

Federal Court



Cour fédérale

Date: 20100511

Docket: DES-6-08

Citation: 2010 FC 507

Ottawa, Ontario, May 11, 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

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1. Introduction

[1] Mahmoud Jaballah is named in a security certificate that was issued in February, 2008. In this certificate, the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness (Ministers) assert their belief that there are reasonable grounds to believe that Mr. Jaballah is inadmissible to Canada on grounds of national security.

[2] Mr. Jaballah has previously been subject to two security certificates. The first, issued in April, 1999, was quashed by the Court in November, 1999. The second, issued in August, 2001, was found to be reasonable by the Court in May, 2003. That decision was set aside by the Federal Court of Appeal in June, 2004, and the matter was returned to this Court. On October 16, 2006, the Court again found the certificate to be reasonable.

[3] Subsequently, the Supreme Court of Canada declared the then existing provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (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.

[4] While the declaration of invalidity was suspended, this Court ordered that Mr. Jaballah be released from detention on strict conditions. Those conditions have been reviewed by the

Court on two subsequent occasions, as reflected in reasons dated January 4, 2008 and March 20, 2009.

[5] At this time, Mr. Jaballah moves for an order, pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (Charter), cancelling the conditions of release imposed upon him on the grounds that the continuation of those conditions will violate sections 7, 9, 12 and 15 of the Charter. All sections of the Act and the Charter referred to in these reasons are set out in the Appendix to these reasons.

[6] More specifically, Mr. Jaballah asserts that:

- (a) He cannot be removed from Canada.
- (b) The conditions of release will continue indefinitely.

[7] In consequence, Mr. Jaballah argues that the conditions are no longer connected to the original purpose for which the security certificate was issued and detention was imposed. The conditions are said to be "unhinged" from the purpose of determining inadmissibility and removal. It follows, he says, that:

- (a) His detention and conditions of release are excessive, unreasonable in length, punitive and arbitrary, thus violating section 7 of the Charter.
- (b) The conditions are indefinite and divorced from their purpose, thereby amounting to arbitrary detention contrary to section 9 of the Charter.

- (c) The conditions constitute cruel and unusual treatment, thus violating section 12 of the Charter.
- (d) The conditions of release now relate solely to national security concerns and not to removal. Since citizens who pose a security risk cannot be subject to the same restrictions, this constitutes a breach of section 15 of the Charter.

[8] In the alternative, Mr. Jaballah argues that even if the conditions have not become unhinged from the purpose of removal, the ongoing and stringent conditions imposed upon him, and their indeterminate length, amount to indefinite detention and so constitute cruel and unusual treatment contrary to section 12 of the Charter. He therefore seeks a remedy, pursuant to subsection 24(1) of the Charter, whereby "ordinary non-intrusive conditions of release" would be imposed. In oral argument counsel clarified that such conditions would be similar to those generally imposed pursuant to section 56 or subsection 58(3) of the Act.

[9] In the further alternative, Mr. Jaballah seeks to have his current conditions of release varied pursuant to subsection 82(4) of the Act.

[10] The Ministers respond that Mr. Jaballah's allegations that he cannot be removed from Canada and that the terms and conditions of release will continue indefinitely are without merit and premature. It follows, in their submission, that the terms and conditions of release have not become "unhinged" from the removal process, nor is the treatment cruel and unusual.

The Ministers ask that the terms and conditions be maintained subject to their cross-motion.

In such cross-motion, the Ministers ask for the following amendments to the existing terms and conditions:

- a. Infra-red illuminators be installed on the security cameras located at the entrances to the Jaballah home;
- b. A contact alarm be installed on the door to the basement apartment in the Jaballah home;
- c. The security camera in the garage of the Jaballah home be reactivated;
- d. Mr. Jaballah not be permitted to remain home alone; and
- e. Mr. Jaballah be prohibited from communicating with Ms. Jean Smith.

2. Relief Sought Pursuant to Subsection 24(1) of the Charter

[11] In light of the view I take of the factual issues raised before me, I believe it is helpful to set out Mr. Jaballah's submissions in more detail.

a. The issues raised and the submissions advanced by Mr. Jaballah

[12] As noted above, Mr. Jaballah seeks relief under subsection 24(1) of the Charter for the alleged breaches of sections 7, 9, 12 and 15 of the Charter. The relief originally sought was "an order pursuant to s. 24(1) of the *Charter of Rights and Freedoms* that s. 77 and all consequent provisions of the *Immigration and Refugee Protection Act (IRPA)* and s. 81 and all consequent provisions of that Act are of no force or effect in respect of Mr. Jaballah." Some confusion arose during the hearing of this motion about the nature of the relief sought by

Mr. Jaballah and the basis upon which he sought such relief. I believe that the confusion arose as a result of the Court raising, on the first day of oral argument, the issue of whether the relief sought under subsection 24(1) of the Charter was available in light of the Supreme Court of Canada's decision in *R. v. Ferguson*, [2008] 1 S.C.R. 96. More will be said about this issue later.

[13] For the purpose of this portion of the reasons it is sufficient to state that by written submissions dated December 18, 2009, the Court was advised that after discussions between counsel for Mr. Jaballah and the Ministers, the Ministers understood, and implicitly accepted, that Mr. Jaballah had abandoned his claim that sections 77, 81 and others of the Act were of no force or effect in respect of him. The Court was also advised that Mr. Jaballah sought no relief at this time pursuant to subsection 52(1) of the *Constitution Act, 1982*. Thus, Mr. Jaballah's arguments on this motion are restricted to the conditions themselves and not to the constitutionality of the regime.

[14] I understand that ultimately Mr. Jaballah's position may be summarized as follows. The Charter constrains the exercise of the broad judicial discretion conferred by paragraph 82(5)(b) of the Act. Mr. Jaballah contends that this discretion has been exercised in a manner that has violated his rights under sections 7, 9, 12 and 15 of the Charter. He further submits that the Court has lost jurisdiction to impose conditions because the conditions have become unhinged from their purpose. The remedy he requests for "what he submits is an

exercise of the Court's discretion that gives rise to a Charter violation" is to have the stringent conditions of release cancelled entirely. In the alternative, he seeks to have the conditions cancelled and replaced with ordinary non-intrusive conditions of release that are routinely imposed in immigration cases.

[15] Mr. Jaballah's Charter arguments that underlie this claim for relief may be summarized as follows.

Section 7 of the Charter

[16] The Ministers concede that Mr. Jaballah's liberty interest is engaged. At the second stage of the section 7 analysis, Mr. Jaballah argues that the maintenance of strict conditions in spite of "the inability of the state to remove him from Canada" has led to a deprivation of liberty which is not in accordance with the principles of fundamental justice. Mr. Jaballah submits that the following three principles of fundamental justice apply: (i) legislation should not be arbitrary, (ii) individuals who have done nothing wrong should not be punished, and (iii) laws should not be overbroad.

Section 15 of the Charter

[17] Mr. Jaballah's section 15 submissions are again premised on the proposition that the result of the certificate provisions has become divorced from the objectives. He asserts because he cannot be removed that "[t]he sole remaining purpose of the conditions is the protection of Canada's national security". This offends section 15 of the Charter since the

process is uniquely reserved for non-citizens: there are no corresponding provisions which would similarly affect citizens of Canada who pose threats to national security.

Section 12 of the Charter

[18] Mr. Jaballah acknowledges that, by reason of the regular opportunities for a detainee to challenge his detention or conditions of release, the Supreme Court found the security certificate process did not violate section 12 of the Charter. However, he submits the review process is no longer meaningful. This is said to be because the reviews “are not being conducted with a view to removing [Mr. Jaballah] from Canada.” The release under conditions “has become unhinged from the legislative intent of the [Act].” Judicial review is “simply a façade propping up an unconstitutional process.”

[19] The absence of a meaningful review creates a situation where the ongoing conditions are cruel and unusual for the purposes of section 12. Moreover, he alleges the Court is in “real danger of [...] implicating itself in the perpetuation of cruel and unusual treatment.”

Section 9 of the Charter

[20] Mr. Jaballah cites *R v. Burke* (1997), 153 Nfld. & P.E.I.R. 91, a decision of the Newfoundland Court of Appeal, in order to explain section 9. That decision characterised “arbitrarily” as the dividing line between capricious, illegitimate detentions and lawful, necessary detentions. Drawing on language used by the Court in *Burke*, Mr. Jaballah argues

that the case against him is based on “little more than a ‘hunch’ on the part of CSIS that he continues to pose a threat”. More importantly, he submits that an articulable cause for his detention no longer exists. This is so because an articulable cause cannot be found without reference to its purpose. Since the purpose of his detention (i.e. removal) no longer exists, any continuing conditions are arbitrary.

b. Has the factual basis for the claim to relief under the Charter been established?

[21] The above summary of Mr. Jaballah’s submissions demonstrates that all of his Charter arguments are premised upon his assertions that:

- (a) he cannot be removed from Canada; and
- (b) the conditions of his release will continue indefinitely.

[22] If the evidence does not establish those assertions, the Charter arguments lack a foundation in the evidence and must, accordingly, fail. Each assertion will therefore be considered in turn.

i. Can Mr. Jaballah be removed from Canada?

[23] In support of his assertion that he cannot be removed from Canada, Mr. Jaballah relies upon the following facts:

- he is a citizen of Egypt and no other country;

- in Canada he has been found to be a person in need of protection;
- in the second security certificate proceeding Mr. Justice MacKay concluded, in October, 2006, that no exceptional reasons had been presented by the Ministers to justify Mr. Jaballah's return to Egypt where he would face arbitrary, indefinite detention and torture. This determination was based upon the August 15, 2002 decision of a pre-removal risk assessment officer that there were substantial grounds for believing that Mr. Jaballah faced a risk of torture and a risk to his life or of cruel and unusual treatment or punishment if removed to Egypt; and,
- country condition documentation, including a recent opinion from Amnesty International, demonstrates that conditions in Egypt have not changed since Justice MacKay made his determination.

[24] Mr. Jaballah argues that, to the best of his knowledge, he remains the subject of criminal charges in Egypt in relation to allegations that he was a member of a terrorist organization in Egypt. In addition to the risk of torture, he also faces a sentence of death or hard labour for life if returned to Egypt. Thus, Mr. Jaballah submits, he may not be removed from Canada.

[25] The Ministers respond that they have demonstrated a continuing intention to establish Mr. Jaballah's inadmissibility on security grounds and to obtain a deportation order against

him. The Ministers state that they intend to remove Mr. Jaballah, but cannot do so unless and until the Court finds the security certificate to be reasonable and Mr. Jaballah has the opportunity to make an application for protection. Thus, the Ministers submit that it is premature to deal with issues of removal at this time.

[26] The foundation of Mr. Jaballah's position that he cannot be removed from Canada is the 2006 decision of Mr. Justice MacKay that no exceptional circumstances had been established that would justify Mr. Jaballah's deportation to face torture. However, Justice Mackay was careful to state that this conclusion did not mean that Mr. Jaballah could not be deported from Canada. Justice MacKay's findings in this regard are set out in his reasons, reported as (2006), 301 F.T.R. 102 at paragraph 82 to 84. There, he wrote:

82 Here, no case has been argued that Mr. Jaballah's circumstances are exceptional, or that they could be so qualified under s.1 of the *Charter*. I have found the Ministers' certified opinion to be reasonable. By inference that opinion signifies that his continuing presence in Canada, without restraints, would constitute a danger to the security of the country. Yet there is no case argued that he has been personally involved in violence.

83 I conclude that the facts of this case do not create an exceptional circumstance that would warrant Mr. Jaballah's deportation to face torture abroad.

84 This does not mean that he may not be deported. The MCI has a responsibility to deport him, as soon as may be reasonably done if he does not leave Canada voluntarily (s-s. 48(2) of the IRPA). But deportation to Egypt or to any country where and so long as there is a substantial risk that he would be tortured or worse would violate his rights as a human being, guaranteed by s. 7 of the *Charter*. The MCI may not exercise discretion in a manner that would violate Mr. Jaballah's rights under the *Charter*. The Minister

has significant discretion under IRPA and if that is not sufficient it may be amended by regulatory or legislative change. Under the Act now he may discharge his responsibility by deporting Mr. Jaballah to a country where he does not face the prospect of torture. If that proves impossible in a reasonable time, then if conditions should change, so that the substantial risk of torture if he is returned to his own country can be judged to have been essentially eliminated, he may then be deported to his own country or another which is now perceived to present to him a substantial risk of torture, or worse. [Emphasis added.]

