

Federal Court



Cour fédérale

**Date: 20090618**

**Docket: DES-6-08**

**Citation: 2009 FC 645**

**Ottawa, Ontario, June 18, 2009**

**PRESENT: The Honourable Madam Justice Dawson**

**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  
MAHMOUD ES-SAYYID JABALLAH**

**REASONS FOR ORDER**

[1] Mr. Jaballah is named in a security certificate which has been referred to the Court pursuant to section 77 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The Court has not made any determination as to the reasonableness of the certificate. While originally detained, Mr. Jaballah was released from detention in May, 2007 on stringent conditions of release. One condition required him to be fitted with an electronic monitoring device (GPS device) as arranged by the Canada Border Services Agency (CBSA), and to wear

the GPS device at all times. This condition remains in effect.

[2] Mr. Jaballah was originally fitted with a GPS device manufactured by Behavioural Intervention (BI). In March, 2009 he was required by the CBSA to change to a GPS device manufactured by Omnilink Systems (OS). The change was necessitated because the CBSA had entered into a new contract with respect to the provision of GPS units.

[3] Mr. Jaballah has moved for an order that the OS GPS device be removed, and the BI GPS device be re-installed in its place, because the OS device is said to be causing Mr. Jaballah considerable and unwarranted pain and discomfort. The Ministers assert that Mr. Jaballah has not demonstrated that he is entitled to the relief sought.

### **The Issue and the Legal Basis for the Motion**

[4] The issue before the Court is a simple one: should the OS GPS device be removed and BI GPS device be re-installed in its place?

[5] The legal basis of the motion is said by the parties to be more complex. Mr. Jaballah argues that his liberty or security of the person interests, which are protected by section 7 of the *Canadian Charter of Rights and Freedoms* (Charter), are engaged and are infringed. He also argues that, while he is not currently subjected to cruel and unusual treatment, over time his situation will convert from mere mistreatment to cruel and unusual treatment violating section 12 of the Charter.

[6] The Ministers acknowledge that section 7 of the Charter is engaged, but argue that Mr. Jaballah has not demonstrated that principles of fundamental justice have been breached. The Ministers also argue that the CBSA's direction that Mr. Jaballah wear the OS GPS device is not excessive treatment for the purposes of either section 7 or section 12 of the Charter. In the alternative, they say that Mr. Jaballah has failed to demonstrate that the actions of the CBSA are grossly disproportionate so as to violate either section 7 or section 12 of the Charter.

### **Consideration of the Issue**

[7] While the parties frame this motion in terms of the Charter, I do not find it necessary to resort to the Charter in order to adjudicate upon the motion.

[8] The Federal Court is a statutory court, without inherent jurisdiction. However, the Court possesses, by implication, such powers as are reasonably and practically necessary for the Court to fully exercise its jurisdiction. See: *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 at paragraph 70. One such power is the power to set aside or vary an order of the Court for reasons that include a matter arising or being discovered after the order was made. This jurisdiction is reflected in Rule 399(2) of the *Federal Courts Rules*, and was acknowledged by the parties during oral argument.

[9] In that context, the following circumstances are pertinent.

*Reasons for the imposition of strict conditions of release*

[10] In reasons reported at 2009 FC 284, the Court reviewed the conditions that govern Mr. Jaballah's release from detention. At paragraphs 27 to 44, the Court considered the reasons that underlie the need for strict conditions of release. There is no need to repeat those reasons here. It is sufficient to state that the Court has concluded that neutralization of the risk posed by Mr. Jaballah's release from detention requires stringent conditions and strict monitoring of Mr. Jaballah. (See also the reasons of Justice Layden-Stevenson reported at 2008 FC 9 at paragraph 46.)

[11] The requirement of electronic monitoring was central to the regimen of conditions imposed by the Court, and therefore is central to Mr. Jaballah's continued release from detention.

*The operational role of the CBSA*

[12] Within the context of the framework of conditions designed by the Court to neutralize the threat posed by Mr. Jaballah's release, the Court generally does not have an operational role. A number of operational details are best, at least initially, resolved between counsel. However, where dispute exists, such dispute may be resolved by the Court. This would include disputes about the efficacy of a particular GPS device.

