

Date: 20090218

Docket: DES-5-08

Citation: 2009 FC 173

Ottawa, Ontario, February 18, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BEFORE THE COURT:

IN THE MATTER OF a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, (the "Act");

IN THE MATTER OF the referral of that certificate to the Federal Court of Canada pursuant to subsection 77(1), sections 78 and 80 of the *Act*;

AND IN THE MATTER OF Mohamed HARKAT

REASONS FOR ORDER

[1] In an order dated February 12, 2009, the Court appointed an individual named Robin Parker to provide administrative assistance to the Special Advocates in this file. These are the reasons for that order.

[2] On January 6, 2008, the Special Advocates made an oral request that this Court authorize them to speak about this proceeding with an individual pursuant to section 85.4 of the *Immigration and Refugee Protection Act* ("IRPA"). This was followed by a series of letters addressing the issue

which were filed as an exhibit to this proceeding with the consent of all parties. Hearings were held on February 12, 2009 both in public and *in camera*.

[3] The Special Advocates sought the ability to communicate with an administrative support person to assist them with the organization of the documents which were to be disclosed pursuant to the order of September 24, 2008 in this proceeding. They indicated that they had identified a person who was prepared to commence work at any time and who was already security cleared. They also provided an email to the Court which indicated that the Minister of Justice was prepared to provide funding for that administrative support.

[4] In correspondence dated January 7, 2009 Mr. Cavaluzzo set out the role of the proposed individual as follows:

- to review the documents for the purpose of summarizing and organizing them and the information in them in a manner useful to the Special Advocates;
- to take instructions from the Special Advocates on specific documentary or information queries;
- to be available during the hearing to provide support to the Special Advocates in respect of the documents.

[5] It was clear from their correspondence that the Special Advocates were not seeking the appointment of another Special Advocate. Indeed, Mr. Cavaluzzo's correspondence recognized that even though Ms. Parker is a member of the Law Society of Upper Canada, she would not have any

advocacy role or communication with the named person, nor would she be charged with representing the interests of the named person. Her role was to be solely administrative.

[6] The Special Advocates rely on s. 85(3) IRPA, a provision that requires the Minister of Justice to provide them with adequate administrative support and resources. They urge an interpretation of this provision, which would include the assistance of an administrative assistant and not just a brick and mortar type of assistance. This appears to be an interpretation that the Special Advocates Program office is willing to accept since, it has undertaken to fund any administrative assistance deemed necessary by the Court, despite the objections made by counsel for the Ministers.

[7] The Minister's objection was two-fold. First, the Ministers argued that the Special Advocates had not established a need for the assistance of an administrative assistant. Second, the Ministers asserted that the appointment of such a person was impermissible under the current legislative scheme set out in IRPA. They argued that the entire scheme of the Act is premised on the general rule that the protected information be given to a specific, limited number of people and that further circulation of the information is prohibited. (Tyndale letter dated January 21, 2009)

[8] No evidence was adduced in support of the arguments made by either the Special Advocates or the Ministers. However, correspondence between the Special Advocates and the Special Advocate Program office (SAP) was filed as an exhibit to the hearing. In that correspondence, the SAP indicated that contact had been made with other persons on the Special Advocate list and those

individuals were either not interested in or unavailable to do the tasks sought to be accomplished by the Special Advocates in this file.

[9] Moreover, the Court is aware of the volume of documents filed with the Registry pursuant to the Order of September 24, 2008, and that the Special Advocates, in this file, have also been appointed to act as Special Advocates in other files with the consent of the Ministers. Furthermore a litigation plan has been approved by all, after lengthy discussion, which reflects a concern for the expeditious and fair determination of this proceeding.

[10] No other options for managing the current difficulties in which the Special Advocates find themselves, apart from appointing a third Special Advocate, were suggested by either counsel for the Ministers or the Special Advocates.

[11] As noted in *Charkaoui v. Canada (Citizenship and Immigration)* 2007 SCC 350 (“*Charkaoui #1*”), Division 9 of IRPA has as a central concern, the protection of the confidential information. The protection of the information has been entrusted to the designated judge pursuant to section 83(1)(d) IRPA and may not be disclosed where, in the judge’s opinion, such disclosure would be injurious to national security or endanger the safety of an individual.

[12] The legislation imposes another imperative on the Court, namely, to hear and determine the proceeding in an expeditious, informal and fair manner [83(1)(a)].

[13] Since the coming into force of section 85(3) and Bill C-3 the context in which the *Act* is to be interpreted has been altered significantly by the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)* 2008 SCC 38 (“*Charkaoui #2*”). The scope of disclosure required by that decision is extremely broad. Indeed, the Supreme Court made an analogy to the disclosure obligations which arise in criminal proceedings.

