Federal Court  Cour fédérale

Date: 20140718

Docket: DES-7-08

Citation: 2014 FC 720

Ottawa, Ontario, July 18, 2014

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

IN THE MATTER OF a certificate signed pursuant to subsection 77(1) of the Immigration and Refugee Protection Act ["IRPA"];

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

AND IN THE MATTER OF the conditions of release of Mohamed Zeki MAHJOUB ["Mr. Mahjoub" or the "Applicant"]

ORDER AND REASONS

I. Introduction

[1] Mr. Mahjoub seeks from this Court that it releases him from and repeals all of his conditions of release from detention, save the usual conditions, pursuant to subsection 82(4) and paragraph 82(5)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "IRPA"].

A. *Facts – A brief history of the proceedings and previous reviews of the conditions of release from detention*

[2] The Applicant was named in a security certificate in June 2000 and put under detention on June 26 of that same year.

[3] The Applicant was released from detention, after nearly seven years, under strict conditions, and he was made the object of a second security certificate in 2008.

[4] Several reviews of the Applicant's conditions of release from detention were made over the years. The most recent hearing for the review of these conditions of release was held before the late Justice Blanchard on October 16, 2013, following which orders were rendered on December 17, 2013 (*Mahjoub (Re)*, 2013 FC 1257 [the "December 17, 2013 review of conditions order"]) and January 24, 2014 (*Mahjoub (Re)*, in docket DES-7-08, dated January 24, 2014 [the "January 24, 2014 review of conditions order"]).

[5] Justice Blanchard's December 17, 2013 review of conditions order renewed and maintained his previous review of conditions order, dated January 7, 2013, which had repealed a number of conditions imposed on the Applicant and softened other conditions considerably.

[6] In the meantime, the Applicant contested the reasonableness of the security certificate issued against him. However, Justice Blanchard declared this security certificate reasonable on October 25, 2013 – the reasons of this decision were released later, on December 6, 2013 (*Mahjoub (Re)*, 2013 FC 1092 [the "Reasonableness Decision"]).

[7] Since the last review of the conditions of release from detention, and more specifically on March 24, 2014, the Ministers sought to have the Applicant's conditions modified in order to, among other things, gain access to all of the Applicant's passwords. Following an oral hearing on May 15, 2014, I ordered that the Applicant was to provide the Ministers with all of his passwords upon request and that the other elements sought by the Ministers were to be addressed at the following review of the conditions of release from detention, i.e. this review.

II. Applicant's submissions

[8] The Applicant seeks to have all of his conditions of release from detention repealed, save for the following usual conditions:

- Mr. Mahjoub shall keep the peace and be of good conduct;
- Mr. Mahjoub shall report change of address;
- Mr. Mahjoub shall comply and agree to comply with each of the conditions set out in this order;
- Mr. Mahjoub's passport and all travel documents, if any, shall remain surrendered to the Canada Border Services Agency [the CBSA]. Without the prior approval of the CBSA, Mr. Mahjoub is prohibited from applying for, obtaining or possessing any passport or travel document. For clarity, this shall not prevent Mr. Mahjoub from traveling within Canada, as long as proper notice is given to the CBSA pursuant to paragraph 8 of these Conditions;
- 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;
- Mr. Mahjoub shall not possess any weapon, imitation weapon, noxious substance or explosive, or any component thereof;
- 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 IRPA;

- The 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.

A. *The evidence in support of the motion*

[9] In addition to adducing new evidence, the Applicant relies on the evidence already on file, including certificates and expert reports produced by Professor Stéphane Leman-Langlois, as well as several other expert psychiatric reports by Dr. Donald Payne and an expert report by Vaughan Barrett.

[10] As for the new evidence in support of his claims, the Applicant claims that they can be split into five categories, as follows:

1) *The psychological impacts of the conditions of release from detention on the Applicant (major depression, anxiety and PTSD symptoms)*: A certificate and an expert psychiatric report prepared by Dr. Payne and dated June 2, 2014.

2) *The recurring problems faced by the Applicant with the CBSA with the implementation of the conditions of release from detention*: Various exchanges between the Applicant and the Department of Justice and the CBSA.

3) *The Applicant's activities in taking language courses and his inability to move forward in that regard because of the conditions of release from detention*: Evidence of the Applicant studying English as a second language.

4) *The Applicant's need for regular medical attention and the negative impact the conditions of release from detention have had in this regard*: Medical letters attesting the Applicant's latent serious medical conditions.

5) *The new evidence with respect to the unfairness and/or unreliability or insufficiency of the allegations and the process against the Applicant*: Articles on the worsening of the situation in Egypt.

B. *The arguments in support of the motion*

[11] At the outset of his submissions, the Applicant reminds this Court that the Ministers bear the burden of proving the necessity of the imposed conditions and that they are also held to numerous constitutional requirements in this regard. The Applicant also argues that for a lack of evidence, his current conditions of release from detention must be changed greatly in order for them to be proportionate, reasonable and respectful of his *Charter*-protected rights and freedoms, particularly, sections 2, 7 and 8. Furthermore, according to the evidence, these current conditions are harmful to the Applicant and must therefore be changed in order to respect sections 7 and 12 of the *Charter*.

[12] The Applicant puts forward four main arguments in support of his claims.

