

Date: 20080104

Docket: DES-4-01

Citation: 2008 FC 9

BETWEEN:

MAHMOUD ES-SAYYID JABALLAH

Applicant

and

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

Respondents

REASONS FOR ORDER

LAYDEN-STEVENSON J.

[1] Mr. Jaballah is the subject of a security certificate under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). On April 12, 2007, he was released from detention on conditions that equate to house arrest. In accordance with the directive of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (*Charkaoui*), the conditions of release must be regularly reviewed. Mr. Jaballah's conditions of release were reviewed on October 22, 23, 24, 25, November 26, 27, 28, 29 and December 4 of 2007. The hearing was public. These reasons detail the changes to be made to the existing conditions. The amended conditions of release will be attached to my order as Schedule "A".

Background

[2] Mr. Jaballah's case has entailed many hearings and proceedings that are well-documented in various decisions of the Federal Court and the Federal Court of Appeal. The factual background is extensively reviewed in Mr. Justice MacKay's decision, *Re. Jaballah* (2006), 58 Imm. L.R. (3d) 267 (F.C.) (*Re. Jaballah*) and need not be repeated. A chronological history is depicted in Appendix "A" to Justice MacKay's reasons. That document was updated to reflect subsequent events and was attached to my reasons in *Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 296 F.T.R. 1 (*Jaballah*), a decision related to another of Mr. Jaballah's detention reviews.

[3] In *Jaballah*, Mr. Jaballah conceded that he is a danger to national security. However, as indicated at paragraph 38 of my reasons, I would have arrived at that conclusion in any event. Because Mr. Jaballah is a danger to national security, within the meaning of the IRPA, he must be detained unless the degree of danger that he poses can be neutralized by the imposition of appropriate terms and conditions. Although cognizant of the fact that stringent release conditions seriously limit individual liberty, in *Jaballah* I determined that restrictive conditions were required to neutralize the degree of danger. The imposition of onerous conditions was due, in part, to the supervisory deficiency that existed with respect to one of the primary supervising sureties (Mr. Jaballah's wife, Ms. Al-Mashtouli). With the co-operation and assistance of counsel for all parties, conditions of release were drafted. Those conditions were attached to my order dated April 12, 2007, as Schedule "A". There were problems with some of the conditions.

[4] Prior to Mr. Jaballah's release, difficulties were encountered regarding satisfaction of condition 3 (video surveillance). After hearing the submissions of counsel and, on the consent of all counsel, I concluded that Mr. Jaballah's release should not be further postponed. I allowed his release and ordered that, pending resolution of condition 3, Mr. Jaballah was to remain inside his residence or on the immediate property (in the front or back yard of the residence) except with the prior approval of the Canada Border Services Agency (CBSA), or in the event of medical emergency (in which case CBSA was to be notified in accordance with paragraphs 8(iii) or (iv) of the order).

[5] The matter was not resolved as expeditiously as anticipated. On May 31, 2007, Mr. Jaballah requested that condition 3 be deleted from Schedule "A" while the Ministers requested that visitors, other than visitors for the children, be prohibited. I denied both requests and concluded that, in the absence of evidence indicating abuse, the temporary compensatory measures implemented by CBSA regarding visitors could continue on an interim basis. Additionally, I permitted Mr. Jaballah to be absent from his residence in accordance with condition 8.

[6] On September 26, 2007, upon being informed and satisfied that CBSA had approved a proposed change of residence for Mr. Jaballah and his family, I approved Mr. Jaballah's request for a change of residence on condition that there were no occupants, other than the Jaballah family, in the residence. At the time, I indicated to counsel that if suitable tenants for the basement apartment were located and CBSA-approved, I would consider a request that tenants be permitted at a future time. I additionally ordered that CBSA have discretion, where it considers it appropriate to do so, to extend Mr. Jaballah's curfew time beyond 9:00 p.m.

[7] On this detention review, both sides seek variations in the conditions. Additionally, it has become apparent that, in spite of the best efforts of counsel for the parties and the Court, the wording in some of the conditions is ambiguous and requires clarification.

[8] Before turning to the matter at hand, a consideration of the basic premises upon which I intend to proceed is in order.

Basic Premises

[9] It is common ground that the governing authority is the Supreme Court's *Charkaoui* decision. There, a unanimous Court concluded that persons, such as Mr. Jaballah, must have meaningful opportunities to challenge their continued detention or the conditions of their release. A meaningful process of ongoing review is one that takes into account the context and circumstances of the individual case (paragraph 107). The review process must also take into account the existence of alternatives to the conditions. The conditions of release must not be a disproportionate response to the nature of the threat (paragraphs 116 and 117). Reviewing courts must adhere to these guidelines when reviewing detentions or conditions of release (paragraph 123). At the hearing, counsel for the parties aptly described the exercise of tailoring the conditions to the individual case as one of proportionality. I agree.

[10] There has been no retraction of Mr. Jaballah's concession that he is a danger to national security. Nor has there been any suggestion that I erred in concluding that he is such a danger. No one has proposed that Mr. Jaballah's release should be unaccompanied by conditions. My task, in

reviewing Mr. Jaballah's conditions of release, is to consider Mr. Jaballah's unique circumstances and to adhere to the noted *Charkaoui* guidelines. Reliance on what has been ordered in other reviews for other persons yields little guidance. Mr. Jaballah's case turns on its own distinct facts.

The Conditions Generally

[11] Mr. Jaballah's release was contingent upon 24 conditions. Most of the conditions are not in issue and some of the proposed changes are not contested. At the time of this review, the Court and counsel for all parties, together, scrutinized the existing conditions for potential ambiguities. Words and phrases that have been, or could be, open to more than one interpretation were re-drafted in an effort to alleviate any possibility of confusion. The re-drafting has been incorporated in Schedule "A" of my order and I will say no more about it. The uncontested variations that I have approved are discussed in these reasons. They too are incorporated in Schedule "A". The contested requests are also addressed in these reasons. Where changes to the conditions have been determined to be appropriate, they are reflected in Schedule "A".

The Uncontested Variations

The Dedicated Line

[12] Condition 2 of my order dated April 12, 2007 requires Mr. Jaballah to arrange, at his expense, for the installation, in his residence, of a separate dedicated land-based telephone line meeting the CBSA's requirements to allow effective electronic monitoring. The Ministers ask that CBSA be responsible for the installation of the dedicated line.

[13] This request arises as a result of the disconnection of the dedicated line on August 10, 2007. Having heard the evidence of Mr. Jaballah, Ahmad Jaballah and Mr. Terrence Pearce of CBSA, I find that the only reasonable explanation for the disconnection is that Bell Canada made an error in entering the work order into its data base. I do not find that there was any effort on Mr. Jaballah's part to defeat the electronic monitoring system. Mr. Jaballah insisted that he requested a disconnection (at the former residence) and a re-connection (at the new residence) for August 30th. Such request was consistent with a second request for the disconnection and re-connection of the residence land-based telephone line.

[14] However, the error rendered the electronic monitoring system inoperative. Because of privacy considerations, CBSA encountered difficulty in its efforts to remedy the situation. Moreover, the proposed move that precipitated Mr. Jaballah's request was not approved by the Court until September 26th. Counsel agree, and I concur, that it is desirable to eliminate the barriers that preclude direct communication between CBSA and Bell Canada regarding the dedicated line. This can be accomplished by vesting responsibility for the installation of the dedicated line with CBSA. The condition will be amended accordingly.

Change of Residence

[15] The present order restricts Mr. Jaballah from changing his residence without prior approval of the Court. The Minister seeks an amendment requiring 60 clear days notice to CBSA of any proposed change of address. Mr. Jaballah consents to the amendment and I view it as a prudent one. There was confusion and delay in effecting the Jaballah family's move from its former

residence to its current residence. This could easily have been averted with sufficient notice. The condition will be so amended.

