

Date: 20090218

Docket: DES-5-08

Citation: 2009 FC 167

Ottawa, Ontario, February 18, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act (IRPA)*;

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

AND IN THE MATTER OF the disclosure of summaries of three conversations in which Mr. Harkat was a participant;

AND IN THE MATTER OF Mohamed HARKAT

REASONS FOR JUDGMENT AND JUDGMENT

[1] A public amended security intelligence report was disclosed to Mr. Harkat and his counsel pursuant to 83(1)(e) of IRPA on February 9, 2009. The amended public summary includes an appendix “K” containing thirteen summaries of conversations: eleven of these summaries are of conversations in which Mr. Harkat was a participant and two are summaries of conversations between third parties about Mr. Harkat. The amended public summary was filed with the Registry of the Federal Court and forms part of the public record of this file.

[2] Three further summaries of conversations in which Mr. Harkat was a participant were not included in appendix “K”. These three further conversations were filed with the Court on September 16, 2008, as exhibits to the testimony of a witness in relation to the top secret security intelligence report. In that respect, they differ from documents filed with the Court in January 2009 pursuant to the September 24, 2008, Order of this Court requiring the Ministers to comply with the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 (“*Charkaoui #2*”). Summaries of these three further conversations have been prepared by counsel for the Ministers and provided to the Court and the Special Advocates (“SAs”).

[3] The SAs objected to the filing of the three further summaries in appendix “K” because, in their opinion, they engage privacy concerns that are protected by human rights legislation and the *Canadian Charter of Rights and Freedoms*.

[4] The SAs propose that the three summaries, as well as summaries of any other conversations relating to the same topic, be disclosed to Mr. Harkat and his counsel, but not put on the public record. Once he is aware of the information and has assessed the contextual background of these conversations, Mr. Harkat in consultation with his counsel should, according to the submissions of the SAs, decide whether the information should be filed on the public record during the public portion of this proceeding.

[5] The Ministers take the position that section 83(1)(e) IRPA does not permit the Court to withhold information from the public record unless, in the judge’s opinion, the disclosure of the information would be injurious to national security or endanger the safety of any person.

[6] IRPA does not provide for a procedure allowing for disclosure only to the interested person and counsel.

<p>77. (1) The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court.</p> <p>(2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister’s opinion, would be injurious to national security or endanger the safety of any person if disclosed.</p>	<p>77. (1) Le ministre et le ministre de la Citoyenneté et de l’Immigration déposent à la Cour fédérale le certificat attestant qu’un résident permanent ou qu’un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée.</p> <p>(2) Le ministre dépose en même temps que le certificat les renseignements et autres éléments de preuve justifiant ce dernier, ainsi qu’un résumé de la preuve qui permet à la personne visée d’être suffisamment informée de sa thèse et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon le ministre, à la sécurité nationale ou à la sécurité d’autrui.</p>
<p>83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:</p> <p>[...]</p> <p>(e) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably</p>	<p>83. (1) Les règles ci-après s’appliquent aux instances visées aux articles 78 et 82 à 82.2 :</p> <p>[...]</p> <p>e) il veille tout au long de l’instance à ce que soit fourni à l’intéressé un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d’autrui et qui permet à l’intéressé d’être</p>

<p>informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed</p>	<p>suffisamment informé de la thèse du ministre à l'égard de l'instance en cause</p>
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[7] As can be seen from a reading of subsection 77(2), once a certificate is referred to Federal Court, the Minister must file the information and other evidence on which the certificate is based, and a summary of that information that protects the confidential information, but enables the named person to be reasonably informed of the case to meet.

[8] Further, section 83(1)(e) of IRPA obliges the judge to ensure, where possible, that the named person is provided with summaries of confidential information and other evidence heard throughout the proceeding, so that they are kept reasonably informed of the case against them, without disclosing confidential information or endangering the safety of any person. The three summaries would be provided to Mr. Harkat by the Court pursuant to s. 83(1)(e) IRPA.

[9] The open court principle is a “cornerstone of the common law” and a “hallmark of a democratic society” (*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paragraphs 22-31) that applies to all court proceedings including this proceeding. However, as noted at paragraph 91 of the *Vancouver Sun* decision, the open court principle is not absolute and may be overtaken by legislative provision. Even in the absence of a statutory requirement that information be treated

confidentially, the principle is subject to certain limited exceptions to prevent a serious risk to an important interest (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.R. 522).

