

**Date: 20081128**

**Docket: DES-5-08**

**Citation : 2009 FC 203**

**Ottawa, Ontario, November 28, 2008**

**PRESENT: The Honourable Mr. Justice Simon Noël**

**BEFORE THE COURT:**

**IN THE MATTER OF a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, (the "*Act*");**

**IN THE MATTER OF the referral of that certificate to the Federal Court of Canada pursuant to subsection 77(1), sections 78 and 80 of the *Act*;**

**AND IN THE MATTER OF Mohamed HARKAT**

**EXPURGATED PUBLIC REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Special Advocates are seeking access to the employment records of T.S., a former Canadian Security Intelligence Service (“CSIS” or “Service”) employee who was an intelligence officer [...] involved in the investigation of Mr. Harkat. In the alternative, the Special Advocates have suggested that the Court review the employment records of this individual and determine whether they should be produced.

[2] The Special Advocates assert that T.S.'s employment records are relevant to this proceeding because of the [...] relationship that developed between her and a person of interest to the Service [...] in the context of the Harkat investigation.

[3] The following facts and circumstances were put into evidence by a Service witness who was cross-examined by the Special Advocates on this point:

- T.S. was an employee of the Service from the late 1980s through January 11, 2002;
- [...]
- [...]
- [...];
- T.S. suffered from domestic difficulties at the beginning of February, 1998. Shortly thereafter, A.B. initiated telephone contact with the officer at work.
- As the relationship between T.S. and A.B. progressed, gifts and photos were exchanged. The officer began communicating with A.B. from both home and work.
- In December 1998, T.S. received written instructions from her employer to cease all contact with A.B. She ignored these instructions.
- In April 1999 T.S. travelled to [...] for a holiday where she had a [...] encounter with A.B.
- CSIS was unaware of the [...] encounter until 2001, at which time the decision was made to begin an internal security investigation;
- January 11, 2002 T.S. was dismissed as a consequence of the revocation of her security clearance;
- [...];

- A grievance was filed by T.S. [...] the grievance was denied.

[4] The Special Advocates have concerns about the reliability and credibility of the information provided [...]. They seek access to T.S.'s employment records to see if they will assist their examination of the reliability and credibility of the information gathered during the period [...].

[5] The Special Advocates submit that this Court should adopt an approach analogous to that set out in *O'Connor v. The Queen*, (1995) 103 C.C.C. (3d) 1 (S.C.C.). Given the *in camera* nature of this portion of the certificate proceeding, they assert that if they establish that the records are likely relevant to the proceeding then they should be produced. This assertion is based on the premise that there can be no breach of the reasonable expectation of privacy where the documents are provided to persons required by law to keep them confidential.

[6] The Ministers' acknowledge that the Court may usefully draw on criminal law to inform its approach to this request for production but that the standards of disclosure in this proceeding and in a criminal trial are not identical. They assert that the *in camera* nature of the proceeding does not preclude the operation of common law rules of privilege and that privacy rights do exist even in the closed portion of the proceedings.

[7] In *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 (*Charkaoui #2*), Justices Lebel and Fish make it clear that the security certificate proceedings are not criminal trials. That difference however does not come from a formal distinction between criminal law and

immigration law, but depends on “...the consequences of the state’s action for the individuals fundamental interests of liberty and security and, in some cases, the right to life.” (see para. 53). They conclude that the security certificate procedure can put these protected rights in “serious jeopardy”.

[8] At paragraph 47 of *Charkaoui #2* Justices Lebel and Fish note that:

...information in CSIS’s possession should be disclosed to the ministers and the designated judge in the context of the proceeding relating to the security certificate. This will require a more nuanced approach than simply importing the model developed by the courts in criminal law. All the interests at stake that relate to public safety and to certain essential functions of the state must be taken into account.

[9] The Court goes on to note that the expanded right of disclosure mandated by s. 7 requires the disclosure of information “relating to the review of the reasonableness of a security certificate and to its implementation.” (para. 58)

[10] The disclosure requirements of *Charkaoui #2* appear to be modelled on the application of criminal law disclosure principles but are tailored to the specific issue before the designated judge in a security certificate proceeding; namely, the verification of the information and grounds on which the certificate is based. Fundamentally, the purpose of the disclosure mandated by the Supreme Court in *Charkaoui #2* is to enable the designated judge and the Special Advocates to test the reliability and credibility of the information relied on by the Ministers to show that the certificate is reasonable. The Court stated that in the context of the certificate proceeding there is a need “... for an expanded right to procedural fairness one which requires the disclosure of information, in the procedures relating to the review of the reasonableness of a security certificate and to its implementation.” [para. 57, emphasis added].

[11] Thus, the question to be asked is whether the employment records of T.S., a CSIS intelligence officer, are necessary for the Court to assume its judicial responsibility to verify the accuracy and reliability of the allegations in relation to the reasonableness of the certificate in which Mr. Harkat is named. I do not think that they are. Employment records will contain information on an individual's employment history such as the dates of employment, positions held within the agency, salaries and benefits paid during the period of employment, annual evaluations, etc. This type of information, which is inherently personal, will not help to determine the reliability of the information [...], nor will it allow for an assessment of the quality of the reporting [...].

[12] The situation is different, however, when the request has as its object the [...] report that studies the reliability and veracity of the information [...] which was primarily reported by [...] who had a [...] encounter with a person of interest to the Service [...]. Such a record is necessary to examine and verify the accuracy of the information submitted to this Court to justify the reasonableness of the certificate. Information of this nature will assist the Court to assess the information provided [...] to the CSIS intelligence officer. As such, it touches directly on the ability of the Court to undertake its obligation to verify the information and allegations made by the Ministers in relation to Mr. Harkat, and falls within the scope of *Charkaoui #2* disclosure obligations.

[13] Five (5) copies of the [...] report should be filed with the designated proceedings section so that it can be viewed by the Court and the Special Advocates within a period of time set by the Court.

[14] If the Ministers or the Service have other information, be it in administrative or operational files, including reports or findings by entities internal or external to the Service related to the reliability and credibility of [...] information provided [...], in light of the [...] involvement of the CSIS intelligence officer with A.B., such information would fall within the Ministers' disclosure obligations pursuant to *Charkaoui #2*.

[15] If there were any question about the necessity to produce further record(s), the Court could review the records to determine if they fall within the scope of the *Charkaoui #2* disclosure obligations, before requiring that they be filed.

## **JUDGMENT**

THIS COURT ORDERS AND ADJUDGES that:

1. The request to access the administrative employment records of T.S., a former Service intelligence officer, is denied.
2. Five copies of the [...] report(s) into the reliability and veracity of any information [...] are to be filed by December 5, 2008 in the designated proceedings section of the Federal Court Registry, along with any other information which may fall within the scope of the disclosure obligations set out in *Charkaoui #2*, and
3. The Special Advocates shall be provided with a copy of the [...] report(s).

“Simon Noël”

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Judge

**FEDERAL COURT****SOLICITORS OF RECORD**

**DOCKET:** DES-5-08  
**STYLE OF CAUSE:** In the matter of a Certificate pursuant to Section 77(1) of  
the *Immigration and Refugee Protection Act* and

In the matter of Mohamed Harkat

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** September 10, 11, 12, 15, 16, 17, 18, 19, 2008

**EXPURGATED PUBLIC  
REASONS FOR JUDGMENT  
AND JUDGMENT:** NOËL S. J.

**DATED:** November 28, 2008

**APPEARANCES:**

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AS SPECIAL ADVOCATES

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