to unsourced information Justice Blanchard implicitly found that the Ministers do not bear the burden of proving its admissibility and by inference the named person bears the burden of proving its inadmissibility. I reject this assertion.

[36] In Mahjoub, it was argued that where a state practice of systemic and persuasive torture or CIDT is shown, it is open to the Court to draw a reasonable inference that the unsourced information was obtained by torture or CIDT. It may be that in the absence of any other evidence, this could be a reasonable inference. However, in the Mahjoub case, other evidence was adduced. As Justice Blanchard stated in his June 9, 2010 decision, at paragraph 168:

> As stated above, the "reasonable grounds to believe" standard requires something more that mere suspicion but less than the standard applicable in civil matters of proof on a balance of probabilities. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information. I do not find, based on the record before me, that there is an objective basis for the belief that all unsourced information, which originates from [redacted] was obtained by torture or CIDT. The evidence establishes that significant information is gathered [redacted] by methods that do not include the use of torture or CIDT. [emphasis added]

[37] In my view, this does not reflect a lifting of the burden of proving the admissibility of the evidence from the Ministers. Instead, it reflects a consideration of all

of the evidence in keeping with the conclusions found in paragraph 59 of the June 9, 2010 decision summarized in paragraph 4 above. I am unable to find any internal inconsistency in the June 9, 2010 decision and note that in the August 31, 2010 decision Justice Blanchard simply applied his earlier finding in relation to the unsourced information.

[38] As noted above, the special advocates rely primarily on the fourth exception identified by Justice Lemieux, namely, that "the decision if followed would create an injustice". The Ministers contend that based on the jurisprudence of this Court the injustice must be a "severe injustice". The Ministers also point out that although the exception of "severe injustice" is repeated in subsequent jurisprudence of the Federal Court, it is not present in subsequent Federal Court of Appeal jurisprudence. In particular, it is not found in the Court of Appeal's decision in *Janssen Pharmaceuticals Inc.*, above. Further, in light of the absence of jurisprudence about this exception, the Ministers argue that the severe injustice must in some way be tied to the rationale for the other exceptions to judicial comity, that is, it must aim to further consistency, clarity and predictability in the common law.

[39] A review of the cases canvassed by Justice Lemieux from which he abstracted the exceptions he identified at paragraph 62 of his reasons is helpful. In the cited jurisprudence, the first time that an exception based on the injustice that would be created

if the prior decision is not followed is in *Glaxo Group Ltd. v. Canada (Minister of National Health and Welfare)*, 64 C.P.R. (3d) 65. In *Glaxo*, at paragraph 10, Justice Richard quoting from the British Colombia Court of Appeal decision in *Bell v. Cessna Aircraft Co.*, [1983] 149 D.L.R. (3d) 509 at 511 stated:

> The principle of judicial comity has been expressed as follows:
>
> > The generally accepted view is that this court is bound to follow a previous decision of the court unless it can be shown that the previous decision was manifestly wrong, or should no longer be followed: for example, (1) the decision failed to consider legislation or binding authorities which would have produced a different result, or (2) the decision, if followed, would result in a severe injustice. The reason generally assigned for this approach is a judicial comity. While doubtless this is a fundamental reason for the approach, I think that an equally fundamental, if not more compelling, reason is the need for certainty in the law, so far as that can be established. Lawyers would be in an intolerable position in advising clients if a division of the court was free to decide an appeal without regard to a previous decision or the principle involved in it.

[40] Other than in those cases in which Justice Richard's statement "the decision, if followed, would result in a severe injustice" is specifically quoted, none of the cases cited by Justice Lemieux mention an exception based on the injustice that would result if the prior decision is followed. As the distinction between injustice and severe injustice is not discussed in *Almrei* and given that Justice Lemieux's articulation of the exceptions to judicial comity was based on his review of the cited decisions, I assume that a reformulation of the exception was not intended. I find some support for this view in Justice Mosley's decision in *Almrei (Re)*, 2009 FC 3 where, at paragraph 85, he set out the exceptions identified by Justice Lemieux and, at paragraph 89, added that "[t]he

authorities indicate that the generally accepted view is that the Court is not bound to follow a previous decision where the decision, if followed, would result in a severe injustice or subsequent decisions have affected the validity of the impugned judgment: *Glaxo Group*, above, at para.10; *Re Hansard*, above, at paras. 4-5." However, as will become evident, for the purpose of this motion, a determination as to whether the exception is in relation to a severe injustice or an injustice is unnecessary.

[41] As noted above, the special advocates rely primarily on the fourth exception identified by Justice Lemieux. In summary, they submit that Justice Blanchard's test for the admissibility of secondary evidence unfairly places a burden on the named person and would create an injustice if applied in the present case. I reject this argument. In effect, it is grounded on the special advocates' disagreement with Justice Blanchard's decision in relation to the test for the admissibility of secondary evidence and their contention that it is wrongly decided because he did not adopt the approach of the international authorities. Before going further, I must note that I do not accept the special advocates' view that Justice Blanchard's test places the burden on the named person. Leaving this aside, in my view, to justify a departure from an earlier decision the alleged injustice must arise from something more than a disagreement with the decision otherwise the principle of judicial comity would be meaningless.

