Federal Court Cour fédérale

Date: 20200603

Dockets: DES-5-08
IMM-5330-18

Citation: 2020 FC 662

Ottawa, Ontario, June 3, 2020

PRESENT: The Honourable Madam Justice Roussel

Docket: DES-5-08

BETWEEN:

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 that certificate to the Federal Court of Canada pursuant to subsection 77(1) of the IRPA;

AND IN THE MATTER OF Mohamed HARKAT

IMM-5330-18

AND BETWEEN:

MOHAMED HARKAT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

I. Overview

[1] Mohamed Harkat is the subject of a security certificate under section 77 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The certificate was determined to be reasonable by this Court in 2010 (*Harkat (Re)*, 2010 FC 1241). This finding was upheld by the Supreme Court of Canada in 2014 (*Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37). Since Mr. Harkat was released from detention in 2006, this Court has reviewed and varied the terms and conditions of his release. The most recent review took place in November 2017 (*Harkat (Re)*, 2018 FC 62).

[2] The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness [Ministers] have brought a motion to vary the terms and conditions of Mr. Harkat's release. In addition to seeking clarification on the existing terms and conditions, the Ministers also assert that Mr. Harkat has committed two (2) breaches relating to the use of his computer.

[3] Mr. Harkat has filed a motion seeking an order for state-funded counsel. Specifically, he seeks an order from this Court requiring the Attorney General of Canada [AGC] to pay the legal fees of his counsel, Barbara Jackman, at a rate to be negotiated between his counsel and the AGC. Mr. Harkat seeks a funding arrangement that will apply to the Ministers' motion, but also to related proceedings, including any future applications he may bring to vary the conditions of his release.

[4] Mr. Harkat is seeking similar relief in relation to his application for leave and judicial review [ALJR] filed against the decision of a senior delegate of Immigration, Refugees and Citizenship Canada [Minister's Delegate] made on October 2, 2018. In that decision, pursuant to paragraph 115(2)(*b*) of the IRPA, the Minister's Delegate determined that Mr. Harkat, a citizen of Algeria, should not be allowed to remain in Canada.

[5] In both files, Mr. Harkat wishes to be represented by Ms. Jackman, who has acted as his counsel over the last several years. He is not eligible for a legal aid certificate, and he claims he cannot afford to pay a private retainer. Ms. Jackman is not prepared to act on a legal aid certificate.

[6] The Ministers oppose Mr. Harkat's motions for state-funded counsel.

[7] For the reasons that follow, Mr. Harkat's motions for state-funded counsel are dismissed. The Ministers' motion will be addressed in a separate set of reasons.

II. Analysis

A. *The Law on State-Funded Counsel and Counsel of Choice*

[8] In the criminal context, where an accused charged with a serious offence lacks the means to retain counsel and has been refused legal aid, the courts may exceptionally stay the proceedings until the state provides the necessary funding to ensure the accused's right to a fair trial. This type of order is commonly referred to as a "*Rowbotham*" order, based on *R v*

Rowbotham, [1988] OJ No 271 (QL), 1988 CanLII 147 (CA) [*Rowbotham*]. Its legal foundation is found in sections 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], which guarantee an accused a fair trial in accordance with the principles of fundamental justice. The courts will only grant such an order in those rare circumstances where the accused person is indigent, ineligible for legal aid, unable to represent him or herself adequately and involved in a serious and complex legal proceeding affecting his or her liberty. While it is generally recognized that an accused person has a fundamental right to choose his or her lawyer, a *Rowbotham* order does not require the state to pay for the accused person's chosen lawyer.

[9] In *R v Peterman* (2004), 70 OR (3d) 481, [2004] OJ No 1758 (QL) (CA) [*Peterman*], the Court of Appeal for Ontario expanded upon the *Rowbotham* principles. The respondent in that case was financially eligible for legal aid. The legal aid certificate allowed him to select a lawyer of his choice to represent him, provided the lawyer would accept the legal aid rate. The certificate also carried certain limitations regarding the payment of fees and expenses of the out-of-town counsel, preparation time and retention of junior counsel.

[10] Charged with arson, Mr. Peterman approached a lawyer who had acted for him previously in several civil and criminal matters. The lawyer agreed to act for Mr. Peterman on the legal aid certificate, but his office was not in the jurisdiction where the offence took place. Counsel therefore sought prior travel authorization from the Legal Aid Ontario area director. The director denied the travel request, a decision that was upheld after counsel exhausted all of Legal Aid Ontario's internal appeals.

[11] Mr. Peterman then brought an application seeking an order for the payment of his chosen counsel at rates in excess of the normal legal aid tariff, as well as payment of a junior counsel. He also sought payment of counsel's reasonable disbursements, payment of counsel for the full amount of preparation time, with no maximum limit on the number of hours for preparation, and payment for counsel's meals and accommodation. The application judge refused to make an order for enhanced rates, but she ordered the payment of Mr. Peterman's chosen counsel and junior counsel's travel time, travel and meal expenses and all of their preparation time, with the limitation that the time expended be reasonable. If Legal Aid Ontario failed to pay, the application judge ordered that the Ministry of the Attorney General of Ontario would pay these expenses.

[12] After reviewing the principles set out in *Rowbotham* and confirming that the right of an accused to choose his or her counsel does not impose a positive obligation on the state to provide funds for counsel of choice, the Court of Appeal for Ontario indicated that there were two (2) exceptions to this principle.

[13] The first exception is where "in some unique situations", "an accused can establish that he or she can only obtain a fair trial if represented by a particular counsel. In those unusual circumstances, the court may be entitled to make an order to ensure that the accused is represented by that counsel" (*Peterman* at para 29). This was the case in *R v Fisher*, [1997] SJ No 530 (QL) (QB) [*Fisher*].

