Date: 20080115

Docket: DES-3-07

Citation: 2008 FC 46

Ottawa, Ontario, January 15, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ABDULLAH KHADR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by the applicant for the appointment of an *amicus curiae* to assist the Court in proceedings under section 38 of the *Canada Evidence Act*, R.S., 1985, c. C-5 (CEA). The underlying application arises in the context of a request for the extradition of the applicant to face charges in the United States of America. Mr. Khadr was arrested in Canada on December 17, 2005 pursuant to a provisional warrant issued by a judge of the Ontario Superior Court of Justice under the *Extradition Act*, S.C. 1999, c. 18. He was denied judicial interim release and remains in custody.

[2] In August 2006, the applicant filed a motion before the extradition judge seeking, among other things, a *voir dire* to determine the admissibility of portions of the Record of the Case relied upon by the requesting state and for an Order requiring the Attorney General of Canada and the requesting state to produce all documents relevant to the *voir dire.* Federal Crown counsel acting for the requesting state voluntarily disclosed documents held by the Canadian Security Intelligence Service, the Department of Foreign Affairs and International Trade and the Royal Canadian Mounted Police.

[3] In preparing to provide disclosure, Crown counsel issued four notices to the Attorney General of Canada under subsection 38.01(1) of the CEA, to the effect that certain of the documents contained information of a sensitive nature or information which could injure Canada's international relations, national defence or national security if released. As required by the statute, the Attorney General reviewed the material and made decisions with respect to whether disclosure of the information would be authorized or not authorized. Extensive redactions or deletions were made to documents disclosed to the applicant.

[4] The extradition judge, Justice Christopher M. Speyer, in a decision rendered on July 24, 2007, ruled that no order for disclosure was required with respect to the material in the possession of Canadian government departments or agencies as those documents had already been disclosed. He declined to make any order for production against the requesting state. At paragraph 23 of his decision, Justice Speyer noted that it was beyond the scope of his authority to determine whether the circumstances of the extradition proceeding required the production of unredacted copies of the material disclosed by the Canadian authorities as that jurisdiction is assigned to a designated judge

of the Federal Court under section 38 of the Canada Evidence Act: *United States of America v. Khadr* [2007] O.J. No.3140 (S.C.J.)

[5] On August 21, 2007, Mr. Khadr filed an application in the Federal Court for an order seeking the disclosure of the information which is the subject of the notices provided by the Crown and with respect of which the Attorney General has not authorized disclosure. I note that the requirements of the statute that such applications be kept confidential were found to be in breach of the *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, in *Toronto Star Newspapers Ltd. v. Canada*, 2007 FC 128, [2007] F.C.J. No. 165. Although there was no controversy between the parties over this question, for greater certainty I adopt the reasoning and conclusions of that decision for the purposes of this proceeding.

[6] On November 5, 2007 counsel for the Attorney General filed and served redacted copies of the documents at issue. These consist of some 266 documents comprising approximately 1200 pages. Application and responding records with supporting public and private affidavit evidence, including unredacted versions of the documents, have been filed with the Court. Thus far, no evidence has been heard *ex parte*.

[7] This motion for the appointment of an *amicus* was filed on November 15, 2007 and an oral hearing on the motion was conducted on December 20, 2007. The applicant has proposed the names of two independent counsel as candidates for appointment as *amicus* in this matter. The respondent acknowledges that the Court has the implicit jurisdiction to appoint an *amicus* but takes

the position that such an appointment is not necessary in the circumstances of this case and would lead to delays in rendering a decision on the application.

[8] In the alternative, should the Court deem it necessary to appoint an *amicus*, the respondent has proposed the names of four independent counsel, all of whom are also acceptable to the applicant. Both parties have submitted proposed terms of appointment and conditions to define the scope of the mandate of an *amicus*. These proposed terms and conditions are substantially similar but differ in certain important respects.

ISSUES:

[9] The issues which the Court is to determine on this motion are as follows:

> 1. Whether the appointment of an *amicus curiae* is necessary to assist the court in deciding whether to confirm the statutory prohibition against disclosure of the redacted information pursuant to subsection 38.06(3) of the CEA; and
>
> 2. If the appointment of an *amicus curiae* is found to be necessary, what should be the terms of appointment and the scope of his or her participation in the proceedings?

