

Date: 20090122

Docket: DES-5-08

Citation: 2009 FC 59

Ottawa, Ontario, January 22, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

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 a request of the Special Advocates to communicate with other Special Advocates pursuant to paragraph 83(1)(b) of *IRPA*;

AND IN THE MATTER OF Mohamed HARKAT

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Cavalluzzo and Mr. Copeland were appointed on June 4, 2008 to act as special advocates for Mr. Harkat in this proceeding (hereinafter “the special advocates”).

[2] Mr. Copeland has also been appointed to act as special advocate in Federal Court file DES-3-08 and Mr. Cavalluzzo is a special advocate in Federal Court file DES-6-08. Other special advocates have also been appointed as special advocates in two distinct files.

[3] On November 6, 2008, the special advocates in this proceeding sought judicial authorization to communicate with special advocates appointed in other certificate proceedings "... concerning the Orders that should be issued in IRPA proceedings where special advocates are appointed" (see written request by the special advocates for leave pursuant to subsection 85.4(2) of the *Immigration and Refugee Protection Act* ("IRPA") dated November 6, 2008 at paragraph 3).

[4] The request to communicate was amended on November 27, 2008, and is now limited to issues common to all five certificate proceedings such as "... questions of jurisdiction, procedure, and substantive law which will lead to orders issued by each designated judge." (See special advocates response dated November 27, 2008). Argument was heard in public on December 16, 2008 and further documentation was filed on December 17 and 22, 2008.

[5] The special advocates refer to my Order dated September 24, 2008 defining the scope of disclosure to the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 ("*Charkaoui #2*"), the interpretation to be given to the judicial obligation to "verify" the material disclosed as prescribed in paragraph 62 of *Charkaoui #2*, and discussions concerning the most appropriate procedures to be followed in light of the new expanded disclosure as examples of common issues that could be usefully discussed by all special advocates.

[6] In their submissions, the special advocates stated that they are “confident” that no inadvertent disclosure of confidential information will occur if they are authorized to communicate with the special advocates appointed in other proceedings. They asserted that even if inadvertent disclosure occurred, the harm to national security would be mitigated by the fact that the other special advocates are top-secret cleared and bound by an oath of secrecy.

[7] The special advocates submit that one of the goals of the amendments made to IRPA by Parliament in Bill C-3 was to put the special advocates in the same position as counsel for the Ministers, that is, provide for an equality of arms in the closed portion of security certificate proceedings. They point to section 85(3) as indicative of this intent. It is therefore asserted that special advocates should be authorized to discuss common issues since it is believed that ministerial counsel have that ability. No evidence was adduced on this point.

[8] The Ministers oppose the request on the grounds that the authorization sought is overly vague and seeks to displace the designated judge’s role to authorize specific communication requests by special advocates appointed in a proceeding (see section 85.4(2) IRPA). The order sought, according to the Ministers, goes against the intent of the legislation which is to prevent the inadvertent disclosure of confidential information by constant judicial supervision. They assert that the order sought is a blanket order for which there is no supporting legislative provision or evidence.

[9] During the hearing of this motion, the Court requested written submissions on the issue of whether a designated judge could authorize communication between special advocates in more than one proceeding. In their written submissions, counsel for the Ministers and the special advocates agreed that an order allowing the special advocates in this proceeding to communicate with special advocates appointed in other proceedings could neither authorize special advocates in other proceedings to reciprocate, or bind judges designated in other security certificate proceedings to issue similar orders. The jurisdiction of a designated judge is limited to authorizations sought by the special advocates appointed by that judge in the context of a specific proceeding. Such an order may spur other special advocates to make similar requests to the designated judges in each proceeding.

[10] There are three issues raised by this request:

1. Is the requested authorization within the scope of the discretion given to a designated judge in section 85.4(2) IRPA?
2. Is the request for authorization to communicate before the Court overly broad or vague?
3. What conditions, if any, are appropriate if such a communication were to be authorized?

The relevant provisions of IRPA

[11] The relevant IRPA provisions read as follows:

<p>83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:</p> <p>[...]</p> <p>(d) the judge <u>shall ensure the confidentiality</u> of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;</p> <p>[...]</p>	<p>83. (1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :</p> <p>[...]</p> <p>d) il lui incombe <u>de garantir</u> la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;</p> <p>[...]</p>
<p>85.1 (1) A special advocate's <u>role is to protect the interests of the permanent resident or foreign national</u> in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.</p>	<p>85.1 (1) L'avocat spécial a <u>pour rôle de défendre les intérêts du résident permanent ou de l'étranger</u> lors de toute audience tenue à huis clos et en l'absence de celui-ci et de son conseil dans le cadre de toute instance visée à l'un des articles 78 et 82 à 82.2.</p>
<p>85.2 A special advocate <u>may</u> :</p> <p>[...]</p> <p>(c) exercise, <u>with the judge's authorization</u>, any other powers that are necessary to protect the interests of the permanent resident or foreign national.</p>	<p>85.2 L'avocat spécial <u>peut</u>:</p> <p>[...]</p> <p>c) exercer, <u>avec l'autorisation du juge</u>, tout autre pouvoir nécessaire à la défense des intérêts du résident permanent ou de l'étranger.</p>
<p>85.4</p> <p>[...]</p> <p>(2) After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding <u>only with the judge's authorization and subject to any conditions that the judge considers appropriate</u>.</p> <p>(3) If the special advocate is authorized to communicate with a person, the judge may prohibit that person from communicating with anyone else about the proceeding during the remainder of the proceeding or <u>may impose conditions</u> with respect to such a communication during that period.</p>	<p>85.4</p> <p>[...]</p> <p>(2) Entre le moment où il reçoit les renseignements et autres éléments de preuve et la fin de l'instance, l'avocat spécial ne peut communiquer avec qui que ce soit au sujet de l'instance <u>si ce n'est avec l'autorisation du juge et aux conditions que celui-ci estime indiquées</u>.</p> <p>(3) Dans le cas où l'avocat spécial est autorisé à communiquer avec une personne, le juge peut interdire à cette dernière de communiquer avec qui que ce soit d'autre au sujet de l'instance, et ce jusqu'à la fin de celle-ci, <u>ou assujettir à des conditions</u> toute communication de cette personne à ce sujet, jusqu'à la fin de l'instance.</p>
<p>85.5 With the <u>exception of communications authorized by a judge</u>, no person shall:</p>	<p>85.5 Sauf à l'égard des communications autorisées par <u>tout juge</u>, il est interdit à quiconque:</p>

<p>(a) disclose information or other evidence that is disclosed to them under section 85.4 and that is treated as confidential by the judge presiding at the proceeding; or</p> <p>(b) communicate with another person about the content of any part of a proceeding under any of sections 78 and 82 to 82.2 that is heard in the absence of the public and of the permanent resident or foreign national and their counsel.</p>	<p>a) de divulguer des renseignements et autres éléments de preuve qui lui sont communiqués au titre de l'article 85.4 et dont la confidentialité est garantie par le juge présidant l'instance;</p> <p>b) de communiquer avec toute personne relativement au contenu de tout ou partie d'une audience tenue à huis clos et en l'absence de l'intéressé et de son conseil dans le cadre d'une instance visée à l'un des articles 78 et 82 à 82.2.</p>
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(Emphasis added)

1. Is the requested authorization within the scope of the discretion given to a designated judge in section 85.4(2) IRPA?

[12] Pursuant to paragraph 83(1)(d) of IRPA, the designated judge bears the responsibility of ensuring the confidentiality of information and other evidence provided by the Minister if, in the opinion of the judge, its disclosure would be injurious to national security or endanger the safety of an individual. As noted by Chief Justice McLachlin in *Charkaoui v. Canada (Citizenship and Immigration)* 2007 SCC 9 (*Charkaoui #1*) at paragraph 55 “[c]onfidentiality is a constant preoccupation of the certificate scheme.” At paragraph 58, the Court notes that the preoccupation with confidentiality can be justified where information relates to national security. The Chief Justice concluded that “...the protection of Canada’s national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective” at paragraph 68 of *Charkaoui #1*. While these comments and references to IRPA were made before the coming into force of the amendments to IRPA, in Bill C-3, the wording of s. 83(1)(d) is identical to former s. 78(b).

[13] At the same time, in *Charkaoui #1*, the Supreme Court found that even though a special counsel would not be able to communicate the confidential information to a person named in a security certificate, the section 7 interests of a person named in a certificate would be better protected by the appointment of a security cleared counsel who would represent the interests of the named person in the closed portion of the proceedings (*Charkaoui #1* at para. 86).

[14] The role of special advocate was described by the Chief Justice of the Federal Court in *Re Almrei*, 2008 FC 1216, paragraph 51:

The special advocate protects the interest of the named person in private hearings. The special advocate challenges the Minister's claim of confidentiality and the reliability of the confidential information. The special advocate makes oral and written submissions concerning confidential information and may cross-examine witnesses during private hearings. Finally, the special advocate may, with the judge authorization, "exercise ... any other powers that are necessary to protect the interests of the [named person]."

[15] Section 85.4(2) prohibits a special advocate from communicating with anyone about the proceeding, for the duration of the proceeding, once he or she has received a copy of the confidential information. If a special advocate wishes to make any communication he or she must seek judicial authorization.¹ In granting the authorization, the designated judge may impose any conditions deemed appropriate.