[14] In that case, Mr. Fisher was charged with murdering and raping a woman named Gail Miller thirty (30) years earlier. Another man, David Milgaard, had already been convicted of her death. The Supreme Court of Canada held a reference into Mr. Milgaard's conviction: *Reference re Milgaard (Can)*, [1992] 1 SCR 866. Mr. Fisher appeared as a witness on the reference and was represented by Brian Beresh. Mr. Beresh had also represented Mr. Fisher in another unrelated criminal matter, and he had continued to give Mr. Fisher legal advice after the reference in the Supreme Court of Canada. When Mr. Milgaard was exonerated and Mr. Fisher charged with the murder, Mr. Fisher applied for an order that Mr. Beresh and his assistant be appointed as his defence counsel. Although Mr. Fisher qualified for legal aid, Mr. Beresh could not be appointed because he was not a resident of Saskatchewan.

[15] Mr. Justice Milliken of the Court of Queen's Bench for Saskatchewan found that the matters reviewed at the reference were, for the most part, the same matters that would be dealt with at Mr. Fisher's trial. He also found that Mr. Fisher's trial would raise complex issues concerning the admission of evidence. He concluded that Mr. Fisher could only receive a fair trial if he was represented by Mr. Beresh. Mr. Justice Milliken recognized that this was a unique case, and he explained why he was not concerned the ruling would set a precedent for other cases:

> I don't think that the circumstances which have occurred in this case, namely a charge of murder and rape which took place over thirty years ago for which another person was convicted and now exonerated and the accused person having appeared at a reference with the same counsel he wishes now to have represent him, will happen again in this province in another thirty years. I am therefore of the opinion that my rulings on this application will not set a precedent which will affect the Legal Aid Tariff.
>
> (*Fisher* at para 20)

[16] The second exception identified by the Court of Appeal for Ontario in *Peterman* is where the accused simply cannot find competent counsel to represent him or her on conditions imposed by legal aid (*Peterman* at para 30). However, the Court of Appeal for Ontario added that one would expect those cases to be exceedingly rare.

[17] The Court of Appeal for Ontario ultimately found that Mr. Peterman's case was not unique, nor was it of the same order of complexity as the *Fisher* case. In reaching this conclusion, the Court noted that it was an arson case expected to last seven (7) days in which there could be up to thirty (30) Crown witnesses, one of whom was a former accomplice. It indicated that if the level of complexity was such that Mr. Peterman's case justified a *Fisher* order, then virtually every accused facing a jury trial could claim an entitlement to state-funded counsel of choice. The Court also rejected the assertion that a *Fisher* order could be justified because of an accused's prior professional relationship with a particular lawyer and the accused's confidence in that lawyer (*Peterman* at para 31). Finally, the Court added that there was no evidence that other competent local counsel were not available to take the case on the conditions imposed by Legal Aid Ontario. Oral submissions from counsel at the hearing about the number of lawyers in the county was no basis for finding that there were no other competent lawyers available to take the case (*Peterman* at para 32).

[18] In *R v Dieckman*, 2012 ONSC 6779 [*Dieckman*], Mr. Justice Durno of the Ontario Superior Court of Justice also dismissed an application for state-funded counsel of choice in a large-scale prosecution. Ms. Dieckman was charged with six (6) counts of fraud over $5,000. The Crown alleged that Ms. Dieckman and others had defrauded the government of several

million dollars through a payroll service company they operated for employers. Mr. Justice Durno reviewed the decisions in *Rowbotham*, *Fisher* and *Peterman* and concluded that on a *Fisher*/*Peterman* application, the applicant was required to establish, on a balance of probabilities, the following five (5) criteria:

> 1. They have applied for legal aid funding and exhausted all avenues of appeal within legal aid or demonstrated that an application would be futile.
>
> 2. Under the first *Peterman* exception where they have been denied legal aid funding: that their case involves a unique situation and he or she can only obtain a fair trial if represented by a particular lawyer. The applicant would also be required to establish why fees in excess of the legal aid tariff were justified in all the circumstances.
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> 3. Under the first *Peterman* exception where they have been granted legal aid funding: that their case involves a unique situation and that he or she can only obtain a fair trial if represented by a particular lawyer. The applicant would also have to establish why that counsel cannot be retained under the legal aid plan and why fees in excess of the legal aid tariff are justified in all the circumstances.
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> 4. Under the second *Peterman* exception where legal aid coverage has been granted: that they cannot find competent counsel to represent him or her on the conditions imposed by legal aid, that a specific counsel will act at rates above those paid by legal aid and why rates in excess of the legal aid tariff are justified in all the circumstances.
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> 5. That they do not have funds with which to pay counsel and have exhausted all means other than legal aid to obtain a private retainer.
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> (*Dieckman* at para 33)

[19] Mr. Justice Durno dismissed the application for state-funded counsel. After observing that Ms. Dieckman had not applied for legal aid funding, he found that she had not demonstrated, on a balance of probabilities, that it would be futile for her to do so, adding that neither counsel's

submissions nor opinion constituted evidence (*Dieckman* at paras 35-37). Although he recognized as an important consideration the fact that counsel had represented Ms. Dieckman on the case for six (6) years and that the case had some complex issues, Mr. Justice Durno was not persuaded that the case qualified as "unique" nor that Ms. Dieckman could only receive a fair trial with her chosen counsel representing her (*Dieckman* at paras 41-44).

