

**Date: 20071224**

**Docket: DES-1-00**

**Citation: 2007 FC 1366**

**Ottawa, Ontario, December 24, 2007**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**MOHAMED ZEKI MAHJOUR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION  
AND  
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondents**

**REASONS FOR ORDER AND ORDER**

[1] The applicant was detained in custody under a security certificate from June 26, 2000 until April 13, 2007, at which time he was released subject to strict terms pending the outcome of the Government's efforts to remove him from Canada. He now moves to vary the release conditions. The respondent Ministers consent to certain of Mr. Mahjoub's proposed changes, oppose others and have submitted their own requests for variances. Having heard evidence and representations from both parties, I am satisfied that some of the terms of Mr. Mahjoub's release should be modified.

## BACKGROUND

[2] I think it useful to outline the background to this application in some detail as the history of events became a matter of some controversy at the hearing.

[3] Mr. Mahjoub, an Egyptian national, was declared a Convention refugee by the Immigration and Refuge Board in 1996, approximately one year after his arrival in Canada from Sudan. He subsequently met and married Ms. Mona El Fouli, a Canadian citizen. Together they have two pre-teen sons, Yusuf and Ibrahim. Ms. El Fouli also has a son, Haney aged 23.

[4] On June 26, 2000 Mr. Mahjoub was detained on the basis of a security certificate signed by the Solicitor General (now Minister of Public Safety & Emergency Preparedness) and the Minister of Citizenship and Immigration (collectively referred to as the Ministers). The security certificate was found to be reasonable by the Federal Court in *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 2001 FCT 1095, [2001] 4 F.C. 644.

[5] Applications by Mr. Mahjoub for conditional release were denied by the Court in 2003 and 2005 on the grounds that the imposition of the suggested conditions and use of the proposed sureties would be insufficient to neutralize the danger that his release would pose to national security or to the safety of any person. On the second application, *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 2005 FC 1596, [2005] F.C.J. No. 1948, the Court noted that it remained open to Mr. Mahjoub to apply again for release and to provide better sureties and evidence that could be capable of convincing the Court that the danger he poses could be neutralized.

[6] A further hearing was held in December 2006 to review the status of Mr. Mahjoub's continued detention. At the time of that hearing, a decision was pending upon an application for judicial review of a determination by a Minister's Delegate that Mr. Mahjoub could be returned to Egypt. That determination was quashed in a ruling issued on December 14, 2006 by my colleague Justice Danièle Tremblay-Lamer and the matter was remitted for re-consideration. Thus it became apparent that Mr. Mahjoub would not be removed from Canada within a reasonable time, one of the requirements for the exercise of the Court's discretion to conditionally release him under subsection 84(2) of the *Immigration and Refugee Protection Act*, as it then read.

[7] In reasons for decision released on February 15, 2007, based on the evidence heard in December 2006, I held that Mr. Mahjoub had also met the second requirement for release, namely that appropriate sureties and conditions could neutralize his risk. I emphasized that this release would amount to a form of house arrest and that Mr. Mahjoub would be returned to custodial detention if he violated the terms and conditions. Draft terms and conditions, based largely on those proposed by applicant's counsel at the December hearing, were attached to the reasons and the parties were given seven days within which to comment on them before they were to be incorporated in a formal Order: *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 171, [2007] F.C.J. No. 206.

[8] On February 23, 2007 the Supreme Court of Canada released its decision in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] S.C.J. No. 9. The Court determined that the procedure for determining whether a certificate was reasonable and the detention review procedures under the Act infringed section 7 and were not justified under section 1 of the *Canadian*

*Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11. The Supreme Court suspended its declaration of invalidity of the certificate procedure for one year to allow Parliament to enact remedial legislation.

[9] The Supreme Court found that the detention review provisions were defective as they denied foreign nationals a prompt review of their detention after confirmation of the reasonableness of the security certificate. The remedy imposed, with immediate application, was to strike subsection 84(2) of the Act, to read the words “foreign nationals” into section 83 and to strike the words "until a determination is made under subsection 80(1)" from subsection 83(2). The effect was that persons arrested subject to a security certificate were to be entitled to a review of detention without the 120 day delay required by former subsection 84(2), and to further reviews on a six month basis thereafter.

[10] At paragraph 116 of *Charkaoui*, the Supreme Court noted that stringent release conditions, while less severe than incarceration, seriously limit individual liberty. Accordingly, the Court stated, release conditions must not be a disproportionate response to the nature of the threat.

[11] With the consent of the parties, the evidence heard and the findings made on Mr. Mahjoub’s application under subsection 84(2) were applied as if they had been heard and made in respect of an application under subsection 83(2), as it read following *Charkaoui*. Comments were received from counsel for the parties by correspondence dated February 22, 2007 on the draft terms and conditions attached to the February 15<sup>th</sup> decision. These included requests from the respondents for the Court to require the installation of video surveillance cameras and a two-way video conferencing system

at the Mahjoub residence. These requests were incorporated into the Order issued on March 1, 2007 that Mr. Mahjoub was to be released when the terms and conditions set out therein were satisfied.

[12] Despite the best efforts of counsel for both parties, it took some time to address all of the terms and conditions specified in the March 1<sup>st</sup> Order. Difficulties were encountered with several of them, notably the installation of the video surveillance cameras and facilities to monitor internet access at the home. These difficulties and other logistical problems were discussed with counsel at conferences on March 9<sup>th</sup>, March 22<sup>nd</sup> and April 5<sup>th</sup>.

[13] In an effort to facilitate Mr. Mahjoub's release, the parties agreed that interim measures could be adopted while they continued to work towards resolving these issues. On April 10<sup>th</sup> counsel for the applicant submitted a list of proposed amendments to which the respondents had consented. A Revised Order was issued by the Court on April 11<sup>th</sup>. This order allowed for the applicant's release prior to the installation of the exterior cameras on the condition that he remain at his home except with prior approval by the Canada Border Services Agency (CBSA) or in the case of medical emergency. The existing Internet connection to the home was also to be disconnected. With those revisions to the conditions, Mr. Mahjoub was released from detention on April 13, 2007.

[14] A hearing was held in Toronto on May 24, 2007 with respect to a number of outstanding issues, notably the video surveillance question. The applicant's landlord was represented at that hearing and opposed the installation of exterior video cameras in the interests of the privacy of the other residents of the complex. The applicant raised but did not press the issue of the video-conferencing equipment. The respondents took the position that there was no need to pursue the

issue of interior cameras. A conference was conducted by telephone on June 4<sup>th</sup> to clarify certain matters arising out of the May 24<sup>th</sup> hearing. The parties reached agreement on the geographical limits within which Mr. Mahjoub could have outings within the City of Toronto and the Court was advised of this by letter dated June 8, 2007.

[15] On June 14, 2007 the Court issued an order amending the Revised Order of April 11<sup>th</sup> to delete the requirement for the installation of exterior video cameras and to incorporate the geographical parameters agreed to by the parties. Until that time, Mr. Mahjoub had been effectively confined to his home apart from brief outings approved by CBSA. Two other minor amendments requested by the respondents and not opposed by the applicant were also made at that time. No change was made to the condition that a two-way monitoring device be installed in his home to allow for direct communications by way of videoconference as required by the March 1<sup>st</sup> and April 11<sup>th</sup> Orders.

[16] Following a scheduling teleconference with counsel on September 25, 2007, a further amending order was issued on September 27<sup>th</sup> to allow CBSA to extend the time-period for Mr. Mahjoub's outings beyond 9:00 p.m. The present application was scheduled at the September 25<sup>th</sup> teleconference for hearing in Toronto on November 5-9, 2007.

[17] The applicant's requests for variation were outlined in correspondence from counsel dated October 10, 2007 and elaborated upon in his motion record and supporting affidavit filed October 29<sup>th</sup>. The respondents stated their position in a letter dated November 2, 2007 and filed a Notice of Motion and record on November 5<sup>th</sup>.

