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Ottawa, Ontario, March 20, 2009

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

IN THE MATTER OF a certificate signed pursuant  
to section 77(1) of the *Immigration and Refugee  
Protection Act (IRPA)*;

AND IN THE MATTER OF the referral of a  
certificate to the Federal Court pursuant to  
section 77(1) of the *IRPA*;

AND IN THE MATTER OF  
MAHMOUD ES-SAYYID JABALLAH

**REASONS FOR ORDER**

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## **Introduction**

[1] In *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Charkaoui 1), the Supreme Court of Canada declared the then existing provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) dealing with security certificates to be inconsistent with the Charter, and so to be of no force or effect. This declaration of invalidity was suspended for a period of one year. At the time, Mahmoud Jaballah, the respondent in this proceeding, was the subject of a security certificate and was in detention.

[2] While the declaration of invalidity was suspended, this Court ordered that Mr. Jaballah be

released from detention on strict conditions.

[3] Following the decision of the Supreme Court in Charkaoui 1, the provisions of the Act with respect to security certificates were amended, and a new security certificate was issued in respect of Mr. Jaballah and referred to the Court by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration (Ministers). In that circumstance, the transitional provisions of the legislation that amended the Act provided that:

- (i) Mr. Jaballah would remain released from detention under the previously ordered conditions.
- (ii) Mr. Jaballah was entitled to apply for a review of the reasons for the continuation of conditions.

[4] The conditions of release that were continued in effect by the transitional provisions were those contained in Schedule A to the Court's order of January 17, 2008. Schedule A to that order is attached to these reasons as Appendix A.

[5] Mr. Jaballah applied, as he was entitled to do, for a review of the conditions of his release. These reasons deal with that application.

### **Procedural History**

[6] Mr. Jaballah's initial application for review of the conditions governing his release from detention was filed on April 22, 2008. Following the filing of that application, a number of events occurred, including the filing of a motion in which counsel for Mr. Jaballah sought public funding for his representation. On June 9, 2008, the Court issued two orders. The first appointed Paul Cavalluzzo and John Norris to act as special advocates in this proceeding. The second set out a schedule of open and closed hearings dealing with both the conditions of release and the reasonableness of the security certificate. All hearing dates were set with the consent of the parties and the special advocates.

[7] The Court has now sat for 19 days *in camera* and 13 days in public. The Court has received the Ministers' evidence with respect to both the reasonableness of the certificate and the conditions of release, and Mr. Jaballah's evidence with respect to the conditions of release. The evidence adduced in public and *in camera* relevant to the review of the conditions of release was all subjected to full cross-examination. The Court has received both public and *in camera* submissions with respect to the conditions of release. Mr. Jaballah will not challenge the Ministers' evidence with respect to the reasonableness of the certificate until after he receives the disclosure of further information that he is entitled to receive pursuant to the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326 (Charkaoui 2). Hence, the Ministers' evidence with respect to the reasonableness of the certificate has not been subjected to cross-examination.

**The Relief Sought on this Application**

**Mr. Jaballah's requested variations**

[8] After filing his motion for a review of the conditions of release on April 22, 2008, Mr. Jaballah filed a second motion on September 2, 2008. However, for the purpose of this application, it is agreed that all of the changes that Mr. Jaballah seeks are contained in a document his counsel filed with the Court on November 20, 2008.

[9] Mr. Jaballah seeks to have the following provisions of Schedule A to the Court's order of January 17, 2008 varied:

1. Paragraph 3: Mr. Jaballah asks that the video surveillance equipment installed at the front and back doors to his home be removed. If, however, he is permitted to be allowed to remain in the home without a supervisor, he is content to allow the cameras to remain.
2. Paragraph 4: Mr. Jaballah asks that Ahmad Shehab be removed as a surety and that the sum of \$5,000.00 be repaid to Mr. Shehab.
3. Paragraph 6: Mr. Jaballah asks that he be permitted to remain in his residence (including in the garage) without a supervisor being present. If permitted, he would not receive visitors while alone. I note, however, that while the November 20, 2008 document asks that Mr. Jaballah be permitted to be alone in the garage, under cross-examination he stated that he does not request that he be allowed to be alone in the garage. See: transcript January 20, 2009, page 65,

line 4 and following. For the purpose of this review, I will proceed on the basis that the request to remain home alone does not include a request that Mr. Jaballah be allowed to be alone in the garage.

4. Paragraph 7: Mr. Jaballah asks that he be permitted to remain in his front and backyards without a supervisor being present. If permitted, he would not receive visitors while alone in either yard.
5. Paragraph 8: Four variations are sought to this clause. First, Mr. Jaballah wishes to extend the hours during which he may leave his residence. He is now permitted to be out of the residence between the hours of 8 a.m. and 9 p.m. He wishes to be able to leave the residence between 8 a.m. and 11 p.m. Second, he is seeking to eliminate the restrictions on his activities outside of his residence. Specifically, he wishes to delete the requirement that the Canada Border Services Agency (CBSA) must give prior approval to his absences from the residence. Instead, he wishes to simply be able to telephone representatives of the CBSA for the purpose of telling them where he will be going. He submits that if there are specific places that the CBSA does not wish him to attend, those locations should be spelled out in advance by the CBSA. Third, he wishes to add two additional supervising sureties who would be permitted to accompany him both within the residence (pursuant to paragraph 6) and on outings from the residence (pursuant to paragraph 8). The two new proposed sureties are Zahra Malek and Sandra Noe. Finally, while Mr. Jaballah does not wish to vary the geographic area in which he is entitled to travel

(pursuant to paragraph 10(i) of the release order), he asks that the CBSA be authorized to permit him to travel outside that geographic area so long as he makes such a request one week in advance of the requested outing.

6. Paragraph 12: Three variations are sought. First, Mr. Jaballah asks that his son Ahmad be permitted to have a wireless laptop computer and that his youngest children be permitted to use the PlayStation Portable (PSP) unit that was seized from the family by the CBSA. When in the residence, both the wireless laptop computer and the PSP unit would be kept in the locked computer room. Second, he requests that his daughter Afnan be permitted to have a cellphone, on the same conditions as those which apply to his son Ahmad. Third, he requests that all monitoring of the residence telephone line and his wife's cellphone be done on a "live monitoring" basis so that only those calls which bear upon a breach or potential breach of the Court's order would be recorded.
7. Paragraph 13: Three changes are sought with respect to the condition that incoming and outgoing written communications be intercepted. First, Mr. Jaballah asks that mail interception be defined to be the simple opening and verification of the contents of the mail, so that no intercepted mail would be copied unless there are reasonable and probable grounds to believe that the information would be of assistance in determining if there has been a breach of the Court's order of release. Second, where the contents of any intercepted mail to date have been copied but do not meet this threshold, copies would be



"sequestered and caveated." Third, Mr. Jaballah asks that CBSA be instructed that mail that is intercepted must be forwarded to the residence within 24 hours of the time of interception.

8. Paragraph 14: Mr. Jaballah asks that the condition be varied to provide that the power to search his residence is subject to the requirement that any search of the belongings of a female member of the household, or any search in relation to any area of the residence primarily used by a female member of the household, be conducted by a female member of the CBSA.
9. Additional request: Mr. Jaballah seeks approval to attend his son Ahmad's wedding ceremony at a mosque to be selected by Ahmad, and to be present with the marriage party. He also asks for approval to "attend a location of Ahmad Jaballah's choice for the celebration of his marriage, including a boat in the Toronto Harbour for the party if that is the choice of Ahmad Jaballah and his wife, and to take part in those celebrations as is expected of the father of the groom."
10. Additional request: Upon their marriage, Ahmad Jaballah and his wife wish to become tenants in the apartment located in the basement of Mr. Jaballah's residence. Mr. Jaballah asks for approval that the apartment be considered to be a separate home in the same manner as is presently the case for the current tenant. There is one exception to the notion of a separate residence. Mr. Jaballah asks that, when required, his supervision could be effected by Ahmad Jaballah or his wife from the basement apartment.

