



Date: 20140516

Docket: DES-7-08

Citation: 2014 FC 479

Ottawa, Ontario, May 16, 2014

PRESENT: The Honourable Mr. Justice Simon Noël

IN THE MATTER OF a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act* [“IRPA”];

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

AND IN THE MATTER OF the terms and conditions of release of Mohamed Zeki MAHJOUB [“Mr. Mahjoub”]

REASONS FOR ORDER AND ORDER

[1] The Ministers are seeking an amendment to a condition and additional conditions to the terms and conditions of release of Mr. Mahjoub pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106. Public counsel for Mr. Mahjoub requested an oral hearing, which was offered, but then submitted that they could not attend unless funding for the fees could be obtained. This Court gave public counsel until May 9, 2014 to solve the funding issue of their fees and, if they did not, the Ministers’ motion would then be dealt with in writing. Public counsel has recently informed that the funding issue has been resolved and that they were ready to proceed with a review of all the terms and conditions of release in early summer, and they suggested that the Ministers’ motion be suspended until then. Again the undersigned offered an

oral hearing to deal with the Ministers' motion, which was agreed. Oral submissions were made. These are the Reasons for Order and Order disposing of the Ministers' motion to amend a condition and to add others to the terms and conditions of release dated January 24, 2014.

[2] The undersigned has been assigned as designated judge by the Chief Justice to deal with matters arising from this file.

I. The Ministers' motion to amend and add conditions

[3] The Ministers are asking that condition 10F) of the terms of conditions of release be amended as follows:

10F) "Mr. Mahjoub shall permit any employee of the CBSA or any person designated by it, to examine his modem and his computer, including the hard drive and the peripheral memory; and seize the computer, modem, and any peripheral memory devices for such examination, without notice. Mr. Mahjoub shall provide any and all peripheral memory to the CBSA immediately upon request.

(The underlining indicates the new additions.)

and that the following conditions of release be added:

10I) Mr. Mahjoub shall not take any action that would circumvent the CBSA's examination of his computer. Such action, includes, but is not limited to use of encryption hardware or software, use of volatile memory, or access to any random access memory ["RAM"] drive software.

10J) Mr. Mahjoub shall provide any and all passwords to the CBSA immediately upon request.

10K) Mr. Mahjoub shall not access or use any form of program or online service which allows him or others to create, store or share files on the Internet. Such services include, but are not limited to, “Drop box”, “Google drive”, Microsoft Sky drive”, and “Icloud”.

[4] An amendment to condition 10F) and the addition of conditions 10I), 10J) and 10K) are being sought because on August 21, 2013, CBSA officers visited Mr. Mahjoub in order to collect his computer for examination pursuant to condition 10F) of the terms and conditions of release dated January 24, 2013, and when he was asked to provide his password to access his computer, Mr. Mahjoub refused (purpose of condition 10J). But in addition, the computer was removed for examination and a virtual machine of the computer was created that enables the viewing of the computer content as if it were operating. As a result of this operation, it is the CBSA’s opinion that Mr. Mahjoub “[...] has likely access to the drop box file hosting service.” A drop box file cannot be accessed through a forensic examination (purpose of condition 10K)). Furthermore, the CBSA considers that another method to circumvent a forensic examination is the use of random access memory (RAM), another memory with the hard disk drive (H.D.D.), which dissolves the information when the computer is turned off. Therefore, the CBSA is seeking a condition to forbid such use (purpose of condition 10I). Finally the amendment to condition 10F) is to broaden the scope of access to the computer information and to specifically obligate Mr. Mahjoub to provide upon request all of the information such as peripheral memory and modem.

[5] The Ministers submit that amending condition 10F) and adding the new conditions are necessary because of Mr. Mahjoub’s lack of cooperation with the CBSA, such as not giving his computer password when required, but also to ensure that he does not circumvent condition 10 of

the terms and conditions of release by accessing without authorization websites, software or hardware which are difficult to monitor and by communicating with persons.

[6] It is also suggested that what is proposed are not new conditions that would add to the already specified restrictions, but rather that they clarify and specify the parameters of Mr. Mahjoub's internet and computer usage which is already set out in the Order of my colleague Justice Blanchard dated January 24, 2014.