[18] As matters stand, Mr. Mahjoub's continued release from detention is subject to the following conditions which I consolidate and paraphrase for convenient reference. This list does not include the performance bonds that were executed prior to his release and is not to be taken as a substitute for the specific terms of the Orders:

- he is required to submit to electronic monitoring by bracelet and GPS tracking device, to allow installation of a separate dedicated land-based telephone line and a two-way monitoring device inside the home to allow for direct communications by way of video conference;
- he is required to remain in his residence except as otherwise provided and is to be supervised at all times by a Court- approved supervising surety;
- he is allowed to go in to the backyard of his residence between 8 a.m. and 9 p.m., under supervision, and may meet only approved persons while there; casual greetings to adjacent neighbours are permitted;
- he is allowed to go on approved outings between 8 a.m. and 9 p.m. wearing the tracking device and accompanied by a supervisor; CBSA may extend its approval beyond 9 p.m. at its discretion;
- three approved short (under four hours) outings per week are allowed; approval must be applied for on a weekly basis, 72 hours in advance specifying the location; he must contact CBSA before leaving and after returning; applications for longer family outings may be made up to three times per month; applications for approval must be made on a weekly basis for the following week, and 72 hours' notice is required;
- escorted by a supervisor, he may accompany the younger children directly between home and school between 8:00 to 9:15 a.m. and 3:00 to 4:30 p.m. having no contact with any

person en route; school locations, routes and the school calendar must be provided to CBSA; attending the school in case of emergencies is permitted provided that he is accompanied and notifies CBSA before leaving and after returning;

- upon 48 hours' notice, he may attend medical or psychological appointments on notice before leaving and after returning; proof of attendance is required; in the case of a medical emergency requiring hospitalization, the situation and his location must be provided to CBSA as soon as possible, and CBSA must be notified on his return to his residence;
- in an emergency involving family members, he may accompany his supervisor and the family member to hospital until another supervisor is available, provided he informs CBSA as soon as possible and again on return to his residence; should he be too unwell to accompany the supervisor, CBSA must be notified immediately;
- only a specified list of persons are permitted to enter the residence; this includes immediate family members, sureties, legal counsel, emergency professionals, children under the age of 15 years who are friends of the minor children, the building superintendent and repair persons employed by the superintendent, and persons approved in advance by the CBSA; approval requires the name, address and date of birth of the person for whom approval is sought; prior approval need not be acquired for subsequent visits by a previously approved person; the CBSA may withdraw its approval at any time;
- on outings he is to remain within a defined geographic area and not go to any unapproved location;
- he shall not enter upon the property of any airport, train station, subway station, bus station or car rental premises or board any boat or vessel;

- he shall not meet any person by prior arrangement other than his solicitors or persons approved by CBSA upon providing the person's name, address and date of birth; this restriction does not apply to family members, sureties and supervisors;
- he is not to have any association with persons he knows or should know are supportive of or have connections with terrorist or jihadist groups, or persons with criminal records other than Matthew Behrens;
- he is not to possess or have access to or use any communication devices except as provided; Mona and Haney El Fouli's cell phones are to be kept from Mr. Mahjoub; their cell phone numbers must be provided to CBSA; Mona El Fouli must consent to the interception of calls on her phone and Haney must provide CBSA monthly billing records showing calls made to and from his cell phone; the cell phones are to be used within the residence solely in a locked area to which only Mona and Haney have keys; Mr. Mahjoub may use a conventional telephone line in the residence subject to consenting to the interception of all communications using that service; he may also use a landline telephone outside his residence to inform CBSA in the case of a medical emergency;
- all written communications to and from the residence are subject to interception by CBSA;
- he must permit access to the residence at any time by CBSA employees, persons designated by CBSA or any peace officer for the purposes of verifying his presence in the residence and to ensure compliance with the terms and conditions, including to search the premises and the removal, installation or service of any device;
- the sureties and supervisors may be interviewed or asked to provide reports on Mr. Mahjoub's compliance with the conditions;

- all travel documents are to be surrendered and Mr. Mahjoub is prohibited from applying for, obtaining or possessing any passport or travel document or ticket and entitling him to travel; this does not prevent travel on public surface transit within the city of Toronto, including the Toronto Island ferry, or within the city of Mississauga;
- he shall report for removal from Canada if so directed;
- he is not to possess any weapon, imitation weapon, noxious substance or explosive, or any component thereof;
- he is to keep the peace and be of good conduct and is subject to arrest and detention without warrant by any CBSA officer or peace officer having reasonable grounds to believe that any term or condition of his release has been breached; the Court will determine whether a breach has occurred within 48 hours of his detention and whether he should be detained in custody;
- he may not change his place of residence without prior approval of the Court and no person may occupy the residence without CBSA approval;

**ISSUES:**

[19] The applicant seeks a number of changes to the terms and conditions in the April 11<sup>th</sup> Order, as amended:

- Re-installation of the Internet connection to be used by his step-son and sons, subject to controls on access;
- Permission to install a “fax machine”, that is the capacity for facsimile transmission of documents to facilitate communication with doctors, social services and lawyers’ offices;

- Relaxation of the restrictions on outings;
- An extension of the time limits and unsupervised access to the backyard of the home;
- Removal of the requirement for installation of a video-conferencing device;
- Addition of Mathew Behrens to the list of court-approved supervisors;
- Relaxation of the notice requirements for visitors.

[20] By cross-motion, the respondents seek an Order:

- Allowing CBSA to install the two-way videoconferencing device on the first floor of the applicant's residence in a location that is easily accessible;
- Allowing CBSA to require 72 business hours' notice when the applicant requests an outing;
- That the applicant not enter any area where CBSA deems that electronic monitoring is ineffective;
- That the applicant not change addresses without a prior risk assessment done by CBSA and prior approval by the Court, at least 60 days prior to the move;
- Allowing CBSA to request, for the purpose of background checks, the name, address and date of birth of persons seeking approval, and also, their home and cell phone numbers, two pieces of photo identification, signature and any other information deemed necessary by CBSA for the completion of security checks;
- Allowing CBSA to require 48 hours' notice prior to any visit by an approved person;
- Requiring the applicant to maintain a visitor's log to be provided by CBSA and available to them for inspection on request;
- Requiring that persons attending the residence appear before the two-way videoconferencing device in order to confirm their identity; and

- That the applicant not possess a video camcorder, or audio-tape or video-tape CBSA officers at any time.

## **DISCUSSION:**

Applicant's Requests:

Internet Access

[21] Clause 12 of the April 11<sup>th</sup> Order provides that Mr. Mahjoub shall not possess, have access to or use, directly or indirectly any equipment capable of connecting to the Internet. It further provides that the Internet connection for the home computers used by Mr. Mahjoub's stepson and his two sons shall be terminated prior to Mr. Mahjoub's release from detention. Removal of the Internet connection was agreed to by the applicant as effective monitoring of access at the home could not be achieved through the means initially proposed by the respondents, video-surveillance.

[22] The respondents do not oppose re-installation of the internet connection provided that the room in which the computer through which the connection is made is properly secured with a lock, and that only Ms. El Fouli and Haney El Fouli hold the keys and the Internet access password. They are opposed to Yusuf and Ibrahim having an Internet connection in their own room on the rationale that the boys would be more susceptible to the applicant's control and influence. It is not disputed that Haney El Fouli requires Internet access for his courses. He now has access at his college with his portable computer but it would be more convenient for him to have a connection at home as well. The respondents suggest that the boys, in grades five and three respectively, could access the Internet at school or at a public library for the limited access required for their projects.