(1) Lack of evidence of the danger posed by the Applicant

[13] The most recent review of conditions of release order (dated December 17, 2013) presented a series of errors which, when taken into consideration, explain the necessity of repealing all the conditions imposed on the Applicant. In this order, Justice Blanchard failed to provide any explanation as to why he still considered that the Applicant posed a threat to the security of Canada. At that time, despite bearing the onus of proving said threat, the Ministers had presented no evidence on the current threat level of the Applicant, whereas the evidence on file, including Professor Leman-Langlois' reports, effectively suggests that the Applicant could not be a threat. There is actually no evidence of the Applicant presenting any current threat whatsoever. Justice Blanchard also dismissed Professor Leman-Langlois' report as well as the then-submitted medical reports by Dr. Payne for no reason and despite their relevance to the

Applicant's claim. The December 17, 2013 review of conditions order also failed to take into consideration the length of time covered by the reasons and, what is more, it concluded that the Applicant could not be trusted to respect his conditions of release because of a single incident – it had been found that the Applicant had changed his telephone and fax services without informing the CBSA in a timely fashion –, thereby ignoring the fact that the Applicant has been observant of all his conditions of release from detention for numerous years.

[14] What is more important, however, is that the Reasonableness Decision actually dismisses the majority of the allegations made over the years against the Applicant. Moreover, as Justice Blanchard rendered his review of conditions of release order on December 13, 2013, the Applicant was not provided with the opportunity to address the Reasonableness Decision's findings (dated December 6, 2013) and their impact on the review of conditions of release. Also, in light of the findings of this Reasonableness Decision, all of the Applicant's conditions of release from detention, save the usual conditions, should be repealed as these conditions are *inter alia* rationally disconnected to controlling the alleged danger the Applicant represents.

(2) The Applicant's health, and the impact the conditions have had and will continue to have on his well-being

[15] For this argument, the Applicant relies on Dr. Payne's report dated June 2, 2014, which states that the various conditions to which the Applicant is held – as well as the numerous incidents that have happened in implementing these conditions – have a great and cumulative effect on the Applicant's physical and psychological health.

[16] According to Dr. Payne, the Applicant's current conditions regarding the interception of his mail, the use of computers and telephones and the access to internet, his travel restrictions, and his obligation to report weekly to the CBSA and to notify the CBSA prior to moving have put him in situations which intensify his depression, wear him down psychologically and lead to a social stigma and isolation. The Applicant has also experienced frustration, loneliness, acute stress and PTSD symptoms, all of which lead to a limitation in his quality of life.

[17] In addition, Dr. Payne's report enounces several factors which aggravate the Applicant's situation. Indeed, the Applicant having been falsely accused of denying the CBSA access to his home, he has been left in a state of constant vigilance and preoccupation. Also, the physical surveillance of which he is the object has given the Applicant a feeling of impotence and a lack of autonomy. Furthermore, the Applicant feels mentally, emotionally and psychologically tortured by the Department of Justice, and he has experienced threats and harassment because he has been publicly identified as a security threat.

[18] These psychological hardships also have important consequences on the Applicant's various physical conditions.

(3) The passage of time, the absence of any reprehensible act from the Applicant, the delays and the anticipated length of appeal

[19] All the above-mentioned social, psychological, educational and functional difficulties resulting from the current conditions of release from detention have had a cumulative impact which is disproportionate, and they must be repealed because the Applicant has consistently

complied with the laws of Canada and his conditions of release. In addition, the Applicant has appealed the Reasonableness Decision, but this process is far from being complete. It is not reasonable to let these entire conditions stand during such a long period.

[20] The Applicant also addresses the Ministers' motion to amend section 10 of the conditions which was the object of a hearing on May 14, 2014. As mentioned above, the issues raised by the motion on which the Court has yet to decide are to be addressed in this review of conditions. The following is a summary of the Applicant's arguments in support of his contention that the amendments sought by the Ministers should not be given:

a) The amendments perpetuate and aggravate the unprotofied intrusion into Mr. Mahjoub's private life, his right to privacy and storage of personal information that is inimical to the principles enunciated by the Supreme Court in *R v Vu*, 2013 SCC 60, [2013] SCJ No 60 [*Vu*];

b) The existing conditions including the new ones are too broad and are not rationally connected to a danger;

c) When the conditions were decided, the issues being raised as part of the new conditions were known and not raised by the Ministers and were not imposed by the Court.

[21] The Applicant affirms that he has never used Dropbox or any other storage service or any software or browser or tool to hide his activities on the internet, and that he had no knowledge that such technology existed. He is cooperating with the CBSA pursuant to the conditions.

[22] Public counsel for the Applicant has also submitted an affidavit of Jeremy Cole, a technological consultant, which in essence says that a forensic examination (which the CBSA can do on its own) can detect and inspect the content of external memory but also examine the information contained in the computer. As for the use of a Dropbox website as claimed by the

CBSA, Mr. Cole says that no logs referred to indicate that Mr. Mahjoub had accessed such website.

[23] It is submitted that all of the Ministers' requests are not necessary since a CBSA forensic investigation can access all of the computer activities even those that use other technology communications to prevent access and, more importantly, that Mr. Mahjoub has not used any of that new technology to prevent a proper access to his computer and that he has respected the conditions ordered on January 24, 2014.

(4) The necessity of protecting the Applicant's constitutional rights

[24] The Applicant's conditions of release from detention must be lifted because there is no evidence linking the Applicant to criminal or dangerous activity, and these conditions constitute *prima facie* violations of the Applicant's constitutional rights. In particular, the Supreme Court of Canada, in *Vu*, above, recently ruled that the search of a person's house or home computer is a highly intrusive invasion. Consequently, the conditions should be repealed as they clearly constitute *Charter* violations.

III. The Ministers' submissions

[25] The Ministers argue that the current conditions of release from detention continue to be necessary to neutralize the threat to Canada posed by the Applicant.

[26] At the outset of their submissions, the Ministers contend that the Applicant's affidavit should be afforded no weight as it contains legal arguments as well as opinion statements which are either unsupported by evidence or contradicted by the record. In addition, the Court has previously found that the Applicant had not been truthful in many regards, and this lack of credibility also suggests that the Applicant's affidavit should be set aside.