11. Additional request: After his son Ahmad's marriage and move to the basement, or any other location, Mr. Jaballah asks that Ahmad's name be removed as one of the adults living in the Jaballah residence, and all authorizations which Ahmad signed in respect of the Court's order would become null and void.
12. Additional request: If the video surveillance cameras remain in place, Mr. Jaballah asks that the CBSA pay the cost for the electricity used to operate the base unit and video surveillance cameras.
13. Additional request: Mr. Jaballah asks that the Ministers reimburse his parking expenses incurred during the hearing.

**Mr. Jaballah's requested restrictions upon the CBSA**

[10] Mr. Jaballah objects to certain practices which he says that CBSA officers currently or recently engage or engaged in. He therefore asks the Court to impose limitations or restrictions upon the CBSA. To some extent these proposed restrictions overlap with the variations that Mr. Jaballah seeks, as set out above. The requested restrictions are contained in a document provided, at the Court's request, by Mr. Jaballah's counsel in the course of oral submissions. The four restrictions sought by Mr. Jaballah are:

1. CBSA be prohibited from conducting "eyes on surveillance" of Mr. Jaballah when he is on family outings. This limitation is said not to preclude covert surveillance of Mr. Jaballah when he is on family outings if the CBSA, on the basis of an individualized assessment, determines this to be necessary. Nor does this

limitation preclude overt "eyes on surveillance" by the CBSA of Mr. Jaballah when he is out of his home and not with his children if, as a result of an individualized assessment, the CBSA determines this to be necessary.

2. CBSA be prohibited from taking pictures of Mr. Jaballah and his family while they are on outings unless officers perceive a potential breach of any of the conditions governing Mr. Jaballah's release or conclude that a photograph is required in order to monitor the threat that Mr. Jaballah poses. Existing photos which do not relate to a breach or a threat should be caveated.
3. Mail sent to the family residence should be intercepted for the limited purposes of monitoring the threat that Mr. Jaballah poses, and monitoring compliance with the conditions of release. Therefore:
  - a. "Mail interception" shall be defined as the simple opening and verification of contents.
  - b. No intercepted mail shall be copied unless there are reasonable grounds to believe that the information would be of assistance in determining the threat that Mr. Jaballah poses, or whether there has been a breach of the Court order. In the alternative, if such mail is copied, it must be fully caveated once it is determined that it does not relate to the threat which Mr. Jaballah presents or to compliance with the terms and conditions of release. The alternative of caveating copied mail is not the preferred option.

- c. Any copies made to date of mail that do not satisfy the above criteria shall be sequestered and caveated.
  - d. Mail which is intercepted must be forwarded within 24 hours of the time of interception.
4. “Phone interception” should be clarified to mean that telephone communications are intercepted for the limited purpose of monitoring the threat that Mr. Jaballah poses and compliance with the conditions of release. To this end, recordings of telephone calls which are unrelated to this purpose shall be destroyed or caveated.

[11] When reference is made to material being “caveated” what is contemplated by Mr. Jaballah is that non-threat related material would remain within the possession of the CBSA. Further, the CBSA can use this material only for the purposes of monitoring the threat Mr. Jaballah poses to national security and his compliance with the terms and conditions of release.

#### **The CBSA’s requested variations**

[12] The government department charged with monitoring Mr. Jaballah's compliance with the conditions of release is the CBSA, and the supervisor of the unit in Toronto that is responsible for monitoring Mr. Jaballah is Mr. Mohammed Al-Shalchi. Through Mr. Al-Shalchi, the CBSA makes the following requests for modifications of the terms of release:

1. Paragraph 13 of the conditions of release be varied. The order currently permits the interception of "incoming and outgoing written communications delivered to or sent from the residence by mail, courier or other means". CBSA asks that the word "written" be deleted so that other forms of communications may be intercepted, for example a DVD.
2. In the event that any item is delivered to the residence by persons other than officers of the CBSA, Mr. Jaballah be required to immediately notify the CBSA of this and to make the item available for inspection by the CBSA. This would include any mail that is not addressed to any resident of the Jaballah residence, but is nonetheless received there.
3. Paragraph 12 of the conditions of release be varied to prohibit Mr. Jaballah from travelling in a vehicle that is equipped with OnStar or similar technology.
4. Mr. Jaballah and members of his family be prohibited from taking photographs, video tapes, or audio tapes of CBSA officers.
5. The current supervisory scheme be reviewed so that the CBSA is not required to supervise Mr. Jaballah. The duty to supervise Mr. Jaballah rests with the Court appointed supervisors and not the CBSA.

[13] Before leaving this enumeration of the relief sought by the parties, on January 23, 2009, I advised counsel that I would not consider any request or suggestion for variation that emerged in the course of the examination or cross-examination of a witness. The Court and the party

opposite are entitled to know with some certainty the position taken by each party. Subsequently, no party sought to amend their written requests for variations.

[14] I now turn to the legal principles that govern this application.

### **Applicable Legal Principles**

#### **The Charkaoui 1 factors**

[15] The parties agree that the principles which govern this application are those articulated by the Supreme Court of Canada in Charkaoui 1. Those principles include the following:

1. Where a person is subject to onerous conditions of release for an extended period of time, the conditions must be subject to a meaningful process of ongoing review that "takes into account the context and circumstances of the individual case." The person named in the certificate must have a meaningful opportunity to challenge the conditions of release (paragraph 107).
2. Conditions of release must be subject to a review which takes into account all relevant factors, including the reasons for the initial detention and the imposition of stringent conditions, the length of detention/conditions, the reasons for any delay in removing the person from Canada, the anticipated future duration of conditions and the existence of alternatives to the conditions (at paragraphs 110-117).

3. Stringent release conditions must not be a disproportionate response to the nature of the threat posed by the individual (paragraph 116).
4. The Ministers bear the initial burden of establishing the need for the continuation of stringent conditions (paragraph 100).

[16] To this I would add three points. First, when considering what terms or conditions are required in order to neutralize or contain the threat posed by Mr. Jaballah's release, it is necessary to consider the cumulative effect of the conditions. Some conditions may be of lesser value than others, but that does not make the aggregate of the conditions inadequate or inappropriate. What is important is whether, in the aggregate, the conditions are adequate and appropriate. See: *Harkat v. Canada (Minister of Citizenship and Immigration)* (2006), 353 N.R. 307 (F.C.A.).

[17] Second, when assessing conditions, the Ministers' consent to a condition is a factor that carries significant weight. Nonetheless, the consent of the parties is not determinative. It is ultimately for the Court to decide what conditions are required in order to contain the threat or danger.

[18] Finally, within the context of a framework of conditions designed by the Court to neutralize the threat, the Court does not have an operational role. Therefore, there are a number of operational details within the framework set by the Court that are best initially resolved between counsel, and then placed before the Court for approval.

**The interests of Mr. Jaballah's children**

[19] Mr. Jaballah submits that when considering whether to vary the conditions of his release order, the Court must take into account the best interests of his children and his family unit. This obligation is said to flow from the requirement in *Charkaoui 1* that the review of conditions must take into account the "context and circumstances of the individual case." It is also said to flow from Canada's international human rights obligations, specifically articles 17, 23 and 24 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 and article 3 of the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3.

[20] As to the role to be played by consideration of the children's interests, Mr. Jaballah does not argue that the presence of his children by itself requires "lighter" conditions. Rather, he acknowledges that any threat posed by his release must be contained. He says, however, that conditions may have to be "[c]rafted differently to achieve the same effect." For example, he says that when there are children on a family outing who may be adversely affected by overt surveillance conducted by the CBSA, consideration of the children's interests may require that the surveillance be covert.

[21] In oral argument, counsel for the Ministers did not disagree with this position as evidenced by the following exchange:

THE COURT: I think the way that I put the question to Ms. Jackman was, if we posit the hypothetical situation where



we have two individuals, each of whom poses an identical threat to [...] Canada's national security or safety of any person, one of those people has children, the other does not, as a matter of law, what is required when considering the conditions for each?

And I think the answer that Ms. Edwardh passed on through Ms. Jackman was, if I have it right, that the threat remains constant, the threat had to be neutralized, but that different conditions may be required in the case of the individual with children. The conditions had to, at one and the same time, neutralize the threat, but do so in a manner that was sensitive to the interests of the children.

