

Date: 20090115

Docket: DES-6-08

Citation: 2009 FC 33

BETWEEN:

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

Applicants

and

MAHMOUD ES-SAYYID JABALLAH

Respondent

REASONS FOR ORDER

MACTAVISH J.

[1] Mahmoud Es-Sayyid Jaballah has for many years been the subject of Security Certificates, the most recent of which is signed by the Minister of Citizenship and Immigration and the Minister of Public Security and Emergency Preparedness. After spending a number of years in detention, Mr. Jaballah was released from custody in April of 2007 on a series of very strict terms and conditions.

[2] The question of the reasonableness of the most recent Security Certificate is currently the subject of proceedings that are ongoing before Justice Dawson. Justice Dawson is also dealing with a review of the terms and conditions of Mr. Jaballah's release from detention.

[3] In the meantime, Mr. Jaballah has brought a motion seeking “clarification of the conditions imposed by this Honorable Court on his release from detention”. By order of the Chief Justice, this motion was scheduled to be heard together with a similar motion brought by Mohamed Zeki Mahjoub, another individual who is the subject of a Security Certificate. A separate set of reasons is being issued simultaneously with this decision with respect to Mr. Mahjoub’s motion.

[4] Messrs. Jaballah and Mahjoub each assert that in purporting to monitor their compliance with the terms and conditions of their release, the Canada Border Service Agency has effectively imposed additional terms and conditions on them, which have not been judicially authorized. They further assert that the way in which the CBSA is monitoring their compliance with the terms and conditions of their release violates sections 7 and 8 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.

[5] It should be noted that this motion was heard on the basis of both affidavit evidence and *viva voce* testimony. Transcripts from other proceedings were also filed with the Court on the consent of the parties, as were all of the previous public decisions relating to Mr. Jaballah. The entire hearing in relation to this motion took place in public, on the basis of a public record. As was agreed to by the parties, the Court has not reviewed any of the evidence that has been received *in camera* in other proceedings.

I. Background

[6] While the proceedings involving Mr. Jaballah have a lengthy history, for the purpose of this motion it is only necessary to identify a few key facts.

[7] In August of 2001, Mr. Jaballah was detained on the basis of a security certificate signed by the then Solicitor General of Canada and Minister of Citizenship and Immigration, pursuant to the provisions of paragraph 40.1(3)(a) of the former *Immigration Act*.

[8] After lengthy proceedings in this Court, and in the Federal Court of Appeal, on October 16, 2006, Justice MacKay found there to be a reasonable basis for the opinion of the Ministers that Mr. Jaballah is inadmissible to Canada, on the grounds that “Mr. Jaballah was engaged in terrorist activities in Egypt in the 1980's, and after he left there in 1991 in international terrorist activities of the AJ [Al Jihad] and Al Qaida, particularly as a communicator between terrorist cells after he came to Canada; and further that Mr. Jaballah, by inference from the standing within AJ and other terrorist networks of the persons with whom he had contact after his arrival in Canada, was a member, with senior standing as a communicator among terrorist cells and persons of the AJ and of the Al Qaida network”: see *Re Jaballah*, 2006 FC 1230, at para. 69.

[9] On April 12, 2007, Justice Layden-Stevenson ordered that Mr. Jaballah be released from detention upon a number of terms and conditions: *Jaballah v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 379. Minor variations were made to these conditions by Justice Layden-

Stevenson in subsequent proceedings. The terms and conditions currently in effect for Mr. Jaballah are attached as an appendix to these reasons.

[10] As a result of the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (*Charkaoui #1*), it was determined that the procedure prescribed in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, for the judicial approval of Security Certificates was inconsistent with the Charter, and was thus of no force or effect. The Court's declaration was suspended for one year from the date of the judgment, so as to allow the government to make the necessary amendments to the Act.

[11] On February 22, 2008, a new Security Certificate was issued with respect to Mr. Jaballah. As was noted earlier, the reasonableness of this second Certificate is currently the subject of proceedings before Justice Dawson, who is also carrying out a further review of the conditions of Mr. Jaballah's release.

[12] On October 17, 2008, Mr. Jaballah brought the motion that is the subject matter of this decision. In his October 14, 2008 order scheduling the hearing of this matter (made in anticipation of the motion actually being filed), the Chief Justice expressed his concern that this motion not duplicate the proceedings before Justice Dawson, and that the judge hearing this motion not be called upon to encroach on matters before her.

II. The Issues on this Motion

[13] Mr. Jaballah has identified three areas of concern with respect to the conduct of the CBSA.

These relate to:

1. The opening of the mail addressed to Mr. Jaballah and his family members, the making and retention of photocopies of that mail, and the use that is made of these photocopies by the CBSA;
2. The taking of photographs of people coming into contact with Mr. Jaballah and his family, and the use that is made of those photographs by the CBSA; and
3. The constant and intrusive overt physical surveillance of Mr. Jaballah when he is on outings outside of the family home.

[14] Each of these issues will be considered in turn.

III. The Issues Relating to the Mail

[15] Amongst the other terms and conditions contained in Justice Layden-Stevenson's April 12, 2007 order releasing Mr. Jaballah from detention, was a condition requiring that he consent to the interception of his mail. The wording of the condition has since been amended slightly, but the essential terms of the condition remain unchanged.

[16] As of January 17, 2008, the condition provides that:

13. Prior to his release from detention, Mr. Jaballah and all of the adult persons who reside at the residence shall consent in writing to the interception, by or on behalf of the CBSA, of incoming and outgoing written communications delivered to or sent from the residence by mail, courier or other means. Prior to occupying the residence, any new occupant shall similarly agree to provide such consent. The

form of consent shall be prepared by counsel for the Ministers.

This condition remains in effect at this time.

[17] On October 10, 2007, Mr. Jaballah, along with his wife and adult son, signed a consent to the interception of their mail in the following terms:

We, the undersigned, hereby authorize the Canada Border Services Agency or anyone acting on its behalf to intercept incoming and outgoing written communications delivered to or sent from our residence by mail, courier or other means; to obtain any mail in the possession of the Canada Post Corporation destined to or originating from our residence; and to obtain anything in the possession of any commercial or private courier destined to or originating from our residence.

a) The Opening of all of the Mail

[18] Mr. Jaballah has objected to the fact that CBSA is opening *all* of the mail coming to both him and to his family members. While recognizing that Justice Layden-Stevenson's order permits the interception of the mail, counsel argued that the Court's condition should be subject to a "reasonableness standard".

[19] That is, correspondence such as that emanating from government sources, bank and credit card statements and the like, which, Ms. Jackman says, could in no way ever engage any justifiable concern on the part of CBSA, should not be opened.

[20] There is no suggestion in this case that there is any issue with respect to the interception of solicitor and client communications.

[21] In her reply submissions, Ms. Jackman did acknowledge that the interception of the mail addressed to Mr. Jaballah and his family was specifically authorized by Justice Layden-Stevenson, and was consented to by Mr. Jaballah and the adult members of his family. There is no limitation contained in Justice Layden-Stevenson's order as to which types of mail should or should not be opened. To now impose limitations on CBSA's ability to open certain types of mail, in the context of this motion, would result in the modification of one of the conditions of release imposed on Mr. Jaballah by Justice Layden-Stevenson. That is not the function of this Court on this motion, and I decline to do so.

[22] If Mr. Jaballah has concerns with respect to the types of mail that are being opened by the CBSA, it is open to him to raise the issue in the context of the review of the conditions of his release which is presently ongoing before Justice Dawson.

b) The Photocopying of the Mail, and the Use Being Made of the Copies by the CBSA

[23] At the time that this motion was initially brought, the concern was that the CBSA was making and retaining photocopies of all of the family's mail, while forwarding the original correspondence on to them.

[24] At some point after the completion of the first set of hearing days with respect to this motion, Mr. Jaballah and his counsel became aware of evidence adduced in proceedings before Justice Layden-Stevenson with respect to Mr. Mahjoub that significantly expanded the nature and depth of Mr. Jaballah's concerns with respect to the CBSA's treatment of the family's mail.

[25] On the resumption of the hearing of this motion, transcripts of the evidence of two CBSA witnesses who testified before Justice Layden-Stevenson were filed with the Court, on the consent of the parties. These witnesses were Philip Whitehorne and Mohammed Al-Shalchi.

[26] Mr. Whitehorne evidently testified *in camera* before Justice Layden-Stevenson. Redacted transcripts of his evidence were subsequently provided to counsel for Mr. Jaballah, and it was these redacted transcripts that were filed with the Court on this motion.

[27] Mr. Whitehorne is the Chief of Operations for CBSA's Northern Ontario Region. He is responsible for the management of the Immigration Enforcement Program, which is in turn responsible for the monitoring of Mohamed Harkat, an individual residing within the Northern Ontario Region who is himself the subject of a Security Certificate.

[28] Mr. Al-Shalchi is an Enforcement Supervisor at the Greater Toronto Enforcement Centre of the CBSA. He is responsible for supervising and implementing the terms and conditions of the court orders that govern both Mr. Mahjoub and Mr. Jaballah. Mr. Al-Shalchi also provided an

affidavit on behalf of the CBSA in this proceeding, and was cross-examined at some length before this Court.