Outings

[16] The issue of Mr. Jaballah's outings will be discussed in more detail later in these reasons. At this point, I will address only the non-contentious features. The first is the notice requirement in relation to Mr. Jaballah's absence from the residence. Generally, the conditions permit Mr. Jaballah, with the prior approval of CBSA, to leave his residence three times per week (with provision for a specified number of extended outings). Requests for CBSA approval of outings are to be made on a weekly basis with not less than 72 hours notice. The Ministers ask that the notice requirement be amended to provide for 72 business hours notice. Mr. Jaballah, after hearing Mr. Pearce's evidence with respect to the operational requirements and functions of CBSA, agreed to the Ministers' request. I do not see the Court's role as an operational one. Given the agreement of the parties, I am content to grant the requested amendment which I regard as a matter of fine-tuning rather than fundamental change.

[17] Mr. Jaballah currently attends a mosque on Friday evenings for prayers. At present, his attendance is regarded as one of his three permissible weekly outings. Mr. Jaballah asks that the Friday attendance at prayers be permitted, but not be regarded as an outing. The evidence indicates that Mr. Dawud accompanies Mr. Jaballah each Friday and the arrangement has worked well. The Ministers accede to Mr. Jaballah's request and I do not have any difficulty with it. Mr. Jaballah's attendance at mosque each Friday evening will not be counted as an outing.

[18] In a similar vein, Mr. Jaballah asks that CBSA be “permitted to reasonably exercise its discretion to accommodate requests for Mr. Jaballah to attend significant religious observances” such as Ramadan and Eid. The issue of Ramadan was raised earlier and I granted CBSA the discretion to extend Mr. Jaballah’s curfew beyond 9:00 p.m. There is no evidence regarding the Eid celebrations. The Ministers noted that there have been Eid celebrations conducted at the Rogers Centre in Toronto and that CBSA could not reasonably be expected to approve attendance at the Rogers Centre because of operational difficulties. I agree. However, there was no suggestion that all Eid observances take place at the Rogers Centre. I am prepared to vest CBSA with the requested discretion, trusting that it will be exercised responsibly.

[19] Mr. Jaballah also requests that CBSA be granted permission to deal with unanticipated daily matters. The specific examples provided were: “If fuse blows for stove and have to pick one up, or if need to pick up milk on way home from an outing”. Notably, there was no evidence that the Jaballah family had encountered any such situations. In the absence of any evidence, I question whether the request is legitimate or illusory. However, the Ministers have not taken exception to it. In the absence of any objection, I am prepared to provide CBSA with the requested permission with the caution that CBSA should not be inundated with requests regarding unanticipated matters that heretofore have not arisen. It will be for CBSA to assess the merit of any such request.

[20] The noted variations with respect to attendance at Friday mosque, attendance at significant religious observances, and unanticipated daily events necessitate an addition to the existing conditions. The insertion appears as condition 8 (vi).

[21] I regard the matter of outing routes as a dead issue. Consequently, it need not be addressed.

Happenstance Encounters

[22] Mr. Jaballah requests clarification with respect to meeting people outside of the home. His request is worded as follows: “the order permits visits with ‘any person approved by the CBSA’ – believe that persons approved to visit the home should be considered as approved when outside of the home, eg. If run into someone in the grocery store, or in a park who is approved, CBSA takes the position that Jaballah cannot talk with the person”.

[23] There was no evidence called in relation to this request for clarification. The single, remotely-connected evidential reference was that of Mr. Pearce when he described a Jaballah family outing in the park. During the outing, a CBSA officer unobtrusively approached Mr. Jaballah and inquired about the identity of a young man (unknown to the officer) whom Mr. Jaballah had embraced.

[24] I have reviewed the existing conditions several times over. I am unable to locate the alleged prohibition. There is a proviso that Mr. Jaballah not have contact with any person when he is delivering his children to school or picking them up from school. It is my understanding that Mr. Jaballah would not be on foot when he is engaged in this venture. Therefore, I have difficulty conceptualizing how the issue could arise in that circumstance.

[25] There are several enumerated exceptions to the prohibition against Mr. Jaballah meeting any person by prior arrangement as mandated in condition 10. I do not understand Mr. Jaballah's counsel to be seeking any variation of this condition (other than one specific, contingent request that will be referred to later under the miscellaneous heading). Because I encountered difficulty in understanding the basis of this request, I pressed counsel for greater clarity. What I take from their explanations follows.

[26] If Mr. Jaballah is on an outing (in the park, for example) and he encounters "happenstance" an individual who is a CBSA-approved visitor to the Jaballah home, it is unfair to prohibit Mr. Jaballah from speaking with that individual. That is, he should not be restricted to a "greeting"; he should be able to speak to the person. I can find nothing in the existing conditions that prohibits such behaviour. The conditions prevent Mr. Jaballah from meeting, by prior arrangement, persons other than those specified in the paragraph. The Ministers do not object to Mr. Jaballah passing the time of day with a CBSA-approved visitor whom Mr. Jaballah encounters "happenstance" while on an outing. Consequently, no amendment is required in this regard.

Wireless Laptop

[27] The terms of the April 13th order provide that "no computer with wireless internet capability shall be brought into the residence". At the time of Mr. Jaballah's previous detention review, Ahmad Jaballah's laptop computer did not have wireless capability. Therefore, only the condition applicable to all computers with internet capability was relevant to his laptop. Ahmad testified that two weeks before the commencement of this hearing, the screen of his laptop died. As I understand the evidence, Ahmad's laptop is dead and is beyond redemption. That is, it cannot be repaired.

Ahmad claimed that he searched at Costco and Future Shop and was unable to locate a laptop without wireless capability. He stated that “all the new computers that are being sold have built-in wireless capability”.

[28] Ahmad’s evidence in this respect was largely corroborated by Mr. Jerry Lukac, the IT specialist for the Greater Toronto Enforcement Centre (GTEC), called by the Ministers. Mr. Lukac testified that it is very difficult to purchase a new laptop without wireless capability. I take it, from Mr. Lukac’s evidence, that acquisition of a laptop without wireless capability would require communication with, and a special order from, the manufacturer.

[29] Ahmad testified that he would disable the wireless capacity of his laptop when it was in the Jaballah residence. Having heard Mr. Lukac, I am not persuaded that the matter is quite so simple. Moreover, there are other difficulties regarding internet service in the Jaballah residence that will be addressed later in these reasons.

[30] Having given considerable thought to Ahmad’s request, I have determined that there is nothing in the existing conditions that prevents him from purchasing a laptop computer with wireless capability. The prohibition relates to him bringing it into the Jaballah residence.

[31] The evidence indisputably indicates that Ahmad spends a great deal of his time at the university. He is at home with his father in the mornings while his mother is volunteering at the Um Al Qura School. He leaves when his mother returns at noon or 1:00 p.m., except on Mondays when he often stays at home until later in the afternoon to enable his mother to spend the day at school.

[32] After he leaves for the university, it is Ahmad's practice to remain there, usually until midnight or 1:00 a.m. He has an office on campus because of his position as vice-president of student equity. His position requires that he be in his office at least 15 hours per week. Ahmad stated that, if he is not needed urgently at home, he stays on campus to get his studying and his work done. He did not say that he studied at home or that he required his laptop at home.

[33] Although it is not impossible to fashion conditions that would enable Ahmad to bring his laptop home, it is not a simple task. The conditions would be intricate and complex. There is also the matter of the wireless router that would have to be addressed. The router is not a live issue if there is no computer with wireless capability in the house. Given the totality of the evidence (I will have more to say about this when I deal with some of the contentious requests), the difficulties that have occurred in interpreting some of the existing conditions, and Mr. Lukac's evidence with respect to disabling wireless capability, I conclude that there is a simple solution to the dilemma. Moreover, it is the solution that I favour. Ahmad Jaballah is free to purchase a laptop with wireless capability, but he must not bring it into the Jaballah residence. He may leave the laptop in his office at the university or any location of his choice, other than the Jaballah residence.