Can I ask, Ms. Edwardh, have I got the answer?

MS. EDWARDH: Yes. The conditions would be, in some cases, required to be different, but they would have the effect, although different, of neutralizing the threat.

THE COURT: Is that a position at law that the Ministers would agree with?

MR. MacINTOSH: I'm not sure that one could say that simply because one has children, that the conditions would have – I mean, the children's interests would have to be taken into account, but I'm not sure they would be taken into account to such an extent that they would modify the terms and conditions.

THE COURT: I take your point. The interest has to be taken into account. However, they can't trump national security interests.

MR. MacINTOSH: That would be my position.

THE COURT: They would be taken into account, and their interest would be [reflected] to the extent that the Court at the same time, neutralized the threat posed by the hypothetical individual.

MR. MacINTOSH: Yes, I agree with that formulation.

THE COURT: Thank you.

[22] In view of this apparent agreement, I am prepared to assume, without deciding, that the interests of Mr. Jaballah's children must be taken into account when the Court reviews the conditions of release, and when the CBSA decides how to monitor Mr. Jaballah's compliance with the terms of the release order. I will, therefore, be cognizant of the best interests of Mr. Jaballah's children.

[23] This conclusion is consistent with the Supreme Court's requirement that any review of the conditions of release must take into account the context and circumstances of the individual. In Mr. Jaballah's case, the context and circumstances include the fact that his children share his residence and so are impacted by the conditions of release and the actions of the CBSA as they monitor compliance.

[24] An important caveat to be placed upon consideration of the children's interests is that those interests do not outweigh other considerations. Thus, a person named in a security certificate may be subject to detention or release on strict terms and conditions even if it is not in his children's best interests. Any threat posed by an individual must be neutralized if the individual is to be released from detention. Put simply, the presence of children does not call for a certain result and does not trump national security concerns. See, for example, *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.) at paragraph 12. As the Ministers submitted, "it is not because the interests of the children favour less stringent terms

and conditions that the Court must be bound to exercise its discretion in a manner that is most favourable to [Mr.] Jaballah."

[25] Having set out the applicable legal principles, I turn to the application of those principles to the requests made of the Court and the evidence before it.

### **Application of Legal Principles to the Evidence**

#### **Charkaoui 1 factors**

[26] Each factor identified by the Supreme Court of Canada in Charkaoui 1 is considered in turn.

#### *Reasons for the imposition of stringent conditions*

[27] The more serious the threat posed by Mr. Jaballah's continued release, the greater the justification for the continuation of onerous conditions of release.

[28] The parties agree that for the purpose of this review, I may rely upon all of the findings of fact made by Justice Layden-Stevenson when she released Mr. Jaballah from detention and when she later reviewed the conditions of release. Such findings form the starting point for consideration of the threat now posed by Mr. Jaballah.

[29] In her decision releasing Mr. Jaballah from detention, reported at (2007), 296 F.T.R. 1,

(first decision) Justice Layden-Stevenson found that:

- Mr. Jaballah posed a danger to national security (paragraph 38).
- Mr. Jaballah was a senior member of the Al Jihad, a terrorist organization that is closely aligned with Al Qaeda. Mr. Jaballah acted as a communication link between cells of the Al Jihad and Al Qaeda (paragraph 40).
- No allegation was made that Mr. Jaballah: posed a danger to the safety of any person, personally committed any act of violence, acted against Canada, or aided anyone in acting against Canada (paragraph 47).
- The contacts Mr. Jaballah once had with persons or organizations of a terrorist nature had been disrupted (paragraph 47).
- The government's evidence, with minor exceptions, was as it was at the time Mr. Jaballah was detained (paragraph 47).
- Without restrictive conditions, Mr. Jaballah could, and possibly would, communicate and associate with individuals or organizations with terrorist beliefs and objectives (paragraph 69). Onerous conditions were not disproportionate to the threat posed by Mr. Jaballah's release (paragraph 70).

[30] In reasons reported at [2008] F.C.J. No. 2, (second decision) Justice Layden-Stevenson reviewed the conditions of Mr. Jaballah's release and found that he continued to pose a danger to national security. Justice Layden-Stevenson also concluded that neutralization of the risk required strict monitoring of Mr. Jaballah and his activities (paragraphs 10 and 46).

[31] Additionally, a representative of the Canadian Security Intelligence Service (Service), David, testified about the view of the Service on the risk or threat posed now by Mr. Jaballah. It was David's opinion, as an experienced intelligence officer, that Mr. Jaballah currently poses a threat to the security of Canada. Such opinion was based upon the facts that Mr. Jaballah is a senior member of a Sunni-Islamic extremist group, Al Jihad, and remains committed to its cause. The latter conclusion was based upon the fact that Mr. Jaballah had been interviewed by the Service on three occasions prior to his arrest, but was not deterred by those interviews, and upon David's view that the commitment that allowed Mr. Jaballah to rise to a senior position in Al Jihad would not change over time with incarceration. It was to be remembered that prior to his arrest, Mr. Jaballah had recruited individuals for the extremist movement, and had served as a communications relay.

[32] Also relevant to the assessment of the threat posed now by Mr. Jaballah are events which have occurred since Justice Layden-Stevenson's findings were made. Relevant considerations include:

- Mr. Jaballah was released from detention in May of 2007.
- It remains the case that no allegation is made that: he poses a danger to the safety of any person, personally committed any act of violence, acted against Canada, or assisted anyone in acting against Canada.

- It remains the case that the contacts Mr. Jaballah once had with persons or organizations of a terrorist nature have been disrupted, and there is no evidence of any resumption or attempted resumption of contact.
- It remains the case that the government's evidence, with minor exceptions, is as it was at the time Mr. Jaballah was detained.
- There are only two suggestions of any breach of any condition by Mr. Jaballah since the Court last reviewed the conditions of his release. The first is that he has been a passenger in two new trucks purchased by his son Ahmad Jaballah. The trucks are equipped with OnStar technology, but neither Mr. Jaballah nor his son informed the CBSA about the presence of this technology in the trucks. The second problematic matter is that during an inspection of the Jaballah residence, conducted by the CBSA, a PSP unit was discovered in the family room in the residence. This is a handheld computer with wireless capabilities. (These two concerns will be dealt with later in these reasons.)
- Mr. Al-Shalchi testified that he would describe his relationship with Mr. Jaballah to be "very amicable" and that Mr. Jaballah "has proven to be extremely cooperative".

[33] In order to assess the threat Mr. Jaballah now poses, it is necessary to deal first with the two alleged breaches of the current conditions of release. It is of some significance, in my view, that the Ministers did not bring any motion before the Court when they learned of the conduct

now characterized to amount to breaches of the release order. Instead, the matters are raised in Mr. Al-Shalchi's affidavit filed in opposition to Mr. Jaballah's application.

[34] With respect to the OnStar issue, the existence of OnStar technology in cars manufactured by General Motors is a well-advertised and well-known fact. For the purpose of this application, the contentious feature is the existence of the hands-free calling system. This is a function akin to a built in cellular telephone.

[35] Ahmad Jaballah testified that as vehicles manufactured by General Motors, his trucks came with 30 free minutes of hands-free calling, the period of free usage has expired, he did not activate the feature, but he could activate the feature in the future and this is a possibility. Ahmad Jaballah agreed that he had not notified the CBSA that these General Motors vehicles were equipped with OnStar.

[36] Mr. Al-Shalchi testified that he had no knowledge of any instance where Mr. Jaballah was left alone in a truck equipped with OnStar and that he did not know whether the hands-free calling feature had been activated after the expiry of the 30 free minutes.

[37] In my view, the presence of this technology in Ahmad Jaballah's trucks does not, by itself, constitute a breach of any term of the release order. Supervisors are permitted to have and to use cellphones. The order prohibits Mr. Jaballah from using such a device directly or indirectly.

Indirect usage would include, for example, asking someone to place a call for him. Just as possession of a cellphone or a BlackBerry by a supervisor does not by itself breach the current conditions of release, the existence of OnStar technology does not breach the conditions of release. Those conditions would be breached if Mr. Jaballah was to use, directly or indirectly, the hands-free calling feature.