ANALYSIS:

Is the appointment of an amicus curiae necessary in these proceedings?

[10] The grounds relied upon by the applicant in support of the appointment of an *amicus* are succinctly set out in his notice of motion as follows:

> 1. Absent the appointment of an *amicus curiae*, the applicant's interests and perspectives will not be represented before the court during *ex parte* sessions of these proceedings;
>
> 2. The exclusion of the applicant from the proceedings and the absence of an *amicus curiae* would constitute a violation of the applicant's rights under section 7 of the *Canadian Charter of Rights and Freedoms*; and
>
> 3. The appointment of an *amicus curiae* is necessary in order to ensure a full and fair hearing of the issues raised in these proceedings.

[11] Although the motion grounds cited by the applicant refer to section 7 of the *Charter*, counsel has confirmed that the applicant does not seek any constitutional remedy at this time, reserving the right to raise such a challenge at a later date should it be warranted by the circumstances. However, counsel submits that the Court's decision on this motion should be informed by the fundamental justice interests protected by section 7.

[12] The Federal Court of Appeal has upheld the constitutionality of the provisions allowing for *ex parte* hearings in section 38 proceedings: *Canada (Attorney General) v. Khawaja*, 2007 FCA 388. The Court of Appeal did not deem it necessary to address the question of the application of section 7 as it considered that the issue was not squarely before it. In the decision under appeal, *Canada (Attorney General) v. Khawaja*, 2007 FC 463, Chief Justice Allan Lutfy cited the existence of a discretion on the part of the presiding judge to appoint an *amicus* as a significant factor, stating the following at paragraph 57 of his reasons:

> In my view, the Court's ability, on its own initiative or in response to a request from a party to the proceeding, to appoint an *amicus curiae* on a case-by-case basis as may be deemed necessary attenuates the respondent's concerns with the *ex parte* process. This safeguard, if and when it need be used in the discretion of the presiding judge,

> further assures adherence to the principles of fundamental justice in the national security context.

[13] Chief Justice Lutfy noted, at paragraph 49, that a variant of the *amicus* model, although not identical to the traditional conception of that office, had been used in *Canada (Attorney General) v. Ribic*, 2003 FCA 246. In that case, counsel for the Attorney General on the section 38 application was appointed to act on behalf of the applicant for the purpose of examining two witnesses *in camera*. The Court of Appeal upheld the fairness of the process in the circumstances in which it arose: the application had been made in the middle of a jury trial, the legislation was new and there were very few security cleared counsel then available.

[14] There is no provision for the appointment of an *amicus* in section 38. The respondent submits that the Federal Court has the implied jurisdiction to appoint an *amicus* where necessary to assist the court: *Harkat (Re)*, 2004 FC 1717.

[15] In *Harkat*, Justice Eleanor Dawson reviewed the scope of the Federal Court's jurisdiction to appoint an *amicus* in the context of a hearing into the reasonableness of a security certificate signed pursuant to subsection 77 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA). In the circumstances of that case, Justice Dawson did not consider it necessary to decide the question and assumed for the purposes of the motion before her that there is such a jurisdiction. At paragraph 20 of her reasons, she noted that a power may be conferred by implication to the extent that the existence and exercise of such a power is necessary for the court to properly and fully exercise the jurisdiction expressly conferred upon it by some statutory provision: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at pp. 639-644.

[16] Justice Dawson concluded that the applicant had not established that the Court could not properly exercise its jurisdiction without the appointment of an *amicus* or that recourse to a remedy under section 24 of the *Charter* was required. Three additional reasons for refusing the application were identified: the absence of any expression of Parliamentary intent in favour of such an appointment; the lateness of the application and the resulting delay that it would occasion; and, that the legislation provided designated judges with sufficient power and flexibility to properly discharge the duties imposed.

[17] A similar result was reached in *Jaballah (Re)*, 2006 FC 1010, also a security certificate case. Both *Harkat* and *Jaballah* preceded the decision of the Supreme Court of Canada in *Charkaoui v. Canada* 2007 SCC 9. I note that in *Charkaoui (Re)*, 2007 FC 1037 and *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1025, both conditional release applications arising in certificate cases, the applicants were invited by the Court to bring motions to appoint *amici* but declined.

