Date: 20080218

Docket: DES-4-02

Citation: 2008 FC 198

Ottawa, Ontario, February 18, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

MOHAMED HARKAT

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS CANADA

Respondents

PUBLIC REASONS FOR ORDER

[1] On January 29, 2008, agents of the Canada Border Services Agency (CBSA) arrested and detained Mohamed Harkat. It was alleged that Mr. Harkat had breached the terms and conditions of the Court's order of May 23, 2006, which had released him from detention (release order).

[2] On January 31, 2008, the Court held a hearing and received evidence, as required by paragraph 19 of the release order. That paragraph states:

> 19. Any officer of the CBSA or any peace officer, if they have reasonable grounds to believe that any term or condition of this order has been breached, may arrest Mr. Harkat without warrant and cause him to be detained. Within 48 hours of such detention a Judge of this Court, designated by the Chief Justice, shall forthwith determine whether there has been a breach of any term or condition of this order, whether the terms of this order should be amended and whether Mr. Harkat should be incarcerated. [emphasis added]

[3] In view of the time constraints, and the full evidentiary record needed in order to adjudicate upon whether there had been a breach of any term or condition of the release order, whether the terms of the release order should be amended and whether Mr. Harkat should be incarcerated, the Court ruled that it would hear evidence and submissions about whether Mr. Harkat should be released from detention pending a further hearing. The Court then received evidence and heard submissions in which Mr. Harkat sought release upon the pre-existing terms and conditions contained in the release order and the Ministers opposed Mr. Harkat's release from detention.

[4] On February 1, 2008, the Court issued an interim order that released Mr. Harkat from detention, but required that he remain, with one exception, inside his residence at all times with one of his supervising sureties. That exception permitted Mr. Harkat to leave his residence in order to attend the Court proceedings. Subsequently, a further

order issued, which allowed Mr. Harkat to visit his lawyer's office in preparation for the Court hearing (instead of requiring Mr. Harkat's lawyer to go to his residence).

[5] On February 4, 5, and 6, 2008, the Court heard further evidence and submissions with respect to the alleged breach of the terms and conditions of the release order. The Court also heard evidence and submissions with respect to a previously scheduled motion brought by Mr. Harkat to vary the conditions of his release.

[6] On February 8, 2008, the Court issued a second interim order. This order allowed Mr. Harkat, when accompanied by a supervising surety, to be in the yard of his residence and to take pre-approved walks as had been previously permitted. Pending a final decision, the Court continued to restrict Mr. Harkat from outings that he had been entitled to previously. Again, one exception was made to allow Mr. Harkat to attend hearings before the Senate of Canada in respect of proposed legislation with respect to security certificates.

[7] These reasons now deal with:

- The request of the Ministers that Mr. Harkat be incarcerated, that monies paid into Court under the release order be paid to Her Majesty, and that certain performance bonds posted pursuant to the terms of the release order, as amended, be forfeited to Her Majesty because Mr. Harkat breached the terms of the release order (Ministers' motion).

- The request of Mr. Harkat that the terms and conditions of the release order be varied (Mr. Harkat's motion).

- The terms and conditions of Mr. Harkat's continued release.

- The interim orders issued by the Court on February 1, 2008, and February 8, 2008, respectively.

[8] In these reasons, I find that:

(i) Pierrette Brunette left the residence with the intent of not living there again. Therefore, she no longer "resides" with Mr. Harkat. The consequence of Ms. Brunette's departure was to put Mr. Harkat in breach of the release order, which required him to reside with Sophie Harkat, Ms. Brunette, and Alois Weidemann.

(ii) The breach of the release order is a serious one.

(iii) Mr. Harkat is entitled to be released if there are any conditions that are capable of containing the danger that he poses. Such conditions still exist.

(iv) The Court is vested with discretion to determine whether, in light of the

breach of the release order, all or part of the monies paid into Court and the performance bonds should be forfeited. In light of the unique and extraordinary circumstances surrounding the breach, which are described below, it would be unfair and unjust to order forfeiture of the monies or the bonds signed by Ms. Harkat, Ms. Brunette, and Mr. Weidemann.

(v) The request of Mr. Harkat to amend the terms and conditions of the release order is denied, except the one request that was consented to by the Ministers. That request expands slightly the geographic boundaries within which Mr. Harkat is permitted to travel.

Thus, it is ordered that all the terms and conditions of the release order, as amended, be reinstated for as long as Mr. Harkat resides with Ms. Harkat and Mr. Weidemann, and Ms. Brunette remains a supervising surety.

Applicable Legal Principles

[9] Before turning to the merits of the competing motions, it is helpful to set out the governing legal principles and the salient background facts.

[10] As a matter of law, Mr. Harkat cannot be incarcerated if there are conditions that, on a balance of probabilities, would neutralize or contain the danger posed by his release. This is so because section 12 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 (Charter), requires that a detained person have the right to challenge their detention and obtain release if it is justified. See: *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, at paragraphs 96 and 101.

[11] Section 12 of the Charter also requires that onerous conditions of release, such as those that apply to Mr. Harkat, be subjected to a meaningful process of robust, ongoing review. That review must take into account the context and circumstances of the individual case and the existence of alternatives to the conditions. See: *Charkaoui* at paragraphs 107 and 117.

[12] The conditions of release imposed upon a person must be proportionate to the threat or danger posed by that person. See: *Charkaoui* at paragraph 116.

[13] In *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 416, my colleague Mr. Justice S. Noël developed a non-exhaustive set of general guidelines to be followed when considering proposed amendments to conditions of release. At paragraph 9 of his reasons, Justice Noël wrote that the reviewing Court should consider the following:

> a) Is the requested variation fundamentally different than the conditions imposed initially? Or is the requested variation more accurately characterised as a fine-tuning of the original conditions?

b) Is the requested variation a proportionate response to the nature of the threat posed by the individual and will such a variation continue to neutralize the threat posed by the individual?

c) Is there a reason why the requested variation was not sought initially?

d) At the time of the initial release were there unknown facts not brought to the attention of the Court that could have affected the original conditions of release?

e) Has there been factual evidence presented to support the requested variation?

f) Are there new facts that did not exist at the time when the conditions were originally established?

g) Is the requested variation a reasonable alternative to the condition being reviewed?

h) Is the requested variation a consequence of different interpretations being given to the wording of the terms and conditions?

i) The passage of time is a factor to be considered in conjunction with the other factors.

[14] Having outlined the applicable legal principles, I now turn to the factual context that underlies the motions before the Court.

Factual Background

[15] On December 10, 2002, Mr. Harkat was arrested and detained pursuant to the security certificate issued against him.

[16] On March 22, 2005, in reasons reported at *Re Harkat* (2005), 261 F.T.R. 52, the Court determined the security certificate to be reasonable.[1] At paragraph 143 of its

reasons, the Court concluded that:

1. Prior to arriving in Canada, Mr. Harkat engaged in terrorism by supporting terrorist activity.
2. Mr. Harkat travelled to and was in Afghanistan.

