

Date: 20090325

Docket: DES-7-08

Citation: 2009 FC 316

Ottawa, Ontario, March 25, 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 Mohamed Zeki MAHJOUR

REASONS FOR ORDER AND ORDER

[1] On November 20, 2008, the Special Advocates (SAs) forwarded to the Court a request for disclosure to counsel for Mr. Mahjoub of the substance, month, and year of any conversations in which Mr. Mahjoub was a participant, the substance, month, and

year of any reports of surveillance of Mr. Mahjoub in Canada that were relied upon by the Ministers in the confidential Security Intelligence Report (SIR). Counsel for the Ministers consented to this request and they have filed the results of the disclosure that were reviewed by the Special Advocates. Some summaries submitted do not raise concerns of a private nature, and they will be forwarded to Mr. Mahjoub and his Counsel, and comprise part of the public record. Other summaries may raise privacy concerns which require a different procedure to be followed.

[2] While the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) does not provide for a procedure allowing for disclosure only to the interested person and counsel (*Harkat (Re)*, 2009 FC 167), the Court is cognizant that counsel for Mr. Mahjoub may wish to make argument regarding the public filing of some of the summaries of conversations, on the basis that they may engage privacy concerns that could be protected by human rights legislation and the *Canadian Charter of Rights and Freedoms*.

[3] As the Court has determined that for the purposes of these proceedings, there is no national security reason to withhold the summaries as written from Mr. Mahjoub, his only option is to seek a confidentiality order pursuant to Rules 151 and 152 of the *Federal Courts Rules* which provide:

<p>151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.</p> <p>(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.</p>	<p>151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.</p> <p>(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.</p>
<p>152. (1) Where the material is required by law to be treated confidentially or where the Court orders that material be treated confidentially, a party who files the</p>	<p>152. (1) Dans le cas où un document ou un élément matériel doit, en vertu d'une règle de droit, être considéré comme confidentiel ou dans le cas où la Cour ordonne de le</p>

material shall separate and clearly mark it as confidential, identifying the legislative provision or the Court order under which it is required to be treated as confidential.

(2) Unless otherwise ordered by the Court,

(a) only a solicitor of record, or a solicitor assisting in the proceeding, who is not a party is entitled to have access to confidential material;

(b) confidential material shall be given to a solicitor of record for a party only if the solicitor gives a written undertaking to the Court that he or she will

(i) not disclose its content except to solicitors assisting in the proceeding or to the Court in the course of argument,

(ii) not permit it to be reproduced in whole or in part, and

(iii) destroy the material and any notes on its content and file a certificate of their destruction or deliver the material and notes as ordered by the Court, when the material and notes are no longer required for the proceeding or the solicitor ceases to be solicitor of record;

(c) only one copy of any confidential material shall be given to the solicitor of record for each party; and

(d) no confidential material or any information derived therefrom shall be

considérer ainsi, la personne qui dépose le document ou l'élément matériel le fait séparément et désigne celui-ci clairement comme document ou élément matériel confidentiel, avec mention de la règle de droit ou de l'ordonnance pertinente.

(2) Sauf ordonnance contraire de la Cour :

a) seuls un avocat inscrit au dossier et un avocat participant à l'instance qui ne sont pas des parties peuvent avoir accès à un document ou à un élément matériel confidentiel;

b) un document ou élément matériel confidentiel ne peut être remis à l'avocat inscrit au dossier que s'il s'engage par écrit auprès de la Cour :

(i) à ne pas divulguer son contenu, sauf aux avocats participant à l'instance ou à la Cour pendant son argumentation,

(ii) à ne pas permettre qu'il soit entièrement ou partiellement reproduit,

(iii) à détruire le document ou l'élément matériel et les notes sur son contenu et à déposer un certificat de destruction, ou à les acheminer à l'endroit ordonné par la Cour, lorsqu'ils ne seront plus requis aux fins de l'instance ou lorsqu'il cessera d'agir à titre d'avocat inscrit au dossier;

c) une seule reproduction d'un document ou d'un élément matériel confidentiel est remise à l'avocat inscrit au dossier de chaque partie;

d) aucun document ou élément matériel confidentiel et aucun renseignement

<p>disclosed to the public.</p> <p>(3) An order made under subsection (1) continues in effect until the Court orders otherwise, including for the duration of any appeal of the proceeding and after final judgment.</p>	<p>provenant de celui-ci ne peuvent être communiqués au public.</p> <p>(3) L'ordonnance rendue en vertu du paragraphe (1) demeure en vigueur jusqu'à ce que la Cour en ordonne autrement, y compris pendant la durée de l'appel et après le jugement final.</p>
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[4] Given Mr. Mahjoub's current lack of knowledge about the contents of the conversations, it is reasonable to give him an opportunity to review them before he decides whether a confidentiality order should be sought. To do otherwise would remove that recourse from him. The SAs do not have the jurisdiction to act in public on behalf of the named person, nor are they permitted to communicate with him while acting as special advocate unless permission is granted by the designated judge. They are not counsel of record in this proceeding. They do not, therefore, have standing to seek a confidentiality order which would prevent public access to Court records; only counsel for Mr. Mahjoub may seek such an order.

[5] To ensure the protection of Mr. Mahjoub's rights, the Court has determined that it would be appropriate to delay placing some of the summaries on the public file until Mr. Mahjoub has had an opportunity to review them and make a decision as to how he wishes to proceed.

[6] If Mr. Mahjoub, on the advice of his counsel, decides to seek a confidentiality order limiting the access to these summaries, the Court will decide the issue on the grounds raised by counsel.

[7] For the interim period, these summaries shall be communicated to Mr. Mahjoub and his counsel and will not be made public. A period of ten days is given to permit Mr. Mahjoub and his counsel an opportunity to determine whether or not to seek a confidentiality order. Upon expiry of that delay, in the absence of a motion, the summaries will be made public. If a motion in accordance with Rule 151 is served and

filed within the ten day period, these summaries shall be kept confidential until this Court decides the issue.

ORDER

THIS COURT ORDERS THAT:

- The summaries of conversations at tabs 1-6 and 10 and the summaries of surveillance reports are hereby filed as part of the public record;
- The summaries of the conversations at tabs 7, 8 and 9 will be kept confidential on an interim basis;
- The summaries of the conversations at tabs 7, 8, and 9 will be disclosed only to Mr. Mahjoub and his counsel in a sealed envelope;
- Mr. Mahjoub and his counsel have ten days to serve and file a motion asking this Court to continue treating the summaries of conversations confidentially;
- In absence of any such motion, the summaries of conversations will become part of the public record.

“Simon Noël”

Judge