

Date: 20090925

Docket: DES-6-08

Citation : 2009 FC 969

Ottawa, Ontario, September 25, 2009

PRESENT: The Honourable Madam Justice Dawson

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
MAHMOUD ES-SAYYID JABALLAH**

REASONS FOR ORDER

[1] Commencing on September 28, 2009, the Court will hear open submissions with respect to a motion brought by the special advocates. The motion seeks an order staying this proceeding on grounds that the proceeding:

- (i) is barred by principles of *res judicata*, cause of action estoppel and issue estoppel;
- (ii) is an abuse of process; and

(iii) infringes s. 7 of the *Canadian Charter of Rights and Freedoms*.

[2] At a case management conference held September 10, 2009, counsel for Mr. Jaballah proposed that, at the open hearing, the special advocates would advance the lead legal submissions in support of the motion. Counsel for Mr. Jaballah would thereafter supplement those submissions as might be required.

[3] Subsequently, the Ministers objected to that proposal. The Ministers' objection is primarily based upon the fact that the *Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Act)* does not contemplate special advocates "assuming the role of the named person's counsel and arguing motions in public as though they themselves were the named person's lawyer". The Ministers also express "more general concerns about duplication and judicial economy if the [special advocates] are permitted to take a major role in arguing motions in public. In addition, the Ministers believe that there would be a heightened risk of inadvertent disclosure in the fluid context of a motion in open court, where the [special advocates] would be acting to protect the named person's interests and may well need to communicate or obtain 'instructions' on the spot."

[4] The current dispute must be viewed in the context of the specific, and unusual, circumstances now before the Court. Those circumstances may be summarized as follows:

1. Following the completion of their review of the *Charkaoui II* disclosure, the special advocates advised the Court of their intention to bring this motion. This intention was communicated to Mr. Jaballah and his counsel by the Court's communication of July 20, 2009. The communication expressed the special advocates' view that "this motion must be heard entirely *in camera* because the argument is based upon the content of documents protected by national security privilege." The communication also confirmed the deadlines for the filing of confidential motion materials by the special advocates and the Ministers.
2. The motion was scheduled to be heard *in camera* on August 31, 2009 and September 1, 2009.
3. On August 13, 2009, counsel for the Ministers wrote to the Court expressing the view that the special advocates' motion was "duplicative of relief that is being sought by counsel in the public proceedings in a motion dated July 13, 2009. Given that counsel for Mr. Jaballah have brought a similar motion, the motion brought by the special advocates should not proceed without argument in public where the Court should determine if there is a basis for a reconsideration of matters decided by Justice McKay in the second certificate proceedings. In the Ministers' view counsel should argue the *res judicata* motion in public. In the event that there are matters that have to be dealt with *in camera* pertaining to this motion, the

Court can, in the exercise of its discretion, deal with any evidentiary matters that are required to be dealt with in camera." (This reference to the motion brought by counsel for Mr. Jaballah relates to a notice of motion provided to alert the Court to a number of motions to be brought on Mr. Jaballah's part and to allow a determination to be made as to when the motions would be heard. Some confusion may have arisen from that notice of motion. Counsel for Mr. Jaballah have, however, confirmed that such motion is not currently before the Court. The only pending motion for a stay of proceedings is that brought by the special advocates.)

4. The August 13, 2009 letter from counsel for the Ministers was discussed at a case management conference on August 26, 2009. It was agreed that the *res judicata* motion would first be argued in public on September 28, 2009 and following, and that there would be a subsequent closed hearing. As a result, the *in camera* hearing scheduled for August 31, 2009 was adjourned. Public versions of the special advocates' motion materials were filed. Mr. Jaballah's motion materials (in which he "join[ed] with the special advocates in seeking to have this proceeding stayed") were filed on September 8, 2009. The Ministers' open and closed materials were filed on September 22, 2009.

[5] Now, after the special advocates' *in camera* motion has been adjourned in order

to permit a public portion to proceed first, the Ministers assert that counsel for Mr. Jaballah must have primary carriage of the public portion of the special advocates' motion. The Ministers do concede, however, that the special advocates would have some right to participate in that oral argument. They say that, if counsel for Mr. Jaballah fail to address a point in their argument, the special advocates may make supplementary submissions raising that point.

[6] The role of the special advocates is set out in subsection 85.1(1) of the Act. Special advocates are "to protect the interests of the permanent resident or foreign national in a proceeding ... when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel." (Underlining added.) To that end, s. 85.2 of the Act defines the powers of the special advocates. Subsection 85.2(a) permits special advocates to "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 person concerned and their counsel.

[7] In light of that statutorily conferred power, the Ministers do not challenge the right of the special advocates to bring a motion in the closed proceeding, based upon the closed materials. This is what the special advocates have done.

[8] However, the open court principle, as reflected in paragraph 83(1)(d) of the Act,

applies to this motion. The resulting consequence is that, to the extent that matters of fact or law may be disclosed without causing injury to national security or endangering any person's safety, the matters of fact or law must be publicly disclosed. To the extent that any portion of a hearing may be heard in open court without causing injury to national security or endangering any person's safety, the hearing must be open. Thus, a public version of the special advocates' submissions was filed on the public record.

[9] To summarize, the motion now before the Court was properly brought by the special advocates. They have made open and closed written submissions based upon the closed record. They will make confidential oral submissions to the Court with respect to the closed record. These actions are specifically authorized by subsection 85.2(a) of the Act.

[10] In the unusual circumstances now before the Court, I see no violation of the spirit or letter of the Act if the special advocates make their oral submissions in public to the extent that those submissions do not disclose information that would be injurious to national security or endanger the safety of any person. In the circumstances, because the motion before the Court is one brought by the special advocates, they should be the first to make their submissions. This is the usual manner of proceeding. Counsel for Mr. Jaballah may then orally supplement those submissions. The Ministers may argue in response. This procedure is consistent with both subsection 85.2(a) of the Act and the

open court principle.

[11] In closing, I see no real risk of any inadvertent disclosure of confidential information. No *viva voce* evidence will be adduced and the submissions will reflect the facts and matters contained in the public motion records. Similarly, I can foresee no need on the part of the special advocates to communicate with, or obtain “instructions” from, Mr. Jaballah as the Ministers suggest. The special advocates have previously been given leave, pursuant to s.s. 85.4(2) of the Act, to communicate with counsel for Mr. Jaballah about this motion on condition that there be no disclosure, direct or indirect, of confidential information or evidence.

[12] For these reasons, the Ministers' objection to the special advocates presenting, in public, the lead submissions in support of their motion for a stay of proceedings is dismissed. An order has issued by which the Court authorized the special advocates to present, at the open hearing, the lead submissions in support of their motion for a stay of proceedings.

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-6-08
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PLACE OF HEARING: Ottawa, Ontario

DATES OF HEARING: September 16, 2009

**TOP SECRET REASONS FOR ORDER BY
THE HONOURABLE MADAM JUSTICE DAWSON**

DATED: September 25, 2009

APPEARANCES:

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Ms. A. Weaver

For Mr. Jaballah

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For the Minister of Citizenship and
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