3. Mr. Harkat supported terrorist activity as a member of the terrorist group known as the Bin Laden Network. Before and after he arrived in Canada Mr. Harkat was linked to individuals believed to be in this network.

4. The Bin Laden Network engages in acts of terrorism in order to obtain its stated objective of establishing Islamic states based on a fundamentalist interpretation of Islamic law. The Bin Laden Network has been directly or indirectly associated with terrorist acts in several countries. […]

5. The Bin Laden Network operated terrorist training camps and guest houses in Afghanistan and Pakistan. The camps provided sanctuary, funds, and military and counter-intelligence training. Abu Zubaida ran the Khaldun and Darunta training camps in Afghanistan.

6. Mr. Harkat acknowledges he was a supporter of the [Front islamique du salut (FIS)]. When the FIS severed its links with the [Groupe islamique armée (GIA)], Mr. Harkat indicated his loyalties were with the GIA. The GIA seeks to establish an Islamic state in Algeria through the use of terrorist violence. Mr. Harkat's support of the GIA is consistent with support for the use of terrorist violence.

7. Mr. Harkat lied to Canadian officials about his:
    - work for a relief company in Pakistan;
    - travel to Afghanistan;
    - association with those who support international extremist networks;
    - use of the alias Abu Muslima; and

- assistance to Islamic extremists.

Such lies were for the purpose, at least in part, of distancing himself from those who support terrorism and to mislead Canadian authorities about his involvement in the support of terrorist activities.

8. Mr. Harkat has assisted Islamic extremists who have come to Canada.

9. Mr. Harkat has associated with Abu Zubaida since the early 1990's. Abu Zubaida was one of Osama Bin Laden's top lieutenants from the 1990's until his capture.

10. While in Canada Mr. Harkat has been in contact with individuals known to be involved in Islamic militant activities. [footnotes omitted]

[17] With respect to Mr. Harkat's testimony, the Court found at paragraph 113 of its reasons that he had lied under oath in several important respects.

[18] Subsequently, Mr. Harkat applied for judicial release from detention pursuant to subsection 84(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), which provides:

84(2) A judge may, on application by a foreign national who has not been removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable, order the foreign national's release from detention, under terms and conditions that the judge	84(2) Sur demande de l'étranger dont la mesure de renvoi n'a pas été exécutée dans les cent vingt jours suivant la décision sur le certificat, le juge peut, aux conditions qu'il estime indiquées, le mettre en liberté sur preuve que la mesure ne sera pas exécutée dans un délai

considers appropriate, if satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person.	raisonnable et que la mise en liberté ne constituera pas un danger pour la sécurité nationale ou la sécurité d'autrui.

[19] Mr. Harkat's first application for release was dismissed, in reasons reported at *Harkat v. Canada (Minister of Citizenship and Immigration)* (2005), 278 F.T.R. 150, because he failed to satisfy the Court that he would not be removed from Canada within a reasonable time.

[20] Mr. Harkat's second application for release from detention was allowed. In reasons reported at *Harkat v. Canada (Minister of Citizenship and Immigration)* (2006), 270 D.L.R. (4th) 50 (F.C.), the Court ordered that he be released pursuant to a number of terms and conditions. Mr. Harkat was released on June 21, 2006.

[21] Since that date, the terms and conditions of Mr. Harkat's release have been reviewed by the Court on two occasions. Some modifications were made to the conditions, while other changes were denied. See: *Harkat v. Canada (Minister of Citizenship and Immigration),* 2006 FC 1105, and *Harkat v. Canada (Minister of Citizenship and Immigration),* 2007 FC 416.

[22] As set out above, on January 29, 2008, Mr. Harkat was arrested and detained as a

result of an alleged breach of the terms and conditions of the release order. The gist of the alleged breach is that it was, and is, a term of the release order that Mr. Harkat reside with his current supervising sureties: Sophie Harkat, Pierrette Brunette, and Alois Weidemann. The Ministers allege that Ms. Brunette, in breach of that term, has moved out of the residence. Mr. Harkat denies any breach of the release order, stating that it did not require Ms. Brunette to live with him and that, in any event, she continues to "reside" with him.

The Release Order and Supporting Reasons

[23] At the heart of the issue of whether there has been a breach of the release order is the proper interpretation of paragraph 6 of that order, which states as follows:

> 6. Upon his release from incarceration, Mr. Harkat shall be taken by the RCMP (or such other agency as the CBSA and the RCMP may agree) to, and he shall thereafter reside at, _____ in the City of Ottawa, Ontario (residence) with Sophie Harkat, his wife, Pierrette Brunette, his mother-in-law, and Pierre Loranger. In order to protect the privacy of those individuals, the address of the residence shall not be published within the public record of this proceeding. Mr. Harkat shall remain in such residence at all times, except for a medical emergency or as otherwise provided in this order. While at the residence Mr. Harkat is not to be left alone in the residence. That is, at all times he is in the residence either Sophie Harkat or Pierrette Brunette or some other person approved by the Court must also be in the residence. The term "residence" as used in this order encompasses only the dwelling house and does not include any outside space associated with it. [emphasis added]

[24] At the time of Mr. Harkat's release, Pierre Loranger was a tenant who lived with

Ms. Brunette and Ms. Harkat. Mr. Loranger also executed a performance bond to facilitate Mr. Harkat's release.

[25] As set out above, the release order provided that Mr. Harkat was not entitled to be alone in the residence. While in the residence, or while out of the residence in the yard or on an approved outing, Mr. Harkat was to be accompanied by either Ms. Harkat or Ms. Brunette. They were his supervising sureties. Mr. Loranger was not a supervising surety.

[26] Mr. Loranger subsequently moved out of the residence and paragraph 6 of the release order was amended to reflect this change in circumstance. The release order was also amended to remove Mr. Loranger as a surety when a replacement surety was found.

[27] Later, Mr. Weidemann, Ms. Brunette's then partner, was added as a supervising surety and paragraphs 6, 7, and 8 of the release order were amended by the Court to reflect this change. This amendment was sought so that Ms. Harkat and Ms. Brunette could leave the residence and someone else could remain with Mr. Harkat. Then, in the fall of 2006, Mr. Weidemann and Ms. Brunette bought a house where the Harkats were to live with them. On February 9, 2007, with the consent of the parties, an order was issued further amending paragraph 6 of the release order to allow Mr. Harkat to reside at the new residence. Thus, Mr. Harkat was required by paragraph 6 of the release order,

as amended, to reside at the new residence "with Sophie Harkat, his wife, Pierrette Brunette, his mother-in-law, and Alois Weidemann." This is the requirement now in force.

[28] Paragraph 1 of the release order required that Mr. Harkat sign a document in which he agreed to comply strictly with each term and condition of the release order. Paragraph 8 of the release order also required that Ms. Harkat and Ms. Brunette, prior to Mr. Harkat's release from detention, each sign a document in which they acknowledged their obligation to immediately report to the CBSA any breach of a term or condition of the release order. The order that added Mr. Weidemann as a supervising surety also required that he sign a similar document before supervising Mr. Harkat.

[29] During oral argument on the Ministers' motion, counsel for Mr. Harkat agreed that the release order should be read together with its accompanying reasons in order to ascertain its proper interpretation.