[18] The respondent submits that in the present case it is clear that an *amicus* is not required in order for the Court to exercise jurisdiction under section 38 of the CEA. The case is no more complex than other section 38 applications, it is said, and the Court has developed an expertise in dealing with national security cases without the benefit of *amici*. The appointment of an *amicus* would likely add to the time required to begin and complete the section 38 proceeding, particularly if the independent counsel selected was not yet security cleared.

[19] As the Supreme Court of Canada recognized in *Charkaoui*, above, at paragraph 77, in enacting section 38 Parliament has made an effort to strike a sensitive balance between the need for protection of confidential information and the rights of the individual. I agree with the respondent that in most instances, that balance can and should be achieved without the insertion of an additional actor into the proceedings to assist the Court. To succeed on such a motion, the applicant must articulate the reasons why it is necessary to appoint an *amicus* for the Court to fully exercise its statutory jurisdiction. It is not sufficient that it be simply desirable: *Canadian Liberty Net*, above at 641.

[20] In these proceedings, the applicant has made a compelling argument that, in the particular circumstances of his case, the appointment of an *amicus* is necessary to assist the Court to arrive at a full and fair determination of the disclosure issues.

[21] The extradition request will be determined largely on the basis of a documentary Record of the Case against the applicant in the foreign state. The applicant has a limited ability to challenge the strength of the case against him in that state. If extradited and convicted, he faces a maximum sentence of imprisonment well in excess of his natural life span. While these may be factors common to many extradition requests, there are additional considerations.

[22] The information at issue in this case is sought for the purpose of demonstrating that the principal evidence against the applicant was allegedly obtained through torture and illegal detention. The applicant argues in the extradition proceedings that the evidence is inadmissible or in the alternative, “manifestly unreliable” as described by the Supreme Court of Canada in *United States*

of America v. Ferras, 2006 SCC 33. The Crown has conceded that there is an "air of reality" to Mr. Khadr's allegations. As stated by Justice Speyer at paragraph 40 of his decision on the *voir dire* motion, there is a realistic possibility that the applicant's claims of abuse can be substantiated giving rise to the remedy sought, that is, to exclude the evidence from the extradition proceedings.

[23] One of the safeguards identified by Chief Justice Lutfy in *Khawaja*, above, at paragraph 59, as contributing to the protection of the interests of the individual whose liberty interests are engaged in a section 38 application based on underlying criminal proceedings is subsection 38.14 of the Act. Subsection 38.14 provides that the "person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial… ". Assuming that this provision would apply to the extradition hearing in Canada, it would have no application to a trial conducted in the foreign jurisdiction.

[24] While there is a duty of utmost good faith on the part of counsel for the Attorney General in section 38 proceedings and the respondent's counsel on this application are not directly engaged in the extradition proceedings, they will be arguing in favour of maintaining the Attorney General's decisions with respect to disclosure of the contested information. Moreover, Federal Crown counsel have carriage of the extradition proceedings on behalf of the requesting state. There is at least the appearance that counsel for the Attorney General will be adverse in interest to the applicant with respect to the disclosure issues which the Court must address.

[25] The possibility, as argued by the respondent, that appointment of an *amicus* would result in delays in the proceedings, either to obtain security clearances or to conduct the *ex parte* hearings, is

a relevant consideration. The Court would be reluctant to adopt the procedure when it may have uncertain benefits and could result in significant delay in related proceedings. One example would be when a section 38 application is being considered in the middle of a jury trial.

[26] In this instance, the motion has been made on a timely basis prior to the hearing of any evidence. There are prospective *amicus* candidates available with the required clearances and it is not expected that the hearings will be unduly prolonged. Counsel for Mr. Khadr has also stressed that his desire for the appointment of an *amicus* outweighs his interest in a more rapid disposition of the underlying application.

[27] I am satisfied that in these circumstances, the appointment of an experienced and independent counsel to act as *amicus curiae* is necessary for the full exercise of the Court's jurisdiction.

