Federal Court



Date:20060508

Docket: DES-04-01

Citation: 2006 FC 1058

Halifax, Nova Scotia, May 8, 2006

PRESENT: The Honourable Mr. Justice W. Andrew Mackay

BETWEEN:

IN THE MATTER OF a certificate pursuant to Section 40.1 of the *Immigration Act*, R. S. C. 1985, c. 1-2, now deemed to be under s-s 77(1) of the *Immigration and Refugee Protection Act*, S. C. 2001, c.27;

AND IN THE MATTER OF the referral of that certificate to the Federal Court of Canada;

AND IN THE MATTER OF Mahmoud JABALLAH,

CERTIFICATE

This certifies that the attached transcript of Reasons delivered orally in the course of

hearings on May 2, 2006, constitutes the essence of Reasons given for the order issued orally

that day whereby I dismissed the application by Mr. Jaballah to postpone hearings on the

reasonableness of the security certificate issued in August 2001, and I adjourned further hearings

for receipt of his evidence to May 15, 2006.

Deputy Judge

Toronto, Ontario 1 Decision Rendered on Tuesday, May 2, 2006 2 in Court File DES-4-01 3 Minister of Citizenship and Immigration and 4 5 Solicitor General v. Mahmoud Jaballah 6 THE COURT: Good morning, all. 7 I will give you my decision 8 9 orally, if I may, and then we will spend a bit of 10 time, not very much, on where we go from here. 11 So far as the Applicant seeks an 12 order postponing the proceedings pending 13 determination by the Supreme Court of Canada of 14 three cases to be argued some six weeks hence, I am 15 not allowing the motion. That said, in the 16 circumstances of this week it seems to me that some 17 arrangements have to be made for further hearings. 18 Let me talk a bit about the major 19 motion. 20 Mr. Jaballah applies for an order 21 to postpone hearings arranged some six weeks ago, 22 with agreement of his counsel, first to meet his 23 request for leave to adduce evidence and then 24 hearings arran^ged for the week of May 15 for 25 argument addressing the reasonableness of the

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1 security certificate issued in August 2001. That 2 certificate certified the opinion of the Ministers 3 of the Crown concerned that Mr. Jaballah is 4 inadmissible to Canada on security grounds. The 5 certificate was then referred to this Court for 6 determination of its reasonableness.

7 You may not like it, but I express 8 some disappointment. This is the second or third 9 scheduled hearing date for Mr. Jaballah to respond 10 to concerns underlying the Ministers' certificate. 11 It is at least the second time that his counsel 12 has brought forward on less than appropriate notice 13 motions that compel the Court in its concern for 14 some fairness in the process to postpone hearing 15 dates. It is at least the second occasion since 16 last September, when counsel had in effect said, 17 "Quite frankly, I am simply too busy with this and

18 other responsibilities to properly serve my
19 client's interest.'

I am disappointed as well, if I may note, that counsel, who were aware of the circumstances at least a week ago of Mr. jaballah's removal from Toronto to Kingston, did not then, so far as I can judge, seek to discuss the matter with counsel for the Crown. I am not certain that that

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is right, but that is my impression from the manner
 in which correspondence was directed to me
 yesterday.

Going back to the motion, counsel are agreed, and I agree as well, that the threestep test concerning a stay of proceedings is the appropriate test to apply. In my opinion that test s is not here met. I acknowledge that there are serious issues concerning the constitutional **10 validity** of the process applicable under IRPA. The and constitutional validity of that process dealing with certificate cases is raised now in other cases before the Supreme Court of Canada. They may arise, but they have not yet been argued, in this scase. I am always surprised at what may be argued in this case, so I am not speculating on what may raised.

18 In a technical sense, there is not 19 a serious issue yet in this case that is before 20 this Court. Nevertheless, I acknowledge that it is 21 likely that issues relating to this case are before 22 the Supreme Court of Canada and will be discussed 23 in the circumstances of other cases in the middle 24 of next month.

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1 a decision of the Federal Court of Appeal in 1988, 2 which concerned a motion to stay investigatory 3 processes leading to possible criminal proceedings 4 under the Competition Act, which proceedings were 5 undertaken pursuant to section 17 of the Combines 6 Act which had not yet previously been dealt with in 7 constitutional terms.

8 Here the Court is concerned with a
9 process already upheld as constitutional and valid
10 by the Federal Court of Appeal. Ahani and

11 Charkaoui both dealt with that. That remains the 12 law that I must apply and follow until the Supreme 13 Court of Canada, or Parliament acting within its 14 powers, determines otherwise.