[30] Relevant portions of the reasons, which supported the release order, are as follows:

- At paragraph 60, the Court repeated the concession of Mr. Harkat's counsel that, based upon the Court's findings when determining the security certificate to be reasonable, Mr. Harkat's release would pose a danger.

- At paragraph 68, the Court independently concluded that "Mr. Harkat's release without the imposition of any term or condition would pose a threat to national security or to the safety of any person. For example, unchecked, Mr. Harkat would be in a position to recommence contact with members of the Islamic extremist network."
- At paragraph 76, the Court found that, because Mr. Harkat's testimony had been found to be untruthful, any term or condition of release had to be based upon something other than his assumed good faith or trustworthiness.
- At paragraph 83, the Court wrote that any terms and conditions of release must be "specific and tailored to Mr. Harkat's precise circumstances" and be "proportionate to the risk posed by Mr. Harkat."
- At paragraphs 84 through 92, the Court listed the factors that supported Mr. Harkat's release upon strict conditions. Particularly relevant to this proceeding are paragraphs 85, 88, 89, 90, and 91, where the Court wrote:

> 85. First, I believe that Mrs. Harkat and her mother are capable of providing effective supervision. Having seen Madam Brunette testify, I was impressed with her testimony as to the significance to her of the sum of $50,000.00 that she is prepared to post and that she does not wish to lose because of any breach of condition by Mr. Harkat. I also accept Mrs. Harkat's testimony that she will have to ensure that her husband abides by all of the conditions of release or she will betray her mother, who is posting the largest cash guarantee, and she will also disappoint people whom she has become close to on the Committee for Justice for Mohamed Harkat.
>
> […]

> 88. Fourth, it can reasonably be assumed that, if released from incarceration, Mr. Harkat will remain a person of interest to Canadian authorities who will have the ability to lawfully exercise supervision of his activities.
>
> 89. Fifth, Mr. Harkat must be assumed to know of both the authorities' interest in him and their ability to monitor his activities. This knowledge may further be assumed to deter conduct that could result in further proceedings against Mr. Harkat.
>
> 90. Sixth, persons with something to hide from Canadian authorities must be presumed to believe that contact with Mr. Harkat will draw the authorities' attention to those persons.
>
> 91. Seventh, while I find much of Mr. Harkat's testimony to be untruthful, I do accept his evidence that he believes that if he breaches any condition of release that:
>
> > […] they're going to take me for sure to jail, plus it is going to be like give [*sic*] opportunity to the Government to point their finger on me and deport me.
>
> This fear, which I believe to be genuine, can reasonably be considered to provide some incentive to Mr. Harkat to abide by the conditions of his release.

- At paragraph 94, the Court noted that, for the terms and conditions of release to be effective and proportionate, "Mr. Harkat's movement, associations and ability to communicate must be restricted in a fashion that permits those activities to be supervised and monitored." At paragraph 81, certain proposed sureties were rejected because the Court was not satisfied that "their genuine commitment is to ensure compliance with the Court's conditions" and so "would not provide a sufficient controlling influence over Mr. Harkat."

- Finally, the Court appended to its reasons the terms of release proposed by Mr. Harkat. In the fourth term, it was proposed that "Mr. Harkat is to reside […] with his wife, Sophie Harkat and his mother-in-law, Ms. Pierrette Brunette." [emphasis added]

The Ministers' Motion

[31] Turning to the Ministers' motion, I propose to deal with it as follows: (a) whether paragraph 6 of the release order was breached; (b) if so, what is the severity of the breach; and (c) what, if any, consequences should flow from the breach.

(a) Was paragraph 6 of the release order breached?

[32] As set out above, Mr. Harkat denies any breach of the release order and asserts that, in any event, the concept of residence is sufficiently flexible so that, on the evidence before the Court, Ms. Brunette continues to "reside" with him and he with her.

[33] On the first point, Mr. Harkat argues that the intent of the release order was to neutralize the perception of danger that his release posed. The release order never directed that Mr. Harkat be in the company of more than one surety and never directed that any person must live with him. Thus, it is said that Ms. Brunette, Ms. Harkat, and Mr. Weidemann could all move out of the residence, and Mr. Harkat would not be in breach of the terms of the release order so long as they arranged for one of them to

always be with him at all times.

[34] In support of this position, Mr. Harkat relies upon Ms. Brunette's e-mail to Peter Foley, dated of September 5, 2006 (Exhibit 11 (a)). Mr. Foley is the “operational case lead” at CBSA for Mr. Harkat's release. Ms. Brunette’s e-mail was sent while approval was then being sought for Mr. Harkat to move to the current residence, which was purchased by Ms. Brunette and Mr. Weidemann in the fall of 2006. In her e-mail, Ms. Brunette wrote:

> You said it very clearly. Mr. Harkat can't move without the approval of the court. NOT ME I sign [*sic*] a document saying that I am ready to watch him and follow all the conditions. I didn't sign any paper saying that I HAVE TO LIVE WITH THIS GUY. He has to be with me OR Sophie 24 hours a day. If I decide that I move, I move. Mrs. Dawson is more opened [*sic*] minded than that you are. She knows perfectly that if I go, they follow. [emphasis in original]

[35] This is said to reflect Ms. Brunette's understanding of her obligations, and Mr. Harkat observes that the CBSA did not respond by asserting any obligation on the part of Ms. Brunette to live with Mr. Harkat.

[36] With respect to the second argument, Mr. Harkat relies upon cases such as *R. v. Stroud*, [2007] O.J. No. 48 (C.A.) (QL), and *R. v. Gravino*, [1991] O.J. No. 2927 (C.A.) (QL), to argue that the word "reside" is one of flexible meaning. He argues that where

Ms. Brunette, as a result of a broken relationship, was "forced" out of the house, she has simply vacated the residence for evenings. During the day, she is said to have a "strong and regular contact" to the residence, as reflected by the fact that she is there almost daily, keeps most of her belongings there, receives her mail there, and maintains her business telephone there.

[37] The evidence with respect to Ms. Brunette's involvement at the residence is fairly straightforward. Her evidence was that:

- she and Mr. Weidemann separated in or about June of 2007;
- she then moved into a second, separate bedroom in the residence;
- she met and became involved with her current partner between October and November of 2007;
- by November of 2007, she was not sleeping in the residence every night;
- since November 25, 2007, she slept in the residence "close to not at all";
- she stops at the residence almost every day between giving music lessons in order to pick up her mail, phone messages, and other things;
- some mail goes to her new address;
- her current partner has purchased a new home where Mr. and Ms. Harkat will live;
- she will have her office at the new home, but she will not sleep there all of the time;

- she was evasive about her future plans;
- she was evasive about whether her new partner was open to living with Mr. and Ms. Harkat; and
- she cannot imagine that her country will make her to live the rest of her life with Mr. Harkat but, if it does, she will do so.