[34] The remaining requests require more elaboration. The Ministers take no exception to some of Mr. Jaballah's proposals. There are other requests (consented to initially) that the Ministers objected to during final submissions. In fairness to the Ministers, their position was, at least in part, the result of developments that evolved as the hearing progressed. It is important to remember (as I reminded counsel during the hearing) that the Ministers' consent is a factor that carries significant

weight. However, it is not determinative. At the end of the day, it is the Court's responsibility and obligation to ensure that the conditions of release will neutralize the threat.

[35] Before turning to the remaining requests, I wish to briefly refer to the rapport between the Jaballah family and CBSA.

CBSA and the Jaballah Family

[36] The relationship between the Jaballah family and CBSA, by all accounts and with one exception, has been a productive one. Mr. Pearce, the Acting Chief of the GTEC has been the primary CBSA contact. Mr. Pearce reports to his immediate supervisor, the GTEC Director, Mr. Reg Williams. Someone is always available to respond to Mr. Jaballah's concerns. Mr. Pearce testified that in an average week, he would be on the telephone with Mr. Jaballah between 10 to 20 times. "It could be more, but never less". CBSA is available to respond to Mr. Jaballah's concerns "24/7".

[37] Mr. Jaballah and Ahmad Jaballah testified that they had encountered difficulty with only one CBSA officer. That officer is no longer in contact with them. Both stated that they have a good working relationship with Mr. Pearce. Ahmad characterized his relationship with "Mr. Terry" as a strong one. Mr. Jaballah said that the CBSA enforcement officers are "nice" and he has "no problem with them". It is evident that Mr. Pearce has been diligent in his efforts to be respectful of the Jaballah family while monitoring the conditions imposed by the Court.

The Contested Issues

[38] Although there are subsidiary issues, I am satisfied that the outstanding issues can be subsumed under six headings:

- (a) outings and Mr. Jaballah's request to teach;
- (b) additional supervisors;
- (c) the fax machine;
- (d) the internet;
- (e) visitors;
- (f) video surveillance.

Outings and Mr. Jaballah's Request to Teach

[39] These topics are joined because of the manner in which they were presented. Mr. Jaballah requests that the number of his permissible outings be increased. He also asks that he be permitted to teach Arabic and the Koran at Um Al Qura School, or alternatively, that he be permitted to do administrative work at the school. In the further alternative, should his plan to work at the school be unacceptable, he proposes to teach students in the basement apartment of the Jaballah residence. If he is permitted to teach, he withdraws his request to increase the number of his outings.

[40] After serving three months as principal at Salaheddin Islamic School and teaching privately from his home for six months, Mr. Jaballah founded Um Al Qura School in July of 2001. Shortly after the school opened, Mr. Jaballah was detained (August 14, 2001). The school houses grades one to eight although it is primarily comprised of students in grades one to six. Its

original enrolment was 178 students. Now, there are approximately 50 students. The school was approved by the Ontario Ministry of Education. Classes in Arabic and the Koran are offered in addition to the prescribed provincial curriculum. It is a non-profit operation. Teachers' salaries (and presumably those of non-volunteer staff) are paid after expenses. The school is administered by a four-person board of directors. One of the board's members has been absent from the province for three years. Ms. Al-Mashtouli is a member of the board.

[41] The school staff consist of four teachers, one assistant teacher, and four volunteers. There is a principal (Ms. Al-Mashtouli) and a vice-principal. It is not clear from the record whether the principal and vice-principal are included in the teaching complement. There is also a secretary.

[42] According to Mr. Jaballah's evidence, the only reason that he wants to teach (or to do administrative work for the school) is to provide financial support to the family. The rent in his former residence was \$400 per month. The rent for the current residence is \$1,200 plus hydro. He anticipates a global amount of \$1,500 per month. Additionally, he has assumed responsibility for the \$900 monthly rent for the basement apartment located in the Jaballah home. He feels obliged to make the latter payment because the tenants (of the former owner) were not approved by CBSA due to criminal records. Mr. Jaballah testified that he would do any kind of work for any number of hours provided that he could earn some money to support his family.

[43] The family presently receives welfare benefits of \$1,500 per month and three child benefit payments of \$250 for a total monthly income of \$2,250. Ahmad contributes \$800 (sometimes \$900) per month. Ms. Al Mashtouli's volunteer work at Um Al Qura School is in exchange for free tuition for the two Jaballah children attending the school. It equates to approximately \$5,000 per year. Mr. Jaballah claims that he can earn income of up to \$800 per month without incurring a reduction in his welfare benefits.

[44] The Ministers strenuously oppose Mr. Jaballah's request. Mr. Pearce pointed to the conditions that restrict contact with other persons and noted that there would be teachers, school custodians and parents with whom Mr. Jaballah could come into contact. He testified as to the necessity for CBSA to be constantly "running a site assessment" because of the school's location in an industrial area with large numbers of tractor trailers in the immediate vicinity. The GPS system could be compromised because there must be a clear area within the school to pick up the signal. Mr. Pearce did not know what the proximity would be between Mr. Jaballah and the supervisor. The cell phones belonging to students, teachers and other staff would also be problematic. In short, Mr. Pearce felt that CBSA would not be able to effectively monitor Mr. Jaballah if he were permitted to teach (or do administrative work) at the school.

[45] Mr. Jaballah testified that the students' parents would have to be informed of his situation. He could communicate with them regarding their children by telephone (the rationale being that CBSA has a tap on his telephone line and could listen). He submitted that he is permitted to deliver and pick up his children to and from the school and that CBSA has allowed him to enter the school on some of his outings. Further, people are present when he goes to the

mosque or to the shopping mall. His obligation is to not have contact with unauthorized people. The same sort of obligation could be extended to his teaching or working at the school.

[46] The CBSA concerns are legitimate. It is evident from the restrictive nature of the conditions as well as my reasons in relation to Mr. Jaballah's previous detention review that, in my view, neutralization of the risk requires strict monitoring of Mr. Jaballah and his activities. The monitoring requirement is not disproportionate to the threat.

[47] It is not necessary for me to undertake a lengthy analysis of the various concerns raised by the CBSA. The Court and counsel for all parties attended the school for a site inspection. Mr. Jaballah's counsel described the school as a "shoestring operation", but rightly noted that the characterization does not detract from the education that the children may be receiving. Considering Mr. Pearce's apprehension regarding the GPS monitoring system (and having heard the evidence of the difficulties that can be encountered with it), combined with a viewing of the facility, I am nearly certain that the GPS system would fail to function.

[48] While there have been difficulties with the GPS system during outings, CBSA has been able to compensate for those difficulties through physical surveillance. There is an enormous difference between physical surveillance during a specified number of pre-determined weekly outings and physical surveillance on a daily basis at a school where the overwhelming majority of the students are children of tender years.

[49] More importantly, Mr. Jaballah would be supervised primarily by Ms. Al-Mashtouli during his time in the school. Ahmad stated that if his mother were to fall ill, he would be happy to stand in her stead for that day. I need not reiterate the significant credibility issues that arose with respect to Ms. Al Mashtouli (*Jaballah* at paragraphs 61-65). Nothing has alleviated those concerns. Ms. Al Mashtouli chose not to testify at this hearing. Notably, when she is supervising Mr. Jaballah at home, the base unit functions in conjunction with the ankle bracelet. Thus, there is capacity for CBSA to monitor Mr. Jaballah. The GPS tracking unit is an altogether different matter. Without a proper signal, the system does not function and the monitoring falls to Ms. Al-Mashtouli. This scenario is simply not acceptable.

[50] I place little stock in Ms. Fauzia Abdullah's evidence that there would be no problem with Mr. Jaballah teaching at the school. Ms. Abdulla was certainly well-intentioned. However, it is obvious that she viewed Mr. Jaballah's proposed return as a mechanism to increase the student population for she believed that people would send their children there if he returned. She had not consulted with or spoken to anyone other than one member of the board of directors (in passing, on the morning of her appearance in court).

