

Federal Court



Cour fédérale

Date: 20090527

Docket: DES-5-08

Citation: 2009FC553

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 Mohamed HARKAT

REASONS FOR ORDER

NOËL S. J.

[1] On May 26, 2009, at 12 p.m., a Top Secret letter containing two Top Secret attachments (together, the “Ministers’ letter”) was delivered to this Court by the Canadian Security Intelligence Service. The Ministers’ letter provided new information dating from 2002 and 2008 concerning the reliability of a human source who provided information in relation to the investigation of Mr. Harkat.

[2] In the Ministers’ letter, counsel for the Ministers acknowledges that it is:

“...clear that the Court and the Special Advocate should have been made aware of [this information] and the failure to do so is a serious matter. The Service is investigating why this information was not provided and will report to the Court as soon as the investigation is complete.”

[3] The information provided in the Ministers' letter is significant and goes to the weight to be given to the evidence of a human source however the information was not provided to the Court or the Special Advocates:

- in Exhibit "A". As noted in *Re Harkat* 2009 FC 204 at paragraph 66, Exhibit "A" is an exhibit prepared by CSIS assessing the reliability of the source and his or her relationship with CSIS. It is intended to permit the Court to make findings on the reliability of the information provided by the source.
- as a part of the disclosure resulting from the Order of this Court dated September 24, 2008 made pursuant to *Charkaoui v. Canada* 2008 SCC 38 ("*Charkaoui 2*").
- in response to the Court order issued November 28, 2008, requiring the Ministers to file information found in either administrative or operational files relating to the reliability of information provided by a human source.
- by the CSIS witness who testified in September 2008 in relation to the reasonableness of the certificate even when specifically questioned on the reliability of the source by the Court.
- by a CSIS witness, who appeared on request of the Court. The Court asked the witness to familiarize himself with the contents of the human source file and provide evidence to the Court regarding the contents of the file.

[4] When the Ministers' letter was received, this Court had under reserve a request made by the Special Advocates to access the human source file in question. Access to the human source file would inevitably result in the Special Advocates learning the identity of the source in question.

[5] In their submissions in support of their request to review the human source file, the Special Advocates asserted a need to know the information contained in the human source file to fulfill their statutory role of protecting the interests of Mr. Harkat in his absence by testing the reliability of confidential information relied on by CSIS. They submitted that they would not be able to fulfill their statutory role if they were required to rely on CSIS to provide them with the relevant information.

[6] The Ministers objected to the request on the grounds that the Special Advocates had already been given sufficient information with which to test the reliability of the information provided by the human source and thus did not have a need to know the identity of the source. It is only in the recent Ministers' letter that they come to the conclusion that the Special Advocates may have access to the file if the Court so orders.

[7] During closed hearings, the Court has reminded counsel for the Ministers of the Ministers' obligation to act in utmost good faith in these proceedings. In particular, relying on the jurisprudence, the Court commented on the duty of the Ministers to provide all information which would tend to weaken their case against Mr. Harkat.

[8] On May 15, 2009, counsel for the Ministers wrote to the Court and indicated that he would be providing further information to the Court which could have a bearing on the Court's decision in relation to the Special Advocates' request. That information was provided by way of the Ministers' letter.

[9] The rule of law is an essential component of any functioning democratic society. In *British Columbia (Attorney General) v. Christie* As the Supreme Court observed at paragraph 20:

The rule of law is a foundational principle. This Court has described it as a “fundamental postulate of our constitutional structure” [...] that “lie[s] at the root of our system of government”. [...] It is explicitly recognized in the preamble to the Constitution Act, 1982, and implicitly recognized in s. 1 of the Charter, which provides that the rights and freedoms set out in the Charter are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. And, as this Court recognized in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750, it is implicit in the very concept of a constitution.

[10] In *Christie* the Supreme Court set out three essential, but not exclusive, principles of the rule of law. The first is that the “law is supreme over officials of the government as well as private individuals, and thereby preclusive of arbitrary power.” The second “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.” The third principle is that “the relationship between the state and the individual be regulated by law.”

[11] The judiciary is the guardian of the rule of law. The Courts, guaranteed independence by the judicature sections of the Constitution Act, 1982, have the duty and responsibility to ensure that all Canadians, irrespective of their wealth, position or influence, respect and comply with the rule of law. Persons in positions of authority within government whose actions impact on the rights and liberties of Canadians must be held to account for even the slightest disregard for this principle.

[12] Recent disclosures made to this Court on May 26, 2009, raise questions in relation to:

- the compliance of the Canadian Security Intelligence Service with orders of this Court, in particular the Orders of September 24, 2008, and November 28, 2008;
- possible prevarication by CSIS witnesses called to testify concerning the reliability of the information provided by the human source; and,
- CSIS' compliance with the obligation of utmost good faith required by the jurisprudence in the context of the *ex parte* proceedings. See *Ruby v. Canada*, 2002 SCC 75 at para. 27 and *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 421 at para. 153-154.

[13] In *Re Harkat*, 2009 FC 204 this Court recognized a covert human intelligence source privilege. The privilege establishes an absolute bar to the identification of a human source in the public domain. The Court recognized one exception to the absolute bar which would only be made in the context of a closed *ex parte* hearing pursuant to section 83(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 ("IRPA"). As noted in *Re Harkat* 2009 FC 204 at paragraph 46, the "need to know" exception:

...will only be established where evidence is adduced demonstrating that the identity of the covert human intelligence source must be disclosed to prevent a flagrant breach of procedural justice which would bring the administration of justice into disrepute.

[14] This Court finds that as a result of the review of the Ministers' letter, the Special Advocates have a "need to know" the contents of the human source file even if this results in the revelation of the source's identity. The rule of law requires no less. Once the Court has evidence that leads it to

question the completeness of the information being provided to it by the Ministers, in apparent violation of their obligation of utmost good faith, it must allow the Special Advocates access to all information which they have a need to know. To do otherwise would bring the administration of justice into disrepute.

[15] This Court will also be reviewing all orders issued and evidence provided to date in this proceeding to see if any further judicial action is required to preserve the integrity of the administration of justice. This review will require the recalling of several CSIS witnesses.

[16] This troubling situation may also raise questions in relation to the information presented, or not, to the designated judge presiding over the first security certificate naming Mr. Harkat. The Court will be asking for submissions on this important issue.

[17] In conclusion, the Court notes that counsel for Mr. Harkat has made a request to postpone the hearing into the reasonableness of the certificate as a consequence of the search by CBSA of Mr. Harkat's residence on May 12, 2009. They have also filed submissions on the legality of this search. A hearing into the legality of the search will be held on June 2, 2009.

[18] In light of all the recent developments in this proceeding, the Court has no choice but to temporarily adjourn the reasonableness hearing. The litigation plan of January 16, 2009, will be amended by the Court after consultation with counsel for Mr. Harkat, counsel for the Ministers and the Special Advocates on June 2, 2009.

THEREFORE, THIS COURT ORDERS that:

- **The Ministers shall file 3 complete and unredacted copies of the human source file with the Court forthwith and no later than 4 p.m. on June 1, 2009. The Special Advocates will be provided with full access to the unredacted file.**
- **A hearing to determine the legality of the May 12, 2009, search of Mr. Harkat's residence will be held at 10 a.m. on June 2, 2009.**
- **The hearing to determine the reasonableness of the certificate is temporarily adjourned. The Court will hear the submissions of counsel and the Special Advocates in relation to an amended litigation plan on June 2, 2009.**

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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REASONS FOR JUDGMENT: NOËL S. J.

DATED: May 27, 2009

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