[29] Mr. Whitehorne testified that a framework for the treatment of intercepted mail by the CBSA is set out in a National Manual. The Manual itself has not been produced to either Mr. Mahjoub or Mr. Jaballah, nor was it provided to the Court, as the CBSA has objected to its production on the grounds of national security.

[30] In the case of Mr. Harkat, Mr. Whitehorne explained that once the intercepted mail is received by the CBSA, it is reviewed at the regional office in an effort to identify any issues of risk, or any potential breach of any of the terms and conditions of Mr. Harkat's release. All of the mail is photocopied, and copies of the mail are then forwarded to the Counter-terrorism Unit in the National Security Directorate at CBSA's national headquarters.

[31] According to Mr. Whitehorne, the Counter-terrorism Unit is responsible for reviewing, from a strategic standpoint, any information that would suggest that any of the individuals being held on Security Certificates could pose a risk. He stated that the Counter-terrorism Unit would have greater expertise than the regional office with respect to strategic intelligence assessments.

[32] Mr. Whitehorne stated that it is his understanding that the CBSA's Counter-terrorism Unit would then analyse the photocopied mail in order to determine whether there were any discernable

patterns in the documents, or whether there was anything in the mail that could raise any question of risk to the supervising officers or to the public.

[33] Mr. Whitehorne also testified that it is CBSA's regional office that is responsible for monitoring Mr. Harkat, whereas one of the principle objectives of the Counter-terrorism Unit is the gathering of intelligence about the target, and the target's contacts.

[34] Mr. Al-Shalchi's evidence was largely consistent with that of Mr. Whitehorne. He explained that in the case of Messrs. Mahjoub and Jaballah, local CBSA Standard Operating Procedures stipulate that an inspection of the mail is to be carried out by officers at GTEC. The original mail is forwarded on to the addressees, and a record of the receipt and delivery of the mail is recorded in the CBSA'S Monitoring Activity Reporting System or "MARS". Two sets of photocopies of the mail are also made at GTEC.

[35] By making photocopies of the mail, GTEC is able to get the mail into the hands of the addressees more quickly than would otherwise be possible. Keeping copies of the mail at GTEC also assists in tracking mail, in the event that there is ever any question about correspondence that may have gone missing, and not been received by the addressee.

[36] According to Mr. Al-Shalchi, inland enforcement officers at GTEC carry out a "superficial" analysis of the mail. Because the officers at GTEC do not have expertise in intelligence analysis,

one set of photocopies is forwarded to the Manager of the Counter-terrorism Unit in Ottawa for analysis, with the other set of copies being retained at GTEC.

[37] Where Mr. Al-Shalchi and Mr. Whitehorne differ in their evidence is in relation to the purpose of the review of the mail that is carried out by the Counter-terrorism Unit in Ottawa. Mr. Whitehorne was of the view that one of the purposes of the Counter-terrorism Unit's analysis of the mail of individuals subject to Security Certificates was to gather intelligence about the target, and the target's contacts.

[38] In contrast, Mr. Al-Shalchi's understanding was that the mandate of the Counter-terrorism Unit was simply to monitor the subject's compliance with the terms and conditions of his release, particularly as it related to the potential for unauthorized communications.

[39] To this end, Mr. Al-Shalchi says that analysts in the Counter-terrorism Unit examine the mail, looking for patterns and trends that might not be immediately obvious in a more superficial inspection of the documents. Counter-terrorism Unit analysts also have experience with codes, which local GTEC officers do not. By retaining photocopies of the mail, Counter-terrorism Unit analysts would be able to go back and re-review earlier correspondence, in the event that a coded message is detected in later correspondence.

c) The Positions of the Parties with Respect to the Mail

[40] Messrs. Mahjoub and Jaballah acknowledge that they cannot assert section 8 Charter rights on behalf of the members of their family who are affected by CBSA's interception of the families' mail. As a result, the only issue before the Court is whether the copying of Messrs. Mahjoub and Jaballah's own mail, and the forwarding of copies of that mail to the CBSA's Counter-terrorism Unit in Ottawa violates their rights under section 8 of the Charter.

[41] Insofar as the photocopying of their own mail is concerned, Messrs. Mahjoub and Jaballah acknowledge that "interception", as the term is used in the context of the *Criminal Code*, R.S.C. 1985, c. C-46, contemplates the copying of the intercepted material. Indeed, they accept that some copying of their mail could be appropriate, where there are "reasonable and probable grounds to believe" or, alternatively, a "reasonable suspicion" that an unauthorized communication may have taken place, in contravention of the terms and conditions of their release.

[42] That said, Messrs. Mahjoub and Jaballah contend that there is nothing in the consents that they provided in compliance with the orders of Justice Mosley in Mr. Mahjoub's case, and Justice Layden-Stevenson, in the case of Mr. Jaballah, that contemplates the photocopying of all of their mail, and the retention of these copies by the CBSA. In such circumstances, and in the absence of any basis for believing that there has been a breach of a term or condition of a Court order, they submit that the making and retaining of copies of the mail amounts to an unauthorized seizure, contrary to the provisions of section 8 of the Charter.

[43] Moreover, Messrs. Mahjoub and Jaballah contend that the consents that they signed were provided for one purpose and one purpose only, namely to allow the CBSA to monitor their compliance with the terms and conditions of their release. Neither Mr. Mahjoub nor Mr. Jaballah ever consented to having his mail reviewed by the CBSA for intelligence gathering purposes.

[44] Messrs. Mahjoub and Jaballah say that the Canadian Security Intelligence Service is the government agency charged with statutory responsibility for intelligence gathering, not the CBSA. If the Government of Canada wishes to be able to gather additional intelligence in relation to either Mr. Mahjoub or Mr. Jaballah, it is open to CSIS to seek judicial authorization for such activities through the means provided for in sections 12 and 21 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23.

[45] Mr. McIntosh submits on behalf of the CBSA that what is being sought here in relation to the mail is not the “clarification” of the parameters of the terms and conditions imposed by this Court on Messrs. Mahjoub and Jaballah. Rather, Messrs. Mahjoub and Jaballah are seeking the amendment of those terms and conditions, so as to limit CBSA’s ability to photocopy the mail to certain specified situations: that is, when a specified threshold of suspicion has been satisfied.

[46] While acknowledging that the terms and conditions of Messrs. Mahjoub and Jaballah’s release do not explicitly authorize the CBSA to make photocopies of the mail, Mr. McIntosh argues that such a power can be implied, in light of all of the circumstances.

[47] The Court's orders do contemplate the CBSA reviewing the mail so as to ensure that there has been no unauthorized communication by either individual. Given the uncontradicted evidence of Mr. Al-Shalchi that GTEC does not have the necessary expertise to carry out a fulsome analysis of the intercepted mail, it is entirely reasonable, Mr. McIntosh argues, for copies of the mail to be sent to the section of the CBSA with the requisite expertise.

[48] This practice could actually operate to the benefit of Messrs. Mahjoub and Jaballah, says Mr. McIntosh, as it limits the possibility of there being a "rush to judgment" in relation to a potential breach by someone without sufficient expertise to make a proper assessment.

[49] Mr. McIntosh further submits that as the interception of Messrs. Mahjoub and Jaballah's mail has been specifically authorized by court order, neither man could have any reasonable expectation of privacy in relation to his mail. In the absence of such a reasonable expectation of privacy, there can be no breach of section 8 of the Charter.

[50] Mr. McIntosh also argues that a "bright line" cannot always be drawn between monitoring compliance with the terms and conditions of Messrs. Mahjoub and Jaballah's release, and intelligence gathering. In his submission, both activities are proper, as both relate to the question of whether either Mr. Mahjoub or Mr. Jaballah is inadmissible to Canada.

[51] Moreover, Mr. McIntosh says that the CBSA is empowered to carry out intelligence gathering as part of its mandate in relation to persons named in Security Certificates. As authority

for this proposition, he points to paragraph 113 of the decision of the Supreme Court of Canada in *Charkaoui #1*.

[52] That is, in *Charkaoui #1*, the Supreme Court discussed the factors to be considered by the Federal Court in the context of detention reviews. The Court identified the length of detention as a relevant consideration, observing that:

A longer period of detention would also signify that the government would have had more time to gather evidence establishing the nature of the threat posed by the detained person. While the government's evidentiary onus may not be heavy at the initial detention review [...], it must be heavier *when the government has had more time to investigate and document the threat*. [emphasis added]

[53] According to Mr. McIntosh, with this comment, the Supreme Court of Canada has invited “the government”, including the CBSA, to engage in intelligence gathering with respect to national security matters.

ANALYSIS

i) Is the CBSA Entitled to Photocopy the Mail?

[54] Section 8 of the Charter provides that “Everyone has the right to be secure against unreasonable search or seizure”. While I am satisfied that the making and retaining of photocopies of Messrs. Mahjoub’s and Jaballah’s mail amounts to a “seizure” within the meaning of section 8 of the Charter, it is not “unreasonable”, in light of all of the surrounding circumstances.

[55] First of all, as the Supreme Court of Canada observed in *Canada (Combiner Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145, while section 8 of the Charter protects the right of privacy, the guarantee against unreasonable search and seizure contained in section 8 only protects a reasonable expectation of privacy.

[56] Messrs. Mahjoub and Jaballah each acknowledge having consented to the interception of their mail for the purpose of enabling the CBSA to monitor their compliance with the terms and conditions of their release from detention. These terms and conditions were imposed by the Court for the purpose of ensuring that the threat to national security posed by each individual was neutralized.