[38] With respect to the testimony that I have characterized as evasive, Ms. Brunette testified on cross-examination as follows:

> Q. You said that your partner has offered to buy a new house where you can live. Your partner has offered to buy a new house.
>
> A. Yes, he might move with us maybe.
>
> Q. Maybe?
>
> A. Yes. We have three houses now, the two of us. I have a house in Greely that I have never been able to enjoy because of the situation, he has a house in Gatineau, and we were going to have that house to accommodate Sophie and Moe.
>
> Q. Is it your intention to reside at this new house?
>
> A. If I have to, I will. But I have never been ordered
>
> Q. That won't be particularly onerous because your definition of reside is to stop off every few days. Right?
>
> MR. WEBBER: That's just argumentative, my lady.
>
> THE COURT: It is.

MR. TYNDALE:

Q. Is it your plan now that you will sleep there most nights?

A. Most of the nights?

Q. Yes.

A. We are not moved yet.

Q. Is it your plan that you will sleep there most nights?

A. If Sophie and Moe don't move there, no. They haven't been accepted yet.

Q. If they are accepted and they move there, is it your plan that you will sleep there most nights?
A. If the courts tell me that I have to sleep there, I will.

Q. Only if the Court tells you.

A. If it's an order, I will follow the order. Before I never felt that the Court ordered me that I had to sleep every night with Sophie and Moe. Beside that, as I said, for four months I did it before and there was absolutely no argument about that fact. I don't see what's changed now. I am a surety, not the shadow of Moe and Sophie.

Q. Your counsel asked you about the new house and you said my office will be there. My intention is to stay there. I am going to suggest to you that until this issue of reside came up, your plan was that Sophie and Mohamed would live there and you would stop off every so often and you and Mr. Parent would live in Gatineau. Isn't that right?

A. He is putting now the words in my mouth.

Q. Tell me if I am wrong. Was that your plan or

wasn't it?

A. Not exactly because I have school in Orleans. We don't know what we are going to do. Are we going to sell the house in Gatineau, sell my house in Greely, just live there? We didn't decide. We don't even know if they will be allowed to move there.

Q. Is it Mr. Parent's intention to move into the house with Mohamed and Sophie?

A. You are going to have to ask him that.

Q. Have you discussed it with him?

A. Mr. Parent said he will do whatever needs to be done.

Q. From your discussions with him, does he seem open to moving in with Mohamed and Sophie? Does he think that's a good idea, something he would like to do?
A. He didn't say no.

Q. That's not what I asked you.

A. I cannot speak for himself.

Q. Again, that's not what I asked you.

MR. WEBBER: But it is her answer.

THE COURT: It is an answer.

MR. TYNDALE: All right, it will have to do.

[39] Ms. Harkat's evidence with respect to the future plan was more clear:

Q. Assuming that you get permission to move to the new house, can you give the Court a brief description of how that house would be set up and who would be there?

> A. It looks like a townhouse connected with two other units on each side, with a garage. The intention would be that my husband and I would live there full-time. We have our own privacy, and my mom can basically move on with her life. She would have her office downstairs which would be locked up to Moe. We have no office on the third floor; the office would be mainly downstairs. My mom and I would use the same office and the same computer.
>
> Q. Have you talked to your mother about how often she would be at the house, if she is going to be staying somewhere else?
>
> A. She said that, if necessary, she can stop by the house every day. She already does anyway to check her mail and her phone messages, because right now all her clients are calling there, and to check her e-mail messages. [emphasis added]

[40] The surveillance cameras outside the residence record that:

- from November 25, 2007, to December 8, 2007, Ms. Brunette did not sleep in the residence;
- from November 25, 2007, to November 28, 2007, Ms. Brunette removed bags and luggage from the residence;
- from November 29, 2007, to December 7, 2007, Ms. Brunette was in the residence as follows:

  November 29, 2007 - 2103 hours to 2234 hours

  November 30, 2007 - 1711 hours to 1758 hours

  December 1, 2007 - 1506 hours to 1523 hours

December 2, 2007 - 1118 hours to 1403 hours

December 2, 2007 - 1714 hours to 1842 hours

December 3, 2007 - 1316 hours to 1716 hours

December 3, 2007 - 2020 hours to 2251 hours

December 5, 2007 - 0728 hours to 0800 hours

December 5, 2007 - 1958 hours to 2212 hours

December 6, 2007 - 2003 hours to 0246 hours

December 7, 2007 - 1102 hours to 1202 hours

- more items were removed from the residence on November 30, December 2, December 5, and December 7, 2007.

[41] On December 9, 2007, Ms. Harkat sent an e-mail to Mr. Foley (Exhibit 23) that began as follows:

> As you probably know by now from reports from Mike, my mother and Louis are no longer together. After numerous discussions, we've all decided to move our separate ways in separate houses. We are looking for something much smaller and more affordable. In the meantime, things are the same around here. [emphasis added]

[42] Turning now to the arguments advanced by Mr. Harkat, I agree that the concept of residence can vary depending upon the particular context.

[43] Here, the context is a scheme of conditions of release that were designed to

neutralize and contain the danger posed by Mr. Harkat's unconditional release from detention. The release order was made in circumstances where the security certificate had been found to be reasonable, Mr. Harkat had been found to be untruthful, and the supervision and monitoring of Mr. Harkat's movement, associations, and ability to communicate had been found to be necessary.

[44] In this context, to "reside" with someone means to "live" with them. As the release order was ultimately amended, Mr. Harkat was to live with Ms. Harkat, Ms. Brunette, and Mr. Weidemann.

[45] I do take guidance from the decisions relied upon by Mr. Harkat. While the supervising sureties were not each obliged to sleep at the residence every night in order for Mr. Harkat to reside with them, his residence had to be the place where they usually returned to and slept at night. Such an interpretation of "reside" is consistent with that applied by the High Court of Justice in *Abu Rideh v. Secretary of State for the Home Department*, [2007] EWHC 2237 (Admin) at paragraphs 11 and 33. So long as the supervising sureties' absences from the residence were each for a temporary purpose and they intended to return to the residence, the sureties resided with Mr. Harkat and he with them.

[46] Thus, Ms. Brunette and Mr. Weidemann could vacation away from Mr. Harkat,

as they did, because their absence was temporary and their intention was to return to the residence. Similarly, Ms. Harkat was entitled to attend an overnight conference because her absence from the residence was only temporary and she intended to return. In both instances, other supervising sureties would be in the residence with Mr. Harkat.

[47] However, on the evidence before the Court, I see no temporary purpose for Ms. Brunette's absence from the residence. By the time Mr. Harkat was arrested, Ms. Brunette had ended her relationship with Mr. Weidemann, formed a new relationship, ceased sleeping at the residence, moved some of her belongings, and was in the process of purchasing a new home. As Ms. Harkat had noted in her email to the CBSA, "we've all decided to move our separate ways in separate houses."

[48] For the purpose of the release order, I find as a fact that Ms. Brunette had left the residence with the intent of not living there again. I also find no intent on the part of the Harkats to later move in with her. The most reasonable inference, based upon Ms. Brunette’s evasive testimony, Ms. Harkat’s clear testimony and Ms. Harkat’s e-mail of December 9, 2007, is that Ms. Brunette and the Harkats were to go their separate ways. There was no plan on their part that the Harkats would join Ms. Brunette at her new location.