[51] I reject Mr. Jaballah's evidence that Hashem Siwalen could act as supervisor while supply teaching. Mr. Jaballah testified that the school used Mr. Siwalen "sometimes it is for one month, sometimes it is for one week". Mr. Siwalen's evidence was that he has no qualifications to supply teach, he helps as a volunteer and does so rarely, maybe once or twice a year.

[52] In summary, I am not prepared to alter the conditions to enable Mr. Jaballah to teach or to do administrative work at Um Al Qura School. I take no exception to Mr. Jaballah undertaking the administrative tasks he described (scheduling, timetables) at home. It seems to me that remuneration should be commensurate with the quantity and quality of the work product. If Mr. Jaballah completes administrative work from home, he should be compensated. He claimed that he had never asked to be paid for work he did at home. In view of his current financial circumstances, he should consider it.

[53] Mr. Jaballah's proposal for teaching at home is to instruct students in the basement apartment. Many of the same concerns arise particularly with respect to contact with unauthorized persons and cell phones. Moreover, it is not at all clear to me what Mr. Jaballah actually intends to do. He stated (when questioned) that his students would range from 14-16 years of age. Persons over the age of 15 require CBSA approval to "visit" the Jaballah home.

[54] Originally, he claimed that his plan was to teach approximately 20 students. When Mr. Pearce raised concerns regarding potential inspections by the fire marshal and other municipal authorities as well as issues surrounding adherence to regulations and codes for operating a business, the proposal was changed in mid-stream. The plan was converted to "tutoring" two or three students. Mr. Jaballah suggested that he would place "flyers" in various mosques. He had no idea if anyone would respond. If the proposal is to tutor two or three students, query why in the basement apartment?

[55] I should mention that following the site inspection of the school, the Court and counsel attended at the Jaballah residence. It was obvious that Mr. Jaballah has been working industriously to improve the basement apartment. However, his evidence as to its utilization was totally inconsistent. Mr. Jaballah proposed tenants, he proposed teaching, he proposed that his sons Ahmad and Munzir live in the basement and he proposed that Ahmad and his future wife (in time) live in the basement. He expressed a desire that his family occupy the residential structure without any outsider.

[56] Yet, concurrent with Mr. Jaballah's expression of these various options, a prospective tenant was found and the individual's name was submitted to CBSA for approval. The Court was so advised on Tuesday, November 29th. I questioned the impact that a tenant would have on Mr. Jaballah's alternative request to teach in the basement. His counsel stated:

In part, there was desire as a teacher to be able to teach, but there was also the economic factor as well. If the basement was going to be standing empty for a time, the suggestion was that he could use that as an area to teach and thus be able to generate some income. If there is a tenant there, the need for income will be lessened because there will be money coming into the family.

[57] The Ministers' counsel was quick to advise that if the prospective tenant did not have a criminal record and passed the security checks, counsel would recommend, subject to Court approval, that the Jaballah family be permitted to have the tenant living there. In counsel's view, a prospective tenant should be seriously considered and preferred (for income purposes).

[58] Five days later, the Court was informed that “there are now no longer prospective tenants at the moment. That makes the family’s financial circumstances more pressing”. The stated reason was that CBSA approval had not materialized in a timely way.

[59] It strikes me as anomalous that upon Mr. Jaballah learning that the income derived from the prospective tenant might be regarded as sufficient to fulfill his stated purpose for working, the tenant prospect evaporated almost immediately.

[60] At this point in time, the conditions of release have been in effect for approximately eight months. The changes required to accommodate Mr. Jaballah’s proposal to teach are fundamental. Although Mr. Jaballah’s counsel presents the request coherently, the evidence in support is thin. It is my view that stringent monitoring of Mr. Jaballah and his movements is essential to neutralize the threat that he poses to national security. I am not persuaded that the conditions should be altered to accommodate his request to teach because I find that his actions could not be effectively monitored. It remains open to Mr. Jaballah to supplement his income by performing administrative tasks for the school from his home. It also remains open to him to proffer prospective basement tenants for CBSA and Court approval.

[61] Having rejected Mr. Jaballah’s request to teach, I must examine the issue of increased outings. The conditions presently permit Mr. Jaballah to have four-hour outings three times per week between the hours of 8:00 a.m. and 9:00 p.m. CBSA has discretion to consider special requests for family outings and to allow one of the weekly outings to extend beyond four hours as well as to extend outings beyond 9:00 p.m. There are a maximum of three extended outings

per month. It should be noted that when Mr. Jaballah takes his children to school on Tuesdays, Wednesdays and Thursdays, neither the deliveries nor the pick-ups are counted as outings. Similarly, appointments with doctors or lawyers are not counted as outings, regardless of numbers.

[62] I have previously determined that Mr. Jaballah's attendance at mosque on Friday evenings should not be counted as an outing. As noted, nearly eight months have passed since Mr. Jaballah's release. Mr. Pearce testified that the outings have gone well and without incident. He also testified that CBSA would accede to whatever number of outings the Court considered to be appropriate.

[63] I am prepared, in view of the evidence, to increase the number of outings per week from three to five and the number of hours from four to five. Given the frequency of Mr. Jaballah's absences from his residence (including those not counted as outings), further changes are not warranted at this time.

Supervisors

[64] Mr. Jaballah seeks to have three additional supervisors. The stated reason is the onerous burden on the primary supervisors to be available to Mr. Jaballah. Ms. Al Mashtouli cannot go for groceries if Ahmad is at school because she has to stay with Mr. Jaballah. Many of the alternate supervisors work and it is difficult for them to be readily available. If additional supervisors were added, it would assist the family by relieving and easing the heavy load carried

by Ahmad and Ms. Al-Mashtouli. This reasoning stands in sharp contrast to the evidence of Ms. Al-Mashtouli and Ahmad Jaballah tendered at the previous detention review.

[65] The proposed supervisors are Hashim Siwalen, Raza Mohammed and Matthew Behrens. The Ministers consent to Hashim Siwalen and Raza Mohammed being supervisors. They object to Mr. Behrens.

[66] Mr. Siwalen has been a friend of Ahmad Jaballah's since high school. Although both Mr. Jaballah and Ahmad describe him as a student, he is currently employed and does not begin his studies until January of 2008 when he will attend Centennial College. Mr. Siwalen was approved as a visitor to the Jaballah home shortly after Mr. Jaballah's release. He is familiar with the conditions of release. He testified that he is prepared to ensure that Mr. Jaballah obeys the conditions.

[67] Mr. Siwalen helped the Jaballah family move to their new residence, he has picked the children up from school and he has been a babysitter for the children. He visits the Jaballah residence at least once each week. He stated that he has, and will have, sufficient time to be available to the Jaballah family both during the week and on weekends.

[68] I presume, in the face of the Ministers' consent, that the appropriate checks have been completed in relation to Hashim Siwalen. On that basis and on the basis that he is a long-standing associate of Ahmad Jaballah and has rendered much assistance to the family since Mr. Jaballah's release, I will approve Hashim Siwalen as a supervisor.

[69] Raza Mohammad executed a performance bond in the amount of \$5,000 in support of Mr. Jaballah's application for release from detention. He testified at the previous detention review and again at this hearing. As a surety, he is familiar with the terms and conditions of release.

[70] Mr. Mohammad has known the Jaballah family for six years. The association began when he was a volunteer at the Toronto Youth Assessment Centre. Through his work with troubled youths, he met Munzir Jaballah. Mr. Mohammad is now married and has a child. He continues to work with three youths, one of whom is Munzir. Thus far, his contact with Mr. Jaballah has been in relation to Munzir. He feels that he has established a good relationship with Mr. Jaballah.