[27] What is more, this Court should afford little weight to most of the evidence presented by the Applicant. Dr. Payne's medical report dated June 2, 2013 contains a number of inaccuracies and relies on facts not found in the record. For example, the medical report claims that the CBSA is responsible for the Applicant no longer being able to communicate with his family, however this is not the case; in fact, an exception was added to the Applicant's conditions to allow the Applicant to have visual electronic communications with his family members in Egypt. Other inaccuracies in the medical report relate to the Applicant's conditions of release from detention as they concern his change of residence and the use of a cell phone. What is more, the medical report also positively portrays the Applicant's past employment whereas the Court has seriously taken issue with the Applicant's past employment situation. In sum, as Dr. Payne's medical report's findings do not appear to be based on actual facts, they should be afforded little weight.

[28] The same treatment should be afforded to the Applicant's evidence produced by Professor Leman-Langlois as the Court already addressed this evidence during the previous review of conditions of release and afforded it little weight back then due to numerous shortcomings.

[29] The Ministers then address the actual conditions of release from detention and state that they are necessary to neutralize the danger which the Applicant represents for Canada. The Ministers submit that the passage of time and the Applicant's history of compliance do not warrant a removal of the conditions but simply prove that these conditions are working effectively. Also, during the last review of the conditions of release, the Court has held that the Applicant still poses a threat, a significantly reduced threat but a threat nonetheless, and the Applicant has provided no evidence of a change in the situation in this regard, especially in the light of the Reasonableness Decision.

[30] In fact, the Applicant's actions and lack of cooperation with the authorities favour the maintaining of the current conditions of release, as the Applicant cannot be trusted to respect his conditions of release. Several incidents involving the CBSA support this claim. On one occasion, the Applicant traveled outside the GTA without providing the CBSA with an accurate itinerary. The Applicant has also shown a lack of cooperation with regard to the communication of his Startec telephone toll records and when the CBSA tried to examine his computer.

[31] Contrary to the Applicant's claim, the time required to process the appeal of the Reasonableness Decision is not a factor that should weigh against the Ministers because the Applicant is still entitled to regular reviews of his conditions of release and the Ministers have not shown any lack of diligence during the proceedings.

[32] The Ministers contend that the Applicant's current conditions of release from detention remain necessary to ensure that he does not communicate with prohibited persons or acquire or re-establish contacts that might threaten Canada's security.

[33] The condition regarding the verification of the Applicant's in-person communications and activities is necessary because the Applicant no longer wears a tracking bracelet and he has already failed to provide his accurate itinerary to the CBSA with respect to one of his travels. It is also necessary to maintain the condition of obtaining telephone toll records, as the interception of calls has ceased and this is the only manner for the authorities to verify this type of communications with the least interruption for the Applicant.

[34] The condition restricting the use of the internet should also be maintained. In this regard, the Ministers claim that communications by the Applicant over the internet by e-mail should not be allowed because the Applicant failed to submit any substantiated argument on the issue or to prove that he has made efforts to overcome his alleged difficulties. Alternatively, communications over the internet by e-mail should be permitted under certain conditions: the Applicant must agree 1) to grant the CBSA access to his e-mail account; 2) to provide his username and password to the CBSA; 3) not to alter or delete any sent, received or drafted e-mails from his account; 4) not to engage in any communication over which he may claim solicitor-client or litigation privilege; and 5) to access his e-mail though non-web based email tools, such as Outlook. As for the use of social networking websites, the Applicant has simply provided no explanations as to why he should have access to them. With regard to the use of Skype, the Applicant claims that he needs to obtain an e-mail address in order to access the

service, but he should have raised this issue before this review of conditions hearing. It remains open for the Applicant to contact the Ministers to determine whether it is possible to come to an agreement.

[35] Furthermore, it remains necessary to examine the Applicant's computer, especially considering the Applicant's actions and lack of cooperation in this regard during the last examinations. Also, the interception of the Applicant's mail remains necessary in order to verify his communications, as do the conditions of keeping the peace and being of good behaviour and the conditions associated with performance bonds.

[36] In his submissions, the Applicant submits arguments on constitutional issues. However these issues have already been addressed and rejected by the Court – they should not be addressed again.

[37] With respect to the motion that was heard by this Court on May 14, 2014 and by which they tried to amend section 10 of the conditions, the Ministers rely on their memorandum filed on March 24, 2014. The following paragraphs are a summary of these claims.

[38] The Ministers are asking that paragraph 10(f) of his conditions of release be amended as follows:

> 10(f) Mr. Mahjoub shall permit any employee of the CBSA or any person designated by it to examine his modem and his computer, including the hard drive and the peripheral memory; and seize the computer, <u>modem</u>, and <u>any peripheral memory</u> devices for such examination, without notice. <u>Mr. Mahjoub shall provide any and all peripheral memory to the CBSA immediately upon request.</u>

(The underlining indicates the new additions.)

and that the following conditions of release be added:

> 10(i) Mr. Mahjoub shall not take any action that would circumvent the CBSA's examination of his computer. Such action, includes, but is not limited to use of encryption hardware or software, use of volatile memory, or access to any random access memory ["RAM"] drive software.
>
> 10(k) Mr. Mahjoub shall not access or use any form of program or online service which allows him or others to create, store or share files on the Internet. Such services include, but are not limited to, "Dropbox", "Google Drive", "Microsoft SkyDrive", and "iCloud".

