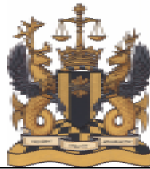
Federal Court		Cour fédérale

Date: 20100122

Docket: DES-6-08

Citation: 2010 FC 80

Ottawa, Ontario, January 22, 2010

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] Mahmoud Jaballah is named in a security certificate signed by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness (Ministers). The certificate has been referred to the Court pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) and the Court is in the process of determining whether the certificate is reasonable.

[2] In the course of that process, the special advocates appointed to protect Mr. Jaballah's

interests have moved for an order staying the proceeding. The grounds of the motion are that the present proceeding is "barred by the principles of *res judicata*, cause of action estoppel and issue estoppel." In the alternative, the special advocates argue that the present proceeding constitutes an abuse of process.

[3] The special advocates are tasked by subsection 85.1(1) of the Act with protecting the interests of a person named in a security certificate "when information or other evidence is heard in the absence of the public and [the person named in the certificate] and their counsel." This motion reflects that mandate in that it is based upon the information and evidence which is before the Court but which has not been disclosed to Mr. Jaballah (because such disclosure would be injurious to national security or endanger the safety of any person). This motion was argued in both open and closed hearings. In the open hearing, the parties' arguments were confined to the relevant principles of law. This was done because of the strong view of the special advocates and counsel for Mr. Jaballah that to focus on the open evidence in the open hearing would "skew" the issues "because a certain impression can be created by comparing the public records and saying, Well, this does appear to be different, this doesn't appear to be different, without being able to delve into the full history of the matter." Thus, with the agreement of counsel for the Ministers, in the closed hearing, submissions were made based upon both the open and the closed evidence and information that is before the Court.

[4] In order to appreciate the issues raised on this motion, it is necessary to review briefly the

history of the various proceedings brought against Mr. Jaballah.

1. Procedural History

[5] This is the third security certificate issued in respect of Mr. Jaballah.

[6] On March 31, 1999, the Minister of Citizenship and Immigration and the Solicitor General of Canada issued a security certificate under section 40.1 of the *Immigration Act*, R.S.C. 1985, c. I-2. The certificate set out the opinion of those ministers that Mr. Jaballah was inadmissible to Canada on grounds of national security because of his alleged membership in Egyptian Al Jihad, an alleged terrorist organization. In accordance with the provisions of the *Immigration Act*, Mr. Jaballah was detained for the duration of that proceeding. In reasons delivered on November 2, 1999, Justice Cullen determined that the certificate was not reasonable, and ordered that it be quashed (Jaballah No. 1).

[7] On August 13, 2001, the Minister of Citizenship and Immigration and the Solicitor General of Canada issued a second security certificate (Jaballah No. 2) which again certified their opinion that Mr. Jaballah was inadmissible to Canada on grounds of national security due to his alleged membership in Egyptian Al Jihad. Pursuant to the then applicable legislation, Mr. Jaballah was again detained in custody.

[8] Justice MacKay was the judge designated by the Chief Justice to preside over the hearing

to determine the reasonableness of the second certificate. At an early stage of the proceeding, counsel for Mr. Jaballah moved for an order staying the proceeding on grounds that the matter was *res judicata* or an abuse of process. The motion was dismissed by Justice MacKay on the ground that it was premature. Justice MacKay gave leave to renew the motion at a later date in light of the evidence that might be adduced. See: *Jaballah (Re)*, 2001 FCT 1287 at paragraph 26.

[9] While the inquiry into the reasonableness of the second certificate was proceeding, on June 28, 2002, the Act came into force. This had the following effects upon Jaballah No. 2:

i) The pending proceeding was deemed to be a proceeding brought under the Act.

ii) Mr. Jaballah became entitled to, and did, apply for protection pursuant to subsection 112(1) of the Act.

iii) By virtue of subsection 79(1) of the Act and Mr. Jaballah's request, the security certificate proceeding was suspended in order to allow the Minister of Citizenship and Immigration to decide the application for protection.

[10] On August 15, 2002, a pre-removal risk assessment officer found there were substantial grounds for believing that Mr. Jaballah would be killed or tortured should he be returned to Egypt.

[11] Thereafter, no decision was made on a timely basis by the Minister of Citizenship and Immigration with respect to Mr. Jaballah's application for protection. Therefore, Mr. Jaballah

moved for an order quashing the certificate. In reasons reported at [2003] 4 F.C. 345, Justice MacKay:

i) found the delay in considering the application for protection to constitute an abuse of process, albeit not an abuse sufficient to justify quashing the certificate;

ii) deemed the risk assessment prepared by the pre-removal risk assessment officer to be the decision of the minister with respect to the application for protection;

iii) resumed consideration of the reasonableness of the security certificate;

iv) found that there was new and significant information before the Court that had not been ascertainable by the ministers before the first certificate was quashed, and that this new information could have led to a different conclusion in Jaballah No. 1. As a result, he concluded that principles of *res judicata*, issue estoppel and abuse of process did not apply; and

v) found the certificate to be reasonable.

