

**Date: 20090115**

**Docket: DES-7-08**

**Citation: 2009 FC 34**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION and  
THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Applicants**

**and**

**MOHAMED ZEKI MAHJOUR**

**Respondent**

**REASONS FOR ORDER**

**MACTAVISH J.**

[1] Mohamed Zeki Mahjoub has for many years been the subject of Security Certificates, the most recent of which was signed by the Minister of Citizenship and Immigration and the Minister of Public Security and Emergency Preparedness. After spending a number of years in detention, Mr. Mahjoub was released from custody in April of 2007 on a series of very strict terms and conditions.

[2] The question of the reasonableness of the most recent Security Certificate is currently the subject of proceedings before the Federal Court. Justice Layden-Stevenson is also dealing with a request for the variation of the terms and conditions of Mr. Mahjoub's release from detention.

[3] In the meantime, Mr. Mahjoub has brought a motion seeking “to clarify the parameters of the conditions imposed by the Court”. By order of the Chief Justice, this motion was scheduled to be heard together with a similar motion brought by Mahmoud Jaballah, another individual who is also the subject of a Security Certificate. A separate set of reasons is being issued simultaneously with this decision with respect to Mr. Jaballah’s motion.

[4] Messrs. Mahjoub and Jaballah each assert that in purporting to monitor their compliance with the terms and conditions of their release, the Canada Border Service Agency has effectively imposed additional terms and conditions on them, which have not been judicially authorized. They further assert that the way in which the CBSA is monitoring their compliance with the terms and conditions of their release violates sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[5] It should be noted that this motion was heard on the basis of both affidavit evidence and *viva voce* testimony. Transcripts from other proceedings were also filed with the Court on the consent of the parties, as were all of the previous public decisions relating to Mr. Mahjoub. The entire hearing in relation to this motion took place in public, on the basis of a public record. As was agreed to by the parties, the Court has not reviewed any of the evidence that has been received *in camera* in other proceedings.

## **I. Background**

[6] While the proceedings involving Mr. Mahjoub have a lengthy history, for the purpose of this motion, it is only necessary to identify a few key facts.

[7] On June 26, 2000, Mr. Mahjoub was detained on the basis of a security certificate signed by the then Solicitor General of Canada and Minister of Citizenship and Immigration, pursuant to the provisions of paragraph 40.1(3)(a) of the former *Immigration Act*. After a hearing before Justice Nadon, the certificate was found to be reasonable: *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 2001 FCT 1095.

[8] On February 15, 2007, Justice Mosley ordered that Mr. Mahjoub be released from detention upon a number of terms and conditions: *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 2007 FC 171. Minor variations have since been made to these conditions by Justice Mosley in subsequent proceedings. The terms and conditions currently in effect for Mr. Mahjoub are attached as an appendix to these reasons.

[9] As a result of the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (*Charkaoui* #1), it was determined that the procedure prescribed in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, for the judicial approval of Security Certificates was inconsistent with the Charter, and was thus of no force or effect. The Court's declaration was suspended for one year from the date of the judgment, so as to allow the government to make the necessary amendments to the Act.

[10] On February 22, 2008, a new Security Certificate was issued with respect to Mr. Mahjoub. As was noted earlier, the reasonableness of this second Certificate is the subject of proceedings before this Court, and Justice Layden-Stevenson is currently dealing with a request to vary the terms and conditions of Mr. Mahjoub's release.

[11] On August 8, 2008, Mr. Mahjoub brought the motion that is the subject matter of this decision. In his October 14, 2008 order scheduling the hearing of this matter, the Chief Justice expressed his concern that this motion not duplicate other proceedings pending before this Court, and that the judge hearing this motion not be called upon to encroach on matters being dealt with by other judges.

## **II. The Issues on this Motion**

[12] Mr. Mahjoub has identified three areas of concern with respect to the conduct of the CBSA.

These relate to:

1. The opening of all the mail addressed to Mr. Mahjoub and his family members, the making and retention of photocopies of that mail, and the use that is made of those photocopies by the CBSA;
2. The taking of photographs of Mr. Mahjoub, the members of his family, and people coming into contact with Mr. Mahjoub and his family, as well as the interior of the Mahjoub home. Mr. Mahjoub also objects to the use that is made of these photographs by the CBSA;
3. The constant and intrusive overt physical surveillance of Mr. Mahjoub when he is on outings outside of the family home.

[13] Each of these issues will be considered in turn.

### **III. The Issues Relating to the Mail**

[14] Amongst the other terms and conditions contained in Justice Mosley's February 15, 2007 order releasing Mr. Mahjoub from detention is the following:

13. Prior to his release from incarceration, Mr. Mahjoub and all of the those persons who reside at the residence shall consent in writing to the interception, by or on behalf of the CBSA, of incoming and outgoing written communications delivered to or sent from the residence by mail, courier or other means. Prior to occupying the residence, any new occupant shall similarly agree to provide such consent. The form of consent shall be prepared by counsel for the Ministers.

This condition has not been varied, and remains in effect at this time.

[15] On March 31, 2007, Mr. Mahjoub signed a consent to the interception of his mail in the following terms:

I, MOHAMED ZEKI MAHJOUR, hereby authorize the Canada Border Services Agency or anyone acting on its behalf to obtain any mail in the possession of the Canada Post Corporation destined to or originating from me. I further authorize the Canada Border Service Agency or anyone acting on its behalf to obtain anything in the possession of any commercial or private courier destined to or originating from me.

The adult members of Mr. Mahjoub's family have also signed similar consents.

#### ***a) The Opening of all of the Mail***

[16] Mr. Mahjoub has objected to the fact that CBSA is opening *all* of the mail coming to both him and to his family members. While recognizing that Justice Mosley's order permits the

interception of the mail, counsel argued that the Court's condition should be subject to a "reasonableness standard".

[17] That is, correspondence such as that emanating from government sources, bank and credit card statements and the like, which, Ms. Jackman says, could in no way ever engage any justifiable concern on the part of CBSA, should not be opened.

[18] Ms. Jackman confirmed that there is no issue in this case with respect to the interception of solicitor and client communications. It appears that Mr. Mahjoub does not usually correspond with his counsel in writing, and the two letters that he has recently received from his lawyers were not opened by the CBSA.

[19] In her reply submissions, Ms. Jackman did acknowledge that the interception of the mail addressed to Mr. Mahjoub and his family was specifically authorized by Justice Mosley, and was consented to by Mr. Mahjoub and the adult members of his family. There is no limitation contained in Justice Mosley's order as to which types of mail should or should not be opened. To now impose limitations on CBSA's ability to open certain types of mail, in the context of this motion, would result in the modification of one of the conditions of release imposed on Mr. Mahjoub by Justice Mosley. That is not the function of this Court on this motion, and I decline to do so.

[20] If Mr. Mahjoub has concerns with respect to the types of mail that are being opened by the CBSA, it is open to him to raise the issue in the context of the motion to vary the conditions of his

release which is presently ongoing before Justice Layden-Stevenson. Indeed, from a review of the transcripts filed in this proceeding of evidence that was adduced before Justice Layden-Stevenson, it appears that Mr. Mahjoub is doing precisely that.

***b) The Photocopying of the Mail, and the Use Being Made of the Copies by the CBSA***

[21] At the time that this motion was initially brought, Mr. Mahjoub's concern was that the CBSA was making and retaining photocopies of all of the family's mail, while forwarding the original correspondence on to them. In Mr. Mahjoub's view, Justice Mosley's order did not authorize the making or retention of photocopies of the intercepted mail. As a consequence, he argued that the CBSA's conduct amounted to an unreasonable search and seizure, contrary to the provisions of section 8 of the Charter.

[22] At some point after the completion of the first set of hearing days with respect to this motion, Mr. Mahjoub and his counsel became aware of evidence adduced in the proceedings before Justice Layden-Stevenson that significantly expanded the nature and depth of Mr. Mahjoub's concerns with respect to the CBSA's treatment of the family's mail.

[23] On the resumption of the hearing of this motion, transcripts of the evidence of two CBSA witnesses who testified before Justice Layden-Stevenson were filed with the Court, on the consent of the parties. These witnesses were Philip Whitehorne and Mohammed Al-Shalchi.

[24] Mr. Whitehorne evidently testified *in camera* before Justice Layden-Stevenson. Redacted transcripts of his evidence were subsequently provided to counsel for Mr. Mahjoub, and it was these redacted transcripts that were filed with the Court on this motion.

[25] Mr. Whitehorne is the Chief of Operations for CBSA's Northern Ontario Region. He is responsible for the management of the Immigration Enforcement Program, which is in turn responsible for the monitoring of Mohamed Harkat, an individual residing within the Northern Ontario Region who is himself the subject of a Security Certificate.

[26] Mr. Al-Shalchi is an Enforcement Supervisor at the Greater Toronto Enforcement Centre of the CBSA. He is responsible for supervising and implementing the terms and conditions of the court orders that govern both Mr. Mahjoub and Mr. Jaballah. Mr. Al-Shalchi also provided an affidavit on behalf of the CBSA in this proceeding, and was cross-examined at some length before this Court.

[27] Mr. Whitehorne testified that a framework for the treatment of intercepted mail by the CBSA is set out in a National Manual. The Manual itself has not been produced to either Mr. Mahjoub or Mr. Jaballah, nor was it provided to the Court, as the CBSA has objected to its production on the grounds of national security.

