

Date: 20100319

Docket: DES-7-08

Citation: 2010 FC 325

Ottawa, Ontario, March 19, 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

Introduction

[1] On February 22, 2008, a certificate naming Mohamed Zeki Mahjoub as a person inadmissible to Canada on grounds of national security was referred to the Federal Court pursuant to section 77 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA). These reasons

address a preliminary motion to the reasonableness hearing brought by Mr. Mahjoub, on February 24, 2010, for further and better particulars and disclosure.

[2] The parties were heard on the motion on March 3, 2010. The Court also heard from the Ministers and the Special Advocates in closed session on March 4, 12 and 16, 2010. The Ministers and the Special Advocates filed submissions on certain disputed issues.

[3] The grounds for Mr. Mahjoub's motion are the following. Mr. Mahjoub argues that his right to a fair hearing requires the disclosure of a clear and detailed outline of the nature of the allegations, coupled with the disclosure of all relevant evidence, with the narrow exception of evidence which is subject to national security privilege. In support of this position, Mr. Mahjoub refers to *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, at paragraph 29 and 56, and *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, at paragraph 64. Mr. Mahjoub also argues, pursuant to paragraph 83(1)(e) of the IRPA, that he must be provided with a summary of information and other evidence that enables him to be reasonably informed of the case made by the Ministers but does not include anything, that in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed. By relying on *Secretary of State v. MB*, [2009] UKHL 46, at paragraph 35, Mr. Mahjoub notes that the Special Advocates procedure does not stand as a replacement for disclosure of the case to be met, to the named person. Mr. Mahjoub also relies on *Duffett v. Attorney General of Canada*, 2007 NLTD 17, at paragraphs 12 and 19, to further argue that for procedural fairness to be met, the essential details

of Ministers' case must be set out. The disclosure of such particulars would ensure that the proceeding is conducted fairly, openly, without surprise and in the process would reduce cost.

[4] Mr. Mahjoub argues that in the particular circumstances, he does not sufficiently know the case against him and as a result his ability to answer that case is impaired. The Public Summary of the Security Intelligence Report (SIR), dated October 24, 2008, and the Supplementary Public Summary of the SIR, disclosed on January 22, 2010, do not allow him to be reasonably informed of the Ministers' case against him.

[5] The Ministers submit that Mr. Mahjoub's request for fuller disclosure and particulars ignores the fact that the Special Advocates and the Court have already carefully considered what information and evidence can be disclosed and that such information and evidence has been provided to Mr. Mahjoub. The Ministers further submit that the disclosure provided to Mr. Mahjoub enables him to be reasonably informed of the Ministers' case.

Issue

[6] The issue to be decided is whether Mr. Mahjoub is entitled to further and better particulars and disclosure of the evidence and information relied upon by the Ministers in their case against Mr. Mahjoub. Mr. Mahjoub requests the following:

- (1) A revised public summary of the SIR which integrates the additional allegations disclosed in the Supplementary Public Summary of the SIR, disclosed on January 22, 2010.
- (2) Cross-referencing of the disclosed materials with the Public Summary of the SIR to enable him to relate the materials to the particular allegations against him.

- (3) Copies of documents or other evidence relating to matters of public knowledge from foreign governments.
- (4) Footnoting of the Public Summary of the SIR to enable Mr. Mahjoub to determine the nature of the source of evidence and/or information against him.
- (5) The names of countries whose intelligence services have provided information to Canadian officials in relation to allegations against Mr. Mahjoub.
- (6) The dates when the Ministers came into possession of the evidence and information underlying the Supplementary Public Summary of the SIR, disclosed on January 22, 2010.
- (7) An accounting of the evidence and information which has been destroyed, cross referenced to the allegations against Mr. Mahjoub in the Public Summary of the SIR.
- (8) Copies of all surveillance reports and reports of intercepted conversations, with expurgations necessary to protect national security.
- (9) Any other information or evidence not yet disclosed which the Court recognized ought to be disclosed.