[49] Ms. Brunette was entitled to leave the residence in the sense that the Court had not, and likely could not have, ordered her to reside with Mr. Harkat if she did not want to. However, the consequence of Ms. Brunette's departure was to put Mr. Harkat in breach of paragraph 6 of the release order, which required him to reside with her.

[50] This breach was not reported to the CBSA by any supervising surety until January 25, 2008, when Mr. Weidemann told Mr. Foley that Ms. Brunette had not lived in the residence since November 25, 2007. Therefore, it follows that each supervising surety was in breach of their obligation to immediately report to the CBSA the breach of the term of the release order that required Mr. Harkat to reside with Ms. Brunette.

[51] In reaching these conclusions, I have considered Mr. Harkat's submission that the release order did not direct the supervising sureties to live with him. That is true. As noted above, I doubt that any basis in law exists for such an order. However, each supervising surety knowingly and willingly accepted the obligation that Mr. Harkat reside with them. Having done so, if one or all of them no longer wished to be bound by that obligation, each were required to ask the Court to be relieved from it. By failing to do so and unilaterally moving out, Ms. Brunette put Mr. Harkat in violation of the condition that he reside with her.

[52] Ms. Brunette's e-mail of September 5, 2006, is not inconsistent with this. The

release order did not expressly require her to obtain approval to move, and it would be consistent with the concept of a temporary purpose to allow her to move in 2006 to the then new residence in order to prepare it for Mr. and Ms. Harkat's arrival. As Ms. Brunette observed in her e-mail, "if I go, they follow."

[53] The evidence of both Ms. Brunette and Ms. Harkat is consistent with this temporary separation. Under cross-examination, Ms. Brunette testified:

> Q. Farther up, just below the line that says, "If I decide that I move, I move," two lines down it says: "She knows – " And, again, you are referring to the judge. "She knows perfectly that if I go, they follow." I am going to suggest to you that the plan was, when you realized you didn't have Court approval for the move, that you would move to the new address and that Mohamed and Sophie would follow when the renovations were complete and the Court approved the move. That was the plan. Right?
>
> A. That was the plan, yes. If we move, they have to follow because he has to reside with me. [emphasis added]

Under cross-examination, Ms. Harkat also stated:

> THE COURT: The question is: Your original hope was to all move together.
>
> THE WITNESS: Yes.
>
> THE COURT: And that turned out not to be possible.
>
> THE WITNESS: Because there were all kinds of delays and stuff like that. I stayed there where we were

> supposed to, and Moe did, too.
>
> THE COURT: Mr. Tyndale.
>
> MR. TYNDALE:
>
> Q. What eventually happened in February is that you and Mr. Harkat rejoined Mr. Weidemann and your mother in the new house. Right?
>
> A. That's correct.
>
> Q. And the plan as of February onward was that all of you were going to reside in that house.
>
> A. That was what we were hoping, and we actually love this place. It is unfortunate that everything is happening.

[54] As for the argument that, by virtue of her "strong and regular contact" with the residence, Ms. Brunette continues to reside there, the usual meaning of “reside”, as Mr. Justice Tarnopolsky noted in *Gravino*, is where one sleeps. Ms. Brunette no longer sleeps at the residence on a regular basis. The purpose of paragraph 6 of the release order was to ensure effective supervision of Mr. Harkat. Effective supervision comes from the supervisor’s physical presence - not from the presence of their belongings. I repeat that there was nothing temporary about Ms. Brunette's decision to no longer sleep at the residence.

(b) What is the severity of the breach?

[55] Mr. Harkat argues that, if I find that a term of the release order was breached, the

matter should be resolved by a clarification to, or an amendment of, the release order. It is suggested that, while the Harkats continue to reside where they now are, the appropriate amendment would be to require Mr. Harkat to continue to reside with Ms. Harkat, while Ms. Brunette would continue to be a supervising surety.

[56] I view the breach of the release order to be more serious than to warrant the mere approval of the *de facto* situation that the supervising sureties and Mr. Harkat have created.

[57] The terms of the release order were carefully tailored to address the danger that Mr. Harkat's release posed.

[58] A very important factor that militated in favor of Mr. Harkat's release was that, together, Ms. Brunette and Ms. Harkat could effectively supervise him. At the hearing that led to Mr. Harkat's release, I was impressed by Ms. Brunette's evidence and believed that her strong personality, coupled with her $50,000.00 performance bond, would result in her close supervision of Mr. Harkat. I also accepted Ms. Harkat's testimony that she would provide careful supervision, because to do otherwise would betray her mother and disappoint members of the Justice for Mohamed Harkat Committee. The release order accordingly required Mr. Harkat to reside with both Ms. Harkat and Ms. Brunette, as they had proposed to the Court.

[59] This requirement was not accidental or made without careful thought.

[60] Today, that supervisory scheme, latter augmented by the addition of Mr. Weidemann, does not exist, and neither the CBSA nor the Court was advised of this by Ms. Brunette or the Harkats.

[61] Indeed, the affidavits filed on December 21, 2007, in support of Mr. Harkat's motion to have the conditions of his release varied, are silent about Ms. Brunette's departure. Ms. Harkat's affidavit simply states that "Mr. Alois Weidemann will be moving from the house." This was not, in my view, an accurate statement of the situation existing at that time.

[62] While I accept that Mr. Harkat's counsel had advised counsel for the Ministers on December 10, 2007, that the residence where Mr. Harkat was living would be sold and also advised the Chief Justice of this Court in a case management teleconference that a change of residence was anticipated, I am concerned that Mr. Harkat would seek the changes that are described below without disclosing the fact that Ms. Brunette had ceased living at, and centralizing her life around, his residence.

[63] Mr. Harkat, Ms. Harkat, and Ms. Brunette all testified that they strictly followed,

and intended to follow, the conditions of the release order. It is difficult to understand how, in light of that evidence, Ms. Brunette believed that she could leave the residence (and remove herself from the living arrangement that she and the Harkats had earlier proposed to the Court for approval) without Mr. Harkat having to seek approval for that very material change in circumstance. It suggests that Mr. Harkat and his supervising sureties did not understand the importance of compliance with the release order, or that they were reckless in interpreting what the order meant, or that they had a careless disregard for the terms of the release order.

[64] The effect of this unauthorized and unilateral change in circumstance is to seriously erode the trust and confidence that I have in the judgment of Ms. Brunette, Mr. Harkat, and Ms. Harkat.

(c) What, if any, consequences should flow from the breach of the release order?

[65] The Ministers submit that the Harkats want to live by themselves and that, rather than seek a variation of release order to permit this change, they are presenting the situation for approval as a *fait accompli*. The Ministers point to the fact that Mr. Weidemann is selling the residence, that Ms. Brunette has entered into a new relationship, that Ms. Brunette's future plans are, at best, vague, and that Ms. Harkat has advised the CBSA that "we've all decided to move our separate ways in separate

houses." The Ministers argue that the Harkats, as a result of the breach of the release order, have presented what is, in essence, "a done deal" for approval by the Court.