Terms of appointment and mandate:

[28] As noted above, both parties have submitted proposed terms and conditions which are largely similar. They are agreed, for example, that the *amicus* designated by the Court shall be required to have, or apply for and receive, security clearance to the satisfaction of the Attorney General before being appointed, that the *amicus* shall have reasonable access to the unredacted versions of the documents at issue and that the Court may order the reasonable fees and disbursements of the *amicus* to be paid by the Attorney General. The respondent would prefer that payment be subject to applicable Treasury Board policies or guidelines. While I would encourage

agreement to be reached, the matter could be determined by the Court at a later date if an issue arises as to what constitutes "reasonable" compensation.

[29] The parties differ over the nature of the role that the *amicus* should perform. The applicant submits that it should be substantially the same as that proposed for "special advocates" in the context of proceedings under IRPA by Bill C-3, currently before Parliament, or as set out in the *Special Immigration Appeals Commission Act*, 1997 c.68 in the United Kingdom. As such, the *amicus* would represent the interests of the applicant and advance his point of view in the *ex parte* portion of the section 38 proceedings, in which the applicant could not take part.

[30] The respondent's position is that the role of an *amicus curiae* has traditionally been regarded as that of a "friend of the court", as the term translates into English. The role has been characterized as that of a disinterested person appointed to assist the court to serve generally one of three different purposes: (i) to represent unrepresented interests before the court; (ii) to inform the court of some factor circumstance that the court may otherwise be unaware of; or (iii) to advise the court on a point of law: *Attorney General of Canada et. al. v. Aluminum Company of Canada*, (1987) 35 D.L.R. (4^{th}) 495 (B.C.C.A.) at 505.

[31] Counsel have drawn my attention to a number of cases in which *amici* have been appointed by the courts in diverse circumstances. In *LePage v. Ontario* (2006), 214 C.C.C. (3d) 105, the Ontario Court of Appeal considered the authority of the mental health board to appoint an *amicus* to present submissions on behalf of a person found not criminally responsible by reason of mental

disorder. In describing the role of the *amicus* for a unanimous panel, Juriansz J.A. stated the following at paragraph 29:

> I would not adopt an unduly technical approach to the question. Certainly, *amicus curiae* appointed by the court have no solicitor-client relationship with the accused and may be described as counsel to the court. However, the role of *amicus curiae* is not strictly defined and continues to evolve. One of the roles of *amicus curiae* has been recognized as being an assistant to the court when "there is a failure to present the issues (as, for example, where one side of the argument has not been presented to the Court)".... In my view *amicus curiae* may be appointed by the Board and assigned the role of presenting the issues favouring the accused which otherwise might not be raised. I am satisfied that an *amicus curiae* who is assigned this role may be said to "act for the accused". [authority cited omitted]

[32] Similarly, I am of the view that in the context of a section 38 application related to a criminal proceeding, such as in the present case, an *amicus* appointed by the Court may present the issues favouring the person seeking disclosure of the information during the *ex parte* portion of the proceedings and may be said in that respect to act for the individual at that stage. But the *amicus* has no solicitor-client relationship with the individual and his or her role will be to assist the Court in arriving at a just determination of the issues.

[33] The applicant does not dispute that the *amicus* must keep the information at issue confidential until such time as it may be ordered disclosed. However he questions the respondent's position that the *amicus* should not have any communication with the applicant or counsel for the applicant once he or she has been granted access to the redacted information and documents, without leave of the Court. He submits that the *amicus* cannot perform an effective role under that constraint. However, it remains open to the Court to grant leave for such communication under such

terms as may be necessary to protect the confidential information when it is deemed necessary for the proper exercise of the Court's jurisdiction.

[34] In view of the recent decision of the Supreme Court of Canada in *Named Person v. Vancouver Sun,* 2007 SCC 43, the respondent submits that the *amicus* should be limited to presenting written and oral submissions on matters of fact and evidence alone and not on points of law. In *Named Person,* an Extradition Judge had appointed an *amicus* to assist him in dealing with an issue of informer privilege. The Supreme Court held that this was an error as the determination of the proper legal test was the Judge's responsibility. Counsel drew my attention to statements in the majority's reasons at paragraph 48 which may be construed as supporting a restrictive interpretation of the scope of the mandate which an *amicus* may be given.