¹ The prohibition does not extend to communications involving individuals who participate in the closed hearing: *Re Almrei* paragraphs 87 and 88.

[16] As highlighted by Chief Justice Lutfy, in his reasons for judgment in *Re Almrei* at paragraph 78, these restrictions must be interpreted in a way which limits the possibility of inadvertent disclosure:

Mr. Almrei and the interveners concede that the protection of confidential information is a legitimate governmental objective. The broad limitations found in the impugned provisions must, therefore, be interpreted by courts keeping in mind the risks of disclosure, particularly inadvertent disclosure, of confidential information, while avoiding absurd consequences.

[17] The legislation also requires that the Minister of Justice provide adequate administrative support and resources to the special advocates (s. 85(3) IRPA). This provision may indicate intent on the part of Parliament to ensure that special advocates are, wherever possible, put in the same position as counsel for the Ministers.

[18] Finally, the referral of five certificates to the Federal Court on February 22, 2008, in conjunction with the coming into force of the amendments made in Bill C-3 requiring the appointment of special advocates in each file, has resulted in an unprecedented situation.

[19] It is in this context that the scope of section 85.4(2) must be interpreted.

[20] The special advocates are requesting authorization to communicate with the special advocates appointed in other cases. They wish to discuss issues common to all security certificate proceedings, such as questions of jurisdiction, procedure, and substantive law relating to orders that have been rendered or could lead to orders being sought. They have undertaken not to discuss the factual matrix in any of the underlying proceedings.

[21] Such an authorization would assist in the expeditious, informal and fair disposition of these certificate proceedings. By giving special advocates the same opportunity to discuss common issues and strategies that is accorded counsel for the Ministers² the Court may be forestalling the unnecessary duplication of motions and requests in the five proceedings. It will also prevent a constant proliferation of motions to communicate which will have to be brought before each judge in each proceeding every time the special advocates wish to discuss a particular issue or order. Judicial economy and the legislative imperative to move forward expeditiously argues for an expansive interpretation of the Court's discretion to authorized communication found in s. 85.4(2) IRPA.

[22] Indeed, nothing on the face of the legislation requires that a judicial authorization to communicate pursuant to section 85.4(2) be tied to a specific, one time, communication. The judge may authorize the special advocate to communicate "with" another person and not simply "to" another person. Communication "with" another person includes an exchange of communications and contemplates the possibility of an on-going communication. Thus, the judge has a broad discretion to authorize communication subject to his or her overriding obligation to ensure that confidential information in a particular proceeding is not disclosed to any person where such disclosure would be injurious.

² In this proceeding, there are some clear indications (such as time required to consult before responding to an issue, the need for meetings etc.) that counsel for the Ministers do discuss issues common to the different security certificate proceedings. Indeed, in submissions counsel for the Ministers acknowledged that they meet and discuss common issues.

2. Is the requested authorization for communication overly broad or vague?

[23] The Ministers assert that the request of the special advocates is overly broad or vague. The special advocates, however, have limited their request to common issues related to questions of jurisdiction, procedure, and substantive law which may have been the subject of orders or could lead to new orders being sought or issued. The special advocates have also undertaken not to discuss the factual basis of this security certificate proceeding in the course of their discussions with other special advocates.

[24] The request is not so vague that it is impossible to determine what can be discussed. A person with legal training, who has qualified to be a special advocate, has the knowledge necessary to determine the meaning of “common issues and questions of jurisdiction, procedure, and substantive law”. He or she is also capable of distinguishing legal from factual issues although whenever there is doubt the guidance of the Court should be sought.

[25] I have therefore come to the conclusion that the request made by the special advocates in this proceeding, to communicate to other special advocates appointed in certificate proceedings pending before the Federal Court, about common issues related to questions of jurisdiction, procedure, and substantive law which may have been the subject of orders or could lead to new orders being sought should be granted.

3. What measures must be taken to protect the confidentiality of the information?

[26] The Court has a legal obligation to protect the confidential information and prevent disclosure which would be injurious. This authorization is not an endorsement of the assertion made by the special advocates that if inadvertent disclosure occurs amongst special advocates the injury done to national security would be mitigated by their security clearances. Such an assertion ignores the “need to know” principle and cannot be accepted. However, in the context of this motion, the Ministers concern about the risk of inadvertent disclosure is less persuasive since Mr. Copeland and Mr. Cavalluzzo are appointed to act as special advocates in two other proceedings. Between them, the special advocates in this proceeding, who speak together regularly, have knowledge of the facts and procedure in three of the five certificate proceedings. These special advocates overlap with two other special advocates, Mr. Cameron and Mr. Norris, who in turn overlap with a fifth special advocate Mr. Kapoor. By not objecting to the appointment of overlapping special advocates in four of the five files, the Ministers have reduced the force of their argument on the risk of inadvertent disclosure.