[7] In that Order, Justice Blanchard clarified that Mr. Mahjoub could browse public available information on social media websites such as Facebook as long as it is not used for the purpose of himself communicating with any person. The Order made it clear that such use was not a breach of condition 10C). The Ministers also sought at that time to add conditions that would clarify and specify the parameters of Mr. Mahjoub's use of the internet but my colleague found that these were new conditions not covered by his Reasons for Order and Order of December 17, 2013 and that they were not properly before the Court. Therefore the new conditions were not considered.

[8] The Ministers, with the present motion, are asking this Court: Should the terms and conditions of release be amended now?

II. Mr. Mahjoub's response

[9] On behalf of Mr. Mahjoub, public counsel submits that the Ministers' motion should be dismissed for the following reasons:

- a) it perpetuates and aggravates the “unprototified” intrusion into Mr. Mahjoub’s private life, his right to privacy and storage of personal information that is inimical to the principles enunciated by the Supreme Court in *R. v Vu*, 2013 SCC 60;
- b) the existing conditions including the new ones are too broad and are not rationally connected to a danger;
- c) when the terms and conditions were decided, the issues being raised as part of the new conditions were known and not raised by the Ministers and were not imposed by the Court.

[10] In his affidavit filed in support of his submissions, Mr. Mahjoub explains that he did not give his password because the terms and conditions do not require such disclosure and that “[...] I (he) respect(s) these conditions.” He also affirms that he has never used drop box or any other storage service or any software or browser or tool to hide his activities on the Internet, and that he had no knowledge that such technology existed. He is cooperating with the CBSA pursuant to the terms and conditions. Mr. Mahjoub considers that he is not a threat to anyone and request that the terms and conditions dated January 24, 2014 be changed.

[11] Public counsel has also submitted an affidavit of Jeremy Cole, a technological consultant, which in essence says that a forensic examination (which the CBSA can do on its own) can detect and inspect the content of external memory but also examine the information contained in the computer even when passwords or encryption device are used to circumvent the access. As

for the use of a drop box website as claimed by the CBSA, Mr. Cole says that no logs referred to indicate that Mr. Mahjoub had accessed such website.

[12] It is submitted that all of the Ministers' requests are not necessary since a CBSA forensic investigation can access all of the computer activities even those that use other technology communications to prevent access and that the knowledge of a password is not essential to permit access and, more importantly, that Mr. Mahjoub has not used any of that new technology to prevent a proper access to his computer and that he has respected the terms and conditions of release of the January 24, 2014 term.

[13] Public counsel submits that the motion of the Ministers to amend and add conditions be dismissed. If not, that the motion of the Ministers be suspended until Mr. Mahjoub's motion to review all of the terms and conditions of release is dealt with in late June or July. To this effect, the public counsel has filed with the Court a notice of motion for release, repealing of conditions and variation of conditions save usual terms such as to keep the peace, report a change of address.

III. Analysis

[14] In his most recent Reasons for Order and Order dated December 17, 2013, Justice Blanchard found that Mr. Mahjoub poses a threat to the security of Canada but that the threat is diminished "significantly". The result of this finding was reflected in the terms and conditions of release dated January 24, 2014.

[15] The Reasons for Order also were also forward looking:

21 [...] in terms of the future length of time that the conditions of release will continue, until decisions are made concerning appeals, it is difficult to estimate the time that will be required. Mr. Mahjoub will continue to benefit from regular reviews of his terms and conditions of release. This factor will be considered again at the next review at this time, it is considered to neutral.”

[16] The Ministers would like, at this time, to amend and add to the conditions of release. Mr. Mahjoub would like the conditions of release to be terminated.

[17] The Ministers do not identify a breach to the conditions on the part of Mr. Mahjoub. It relies on a CBSA visit of August 21, 2013, months before the last review of conditions, to support their request to amend and add conditions. The Ministers want to clarify and specify the parameters of Mr. Mahjoub’s internet and computer usage. The closest the Ministers came to identify an issue of concern is that Mr. Mahjoub “[...] has likely access to the drop box [...]”.

[18] On the opposite, Mr. Mahjoub denies having done so or having used any device to communicate without leaving a trace of doing so. Public counsel has also filed technological evidence that shows that a forensic examination can detect any wrongful use and the information beneath.