*The intent of the CBSA with respect to the switch to the OS GPS device*

[13] The CBSA must keep up with new technology. I accept that the CBSA had valid reasons for wishing to switch from the BI GPS device to the OS GPS device. Those reasons included:

- the OS GPS device allows indoor tracking, using both GPS and cellular signals;
- its software is "substantially better";
- the OS GPS device does not require a dedicated telephone line or a base unit; and
- the OS GPS device does not require any handheld unit.

*Mr. Jaballah's personal circumstances*

[14] Mr. Jaballah was originally detained in April, 1999 pursuant to a security certificate. The certificate was quashed, and Mr. Jaballah was released from detention in November, 1999.

Mr. Jaballah was detained again in August, 2001 on the basis of a second certificate. He was released from detention in May, 2007 on strict conditions. Since then, Mr. Jaballah has been required to wear a GPS device. He will be required to continue to wear such device until further order of the Court.

[15] Dr. Donald E. Payne provided a psychiatric report that states that Mr. Jaballah suffers from symptoms of chronic Post-Traumatic Stress Disorder. There is no opposing medical evidence on this point.

[16] Dr. Roland Wong, an Occupational Medicine Consultant who is certified as a medical specialist in Community Medicine, provided his opinion that Mr. Jaballah suffers from mild

degenerative changes in his hips and from degenerative changes within his right knee joint. The Ministers do not appear to take issue with this diagnosis.

[17] The requirement that the conditions of release be proportionate to the threat posed by an individual carries with it the requirement that the GPS device selected by the CBSA should, at least to the extent possible, avoid aggravating Mr. Jaballah's medical condition. When selecting a GPS device the CBSA should also be mindful about the length of time Mr. Jaballah has worn, and will likely be required to wear, a GPS device.

*The disadvantages of the OS GPS device*

[18] There are a number of disadvantages to the wearer that are inherent in the OS GPS device when compared with the BI GPS device. They include:

1. The OS GPS device is heavier. It weighs 7.3 ounces compared to just under 4 ounces for the BI GPS device (not including the weight of the BI portable tracking unit that maybe handheld or hung from a belt).
2. It is almost twice as thick.
3. The strap on the OS GPS device is almost twice as high and twice as thick, and is more rigid, than the strap on the BI GPS device. The OS GPS device strap is also less capable of fine adjustment.

4. One end of the OS GPS strap feeds through the device and then overlaps the other end of the strap. This forms a seam which lies against the skin of the wearer. The BI GPS strap has no such seam.
5. The pressure exerted by the OS GPS device against the wearer's ankle area appears to be greater than that exerted by the BI GPS device.
6. The wearer of the OS GPS is required to plug the device into an electric outlet for two hours a day in order to charge the device. While the wearer may use an extension cord in order to increase his mobility, the wearer is nonetheless limited in his movements. Any interruption of charging requires the wearer to recommence and continue the charging session for a full two hours. According to Mr. Al-Shalchi of the CBSA, the charging cannot take place while the wearer is lying down or sleeping. The OS GPS device carries with it no similar charging requirement.

[19] Additionally, Mr. Jaballah says that the OS GPS device irritates the skin around his ankle, causes calf pain and interferes with his sleep because the device strikes the opposite leg when he moves.

[20] Dr. Wong reports that Mr. Jaballah does suffer from a rash and that the type of rash is compatible with mechanical skin irritation. The rash responded to treatment with cortisone cream. However, Dr. Wong's evidence is that "in the long run" cortisone cream is not the proper

way to treat the condition because it may "thin out the skin." The GPS device may, in his view, exacerbate the symptoms caused by the degenerative changes. Dr. Wong is also of the view that due to the difference in weight between Mr. Jaballah's two legs caused by wearing the device on one leg, on the basis of "bio-mechanical reasoning, there is a good chance" that Mr. Jaballah's low back and knees can be affected.

[21] The affidavit of Hassan Almrei was filed in support of Mr. Jaballah's motion. Mr. Almrei swears that the OS GPS device is too heavy for his leg and that if he wears it without wearing socks his skin is irritated. Mr. Almrei was not cross-examined on that evidence. Hearsay evidence was also filed with respect to bruising and lacerations said to be caused to another individual who wears the OS GPS device.