[28] In the case of Mr. Harkat, Mr. Whitehorne explained that once the intercepted mail is received by the CBSA, it is reviewed at the regional office in an effort to identify any issues of risk,



or any potential breach of any of the terms and conditions of Mr. Harkat's release. All of the mail is photocopied, and copies of the mail are then forwarded to the Counter-terrorism Unit in the National Security Directorate at CBSA's national headquarters.

[29] According to Mr. Whitehorne, the Counter-terrorism Unit is responsible for reviewing, from a strategic standpoint, any information that would suggest that any of the individuals being held on Security Certificates could pose a risk. He stated that the Counter-terrorism Unit would have greater expertise than the regional office with respect to strategic intelligence assessments.

[30] Mr. Whitehorne stated that it is his understanding that the CBSA's Counter-terrorism Unit would then analyse the photocopied mail in order to determine whether there were any discernable patterns in the documents, or whether there was anything in the mail that could raise any question of risk to the supervising officers or to the public.

[31] Mr. Whitehorne also testified that it is CBSA's regional office that is responsible for monitoring Mr. Harkat, whereas one of the principle objectives of the Counter-terrorism Unit is the gathering of intelligence about the target, and the target's contacts.

[32] Mr. Al-Shalchi's evidence was largely consistent with that of Mr. Whitehorne. He explained that in the case of Messrs. Mahjoub and Jaballah, local CBSA Standard Operating Procedures stipulate that an inspection of the mail is to be carried out by officers at GTEC. The original mail is forwarded on to the addressees, and a record of the receipt and delivery of the mail

is recorded in the CBSA'S Monitoring Activity Reporting System or "MARS". Two sets of photocopies of the mail are also made at GTEC.

[33] By making photocopies of the mail, GTEC is able to get the mail into the hands of the addressees more quickly than would otherwise be possible. Keeping copies of the mail at GTEC also assists in tracking mail, in the event that there is ever any question about correspondence that may have gone missing, and not been received by the addressee.

[34] According to Mr. Al-Shalchi, inland enforcement officers at GTEC carry out a "superficial" analysis of the mail. Because the officers at GTEC do not have expertise in intelligence analysis, one set of photocopies is forwarded to the Manager of the Counter-terrorism Unit in Ottawa for analysis, with the other set of copies being retained at GTEC.

[35] Where Mr. Al-Shalchi and Mr. Whitehorne differ in their evidence is in relation to the purpose of the review of the mail that is carried out by the Counter-terrorism Unit in Ottawa. Mr. Whitehorne was of the view that one of the purposes of the Counter-terrorism Unit's analysis of the mail of individuals subject to Security Certificates was to gather intelligence about the target, and the target's contacts.

[36] In contrast, Mr. Al-Shalchi's understanding was that the mandate of the Counter-terrorism Unit was simply to monitor the subject's compliance with the terms and conditions of his release, particularly as it related to the potential for unauthorized communications.

[37] To this end, Mr. Al-Shalchi says that analysts in the Counter-terrorism Unit examine the mail, looking for patterns and trends that might not be immediately obvious in a more superficial inspection of the documents. Counter-terrorism Unit analysts also have experience with codes, which local GTEC officers do not. By retaining photocopies of the mail, Counter-terrorism Unit analysts would be able to go back and re-review earlier correspondence, in the event that a coded message is detected in later correspondence.

***c) The Positions of the Parties with Respect to the Mail***

[38] Messrs. Mahjoub and Jaballah acknowledge that they cannot assert section 8 Charter rights on behalf of the members of their family who are affected by CBSA's interception of the families' mail. As a result, the only issue before the Court is whether the copying of Messrs. Mahjoub and Jaballah's own mail, and the forwarding of copies of that mail to the CBSA's Counter-terrorism Unit in Ottawa violates their rights under section 8 of the Charter.

[39] Insofar as the photocopying of their own mail is concerned, Messrs. Mahjoub and Jaballah acknowledge that "interception", as the term is used in the context of the *Criminal Code*, R.S.C. 1985, c. C-46, contemplates the copying of the intercepted material. Indeed, they accept that some copying of their mail could be appropriate, where there are "reasonable and probable grounds to believe" or, alternatively, a "reasonable suspicion" that an unauthorized communication may have taken place, in contravention of the terms and conditions of their release.

[40] That said, Messrs. Mahjoub and Jaballah contend that there is nothing in the consents that they provided in compliance with the orders of Justice Mosley in Mr. Mahjoub's case, and Justice Layden-Stevenson, in the case of Mr. Jaballah, that contemplates the photocopying of all of their mail, and the retention of these copies by the CBSA. In such circumstances, and in the absence of any basis for believing that there has been a breach of a term or condition of a Court order, they submit that the making and retaining of copies of the mail amounts to an unauthorized seizure, contrary to the provisions of section 8 of the Charter.

[41] Moreover, Messrs. Mahjoub and Jaballah contend that the consents that they signed were provided for one purpose and one purpose only, namely to allow the CBSA to monitor their compliance with the terms and conditions of their release. Neither Mr. Mahjoub nor Mr. Jaballah ever consented to having his mail reviewed by the CBSA for intelligence gathering purposes.

[42] Messrs. Mahjoub and Jaballah say that the Canadian Security Intelligence Service is the government agency charged with statutory responsibility for intelligence gathering, not the CBSA. If the Government of Canada wishes to be able to gather additional intelligence in relation to either Mr. Mahjoub or Mr. Jaballah, it is open to CSIS to seek judicial authorization for such activities through the means provided for in sections 12 and 21 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23.

[43] Mr. McIntosh submits on behalf of the CBSA that what is being sought here in relation to the mail is not the "clarification" of the parameters of the terms and conditions imposed by this

Court on Messrs. Mahjoub and Jaballah. Rather, Messrs. Mahjoub and Jaballah are seeking the amendment of those terms and conditions, so as to limit CBSA's ability to photocopy the mail to certain specified situations: that is, when a specified threshold of suspicion has been satisfied.

[44] While acknowledging that the terms and conditions of Messrs. Mahjoub and Jaballah's release do not explicitly authorize the CBSA to make photocopies of the mail, Mr. McIntosh argues that such a power can be implied, in light of all of the circumstances.

[45] The Court's orders do contemplate the CBSA reviewing the mail so as to ensure that there has been no unauthorized communication by either individual. Given the uncontradicted evidence of Mr. Al-Shalchi that GTEC does not have the necessary expertise to carry out a fulsome analysis of the intercepted mail, it is entirely reasonable, Mr. McIntosh argues, for copies of the mail to be sent to the section of the CBSA with the requisite expertise.

[46] This practice could actually operate to the benefit of Messrs. Mahjoub and Jaballah, says Mr. McIntosh, as it limits the possibility of there being a "rush to judgment" in relation to a potential breach by someone without sufficient expertise to make a proper assessment.

[47] Mr. McIntosh further submits that as the interception of Messrs. Mahjoub and Jaballah's mail has been specifically authorized by court order, neither man could have any reasonable expectation of privacy in relation to his mail. In the absence of such a reasonable expectation of privacy, there can be no breach of section 8 of the Charter.

[48] Mr. McIntosh also argues that a “bright line” cannot always be drawn between monitoring compliance with the terms and conditions of Messrs. Mahjoub and Jaballah’s release, and intelligence gathering. In his submission, both activities are proper, as both relate to the question of whether either Mr. Mahjoub or Mr. Jaballah is inadmissible to Canada.

[49] Moreover, Mr. McIntosh says that the CBSA is empowered to carry out intelligence gathering as part of its mandate in relation to persons named in Security Certificates. As authority for this proposition, he points to paragraph 113 of the decision of the Supreme Court of Canada in *Charkaoui #1*.

[50] That is, in *Charkaoui #1*, the Supreme Court discussed the factors to be considered by the Federal Court in the context of detention reviews. The Court identified the length of detention as a relevant consideration, observing that:

A longer period of detention would also signify that the government would have had more time to gather evidence establishing the nature of the threat posed by the detained person. While the government's evidentiary onus may not be heavy at the initial detention review [...], it must be heavier *when the government has had more time to investigate and document the threat*. [emphasis added]

[51] According to Mr. McIntosh, with this comment, the Supreme Court of Canada has invited “the government”, including the CBSA, to engage in intelligence gathering with respect to national security matters.

## ANALYSIS

### *i) Is the CBSA Entitled to Photocopy the Mail?*

[52] Section 8 of the Charter provides that “Everyone has the right to be secure against unreasonable search or seizure”. While I am satisfied that the making and retaining of photocopies of Messrs. Mahjoub’s and Jaballah’s mail amounts to a “seizure” within the meaning of section 8 of the Charter, it is not “unreasonable”, in light of all of the surrounding circumstances.

[53] First of all, as the Supreme Court of Canada observed in *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145, while section 8 of the Charter protects the right of privacy, the guarantee against unreasonable search and seizure contained in section 8 only protects a reasonable expectation of privacy.

[54] Messrs. Mahjoub and Jaballah each acknowledge having consented to the interception of their mail for the purpose of enabling the CBSA to monitor their compliance with the terms and conditions of their release from detention. These terms and conditions were imposed by the Court for the purpose of ensuring that the threat to national security posed by each individual was neutralized.