[71] Mr. Mohammad works in real estate. He claimed that his profession allows for flexible hours. He could be available, if needed. His home is twenty minutes from the Jaballah residence. He anticipated that his involvement with Mr. Jaballah could require his attention four or five times per month. He stated that he would not hesitate to report a breach of any condition. Mr. Mohammad, as a conditional surety, has a vested interest in ensuring Mr. Jaballah's compliance with the conditions. I will approve Mr. Mohammad as a surety.

[72] Matthew Behrens is an editor and has known and assisted the Jaballah family for a number of years. His hours are flexible and he testified that he can be available to the Jaballahs on a moment's notice, at any time.

[73] Mr. Behrens testified at length as to the various ways in which he has assisted the Jaballah family. The one thing that he has been unable to do is relieve the supervisors. He is an approved visitor and is specifically excluded, by my order, from the prohibition regarding visitors with criminal records. In addition to assisting the family directly, he apparently does a voluminous amount of work for Mr. Jaballah's counsel.

[74] The Ministers rigorously oppose Mr. Behrens's appointment as a supervisor. The basis of their objection is the articles authored by Mr. Behrens in which he is critical of judges of the Federal Court and their decisions regarding security certificate cases. The Ministers claim that he lacks the requisite respect for the Court and its processes to be approved as a supervisor. Mr. Behrens countered that he would nonetheless report a breach of conditions.

[75] I expressed concern that Mr. Behrens's evidence indicated to me that he viewed his role as that of an intermediary between CBSA and the Jaballah family, rather than as a supervisor of Mr. Jaballah. I have reviewed his evidence again and I am confident in that assessment. The relationship between CBSA and the Jaballah family is a good one and I do not want to see it needlessly jeopardized in any way. Further, in view of the various "interpretation" difficulties that have arisen with respect to the conditions, the Ministers' concern that Mr. Behrens's interpretation may not accord with the intent of the conditions is not without some merit.

[76] I asked Mr. Behrens what difference being a supervisor would mean. In other words, could he not continue doing what he normally does for the family, if he were not a supervisor? His response was that he could not stay with Mr. Jaballah unless a supervisor was present.

[77] In the present circumstances, I need not determine whether Mr. Behrens would be an appropriate supervisor. Mr. Jaballah had five supervisors and I have just added two more. I do not think yet another is required. Both Messrs. Siwalen and Mohammad have stated that they are flexible and can be available. The role of supervisor is not one of convenience; it is one of necessity. The number of supervisors should not become unwieldy. In my view, the approval of Mr. Behrens as a supervisor for Mr. Jaballah is not necessary. I am aware that Mr. Justice Mosley approved (with some misgiving) Mr. Behrens as a supervisor for Mr. Mahjoub. In fairness to both Messrs. Jaballah and Mahjoub, Mr. Behrens should not spread himself too thin.

The Fax Machine

[78] Mr. Pearce testified that CBSA began receiving Mr. Jaballah's visitor requests by fax in late May or early June. Because of the absence of a header indicating a fax number, date and time, Mr. Pearce initially thought that the faxes had been transmitted from a location external to the Jaballah residence, such as a corner store. He questioned Mr. Jaballah and learned that the faxes had been sent from the Jaballah residence. Mr. Jaballah informed Mr. Pearce that Ahmad sent the faxes on Mr. Jaballah's behalf. Concerned as to whether the use of a fax machine contravened the conditions of release, Mr. Pearce referred the matter to Mr. Williams who, in turn, requested an opinion from National Headquarters (NHQ). Pending direction from NHQ, Mr. Pearce did not raise the issue with

Mr. Jaballah. All subsequent visitor and outing requests for Mr. Jaballah have been submitted by fax. The NHQ response to GTEC remains outstanding.

[79] Ahmad Jaballah testified that he purchased a multi-function unit (printer, scanner, photocopier and fax) before his father's release from detention. The machine was connected to the computer and was used for printing. The fax function operates from the land-based residence telephone line. This means, in order to send or receive a fax, the telephone line must be connected to the unit. Telephone calls (incoming or outgoing) are suspended during the time that the fax is connected to the telephone line. Anyone intending to send a fax provides advance notice by telephone in order that the fax function can be connected. The same procedure (absent the telephone notification) applies to outgoing transmissions. Ahmad stated that once the receipt or transmission of the fax is complete, the telephone line is re-connected to enable incoming and outgoing telephone calls to continue.

[80] Much debate revolved around the propriety of the fax machine being in the Jaballah home.

Condition 12 of the April 12, 2007 order provides, in part:

Except as provided herein, Mr. Jaballah shall not possess, have access to or use, directly or indirectly, any radio or radio device with transmission capability or any communication equipment or equipment capable of connecting to the internet or any component thereof, including but not limited to: any cellular telephone; any computer of any kind that includes a modem or that can access the internet or a component thereof; any pager; any fax machine; any public telephone; any telephone outside the residence; any internet facility; any hand-held device, such as a blackberry [...]

[81] The remainder of the condition specifically deals with the location of, and procedure for, computers with internet capability and cell phones in the Jaballah residence. Mr. Jaballah is restricted to the use of a land-based telephone line.

[82] Ahmad testified that fax activity, prior to his father's release, was virtually non-existent. Since his release, the fax function is used regularly for communicating with Mr. Jaballah's counsel and Matthew Behrens, scheduling doctors' appointments, and requesting visitor and outing approval from CBSA. Ahmad could recall only one occasion when his mother used the fax for another purpose. She forwarded a fax to the Canadian Embassy in Egypt regarding either her mother or Mr. Jaballah's brother.

[83] The Ministers take the position that the condition constitutes a blanket prohibition against any fax machine being located in the Jaballah residence. From the Ministers' perspective, the specificity with which the computer and cell phones are carved out renders it crystal clear that the words "directly or indirectly" "access" or "possess" mean that the enumerated devices cannot be housed within the residence.

[84] Mr. Jaballah counters that the unit has consistently been kept in the locked room where the computer with internet capability is kept, that he has not used it, and that there is no prohibition with respect to other members of the family possessing a fax machine. He further maintains that, on the Ministers' interpretation, each time that Ahmad calls Mr. Pearce from his cell phone in the car (on Mr. Jaballah's behalf) or any time that Ahmad requests an outing (on Mr. Jaballah's behalf) by way of email, it could be said that he (Mr. Jaballah) was "indirectly" using a cell phone or a computer

with internet capability in contravention of the condition. He asserts that the Ministers' position is untenable.

[85] Although I would have thought that the condition prohibited the existence of a fax machine in the Jaballah residence, the matter is not free from doubt. The debate on this issue illustrates why I considered it advisable to identify (with the assistance of counsel for all parties) potential ambiguities in the conditions. At this point, it appears that the horse has already left the barn. I can understand why Mr. Jaballah did not think that the existence of the fax machine was a breach of the conditions when CBSA was aware of it and did not admonish him in any way.

[86] CBSA requires that requests for outings and visitors be completed in writing. Obviously, Mr. Jaballah cannot complete a written request by telephone. The only alternate available option is to utilize the CBSA officers who deliver the mail daily. Mr. Jaballah could complete the requests and send them back with these officers. However, I am not convinced, if the fax transmissions can be monitored, that it is necessary to use, as counsel described it, "the pony express".

[87] Because the fax machine is one that is dependant upon the land-based residence telephone line and the residence line is subject to interception, the consent to interception of the telephone line would cover the interception of faxes. Justice Mosley was of the same view when he dealt with a similar issue in relation to Mr. Mahjoub. However, if such interception is not authorized, consent should be provided forthwith. Alternatively, if the fax unit has the capacity to generate an automated list of incoming and outgoing transmissions (that cannot be tampered with), Mr. Jaballah

may choose to provide such a list to CBSA on a monthly basis. The use of the fax machine must be subject to some form of monitoring.

