Date: 20090220

Docket: DES-4-08

Citation: 2009 FC 175

Ottawa, Ontario, February 20, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

IN THE MATTER OF a certificate
pursuant to subsection 77(1)
of the *Immigration and Refugee Protection Act* (IRPA)

IN THE MATTER OF the referral of
this certificate to the Federal Court
pursuant to subsection 77(1) of the IRPA

AND IN THE MATTER OF
Adil Charkaoui

AND LE BARREAU DU QUÉBEC, intervenor

REASONS FOR ORDER AND ORDER

[1] This is a motion by Mr. Charkaoui to set aside the conditions or, in the alternative, to modify the preventive release conditions imposed by the Court at the fourth judicial review of the reasons for detention in its order dated February 17, 2005, as subsequently modified in a minor way.

[2] The Ministers oppose this motion on the ground that the applicant has not demonstrated that he satisfies the criteria for such a request. The preventive release conditions in place are appropriate in light of the danger to national security and the safety of any person. Abolishing these conditions would cause the danger to reappear.

Applicable law

[3] This motion stems from the fact that on February 22, 2008, the Ministers signed and referred a certificate stating that, in their opinion, there are reasonable grounds to believe that the applicant is inadmissible to Canada on security grounds pursuant to paragraphs 34(1)(*c*), (*d)* and (*f*) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) (IRPA), as amended.

[4] The applicant fell within the ambit of section 7(3) of the transitional provisions of the IRPA amending the IRPA and continuing the conditions imposed in February 2005. Any person affected by this provision may ask the Federal Court to review the grounds for continuing the conditions. His motion to set aside/modify the conditions was filed pursuant to section 7(4) of the transitional provisions of the IRPA.

[5] The appropriate test on the review is set out in section 82(5) of the new Act, which reads as follows:

On review, the judge, (*a*) shall order the person's detention to be continued if the judge is satisfied that the person's release under conditions would be injurious to national security or endanger the safety of any person or that they would be unlikely to appear at a proceeding or for removal if they were released under conditions; or (*b*) in any other case, shall order or confirm the person's release from detention and set any conditions that the judge considers appropriate.	Lors du contrôle, le juge: *a*) ordonne le maintien en détention s'il est convaincu que la mise en liberté sous condition de la personne constituera un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi si elle est mise en liberté sous condition; *b*) dans les autres cas, ordonne ou confirme sa mise en liberté et assortit celle-ci des conditions qu'il estime indiquée.

[6] The last paragraph reflects what the Supreme Court of Canada stated at paragraph 119 of *Charkaoui v. Canada*, [2007] 1 S.C.R. 350 ("*Charkaoui 1*"): the judge must be satisfied "that the danger no longer exists or that it can be neutralized by conditions". [Not underlined in the original.]

[7] It is also important to point out that the Supreme Court of Canada confirmed in *Charkaoui 1*, above, that a meaningful review process must take into account the context and circumstances of the individual case and include a meaningful opportunity to challenge the release conditions (*Charkaoui 1*, above, paragraph 107). The release conditions must not be a disproportionate response to the nature of the threat (*Charkaoui 1*, above, paragraph 116).

[8] In the case of a new certificate, I concur with my colleague, Mr. Justice Mosley, that the hearing to modify the conditions is a *de novo* hearing, and thus the designated judge is not bound by previous decisions on questions of fact in the case (*Almrei*, paragraph 70).

[9] The Ministers bear the initial burden of establishing that the person "continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal" (*Charkaoui 1*, paragraph 100).

[10] In a detention review, the Court assesses the evidence on the basis of the reasonable grounds standard (*Charkaoui (Re)*, 2005 FC 248, paragraph 30), despite the submissions of counsel for the applicant, and nothing in the new legislation suggests that Parliament chose to derogate from this standard. The "reasonable grounds" standard requires more than suspicions. It also requires more than a mere subjective belief by the person relying on them. It must be objectively established that reasonable grounds did in fact exist. That is to say that a reasonable person in the same circumstances would have believed that reasonable grounds existed (*R. v. Storrey*, [1990] 1 S.C.R. 241).

Positions of the parties

Ministers' position

[11] The Ministers submit that the applicant has not demonstrated that he satisfies the criteria for a request to set aside or modify conditions.