[55] As such, neither Mr. Mahjoub nor Mr. Jaballah could have any reasonable expectation of privacy in relation to his mail, to the extent that the information contained in the correspondence is being utilized by the CBSA for the purpose of monitoring the threat posed by Messrs. Mahjoub and Jaballah, and their compliance with the terms and conditions of their release.

[56] Secondly, the making of photocopies is arguably implicitly authorized by the wording of the orders of Justice Mosley and Justice Layden-Stevenson, both of which authorized the “interception” of Messrs. Mahjoub and Jaballah’s mail upon receipt of consents signed by each individual. Indeed, Ms. Weaver conceded in argument that some photocopying of the mail was indeed authorized by the orders of the Court.

[57] In the provisions of the *Criminal Code* dealing with the invasion of privacy, the interception of communications is defined as including the recording or copying of the communication in question. By way of example, as it relates to the interception of private communications by the use of electro-magnetic, acoustic, mechanical or other devices, section 183 of the Code states that “intercept” includes “listen to, *record* or acquire a communication or acquire the substance, meaning or purport thereof” [emphasis added].

[58] Similarly, in relation to the Code provisions dealing with the unauthorized use of computers, section 342.1 defines “intercept” as “listen to or *record* a function of a computer system, or acquire the substance, meaning or purport thereof” [emphasis added].

[59] Finally, and in any event, there are a number of reasons why the making and retaining of photocopies of the mail is entirely reasonable, in all of the circumstances. Firstly, it allows for the timely forwarding of the mail to the Mahjoub and Jaballah families. This is especially important in light of the families’ complaints that delays in getting bills into their hands are having an adverse effect on their credit ratings.



[60] Moreover, the Court's orders allow the "CBSA" to intercept Messrs. Mahjoub and Jaballah's mail. The interception power conferred by the orders is not limited to GTEC. Given the apparent lack of expertise at the GTEC office, it is reasonable for GTEC to forward photocopies of the mail to those within the CBSA with the necessary expertise to analyze the mail for the purposes of ensuring that there has been no breach of any of the terms and conditions governing either Mr. Mahjoub's or Mr. Jaballah's release from detention.

[61] Retaining copies of the mail also allows for the tracking of mail that may not have been received by Messrs. Mahjoub and Jaballah or their families, as occurred with respect to drug eligibility cards that had evidently gone astray. Keeping copies of the mail would also allow for a re-review of the mail by the CBSA, in the event that a code or pattern in the mail is subsequently detected.

[62] Lastly, the destruction of copies of the mail held by the CBSA could raise concerns insofar as the document retention requirements of the Government of Canada are concerned. The destruction of copies of the mail could also potentially give rise to fairness concerns in subsequent proceedings involving either Mr. Mahjoub or Mr. Jaballah: see *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] S.C.J. No. 39 (*Charkaoui #2*).

ii) ***What is the CBSA Entitled to do with the Photocopies of the Mail?***

[63] Given that I am satisfied that the making and retaining of photocopies of Messrs. Mahjoub and Jaballah's mail does not breach section 8 of the Charter, the next question is whether there is any limitation on the use that the CBSA may make of the copies of the mail.

[64] In this regard, I agree with Messrs. Mahjoub and Jaballah that the consents that they provided to the CBSA in relation to the interception of their mail were limited in scope, and did not provide the CBSA with *carte blanche* to use their mail for any and all purposes.

[65] In coming to this conclusion, I would start by observing that contrary to the position of the CBSA in this matter, it is evident from a reading of paragraph 113 of *Charkaoui #1* that this portion of the Supreme Court of Canada's decision does not purport to confer authority on the Government of Canada to engage in intelligence gathering in the context of national security proceedings, where such authority might not otherwise exist.

[66] While the orders of Justices Mosley and Layden-Stevenson clearly authorize the CBSA's interception of Messrs. Mahjoub and Jaballah's mail, the orders are equally clear that such interception could only take place once Messrs. Mahjoub and Jaballah consented to it happening.

[67] I also note that the conditions imposed by Justices Mosley and Layden-Stevenson, including the condition relating to the interception of the mail, were imposed in the context of detention

reviews, and were intended as a means of neutralizing the threat posed by the release of Mr. Mahjoub and Mr. Jaballah from custody.

[68] To this end, the terms and conditions imposed by the Court, including conditions such as those allowing for the interception of the mail, the monitoring of telephone calls, and the right to inspect Messrs. Mahjoub and Jaballah's homes were all clearly intended to provide the CBSA with the ability to monitor the compliance of Messrs. Mahjoub and Jaballah with the terms and conditions of their release.

[69] There is nothing in any of the reasons or orders of either Justice Mosley or Justice Layden-Stevenson that would suggest that the terms and conditions imposed by the Court were also intended to provide an additional investigative tool to the CBSA to assist it in building its case against either Mr. Mahjoub or Mr. Jaballah in relation to the Security Certificate proceedings.

[70] Moreover, the fact that Messrs. Mahjoub and Jaballah have consented to the interception of their mail by the CBSA for the purpose of enabling the CBSA to monitor the threat that they pose and their compliance with the terms and conditions of their release from detention does not mean that they have waived their section 8 Charter rights in relation to their mail for all purposes.

[71] As the Supreme Court of Canada observed in *R. v. Dyment*, [1988] 2 S.C.R. 417, at paragraph 26, "the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent".

[72] However, even if a person has consented to the giving up of property or information for one purpose, it does not follow that this consent will necessarily amount to an effective waiver of section 8 Charter rights for all purposes.

[73] By way of example, in *R. v. Wills*, (1992), 7 O.R. (3d) 337, the Ontario Court of Appeal found that the voluntary provision of a breath sample for the purposes of a Breathalyser analysis nevertheless amounted to an unlawful seizure, where the consent of the accused was vitiated by the non-disclosure or innocent mis-representation of material facts.

[74] In order for a consent to constitute an effective waiver of section 8 Charter rights, the Ontario Court of Appeal held that the following conditions had to be established by the Crown, on a balance of probabilities:

- (i) there was a consent, express or implied;
- (ii) the giver of the consent had the authority to give the consent in question;
- (iii) the consent was voluntary [...] and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,

(vi) the giver of the consent was aware of the potential consequences of giving the consent. (*Wills* at para. 69)

[75] It is the fourth and sixth of the *Wills* conditions that are at issue in this case.

[76] It should be noted that the *Wills* approach to the issue of effective waiver has been approved by the Supreme Court of Canada. That is, in *R. v. Borden*, [1994] 3 S.C.R. 145, the Supreme Court found that a blood sample voluntarily provided by a suspect in connection with one suspected sexual assault nevertheless amounted to an unlawful seizure in violation of section 8 of the Charter, where the sample was in fact used in connection with the investigation of a different sexual assault.

[77] In finding that the consent of the accused did not amount to an effective waiver of his section 8 Charter rights in relation to the blood sample for all purposes, the Supreme Court held that in order for a consent to amount to an effective waiver, the suspect must possess “the requisite informational foundation for a true relinquishment of the right”. That is, the ability to consent “requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful”: see *Borden*, at para. 34.

[78] As to the extent of the information that must be provided in order for a waiver of section 8 rights to be effective, the Supreme Court held in *Borden* that:

The degree of awareness of the consequences of the waiver of the s. 8 right required of an accused in a given case will depend on its particular facts. Obviously, it will not be necessary for the accused to

have a detailed comprehension of every possible outcome of his or her consent. However, his or her understanding should include the fact that the police are also planning to use the product of the seizure in a different investigation from the one for which he or she is detained: at para. 40.

[79] Similarly, in *R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 55, the Supreme Court recognized that a consent to the taking of a blood sample could be limited to the taking of the blood for certain purposes only. Commenting on *Colarusso* in *Borden*, the Supreme Court recognized that “This concept reveals a link between the scope of a valid consent and the scope of the accused's knowledge in relation to the consequences of that consent”: see *Borden*, at para. 35.

[80] Implicit in the reasoning of the Supreme Court is that for a waiver of section 8 rights to be effective, knowledge of the purpose for which the search or seizure is sought to be made is a vital component of the “requisite informational foundation” necessary for there to be a true relinquishment of the right.

[81] A further example of where a consent given for one purpose was held not to amount to a waiver of section 8 rights for all purposes occurred in *R. v. Smith*, 1998 ABCA 418. In *Smith*, the Alberta Court of Appeal found that the warrantless search of the basement of a private home was unreasonable, even though the accused had consented to the police entering the first floor of his home to verify that an individual who had placed a 911 call was safe.

[82] In excluding the evidence obtained through the search of the basement, the Alberta Court of Appeal held that “Even if the entry onto the premises was legal, consent to entry was for a limited purpose, namely, to ensure the safety of the telephone complainant. This does not imply that a search of those premises for other purposes is allowable”: *Smith* at para. 8.

[83] I recognize that the cases discussed above are all criminal jurisprudence, whereas Messrs. Mahjoub and Jaballah’s cases are not criminal proceedings. However, having regard to the significant liberty interests that are engaged in Security Certificate proceedings, and the fact that the failure to comply with the terms and conditions of their release could amount to a criminal offence, I am satisfied that it is appropriate to draw an analogy to the law that has developed in the criminal context in determining what is required for there to be an effective waiver of section 8 Charter rights in the present cases.

[84] The consents provided in the cases of Messrs. Mahjoub and Jaballah were provided for the purpose of allowing the CBSA to monitor the threat that each posed to national security, and their compliance with the terms and conditions of their release.