[57] As such, neither Mr. Mahjoub nor Mr. Jaballah could have any reasonable expectation of privacy in relation to his mail, to the extent that the information contained in the correspondence is being utilized by the CBSA for the purpose of monitoring the threat posed by Messrs. Mahjoub and Jaballah, and their compliance with the terms and conditions of their release.

[58] Secondly, the making of photocopies is arguably implicitly authorized by the wording of the orders of Justice Mosley and Justice Layden-Stevenson, both of which authorized the “interception” of Messrs. Mahjoub and Jaballah’s mail upon receipt of consents signed by each individual. Indeed, Ms. Weaver conceded in argument that some photocopying of the mail was indeed authorized by the orders of the Court.

[59] In the provisions of the *Criminal Code* dealing with the invasion of privacy, the interception of communications is defined as including the recording or copying of the communication in question. By way of example, as it relates to the interception of private communications by the use of electro-magnetic, acoustic, mechanical or other devices, section 183 of the Code states that “intercept” includes “listen to, *record* or acquire a communication or acquire the substance, meaning or purport thereof” [emphasis added].

[60] Similarly, in relation to the Code provisions dealing with the unauthorized use of computers, section 342.1 defines “intercept” as “listen to or *record* a function of a computer system, or acquire the substance, meaning or purport thereof” [emphasis added].

[61] Finally, and in any event, there are a number of reasons why the making and retaining of photocopies of the mail is entirely reasonable, in all of the circumstances. Firstly, it allows for the timely forwarding of the mail to the Mahjoub and Jaballah families. This is especially important in light of complaints that have been received that delays in getting bills into the hands of those subject to security certificates and their families are having an adverse effect on the families’ credit ratings.

[62] Moreover, the Court’s orders allow the “CBSA” to intercept Messrs. Mahjoub and Jaballah’s mail. The interception power conferred by the orders is not limited to GTEC. Given the apparent lack of expertise at the GTEC office, it is reasonable for GTEC to forward photocopies of the mail to those within the CBSA with the necessary expertise to analyze the mail for the purposes

of ensuring that there has been no breach of any of the terms and conditions governing either Mr. Mahjoub's or Mr. Jaballah's release from detention.

[63] Retaining copies of the mail also allows for the tracking of mail that may not have been received by Messrs. Mahjoub and Jaballah, or their families, as occurred with respect to drug eligibility cards that had evidently gone astray. Keeping copies of the mail would also allow for a re-review of the mail by the CBSA, in the event that a code or pattern in the mail is subsequently detected.

[64] Lastly, the destruction of copies of the mail held by the CBSA could raise concerns insofar as the document retention requirements of the Government of Canada are concerned. The destruction of copies of the mail could also potentially give rise to fairness concerns in subsequent proceedings involving either Mr. Mahjoub or Mr. Jaballah: see *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] S.C.J. No. 39 (*Charkaoui #2*).

ii) What is the CBSA Entitled to do with the Photocopies of the Mail?

[65] Given that I am satisfied that the making and retaining of photocopies of Messrs. Mahjoub and Jaballah's mail does not breach section 8 of the Charter, the next question is whether there is any limitation on the use that the CBSA may make of the copies of the mail.

[66] In this regard, I agree with Messrs. Mahjoub and Jaballah that the consents that they provided to the CBSA in relation to the interception of their mail were limited in scope, and did not provide the CBSA with *carte blanche* to use their mail for any and all purposes.

[67] In coming to this conclusion, I would start by observing that contrary to the position of the CBSA in this matter, it is evident from a reading of paragraph 113 of *Charkaoui #1* that this portion of the Supreme Court of Canada's decision does not purport to confer authority on the Government of Canada to engage in intelligence gathering in the context of national security proceedings, where such authority might not otherwise exist.

[68] While the orders of Justices Mosley and Layden-Stevenson clearly authorize the CBSA's interception of Messrs. Mahjoub and Jaballah's mail, the orders are equally clear that such interception could only take place once Messrs. Mahjoub and Jaballah consented to it happening.

[69] I also note that the conditions imposed by Justices Mosley and Layden-Stevenson, including the condition relating to the interception of the mail, were imposed in the context of detention reviews, and were intended as a means of neutralizing the threat posed by the release of Mr. Mahjoub and Mr. Jaballah from custody.

[70] To this end, the terms and conditions imposed by the Court, including conditions such as those allowing for the interception of the mail, the monitoring of telephone calls, and the right to inspect Messrs. Mahjoub and Jaballah's homes were all clearly intended to provide the CBSA with

the ability to monitor the compliance of Messrs. Mahjoub and Jaballah with the terms and conditions of their release.

[71] There is nothing in any of the reasons or orders of either Justice Mosley or Justice Layden-Stevenson that would suggest that the terms and conditions imposed by the Court were also intended to provide an additional investigative tool to the CBSA to assist it in building its case against either Mr. Mahjoub or Mr. Jaballah in relation to the Security Certificate proceedings.

[72] Moreover, the fact that Messrs. Mahjoub and Jaballah have consented to the interception of their mail by the CBSA for the purpose of enabling the CBSA to monitor the threat that they pose and their compliance with the terms and conditions of their release from detention does not mean that they have waived their section 8 Charter rights in relation to their mail for all purposes.

[73] As the Supreme Court of Canada observed in *R. v. Dyment*, [1988] 2 S.C.R. 417, at paragraph 26, “the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent”.

[74] However, even if a person has consented to the giving up of property or information for one purpose, it does not follow that this consent will necessarily amount to an effective waiver of section 8 Charter rights for all purposes.

[75] By way of example, in *R. v. Wills*, (1992), 7 O.R. (3d) 337), the Ontario Court of Appeal found that the voluntary provision of a breath sample for the purposes of a Breathalyser analysis nevertheless amounted to an unlawful seizure, where the consent of the accused was vitiated by the non-disclosure or innocent mis-representation of material facts.

[76] In order for a consent to constitute an effective waiver of section 8 Charter rights, the Ontario Court of Appeal held that the following conditions had to be established by the Crown, on a balance of probabilities:

- (i) there was a consent, express or implied;
- (ii) the giver of the consent had the authority to give the consent in question;
- (iii) the consent was voluntary [...] and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
- (vi) the giver of the consent was aware of the potential consequences of giving the consent. (*Wills* at para. 69)

[77] It is the fourth and sixth of the *Wills* conditions that are at issue in this case.

[78] It should be noted that the *Wills* approach to the issue of effective waiver has been approved by the Supreme Court of Canada. That is, in *R. v. Borden*, [1994] 3 S.C.R. 145, the Supreme Court found that a blood sample voluntarily provided by a suspect in connection with one suspected sexual assault nevertheless amounted to an unlawful seizure in violation of section 8 of the Charter, where the sample was in fact used in connection with the investigation of a different sexual assault.

[79] In finding that the consent of the accused did not amount to an effective waiver of his section 8 Charter rights in relation to the blood sample for all purposes, the Supreme Court held that in order for a consent to amount to an effective waiver, the suspect must possess “the requisite informational foundation for a true relinquishment of the right”. That is, the ability to consent “requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful”: see *Borden*, at para. 34.

[80] As to the extent of the information that must be provided in order for a waiver of section 8 rights to be effective, the Supreme Court held in *Borden* that:

The degree of awareness of the consequences of the waiver of the s. 8 right required of an accused in a given case will depend on its particular facts. Obviously, it will not be necessary for the accused to have a detailed comprehension of every possible outcome of his or her consent. However, his or her understanding should include the fact that the police are also planning to use the product of the seizure in a different investigation from the one for which he or she is detained: at para. 40.

[81] Similarly, in *R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 55, the Supreme Court recognized that a consent to the taking of a blood sample could be limited to the taking of the blood for certain purposes only. Commenting on *Colarusso* in *Borden*, the Supreme Court recognized that “This concept reveals a link between the scope of a valid consent and the scope of the accused's knowledge in relation to the consequences of that consent”: see *Borden*, at para. 35.

[82] Implicit in the reasoning of the Supreme Court is that for a waiver of section 8 rights to be effective, knowledge of the purpose for which the search or seizure is sought to be made is a vital component of the “requisite informational foundation” necessary for there to be a true relinquishment of the right.

[83] A further example of where a consent given for one purpose was held not to amount to a waiver of section 8 rights for all purposes occurred in *R. v. Smith*, 1998 ABCA 418. In *Smith*, the Alberta Court of Appeal found that the warrantless search of the basement of a private home was unreasonable, even though the accused had consented to the police entering the first floor of his home to verify that an individual who had placed a 911 call was safe.

[84] In excluding the evidence obtained through the search of the basement, the Alberta Court of Appeal held that “Even if the entry onto the premises was legal, consent to entry was for a limited purpose, namely, to ensure the safety of the telephone complainant. This does not imply that a search of those premises for other purposes is allowable”: *Smith* at para. 8.

[85] I recognize that the cases discussed above are all criminal jurisprudence, whereas Messrs. Mahjoub and Jaballah's cases are not criminal proceedings. However, having regard to the significant liberty interests that are engaged in Security Certificate proceedings, and the fact that the failure to comply with the terms and conditions of their release could amount to a criminal offence, I am satisfied that it is appropriate to draw an analogy to the law that has developed in the criminal context in determining what is required for there to be an effective waiver of section 8 Charter rights in the present cases.