[20] Although the foregoing cases were decided in a criminal law context, the Supreme Court of Canada extended this type of relief to civil proceedings in *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 [*G(J)*]. There, the issue raised was "whether indigent parents have a constitutional right to be provided with state-funded counsel when a government seeks a judicial order suspending such parents' custody of their children" (*G(J)* at para 1). It arose as a result of the decision by Legal Aid New Brunswick to refuse assistance to the appellant in proceedings where that province's Minister of Health and Community Services [Minister] sought to extend an order granting the Minister custody of the appellant's three (3) children for another six (6) months. The decision to deny the appellant legal aid was based on a policy that stipulated that no legal aid certificates would be issued to respondents in custody applications made by the Minister.

[21] The Supreme Court of Canada found that the state's removal of a child from parental custody constitutes a serious interference with the parent's psychological integrity that could affect the "security of the person", thus engaging section 7 of the *Charter* (*G(J)* at paras 58-61, 69). After considering the seriousness of the interests at stake, the complexity of the proceedings and the capacities of the appellant, the Supreme Court concluded that, in the circumstances of

that case, the appellant's right to a fair hearing and a fair determination of the children's best interests required that counsel represent the appellant (*G(J)* at para 75). The Supreme Court hastened to add that it was limiting its comments to child protection proceedings while noting that it need not and should not comment as to other kinds of proceedings (*G(J)* at para 104).

[22] There are few cases in the Federal Courts where the issue of court-ordered state funding for legal representation has been the subject of discussion. In *AB v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 14 (QL), 269 NR 381 (CA) [*AB*], the issue raised on appeal was whether section 7 of the *Charter* imposed an obligation on the state to finance counsel's preparation of a case prior to an immigration inquiry that could lead to the removal of an impecunious person who had been granted refugee status but was alleged to be a member of an inadmissible class, when the complexity of the case required more preparation time than that funded under the provincial legal aid plan. The Federal Court of Appeal recognized that the potential threat to the appellant's liberty or security of the person emanated from administrative action taken under federal legislation. However, the Court found that this potential threat was insufficient to impose a constitutional obligation on the federal government to provide counsel with additional funding, especially when the federal government had already contributed to the provincial legal aid scheme (*AB* at paras 10, 12).

[23] In *Canada (Minister for Public Safety and Emergency Preparedness) v Muse*, 2005 FC 1380 [*Muse*], Mr. Justice Sean Harrington of this Court dismissed an application for a *Rowbotham* order. The Minister of Public Safety and Emergency Preparedness [MPSEP] had issued a deportation order against Mr. Muse on the basis that he was inadmissible to Canada for

serious criminality. Mr. Muse was detained pending an opinion by the Minister's Delegate pursuant to section 113 of the IRPA. In his fourth detention review hearing, an immigration officer released Mr. Muse from detention on certain terms and conditions. The MPSEP brought an application for judicial review of that decision and obtained a stay of the release order. Mr. Muse asked the Court to provide him with a lawyer, indicating that he could not afford one. Applying the principles set out in *Rowbotham*, Mr. Justice Harrington found that Mr. Muse had access to legal services in earlier stages of the proceeding and was not "indigent". In addition, there was no evidence that Mr. Muse would be unable to represent himself adequately. Finally, the proceeding was not complex, as "[a]ll that [was] at issue [was] whether he should be held in detention" pending the Minister's Delegate's final determination of risk should he be returned to his country of origin (*Muse* at paras 19, 22-25).

[24] The issue of court-ordered funding was also discussed in *Mahjoub v Canada (Citizenship and Immigration)*, 2012 FCA 296 [*Mahjoub*]. On appeal from a ruling of this Court declining to permanently stay the security certificate proceedings against him for abuse of process, Mr. Mahjoub brought a motion requiring the AGC to reimburse him for his counsel fees and disbursements on appeal, or, in the alternative, an order for "advance costs". Mr. Justice Stratas dismissed Mr. Mahjoub's motion on the basis that the evidence adduced fell short of establishing that state funding was necessary. Before reaching this conclusion, he examined the similarities and differences between a *Rowbotham* order and an order for advance costs under *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [*Okanagan*]. He noted that a common feature of both types of relief was that court-ordered funding for legal representation was an absolute last resort and that a moving party must demonstrate, among

other things, that there is no other way of obtaining legal representation (*Mahjoub* at para 13). He acknowledged that: (1) Mr. Mahjoub did not have the necessary funds to pay the fees and disbursements of his counsel, he was under house arrest, and he was not working; (2) his counsel's fees and disbursements for the appeal were not covered by legal aid, and his counsel would not continue to act without funding; (3) Mr. Mahjoub wanted his counsel to continue to represent him on the appeal because they had been his counsel throughout the security certificate proceedings; and (4) Mr. Mahjoub did not have the legal skills necessary to prepare the oral and written argument for the appeal, including language ability (*Mahjoub* at para 28). However, Mr. Justice Stratas also noted there was no evidence that Mr. Mahjoub had taken any steps to raise funds and search for counsel willing to act on a reduced fee or *pro bono* basis (*Mahjoub* at para 29). In fact, he was of the view that Mr. Mahjoub had sought court-ordered state funding as a first resort, instead of as a last resort. In closing, he added that he would refrain from commenting on the arguments raised by the respondents that court-ordered state funding was not available in security certificate proceedings, or that Mr. Mahjoub did not meet other requirements for obtaining court-ordered state funding (*Mahjoub* at para 33).