[27] I do not conclude, and it is not necessary for me to conclude, that Mr. Jaballah may at this time be returned to Egypt or that he may be deported to a safe third country. Mr. Jaballah may not be removed unless a valid removal order exists. The point is that Justice MacKay's determination that exceptional circumstances had not been established is not conclusive of whether or not Mr. Jaballah may at a future date be removed from Canada. It is not conclusive on the point because Justice MacKay himself contemplated the possibility of Mr. Jaballah's removal from Canada. Further, Mr. Jaballah has not established that he cannot be removed at a future date to another country where he does not face a risk of torture.

[28] I therefore find as a fact that Mr. Jaballah has not established that he cannot be removed from Canada. It follows that he has failed to establish that the conditions of release have become unhinged from the purpose of the Act.

[29] I accept the submissions of the Ministers that it is premature to deal with issues relating to removal at this time. Subsection 48(2) of the Act requires the Minister to enforce

removal orders as soon as reasonably practicable. Mr. Jaballah concedes that the Ministers have demonstrated a continuing intention to remove him from Canada. Mr. Jaballah can only be removed if this Court finds the security certificate to be reasonable. Only then, by operation of section 80 of the Act, will a removal order be in place so as to permit the Ministers to make removal arrangements (subject to Mr. Jaballah's right to apply for protection). Only when removal becomes a legal possibility can an assessment be made, based upon updated and current information, as to whether it is possible in all of the circumstances.

[30] In reaching this conclusion, I have noted Mr. Jaballah's submission that the Ministers failed to adduce any evidence contradicting his own. However, the burden of proof to establish an evidentiary basis for his Charter challenges rests upon Mr. Jaballah. In the absence of a more cogent evidentiary record from Mr. Jaballah, no tactical burden of persuasion shifted to the Ministers. Only if Mr. Jaballah had produced sufficient evidence to meet his burden of proof would there be a basis in law for the drawing of an adverse inference against the Ministers. See: *Chippewas of Kettle & Stony Point First Nation v. Shawkence*, [2005] F.C.J. No. 1030 at paragraphs 42 to 44; aff'd [2006] F.C.J. No. 655 (F.C.A.).

[31] No evidence or convincing argument was advanced that would lead me to conclude that the Act is being used for improper purpose. The Ministers have a continuing intention to establish Mr. Jaballah's inadmissibility and to remove him from Canada.

ii. Will the conditions of Mr. Jaballah's release continue indefinitely?

[32] Mr. Jaballah submits that the imposition of detention and controls will continue indefinitely and that the Court's continued reviews are "based on a constructed myth - that removal is imminent and not so remote as to be illusory".

[33] The Ministers respond that the present proceedings are finite in nature. While there may not be any certainty with respect to the length of time that Mr. Jaballah may remain subject to strict conditions, that situation is mitigated through regular and meaningful reviews.

[34] In *Jaballah (Re)* (F.C.), [2006] 4 F.C.R. 193, Justice Mackay considered the nature of Mr. Jaballah's detention in the context of an application brought by Mr. Jaballah for his release from detention. At paragraph 63, Justice MacKay wrote:

63 The duration of his detention cannot be considered without at least acknowledging its purpose is to hold a foreign national who is considered by two Ministers of the Crown to be inadmissible to Canada because he presents a risk to national security, as a preventive measure, not indefinitely but only so long as that ministerial determination is contested and, if that be upheld as reasonable, then pending his departure from Canada. [...] In the context of the provisions for detention, read as a whole, the future duration of any continuing detention is indeterminate only in the sense that a date for Mr. Jaballah's release cannot be predicted with any certainty. [emphasis added]

[35] Such analysis is equally applicable to the duration of conditions of release. Such

conditions will continue only for so long as the reasonableness hearing continues and, if the certificate is found to be reasonable, then pending Mr. Jaballah's removal from Canada.

[36] The duration of the reasonableness hearing is finite. While the hearing has continued for an extended period, this has largely reflected the time required for the Ministers to comply with the Court's order of November 19, 2008 (Charkaoui II disclosure order) and for the special advocates to review the Charkaoui II disclosure.¹

[37] An outline of the Charkaoui II chronology is contained in endnote 1. I believe that the Ministers and the special advocates were diligent in the discharge of their duties. I do not believe that initially anyone anticipated the volume of the Charkaoui II disclosure. Even when the volume was known, I am not satisfied that anyone anticipated the time reasonably required to marshal and produce the disclosure, or the time reasonably required by the special advocates to assimilate the material, or the time reasonably required to summarize the material requested by the special advocates.

[38] All of this is to say that the further duration of the reasonableness hearing is finite. Should the certificate be found to be unreasonable, all of the conditions in respect of Mr. Jaballah's release will be at an end. If the certificate is found to be reasonable, the conditions of release will continue until Mr. Jaballah is removed from Canada or the Court terminates the conditions. Situations where the Court would remove onerous conditions

would include the situation where, at a certain point, the Court concluded that continuation of the conditions would constitute cruel and unusual treatment or be inconsistent with the principles of fundamental justice. See: *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Charkaoui I) at paragraph 123.

[39] On the evidence before me, I find as a fact that Mr. Jaballah has not established that the conditions of release will continue indefinitely. While such conditions do remain in place, the Court will continue to conduct meaningful reviews as requested by Mr. Jaballah.

c. Consequences of Findings of Fact

[40] In oral submissions, counsel for Mr. Jaballah first conceded that all of Mr. Jaballah's Charter based arguments depend upon the Court finding that he cannot be removed from Canada so that the ongoing conditions of release have become unhinged from the legislative intent of Division 9 of the Act. She later argued that even if the conditions are not unhinged, the detention can still be indefinite or indeterminate, which converts the process into cruel treatment.

[41] I believe that all of the arguments do depend upon a finding that Mr. Jaballah cannot be removed from Canada so that the conditions have become unhinged. I have found that Mr. Jaballah has failed to establish that he cannot be removed from Canada. It follows that there is no evidentiary basis for his submissions that the conditions of release have become

unhinged.

[42] In the event that the argument advanced under section 12 of the Charter has a component that is independent from the “unhinged” argument, I have found that Mr. Jaballah has failed to establish that the conditions of release will continue indefinitely. It follows that there is no evidentiary basis for the submissions that the conditions are cruel and unusual treatment because of their indefinite or indeterminate nature.

d. The *Ferguson* Decision

[43] As referenced above, at the commencement of the oral hearing I raised the issue of the potential application of the *Ferguson* decision. The concern that I expressed was that in *Ferguson* the Court explained that the sole remedy for unconstitutional laws (as opposed to unconstitutional governmental actions) is found in subsection 52(1) of the *Constitution Act, 1982*. Unconstitutional laws are to be found of no force or effect. Constitutional exemptions should not be fashioned under either subsection 52(1) or 24(1) of the Charter.

[44] It was agreed that the parties would make submissions on this point at a later date after they had the opportunity to review the case and consider their position. Ultimately, the parties provided written submissions dated December 10, 2009 and further written submissions on December 18, 2009.

[45] In his written submissions, Mr. Jaballah states that he had previously abandoned his request for declaratory relief. His requests that the conditions be cancelled, or be replaced by “ordinary non-intrusive conditions”, did not constitute a request that he be declared exempt from the provisions of the Act that govern release from detention or the review of conditions of release. Instead, he asks that the discretion granted under paragraph 82(5)(b) be exercised in accordance with his constitutional rights.

[46] The Ministers do not quibble with Mr. Jaballah’s statement that the sections 7, 9 and 12 arguments do not constitute requests for a constitutional exemption. However, they respond that two arguments advanced by Mr. Jaballah do constitute a request for constitutional exemption. The first is the argument that the Court has lost jurisdiction to impose conditions on Mr. Jaballah’s release because the conditions have become unhinged from the purpose for which they could be imposed. The second is the argument advanced under section 15 of the Charter that the imposition of conditions only to protect national security is discriminatory.

[47] With respect to the first argument, paragraph 82(5)(a) of the Act requires continued detention if the concerned person’s release under conditions would be injurious to national security. Release has been granted where the Court has been satisfied that conditions will neutralize the injury to national security. The Ministers submit that national security must be considered throughout the proceeding. Therefore, Mr. Jaballah would require a constitutional exemption in order to allow the Court to overlook the requirements of national security and order

release without terms and conditions.

[48] Regarding the second argument, Mr. Jaballah is not requesting relief under section 52 of the *Constitution Act*. The Act permits detention on the ground that one is a danger to national security. Thus, the Ministers state that the second argument constitutes a clear request for a constitutional exemption.

[49] Notwithstanding that Mr. Jaballah has abandoned his claim to declaratory relief, it is not clear to me that while this matter was being argued orally Mr. Jaballah had abandoned the position that the legislation is unconstitutional in his case. Paragraph 12 of his notice of motion states:

12. Because Mr. Jaballah cannot be removed from Canada and/or because the imposition of detention and controls on release will continue with no fixed time frame for final resolution, the continuation of the security certificate proceedings and the continued imposition of extremely stringent conditions of release violate ss. 7, 9, 12 and 15 of the *Charter of Rights and Freedoms*:

- a. The continuing imposition of the security certificate and/or the extremely stringent conditions of release are no longer related to the purpose for which the certificate was imposed and the conditions for release authorized [...]
- b. The continuing imposition of the security certificate and stringent conditions of release are arbitrary and violate s. 9 of the *Charter* [...]
- c. The continuing imposition of the security certificate and/or the stringent conditions of release pursuant to the certificate breach s. 15 of the *Charter* [...]

This engages not only the conditions of release but the continuation of this proceeding and the

imposition of the certificate itself.

[50] Equally, paragraphs 32, 43, 45, 46, 74, 75 and 79 of his written submissions direct the Charter challenges not only to the conditions but also to the proceedings and the legislative scheme itself.

[51] In oral argument, Ms. Jackman submitted the following in respect of section 7 of the Charter:

In any event, the courts have recognized that legislation which is overbroad can be characterized as arbitrary, overbroad. In any event, it is contrary to the principles of fundamental justice.

[...] We are not arguing that you strike out section 180, that you strike out the sections at issue here. It is that they can't be applied in this case. I will deal with the constitutional exemption issue later.

[52] She went on to submit that:

In the context of the case before you, we say that the law has been tailored to permit state controls for the protection of the public for a temporal time to enable a state to remove a non-citizen. This law in its application continues indefinitely, forever, even where the purpose of imposing the controls as a means of protecting, pending removal -- when that purpose no longer exists. The means chosen are too broad, too wide. The law goes further than necessary because it continues to impose controls when the purpose is lost. In that sense, it is both disproportionate and arbitrary.

THE COURT: On the facts of this case.

MS. JACKMAN: On the facts of this case, yes.

[53] The effect of the weight of the written and oral submissions was that the Act has created an unconstitutional result because it is overbroad, disproportionate and arbitrary. Counsel for Mr. Jaballah did not submit that the legislation be struck out, but rather that it should not be applied. The weight of the submissions belies the arguments now advanced in the submissions responding to *Ferguson* that what is in issue is an unconstitutional exercise of discretion or a loss of jurisdiction.

[54] Mr. Jaballah asked for a personal remedy to the effect that the provisions of the Act relating to detention and release do not apply to him. This is, in substance, a constitutional exemption because it leaves the legislation in full force and effect except in its application to him. This is relief that by application of the principles articulated in *Ferguson* is not, as a matter of law, available.

[55] That said, Mr. Jaballah now apparently disavows those arguments. I am prepared to accept that. However, I accept the submission of the Ministers for the reasons given in their submissions of December 18, 2009 that both the unhinged and the section 15 arguments continue to constitute requests for a constitutional exemption.

[56] I prefer to rest my reasons upon the lack of an evidentiary basis for Mr. Jaballah's Charter challenges. However, had I not disposed of the "unhinged" motion on that basis,

Mr. Jaballah would not have persuaded me that irrespective of considerations of national security he is entitled to the relief he seeks cancelling the existing conditions or imposing ordinary non-intrusive conditions of release. Such relief amounts to an impermissible request for a constitutional exemption.

[57] Having considered Mr. Jaballah's Charter based arguments, I now turn to his second alternate claim for relief under subsection 82(4) of the Act.