[39] An amendment to paragraph 10(f) and the addition of paragraphs 10(i) and 10(k) to the conditions of release are being sought because on August 21, 2013, officers from the CBSA visited Mr. Mahjoub in order to collect his computer for examination pursuant to paragraph 10(f) of the conditions of release dated January 24, 2013 and a virtual machine of the computer was then created to enable the viewing of the computer content as if it were operating. As a result of this operation, it is the CBSA's opinion that Mr. Mahjoub "[...] has likely access to the drop box file hosting service." A Dropbox file cannot be accessed through a forensic examination (purpose of proposed paragraph 10(k)). Furthermore, the CBSA considers that another method to circumvent a forensic examination is the use of random access memory (RAM), another memory with the hard disk drive (H.D.D.), which dissolves the information when the computer is turned off. Therefore, the CBSA is seeking a condition to forbid such use (purpose of proposed paragraph 10(i)). Finally the proposed amendment to paragraph 10(f) of the conditions of release is to broaden the scope of access to the computer information and to specifically obligate Mr. Mahjoub to provide upon request all of the information such as peripheral memory and modem.

[40] The Ministers then submitted that amending paragraph 10(f) and adding the new proposed conditions is necessary because of Mr. Mahjoub's lack of cooperation with the CBSA, but also to ensure that he does not circumvent section 10 of his conditions of release by accessing without authorization websites, software or hardware which are difficult to monitor and by communicating with persons.

[41] The Ministers also suggest that these are not new conditions that would add to the already specified restrictions; they merely clarify and specify the already existing parameters of Mr. Mahjoub's internet and computer usage, which were already set out in my colleague Justice Blanchard's January 24, 2014 review of conditions order.

[42] Lastly, the Ministers seek to add a condition relating to the Applicant's residence:

> No other person may occupy Mr. Mahjoub's residence without notice to the Court.

[43] This provision is rendered necessary because the Applicant has received mail addressed to another individual, and he has failed to provide any explanation on the issue. The Ministers wish the Applicant be required to give notice prior to someone else occupying his residence.

IV. Analysis

[44] In order to make the proper determination in the present review of the conditions of release, it is the intention of this Court to proceed with its analysis by relying on the criteria established in *Harkat v Canada (Minister of Citizenship and Immigration)*, 2013 FC 795 at para

26, [2013] FCJ No 860, and in *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at paras 110-121, [2007] SCJ No 9, which are as follows:

A. Past decisions relating to the danger and the history of the procedures pertaining to reviews of detention, release from detention with conditions and the decisions made;

B. The Court's assessment of the danger to the security of Canada associated with the Applicant in light of all the evidence presented;

C. The decision, if any, on the reasonableness of the certificate;

D. The elements of trust and credibility related to the behaviour of the Applicant after having been released with conditions and his compliance with them;

E. The uncertain future as to the finality of the procedures;

F. The passage of time (in itself, not a deciding factor – see *Harkat v Canada (Minister of Citizenship and Immigration)*, 2007 FC 416, at para 9, [2007] FCJ No 540);

G. The impact of the conditions of release on the Applicant and his family and the proportionality between the danger posed by the Applicant and the conditions of release.

A. *Past decisions relating to the danger and the history of the procedures pertaining to reviews of detention, release from detention with conditions and the decisions made*

[45] As the certificate procedures were evolving, there have been numerous reviews of Mr. Mahjoub's detention prior to his release and, since his release under conditions, numerous reviews of these conditions. Mr. Mahjoub remained in detention from June 26, 2000 until April

11, 2007, when he was released with strict conditions. On March 17, 2009, as his wife and stepson decided to cancel their supervising sureties (an important condition of release), Mr. Mahjoub was once again put under detention until his release under conditions on March 11, 2010. Since then, there have been periodic reviews of his conditions of release.

[46] The consistent pattern has always been that Mr. Mahjoub was associated to a danger to the security of Canada and that, when he was released under conditions, this danger, although it diminished with time, when considering other factors, still required important conditions of release in order to be neutralized.

B. *The Court's assessment of the danger to the security of Canada associated with the Applicant in light of all the evidence presented*

[47] In *Mahjoub (Re)*, 2011 FC 506 at para 59, [2011] FCJ No 936, the danger associated to the Applicant was described as follows:

> […] The threat posed relates essentially to Mr. Mahjoub's alleged past activities and contacts with persons and organizations involved in international terrorism; and the concern that he espouses extremism and is likely to radicalize others and is prepared to resort to violence and direct others to violence if asked to do so by terrorist leaders. […]

[48] After holding hearings for the review of the Applicant's conditions of release from detention in October 2013 where both parties had the full opportunity to present their case, the Court found that although the level of danger was significantly diminished, there was still a

threat associated to Mr. Mahjoub which required to be neutralized by conditions. Thus, the Court in the December 17, 2013 review of conditions order concluded as follows, at para 6:

> I remain satisfied that Mr. Mahjoub poses a threat to the security of Canada as described in my Reasons for Order dated January 7, 2013. I would consider the significantly diminished threat described at that time to be unchanged.

[49] This finding shows that the assessment of the threat associated to the Applicant by the Court was made in January 2013 and confirmed again in December 2013, and that although this threat diminished significantly, it remained important enough to require conditions to be neutralized. A little over six months has passed since the last review of conditions and, as such, the question to be asked is what has changed since that time that could justify maintaining the conditions of release or, as the Applicant seeks, cancelling the most important conditions.

[50] The Ministers are relying on a non-updated threat assessment dated November 2, 2011. In addition, it is argued that the security certificate was found to be valid, that Mr. Mahjoub's behaviour and lack of candour with the supervising agency of the conditions of release, i.e. the CBSA, and the lack of evidence of a change in his ideology all render the then-determined danger unchanged, and that the conditions of release should, too, remain unchanged. They submit that the above-mentioned elements are sufficient to meet their burden.

[51] The Applicant considers that the threat assessment is outdated, that there is no danger of which to speak, that he has complied with his conditions of release, and that the medical and

other evidence shows that the existing conditions of release are not in proportion with the danger supposedly associated to him.