[23] The applicant counters that given the restrictions on his movements and corresponding obligations on Mona and Haney El Fouli as supervising sureties, they do not have the time to accompany the boys to a library or remain with them at school for this purpose. The applicant proposes that access to the internet for the boys be by way of a wired connection between the computer in their room and that in Haney's, activated as required, so that the two sureties could supervise the boys' access to the Internet at all times.

[24] The Internet has become a valuable resource for educational purposes and access to it from their home could assist the boys in researching their school projects, although the extent to which that is necessary at their ages and grade levels is questionable. The Internet also provides increasingly effective means to communicate. To reiterate a point made at the outset, the Court must be satisfied that the applicant's release conditions adequately neutralize the risk that he poses to national security or to the safety of any person. As specified in the release conditions, the means to neutralize that risk includes barring access to communications devices.

[25] It was accepted by the applicant, Ms. El Fouli and Haney El Fouli, when they testified at the December 2006 release hearing that the terms and conditions imposed would have an impact on the family's living conditions and privacy. This included the requirement to consent to the interception of communications through the telephone landline at the home and Mona El Fouli's cell phone. A less intrusive condition was imposed upon Haney El Fouli. He was required to provide CBSA with monthly billing records reflecting the calls made from and received by his cell phone. Those were, in my view, proportionate responses to the risk posed by the applicant.

[26] The applicant is opposed to any monitoring of Internet usage from the home if the condition is varied to allow re-connection of the service. That position is not acceptable as the Internet could be used to defeat any attempt to monitor Mr. Mahjoub's communications. An alternative raised by the Court during the hearing was that the applicant and his family consent to periodic disclosure by the chosen Internet Service Provider (ISP) to the CBSA of information about the websites visited and the e-mail addresses to or from which messages were sent or received from the connection at the Mahjoub residence. In my view this would achieve a proportionate balance between the liberty of the individual and adequate measures to neutralize the risk. If the applicant and his family are not prepared to accept that condition, the prohibition on Internet access will remain in place.

[27] Another question arises over the possible use in the Mahjoub residence of Internet based telephony services, via Voice over Internet Protocol ("VOIP") and programs such as "Skype" or "MSN Voice" which allow computer to computer and computer to land-line voice and visual communication. This was not raised at the hearing but subsequently came to the attention of the Court as a potential concern. Counsel were asked to provide post-hearing submissions in writing as to whether there was any need for the revised Order to address this issue.

[28] In correspondence to the Court, counsel for the respondents advised that the Ministers wished to provide evidence and make submissions on this question in private. Counsel for the applicants requested that Internet based telephone services be permitted and that they be allowed to make further submissions should the Ministers oppose this or request that it be limited by conditions. The Court agreed to allow the Ministers to tender evidence and submissions which were received in private on December 17, 2007. In light of that evidence and submissions, the Court

considers it necessary to pursue the matter. Applicant's counsel are invited to make submissions either orally or in writing as to whether such programs should be permitted and, if so, under what conditions. In the interim, such programs are not to be installed and if installed already in the computers at the home are to be removed or disabled and no microphones are to be connected to the computers. Subject to that proviso and the others discussed above, the Court will order that the terms and conditions of Mr. Mahjoub's release be varied to permit installation of an Internet connection.

#### Fax Capacity

[29] Clause 12 of the April 11<sup>th</sup> Order also prohibits the applicant's possession of or any access to a fax machine. The applicant's request is not that Mr. Mahjoub be permitted to personally make use of a fax machine but that one be allowed in the house for his wife's use or that of his stepson under the same terms for controlling access as proposed for the Internet connection. Ms. El Fouli's evidence was that from time to time she has had to fax documents to doctors' offices, to social services offices and to the applicant's lawyers. To do so she has had to go to a store that provides fax services and this has been very inconvenient, as another supervisor must remain with the applicant, and also costly. It is suggested that access to a fax machine within the residence would also facilitate communications with the CBSA.

[30] The respondents are opposed to this request as they consider that it would be difficult to effectively monitor the use of a fax machine as a communications device. The respondents tendered a statutory declaration from an information technology specialist regarding the capacities and

limitations of intercepting fax transmissions from land-line fax machines or computer-based fax modems. The Court's understanding is that fax machines scan paper documents and transmit copies by way of landlines to a remote telephone line connected to a fax printer. Computer-based fax programs use a modem to transmit documents composed on the computer to the remote telephone and printer.

[31] It appears from the evidence of Haney El Fouli that he has an existing fax capacity in his room through a device called an "all-in-one" which also includes a printer and a scanner. He testified that he had tried to use it once, unsuccessfully as he was unable to obtain a dial tone. If it had been operative, a question might have arisen as to whether this constituted a breach of the terms of the April 11<sup>th</sup> Order.

[32] Haney El Fouli acknowledged that he could also scan and e-mail documents using this device. The respondents suggested that this capacity might serve as an alternative to the installation of a separate fax machine, subject to the proviso that the device remain in Haney's locked room with access limited to him and Ms. El Fouli.

[33] The addition of a fax machine using the conventional land based telephone line would not, in my view, materially increase the risk posed by the applicant having access to certain communication devices, such as the telephone. As noted above, the applicant and Ms. El Fouli were required under the terms of the April 11<sup>th</sup> Order to consent to the interception, by or on behalf of the CBSA, of all communications conducted using the conventional land based telephone line service to the home. I am satisfied that this consent covers the interception of any fax transmission

using that landline. However, the evidence of the CBSA technical specialist is that interception of fax transmissions at the land-line service provider would require a Court Order. I am prepared to include a term to that effect in the revised Order granting permission to install a fax machine.

[34] I think it prudent to require that the applicant and Ms. El Fouli also provide a list of all persons and offices to whom they propose to send fax transmissions together with their respective telephone numbers, to be updated periodically as needed or as required by CBSA.

### Outings

[35] The applicant seeks relaxation of the restrictions on outings in four respects: a) that he be permitted one hour per week day of exercise and fresh air outside of the home when proceeding to or from the boys' school and also during school holidays; b) greater freedom for religious observance; c) participation in Islamic Sunday School and recreational programs for the boys as extra outings; and d) permission to use the subway to attend doctors' offices for medical appointments.

[36] I think it worth noting that, from the evidence, including that of the applicant and his wife, CBSA officials appear to have been generally flexible in their interpretation of the conditions respecting outings and that the officers have acted professionally in carrying out their duties. As of the dates of the hearing, they had approved approximately 42 outings by the applicant. A handful were refused for various reasons. Approval was withheld for a short time after an incident in August which will be discussed below. In general, however, the parties are agreed that the Mahjoub family

and the officers have developed a good working relationship. Particular credit for this must be given to Mr. Terence Pearce, Enforcement Supervisor at the Greater Toronto Supervisor Centre ("GTEC"), who is one of the primary contacts with the family and has worked diligently to resolve problems. The applicant and Ms. El Fouli both acknowledged the constructive role of "Mr. Terry" in their testimony.

[37] For the most part Mr. Mahjoub and his family appear also to have made careful efforts to comply with the conditions and to cooperate with CBSA officials. They have been careful to contact CBSA before leaving the home and upon returning and to inquire of Mr. Pearce and others if unsure about the scope and effect of the conditions. The only incident which I consider to give rise to a serious concern arose with respect to the installation of the videoconferencing device which I will discuss below.

[38] Evidence was led with respect to an incident that occurred at Ontario Place when Mr. Mahjoub, on an outing with his family, boarded a small ferry used to transport visitors between attractions and made use of a paddle boat with one of his sons. While this could be construed as a technical breach, it seems to have arisen from a genuine misunderstanding about the scope of the terms of the Order. The object of the condition is to prevent Mr. Mahjoub from entering upon a "boat or vessel" to evade monitoring or to leave the geographical area to which he is restricted. It was not intended to impose restrictions on the applicant's enjoyment of an amusement park with his family. I note that there were CBSA officers in the immediate vicinity who did not see fit to intervene. While I do not wish to encourage the applicant to commit even minor breaches of the conditions, I place no weight on the incident.