[66] In this context, where the supervisory scheme required by the release order is said to have disintegrated, the Ministers submit that Mr. Harkat should be placed in detention. The onus should then be placed upon Mr. Harkat to design a new supervisory plan and come before the Court, with witnesses, to ask for release on those terms.

[67] I have given very serious consideration to the submissions of the Ministers. However, notwithstanding the actions of Ms. Brunette and the silence of the Harkats, as a matter of law, Mr. Harkat is entitled to be released if there are any conditions that are capable of containing the danger that his release poses. See: *Charkaoui* at paragraphs 96 and 101. In my view, at this time, such conditions still exist.

[68] The supervisory scheme ordered by the Court, whereby Mr. and Ms. Harkat would reside with another supervising surety remains intact, albeit barely, in the form of Mr. Weidemann.

[69] Mr. Weidemann testified that he is prepared to allow the Harkats to live in his house for the short term, and that, during that period, he is prepared to continue his obligations as a supervising surety. I was impressed with Mr. Weidemann's testimony

and found him to be a decent, conscientious, and straightforward individual. He was the one supervisory surety to notify the CBSA of Ms. Brunette's departure from the residence.

[70] Mr. Harkat testified that Mr. Weidemann is a "good man" who he respects and who has helped him a lot. While Ms. Brunette said that she did not trust Mr. Weidemann, Mr. Harkat “[saw] it a different way” and said that he gets along very well with Mr. Weidemann. Ms. Harkat also testified that her husband has a good relationship with Mr. Weidemann and that she had no problems continuing to live with him in the residence.

[71] Mr. Weidemann has also signed a performance bond.

[72] I accept, and find, that Mr. Weidemann will provide effective supervision of Mr. Harkat in the next short while.

[73] There are four other factors that militate in favor of Mr. Harkat's continued release.

[74] The first is that, aside from the departure of Ms. Brunette, there is no evidence that Mr. Harkat has breached any term of the release order. It was the evidence of

Mr. Foley that, aside from the incident giving rise to this proceeding, things have “been working quite well” and that, given Mr. Harkat's conduct to date, the CBSA has not found it necessary to provide surveillance of Mr. Harkat on every outing. Mr. Foley has not identified any breach of the conditions relating to Mr. Harkat's activities outside the residence. While there have been some misunderstandings or disputes about scheduling outings or visits, Mr. Foley testified that those matters have generally been resolved “informally”. He described the relationship between the Harkats and the CBSA as being a generally cooperative one. When the CBSA entered the residence on January 25, 2008, unannounced, access to the computer was restricted and locked as required.

[75] The second factor is the residual confidence that I have in Ms. Brunette and Ms. Harkat. While I am at a loss to understand how they seemed to believe that Ms. Brunette could leave the residence without notifying the CBSA or the Court, and while I am concerned that they may have intended to present the new living arrangements to the Court as a *fait accompli* in order to have the release conditions amended, I find that they remain committed to the day-to-day supervision of Mr. Harkat.

[76] I reach this conclusion from their vehement testimony to that effect and their, at times unnecessarily, combative attitude when cross-examined on this point. I am satisfied that they worked hard to ensure compliance with the terms relating to what Mr. Harkat could and could not do, and thus resent any suggestion to the contrary. I am

also satisfied that the existence of the performance bonds, particularly Ms. Brunette's $50,000.00 bond, remains a powerful motivator.

[77] The third factor is that I continue to accept Mr. Harkat's testimony that he believes that any breach of the release order on his part would probably lead to his detention and increase the likelihood of his deportation.

[78] Finally, when ordering Mr. Harkat’s release from detention, I placed reliance upon the fact that authorities such as the CBSA would monitor him. Aside from such monitoring, the presence of the CBSA would also act as a deterrent to both Mr. Harkat and to those with something to hide from the authorities. The CBSA will continue to exert that monitoring and deterrent presence.

[79] For these reasons, I find that it is not now necessary that Mr. Harkat be detained and that conditions still exist which are capable of containing the risk that his release poses. This will remain the case for so long as the Harkats live with Mr. Weidemann.

[80] I recognize that this is not a long-term solution and that Mr. Weidemann’s willingness to act as a supervising surety is for a limited period of time. In that period, it is up to Mr. Harkat to present to the Court for approval a proposal for his supervision over the longer term.

[81] To be clear, while Mr. Harkat continues to reside with Ms. Harkat and Mr. Weidemann, he must bring a motion to the Court for the amendment of the release order to permit any change from that situation.

[82] In addition to seeking Mr. Harkat's detention, the Ministers also seek payment to Her Majesty of the monies paid into Court pursuant to the release order and the forfeiture of the performance bonds posted by Ms. Brunette, Ms. Harkat, and Mr. Weidemann.

[83] Of relevance to the Ministers' claim are paragraphs 4 and 5(i), (ii), and (vii) of the release order, which provide:

> 4. Prior to Mr. Harkat's release from incarceration, the sum of $35,000.00 is to be paid into Court pursuant to Rule 149 of the *Federal Courts Rules*. In the event that any term of the order releasing Mr. Harkat is breached, an order may be sought by the Ministers that the full amount, plus any accrued interest, be paid to the Attorney General of Canada.
>
> 5. Prior to Mr. Harkat's release from incarceration, the following seven individuals shall execute performance bonds by which they agree to be bound to Her Majesty the Queen in Right of Canada in the amounts specified below. The condition of each performance bond shall be that if Mr. Harkat breaches any terms or conditions contained in the order of release, as it may from time to time be amended, the sums guaranteed by the performance bonds shall be forfeited to Her Majesty. The terms and conditions of the performance bonds shall be provided to counsel for Mr. Harkat by counsel for the Ministers and shall be in

> accordance with the terms and conditions of guarantees provided pursuant to section 56 of the *Immigration and Refugee Protection Act*. Each surety shall acknowledge in writing having reviewed the terms and conditions contained in this order.
>
> | | | |
> |---|---|---|
> | i) | Pierrette Brunette | $50,000.00 |
> | ii) | Sophie Harkat | $5,000.00 |
> | […] | | |
> | vii) | Alois Weidemann | $5,000.00 |

[84] There are no express criteria in the Act or its associated regulations that govern the forfeiture of bonds or monies paid into Court in the present context. Both parties nonetheless acknowledge that the Court has discretion as to whether or not to order forfeiture.

[85] On Mr. Harkat's behalf, it is argued that regard should be had to the criminal context and to cases such as *Gayle v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 446 (QL), which speak of a discretion to grant relief from forfeiture where a breach of condition occurs through no fault of the surety or where extenuating humanitarian considerations exist.

[86] The Ministers acknowledge a "wide" discretion on the part of the Court to decide whether a bond should be forfeited in whole or in part, as well as a discretion to order that some, but not all, the monies or bonds be forfeited. The Ministers argue that a relevant consideration is the purpose for which the security is placed. Reference was

made to the prior decision of this Court in *Khalife v. Canada (Minister of Citizenship and Immigration)* (2006), 287 F.T.R. 306.