3. Relief sought pursuant to subsection 82(4) of the Act

[58] Subsection 82(4) of the Act permits a person such as Mr. Jaballah, who has been released from detention under conditions, to apply for another review of the reasons for continuing the conditions. Such an application may be brought if a period of six months has expired since the conclusion of the last review.

[59] The reasons issued in respect of the last review of conditions are reported at 2009 FC 284, (2009), 340 F.T.R. 247 (Reasons). The current order that contains the conditions of release is the order of May 21, 2009, as amended by consent on August 20, 2009 (Order). The conclusions reached in the last review of conditions are summarized at paragraph 178 of the Reasons. Paragraph 178 is set out in Appendix B to these reasons. It should be noted, however, that while the Reasons and Order authorized Mr. Jaballah to stay home without supervision on certain conditions, Mr. Jaballah declined to take advantage of that provision.

This was because Mr. Jaballah refused to permit the installation of contact switches on the door of the room in his home where computers with internet capability are located, and on the entrances to his residence (including the door to the separate basement apartment). As the contact switches were not installed, Mr. Jaballah is currently not permitted to be what counsel refer to as “home alone,” that is to be at home while not accompanied by a supervisor.

a. Positions of the Parties

i. Position of Mr. Jaballah on the review of conditions

[60] During his direct examination, Mr. Jaballah advised that he had no objection to conditions which would require him to:

- advise the Canada Border Services Agency (CBSA) before changing his address
- continue cash and performance bonds
- appear at a given time and place to comply with a requirement such as removal
- report monthly to the CBSA, either in person or by a voice authenticated call-in
- surrender his passport
- cooperate with requests for documents or questionnaires relating to identity or travel documents
- not associate with persons with criminal records or who believe, or engage, in terrorism
- obtain an authorization for employment

- be subject to a reasonable curfew instead of, in his words, “house arrest”
- continue to wear the GPS [Global Positioning System] bracelet (although he says it causes psychological problems for him and his children)
- advise the CBSA if he is to leave the “present geographic area”
- be restricted from attendance at airports, train stations, and the Toronto harbour
- have his calls intercepted
- have his mail intercepted and copied
- sign an undertaking not to receive mail through his wife or children
- promise to have his porch light on if someone was coming to visit (so long as the CBSA pays for the extra hydro).

[61] Mr. Jaballah objects to any conditions that would:

- require video surveillance equipment to remain at the entrances to his residence
- authorize him to stay home without a supervisor, but still require him to obtain permission to leave the residence
- require him to obtain permission to leave the residence to go anywhere
- require him to call the CBSA to notify it every time he leaves the residence and returns
- require him to obtain approval for visitors
- restrict him from using the Toronto subway

- restrict him from meeting people while he is out
- restrict his children's use of cell phones and wireless computers
- authorize the interception of his wife's and children's telephone calls or internet chatting
- authorize the interception of his wife's and children's mail
- authorize the CBSA to be able to search his home without a court order
- require him to request an outing in order to visit the separate basement apartment
- require the installation of contact switches on doors.

[62] In oral argument, his counsel submitted:

MS. JACKMAN: I should note that you know our principle -- you may be frustrated by some of the lack of evidence, but what we have done all along is I feel we've sold our clients out. We come to you and we say, All right, he's willing to accept this condition, he's willing to accept that condition, and that's what ends up happening.

The position Mr. Jaballah wanted to take before this court and which we have taken is that these conditions are not justified. He should not be subject to these conditions. You don't then get into saying, All right, but you can do this and you can do that, because that's where you're going to go. That is not what he wants.

We don't want it justified on the evidence, and if you go there, I think you should be the one working out the proportionate balance in a way that will not cause further harm to him and his family. (Transcript December 14, 2009 at page 147.)

ii. Position of the Ministers in response

[63] The Ministers assert that Mr. Jaballah has not been compliant with the Order.

Particulars of the alleged breaches are set out below. As a result of that behaviour, the Ministers submit that the danger posed by Mr. Jaballah has not attenuated since the last review of conditions. Therefore, they say, Mr. Jaballah's request that the conditions be modified should be dismissed.

iii. The Ministers' motion

[64] Additionally, the Ministers move for an order amending the Order. They request that the Order be amended so as to:

- a. Require infra-red illuminators to be installed on the security cameras located at the entrances to the Jaballah residence.
- b. Require a contact switch to be installed on the door to the basement apartment in the Jaballah residence.
- c. Require the security camera in the garage of the Jaballah residence to be reactivated.
- d. Remove the inchoate right for Mr. Jaballah to be home alone.
- e. Prohibit Mr. Jaballah from communicating with Ms. Jean Smith.

b. Applicable legal principles

[65] At paragraphs 15 to 24 of the Reasons, I summarized the legal principles that apply to a review of conditions under subsection 82(4) of the Act. During the oral argument of this motion, counsel were invited to express any disagreement with the Court's prior exposition of

the law. Counsel for Mr. Jaballah expressed concern with comments made at paragraphs 29 and 56 of the Reasons which, to the extent relevant to these reasons, will be discussed below. Counsel for the Ministers expressed no concern.

[66] Accordingly, to promote brevity, I incorporate by reference into these reasons paragraphs 15 to 24 of the Reasons.

c. Application of the legal principles to the evidence

[67] In *Charkaoui I*, the Supreme Court of Canada identified a number of relevant factors to be taken into account on applications of this nature. Each of those factors is considered below.

i. Reasons for the imposition of stringent conditions

[68] The more serious the threat posed by Mr. Jaballah's continued release, the greater the justification for the continuation of onerous conditions of release.

[69] The parties continue to agree that, for the purpose of this review, I may rely upon all of the findings made by Justice Layden-Stevenson when she released Mr. Jaballah from detention and when she later reviewed the conditions of release. Those findings, therefore, form the starting point for consideration of the threat now posed by Mr. Jaballah. Justice Layden-Stevenson's findings were summarized at paragraphs 29 and 30 of the Reasons.

[70] For ease of reference, I repeat paragraphs 29 and 30 of the Reasons, deleting the last sentence from the last bullet of paragraph 29 in order to deal with a concern raised by counsel for Mr. Jaballah.²

29. In her decision releasing Mr. Jaballah from detention, reported at (2007), 296 F.T.R. 1, (first decision) Justice Layden-Stevenson found that:

- Mr. Jaballah posed a danger to national security (paragraph 38).
- Mr. Jaballah was a senior member of the Al Jihad, a terrorist organization that is closely aligned with Al Qaeda. Mr. Jaballah acted as a communication link between cells of the Al Jihad and Al Qaeda (paragraph 40).
- No allegation was made that Mr. Jaballah: posed a danger to the safety of any person, personally committed any act of violence, acted against Canada, or aided anyone in acting against Canada (paragraph 47).
- The contacts Mr. Jaballah once had with persons or organizations of a terrorist nature had been disrupted (paragraph 47).
- The government's evidence, with minor exceptions, was as it was at the time Mr. Jaballah was detained (paragraph 47).
- Without restrictive conditions, Mr. Jaballah could, and possibly would, communicate and associate with individuals or organizations with terrorist beliefs and objectives (paragraph 69). [...]

30. In reasons reported at [2008] F.C.J. No. 2, (second decision) Justice Layden-Stevenson reviewed the conditions of Mr. Jaballah's release and found that he continued to pose a danger to national security. Justice Layden-Stevenson also concluded that neutralization of the risk required strict monitoring

of Mr. Jaballah and his activities (paragraphs 10 and 46).

[71] Also relevant to the assessment of the threat now posed by Mr. Jaballah is the fact that he was released from detention in May of 2007. It remains the case that:

- No allegation is made that Mr. Jaballah poses a danger to the safety of any person, personally committed any act of violence, acted against Canada, or assisted anyone in acting against Canada.
- The contacts Mr. Jaballah is alleged to have had with persons or organizations of a terrorist nature have been disrupted, and there is no evidence of any resumption or attempted resumption of contact.
- The Ministers' evidence, with minor exceptions, remains as it was at the time Mr. Jaballah was detained.

[72] Two matters asserted by the Ministers require particular attention. They are a threat assessment prepared by the Canadian Security Intelligence Service (CSIS or Service) and the allegation Mr. Jaballah has breached the conditions of release.

[73] Dealing first with the CSIS threat assessment, the Service's conclusion as expressed in the public summary of the threat assessment is that:

[...] CSIS believes Jaballah: will, while in Canada, engage in or instigate the subversion by force of the government of Egypt; is and was a member of the AJ [Egyptian Al Jihad], an organization for which there are reasonable grounds to believe engaged in or instigated the subversion by force of the government of Egypt, and engaged in terrorism; is and was a

member of the AJ, an organization that there are reasonable grounds to believe is, or was engaged in terrorism; and, has engaged in terrorism.

CSIS believes that the threat posed by Jaballah's activities has been mitigated by the terms and conditions of his release. CSIS has no information indicating that he has resumed threat-related activities since his release, nor that he has renounced his beliefs in support of Islamist extremism. Should the situation arise where Jaballah's conditions of release are lifted, CSIS would undertake an assessment of all relevant information to determine the appropriate response. CSIS assesses that Jaballah would be a threat to national security if he were released without conditions.

[74] A CSIS employee was produced to testify in open session with respect to the Service's threat assessment and to be cross-examined.

[75] The cross-examination of the witness was lengthy. Of particular assistance was the witness' admission that while there is particular concern that Mr. Jaballah may have had access to the computer room, the witness was unaware of whether anyone had attempted to learn whether any website or internet communications were attempted or accessed.

Parenthetically, it is relevant to remember that paragraph 13(e) of the Order requires subscriber consent to the periodic disclosure to the CBSA by the Jaballah internet service provider of information regarding the websites visited and e-mail addresses communicated with.

[76] Of less assistance, in my view, was the cross-examination based upon the lack of

scientific methodology used by the Service when assessing the threat, particularly when compared to methods used for predicting the probability of future violent behaviour in other fields, such as corrections or forensic psychology and psychiatry.

[77] Counsel for Mr. Jaballah linked his alleged direct or indirect facilitation of, endorsement of, or engagement in, the subversion by force of the government of Egypt with a direct or indirect involvement in an act of violence. However, there is no allegation that Mr. Jaballah ever personally committed any act of violence. Without further evidence, I find that methodologies developed, and still under development, in order to determine whether to recommend parole do not constitute a sufficient basis for impugning the methodology used by an intelligence agency when assessing threats posed to national security. This is because the Service's threat assessment was not a risk assessment in respect of a direct risk of violent behavior. The disparate nature of the two exercises is illustrated by a chapter entitled "Violence Risk Assessment" provided to the Court during oral argument. The chapter is contained in a text entitled *Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues*, (New York: Oxford University Press, 2009). The purpose of the chapter is stated to be to review research and current knowledge related to general violence risk assessment and its overlap with mental illness, and to then delineate approaches to violence risk assessments on the basis of current understanding of risk factors. This is not the nature of the exercise conducted by CSIS.

[78] That said, for a different reason I do not find the Service's threat assessment to be of significant assistance. My reason flows from the content of the threat assessment itself. In it, the Service expresses its belief that the threat posed by Mr. Jaballah's activities has been mitigated by the existing terms and conditions of his release. The Service then provides its opinion on what would happen should the situation arise where Mr. Jaballah's conditions of release are lifted and he is released without conditions. However, because of the agreement that the Court may continue to rely upon the findings of Justice Layden-Stevenson, what is at issue now is what terms and conditions of release are proportionate to the current threat posed by Mr. Jaballah. This is a far more nuanced question than that addressed by the CSIS threat assessment.

[79] Evidence that is particularly helpful to the Court's assessment is evidence of Mr. Jaballah's current conduct and beliefs, and evidence as to the extent that he has complied with conditions that are agreed by CSIS, and by extension the Ministers, to have mitigated the threat.

[80] This leads to consideration of the Ministers' allegations that Mr. Jaballah has breached the terms of the Order in the following respects:

1. On April 26, 2009, he entered the computer room in his residence, contrary to paragraph 13(c) of the Order.

2. On September 15, 2009, Mr. Jaballah was left home alone, contrary to paragraph 6(d) of the Order.
3. On two occasions, September 13, 2009, and September 30, 2009, Mr. Jaballah was not properly supervised because no supervisor was with him in the residence. Instead, the supervisors were in the separate basement apartment, contrary to subparagraph 6(e)(iii) of the Order.
4. Mr. Jaballah has contacted individuals he is prohibited by paragraph 12 of the Order from contacting.
5. Additionally, Mr. Jaballah has engaged in unreasonable and untruthful conduct.