## Daily Exercise

[39] With respect to the request to be permitted an hour per weekday for exercise and fresh air, the applicant and Ms. El Fouli both testified that it would be beneficial for their health. Ms. El Fouli stated that she had been advised by her physicians to seek additional exercise. This has been difficult to achieve in light of her responsibilities to the family and as a supervisor for her husband. The applicant proposes that this remain subject to the requirement that he notify CBSA before leaving and upon returning and that he would have the GPS tracking unit with him at all times. He did not press the request, at this time, that this practice be permitted during school vacations.

[40] The respondents are opposed to this request because of a number of problems which CBSA agents had observed with the applicant's use of the GPS tracking device. These problems were described in Mr. Pearce's evidence. The system needs to be programmed to track Mr. Mahjoub's location when he leaves the home. There were a number of occasions where the signal from the tracking unit was not captured by the system when Mr. Mahjoub left the home or the signal was subsequently lost and not recaptured for varying periods of time. Mr. Pearce was very fair in his evidence and did not suggest that this was due to any deliberate attempt on the part of Mr. Mahjoub to impair or test the limits of the electronic tracking system. But this problem does not appear to have been experienced in other cases where this system is employed.

[41] Mr. Mahjoub was generally under physical surveillance during these outings so the losses of the signal, while disturbing, do not mean that he has not been effectively monitored. CBSA took steps to verify that the system was working as it should and provided Mr. Mahjoub with a refresher

course in how to capture and maintain the signal. In his testimony, Mr. Pearce acknowledged that in recent weeks there had not been a problem with the operation of the GPS tracking unit.

[42] The Court would be very concerned if there were any evidence that Mr. Mahjoub was deliberately attempting to test the limits or to defeat the electronic tracking system. That does not appear to be the case. It is not clear from the evidence whether he has become more adept in using the GPS unit or the CBSA programming has become more effective. Whatever the reason, I do not believe that the early problems with this system should count against the applicant's request to have an hour per weekday outside the home for fresh air and exercise en route to or from the boys' school. I am satisfied that with the combination of the electronic system and the use of physical surveillance at the discretion of CBSA, the applicant can be effectively monitored. Accordingly, this variation will form part of the revised order. Mr. Mahjoub will, of course, have to advise CBSA of when he intends to take this time and where he will be during the hour.

#### Greater Freedom for Religious Observances

[43] The applicant requests that he be permitted to attend prayers at a mosque on Friday afternoons and evening prayers during Ramadan and not have this count as weekly outings. The respondents have no objection to these changes provided that the mosque has been approved by CBSA. I understand this to mean that CBSA can effectively monitor the applicant's presence at that location, and not that they propose to monitor the actual prayers. There does not appear to have been any major problem in this regard since Mr. Mahjoub's release. Indeed, the variation made in September to allow for the daily curfew to be extended at CBSA's discretion was a jointly submitted

response to accommodate the applicant during Ramadan. Accordingly, the Court will accede to these requests.

[44] CBSA refused to permit the applicant to celebrate the festival of Eid ul-Fitr at the Rogers Centre, a very large facility capable of holding many thousands of persons. The request was refused because the agency determined that the Centre was not a secure venue and officers concluded that they could not effectively monitor an outing to that location. The respondents are not opposed in principle to the applicant's request to attend these celebrations or those of Eid ul-Adha in December, subject, again, to the proviso that the location is secure and the applicant can be effectively monitored.

[45] I understand that these events are important occasions in the Islamic calendar and that they provide an opportunity for family members to share in both religious observances and festivals. Ms. El Fouli testified about how much the boys enjoyed attending these events and missed the opportunity to share the experience with their father this year. Nonetheless, the determination of whether the location is secure and will permit effective monitoring is an operational decision best left to the discretion of CBSA officials.

[46] Counsel for the applicant acknowledged in closing argument that this is not a field upon which the Court should venture but expressed the hope that CBSA could be encouraged not to adopt a restrictive view based solely on the size of the venue. I am reluctant to comment as there was no evidence before me as to the options which might be available to participate in these celebrations in other venues where there may be less concern about security and monitoring.

## Islamic Sunday School and recreational programs for the boys

[47] Prior to the applicant's release from detention the two younger boys were enrolled in recreational programs within the local community and attended Islamic Sunday School between 10:00 a.m. and 2:30 p.m. Since his release, they have not enrolled in the programs or attended the Sunday School because of the restrictions imposed on their father's movements and their mother's and stepbrother's responsibilities as supervisors. The applicant seeks permission to take the boys to the recreational programs and to attend the Sunday school with them and his wife and not to have these count against his weekly outings. Ms. El Fouli previously taught at the Sunday school and wishes to resume teaching there.

[48] The respondents' position is that the applicant may apply to CBSA for approval to attend the recreational programs as part of his weekly outings. They are opposed to his request to attend Sunday School with his sons because CBSA regards this as operationally unfeasible. Their objection is not based on the nature of the event nor the premises in which it is conducted, a school vacant for the weekend. Mr. Pearce's evidence was that the agency's ability to monitor would be compromised. It is unlike the regular school situation where the applicant merely escorts the children to the school and collects them. He would remain present at the Sunday School for over four hours. Mr. Pearce testified that the agency would have to obtain information about the other participants, inform them that the applicant is a national security risk and obtain their agreement to being approved by CBSA. This was vigorously contested on cross examination and in closing argument. CBSA has not imposed the same requirements in approving requests for outings to

locations where other persons will be present such as to shopping malls and restaurants. The same no-contact rules which apply to those situations could be imposed for the Sunday School outings.

[49] It is evident that CBSA officials are concerned that they may not be permitted access to the Sunday School venue and would not be able to monitor the applicant's activities while he was there. These are valid concerns. The Court is not prepared to countenance any situation in which the applicant could not be effectively monitored for an extended period of time or would be engaged in teaching. But I do not think it necessary that CBSA identify each of the other participants at the Sunday School, inform them of the applicant's status and obtain their consent to being approved. Ms. El Fouli testified that she would ensure that her husband remained with her and that he would play no active role at the school. On that understanding and with the proviso that CBSA would have access to the school to monitor the applicant's activities, I see no reason why this attendance could not be approved as one of the applicant's weekly outings.

[50] Counsel for the applicant conceded that given a choice between a trip to a shopping mall or restaurant and Sunday School, the latter would take priority. It was argued, however, that the applicant should not have to make that choice as the other outings such as to shopping malls and restaurants were also important to the family. That may be a question for further consideration at a later date. At this point in time, with only seven months of experience of the practical operation of these conditions, I am not prepared to increase the number of weekly outings.

## Use of the Subway

[51] At present, the applicant is prohibited from using the Toronto subway for any of his outings, including trips to his doctors. Evidence was provided as to the location of the doctors' offices, distances from the applicant's home and likely times required to travel between them by surface public transit. The family, as of the dates of the hearing, did not have a functioning automobile and the applicant has been dependent upon the goodwill of friends and supporters to obtain rides. The Court was subsequently advised by correspondence from counsel for the respondents that a vehicle had been obtained by the family and registered in Ms. El Fouli's name on November 19, 2007.

[52] Although the respondents tendered a Toronto Transit Commission schedule to demonstrate that it was not impossible, they did not seriously dispute the contention that travel by public transit in Toronto is vastly more difficult if one cannot make use of the subway system. A trip which might be measured in minutes if made by subway could take hours in either direction by bus and streetcar. Nonetheless, the respondents remain opposed to any relaxation of this restriction because the GPS tracking system does not work underground and physical surveillance is much more difficult in the busy subway environment.