[25] The criteria for obtaining a *Rowbotham* order were again considered by this Court in *International Relief Fund for the Afflicted and Needy v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 435 [*IRFAN*]. As in *Mahjoub*, the Court was seized with a motion seeking an order compelling the AGC to pay the legal costs associated with the applicant's application for judicial review. In April 2014, the applicant, the International Relief Fund for the Afflicted and Needy (Canada) [IRFAN-C], was added to the list of terrorist entities established by the Governor in Council under section 83.05 of the *Criminal Code*, RSC 1985, c C-46. As a

result, its property and assets were frozen. IRFAN-C sought an exemption to permit it to raise funds to pay for legal advice for matters arising out of its listing as a terrorist entity. The MPSEP refused to grant the fundraising exception. IRFAN-C commenced an application for judicial review of the MPSEP's decision, and it brought a motion seeking an order compelling the AGC to pay its legal costs associated with that application.

[26] Madam Justice Anne L. Mactavish dismissed IRFAN-C's motion. She set out the tests developed for a *Rowbotham* order and an award of advance costs under *Okanagan*, and she examined the evidence adduced by IRFAN-C. She concluded that IRFAN-C had not satisfied the indigency requirement of the *Rowbotham* test, nor had IRFAN-C demonstrated that it genuinely could not afford to pay for the litigation such that it should be entitled to an order of advance costs. The only evidence provided to the Court with respect to IRFAN-C's financial situation was a statement made in the affidavit of a legal assistant working in the office of the lawyer who had been assisting the organization. She found this evidence to be insufficient, and she added that the jurisprudential requirement that an applicant provide information regarding its financial position when seeking a *Rowbotham* order or an order for advance costs was designed to provide the Court with the information necessary to determine whether the applicant has established the existence of exceptional circumstances that would justify the granting of such an order (*IRFAN* at para 27).

[27] While the insufficiency of the evidence on IRFAN-C's financial position was sufficient to dispose of the motion, Madam Justice Mactavish nevertheless proceeded to identify the shortcomings in the record regarding the criteria relating to the availability of legal

representation and the ability of IRFAN-C to represent itself adequately. In so doing, she approved the observation in *Mahjoub* that courts have repeatedly emphasized "the need for an accused seeking a *Rowbotham* order to establish that significant efforts have been made to find other legal representation or funding" (*IRFAN* at para 33, citing *Mahjoub* at para 16). She noted that three (3) other lawyers had acted for IRFAN-C in litigious matters in the past, and there was no evidence that IRFAN-C had contacted any of these individuals to see whether they would be willing to represent it on a *pro bono* basis (*IRFAN* at para 37). Given the shortcomings in the evidence adduced in support of the motion, she concluded that IRFAN-C had not satisfied the test for either a *Rowbotham* order or an order for advance costs. She nevertheless recognized that the underlying application for judicial review involved an unusual situation implicating new legislation not previously tested. As a result, she dismissed the motion without prejudice to IRFAN-C's right to bring a further motion for state-funded costs on better evidence.

[28] Many of the principles discussed here find their roots in criminal law. I recognize that the Supreme Court of Canada has avoided directly importing the principles of criminal law into the security certificate process, as the latter "takes place in a context different from that of a criminal trial" (*Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 50).

[29] However, section 7 of the *Charter* serves as a common basis upon which a court may grant an order for state-funded counsel. Whether in a criminal proceeding or in the security certificate process, the subject person's liberty interests are engaged. According to section 7 of the *Charter*, those interests cannot be infringed except in accordance with the principles of fundamental justice. Although section 7 claims often arise in the criminal context, the *Charter*

does not limit section 7 protections to criminal proceedings. As the Supreme Court of Canada held in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paragraph 18:

> In determining whether s. 7 applies, we must look at the interests at stake rather than the legal label attached to the impugned legislation. As Professor Hamish Stewart writes:
>
> > Many of the principles of fundamental justice were developed in criminal cases, but their application is not restricted to criminal cases: they apply whenever one of the three protected interests is engaged. Put another way, the principles of fundamental justice apply in criminal proceedings, not because they are *criminal* proceedings, but because the liberty interest is always engaged in criminal proceedings. [Emphasis in original.]
> >
> > ("Is Indefinite Detention of Terrorist Suspects Really Constitutional?" (2005), 54 *U.N.B.L.J.* 235, at p. 242)
>
> I conclude that the appellants' challenges to the fairness of the process leading to possible deportation and the loss of liberty associated with detention raise important issues of liberty and security, and that s. 7 of the *Charter* is engaged.

[30] Therefore, despite the difference in context, I see no reason to restrict the principles from *Rowbotham*, *Fisher, Peterman* and *Dieckman* to criminal proceedings. Where liberty or security interests are at stake in a non-criminal setting, as here, the Court can draw inspiration from principles developed in criminal case law. The principles from *Rowbotham*, *Fisher*, *Peterman* and *Dieckman* can be applied to Mr. Harkat's motions for state-funded legal counsel, despite their origins in criminal law.

B. *Application of These Principles*

[31] With this understanding of the relevant principles, I now turn to the motions before the Court.

[32] Mr. Harkat has filed separate but identical motions seeking state funding in respect of:

i. the Ministers' motion to amend the terms and conditions of his release in the security certificate proceedings, but also for related proceedings, including any future applications he may bring to vary the conditions of his release (File DES-5-08); and

ii. his ALJR against the decision of the Minister's Delegate pursuant to paragraph 115(2)(*b*) of the IRPA, which determined Mr. Harkat should not be allowed to remain in Canada based on the nature and severity of the acts he committed (File IMM-5330-18).

[33] Mr. Harkat is essentially seeking *Fisher* orders, as he wishes to continue being represented by his current counsel, Ms. Jackman, who has stated that she will not act for him on a legal aid certificate. He is seeking enhanced rates for counsel and the payment of his experts' fees. In the alternative, Mr. Harkat seeks a stay of proceedings until there is an "arrangement" with the AGC to cover his legal fees.