[81] An additional allegation that Mr. Jaballah breached the condition that he not be in the basement apartment unless on an approved visit was withdrawn during the hearing.

[82] The most serious breach is said to be Mr. Jaballah's entry into the computer room. Paragraph 13(c) of the Order provides that "Mr. Jaballah is not permitted access to the computer room at any time."

[83] The evidence that is proffered to support this allegation is an intercept of a telephone conversation between Mr. Jaballah and Rogers, the family's internet service provider. In the call, Mr. Jaballah identifies himself as the service subscriber (he is not, his wife is) and reports that the internet is not working. During the call he is asked what lights he can see on the

internet modem. He responds that "I didn't go the ... the ... inside now, but I can go." There then follows a discussion of service outages. Mr. Jaballah is again asked about the modem lights. He responds "Mmm ... give me a sec". A CBSA witness Niky Joyce, the Manager, Program Support and Special Projects Section at CBSA headquarters, testified that the intercept then captures the sound of footsteps and a door opening. Mr. Jaballah never answers the question about the modem lights.

[84] On cross-examination, Ms. Joyce agreed that the intercept was also open to the interpretation that Mr. Jaballah never accessed the computer room.

[85] Mr. Jaballah testified that he did not enter or look in the computer room during the call.

[86] In view of the equivocal nature of the intercept (acknowledged by Ms. Joyce), this evidence fails to establish on a balance of probabilities any breach of the Order.

[87] Turning to the allegation that on one occasion Mr. Jaballah was left home alone, this is based upon an intercept of a phone call made by Mr. Jaballah's wife, Husnah Al-Mashtouli, to Sandra Noe on September 15, 2009. Ms. Noe is one of Mr. Jaballah's supervisors. The CBSA transcript of the relevant portion of the call is as follows:

Husnah: I don't know today, I drop my kids and I came back.

Sandra: Ok.

Husnah: And nobody was with Abu Ahmad (Jaballah).

Sandra: Ohh ok alright.

[88] Ms. Al-Mashtouli did not testify. Ms. Noe testified that Ms. Al-Mashtouli's English is not good and that having listened to the intercept, both out of court and during court, the transcript is wrong in that the word "was" is not contained in the phrase where Ms. Al-Mashtouli says "And nobody was with Abu Ahmad (Jaballah)." Ms. Noe went on to say that the phrase "nobody with Abu Ahmad" was intended in the future tense and that she is able to say this because of her frequent conversations with Ms. Al-Mashtouli.

[89] Mr. Jaballah testified that on September 15, 2009 he called the CBSA at 9:20 a.m. to advise that he was taking his daughter Afnan to school (and this is confirmed in the CBSA telephone log). He went on to testify that thereafter he, accompanied by his son Ahmad (a supervisor), took Afnan to school. They then returned home. His wife, also a supervisor, had taken their sons Ali and Osama to school. She was to return home to supervise him so that Ahmad could go to work. Mr. Jaballah was not asked in his direct examination if his wife did return before Ahmad left for work, or if Ahmad stayed with him.

[90] Mr. Jaballah was not cross-examined on this point.

[91] Ms. Joyce was cross-examined on the meaning to be given to the transcript. She

agreed that if one didn't hear Ms. Al-Mashtouli say the word "was," the call was consistent with Mr. Jaballah and his wife taking the children to school together. However, Mr. Jaballah's evidence, given after Ms. Joyce's, contradicts this scenario.

[92] What I find to be determinative is that I have listened to the intercept of the conversation a number of times. It is Exhibit C to Exhibit 4 on this motion. I am satisfied, and find, that the transcript of the conversation is correct. Ms. Al-Mashtouli told Ms. Noe that when she returned from taking her children to school on September 15, 2009 "nobody was with" Mr. Jaballah. I find the transcript and intercept of Ms. Al-Mashtouli's admission to establish, in the absence of evidence to the contrary, that Mr. Jaballah was left home alone.

[93] Mr. Jaballah's testimony leaves unanswered the question as to what happened after he left his daughter at school and returned home with his son Ahmad. Neither his son Ahmad nor his wife testified. Ms. Noe's interpretation of the conversation is insufficient to nullify the admission made by Ms. Al-Mashtouli, particularly where, contrary to Ms. Noe, I find that Ms. Al-Mashtouli used the word "was." The relevant portion of the conversation makes no sense in the context of the future tense as Ms. Noe testified.

[94] I find, therefore, on a balance of probabilities, that on September 15, 2009 Mr. Jaballah was in the residence without a Court approved supervisor and so was in breach of the Order.

[95] I now turn to consider the allegation that on two occasions in September of 2009 Mr. Jaballah was not properly supervised because his supervisors were in the separate basement apartment.

[96] The first occurrence is said to be on September 13, 2009. The allegation is based upon two intercepted telephone conversations, one at 12:57 p.m., the other at 1:04 p.m. on September 13, 2009. In the first conversation, Mr. Jaballah calls his wife who advises that she is near the school. This establishes that she is away from home. The second conversation is with Zahra Malek, Mr. Jaballah's daughter-in-law and a supervisor. According to the transcript of the intercept, Zahra Malek is said to call Mr. Jaballah. The transcript of the intercept is as follows:

Z: Salam alekom.

J: Ya Alekom el salam, how are you Zahra?

Z: Good, al hamdallah, how are you?

J: You waked up or not yet?

Z: Ya, I do.

J: Ok, why don't you come up before to see what we can do.

Z: Yeah, I am coming I am just finishing off some work.

J: Ok, it's fine.

Z: Ok.

J: But, because we would like to know what we suppose to cook and what we are suppose to do.

Z: Ok, don't worry everything is simple inshallah.

J: Everything what?

Z: I said simple, inshallah.

J: Khair inshallah.

Z: Don't work too hard, don't start yet.

J: Finish whatever you have and come here.

Z: Ok, inshallah.

J: Salam alekom, Ahmad he woke up or not yet?

Z: Uh..no, not yet.

J: It's ok, leave him take a rest today.

Z: Ok, inshallah.

J: Salam alekom.

Z: Ya alekom el salam.

[97] Mr. Jaballah testified that it had been agreed that Zahra would prepare the evening meal that day. Therefore, he called Zahra to make sure that she was going to begin cooking. He stated that when he made the call he was in the top floor master bedroom and Zahra was in the main floor computer room "doing some of her own stuff" with Afnan. Mr. Jaballah asked Zahra to come up to the top floor master bedroom "so we could figure out what she is going to do."

[98] On cross-examination, Mr. Jaballah stated that when he called Zahra, Ahmad was asleep in the basement apartment. Mr. Jaballah called Zahra because he was busy in the master bedroom doing paperwork relevant to Ahmad's garage door business.

[99] Ms. Malek did not give evidence.

[100] The evidence is problematic in at least two respects. First, while Mr. Jaballah testified that he was the caller, the CBSA transcript shows Zahra to be the caller. The content of the conversation is, in my view, more consistent with Mr. Jaballah's evidence that he originated the call. I reach this conclusion because the call begins with a series of questions asked by Mr. Jaballah. His purpose for originating the call is clear.

[101] That said, Mr. Jaballah's explanation that he was on the top floor of the home and Zahra was on the main floor working in the computer room raises a number of questions. Why would he ask Zahra if she was awake if he knew she was working in the computer room? Why would he ask Zahra if Ahmad was awake if he knew that they were on different floors of the house? Why would Mr. Jaballah ask Zahra to come to the top floor to explain what Mr. Jaballah or others were supposed to do with respect to meal preparation? Why would Zahra tell Mr. Jaballah not to start work on meal preparation if he was in the master bedroom and she was on the main floor where the kitchen is located?

[102] I find that the unchallenged content of the conversation is more consistent with Mr. Jaballah calling Zahra while she was in the basement apartment with Ahmad. The intercept establishes on a *prima facie* basis that Mr. Jaballah's two supervisors were in the basement. Mr. Jaballah's evidence is insufficient to explain away the words used in the conversation and I reject it as being implausible. As well, I draw an adverse inference from the failure of Zahra Malek to testify. While Mr. Jaballah testified that he is reluctant to visit the stress of testifying upon his family, his daughter-in-law is a university educated adult and a Court appointed supervisor with obligations to the Court and the CBSA. She ought to have testified.

[103] In consequence of the content of the conversation, my rejection of Mr. Jaballah's evidence, and drawing a negative inference from the failure of Zahra Malek to testify, I find it is more likely than not that on September 13, 2009 Mr. Jaballah was in the residence without a Court approved supervisor. His supervisors Ahmad and Zahra were in the separate basement apartment and his wife was away from home. As such, Mr. Jaballah was in breach of one of the conditions of the Order.

[104] Moving to the allegation relating to September 30, 2009, this is based upon the following transcript of a call said to be made by Zahra Malek to Mr. Jaballah on that date at 8:47 a.m. The transcript is as follows:

Z: Salam Alekom.

J: Wa Alekom, how are you Zahra?

Z: Good, how are you?

J: What time you leave?

Z: I leave at 10...hmmmm...10:15.

J: Uh, 10:15.

Z: Yeah, inshallah.

J: Ok, ok, because I gonna let Ahmad to go before his mom come.

Z: Ok.

J: If you gonna...because my wife she is going to come around 10 and Ahmad he can leave 9:30.

Z: Ok, that's fine.

J: Ahmad is sleeping still?

Z: Yeah.

J: I gonna call him now.

Z: Oh, ok.

J: The phone besides him.

Z: Yeah.

J: Ok, Salam Alekom.

Z: Wa Alekom el salam.

[105] Again, Mr. Jaballah's wife is not in the home and what is important is where Ahmad and Zahra are at the time of the call.

[106] Mr. Jaballah testified that he called Zahra after his wife left the house at about 8 a.m. He had previously gone to the main floor to close the door behind his wife and to call his son Ahmad upstairs. Ahmad came up and lay down on the couch. Mr. Jaballah then went up to his bedroom. He later heard talking. After a while, he called Zahra who was in the basement. She told him that she could stay until about 10:15 a.m., and in response to Mr. Jaballah's question said that Ahmad was still sleeping. Mr. Jaballah then told Zahra that he would call Ahmad.

[107] Mr. Jaballah testified to the same effect on cross-examination.

[108] In my view, a question is raised as to why Mr. Jaballah would ask Zahra if Ahmad was sleeping while they were on different floors. Equally however, the fact that Mr. Jaballah would then telephone Ahmad is supportive of the inference that Ahmad and Zahra were not together and were on different floors of the house. I find that the content of the transcript is insufficient to make out a *prima facie* case so as to cause me to draw an adverse inference from the failure of Zahra to testify, and is insufficient to establish a breach of a condition on a balance of probabilities.

[109] I now move to consider the allegation that Mr. Jaballah has contacted individuals that he is prohibited from contacting by paragraph 12 of the Order. The individuals in question are Najeeb Saad and Aly Hindy.

[110] Mr. Saad is said to be a prohibited contact because court documents from Florida show dispositions of guilty, but not convictions, in respect of certain criminal charges. The CBSA had refused requests made by Mr. Jaballah to approve Mr. Saad as a visitor to the Jaballah residence. With some exceptions that are not relevant to Mr. Saad, subparagraph 12(b) of the Order prohibits communication between Mr. Jaballah and anyone he knows or ought to know has a criminal record.

[111] The specific breaches are said to be:

- i. 21 telephone conversations between July 18, 2008 and March 26, 2009 between Mr. Saad and Mr. Jaballah;
- ii. a transcript of an intercepted telephone conversation between Mr. Jaballah's wife and Mr. Saad's wife where they are said to discuss the possibility of Mr. Saad's passing by the Jaballah home to greet the family; and
- iii. transcripts of calls that are said to suggest that Mr. Saad attended Ahmad Jaballah's wedding.