[86] The consents provided in the cases of Messrs. Mahjoub and Jaballah were provided for the purpose of allowing the CBSA to monitor the threat that each posed to national security, and their compliance with the terms and conditions of their release.

[87] Mr. Al-Shalchi candidly acknowledged in his testimony that neither Mr. Mahjoub nor Mr. Jaballah was ever told that his mail was being sent to the CBSA's Counter-terrorism Unit in Ottawa. Nor is there any evidence that either man was ever made aware that his mail could be scrutinized by the CBSA for the purpose of gathering intelligence, or for any other purpose.

[88] As a consequence, in the event that the CBSA is indeed using the mail of Messrs. Mahjoub and Jaballah for purposes beyond the monitoring of the threat that either man poses to national security, or their compliance with the terms and conditions of their release - a question that will be addressed in the next section of these reasons - such use would be unauthorized, and would violate the section 8 rights of the two individuals.

[89] Mr. McIntosh points out that both Mr. Mahjoub and Mr. Jaballah have been represented by experienced counsel throughout these proceedings, and that their counsel was actually involved in the drafting of the consents. According to Mr. McIntosh, it was incumbent on Messrs. Mahjoub and Jaballah to put limitations on the consents that they signed, if they did not intend that the consents be open-ended.

[90] I do not agree.

[91] Although the interception of the mail was specifically contemplated by the orders of Justices Mosley and Layden-Stevenson, the CBSA's ability to intercept the mail was made contingent upon the provision of the consents of Messrs. Mahjoub and Jaballah. Absent such consent, or subsequent specific judicial authorization, the CBSA has no power to do anything in relation to Messrs. Mahjoub and Jaballah's mail.

[92] The fact that Messrs. Mahjoub and Jaballah may have been assisted by counsel in relation to the execution of the consents does not assist the CBSA. The advice of counsel can only be as good as the information upon which it is based.

[93] While Messrs. Mahjoub and Jaballah do undoubtedly have a greatly diminished expectation of privacy with respect to their mail in light of the consents that they have signed, they have not relinquished all of their privacy rights in their mail for all purposes. They have most certainly relinquished their section 8 rights so as to allow for monitoring by CBSA of the threat that each

poses, as well as their compliance with the terms and conditions of their release. However, they have not been provided with a sufficient informational foundation as to enable them to provide an effective waiver of their section 8 rights in relation to their mail for any other purpose.

[94] The next question, then, is whether the CBSA has in fact been subjecting Messrs. Mahjoub and Jaballah's mail to a form of scrutiny that has been neither judicially authorized, nor consented to by either individual.

iii) Has CBSA's Treatment of the Mail Gone Beyond What is Authorized by the Consents?

[95] For the reasons that follow, I am not prepared to make any finding as to whether the CBSA is in fact exceeding its authority in relation to its treatment of Messrs. Mahjoub and Jaballah's mail.

[96] This motion proceeded in a somewhat unusual fashion. Counsel originally asked that the affidavits filed in support of the motion be treated as the deponents' evidence in chief, that the deponents be allowed to provide *viva voce* evidence to update information in relation to the matters covered by their affidavits, and that each deponent be made available for cross-examination at the hearing.

[97] While the hearing of this motion was ongoing, the motion to vary the terms and conditions of Mr. Mahjoub's release was also proceeding before Justice Layden-Stevenson. As was mentioned earlier, it was in the course of the proceedings before Justice Layden-Stevenson that additional

information emerged through the testimony of Messrs. Whitehorne and Al-Shalchi as to what it was that the CBSA was actually doing with the photocopies of Messrs. Mahjoub and Jaballah's mail.

[98] The parties then filed 10 volumes of transcript with the Court of testimony given by Messrs. Whitehorne and Al-Shalchi in the hearing before Justice Layden-Stevenson, to be considered as evidence on this motion. As was noted earlier, portions of Mr. Whitehorne's *in camera* evidence were redacted from the transcripts, and were not provided to counsel for Messrs. Mahjoub and Jaballah or to the Court on this motion.

[99] I have previously identified the conflict in the evidence of Messrs. Whitehorne and Al-Shalchi with respect to the purpose of the review of Messrs. Mahjoub and Jaballah's mail that is carried out by CBSA's Counter-terrorism Unit in Ottawa.

[100] In the course of hearing this motion, I expressed my concern to the parties as to the way in which this matter had unfolded and the potential for overlap in the issues before me, and the matters currently before Justice Dawson, in the case of Mr. Jaballah, and, in particular, before Justice Layden-Stevenson in the case of Mr. Mahjoub. Indeed, the parties acknowledged the very difficult position in which the Court had been placed in relation to this motion.

[101] These difficulties are graphically illustrated by the fact that mid-way through Mr. McIntosh's closing submissions, I was advised by counsel that Elizabeth Snow, the Manager of the Counter-terrorism Unit at CBSA's national headquarters, had since given evidence before Justice

Layden-Stevenson, both in public and *in camera*, with respect to the work of the Counter-terrorism Unit, as it relates to its review of the intercepted mail.

[102] Surely no one would be better positioned to advise the Court of what it is that the CBSA's Counter-terrorism Unit is actually doing with Messrs. Mahjoub and Jaballah's mail than the Manager of the Counter-terrorism Unit herself.

[103] However, Ms. Snow's evidence was not put before me on this motion. As a result, I am now being asked to resolve a conflict in the evidence and to make factual findings based upon an incomplete evidentiary record. My concerns in this regard are amplified by the fact that any findings that I may make in this regard could have significant consequences in relation to the proceedings before Justice Dawson and Justice Layden-Stevenson.

[104] Given that the evidentiary record before me in relation to this issue is incomplete, I am not prepared to make a finding as to whether CBSA has in fact exceeded its authority in the way that it has handled the mail. That question is better determined by the judges dealing with the variation or review of the terms and conditions of Messrs. Mahjoub and Jaballah's release, on the basis of a complete evidentiary record.

iv) Conclusion With Respect to the Issues Relating to the Mail

[105] In summary, I find that:

1. The CBSA is entitled to open all of the mail addressed to either Mr. Mahjoub or Mr. Jaballah;
2. The CBSA is entitled to make and retain photocopies of Mr. Mahjoub's and Mr. Jaballah's mail, for the purpose of monitoring the threat to national security posed by each individual, and their compliance with the terms and conditions of their release;
3. Neither the orders of Justices Mosley and Layden-Stevenson, nor the consents signed by Messrs. Mahjoub and Jaballah, authorize the CBSA to use Messrs. Mahjoub and Jaballah's mail for any other purpose;
4. No finding is made as to whether the CBSA has in fact exceeded its authority in the way that it has handled the mail.

IV. The Issues Relating to the Taking of Photographs

[106] Mr. Jaballah asserts that the CBSA regularly takes photographs of both himself and members of his family while they are outside of their home. He also complains that the CBSA takes pictures of third parties who come into contact with either himself or with members of his family.

[107] By way of example, Mr. Jaballah testified that on August 30, 2007, the day that the family was moving to a new home, CBSA officers stood outside the family home taking photographs of individuals helping to move the family's household effects.

[108] Mr. Jaballah also referred in his evidence to an incident on October 1, 2008, when CBSA officers took photographs of Mr. Jaballah and his family as they were leaving the family home in order to attend Eid celebrations. According to Mr. Jaballah, the officers stopped only when Ali Jaballah, Mr. Jaballah's 13 year old son, approached the officers and asked them what they were doing.

[109] Ali Jaballah testified before the Court, and provided additional detail with respect to the October 1, 2008 incident. According to Ali, as he and one of his brothers were leaving their house, they encountered CBSA officers taking their pictures. Ali says that he started yelling at the officers, asking them why they were taking the photographs. The commotion led Mr. Jaballah to come running out of his home, whereupon he asked the CBSA officers why they were taking photographs. The officer evidently put the camera down at that point, and Mr. Jaballah and his sons left the home in the family car to attend the Eid celebration.

[110] Mr. Jaballah accepts that CBSA should be able to take photographs from time to time in order to document a suspected breach of any of the terms or conditions of his release. I also understand him to accept that the CBSA may need to take photographs of locations that have been proposed as possible sites for family outings. However, Mr. Jaballah maintains that the Court's orders do not allow the CBSA to intrude on his life, and the lives of his family members, by taking photographs in circumstances where there is no reason to suspect that any term or condition of his release is being breached.

[111] According to Mr. Jaballah, the personal and corporeal privacy of the members of his family are regularly being compromised through the taking of their pictures. Whatever discretion the CBSA may have under the *Immigration and Refugee Protection Act* in relation to the monitoring of Mr. Jaballah is limited, he says, by Article 17 of the *International Covenant on Civil and Political Rights*, December 1966, 999 U.N.T.S. 171. That is, Mr. Jaballah argues that the CBSA's discretion to take photographs cannot be exercised in a way that unreasonably infringes his family life, his home and his privacy.

[112] Moreover, Mr. Jaballah submits that if the taking of photographs has a sufficiently negative impact on his family, and if the conduct of the CBSA in this regard is sufficiently oppressive, it could amount to a violation of his own rights under sections 7 and 8 of the Charter.