[12] The ministers appealed Justice MacKay's finding with respect to abuse of process and his treatment of the risk assessment. Mr. Jaballah cross-appealed against the finding that the certificate was reasonable on the ground that Justice MacKay had failed to determine whether the ministerial decision concerning protection was lawfully made before he determined whether the certificate was reasonable.

[13] In reasons reported at [2005] 1 F.C.R. 560, the Federal Court of Appeal dismissed the

ministers' appeal, but allowed Mr. Jaballah's cross-appeal. The Court of Appeal directed that the issues of the reasonableness of the certificate and the lawfulness of the Minister of Citizenship and Immigration's subsequent protection decision should be returned to the Federal Court for redetermination.

[14] The matter then proceeded before Justice MacKay. In reasons delivered on October 16, 2006, reported as (2006), 301 F.T.R. 102, Justice MacKay again found the second security certificate to be reasonable.

[15] On February 23, 2007, in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Charkaoui I) the Supreme Court of Canada found the then existing provisions of the Act dealing with security certificates to be of no force or effect. The declaration of invalidity was suspended for a period of one year. At that time, Mr. Jaballah was subject to the second security certificate and was in detention.

[16] On April 12, 2007, this Court ordered that Mr. Jaballah be released from detention on strict terms and conditions.

[17] On February 22, 2008, Bill C-3, *An Act to amend the Immigration and Refugee Protection Act*, 2nd Session, 39th Parliament came into force. This was legislation that amended the security certificate provisions of the Act in response to the decision of the Supreme Court in Charkaoui I.

The coming into force of this legislation terminated the existing proceeding in accordance with the transitional provisions of the legislation. On the same day, a third, new security certificate was signed by the Ministers and was referred to the Court. This is the security certificate now before the Court. In this third certificate, the Ministers again certify their belief that Mr. Jaballah is inadmissible on grounds of national security, relating to his alleged membership in the Egyptian Al Jihad.

2. Matters of Agreement

[18] During the course of both public and closed oral argument, a number of matters were agreed upon by the parties and the special advocates. Important areas of agreement are as follows.

1. In this case, nothing turns upon the distinction between issue estoppel and cause of action estoppel. See: transcript September 28, 2009 at pages 46 and 125.
2. Justice Mackay's determination in 2003 in Jaballah No. 2 that there was new and significant information before the Court, so that the doctrines of *res judicata*, issue estoppel and abuse of process did not apply, was not overturned by the Federal Court of Appeal. See: transcript of September 28, 2009 at pages 16-17. This is so both because of the privative provision in the Act that protected the finding of reasonableness and because no appeal was pursued in respect of that finding.
3. If evidence was new in 2003, it remains new evidence today because the point of comparison is with 1999. That is, if evidence was new in 2003 compared to 1999,

it is still new today compared to 1999. See: transcript September 28, 2009 at page 62.

4. On the basis of the public record, issue estoppel would apply so that Mr. Jaballah could not re-litigate the issue of whether a new certificate should be quashed on grounds of *res judicata* or abuse of process. See: transcript September 28, 2009 at pages 8, 9, 129, and 130.

5. In view of the agreement of counsel for the Ministers and the special advocates that Justice MacKay's 2003 finding about the existence of new and significant evidence was not over-turned, and their agreement that on the public record issue estoppel would prevent Mr. Jaballah from re-litigating the issues of *res judicata*, issue estoppel and abuse of process, the starting point of the present analysis should be whether special circumstances exist that estop the Ministers from relying on issue estoppel with respect to the Court's 2003 finding that there was new and significant information before the Court. See: transcript *in camera* hearings October 19, 2009 at page 9 and October 20, 2009 at page 86.

6. The onus is upon the special advocates to establish the existence of special circumstances that would estop the Ministers. See: transcript *in camera* hearing October 19, 2009 at pages 10-11.

7. The special advocates do not allege that there was any fraud or willful suppression of evidence in the prior proceeding before Justice MacKay. See: transcript *in camera* hearings October 19, 2009 at page 11 and October 20, 2009 at page 84.

8. Counsel for Mr. Jaballah do not challenge any of the concessions made by the special advocates because they are not in a position to do so. See: transcript September 28, 2009 at page 90.

[19] In light of the agreement set out at point 5 above, my review of the relevant principles of law will begin from that premise.

3. Relevant Principles of Law

[20] *Res judicata* is a fundamental principle of law made up of two distinct constituent parts: issue estoppel and cause of action estoppel. Issue estoppel precludes the relitigation of an issue that has been previously decided in court in another proceeding. Cause of action estoppel precludes of the relitigation of a cause that has been conclusively disposed of by an earlier judgment. *Res judicata* generally applies not only to what has been decided, but also to what could have been decided had the parties exercised reasonable diligence. See: *Doering v. Grandview (Town)*, [1976] 2 S.C.R. 621.

[21] *Res judicata* reflects two policy considerations. First, prohibiting repeated litigation is important for the efficiency and reputation of the justice system. *Res judicata* thus avoids squandering limited judicial resources through the relitigation of cases and the resultant potential controversy of inconsistent findings. Second, as a matter of fairness and justice, "persons should not be twice vexed by the same cause." See: *R. v. Mahalingan*, [2008] 3 S.C.R. 316, 2008

SCC 63 at paragraph 106 (the concurring reasons of Justice Charron).