[87] In considering these submissions, it is my view that cases such as *Gayle* are of limited assistance because they turn upon express ministerial guidelines that do not apply in the present situation.

[88] While I do not purport to set the exact bounds of the discretion vested in the Court or to enumerate an exhaustive list of factors to be considered by the Court, the relevant considerations, in my view, include:

1. In every case, the exercise of discretion must be principled, having regard to the merits of the particular case before the Court.

2. All of the relevant circumstances must be taken into account.

3. The purpose for which the bonds and monies were put forward must be considered. In this context, that purpose is to ensure compliance with the terms and conditions of an order releasing a person detained pursuant to a security certificate. This purpose must not be undermined.

4. A surety enters into a serious obligation and ought to pay the amount promised, unless there are circumstances that make it

unfair or unjust for all or a portion of the monies to be forfeited.

[89] Applying those considerations, the most relevant factors that counsel in favour of forfeiture and payment in the present case are the following:

i. The serious nature of the breach of the release order.

ii. The breach was personally committed by a surety, Ms. Brunette, not reported by another surety, Ms. Harkat, and not immediately reported by yet another surety, Mr. Weidemann. The failure to report the breach immediately is itself a breach of the release order.

iii. The bonds and monies paid into Court were taken in order to ensure Mr. Harkat's compliance with the release order.

[90] On the basis of this evidence, I gave serious consideration to ordering full or partial forfeiture of the monies and bonds. I also considered requiring that additional monies be secured by performance bonds.

[91] There, however, is one significant factor that militates against forfeiture. In October of 2006, Mr. Weidemann and Ms. Brunette bought the current residence. Mr. Weidemann moved into the residence and Ms. Brunette joined him, leaving the Harkats alone in the former residence until Mr. Harkat was permitted to move in

February of 2007. Mr. Harkat and his sureties argue that, if this arrangement was permitted then, why does the present situation amount to a breach of the order or to a sufficiently culpable situation that would trigger forfeiture of the performance bonds and the monies paid into Court?

[92] As stated above, I find the two situations to be distinguishable. The move by Ms. Brunette in 2006 was for a temporary purpose until the residence was renovated and approved by the CBSA. The plan was for the Harkats to follow Ms. Brunette to the residence. Thus, it may well not have constituted a breach of the release order.

[93] As well, by way of distinguishing factors, Mr. Foley testified that the CBSA was unaware that Ms. Brunette had left the former residence. Thus, Mr. Foley notes, the CBSA did not approve of Ms. Brunette living apart from Mr. Harkat. Counsel for Mr. Harkat accepted Mr. Foley's evidence, as do I. There is, therefore, no basis upon which to suggest that CBSA "waived" this conduct.

[94] Notwithstanding that the CBSA did not know of Ms. Brunette's move in October of 2006, given the degree to which the CBSA was monitoring Mr. Harkat (but not Ms. Brunette) at the time, I accept that it was open to Ms. Brunette and the Harkats to infer that the CBSA knew that Ms. Brunette had moved out of the former residence in October of 2006 and lived apart from them until February of 2007. Yet, no

consequences flowed from Ms. Brunette's move in 2006.

[95] In that very unique and extraordinary circumstance, I conclude that it would be unfair and unjust to order forfeiture of the bonds or the monies paid into Court, whether in whole or in part. I further conclude that this will not undermine the purpose for which those securities were placed. In the exercise of my discretion, no forfeiture will be ordered.

[96] I emphasize the extraordinary circumstance that led to the exercise of this discretion. It should not be assumed by any surety that, in future, anything other than an equally extraordinary circumstance will prevent the forfeiture of all, or a significant portion, of the bonds and monies that now support the release order. I also wish to emphasize that this decision is a specific response to the very specific evidence before the Court. In every case, the Court will have to carefully weigh all of the particular evidence before it and consider the applicable legal principles.

Mr. Harkat's Motion

[97] I now turn to Mr. Harkat's motion. He asks that the release order be amended in the following four respects:

1. He be permitted to stay in the residence alone, without his supervising sureties. (From Ms. Harkat's evidence, it is clear that

this amendment is sought not just to allow Ms. Harkat to attend meetings and appointments, but also to attend conferences and events that would take her away from the residence overnight and perhaps longer).

2. He be permitted to stay in the yard of the residence alone, without his supervising sureties.

3. The geographic boundaries in which he is permitted to travel be expanded, so as to permit visits to the new home of Ms. Harkat's sister.

4. An additional residual clause be added to his conditions of release, allowing the CBSA to consider special requests to extend one of his weekly outings for a family outing exceeding four hours in duration, so long as such outing would be within the permitted geographic boundaries. Such a clause would allow him to go on these extended outings up to three times per month.

[98] The third request was not opposed by the Ministers and will be dealt with below.

[99] At paragraph 13 above, I set out the general guidelines to be considered when faced with proposed amendments to conditions of release.

[100] Independent of those guidelines, however, is the overarching reality that, when assessing what conditions of release are proportionate to the threat or danger posed by release, reliance must be placed upon the person concerned and/or his supervising sureties. In this case, when Mr. Harkat was released from detention, significant reliance was placed upon his supervising sureties. Limited reliance was placed upon Mr. Harkat, except to the extent that the Court accepted that he believed a breach of the release order would probably lead to his detention and increase the likelihood of his deportation.

[101] As noted above, the effect of the breach of the release order is to seriously erode the trust and confidence that I have in the judgment of Ms. Brunette, Mr. Harkat, and Ms. Harkat. Because of that diminished confidence in their judgment, I am not, at this time, prepared to loosen the terms and conditions to permit Mr. Harkat to be alone in the residence or the yard.

[102] As I explained above, one of the factors that justified my conclusion that Mr. Harkat need not now be detained, notwithstanding the breach of the release order, was the residual confidence that I have in the ability and the willingness of the supervising sureties to continue to monitor the day-to-day activities of Mr. Harkat. I cannot conclude that, in all of the circumstances, allowing Mr. Harkat to be

unsupervised and alone is, at this time, proportionate to the threat that he poses.

[103] The reason for which Mr. Harkat sought permission to be alone in the residence was to reduce the hardship upon his wife. I acknowledge that this decision will maintain the onerous supervisory obligations that Ms. Harkat has chosen to bear. However, as Mr. Justice S. Noël noted at paragraphs 40 and 45 of his reasons in the last review of Mr. Harkat's conditions of release, those obligations may be substantially mitigated by the addition of supplementary supervising sureties. This is something that Ms. Harkat has not done because she and her husband wish to do it on their own.

[104] In oral argument, counsel for Mr. Harkat observed that the Court had previously rejected Ms. Squires and Messrs. Skerrit and Bush as supervising sureties' and suggested that they were, perhaps, the best sureties available. However, at the time they were rejected, the Court, at paragraphs 78 through 81 of its reasons, noted their limited connection with Mr. Harkat, together with their lack of any detailed discussion about how their roles would be discharged. These were two of the factors that militated against their approval as supervising sureties at that time. This does not necessarily mean that, on a different evidentiary record, they would be rejected in the future.