Let me acknowledge that there are serious **issues** arising in this case, some of which will be dealt **with**, **I** assume, in the argument and hopefully addressed by the Supreme Court in other cases. I acknowledge that there are serious issues. I turn to irreparable harm. As I read the decision in *YRI-York*, the principal concern there underlying the Court's decision to grant a stay of another tribunal's process, not the Court's own as is here sought, was its concern over

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1 the potential misuse of information obtained by
2 investigatory processes that mi^ght later be found
3 to be invalid.

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4 Here the stay is sought to 5 preclude testimony which Mr. Jaballah sought leave 6 to adduce presumably to respond to the concerns of 7 the Ministers as disclosed by the summaries 8 released to Mr. Jaballah, b^y numerous public

9 documents on the record, by public testimon^y cf 10 officers of CSIS, and not about other matters. 11 There is much evidence in the public record of this 12 proceeding to which Mr. Jaballah simply has not yet 13 responded.

¹4 If he does testify in this
15 proceeding, he will have the benefit of section 13
16 of the *Charter*, and you know that that provides
17 protection for a witness testifying in proceedings.
18 They then have the right not to have any
19 incriminating evidence so given used to incriminate
20 that witness in any other proceeding except in a
21 prosecution for perjury or for the giving of
22 contradictory evidence. Admittedly, that applies

23 in the criminal processes only hut, if necessary,
24 this Court would order that any testimony given in
25 this case by Mr. Jaballah not be used in any other

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1 proceedings, whether criminal, civil or

2 immigration, apart from this case and apart from 3 any prosecution for perjury in relation to the 4 testimony given.

5 In any event, I am not persuaded 6 that in the circumstances of this case there is any 7 irreparable harm if the proceedings to hear Mr. 8 Jaballah are not postponed.

9 In those circumstances and in
10 light of the public interest, the speedy resolution
11 of these proceedings, an interest that has been
12 ignored by me until now, among others, I simply do
13 not see that the balance of convenience favours Mr.
14 Jaballah. Indeed, the balance favours the
15 Ministers' position that the matter not be stayed.
16 That is my decision in relation to
17 the application to postpone the hearing essentially
18 indefinitely.

We are already in Tuesday of this 20 week's scheduled hearing, and I have said that Mr. 21 Jaballah would not be ordered to be present in the 22 court except on at least two clear days' notice, so 23 there is cne day left at the end of :his week. 24 am not sure, in light of what I know -- and it is 25 very little -- about the arrangements made for

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1 access by counsel to Mr. Jaballah at the moment, 2 whether that be in Kingston or Toronto. I am not 3 sure what those arrangements **are**.

In the circumstances it seems to me, unless counsel have a better idea, that we ought to ensure that Mr. Jaballah is available for rat least the time that he might have been available had he not been removed from Toronto in the five days from April 24 to April 29 before this hearing commenced, so that counsel have an opportunity to finish their preparations. I would like counsel to give me some estimate of how much time they anticipate they would have with Mr. Jaballah in that period of time.

15 In any event, I want to leave it 16 to counsel for both parties, if I may, to work out 17 arrangements for Mr. Jaballah to be able to be 18 present for this testimony to be given to the 19 Court, if he wishes to testify, in the week of May 20 15, a week we have held for further hearings in 21 this matter. We have yet to find a time for 22 hearings in relation to the argument on the 23 reasonableness of the certificate. 24 I would like to complete this 25 matter as quickly as I can. I am prepared to say

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1 that, if that has to be after the Supreme Court and 2 before the end of June, we will do it then. 3 Counsel may want to talk about 4 this. I do think counsel can work out co-operative 5 arrangements for dealing with Mr. Jaballah's 6 circumstances now so that he can testify 10 days from now, or almost two weeks from now, 8 satisfactorily. He has to determine whether he 9 wishes to do that. If he does, I can't believe 10 that counsel can't work it out. 11 MS JACKMAN: Maybe we should have 12 a break to talk about it. 13 THE COURT: I think so. I invite 14 you to canvass when you might hear argument on the 15 matter. I assume that a number of you may be 16 involved before the Supreme Court. I am not 17 asking. 18 MR. NORRIS: On this side, yes. 19 THE COURT: We will break for 15 20 minutes.

--- Short Recess at 10:15 a.m.

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