Date: 20090324

Docket: DES-3-08

Citation: 2009 FC 314

Ottawa, Ontario, March 24, 2009

PRESENT: The Honourable Mr. Justice Mosley

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 Hassan ALMREI

REASONS FOR ORDER AND ORDER

[1] This decision concerns the exclusion of the special advocates from a closed hearing in which the Court heard evidence from a witness presented by the Ministers with respect to one of the conditions of Mr. Almrei's release from detention. A redacted version of the transcript of the evidence heard on that occasion was provided to the special advocates and the Court invited submissions from them and counsel for the Ministers as to whether the procedure adopted was correct.

[2] For the reasons that follow, I have concluded that a complete transcript of the evidence from the hearing must be provided to the special advocates and an opportunity provided to them to cross-examine the witness and make further submissions. The transcript of evidence will remain confidential pending any further determination by the Court, but this decision will be entered on the public record of proceedings.

[3] In Reasons for Judgment issued on January 2, 2009 the Court held that Mr. Almrei's release on conditions would not be injurious to national security or present a flight risk. To give effect to this decision, the parties were invited to propose conditions for the Court's consideration prior to the issuance of a formal order.

[4] Counsel for the Ministers undertook to prepare a draft set of terms and conditions in consultation with counsel for Mr. Almrei. There followed a series of discussions by teleconference and exchanges of correspondence between the parties and with the Court to narrow the issues regarding the proposed conditions. With a good faith effort by counsel for both parties, these issues were reduced to a handful of questions upon which disagreement remained. These were resolved by an Order issued on February 13, 2009 and an amended Order issued February 26, 2009.

[5] Counsel did not reach agreement on a proposal by the Ministers to prohibit Mr. Almrei from making use of "three-way" telephone services, by which a call made and received from two locations is relayed to a third party. Mr. Almrei's position is that this would assist him to remain in touch with his family abroad and to participate in communications related to his Court proceedings. Given that government agencies would be monitoring his communications, other than

those subject to solicitor-client privilege, he could not understand why the prohibition on such calls was necessary. However, rather than further delay the Release Order, counsel for Mr. Almrei proposed that it be issued with the condition as requested by the Ministers until the question could be resolved at a later date through evidence. Notwithstanding that concession, in a letter dated February 4, 2009, counsel for the Ministers urged that the Court schedule an *in camera* hearing on this and an unrelated technical issue. In the correspondence to the Court, it was stated that the request was for a hearing with counsel for the Ministers and the special advocates present.

[6] Questions about three-way calling had been put to witnesses during the public evidence hearings on the review of Mr. Almrei's detention. The Court had sought confirmation from witnesses, notably "Sukhvindar", a CSIS employee, that Mr. Almrei's participation in such calls could be monitored. Sukhvindar had agreed with that assumption but stressed that he was not an expert in such matters. I presume that the Ministers considered it necessary to call expert evidence on the subject in light of that testimony.

[7] Paragraph 83(1)(c) of the *Immigration and Refugee Protection Act*, 2001, c. 27 ("the Act") requires the hearing of information or other evidence in a closed session when the Ministers request such a hearing and the judge is of the opinion that disclosure of the information or other evidence could be injurious to national security or to the safety of any person. The paragraph is silent as to how the Court is to form the opinion that disclosure could be injurious prior to hearing the information or evidence. Absent some other means of making that determination, the Court must necessarily rely on the Minister's representations as to the nature of the information to be presented. In this instance, the Ministers requested that the evidence of two witnesses be heard *in*

camera because of the sensitive nature of the evidence they wished to call respecting the technology to be used to monitor compliance with the release conditions.

[8] At the outset of the hearing on February 10, 2009, counsel for the Ministers advised the Court that he had received instructions to request that the evidence of the first witness be heard without the presence of the special advocates. It was submitted that given the nature of the evidence, it was not necessary for the special advocates to know the details in order to make representations on Mr. Almrei's behalf with respect to the three-way calling issue. Reference was made to Noël J.'s decision respecting informer privilege in *Re Harkat*, 2009 FC 204. The Ministers proposed to provide the special advocates with a summary of the evidence approved by the Court following the hearing.

[9] The special advocates objected to the Ministers' request. After some discussion, I indicated that I would grant the request to the extent that I would hear the evidence before determining what next steps would be taken, such as providing a summary, a transcript and an opportunity to cross-examine. This was done in the interest of expediting the Release Order considering that the evidence would address a collateral issue that was not being pressed at that point by Mr. Almrei and his counsel. I also considered that without having heard the evidence, I could not determine whether its disclosure would be injurious to national security or to the safety of any person as provided for in paragraph 83(1)(d) of the Act.