(1) Legal Aid Application

[34] The first criterion Mr. Harkat is required to establish is that he has applied for legal aid funding and exhausted all avenues of appeal within legal aid, or that such an application would be futile.

[35] In support of his motions, Mr. Harkat submitted an affidavit of ten (10) paragraphs sworn by his wife, Sophie Harkat, on April 9, 2019. In her affidavit, Ms. Harkat states that, while her husband was eligible for legal aid certificates in the past, he is no longer eligible. She explains that she and her husband worked part-time in 2018, and she attended college from September to December 2018. She reports their total income for 2018 and she adds that she does not expect their income to increase in 2019. Her studies will continue to June 2019, and she will be required to complete a placement without pay before finding work. She is hoping that she will continue working part-time where she is currently employed. She believes that it is unlikely that Mr. Harkat will find other employment because of the current conditions imposed on him by the Court. She also believes that it is unlikely that Mr. Harkat will be given more hours at his present place of employment. Finally, she refers to a funding agreement in place in the past between her husband, the other security certificate subjects and the AGC that is no longer in effect.

[36] No supporting documents were attached to the affidavit of Ms. Harkat.

[37] At the hearing, I asked Mr. Harkat's counsel whether the evidence submitted was sufficient to satisfy the first criterion for obtaining a *Fisher* order, as set out in *Dieckman.* There

was no evidence that Mr. Harkat had recently applied for legal aid, nor was there evidence that explained his specific financial circumstances in sufficient detail to enable a determination of whether an application for legal aid would be futile. After suggesting that Ms. Harkat's sworn statement regarding her husband's ineligibility should be enough, Mr. Harkat's counsel sought permission to obtain and file additional evidence confirming that her client was not eligible for legal aid. Since the Ministers' counsel raised no opposition, I granted the request.

[38] On October 10, 2019, Legal Aid Ontario advised Mr. Harkat that his application for legal aid regarding "representation at a Federal Court detention review" was refused on the basis that his income or assets exceeded the amount necessary to qualify for legal aid assistance.

[39] His application to fund the judicial review proceedings was refused for the same reasons on October 18, 2019. I note that, in its response, Legal Aid Ontario indicates that the application for legal aid was "[f]or an opinion as to the merits of appeal/judicial review to Superior Court and/or Divisional Court- and to file notice of appeal in the clients name only- including motion to extend time if necessary. Limited to 3 hours." I fail to understand this characterization of the proceedings. While the description of the proceedings by Legal Aid Ontario is somewhat unclear, I am satisfied that Legal Aid Ontario understood that the decision subject to review was the "Ministers negative danger opinion", which is referenced in the "comments" section of the letter. The letter clearly states that the application is refused because Mr. Harkat does not qualify financially for legal aid.

[40] Based on the letters received from Legal Aid Ontario, I am satisfied that Mr. Harkat applied for legal aid and that his applications were refused.

[41] The first criterion for obtaining a *Fisher* order also necessitates that Mr. Harkat demonstrate that he has exhausted all avenues of appeal. There is no such evidence. There is also little evidence in the record to determine whether an appeal would be futile. While I find the evidence on this issue to be insufficient and lacking in detail, I will nevertheless proceed to the second criterion for granting a *Fisher* order, as I have no reason to doubt the assessment conducted by Legal Aid Ontario.

(2) Unique Situation and Right to a Fair Hearing Only if Represented by a Particular Lawyer

[42] The second criterion Mr. Harkat must satisfy to obtain a *Fisher* order is that his cases involve unique situations and are of such complexity that he can only obtain a fair hearing if represented by Ms. Jackman. He must also demonstrate why fees in excess of the legal aid tariff are justified.

(a) *DES-5-08*

[43] Mr. Harkat submits that he has been involved in ongoing legal proceedings before this Court since 2002. The proceedings relating to the security certificate first issued in 2002 have been lengthy, extending over years, and they have been extremely complex, resulting in a number of different legal challenges. The Supreme Court of Canada quashed the certificate in

2007 and, in February 2008, the Ministers issued a new certificate. The new security certificate process culminated in the Supreme Court of Canada upholding the certificate in 2014. Since his release in 2006, Mr. Harkat has been subjected to stringent conditions. The last review of the terms and conditions of release occurred in November 2017.

[44] Mr. Harkat contends that the breach allegations raised in the Ministers' motion are serious. The cash bond of $35,000 deposited with the Court to secure his release from incarceration and the $133,000 in performance bonds executed by the sureties are at stake. He could also be re-detained if found to have breached the terms and conditions of his release, which, in turn, engages his right to liberty, his reputational interest and the integrity of his family. Moreover, the breach allegations are rooted in his computer use and are technical, requiring consultation with experts. As in the past, there is no reason to anticipate that the proceedings will be any less contentious, complex or time consuming.

[45] Mr. Harkat submits that he is unable to represent himself, as he does not have the legal or language skills required to address the issues arising in his case, which extend beyond simple questions of fact. He further submits that he has been represented by counsel over the last several years, and he is seeking to continue with Ms. Jackman, an experienced senior member of the bar with particular experience in national security matters. The absence of adequate funding for experienced counsel jeopardizes his right to a fair hearing.

[46] Finally, Mr. Harkat submits that he is one of only two (2) individuals who are still subject to a security certificate. These certificates are rarely used, likely because of the severe,

immediate and ongoing consequences to the subject person. The cases have raised and continue to raise serious constitutional issues of broad import about Canada's human rights protections for non-citizens.