[7] I shall address each of the above requests in turn.

Request 1

A revised public summary of the SIR which integrates the additional allegations disclosed in the Supplementary Public Summary of the SIR, disclosed on January 22, 2010.

[8] Mr. Mahjoub argues that the details of the Supplementary Public Summary of the SIR conflict with some of the details in the Public Summary of the SIR. On this basis he requires that the allegations in the Supplementary Public Summary of the SIR be integrated into a revised public summary of the SIR. According to Mr. Mahjoub there is a risk that he will be misled about the Ministers' case, if he is not provided with such a consolidated document. In oral submissions,

Mr. Mahjoub's Counsel specified that the inconsistencies between the Supplementary Public Summary of the SIR and the Public Summary of the SIR are with respect to Mr. Mahjoub's whereabouts in the early 1990s, and whether he had one or many outstanding Egyptian criminal charges.

[9] The Ministers have now produced a Consolidated Summary of the SIR, dated March 10, 2010, and released to Mr. Mahjoub on March 16, 2010. This document integrates the allegations of the Supplementary Public Summary of the SIR into a revised public summary of the SIR, as requested by Mr. Mahjoub.

[10] I now turn to Mr. Mahjoub's allegation of inconsistency, and request for clarification as to whether there is one or many outstanding Egyptian criminal charges against him. The Ministers filed Volume III of the Reference Index, dated March 10, 2010 and released March 16, 2010, in addition to the Consolidated Public Summary of the SIR. At tab 84 of Volume III is a copy of an Interpol Notice, requested by Egypt, containing a list of the criminal charges against Mr. Mahjoub. The information, contained in the Interpol Notice, answers Mr. Mahjoub's request for clarification. The issue of inconsistency with respect to the criminal charges was also discussed in closed session. As a result, the Special Advocates and the Ministers agreed to the disclosure of the following information, for the purpose of clarity:

It is the position of the Ministers that there are several charges against Mr. Mahjoub outstanding in Egypt. These are in addition to his conviction in the Returnees of Albania case.

[11] With respect to Mr. Mahjoub's whereabouts in the early 1990s, the Consolidated Summary of the SIR addresses to the extent possible any alleged inconsistencies. Any further perceived inconsistencies which remain can be pursued by Mr. Mahjoub at the hearing on the reasonableness of the certificate.

Request 2

Cross-referencing of the disclosed materials with the Public Summary of the SIR to enable him to relate the materials to the particular allegations against him.

[12] Mr. Mahjoub requested that the Ministers cross-reference the disclosed materials to the allegations in the Public Summary of the SIR. Mr. Mahjoub argued that he should not be left "guessing" how the disclosed materials relate to the particular allegations against him. This request was more specifically focused on having the Summaries of Conversations and Surveillance, which were disclosed subsequent to the public summary of the SIR, referenced to specific allegations in the Public Summary of the SIR.

[13] As directed by Prothonotary Aalto, the Ministers created a document, to be provided to Mr. Mahjoub and his Counsel, which cross-referenced the allegations in the Public Summary of the SIR with the Summaries of Conversations and Surveillance. Mr. Mahjoub and his Counsel were provided with this document on March 2, 2010, as part of the Ministers' Motion Record. The allegations in the Consolidated Summary of the SIR, which rely on the Summaries of Conversations and Surveillance, are now referenced to these summaries. As a consequence, I view that Mr. Mahjoub's request has been satisfied.

Request 3

Copies of documents or other evidence relating to matters of public knowledge from foreign governments.