[22] The Ministers take issue with much of the testimony of Mr. Jaballah and Dr. Wong. I am particularly mindful of the numerous objections the Ministers made with respect to Dr. Wong's evidence, including: that the evidence of medical problems is lacking, speculative, and is "highly equivocal with respect to causation." I am also mindful of the objections to the completeness of Dr. Wong's records and his being unaware of which of Mr. Jaballah's ankles the GPS device was placed. However, it is not necessary for me to consider those objections in detail because the existence of the rash located proximate to the GPS device was not seriously challenged and the long-term effects of a steroid-based cream are not disputed.



[23] I accept that the device causes Mr. Jaballah a rash and that currently Mr. Jaballah treats the rash with the cortisone cream. I also accept that this is not a long-term solution for the reason given by Dr. Wong. While other solutions were suggested by the Ministers during the cross-examination of Mr. Jaballah, none were tried or apparently suggested in the period following Mr. Jaballah's initial complaint. It would be speculative to rely on other alternate solutions now, particularly when the BI GPS device previously caused no skin problems.

[24] I also accept that, due to its increased thickness, the OS GPS device makes it more likely that the wearer's sleep will be disturbed due to the device colliding with the opposite leg.

[25] On all of the evidence, including the affidavit of Mr. Almrei and my observation of the BI and OS GPS devices, I am satisfied that the OS GPS device is materially less comfortable to wear and much less user-friendly in that the wearer is subjected to restrictive movements for two hours a day while the device charges.

[26] Mr. Al Shalchi was not able to say that the CBSA gave consideration to the health issues of the people, including Mr. Jaballah, who would be wearing these devices when the decision was made to switch GPS devices.

[27] There is one other disadvantage to the OS GPS device. That is that the relationship between Mr. Jaballah and the CBSA has deteriorated since the New Year. While the CBSA is of the view that the OS GPS device is a minimal factor in the deterioration, it is nonetheless a factor.

[28] I have set out the respective benefits and disadvantages of the two GPS systems. Before moving to an assessment of that evidence it is significant to note the absence of evidence on two points.

*Matters not in evidence*

[29] No evidence has been adduced on two significant matters.

[30] First, there is no evidence that the BI GPS device does not provide adequate electronic monitoring when compared to the OS GPS device. Mr. Al-Shalchi testified that the BI software "is still good" and that both the BI and OS systems have suffered breakdowns which have affected the ability to monitor Mr. Jaballah.

[31] Second, there is no evidence that the BI system is no longer available to the CBSA. I infer from the absence of this evidence that the BI GPS device is still available to the CBSA. Indeed, Mr. Al-Shalchi agreed that it is possible that Mr. Charkaoui, another person named in a security certificate, may continue to wear a BI GPS device.

**Conclusion**

[32] Having set out the advantages and disadvantages of the two GPS devices, I find that the technical advantages delivered by the OS GPS device do not outweigh the adverse physical

disadvantages to Mr. Jaballah. This is particularly so where there is no suggestion that the device he prefers is either inadequate or unavailable, where the device now in use is responsible for at least some deterioration in Mr. Jaballah's relationship with the CBSA, and where Mr. Jaballah will be required to wear the device at least until the next review of his conditions.

[33] It follows that the OS GPS device should be removed and be replaced with a BI GPS device. An order will issue to that effect on the basis that the difficulties resulting from the use of the OS GPS device are matters that arose or were drawn to the Court's attention subsequent to the making of the order that required Mr. Jaballah to wear an electronic monitoring device. I note, parenthetically, that on the last review of the conditions of release Mr. Jaballah did not ask that this requirement be amended. The current motion was filed after the evidence and argument was received with respect to the review of conditions.

[34] Notwithstanding this conclusion, I wish to stress that technology does not stand still. The CBSA is to be commended for wishing to use the best technology. However, experience teaches that often the first generation of a new technology lacks the refinements of successive generations. If the new electronic monitoring technology can be coupled with a more wearer-friendly bracelet and GPS device, there is no reason why the CBSA should not in future ask to fit Mr. Jaballah with such a new device.

### Costs

[35] Counsel for Mr. Jaballah did not press their claim for costs and I do not consider this to be an appropriate case for an award of costs.

“Eleanor R. Dawson”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** DES-6-08

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION and THE MINISTER OF  
PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS  
v. MAHMOUD ES-SAYYID JABALLAH

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 4, 2009

**REASONS FOR ORDER by**  
**THE HONOURABLE MADAM JUSTICE DAWSON**

**DATED:** June 18, 2009

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