[38] The existence of OnStar does, however, pose an increased challenge to the ability of the CBSA to monitor Mr. Jaballah's compliance with the terms of release. This is because the hands-free feature prevents an observer from visually ascertaining whether Mr. Jaballah is speaking to someone in a truck, or speaking on the telephone. Accordingly, I will further address OnStar when I come to consideration of the requested changes to the terms and conditions of the release order.

[39] With respect to the PSP, when this unit was seized both Mr. Jaballah and his son Ahmad denied knowing of its wireless capabilities. Mr. Al-Shalchi could not recall whether, at the time the PSP was seized, any attempt was made to see whether the PSP could in fact access the internet from the Jaballah residence. After its seizure, the CBSA conducted a forensic examination of the PSP and concluded that no one in the Jaballah residence had used it to connect to the internet.

[40] The presence of the PSP in the family room of the residence did breach paragraph 12 of the release order. The PSP is a handheld computer with wireless capability. Paragraph 12 of the



order requires every computer with internet capability to remain in the computer room.

[41] However, on the evidence before me, I find no breach of the terms and conditions of the release order which directly engages national security concerns. This is because the forensic examination concluded that the PSP unit had not been used to connect to the internet. Because the PSP was not used to connect to the internet and because it was purchased secondhand (and so may well have come without all of the original packaging and instructions), I accept that this was an inadvertent or negligent breach of the conditions.

[42] Notwithstanding, I stress to Mr. Jaballah and to his supervisors that, before any electronic equipment is brought into the residence, a full inquiry should be made about the capabilities of the equipment. If in doubt, advice should be sought from the CBSA. In view of this admonition, any subsequent breach of this nature is less likely to be characterized as inadvertent.

[43] Having dealt with the two alleged breaches of the conditions of release, in my view the most salient considerations when assessing the threat and the reasons for the continuation of conditions are that:

- The government did not argue that Mr. Jaballah poses a threat to the safety of any person or that he is a flight risk. The risk is that he will associate or communicate with individuals who hold terrorist beliefs or objections.
- The government's evidence relevant to assessing the risk or threat posed by Mr. Jaballah is largely as it was when he was arrested.

- The concern identified by Justice Layden-Stevenson was that Mr. Jaballah could, and perhaps would, communicate with individuals or organizations with terrorist beliefs or objectives. It therefore remains important to monitor Mr. Jaballah's communications.
- The public record before the Court does not allege that, since his last arrest in 2001, Mr. Jaballah has had contact, or attempted contact, with any of the individuals listed in the amended public summary of the security intelligence report, or with any other person or organization whom the Ministers believe to be terrorists (with the exception of his fellow detainees at the Kingston Immigration Holding Center).
- There is no allegation of any such contact, or attempted contact, since Mr. Jaballah's release from detention in May of 2007 (again, except for any authorized contact Mr. Jaballah may have had with Mr. Mahjoub at their lawyers' offices).
- While it remains important to monitor Mr. Jaballah's communication, it must be remembered that it is well-known that he remains of interest to Canadian authorities and that he is closely monitored by the CBSA. Anyone who contacts Mr. Jaballah must be taken to know that this will draw the attention of Canadian authorities to them.

- Mr. Jaballah's ability to be of use to any extremist activity has been adversely affected by his exposure, detention and the monitoring that accompanied his release.
- Mr. Al-Shalchi characterizes his relationship with Mr. Jaballah to be "very amicable", and characterizes Mr. Jaballah to be "extremely cooperative."

[44] The existing terms and conditions have ensured that the threat posed by Mr. Jaballah has been contained. The absence of any breach of the terms and conditions of release that directly engages any national security concern, and the co-operation that Mr. Jaballah and his supervisors have shown, convince me that the threat has not increased. The Ministers have failed to persuade me that the threat posed by Mr. Jaballah has not attenuated to a degree since the conditions were last reviewed by the Court.

*The length of detention and release on stringent conditions*

[45] The Supreme Court of Canada found in *Charkaoui 1* that the longer a person is in detention, the less likely it is that an individual will remain a threat to national security (paragraph 112).

[46] Mr. Jaballah was detained on August 14, 2001 after the issuance of a second security certificate. He was released from detention on May 20, 2007. In her first decision, Justice Layden-Stevenson concluded that the length of Mr. Jaballah's detention was "of sufficient

duration to trigger the observations noted by the Supreme Court, specifically disruptive of the contact and communication with extremist individuals or groups previously engaged in by Mr. Jaballah.”

*Reasons for the delay in deportation*

[47] Counsel agree that on the facts now before the Court, this is not a significant factor. See: transcript of argument January 22, 2009, page 98 at line 15 and following; transcript January 23, 2009, page 23 at line 6 and following. I agree that this is a neutral factor.

*Anticipated future length of conditions*

[48] The Supreme Court held in Charkaoui 1 that if the future duration of detention or onerous conditions of release cannot be ascertained, this is a factor that weighs in favour of the person named in the security certificate (paragraph 115).

[49] At paragraph 113 of its reasons, the Supreme Court also noted that the government’s evidentiary onus must be heavier when the government has had more time to investigate and document the threat alleged to be posed by an individual.

[50] Here, counsel agree that the date of any future removal of Mr. Jaballah from Canada is uncertain. See: transcript January 22, 2009, page 99 at line 3 and following and January 23, 2009, page 27 at line 23 and following. My colleague Justice MacKay, in reasons reported at

(2006) 301 F.T.R. 102, concluded that, as of that date, Mr. Jaballah could not be removed "to Egypt or to any country where and so long as there is a substantial risk that he would be tortured or worse" (paragraph 84). Thus, there is no certainty as to the length of time that Mr. Jaballah will remain bound by strict terms and conditions.

[51] This consideration is ameliorated to some extent because of the requirement that those conditions be subject to a meaningful process of ongoing review.

*Alternatives to the existing conditions*

[52] At paragraph 116 of its reasons in *Charkaoui 1*, the Supreme Court of Canada admonished that stringent release conditions must not be disproportionate to the nature of the threat posed.

*Conclusion with respect to the Charkaoui 1 factors*

[53] As set out above, the threat posed by Mr. Jaballah at the time of his release has been contained by the terms of the release order. The Ministers have failed to establish that the threat has not attenuated to a degree since the conditions were last reviewed by the Court. There is no certainty as to when Mr. Jaballah can be removed from Canada. Mr. Jaballah has cooperated with the CBSA and enjoys a good working relationship with Mr. Al-Shalchi. I am satisfied that Mr. Jaballah's release from detention should be confirmed and that the conditions of his release may be modified in some respects as Mr. Jaballah requests.

[54] In the following paragraphs I review all of the requested changes (including the changes sought by the CBSA). I am satisfied that the modifications discussed below, taken as a whole, will continue to contain the threat now posed by Mr. Jaballah, and that these modified conditions will be proportionate to the threat he now poses.

[55] The issue of proportionality is largely fact based. When assessing the proportionality of the conditions as a whole, I have taken into account a number of considerations, including:

- The threat posed by Mr. Jaballah (as discussed above).
- The supervisory deficiency that concerned Justice Layden-Stevenson, as discussed at paragraphs 60-69 of her first decision.
- The failure of Mr. Jaballah's wife, Ms. Al-Mashtouli, to testify before me.
- The need for conditions to counter-balance the supervisory deficiency.
- The reliance placed upon the CBSA to monitor the conditions of release and the need for the CBSA to perform this role while not being overly intrusive into the life of Mr. Jaballah and his family.
- The co-operation and compliance Mr. Jaballah has demonstrated to date.
- The best interests of Mr. Jaballah's family.
- Whether lesser conditions would be sufficient to contain the threat.

[56] I have particularly considered the submission of Mr. Jaballah's counsel that this review is

seen by Mr. Jaballah to be part of a process to “cascade” Mr. Jaballah to full liberty. Implicit in that submission is the notion that this is an incremental process. I believe that is correct that the process must be incremental. For conditions to be relaxed, the Court must have confidence that Mr. Jaballah will not breach the conditions of release and that the conditions are workable. Thus some of the changes to the existing conditions are introduced incrementally.