[10] The witness was then examined by counsel for the Ministers in the absence of the special advocates. I posed questions to clarify his evidence. To illustrate his testimony, the witness drew diagrams which were entered as exhibits.

[11] A second witness was heard on the afternoon of February 10, 2009 with respect to technical matters regarding the GPS/cellular monitoring bracelet which Mr. Almrei has been ordered to wear. The special advocates were present for the evidence of this witness, he was cross-examined by them and they made submissions as to the significance and weight to be afforded that evidence. No issue presently arises from this proceeding.

[12] On February 16, 2009, the Ministers filed a summary and transcript of the evidence heard in the absence of the special advocates, with the name of the witness and portions of his testimony redacted. These were provided to the special advocates and written submissions were then received from them and the Ministers. While these submissions were filed confidentially, at least those by the Ministers, I believe they can be summarized in these public reasons without disclosing any sensitive information.

Relevant Legislation:

[13] The following are the relevant provisions of the Act for these reasons:

83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	**83.** (1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :

(*c*) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

c) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(*d*) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(*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 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;

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 suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

85.1 (1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a

85.1 (1) L'avocat spécial a pour rôle de défendre les intérêts du résident permanent ou de l'étranger lors de toute

proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

audience tenue à huis clos et en l'absence de celui-ci et de son conseil dans le cadre de toute instance visée à l'un des articles 78 et 82 à 82.2.

Responsibilities

(2) A special advocate may challenge

Responsabilités

(2) Il peut contester :

(*a*) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and

a) les affirmations du ministre voulant que la divulgation de renseignements ou autres éléments de preuve porterait atteinte à la sécurité nationale ou à la sécurité d'autrui;

(*b*) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.

b) la pertinence, la fiabilité et la suffisance des renseignements ou autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil, et l'importance qui devrait leur être accordée.

85.2 A special advocate may

(*a*) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;

85.2 L'avocat spécial peut:

a) présenter au juge ses observations, oralement ou par écrit, à l'égard des renseignements et autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil;

(*b*) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel; and

b) participer à toute audience tenue à huis clos et en l'absence de l'intéressé et de son conseil, et contre-interroger les témoins;

(*c*) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.	*c*) exercer, avec l'autorisation du juge, tout autre pouvoir nécessaire à la défense des intérêts du résident permanent ou de l'étranger.

Issues:

[14] The issues arising from this controversy can be defined by these questions:

1. Can the special advocates be excluded from any *in camera* hearing during a security certificate proceeding in which the Ministers will present evidence?
2. Does the "need to know" principle operate to exclude special advocates from hearing and receiving evidence that would reveal technical operations?

The Positions of the Special Advocates and the Ministers:

[15] The special advocates' position can be summarized as follows:

1. Subsections 85.1(1) and 85.2 of IRPA implicitly, but nonetheless necessarily, require the presence of a special advocate at any *in camera* session in a security certificate proceeding; and
2. Subsections 85.4(1) and 85.2(b) explicitly stipulate that a special advocate is to be provided with all confidential evidence and is entitled to cross-examine any witness who testifies at an *in camera* session.

[16] The special advocates argue that it is difficult to make submissions by reference only to the summary of the testimony concerning three way-calls and the redacted transcript of the February 10th hearing. They contend it is difficult or even impossible to know what questions should be asked in relation to testimony that has been redacted.

[17] The special advocates maintain that they "need to know" any information that is presented to the judge in the absence of the named person or his counsel. Specifically here, the special advocates argue, they had a "need to know" what information was presented to the Court so that they could test the information provided by the witness through cross-examination. They submit the terms of release might have been different had they been permitted to cross-examine the witness.

[18] Lastly, the special advocates contend that the provisions of IRPA are clear: they are entitled to cross-examine any witness presented by the Ministers *in camera*. To proceed otherwise would trivialize their role. They request an unredacted transcript of the witness' testimony (and the drawings the witness created during the testimony) to allow them to respond in a meaningful way as to whether or not they require the re-attendance of the witness for cross-examination.

[19] The Ministers submit that the transcript of the hearing should remain redacted because the disclosure of the witness' complete testimony would reveal an important aspect of how the security services conduct their technical operations. They further submit that the information is so technical in nature that it does not need to be disclosed to the special advocates in order for them to fulfil their legislative role, nor would it assist Mr. Almrei to make full answer and defence against the Ministers' allegations.

[20] The Ministers contend that disclosure in the security certificate context is not absolute. While Mr. Almrei is entitled to a fair process, such a process must strike a fair balance between his right to full answer and defence and national security: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 57.