[19] In such a case, at this time, a Court does not have to decide on the extent and scope of condition 10 by which Mr. Mahjoub will have to abide in order to ensure that he does not communicate with outsiders through the use of his computer. My reading of condition 10F) in particular indicates that the purpose of the access to the content of the computer is to insure that

all of its use can be monitored by CBSA. At this stage, there is no need to go any further and to clarify and specify the parameters of Mr. Mahjoub's use of his computer. There will be a time to review all of that including all the terms and conditions of release.

[20] Having said that, a matter has to be explained in detail to Mr. Mahjoub. The condition 10F) of the terms and conditions of release is clear. It will now be crystal clear. Mr. Mahjoub cannot directly or indirectly use his computer for the purpose of communicating with any person as condition 10C) specifies. Justice Blanchard had this to say about it:

“Conditions 10C) is aimed at preventing the use of the Internet for the purpose of communicating by Mr. Mahjoub with any person. To that end, Mr. Mahjoub was prohibited from setting up an account or accessing any existing account. The condition was not intended to prevent browsing publicly available information on such websites as long as Mr. Mahjoub does not use such websites for the purpose of communicating with any person.”

(See Order of January 24, 2014, at page 4).

[21] It goes without saying that the Ministers and the CBSA for the purposes of monitoring condition 10C) must have full access to Mr. Mahjoub's computer, including his passwords. It would not be logical for conditions 10C) and 10F) to mean that the computer can be seized for such examination but that the entry code not be given. Public counsel argues that a password can always be circumvented when the forensic examinations begins. If that is the case then, Mr. Mahjoub shall in the future give his password when asked. The best example this Court can use is the following: if access is given to a house for search purposes (such as Condition 15 does), it goes without saying that either a key is given or the doors of the house are made accessible. Surely, even if it is not specified that the key or access to the house has to be given, it does not

mean that the doors have to be broken. Some sense has to be given to giving access to a house like giving it to a computer. Therefore condition 10F) with the following addition as underlined will read as follows:

F) “Mr. Mahjoub shall permit any employee of CBSA or any person designated by it, to examine his computer, including the hard drive in the peripheral memory; and seize the computer for such examination without notice. Upon request Mr. Mahjoub shall give forthwith all passwords necessary in order to give full access to the information to his computer.

[22] As for the motion of the Ministers to amend condition 10F) (subject to the clarification contained in paragraph 19 of the present reasons) to give it a larger scope, and to add condition 10I) to forbid the use of encryption hardware, RAM drive software, etc., and condition 10K to forbid the use of drop box, Google drive, etc., it shall be dealt with at the time of a full review of the terms and conditions of release dated January 24, 2014 as amended by the present Order.

[23] For the sake of clarity, this does not mean that meanwhile if the Ministers have evidence that indicate that Mr. Mahjoub has breached any of the terms and conditions of release that a motion cannot be presented to that effect.

ORDER

THEREFORE THIS COURT ORDERS THAT:

1. That the motion of the Ministers to amend condition 10F) and add conditions 10I), 10J) and 10K) is granted in part;
2. Paragraph 10F) is amended as follows: Mr. Mahjoub shall permit any employee of CBSA or any person designated by it, to examine his computer, including the hard drive and the peripheral memory; and seize the computer for such examination without notice. Upon request, Mr. Mahjoub shall give forthwith all passwords necessary in order to give full access to the information on his computer.
3. The requests for further amendment to paragraph F) and the new conditions 10I) and 10K) to the terms and conditions of release are to be dealt with at the time there is a full review of the said terms and conditions of release by a designated judge of this Court unless evidence is presented that shows that Mr. Mahjoub has breached any of his terms and conditions of release and that a motion is presented to this effect.

4. Without cost.

“Simon Noël”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-7-08

STYLE OF CAUSE: **IN THE MATTER OF A CERTIFICATE SIGNED PURUSANT TO SECTION 77(1) OF THE IMMIGRATION AND REFUGEE PROTECTION ACT (IRPA);**

AND IN THE MATTER OF THE REFERRAL OF A CERTIFICATE TO THE FEDERAL COURT PURSUANT TO SECTION 77(1) OF THE IRPA

AND IN THE MATTER OF MOHAMED ZEKI MAHJOUB

PLACE OF HEARING OTTAWA, ONTARIO

DATE OF HEARING: MAY 15, 2014

REASONS FOR ORDER AND ORDER: JUSTICE SIMON NOËL

DATE OF REASONS MAY 16, 2014

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