Federal Court  Cour fédérale

Date: 20101126

Docket: DES-7-08

Citation: 2010 FC 1193

Ottawa, Ontario, November 26, 2010

PRESENT: The Honourable Mr. Justice Blanchard

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 Mohammed Zeki Mahjoub

REASONS FOR ORDER AND ORDER

[1] By notice of motion dated November 12, 2010, the Minister of Citizenship and Immigration and the Minister of Public Safety (the Ministers) seek:

(a) an Order quashing subpoenas issued on November 8, 2010 in this proceeding requiring the attendance of Richard Fadden, Stephen Rigby, The Hon. Diane Finley, the Hon. Stockwell Day, Ted Flanigan and Michael Duffy;

(b) an Order prohibiting the Respondent from seeking subpoenas in this matter without leave of the Court, to be obtained on notice to the Ministers;

(c) such other relief as counsel may request and the Court may permit.

[2] The Ministers' stated grounds for the motion are the following:

(a) It has not been demonstrated that the proposed witnesses are likely to give evidence that is relevant to the issues in this proceeding;

(b) the subpoenas issued to Richard Fadden and Stephen Rigby have been obtained in violation of the Court's order requiring the Respondent to provide notice of witnesses to be called, which constitutes an abuse of process;

(c) the Hon. Diane Finley, the Hon. Stockwell Day cannot be compelled to give evidence, as they are subject to Parliamentary privilege;

(d) Michael Duffy's proposed evidence is protected by solicitor/client and litigation privilege;

(e) the documents requested to be produced in the subpoenas include documents which the Court has ruled are properly the subject of another motion. It is abusive for the Respondent to issue subpoenas for the purpose of circumventing the Court's previous ruling;

(f) the information sought from the proposed witnesses is available on the public record without the need for subpoenas;

(g) the subpoenas and requests for documents in general constitute an impermissible fishing expedition;

(h) Rules 41 and 42 of the *Federal Courts Rules*;

(i) such further and other grounds as counsel may advise and this Honourable Court permit.

[3] The Ministers' motion record was served and filed on November 12, 2010, the Respondent record was served and filed on November 17, 2010, and the parties were heard on the motion on November 18, 2010, in Ottawa. Mr. Mahjoub attended via video conference.

[4] The Respondent contests the motion and contends that the subpoenas are properly issued and necessary for the purpose of adducing evidence in his outstanding motions and for his defence in the reasonableness proceeding.

[5] The matter was taken under reserve at the close of the hearing. Prior to the issuance of these reasons, counsel for the Ministers advised the Court that the Ministers were prepared to produce Mr. Paul Vrbanac as a witness to speak on behalf of the Canadian Security Intelligence Service (CSIS or the Service) and Mr. Brett Bush, as a witness to speak on behalf of the Canadian Border Services Agency (CBSA). The parties agreed that these two witnesses would be substituted for Mr. Richard Fadden, the Director of CSIS, and Mr. Stephen Rigby, President of the CBSA, who are currently under subpoena as witnesses on behalf of the CSIS and the CBSA, respectively. The parties further agreed to the attendance of these two witnesses. All other issues raised in the Ministers' motion to quash the subpoenas remain in dispute. I will now turn to address the remaining outstanding issues on the motion.

Issue

[6] Should the subpoenas *duces tecum* at issue be quashed?

The Law

[7] In *Laboratoires Servier v Apotex Inc*. 2008 FC 321, Justice Snider conducted a comprehensive and useful review of the jurisprudence and principles applicable when quashing a subpoena. I agree with the following articulation of the general test:

> (a) Is there a privilege or other legal rule which applies such that the witness should not be compelled to testify? (*Re (Zündel)* 2004 FC 798); *Samson Indian Nation and Band v Canada* 2003 FC 975).
>
> (b) Is the evidence from the witness subpoenaed relevant in regard to the issues the Court must decide? (*Jaballah (Re)* 2001 FCT 1287; *Merck & Co v Apotex* 1998 FCJ No. 294).