[53] The applicant submits that these problems could be resolved through careful coordination with the officers conducting the surveillance. Covert surveillance is not required. As with any other outing, Mr. Mahjoub would be required to notify CBSA as to his destination and route. Explicit instructions could be provided to ensure that they did not lose track of him in the system.

[54] This assumes, of course, that CBSA officials would deem it necessary to maintain physical surveillance of the applicant if he was traveling underground. In the present circumstances, I think that is a reasonable assumption and while there is much force to the applicant's submissions, it would impose an additional burden on the agency's capacity to effectively monitor the applicant's movements. I think that the Court should proceed cautiously before approving a change in mode of transportation which is significantly different from that previously permitted. In light of the family's recent acquisition of a vehicle, the need for this variation is less pressing. As a result I am not prepared to approve it at this time.

#### Access to the backyard

[55] At present, the applicant is permitted to be in his backyard between 8:00 a.m. and 9:00 p.m. provided that he is in the company of a supervisor. He requested that this curfew be extended to between 7 a.m. and 10 p.m. In light of the change of seasons, this request was not pressed at the hearing but will be advanced again before the summer months. The applicant does seek, however, to have the requirement that he be in the constant presence of a supervisor relaxed. This has proven to be inconvenient as when the telephone rings or a meal is to be prepared both must re-enter the house. Under the proposed change, the supervisor could remain in the house and observe the applicant from time to time through the windows.

[56] The respondents oppose this change as there is a walkway with foot traffic adjacent to the yard in an area between two rows of townhouses. Ms. El Fouli testified that she rarely saw anyone on the path that she did not recognize. Mr. Pearce's evidence was that the base station for the ankle

bracelet could be programmed so as to encompass the yard. Thus the concern is not that Mr. Mahjoub might slip away without an alarm being sent but that he might have unsupervised contact with passersby. The area is visible from locations such as the parking lot and it remains open to CBSA to conduct random physical surveillance.

[57] As a compromise, counsel for the applicant suggested that the condition be relaxed to permit Mr. Mahjoub to remain in the backyard not in the immediate presence of a supervisor, so long as he remains within the sight of a supervisor who may be inside the residence in the living room, kitchen or dining room. I think that is a reasonable proposal and agree to incorporate that change in the revised Order.

#### The addition of Matthew Behrens as a supervisor

[58] The applicant requests the addition of Mr. Matthew Behrens to the list of Court-approved supervisors who are required to remain with Mr. Mahjoub and to accompany him on his outings. Mr. Behrens works as a book editor and is a well-known political activist opposed to the security certificate procedure and the detention of persons on national security grounds. Through his efforts in furtherance of this cause, he has developed a close relationship with the applicant and his family and has provided assistance to them prior to and since Mr. Mahjoub's release from detention.

[59] Mr. Behrens has a minor criminal record. As a result, he was not proposed as a supervising surety when the applicant's release was under consideration a year ago. He was, however, specifically excluded from the prohibition on association with persons with criminal records. Mr.

Behrens arranged, through his organization, for the cash deposit paid into Court on behalf of Mona El Fouli, and his wife was one of the community members who executed performance bonds. Thus he has demonstrated a considerable commitment to supporting Mr. Mahjoub's release from detention.

[60] Due to the nature of his employment, Mr. Behrens' hours are flexible and he has made himself available to drive the applicant and Ms. El Fouli to appointments. He remains willing and able to provide that service but the applicant submits that it would be more convenient if Mr. Behrens was approved as a supervisor. For example, Ms. El Fouli requires physiotherapy for an automobile accident that occurred some time ago but has been unable to arrange sufficient supervision for Mr. Mahjoub to schedule the appointments. Having an additional supervisor would give her the flexibility to do so, the applicant submits.

[61] The respondents vigorously oppose this request. They do not rely on Mr. Behrens' minor criminal record; rather they argue that he has demonstrated a lack of respect for the Court and for the administration of the law. They submit that the Court can have no confidence that Mr. Behrens would ensure that Mr. Mahjoub complied with the imposed conditions if he were authorized to supervise the applicant.

[62] Mr. Behrens was taken on cross-examination to several articles which he had written in 2003 and which continue to circulate on the Internet. They contain statements that are critical of decisions made by members of this Court in security certificate cases. Counsel for the applicant objected to this cross-examination on the ground that Mr. Behrens' right to express his opinions was

protected by the *Charter*. The respondents argued that the issue was not freedom of expression, to which indisputably he is entitled, but whether the Court should exercise its discretion to repose trust in Mr. Behrens. On that ground the cross-examination was allowed and the articles were introduced as exhibits.

[63] On one level, the statements to which the Court's attention was drawn amount to no more than comment on the quality of the reasons for judgment provided in a particular case. On another level, certain statements may be construed as personal attacks on the individual judges who rendered those decisions. Of particular concern was an excerpt that compared a member of the Court to "...a southern judge throwing Rosa Parks in jail because the law is the law and the law says black people can't sit in the whites-only area of the bus, [the judge] adheres to the unfair security certificate law..." This equates a statute enacted by Parliament, which had withstood constitutional scrutiny by the Supreme Court of Canada, to a racist law in a segregationist state. It also implies that the judge presiding over the case had the discretion to disregard the statute. In my view it exceeds fair comment.

[64] Counsel for the applicant argued that Mr. Behrens was merely alluding to the fact that the judges of this Court were obliged to administer an unfair law, a view shared by many others and which was ultimately adopted in *Charkaoui*. That is, I think, an inaccurate comment on the scope and effect of the Supreme Court's decision. More to the point, it is also an overly generous characterization of Mr. Behrens' intent in making this statement. Reading the articles as a whole, they suggest that Mr. Behrens was, when he wrote them, contemptuous of Parliament's national

security laws and of those who must apply them in the exercise of their duties, including judges and officials.

[65] In these proceedings, Mr. Behrens testified that his obligation to the Court, if he were to be approved as a supervisor, would take priority over his personal beliefs. The question is whether, given those beliefs, the Court should take this assertion at face value.

[66] In addition to their concerns about his published writings, the respondents point to comments by Mr. Behrens in an exchange of e-mails with Mr. Pearce on an occasion when Mr. Behrens sought to intercede with CBSA on Mr. Mahjoub's behalf. The respondents submit that the use of what counsel described as “vitriolic” language by Mr. Behrens in criticizing an action taken by CBSA officers lends credence to their concern that he would not respect the terms and conditions imposed on the applicant. The emails disclose that there had been an apparent misunderstanding as to what had occurred and that Mr. Behrens quickly apologized. Of greater concern is Mr. Pearce’s evidence about the role that Mr. Behrens has apparently assumed to act as an agent for Mr. Mahjoub in questioning decisions made by CBSA officials. He has no authority to intercede on the applicant’s behalf and CBSA officials are under no obligation to deal with him.

[67] The fundamental question with respect to this issue is whether the approval of Mr. Behrens as a supervisor would aid or detract from the objective of ensuring compliance with the terms and conditions imposed upon Mr. Mahjoub. The respondents submit that it is not necessary as Mr. Behrens is prepared to continue to make himself and his car available to drive the applicant and his wife to appointments whether he is made a supervisor or not. The transportation question is no

longer so pressing as the family has now acquired a vehicle. However, it is clear from the evidence that the addition of another supervisor, particularly one with flexible hours and access to a vehicle, would help the family cope with the conditions. In my view, this would facilitate compliance.

[68] Mr. Behrens is well aware that a violation of the terms and conditions could result in Mr. Mahjoub's return to detention and the forfeiture of performance bonds executed by the sureties, including his wife. He has sworn under oath that he would put his responsibility to the Court above his personal beliefs. In those circumstances, despite some misgivings, I am prepared to approve him as a supervising surety upon his signing of an undertaking in terms similar to those executed by the other sureties.