[22] However, special circumstances may operate to restrict the application in a second proceeding of both issue estoppel and cause of action estoppel. See: *Apotex Inc. v. Merck & Co.*, [2003] 1 F.C. 242 (C.A.). See also: Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 2nd ed., (Markham: LexisNexis 2004) at page 231.

[23] In *Apotex*, at paragraph 30, the Federal Court of Appeal considered the nature of special circumstances by writing that:

> 30. The jurisprudence is unclear as to what factors will, in principle, constitute special circumstances. Recent jurisprudence from the Supreme Court of Canada, however, has affirmed that a discretion is vested in the Court as to the application of issue estoppel. This discretion is restricted where the estoppel arises from a final decision of a competent Court (Danyluk, supra, at paragraph 62; General Motors of Canada Ltd. v. Naken et al., [1983] 1 S.C.R. 72, at pages 100-101). In determining whether justice will be done between the parties, the Court must as a final and most important factor, stand back and, taking into account the entirety of the circumstances, consider [page260] whether application of issue estoppel in the particular case would work an injustice (Danyluk, supra, at paragraph 80). It follows that any special circumstances which would give rise to an injustice would, at the least, make the Court reluctant to apply the estoppel. [Emphasis added.]

[24] As well, in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, the Supreme Court of Canada observed, at paragraph 1, that issue estoppel, a "judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

[25] In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.) Local 79*, [2003]

3 S.C.R. 77, the Supreme Court of Canada considered the related common law doctrines of issue estoppel, abuse of process and collateral attack. Of particular assistance are the comments of the majority of the Court about the effects of relitigation and the discretionary factors that operate to prevent the application of issue estoppel. At paragraphs 52 and 53, the majority wrote:

> 52. In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that [page110] from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.
>
> 53. The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55). [Emphasis added.]

[26] The burden of establishing special circumstances is upon the party who seeks to rely upon

those special circumstances. See: *Wagner v. Matheson*, [1994] O.J. No. 1611 at paragraph 13 (Ont. Gen. Div); aff'd [1997] O. J. No. 2403 (C.A.).

[27] Based upon my review of the law, I conclude that the matters agreed by the parties and the special advocates, as set out above, correctly reflect the state of the record and the jurisprudence. Particularly, the starting point of the analysis should be whether special circumstances exist that estop the Ministers from relying on issue estoppel with respect to the Court's 2003 finding concerning the existence of new evidence.

[28] There remains to consider the required materiality of the special circumstances.

[29] Detailed submissions were received with respect to how material new evidence must be in order to preclude the operation of the issue estoppel or cause of action estoppel. The special advocates submitted that new evidence must be "practically conclusive." The Ministers submitted that new evidence must meet the threshold that it "would probably have changed the result" and say that, in any event, in substance this is the same test as proposed by the special advocates. The special advocates asserted what they say is a higher threshold in the context of their argument that on an independent review of what is new, the Court should find insufficient new evidence to justify this proceeding.

[30] The special advocates rely upon Dr. Lange's text, cited above, to support their

submission. At pages 266 and 267 it is stated that "the new evidence must be practically conclusive of the matter." Notwithstanding, at page 235 Dr. Lange writes, with respect to what effect the special circumstances must have upon the first proceeding, that “the case law, in the areas of fraud and new evidence, reflects a general principle that the special circumstances must ‘be demonstrably capable of altering the result” of the first proceeding. This is supported by the decision of the Newfoundland Court of Appeal in *Lundrigan Group Ltd. v. Pilgrim (Nfld. C.A.)* (1989), 75 Nfld. & P.E.I.R. 217. The apparently stronger statement at pages 266 and 267 is supported by reference to two Supreme Court decisions: *Varette v. Sainsbury*, [1928] S.C.R. 72 at page 76 and *Dormuth v. Untereiner*, [1964] S.C.R. 122.

[31] In *Varette,* the Court held that a new trial, sought on the basis that new evidence had been discovered after the first trial, could only be granted where the new evidence could not have been obtained by reasonable diligence before the trial and was such that, if adduced, it would be "practically conclusive." The prior decision of *Young v. Kershaw* (1899), 16 T.L.R. 53 was cited in support.

[32] In *Young* the defendant, Kershaw, wrote a letter to the Archbishop of York alleging an illicit affair between the plaintiffs. The plaintiffs brought a successful action for libel and were awarded damages. The defendant sought a new trial on several grounds, including that he had discovered new evidence which he could not by reasonable diligence have discovered before the trial.

[33] Lord Justice Smith concluded that the authorities showed where a trial had been conducted with a jury, new evidence must have been undiscoverable with reasonable diligence before the trial and “conclusive to show the verdict ought to have been the other way.” He was suspicious about the veracity of the proposed new evidence and the circumstances in which it was discovered. “From this fact alone” he found it “was not conclusive at all, so that he could say that the jury would act upon it.” Further, since the proposed evidence was to be entered by two witnesses, it would have amounted to “oath against oath”; again, not liable to be conclusive to the jury.