[8] The jurisprudence also teaches that while the threshold for relevance is low, a party must do more than merely assert relevance. It is not sufficient for the party calling the witness to simply state that the witness might have relevant evidence; rather, the party has to establish that it is likely that the witness will give relevant evidence, *Zündel Re*, 2004 FC 798.

[9] The Respondent contends that the onus is on the person challenging a subpoena to establish a lack of relevance and cites *Zündel*, above, in support of his argument. Upon review of the jurisprudence, I am of the view that the burden of proof remains with the party seeking to sustain the subpoena to establish that the witness would probably have evidence relevant to the issues raised before the Court. See: *Servier*, above, and *R. v Harris* (1994), 93 CCC (3d) 478 (Ont. CA).

Analysis

[10] I propose to deal with each subpoena in turn. In doing so, I will review the respective position of the parties.

Subpoenas issued to the Ministers

[11] The Hon. Diane Finley is currently the Minister of Human Resources and Skills Development. In 2008, she was the Minister of Citizenship and Immigration and signed the current certificate against Mr. Mahjoub. The Hon. Stockwell Day is the President of the Treasury Board and the Minister for the Asia-Pacific Gateway. In 2008, he was the Minister of Public Safety and Emergency Preparedness and signed the current certificate against Mr. Mahjoub.

[12] The Ministers argue that the Hon. Diane Finley and the Hon. Stockwell Day are subject to Parliamentary privilege and that their evidence is not relevant to the issues before the Court.

[13] Mr. Mahjoub does not dispute the existence of the privilege but contends that the scope of the privilege is unclear in Canadian law.

[14] The lack of clarity relates to whether the privilege applies during a recess of a session of Parliament; more specifically in this case, over the holiday adjournment in December. Counsel for Mr. Mahjoub acknowledge that the jurisprudence of this Court has indeed extended the scope of he privilege to the entire session of Parliament, but argues that this conclusion was made in the absence of consideration of the relevant circumstances surrounding the exceptional nature of the procedures in place for the recall of Parliament during such recesses.

[15] In my view, the law is settled. Parliamentary privilege will apply while Parliament is in session, even if not sitting. In *Samson Indian Nation and Band v Canada* 2003 FC 975, at paragraph 43, Justice Teitelbaum stated:

> I find that the privilege exists and has existed historically, and that it persists for the direction of a session, as opposed to the more narrow

> "sitting" advanced in *Telezone*. I agree with the words of Low J.A. in *Ainsworth*, at paragraph 56, and make them mine:
>
> > When Parliament is in session it can be called to sit at any time. When it is in session, it is assembled, whether actually sitting or not…The business of Parliament and the duties of parliamentarians are not at rest just because Parliament, during a session, is not physically sitting.

[16] There is no dispute that Parliament is currently in session. The Respondent seeks to have the Ministers appear before the Court in early January 2011, during which time Parliament is recessed for the holidays. I find that Parliamentary privilege applies during this period. As a consequence, the impugned subpoenas directed to the Hon. Diane Finley and the Hon. Stockwell Day will be quashed. Given this finding I need not address relevancy.

Subpoena issued to Michael Duffy

[17] Mr. Duffy is currently Senior General Counsel in the National Security Law, Public Safety Defence and Immigration Portfolio with the Department of Justice. On June 4, 2009, while he was employed as Senior General Counsel with CSIS legal Services, Mr. Duffy signed a letter to the Court meant to address developments in another certificate proceeding (DES-5-08, concerning Mr. Harkat). In that letter, issues relating to certain deficiencies in the disclosure of information regarding source matrices by the Service are addressed. The letter also indicates that this omission of relevant information may raise similar concerns relating to the integrity of other source matrices in outstanding certificate proceedings and even in the warrant application process.