[85] Mr. Al-Shalchi candidly acknowledged in his testimony that neither Mr. Mahjoub nor Mr. Jaballah was ever told that his mail was being sent to the CBSA’s Counter-terrorism Unit in Ottawa. Nor is there any evidence that either man was ever made aware that his mail could be scrutinized by the CBSA for the purpose of gathering intelligence, or for any other purpose.

[86] As a consequence, in the event that the CBSA is indeed using the mail of Messrs. Mahjoub and Jaballah for purposes beyond the monitoring of the threat that either man poses to national security, or their compliance with the terms and conditions of their release - a question that will be addressed in the next section of these reasons - such use would be unauthorized, and would violate the section 8 rights of the two individuals.

[87] Mr. McIntosh points out that both Mr. Mahjoub and Mr. Jaballah have been represented by experienced counsel throughout these proceedings, and that their counsel was actually involved in the drafting of the consents. According to Mr. McIntosh, it was incumbent on Messrs. Mahjoub and Jaballah to put limitations on the consents that they signed, if they did not intend that the consents be open-ended.

[88] I do not agree.

[89] Although the interception of the mail was specifically contemplated by the orders of Justices Mosley and Layden-Stevenson, the CBSA's ability to intercept the mail was made contingent upon the provision of the consents of Messrs. Mahjoub and Jaballah. Absent such consent, or subsequent specific judicial authorization, the CBSA has no power to do anything in relation to Messrs. Mahjoub and Jaballah's mail.



[90] The fact that Messrs. Mahjoub and Jaballah may have been assisted by counsel in relation to the execution of the consents does not assist the CBSA. The advice of counsel can only be as good as the information upon which it is based.

[91] While Messrs. Mahjoub and Jaballah do undoubtedly have a greatly diminished expectation of privacy with respect to their mail in light of the consents that they have signed, they have not relinquished all of their privacy rights in their mail for all purposes. They have most certainly relinquished their section 8 rights so as to allow for monitoring by CBSA of the threat that each poses, as well as their compliance with the terms and conditions of their release. However, they have not been provided with a sufficient informational foundation as to enable them to provide an effective waiver of their section 8 rights in relation to their mail for any other purpose.

[92] The next question, then, is whether the CBSA has in fact been subjecting Messrs. Mahjoub and Jaballah's mail to a form of scrutiny that has been neither judicially authorized, nor consented to by either individual.

*iii) Has CBSA's Treatment of the Mail Gone Beyond What is Authorized by the Consents?*

[93] For the reasons that follow, I am not prepared to make any finding as to whether the CBSA is in fact exceeding its authority in relation to its treatment of Messrs. Mahjoub and Jaballah's mail.

[94] This motion proceeded in a somewhat unusual fashion. Counsel originally asked that the affidavits filed in support of the motion be treated as the deponents' evidence in chief, that the

deponents be allowed to provide *viva voce* evidence to update information in relation to the matters covered by their affidavits, and that each deponent be made available for cross-examination at the hearing.

[95] While the hearing of this motion was ongoing, the motion to vary the terms and conditions of Mr. Mahjoub's release was also proceeding before Justice Layden-Stevenson. As was mentioned earlier, it was in the course of the proceedings before Justice Layden-Stevenson that additional information emerged through the testimony of Messrs. Whitehorne and Al-Shalchi as to what it was that the CBSA was actually doing with the photocopies of Messrs. Mahjoub and Jaballah's mail.

[96] The parties then filed 10 volumes of transcript with the Court of testimony given by Messrs. Whitehorne and Al-Shalchi in the hearing before Justice Layden-Stevenson, to be considered as evidence on this motion. As was noted earlier, portions of Mr. Whitehorne's *in camera* evidence were redacted from the transcripts, and were not provided to counsel for Messrs. Mahjoub and Jaballah or to the Court on this motion.

[97] I have previously identified the conflict in the evidence of Messrs. Whitehorne and Al-Shalchi with respect to the purpose of the review of Messrs. Mahjoub and Jaballah's mail that is carried out by CBSA's Counter-terrorism Unit in Ottawa.

[98] In the course of hearing this motion, I expressed my concern to the parties as to the way in which this matter had unfolded and the potential for overlap in the issues before me, and the matters

currently before Justice Dawson, in the case of Mr. Jaballah, and, in particular, before Justice Layden-Stevenson in the case of Mr. Mahjoub. Indeed, the parties acknowledged the very difficult position in which the Court had been placed in relation to this motion.

[99] These difficulties are graphically illustrated by the fact that mid-way through Mr. McIntosh's closing submissions, I was advised by counsel that Elizabeth Snow, the Manager of the Counter-terrorism Unit at CBSA's national headquarters, had since given evidence before Justice Layden-Stevenson, both in public and *in camera*, with respect to the work of the Counter-terrorism Unit, as it relates to its review of the intercepted mail.

[100] Surely no one would be better positioned to advise the Court of what it is that the CBSA's Counter-terrorism Unit is actually doing with Messrs. Mahjoub and Jaballah's mail than the Manager of the Counter-terrorism Unit herself.

[101] However, Ms. Snow's evidence was not put before me on this motion. As a result, I am now being asked to resolve a conflict in the evidence and to make factual findings based upon an incomplete evidentiary record. My concerns in this regard are amplified by the fact that any findings that I may make in this regard could have significant consequences in relation to the proceedings before Justice Dawson and Justice Layden-Stevenson.

[102] Given that the evidentiary record before me in relation to this issue is incomplete, I am not prepared to make a finding as to whether CBSA has in fact exceeded its authority in the way that it

has handled the mail. That question is better determined by the judges dealing with the variation or review of the terms and conditions of Messrs. Mahjoub and Jaballah's release, on the basis of a complete evidentiary record.

*iv) Conclusion With Respect to the Issues Relating to the Mail*

[103] In summary, I find that:

1. The CBSA is entitled to open all of the mail addressed to either Mr. Mahjoub or Mr. Jaballah;
2. The CBSA is entitled to make and retain photocopies of Mr. Mahjoub's and Mr. Jaballah's mail, for the purpose of monitoring the threat to national security posed by each individual, and their compliance with the terms and conditions of their release;
3. Neither the orders of Justices Mosley and Layden-Stevenson, nor the consents signed by Messrs. Mahjoub and Jaballah, authorize the CBSA to use Messrs. Mahjoub and Jaballah's mail for any other purpose;
4. No finding is made as to whether the CBSA has in fact exceeded its authority in the way that it has handled the mail.

**IV. The Issues Relating to the Taking of Photographs**

[104] Mr. Mahjoub asserts that the CBSA frequently takes pictures of himself and of members of his family while they are outside of their home. In addition, he says that the CBSA regularly

photographs the interior of his home. Mr. Mahjoub also complains that the CBSA takes pictures of third parties who come into contact with either himself or with members of his family.

[105] Mr. Mahjoub accepts that CBSA should be able to take photographs from time to time in order to document a suspected breach of any of the terms or conditions of his release. I also understand him to accept that the CBSA may need to take photographs of locations that have been proposed as possible sites for family outings. However, Mr. Mahjoub maintains that the Court's orders do not allow the CBSA to intrude on his life, and the lives of his family members, by taking photographs in circumstances where there is no reason to suspect that any term or condition of his release is being breached.

[106] According to Mr. Mahjoub, the personal and corporeal privacy of the members of his family are regularly being compromised through the taking of their pictures. Whatever discretion the CBSA may have under the *Immigration and Refugee Protection Act* in relation to the monitoring of Mr. Mahjoub is limited, he says, by Article 17 of the *International Covenant on Civil and Political Rights*, December 1966, 999 U.N.T.S. 171. That is, Mr. Mahjoub argues that the CBSA's discretion to take photographs cannot be exercised in a way that unreasonably infringes his family life, his home and his privacy.

[107] Moreover, Mr. Mahjoub submits that if the taking of photographs has a sufficiently negative impact on his family, and if the conduct of the CBSA in this regard is sufficiently oppressive, it could amount to a violation of his own rights under sections 7 and 8 of the Charter.

[108] Mr. Mahjoub also objects to the CBSA taking photographs of individuals coming into contact with members of his family. Many of these individuals are members of the Muslim community, and the photographs in question are taken in the context of cases involving allegations of Islamic terrorism. Ms. Jackman argues that the cases of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin demonstrate the terrible consequences that can flow from government over-reaction and inappropriate information-sharing.

[109] Mr. Mahjoub also points to photographs taken of Matthew Behrens, a Court-appointed supervisor, when Mr. Behrens was accompanying Mr. Mahjoub to a medical appointment. Mr. Mahjoub submits that Mr. Behrens was well-known to the CBSA, and that there was no reason for the photographs to have been taken.

[110] Mr. Mahjoub's concerns with respect to the taking of photographs of third parties is heightened by the fact that copies of all of the photographs taken by the CBSA are stored on a computer database, and that copies of the photographs are also transmitted to the CBSA in Ottawa. While Mr. Al-Shalchi was unclear as to whether the photographs were sent to the Counter-terrorism Unit or to "policy people", his understanding was that both the Counter-terrorism Unit and the "policy people" in Ottawa are sent copies of the photographs.

### **Analysis**

[111] Mr. Mahjoub asserted in his memorandum of fact and law that a warrant should be required in order for the CBSA to be able to take any photographs of him, whether inside or outside of his

home. However, given Ms. Jackman's concession in argument that the CBSA is indeed entitled to take photographs in several different circumstances, I do not understand her to be pursuing this argument.