[57] No order accompanies these reasons. The parties are to jointly prepare a draft order that contains all of the continued conditions of release and embodies the variations set out in these reasons. The draft order should then be submitted to the Court for approval. A teleconference will be scheduled within two weeks of the release of these reasons to ascertain the progress that counsel are making.

### **Matters Not Opposed**

[58] The following matters requested by Mr. Jaballah are not opposed. I am satisfied that the conditions of release should be varied in the following respects.

#### **Addition of supervisors**

[59] Mr. Jaballah asks that Zahra Malek and Sandra Noe be added as supervisors. Ms. Malek is the fiancée of Mr. Jaballah’s son Ahmad. Ms. Noe is a family friend. Both are approved visitors to the Jaballah residence.

[60] Mr. Al-Shalchi testified that the CBSA "is not opposed to adding additional supervisors" (transcript November 24, 2008, page 140), he was not sure "if checks are needed to be renewed or further checks need to be conducted" with respect to Ms. Malek (transcript November 24, 2008, page 141), and that the CBSA was currently conducting a check of Ms. Noe (transcript November 24, 2008, page 142).

[61] I infer from the CBSA's subsequent silence that nothing adverse emerged during its inquiries.

[62] I was impressed with the testimony of both Ms. Malek and Ms. Noe. While Ms. Malek is comparatively young, 22 years of age, she is well educated and struck me as being mature for her age. I accept her evidence that she understands the gist of the allegations against Mr. Jaballah and that she takes seriously her promise to the Court to be a responsible supervisor. Similarly, I accept Ms. Noe's evidence that she is familiar with the nature of the allegations against Mr. Jaballah and that she understands her responsibilities and obligations as a supervisor.

[63] Both individuals are added as supervising sureties.

[64] The addition of two supervisors should make it easier for Mr. Jaballah to arrange for supervisors to be with him after work and on weekends. I agree that the CBSA has no duty to supervise Mr. Jaballah.



### **Travel outside geographic boundary**

[65] Mr. Jaballah asks that the CBSA be given discretion to consider and approve requests for outings outside the geographic boundary referred to in the Court's order releasing him from detention. He wishes to be able to go to locations such as Niagara Falls or the African Lion Safari. In oral argument, counsel for the Ministers agreed the request was reasonable if there were some limits upon the number and frequency of such outings (transcript January 23, 2009, pages 148 and 149).

[66] I agree that it is reasonable to give this discretion to the CBSA. I also agree that there should be a limit with respect to the maximum distance Mr. Jaballah would be permitted to travel, a limit with respect to the number of such outings that the CBSA may approve and a requirement for reasonable advance notice of any requested outing outside the existing geographic boundary. Ideally, those matters should be agreed between counsel and should balance the desire for reasonable family activities against the operational limits and requirements of the CBSA. If these matters cannot be agreed, they will be settled by the Court.

### **Afnan's cellphone**

[67] Mr. Jaballah asks that his 15-year-old daughter Afnan be permitted to have a cellphone for safety reasons and because teenagers want cellphones. The CBSA does not oppose this request, but asks that Afnan be subject to the same cellphone conditions as Ahmad Jaballah and

Mr. Jaballah's wife Husnah Al-Mashtouli.

[68] Afnan Jaballah testified and I am satisfied that she understands the conditions that now apply to her mother's and her brother Ahmad's cellphones. I believe that she would abide by those conditions.

[69] Accordingly, Afnan Jaballah will be permitted to have a cellphone on the same conditions that apply to her brother with one additional condition that Mr. Jaballah has agreed to. That condition is that, while calls placed or received by the cellphone will not be intercepted, the telephone service provider must be irrevocably directed to provide the CBSA with copies of the cellphone records that show particulars of the cellphone's usage, including all numbers called. Such direction may only be revoked with the approval of the Court.

#### **CBSA access to the Jaballah residence**

[70] The parties agree that CBSA's right to enter and search the Jaballah residence should be qualified in one respect. Any search of the belongings of Mr. Jaballah's wife or daughter and any search of any space primarily used by Mr. Jaballah's wife or daughter should be conducted by a female officer of the CBSA.

[71] This is a reasonable restriction and the conditions of release should be amended to reflect this.

[72] I now turn to requests made by Mr. Jaballah that are opposed by the CBSA.

### **Mr. Jaballah's Contested Requested Variations**

#### **Removal of video surveillance equipment**

[73] Mr. Jaballah does not press this request if he is to be allowed to be in the residence without a supervisor. As I am prepared to give Mr. Jaballah a limited right to be home without a supervisor, it is necessary for the video surveillance equipment to remain in place.

#### **Removal of Ahmad Shehab as a surety**

[74] Ahmad Shehab is a surety who paid \$5,000.00 into Court. In the event that any condition of release is breached, the Ministers may seek an order for the payment of such sum, together with other monies, to the Attorney General of Canada. Mr. Shehab was an approved visitor to the Jaballah residence. However that status has been revoked by the CBSA.

[75] The Ministers do not object to Mr. Shehab being removed as a surety, but ask that the sum of \$5,000.00 be paid into Court by another surety. While Mr. Jaballah testified that he had no one to replace Mr. Shehab, he gave no evidence of any effort made to find a replacement surety.

[76] There was no evidence that Mr. Shehab wishes to be removed as a cash surety.

[77] In my view, the lodging of cash sureties or the execution of performance bonds continues to provide an additional incentive for Mr. Jaballah to comply with all of the conditions of release. In view of the fact that Mr. Jaballah is to be permitted to be home without a supervisor for limited periods of time, I do not think it appropriate to reduce the monies pledged to secure Mr. Jaballah's compliance with the conditions of release. This is particularly the case when Mr. Shehab has made no request to the Court that the sum of \$5,000.00 be returned to him.

[78] At the same time, I am mindful of the difficulty Mr. Jaballah may face in securing \$5,000.00 in cash.

[79] Mr. Shehab may be removed as a cash surety if Mr. Jaballah can secure either a cash surety who will pay \$5,000.00 into Court, or an individual acceptable to the CBSA who is prepared to execute a performance bond in the amount of \$5,000.00.

### **Home without a supervising surety**

[80] This is the most contentious request. Mr. Jaballah asks that he be permitted to be home without a supervising surety. While alone, he would not receive visitors or accept deliveries (other than from the CBSA). Mr. Jaballah says that he should be trusted to be alone because:

A. First, if I am allowed to be alone, what things would you be – like, would you have concerns about? For example, the computer is locked inside the computer room, in addition to the fact that the computer is subject to interception.

The phone is also monitored and intercepted. Also, before any of the supervisors leave home, like my wife or Ahmed, they take with them also their cellphones, so there is no cellphone left in the house.

Also, I have already mentioned that if this again, like, makes everybody feel good about it, then I am willing to accept the video cameras that would monitor anyone coming into the house or leaving the house.

So I don't see how – I don't see any reason why there would be any concerns that I might in fact violate the conditions.

[81] He notes that on one previous occasion, the CBSA permitted him to be alone for four or five hours.

[82] The CBSA opposes this request because, if alone, the risk of unauthorized or prohibited communication increases.

[83] In my view, the requirement that Mr. Jaballah never be in the residence without a supervisor is no longer proportionate to the threat he poses. With the imposition of some additional conditions, the threat of unauthorized or prohibited communication can be neutralized.

[84] I reach this conclusion because the prohibition against receiving visitors or deliveries contains the risk of unauthorized communication through visitors or through items delivered to Mr. Jaballah. This prohibition can be monitored through the video surveillance equipment which can be live monitored.

[85] As Mr. Jaballah notes, the computers and home telephone are subject to interception. As well, the CBSA is entitled to enter the residence at any time for the purpose of verifying compliance with the conditions of release.

[86] At paragraph 69 of her first decision, Justice Layden-Stevenson expressed concerns about the "supervisory deficiency" and "fallibility" of Mr. Jaballah's wife as a supervising surety. In view of those concerns, I believe that the additional conditions I impose will contain the risk of unauthorized communication to a degree that is at least equal to that now in place.