[34] Lord Justice Collins concurred and found that the new evidence must be “practically conclusive.” Further, in examining the evidence, he found that it related to the same incident dealt with at trial and amounted to simply “throwing in a fresh piece of evidence to support a charge already contradicted at the trial and disposed of by the jury.” He asked: “how could the Court say that the new evidence would render it probable that the verdict would have been different?” This demonstrates the balancing exercise he carried out. If it was more likely than not that the evidence would affect the verdict, the evidence would be practically conclusive.

[35] From this I conclude that the terminology of “conclusive” or “practically conclusive” is linked to the potential effect of the proposed evidence. The conclusive quality of evidence or special circumstances can only be determined by examining the effect that evidence would likely

have had on the original proceeding. To determine this effect, the question to be asked is would the evidence or special circumstances have probably changed the outcome? Thus, a determination that special circumstances probably (more likely than not) would have changed the original result means that the special circumstances are conclusive for the purpose of the test. Determining whether it is more likely than not depends on the sufficiency and nature of the proposed evidence or special circumstances.

[36] I therefore conclude that the Ministers are correct when they submit that the "practically conclusive" test and the "probably change the result" test do not represent different standards. Evidence or circumstances which are "practically conclusive" are those which would probably have changed the result.

[37] This conclusion is consistent with the reasoning of Justice Sharlow in *Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*, [2002] F.C.J. No. 146 (C.A.). There, Justice Sharlow considered a motion to introduce fresh evidence on appeal. In the course of her reasons, she wrote at paragraph 20:

> In considering this motion, I must consider whether the evidence could with reasonable diligence have been discovered before the end of the trial, whether the evidence is credible, and whether the evidence is practically conclusive on the appeal: Frank Brunckhorst Co. v. Gainers Inc. et al., [1993] F.C.J. No. 874 (C.A.) (QL). I understand the third test to mean simply that the new evidence, if believed, could reasonably be expected to affect the result of the trial: Palmer v. R., [1980] 1 S.C.R. 759. [Emphasis added.]

[38] Further, in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the Supreme Court of Canada considered whether a trial should have been re-opened to receive new evidence after the judge had issued his reasons for judgment, but before judgment had been formally entered. At paragraphs 62 and 63, the Court wrote:

> 62. In this case, the trial judge decided not to exercise his discretion to reopen the trial because neither of the two steps of the test in Scott, supra, was met to his satisfaction. First, he found that he could not say that the new evidence, if presented at trial, would probably have changed the result, only that it may have changed the result. If the trial were to be reopened, Landow's evidence might well not be believed. His credibility would be in issue. Second, the trial judge found that Landow's evidence could have been obtained before trial. Design could have compelled Landow to testify under oath at trial. While this carried some risk, the trial judge viewed it as a trial strategy, a conclusion he was entitled to reach.
>
> 63. In my opinion, the Court of Appeal erred in substituting its discretion for that of the trial judge in deciding to reopen the trial. On the first branch of the test set out in Scott, the trial judge found that Landow's credibility would be in issue whereas the Court of Appeal found it difficult to see how the trial judge could make this determination without hearing Landow testify. In the Court of Appeal's determination, it was not sufficiently clear that Landow would be disbelieved. I disagree with the Court of Appeal on this point. Landow's affidavit evidence contradicts his sworn evidence on discovery, particularly with respect to the existence of the bribery scheme which Landow avoids acknowledging on discovery. To this significant extent, Landow is akin to a recanting liar. Lord Denning's comments in Ladd v. Marshall, [1954] 1 W.L.R. 1489 (C.A.), at p. 1491, are applicable:
>
> > It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case,

> though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible. [Emphasis added.]

[39] That the Supreme Court of Canada would apply this test without reference to *Varette* suggests to me that there is no conflict in practice between the two articulations of the test.

[40] As a final point I note that in *Lavigne v. Canada (Commissioner of Official Languages)*, [2004] F.C.J. No. 1651 at paragraphs 14-15; aff'd [2005] F.C.J. No. 996 this Court applied the "capable of altering the outcome" test when considering the receipt of new evidence and the application of *res judicata*.

[41] For these reasons, I will consider whether the special circumstances asserted by the special advocates would probably have changed the result before Justice MacKay. If I am wrong in my analysis, and there is a material distinction between the two formulations of the test, the error will benefit Mr. Jaballah as the lower threshold will be applied to determine whether special circumstances have been established on his behalf.

