

Date: 20090331

Docket: DES-5-08

Citation : 2009 FC 340

Ottawa, Ontario, March 31, 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 a request of the Special Advocates to obtain access to 8 security intelligence files in whole or in part;

AND IN THE MATTER OF Mohamed HARKAT

EXPURGATED REASONS FOR JUDGMENT AND JUDGMENT

[1] On February 22, 2008, the Ministers referred a certificate to the Federal Court naming Mohamed Harkat as a person who is inadmissible to Canada on grounds of national security. The Ministers also filed a confidential Security Intelligence Report (“SIR”) which sets out the grounds

and supporting information underlying the certificate. A public summary of information and other evidence was filed and provided to Mr. Harkat with the goal of reasonably informing him of the allegations made by the Ministers pursuant to subsection 77(2) of the *Immigration and Refugee Protection Act* S.C. 2001 c. 27 (*IRPA*).

[2] Special advocates were appointed on June 4, 2008. Copies of both the confidential SIR and the public SIR were provided to the special advocates after their appointment and after they had been briefed by Mr. Harkat and his counsel.

[3] In a document prepared August 20, 2008, and in a subsequent addendum, the special advocates made substantial requests for disclosure in addition to that which was provided to them as appendices to the confidential SIR (exhibit SA-3 and SA-3a).

[4] During the weeks of September 10 and 15, 2008, the Court heard submissions and evidence on the scope of the disclosure required by the decision of the Supreme Court of Canada in *Charkaoui v. Canada*, 2008 SCC 38 (“*Charkaoui #2*”). On September 24, 2008, this Court ordered that “the Ministers and CSIS file all information and intelligence related to Mohamed Harkat including but not limited to drafts, diagrams, recordings and photographs in CSIS’ possession or holdings...”.

[5] The *Charkaoui #2* disclosure ordered on September 24, 2008, satisfied a number of the special advocate’s requests for further disclosure made in exhibits SA-3 and SA-3a. Indeed the list

- (...)
- (...)

The special advocates also sought the disclosure of the exact sum paid to human sources for each piece of information about Mr. Harkat provided by them to CSIS. Further, they requested information about whether these same human sources had provided information about other persons of interest to CSIS and whether they had been compensated for such information. No justification was given in support of these requests on February 26, 2009. Further submissions in relation to this request were heard by the Court on March 24, 2009, and consequently these requests will be dealt with in separate reasons for judgment.

[9] On March 12, 2009, the Court reviewed redactions made to 67 documents in the presence of Ministers' counsel, a witness, and a special advocate and lifted the great majority of the redactions examined. As a follow-up to this hearing, an order dated March 12, 2009, was issued requiring the Ministers to review and lift other redactions made in reference to a number of persons and groups mentioned in the confidential SIR. (Order of March 12, 2009, in DES-5-08)

[10] The issue that must be addressed is whether the disclosure obligation set out in *Charkaoui* #2 requires the Ministers to comply with the further requests for disclosure set out by the special advocates in their correspondence dated February 26, 2009.

[11] These requests were set out by Mr. Copeland as follows:

- (...)
- (...)
- (...)
- (...)
- (...)
- (...)
- (...)
- (...)

[12] The Ministers take the position that they have complied with the September 24, 2008, order of this Court and have provided all of the information that is required to be disclosed in accordance with *Charkaoui #2*. In their opinion, the special advocates are in possession of all the information in the possession or control of the CSIS regarding Mr. Harkat. Ministers' counsel also assert that the request for further disclosure is not relevant to the review of the Ministers' decision to issue a security certificate naming Mr. Harkat, since it goes far beyond what the Ministers are required to disclose. Indeed, they note that in some respects, the further requests for disclosure seek information that is already found in the *Charkaoui #2* material. The Ministers also assert that the special advocates are attempting to do indirectly what this Court has determined they may not do directly; that is, identify human sources (2009 FC 204).

[13] The special advocates argue that Supreme Court jurisprudence on disclosure obligations in security certificate cases gives them an entitlement to all of the files that have been requested by them. Special Advocate Copeland took the position that the special advocates are entitled to the disclosure of the eight intelligence files mentioned above:

...in my view the SA's, having regard to the Supreme Court of Canada jurisprudence on the disclosure obligations in security certificate matters, are entitled to disclosure of all the files that have been requested... (see letter from Mr. Copeland, dated February 26, 2009), page 1).

[14] In *Charkaoui #2*, the Supreme Court stated at paragraph 2:

[...] In our view, the Canadian Security Intelligence Service (CSIS) is bound to disclose to the ministers responsible all information in its possession regarding the person named in the security certificate. The ministers must convey this information to the designated judge.

[15] The Supreme Court went on to qualify this obligation to disclose at paragraph 50 where it noted that:

The principles governing the disclosure of evidence are well established in criminal law, but the proceeding in which the Federal Court determines whether a security certificate is reasonable takes place in a context different from a criminal trial. No charges are laid against the person named in the certificate. Instead, the ministers seek to expel the named person from Canada on grounds of prevention or public safety. However, the serious consequences of the procedure on the liberty and security of the named person bring interests protected by s. 7 of the *Charter* into play. A form of disclosure of all the information that goes beyond the mere summaries which are currently provided by CSIS to the Ministers and the designated judge is required to protect the fundamental rights affected by the security certificate procedure.

