Date: 20060210

Docket: DES-04-01

Citation: 2006 FC 180

Toronto, Ontario, February 10, 2006

PRESENT: THE HONOURABLE MR. JUSTICE W. ANDREW MACKAY

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION & SOLICITOR GENERAL OF CANADA

Applicants

and

MAHMOUD JABALLAH

Respondent

REASONS FOR ORDER AND ORDER
(Applicant's Motion to recuse)

[1] These Reasons and Order concern the disposition of a Motion on behalf of the applicant, Mr. Jaballah, that I now recuse myself "from the determination of the reasonableness of the security certificate in this matter on grounds of a reasonable apprehension of bias."

[2] The Motion made orally without written text or affidavit, is raised in the course of on-going proceedings initiated in August 2001 when a security certificate, signed by the two ministers of Canada concerned, was referred to this Court for determination of its reasonableness, in accord with the process now provided under s-s. 77 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 as amended ("IRPA").

[3] These proceedings have a long and somewhat complex history. That was most recently summarized in paragraphs 2, 3 and 4, in a recent decision of this Court (2006 FC 115, filed February 1, 2006) whereby I dismissed an application by Mr. Jaballah for his release from detention and ordered that his detention be continued pending further order. That summary history is, of course, supplemented by the decision concerning Mr. Jaballah's continuing detention (2006 FC 115).

[4] Two findings made in that most recent decision are the bases for the application that I recuse myself from consideration of the reasonableness of the certificate. The first is a finding in relation to certain of Mr. Jaballah's testimony, i.e. explanations given in cross examination concerning telephone records of long distance calls to overseas numbers charged to his telephone number in Toronto, and similar calls and personal contacts with persons in Canada of concern to CSIS for security reasons. Those explanations I described as "not satisfactory and simply not credible." The second finding of concern is that in considering Mr. Jabballah's application for release from detention, I adopted, as counsel for Mr. Jabballah had suggested when the matter was heard, the

statutory standard under s. 83 (3) for considering an application for release from detention in similar circumstances of a permanent resident, and had followed that statutory provision since I was satisfied that Mr. Jabballah "continues to be a danger to national security".

[5] It is urged for Mr. Jabballah that those two findings will be key elements in the assessment of the reasonableness of the Ministers' certificate, and, having made them, a reasonable apprehension of bias arises if I were to proceed in due course to consider the reasonableness of the certificate. Before proceeding to consider further the issue raised, I set out the context of the proceedings in which it arises and I refer briefly to the principles applicable in considering a claim of a reasonable apprehension of bias.

[6] It may be somewhat unusual that matters dealt within in interlocutory proceedings become the basis for a Motion to recuse and not, at least as yet, a basis for appeal. So be it. In this case it is also unusual in that the application to recuse myself relates only to determination of the reasonableness of the security certificate, and not to the determination of the lawfulness of the decision, on behalf of the Minister of Citizenship and Immigration, to refuse Mr. Jaballah's application for protection, a decision made pursuant to subpara. 113 (d) (ii) of *IRPA*. I heard argument on that matter in December 2005 and my decision is currently under reserve.

[7] The Court scheduled hearings to resume on February 7, 2006, to hear evidence, having earlier granted leave to Mr. Jabballah, who had originally declined to adduce any evidence in

relation to the Ministers' certificate, though he later testified in regard to his Motion for release from detention. That schedule was put aside pending hearing and decision on the Motion that I now recuse myself. When the Motion was heard on February 7, I reserved decision to consider counsel's submissions. By these Reasons and Order I now dismiss the Motion to recuse myself.

[8] Counsel for the parties are agreed on the general principles relating to claims of a reasonable apprehension of bias, as enunciated by well known authorities. Not surprisingly, counsel for the Ministers concerned, the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness, do not agree with counsel for Mr. Jabballah on the application of principles in this case. After the applicable principles, I turn to consider their application in the circumstances and context in which the concerns are raised on behalf of Mr. Jabballah, discussing first the finding of credibility and then the finding that Mr. Jabballah continues to be a danger to national security.

<u>Assessing a claim of a reasonable apprehension of bias</u>

[9] It is well-accepted that the applicable principle of law as to a claim of a reasonable apprehension of bias is that stated by de Grandpre J., writing in dissent in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at 394-5, as follows:

> [W]hat would an informed person, viewing the matter realistically and practically, and having thought the matter through – conclude. Would he think it is more likely than not that Mr [X], whether consciously or unconsciously, would not decide fairly?