[87] The additional conditions that must be in place in order for Mr. Jaballah to be in the residence without a supervisor are as follows:

1. First, Mr. Jaballah should only be permitted to be without a supervisor during fixed hours on weekdays. On weekends and holidays there should be no shortage of supervisors available to be with Mr. Jaballah. It was not helpful that Mr. Jaballah testified that he did not know the times during which he proposed that he be home alone. In my view, those hours should be during the workday when his supervisors and his children are at work or school, and should not initially exceed six hours per day. This temporal limit reflects the incremental nature of this process. Counsel should endeavor to agree to these hours. If they cannot be agreed, the Court will set the hours.

2. Mr. Jaballah must notify CBSA immediately prior to the departure of his supervisor that he is about to be alone.
3. While Mr. Jaballah is in the residence without a supervisor, no one shall have access to the computer room and it shall remain locked. (This should not pose any difficulty as his children will be at school and no supervisor with a key to the computer room and knowledge of the computer password will be present.) A contact switch of the sort used by companies that provide home alarm and security services shall be installed on the door to the computer room. The contact switch must either record the times at which the door to the computer room is opened, or transmit a signal to the CBSA or its agent that notifies the recipient of the signal that the computer room door has been opened. This switch must be activated and functional at all times when Mr. Jaballah is home alone.
4. Mr. Jaballah must not leave the residence except in the event of an emergency or if requested by the CBSA to stand in front of the video surveillance equipment for the purpose of verifying his presence. For clarity, while alone, Mr. Jaballah is not permitted to be in the garage.
5. Mr. Jaballah shall telephone representatives of the CBSA, as they may request, to confirm his presence in the residence. When a supervisor enters the residence, so that Mr. Jaballah is no longer unsupervised, the supervisor shall promptly notify

the CBSA of his or her arrival. If one of Mr. Jaballah's minor children enters the residence while Mr. Jaballah is alone, Mr. Jaballah shall promptly notify the CBSA of this.

6. While without a supervisor, Mr. Jaballah will receive no visitors and receive no deliveries (other than from the CBSA). If his minor children are in the residence, they may not have visitors or receive deliveries.
7. To assist the CBSA in monitoring Mr. Jaballah's presence in the residence, and to assist the CBSA in monitoring that no visitors or deliveries are received, contact switches must be placed on all entrances into the residence, including the entrance from the basement apartment. Those switches must either record the times at which the doors are opened, or transmit a signal to the CBSA or its agent that notifies the recipient of the signal that the door has been opened. The switches must be activated and functional at all times when Mr. Jaballah is home alone.

[88] The issue of contact switches, or something similar, was raised with counsel during the hearing. No objection was stated to the concept. Counsel for Mr. Jaballah stated that she could see the need for a similar device on the interior door to the basement apartment, but she questioned the necessity for it on other doors (transcript January 22, 2009, page 179 and following). In my view, the benefits of such a switch include the following. First, this is a much less intrusive device than the biometric devices proposed by the Ministers. Second, it avoids the suggestion that Mr. Jaballah somehow be locked in the residence. Third, it gives to the CBSA a



tool for monitoring Mr. Jaballah's presence in the residence (and his absence from the computer room) when he is home alone. This tool has the potential to be much less intrusive upon Mr. Jaballah and his family than the physical presence of CBSA officers posted at or around the residence.

[89] Counsel may suggest some refinement to this.

#### **Front and backyard access**

[90] Mr. Jaballah wishes to be allowed to be in his front and backyard without a supervisor so that he could do things such as snow removal, garden and cut the grass. The Ministers oppose this request because it increases the risk of prohibited communication.

[91] No evidence was adduced as to whether the backyard is fenced or whether it adjoins any laneway.

[92] Given the interest that the CBSA shows in Mr. Jaballah's activities, I have some doubt that persons with something to hide from Canadian authorities would attempt to contact Mr. Jaballah by meeting him outside of his residence. Such persons would likely reasonably conclude that any contact with Mr. Jaballah would draw the attention of Canadian authorities to them.

[93] That said, the potential does exist for such contact. Of particular concern would be any effort to pass to Mr. Jaballah a communication device. Thus, prudence dictates that if Mr. Jaballah is in his front or backyards he must remain within sight of a supervisor. The supervisor may remain in the residence, but at a location from which he or she is able to keep Mr. Jaballah in sight at all times. While in the yard without the physical presence of a supervisor, Mr. Jaballah cannot have any contact or communication with others (other than a casual greeting to a neighbor) and cannot receive any delivery or any thing.

### **Outings**

[94] As noted above, Mr. Jaballah sought four variations to the conditions governing outings. Two were not controversial: the addition of two additional supervisors and granting discretion to the CBSA to approve outings outside the existing geographic boundary. Two variations that Mr. Jaballah seeks are opposed: the extension of the hours during which he may leave the residence and the deletion of the requirement that the CBSA must give prior approval to his outings.

[95] The request to extend the hours during which Mr. Jaballah may leave the residence is opposed on the basis that the conditions of release currently allow Mr. Jaballah to request of the CBSA that it extend his curfew, but he has not availed himself of this opportunity. Mr. Jaballah responds that when he made such a request it was denied because his curfew is 9 p.m. and there was no emergency.

[96] Mr. Al-Shalchi testified that Mr. Jaballah takes approximately one half of the number of outings he is entitled to and no evidence was tendered that the extension of Mr. Jaballah's curfew would pose operational difficulties for the CBSA. In that circumstance, the curfew will be extended as requested.

[97] The second request is more problematic. Mr. Jaballah complains that when he is on an outing with his children the CBSA should be precluded from carrying out overt surveillance. However, the ability of the CBSA to conduct covert surveillance would be, in my view, hindered in the scenario where, with no advance warning, Mr. Jaballah could inform the CBSA that he is about to leave the residence for a specified location. More importantly, I am not persuaded that it is reasonable to require the CBSA to compile a list of prohibited destinations. Three difficulties immediately come to mind. First, some destinations may be suitable at some times but be unsuitable at other times (for example, during situations of crowding). Second, considerable resources would be expended in order to ascertain locations where the operation of the Global Positioning System (GPS) bracelet may be interfered with. However, Mr. Jaballah might have no desire to visit those locations. Finally, the presence of some locations on a list of prohibited destinations might disclose that Canadian authorities are interested in persons or activities associated with those locations.

[98] For these reasons, this request is refused.

[99] That said, I am mindful of difficulties that have arisen when Mr. Jaballah has not been permitted to depart from his pre-approved outing route. Mr. Jaballah's son Ali is 13 years old. His evidence (contained in Exhibit 17) is that he is lactose intolerant. While on outings with his father they cannot make detours and so they cannot get something to eat if Ali's stomach is bothering him and they cannot stop to allow Ali to use the washroom.

[100] During oral argument (see transcript January 23, 2009, page 144) counsel for the Ministers stated that he hoped that it would not be necessary to have the Court pronounce on things such as Mr. Jaballah's ability to stop at a washroom while on an outing, or his ability to pick up bread on the way home. I agree. On outings, Mr. Jaballah is with a supervisor and is generally followed by CBSA officers. A practical solution must exist. Counsel are asked to attempt to resolve this. If they are unable to reach agreement, the Court will settle the issue.

### **Ahmad's laptop and the PSP**

[101] Mr. Jaballah asks that his son Ahmad be permitted to have a wireless laptop computer and that his children be permitted to use the PSP unit that was seized by the CBSA. While in the residence, both the wireless laptop and the PSP would be kept in the locked computer room.

[102] Ahmad is, of course, entitled to own a wireless laptop. He is not entitled to take it into the Jaballah residence. Given that Mr. Jaballah is now to be permitted to be home alone in the residence, for the reasons given by Justice Layden-Stevenson in her second decision at

paragraphs 27 through 34, I have not been persuaded that it is appropriate to allow a wireless laptop computer in the Jaballah residence.

[103] I view the PSP in a different light. While it too is a wireless computer, it was purchased in order to allow the younger children to play games. There is no suggestion of any expectation of privacy with respect to PSP usage (unlike the business and personal information that Ahmad would be expected to store on his laptop). Further, the CBSA has demonstrated its capacity to conduct a forensic analysis of the PSP unit in order to ascertain whether the PSP has been connected to the internet.