[12] The Ministers' evidence establishes that there are reasonable grounds to believe that the applicant is a danger to national security or to the safety of any person and that the danger must continue to be neutralized by the existing preventive conditions.

[13] Since the applicant chose not to testify, the Court is left in a factual vacuum regarding the concerns raised by the Ministers' evidence.

[14] The testimony in support of the applicant does not establish that he is a danger to national security or to the safety of any person.

[15] The existing preventive conditions ensure a delicate balance between the protection of national security and the safety of other persons. The changes being sought would jeopardize this delicate balance. Lifting the preventive conditions before the final decision on the certificate would cause the danger to reappear. The Ministers acknowledge that their arguments are not based on a risk of flight.

Applicant's position

[16] The applicant is requesting that the preventive conditions be lifted or, in the alternative, substantially modified by ordering his release under the usual conditions, i.e., reasonable bail and an undertaking to keep the peace.

[17] Counsel submit that, pursuant to section 82(5), detention under the new law requires evidence that release under conditions will pose a danger or that the person will not appear. In those cases, the judge sets any conditions for release that he or she considers appropriate (82(5)(*b*) of the IRPA). The criteria for imposing conditions are those adopted in *Sahin v. MCI*, [1995] 1 F.C. 214, which were confirmed by the Supreme Court in *Charkaoui I*, above.

[18] The conditions must impair the person's rights as little as possible and be applied restrictively. The restrictions must allow the person to lead a normal life in a manner proportionate to the danger invoked and established. Counsel rely on *Teale v. Noble*, 2005 CanLII 44305 (QC S.C.).

[19] In order to prove a danger to the security of Canada, counsel submit that the facts must establish a serious threat and the imminence of a prohibited act or activity. Counsel also argue that an innocent contribution to or association with a terrorist group is not subject to the Act.

[20] In addition, alternatives to detention pursuant to a certificate, such as stringent release conditions, must not be a disproportionate response to the nature of the threat.

[21] In this case, the evidence does not demonstrate that Mr. Charkaoui will be a danger to national security or to the safety of any person if he is released without conditions; nor does the evidence show that conditions are necessary and that without them he will be a danger. The

allegations date back roughly nine years; they do not establish imminent acts or detailed risks; there is no evidence that conditions are necessary or useful. Rather, the evidence suggests that the conditions are not necessary to ensure his attendance at court, to ensure that he will submit to a removal proceeding or to prevent the commission of a criminal offence. Indeed, the evidence calls for the following finding: the Ministers have no valid and founded grounds; the Ministers have no evidence; there is proof on a balance of probabilities of the applicant's responsible nature and conduct as the father of a family, and there is general evidence of compliance with conditions.

Analysis

[22] Since the Ministers have acknowledged that there is no risk of flight, this analysis will be limited to determining, in light of the evidence adduced to date, whether the applicant will pose a danger to national security or to the safety of any person if he is not detained. If the danger is neutralized, are the conditions that were imposed relevant and proportionate having regard to the nature of the danger?

[23] In his decision granting release under conditions, Mr. Justice Noël noted that "[i]f Parliament intended the designated judge to assess whether there was still any danger, it also imposed an assessment of how the danger might evolve. The imminence of danger may decline with the passage of time." That is the finding he made in his decision. At that time, for Justice Noël, the danger to national security and to the safety of any person had decreased with the passage of

time and the interaction of the group of circumstances to the point where, in fact, the danger was neutralized at the time of his assessment (*Charkaoui (Re)*, above, paragraphs 74-75).

[24] Is the situation the same four years later so that I can determine, as he did, that the danger is neutralized at the time of this assessment?

Evidence

[25] I note at the outset that the Ministers did not submit any evidence regarding the release conditions. The Ministers rely strictly on the evidence they submitted that there are reasonable grounds to believe that the applicant poses a danger to national security or to the safety of any person.

[26] Essentially, the Ministers contend that the preventive release conditions in place are appropriate with respect to the danger to national security and the safety of any person and that any change would cause the danger to reappear.

[27] The applicant's evidence essentially consists of the testimony of his mother and friends, who spoke of the applicant's responsible nature vis-à-vis his family and his children, his maturity, his compliance with the release conditions and the exemplary role he plays in his community.