[16] In this application, the special advocates are seeking access to eight intelligence files, in whole or in part, regarding persons or organizations to which Mr. Harkat is linked in the SIR. The information sought is not information regarding Mr. Harkat, since, subject to the Ministers complying with my order of March 12, 2009, the special advocates have been provided with the information regarding Mr. Harkat in the control or possession of CSIS.

[17] The reasons of the Supreme Court in *Charkaoui #2* do not require CSIS to disclose all of its holdings regarding every person or organization connected to Mr. Harkat. Such a reading of the decision would require CSIS to disclose thousands upon thousands of documents which would not contain information regarding Mr. Harkat but would contain information regarding these other individuals or organizations. The Supreme Court of Canada cannot have intended that this Court and the special advocates be provided with the complete intelligence holdings on all of the alleged associates or contacts of Mr. Harkat. CSIS must disclose all information in its possession regarding Mr. Harkat. To read *Charkaoui #2* in any other way would undermine the intent of Parliament that these proceedings proceed as expeditiously and informally as the circumstances and considerations of fairness and natural justice permit.

[18] Since the documents being sought by the special advocates are not records regarding Mr. Harkat and are not, in my opinion, caught by the disclosure obligations set out in *Charkaoui #2*, are they necessary for the special advocates to fulfill their legislative role?

[19] The role of the special advocate in the current proceeding is set out in the provisions of the relevant legislation. Subsection 85.1(1) *IRPA* provides that the role of the special advocate is to protect the interests of the named person in a proceeding when information or other evidence is heard in the absence of that person and the public. To fulfill this role, special advocates may challenge the Ministers' claim that the disclosure of information would be injurious to national security (s. 85.1(2)(a) *IRPA*); they may also challenge the relevance, reliability and sufficiency of information not disclosed to the named person (s. 85.1(2)(b) *IRPA*). The statute gives special

advocates specific powers to make oral and written submissions with respect to the closed information and participate in and cross-examine witnesses who testify in the absence of the named person and the public (s. 85.2(a) & (b) *IRPA*). Special advocates may also exercise any other power necessary to protect the named person's interest with the authorization of the judge (s. 85.2(c) *IRPA*). (See also *Re Almrei* 2008 FC 1216 at para. 51 per Lutfy C.J. and *Re Almrei* 2009 FC 322 at par. 8-9, 29 per Mosley J.).

[20] The Court notes that, to date, the special advocates have been provided with:

- All information in support of the confidential SIR which constitutes the grounds on which the Ministers base their allegations against Mr. Harkat.
- The remaining confidential information (the *Charkaoui #2* information) in the possession or control of CSIS regarding Mr. Harkat regardless of whether it is found in the Harkat investigation file or any other CSIS file. As noted above, this information is contained in several thousand documents which comprise over 8000 pages of information.

[21] The special advocates have not provided clear and cogent evidence of how the additional information they requested on February 26, 2009, would assist them in testing the reliability of the information and evidence led by the Ministers in the closed proceedings. Requiring CSIS to produce all of the information (eight intelligence files in whole or in part) requested by the special

advocates would involve the disclosure of thousands of documents all of which would have to be reviewed to determine whether they are related to the individual or group at issue and whether a legal privilege attaches to them. Such an order would be akin to a fishing expedition and would unacceptably delay this proceeding which is legislatively mandated to proceed as expeditiously and informally as possible subject to the overarching requirements of natural justice.

[22] This proceeding is a review of the reasonableness of a certificate signed by two Ministers alleging that Mr. Harkat is inadmissible to Canada pursuant to sections 34(1)(c), 34(1)(d) and 34(1)(f) *IRPA*. That certificate was signed and referred to this Court on the basis of confidential information which has been provided to the special advocates in the confidential SIR. A public version of this information has been provided to Mr. Harkat in the form of a public SIR filed pursuant to subsection 77(2) of *IRPA* which has subsequently been expanded pursuant to paragraph 83(1)(e) *IRPA*. Further summaries of information as well as public communications and reasons for judgment have also been provided to Mr. Harkat pursuant to paragraph 83(1)(e) *IRPA*. These requests for further disclosure, made by the special advocates, go far beyond the mandate of this Court and are analogous to what would be required of the Ministers in the context of an investigation undertaken by a Royal Commission of Inquiry or some other legislatively mandated oversight agency.

[23] I cannot conclude that, given the current level of disclosure, the special advocates are unable to protect Mr. Harkat's interests or that he is being treated unfairly by limiting the disclosure obligation of CSIS to information in its control or possession regarding him.

[24] Public and closed hearings are scheduled to resume in April, May and June 2009. During the closed hearings, the special advocates may challenge the reliability and sufficiency of the Ministers' confidential evidence in support of the reasonableness of the certificate. Without further justification for the information requested, I conclude, at this time, that the special advocates are in a position to protect the interests of Mr. Harkat as required by the legislation.

[25] My conclusion does not foreclose future requests by the special advocates that are specific and justified in relation to their role in these proceedings. The judge retains the power to authorize the special advocates to undertake additional measures to protect the interests of the named person (s. 85.2(c) *IRPA*). Without specific and clear justification, this discretion should not be exercised in a way which will undermine the intent of Parliament and result in the undue delay of an application to determine the reasonableness of the security certificate signed by the Ministers.

JUDGMENT

THEREFORE, THE COURT ORDERS THAT:

- The requests for disclosure made by the special advocates on February 26, 2009, are denied.

"Simon Noël"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-5-08

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AND IN THE MATTER OF MOHAMAD HARKAT

REASONS FOR JUDGMENT: NOËL S. J.

DATED: March 31, 2009

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