[14] This Court also notes that the amendments creating the role of Special Advocate in Bill C-3 were remedial and should be given an interpretation consistent with the intent of the legislator to limit the infringement of the named person’s constitutional rights to the extent possible given the confidential nature of the information underlying proceedings referred pursuant to section 77 IRPA.

[15] In a previous decision (*Re Harkat* 2009 FC 59 at para. 17), this Court commented on, but did not determine, the scope of section 85(3) IRPA which is raised squarely in the request of the Special Advocates for an administrative support person to assist them in their review of the *Charkaoui #2* disclosure material.

[16] The wording of section 85(3) indicates intent on the part of the legislator to ensure that the Special Advocates are placed, inasmuch as possible (“adequate”), in the same position as counsel for the Ministers. This is also consistent with the explicit legislative requirement that all certificate proceedings be expeditious and fair.

[17] The Special Advocates, the Court and counsel for the Ministers find themselves in a situation that was not foreseen or foreseeable on May 30, 2008 when the Court heard representations on the appointment of special advocates to represent Mr. Harkat's interests. Indeed, the scope of the disclosure requirement set out by the Supreme Court of Canada in *Charkaoui #2* only became clear when, in September 2008, the Ministers estimated that it would take 3 to 6 months to comply with their new disclosure obligations.

[18] Section 85(3) requires the Minister of Justice to ensure that Special Advocates are provided with adequate administrative support and resources. In the context of *Charkaoui #2* disclosure, an unforeseen event which arose after the coming into force of Bill C-3, it is consistent with the intent of the legislator to read "adequate administrative support and resources" as encompassing limited forms of human support. Human support is a necessary part of an efficient office environment. Indeed, in oral submissions counsel for the Ministers conceded that section 85(3) could extend to the appointment of administrative support staff as long as the person was not provided with access to the closed information.

[19] As acknowledged at the public hearing on February 12, 2009, counsel for the Ministers have access to support staff who are able to assist them in organizing the information in the holdings of the Service. The Special Advocates are seeking a similar administrative resource.

[20] The requirement to proceed expeditiously and fairly in conjunction with the requirement that Special Advocates be provided with adequate administrative support and resources must be

read as giving the Court, in the circumstances of this proceeding, an implicit authority to appoint an administrative support person.

[21] The Ministers assert that even if this Court has the authority to appoint an administrative support person it does not have the jurisdiction to allow access to the confidential information to any person other than a duly appointed Special Advocate.

[22] The Special Advocates did not directly address this issue in their submissions.

[23] The scheme set out in IRPA requires this Court to safeguard the confidentiality of the information filed in relation to a certificate where, in the opinion of the judge, the disclosure of those records would be injurious to national security or endanger the safety of any person. Discretion to disclose court records is vested with the judge where, in his or her opinion, that disclosure would not be injurious to national security or endanger the safety of any person.

[24] Ms. Parker is not being appointed as a special advocate; she will have no advocacy role, will have no relationship deemed or otherwise with the named person, will not be charged with representing his interests, and will not be present during the closed hearings. Her administrative assistance is necessary to the expeditious and fair conduct of this proceeding and is limited to organizing and summarizing the confidential documents for the Special Advocates. In the particular circumstances of this file, her appointment is in the interests of justice given the procedural history of this file. Mr. Harkat was named in a second certificate almost one year ago. He has been

detained and living under conditions since December 2002. The Court has, with the consent of all parties, set a timetable which may have to be modified if the Special Advocates are not provided with appropriate assistance causing further delay and hardship to Mr. Harkat.

[25] I therefore conclude that where a person is not representing the interests of a named person, has the requisite security clearance, agrees to become permanently bound to secrecy and is subject to the same restrictions on communication as other participants in the proceeding, the disclosure of the confidential information to her by the Court for administrative support purposes will not injure national security or endanger the safety of any individual.

[26] I have been asked by counsel for the Ministers to certify a question. During the closed hearing sections 79(2) and 82.3 were brought to the attention of counsel for the Ministers and I requested written submissions on whether or not this Court has jurisdiction to certify a question at this point in the proceeding. No submissions were received on this specific point. On a plain reading of these provisions, appeals from interlocutory orders such as this are prohibited. I therefore decline to certify any question at this time.

S. Noël

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-5-08

STYLE OF CAUSE: In the matter of a Certificate pursuant to Section 77(1) of
the *Immigration and Refugee Protection Act* and
In the matter of Mohamed Harkat

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 12, 2009

REASONS FOR ORDER: NOËL S. J.

DATED: February 18, 2009

APPEARANCES:

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Mr. M. Webber FOR M. HARKAT
Mr. N. Boxall

Mr. P. Copeland SPECIAL ADVOCATE

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