

**Date: 20080514**

**Docket: DES-5-08**

**Citation: 2008 FC 595**

**Toronto, Ontario, May 14, 2008**

**PRESENT: The Honourable Madam Justice Dawson**

**BETWEEN:**

**MOHAMED HARKAT**

**Applicant**

**- and -**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**MINISTER OF PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS CANADA**

**Respondents**

**REASONS FOR ORDERS**

[1] Mr. Harkat has moved for an order approving William Baldwin as a supervising surety and for an order permitting Mr. Harkat to move to a new residence pending resolution of two conditions that counsel for the Ministers say must be met before the Canada Border Services Agency (CBSA) would consider approving the move. Those conditions are:

- (i) Prior to moving, Mr. Harkat must obtain in writing permission for the installation of cameras and all related equipment from the condominium corporation; and
- (ii) Prior to moving, Mr. Harkat must obtain in writing the permission of the condominium corporation for the CBSA to be parked on the private roadway at any time.

[2] These are the Court's reasons for its orders that approved Mr. Baldwin as a supervising surety but dismissed the request that Mr. Harkat be permitted to move pending resolution of the concerns of the CBSA. The latter order provided that Mr. Harkat was free to reapply for permission to change his place of residence, but that any reapplication involving the same proposed new residence should contain specific proposals to deal with the expressed concerns of the CBSA.

### **The Nature of this Proceeding**

[3] On February 23, 2007, the Supreme Court of Canada declared that the then existing procedures under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), for determining whether a security certificate was reasonable and the related detention review procedures infringed section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter). The Court's declaration was suspended for one year.

[4] In the result, the Act was amended to provide that, when proceeding under any of sections 78 (determining the reasonableness of the security certificate) and 82 to 82.2 of the Act

(detention reviews, variations, and proceedings in respect of alleged breaches of conditions of release), a special advocate should be appointed. See: paragraph 83(1)(b) of the Act.

[5] A new security certificate was issued in respect of Mr. Harkat under the amended legislation.

[6] The transitional provisions of the amending legislation had the effect that:

- Mr. Harkat remained released under the conditions previously imposed by the Court;
- within 60 days of the amending legislation coming into force, February 22, 2008, Mr. Harkat was entitled to apply to the Court for a review of the reasons for continuing the conditions of his release; and
- if no such application was made, Mr. Harkat could apply for review of the conditions after six months passed since the coming into force of the amending legislation.<sup>1</sup>

[7] As of the date of the hearing of Mr. Harkat's motion, no special advocate had been appointed in respect of Mr. Harkat. Counsel for Mr. Harkat advised the Court at the commencement of this proceeding that "[i]n regard to the new process created by Bill C-3 and the whole use of the special advocate, my view and the position I take in regard to this is that we would like not to go through that process because of the time I think it will take to develop that

process." Counsel continued:

So I am waiving the need for the special advocate process and the new process contemplated in the legislation. I am content to proceed on the basis that Mr. Harkat forms the same danger that you have found on prior occasions. You of course made the determination on the reasonableness of the certificate and you made the determination on the original release. You have made one other determination, Mr. Justice Noël made another determination.

I am not seeking to back away from any aspect of the finding of the danger that he poses other than to say I will argue that, almost two years out now, he should be getting some credit for that time of proper behaviour, but I don't think that that changes my position at all in regard to the aspect of dangerousness.

[8] Counsel for the Ministers confirmed that:

For the purposes of this hearing, it's acceptable to the Ministers that my friend's submissions on the issue of danger are sufficient such that we don't need to refer to any evidence that requires a special advocate.

[9] There are two consequences of this position. First, the issues before the Court are very narrow. They are the request for the appointment of a new, additional supervising surety and the request for permission to move. Second, it is not appropriate for the Court to assess what danger Mr. Harkat's release poses. That can only be done with the assistance of a special advocate. As acknowledged by counsel, the Court in this hearing is to proceed on the basis that the threat remains as previously assessed and determined by the Court.

[10] I turn to the two requests made by Mr. Harkat.