[18] The Ministers argue that all of the proposed areas of examination of this witness fall within the ambit of solicitor/client or litigation privilege, because Mr. Duffy was employed by the Department of Justice as head of the Legal Services unit of the Service at the time he issued the letter, that is the period identified in his subpoena. The Ministers further submit that Mr. Duffy's evidence is not relevant or necessary to the proceedings. The Ministers argue that the circumstances leading up to Mr. Duffy's letter are the subject of public judgments in the *Harkat* case and that nothing prevents Mr. Mahjoub from reviewing the public record with respect to these events and to file information relevant to the within proceeding.

[19] Mr. Mahjoub argues that Mr. Duffy is a "material" witness for the defence since he signed the June 4, 2009, public letter wherein concerns are raised as to the reliability of the information and evidence in support of other outstanding security certificates. This disclosure constituted a waiver of the solicitor/client and litigation privileges. Mr. Mahjoub further submits that Mr. Duffy's evidence is relevant to the within proceeding, as it concerns the reliability of the information and evidence in support of all outstanding security certificates and therefore may have a direct impact on Mr. Mahjoub's case.

[20] Contrary to the Ministers' submissions, this letter is not a communication between a solicitor and a client. Rather, it is a public communication to the Court and accordingly no solicitor/ client or litigation privileges attaches.

[21] In my view, Mr. Duffy may be called as a witness in respect to the matters that are raised in his letter. I am satisfied that his evidence is likely to be relevant in regard to the issues before the

Court. Should questions arise that potentially engage issues of solicitor/client privilege, these will be dealt with at the hearing.

[22] The subpoena requires Mr. Duffy to bring with him and produce at the hearing the following documentation:

> All material, documents and information that you reviewed in preparation of your letter dated June 4, 2009 in respect of the review of human source matrices within CSIS relating to , in particular, security certificate cases.
>
> All material, documents relating to follow up actions taken in respect of CSIS practice and/or policy relating to all security certificate cases including the case of Mr. Mahjoub since June 4, 2009.

[23] In the circumstances of the within proceeding, the request is unreasonable. It is known to Public Counsel that the Ministers place no reliance on information tendered in private from human sources in support of their case against Mr. Mahjoub. Therefore information relating to human sources is not relevant. What is relevant is information that concerns other source matrices which may have an impact on all certificate proceedings. Mr. Duffy's evidence in this respect does not require the production of the requested materials relating to human sources, which are likely protected information in any event. Mr. Duffy will be required to produce documentation, if any, that relates to "follow up action" by the Service. Objections on solicitor/ client privilege, or litigation privilege regarding the production of any such documentation, will be dealt with at the hearing.

Subpoena issued to Ted Flanigan

[24] Mr. Flanigan is a former manager at CSIS and is now retired. In 2009, he was the Assistant Director of CSIS.

[25] The Ministers argue that Mr. Flanigan's evidence, as a retired CSIS official, is neither relevant nor necessary to the proceedings. Mr. Flanigan, while he was still working with CSIS, gave evidence in the *Charkaoui* certificate process and was cross-examined over two days on the Service's policies and practices. The Ministers submit that it is unnecessary to have a retired CSIS official attend to give evidence if there is a public record through which similar evidence can be tendered. The Ministers also argue that Mr. Flanigan is unlikely to have relevant information about the proposed areas of examination set out by Mr. Mahjoub and that a number of those areas are not relevant to this proceeding.

[26] Mr. Mahjoub argues that Mr. Flanigan is a competent witness from CSIS and is able to testify on the basis of his personal knowledge of pending security certificate cases and about facts related to Mr. Mahjoub's security certificate. Mr. Flanigan's position when employed by the Service as an Executive member and Assistant Director required a high level involvement dealing with the analysis and review of all the security certificate files. Mr. Mahjoub also points out that the CSIS witness provided by the Ministers for the reasonableness hearing, Mr. Guay, did not have the same involvement and personal knowledge of Mr. Mahjoub's file as Mr. Flanigan and that during his examination, Mr. Guay was unable to answer questions about the Classified Security Intelligence Report and about the manner by which it was compiled.

[27] No privilege is claimed in the case of Mr. Flanigan. The only issue is whether his evidence would be relevant in regard to the issues the Court must decide. I am satisfied, in the context of the within proceeding, and particularly in respect to the motion on abuse of process, that his evidence is likely to be relevant. Accordingly, the subpoena requiring his attendance as a witness in this proceeding will stand.