[47] In response, the Ministers argue Mr. Harkat's circumstances are nothing like those in *Fisher*, *Peterman* and *Dieckman*, and the impact on his *Charter* rights is minimal. Mr. Harkat is not charged with a serious criminal offence. They are not applying to have his release order revoked. They are simply seeking to vary several of Mr. Harkat's terms and conditions in order to allow greater certainty and resolve the parties' differences in their interpretation. If granted, the amendments will have little, if any, additional impact on Mr. Harkat's liberty.

[48] Moreover, they submit that the issues before the Court are not complex and that Mr. Harkat has failed to demonstrate that only Ms. Jackman is able to respond to the issues raised in the motion. The fact that Ms. Jackman has represented Mr. Harkat in connection with the security certificate proceedings for some time, and that he continues to have faith in her, are not determinative factors justifying the issuance of a *Fisher* order.

[49] I disagree with the Ministers' assertion that no particular technological expertise is required to understand Mr. Harkat's current terms and conditions or their proposed variations.

[50] When the matter initially came before the Court, the Ministers were seeking to clarify the terms and conditions relating to Mr. Harkat's use of a mobile telephone and computer for employment purposes. They also alleged that Mr. Harkat had breached two (2) of his conditions

of release by changing his email password without informing the Canada Border Services Agency [CBSA] and by deleting a number of his emails without their consent. In late March 2019, after the Ministers filed their motion record, Ms. Jackman was provided with a copy of an affidavit sworn by a digital forensic investigator employed with the CBSA. The affiant alleged that, as a result of his forensic investigation and analysis of the internet artifacts on Mr. Harkat's hard drive, he believed that Mr. Harkat had used the "InPrivate Browsing" feature of Internet Explorer, in violation of his terms and conditions of release. After receiving a copy of the affidavit, Ms. Jackman indicated she would consent to the filing of this late affidavit, provided she could cross-examine the affiant and obtain her own expert report, to which the Ministers agreed. On April 24, 2019, the CBSA provided Ms. Jackman a disk image of Mr. Harkat's hard drive to allow her expert to examine it.

[51] The Ministers' amended their motion record on July 4, 2019. They included the affidavit sworn by the digital forensic investigator in March 2019 and a second affidavit from him sworn on June 28, 2019 on the issue of the alleged "InPrivate Browsing" breach. In both his affidavits, the digital forensic investigator explained the "InPrivate Browsing" feature, its purpose, the footprint it leaves behind and how one can retrace it using digital forensic tools.

[52] On August 23, 2019, Mr. Harkat filed his responding motion record, which included a digital forensic expert report. This investigator concluded there was no evidence that the laptop had been used to perform "InPrivate Browsing" using Internet Explorer. Rather, it was his view that a misunderstanding of Internet Explorer's "Automatic Crash Recovery" feature had led the CBSA investigators to an inaccurate conclusion.

[53] After reviewing the Ministers' motion materials as well as Mr. Harkat's responding motion record, I issued a direction to the parties that the Ministers' motion would proceed orally and that the Court would hear from the forensic investigators. Five (5) days before the scheduled hearing, the Ministers filed a reply record. It included a will-say statement from the CBSA's digital forensic investigator and a copy of the digital forensic report he had originally prepared and relied upon to conclude there was a breach. This new information caused Mr. Harkat's expert to prepare several videos simulating Mr. Harkat's computer to dispute the findings reached by the CBSA digital forensic investigator. After reviewing the videos and the findings advanced by Mr. Harkat's expert, the Ministers informed the Court on October 7, 2019 that, while their digital forensic investigator had found traces of browsing artifacts consistent with "InPrivate Browsing", he could no longer confirm with certainty whether this feature had been used by Mr. Harkat or the computer's previous owner. As a result, the Ministers advised that they would revise their request for relief.

[54] In total, two and a half (2.5) days of the five (5) day hearing were devoted to the examination and cross-examination of the digital forensic investigators. In my view, the Ministers' suggestion that no particular technical expertise was required to understand the alleged breaches and the proposed variations to the terms and conditions of release is an understatement of the level of complexity of the issues raised before the Court.

[55] Furthermore, I cannot agree with the Ministers' statement that the proposed variations, if granted, "will have little if any additional impact on [Mr. Harkat's] liberty". While I recognize that the Ministers are not seeking to revoke his release, the terms and conditions imposed on

Mr. Harkat and those proposed by the Ministers remain intrusive and seriously restrain his ability to live his life freely.

[56] That being said, even if I accept that the circumstances of this case have involved lengthy and complex legal proceedings in the past, including those currently before me, I am not satisfied that they meet the high threshold for the issuance of a *Fisher* order.

[57] Since the Supreme Court of Canada has upheld the decision of this Court on the reasonableness of the security certificate, the proceedings have related to the review of Mr. Harkat's terms and conditions of release pending the opinion of the Minister's Delegate on the ability to remove Mr. Harkat to Algeria. This opinion was issued on October 2, 2018, and it is now subject to judicial review.

[58] In some ways, a parallel can be drawn between the review of conditions under subsection 82(4) of the IRPA and bail orders made under the *Criminal Code*. Both place judicially-approved restrictions on the individual's liberty and, in both cases, any breach of condition will be sanctioned by the Court. While I recognize that the review of conditions can involve complex issues and require technical evidence, it would be speculative to presume that all future proceedings reviewing Mr. Harkat's conditions of release will necessarily be contentious, technical, complex, time consuming or that they will raise constitutional issues of broad import.

[59] I also note that Mr. Harkat's concerns regarding the amounts of money at stake are not well founded, at least at this point in the proceedings. The Ministers' motion did not seek the

total forfeiture of the $35,000 cash bond. They sought a partial forfeiture of the cash bond in the amount of $7,000, and they claimed no relief against the $133,000 in performance bonds. Moreover, the Ministers have now abandoned that portion of their relief sought.