[35] I do not read the majority's decision in the *Named Person* case as laying down a definitive rule that an *amicus curiae* cannot make submissions on points of law. As stated by Justice Louis LeBel in his dissenting reasons at paragraph 155, that would be inconsistent with the Supreme Court's own practice in appointing *amici* in cases such as the *Reference Re Succession of Québec*, [1998] 2 S.C.R. 217. To illustrate recent application of this practice, counsel for the applicant tabled a copy of an Order issued by the Chief Justice on December 10, 2007 under Rule 92 of the *Supreme Court Rules* SOR/2002-156 appointing an *amicus* to file a factum and book of authorities and to make oral submissions in a pending appeal: *Attorney General of Ontario, 3rd Party Record Holder v. Lawrence McNeil et al., File No.31852.*

[36] In my view, the decision of the majority in *Named Person* turns on the absolute nature of the informer privilege. As stated at paragraph 63 of the majority's reasons, "... the determination of the proper legal test to be applied was the responsibility of the Extradition Judge. Moreover, the decision to reveal to the *amicus* detailed facts about the Named Person was inconsistent with the Extradition Judge's obligation to protect the information covered by informer privilege...."

[37] Should the issue of informer privilege arise with respect to the redacted information at issue in these proceedings, the Court will have to ensure that the *amicus* not have access to that information or make submissions on the scope of the privilege. Barring that situation, the *amicus* will be invited to make submissions on the facts and the law.

[38] As noted above, the parties have put forward the names of six very experienced and capable independent counsel. The applicant would be content with any of the four proposed by the respondent. One of the six lacks the required security clearances at present and another is not available other than on a limited part time basis until April. While delay is not a major concern, as discussed previously, the proposed candidates indicated through counsel or were asked by the Court Registry to submit information as to their short-term availability and that was taken into consideration.

[39] The respondent submits that the Court should appoint a candidate only from the list suggested by the parties and in the event that no satisfactory candidate is presented, the parties should be given a reasonable opportunity to provide additional candidates. Barring a statutory restriction such as is set out in the proposed paragraph 83(1)(b) in Bill C-3 or binding authority on

the question, I see no reason for the Court to accept such a constraint on the exercise of its discretion. It is open to the Court to select independent counsel worthy of the Court's trust and confidence whether or not they are proposed by the parties.

[40] Having said that, I have had no difficulty in finding within the group of proposed candidates a senior member of the private bar in whom I have confidence, who has experience in national security matters and the required security clearances and who is available to participate in the *ex parte* proceedings in the coming days.

ORDER

THIS COURT ORDERS that:

1. Mr. Leonard M. Shore, Q.C. of Ottawa, Ontario is appointed as *amicus curiae* to assist the Court in preparing for and to participate in the *ex parte* hearings of evidence and representations submitted on behalf of the Attorney General of Canada in this application pursuant to section 38 of the *Canada Evidence Act;*
2. The *amicus curiae* shall have reasonable access to the *ex parte* affidavits filed by the Attorney General of Canada in these proceedings, including attachments, as determined by the Court;
3. The *amicus curiae* may communicate with counsel for the parties in preparation for the *ex parte* hearings;

4. The *amicus curiae* will keep confidential from the applicant, his counsel and any others not participating in the *ex parte* hearings, all confidential information and documents to which the *amicus curiae* has access in this application;
5. The *amicus curiae* will not have any communication with the applicant or counsel for the applicant once he has been granted access to the confidential information and documents, without prior leave of the Court;
6. The *amicus curiae* may participate in the *ex parte* proceedings, may cross-examine the respondent's *ex parte* affiants and witnesses and present written and oral submissions as directed by the Court;
7. The *amicus curiae* may also participate in any *ex parte* proceedings requested by the applicant, as directed by the Court;
8. The *amicus curiae* may attend any public proceedings in respect of this application and may make oral submissions with leave of the Court;
9. The respondent will have the right of reply to any submissions made by the *amicus curiae*; and,
10. The respondent will pay the reasonable fees and disbursements of the *amicus curiae.*

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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