Subpoenas issued to Stephen Rigby and Richard Fadden

[28] By agreement between the parties, the attendance of Mr. Richard Fadden and Mr. Stephen Rigby will not be required. They are substituted by Mr. Paul Vrbanac and Mr. Brett Bush as stated above. Accordingly, the subpoenas issued for the attendance of Mr. Richard Fadden and Mr. Stephen Rigby, will be quashed. I will therefore not address the arguments raised relating to their attendance. However, the documents requested to be produced by the substituted witnesses is still contested and will be dealt with below.

[29] The Ministers' main argument is that the Respondent is attempting to obtain evidence, the disclosure of which is a matter currently before Prothonotary Aalto. The Ministers say that it is abusive to seek the production of the same documentation by way of a subpoena *duces tecum*, particularly when this Court already determined that it would not intervene.

[30] A review of the two subpeonas *duces tecum* at issue reveals that the documentation required to be produced at the hearing is essentially the same documentation ordered produced by Prothonotary Aalto in his November 3, 2010**,** reasons in the *Jaballah* matter. The related information, as it applies to Mr. Mahjoub, will be released to him within a week. While accepting

that the issue is resolved for the most part, counsel for Mr. Mahjoub, nevertheless contend that their request is broader in scope than the disclosure ordered by Prothonotary Aalto. I disagree. Should issues arise regarding a discreet document that is not otherwise produced, the Respondent may seek the Ministers' undertaking to produce such a document and the Court will resolve any dispute that may flow from such a request. The documentation requested is essentially the same documentation to be disclosed as a result of a separate proceeding. It is improper to seek to obtain the same documentation by way of subpoena *duces tecum*. As a consequence, the substituted witnesses will not be required to produce at the hearing the documents requested in the subpoenas. This finding is also applicable to Mr. Flanigan.

[31] The Ministers also seek an Order prohibiting the Respondent from seeking subpoenas in this matter without leave of the Court, to be obtained on notice to the Ministers. The time lines set for the filing of the Respondent's witness list has expired. Any subpoenas required for the attendance of the Respondent's witnesses should have issued by now. Consequently, any further subpoenas may only issue with leave of the Court on notice to the Ministers.

Conclusion

[32] For the above reasons, the subpoenas issued to the Hon. Diane Finley, the Hon. Stockwell Day, Mr. Richard Fadden and Mr. Stephen Rigby will be quashed. The subpoena issued to Mr. Flanigan is proper and he can be called to give evidence in the court hearing of this proceeding. However, as is the case with Mr. Paul Vrbanac and Mr. Brett Bush, he need not produce the documentary evidence requested in the subpoena. Mr. Duffy may be called as a witness and shall

produce only documentation relating to the "follow up actions" of the Service referred to in the subpoena.

ORDER

THIS COURT ORDERS that:

1. The motion is allowed in part;

2. The subpoenas *duces tecum* directed to the Hon. Diane Finley, the Hon. Stockwell Day, Mr. Richard Fadden and Mr. Stephen Rigby are quashed;

3. The subpoena *duces tecum* directed to Mr. Duffy will stand, however he is required to produce at the hearing only documentation relating to the "follow up actions" of the Service referred to in the subpoena;

4. The subpoena directed to Mr. Flanigan will stand and, as in the case of Mr. Paul Vrbanac and Mr. Brett Bush, the substituted witnesses for Director Fadden and President Rigby, he need not produce at the hearing the documentation requested in the subpoena.

5. Any further subpoenas in this proceeding may only issue with leave of the Court on notice to the Ministers.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-7-08
STYLE OF CAUSE:	The Minister of Citizenship and Immigration and The Minister of Public Safety v. Mohamed Zeki Mahjoub
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING BY TELECONFERENCE:	November 18, 2010
REASONS FOR ORDER:	BLANCHARD J.
DATED:	November 26, 2010

APPEARANCES:

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