[42] Turning to the Respondent's submission based on the third exception in *Re Hansard*, the Respondent does not press the submission that the August 31, 2010 decision was a *nisi prius* decision in the sense of an immediate decision given during the course of a trial without an opportunity to fully consider the relevant authorities. Rather, the Respondent argues that the events surrounding the Mahjoub motion are analogous to the circumstances upon which the exception is based.

[43] The following is a summary of the circumstances surrounding the hearing of the motion in the Mahjoub case. Following the sixteen day hearing of the motion that was concluded at the end of April 2010, Justice Blanchard issued reasons and an Order on the scope and application of section 83(1.1) on June 9, 2010. On June 14, 2010, Mr. Mahjoub's counsel were removed as solicitors of record. On July 7, 2010, the Ministers produced a revised Service Intelligence Report (SIR) and a revised public summary of the SIR with proposed exclusions of information that in their view complied with the June 9, 2010 Order. On July 8, 2010, the special advocates took the position that additional information and corresponding source references should be excluded from the SIR. On July 14, 2010, in a closed hearing, the Court heard arguments on the question of whether this additional information should be excluded. Mr. Mahjoub's new counsel filed their appointments as solicitors of record on July 21, 2010 and advised the Court that they would need sometime to review the file before they could proceed. As noted above, Justice Blanchard issued top secret reasons on August 31, 2010.

[44] The Respondent's submission that in reaching his decision Justice Blanchard did not have the benefit of full submissions from counsel and an opportunity consult relevant authorities is based on a number of assertions. As to the lack of opportunity to make submissions on the question of derivative evidence, while it is true that the issue was not addressed in the written submissions, public counsel had an opportunity to discuss the legal issues arising on the motion with the special advocates prior to making their oral submissions. In their oral submissions on April 16, 2010 public counsel raised the issue of derivative evidence and advanced a "but for" test. Counsel also cautioned the Court when approaching certain kinds of evidence in the context of derivative evidence in light of the evidence of one of the expert witnesses. I appreciate that public counsel did not know the nature and the scope of the information relied upon by the Ministers, however, the question of whether derivative evidence came within the ambit of section 83(1.1) and the test for the admissibility of derivative evidence were live issues at that time. As noted below, the August 31, 2010 decision came about as a result of the disputed application of the June 9, 2010 decision.

[45] With respect to the process itself, the Respondent characterizes the Mahjoub motion as a bifurcated motion. While Justice Blanchard did issue two decisions, the second decision arose as a result of the disputed application of the first decision to the SIR, a dispute that given the nature of the information had to be addressed in a closed

hearing. This was not a situation in which it was contemplated from the outset that the motion would be dealt with in two stages with public hearings at each stage. The distinction in my view is important as at the conclusion of the public hearing of the motion, additional submissions from public counsel were not contemplated unless, as discussed at the end of the hearing, the Court was of the view that additional assistance from public counsel was required.

[46] The Respondent points out that at the time the Court was considering the test for the admissibility of secondary evidence, "there were effectively no public counsel to whom it could look for assistance." This assertion is also problematic. Underlying this assertion is the suggestion that the Court would not have sought the assistance of newly appointed public counsel and made whatever arrangements were necessary in the circumstances while they were familiarizing themselves with the file if their assistance or participation was required.

[47] In oral argument, the Respondent pointed out that at the June 14, 2010 hearing on the motion filed by public counsel to be removed as counsel of record, the Court made it clear to Mr. Mahjoub that the case would continue *in camera*. After the Court stated that the motion would be granted, there was also a discussion with the special advocates and the Ministers' counsel regarding the work that could be done while Mr. Majoub was in the process of retaining new counsel, in particular, matters arising from the June 9, 2010

Order that had to be done *in camera*. While the Court certainly stressed to Mr. Mahjoub the importance of appointing new public counsel without delay and the need to move the matter forward, there was no suggestion that other than with respect to the identified matters, the case would continue without public counsel.

[48] Having reviewed the record in the Mahjoub motion, I am unable to find that the circumstances surrounding the hearing of the motion in that case are such that in the present case the principle of judicial comity should not be applied.

[49] For the above reasons, I have concluded that the principle of comity applies and I have adopted and applied the analytical framework articulated by Justice Blanchard in his decisions of June 9 and August 31, 2010.

"Dolores M. Hansen"
Judge

Ottawa, Ontario
January 6, 2012

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: **DES-6-08**

STYLE OF CAUSE:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act* (*IRPA*);

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF MAHMOUD ES-SAYYID JABALLAH

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: January 20, 24, 25, 26, 27, and 28, 2011

REASONS FOR ORDER BY: Madam Justice Hansen

DATED: January 6, 2012

APPEARANCES:

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