[69] In agreeing to this, I wish to make it clear that Mr. Behrens is not being equipped with any greater authority to intercede with CBSA on behalf of Mr. Mahjoub than he would otherwise have as a private citizen and friend of the family. It does not entitle him to obtain information from CBSA of a private nature or to question officials about their dealings with Mr. Mahjoub. His responsibility is to the Court to ensure compliance with the terms and conditions of the Court's Orders. He has no authority to interpret those terms and conditions or to negotiate with CBSA on their application. If there is any indication that he is interfering with the exercise of the CBSA officers' duties, this designation will be revoked and Mr. Mahjoub will be barred from having contact with him.

[70] I am also concerned that Mr. Behrens is being put forward as a proposed supervising surety in other cases involving persons subject to security certificates and release conditions. It seems to

me that if the Court is to have confidence in his capacity to perform the responsibilities of a supervising surety in the present case, this should not be encouraged.

#### The videoconferencing equipment

[71] The condition that Mr. Mahjoub allow for the installation of two-way monitoring devices inside his home to permit direct communications by way of teleconference was not discussed at the December 2006 hearing but was adopted by the Court as proposed by counsel for the respondents following release of the February 15, 2007 reasons for decision. The applicant did not respond or object at that time; however no express opportunity to do so was provided before the condition was incorporated into the March 1st Order.

[72] The question of the installation of the video-conferencing equipment was raised by counsel for the applicant at the March 9<sup>th</sup> and 22<sup>nd</sup> conferences and during the hearing on May 24<sup>th</sup>. The position taken consistently by the applicant and his counsel on these occasions is that they objected to this as an unnecessary intrusion into the privacy of the family. However, other matters were more pressing at the time, notably the exterior video surveillance camera issue, and this objection was neither pursued nor resolved.

[73] The device was not installed in the Mahjoub home prior to his release as contemplated by the March 1<sup>st</sup> and April 11<sup>th</sup> Orders. The April 11<sup>th</sup> Order allowed for his release pending resolution of the exterior video camera issue but did not make provision for any delay in installing the video-conferencing device. It appears from the evidence that there were three unsuccessful attempts

during the spring and early summer to install the device. On the first two occasions, in May and June, a Bell technician was not permitted access to the premises. On the third attempt, July 26<sup>th</sup>, two CBSA officers accompanied the technician but the Mahjoub family objected to any of them entering the living room area wearing their service footwear. Mr Mahjoub took the position that the entire living room was a prayer area in which the family and any visitors habitually removed their footwear. The officers were under instructions not to do so as their footwear is part of their service uniform. Rather than have any further confrontation, Mr. Pearce instructed the officers by phone to leave.

[74] A CBSA officer advised Mr. Mahjoub's counsel, Barbara Jackman, by e-mail that they would be returning to the premises on August 2<sup>nd</sup> to install the device and that they would put it close to the electronic base station to make use of the same DSL line. In her response, Ms. Jackman stated the following: "In order to avoid any impasse on August 2nd please confirm that your officers will not insist that the phone be put in a place not acceptable to Mr. Mahjoub and Ms. El Fouli."

[75] The officers and a technician returned on August 2<sup>nd</sup> and used clean boot covers to enter the living room and to install the device adjacent to the base station. I note that this is also adjacent to the family television and DVD player. The Mahjoub's objected to the installation of the device in the living room. A box was therefore provided together with a long extension cord so the device could be moved to a corner or out of the living room into the kitchen area if necessary. The officers demonstrated that it could be placed in three different locations on the main floor.

[76] This device looks like a phone and is 10 inches deep, 9 wide & 3 high. The camera lens, which comes with a cap that can be placed over it when not in use, is only active when connected and the recipient has picked up the handset. It has no recording capabilities. The scope of view can be narrowed so as to capture only the person in front of the camera and not the background.

[77] Shortly after its installation Mr. Mahjoub, acting on the advice of counsel, disconnected the video-conferencing device and moved it into the basement. According to his and Ms. El Fouli's evidence, the applicant's counsel Barbara Jackman told them that they could unplug the device and put it in the furthest corner of the house as the location had not been specified in the Court's Order. This interpretation was also conveyed to Mr. Pearce by e-mail from Ms Jackman dated August 3<sup>rd</sup>. She indicated that the device could be made operational at any time CBSA needed it to be, but the location of the device remained in dispute and that the Court's guidance should be sought, if necessary.

[78] By letter dated August 14, 2007, counsel for the respondents wrote to Ms. Jackman with respect to the issue stating that an implied condition of the Court's Order was that the device would be operational at all times and that nothing in the Order with respect to the device was contingent upon Mr. Mahjoub's consent as to where it was installed.

[79] Neither party brought the matter to the Court's attention until their records were filed on this application. It was not raised by counsel for either party during the September scheduling teleconference with the Court. The video terminal has not been reconnected since it was removed to

the basement. The respondents submit that this is a continuing and flagrant breach of the Court's Orders. At first impression, that is how I saw the matter as well.

[80] I agree with the respondents that it was an implied term of the April 11<sup>th</sup> Order that the device would remain operational once it had been installed. It was improper for Ms. Jackman to have advised her clients that they could disconnect the device and put it in the basement. The terms of the Court's Orders are not negotiable between the parties. While their views are factors to be taken into consideration, the determination of what terms will be maintained rests with the Court and not counsel. The correct course of action would have been to advise the Court that there was an issue as to the location of the device and to seek direction as to where it could be installed. Counsel for the respondents could also have brought the matter to the Court's attention when they became aware that the location where the device was installed was a concern.

[81] The Court is not inclined to reward bad behaviour on the part of an applicant such as what appeared at first impression to be open defiance of an implied term of the Court's Order. The responsibility for compliance with the terms and condition of his release rests upon Mr. Mahjoub, not his counsel. But it appears clear from the evidence that he acted on the advice of counsel that removal of the device would not violate the conditions. Had that not been the case I would have proceeded to consider whether Mr. Mahjoub's release should be revoked and that he be returned to custody.

[82] In the particular circumstances in which this term of the Order was imposed, because notice had been served that both the installation of the device and its location within the home were issues to be raised with the Court and because he acted on the advice of counsel, I do not think that it would be fair to count this incident against the applicant as a breach of the conditions.

[83] I am now asked to rule on whether installation of the device is necessary and, if so, where it should be located. The applicant maintains his objection to it being installed on the main level of his home. If it is to be installed anywhere in his residence, he wants it to be in the basement and connected to the DSL line via a cable passed through the floor. But the central issue is whether it is required either to monitor Mr. Mahjoub or visitors to the home.

[84] The applicant's principal objection is that the presence of the device represents an unwarranted intrusion by the state into the family's private space in the absence of a convincing rationale for its use. He submits that his presence in the home is already monitored through the electronic bracelet and that he is subject to tracking by the GPS device and physical surveillance when he leaves the home. Active communication with CBSA is maintained by telephone and the officers may access the residence at any time to ensure that he is there and that there are no non-approved visitors on the premises.

[85] Under those conditions, the applicant questions what additional benefit would be achieved through the use of the video-phone. The suggestion by the respondents that it be used to monitor visits to the home by other persons, including tradespeople, is unworkable, in the applicant's submission. How would Mr. Mahjoub enforce this when, for example, the cable repairman shows

up at the house? There is no evidence before the Court of any breach of the terms and conditions through the visit of an unauthorized person, and no evidence that the existing measures have proven to be insufficient. Should someone wish to visit who was unauthorized, it is unlikely that they would submit to a conversation by video-phone with CBSA officers or that CBSA would be aware of it unless the home was under surveillance at that point in time.

[86] An additional factor that the applicant submits should be taken into consideration is that Ms. El Fouli wears the hijab when in public but not within the home, which could present a problem if the device were in the main living area and she were required to answer the phone.