4. The Alleged Special Circumstances and the Evidence and Submissions of the Special Advocates

[42] The special advocates submit that because of the existence of special circumstances Mr. Jaballah should not be bound by Justice MacKay's finding that there was new evidence and

information not before the Court in 1999 so that the second certificate was not barred by principles of *res judicata* or abuse of process. Those circumstances are said to be that such finding was made in a process subsequently found not to comply with the requirements of fundamental justice. Specifically:

1. In Charkaoui I, the Supreme Court of Canada found that the then existing legislation impermissibly deprived a person named in a security certificate of the opportunity to know the case against him or her so as to be able to challenge the government's case.
2. Justice MacKay's decision was based only upon the open and closed record put before him by the Ministers. He did not have the benefit of access to the holdings of the Canadian Security Intelligence Service (CSIS or Service) as later required by the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326 (Charkaoui II).
3. Justice MacKay did not have the benefit of special advocates to permit "full submissions from both sides in as close to a genuinely adversarial process as is possible despite the exclusion of Mr. Jaballah and his counsel from that process."

[43] In closed submissions, the special advocates argued that "[w]hile some of the evidence relied upon by the Ministers in the present case is ‘new’ in the sense that it was not available [with the exercise of reasonable diligence] before November 2, 1999, [the date on which Justice

Cullen quashed the first certificate] … there is significantly less 'new' evidence than the Honourable Justice MacKay found to be the case in his judgment of May 23, 2003. It is submitted, moreover, that even that which is truly 'new' is insufficient to warrant the re-litigation of issues decided in Mr. Jaballah's favour in 1999."

[44] The Court was invited to make its own determination as to what information or other evidence now relied upon by the Ministers is new when compared to what was, or ought to have been, available to them in 1999. To that end, the special advocates reviewed the Charkaoui II disclosure in order to point to information known by the Service prior to November 2, 1999 with respect to:

- the East Africa embassy bombings;
- Al Bari, Eidarous and the International Office for the Defence of Egyptian Peoples;
- Thirwat Shehata;
- the Interpol notice and related developments;
- Mohammed Zeki Mahjoub; and,
- the use of post office boxes.

5. <u>The Proceedings Before Justice MacKay</u>

[45] In light of the nature of the special circumstances asserted by the special advocates, it is important to review the procedural and substantive bases for Justice MacKay's findings that

neither the doctrine of *res judicata* nor abuse of process applied. Before doing so I must stress that in this proceeding I am not sitting in review of matters that were before Justice MacKay. The exercise is conducted solely for the purpose of ascertaining whether the record establishes special circumstances that would preclude the Ministers from relying upon Justice MacKay's prior finding that there was new and significant information before the Court so that the principles of *res judicata,* issue estoppel and abuse of process did not apply, notwithstanding that a prior security certificate had been quashed.

[46] When counsel for Mr. Jaballah moved for the second time to have Jaballah No. 2 stayed on grounds of *res judicata* or abuse of process, Justice MacKay proceeded as follows:

1. He directed that the Ministers provide Mr. Jaballah with a comparison of the information contained in the public summaries in Jaballah No. 1 and Jaballah No. 2. On December 7, 2001, a 44-page comparison document was provided to counsel for Mr. Jaballah.
2. He directed that the Ministers produce a CSIS officer knowledgeable about the evidence in Jaballah No. 1 and Jaballah No. 2 to testify in public about the differences in the evidence and information in the two cases. An officer identified as Mike was produced and was examined and cross-examined by counsel for Mr. Jaballah on December 17 and 18, 2001. The proceeding then adjourned so that submissions could be made based upon a transcript of Mike's evidence.

3. On January 8, 2002, counsel for the Ministers and counsel for Mr. Jaballah made submissions to the Court on whether there was sufficient new evidence to support the second certificate. Counsel for Mr. Jaballah urged that he could not properly assist or advise his client unless the information claimed to be new could be better identified than it was by the testimony of Mike and the Ministers' submissions relating to that testimony.

4. After hearing submissions, the Court adjourned so as to permit a detailed review of the entire evidentiary record in both Jaballah No. 1 and Jaballah No. 2. The Court requested that the Service prepare a comparison document based upon the closed records.

5. This and the following steps taken by the Court are described as follows by Justice MacKay in his reasons of May 23, 2003 (reported as [2003] 4 F.C. 345) at paragraphs 53 to 54:

> 53. Thereafter, in January and early February 2002, I again convened hearings in camera and ex parte with counsel and a representative of CSIS, on five occasions, (January 10, 15, 25, 31 and February 4, 2002), all to direct the production of a further summary statement concerning the basis of the certified opinion of the Ministers which was intended, by emphasis in the text, to indicate clearly the information now available that was said to be new in that it was not before Mr. Justice Cullen, and was not withheld for security reasons. Further, I reviewed all documents filed with the Court, both those in the public record which were released to Mr. Jaballah in six binders in August 2001, and the classified documents not released, to identify which of those were considered to be new by the Ministers. A list of "new" documents among those in the public record in this case, which were not provided in

> Jaballah No. 1, was provided to counsel. I considered again those documents not previously released on national security grounds and confirmed for myself that these should continue to be held without disclosure to Mr. Jaballah, in accord with paragraph 40.1(5.1)(d) of the 1985 Act. By telephone conferences with counsel for both parties on January 15, 31 and February 8, I sought to keep counsel for the respondent informed of progress and involved in scheduling further hearings.
>
> 54. As a result of those in camera hearings I issued directions dated February 5, 2002. Those directions provided for a further statement entitled "Unclassified Supplementary Summary of Information Relating to Mahmoud Jaballah (Jaballah No. 2), February 4, 2002", which highlighted information on the public record which is considered by the Ministers to be new. The directions also listed documents provided to the respondent that were not before the Court in Jaballah No. 1. Arrangements were then made for public hearings to resume on March 11 and continue, to ensure, in accord with paragraph 40.1(4)(c) of the 1985 Act, that Mr. Jaballah had a reasonable opportunity to be heard, before assessing the reasonableness of the certificate issued by the applicant Ministers on the basis of the evidence and information available to the Court.