**The Request for a new Supervising Surety**

[11] Since Mr. Harkat was released from detention, changes have been made to add a supervising surety where the Court has been satisfied that the proposed surety is capable of objectively ensuring compliance with the conditions of release and providing a sufficient controlling influence over Mr. Harkat.

[12] Mr. Baldwin, the proposed additional supervising surety, is a retired priest of the Anglican Church of Canada. As such, his time is flexible. Before retirement, in addition to working in various parishes, Mr. Baldwin worked as a coordinator of theological education. He is willing to execute a performance bond in the amount of \$5,000.00, and he has the financial resources to support that bond. Mr. Baldwin has been interviewed by the CBSA, and no concerns were brought to the Court's attention arising from that interview. Mr. Baldwin testified that he is aware of the allegations made against Mr. Harkat, that he has discussed his role as a supervising surety with Mr. and Mrs. Harkat, and that he understands he is to ensure that Mr. Harkat complies with the conditions of his release.

[13] In the words of counsel for the Ministers, "Mr. Baldwin has eminent qualifications and a respectful and very eminent background."

[14] I was impressed with Mr. Baldwin's evidence. He is involved in peace and justice issues,

and has obviously given significant thought as to how his duties as a supervising surety might be impacted by his personal beliefs. Notwithstanding his view that situations may exist where there is a "higher law" than government law, Mr. Baldwin is prepared to commit himself to abide by all of the conditions he has agreed to as a surety. He would make sure that, if so ordered, Mr. Harkat would report for removal.

[15] I accept the truthfulness and sincerity of Mr. Baldwin's evidence. I am satisfied that he is capable of ensuring compliance with the conditions of release and providing a sufficient controlling influence over Mr. Harkat. Accordingly, I ordered that, subject to the execution of a performance bond and a written acknowledgment that he has reviewed all of the terms and conditions of Mr. Harkat's release, Mr. Baldwin is approved as a supervising surety.

### **The Request for a Change of Residence**

[16] Mr. Harkat's proposed new residence is located in a condominium. It is the recommendation of the CBSA, and the position of the Ministers, that Mr. Harkat should be permitted to move to the new residence only if he obtains written permission from the board of the condominium corporation for the installation of surveillance cameras and for CBSA vehicles to park on the corporation's private roadway at any time.

[17] To this, Mr. Harkat responds that his present living arrangement, where he and his wife live with Alois Weidemann, is untenable. Mr. Weidemann is the former partner of Mrs. Harkat's

mother, Pierrette Brunette. Mr. Weidemann did not testify on this motion, but he is said to now want Mr. Harkat and his wife to move out. Mr. Harkat submits that he should not be compelled to live in this situation. The need to move is characterized as being urgent and Mr. Harkat's only alternative, if not allowed to move, is said to be to return to detention.

[18] Mr. Harkat notes that, lately, the CBSA is not surveilling him as frequently as it has in the past and he points to the evidence of Peter Foley, the CBSA operational case lead for Mr. Harkat's release, that since February of this year the supervision and monitoring of Mr. Harkat has proceeded without problems. Mr. Harkat also points to his record of compliance with the conditions of his release (but for the breach arising when Ms. Brunette ceased residing with Mr. Harkat, and neither she nor Mr. or Mrs. Harkat reported this to the CBSA).

[19] Accordingly, counsel for Mr. Harkat submits that:

[...] it is appropriate in the circumstances for the Court to make the order allowing the move as expeditiously as possible and instructing the parties to go off and deal with the issues to try and figure out some alternative to building mounted cameras and perhaps – I am not sure I have a suggestion for how we will ever do this – parking space for the CBSA basically so they can watch the front of the house. I am not sure how we are ever going to resolve that particular issue.

[20] My analysis of Mr. Harkat's submissions is as follows.

[21] The proposed residence is a middle unit condominium townhouse, bordered on both sides

by neighbours. The front of the unit is on a private roadway owned by the condominium corporation. The private roadway is very narrow. No parking is permitted on the roadway. When CBSA agents have parked there, they have been approached by neighbours and by the Harkats, all complaining that the CBSA vehicle was obstructing traffic.