[10] The protection of confidential information in the national security context has been deemed by Parliament to be sufficiently important to warrant mandatory confidential treatment. This approach has been accepted by the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (“*Charkaoui #1*”) at paragraph 55:

Confidentiality is a constant preoccupation of the certificate scheme. The judge “shall ensure” the confidentiality of the information on which the certificate is based and of any other evidence if, in the opinion of the judge, disclosure would be injurious to national security or to the safety of any person: s. 78(b). At the request of either minister “at any time during the proceedings”, the judge “shall hear” information or evidence in the absence of the named person and his or her counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person: s. 78(e). The judge “shall provide” the named person with a summary of information that enables him or her to be reasonably informed of the circumstances giving rise to the certificate, but the summary cannot include anything that would, in the opinion of the judge, be injurious to national security or to the safety of any person: s. 78(h). Ultimately, the judge may have to consider information that is not included in the summary: s. 78(g). In the result, the judge may be required to decide the case, wholly or in part, on the basis of information that the named person and his or her counsel never see. The named person may know nothing of the case to meet, and although technically afforded an opportunity to be heard, may be left in a position of having no idea as to what needs to be said.

[11] Under the legislative scheme set out in IRPA, documents filed with the Court may only be kept confidential where, in accordance with section 83(1)(d) their disclosure would result in injury to national security or endanger the safety of any person. Absent a Court order requiring the information to be kept confidential on another ground, the public may access records filed in the

Registry. Indeed, the open court principle is codified in Rule 26(1) of the *Federal Courts Rules* which provides that any person may inspect a Court file or annex. A summary issued by the Court pursuant to section 83(1)(d) is no different from any other record placed on a Court file.

[12] The SAs, have requested that this Court treat the three summaries in question confidentially. It is their position that by disclosing them solely to Mr. Harkat and his counsel, the documents would not become part of the public file unless Mr. Harkat decided to file them with the Court.

[13] This position overlooks the fact that the documents on which the summaries are based have already been filed with this Court as exhibits to the top secret testimony of a CSIS witness. As such, Mr. Harkat has only one option once the Court has determined that there is no national security reason to withhold the summaries from him, namely, to seek a confidentiality order pursuant to Rules 151 and 152 of the *Federal Courts Rules* which provide:

<p>151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.</p> <p>(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.</p>	<p>151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.</p> <p>(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.</p>
<p>152. (1) Where the material is required by law</p>	<p>152. (1) Dans le cas où un document ou un</p>