[112] In respect of Aly Hindy, it is said that this Court has in the past refused to allow him to act as a surety because, among other things, "his published statements are open to the inference that he is sympathetic to or at least defensive of the threats of Islamic terrorism towards Canada." See: *Mahjoub v. Canada (Minister of Citizenship and Immigration)*,

[2007] F.C.J. No. 206 at paragraph 152. Subparagraph 12(a) of the Order in relevant part prohibits communication between Mr. Jaballah and anyone he knows or ought to know supports terrorism or violent Jihad. The specific breaches are said to be telephone conversations between Mr. Jaballah and Aly Hindy commencing February 13, 2008 and continuing to July 13, 2009.

[113] For the following reasons, no breach of conditions has been established on this evidence.

[114] First, with respect to the telephone calls between both Mr. Saad and Aly Hindy, Mr. Jaballah testified that after his release from detention he met with representatives of the CBSA and raised the issue of communicating with these individuals. He understood, as a result of that meeting, that he could speak to anyone by telephone as long as the calls were intercepted. No evidence was adduced to rebut Mr. Jaballah's testimony on this point.

[115] On cross-examination, Ms. Joyce testified as follows:

Q. That is not my question. Did you or the agency communicate to Mr. Jaballah, Mr. Mahjoub or anyone else, other than Hassan Almrei, that they should not talk to Ali Hindy?

A. I understand your question. The point is we were conferring with our - - with justice, as to whether or not this prohibition included phone and not just visitor interactions, thus, no, we did not.

Q. No one was ever told other than Hassan Almrei that they should not speak with Ali Hindy on their home telephone, correct?

A. Correct.

Q. That is because you were not sure that the order of the Court extended to telephone communication where there was interception going on?

A. CBSA felt that it did. We just needed to address it in court.

Q. If you felt that it did, why didn't you tell Mr. Jaballah, for example, or Mr. Mahjoub, that they ought not to speak to a person that they had been speaking to over the better part of a decade?

A. We were advised that it needed to be addressed in court.

Q. Let me then ask you about a meeting. Were you aware of a meeting that took place in mid-April, 2007, with Mr. Jaballah, Reg Williams, Hal Sippel and Terry Pearce?

A. No. That would be approximately when I started working these files as a senior program adviser.

[...]

Q. Were you aware that there was a meeting whether there was a discussion between these people, Reg Williams, Hal Sippel, Terry Pearce, and there was a discussion about speaking on the phone, and that being wide open as long as it was being intercepted, except if you knew the person had a criminal record or you knew the person supported violent jihad, but that you could talk on the phone to people who would not be approved, because there is no approval process for telephone contact? Were you aware of that discussion?

A. No, I was not.

[...]

Q. Let me go back to the meeting. Were you aware of any representation made to Mr. Jaballah by your colleagues or other senior people at CBSA about restrictions on telephoning?

A. No.

Q. To whom they could speak?

A. No. I was not aware.

[...]

Q. It is clear if you look at this first communication between Ali Hindy and Mr. Jaballah that Ali Hindy knows at this time, February 2008, that he is not to be speaking to Hassan Almrei, who is still in jail, correct?

A. Correct.

Q. He asked Mr. Jaballah: “How come you can speak to me on the telephone?”
Mr. Jaballah’s clear understanding comes out, which is that he can speak to him because it is all being intercepted. Do you see that?

A. Yes, I do.

Q. I am going to suggest to you that this understanding is common among other persons who are out on conditions of release, that, if their telephones are being intercepted by CSIS, as agent for CBSA, that they are free to talk to not only many people, they are free to talk to Ali Hindy. Are you aware of that?

A. It would appear that is the situation.

[Emphasis added.]

[116] I am satisfied on the evidence that Mr. Jaballah was told that he could talk by telephone with any individual, so long as the call was intercepted. It follows Mr. Jaballah's telephone conversations with Mr. Saad and Aly Hindy can not be viewed as being culpable or blameworthy, and can not lead to any sanction against Mr. Jaballah.

[117] If the CBSA had any doubt about this, a better mechanism for resolving doubt existed than alleging a breach of the conditions after a prolonged period of uncertainty or inaction on its part. This is particularly so where Mr. Jaballah had been led to believe he could speak to anyone on his residence phone and where a number of the conversations relied upon by the CBSA pre-date the Reasons issued in the last review of conditions where no complaint was made about the conversations.

[118] Second, with respect to the suggestion that the possibility was discussed of Mr. Saad's passing by the Jaballah home, there is no evidence that this actually happened. On cross-examination, Ms. Joyce agreed that at the conclusion of the impugned conversation it was agreed that the two wives would meet together. This is not evidence of a breach on the part of Mr. Jaballah. Further, it should be noted that when the suggestion was made that Mr. Saad would pass by the door to say hi, Ms. Al-Mashtouli replied "No, no, this is not going to work, passing by the door."

[119] Finally, with respect to Ahmad's wedding, the CBSA conducted covert surveillance of

both the wedding and the reception. Mr. Saad was not seen entering the mosque or the banquet hall. At their highest, the intercepts record Mr. Jaballah telling Mr. Saad, "We will send you an invitation [to the wedding], God willing." Mr. Saad's wife, a good friend of Ms. Al-Mashtouli, did attend the wedding. There is no cogent evidence of any breach.

[120] I now turn to the final allegation of unreasonable and untruthful conduct on the part of Mr. Jaballah.

[121] The assertions of unreasonable conduct center on the amount of notice Mr. Jaballah has given to the CBSA for medical appointments in non-emergency situations and his treatment of CBSA officers at an engagement party held for Mr. Jaballah's son, Ahmad. The allegations of untruthful conduct relate to a May 8, 2009 call by Mr. Jaballah to the CBSA with respect to an appointment for an x-ray, and a May 12, 2009 call about the health that day of Mr. Jaballah's daughter, Afnan. See: transcript November 23, 2009 at page 143 lines 14 to 16.

[122] With respect to the allegations of untruthful conduct, I am satisfied from the cross-examination of Ms. Joyce on November 23, 2009 (particularly at page 155 line 12 to page 159 line 19, page 165 lines 9 to 16, page 171 lines 11 to 16, and page 181 line 1 to page 184 line 11) that, at worst, these represent incidents of unreasonable behavior on the part of Mr. Jaballah.

[123] With respect to all of the allegations of unreasonable behavior, I think it fair to say that the evidence on this review of conditions, and on the prior review of conditions, shows an ebb and flow in the relationship between Mr. Jaballah and the CBSA. This is not surprising when one considers the nature of the relationship and the pressure the existing conditions and their enforcement place upon both Mr. Jaballah (and by extension his family) and the CBSA.

[124] Certainly, I am satisfied that the relationship was particularly strained at the time leading to Ahmad's wedding (see the Court's order of July 3, 2009) and during the time leading to a resolution by the Court of the dispute concerning the model of GPS bracelet Mr. Jaballah was required to wear (see the Court's reasons of June 18, 2009, 2009 FC 645).

[125] The evidence of CBSA witness Mr. Al-Shalchi prior to those events was that the relationship was "very amicable" and that Mr. Jaballah had "proven to be extremely cooperative." See: Reasons at paragraph 32. Mr. Jaballah's evidence was to a similar effect.

[126] At the time of this hearing, the evidence satisfies me that the relationship is once again improving. This is to the credit of both Mr. Jaballah and the CBSA.

[127] To Mr. Jaballah's credit, he contacted the CBSA to request a meeting. As a result, a meeting was held on June 11, 2009 between Mr. Jaballah, his son Ahmad, two of

Mr. Jaballah's supervisors and three representatives of the CBSA. The purpose of the meeting was to bring the parties back to a good working relationship. Ms. Alison Scoburgh, an Enforcement Supervisor with the CBSA, attended that meeting and agreed that this was a very useful initiative by Mr. Jaballah that marked the beginning of an improved working relationship between the CBSA and Mr. Jaballah.

[128] To the credit of the CBSA, it has scaled back on the frequent and extremely overt surveillance that it conducted prior to the last review of conditions. Now, when overt surveillance is conducted increased efforts are made by CBSA officers to be discreet and unobtrusive. In the words of Ms. Scoburgh this is so "the family doesn't feel it is stigmatized by this." Mr. Jaballah acknowledged in an affidavit filed on this motion that:

40. CBSA officials are no longer overtly following me, except once in a while. When I went to the mosque during Ramadan I did not notice them following me. Generally, now, CBSA officials do not remain outside my home. On occasion I see them watching, but not close to my home.

[129] In the context of this relationship, I am not inclined to give any significant weight to the Ministers' allegations of unreasonable behaviour. The episode at Ahmad's engagement party occurred at a very low point in the relationship and there is no evidence this behaviour has been repeated. The concerns about the notice given for non-emergent medical appointments were raised by Ms. Joyce who was located at CBSA headquarters in Ottawa. On cross-examination, she admitted that she was unaware of the Toronto region's practice to allow Mr. Jaballah to accompany his wife to medical appointments because he was not

allowed to remain home alone. She also acknowledged that the incident with respect to Afnan's health that gave rise to an allegation of untruthful conduct was not even brought to headquarters' attention by the Toronto region. It was Ms. Scoburgh's evidence that the Toronto region tries to accommodate healthcare appointments. Only on one occasion was Mr. Jaballah ever reminded of the obligation to give notice. Conduct that does not warrant mention by the CBSA agents in Toronto who deal regularly with Mr. Jaballah, does not warrant sanction by this Court, or the amount of time taken in Court to air these matters.

[130] Having dealt with the allegations of breach of the Order, in my view the most salient considerations when assessing the threat posed by Mr. Jaballah and the reasons for the continuation of conditions are as follows.

[131] First, while I have found that Mr. Jaballah breached the terms of the Order on two occasions in September of 2009, there is no public evidence from telephone intercepts or the internet service provider of any untoward communication or attempted communication by Mr. Jaballah when left alone. I acknowledge that the absence of such evidence is not conclusive.

[132] With respect to the two breaches, they are confined to a three day period in September of 2009. I attribute significant fault for the breaches to the supervisors who were to be with Mr. Jaballah at the relevant time and who owe obligations to the Court and to the CBSA.

Only one supervisor testified, Ms. Noe (one of the most recently appointed supervisors). Of concern was her testimony that in her conversations with other supervisors, surprise was expressed that the conditions have gone on for an extended period and “the theme for the supervisors, is they are just not even sure why this keeps going on.” This suggests, at the least, complacency on the part of some of the supervisors.

[133] Based upon the context of the breaches I have found and Ms. Noe’s testimony, I believe that Ahmad Jaballah and Zahra Malek exhibited such complacency that led to the two breaches I have found.

[134] The consequence of the breaches is that consideration must be given to Mr. Jaballah’s ability to access the internet or cell phones in the home while supervised by Ahmad or Zahra and whether supervision of Mr. Jaballah while home is effective. Consideration must also be given to whether the requirement of in-home supervision is still warranted.

[135] The second salient consideration is that Mr. Jaballah must be given significant credit for his efforts to restore the good working relationship he enjoyed with the CBSA. In my view, this manifests a general intention to cooperate with the CBSA and to function within the strictures of the Order. That is not to say that the breaches of the Order are insignificant or should be overlooked. But they must be seen in the context of the overall compliance Mr. Jaballah and members of his family have shown.

[136] At the same time, I believe that, as evidenced by his testimony and the instructions counsel for Mr. Jaballah referenced when explaining the lack of evidence on many points, Mr. Jaballah chafes at the continuation of the conditions. I further believe he is either dismissive of the condition that he not be supervised from the separate basement apartment or, perhaps more likely, he is unwilling to inconvenience Ahmad or Zahra or to risk confrontation by insisting that they properly supervise him. Notwithstanding the two lapses of in-home supervision, I generally accept Mr. Jaballah's prior evidence that he is obliged to obey the conditions because he hopes that compliance will facilitate future removal of the conditions.

[137] Third, the present conditions are viewed by CSIS to have mitigated the threat it sees as being posed by Mr. Jaballah's activities. In the absence of misconduct that engages national security concerns on the part of Mr. Jaballah on the two occasions I have found that he was improperly supervised, I remain of the view expressed at paragraph 44 of the Reasons that the existing conditions have contained the threat posed by Mr. Jaballah.

[138] Finally, it remains the case that:

- The Ministers' evidence relevant to assessing the risk or threat posed by Mr. Jaballah is essentially as it was when he was arrested.
- The Ministers do not argue that Mr. Jaballah poses a threat to the safety of any person or that he is a flight risk. The chief risk is that he will associate or

communicate with individuals who hold terrorist beliefs or objectives. For that reason, it remains important to monitor Mr. Jaballah's communications.