[14] This request relates to the criminal charges and criminal conviction against Mr. Mahjoub in Egypt. Mr. Mahjoub notes that the Supplementary Public Summary of the SIR discloses that there are charges pending against him in Egypt, in addition to his Egyptian conviction. He argues that he has not received adequate disclosure in relation to any criminal proceedings in Egypt, and that he has no knowledge of the elements of the offences or the factual allegations which led to the laying of charges and the conviction. In oral submissions, Mr. Mahjoub's Counsel argued:

If Mr. Mahjoub is facing other charges, where are the indictments?
Are there Interpol warrants out there? And if they don't exist as
opposed to being withheld for reasons of national security or to
shield a friendly intelligence service that commits torture,
Mr. Mahjoub should know that. It's an important element.

[15] As stated above, tab 84 of Volume III of the Reference Index contains a copy of an Interpol Notice requested by Egypt, which specifies the criminal charges against Mr. Mahjoub. I am of the view that the disclosure of this document has satisfied Mr. Mahjoub's request.

Request 4

Footnoting of the Public Summary of the SIR to enable Mr. Mahjoub to determine the nature of the source of evidence and/or information against him.

[16] Mr. Mahjoub argues that he is entitled as a matter of fairness to a listing of the actual sources of evidence or information, which are relied on in the Public Summary of the SIR. In cases

where national security claims bar such disclosure, Mr. Mahjoub argues that he has a right to know, at least, the nature of the source. Mr. Mahjoub therefore requests that the Public Summary of the SIR be footnoted to identify the nature of the source of information or evidence. Mr. Mahjoub argues that such information is needed to enable him to gage the strength of the Ministers' case and to enable him to determine how to conduct his defence to the information or evidence proffered from these sources.

[17] The sources of information and evidence relied on by the Ministers have been publicly disclosed to the extent possible pursuant to section 83 of the IRPA in the Consolidated Public Summary of the SIR. Those sources that have not been identified to Mr. Mahjoub, have been identified to the Court and the Special Advocates in the classified SIR. Mr. Mahjoub seeks to know the nature of those sources which have not been identified in the Consolidated Public Summary of the SIR.

[18] Mr. Mahjoub's request for disclosure of the nature of the confidential sources was litigated in closed session. I have determined that disclosing the nature of the confidential sources of information or evidence, which support specific allegations in the Consolidated Public Summary of the SIR, would be injurious to national security. However, I have found that disclosing the following information would not be injurious to national security or endanger the safety of any person:

A substantial portion of the information in the SIR originates from foreign agencies.

Request 5

The names of countries whose intelligence services have provided information to Canadian officials in relation to allegations against Mr. Mahjoub.

[19] Mr. Mahjoub seeks disclosure of the names of countries whose intelligence services have provided evidence or information to the Ministers in relation to the allegations against him.

Mr. Mahjoub argues that the obligation to protect information received from foreign agencies, does not negate the obligation on the part of the Ministers to request permission to disclose the information, and it does not preclude disclosure of the source even if the substance of the information cannot be provided.

[20] The issue of the Ministers' obligation to seek consent for disclosure of information obtained from foreign agencies has been addressed in closed session. The issue of disclosure of information obtained from foreign agencies was litigated in closed session. Pursuant to the process mandated by section 83 of the IRPA, Mr. Mahjoub was informed of the result of the litigation, to the extent possible, by the Expurgated Reasons for Order and Order, dated February 19, 2010, and released March 18, 2010.

[21] With respect to Mr. Mahjoub's argument that the obligation to protect information received from foreign agencies does not preclude disclosure of the source of the information even if the substance of the information cannot be provided, I make the following observations. Disclosure of the names of the countries having provided intelligence, in the circumstances, would be injurious to national security because it would breach the third party rule. The third party rule concerns the

exchange of information among foreign agencies: “Put simply, the receiving agency is neither to attribute the source of the information or disclose its contents without the permission of the originating agency” (See: *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2006 FC 1552, at para. 25). Disclosing a list of names of countries whose intelligence services provided evidence or information, relied on by the Ministers in their case against Mr. Mahjoub, would in the circumstances breach the third party rule.

Request 6

The dates when the Ministers came into possession of the evidence and information underlying the Supplementary Public Summary of the SIR, disclosed on January 22, 2010.