[60] Mr. Harkat contends that he is not able to represent himself because he is not legally trained and English is not his first language. Although I recognize that Mr. Harkat would be at a disadvantage if he were not represented by counsel, the absence of legal training and limited language skills cannot by themselves justify a *Fisher* order. To hold otherwise would remove the onus on Mr. Harkat of demonstrating the uniqueness of his circumstances. Furthermore, it would mean that virtually every applicant with limited language skills and no legal training would be entitled to state funding when they do not qualify for legal aid.

[61] I also find that Mr. Harkat has not demonstrated that his English-language skills are so lacking that he would not be able to sufficiently and adequately understand and express himself in proceedings before the Court. In reaching this conclusion, I have considered the fact that Mr. Harkat has testified before me twice, both in the context of the Ministers' current breach of conditions motion and his review of his conditions in 2017. In each case, he did so without the aid of an interpreter.

[62] I understand that Mr. Harkat wishes to have Ms. Jackman represent him. Although she was not the lawyer who represented him in the proceedings that led to the reasonableness finding, she has been acting for him for several years. She is also experienced in security certificate cases. However, the fact that a counsel has a professional relationship with a litigant

or that the litigant has confidence in a particular counsel does not demonstrate an entitlement to state-funded counsel of choice (*Dieckman* at paras 40, 42; *Peterman* at para 31). I am not persuaded, based on the evidence presented and the submissions made, that Mr. Harkat's case is so unique and of such complexity that only Ms. Jackman can ensure his right to a fair hearing or that fees in excess of the legal aid rate would be justified in the circumstances of this case.

(b) *IMM-5330-18*

[63] Mr. Harkat submits that he faces potential removal to Algeria, a country where he claims to be at a real risk of torture and other forms of cruel treatment. He has initiated judicial review proceedings against the decision of the Minister's Delegate that he should not be allowed to remain in Canada. In this proceeding, Mr. Harkat raises several issues including his right to liberty and security in accordance with the principles of fundamental justice.

[64] Mr. Harkat also submits that his application for judicial review is unique because of the security certificate issue. Moreover, it is complex because of the classified information in the certified tribunal record and the need to appoint a special advocate.

[65] I recognize that Mr. Harkat's application for judicial review raises important issues and that there are complexities to his case. Unlike most immigration matters, the file is being specially managed. The certified tribunal record is quite extensive and contains several thousand pages. The Ministers have also brought an application under section 87 of the IRPA for the non-disclosure of certain portions of the record, claiming that their disclosure would be injurious to

national security. To protect his interests, Mr. Harkat has requested that the Court appoint a special advocate pursuant to section 87.1 of the IRPA.

[66] There is no doubt that the classified information contained in Mr. Harkat's file renders the proceedings more complex than other judicial review applications involving decisions made pursuant to subsection 115(2) of the IRPA, where there are no applications under section 87 of the IRPA. The Ministers are also seeking substantial redactions, thus distinguishing their application from most section 87 applications. That being said, I am not persuaded, at least at this time, that the circumstances of Mr. Harkat's case justify the issuance of a *Fisher* order.

[67] In reaching this conclusion, I have considered Mr. Harkat's request for the appointment of a special advocate pursuant to section 87.1 of the IRPA. Once appointed, the special advocate's role is to protect the interests of the permanent resident or foreign national in proceedings during which information or evidence is heard in the absence of the public, the permanent resident or foreign national and their counsel. In accordance with subsection 85.1(2) of the IRPA, the special advocate may challenge the Minister's claim that the disclosure of the information or other evidence would be injurious to national security or endanger the safety of any person. The special advocate may also challenge the relevance, reliability and sufficiency of the information or other evidence provided and not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it. Pursuant to subsection 85(3) of the IRPA, the Minister of Justice is required to ensure that the special advocates are provided with adequate administrative support and resources.

[68] The potential appointment of a special advocate has been discussed with the parties during past case management conferences. Ms. Jackman has already proposed an individual whose name is on the list of special advocates maintained by the AGC. There has also been some discussion regarding the appointment of a second special advocate. When all of the materials relating to the Ministers' section 87 application have been filed, the Court will have a better understanding of the scope and the nature of the work required of the special advocate. Without wanting to minimize or understate Ms. Jackman's future work, I expect that much of the work relating to the classified information in the record will fall to the special advocate, thus reducing her workload.

[69] In addition, during a case management conference held on October 18, 2019, the Ministers indicated that previous special advocates have already reviewed much of the information they seek to protect, and this information was the subject of previous injury findings in the context of Mr. Harkat's security certificate proceedings. While it is premature for me to determine whether that is the case, and, if so, whether the Court may revisit those findings, I note from Mr. Harkat's application record that he appears to have already received summaries of the information contained in the classified security intelligence reports. The parties have already filed comprehensive written materials in regards to the ALJR, and they have comprehensively articulated their positions in writing. Mr. Harkat's application record is comprised of nine hundred and fifty-eight (958) pages across four (4) volumes. His memorandum of argument is twenty-nine (29) pages long. In response to the Ministers' twenty-six (26) page memorandum of argument, Mr. Harkat also filed a reply of ten (10) pages. I recognize that the parties will have the right to file further memorandums of argument later in the proceedings. However, at this

point, it would be speculative for me to presume that the proceedings will be of such complexity that Mr. Harkat can only obtain a fair hearing if he is represented by Ms. Jackman or that fees in excess of the legal aid tariff would be justified in the circumstances of this case.