6. When the hearing resumed on March 11, 2002, counsel for Mr. Jaballah withdrew, leaving Mr. Jaballah, in his counsel's own words prior to his departure, to stand “silent in the capable, but secret, hands of your lordship and CSIS counsel.” Mr. Jaballah then declined to retain another lawyer, stating he would follow his counsel's instructions.

7. Justice MacKay then adjourned the proceedings in order to consider whether there was new information that supported the second opinion of the Ministers.

8. In his reasons of May 23, 2003, Justice MacKay concluded that where a second security certificate is issued after a prior certificate has been quashed, as a matter of law, principles of *res judicata*, issue estoppel, cause of action estoppel or abuse of process may apply. On the facts before him, after setting out what he found to be new or partially new information, Justice MacKay concluded that:

> 86. I conclude there is new information before this Court that was not before the Court in Jaballah No. 1. Some of that information is significant in its direct implications for Mr. Jaballah, including the Interpol notice and the identification, by fingerprint comparison, of the person concerned in that notice as Mr. Jaballah, information that he had spent time in Afghanistan, the fact that his telephone number was found in Mr. Mahjoub's possession, the fact that his anonymously rented postal box had been used and that its address was found on a computer disk in the possession of an accused extremist detained in Jordan, and information that certain persons with whom Mr. Jaballah had contact were active operatives with senior responsibilities in AJ/Al Qaida, some of whom were involved in communications concerning the bombings in Kenya and Tanzania in 1998.
>
> 87. <u>That information, new to the Ministers and not before the Court in Jaballah No. 1 is all on the public record in the summary statements and documents provided to Mr. Jaballah, and by testimony of Mike</u>. The decision in Jaballah No. 1 was rendered without the additional new information now before the Court, not disclosed to Mr. Jaballah because of concern for national security or the safety of others, which relates to the contacts between Mr. Jaballah and others involved in AJ operations. That information, not on the public record, in part contradicts the evidence Mr. Jaballah gave in Jaballah No. 1, and it could only be ignored if there were persuasive explanation on his part, explanation which only Mr. Jaballah could provide, but which he declined to do.

> 88. It is my opinion, considering only the public information that is before the Court that is new and significant, not ascertainable by the Ministers before November 1, 1999, that information, had it been available for the earlier proceedings, could well have led to a different conclusion in Jaballah No. 1. That conclusion is reinforced by other new information before the Court that was not made public but was withheld from Mr. Jaballah on grounds that its disclosure would prejudice national security or the safety of others.
>
> 89. In these circumstances, the principles of res judicata, issue estoppel and abuse of process, perceived because this is a second proceeding relating to a second certificate, of the same opinion that was before the Court in Jaballah No. 1, have no application here. [Emphasis added.]

9. Mr. Jaballah appealed Justice MacKay's decision. Before the Federal Court of Appeal his new counsel withdrew all of the grounds of appeal advanced by Mr. Jaballah's former counsel (including an appeal of the findings concerning *res judicata* and abuse of process) and instead based the appeal solely upon the asserted incompetence of former counsel.

10. When the case was returned to Justice MacKay after the hearing before the Federal Court of Appeal, the parties accepted both the test Justice MacKay had applied in order to assess whether information or evidence was new, and that the Court had previously identified new and partially new information. See: *Jaballah (Re)* (2006), 301 F.T.R. 102 at paragraphs 31 and 32. Indeed, on May 17, 2006, counsel for Mr. Jaballah, now one of his special advocates, made the following submission to Justice MacKay:

> MR. NORRIS: We are on the threshold of calling some evidence. That is a threshold that you may have felt that you have been perched on for several years now, but here we are again.
>
> As background, I can indicate to the Court that we anticipate that Mr. Jaballah will be testifying and that he will be testifying in relation to areas that this Court identified as new or partially new in its 2003 decision regarding the security certificate. He will also address to the extent that he can certain new disclosure that we were provided with in November 2005, I believe pursuant to an Order of this Court. We were given amended copies of statements summarizing information prepared by the Service, which included some additional information that had not previously been disclosed. We anticipate that Mr. Jaballah, to the extent that he can, will attempt to respond to that additional information.
>
> It is not our intention to go over again all his evidence before Justice Cullen. It is available before this Court in the form of transcripts. In our submission, there would be serious concerns about adjudicative fairness to require him to go through all of that again, considering the favourable credibility finding that Justice Cullen made in respect of that.
>
> <u>I know that you heard extensive arguments from Mr. Jaballah's previous counsel on matters of issue estoppel and *res judicata,* and I certainly don't propose to repeat any of those. The Court, in my respectful view, dealt with them very thoroughly and very fairly in its 2003 judgment, and we will be guided by the Court's own approach to what has been determined to be new of partially new</u>. [Emphasis added.]