[52] As it will be seen, this Court considers that the Court's January 2013 finding regarding the danger level associated with the Applicant, confirmed by the December 17, 2013 review of conditions order, at para 6, remains valid. In addition, the Reasonableness Decision was based on solid findings of fact and concluded that the certificate was reasonable. Furthermore, Mr. Mahjoub's behaviour in relation to his conditions of release, the supervision of them by the CBSA, and his general attitude were not such as to indicate to this Court that the danger level found to be associated to him in January 2013 should be changed.

[53] As a side note, I wish to respond to the Applicant's argument that the Court, when it issued its December 17, 2013 review of conditions order, committed a breach to the duty of fairness by not informing the Applicant of its findings of fact in the Reasonableness Decision. This Court finds no legal basis to such an argument. The Reasonableness Decision was issued publicly on December 6, 2013, a little more than six weeks after the hearing for the review of conditions (held on October 16, 2013) where both parties were invited to fully present their case. The decision on this matter was under reserve up until the time of issuance, specifically December 17, 2013, a little less than two weeks after the Reasonableness Decision was made public. To pretend that Mr. Mahjoub did not have an opportunity to address the impact of the Reasonableness Decision's findings on the review of conditions is unfounded. He had the opportunity to present his case in October 2013: he became knowledgeable of the Reasonableness Decision's findings in early December 2013 and despite having had more than

ten (10) days to do so, at no time did he make a request to the Court to address this matter. In any event, it was known to all that at the time of the hearing on the review of conditions of release that the Reasonableness Decision was under reserve since the last *ex parte in camera* hearing of January 27, 2013.

C. *The decision, if any, on the reasonableness of the certificate*

[54] When considering the Applicant's record as well as his written and oral submissions, the resulting impression is that Mr. Mahjoub is minimizing the key findings made in the Reasonableness Decision. It is true that some allegations made by the Ministers were not found to be factually founded, but the findings actually made are important not only in substance but also for their legal impact on the tests required to conclude that the certificate is reasonable. Here are some of them:

> [627] Upon considering the evidence holistically, and on the basis of substantiated and reasonable inferences, I find that the Ministers have established reasonable grounds to believe that Mr. Mahjoub is a member of the AJ and its splinter or subtest group, the VOC.
>
> [628] In so determining I rely on my findings set out above which include:
>
> > that the AJ and VOC existed as terrorist organizations at the relevant times;
> >
> > Mr. Mahjoub had contact in Canada and abroad with AJ and VOC terrorists;
> >
> > Mr. Mahjoub used aliases to conceal his terrorist contacts;
> >
> > Mr. Mahjoub was dishonest with Canadian authorities to conceal his terrorist contacts;

> Mr. Mahjoub worked in a top executive position in a Ben Laden enterprise alongside terrorists in Sudan at a time when key terrorist leaders were in Sundan;
>
> Mr. Mahjoub was dishonest in concealing from Canadian authorities the nature of his position at Damazine Farm;
>
> Mr. Mahjoub traveled to and from Sudan at the same time as AJ and Al Qaeda elements, and
>
> [Some of the direct evidence] that Mr. Mahjoub was a member of the AJ and Mr. Mahjoub's intercepted conversations support the Ministers' allegation.

[629] In my determination, I have also relied upon the following inferences relating to Mr. Mahjoub's travels and activities. These include:

> Mr. Mahjoub's contacts were of a terrorist nature;
>
> Mr. Mahjoub had a close and long-lasting relationship with a number of his terrorist contacts;
>
> Mr. Mahjoub was trusted by Mr. Bin Laden on the basis of his ties to the Islamic extremist community;
>
> Mr. Mahjoub was aware of and complicit in Al Qaeda weapons training occurring at Damazine Farm, and
>
> Mr. Mahjoub's travels to and from Sudan at the same time as AJ elements were not coincidental.

[669] I find that these facts establish reasonable grounds to believe that prior to his arrest, as a member of the AJ and its splinter or subtest group the VOC, Mr. Mahjoub was a danger to the security of Canada.

[Reasonableness Decision, above]

[55] Such findings were determinative for the conclusion that the certificate issued by the Ministers was reasonable, and they cannot be qualified as being not that important or relatively not important when considering all the allegations made. They are substantive findings which go to the essence of what terrorism is all about and how it can be articulated worldwide but also in Canada. The determination regarding the danger must also be read as being important since it concludes that prior to his arrest, Mr. Mahjoub was found to be a danger to the security of Canada. This finding related to the danger is to be read with the most recent assessment made as of December 2013 where this danger was found to be significantly less important but still existing and requiring conditions of release to be neutralized. At the time of his arrest in 2000, it was decided that the danger was such that it required the detention of Mr. Mahjoub for a little less than seven years and again later in 2009 for close to one year.

[56] During the period spent released from detention, the conditions evolved: they were strict and restrictive at first and, as the circumstances called for it, they became less strict and restrictive, and as of December 2013, they became significantly less so. Having noted that, the danger associated to Mr. Mahjoub remains and the conditions of release must be enacted to neutralize it as it will be seen in the following paragraphs.

D. *The elements of trust and credibility related to the behaviour of the Applicant after having being released with conditions and his compliance with them*

[57] The behaviour of an individual with respect to the conditions of his release is an important factor to consider when considering amending them or some of them. In *Harkat (Re)*, 2009 FC 241 at para 92, [2009] FCJ No 316, the Court had this to say on this factor:

> **[92]** Credibility and trust are essential considerations in any judicial review of the appropriateness of conditions. When considering whether conditions will neutralize danger, the Court must consider the efficacy of the conditions. The credibility of and the trust the Court has in a person who is the subject of the conditions will likely govern what type of conditions are necessary.

[58] Mr. Mahjoub's record regarding his most recent conditions of release has not been exemplary, as noted by the Court in its December 17, 2013 review of conditions order, when it concluded that Mr. Mahjoub had breached his condition of release by not giving proper notice of the acquisition and use of the telephone and fax services. It was found that: "[…] Mr. Mahjoub cannot be relied upon to respect his conditions of release." (December 17, 2013 review of conditions order at para 18).