<p>to be treated confidentially or where the Court orders that material be treated confidentially, a party who files the material shall separate and clearly mark it as confidential, identifying the legislative provision or the Court order under which it is required to be treated as confidential.</p> <p>(2) Unless otherwise ordered by the Court,</p> <p>(a) only a solicitor of record, or a solicitor assisting in the proceeding, who is not a party is entitled to have access to confidential material;</p> <p>(b) confidential material shall be given to a solicitor of record for a party only if the solicitor gives a written undertaking to the Court that he or she will</p> <p>(i) not disclose its content except to solicitors assisting in the proceeding or to the Court in the course of argument,</p> <p>(ii) not permit it to be reproduced in whole or in part, and</p> <p>(iii) destroy the material and any notes on its content and file a certificate of their destruction or deliver the material and notes as ordered by the Court, when the material and notes are no longer required for the proceeding or the solicitor ceases to be solicitor of record;</p>	<p>élément matériel doit, en vertu d'une règle de droit, être considéré comme confidentiel ou dans le cas où la Cour ordonne de le considérer ainsi, la personne qui dépose le document ou l'élément matériel le fait séparément et désigne celui-ci clairement comme document ou élément matériel confidentiel, avec mention de la règle de droit ou de l'ordonnance pertinente.</p> <p>(2) Sauf ordonnance contraire de la Cour :</p> <p>a) seuls un avocat inscrit au dossier et un avocat participant à l'instance qui ne sont pas des parties peuvent avoir accès à un document ou à un élément matériel confidentiel;</p> <p>b) un document ou élément matériel confidentiel ne peut être remis à l'avocat inscrit au dossier que s'il s'engage par écrit auprès de la Cour :</p> <p>(i) à ne pas divulguer son contenu, sauf aux avocats participant à l'instance ou à la Cour pendant son argumentation,</p> <p>(ii) à ne pas permettre qu'il soit entièrement ou partiellement reproduit,</p> <p>(iii) à détruire le document ou l'élément matériel et les notes sur son contenu et à déposer un certificat de destruction, ou à les acheminer à l'endroit ordonné par la Cour, lorsqu'ils ne seront plus requis aux fins de l'instance ou lorsqu'il cessera d'agir à titre d'avocat inscrit au dossier;</p> <p>c) une seule reproduction d'un document ou d'un élément matériel confidentiel est remise à l'avocat inscrit au dossier de</p>
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<p>(c) only one copy of any confidential material shall be given to the solicitor of record for each party; and</p> <p>(d) no confidential material or any information derived therefrom shall be disclosed to the public.</p> <p>(3) An order made under subsection (1) continues in effect until the Court orders otherwise, including for the duration of any appeal of the proceeding and after final judgment.</p>	<p>chaque partie;</p> <p>d) aucun document ou élément matériel confidentiel et aucun renseignement provenant de celui-ci ne peuvent être communiqués au public.</p> <p>(3) L'ordonnance rendue en vertu du paragraphe (1) demeure en vigueur jusqu'à ce que la Cour en ordonne autrement, y compris pendant la durée de l'appel et après le jugement final.</p>
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[14] The Court acknowledges the possibility that the matters referred to in these documents may give rise to privacy concerns. Given Mr. Harkat's current lack of knowledge about the contents of the conversations, it is reasonable to give him an opportunity to review them before he decides whether a confidentiality order should be sought. To do otherwise would remove that recourse from him. The SAs do not have the jurisdiction to act in public on behalf of the named person, nor are they permitted to communicate with him while acting as special advocate. They are not counsel of record in this proceeding. They do not, therefore, have standing to seek a confidentiality order which would prevent public access to Court records; only counsel for Mr. Harkat may seek such an order.

[15] To ensure the protection of Mr. Harkat's rights, the Court has determined that it would be appropriate to delay placing the three summaries on the public file until Mr. Harkat has had an opportunity to review them and make a decision as to how he wishes to proceed.

[16] If Mr. Harkat, on the advice of his counsel, decides to seek a confidentiality order limiting the access to the three summaries, I will decide the issue on the grounds raised by counsel.

[17] For the interim period, the summaries shall be communicated to Mr. Harkat and his counsel and will not be made public. A period of ten days is given to permit Mr. Harkat and his counsel an opportunity to determine whether or not to seek a confidentiality order. Upon expiry of that delay, in the absence of a motion, the three summaries will be made public. If a motion in accordance with Rule 151 is served and filed within the ten day period, the three summaries shall be kept confidential until this Court decides the issue.

ORDER

THIS COURT ORDERS THAT:

- The objection made by the special advocates that the three summaries of conversations be kept confidential is granted on an interim basis;
- The three summaries of conversations are to be disclosed to Mr. Harkat and his counsel;
- Mr. Harkat and his counsel have ten days to serve and file a motion asking this Court to continue treating the three summaries of conversations confidentially;
- In absence of any such motion, the three summaries of conversations will become part of the public amended security intelligence report.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-5-08

STYLE OF CAUSE: IN THE MATTER OF a certificate signed pursuant to section 77(1) of the *Immigration and Refugee Protection Act, (IRPA)*;

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

AND IN THE MATTER OF the disclosure of summaries of three (3) conversations in which Mr. Harkat was a participant

AND IN THE MATTER OF MOHAMAD HARKAT

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 12, 2009

REASONS FOR ORDER AND ORDER: NOËL S. J.

DATED: February 18, 2009

APPEARANCES:

Mr. David Tyndale,
Mr. Andre Seguin

FOR THE APPLICANT

Mr. M. Webber,
Mr. N. Boxall and
Mr. L. Russomanno

FOR THE RESPONDENT

Mr. P. Copeland,
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AS SPECIAL ADVOCATES

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