

Federal Court



Cour fédérale

Date: 20100409

Docket: DES-7-08

Citation: 2010 FC 380

Ottawa, Ontario, April 09, 2010

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

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

AND IN THE MATTER OF the referral of a certificate to the Federal Court pursuant to section 77(1) of the *IRPA*;

AND IN THE MATTER OF Mohamed Zeki Mahjoub.

REASONS FOR ORDER AND ORDER

[1] Mr. Mahjoub proposes that Professor Wesley Wark be qualified as an expert in the motion for the exclusion of evidence pursuant to section 83(1.1) of the *Immigration and Refugee Protection Act, 2001, c.27 (IRPA)*. Mr. Mahjoub proposes that Mr. Wark: “be qualified to give expert opinion evidence on this motion based on his knowledge of the information that is in the public domain, his personal experiences, and his observations arising from his review of un- and declassified materials, in the following three areas:

- a. CSIS [Canadian Security Intelligence Service (Service)] policies and practices in relation to information sharing;
- b. The sources of information and intelligence available to CSIS concerning terrorist organizations and activities rooted in Egypt; and
- c. The Service's capacity independently to investigate and evaluate that information and intelligence."

[2] Mr. Mahjoub submits that Mr. Wark has special knowledge or experience going beyond that of the trier of fact in the three areas of expertise, and that such a qualification is amply demonstrated by Mr. Wark's *curriculum vitae* and testimony.

[3] The Ministers' position is that Mr. Wark is not an expert in any of these areas. The Ministers argue that, at most, Mr. Wark is an expert on the history of intelligence agencies, this would not be of any assistance to the Court and therefore Mr. Wark should not be qualified as an expert in this motion.

[4] The issues to be determined are: Whether Mr. Wark should be qualified as an expert to give evidence in this motion? And if so, what are the areas of expertise in which Mr. Wark is qualified to give opinion evidence? If he is qualified, whether Mr. Wark's expert opinion is necessary to this motion and therefore admissible?

[5] The parties agree that the four preconditions for admissibility of expert opinion evidence, as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, are: necessity, relevance, the absence of any exclusionary rule of evidence, and a properly qualified expert. The parties further agree that the test for determining whether a witness is properly qualified to give opinion evidence is set out in *R v.*

Marquard [1993] 4 S.C.R. 223, at page 78, and is as follows: does the witness possess special knowledge or experience going beyond that of the trier of fact?

[6] The first area of expertise proposed by Mr. Mahjoub for Mr. Wark is Service policies and practices in relation to information sharing. Mr. Mahjoub relies on Mr. Wark's testimony, in which he stated that his understanding of the Service resulted from the work he had undertaken in: the Arar Inquiry and the Air India Inquiry; the testimonies he gave to Parliamentary committees; his research, academic work and experience in the field of intelligence; his consultancy work at the Intelligence Assessment Secretariat of the Privy Council Office; and his experience as an appointed member to the Prime Minister's Advisory Council on National Security.

[7] The Ministers argue, in respect of this first proposed area of expertise, that Mr. Wark has not written any books, articles or chapters in books which deal specifically with Service policies and practices in relation to information sharing. The Ministers further argue that Mr. Wark has not, through his professional experience, accessed classified Service policies and practices. On the basis of the above, the Ministers argue that Mr. Wark would not be able to provide expertise in relation to such policies and practices.

[8] Mr. Wark testified that his awareness of Service policies and practices is largely derived from information in the public domain. I accept Mr. Wark's evidence that there is a substantial amount of information in the public domain on the Service's policies and practices. In my view, Mr. Wark has special knowledge and experience going beyond that of the trier of fact, in regards to

Service policies and practices. Deficiencies in his expertise, if any, go to weight rather than admissibility of his evidence (See: *Marquard*, at page 78; *R v. Fisher*, 2003 SKCA, at para. 19).