[59] In that same decision, again as recently as December 2013, the Court also found that in relation to the cutting of the GPS bracelet and not permitting the CBSA to remove the bracelet without being damaged, Mr. Mahjoub's actions were: "[…] indicative of an unwillingness to cooperate with the CBSA." (see para. 17)

[60] Mr. Mahjoub's recent attitude, action and behaviour are also indicative of an unwillingness to collaborate and cooperate with the supervision duty of the CBSA that the Court has imposed. Here are a few examples of this:

A. January 2014 – Mr. Mahjoub, although obligated to do so by section 7 of his conditions of release, did not give correct information to the CBSA concerning his travel from Toronto to Ottawa. Through counsel, the Applicant gave the wrong departure time which

prevented the CBSA from assuming its supervisory role. The reasons given to explain this failure, to the effect that it was the error of counsel and that the CBSA should have informed Mr. Mahjoub of the discrepancy, are not accepted. Mr. Mahjoub was required by section 7 of his conditions of release to give accurate information when traveling, and it is not for the CBSA to compensate for a lack of accuracy. Still, because of that blatant failure by Mr. Mahjoub to provide accurate factual information, the CBSA was rendered unable to assume its supervisory role as the Court so required. This is another indication showing a lack of collaboration and cooperation on his part.

B. Mr. Mahjoub has failed to provide the Startec toll records as requested by the CBSA pursuant to paragraph 11(b) of the conditions of release for the period of use between January 31, 2014 and February 21, 2014, and he has yet to do so. This matter was submitted to the Court sometime in late spring 2014. Paragraph 11(b) of the conditions of release is clear: Mr. Mahjoub has the obligation to supply the Startec toll records for this three-week period. Again, this is another example of Mr. Mahjoub's lack of collaboration and cooperation. As for the Startec toll records for the year 2013, pursuant to paragraph 11(a) of the January 31, 2013 conditions of release, even though being asked to consent, Mr. Mahjoub still has not given consent. The reason he gives is that the CBSA should not gain retroactive access to these toll records. Furthermore, the Applicant has not given notice that he was using Startec as required by that condition of release. He argues that the CBSA knew of this account and should have asked them earlier. This argument does not relieve Mr. Mahjoub of his obligation to consent to the release of these toll records as required by the Court pursuant to paragraph 11(a) of his conditions of release. Again, this is not an attitude that shows collaboration and cooperation as the conditions of release so

require. By acting in such a way again, Mr. Mahjoub decides that the CBSA will not assume its supervisory role as requested by the Court.

C. Pursuant to paragraph 10(f) of the 2014 conditions of release, Mr. Mahjoub must give full access to his computer to the CBSA without notice, which includes the hard drive and the peripheral memory, and the CBSA may seize the computer for such purpose. On April 24, 2014, when requested by the CBSA, Mr. Mahjoub did not give the immediate access. He had the CBSA representative wait at the door and, as he went back to his computer, he appeared to be seen for a period of two minutes to be doing something to his computer. The condition compels Mr. Mahjoub to give access and control to the CBSA without notice. He did not. He also objected to the taking of photographs by the CBSA, when the purpose of the picture is to wire the computer in the same way when it is brought back and to document any damage on the computer. This is standard procedure for the CBSA and an understandable policy to be followed. In addition, Mr. Mahjoub refused to provide any USB devices for inspection as required by paragraph 10(f) of his conditions of release which stipulates not only the examination of the computer but also all peripheral memory devices. This is very close to a breach of the condition if not a breach. Finally on this matter, Mr. Mahjoub objected to giving his password to access his computer. This Court wrote Reasons for Order and Order obligating Mr. Mahjoub to do so (see *Mahjoub (Re)*, 2014 FC 479 and more specifically paragraph 21). To this Court, it was evident that the password had to be given for the purpose of examining the computer. What was evident to this Court, however, was not to Mr. Mahjoub. This type of attitude can only show a lack of collaboration and cooperation, and not only is this is not helpful to Mr. Mahjoub's interest, but it also complicates and possibly makes it impossible for

the CBSA to assume its supervisory role as the Court requires in the *Conditions of Release* of both 2013 and 2014.

[61] Mr. Mahjoub explains that his attitude is intended to ensure that his conditions of release are limited to what they are and that his privacy is respected. These are, to some degree, valid grounds, but they must not be used to the point of taking the essence of the conditions of release away from their purposes and preventing the supervision of the use of communication devices, computers and other modes of transmission of data, information and images. Without proper supervision by the CBSA, conditions of release become useless.

[62] Through his behaviour, Mr. Mahjoub may give to a neutral observer of this situation an impression that he has something to hide. This is not only hurtful to the condition of release but it also impacts negatively on Mr. Mahjoub, should his intention be to eventually have the least conditions of release possible imposed on him. The trust and credibility components related to the behaviour of the Applicant when dealing with conditions of release are factors to be considered. It is in the interest of Mr. Mahjoub that he collaborates and cooperates in making sure that the conditions of release are complied with and that the supervisory role of the CBSA confirms the compliance.

E. *The uncertain future of the finality of the procedures*

[63] As long as there are robust, periodic reviews of detention or of conditions of release, long periods of detention or of release with conditions that impact on the life and rights of an

individual do not constitute violations of the *Charter* (see *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 123, [2007] SCJ No 9).

[64] The Court has rendered the Reasonableness Decision as well as other decisions concerning the Applicant, including on the abuse of process and a permanent stay of the proceedings. The procedures have now been moved in good part to the appeal level, and the Federal Court of Appeal will be dealing eventually with any issues arising from the Notice of Appeal or from the appeal itself. The Applicant is benefiting from the appeal procedure and time has to be reserved for such process.