The Internet

[88] The internet became a major concern as the hearing progressed. When the Jaballah family lived in the former residence, Ahmad's laptop and one other computer had internet capability. None had wireless capability. The computers were kept under lock and key in Ahmad's bedroom. Only Ahmad was permitted to have the computer passwords (Ms. Al Mashtouli's request to be provided with the passwords was not granted). Mr. Jaballah was not permitted access to Ahmad's bedroom. Internet access was through a cable network.

[89] In the new residence, the bedrooms are on the second floor. A self-contained, locked room on the first floor has been designated as the computer room. During the hearing in October, both Mr. Jaballah and Ahmad stated that the new house did not have any internet connection. Mr. Jaballah explained that the underground cable was "busted" and that it would take Rogers quite some time to fix it. The Jaballah family have television service only. Here, I should note that one of CBSA's concerns at the time of its inspection was the existence of a cable running from a neighbouring residence to the proposed Jaballah residence. Mr. Jaballah seemed to think that Rogers had avoided repairing the underground cable by running a cable from the neighbouring house. That cable was removed, at CBSA's insistence, before Mr. Jaballah moved into the new residence.

[90] It is fair to say that when the hearing began, no one anticipated the difficulties that would ensue in relation to the internet. Mr. Jaballah assumed that the specific provisions in condition 12 would continue to apply. He requested that Ms. Al-Mashtouli (in addition to Ahmad) have possession of the key to the locked room and the password to the computer because of Ahmad's absences from home. He explained that Afnan is now in grade 9 and requires computer internet access to complete her homework. If Ms. Al-Mashtouli were permitted to have the key and password, it would be much more convenient.

[91] By the time the hearing concluded, the Ministers were suggesting that internet not be permitted in the house at all. The difficulties began when the incident of September 1st was discussed. To situate the problem, reference to the contextual background is required.

[92] The Jaballah family intended to move from the former residence to the current residence on September 1st. The move was not Court-approved until September 26th because a number of outstanding deficiencies had to be remedied in relation to the proposed residence. Notwithstanding, at the end of August it appeared reasonably certain that the proposed relocation would take place in due course. CBSA was aware that arrangements had been made to move the Jaballahs' furniture at the end of August. When the move was not approved, the bulk of the furniture was moved as scheduled, but the family remained in the former residence. On the morning of September 1st, CBSA officers attended at the former residence to ensure that things were proceeding smoothly. The officers observed that the door to Ahmad's bedroom was open and that there was no lock on the door. The officers notified Mr. Pearce and he requested that photographs be taken. When the officers returned with a camera (approximately ten minutes later), a lock was on the door.

[93] Ahmad Jaballah explained that when his father was released, he (Ahmad) installed a hardwood door on his bedroom. Before moving, he had to put the original door back in its place. The preceding evening, Ahmad had removed the hardwood door and taken it to the new residence. He took the computer modem with him (because his bedroom was open). When he returned home, it was after midnight. He installed the original door, but not the lock (which was on his parents' bedroom door) because it was late. He put the lock back on the door after the CBSA officers went to obtain a camera. I will return to this incident later.

[94] On November 16th, Mr. Lukac attended the Jaballah residence to test the telephone jacks for the presence of an Asynchronous Digital Subscriber Line (DSL) signal on any of the phone jacks. In layman's terms, DSL is simply high speed internet through a telephone line rather than a cable. There were telephone jacks in nearly every room of the Jaballah household. One jack (the jack in the kitchen behind the freezer) had a live internet connection.

[95] Mr. Lukac testified that DSL service is normally available from each telephone jack in a residence. To obtain DSL for a single jack requires a "dry loop". This is a second telephone circuit wired to a specific jack that is dedicated to DSL. No telephone service is available on a DSL-specific jack. The connection in the Jaballah house is not a dry loop because there is telephone service available from the jack.

[96] Mr. Lukac provided four possible explanations for the existence of DSL in only a single jack. He was unable to state, with any degree of accuracy, which of the possibilities was to be

preferred. He testified that a determination could be made only if a Bell technician attended at the residence and conducted a thorough examination of the signal levels.

[97] Mr. Lukac also looked for cookies on the desktop computer (in the computer room of the Jaballah residence). A cookie is created as a special file (by a website) when one browses the internet. Cookies are located in a specific place on the hard disk. They track visitors for marketing purposes and determine when a user returns to a particular website. Cookies can be deleted by the simple click of a mouse. Mr. Lukac found cookies on the desktop computer. The internet activity, with one exception, had occurred before September 25th. There was a single isolated cookie that revealed brief internet usage on November 3rd.

[98] Mr. Jaballah testified that his daughter Afnan had been accepted as a participant in a program known as the “kids@computers scholarship project”. This program is available through social services for the City of Toronto and is designed to provide computer training and internet access to children of disadvantaged families. Afnan was accepted as a participant on February 8, 2007 (prior to Mr. Jaballah’s release). Afnan attended and successfully completed the computer orientation training programs on August 8th and 22nd. As a result, the project will provide Afnan with a home computer and one year of free internet (through Bell Sympatico). The Bell account apparently has been established in Ms. Al-Mashtouli’s name.

[99] Mr. Jaballah testified that he and the other members of his family were not aware of the live internet connection in their home. After its discovery on November 16th, he contacted Bell on several occasions. Ultimately, he learned that the kids@computers internet connection was to have

been established on November 28th concurrent with delivery of the modem. However, the account had been activated on November 5th. The existence of the DSL in the single jack remains a mystery. Mr. Jaballah was apparently informed by Bell that once the family received the modem, a technician will come and test the jacks.

[100] On the one hand, the proffered explanations regarding the incidents of September 1st and November 16th seem reasonable. On the other hand, they are troubling. With respect to September 1st, Ahmad Jaballah was interviewed by a CBSA enforcement officer. He provided his explanation about the unlocked bedroom door to the officer who, in turn, reported back to Mr. Pearce. Mr. Pearce accepted Ahmad's explanation but felt that it was advisable to follow up with a letter to Ahmad reminding him of his responsibilities as a supervisor. Mr. Pearce's correspondence to Ahmad Jaballah dated September 12th states, in part, as follows:

At the interview on September 06, 2007 you provided the following explanation:

You said that the door was left open because you had taken off the old door and taken it to the new house and installed it there. Further, that the ____ Street house had to be left in the same state as when you moved in, so the original door had to be put back. You then mentioned that it was late at night when you replaced the old door, and you thought that you would replace the lock, which was in your mom's room, the next day. You explained that you were asleep in the room anyway and that this was the only incident when the room was unlocked.

With respect to your father having access to your laptop, you indicated that your father did not have access to the laptop computer during the move because you took it with you. You added that if you do not have the laptop with you at anytime then the room is locked and the computer is password protected. You expressed with certainty that your father did not enter your room or use the laptop while you were asleep as you would have woken (sic) up.

Finally, you stated that you are the only one who has possession of the key to the room where you keep your laptop that has internet access and, except for this incident, the room is locked at all times and the key remains with you.

In considering all of the circumstances and information, I am obligated to remind you that as a Court appointed supervisor you must exercise greater diligence to ensure that the conditions of release imposed are strictly observed. Failure to abide by the conditions of release may result in Mahmoud Es-Sayyid Jaballah being detained.

[101] It appears, from the correspondence, that Ahmad described the incident of September 1st as a one-time event. During examination-in-chief, Ahmad was discussing his daily schedule. In relating the status of the computer room when he was at school, he stated “[d]uring that period of time, if I am not home, my siblings are restricted from using the computer because I am the only one entitled to the password and I have to open the room for them”.

[102] When questioned, on cross-examination, about the incident of September 1st, the following exchange occurred:

Q. Your interpretation of that is that it can be locked sometimes and unlocked sometimes?

A. My interpretation was that, if I am in the room, then the room does not have to be locked. It is when I am outside the room that the room needs to be locked.

[...]

Q. Perhaps the Court Order says that the room is supposed to be locked.

A. It doesn't say at all times. I guess we could get clarification on that later on.

[...]