[105] As to the request for a residual clause that would allow extended outings, in view of Mr. Foley's evidence that this raises serious operational issues, my reliance

upon the CBSA and the current breach of the release order, this request is denied at this time.

The terms of Mr. Harkat's continued release

[106] For the reasons given starting at paragraph 67 above, I have found that it is not now necessary that Mr. Harkat be detained, that conditions still exist that are capable of containing the risk that his release poses, and that this will remain the case for so long as Mr. Harkat continues to reside with both Ms. Harkat and Mr. Weidemann.

[107] For the reasons given starting at paragraph 101 above, I have found that, at this time, it would not be proportionate to the risk posed by Mr. Harkat to allow him to be in the residence or the yard without a supervising surety or to permit him to be on extended outings.

[108] In all of the circumstances, an order will issue reinstating all of the terms and conditions of the release order, as amended, clarifying that this will continue only for so long as Mr. Harkat resides with both Ms. Harkat and Mr. Weidemann. This will restore Mr. Harkat’s right to limited outings, with the prior approval of the CBSA.

[109] Additionally, in view of the fact that the Ministers consent to the slight amendment of the geographic boundaries in which Mr. Harkat is permitted, and in view

of Mr. Foley's testimony that this will make no operational difference to the CBSA, an order will issue to that effect once counsel provides the appropriate wording for the demarcation of the boundaries.

[110] As explained above, because Mr. Weidemann is not prepared to function as a supervising surety in the long term, this will require that Mr. Harkat bring a motion to the Court for amendment of the release order to permit any change from the current situation.

[111] I anticipate as well that, if new legislation with respect to security certificates comes into force, and if a new certificate is issued in respect of Mr. Harkat, future motions will be brought to review and vary the conditions of his release.

[112] It is in that context that I make the following observation.

[113] A concern that emerged while hearing the evidence of Ms. Harkat and Ms. Brunette was their resentment and dissatisfaction with the actions of the CBSA. Ms. Harkat testified that she could not understand why she needed the CBSA to "double-check" her work. Ms. Brunette testified that she has refused to accompany Mr. Harkat on walks if agents of the CBSA intend to follow.

[114] While both Mr. Foley and Ms. Harkat testified as to their generally good

working relationship, their testimony was somewhat belied by other testimony. Ms. Brunette testified that she believes that Mr. Foley abuses his power and uses the terms of the release order as a sort of pretext to make their lives difficult. Ms. Harkat testified that Mr. Foley's interpretation of the release order goes too far, and she cannot understand why some outings are not permitted. Mr. Foley testified that he opposed the residual clause because reposing such a discretion in him would increase the potential for conflict between him and Mr. Harkat's supervising sureties.

[115] Two things arise out of this:

- First, there has been no formal allegation of arbitrary or abusive conduct on the part of the CBSA, and no evidence to support any such suggestion was adduced.

- Second, the resentment toward the CBSA is misplaced and reflects a lack of understanding about one of the bases for the release order.

[116] As detailed above, a significant factor that weighed in favour of Mr. Harkat's release and his continued release, notwithstanding the breach of the release order was and, is the monitoring and deterrent presence of the CBSA.

[117] To use an analogy, the release order is not a one-legged stool, supported only by

the existence of supervising sureties. Other important legs were listed at paragraphs 86 through 92 of the Court's reasons in support of the release order. One of those legs is the presence of the CBSA.

[118] I point this out because I believe that evidence of a mature, civil, and genuinely cooperative relationship between Mr. Harkat, his supervising sureties, and the CBSA would be a relevant factor when assessing whether less stringent conditions of release may be proportionate in the future. This is because evidence of such a relationship would be relevant when weighing the confidence the Court might place in future in the supervising sureties and Mr. Harkat.

[119] To clarify, this does not mean that Mr. Harkat is required to blindly follow every decision made by the CBSA. But, at the same time, there must be an understanding of the role that the CBSA plays and a respectful dialogue between the parties.

The Interim Orders

[120] There remains the explanation for the Court's interim orders of February 1, 2008, and February 8, 2008.

[121] It is important to state that the interim orders were of a temporary nature and intended to reflect the circumstances known to the Court at the time each was made.

(a) The February 1, 2008 Order

[122] After the hearing on January 31, 2008, which immediately followed Mr. Harkat's arrest, the Court ordered, on an interim basis, that he be released from detention. Once released, the order required that Mr. Harkat remain in his residence with one of his supervising sureties, save for his attendance at the scheduled Court hearing.

[123] This order was made because the Court had heard no evidence to convince it that, if released on that condition, Mr. Harkat would pose a danger to national security or to the safety of any person. The full terms of the release order were not restored because the Court was satisfied, on the evidence that it had heard, that the Ministers' allegation that a breach of the release order had occurred was not frivolous. The restrictions on Mr. Harkat's liberty until all of the evidence and submissions had been heard was viewed by the Court to be proportionate.

(b) The February 8, 2008 Order

[124] After hearing all of the evidence and submissions, particularly the evidence of Mr. Weidemann, the Court issued a second interim order. Mr. Weidemann gave important evidence that he remained committed to providing effective supervision, although he would like to be relieved of that obligation in six weeks. The second order required Mr. Harkat to continue to reside with Ms. Harkat and Mr. Weidemann, but allowed him to be in the yard or on a pre-approved walk with a supervising surety.

Pending the final decision of the Court on the Ministers' motion, Mr. Harkat was not permitted to take the thrice weekly outings contemplated under the terms of the release order.

[125] These conditions reflected that the Court had heard evidence with respect to what it viewed to be a serious breach of the terms of the release order. The requirement that Mr. Harkat continue to reside with Ms. Harkat and Mr. Weidemann was designed to ensure that the scheme of the original release order, which required him to live with more than one supervising surety, was retained.

[126] The restriction on outings was considered to be proportionate because, pending the Court's final decision on the Ministers' motion, it was not appropriate to allow Mr. Harkat to engage in activities that were more difficult for the CBSA to monitor.

Conclusion

[127] An order will issue embodying these reasons.

"Eleanor R. Dawson"
Judge

1. The Court reviewed the reasons for the lengthy nature of the proceeding, at paragraph 12 of its reasons.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: **DES-4-02**

STYLE OF CAUSE: **MOHAMED HARKAT**
- and -
THE MINISTER OF CITIZENSHIP AND IMMIGRATION
MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS CANADA

PLACE OF HEARING: Ottawa, Ontario

DATES OF HEARING: January 31 and February 4, 5 and 6, 2008

SUPPLEMENTARY WRITTEN SUBMISSIONS: February 11, 2008

REASONS FOR ORDER
THE HONOURABLE MADAM JUSTICE DAWSON

DATED: February 18, 2006

APPEARANCES:

Mr. Paul Copeland Mr. Matthew Webber	Counsel on behalf of the applicant
Mr. D. Tyndale Ms. A. Riaz Mr. B. Assan	Counsel on behalf of the respondents

SOLICITORS OF RECORD:

Mr. Paul Copeland Copeland, Duncan Barrister, Solicitors Toronto, Ontario	For the applicant
Mr. Matthew Webber Webber Schroeder Ottawa, Ontario	For the applicant
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