- There is no allegation on the public record that, since his last arrest in 2001, Mr. Jaballah has had improper contact, or attempted improper contact with any of the individuals listed in the amended public summary of the security intelligence report, or with any other person or organization the Ministers believe to be terrorists (I have rejected the Ministers' recent allegation of improper contacts).
- While it remains important to monitor Mr. Jaballah's communications, it is well-known that he remains of interest to Canadian authorities and that he is closely monitored by the CBSA. Whoever contacts Mr. Jaballah will draw the attention of Canadian authorities.
- Mr. Jaballah's ability to be of use to any extremist activity has been adversely affected because of his exposure, detention and the monitoring that accompanies his release.

[139] On all of the evidence, notwithstanding the inattention of his supervisors on two occasions relating to the supervision of Mr. Jaballah while at home, the Ministers have failed to persuade me that the threat posed by Mr. Jaballah has not attenuated to a degree since the conditions were last reviewed by the Court.

[140] I now turn to the other Charkaoui I factors.

- ii. The length of detention and release on stringent conditions

[141] The Supreme Court of Canada found in Charkaoui I that the longer a person is in detention, the less likely it is that an individual will remain a threat to national security. As well, a longer period of detention affords the Ministers more time to gather evidence establishing the nature of the threat posed by the individual. The Ministers' evidentiary onus is heavier when they have had more time to investigate and document the threat. See: Charkaoui I at paragraphs 112 and 113.

[142] Mr. Jaballah was detained on August 14, 2001 after the issuance of a second security certificate. He was released from detention on May 20, 2007. In her first decision, Justice Layden-Stevenson concluded that the length of Mr. Jaballah's detention was "of sufficient duration to trigger the observations noted by the Supreme Court, specifically disruption of the contact and communication with extremist individuals or groups previously engaged in by Mr. Jaballah."

[143] Throughout, Mr. Jaballah has been the subject of extensive public exposure, making it less likely that persons who would be of interest to the Service or the CBSA would risk drawing attention to themselves by contacting Mr. Jaballah, or that Mr. Jaballah would be effective as a covert agent.

[144] The length of detention and the time released on conditions, coupled with the absence of any significant new evidence, are factors that favour Mr. Jaballah.

iii. Reasons for the delay in deportation

[145] Reasonable recourse in the circumstances to the provisions of the Act or the Charter are neutral considerations. However, “an unexplained delay or lack of diligence should count against the offending party.” See: Charkaoui I at paragraph 114.

[146] On the last review of conditions, the parties agreed that this was a neutral factor. However, on this review Mr. Jaballah argues that there has been unreasonable delay in the production of the Charkaoui II disclosure and that his reasonableness hearing cannot proceed as scheduled because “we are now tied up on Mr. Mahjoub’s case in February. I don’t see how we can do Mr. Jaballah in January and February before Mr. Mahjoub.”(December 14, 2009 transcript, page 118).

[147] The Ministers argue that this is a neutral factor and point to the fact that Mr. Jaballah has freely availed himself of the right to bring motions.

[148] I have previously concluded, at paragraph 36 above, that the length of this proceeding to date largely reflects the time required for the Ministers to comply with the Charkaoui II

disclosure order. I also found, at paragraph 37, that the Ministers and special advocates were diligent in the discharge of their duties with respect to the Charkaoui II disclosure.

[149] The fact that this matter was further delayed following the Charkaoui II disclosure reflects the fact that both the Ministers and Mr. Jaballah chose to retain the same counsel who were involved in the Mahjoub proceeding. Those counsel were required to give priority to Mr. Mahjoub's case because he was in detention and in failing health.

[150] I see no unexplained delay or lack of diligence that should, in the words of the Supreme Court, "count against" any party.

iv. Anticipated future length of conditions

[151] If there will be a lengthy continuation of conditions, or the future duration of conditions cannot be ascertained, this is a factor that weighs in favour of a person named in the security certificate. See: Charkaoui I at paragraph 115.

[152] I have previously rejected the contention that conditions of release will continue indefinitely (see paragraph 32 and following above). That said, the duration of conditions, while finite, is uncertain. This weighs in favour of Mr. Jaballah.

[153] I remain of the view, however, that this consideration is ameliorated to a degree

because of the requirement that the conditions be subject to a meaningful process of review.

v. Alternatives to the existing conditions

[154] As I noted in the Reasons at paragraph 52, in Charkaoui I the Supreme Court of Canada admonished that stringent conditions of release must not be disproportionate to the nature of the threat posed.

vi. Conclusion with respect to the Charkaoui I factors

[155] As set out above, the threat posed by Mr. Jaballah at the time of his release has been contained by the terms of the Order. The Ministers have failed to establish that the threat has not attenuated to a degree since the conditions were last reviewed by the Court. The length of Mr. Jaballah's detention and subsequent release on stringent conditions are matters that weigh in his favour. There is no certainty as to when Mr. Jaballah can be removed from Canada. Mr. Jaballah has manifested a general intention to cooperate with the CBSA and to generally function within the strictures of the Order. I am satisfied that Mr. Jaballah's release from detention should be confirmed and that the conditions of his release may be modified in some respects.

d. Appropriate modification of conditions

i. The children

[156] Of significant concern is the 2009 psychological assessment of Mr. Jaballah's three

youngest children: Afnan, Ali and Osama (Deutsch Report). The evidence is unchallenged that the conditions are exacting a toll on the children's day-to-day functioning and are directly impinging on their abilities to master age-specific developmental tasks. The Deutsch Report expresses concern at the children's "pervasive sense of helplessness and hopelessness to change the situation."

[157] In the Reasons at paragraphs 19 to 25, I considered the obligation of the Court to take into account the best interests of Mr. Jaballah's children and his family unit. On the basis of the agreement of the parties, I assumed that the children's interests had to be taken into account when renewing the conditions of release. This conclusion was consistent with the obligation of the Court to take into account the totality of Mr. Jaballah's context and circumstances. However, at the same time, the presence of children does not call for a certain result or trump national security concerns.

[158] In my view, the following modifications to the Order will promote the best interests of Mr. Jaballah's three youngest children who still live at home, while not endangering national security or the safety of any person:

- i) The CBSA should no longer be permitted to open mail addressed to Afnan, Ali or Osama Jaballah that originates from any provincial, federal or municipal government entity, including mail originating from their school or school division, unless there are reasonable grounds to suspect that the correspondence

does not in fact originate from such a sender.

- ii) The CBSA is given discretion to not open mail directed to Afnan, Ali or Osama Jaballah in circumstances where the CBSA is familiar with the sender of the mail or otherwise satisfied there is no need to open the mail. This modification is subject to Mr. Jaballah undertaking, as he offered, not to receive communications through family members.
- iii) With respect to the residence telephone line, the home business lines and Husnah Al-Mashtouli's cell phone, when an analyst reasonably believes that Afnan, Ali or Osama Jaballah are speaking to one of their own age contemporary friends, the analyst shall cease monitoring the communication. This modification is subject to Mr. Jaballah undertaking, as he offered, not to receive communications through family members.
- iv) Under the Order, children under the age of 15 years who are friends of Mr. Jaballah's children may enter the residence without being approved by the CBSA. As those individuals who have visited the home and so have become known to CBSA turn 15, there is no need for them to obtain CBSA approval to visit. To be clear, existing young visitors will be "grandfathered" and so be exempted from the requirement of obtaining approval to continue to visit. As

suggested by counsel for Mr. Jaballah, any dispute with respect to a visitor's status shall be directed to the Court.

[159] Before leaving this area, I pause to note that Mr. Jaballah testified that Jean Smith, an individual who supports persons named in security certificates, sent a children's magazine to the Jaballah children (November 25, 2009 Transcript, page 136 at line 20 and following). Also in evidence was a transcript of a conversation between Ms. Smith and Mr. Mahjoub's step-son. On the basis of that evidence, at this time I consider it prudent and necessary to continue to allow the CBSA to intercept correspondence and telephone conversations involving the children other than in the situations set out above.

[160] Other changes to the existing terms and conditions, which are explained below, will impact on the interests of the children.

ii. Other modifications

Home Alone

[161] In the submission of counsel for Mr. Jaballah, the most onerous condition is that Mr. Jaballah is not allowed to be home alone. This is consistent with Mr. Jaballah's evidence that "[t]here is fighting in the house everyday" over the supervisory responsibility. This is in no one's best interests and certainly is not in the best interests of the children. I had previously ordered that Mr. Jaballah be allowed to be home alone on certain conditions. I

remain of the view that this is an appropriate condition, if conditions can be constructed that ensure that, if alone, Mr. Jaballah will not be able to communicate in an unsupervised manner with unknown individuals.

[162] The controls with respect to the cell phones of Ms. Al-Mashtouli and Afnan Jaballah and the computer room are in place and have not to date, in my view, given rise to legitimate concerns (as I found no breach of the condition that Mr. Jaballah not access the computer room).

[163] What is unknown is whether there is internet access (see: Transcript December 14, 2009 at page 270) or a landline in the separate basement apartment. If so, that risk would have to be addressed by installing contact switches on the doors of the apartment that would alert CBSA if those doors were opened while Ahmad and his wife were absent.

[164] If there is no internet access or landline in the basement apartment, and it was agreed that no cell phones or devices with wireless internet capability would be left in the basement apartment when Ahmad and Zahra were not home, and that the apartment would be locked so that Mr. Jaballah could not enter the apartment when they were away, contact switches would not be required. Agreement would also be required that no landline or internet access would later be installed without advance notice to the CBSA.

[165] Mr. Jaballah's refusal to adduce a proper evidentiary basis leaves the matter at an impasse that, in my view, can only be addressed by the parties providing an agreed statement of fact about the communication facilities in the basement apartment (allowing for the removal, if sought by Ahmad and Zahra, of any equipment now there in order to address the Court's concerns). In the absence of agreement, this matter must await a further hearing at which proper evidence is adduced. Best efforts should be made to reach agreement on the objective facts as to whether there is a telephone landline and either wireless or other internet capability in the basement apartment. It may be necessary for Ahmad and Zahra to consent to an inspection of the apartment in order to facilitate such an agreement.

[166] For clarification, if the issue of the basement communication facilities is addressed to the satisfaction of the Court, I would not limit the hours Mr. Jaballah is permitted to be alone. Subparagraphs 9 (b),(c),(e),(f),(g) and (i) of the Order would remain in place.

[167] In so concluding, I recognize that part of the relief claimed by the Ministers on their motion is an order removing Mr. Jaballah's right to remain at home alone. I do not consider such an order to be appropriate for the following reasons.

[168] First, the Ministers' motion, in large part, is based upon the allegation that:

5. Mr. Jaballah has not been compliant with the terms and conditions of his release. The telephone interceptions show that Mr. Jaballah has been communicating with prohibited persons, has been in the locked computer room, has been in the basement

apartment in his home and has not been truthful in his communications with CBSA.

None of those allegations were made out.

[169] Second, while I have found two instances of improper supervision of Mr. Jaballah while in the residence, one cannot ignore the substantial history of compliance with the Order and its predecessors. Specifically, there is no evidence on the public record that Mr. Jaballah has had, or attempted, improper contact with individuals. The CSIS witness acknowledged that since Mr. Jaballah's release, there is no new information that he has been involved in threat related activities.

[170] Finally, it is obvious the Court cannot reward breaches of the Order. However, the two incidents of inadequate in-home supervision since May 20, 2007 must be viewed in context. I have found the breaches to be attributable to an unacceptable complacency on the part of Ahmad Jaballah and Zahra Malek. I also accept Mr. Jaballah's evidence that the requirement of in-home supervision is a source of ongoing conflict. In my view, it is preferable that a condition that breeds complacency and disharmony be removed so long as there are technical methods for monitoring Mr. Jaballah's access to communication facilities. Those methods are in place in the computer room and with respect to the family and business phone lines. They can be put in place with respect to the basement apartment if communication facilities are removed when the apartment is not occupied, or contact switches are placed on the doors to the apartment. In any event, subparagraphs 6(e)(ii) and (iv) of the Order would continue to

apply.

Outings

[171] Mr. Jaballah is currently allowed, with prior approval of CBSA, five outings per week. Generally the outing shall not exceed 5 hours and 72 business hours notice³ is required. He is also allowed to accompany his children to school, to attend medical appointments, to attend the mosque and to have extended outings. At all times he must be supervised.