[113] Mr. Jaballah also objects to the CBSA taking photographs of individuals coming into contact with members of his family. Many of these individuals are members of the Muslim community, and the photographs in question are taken in the context of cases involving allegations of Islamic terrorism. Ms. Jackman argues that the cases of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin demonstrate the terrible consequences that can flow from government over-reaction and inappropriate information-sharing.

[114] Mr. Jaballah's concerns with respect to the taking of photographs of third parties is heightened by the fact that copies of all of the photographs taken by the CBSA are stored on a computer database, and that copies of the photographs are also transmitted to the CBSA in Ottawa.

While Mr. Al-Shalchi was unclear as to whether the photographs were sent to the Counter-terrorism Unit or to “policy people”, his understanding was that both the Counter-terrorism Unit and the “policy people” in Ottawa are sent copies of the photographs.

[115] Mr. Al-Shalchi testified that the CBSA has over 500 photographs relating to Mr. Jaballah. He says that he has reviewed approximately half of these, and that there is a significant amount of duplication in the photographs. That is, the total number of photographs includes multiple copies of the same photographs.

[116] According to Mr. Al-Shalchi, approximately two thirds of the photographs are of places, such as proposed outing locations, or are of equipment, while the remaining photographs are of Mr. Jaballah and members of his family.

[117] Mr. Al-Shalchi further stated that CBSA officers have been instructed not to take photographs of Mr. Jaballah and his family while they are on outings, unless the officers perceive a potential breach of any of the terms and conditions governing Mr. Jaballah’s release.

ANALYSIS

[118] Mr. Jaballah asserted in his memorandum of fact and law that a warrant should be required in order for the CBSA to be able to take any photographs of him, whether inside or outside of his home. However, given Ms. Jackman’s concession in argument that the CBSA is indeed entitled to

take photographs in several different circumstances, I do not understand her to be pursuing this argument.

[119] That is, it is acknowledged that the CBSA is entitled to take photographs inside the Jaballah home, when the CBSA is exercising the right of entry specified in the terms and conditions of Mr. Jaballah's release from detention. Ms. Jackman also accepts that the CBSA is entitled to take photographs in order to document something or someone that may involve a breach of any of the terms and conditions of Mr. Jaballah's release. Finally, it is conceded that the CBSA may take photographs of public places while scouting out potential venues for outings, when Mr. Jaballah and his family are not present.

[120] Fifty-one photographs relating to Mr. Jaballah have been entered into evidence in this proceeding, apparently taken on five different occasions. Almost all of the photographs are of Mr. Jaballah, members of his family or third parties. Different issues arise in relation to different categories of photographs. As a consequence, I will deal with each category of photographs separately, starting with the August 30, 2007 photographs of the family's move.

i) The August 30, 2007 Photographs of Those Assisting with the Jaballah Move

[121] Twenty two of the fifty photographs that have been provided to the Court are pictures of at least three different young men standing outside the Jaballah home, or in a moving van parked nearby. An unidentified older gentleman also appears in a couple of the photographs. Some of the

Jaballah children appear in certain of the photographs along with the unidentified individuals, and Mr. Jaballah himself appears in one photograph along with unidentified young men.

[122] As I understand Mr. Jaballah's concern with respect to these photographs, it is that individuals assisting the family in their move could end up having their photographs sent to the Counter-terrorism Unit within the CBSA, with all of the potential ramifications that this may entail.

[123] Mr. Al-Shalchi could not state with certainty why these photographs were taken. He did, however, say that there may have been a concern that some of the people entering the Jaballah residence in the course of the move were not approved visitors. While it was put to Mr. Al-Shalchi in cross-examination that at least one of the individuals in question was actually an approved visitor, he could not confirm this, and there is no evidence before me that this was in fact the case.

[124] Condition 9 of the terms and conditions of Mr. Jaballah's release prohibits anyone from entering the Jaballah residence who is not identified in the Condition, or who has not obtained the prior approval of the CBSA. As a result, unidentified individuals entering the residence could potentially give rise to a concern as to a potential breach of conditions. I am therefore not persuaded that there was anything inappropriate in CBSA taking these photographs.

[125] Moreover, and without accepting that a photograph taken of an individual in a public place could give rise to a violation of either section 7 or section 8 Charter rights, I agree with Mr. McIntosh that Mr. Jaballah cannot rely on the potential breach of a third party's Charter rights in

seeking relief on his own behalf. A claim for relief under subsection 24 of the Charter can only be advanced by the person whose Charter rights have been infringed: see, for example, *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45.

ii) *The May 24, 2008 Pictures of Mr. Jaballah and Mr. Dawud*

[126] There are five photographs of Mr. Jaballah walking with an individual who has since been identified as Mohammed Aberra Dawud, a court-approved surety and supervisor.

[127] According to Mr. Al-Shalchi, in the course of an emergency visit to the hospital for one of the Jaballah children, Mr. Jaballah was observed walking with an individual who was unknown to the CBSA officers observing him. As the officers were concerned about a potential breach of conditions, photographs were taken.

[128] Mr. Al-Shalchi explained that the CBSA does not have photographs of every court-approved supervisor to refer to in order to confirm the identity of those accompanying Mr. Jaballah. Although he testified that he believed that these were the first photographs taken of Mr. Dawud, it appears that the CBSA was in fact in possession of photographs of Mr. Dawud taken some months earlier.

[129] Mr. Al-Shalchi further stated that upon observing Mr. Jaballah with an unknown individual, the officers contacted Mr. Al-Shalchi by telephone to alert him to their concerns. Mr. Al-Shalchi in turn contacted Mr. Jaballah's wife, Husnah Al Mashtouli, in order to ascertain who it was that was

accompanying Mr. Jaballah. When Ms. Al Mashtouli explained that Mr. Jaballah was with Mr. Dawud, that was the end of the matter as far as Mr. Al-Shalchi was concerned.

[130] Given that the photographs were taken to document a perceived potential breach of the terms and conditions of Mr. Jaballah's release, I am of the view that it was appropriate for the CBSA to have taken the pictures in question. That said, it would most certainly be helpful if the CBSA officers responsible for monitoring Mr. Jaballah were to familiarize themselves with the appearance of all of the approved supervisors, so as to avoid potential confusion of this nature in the future.

iii) The October 1, 2008 Photographs

[131] Mr. Jaballah and his son Ali each testified that photographs were taken by the CBSA on October 1, 2008, as the Jaballah family was preparing to leave their home to attend Eid celebrations.

[132] Mr. Jaballah acknowledged that his son Ahmed's driver's license was suspended for a period of time, although he says that it had since been reinstated. Mr. Jaballah refused to say whether Ahmed had ever driven his car while his license was under suspension. He did, however, assert that Ahmed was not with the family on October 1, 2008.

[133] It will be recalled that Ali Jaballah had indicated that he was photographed with one of his brothers, as they were leaving their home. He did not identify which brother it was that was accompanying him.

[134] Only one photograph taken that day was entered into evidence in this proceeding. The photograph is of the back of the Jaballah vehicle, which is being driven down a road. One cannot see who was in the car, or who was driving. On the back of the photograph is a record of the date, and the notation “Ahmed driving w/ suspended licence”. No questions were asked of any witness with respect to this photograph.

[135] In light of the equivocal nature of the evidence on this point, I am not prepared to make any finding in this regard, other than to observe that it would be reasonable for the CBSA to take photographs in order to document potentially unlawful behaviour on the part of one of the court-appointed supervisors.

iv) The October 3, 2008 Photographs

[136] A series of nine photographs taken on October 3, 2008 were also introduced into evidence. Counsel for Mr. Jaballah took issue with three of the photographs, which depict a woman leaning towards the Jaballah van, evidently speaking to someone inside the vehicle. There is also a fourth photograph of the woman in question, which does not include the van. The photographs appear to have been taken near a school.

[137] There does not appear to be any dispute that Mr. Jaballah was in the vehicle at the time. While counsel suggested to Mr. Al-Shalchi that the woman was speaking to Ms. Al Mashtouli, and not to Mr. Jaballah, Mr. Al-Shalchi was unable to confirm this, and there is no evidence before me that this was in fact the case.

[138] Condition 8 (ii) of the terms and conditions governing Mr. Jaballah's release from detention authorizes Mr. Jaballah to leave his home each day, in the company of an approved supervisor, for the purpose of taking his children to school in the morning and picking them up in the afternoon, where it is necessary for him to do so because there is no one available to supervise Mr. Jaballah in his home.

[139] Condition 8 (ii) further requires that Mr. Jaballah must go directly to and from the schools, and that he "not enter into contact with any person en route".

[140] An unidentified individual speaking to people inside the Jaballah van could potentially constitute an unauthorized communication, thus giving rise to concerns as to a potential breach of the conditions of Mr. Jaballah's release. As a consequence, I am not persuaded that there was anything inappropriate in CBSA taking these photographs.

v) ***The Photographs Taken Outside the Mosque***

[141] The remaining 13 photographs were taken on two occasions in late 2007. Both sets of photographs were taken in the parking lot outside of Mr. Jaballah's mosque, and record a number of men, including Mr. Jaballah, leaving the Mosque. In one set of photographs, Mr. Jaballah appears to be accompanied by Mr. Dawud, and in the second set he is accompanied by his son Ahmed.

[142] Mr. Al-Shalchi stated that the photographs of Mr. Jaballah with Ahmed may have been taken because of concerns with respect to the plastic bags that Mr. Jaballah was carrying at the time.