[21] The Ministers' obligation to file information and other evidence on which the security certificate is based, they contend, does not extend to information relating to technical operations. The information and other evidence which must be disclosed relates to "what" the government has retained throughout its investigation of Mr. Almrei, not "how" it obtained this information. In this instance, the Ministers say, it was necessary to disclose the "how" to the Court as it went directly to one of the conditions of Mr. Almrei's release, but not necessary that the special advocates be informed other than by way of a summary of the evidence.

[22] The Ministers note that this Court has recognized the importance of protecting technical capabilities and methods of operations: *Henrie v. Canada (SIRC)*, (1988) 53 D.L.R. at pages 578 and 579; *Re Harkat*, (2005) F.C. 393 at paras. 81 and 82. They point to the recent decision of my colleague Justice Simon Noël in *Re Harkat*, above, in which he dealt with a motion by the special advocates in that proceeding for the disclosure of human source information. At paragraph 52 of that decision, Justice Noël stated as follows:

> … If Parliament had intended the Special Advocates to have access to all information, including information over which the government claims solicitor-client or other privilege, it would have explicitly stated so in the legislation. The limited powers given to the Special Advocates in s. 85.2 do not, without this Court's authorization, permit them to call witnesses or require the production of a witness or document particularly where to do so would pierce a common law privilege.

[23] Further, as Justice Noël observed at paragraph 57, the special advocates are not in the same position as the Court. Their role is to protect the interests of the named person; they are not impartial judges. In this instance, the Ministers argue, the "need to know" principle is triggered to preserve the confidentiality, integrity, availability and value of CSIS assets. Only in the most compelling of cases can anyone, including the special advocates, have access to information which would reveal technical capabilities. The Ministers submit that the special advocates have failed to demonstrate that this is a case where this fundamental principle ought to be abrogated.

[24] The special advocates reply that the principles identified by Justice Noël in *Re Harkat*, above, can be distinguished from this matter. In that case, the Court found that a common law privilege of profound importance, namely the covert human intelligence source privilege, would be abrogated if the request were granted. Here, the Ministers have relied on evidence that they claim to be relevant and over which they did not (and could not have) asserted privilege.

[25] Further, the special advocates submit, the language of subsection 85.2(b) of the Act is explicit: the special advocates may "participate in, and cross examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel" [underlining added].

Analysis:

[26] The context in which the present controversy arose was the determination of appropriate conditions for Mr. Almrei's release, as contemplated by subsection 82(5) of the Act. The statute

gives the Court a broad discretion subject to the limits of reasonableness and proportionality: *Charkaoui*, above, at para. 116; *Re Mahjoub*, 2009 FC 34, at para. 159; *Re Jaballah*, 2009 FC 33, at para. 161. The Ministers' request that three-way calling be prohibited was questioned by Mr. Almrei. Despite the concession made by his counsel in the interests of avoiding delay, the issue remained a live one between the parties as the issue was merely deferred to be resolved later through evidence.

[27] In seeking to strike a fair balance between the interests of the named persons and national security in response to the decision of the Supreme Court of Canada in *Charkaoui*, above, the legislative scheme adopted by Parliament embraces two concepts that are relevant to the present controversy.

[28] The first concept is that the presiding judge is required to protect from disclosure information and evidence that would be injurious to national security or endanger the safety of any person. To carry out that responsibility, the judge is authorized to hear information and other evidence in the absence of the public, including the named person and his counsel, and to determine what should be disclosed to enable them to be reasonably informed of the Minister's case (s. 83(1)). As noted above, such a hearing is required by the statute at the request of the Minister, or on the judge's own motion, when the judge believes that disclosure could be injurious, a lower standard.

[29] The second concept is that the special advocates are to play an important role in ensuring that the Minister's national security claims and the information and evidence relied upon by the Minister are closely examined to protect the named person's interests. In order for them to perform

that role, the statute provides that they are to participate in and cross-examine witnesses who testify during any part of the proceeding that is held in a closed session and in the absence of the named person and his counsel.

[30] Counsel for the Ministers is correct to assert that, in general, information which could cause injury to national security should only be accessed by persons who have a genuine need to know the information in order to carry out their responsibilities. There is much, I expect, about how CSIS conducts its investigations that the special advocates or the Court might be interested in learning but would not assist in determining the issues in these proceedings. It has to be kept in mind that the Court and the special advocates are not embarked upon an inquiry into the operations of the security services. But the statute contains no explicit "need to know" test that would restrict the special advocates' participation in a closed hearing in which the Minister presents information or other evidence to the Court which may affect the named person's interests. Nor does the law implicitly recognize such a test, in my view, that would override the express terms of the statute.