[172] In my view, it is appropriate to modify the provisions with respect to outings in the following respects.

[173] First, Mr. Jaballah's son Ahmad operates a garage door business. Mr. Jaballah now assists his son by answering the business telephone lines and by doing paperwork. He wishes to be able to attend service calls with his son Ahmad. In my view, national security and the safety of individuals would not be affected if Mr. Jaballah was allowed to work with his son on the following terms:

- i) Mr. Jaballah must obtain any required authorization for employment.
- ii) Mr. Jaballah must give notice to the CBSA of the address of all locations where he will work. Such notice must be given prior to 3:00 p.m. on the preceding business day (that is, for example, by 3:00 p.m. on a Friday for a Monday

appointment). CBSA may refuse permission for Mr. Jaballah to attend any particular address or appointment.

- iii) At no time may Mr. Jaballah leave the geographic area defined in subparagraph 11(a)(i) of the Order.
- iv) At all times Mr. Jaballah must be accompanied by his son Ahmad or another supervisor.
- v) While working, Mr. Jaballah may exchange casual greetings with persons he encounters on the job and may engage in casual, brief, superficial conversation.

[174] I conclude that this will not jeopardize national security or endanger persons because of Mr. Jaballah's past compliance when on outings and because there is no suggestion that Ahmad or the other supervisors have permitted any breach of the Order when Mr. Jaballah has been out on an observable outing. Further, Mr. Jaballah's public exposure has made it less likely that persons who would be of interest to the Service or the CBSA would risk drawing attention to themselves by arranging to have their garage doors serviced or installed by Mr. Jaballah.

[175] I recognize that these provisions will not enable Mr. Jaballah to attend emergency calls where he is unable to give sufficient notice to the CBSA. There is, however, no evidentiary basis before me about the nature of the business operation, and specifically no evidence with

respect to the nature and frequency of emergency calls.

[176] Second, the evidence establishes that the CBSA's officers in Toronto do not consider it to be a critical requirement to obtain 72 hours notice for medical appointments. (See: Transcript November 20, 2009 at page 126.) From this, I infer that a certain number of destinations Mr. Jaballah visits are well-known to the CBSA and so the usual notice period is not required.

[177] With respect to outings to well-known medical practitioners or retail outlets, the Order should be varied in the following respects:

- i) Counsel for the parties should agree upon the medical practitioners and retail establishments where 72 hours' advance notice is not required.
- ii) With respect to those locations, Mr. Jaballah shall give notice to the CBSA at least 90 minutes prior to leaving his residence, advising of the location(s) he will travel to and attend, and his intended route.
- iii) Generally, Mr. Jaballah shall be accompanied by a supervisor and shall report to the CBSA immediately upon leaving and returning to the residence.
Mr. Jaballah need not be accompanied by a supervisor if he is attending a medical appointment for himself or one identified grocery store and he goes directly to and from the medical practitioner or grocery store and makes no

other stops before returning to the residence. While out, Mr. Jaballah may exchange casual greetings with persons he encounters and make casual, brief and superficial conversation. For clarity, I repeat that he must report to the CBSA immediately upon leaving and returning to the residence and give at least 90 minutes' notice to the CBSA of his intended departure advising of his destination and intended route.

- iv) Outings to the agreed upon medical practitioners and retail establishments shall not exceed 4 hours in duration and shall not be counted as one of the outings referred to in subparagraph 8(a) of the Order.

[178] In my view, it was unfortunate that Mr. Jaballah elected to take the position that he would not adduce relevant evidence because he wanted to argue that he should not be subject to intrusive conditions. In the result, I have attempted to craft conditions that are proportionate to the attenuated threat. However, I have been constrained by the absence of a full evidentiary record.

e. The Ministers' motion

[179] I have already dealt with the Ministers' objection that Mr. Jaballah should not be permitted to be home alone and with the status of a contact switch on the entrance to the basement apartment. I now deal with their requests that the Order be amended so as to:

- Require infra-red illuminators to be installed on the security cameras located at the entrances to the Jaballah residence.
- Require the security camera in the garage of the Jaballah residence to be reactivated.
- Prohibit Mr. Jaballah from communicating with Ms. Jean Smith.

Infra-red illuminators

[180] The illuminators are intended to improve the capacity of the video-cameras to identify persons entering or leaving the residence at night. The infra-red light is said to be invisible to the human eye. The device measures 74 x 70 x 70 mm.

[181] Mr. Jaballah objects to the installation of the devices. He testified he is surprised at the request, and he believes it will upset his children.

[182] To date there is no evidence or report of any unauthorized visitor entering the Jaballah residence. Mr. Jaballah testified that only on three occasions has the CBSA called him to inquire about the identity of visitors.

[183] In the absence of a demonstrated need for these devices (and the evidence does not demonstrate such a need), the installation of this equipment would not be proportionate to the threat. This is particularly so where Mr. Jaballah has agreed to put his porch lights on when he is expecting visitors or when visitors arrive. The Order will be varied to confirm this

obligation. While Mr. Jaballah asks for reimbursement of the additional hydro costs. I am not prepared to order this when no evidence was adduced to establish that the additional cost can be quantified.

Garage security camera

[184] No breach of any condition was established that would make it necessary to re-activate the surveillance camera that is located in the garage. If Mr. Jaballah is to be home alone, the basement apartment will either not contain communication devices when Ahmad and Zahra are away, or the doors will be fitted with contact switches. In any event, the apartment must be locked when not occupied and Mr. Jaballah must not have access to the keys.

Jean Smith

[185] As mentioned above, Jean Smith is an individual who has contacted Mr. Mahjoub's step-son and sent a magazine to the Jaballah children. A transcript of an intercepted call with Mr. Mahjoub's step-son records her stating that after learning that another magazine she sent did not reach the Jaballahs she sent another copy to the school where Ms. Al-Mashtouli works. In another telephone conversation with Hassan Almrei, an individual then subject to a security certificate, she offered to pass on a message to Mr. Mahjoub. Mr. Almrei declined as that would have been a prohibited communication.

[186] Obviously, Ms. Smith is prepared to facilitate conduct that would breach the Order.

The Ministers wish Mr. Jaballah to be prohibited from communicating with her.

[187] In oral argument, Mr. Jaballah's counsel advised that Mr. Jaballah has been instructed by his counsel not to talk to Ms. Smith, and that he would sign an undertaking to that effect.

The Ministers do not consider an undertaking to be sufficient.

[188] There is no evidence Mr. Jaballah has communicated with Ms. Smith, and no evidence to suggest he wanted the magazines she sent. The Ministers have not shown why an undertaking is not sufficient, particularly where there is no evidence of Mr. Jaballah communicating with Ms. Smith. It will be sufficient for Mr. Jaballah to provide his undertaking to the Court, in a form acceptable to the Ministers, that he will not communicate directly or indirectly with Ms. Smith.

f. Conclusion

[189] The Order will be varied in accordance with these reasons. No order is issued at this time in view of the lack of evidence with respect to whether the basement apartment has internet access or a telephone landline or other non-removable communication devices. The parties have 14 days from the date of these reasons to file an agreed statement of fact on this point.

[190] Submissions seeking certification of a question should be served and filed within

7 days of the date of these reasons. Responsive submissions should be served and filed within 14 days of the date of these reasons.

g. Parting comments

[191] I make the following observations in the event a further application is made to review conditions.

[192] First, the Ministers put in evidence many intercepts that disclosed personal details of the Jaballah family. In future, strong consideration should be given to providing notice to Mr. Jaballah's counsel of any documents intended to be relied upon so that, if required, a confidentiality order may be sought.

[193] Second, both parties failed to redact from exhibits information that would disclose the address of the Jaballah residence. Better care should be taken in future.

[194] Third, counsel are reminded that the Court is assisted by a full evidentiary record on the relevant issues. As noted, the lack of evidence posed difficulty when crafting conditions.

[195] Fourth, on any further review of conditions it would be helpful if each side clearly articulated any requested changes well in advance of the hearing and efforts were made to agree on relevant evidence.

[196] Finally, counsel and their clients are encouraged in future to narrow the issues that are in dispute so that the Court and the parties are not required to expend significant time on issues that are not supported by the evidence or are peripheral. It is in everyone's interest that this matter proceed to determination of the reasonableness of the certificate.

“Eleanor R. Dawson”

Judge

1. As noted in the Court's communication to Mr. Jaballah dated May 8, 2009, on February 27, 2009 the Ministers filed with the Court in confidence DVDs and indices entitled "Charkaoui II Production - Phase 1." The production contained in the order of 3,000 records. The "Charkaoui II Production - Phase 2" was filed with the Court on March 27, 2009. This contained in the order of 200 records.

The Court's communication to Mr. Jaballah dated July 20, 2009 advised that on July 16, 2009, the Court had been advised that the special advocates had completed their review of the Charkaoui II production. They indicated their intent to advise counsel for the Ministers by July 31, 2009 of the information contained therein that they wished to have disclosed to Mr. Jaballah.

On September 25, 2009, the Court received “Draft Public Summaries Charkaoui II/Phase 1”. The Court's communication of October 9, 2009 advised that on October 7, 2009 the Ministers and the Court received the comments of the special advocates with respect to these documents. On October 23, 2009, the Court received "Draft Public Summaries Charkaoui II/Phase 2." The Court's communication dated October 28, 2009 advised that on October 27, 2009 the Ministers and the Court received the initial comments of the special advocates with respect to these documents.

On December 11, 2009 the Court issued an order authorizing disclosure of summaries of the Charkaoui II disclosure.

2. The deleted sentence repeated Justice Layden-Stevenson's conclusion that onerous conditions were not disproportionate to the risk then posed by Mr. Jaballah. The repetition of that conclusion in the Reasons was not, as feared by counsel for Mr. Jaballah, intended to suggest that such legal conclusion continued to bind the Court. That this is so, is reflected by the modification of the existing conditions in the Reasons.

3. Uncertainty has arisen with respect to what is meant by "72 business hours". It is not intended to mean 72 hours accumulated over a series of 8 hour business days. It was intended to capture the concept that 3 days' notice was required, but Saturdays and Sundays were not included in the calculation of time.

APPENDIX A

Sections 7, 9, 12, 15, 24 of the *Canadian Charter of Rights and Freedoms*, section 52 of the *Constitution Act, 1982* and sections 48, 56, 58, 77, 80, 81 and 82 of the *Immigration and Refugee Protection Act* are as follows:

Canadian Charter of Rights and Freedoms

Charte canadienne des droits et libertés

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[...]

[...]

9. Everyone has the right not to be arbitrarily detained or imprisoned.

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

[...]

[...]

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

[...]

[...]

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou

mental or physical disability.

ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

[...]

[...]

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est

circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

[...]

[...]

Constitution Act, 1982

Loi constitutionnelle de 1982

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

(2) The Constitution of Canada includes

(2) La Constitution du Canada comprend :

(a) the *Canada Act 1982*, including this Act;

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

(b) the Acts and orders referred to in the schedule; and

b) les textes législatifs et les décrets figurant à l'annexe;

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas a) ou b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

Immigration and Refugee Protection Act

Loi sur l'immigration et la protection des réfugiés

48. (1) A removal order is enforceable if it has come into force and is not stayed.

(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.

[...]

56. An officer may order the release from detention of a permanent resident or a foreign national before the first detention review by the Immigration Division if the officer is of the opinion that the reasons for the detention no longer exist. The officer may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer considers necessary.

[...]

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

- (a) they are a danger to the public;
- (b) they are unlikely to appear

48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

[...]

56. L'agent peut mettre le résident permanent ou l'étranger en liberté avant le premier contrôle de la détention par la section s'il estime que les motifs de détention n'existent plus; il peut assortir la mise en liberté des conditions qu'il estime nécessaires, notamment la remise d'une garantie.

[...]

58. (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants :

- a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;

for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or
(d) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or

b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux;

d) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger.

(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au

the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.

[...]

77. (1) The Minister and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court.

(2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not

renvoi.

(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

[...]

77. (1) Le ministre et le ministre de la Citoyenneté et de l'Immigration déposent à la Cour fédérale le certificat attestant qu'un résident permanent ou qu'un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée.

(2) Le ministre dépose en même temps que le certificat les renseignements et autres éléments de preuve justifiant ce dernier, ainsi qu'un résumé de la preuve qui permet à la personne visée d'être suffisamment informée de sa thèse et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon le

include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.