[65] There have been and continues to be ongoing reviews of the conditions of release of Mr. Mahjoub. Reviews of the conditions of release were held and decisions were rendered in January 2013, December 2013 and January 2014 and in the summer 2014 (the current decision). Over a period of a little more than 18 months, Mr. Mahjoub has had three hearings dealing with reviews of the conditions of release and three decisions.

[66] Undertaking robust reviews of the conditions of release from detention does not necessarily mean granting Mr. Mahjoub what he wants. It requires a careful examination of the conditions of release and their necessity, i.e. ensuring not only that they are required to neutralize the assessed danger but that they impact minimally on the rights and freedom of the Applicant. In order to go along with less invasive conditions, it must be shown (1) that the danger has diminished and (2) that the conditions neutralize the lessened danger. In this regard, the Applicant has a strong interest in collaborating and cooperating so that the supervision of the

conditions shows that they are respected. With such evidence, then it can be argued that the conditions are not necessary. This is what a robust review is all about.

F. *The passage of time*

[67] These procedures are lengthy, complex and subject to numerous legal issues and challenges. The fact that they are long and complex does not in itself support less strict conditions of release. The passage of time has to be considered along with other factors. In the present circumstances, the proceedings began in 2000 with the first certificate, and thereafter with the second certificate issued and which was found reasonable in October 2013. There will now be a time period for the appeal process and, most likely, other periods for other reasons.

[68] On a more specific point, as shown earlier, in the previous section, there have been three reviews of the conditions of release.

[69] On this factor, the passage of time does not justify abolishing or amending the conditions of release as suggested.

G. *The impact of the conditions of release on the Applicant and his family, and the proportionality between the danger posed by the Applicant and the conditions of release*

[70] I do not have any hesitation in saying that the conditions of release do somewhat impact the psychological health of the Applicant. In fact, the Court has recognized this in *Mahjoub (Re)*, 2013 FC 10 at para 38, [2013] FCJ No 77.

[71] To a certain extent, Dr. Payne's opinion on this matter reflects this Court's point of view. Having said that, I have noted that a similar yet adapted opinion was filed for the purposes of the late 2012 and early 2013 review of the conditions of release. In the December 17, 2013 review of conditions order, at para 11, the Court considered that the conditions of release as analyzed by Dr. Payne were essentially the ones as perceived by Mr. Mahjoub. The Court also noted that certain facts used were not in the record and that some circumstances were not described accurately. The Court concluded that such weaknesses gave little weight to the impact of the changes in the conditions of release.

[72] I also afford little weight to Dr. Payne's opinion report for the same reasons. Mr. Mahjoub can communicate with his family pursuant to the conditions of release. The fact that he cannot communicate with his ex-wife and children is the result of two distinct orders (the no-contact order and a peace bond) issued by the Ontario Court of Justice and not a result of his ordered conditions of release from detention. This was not mentioned in Dr. Payne's opinion. Furthermore, it is erroneous to say in the report that the conditions of release require Mr. Mahjoub to obtain the CBSA's approval for a change of residence. Section 24 of his conditions of release requires a prior notice of a change of residence to the CBSA, not an approval. It is also misleading to say in the doctor's report that Mr. Mahjoub cannot use a cell phone except on the conditions imposed by the CBSA. Firstly, it is not factually accurate to write that the CBSA imposes conditions of release when it is the Court that imposes them. Secondly, Mr. Mahjoub had without giving proper notice used a cell phone for a period of three weeks in the early part of the present year. The real reason why Mr. Mahjoub is not able to use a cell phone is his own reluctance to provide consent to the release of toll records. Such was not reflected in Dr. Payne's

report. Finally, it is telling that Dr. Payne's report mentions that at an earlier time Mr. Mahjoub had a respected job as the deputy general manager of an agricultural business without giving any indication of the Reasonableness Decision's findings on this particular matter. This decision concludes that there was terrorists' training on the farm while Mr. Mahjoub was a key manager and a trusted collaborator of Bin Laden, that he was aware of such training because of his executive job, and that he was complicit in the terrorist training. This reality was not mentioned. For all of these inaccuracies, errors and one-sided views, I find that Dr. Payne's report is of limited use when he comments and assesses the impact of the recent conditions of release on Mr. Mahjoub.

[73] Again, the Applicant filed the same report of Professor Leman-Langlois that was used in previous reviews of the conditions of release. In *Mahjoub (Re)*, 2013 FC 1257 at paras 9 and 10, the Court concluded that the opinion on the threat posed by the Applicant was of little assistance and thus given little weight. It also found that the part dealing with the methodology of the SIR was useful. However, while this part was somewhat useful for the Reasonableness Decision, it is of no use for the purposes of this review of conditions of release. Therefore, I give it little weight.

[74] I also reviewed carefully Mr. Mahjoub's affidavit. I have found that it contains large portions on legal arguments and gives opinions on numerous issues that are the subject matters of the determinations and findings to be made by this Court. I have not read any undertaking on his part to respect and abide with the conditions of release and to collaborate and cooperate with the CBSA in ensuring its supervisory role as requested by the Court. Such an undertaking may

have been useful. Although I do understand that Mr. Mahjoub is entitled to his own opinion, this Court must also consider all of the evidence including the findings of the Court in the Reasonableness Decision on the credibility of Mr. Mahjoub such as: "[…] omissions and lies by Mr. Mahjoub are crafted and designed to consistently conceal any facts that could connect Mr. Mahjoub to known terrorists, terrorist activities or known terrorist related enterprises such as Althemar." (See Reasonableness Decision at paras 619-620.)

[75] As for the proportionately between the assessed danger, which I found to be similar to the one determined in the December 17, 2013 review of conditions order, at para 6, and the conditions of release issued in the January 24, 2014 review of conditions order, I find them to be required and proportional to the danger identified for the same reasons as the Court so decided in the previous reviews of the Court, subject to the following comments.