[9] The second proposed area of expertise is with respect to the sources of information and intelligence available to the Service concerning terrorist organizations and activities rooted in Egypt. Mr. Mahjoub submits that for this area of expertise Mr. Wark would rely on his knowledge of intelligence sharing practices in general and his knowledge of Canada's alliances with foreign partners. Mr. Mahjoub further submits that Mr. Wark's specialized knowledge of terrorist groups originating in Egypt is reflected in the opinion evidence he gave in the Harkat matter on, *inter alia*, the nature of membership in and the evolution of al-Qaeda. Mr. Mahjoub submits that persons involved in Egyptian terrorist organizations, and the tactics and ideologies developed in these organizations played a key role in the evolution of al-Qaeda.

[10] The Ministers argue that Mr. Wark admitted that he had no real expertise in the sources of information and intelligence available to the Service concerning terrorist organizations and activities rooted in Egypt.

[11] The third area of expertise proposed for Mr. Wark is the Service's capacity independently to investigate and evaluate the information and intelligence available to the Service concerning terrorist organizations and activities rooted in Egypt. Mr. Mahjoub notes that in his testimony, Mr. Wark stated that his expertise in this regard stemmed from his understanding of the Service's capacities and practices and his general knowledge about how intelligence services engage in intelligence collection and analysis. Mr. Mahjoub highlights Mr. Wark's scholarly research on

intelligence failures and the problems facing intelligence services, as well as his report in the Air India Inquiry which discusses the receipt of information from foreign agencies by the Canadian intelligence community, with respect to Sikh nationalism.

[12] Again, the Ministers argue with respect to the third area of expertise that Mr. Wark admitted to having no real expertise in this area, and that on this basis he should not be qualified as an expert in this area.

[13] With respect to the second and third proposed areas of expertise, I find that Mr. Wark is qualified to give opinion evidence on the sources of information and intelligence available to the Service concerning terrorist organizations and activities rooted in Egypt, and the Service's capacity independently to investigate and evaluate that information and intelligence. The Ministers' submission that Mr. Wark admitted having no expertise in these areas is based on the evidence he gave in cross-examination that he had not written any books or articles on Egyptian security intelligence, specifically. This does not necessarily lead to the conclusion that Mr. Wark is not qualified to give opinion evidence on the two areas of expertise at issue. The evidence demonstrates that, in the Harkat proceeding, Mr. Wark provided expert analysis of the public summary of the Security Intelligence Report on Mr. Harkat, which included allegations that Mr. Harkat was affiliated with one or more Egyptian terrorist groups. His expert report, in the proceeding, canvassed the evolution of al-Qaeda as a terrorist group. Further, his expertise, with respect to the second and third proposed area of expertise, stems from his knowledge of the Service's capacities and practices and his general knowledge about how intelligence services engage in intelligence collection and

analysis. I am satisfied that Mr. Wark has acquired knowledge which is beyond that of the trier of fact, through his research and experience.

[14] In the result, I am satisfied that Mr. Wark is qualified to give opinion evidence on the following:

- a. Service policies and practices in relation to information sharing;
- b. The sources of information and intelligence available to the Service concerning terrorist organizations and activities, rooted in Egypt; and
- c. The Service's capacity independently to investigate and evaluate that information and intelligence.

[15] I am also satisfied that the opinion evidence of Mr. Wark in the above areas of expertise is required and will assist the Court.

ORDER

THIS COURT ORDERS that

1. Mr. Wark is qualified to give opinion evidence based on his knowledge of the information that is in the public domain, his personal experiences, and his observations arising from his review of un- and declassified materials, in the following three areas:
 - a) Service policies and practices in relation to information sharing;
 - b) The sources of information and intelligence available to the Service concerning terrorist organizations and activities, rooted in Egypt; and
 - c) The Service's capacity independently to investigate and evaluate that information and intelligence.

"Edmond P. Blanchard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-7-08

STYLE OF CAUSE: The Minister of Citizenship and Immigration
and The Minister of Public Safety v.
Mohamed Zeki Mahjoub

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 24 to April 1, 2010

REASONS FOR ORDER: BLANCHARD J.

DATED: April 9, 2010

APPEARANCES:

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