(3) Once the certificate is referred, no proceeding under this Act respecting the person who is named in the certificate — other than proceedings relating to sections 82 to 82.3, 112 and 115 — may be commenced or continued until the judge determines whether the certificate is reasonable.

[...]

80. A certificate that is determined to be reasonable is conclusive proof that the person named in it is inadmissible and is a removal order that is in force without it being necessary to hold or continue an examination or admissibility hearing.

81. The Minister and the Minister of Citizenship and Immigration may issue a warrant for the arrest and detention of a person who is named in a certificate if they have reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.

ministre, à la sécurité nationale ou à la sécurité d'autrui.

(3) Il ne peut être procédé à aucune instance visant la personne au titre de la présente loi tant qu'il n'a pas été statué sur le certificat. Ne sont pas visées les instances relatives aux articles 82 à 82.3, 112 et 115.

[...]

80. Le certificat jugé raisonnable fait foi de l'interdiction de territoire et constitue une mesure de renvoi en vigueur, sans qu'il soit nécessaire de procéder au contrôle ou à l'enquête.

81. Le ministre et le ministre de la Citoyenneté et de l'Immigration peuvent lancer un mandat pour l'arrestation et la mise en détention de la personne visée par le certificat dont ils ont des motifs raisonnables de croire qu'elle constitue un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à

- | | |
|--|--|
| <p>82. (1) A judge shall commence a review of the reasons for the person's continued detention within 48 hours after the detention begins.</p> | <p>la procédure ou au renvoi.</p> |
| <p>(2) Until it is determined whether a certificate is reasonable, a judge shall commence another review of the reasons for the person's continued detention at least once in the six-month period following the conclusion of each preceding review.</p> | <p>82. (1) Dans les quarante-huit heures suivant le début de la détention, le juge entreprend le contrôle des motifs justifiant le maintien en détention.</p> <p>(2) Tant qu'il n'est pas statué sur le certificat, le juge entreprend un autre contrôle des motifs justifiant le maintien en détention au moins une fois au cours des six mois suivant la conclusion du dernier contrôle.</p> |
| <p>(3) A person who continues to be detained after a certificate is determined to be reasonable may apply to the Federal Court for another review of the reasons for their continued detention if a period of six months has expired since the conclusion of the preceding review.</p> | <p>(3) La personne dont le certificat a été jugé raisonnable et qui est maintenue en détention peut demander à la Cour fédérale un autre contrôle des motifs justifiant ce maintien une fois expiré un délai de six mois suivant la conclusion du dernier contrôle.</p> |
| <p>(4) A person who is released from detention under conditions may apply to the Federal Court for another review of the reasons for continuing the conditions if a period of six months has expired since the conclusion of the preceding review.</p> | <p>(4) La personne mise en liberté sous condition peut demander à la Cour fédérale un autre contrôle des motifs justifiant le maintien des conditions une fois expiré un délai de six mois suivant la conclusion du dernier contrôle.</p> |

(5) On review, the judge
(a) shall order the person's detention to be continued if the judge is satisfied that the person's release under conditions would be injurious to national security or endanger the safety of any person or that they would be unlikely to appear at a proceeding or for removal if they were released under conditions; or
(b) in any other case, shall order or confirm the person's release from detention and set any conditions that the judge considers appropriate.

(5) Lors du contrôle, le juge :
a) ordonne le maintien en détention s'il est convaincu que la mise en liberté sous condition de la personne constituera un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi si elle est mise en liberté sous condition;
b) dans les autres cas, ordonne ou confirme sa mise en liberté et assortit celle-ci des conditions qu'il estime indiquées.

APPENDIX B

Paragraph 178 of the 2009 FC 284 reasons read as follows:

To summarize, I have concluded as follows:

- (1) Zahra Malek and Sandra Noe are added as supervising sureties.
- (2) The CBSA is granted discretion to approve requests for outings outside the geographic boundary set by the Court. This discretion should be exercised in accordance with certain limits to be agreed to by counsel respecting the maximum distance Mr. Jaballah would be permitted to travel, the number of such outings that the CBSA may approve and a requirement of reasonable advance notice of any requested outing outside the geographic boundary. If these limits cannot be agreed to, they will be settled by the Court.
- (3) Afnan Jaballah will be permitted to have a cellphone on the same conditions that apply to her brother with one additional condition. While calls placed or received by the cellphone will not be intercepted, the telephone service provider must be

irrevocably directed to provide the CBSA with copies of the cellphone records that show particulars of the cellphone's usage, including all numbers called.

- (4) The CBSA's right to enter and search the Jaballah residence is qualified in that any search of the belongings of Mr. Jaballah's wife or daughter and any search of any space primarily used by Mr. Jaballah's wife or daughter should be conducted by a female officer of the CBSA.
- (5) The video surveillance equipment installed at the front and back doors of the Jaballah residence will remain in place.
- (6) Mr. Shehab may be removed as a cash surety if Mr. Jaballah can secure either a cash surety who will pay \$5,000.00 into Court, or an individual acceptable to the CBSA who is prepared to execute a performance bond in the amount of \$5,000.00.
- (7) Mr. Jaballah may remain at home alone (excluding the garage) during fixed hours on weekdays provided these additional conditions are met:
 - a. Counsel should endeavour to agree to fixed hours during weekdays that Mr. Jaballah will be permitted to be home alone. If they cannot be agreed, the Court will set the hours. The hours should not initially exceed six hours per day.
 - b. Mr. Jaballah must notify the CBSA immediately prior to the departure of his supervisor that he is about to be alone.

- c. While Mr. Jaballah is in the residence without a supervisor, no one shall have access to the computer room and it shall remain locked. A contact switch shall be installed on the door to the computer room and must be activated and functional at all times when Mr. Jaballah is home alone. The contact switch must either record the times at which the door to the computer room is opened, or transmit a signal to the CBSA or its agent that notifies the recipient of the signal that the computer room door has been opened.
- d. Mr. Jaballah must not leave the residence except in the event of an emergency or if requested by the CBSA to stand in front of the video surveillance equipment for the purpose of verifying his presence.
- e. Mr. Jaballah shall telephone representatives of the CBSA, as they may request, to confirm his presence in the residence. When a supervisor enters the residence, so that Mr. Jaballah is no longer unsupervised, the supervisor shall promptly notify the CBSA of his or her arrival. If one of Mr. Jaballah's minor children enters the residence while Mr. Jaballah is alone, Mr. Jaballah shall promptly notify the CBSA of this.
- f. While without a supervisor, Mr. Jaballah will receive no visitors and receive no deliveries (other than from the CBSA). If his minor children are in the residence, they may not have visitors or receive deliveries.

- g. Contact switches must be placed on all entrances into the residence, including the entrance from the basement apartment. The switches must be activated and functional at all times when Mr. Jaballah is home alone.

- (8) If Mr. Jaballah is in his front or backyard, he must remain within sight of a supervisor. While in the yard without the physical presence of a supervisor, Mr. Jaballah cannot have any contact or communication with others (other than a casual greeting to a neighbour) and cannot receive any delivery or any thing.

- (9) The hours within which Mr. Jaballah may leave the residence, 8 a.m. to 9 p.m., are extended to 8 a.m. to 11 p.m.

- (10) The requirement that the CBSA must give prior approval to Mr. Jaballah's outings remains in force. Counsel are asked to attempt to find a practical solution to what should occur if an issue, such as a need to stop for a bathroom or to pick up bread, arises on an outing. If counsel are unable to reach agreement, the Court will settle the issue.

- (11) No wireless laptop computer is permitted in the residence.

- (12) The children shall be permitted to use the PSP unit that was seized by the CBSA provided that:

- a. The PSP remains in the computer room at all times.
- b. Mr. Jaballah must instruct all PSP users that the unit is not to be connected to the internet.
- c. Mr. Jaballah shall make the PSP unit available for inspection and forensic examination by the CBSA as the CBSA may reasonably request. If such examination reveals the unit has been connected to the internet, it shall not be returned to the Jaballah residence.

(13) Mr. Jaballah will have to return to Court for approval to attend his son's wedding and wedding reception. It is premature to make any ruling on this matter on the basis of the evidentiary record before the Court. However, as a matter of principle, every effort should be made to permit this. Timely advice as to the details and guest list should be provided to the CBSA.

(14) If Ahmad Jaballah and Zahra Malek move into the basement apartment, it may be treated as a separate residence subject to the following conditions:

- a. If Mr. Jaballah wishes to visit the apartment he will have to seek CBSA approval as for any other outing.
- b. The surveillance camera that is located in the garage must be activated.

- c. The interior door between the basement apartment and the main Jaballah residence must be closed and kept locked when neither Ahmad Jaballah nor Ms. Malek are in the basement apartment. Mr. Jaballah shall not have access to that key.
- d. Neither Ahmad Jaballah nor Ms. Malek can supervise Mr. Jaballah from the basement apartment.

- (15) If Ahmad Jaballah and Ms. Malek move into the basement apartment, mail addressed to the basement apartment will be treated in the same manner as the current tenant's mail is, and any phone line in the basement will not be intercepted. The mail delivered to the Jaballah residence and the telephone line in the Jaballah residence will still be intercepted.
- (16) No order is made concerning Mr. Jaballah's requests regarding the electrical costs of the video surveillance equipment or the reimbursement of parking expenses.
- (17) The CBSA is not prohibited from conducting overt surveillance on Mr. Jaballah when he is with his family.
- (18) The CBSA is to conduct a risk assessment regarding Mr. Jaballah forthwith.
- (19) No order will issue prohibiting the CBSA from taking pictures of Mr. Jaballah or his family. The CBSA shall safeguard photographs now, or in the future, in its possession and should not release any photograph in its possession to any entity

unless a photograph depicts an activity which is relevant to a threat perceived to be posed by Mr. Jaballah or to a perceived breach of any condition of release.

- (20) No order will issue restricting the CBSA's right to copy intercepted mail. The CBSA shall safeguard any intercepted mail in the manner detailed above for photographs of Mr. Jaballah and his family.
- (21) The CBSA should use its best efforts to see that intercepted mail is forwarded to Mr. Jaballah within 24 hours.
- (22) No order will issue directing the destruction of telephone intercepts. Again, however, the CBSA should safeguard the contents of telephone intercepts in the same manner as that discussed above in regard to photographs and copies of intercepted mail.
- (23) The word "written" in paragraph 13 of the conditions of release shall be deleted.
- (24) Mr. Jaballah must notify the CBSA when items, including mail that should have been intercepted, are delivered to the residence, and make the items available for inspection. The one exception is that there is no obligation to notify the CBSA of the delivery of prepared foods from entities whose business it is to sell and deliver prepared foods.

- (25) No order will issue prohibiting Mr. Jaballah from traveling in a vehicle that is equipped with OnStar. However, if Ahmad Jaballah intends to activate the hands-free calling service and if Mr. Jaballah intends to ride in one of those vehicles when this service has been activated, Mr. Jaballah must give advance and timely notice of this to the CBSA.
- (26) No order will issue prohibiting Mr. Jaballah and members of his family from taking photographs, video tapes or audio tapes of CBSA officers.
- (27) The geographic boundary beyond which Mr. Jaballah cannot travel is as proposed by the Ministers. That area includes the City of Toronto, the City of Mississauga, and portions of Markham and Vaughan. It also includes the location of Ash Shaymaa Es Sayyid's new residence.

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: Toronto, Ontario

DATES OF HEARING: November 16, 17, 20, 23, 24, 25, 26, 27 and
December 4 and 14, 2009

SUPPLEMENTARY WRITTEN

SUBMISSIONS BY: the Ministers, December 10 and 18, 2009 and
the Respondent, December 10 and 18, 2009

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

DATED: May 11, 2010

APPEARANCES:

Ms. B. Jackman
Ms. M. Edwardh
Ms. A. Weaver

For Mr. Jaballah

Mr. D. MacIntosh
Mr. J. Provart
Mr. D. Joseph
Ms. T. Kroeker
Mr. D. Knapp
Mr. A. Cameron

For the Minister of Citizenship and
Immigration and the Minister of Public
Safety and Emergency Preparedness

Mr. John Norris

Special Advocate

SOLICITORS OF RECORD:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Toronto, Ontario

For the Minister of Citizenship and
Immigration and the Minister of Public
Safety and Emergency Preparedness