[104] In my view, any risk posed by the PSP can be neutralized with the following additional conditions:

1. The PSP is to remain at all times in the computer room.
2. Mr. Jaballah must instruct all PSP users that the unit is not, under any circumstance, to be connected to the internet.
3. Mr. Jaballah shall make the PSP unit available for inspection and forensic examination by the CBSA as the CBSA may reasonably request. If such examination reveals that the unit has been connected to the internet, it shall not be returned to the Jaballah residence.

### **Live monitoring of telephone lines**

[105] This request will be dealt with below in the context of Mr. Jaballah's requested limitations upon the CBSA.

### **Mail interception**

[106] This request deals with restrictions Mr. Jaballah seeks concerning the interception of incoming mail. This request will also be dealt with below in the context of the limitations that Mr. Jaballah requests be placed upon the CBSA.

### **Ahmad's wedding and reception**

[107] As noted above, Mr. Jaballah seeks permission to attend his son's wedding and reception. However, the evidence concerning both the wedding and reception is, at best, vague.

[108] Ms. Malek testified that:

- While no firm wedding date has been set, they will try to marry in June of 2009.
- The mosque where the wedding ceremony will take place has not been selected.
- She and Ahmad have been developing a guest list. There are now between 350 and 400 people on the guest list, and she thinks the number will increase. The guest list will perhaps be finalized in May of 2009.
- They are thinking of holding the reception on a boat in the Toronto Harbour area, but no vessel has been selected.

- She does not think it is necessary to provide the CBSA with a copy of the guest list.
- Not all guests will be invited to both the wedding and the reception.
- A lot of the invitations will be sent by mail.

[109] Ahmad's Jaballah testified that:

- They plan to finalize the wedding date in April and hope to marry in June or July of 2009 (most likely in June).
- They will have a traditional ceremony at a mosque and would like to have a reception on a boat in the Toronto Harbour.

[110] Mr. Jaballah testified:

- No list of invitees has been prepared.
- Everyone who is invited to the wedding will be invited to the reception and vice versa.

[111] It is premature to make any ruling about Mr. Jaballah's attendance at the wedding and the reception on this evidence. However, I make the following general observations.

[112] First, as a matter of general principle it would be desirable for Mr. Jaballah to attend his

son's wedding and reception and every effort should be made to facilitate this.

[113] Second, for this to be permitted, timely advice must be provided to the CBSA about the date and the particulars of the ceremony and reception. Much will depend upon the level of cooperation demonstrated by Mr. Jaballah and his family and by the CBSA.

[114] Third, I accept that it may not be reasonable to provide the date of birth and a photocopy of the drivers license of each person invited to the ceremony and reception. This is the information the CBSA requires in order to approve visitors to the Jaballah residence. Equally, in my view, it is unreasonable to expect the CBSA or the Court to approve Mr. Jaballah's attendance at a gathering of 350 to 400 unknown persons. At the least, Mr. Jaballah must provide the names and addresses of all invitees to the ceremony and to the reception. In view of the large number of invitees, this should be done well in advance of the wedding and reception.

[115] Mr. Jaballah will have to return to the Court for approval to attend his son's wedding and wedding reception.

### **The basement apartment**

[116] Mr. Jaballah says that, after their marriage, Ahmad Jaballah and his wife wish to live in the basement apartment in the Jaballah residence. The apartment is currently rented to a tenant and is considered to be a separate residence. Mr. Jaballah asks that the apartment continue to be



treated as a separate residence. This would mean that mail sent to that residence would not be intercepted, visitors to that residence would not have to be approved by the CBSA, telephones in that residence would not be intercepted and Ahmad Jaballah could keep a wireless laptop computer there. However, Mr. Jaballah also asks that Ahmad and his wife would also be able to supervise him while they are in that separate residence.

[117] The apartment is now treated as a separate residence and there is no evidence that this has caused any difficulty. There is nothing in the evidence that suggests that Ahmad Jaballah has allowed his father to breach any condition of the release order and Ahmad has served as one of his father's primary supervisors. His fiancée, Ms. Malek, has been approved as a supervisor. In my view, it is appropriate that, if they move into the basement apartment, it be treated as a separate residence subject to the following additional conditions:

1. Mr. Jaballah's access to that separate residence must be controlled. Thus, if Mr. Jaballah wishes to visit the apartment he will have to seek CBSA approval as for any other outing to any other residence.
2. The surveillance camera that is located in the garage must be activated so as to provide verification as to when Mr. Jaballah visits the apartment. In this regard, neither Ahmad Jaballah nor Zahra Malek testified that they would object to this. Mr. Jaballah testified that if Ahmad was "living in the basement as part of the family and he agrees to that, then I have no objection to the camera being

activated.” (transcript January 20, 2009, page 64). Mr. Jaballah’s wife did not testify.

3. The interior door between the basement apartment and the main Jaballah residence must be closed and kept locked when neither Ahmad Jaballah nor his wife are in the basement apartment. Mr. Jaballah shall not have access to that key.
4. Neither Ahmad Jaballah nor his wife can supervise Mr. Jaballah from the basement apartment. To supervise Mr. Jaballah they must be in the main Jaballah residence.

#### **Revocation of Ahmad Jaballah's authorizations**

[118] I am not certain what is intended by Mr. Jaballah. Mail addressed to the basement apartment is to be treated in the same manner as the current tenant’s mail is, and any phone line in the basement apartment will not be intercepted. However, if, when Ahmad Jaballah is in the Jaballah residence, he uses the family phone that telephone line will still be intercepted. Similarly, mail delivered to the Jaballah residence shall continue to be intercepted. For Ahmad Jaballah's mail not to be intercepted it must be addressed to him or to his business in the same manner as the current tenant’s mail. In this regard no evidence was led as to whether there was a separate mailbox for the basement apartment (see transcript January 22, 2009, page 238).

#### **Electrical costs of video surveillance equipment**

[119] There is no evidence before the Court as to the cost of electricity used to power the

surveillance equipment, and Ms. Jackman advised that she was hopeful this issue would be resolved. No order will be made on the basis of the evidentiary record before the Court.

### **Reimbursement of parking expenses**

[120] There is no evidence about what, if any, parking expenses were incurred by Mr. Jaballah during the public hearings held to date. No order will be made on the basis of the evidentiary record before the Court.

[121] Having dealt with the variations sought by Mr. Jaballah, I now turn to consider the restrictions he asks the Court to impose upon the CBSA.

### **Requested Restrictions upon the CBSA**

[122] As set out above, Mr. Jaballah wishes limitations to be imposed upon the CBSA with respect to:

1. "Eyes on surveillance" of Mr. Jaballah when he is on family outings.
2. Photographing Mr. Jaballah and his family while on outings.
3. Mail interception.
4. Telephone interception.

### **Overview comment**

[123] I begin by noting that Justice Layden-Stevenson's first decision contemplated that Mr. Jaballah's activities would be monitored by the CBSA through methods that included

physical surveillance and telephone and mail intercepts. In her second decision, she noted that difficulties with the GPS tracking were overcome through physical surveillance conducted by the CBSA.

[124] This reliance upon the CBSA to monitor compliance with the conditions of release is consistent with other jurisprudence of the Court. In *Harkat v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 321 (F.C.), the Court gave reasons for releasing Mr. Harkat, another individual named in a security certificate, from detention. At paragraphs 88 and 89, the Court wrote:

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.

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.

[125] Additionally, the Court has recognized the relative expertise of the CBSA when monitoring compliance with conditions of release, and the Court has recognized the need for discretion to be vested in the CBSA with respect to how it monitors individuals. In *Harkat v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 747 (F.C.), the Court wrote at paragraph 35:

Second, I have given little weight to Mr. Harkat's submissions concerning the frequency with which the CBSA now monitors his

activities and the efficacy of surveillance cameras in light of the existence of active GPS monitoring. In this regard, the extent to which the CBSA chooses to provide visible surveillance is a matter within its expert discretion. The ability of the CBSA to monitor Mr. Harkat's activities is a significant aspect of the scheme controlling Mr. Harkat's release. Cameras very recently provided cogent evidence of a breach of the conditions of Mr. Harkat's release and provide a deterrent to any further breach.