[27] However, even a small risk of inadvertent disclosure must be of concern to the Court. Such disclosure should not occur and all measures to prevent it should be taken by the Court and the special advocates. Consequently, the order authorizing the special advocates in this proceeding to communicate with special advocates in other proceedings will impose the following conditions.

[28] The special advocates are not authorized to disclose any confidential factual information that is the subject of closed hearings. Even discussions of litigation strategy or public orders may give rise to concerns of inadvertent disclosure; for example, the order rendered September 24, 2008, in this proceeding concerning the scope of the disclosure to be made as a consequence of *Charkaoui #2* refers to the testimony of two confidential witnesses. This evidence was relied on in establishing the content and parameters of the disclosure to be made. The evidence contains confidential information that cannot be communicated to anyone not authorized to participate in the closed hearing. This example demonstrates that extreme care must be taken by the special advocates even when discussing seemingly public orders.

[29] Second, the communications between special advocates in this proceeding and other special advocates shall be made in a manner similar to that permitted in the United Kingdom where procedures are in place to permit and facilitate communications between special advocates in different cases. These institutional discussions, called “knowledge sharing sessions”, are organized by the Special Advocate Support Office (SASO) and focus on the public proceedings as well as general points of principle raised in closed proceedings. This practice excludes any discussion of the confidential factual basis of a particular case (see C. Forcese “*Research memorandum on anticipated legal and constitutional issues in special advocate proceedings*”, Faculty of Law, University of Ottawa (August 2008) at pages 9 and 10, paragraph 4).

[30] In Canada, the Department of Justice has established a section in the Policy Planning Directorate, the Special Advocates Program (SAP), which has as its purpose the provision of administrative support and resources to special advocates. The personnel of this division, like the SASO in the United Kingdom, shall provide assistance to the special advocates and upon request will organize and be present at all knowledge sharing sessions involving the special advocates appointed in this proceeding. The SAP, may upon request by the special advocates, prepare an agenda containing issues authorized by this order, choose a secure location for such a meeting (e.g. the special advocates secure offices or a comparable secure facility) as well as determine the best date, time and duration for such sessions.

[31] During any knowledge sharing session in which a special advocate in this proceeding is participating, a representative of SAP with requisite security clearance shall be present to provide administrative support. The special advocates must ensure that the parameters established by these reasons and the order to follow are fully respected and that proper recourses are followed if need be.

[32] Subject to these conditions, this proposed order benefits the judicial system; it will enable special advocates to discuss, in the presence of support and resource personnel, an agenda relating to common issues. It will enable the special advocates to coordinate their motions thereby reducing duplication of procedures. It will also reduce the number of motions for authorization to communicate since relevant topics within the scope of the order, can be discussed in a timely manner, without having to postpone the meeting to seek further judicial authorization. That said, it is always open for the special advocates to bring a motion seeking judicial authorization if for

unforeseen reasons, an issue becomes a subject of discussion as to whether or not it is within the parameters set out in the order.

[33] This authorization is distinguishable from that which was sought before Justice Tremblay-Lamer in DES-3-08. This request does not seek an authorization to communicate with the person named in the certificate; nor is it a blanket order. The topics which may be discussed are delineated and ascertainable and the discussions are to be held in accordance with the conditions set out in these reasons and the order to follow.

[34] The approach suggested is not an abdication of the judicial authority to authorize communications between special advocates; on the contrary, it is an efficient way of exercising this authority without hearing communication motions on an issue by issue basis in five distinct proceedings. The communications hereby authorized are in the interests of justice.

JUDGMENT

- The Court grants permission to Mr. Cavalluzzo and Mr. Copeland, in their capacity as special advocates in DES-5-08, to communicate with other special advocates (who have obtained the same judicial authorization from their respective designated judge) appointed in other security certificate proceedings to discuss common issues related to questions of jurisdiction, procedure, and substantive law and orders rendered or orders to be sought. They are not authorized to refer directly or indirectly to any information or evidence which has been provided to them or to which they have been privy in their capacity as special advocates.
- These communications are only authorized at meetings organized by the support resources group for special advocates. The SAP shall determine the place and time for the meetings and shall, in consultation with the special advocates, establish an agenda. A member of SAP with appropriate security clearance shall be present at all meetings to give administrative support to the special advocates.
- Mr. Cavalluzzo and Mr. Copeland are also authorized to communicate with the SAP for the purposes of implementing this order.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-5-08

STYLE OF CAUSE: 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 MOHAMAD HARKAT

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: December 15-16, 2008

REASONS FOR JUDGMENT: NOËL S. J.

DATED: January 22, 2009

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