[22] The private roadway is bordered on one side by another private roadway, which is also owned by the condominium corporation. There is no evidence of any place where visitor parking is permitted that affords a view of the front of the proposed residence. It was Mrs. Harkat's evidence that the visitor parking provides no sight line to the front door of the residence.

[23] The number of routes for leaving from the front of the proposed residence is greater than for other residences in which Mr. Harkat has lived because of the presence of a series of foot or bicycle paths. On one occasion, while visiting the proposed residence, Mr. Harkat left the residence using a foot or bicycle path and the CBSA agents who were monitoring the rear of the residence were unaware of his departure.

[24] The condominium corporation has declined to consent to the installation of surveillance cameras or to allow CBSA vehicles to park on the private roadway.

[25] The rear of the proposed unit borders on a major thoroughfare. No parking is allowed on one side of that road; however, six or seven parking spaces are available on the other side of the road. In this regard, I rely upon supplementary evidence provided in Mr. Copeland's and



Mr. Tyndale's letters of May 8, 2008, which corrected some evidence given at trial. The rear yard is fenced. The fence is approximately 5 foot 2 inches in height. On the side facing the road, between half to three quarters of the fence is covered by bushes that are between 2 1/2 to 3 feet higher than the fence. The fence has a gate that allows access to and from the residence.

[26] On this evidence, I find as a fact that the concerns of the CBSA about the proposed move, and the resultant ability of the CBSA to monitor Mr. Harkat's activities, are reasonable and grounded in the evidence. The CBSA is now able to monitor, through the use of surveillance cameras, activities in the front and back yards of Mr. Harkat's current residence. There is also ample parking on the street in front of that residence, which affords CBSA agents an unobstructed view of the front of the residence. Neither of those conditions exists at the proposed residence.

[27] Thus, I find that allowing Mr. Harkat to move to the proposed residence would amount to a substantial change of the conditions upon which Mr. Harkat is now released. Such a substantial change is not warranted in the absence of a reconsideration of the danger that Mr. Harkat's release now poses.

[28] Mr. Harkat has submitted that the need to move is urgent and that, if the move is not allowed, he has no alternative but to ask to be returned to detention. In my view, neither of these submissions is sufficiently supported by the evidence.

[29] I acknowledge that Mr. Harkat's current living situation is difficult and not viable in the middle to long-term. However, while Mr. Weidemann indicated in February of this year his willingness to continue as a surety for a further period of six weeks, he nonetheless continues to allow Mr. and Mrs. Harkat to live in his house (a small portion of which is owned by Pierrette Brunette). Ms. Brunette still receives her business telephone calls and e-mails at this residence, and she continues to teach music lessons there. There is no evidence that Mr. Weidemann has given Mr. Harkat a firm date by which he has to move out. As noted above, Mr. Weidemann did not testify on this motion. On this evidence, I am not persuaded that sufficient time does not exist for Mr. Harkat to meet the concerns of the CBSA before he is required to leave his current residence.

[30] With respect to any return to detention, no evidence was adduced that Mr. Harkat had pursued any other option for his short-term living arrangements. It is reasonable to think that, rather than return to detention, Mr. Harkat might ask for permission to move in with a relative such as his mother-in-law or his sister-in-law on a temporary basis. If those are not possibilities, it is equally reasonable to expect that evidence would have been adduced that alternatives had been considered or pursued without success.

[31] I have dealt with Mr. Harkat's submissions about urgency and detention. However, it is important to understand that the Act specifies, in subsection 82(5), that where a person is

released from detention under conditions, on a review of those conditions, the judge "shall order the person's detention to be continued if the judge is satisfied that the person's release under conditions would be injurious to national security or endanger the safety of any person." This means that the Court's focus must be on national security and the safety of persons. Given Mr. Harkat's admission that he continues to pose the danger originally found by the Court, the Court cannot approve a change of residence in circumstances where the CBSA's ability to monitor Mr. Harkat is so diminished.