[112] That is, it is acknowledged that the CBSA is entitled to take photographs inside the Mahjoub home, when the CBSA is exercising the right of entry specified in the terms and conditions of Mr. Mahjoub's release from detention. Ms. Jackman also accepts that the CBSA is entitled to take photographs in order to document something or someone that may involve a breach of any of the terms and conditions of Mr. Mahjoub's release. Finally, it is conceded that the CBSA may take photographs of public places while scouting out potential venues for outings, when Mr. Mahjoub and his family are not present.

[113] The CBSA has produced what it says are all of the photographs that have been taken in relation to Mr. Mahjoub since his release from detention in April of 2007. There are a total of 108 photographs.

[114] Some photographs are of physical objects and locations, both inside and outside of the Mahjoub home. Other photographs are of individuals, including Mr. Mahjoub himself, members of his family, and third parties. Different issues arise in relation to different categories of photographs. As a consequence, I will deal with each category of photographs separately, starting with the photographs taken inside the family home.

*i) The Photographs Taken Inside the Mahjoub Residence*

[115] While noting that a family home is a “personal place”, Ms. Jackman concedes that if the CBSA has a colour of right to take photographs inside the home, it should be able to do so.

[116] A total of thirty photographs have been taken inside the Mahjoub family home, on three separate occasions in September of 2007, March of 2008 and July of 2008. Most of the photographs are of electronic equipment such as home computers, a fax machine, a two-way video device, a modem, a Wii entertainment system, and electronic cabling. Three photos are of an open door with a lock on it leading to what appears to be a bedroom.

[117] Condition 11 of the terms and conditions of Mr. Mahjoub’s release prohibits him from communicating with various categories of persons, including any person whom Mr. Mahjoub knows, or ought to know, supports terrorism or violent Jihad, or who attended any training camp or guest house operated by any entity that supports terrorism or violent Jihad.

[118] To this end, Condition 12 of the terms and conditions of his release specify that Mr. Mahjoub is not to possess or have access to communications equipment including items such as radios or radio devices with transmission capability, communications equipment or equipment capable of connecting to the internet, cellular telephones, computers containing a modem or ones that can access the internet, pagers, fax machines, and hand-held devices such as a Blackberry.



[119] While the family is allowed to have computer equipment with internet access within the residence, strict controls on access to the equipment have been imposed by the Court in Condition 12 of the terms and conditions of Mr. Mahjoub's release.

[120] Finally, in accordance with Condition 14, the Court has provided the CBSA with both access to the Mahjoub residence, and the power to search the residence in order to ensure that Mr. Mahjoub is complying with the terms and conditions of the Court's order.

[121] The photographs taken during the home inspections clearly relate directly to the issue of permissible electronic equipment, the security of that equipment, and the monitoring of Mr. Mahjoub's compliance with the terms and conditions of his release. As such, I see nothing in these photographs that would indicate that the CBSA is exceeding its authority in this regard.

[122] Moreover, many of the photographs are of the family's Wii entertainment system. A Wii device evidently has internet capacity. While Mr. Mahjoub's wife, Mona El Fouli, testified that the family was unaware of this fact when they purchased the Wii, it appears to be uncontested that the unit was not kept in a secure location as mandated by the Court's orders. As a consequence, the photographs taken of the Wii by the CBSA were taken to document a potential breach of the terms and conditions of Mr. Mahjoub's release. It is conceded by counsel that it is perfectly appropriate for the CBSA to take photographs in such circumstances.

ii) *Photographs of Locations and Vehicles Outside the Home*

[123] Several photographs have been taken by the CBSA in order to assess a particular site for a possible outing. It is conceded that such photographs are appropriate.

[124] A few photographs have been taken of the outside of the Mahjoub family car, as well as that of Mr. Mahjoub's step-son, Haney El Fouli. The only issue that has been raised with respect to these photographs is the fact that Mr. El Fouli appears in one photograph, standing near to the Mahjoub family car. Mr. Al-Shalchi explained that the officers taking that particular picture had not been able to identify Mr. El Fouli at the time the photograph was taken, given the hat that he was wearing and the distance between Mr. El Fouli and the officers.

[125] An unidentified individual coming into contact with the Mahjoub car could potentially give rise to concerns as to a potential breach of conditions. As a consequence, I am not persuaded that there was anything inappropriate in CBSA taking this photograph.

[126] A few photographs have also been taken of the street view of Mr. Mahjoub's counsel's office. Mr. Al-Shalchi explained that these photographs may have been taken in order to provide the officers carrying out physical surveillance of Mr. Mahjoub with information such as the location of the parking lot relative to the office building. I can see nothing in these photographs that could rise to the level of a Charter breach.

**iii) Photographs Taken of Third Parties**

[127] Mr. Mahjoub takes issue with the fact that photographs have been taken of third parties, some of whom have not been identified, who have come into contact with members of his family.

[128] Without accepting that a photograph taken of an individual in a public place could give rise to a violation of either section 7 or section 8 Charter rights, I agree with Mr. McIntosh that Mr. Mahjoub cannot rely on the potential breach of a third party's Charter rights in seeking relief on his own behalf. A claim for relief under subsection 24 of the Charter can only be advanced by the person whose Charter rights have been infringed: see, for example, *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45.

**iv) Photographs Taken of Mr. Mahjoub and his Family**

[129] Mr. Mahjoub submits that the conduct of the CBSA in photographing both himself and the members of his family has become so oppressive, and is such an unwarranted intrusion upon his family life that it constitutes a violation of both Article 17 of the *International Covenant on Civil and Political Rights* and his Charter rights.

[130] In light of the conclusion that I have reached with respect to the conduct of the CBSA in relation to the photographing of Mr. Mahjoub and his family, it is not necessary for me to decide whether Mr. Mahjoub can rely on the impact on his family members and family life in this regard.

[131] All of the photographs in issue were taken in public locations. A review of the photographs discloses that the majority of these photographs were taken on two occasions.

[132] The first of these occasions was an August 19, 2007 family outing to Ontario Place. Most of the 27 photographs taken that day either show Mr. Mahjoub and his family boarding or riding on a small ferry boat, or show Mr. Mahjoub and one of his children riding on a paddle boat.

[133] This incident was the subject of proceedings before Justice Mosley, who found that riding on the small ferry used to transport visitors between attractions at an amusement park, and on the paddle boat “could be construed as a technical breach” of the terms and conditions of Mr. Mahjoub’s release: see *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1366, at para. 38.

[134] Given Mr. Mahjoub’s concession that it is open to the CBSA to take photographs in order to document an event that may involve a breach of any of the terms and conditions of his release, I find that there is nothing inappropriate with the CBSA having taken these photographs.

[135] There is a second batch of 16 photographs that were taken on January 16, 2008. The photographs include pictures of a sign for a skating rink, as well as photographs of the Mahjoub family car, and of Mr. Mahjoub walking with Ms. El Fouli.

[136] Mr. Mahjoub had evidently requested and received permission to go on two outings on successive days – one to the skating rink, and the other to his mosque and the Cloverdale Mall. Mr. Mahjoub and Ms. El Fouli each testified that they got confused as to which outing had been approved for which day. As a result, they went to the skating rink on the day that Mr. Mahjoub was supposed to be going to the mosque and the mall.

[137] Given that Mr. Mahjoub was observed going to the rink on a date that had not been approved by the CBSA, he was potentially in breach of Condition 8 of his release, which required that he obtain the advance approval of the CBSA for all outings. As noted above, Mr. Mahjoub has acknowledged that it is indeed open to the CBSA to take photographs in such circumstances, and I find that there is nothing inappropriate with the CBSA having taken these photographs.

[138] Five photographs were taken on March 16, 2008 of Mr. Mahjoub holding a video camera. The CBSA had previously expressed its concern to the Court that Mr. Mahjoub may have attempted to film CBSA officers while they were carrying out their duties. In response to this concern, on December 24, 2007, Justice Mosley added a condition to the terms and conditions of Mr. Mahjoub's release, specifying that "Neither Mr. Mahjoub nor any person in his residence shall make a recording of CBSA Officers by video or audio device, while they are carrying out their duties in monitoring compliance with the terms and conditions of this Order": *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1366, at para. 10 of the Order.

[139] In adding this provision to the terms and conditions governing Mr. Mahjoub's release, Justice Mosley observed that officers charged with the responsibility of enforcing the Court's orders "should not be faced with the possibility that their identities would be publicly disclosed as this would expose them to possible risks and would compromise their ability to carry out other duties": see *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1366, at para. 101.

[140] Mr. Al-Shalchi testified before Justice Layden-Stevenson that the March 16, 2008 photographs taken of Mr. Mahjoub holding a video camera were taken because of the officers' concerns that he might use the video camera to take photographs of the officers, in breach of Justice Mosley's order.

[141] Even though it does not appear that Mr. Mahjoub did in fact try to film the officers on that date, there was a rational connection between the monitoring of Mr. Mahjoub's compliance with the terms and conditions of his release, and the photographs taken by the CBSA. In the circumstances, I am not persuaded that it was inappropriate for these photographs to have been taken.

[142] What we are then left with are approximately a dozen photographs that have been taken of Mr. Mahjoub and members of his family by the CBSA between the time that Mr. Mahjoub was released from custody in April of 2007, and the time that Mr. Al-Shalchi testified before Justice Layden-Stevenson in late October and early November of 2008.