According to Mr. Al-Shalchi, if Mr. Jaballah were seen bringing a bag back from an outing, this could indicate a breach of condition.

[143] There is no indication that Mr. Jaballah had the bags in question with him when he entered the Mosque. As a consequence, the presence of the bags could signify an unauthorized communication with a third party, in breach of the terms and conditions of Mr. Jaballah's release from detention. As a consequence, I am satisfied that it was reasonable for the CBSA to have taken the photographs of Mr. Jaballah with Ahmed.

[144] No explanation has been provided as to why CBSA felt that it was necessary to take the photographs of Mr. Jaballah with Mr. Dawud. That said, what is in issue are six photographs, all taken on one occasion. All of the photographs were taken in a public place, and all appear to have been taken from some distance from the pair. Moreover, it does not appear that either Mr. Jaballah or Mr. Dawud was even aware that photographs were being taken. In these circumstances, I cannot find that the conduct of the CBSA is sufficiently intrusive or oppressive as to give rise to a violation of any rights on the part of Mr. Jaballah.

vi) Final Comments Regarding the Photographs

[145] Before leaving the subject of the photographs of Mr. Jaballah and his family, I would note that Mr. Al-Shalchi testified before Justice Layden-Stevenson that while the taking of photographs is left to the discretion of individual CBSA officers, these officers have recently been instructed that the taking of photographs of the Mahjoub family should be "more reflective of situations that would

constitute a breach” of the terms and conditions that have been imposed upon Mr. Mahjoub. These instructions presumably apply in the case of Mr. Jaballah and his family as well.

[146] Indeed, before me, Mr. Al-Shalchi testified that CBSA officers have been instructed not to take photographs of Mr. Jaballah and his family while they are on outings, unless the officers perceive a potential breach of any of the terms and conditions governing Mr. Jaballah’s release.

[147] Limiting the photographing of Mr. Jaballah and the members of his family to such situations may go some distance towards reducing the tension that has clearly built up between the Jaballah family and the CBSA over recent months.

V. The Physical Surveillance of Mr. Jaballah

[148] Mr. Jaballah’s final area of concern relates to the regular and overt physical surveillance that is being carried out by CBSA officers when he is away from his home on outings. While accepting that some physical surveillance on the part of the CBSA is appropriate, Mr. Jaballah submits that none of the terms and conditions imposed by this Court in relation to his release from detention authorize the CBSA to carry out physical surveillance of the type that is actually taking place.

[149] Mr. Jaballah testified to the deleterious effect that the conduct of the CBSA is having on himself and on the members of his family. Two of Mr. Jaballah’s children – his daughter, Afnan, and his son, Ali – also testified to the intrusiveness of the CBSA’s conduct in this regard.

[150] It is true that none of the terms and conditions that have been imposed by the Court governing Mr. Jaballah's release from detention make specific reference to the carrying out of physical surveillance by the CBSA. This may be explained in part by the fact that the primary focus of these terms and conditions is the limitations and obligations that are being imposed on Mr. Jaballah himself.

[151] A further explanation for the fact that the terms and conditions of Mr. Jaballah's release do not make explicit reference to the use of physical surveillance by the CBSA is the fact that, as a general rule, physical surveillance does not require prior judicial authorization: see *Cody v. R.*, 2007 QCCA 1276, at para. 26.

[152] Moreover, a review of the reasons provided by the Court in proceedings relating to Mr. Jaballah's release from detention make it clear that the Court contemplated that Mr. Jaballah's activities would be monitored by the CBSA through the use of physical surveillance, amongst other means.

[153] In her decision releasing Mr. Jaballah from detention, Justice Layden-Stevenson expressed very serious reservations with respect to the reliability of Ms. Al Mashtouli as a supervisor for Mr. Jaballah, observing that while she did not expect Ms. Al Mashtouli to be objective, "I need to be able to trust her to properly supervise Mr. Jaballah to ensure his compliance with the conditions of release. My capacity to repose such trust in her is severely compromised": See *Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 379, at para. 64.

[154] I note that Mr. Jaballah confirmed in his testimony before this Court that Ms. Al Mashtouli acts as his primary supervisor when he is outside the home, although he is accompanied by other individuals from time to time.

[155] Despite her reservations, Justice Layden-Stevenson nevertheless went on to find that “Onerous conditions will go a long way to counter-balance the supervisory deficiency. 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. This constitutes a continuing threat”: see *Jaballah*, cited above, at para. 69.

[156] In a subsequent review of the terms and conditions of Mr. Jaballah’s release, Justice Layden-Stevenson observed that it was evident from the restrictive nature of the conditions that she had previously imposed, together with her reasons in relation to Mr. Jaballah's previous detention review, that neutralization of the risk that he posed “requires strict monitoring of Mr. Jaballah and his activities. The monitoring requirement is not disproportionate to the threat: see *Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 9, at para. 46.

[157] Justice Layden-Stevenson then considered Mr. Jaballah’s request that he be allowed out of his home to teach at an Islamic school. In discussing the problems that had been experienced with Mr. Jaballah’s GPS system during previous outings, Justice Layden-Stevenson observed that while there had been difficulties in this regard, the CBSA “has been able to compensate for those difficulties through physical surveillance”: at para. 48.

[158] Moreover, Justice Layden-Stevenson clearly contemplated that physical surveillance by the CBSA would be a regular occurrence in relation to Mr. Jaballah's outings, observing that "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": at para. 48.

[159] In rejecting the Ministers' request that Mr. Jaballah be prohibited from entering any area where CBSA deemed that electronic monitoring would be ineffective, Justice Layden-Stevenson discussed past problems with the GPS signal, once again observing that the "CBSA has compensated for this frailty through physical surveillance": at para. 131.

[160] Finally, a review of Justice Layden-Stevenson's reasons as a whole make it clear that she has vested considerable discretion in the CBSA in relation to the issue of physical surveillance as an adjunct to other means of monitoring the compliance of Mr. Jaballah with the terms and conditions of his release.

[161] It is common ground that conditions governing the release from detention of individuals subject to Security Certificates must not be disproportionate to the nature of the threat: see *Charkaoui #1*, at para. 116.

[162] While I am not being asked to craft suitable terms and conditions of release in this case, I am being asked to determine whether the way in which the CBSA is carrying out its physical

surveillance of Mr. Jaballah and his family violates his rights under section 7 of the Charter, and if so, whether the conduct of the CBSA is saved by section 1. This also requires a balancing of Mr. Jaballah's liberty interests against state interests in national security.

[163] The terms and conditions imposed by the Court governing Mr. Jaballah's release from detention were carefully tailored by Justice Layden-Stevenson in order to address the risks identified by her, based upon her review of the totality of the evidentiary record, a review which included the consideration of the evidence received *in camera*. Similarly, the review of the conditions of Mr. Jaballah's release that is currently underway before Justice Dawson will take place on the basis of a complete evidentiary record.

[164] I agree with Mr. McIntosh that I am not well positioned to determine whether the conduct of the CBSA as it relates to the conduct of its physical surveillance of Mr. Jaballah is so intrusive and so disproportionate as to amount to a violation of Mr. Jaballah's Charter rights. Such a determination requires an understanding and assessment of the evidence as to the nature and extent of the threat that Mr. Jaballah may represent.

[165] This is, in my view, a determination best made on a consideration of the complete evidentiary record. Indeed, as the Supreme Court of Canada has repeatedly observed, Charter questions should not be decided in the absence of a proper evidentiary record: see, for example, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 80; *R. v. Kang-Brown*, 2008 SCC 18, at para. 16; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at para. 8 and following.

[166] I would also note that in *Charkaoui* #1, the Supreme Court of Canada clearly contemplated that the determination of whether conditions of release were being misused or abused was one that would be made in the context of a review of conditions such as that which is currently ongoing before Justice Dawson. In this regard, the Court observed at paragraph 117 of its decision that:

[T]here must be detention reviews on a regular basis, at which times the reviewing judge should be able to look at all factors relevant to the justice of continued detention, including the possibility of the *IRPA*'s detention provisions being misused or abused. Analogous principles apply to extended periods of release subject to onerous or restrictive conditions: these conditions must be subject to ongoing, regular review under a review process that takes into account all the above factors, including the existence of alternatives to the conditions.

[167] For these reasons, I decline to make any findings with respect to the conduct of the CBSA in relation to the issue of physical surveillance.

VI. Order

[168] In the event that the parties require that an order issue in relation to these reasons, brief submissions in writing may be filed with respect to the form that the order should take.