[87] While there was considerable evidence put forward by the respondents as to where the videophone device should be located in the home, the same cannot be said for evidence as to the justification for its use. The respondents have relied primarily on the fact that the Court thought that this was an appropriate addition to the terms and conditions when it was initially proposed. No evidence has been advanced to establish why it would be necessary as an additional means to monitor Mr. Mahjoub other than that it would confirm his presence in the home. That can be determined through the other electronic means which have been employed and by random physical surveillance. The device could aid in ensuring that visitors to the home are who they are said to be, if CBSA has in its possession photographic identification of those persons. But in the absence of any evidence that this is a real concern, is that capability sufficient justification for maintaining the condition?

[88] I must keep in mind the Supreme Court's admonition at paragraph 116 of *Charkaoui* that release conditions must not be disproportionate to the nature of the threat. I am sceptical that the presence of the video-phone would intrude upon the privacy of the family to the extent that they evidently believe. Nonetheless, I have concluded that on the evidence before me, even the minimal intrusion it represents is disproportionate in light of the other available measures and that this condition may be safely removed. That does not preclude the respondent Ministers from returning to the Court on a future occasion with new or additional evidence to demonstrate that the video-phone is necessary to neutralize the risk that the applicant poses to national security or to the safety of any person.

#### Relaxation of the Notice Requirement for Visitors

[89] Although it is not specifically required in the April 11, 2007 Order, CBSA has been interpreting the condition that notice be provided of visitors at least 48 hours in advance as applying also to previously approved visitors. The applicant and his family have thus far acceded to CBSA requests to submit such information. There have been, in any event, very few visits. The applicant seeks to have CBSA's interpretation of the Order clarified and to have the requirement relaxed as it causes practical difficulties. As this relates also to requests made by the respondents, I will deal with it in the next section.

#### Respondents' Requests to Vary

##### Re Visitors:

[90] Access to the Mahjoub home is strictly limited to specified persons and visitors approved in advance by CBSA. The names, addresses and dates of birth of such visitors must be provided in order to obtain approval and the approval may be withdrawn at any time. While the release conditions do not require prior approval for subsequent visits by previously approved persons, it appears that CBSA officials have imposed that condition in practice. The applicant has gone along with it thus far although he is now questioning its necessity. The respondents wish to have a requirement for such notice adopted as one of the terms.

[91] Mr. Pearce's evidence was that CBSA has not refused any visits by approved visitors even where less than 48 hours' notice was provided. They required lead time to allow the identification of cleared visitors and to prepare. On cross-examination, he said that it was an operational issue, so that they could ensure that there would not be breaches of the conditions such as bringing cell-phones into the home. He further noted that CBSA did an update to the security check, to ensure that approved visitors had not done anything of concern in the interim since their initial approval. In view of this evidence, the Court will accept that a variation is necessary to require notice of visits even by approved persons. However, CBSA is to continue to exercise discretion when there is no reason for concern, such as in the case of a visit by a person familiar to the agency and close to the Mahjoub family.

[92] The respondents also seek terms allowing CBSA to require the submission of additional information regarding visitors for whom approval is sought, including their signatures, two pieces of photo identification and any other personal data CBSA officials deem necessary to conduct security

checks. Further, the respondents wish to have a log maintained at the Mahjoub residence which visitors would be required to sign.

[93] Should CBSA officials encounter difficulties in conducting security checks of prospective visitors, they may need to withhold or withdraw approval if they are not satisfied about the identity of the individual and need to make further inquiries. I am not satisfied from the evidence that it is necessary to require every person who might be put forward as a prospective visitor to submit two pieces of photo identification, signatures and other information. In my view, a proportionate response would be to allow CBSA to determine at their discretion in each instance whether they require such additional information to conduct a security check. That may include, for example, requiring a photocopy of a driver's license or other official document.

[94] The proposal that approved visitors to the home be asked to sign a log recording the date and time of their arrival and departure on each occasion does seem to be a reasonable response to the agency's need to monitor comings and goings at the Mahjoub home and one that is not disproportionately intrusive. Counsel has questioned how the applicant could enforce this requirement if visitors refuse to sign. That objection overlooks the authority which CBSA has been granted to revoke approval for any subsequent visits. The revised order will require that Mr. Mahjoub maintain a visitors' log provided by CBSA and make it available for inspection on request.

## Notice for Outings

[95] The respondents have put forward several requests for variances with respect to the notice requirements in the release conditions. First, the respondents seek an order allowing CBSA to require 72 business hours' notice when the applicant requests an outing. Under the terms of the April 11<sup>th</sup> order as varied on September 27, 2007, Mr. Mahjoub is required to seek approval for extended outings on a weekly basis with not less than 72 hours' notice for the following week's absences. As I understand the present request, the respondents seek to clarify that term so that CBSA officials would have three working days' notice of intended outings for the following week. The applicant is not opposed to that variance. As stated by counsel during the hearing, it makes sense for the family to group its requests for outings and present them at one time. Accordingly, that change will be made.

[96] Mr. Mahjoub is not permitted to change his place of residence without the prior approval of the Court. The respondents request a minor variance to ensure that this is not done without 60 days' notice and a prior risk assessment by CBSA. The applicant has no objection to this change and the Court agrees that it is reasonable.

## Other proposed changes

[97] The respondents request that the Order be varied to prohibit Mr. Mahjoub from entering any area where CBSA deems that the electronic monitoring is ineffective. The applicant submits that this would be unworkable as the GPS signal is lost when he enters enclosed premises such as

shopping malls, restaurants, his lawyers' and doctors' offices and the Courthouse. It is not difficult to envisage situations where CBSA officials might apply this condition to bar Mr. Mahjoub from entering locations where he has a legitimate purpose to be.

[98] As discussed above, the evidence is that the GPS tracking system is working reasonably well and that the applicant has been cooperating with CBSA officials to ensure that they are aware of his location when the signal has been lost. The combination of electronic tracking and physical surveillance, as deemed necessary by CBSA officials, should be sufficient to effectively monitor the applicant's movements without imposing this further restriction upon him. I will, therefore, not accede to this request at this time. The respondents may raise the matter again should further experience suggest that the Court should revisit the question.

[99] The request that the Court prohibit the applicant from possessing a video camcorder or from audio-taping or video-taping CBSA officers at any time arose from an incident which occurred in the course of an unannounced visit by officers to the Mahjoub home. The officers apparently became concerned that Mr. Mahjoub was filming them or intended to film them with a video camcorder. Mr. Mahjoub testified that he had another purpose in mind; to record the fact that Haney had control of his cell-phone as he was supposed to.

[100] The camcorder belongs to the family. The respondents submit that possession of it by Mr. Mahjoub may breach the condition that he not have in his possession any "communication device". While it might technically fall within the meaning of that term, in my view that interpretation would be overreaching the intent of the provision. There is no evidence before me that Mr. Mahjoub has

used the device for that purpose or that its possession by the family is intended for such use. To the extent that it is kept to record family related events or special occasions, I see no reason to prohibit possession of the device.

[101] However, I agree with the respondents that the officers charged with the responsibility of enforcing the Court's Orders should not be faced with the possibility that their identities would be publicly disclosed as this would expose them to possible risks and would compromise their ability to carry out other duties. They are required to identify themselves upon seeking access to the home but that should be the extent of their disclosure. Mr. Mahjoub, or anyone else at the home, should not be video-taping or audio-taping the officers as they are carrying out their duties.

[102] In post-hearing correspondence to the Court, respondent's counsel have advised that the cell-phone used by Mona El Fouli is now registered to her son Haney and that the billing records for the account are incomplete. They request that the Order be amended with regard to Ms. El Fouli's cell-phone usage. CBSA would request that Haney obtain detailed records or change his service provider. Counsel for the applicant has replied that they have no objection to the amendment sought by the Ministers. That change will also be reflected in the variance Order.