[22] Mr. Mahjoub argues he is entitled to know the dates upon which the Ministers came into possession of the evidence and information underlying the Supplementary Public Summary of the SIR. Mr. Mahjoub argues that he requires this information to determine how to conduct his defence against the Ministers’ case, more particularly in respect of his potential claim against the Ministers for abuse of process.

[23] Mr. Mahjoub’s request for the dates, at issue, was debated in closed session. I find that it would be injurious to national security to disclose the specific dates when the Ministers came into possession of the evidence and information underlying the Supplementary Public Summary of the SIR. However, I find that it would not be injurious to national security to disclose the following:

The evidence and information underlying the Supplementary Public Summary of the SIR was obtained by the Canadian Security Intelligence Service prior to the issuance of the first certificate against Mr. Mahjoub in June of 2000.

Request 7

An accounting of the evidence and information which has been destroyed, cross referenced to the allegations against Mr. Mahjoub in the Public Summary of the SIR.

[24] In order to know the strength of the case against him and prepare to meet it, Mr. Mahjoub seeks to know which allegations in the Public Summary of the SIR rely on evidence or information, which has been destroyed.

[25] The issue was litigated in closed session, following which the Ministers agreed to disclosure of the following information: “A substantial number of the allegations in the SIR are based on Service records for which the original evidence has been destroyed or is otherwise not available. The SIR discloses to the Court and to the Special Advocates the specific allegations in the SIR for which the original evidence is or is not available, and where the evidence is available it has been provided to the Court and the Special Advocates.”

[26] The above information, agreed to be released by the Ministers, is essentially already available to Mr. Mahjoub and his Counsel by reason of a Communication, prepared on a collaborative basis and approved by the Ministers and Special Advocates, dated June 18, 2009. The Communication was meant to inform Mr. Mahjoub of the outcome of closed discussions on the issue of the destruction of operational notes and intercepted communications.

[27] The Court received additional submissions from the Ministers and the Special Advocates on the issue of disclosing which allegations in the Public Summary of the SIR rely on destroyed

information. Having reviewed these additional written submissions, I am of the view that it would not be injurious to national security to disclose which allegations in the Consolidated Public Summary of the SIR rely on information or evidence that has been destroyed or is no longer available. In the result such information shall be disclosed to Mr. Mahjoub and his Counsel.

Request 8

Copies of all surveillance reports and reports of intercepted conversations, with expurgations necessary to protect national security.

[28] Mr. Mahjoub argues that the evidence or information relied upon by the Ministers that can be released to him, should be available in its “most original form”. He knows that original records, such as tapes of intercepts or officer’s notes made at the time of surveillance, were destroyed by the Service. He contends that, with the exception of information redacted by reason of national security privilege, all other information or evidence, be it summaries created by the Service or transcribed conversations, should be made available to him.

[29] This issue was addressed in closed session. The Ministers and the Special Advocates agreed that the following information, with regards to the manner in which the summaries provided to Mr. Mahjoub were prepared, could be disclosed:

The summaries of communications and surveillance (relied on in the SIR and disclosed pursuant to *Charkaoui II*) that have been provided to Mr. Mahjoub fairly reflect the substance of the Service reporting of the same. Redacted versions of this reporting would not provide any additional material information.

Request 9

Any other information or evidence not yet disclosed which the Court recognized ought to be disclosed.

[30] The Court has decided all matters relating to disclosure of information and/or evidence brought before it, in both public and closed session. It is noted that the disclosure obligation is ongoing. Paragraph 83(1)(e) of the IRPA provides that the designated judge shall ensure “throughout the proceeding” that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the Ministers case against them.

ORDER

THIS COURT ORDERS that:

1. The Ministers shall provide Mr. Mahjoub and his Counsel, by March 23, 2010, a table indicating which allegations in the Consolidated Public Summary of the SIR rely on evidence that has been destroyed or is otherwise not available.

“Edmond P. Blanchard”

Judge