[10] In *Arthur v. Canada (Minister of Employment and Immigration),* [1993] 1 F.C. 94, [1992] F.C.J. No. 1000 (QL), Mr. Justice MacGuigan writing for the Court of Appeal, in relation to successive determinations by an adjudicator, commented at para 15:

> The most accurate statement of the law would thus appear to be that the mere fact of a second hearing before the same adjudicator, without more, does not give rise to reasonable apprehension of bias, but that the presence of other factors indicating a predisposition by the adjudicator as to the issue to be decided on the second hearing may do so. Obviously one consideration of major significance will be the relationship of the two issues on the two hearings, and also the finality of the second decision. If, for instance, both [page 106} decisions are of an interlocutory character, such as two decisions on detention (as in Rosario), it may be of little significance that the matter in issue is the same, but where the second decision is a final one as to a claimant's right to remain in the Country, the avoidance of a reasonable apprehension of bias may require greater distinction in the issues before the tribunal on the two occasions.

[11] In *R. v. S (R.D),* [1997] 3 S.C.R. 484 at pp. 531-532, Cory J. comments upon the necessity for substantial grounds to support a claim of a reasonable apprehension of bias, that the threshold for establishing such a claim is high, and whether a reasonable apprehension of bias arises will depend entirely upon the facts of the case.

[12] In *Charkaoui,* 2004 FC 624, [2004] F.C.J. No. 757 (QL), my colleague Noël J. reviewed the statutory arrangements for designated judges under *IRPA* with particular reference to a single judge considering applications for release from detention and also the reasonableness of the security certificate. I agree that under *IRPA* parliament has provided arrangements for the same judge to consider the various phases of the process relating to persons detained under certificates that they are inadmissible to Canada on national security grounds, including any applications for release from

detention. At paragraphs 15-22 in that case Noël J. compared the decisions concerning continuing detention and concerning the reasonableness of the certificate. He concluded:

> Accordingly, it follows that review of the reasonableness of a certificate, determining whether a danger exists and monitoring the continued detention are separate functions which ultimately lead to different conclusions. It cannot be said that a determination regarding continuing detention necessarily leads to the same kind of determination regarding the reasonableness of the certificate.

[13] In *Fong v. Winnipeg Regional Health Authority*, [2004] M.J. No. 299 (QL), 2004 MBGB 182, where the issue of a reasonable apprehension of bias arose in regard to decisions rendered by an arbitrator, Beard J. discussing “pre-judgement” as an aspect of procedural fairness, commented at para 12:

> …the question typically becomes one of whether the decision–maker exhibited such a degree of pre-judgement or predisposition to one side or the other that it gives rise to a reasonable apprehension that the decision-maker is or would be unresponsive to the evidence and arguments advanced at the hearing…

[14] These principles I now apply to the facts of this case and the particular circumstances which it is urged give rise to a reasonable apprehension of bias.

The finding of a lack of credibility

[15] In the decision in question I accepted much of Mr. Jaballah’s testimony about conditions of his detention and the effects of those upon him, and the testimony of his wife and his son about the adverse effects of his continuing detention upon his family, as well as the written assessment by Dr. Bagby of his psychological and emotional condition. I did not draw similar inferences as they urged

about the appropriateness of Mr. Jaballah's release, or in the case of Dr. Bagby as he would support for release from detention.

[16] The decision also reviewed the evidence of the conditions of his detention and then turned to evidence on other aspects, including "Mr. Jaballah's attitude to his release and his credibility." That section of the decision, at paras. 53 to 57 is as follows:

> [53] In the course of his testimony, Mr. Jaballah undertook that if now released he would obey any conditions imposed on him by the Court. He stressed that for him the important thing is to be close to his family. Conditions of house arrest, or time outside his home only in the company of persons approved by the Court, he undertook would be met if released. In his own words: (transcript p.503 lines 7-12) …I am willing to accept any condition that the Court asks me to observe because breaking those conditions would mean that I would be deprived of the only thing I am fighting for, which is being with my children.
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> [54] I have no doubt about Mr. Jabballah's deep interest in being with and supporting his family. Yet his credibility about other matters leaves much to be desired. In cross-examination, he first stated that he could not remember whether he had contacted anyone in Pakistan after he had come to Canada, he had not contacted anyone in Yemen after leaving there where he only knew one person he had worked with, and later after leaving Azerbaijan in 1995 he had left no friends behind and had no communication with persons in either Country after coming to Canada. Later he was asked about the telephone company records, then produced, which indicated a number of calls to all three countries, including 72 to Yemen and 47 calls to Azerbaijan from his Canadian telephone, mainly in 1996 and 1997. He then acknowledged that some of the recorded calls were his, or perhaps his wife's. While some recorded calls were so brief, a minute or so, they might have indicated inability to complete a call, as he suggested, numerous longer calls that he appeared to acknowledge as his, were not satisfactorily explained.
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> [55] Again, there are telephone records of some 75 calls from his telephone to London England, mainly to the International Office for Defence of the Egyptian people, believed to be an office with an operational link to Al Qaeda. These calls he admitted making when he was seeking advice or assistance for his refugee claim, to support his application to review his failed refugee claim. Yet many calls recorded in 1996 and 1997 were made before Mr. Jaballah's application for refugee status was heard, and, in my opinion, these were not satisfactorily explained. Nor was there any satisfactory explanation of more than 20 calls billed by Bell Canada to Mr. Jaballah's phone number from June 4, to 6, 1996, soon after his arrival to Canada, made to the United Kingdom, Yemen, Azerbaijan and Pakistan.
>
> [56] Other testimony about his lack of communication with certain others in this country after his arrival here was cast into doubt by records of calls from his telephone to Montreal, to Winnipeg, and to Edmonton, in each centre to phone numbers of persons suspected by C.S.I.S. of links to international terrorist activity.

> As for travels within Canada he first said he had only visited Montreal, to arrange automobile insurance at a lower premium than he could arrange in Toronto, and to Niagara Falls and London. Later when asked specifically about the other centres he had visited, he acknowledged that he had driven to St. Catherine's, and also to Winnipeg to visit a particular person, described by him as not really a friend, who had been of assistance to him and his family on their arrival to Canada. His contact with another person, then living in Alberta, one since charged with terrorist funding activities by prosecutors in the United States, was said to have been casual, and initiated by the person in Alberta whom Jaballah claims he really did not know. Yet there were numerous phone calls recorded from Jaballah's Toronto telephone number to Edmonton and to Leduc where his acquaintance was then based. These calls were not satisfactorily explained.
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> [57] The calls and visits in question were now almost a decade ago but Mr. Jaballah's explanations, while not directly relevant to the conditions of his detention, which is the prime issue of concern in this application, were not satisfactory and are simply not credible. In my opinion that in turn casts doubt upon any undertaking he might give in relation to conditions imposed if he were to be released at this stage.

That is the last reference to Mr. Jaballah's credibility in the decision. The decision proceeded to recognize a constitutional exemption, pursuant to s-s. 24 (1) of the C*harter*, on grounds that the effects of applying s-s. 82 (2) of *IRPA* to continue his detention without a review by a judge resulted in a violation of equality rights guaranteed by s-s.15(1) of the *Charter of Rights and Freedoms*. Mr. Jaballah's detention was then reviewed by analogy to the process under s-s. 83(3) of *IRPA* for a judge's review of the detention of a permanent resident in circumstances similar to those of Mr. Jaballah.

[17] The conclusion of the decision makes no reference to the testimony of Mr. Jaballah about telephone calls or other contacts with certain persons overseas or in Canada, and there is no other reference to the credibility of his explanations.

[18] The argument on behalf of Mr. Jaballah is put thus by counsel:

> This Motion rests on two bases. The first is that in its decision on continuing detention this Court made determinations of credibility adverse to Mr. Jaballah, which give rise to a reasonable apprehension that any attempt by him now to answer the certificate and the evidence upon which it is based would be an exercise in futility (Transcript, February 7, 2006, p. 11).

[19] It is urged that since the finding of credibility related to evidence about Mr. Jaballah's associations with others, an underlying concern of the Ministers' case leading to issuance of the security certificate, this Court would be seen by the informed reasonable observer as having prejudged that matter and as having raised an apprehension of bias about any evidence Mr. Jaballah might now offer.