6. <u>Have Special Circumstances been Established?</u>

[47] To recap, issue estoppel will apply to this motion unless the special advocates can establish the existence of special circumstances. The special circumstances asserted by the special advocates flow from:

1. The constitutional infirmity of the prior proceedings, particularly the denial of Mr. Jaballah's right to know the case against him.
2. The absence of Charkaoui II disclosure.
3. The absence of special advocates.

[48] Flowing from this, in my view, the questions to be asked are:

1. If Mr. Jaballah had known all of the allegations against him, and known all of the information and evidence relied upon by the Ministers so as to be able to challenge the Ministers’ position on new evidence, would the finding that there was sufficient new and partially new information probably have been different?
2. If the Charkaoui II disclosure had been available, would that have probably changed the result before Justice MacKay?
3. If a special advocate had been involved to challenge the Ministers' assertions of new evidence, would the result probably have been different?

[49] With respect to the first question, it is highly relevant that Justice MacKay's finding of sufficient new information was a finding based upon the public record. That is, the finding was

based upon the summary statements and documents provided to Mr. Jaballah and upon the testimony of Mike. The conclusion reached on the public record was simply "reinforced" by the closed record.

[50] The significance of this, of course, is that it goes a long way to addressing the concern that Mr. Jaballah did not know the case against him. Notwithstanding the later-identified constitutional infirmities in terms of the case-to-meet principle, in this instance Mr. Jaballah was not prejudiced by a lack of knowledge of the allegations against him or the substance of the evidence said to be new.

[51] While the fact that the decision was reached upon the public record goes a long way to addressing concerns about inadequate disclosure, in my view that fact by itself is not dispositive of the motion. Other relevant concerns are whether access to the Charkaoui II disclosure would have allowed a special advocate to effectively challenge allegations of newness or to proffer alternate explanations or theories.

[52] In this regard, the Court now has the benefit of submissions and assistance from special advocates who have had the opportunity to review, what is, in this case, the voluminous Charkaoui II disclosure.

[53] In that context, of significance are the concessions of the special advocates, based upon

the Charkaoui II disclosure, that there was no fraud or willful suppression of evidence before Justice MacKay. Further, the special advocates made no suggestion of any failure to disclose exculpatory information or evidence.

[54] The thrust of the special advocates' submissions was that what was presented and found to be new by Justice MacKay was either known to the Service at the time of Jaballah No. 1, or should have been known with reasonable diligence. The inference sought to be drawn was that information known or available to the Service was not presented to Justice Cullen in Jaballah No. 1.

[55] In that regard, during the special advocates' reply submissions I raised with Mr. Norris whether he was obliged to establish on the basis of the record, including the Charkaoui II disclosure, evidence or information that would likely have affected the result before Justice MacKay. For example, a document that could have been put to Mike in cross-examination in order to discredit his testimony that either information was new or that it cast new light on pre-existing information. Mr. Norris agreed and asked for the opportunity to do so. The Court adjourned in order to allow this.

[56] The next day, the special advocates provided a document that attempted to identify relevant information in the Service's possession that was not put before Justice MacKay that would have shown the information said to be new was in fact known to the Service during

Jaballah No. 1. The document was provided with the caveat that, due to time constraints, the special advocates could not press its exhaustiveness with certainty (See transcript of *in camera* hearing on October 21, 2009). The Court then adjourned in order to allow counsel for the Ministers to respond to the new document.

[57] On December 7, 2009, the *in camera* hearing of the *res judicata* motion resumed and counsel for the Ministers filed a responsive document. On the basis of that document, and the documents that it in turn references, I am completely satisfied that the Ministers did not withhold relevant material from either Justice Cullen or Justice MacKay.

[58] Despite their best efforts, the special advocates have failed to point to any information or evidence in the record before me, including the Charkaoui II production, that, if in the hands of the Court or a special advocate, would probably have changed the result before Justice MacKay.

[59] In this regard, it is necessary to review carefully what the Ministers submitted was new before Justice MacKay. As noted by Justice MacKay in his reasons, the Ministers' position was that there was new information and that the new information cast a different light on the old information. What was alleged to be new and the significance of that information was clearly set out in the Ministers' public submissions to Justice MacKay. Some of the information the special advocates said was not new was not alleged by the Ministers to be new before Justice MacKay.

[60] The Ministers' position that new information allowed the Service to see existing information in a new light finds support in a number of documents before the Court. For example, documents found at Tabs 19 and 21 of the document filed by counsel for the Ministers on December 7, 2009 show the evolution of the Service's analysis.

[61] I have considered the special advocates' submission that, had the Ministers been duly diligent by pursuing leads from pieces of information in their possession, there were many things that they could have learned on a timely basis. No evidence was cited by the special advocates in support of that submission, particularly there was no evidence that the Service was not pursuing leads or chose not to pursue leads. In the absence of such evidence, I see no basis for concluding that any burden of persuasion shifted to the Ministers to adduce evidence of diligence.