(3) No Funds to Pay Counsel and All Other Means to Pay Counsel Exhausted

[70] As stated above, in support of his motions, Mr. Harkat filed one affidavit sworn by his wife and another from a law clerk and social worker in Ms. Jackman's office. In her affidavit, Ms. Harkat states that "in respect of the past review of conditions and ongoing court matters", they have made efforts to fundraise to cover counsel's fees, but that it is harder as time goes on. She states that they do not have the funds to cover the significant legal work that needs to be done in the present cases. She provides their total income for 2018 and adds that, from this amount, they paid her college fees and a specified amount in rent for 2018. She states that their expenses will remain the same for 2019, and that they do not expect their income to increase. Her studies will continue to June 2019, after which she is required to complete a placement without pay. She will then have to try to find a job, and she hopes to continue working part-time where she worked in 2018. Additionally, Mr. Harkat is unlikely to find other employment because of the current conditions imposed on him by this Court or to be given more hours of work at his present work place. Finally, she mentions that, in the past, there was a funding agreement between her husband, other security certificate subjects and the AGC, but that it is no longer in effect. Her husband is not eligible for legal aid, and she adds that, before he was eligible to legal aid, she had to borrow money to pay for his lawyers. This put them in debt, which has taken them years to pay back.

[71] As to the second affidavit, the affiant indicates that Mr. Harkat is not eligible for a legal aid certificate, nor would Ms. Jackman act for him on a certificate if he was, because the rate of pay, including the hourly cutbacks imposed by the Legal Aid Plan on counsels' accounts, does not cover the cost of running the firm. She adds that Mr. Harkat does not have the income to afford to retain counsel privately.

[72] In my view, this evidence falls short of what is necessary to establish that Mr. Harkat has insufficient funds with which to pay counsel. While it is possible that Mr. Harkat has insufficient funds and no other sources available to pay counsel, these affidavits leave too many questions unanswered. Mr. Harkat has not met his onus on this part of the test for obtaining state funding by way of a *Fisher* order.

[73] In *Al Telbani v Canada (Attorney General)*, 2012 FCA 188 [*Al Telbani*], the Federal Court of Appeal wrote that "litigants who ask the state to subsidize all or part of the costs incurred in a dispute against the state must show their financial inability by filing, at the very least, a detailed statement of their income and expenditures and a complete financial statement" (*Al Telbani* at para 9). Although the appeal in that case related to an interlocutory order of this Court dismissing a motion for advance costs under *Okanagan,* I am of the view that the same holds true in the case of a request for a *Fisher* order. In *Mahjoub*, the Federal Court of Appeal examined the similarities and differences between a *Rowbotham* order and its progeny and an order for advance costs. The Court noted that both were aimed at the same thing, namely court-ordered state funding for legal representation, and, therefore, the tests that had developed shared common features (*Mahjoub* at para 12). Although the requirements are phrased somewhat

differently, in the end, the burden is on the moving party to demonstrate that its financial position is such that it cannot pay its own legal costs. Bald assertions of impecuniosity will not suffice (*IRFAN* at paras 20, 23; *Mahjoub* at para 27).

[74] I find that the information provided by Ms. Harkat in her affidavit does not meet the jurisprudential requirements. With the exception of the amount of their joint income in 2018 and their yearly rent, there is no other information regarding their financial situation. To name a few examples, there is no detailed list of assets, bank accounts or life insurance policies. There is no indication of what Ms. Harkat is studying, how long her unpaid work placement will be or what her employment prospects will be. There is no detailed statement of their expenses. While Ms. Harkat indicates that they had to pay her college fees, she provides no amount. She also fails to provide any information about the amount of money they borrowed in the past and how much, if any, remains due.

[75] In addition, beyond legal aid, there is no indication that other alternative sources have been exhausted. While Ms. Harkat states in her affidavit that they have made efforts to fundraise to cover the legal costs “in respect of the past review of conditions and ongoing court matters”, she provides no other information. There is no evidence of what those efforts were or when they were attempted. There is no evidence of whether the couple has explored the existence of programs designed to assist individuals or groups in taking legal action. There is no evidence that they have taken steps to search for counsel willing to act on a reduced fee or a *pro bono* basis.

[76] As stated above, bald assertions of impecuniosity will not suffice.

[77] In the absence of any detailed information regarding the couple's financial situation, I can only conclude that Mr. Harkat has failed to demonstrate that he meets the last criterion for the issuance of a *Fisher* order. While Mr. Harkat was afforded the opportunity to provide evidence that he was not eligible for legal aid, it is neither the Ministers' nor the Court's duty to fill in the gaps in the evidence or to ask for supporting documents (*Dieckman* at para 88). It appears from the motion records that Mr. Harkat sought court-ordered state funding as a first resort, not as a last resort (*Mahjoub* at para 31), relying on an agreement in place in the past between the AGC and security certificate subjects. That agreement is no longer in place, and the past existence of an agreement to fund security certificate cases does not bind this Court.

[78] To conclude, after considering the criteria set out by the jurisprudence for obtaining a *Fisher* order and the record before me, I am not persuaded that Mr. Harkat can only obtain a fair hearing with Ms. Jackman representing him. The right to counsel of choice is not an absolute right, and the onus rested with Mr. Harkat to put his best foot forward.

ORDER in DES-5-08 and IMM-5330-18

THIS COURT ORDERS that:

1. Mr. Harkat's motions are dismissed without costs.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-5-08
STYLE OF CAUSE:	IN THE MATTER OF a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act* and IN THE MATTER of Mohamed Harkat
AND DOCKET:	IMM-5330-18
STYLE OF CAUSE:	MOHAMED HARKAT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 18, 2019
ORDER AND REASONS:	ROUSSEL J.
DATED:	JUNE 3, 2020

APPEARANCES:

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