[143] Mr. Al-Shalchi was able to speculate as to why CBSA officers may have felt it necessary to take some of these photographs, but could offer no explanation as to why other photographs were taken.

[144] The dozen or so photographs of Mr. Mahjoub and his family that are still in issue were taken over an approximately 18 month period. All of the photographs were taken in public places. Most of the photographs appear to have been taken from some distance from the family. In most of the photographs, it does not appear that the family was even aware that photographs were being taken. In these circumstances, I cannot find that the conduct of the CBSA is sufficiently intrusive or oppressive as to give rise to a violation of any rights on the part of Mr. Mahjoub.

v) *Final Comments Regarding the Photographs*

[145] Before leaving the subject of the photographs of Mr. Mahjoub and his family, I would note that Mr. Al-Shalchi testified before Justice Layden-Stevenson that while the taking of photographs is left to the discretion of individual CBSA officers, these officers have recently been instructed that the taking of photographs of the family should be “more reflective of situations that would constitute a breach” of the terms and conditions that have been imposed upon Mr. Mahjoub.

[146] Before me, Mr. Al-Shalchi testified that CBSA officers have been instructed not to take photographs of Mr. Mahjoub and his family while they are on outings, unless the officers perceive a potential breach of any of the terms and conditions governing Mr. Mahjoub’s release.

[147] Limiting the photographing of Mr. Mahjoub and the members of his family to such situations may go some distance towards reducing the tension that has clearly built up between the Mahjoub family and the CBSA over recent months.

#### **V. The Physical Surveillance of Mr. Mahjoub**

[148] Mr. Mahjoub's final area of concern relates to the regular and overt physical surveillance that is being carried out by CBSA officers when he is away from his home on outings. While accepting that some physical surveillance on the part of the CBSA is appropriate, Mr. Mahjoub submits that none of the terms and conditions imposed by this Court in relation to his release from detention authorize the CBSA to carry out physical surveillance of the type that is actually taking place.

[149] Both Mr. Mahjoub and Ms. El Fouli testified to the deleterious effect that the conduct of the CBSA is having on him, and on the members of his family.

[150] It is true that none of the terms and conditions that have been imposed by the Court governing Mr. Mahjoub's release from detention make specific reference to the carrying out of physical surveillance by the CBSA. This may be explained in part by the fact that the primary focus of these terms and conditions is the limitations and obligations that are being imposed on Mr. Mahjoub himself.



[151] A further explanation for the fact that the terms and conditions of Mr. Mahjoub's release do not make explicit reference to the use of physical surveillance by the CBSA is the fact that, as a general rule, physical surveillance does not require prior judicial authorization: see *Cody v. R.*, 2007 QCCA 1276, (Que. C.A.), at para. 26.

[152] Moreover, a review of the reasons provided by the Court in proceedings relating to Mr. Mahjoub's release from detention make it clear that the Court contemplated that Mr. Mahjoub's activities would be monitored by the CBSA through the use of physical surveillance, amongst other means.

[153] In this regard, I note that in *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1366, Justice Mosley noted at paragraphs 41 and 42 of his reasons that the loss of the GPS signal while Mr. Mahjoub was away from his home was "disturbing". Justice Mosley was, however, comforted by the fact that the CBSA had been able to compensate for the loss of a GPS signal through the use of physical surveillance. In this regard, Justice Mosley went on to find that he was satisfied that "with the combination of the electronic system and the use of physical surveillance at the discretion of CBSA, [Mr. Mahjoub] can be effectively monitored".

[154] Elsewhere in that decision, Justice Mosley noted that the CBSA would likely want to carry out physical surveillance if Mr. Mahjoub were to use the subway: see *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1366, at paras. 52-54.

[155] In allowing Mr. Mahjoub to remain in his back yard without a supervisor being physically present with him at all times, Justice Mosley noted that it was open to the CBSA to carry out random physical surveillance to make sure that he did not leave the area: *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1366, at para. 56.

[156] In relieving Mr. Mahjoub of the obligation to have two-way video equipment installed in his home, Justice Mosley observed that no evidence had been provided to demonstrate why it would be necessary as an additional means of monitoring Mr. Mahjoub, other than to confirm his presence in the home. According to Justice Mosley, this could be determined through other electronic means, “and by random physical surveillance”: see *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1366, at para. 87.

[157] Finally, a review of Justice Mosley’s reasons as a whole make it clear that he has vested considerable discretion in the CBSA in relation to the issue of physical surveillance as an adjunct to other means of monitoring the compliance of Mr. Mahjoub with the terms and conditions of his release. As was mentioned above, Justice Mosley made explicit reference at paragraph 42 of his reasons to the discretion of the CBSA in this regard.

[158] In the same vein, in rejecting the CBSA’s request that Mr. Mahjoub be prohibited from entering any area where GPS monitoring was ineffective, Justice Mosley found that “the combination of electronic tracking *and physical surveillance, as deemed necessary by CBSA officials*, should be sufficient to effectively monitor the applicant's movements without imposing

this further restriction upon him” [emphasis added]: *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1366, at para. 98.

[159] It is common ground that conditions governing the release from detention of individuals subject to Security Certificates must not be disproportionate to the nature of the threat: see *Charkaoui #1*, at para. 116.

[160] While I am not being asked to craft suitable terms and conditions of release in this case, I am being asked to determine whether the way in which the CBSA is carrying out its physical surveillance of Mr. Mahjoub and his family violates his rights under section 7 of the Charter, and if so, whether the conduct of the CBSA is saved by section 1. This also requires a balancing of Mr. Mahjoub’s liberty interests against state interests in national security.

[161] The terms and conditions imposed by the Court governing Mr. Mahjoub’s release from detention were carefully tailored by Justice Mosley in order to address the risks identified by him, based upon his review of the totality of the evidentiary record, a review which included the consideration of the evidence received *in camera*. Similarly, the motion to vary the conditions of Mr. Mahjoub’s release that is currently underway before Justice Layden-Stevenson will take place on the basis of a complete evidentiary record.

[162] I agree with Mr. McIntosh that I am not well positioned to determine whether the conduct of the CBSA as it relates to the conduct of its physical surveillance of Mr. Mahjoub is so intrusive and

so disproportionate as to amount to a violation of Mr. Mahjoub's Charter rights. Such a determination requires an understanding and assessment of the evidence as to the nature and extent of the threat that Mr. Mahjoub may represent.

[163] This is, in my view, a determination best made on a consideration of the complete evidentiary record. Indeed, as the Supreme Court of Canada has repeatedly observed, Charter questions should not be decided in the absence of a proper evidentiary record: see, for example, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 80; *R. v. Kang-Brown*, 2008 SCC 18, at para. 16; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at para. 8 and following.

[164] I would also note that in *Charkaoui #1*, the Supreme Court of Canada clearly contemplated that the determination of whether conditions of release were being misused or abused was one that would be made in the context of a consideration of conditions such as that which is currently ongoing before Justice Layden-Stevenson. In this regard, the Court observed at paragraph 117 of its decision that:

[T]here must be detention reviews on a regular basis, at which times the reviewing judge should be able to look at all factors relevant to the justice of continued detention, including the possibility of the *IRPA*'s detention provisions being misused or abused. Analogous principles apply to extended periods of release subject to onerous or restrictive conditions: these conditions must be subject to ongoing, regular review under a review process that takes into account all the above factors, including the existence of alternatives to the conditions.

[165] For these reasons, I decline to make any findings with respect to the conduct of the CBSA in relation to the issue of physical surveillance.

**VI. Order**

[166] In the event that the parties require that an order issue in relation to these reasons, brief submissions in writing may be filed with respect to the form that the order should take.

“Anne Mactavish”

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Judge

Ottawa, Ontario  
January 15, 2009

**APPENDIX**

**CONSOLIDATED RELEASE TERMS AND  
CONDITIONS FOR MR. MAHJOUB**

1. Mr. Mahjoub is to be released from detention on condition that he sign a document, to be prepared by his counsel and to be approved by counsel for the Ministers, in which he agrees to comply strictly with each of the following terms and conditions.
2. Mr. Mahjoub, before his release from custodial detention, shall be fitted with an electronic monitoring device as will be, from time to time, arranged by the CBSA, along with a tracking unit. Mr. Mahjoub shall thereafter at all times wear the monitoring device and at no time shall he tamper with the monitoring device or the tracking unit or allow them to be tampered with. Where, for necessary medical reasons and at the direction of a qualified medical doctor, the electronic monitoring device must be removed, the CBSA shall be notified of this beforehand and shall arrange for its removal and Mr. Mahjoub's supervision while it is removed for medical treatment. Mr. Mahjoub shall permit CBSA to arrange at its own expense for the installation in the residence specified below of a separate dedicated land based telephone line meeting the CBSA's requirements to allow effective electronic monitoring. Mr. Mahjoub shall consent to the disabling as necessary of all telephone features and services for such separate dedicated land-based telephone line. Mr. Mahjoub shall follow all instructions provided to him regarding the use of the monitoring equipment and any other requirement necessary for the proper and complete functioning of the electronic monitoring equipment and system.