[20] I am not persuaded that the informed reasonable observer aware of all the circumstances and thinking the matter through would find a reasonable apprehension of bias arising because of the reference to Mr. Jaballah's credibility in his explanations offered in cross examination in respect of certain telephone billing evidence. That was not an assessment of his general credibility, and it was considered only with reference to his testimony about his willingness to abide by reasonable conditions imposed if he were to be released. Moreover, as noted, much of his evidence about the conditions of his detention and their effects, and about his life before coming to Canada, was accepted by the Court. The assessment of his credibility was limited to certain of his testimony, and was used for a limited purpose.

[21] Further, the assessment of his credibility with reference to his evidence in considering his willingness to meet conditions that might be imposed if he were released from detention, is not a

significant matter concerning the reasonableness of the Ministers' security certificate. The assessment made was concerned with the evidence thus far adduced. Further evidence even on the same matter, may be adduced if counsel considers that useful. If it is, my duty to my office as a Judge is to weigh and consider all the evidence before me.

Mr. Jaballah as a continuing danger

[22] The second finding said to give rise to a reasonable apprehension of bias is my conclusion, in refusing Mr. Jaballah's application for release from detention, that he "continues to be a danger to national security" and thus his detention should be continued, by analogy with s-s. 83(3) of *IRPA* applicable to permanent residents detained in similar circumstances. That finding I explained at paragraphs 88-92 of the decision.

[23] That is not a factor to be assessed in considering the reasonableness of the security certificate. That assessment will depend on weighing all of the evidence and information before the Court relevant to whether the certified opinion of the Ministers is reasonable that Mr. Jaballah is inadmissible to Canada on specified grounds included within section 34 of *IRPA*. The grounds specified in this case under the *Immigration Act, 1978*, applicable when the certificate was issued, I have already determined (see *Re: Jaballah*, [2003] 3 F.C. 85 (T.D.) at para. 4) to be those reflected in paragraph 34(1)(b), (c) and (f) of *IRPA*.

[24] Those specified grounds are that Mr. Jaballah …is inadmissible on security grounds for:

> (b) engaging in or instigating the subversion by force of any Government
> (c) engaging in terrorism;
> (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

While "a danger to the security of Canada" is specified as a ground in subsection 34(1)(d) of *IRPA*, that was not a ground specified in paragraph 19(1)(e) or (f) of the *Immigration Act, 1978*, in force and referred to when the certificate was issued. It is not a ground under subsection 34(1) of *IRPA* which is deemed to have been specified in the security certificate concerning Mr. Jaballah.

[25] Thus, the finding, in relation to his application for release from detention, that Mr. Jaballah continues to be a danger to national security is not directly relevant for considering the reasonableness of the security certificate in regard to specified grounds. The issues to be determined in relation to the certificate, in light of all the evidence adduced relevant to those issues are different from the assessment made about his continuing to be a danger to national security in considering his application for release from detention. That difference was referred to at para. 92 of release from detention:

> Finally, I add for the record that my determination, on the evidence and arguments adduced in these certificate proceedings and in this application for release, that Mr.. Jaballah continues to be a danger to national security is a decision at this stage made on the record before me. It is not a decision on the issue of the reasonableness of the security certificate. That issue will be addressed after hearing further evidence, for the presentation of which leave has been granted.

[26] In the circumstances, I am of the view that an informed, reasonable observer, aware of the circumstances here, upon thinking the matter through would not consider that the finding that Mr. Jaballah was at the time of the decision a continuing danger to national security raises an apprehension of bias if I were to proceed to hear further evidence and argument concerning the reasonableness of the security certificate.

Conclusion

[27] With respect to both grounds here advanced, as the bases of the Motion to recuse myself from consideration of the reasonableness of the Ministers' certificate, I conclude that an informed reasonable person, aware of the full context and the circumstances of this case, would not consider that a reasonable apprehension of bias is raised if I were to continue and consider the evidence and argument in regard to the security certificate, I conclude that the findings concerned in the decision about the release of Mr. Jaballah from detention do not give rise to a reasonable perception that I have prejudged the evidence and argument yet to be adduced in regard to the issue of the reasonableness of the certificate.

[28] This Court's task is to consider carefully any new evidence and argument and all other relevant information, evidence and argument concerning the Ministers' certificate. That task I seek to discharge in performance of my duty as a Judge, consistent with my oath of office.

ORDER

IT IS ORDERED THAT the application on behalf of Mr. Jaballah heard on oral Motion on February 7, 2006, that this Judge recuse himself from consideration of the reasonableness of the Ministers' security certificate, is dismissed.

"W. Andrew MacKay"

DEPUTY JUDGE

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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