Mr. Larbi Ouazzani

[28] Mr. Larbi Ouazzani is a Canadian citizen of Moroccan origin. He acts as a supervisor for Mr. Charkaoui. He has known Mr. Charkaoui since his marriage to Foujzia Ouahid, who is his wife's cousin. He has discussed violence and extremist groups with Mr. Charkaoui on a number of occasions. He has heard Mr. Charkaoui denounce attacks in the news. He notes that Mr. Charkaoui has had a lot of contact with his children since his release from detention and that he is concerned about seeing them suffer because of the conditions.

[29] As a supervisor, he noticed that Mr. Charkaoui was concerned about complying with his conditions. Mr. Ouazzani is ready to continue as a contributor to the bail offered for the applicant.

Ms. Latifa Radwan

[30] Ms. Radwan, the applicant's mother, explained the difficulties her husband has experienced as a supervisor over the last four years, since he must accompany Adil everywhere he goes, whether it be to the university, doing errands or driving the children to school. Her husband had to leave his employment as a machinist because of his supervisory duties, which did not leave him enough time to work. The financial impact is being felt, and they can no longer afford to continue like this.

Ms. Layla Sawaf

[31] Ms. Sawaf, principal of a private school that she founded in 2000, testified that Mr. Charkaoui was an excellent French teacher. He was very well-liked by the students, but she had to let him go because Mr. Charkaoui's problems with the government prevented him from obtaining a teaching permit. Once the problems with the Ministère de l'éducation du Québec are resolved, she will take him back as a teacher without hesitation.

Mr. Salem El Menyawi

[32] Mr. El Menyawi, a Montréal imam and professor of Islamic theology at Concordia University, knew Mr. Charkaoui during his detention. He continued his contacts with him after his release from detention; he sees him regularly almost every week and considers him a good friend. Mr. El Menyawi describes Mr. Charkaoui as a devout Muslim who adheres to the Sunni interpretation but who respects other religions and opinions that are contrary to his own.

[33] From the conversations he has had with Mr. Charkaoui, he is convinced that if Mr. Charkaoui is released without conditions, he will be a model citizen. Mr. Charkaoui is very mindful of the fact that he has the support of his community and he would not want to behave in a way that would disappoint them.

[34] Although Mr. El Menyawi is not an expert, I place significant weight on his testimony since he has had many opportunities to personally observe Mr. Charkaoui and to notice his maturity or lack thereof, his commitment to his family and to his community and to what extent the community exercises control over Mr. Charkaoui's conduct. Mr. El Menyawi significantly assisted the Court in determining whether Mr. Charkaoui's release will or will not pose a danger to national security or to the safety of any person.

[35] The Ministers pointed out that the applicant chose to not testify about the release conditions as he had done in the past before Justice Noël. The applicant submitted a detailed affidavit, which specifically explains the impact of the release conditions on his personal and professional life. I note that the Ministers chose to not cross-examine the applicant on his affidavit as they could have done under rule 83 of the *Federal Courts Rules* (*1998*), SOR/98-106.

[36] Based on all the testimony and the evidence heard thus far, I find as a fact that the danger to national security and to the safety of any person is neutralized. I point out, as Justice Noël did previously in *Charkaoui (Re)*, above, that in making this finding, I am not ruling on the reasonableness of the certificate since the evidence is not complete and this issue must be determined at a later time.

[37] If the danger is neutralized, it remains to be determined what preventive conditions would be necessary and proportionate to ensure that the danger remains neutralized until the Court determines the reasonability of the certificate.

[38] I place considerable weight on the passage of time. First, the allegations in the certificate date back nine years. The contacts that the applicant could have had with certain individuals before his arrest that may have been problematic at that time would have been interrupted for roughly nine years. The applicant's trips ended in January 2001. He lives in the same building as his parents, with his wife and, now, his three children.

[39] The uncontradicted evidence shows that he is complying with the conditions imposed by the Court.

[40] The applicant's case receives a great deal of media attention, which compels Mr. Charkaoui to behave in an exemplary manner. Similarly, if he fit the profile of a sleeper agent nine years ago, it is clear that he could not be one today given the publicity surrounding his case. Moreover, he has the support of his family and his community. It appears unlikely to me that he would risk disappointing them.

[41] I am satisfied that the control exercised by his community as well as the applicant's desire to meet the expectations of those around him neutralize the danger to national security and the safety of any person. Moreover, is it likely that the applicant, who has always complied with the conditions that the Court imposed on him, would do something that would risk compromising his case? I do not believe so.