[Condition 3 has now been deleted]

4. Prior to Mr. Mahjoub's release from detention, the sum of \$32,500.00 is to be paid into Court pursuant to Rule 149 of the *Federal Courts Rules*, S.O.R./98-106 from the following persons:
5.
 

i)	Mona El Fouli	\$10,000.00
ii)	Omar Ahmed Ali	\$15,000.00
iii)	Rizwan Wancho	\$ 2,500.00
iv)	John Valteau	\$ 5,000.00
5. Prior to Mr. Mahjoub's release from custodial detention, the following individuals shall execute performance bonds by which they agree to be bound to Her Majesty the Queen in Right of Canada in the amounts specified below. The condition of each performance bond shall be that if Mr. Mahjoub breaches any terms or conditions contained in the order of release, as it may from time to time be amended, the sums guaranteed by the performance bonds shall be forfeited to Her Majesty. The terms and conditions of the performance bonds shall be provided to counsel for Mr. Mahjoub by counsel for the Ministers and shall be in accordance with the terms and conditions of guarantees provided pursuant to section 56 of

the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”). Each surety shall acknowledge in writing having reviewed the terms and conditions contained in this order, and shall indicate in particular their understanding with respect to this condition.

i)	El Sayed Ahmed	\$ 5,000.00
ii)	Murray Lumley	\$ 5,000.00
iii)	Maggie Panter	\$10,000.00
iv)	Elizabeth Block	\$ 1,000.00
v)	Laurel Smith	\$10,000.00
vi)	Dwyer Sullivan	\$20,000.00
vii)	Elizabeth O’Connor	\$ 1,000.00
viii)	Patricia Taylor	\$ 1,000.00
ix)	John Valleau	\$ 5,000.00

6. Upon his release from detention, Mr. Mahjoub shall be taken by the RCMP (or such other agency as the CBSA and the RCMP may agree) to, and he shall thereafter reside at, \_\_\_\_\_ in the City of Toronto, Ontario (residence) with Mona El Fouli, his wife, Haney El Fouli, his step son, and Ibrahim and Yusuf, his sons. In order to protect the privacy of those individuals, the address of the residence shall not be published within the public record of this proceeding. Mr. Mahjoub shall remain in such residence at all times, except for a medical emergency or as otherwise provided in this order. While at the residence Mr. Mahjoub is not to be left alone in the residence. That is, at all times he is in the residence either Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens or Murray Lumley must also be in the residence. The term "residence" as used in these reasons encompasses only the dwelling house and does not include any outside space associated with it.
7. Between the hours of 8:00 a.m. and 9:00 p.m., Mr. Mahjoub may exit the residence but he shall remain within the boundary of any outside space associated with the residence (that is, the front or backyard). He must at all times be accompanied by or remain in direct view of either Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens or Murray Lumley. While in the backyard, he may only meet or communicate with persons referred to in paragraph 9, below. This restriction does not apply to casual greetings to the neighbours who live immediately adjacent to the backyard. He may not speak to any other person who may be visiting these neighbours unless they are persons otherwise authorized to visit with or supervise Mr. Mahjoub.
8. Mr. Mahjoub may, between the hours of 8:00 a.m. and 9:00 p.m.,
  - i) With the prior approval of the CBSA, leave the residence three times per week, for a duration not to exceed 4 hours on each absence, so long as he remains within the perimeter determined pursuant to paragraph 10 i) below. Requests for such approval shall be made on a weekly basis with not less than 72 business hours notice for the following week’s absences and shall specify the location or locations

that Mr. Mahjoub wishes to attend as well as the times when he proposes to leave and return to the residence. If such absences are approved, Mr. Mahjoub shall, prior to leaving the residence and immediately upon his return to the residence, report as more specifically directed by a representative of the CBSA. The CBSA may consider special requests by Mr. Mahjoub to extend one of the weekly absences go on a family outing that exceeds 4 hours, so long as such an outing would be within the perimeter determined pursuant to paragraph 10 i). Mr. Mahjoub may be permitted to go on such an outing up to 3 times per month. Such requests must be made to the CBSA at least one week in advance of the proposed family outing. CBSA, in its discretion and where it considers it appropriate to do so, may extend the above-noted hours beyond 9:00pm.

- ii) Leave the residence every school day between the hours of 8:00 and 9:30 a.m. and 3:00 and 4:30 p.m. in the company of Mona El Fouli or Haney El Fouli to take Ibrahim and Yusuf, Mr. Mahjoub's sons, to school in the morning and to pick them up after school. Mr. Mahjoub must go directly to and from the public elementary schools, with the exception of a one-hour period every day for exercise. He must provide CBSA with prior notice of his intended route and location where he will exercise. Mr. Mahjoub may not enter into contact with any other person en route to or from his home. He will provide the name and address and yearly school calendar to the CBSA for each school. Should the children need to leave school for a legitimate and unexpected reason outside of these times, Mr. Mahjoub would be permitted to accompany Mona El Fouli or Haney El Fouli to pick them up, provided CBSA is notified before he leaves of the circumstances, and is notified once he returns home. Mr. Mahjoub shall be permitted to continue with one hour of exercise each day on weekdays between Monday and Friday, when the children are not in school, at times to be specified with CBSA.
- iii) With the prior knowledge of the CBSA, leave the residence as required and for the duration required for the purpose of medical or psychological appointments and related tests, treatment or operations. Notification shall be given at least 48 hours in advance of the intended absence and shall specify the location or locations Mr. Mahjoub must attend and the time when he shall leave and the estimated time when he shall return to the residence. Proof of attendance following the completion of the appointment must also be provided to CBSA. Mr. Mahjoub shall, prior to leaving the residence and immediately upon his return to the residence, report as more specifically directed by a representative of the CBSA. If Mr. Mahjoub experiences a medical emergency requiring hospitalization, the CBSA shall be notified of this as soon as possible by Mr. Mahjoub, Mona El Fouli or Haney El Fouli and shall be advised of the location where Mr. Mahjoub has been taken and shall be advised immediately upon his return to the residence.
- iv) Should an emergency arise in which Ibrahim, Yusef, Haney El Fouli, or Mona El Fouli is required to be taken to the hospital, and no one is available to supervise Mr.



Mahjoub in the residence, Mr. Mahjoub is permitted to go to the hospital with Mona El Fouli or Haney El Fouli, regardless of the time of the occurrence, until such time as another individual is available to supervise him. Mr. Mahjoub will notify the CBSA of the circumstances as soon as is reasonably practicable, and will again notify them as soon as he has returned to the residence. Should Mr. Mahjoub be too unwell to leave the home in the context of such an emergency, and should no other supervisor be available, CBSA must be contacted immediately.

During all approved absences from the residence, Mr. Mahjoub shall at all times have on his person the tracking unit enabling electronic monitoring and shall be accompanied at all times by either Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens or Murray Lumley who shall bear responsibility for supervising Mr. Mahjoub and for ensuring that he complies fully with all of the terms and conditions of this order. This requires them to remain continuously with Mr. Mahjoub while he is away from the residence, but for the times that he is actually in consultation with his doctors or taking tests or undergoing treatment or therapy. In such cases Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens or Murray Lumley will remain as close as is reasonably possible to the room in which Mr. Mahjoub is receiving his consultation, treatment or therapy. Should Mona El Fouli need to visit a public restroom while supervising Mr. Mahjoub away from the home, Mr. Mahjoub must remain as close as is reasonably practicable to the restroom. Prior to Mr. Mahjoub's release from detention, Mona El Fouli, Haney El Fouli, El Sayed Ahmed, Matthew Behrens and Murray Lumley shall each sign a document in which they acknowledge and accept such responsibility, specifically including their obligation to immediately report to the CBSA any breach of any term or condition of this order. The document shall be prepared by Mr. Mahjoub's counsel and shall be submitted to counsel for the Ministers for approval.

9. No person shall be permitted to enter the residence except:
  - a) Mona, Haney, Ibrahim and Yusuf El Fouli.
  - b) the other individuals specified in paragraphs 4 and 5 above.
  - c) his legal counsel, Barbara Jackman, Marlys Edwardh, and Adriel Weaver.
  - d) in an emergency, fire, police and health-care professionals.
  - e) children under the age of 15 years who are friends of Ibrahim and Yusuf, Mr. Mahjoub's sons.
  - f) the building superintendent and such authorized and qualified repair persons as are employed by the building superintendent. 24 hour notice of any repairs must be given to the CBSA, except in the case of an emergency. Mr. Mahjoub is to have no contact with such persons while they are in the residence.

- g) a person approved in advance by the CBSA. In order to obtain such approval, the name, address and date of birth of such person and such additional information as may be deemed necessary by the CBSA, must be provided to the CBSA at least 48 hours prior to the initial visit. CBSA shall be given 48 hours' notice of any subsequent visits by a previously approved person but may waive that requirement in the discretion of its officials. The CBSA may withdraw its approval of previously approved visitors at any time.

Those persons set out above, who are permitted to enter the residence, may not bring in with them any electronic device which is wireless or capable of being connected to the internet nor a cell phone. The applicant must maintain a log of visitors to the home in a format to be provided by the CBSA, and must make such log available for inspection on request by CBSA.