“Anne Mactavish”

Judge

Ottawa, Ontario
January 15, 2009

APPENDIX

SCHEDULE "A"

to the

Order dated January 17, 2008

in

MAHMOUD ES-SAYYID JABALLAH

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

DES-04-01

CONDITIONS RESPECTING THE RELEASE OF MR. JABALLAH

1. Mr. Jaballah is to be released from detention on condition that he sign a document, to be prepared by his counsel and to be approved by counsel for the Ministers, in which he agrees to comply strictly with each of the terms and conditions that follow.
2. Mr. Jaballah, before his release from custodial detention, shall be fitted with an electronic monitoring device as will be, from time to time, arranged by the CBSA, along with a tracking unit. Thereafter, Mr. Jaballah shall wear the monitoring device at all times and shall not tamper with the monitoring device or the tracking unit or allow them to be tampered with. Where for medical reasons a qualified medical doctor directs that the electronic monitoring device must be removed, the CBSA shall be notified beforehand and shall arrange for its removal as well as for Mr. Jaballah's supervision while it is removed. Mr. Jaballah shall consent to the installation by CBSA in the residence specified below of a separate dedicated land-based telephone line meeting the CBSA's requirements to allow effective electronic monitoring. Mr. Jaballah shall consent to the disabling as necessary of all telephone features and services for such separate dedicated land-based telephone line. Mr. Jaballah shall follow all instructions provided to him regarding the use of the monitoring equipment and any other requirement necessary for the proper and complete functioning of the electronic monitoring equipment and system.
3. Mr. Jaballah shall allow for the installation of video surveillance equipment at all entrances to the property. The CBSA shall install and test the necessary equipment and shall report to the Court, within 10 days of the date of this Order, as to whether it is satisfied that the equipment is functioning properly and that all requirements to initiate electronic monitoring have been completed.
4. Prior to Mr. Jaballah's release from detention, the sum of \$43,250.00 is to be paid into Court pursuant to Rule 149 of the *Federal Courts Rules* and is to be paid by the following persons:

Ahmed Jaballah	\$ 3,000.00
Mubarach Adan	\$ 1,000.00
Jamal Azawi	\$10,000.00
Mahmoud Idris	\$ 2,000.00
James Loney	\$ 250.00
Hayat Mabruk	\$ 4,000.00
Adel Qablawi	\$10,000.00
John Valleau	\$ 5,000.00
Ahmad Shehab	\$ 5,000.00
Remzi Bekri	\$ 3,000.00

In the event that any term of the order releasing Mr. Jaballah is breached, the Ministers may seek an order that the full amount, plus any accrued interest, be paid to the Attorney General of Canada.

5. Prior to Mr. Jaballah's release from custodial detention, the following persons shall execute performance bonds by which they agree to be bound to Her Majesty the Queen in Right of Canada in the amounts specified below. The condition of each performance bond shall provide that if Mr. Jaballah breaches any terms or conditions contained in the order of release, as it may from time to time be amended, the sums guaranteed by the performance bonds shall be forfeited to Her Majesty. The terms and conditions of the performance bonds shall be provided to counsel for Mr. Jaballah by counsel for the Ministers and shall be in accordance with the terms and conditions of guarantees provided pursuant to section 56 of the *Immigration and Refugee Protection Act*. Each surety shall acknowledge in writing having reviewed the terms and conditions contained in this order, and shall indicate, in particular, his or her understanding of this condition.

i) Mubarach Adan	\$ 5,000.00
ii) Mahmoud Idris	\$ 5,000.00
iii) Raza Mohammad	\$ 5,000.00
iv) Adel Qablawi	\$10,000.00
v) Mohammed Aberra Dawud	\$ 6,000.00
vi) Adnan Srajeldin	\$20,000.00
vii) John Valleau	\$ 5,000.00

6. Upon his release from detention, Mr. Jaballah shall be taken by the RCMP (or such other agency as the CBSA and the RCMP may designate), and he shall thereafter reside at, _____ in the City of Toronto, Ontario (the residence) with Husnah Al Mashtouli, his wife, and his sons, Ahmad, Al Munzir, Osama and Ali, and his daughter, Afnan. In order to protect the privacy of those individuals, the address of the residence shall not be published within the public record of this proceeding. Except for a medical emergency or as otherwise provided in this order, Mr. Jaballah shall remain in such residence at all times. Mr. Jaballah is not to be left alone in the residence. That is, at all times when he is in the residence, either Husnah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud,

Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen, or Raza Mohammad must also be in the residence. The term “residence” as used in these conditions refers exclusively to the dwelling house and does not include any outside space associated with it.

7. Between the hours of 8:00 a.m. and 9:00 p.m., Mr. Jaballah may exit the residence but he shall remain at all times within the boundary of any outside space associated with the residence (that is, the front or backyard). He must at all times be accompanied by either Husnah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen, or Raza Mohammad. While in the yard, he may meet only with persons referred to in paragraph 9 below. This restriction does not apply to casual greetings to neighbours. Mr. Jaballah may not speak to other persons who may be visiting the neighbours unless they are persons otherwise authorized to visit or supervise Mr. Jaballah.
8. Mr. Jaballah may, between the hours of 8:00 a.m. and 9:00 p.m.:
 - i) with the prior approval of the CBSA, leave the residence five times per week, for a duration not to exceed five hours on each absence, so long as he remains within the perimeter determined pursuant to paragraph 10(i) below . Requests for such approval shall be made on a weekly basis with not less than 72 business hours notice for the following week’s absences and shall specify the location or locations that Mr. Jaballah wishes to attend as well as the times when he proposes to leave and return to the residence. If such absences are approved, Mr. Jaballah shall, prior to leaving the residence and immediately upon his return to the residence, report as more specifically directed by a representative of the CBSA. The CBSA may consider special requests by Mr. Jaballah to extend one of the weekly absences to go on a family outing that exceeds 4 hours (*sic*), so long as such outing would be within the perimeter determined pursuant to paragraph 10(i). Mr. Jaballah may be permitted to go on such an outing up to 3 times per month. Such requests must be made to the CBSA at least one week in advance of the proposed family outing. CBSA, in its discretion and where it considers it appropriate to do so, may extend the above-noted hours beyond 9:00 p.m.;
 - ii) leave the residence on a school day between the hours of 8:00 – 9:30 a.m. and/or 3:00 – 4:30 p.m. in the company of Husnah Al Mashtouli, Ash Shaymaa Es Sayyid or Ahmad Jaballah to take Afnan, Osama and Ali (Mr. Jaballah’s youngest children) to school in the morning and to pick them up after school but only where this is necessary because there is no supervising person available to supervise Mr. Jaballah in his home and only where CBSA has advance notice in the weekly itinerary provided by Mr. Jaballah. In such a case, Mr. Jaballah shall go directly to and from the schools, shall not enter into contact with any person en route, and shall provide the yearly school calendar for each child to the CBSA. The address of the school or schools shall be provided to the CBSA prior to Mr. Jaballah’s release from detention. In the event that the children need to leave school for a legitimate and

unanticipated reason outside of these times, Mr. Jaballah may be permitted to accompany Husnah Al Mashtouli, Ash Shaymaa Es Sayyid or Ahmad Jaballah to pick them up, provided that CBSA is notified, before he leaves, of the circumstances and is also notified when he returns home;

- iii) with the prior knowledge of the CBSA, leave the residence as required and for the duration required for the purpose of medical or psychological appointments and related tests, treatment or operations. Notification shall be given not less than 72 business hours in advance of the intended absence and shall specify the location or locations that Mr. Jaballah must attend as well as his departure time and his anticipated return time. Following completion of appointments, proof of attendance must be provided to the CBSA. Mr. Jaballah shall, before leaving the residence and immediately upon his return, report as more specifically directed by a representative of the CBSA. Should Mr. Jaballah experience a medical emergency requiring hospitalization, the CBSA shall be notified forthwith by Mr. Jaballah, Husnah Al Mashtouli, Ash Shaymaa Es Sayyid or Ahmad Jaballah. CBSA shall be informed of the location where Mr. Jaballah has been taken and shall be further informed of his return to the residence;
- iv) should an emergency arise whereby Husnah Al Mashtouli, any of Mr. Jaballah's children or his grandchildren are required to be taken to hospital and no one is available to supervise Mr. Jaballah in the residence, Mr. Jaballah may go to the hospital with Husnah Al Mashtouli, Ash Shaymaa Es Sayyid or Ahmad Jaballah, regardless of the time of the occurrence, until such time as another individual is available to supervise him. Mr. Jaballah shall notify the CBSA of the circumstances forthwith, and shall notify the CBSA immediately upon his return to the residence. Should Mr. Jaballah, due to illness, not be well enough to leave the home in the context of such an emergency and should no other supervisor be available, the CBSA must be contacted immediately;
- v) during all approved absences from the residence, Mr. Jaballah shall have on his person at all times the tracking unit enabling electronic monitoring and shall be accompanied at all times by either Husnah Al Mashtouli, Ahmad Jaballah, or Mohammed Aberra Dawud. Only when one of these three persons is not available and where necessary, he shall be accompanied by Ash Shaymaa Es Sayyid, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen or Raza Mohammad, each of whom shall bear responsibility for supervising Mr. Jaballah and for ensuring that he complies fully with all of the terms and conditions of this order. Any of these individuals must remain continuously with Mr. Jaballah while he is away from the residence, except for times that he is actually in consultation with his doctors or taking tests or undergoing treatment or therapy. In such cases, Husnah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen and Raza Mohammad will remain as close as is reasonably possible to the room in which Mr. Jaballah is

receiving his consultation, treatment or therapy. Should Hoonah Al Masterly, Ash Sharma Es Spayed, or Heat Mark need to visit a public restroom while supervising Mr. Jaballah away from the home, Mr. Jaballah must remain as close as is reasonably practicable to the restroom. Prior to acting as supervisor, each of Hoonah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen and Raza Mohammad shall sign a document in which each acknowledges and accepts such responsibility, specifically including the obligation to immediately report to the CBSA any breach of any term or condition of this order. The document shall be prepared by Mr. Jaballah's counsel and shall be submitted to the Ministers' counsel for approval.