[62] Finally, I have considered the special advocates' argument that Justice MacKay applied the wrong legal test in order to determine whether evidence or information was new. I believe that the special advocates are estopped by application of issue estoppel from raising this issue. However, and in any event, the special advocates have not persuaded me that Justice MacKay erred.

[63] In his reasons, Justice MacKay referred to three cases. The first was *Sagaz*, cited above, where the Supreme Court of Canada confirmed the appropriate test to be whether the newly discovered evidence "would probably have changed the result." The Supreme Court had quoted

from a passage in *Ladd v. Marshall*, [1954] 1 W.L.R. 1489 (C.A.) at 1491 also relied upon by Justice MacKay, where Lord Denning had expressed the view that one of the conditions needed to justify a new trial was that newly discovered evidence "would probably have an important influence on the result of the case." Finally, Justice MacKay referred to *Mackay v. Canada (Attorney General)* (1997), 129 F.T.R. 286 (F.C.T.D.) where the same principles were adopted and the test was expressed as the new evidence “must be such that if believed it could reasonably, when taken with other evidence adduced at trial, be expected to have affected the result.” See: paragraph 26.

[64] Justice MacKay then concluded that the new and partially new information "could well have led to a different conclusion in Jaballah No. 1."

[65] In my view, this equates to the test of whether the evidence would likely, or would probably, have changed the result. For the reasons expressed above in my review of the relevant legal principles, I find the test to be in accordance with the jurisprudence.

7. The Exercise of Discretion

[66] As noted above, a court possesses discretion to consider whether the application of issue estoppel in a particular case would work an injustice.

[67] As stated by the special advocates, profound interests are impacted when the Court considers whether to stay this proceeding on grounds of *res judicata* or issue estoppel. Counsel for Mr. Jaballah has eloquently articulated the profound impact the prior and present proceedings have had, and continue to have, upon Mr. Jaballah's liberty and security interests, his family interests, and the family integrity. Equally, as submitted by counsel for the Ministers, there is a profound societal interest in the protection of Canada's national security and the rendering of a decision on the merits in a constitutionally sound proceeding. See: *Al Yamani v. Canada (Minister of Citizenship and Immigration),* [2003] F.C.J. No. 1931, 2003 FCA 482 at paragraph 39 (F.C.A.).

[68] In endeavoring to exercise my discretion on a principled basis, I have had regard to the guidance provided by the Supreme Court of Canada in the *C.U.P.E.* case, cited above at paragraph 25. There, the Court contemplated that there may be circumstances where relitigation will enhance, rather than impeach, the integrity of the judicial system. One example cited was where the first proceeding was tainted by fraud or dishonesty.

[69] Mr. Jaballah has had one security certificate quashed and one upheld. Both proceedings were subsequently found to be based upon legislation that was not constitutionally sound. In my view, the credibility and the effectiveness of the adjudicative process will be enhanced by rendering a decision on the merits of this case in a reformed proceeding; one intended by Parliament to be constitutionally sound and responsive to the concerns of the Supreme Court of

Canada in Charkaoui I and Charkaoui II.

[70] While the special advocates urged that I not hold Mr. Jaballah to Justice MacKay's determination that neither *res judicata* nor abuse of process applies because that determination itself was made in a constitutionally flawed proceeding, such flaws were materially reduced to the extent that Justice MacKay's finding was based upon the public record. Further, notwithstanding the volume of disclosure produced to the special advocates pursuant to Charkaoui II, no information or evidence was produced by the special advocates that would probably have changed the result before Justice MacKay.

[71] For these reasons, I have not been persuaded that applying issue estoppel based upon Justice MacKay's prior determination would be unfair or work an injustice.

8. Abuse of Process

[72] The special advocates' assertion of abuse of process was tied to the concept of relitigation of previously decided matters. Justice MacKay also rejected Mr. Jaballah's prior motion brought on the basis of abuse of process because of the relitigation of issues. For the above reasons, issue estoppel precludes the special advocates from rearguing abuse of process.

[73] This of course is not dispositive of, and does not affect, a motion in respect of abuse of process said to be brought in the future by Mr. Jaballah on broader grounds.

9. Conclusion

[74] The motion of the special advocates will, therefore, be dismissed. No order will issue at this time as the parties have acknowledged that no interlocutory appeal lies from this decision. An opportunity will in future be afforded for the parties to propose any certified question.

"Eleanor R. Dawson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: **DES-6-08**
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 MAHMOUD ES-SAYYID JABALLAH

PLACE OF HEARING: 1) Toronto, Ontario

2) Ottawa, Ontario

DATES OF HEARING: 1) September 28, 2009 (public)

2) October 19, 20 and 21, 2009 (in camera)
December 2 and 7, 2009 (in camera)

REASONS FOR ORDER BY
THE HONOURABLE MADAM JUSTICE DAWSON

DATED: January 22, 2010

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