10. When, Mr. Mahjoub leaves the residence, in accordance with paragraph 8 above, he shall not:
- i) leave the area bordered by streets or geographic features set out as follows:
- City of Toronto:
- West – Etobicoke Creek/HWY 427
  - East – Rouge River and Rouge River Park
  - North – Steeles Avenue
  - South – Lake Ontario and the Lakeshore. The City of Toronto also includes the Toronto islands.
- City of Mississauga:
- West – 9<sup>th</sup> Line, Dundas and Winston Churchill Blvd.
  - East – 427 down to Eglinton to Etobicoke Creek
  - North – 407
  - South – Lakeshore
- ii) be on the property of, or attend at any airport, train station, subway station or bus depot or car rental agency, or enter upon any boat or vessel.
- iii) meet any person by prior arrangement other than:
- a) his counsel Barbara Jackman, Marlys Edwardh and Adriel Weaver, and members of their staff assisting in respect of the case;
  - b) members of his family, including Mona El Fouli, his wife, Haney El Fouli, his step son, and Ibrahim and Yusuf, his sons;
  - c) friends of his sons, Yusef and Ibrahim, who are children under the age of 15, on approved outings;

- d) the bond signers named in paragraphs 4 and 5 above and any other person appointed by the Court to act as a supervisor in accordance with paragraph 6 above; and
  - e) any person approved in advance by the CBSA. In order to obtain such approval, the name, address and date of birth of such person must be provided to the CBSA.
- iv) go to any location other than that or those approved pursuant to paragraph 8 above, during the hours approved.
11. Mr. Mahjoub shall not, at any time or in any way, associate or communicate directly or indirectly with:
- i) any person whom Mr. Mahjoub knows, or ought to know, supports terrorism or violent Jihad or who attended any training camp or guest house operated by any entity that supports terrorism or violent Jihad;
  - ii) any person Mr. Mahjoub knows, or ought to know, has a criminal record, but for Matthew Behrens; or
  - iii) any person the Court may in the future specify in an order amending this order.
12. Except as provided herein, Mr. Mahjoub shall not possess, have access to or use, directly or indirectly, any radio or radio device with transmission capability or any communication equipment or equipment capable of connecting to the internet or any component thereof, including but not limited to: any cellular telephone; any computer of any kind that contains a modem or that can access the internet or a component thereof; any pager; any fax machine; any public telephone; any telephone outside the residence; any internet facility; any hand-held device, such as a blackberry.
- i) The internet connection for the home computers used by Mr. Mahjoub's step son and his two sons shall be kept in a locked portion of the residence that Mr. Mahjoub cannot access, to which only Mona El Fouli and Hanel El Fouli shall have keys. Each computer in the residence shall have a password to access it and such passwords shall be held by Mona El Fouli and Haney El Fouli and shall not be provided to Mr. Mahjoub or to his sons, Ibrahim and Yusuf. The internet connection to the computer in Ibrahim and Yusuf's room shall be by means of a manually activated connection in Haney's room and activated only when Mona El Fouli or Haney El Fouli are present. CBSA is authorized to obtain from the internet service provider information regarding the internet connection, including the addresses of websites visited and email addresses to which messages are sent or from which they are received using the connection. Until further Order, no internet-based phone service software or microphones may be installed on

computers in the residence which are or may be connected to the internet and if such programs or microphones are presently installed, they must be removed or disabled.

- ii) A fax machine connected to the landline telephone service to the home is permitted. It shall be used only by Mona El Fouli or Haney El Fouli and kept in the locked room as provided for in subparagraph i). CBSA is authorized to intercept transmissions to and from this machine. A list of people and offices to whom faxes will be sent from the residence, along with their facsimile numbers, shall be provided to CBSA by Mona El Fouli and updated as necessary.
  - iii) The cell phones owned, registered to or used by Mona El Fouli and Haney El Fouli shall remain with them at all times and they must ensure that Mr. Mahjoub does not have access to them. The numbers of these cell phones must be provided to the CBSA, and their use while within the residence must be confined to the room in which the computer with access to the internet is situated. Mona El Fouli shall provide written consent to the interception by or on behalf of the CBSA of all communications involving the cell phones which she uses. Haney El Fouli shall agree to provide CBSA with monthly billing records reflecting calls made from and received by his cell phone. Mr. Mahjoub may use a conventional land-based telephone line located in the residence (telephone line) other than the separate dedicated land-based telephone line referred to in paragraph 2 above upon the following condition. Prior to his release from detention, both Mr. Mahjoub and the subscriber to such telephone line service shall consent in writing to the interception, by or on behalf of the CBSA, of all communications conducted using such service. This shall include allowing the CBSA to intercept the content of oral communication and also to obtain the telecommunication records associated with such telephone line service. The form of consent shall be prepared by counsel for the Ministers. Mr. Mahjoub is also permitted to place a call to CBSA to inform them of the situation and his whereabouts using a land-line telephone outside his residence, should a medical emergency arise outside of the home and no one is able to make the call on his behalf. In the alternative, Mr. Mahjoub may also call 911.
13. Prior to his release from detention, Mr. Mahjoub and all of the persons who reside at the residence shall consent in writing to the interception, by or on behalf of the CBSA, of incoming and outgoing written communications delivered to or sent from the residence by mail, courier or other means. Prior to occupying the residence, any new occupant shall similarly agree to provide such consent. The form of consent shall be prepared by counsel for the Ministers.
14. Mr. Mahjoub shall allow employees of the CBSA, any person designated by the CBSA and/or any peace officer access to the residence at any time (upon the production of identification) for the purposes of verifying Mr. Mahjoub's presence in the residence and/or

to ensure that Mr. Mahjoub and/or any other persons are complying with the terms and conditions of this order. For greater certainty, Mr. Mahjoub shall permit such individual(s) to search the residence, remove any item of concern, and/or install, service and/or maintain such equipment as may be required in connection with the electronic monitoring equipment and/or the separate dedicated land-based telephone line referred to in paragraph 2 above. Prior to Mr. Mahjoub's release from detention all other adult occupants of the residence shall sign a document, in a form acceptable to counsel for the Ministers, agreeing to abide by this term. Prior to occupying the residence, any new adult occupant shall similarly agree to abide by this term.

15. Prior to his release, Mr. Mahjoub and his supervising sureties will consent in writing to being interviewed by or on behalf of the CBSA, individually or together, as is deemed required, in order to ascertain whether Mr. Mahjoub and/or other persons are complying with the terms and conditions of this order. The Court may also request a periodic report from Mona El Fouli, Haney El Fouli and/or El Syed Ahmed as to how the terms and conditions are functioning.
16. Prior to his release, Mr. Mahjoub shall surrender his passport and all travel documents, if any to a representative of the CBSA. Without the prior approval of the CBSA, Mr. Mahjoub is prohibited from applying for, obtaining or possessing any passport or travel document, or any bus, train or plane ticket, or any other document entitling him to travel. This does not prevent Mr. Mahjoub from travelling on public surface transit within the City of Toronto, including the Toronto Island Ferry, or the City of Mississauga as authorized in paragraph 8 above.
17. If Mr. Mahjoub is ordered to be removed from Canada, he shall report as directed for removal. He shall also report to the Court as it from time to time may require.
18. Mr. Mahjoub shall not possess any weapon, imitation weapon, noxious substance or explosive, or any component thereof.
19. Mr. Mahjoub shall keep the peace and be of good conduct.
20. Any officer of the CBSA or any peace officer, if they have reasonable grounds to believe that any term or condition of this order has been breached, may arrest Mr. Mahjoub without warrant and cause him to be detained. Within 48 hours of such detention a Judge of this Court, designated by the Chief Justice, shall forthwith determine whether there has been a breach of any term or condition of this order, whether the terms of this order should be amended and whether Mr. Mahjoub should be detained in custody.
21. If Mr. Mahjoub does not strictly observe each of the terms and conditions of this order he will be liable to detention upon further order by this Court.

22. Mr. Mahjoub may not change his place of residence without the prior approval of this Court. Sixty days' prior notice must be provided to the CBSA, in order for the Agency to conduct a prior risk assessment. No persons may occupy the residence without the approval of the CBSA.
23. A breach of this order shall constitute an offence within the meaning of section 127 of the *Criminal Code* and shall constitute an offence pursuant to paragraph 124(1)(a) of the *Immigration and Refugee Protection Act*.
24. The terms and conditions of this order may be amended at any time by the Court upon the request of any party or upon the Court's own motion with notice to the parties. The Court will review the terms and conditions of this order at the earlier of: (i) the rendering of a decision of the Minister's delegate as to whether Mr. Mahjoub may be removed from Canada; and (ii) four months from the date of this order. Thereafter, the Court will direct the frequency of the review of the terms and conditions of this order.
25. Neither Mr. Mahjoub nor any person in his residence shall make a recording of CBSA Officers by video or audio device, while they are carrying out their duties in monitoring compliance with the terms and conditions of this Order.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** DES-7-08

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION and THE MINISTER OF PUBLIC  
SAFETY AND EMERGENCY PREPAREDNESS  
v. MOHAMED ZEKI MAHJOUR

**PLACE OF HEARING:** Toronto, Ontario

**DATES OF HEARING:** October 22, 23, & 24, 2008  
November 18 & 19, 2008  
December 17, 2008

**REASONS FOR ORDER:** Mactavish J.

**DATED:** January 15, 2009

**APPEARANCES:**

Donald MacIntosh  
James Mathieson  
Angela Marinos  
Judy Michaely

FOR THE APPLICANTS

Barbara Jackman  
Marlys Edwardh  
Adriel Weaver

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

JOHN H. SIMS, Q.C.  
Deputy Attorney General of Canada

FOR THE APPLICANT

JACKMAN & ASSOCIATES  
RUBY & EDWARDH  
Barristers and Solicitors  
Toronto, Ontario

FOR THE RESPONDENT