- vi) CBSA, in its discretion and where it considers it appropriate to do so, may approve Mr. Jaballah's attendance at significant religious observances such as Ramadan and Eid. Mr. Jaballah's weekly attendance at Friday mosque shall not be counted as an outing. CBSA may, in its discretion and where it considers it appropriate to do so, permit Mr. Jaballah to leave his residence with a supervisor to attend to unanticipated family matters. In such cases, prior approval is required and Mr. Jaballah must report as specifically directed by a CBSA officer.

9. No person shall be permitted to enter the residence at any time except:

- i) Mr. Jaballah's immediate family members, including his wife, Husnah Al Mashtouli, his sons, Ahmad, Al Munzir, Osama and Ali, his daughters, Afnan and Ash Shaymaa, his son in law, Ahmad Bassam Mohammad Ali and his grandchildren;
- ii) the other individuals who are acting as supervisors;
- iii) his legal counsel, Barbara Jackman, John Norris and Paul Copeland;
- iv) in an emergency, fire, police and health-care professionals;
- v) children under the age of 15 years who are friends of Mr. Jaballah's children;
- vi) the landlord and such authorized and qualified repair persons as are employed by the landlord, pursuant to an arrangement between CBSA and the landlord. Twenty-four hours notice of repairs must be given to the CBSA, except in the case of [an] emergency. Mr. Jaballah shall not have contact with any such person;
- vii) a person approved in advance by the CBSA. To obtain such approval, the name, address, date of birth and photocopy of such person's driver's licence must be provided to the CBSA. If the person does not have a driver's licence, CBSA may

request a substitute photo I.D. CBSA may waive the requirement for photo I.D. where it considers appropriate to do so. Prior approval need not be required for subsequent visits by a previously approved person. However, CBSA may withdraw its approval at any time.

Subject to paragraph 12, those persons identified above, who are permitted to enter the residence, shall not bring with them any electronic device that is wireless or capable of being connected to the internet or a cell phone.

10. When Mr. Jaballah leaves the residence, as provided in paragraph 8, he shall not:
 - i) leave the area bordered by the streets or geographic features agreed upon by counsel and CBSA;
 - ii) attend any airport, train station, bus depot or car rental agency, or enter upon any subway, boat or vessel, except the Toronto Island Ferry;
 - iii) meet any person by prior arrangement other than:
 - (a) Barbara Jackman, John Norris, Paul Copeland or Matthew Behrens while Mr. Behrens is in the company of Ms. Jackman or Messrs. Norris or Copeland;
 - (b) members of his family, including his wife, Husnah Al Mashtouli, his sons, Ahmad, Al Munzir, Osama and Ali, and his daughters, Afnan and Ash Shaymaa, his son in law, Ahmad Bassam Mohammad Ali and his grandchildren ;
 - (c) the persons appointed by the Court to act as supervisors in accordance with paragraph 6;
 - (d) any person approved in advance by the CBSA;
 - iv) go to any location other than a location(s) approved in accordance with paragraph 8.
11. Mr. Jaballah shall not, at any time or in any way, associate or communicate directly or indirectly with:
 - i) any person whom Mr. Jaballah knows, or ought to know, supports terrorism or violent Jihad or who attended any training camp or guest house operated by any entity that supports terrorism or violent Jihad;
 - ii) any person Mr. Jaballah knows, or ought to know, has a criminal record, except Matthew Behrens and immediate family members; or
 - iii) any person whom the Court may specify in an order amending this order.

12. Except as provided herein, Mr. Jaballah shall not possess, have access to or use 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 contains 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. The internet connection for the computers used by Mr. Jaballah's children shall be a dry loop DSL 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. Alternatively, if the internet connection is not a DSL connection, the internet connection for the computers used by Mr. Jaballah's children shall be kept solely in the designated computer room. 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. Mr. Jaballah is not permitted access to the computer room at any time. Each computer with internet capability shall be housed in, and shall remain in, the designated computer room. 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. No computer with wireless capability shall be brought into the residence. Ms. Al-Mashtouli (or such other member of the Jaballah family), as the subscriber to the internet service, shall provide written consent to periodic disclosure, by the internet service provider to the 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. The fax machine shall also be kept in the designated computer room at all times. The subscriber to the residence telephone line shall provide such written consent as may be required to allow for the interception by or on behalf of the CBSA of faxes. The cell phones owned by Husnah Al Mashtouli, and Mr. Jaballah's children, Ash Shaymaa, Ahmad and Al Munzir shall remain with them at all times and they must ensure that Mr. Jaballah does not have access to them. The numbers of these cell phones must be provided to the CBSA, and their use, while in the residence, must be confined to the room in which the computer with access to the internet is situated. Husnah Al Mashtouli, Ash Shaymaa, Ahmad and Al Munzir shall agree in writing to these conditions. Mr. Jaballah may use a conventional land based telephone line located in the residence (telephone line) other than the separate CBSA dedicated line. Mr. Jaballah and the subscriber to the residence telephone line shall consent in writing to the interception by or on behalf of the CBSA, of all communications conducted using such service. For greater certainty, this includes allowing the CBSA to intercept the content of oral communications and also to obtain the telecommunication records associated with such telephone line service. Prior to Mr. Jaballah's release from detention, Husnah Al Mashtouli shall consent in writing to the interception by or on behalf of the CBSA of all communications conducted using her cell phone. The form of these consents shall be prepared by counsel for the Ministers. In the event of a medical emergency outside the residence, and if no one is able to make the call on his behalf, Mr. Jaballah shall be permitted use of a telephone outside his residence to call the CBSA to inform it of the situation and his whereabouts. Mr. Jaballah may also call 911, in the event of an emergency.

13. Prior to his release from detention, Mr. Jaballah and all of the adult persons who reside at the residence shall consent in writing to the interception, by or on behalf of the CBSA, of incoming and outgoing written communications delivered to or sent from the residence by mail, courier or other means. Prior to occupying the residence, any new occupant shall similarly agree to provide such consent. The form of consent shall be prepared by counsel for the Ministers.
14. Mr. Jaballah shall allow employees of the CBSA, any person designated by the CBSA or any peace officer access to the residence at any time (upon the production of identification) for the purposes of verifying Mr. Jaballah's presence in the residence or ensuring that Mr. Jaballah or any other persons are complying with the terms and conditions of this order. For greater certainty, Mr. Jaballah shall permit such individual(s) to search the residence, remove any item, install, service and maintain such equipment as may be required in connection with the electronic monitoring equipment or the separate dedicated line. Prior to Mr. Jaballah's release from detention all other adult occupants of the residence shall sign a document, in a form acceptable to counsel for the Ministers, agreeing to abide by this term. Prior to occupying the residence, any new occupant shall similarly agree to abide by this term.
15. Mr. Jaballah and his supervisors shall provide written consent to being interviewed by CBSA, individually or together, as CBSA may require, to ascertain whether Mr. Jaballah or other persons are complying with the terms and conditions of this order. The Court may also request a periodic report from Husnah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen, or Raza Mohammad as to how the conditions are functioning.
16. Prior to his release, Mr. Jaballah shall surrender his passport and all travel documents, if any, to a representative of the CBSA. Without the prior approval of the CBSA, Mr. Jaballah is prohibited from applying for, obtaining or possessing any passport or travel document, any bus, train or plane ticket, or any other document entitling him to travel. This does not prevent Mr. Jaballah from travelling on public city surface transit within the City of Toronto (including the Toronto Island Ferry) or the City of Mississauga as authorized in paragraph 8.
17. If Mr. Jaballah is ordered to be removed from Canada, he shall report as directed for removal. He shall also report to the Court as it from time to time may require.
18. Mr. Jaballah shall not possess any weapon, imitation weapon, noxious substance or explosive, or any component thereof.
19. Mr. Jaballah shall keep the peace and be of good conduct.
20. Any officer of the CBSA or any peace officer, who has reasonable grounds to believe that any term or condition of this order has been breached, may arrest Mr. Jaballah without warrant and cause him to be detained. Within 48 hours of such detention a Judge of this Court, designated

by the Chief Justice, shall forthwith determine whether there has been a breach, whether the terms of this order should be amended and whether Mr. Jaballah should be detained in custody.

21. If Mr. Jaballah does not strictly observe each of the terms and conditions of this order, he will be liable to detention upon further order by this Court.
22. Mr. Jaballah may not change his place of residence without the prior approval of this Court. Mr. Jaballah must provide [...] CBSA with 60 clear days notice of any proposed change of residence.
23. A breach of this order shall constitute an offence within the meaning of section 127 of the Criminal Code and shall constitute an offence pursuant to paragraph 124(1)(a) of the *Immigration and Refugee Protection Act*.
24. The terms and conditions of this order may be amended at any time by the Court upon the request of any party or upon the Court's own motion with notice to the parties.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-6-08

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

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: October 22, 23, & 24, 2008
November 18 & 19, 2008
December 17, 2008

REASONS FOR ORDER: Mactavish J.

DATED: January 15, 2009

APPEARANCES:

Donald MacIntosh
James Mathieson
Angela Marinos
Judy Michaely

FOR THE APPLICANTS

Barbara Jackman
Marlys Edwardh
Adriel Weaver

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Deputy Attorney General of Canada

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RUBY & EDWARDH
Barristers and Solicitors
Toronto, Ontario

FOR THE RESPONDENT