Q. In the interview that you had did you make it clear to the officer that you spoke to that there were times when the room was unlocked, i.e. when you are in it?

A. Yes.

[103] On re-examination, Ahmad was questioned about whether CBSA had inspected the computer room.

Q. At any time after your dad was released and up until now, other than that one time on September 1, have they gone into that room?

A. I wouldn't know. During the period that I was at home I don't believe so, but I am not sure if that took place when I was not at home. I would assume not because I have the key to the room. I don't think so, no.

[104] In response to questions from the Court, the following occurred:

Q. What I need to know is how your mom gets access to the room to send the faxes, for the doctors' appointments and to the lawyers and to CBSA and all of those things, when you are not there at the same time and the fax machine is in the bedroom, which is the locked room, and you have the key with you.

A. Sometimes they will wait for me to come back and do it. In specific instances, if my siblings are using the computer room, I leave it open for them. When they leave, they will call me or stay in there until I come back. My sister usually spends the most amount of time on the computer because she uses MSN. Basically, with respect to that, I usually leave it open. As long as somebody is in there and I am not there, I consider that to be okay as well, and they can use it.

[...]

Q. If one of your siblings was in the room using the computer, if you left it open for that sibling, which most frequently is your sister, your mother could then use the fax machine?

A. Yes. The reason I say that is because – as I said to Mr. Tyndale, my understanding of the condition is that, when nobody is in the room, the room is to be locked. For example, let's say I am at home one day and my sister wants to use the computer. I

wouldn't lock her in the room. If she is in there and I am sitting with my dad or sitting with the family in the living room, for example, the door would be open. My understanding of the conditions is that, if there is nobody in the room, the room needs to be locked. If there is somebody in the room, then the door doesn't have to be locked.

If I was leaving for school and my sister was using the computer to do her homework or whatever, I would leave the door open for her. If she was going to sleep or whatever, then I would come back and lock the door.

[105] Finally, in response to questions arising from the Court's questions, Ahmad testified as follows:

- Q. Potentially, if your youngest brother [8 years old] is using the Internet when you leave the house, he is in the room with the computer. The Internet is on. You are gone. The room is unlocked. The room can't be locked because there is no key, and your mom and dad are at home.
- A. Yes. I consider my mom to be – she is a supervisor, so I consider her to enforce the conditions when I am not there. I don't leave the house thinking in the back of my mind that my dad is going to be in that room because I expect my mom to enforce the conditions as the supervisor being at home when I am not there.
- Q. That is your interpretation of the condition that says that the Internet connection shall be kept in a locked room. That is how you interpret that?
- A. Yes, as I stated, I understand that to mean that, when nobody is in the room, the room is to be locked. It doesn't state that it has to be locked at all times. To my interpretation, if no one is in the room, then it needs to be locked. If somebody is in the room, it doesn't need to be locked.

[106] The discrepancy between Ahmad's initial and final responses is manifestly obvious. It is also disturbing. The Ministers' counsel labelled his evidence as "evolving". It was this evidence that led to the Ministers' requests for a biometric device regarding computer access and for the installation of video surveillance at the entrance to the computer room.

[107] Additionally, during Mr. Jaballah's previous detention review, Ahmad's mother proposed that both she and Ahmad be provided with the computer password. I declined her request and entrusted the password to Ahmad only. While the order does not specifically state that only Ahmad is to have the key to the computer room, all counsel (and the Jaballah family) agreed that it does so by implication. It is most discouraging that Ahmad would take it upon himself to vest Ms. Al-Mashtouli with the very responsibility that the Court denied her. The paucity of evidence indicating that Ahmad sought guidance or direction from either counsel or CBSA regarding such a crucial matter is conspicuous by its absence.

[108] As for the November 16th discovery of DSL in the Jaballah residence, the Ministers do not suggest that Mr. Jaballah was aware of its existence. However, this matter remains problematic for two fundamental reasons. The first is that the Court was not informed of the free internet service arising out of the kids@computers scholarship project. There is little doubt that the internet constitutes a major consideration in this matter. All of the parties are fully cognizant of its import. Lest it be forgotten, there is sufficient credible and compelling information to found an objective basis to believe that Mr. Jaballah acted "as a communicator among terrorist cells of the AJ and Al Quaida" (*Jaballah* at paragraph 40). Ahmad and Mr. Jaballah consistently and repeatedly stated that there was no internet service in their home. Significantly, Mr. Jaballah led me to believe that the internet would not be available until Rogers fixed the cable. All the while, the family was to be connected to Bell Sympatico at the end of November.

[109] Mr. Jaballah's counsel suggested that CBSA had to have been aware of the computer project because of the mail intercept. That is not necessarily so. There is no address on the correspondence from social services to Ms. Al-Mashtouli. The letter may have been delivered personally; it may have been delivered to the school; or it may have been delivered to the residence. I do not know and it appears that counsel does not know. Speculation provides little assistance. I consider the non-disclosure in this regard to be inexcusable.

[110] The second problematic item is the computer in the master bedroom. I realize that this computer does not have internet capability. However, Mr. Jaballah stated that he was using this computer if he wanted to help his wife "to type some stuff, something, some material". This is the computer that was located in the basement of the former residence. An additional computer has been acquired for the younger children's use and it is located in their bedroom.

[111] The difficulty with respect to Mr. Jaballah's evidence is that it is inconsistent with Ahmad's evidence regarding Ms. Al-Mashtouli's use of the home computer. Ahmad testified that his mother rarely used the computer at home. She completes her work for report cards on the computer at the school. The only reason she uses the home computer is to read the Arabic newspaper. For that, she requires internet access. Such inconsistencies are troublesome as is the unexplained internet use (albeit brief) of November 3rd.

[112] That said, the admonition in *Charkaoui* remains. As I understand the Supreme Court's reasoning, if it is possible to fashion conditions that will neutralize the threat, then it must be done.

Suffice it to say that relaxation of the conditions with respect to the internet is not a viable alternative in the circumstances.

[113] I am not inclined to grant the Ministers' request for a biometric device because I do not believe that it will be of any particular assistance. The biometric device relates to access only. It has no capacity to monitor use. Since it cannot monitor internet use, which is the concern, its implementation is not justified.

[114] Similarly, for reasons that will be apparent when I discuss the issue of video surveillance, the Ministers' request to install video surveillance at the entrance to the computer room will be refused. This does not mean that internet use should not be monitored. I will permit internet in the Jaballah residence only on the following conditions:

- (a) The internet connection for the computers used by Mr. Jaballah's children shall be a dry loop connection to the telephone jack located in the room designated as the computer room on the first floor of the Jaballah residence. Internet service to all other telephone jacks in the Jaballah residence is to be blocked;
- (b) The computer room is to be locked at all times when it is not in use. When the computer room is in use, the door shall remain closed. Only Ahmad Jaballah and Husnah Al-Mashtouli shall have possession of the key to the computer room;
- (c) Mr. Jaballah is not permitted access to the computer room at any time;
- (d) Each computer with internet capability shall be housed in and shall remain in the designated computer room;

- (e) Each computer with internet capability shall have a password to access it. Only Ahmad Jaballah and Husnah Al-Mashtouli shall have access to the computer passwords;
- (f) No computer with wireless capability shall be brought into the residence;
- (g) Ms. Al-Mashtouli, as the subscriber to the internet service, shall provide written consent to periodic disclosure, by the internet service provider to CBSA, of information regarding the websites visited and the e-mail addresses to or from which messages were sent or received from the internet connection at the Jaballah residence.

[115] Unless all of the noted conditions are met, there shall be no internet service within the Jaballah residence. If the Jaballah family agrees to abide by the noted conditions, Ahmad (should he wish) will be able to complete school work at home, forward it to his laptop and vice versa.