[31] I agree with my colleague Noël J. that the special advocates are not empowered to have access to all information within the possession of the government, particularly privileged information, but this is not a situation directly comparable to that upon which he ruled in *Re Harkat*, above. The special advocates have not requested that the government provide access to privileged information which is not before the Court, as was the case in *Re Harkat*; they are asking that they be allowed to perform the role which Parliament has assigned to them to question evidence that the Ministers have chosen to present to the Court.

[32] The Court may be called upon from time to time in certificate proceedings to determine whether specific information is privileged and would not be subject to disclosure to the special advocates or, ultimately, to the named person and his counsel. Examples would include informer privilege, such as was dealt with in *Re Harkat*, above, and solicitor-client privilege. The statute does not expressly grant the special advocates access to such information, and for the reasons expressed by Justice Noël, I am satisfied that Parliament did not intend to change the law in this regard.

[33] I do not wish to preclude the possibility that a situation may arise in which the Court will have to hear special operational information in the absence of the special advocates. But in each such instance, should it occur, the Court must find the means to ensure meaningful participation by the special advocates if information or other evidence respecting the interests of the named person is to be presented. Counsel for the Ministers could assist the Court by presenting evidence and submissions in a form of "show cause" hearing in which the special advocates participate, should the need arise.

[34] Information subject to claims of injury to national security or to the safety of any individual may be withheld from disclosure to the named person and his counsel. But for such claims, the statute, in paragraph 85.1(2)(b), expressly empowers the special advocates to challenge the Minister's assertions. To perform that function, they must have access to the information or other evidence the Minister is seeking to protect. To ensure that the information is protected pending a determination of the claim, the special advocates require high-level security clearances and are subject to severe sanctions should they disclose the information without authorization.

[35] The Court may need to review information provided by the Ministers in the absence of the special advocates to determine whether it pertains to the proceedings or is privileged for reasons other than national security claims. For this reason, the Court is currently reviewing documents collected from CSIS records and filed with the Court Registry on February 9, 2009 in response to an Order issued on October 10, 2008.

[36] In the version of the February 9, 2009 disclosure package provided to the special advocates, some of the documents have been redacted to exclude information which the government considers unrelated to these proceedings or privileged. For example, certain of these records are overview reports containing information respecting individuals with no connection to Mr. Almrei. The Court considered it necessary to review the redactions to ensure that the principles set out in the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326 had been respected. A special advocate was present when it was deemed necessary to hear evidence from a CSIS witness as to the reasons for the redactions and they will be present for any further hearings in that regard.

[37] The issue of whether the redacted content in the February 9, 2009 production should be disclosed to the special advocates and to the named person or whether further disclosure shall be required remains under active consideration by the Court. But this review does not and should not concern information or other evidence which the Ministers have presented to the Court as part of their case as occurred on February 10, 2009.

[38] In this instance, the Ministers have not established that the information relating to technical operations should be considered privileged, nor have they demonstrated a basis in law for the exclusion of the special advocates by reason of the "need to know" rule. The technical nature of the evidence did not require the non-disclosure to or non-participation of the special advocates at the February 10th hearing nor can it override the express terms of the legislation.

[39] I conclude that the special advocates should not have been excluded from the hearing on February 10, 2009. The summary and redacted transcript of the testimony given to them does not serve as an adequate substitute for the right to "participate in and cross-examine witnesses who testify during any part of the proceeding that is held in the absence of the public" as set out in subsection 85.2(b). The only suitable recourse, in my view, is to provide them with an unredacted copy of the evidence together with the illustrative drawings made by the witness during his testimony and an opportunity to cross-examine the witness should they consider it necessary.

ORDER

THIS COURT ORDERS that:

1. The full and unredacted transcript of the hearing held on the morning of February 10, 2009 shall be provided to the special advocates together with a copy of the drawings entered as exhibits at that hearing; and
2. At the request of the special advocates, a hearing shall be scheduled to permit them to cross-examine the witness called by the Ministers on the morning of February 10, 2009.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-3-08
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 Hassan ALMREI**
PLACE OF HEARING:	Ottawa
DATES OF HEARING:	February 10, 2009
REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	March 24, 2009

APPEARANCES:

Marcel Larouche	for the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness
Paul Copeland Gordon Cameron	Special Advocates

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	for the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness
Copeland, Duncan Toronto, Ontario	Special Advocates
Blake, Cassels & Graydon LLP Ottawa, Ontario	