[76] It is clear that the Court in the January 2013 review of conditions order, at para 47 wanted to "[…] prevent Mr. Mahjoub from acquiring or reacquiring terrorist contacts to ensure that Mr. Mahjoub does not re-acquire terrorist contacts. Mr. Mahjoub's communications shall be restricted." This objective remains valid and I have not found any evidence that would trigger a different conclusion.

[77] That being said, a brief review of the conditions of release of January 2014, which shall remain in existence subject to added supervisory clarification, are directed at ensuring that Mr. Mahjoub will not communicate with terrorist contacts. Such is the case with the in-person communications and activities (sections 6 to 9 of the conditions), obtaining telephone tolls

(section 11 of the conditions), restriction on internet use (section 10 of the conditions), use of Skype (see Order dated July 17, 2013), examination of the computer (paragraph 10(f) of the conditions), interception of mail (section 13 of the conditions), keeping peace and good behaviour (section 23 of the conditions), performance bonds (sections 2 and 3 of the conditions). All of these conditions are still required as they are directly related and proportional to the danger as it was assessed. It goes without saying that most of these conditions require supervision by the CBSA, and that if this role cannot be properly articulated the Court will not be able to consider lessening the conditions of release.

[78] The communication over the internet will only be considered by the Court if the parties can agree on modes of satisfactory supervision. The parties are invited to discuss the subject matter and if the Court can be of some help, it shall gladly get involved as long as the parties are serious about it and have shown significant progress. The CBSA is invited to have an open mind about this.

[79] For the sake of clarification and as a follow-up to the Minister's motion to amend condition 10 of the conditions of release which was only granted in part subject to the present review of conditions, it is the opinion of this Court that the supervision of the communications via the computer must include Mr. Mahjoub's modem/router. This will permit a better supervision by the CBSA and show that Mr. Mahjoub complies with the conditions of release. Finally on this, any use of the computer must be subject to supervision. If a program does not permit supervision, it must not be used by Mr. Mahjoub.

[80] Furthermore, the Ministers requested that Mr. Mahjoub gives a notice of the names of other persons that may occupy his residence. At this time, this Court does not want to impose such an obligation, but if in the future it becomes an issue complicating any of the conditions of release, it may have to be reviewed.

[81] In his submissions, at paragraphs 147-153, Mr. Mahjoub raised simply and without any well-thought or developed arguments, a number of arguments concerning his constitutional rights. Trying to verse criminal law into immigration certificate law is inappropriate considering that Parliament has codified the certificate procedure and that specific jurisprudence is developing on this particular subject matter. This Court considers that the certificate procedure is constitutional as it has been found to be so by the Supreme Court recently in *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] SCJ No 37.

[82] As a last word to the CBSA, it is your duty and obligation to supervise the conditions of release as the Court so requires. Having said that, I offer this suggestion: please assume your duty and obligations without creating a spectacle and drawing the attention of the neighbourhood on your activities and, by way of consequence, on Mr. Mahjoub. This Court understands that it is not an easy job, but with your professional input and delicateness, you should succeed in the interests of justice but also in the interest of Mr. Mahjoub. It goes without saying that the cooperation of Mr. Mahjoub would be of assistance in this regard.

[83] Lastly, the Applicant submitted the following questions for certification pursuant to section 79 of the IRPA:

- May conditions be constitutionally or lawfully imposed on a person when a declaratory order was also issued finding that the right to a fair process was violated in the same process underlying the certificate or the inadmissibility? Or does the imposition of conditions in such circumstances violate section 7 of the *Charter*?

- Can the Ministers establish a *prima facie* case or justify the imposition of conditions by its reliance on previous inadmissibility or release conditions orders when such orders were rendered after the violation of the right to a fair process as recognized by declaratory judgment?

- Does a declaratory order concluding that the right to a fair process was violated in the same process underlying the certificate or inadmissibility constitute a clear and compelling reason to depart from previous decisions to impose conditions?

- In presence of a declaratory judgment that the right to a fair process was violated in the process underlying the certificate and/or inadmissibility ruling, must the judge grant a remedy to abolish the conditions under the law or under section 24 of the *Charter*?

[84] The Ministers object to the certification of any of the Questions (see letter dated July 18, 2014). I agree.

[85] These questions are not certifiable for the following reasons:

- Counsel for Mr. Mahjoub did not substantially present arguments relating to the findings made by Justice Blanchard concerning the violation to the right to a fair process in Mahjoub (Re) (DES-7-08 (October 25, 2013)); see also submissions of the Applicant on the necessity of protecting constitutional rights at paras 147-156). It was briefly referred to in the oral submissions but no more than that;

- The wording of the questions are such that they are asking this Court to sit on appeal of a decision of Justice Blanchard (referred to above), which is not the role of a judge dealing with reviews of conditions;

- The reviews of conditions are not final since they can be revised periodically at the request of the parties. As noted earlier, there have been three reviews of conditions in the past 18 months.

ORDER

THIS COURT ORDERS that:

1. The conditions of release of January 24, 2014 remain, subject to the amendments already made concerning passwords, but also with the amendments to be made which shall reflect the present reasons.

2. The parties are invited to jointly and/or separately prepare a draft Order providing for the implementation of the above reasons for the Court's consideration within 30 days of the date of this Order.

3. No question will be certified.

"Simon Noel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-7-08
STYLE OF CAUSE:	**IN THE MATTER OF** a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act* ["IRPA"]; **AND IN THE MATTER OF** the referral of a certificate to the Federal Court of Canada pursuant to subsection 77(1) of the IRPA; **AND IN THE MATTER OF** the conditions of release of Mohamed Zeki MAHJOUB ["Mr. Mahjoub"]
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 8, 2014
ORDER AND REASONS:	NOËL S J.
DATED:	JULY 18, 2014

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