[32] I make three additional comments.

[33] First, I am satisfied that, as of the date of the hearing, Mr. Harkat had given no significant thought as to how the concerns of the CBSA could be met. For example, neither Mr. Harkat nor his wife owns a car. From time-to-time, they borrow Pierrette Brunette's car. The proposed residence has a garage and a one-car driveway. Thus, there would seem to be no reason why Ms. Brunette's car could not be kept in the garage when she is in the proposed residence or when her car is on loan to Mr. and Mrs. Harkat. This would leave the driveway available for the CBSA and the visitors' parking available for visitors. (Although Mrs. Harkat suggested that she opposes this arrangement because of privacy concerns.) By way of further examples, paragraph 16 of Peter Foley's affidavit raised alternate monitoring methods, including an interior camera to monitor the front door. It may also be that a camera could be installed in the rear yard of the proposed residence that would not be affixed to condominium property or that the condominium corporation might consent to because the camera would not capture images other

than those within the Harkats' rear yard.

[34] These are matters that Mr. Harkat ought to have considered, and ought to consider should he remain desirous of moving to this property.

[35] Second, I have given little weight to Mr. Harkat's submissions concerning the frequency with which the CBSA now monitors his activities and the efficacy of surveillance cameras in light of the existence of active GPS monitoring. In this regard, the extent to which the CBSA chooses to provide visible surveillance is a matter within its expert discretion. The ability of the CBSA to monitor Mr. Harkat's activities is a significant aspect of the scheme controlling Mr. Harkat's release. Cameras very recently provided cogent evidence of a breach of the conditions of Mr. Harkat's release and provide a deterrent to any further breach.

[36] Finally, I do not consider it to be at all realistic to approve, as Mr. Harkat suggests, any change of residence on the basis of further negotiations. I accept the submission of counsel for the Ministers that, if the move is permitted as proposed, it will be extremely difficult to later achieve a result that replaces, or substantially replicates, the conditions that now exist.

[37] On this point, I note Mrs. Harkat's position with respect to surveillance cameras. While her husband testified that he would consent to surveillance cameras being placed at the front and back doors, during her cross-examination, Mrs. Harkat testified that even if the condominium

corporation approved such cameras she would not provide her consent. In Exhibit 6, an article Mrs. Harkat wrote for the “Justice for Mohamed Harkat” website, she advised that "the Passion is there to fight against the surveillance cameras." Similarly, as noted above, she expressed privacy concerns about the CBSA’s use of the driveway. I acknowledge that, after the evidence was closed on the first day of the hearing, Mrs. Harkat sent an e-mail, Exhibit 9, to Peter Foley in which she made various suggestions to deal with the concerns of the CBSA. I am not confident, however, that such willingness would remain if the requested move was permitted without clear conditions being in place before the move.

[38] For these reasons, the motion for an order permitting Mr. Harkat to move to a new residence was dismissed, with leave to reapply on the basis set out in paragraph 2 above.

“Eleanor R. Dawson”

---

Judge

1. Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, 2nd Sess., 39th Parl., 2008, cl. 7 (assented to 14 February 2008).

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** DES-5-08

**STYLE OF CAUSE:** MOHAMED HARKAT

- and -

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

**PLACE OF HEARING:** Ottawa, Ontario

**DATES OF HEARING:** April 30 and May 1, 2008

**SUPPLEMENTARY WRITTEN SUBMISSIONS:** May 8, 2008

**REASONS FOR ORDERS**

**THE HONOURABLE MADAM JUSTICE DAWSON**

**DATED:** May 14, 2008

**APPEARANCES:**

Mr. Paul Copeland Counsel on behalf of the applicant

Mr. David Tyndale Counsel on behalf of the respondents

Ms. Amina Riaz

**SOLICITORS OF RECORD:**

Mr. Paul Copeland For the applicant  
Copeland, Duncan  
Barrister, Solicitors  
Toronto, Ontario

John H. Sims, Q.C. For the Ministers  
Deputy Attorney General of Canada  
Toronto, Ontario