Visitors and Video Surveillance

[116] Although these are two discrete issues, in view of my determinations with respect to each of them, it is expedient to deal with them together. Regarding visitors, the current order permits children under the age of 15 years (friends of Mr. Jaballah's younger children) to visit without CBSA approval. All other visitors must be approved in advance by the CBSA. To obtain such approval, the person's name, address and date of birth must be provided to the CBSA. Prior approval need not be required for subsequent visits by a previously-approved person. However, the CBSA may withdraw its approval at any time. At the time of the hearing, CBSA had approved approximately 38 visitors for the Jaballah residence.

[117] Condition 3 (which has yet to be implemented) provides for the installation of video surveillance equipment at all entrances to the property. When the video surveillance condition was temporarily derailed, CBSA imposed more stringent requirements for the approval of visitors. At some point, Mr. Jaballah's counsel, and subsequently Mr. Jaballah and some visitors, took exception to CBSA's insistence upon more information than my order required. It seems to have escaped their attention that the additional information was an interim measure designed to compensate for the lack of video surveillance as specifically referenced in my order dated June 6, 2007.

[118] Mr. Pearce testified that one of CBSA's paramount difficulties was a lack of photo identification for visitors. CBSA paper approved visitors. In other words, the security checks and visitor screenings were completed on the basis of the requested information, but without photo I.D. Consequently, CBSA has approved visitors without ever matching a visual image to a printed name. Of course, some individuals are known to CBSA (counsel and Mr. Behrens, for example). Others are not.

[119] This causes me considerable consternation. In *Jaballah*, I concluded that Mr. Jaballah constituted a continuing threat to national security. In particular, I stated that "without restrictive conditions, I entertain no doubt that Mr. Jaballah could and possibly would communicate and associate with individuals or organizations with terrorist beliefs and objectives". If CBSA cannot put a face with a name, the risk persists and cannot be regarded as neutralized.

[120] Although originally opposed to photo identification for visitors, upon reflection, Mr. Jaballah considered the request to be a reasonable one. His counsel suggested that a photocopy of the person's driver's licence be provided to CBSA. Although I find that suggestion acceptable, if the person does not have a driver's licence, it should be open to CBSA to insist upon a substitute. Equally, CBSA should have discretion to waive the requirement for photo identification, where it considers it appropriate. I regard the failure to provide for photo identification in my original order to have been an oversight.

[121] As for the video surveillance, Mr. Jaballah consented to the installation of video surveillance equipment at all entrances to his residence before he was released. While he has not revoked his consent, his counsel argued against it. The Ministers have requested both exterior and interior video surveillance. They claim that the interior cameras would be situated so as to capture only the image of the individual entering the residence. Additionally, the Ministers ask for the installation of a two-way video conferencing device to permit visual communication between the occupants of the Jaballah residence and CBSA.

[122] The condition providing for the installation of exterior cameras has existed from the outset. This fact renders the issue of the exterior cameras a very different matter than that of the interior cameras. I denied an earlier request to delete the condition requiring the exterior cameras. I reiterate that Mr. Jaballah, while still in detention, consented to the installation.

[123] Mr. Kilgore's evidence was that the exterior cameras are unobtrusive. Only one (camera 11) was identified as having the potential to impinge upon the privacy of the neighbouring

residence. As it happens, that camera was designed to capture images for the laundry room door. Although this door leads to the outside, it does not function as an exterior door. The laundry room door opens inwardly. That is, it opens into the laundry room. In the laundry room, there is a large soaking sink. It is fixed to the wall by the plumbing and it is also attached to the floor. In short, the sink is a fixture. Its existence impedes the opening of the laundry room door beyond a few inches. Accordingly, the laundry room door does not function as an entrance to, or an exit from, the Jaballah residence. Consequently, there is no need to monitor it.

[124] There are three proposed cameras to monitor the exterior entrances. Only one is intended to be located on the interior and then, in the garage (to capture images of individuals entering the basement), not the residence. The proposed cameras are cameras 5, 10 and 12. It is camera 5 that is to be located within the garage. These cameras would capture the profiles of persons entering the Jaballah home.

[125] I agree with Mr. Jaballah that the installation of interior cameras is unprecedented. In spite of the Ministers' assertions to the contrary, in my view, the installation of interior cameras would constitute an unwarranted intrusion into the Jaballah family's privacy. There are issues that arise regarding proper attire for Ms. Al-Mashtouli and Afnan. Their images would be visible if answering the door.

[126] I appreciate that the interior cameras would provide additional images and that Mr. Kilgore testified that more images are better. While I do not take issue with that observation, I am not satisfied that the necessity of interior cameras has been justified. It seems to me that if a visitor

obstructs or attempts to obstruct his or her image, when entering the Jaballah residence, it is open to CBSA to withdraw its approval for that visitor.

[127] For the foregoing reasons, condition number 3 of my order dated April 12, 2007 will remain in place, without alteration. I should add, in the event that a tenant is located and CBSA-approved to rent the basement apartment, that camera 5 should be removed prior to a tenant's occupation of the apartment.

[128] I have not forgotten Mr. Jaballah's caution regarding the necessity of the landlord's consent to the installation of the exterior cameras. I remind Mr. Jaballah that his current residence is owned by the wife of a surety and supervisor. Mr. Qablawi paid \$10,000 into court and executed a performance bond for an additional \$10,000 before Mr. Jaballah's release. Mr. Qablawi provided written acknowledgement that he had reviewed (and understood) the terms and conditions contained in my order of April 12, 2007, including condition number 3. It would be shocking indeed if Mr. Qablawi's spouse were to refuse to honour a condition of the Court's order thereby initiating a breach of its terms. In my view, it ill-befits Mr. Jaballah to even suggest such a position.

[129] CBSA will have photo identification regarding visitors and there will be exterior surveillance of the Jaballah residence. It seems to me that a visitors' log and a video-conferencing device are not required at this time. It remains open to the Ministers to make further requests for these items should subsequent circumstances establish justification for them.

Miscellaneous

[130] Mr. Jaballah requested, if Matthew Behrens was not approved as a supervisor, that condition 10 (iii)(a) be amended to add Matthew Behrens while Mr. Behrens is in the company of Ms. Jackman or Messrs. Norris or Copeland. This is the condition that prohibits Mr. Jaballah from meeting any person by prior arrangement other than as specifically provided. I have no difficulty with Mr. Jaballah's request in this regard and the condition will be amended accordingly.

[131] The Ministers asked that Mr. Jaballah be prohibited from entering any area where CBSA deems electronic monitoring is ineffective. The evidence does not support the granting of this request. Mr. Pearce testified at length regarding the GPS signals. The monitoring system does not function in hospitals, in Ms. Jackman's office, or in the food court at the mall. CBSA has compensated for this frailty through physical surveillance. There is no evidence that Mr. Jaballah has attempted to defeat the system. Should there be such evidence in the future, I would entertain the Ministers' request. At this point, it is not justified.

[132] Finally, greater clarity has been requested in relation to condition 9 of the April 12, 2007 order. At this point, enough has been said regarding the Jaballah family's interpretation of my order. I consider it imperative that Mr. Jaballah and visitors to his home comply with the conditions. Read in their totality, the conditions make that abundantly clear. To alleviate confusion, the words "at any time" will be inserted between the word "residence" and the word "except" in line 1 of condition 9.

[133] This concludes my consideration of the various requests of the parties on the review of Mr. Jaballah's conditions of release. The issuance of my order will be delayed pending notification

from Mr. Jaballah's counsel with respect to the conditions regarding the fax machine and the internet. Such notification should be filed in the registry within 7 days of the date of these reasons.

My order will issue immediately thereafter.

Ottawa, Ontario
January 4, 2008

"Carolyn Layden-Stevenson"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: DES-4-01

STYLE OF CAUSE: MAHMOUD ES-SAYYID JABALLAH
v. THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS and THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 26, 27, 28, 29 and December 4, 2007
Further submissions: December 14, 18, 2007

REASONS FOR ORDER: Layden-Stevenson J.

DATED: January 4, 2008

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