## **CONCLUSION**

[103] Taking into account the evidence and submissions heard and received by correspondence, the Court is of the view that the terms and conditions providing for Mr. Mahjoub's release from custody should be varied as set out in the Order below.

[104] As discussed above, counsel for the applicant may make further submissions respecting the use of Internet based telephone services in writing, or seek an opportunity to make oral submissions on the matter upon request to the Court.

[105] While the order below is issued as a revision to the Order of April 11, 2007, as amended, counsel for the parties are asked to collaborate on the preparation of a draft of the terms and conditions that could be issued as a fresh consolidating order taking into account the changes that have occurred since Mr. Mahjoub was released from custody.

**ORDER**

**THIS COURT ORDERS that** the Revised Order of April 11, 2007 as varied by the Order of June 14, 2007 and the Order of September 27, 2007 is further amended as follows:

1. Paragraph 3 mandating the installation of a two-way video device to permit visual contact during communications between the applicant and CBSA, is deleted;
2. Paragraphs 6, 7 and 8 are amended to include the name of Mr. Matthew Behrens in the lists of the names of those persons referenced as supervising sureties required to sign an undertaking and of whom, one is to remain with the applicant at all times;
3. Paragraph 7 is amended to add the phrase “or remain in direct view of” to the second sentence after the phrase “be accompanied by” to allow the applicant access to the backyard while within sight of a supervising surety within the home;
4. Subparagraph 8 (i) of the Order, as revised on September 27, 2007, is amended to require 72 business hours’ notice for approval of shorter weekly outings, of less than four hours’ duration.
5. The following subparagraph is substituted for and will replace subparagraph 8 (ii) to permit Mr. Mahjoub and his accompanying supervisor to remain outside the house for one hour of exercise on their way to or from the school each day:

ii) Leave the residence every school day between the hours of 8:00 and 9:30 a.m. and 3:00 and 4:30 p.m. in the company of Mona El Fouli or Haney El Fouli to take Ibrahim and Yusuf, Mr. Mahjoub's sons, to school in the morning and to pick them up after school. Mr. Mahjoub must go directly to and from the public elementary schools, with the exception of a one-hour period every day for exercise. He must provide CBSA with prior notice of his intended route and location where he will exercise. Mr. Mahjoub may not enter into contact with any other person en route to or from his home. He will provide the name and address and yearly school calendar to the CBSA for each school. Should the children need to leave school for a legitimate and unexpected reason outside of these times, Mr. Mahjoub would be permitted to accompany Mona El Fouli or Haney El Fouli to pick them up, provided CBSA is notified before he leaves of the circumstances, and is notified once he returns home.

6. Paragraph 12 is amended such that the paragraph set out below is to be substituted for and is to replace the existing paragraph:

Except as provided herein, Mr. Mahjoub shall not possess, have access to or use, directly or indirectly, any radio or radio device with transmission capability or any communication equipment or equipment capable of connecting to the internet or any component thereof, including but not limited to: any cellular telephone; any computer of any kind that contains a modem or that can access the internet or a component thereof; any pager; any fax machine; any public telephone; any telephone outside the residence; any internet facility; any hand-held device, such as a blackberry.

- i) The internet connection for the home computers used by Mr. Mahjoub's step son and his two sons shall be kept in a locked portion of the residence that Mr. Mahjoub cannot access, to which only Mona El Fouli and Haney El Fouli shall have keys. Each computer in the residence shall have a password to access it and such passwords shall be held by Mona El Fouli and Haney El Fouli and shall not be provided to Mr. Mahjoub or to his sons, Ibrahim and Yusuf. The internet connection to the computer in Ibrahim and Yusuf's room shall be by means of a manually activated connection in Haney's room and activated only when Mona El Fouli or Haney El Fouli are present. CBSA is authorized to obtain from the internet service provider information regarding the internet connection, including the addresses of websites visited and email addresses to which messages are sent or from which they are received using the connection. Until further Order, no internet-based phone service software or microphones may be installed on computers in the residence which are or may be connected to the internet and if such programs or microphones are presently installed, they must be removed or disabled.
- ii) A fax machine connected to the landline telephone service to the home is permitted. It shall be used only by Mona El Fouli or Haney El Fouli and kept in the locked room as provided for in subparagraph i). CBSA is authorized to intercept transmissions to and from this machine. A list of people and offices to whom faxes will be sent from the residence, along with their facsimile numbers, shall be provided to CBSA by Mona El Fouli and updated as necessary.

iii) The cell phones owned, registered to or used by Mona El Fouli and Haney El Fouli shall remain with them at all times and they must ensure that Mr. Mahjoub does not have access to them. The numbers of these cell phones must be provided to the CBSA, and their use while within the residence must be confined to the room in which the computer with access to the internet is situated. Mona El Fouli shall provide written consent to the interception by or on behalf of the CBSA of all communications involving the cell phones which she uses. Haney El Fouli shall agree to provide CBSA with monthly billing records reflecting calls made from and received by his cell phone. Mr. Mahjoub may use a conventional land-based telephone line located in the residence (telephone line) other than the separate dedicated land-based telephone line referred to in paragraph 2 above upon the following condition. Prior to his release from detention, both Mr. Mahjoub and the subscriber to such telephone line service shall consent in writing to the interception, by or on behalf of the CBSA, of all communications conducted using such service. This shall include allowing the CBSA to intercept the content of oral communication and also to obtain the telecommunication records associated with such telephone line service. The form of consent shall be prepared by counsel for the Ministers. Mr. Mahjoub is also permitted to place a call to CBSA to inform them of the situation and his whereabouts using a land-line telephone outside his residence, should a medical emergency arise outside of the home and no one is able to make the call on his behalf. In the alternative, Mr. Mahjoub may also call 911.

7. Paragraph 9 (e) is amended as follows:

e) a person approved in advance by the CBSA. In order to obtain such approval, the name, address, date of birth of such person and such additional information as may be deemed necessary by the CBSA, must be provided to the CBSA at least 48 hours prior to the initial visit. CBSA shall be given 48 hours' notice of any subsequent visits by a previously approved person but may waive that requirement in the discretion of its officials. The CBSA may withdraw its approval of previously approved visitors at any time.

8. The following sentence shall be appended to paragraph 9:

The applicant must maintain a log of visitors to the home in a format to be provided by the CBSA, and must make such log available for inspection on request by the CBSA.

9. Paragraph 22 is replaced by the following paragraph:

Mr. Mahjoub may not change his place of residence without the prior approval of this Court. Sixty days' prior notice must be provided to the CBSA, in order for the Agency to conduct a prior risk assessment. No persons may occupy the residence without the approval of the CBSA.

10. The following paragraph shall be added:

Neither Mr. Mahjoub nor any person in his residence shall make a recording of CBSA Officers by video or audio device, while they are

carrying out their duties in monitoring compliance with the terms and conditions of this Order.

“Richard G. Mosley”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** DES-1-00

**STYLE OF CAUSE:** MOHAMED ZEKI MAHJOUR  
AND  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION and THE MINISTER  
OF PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 5, 6, 7, 8, 2007

**REASONS FOR ORDER:** MOSLEY J.

**DATED:** December 24, 2007

**APPEARANCES:**

Barbara Jackman FOR THE APPLICANT  
John Norris

Donald MacIntosh FOR THE RESPONDENTS  
Angela Marinos

**SOLICITORS OF RECORD:**

BARBARA JACKMAN FOR THE APPLICANT  
Jackman & Associates  
Toronto, Ontario

JOHN NORRIS  
Ruby & Edwardh  
Toronto, Ontario

JOHN H. SIMS, Q.C. FOR THE RESPONDENTS  
Deputy Attorney General of Canada  
Toronto, Ontario