At this juncture, what restrictions are required to ensure that the danger remains neutralized?

[42] A number of restrictions that were imposed are necessarily aimed at controlling Mr. Charkaoui's movements and, in my view, are justified primarily where there is a concern that the individual will flee or will not submit to the removal process or where there is a concern that the individual will commit a criminal offence or pose a danger to any person. The evidence that I have heard to date does not demonstrate that this is the case.

[43] Therefore, in my view, the conditions dealing with supervision, curfew and signing in every week at the Border Services Agency are a disproportionate response, after all these years, to the nature of the danger, which I determined above is neutralized, in large part as a result of the passage of time.

[44] Consequently, the Court has decided, on the basis of the evidence adduced to date, to significantly modify the previous conditions. The Court imposes the following preventive conditions:

(1) The bail that has been deposited with the Court Registry in accordance with Rule 149 of the *Federal Courts Rules (1998)*, SOR/98-106 is to be maintained. If this order is breached, this amount will become payable to the Attorney General of Canada following an order by the Court;

(2) Mr. Charkaoui undertakes to continue wearing a monitoring bracelet with GPS functions (a global positioning system);

(3) Mr. Charkaoui shall inform the Court, the Ministers and the Canada Border Services Agency of any change of address at least 72 hours prior to the change taking effect;

(4) His passport, as well as all travel documents, shall continue to be held by a Canada Border Services Agency officer. The Ministers shall provide him with the name of the officer;

(5) Mr. Charkaoui undertakes to appear at Court hearings;

(6) Mr. Charkaoui undertakes to not be in possession of a weapon, an imitation weapon or explosive or chemical substances;

(7) If he leaves the Île de Montréal, he undertakes to give 48 hours' notice to the Canada Border Services Agency;

(8) Mr. Charkaoui undertakes to not communicate directly with the following persons: Abousofiane Abdelrazik;

Raouf Hannachi;
Samir Ait Mohammed;
Abdellah Ouzghar; and
Karim Saïd Atmani;

(9) Mr. Charkaoui undertakes to not knowingly associate with any person who has a criminal record or any person who poses a threat to national security;

(10) Mr. Charkaoui may use any telephone, subject to the prohibition to communicate with the persons identified by the Court in paragraphs 8 and 9 above;

(11) Mr. Charkaoui may use his desktop computer with an Internet connection at his residence. However, he shall permit any employee of the Canada Border Services Agency or any person designated by the Agency to examine his computer, including the hard drive and the peripheral memory, without notice;

(12) Mr. Charkaoui undertakes to keep the peace and be of good behaviour; and

(13) Mr. Charkaoui acknowledges that any breach of this order will constitute an offence under section 127 of the *Criminal Code*, R.S.C. 1985, c. C-46, as amended, and that if he does not comply with each of the preventive conditions, he will be detained again following an order of the Court to that effect.

ORDER

THE COURT ORDERS that Mr. Charkaoui shall remain at liberty provided that he signs a document to be prepared by his counsel in which he undertakes to comply with each of the following preventive conditions:

(1) The bail that has been deposited with the Court Registry in accordance with Rule 149 of the *Federal Courts Rules* (*1998*), SOR/98-106 is to be maintained. If this order is breached, this amount will become payable to the Attorney General of Canada following an order by the Court;

(2) Mr. Charkaoui undertakes to continue wearing a monitoring bracelet with GPS functions (a global positioning system);

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(13) Mr. Charkaoui acknowledges that any breach of this order will constitute an offence under section 127 of the *Criminal Code*, R.S.C. 1985, c. C-46, as amended, and that if he does not comply with each of the preventive conditions, he will be detained again following an order of the Court to that effect.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-4-08
STYLE OF CAUSE:	**IN THE MATTER OF a certificate pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act* (IRPA)** **IN THE MATTER OF the referral of this certificate to the Federal Court pursuant to subsection 77(1) of the IRPA** **AND IN THE MATTER OF Adil Charkaoui** **AND LE BARREAU DU QUÉBEC, intervenor**
PLACE OF HEARING:	Montréal, Quebec
DATES OF HEARING:	December 9, 10, 11, 15, 16, 2008 January 19, 20, 21, 22, 2009 February 4, 2009
REASONS FOR ORDER BY:	JUSTICE TREMBLAY-LAMER
DATED:	February 20, 2009

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