[126] See also: *Harkat v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1394 at paragraph 22 (F.C.).

[127] The CBSA has been given a difficult task and absent inappropriate, objectionable, or arbitrary conduct on its part the Court should not, in my view, interfere.

### **Overt surveillance**

[128] Mr. Jaballah asks that the CBSA be prohibited from conducting overt surveillance of him while he is on outings with his family. This is said not to preclude covert surveillance, nor overt surveillance when Mr. Jaballah is out without his children (if, as a result of an individualized assessment, the CBSA determines this to be necessary).

[129] There is some diversion in the evidence as to how CBSA officers follow Mr. Jaballah and his family members.

[130] It was Ali Jaballah's evidence that he no longer likes going on outings. It annoys him

when CBSA officers follow the family, his friends are frightened by the officers and they no longer want to come to his home or go on outings with the family. Once, Ali screamed at officers who were taking pictures of him. While in Costco buying a gift for his mother, an officer came near Ali and looked at the item he wished to purchase. Ali became angry and he did not purchase the item.

[131] Afnan Jaballah testified that the officers follow the family closely on outings, her friends do not come on outings with her family and she feels shy about buying clothing when officers are following her. She was particularly upset when uniformed officers followed her parents into her school for parent-teacher night.

[132] Mr. Al-Shalchi testified that on outings officers are encouraged to exercise their discretion with regards to how close they need to be to Mr. Jaballah in order to monitor compliance with the conditions of release. He testified that there is no need for “eyes on surveillance” of the children and officers do not follow the minor children when they leave Mr. Jaballah. He testified that:

Q. Are you able to comment on CBSA’s general approach to physical surveillance as it relates to Mr. Jaballah and his family?

A. The concerns that I have expressed to the officers is basically Mr. Jaballah has a family; he has children. These are human beings. The outings are designed for his enjoyment with the family, to go shopping as a family and that type of thing.

The instructions are to the officers, be respectful, maintain yourself to be as discreet as possible, not to advertise your presence there if you can avoid it, to try to be as far away as possible, while keeping in mind that you have a job to do basically to ensure compliance with the conditions, but at the same time to understand that these are people with children that are present, and your presence there is not always welcome. So be mindful that you try to be as respectful as possible.

[133] Given the relative expertise of the CBSA when monitoring compliance with the conditions of release, the need for the CBSA to have and to exercise discretion, and Mr. Al-Shalchi's evidence about what is expected of CBSA officers, I am not prepared to prohibit the CBSA from conducting overt surveillance on Mr. Jaballah when he is with his family. This is particularly so where there is no evidence that the impact of such surveillance upon Mr. Jaballah's children is other than to engage annoyance, anger and frustration.

[134] That said, certain aspects of Mr. Al-Shalchi's evidence give rise to concern:

- The standard operating procedures with respect to the surveillance of outings of individuals named in security certificates who are located in the Toronto area (Exhibit 5) does not contemplate covert surveillance.
- Generally, no overt surveillance is conducted when Mr. Jaballah takes his children to school, is in a mosque, or on a health walk. All other outings are subject to overt surveillance. This is because this is the policy of the CBSA in the Toronto region.

- Mr. Al-Shalchi does not know whether any individualized risk assessment with respect to Mr. Jaballah has been undertaken since his release from detention.
- The premise about the risk that Mr. Jaballah poses comes from what the Court has set out in the orders specifying the conditions of release. Mr. Al-Shalchi stated that "I am not aware of any CBSA risk assessment [...]. There might be, but I don't know about it."
- Mr. Al-Shalchi could not explain why the CBSA's policy is different with respect to Mr. Jaballah's outings than it is for two other individuals named in security certificates, Mr. Harkat and Mr. Charkaoui.

[135] The Court received, in confidence, an unredacted CBSA national policy manual with respect to security certificate case monitoring (IC 7). Subsequently, a redacted public version was received. Of significance are the following sections:

1. Section 9.4 deals with physical monitoring. In part it states:

The purpose of physical monitoring, where officers watch and listen to the ISSC [(individuals subject to security certificates)] during outings, is to ensure the ISSC's compliance with the conditions of release. This tool may also be used to maintain an overt physical presence at the residence to discourage the ISSC from breaching their conditions.

2. Section 9.5 contemplates covert surveillance.



3. Section 5.2 sets out the governing principles for security certificate case monitoring. One principle is that “the intelligence-led and risk-based application of strategic tools is the most effective way to monitor.”
4. Section 5.3 deals with the risk-management framework. Salient portions of this section are:

#### Risk-Management Framework

The foundation of the CBSA security-certificate monitoring program is the risk-management framework which assesses risk so that the appropriate tool can be used to neutralize or contain that risk.

[...]

#### Risk assessment

This assessment estimates the chance of something happening and the severity of the event and assigns a risk level to it. In assessing risk, the CBSA manager should look at a number of factors. These factors are broken into two groups: static and dynamic.

Static risk factors are part of the ISSC’s history. They do not change and are factored into the base level of risk. This base level is derived from court documents, personal history, and information from intelligence and law-enforcement partners. It is unique to each ISSC and forms the foundation on which an operational risk assessment is built.

Dynamic risk factors are situational and may have an impact on the ISSC’s level of compliance or the health and safety of officers, the public or the ISSC. Over time, dynamic risk factors may evolve into static risk factors.

Dynamic risk factors, as they apply, are added to the base risk level and then assessed against the resources, equipment, and training available to the monitoring unit. A response is developed and implemented operationally.

The weight given to dynamic risk factors should vary depending on the situation and the monitoring unit's experience in dealing with the condition. New outing requests or newly court-varied conditions would initially warrant a higher level of risk, and once the ISSC establishes a reasonable level of compliance under the new situation, the level of risk may decline.

Table 5.3.1 provides examples of static and dynamic factors that should be considered in establishing the risk level. For a more comprehensive list of static and dynamic risk factors, see Appendix B.

[...]

#### Risk levels

Each ISSC should be given a base level of risk as derived from the court documents and information from our intelligence and law enforcement partners. This level will be unique to each ISSC and forms the foundation on which an operational risk assessment is built.

Dynamic risk factors are added, as they apply, to the base risk level and then assessed against the resources, equipment and training levels of the security-monitoring unit. A response to the assessed risk is then completed and implemented operationally.

[...]

#### Operational risk assessment

Once the CBSA manager has determined the base risk level and the dynamic factors, this data is measured against the operational situation. This may include visitors to the ISSC residence, outings, medical appointments and family situations. Since any situation could arise, officer discretion will play a key role in determining an appropriate response.

Table 5.3.2 provides an example of potential responses to specific situations by risk level. A more comprehensive version of the risk

matrix, outlining the possible responses based on the risk level, can be found in Appendix B.

[...]

The CBSA manager will review the monitoring unit's resources, equipment and training then strategically use tools to neutralize or contain any risk generated by the ISSC.

[...]

Operational situations evolve constantly and are affected by different mitigating factors at different times. While an operational risk assessment will be conducted by the CBSA manager, officers in the field must constantly evaluate the situation to respond appropriately to a dynamic and changing environment.

The outline on the next page combines all of the factors in the risk-assessment framework and is a risk-assessment aid.

Using this process, the regions can:

- analyze risk transparently in a consistent and unbiased manner
- make decisions based on intelligence and experience
- document decisions and the reasons for the decisions in a consistent manner that will support actions taken under legal scrutiny
- make the most efficient use of limited resources
- strategically apply tools to effectively neutralize or contain specific risks posed by the ISSC
- create a consistent framework for assessing and responding to risk related to the ISSC.

5. Section 9.6 deals with spot checks:

#### Spot Checks

A spot check may also be used to verify ISSC compliance and is not as labour intensive as physically monitoring an entire outing or a long-term situation at the residence. A spot check may involve

stationing officers along a pathway the ISSC will use or at a location they intend to visit. It could involve a short period of following the ISSC, or simply visual confirmation of their location and activity before moving on.

The strategic benefit of using this tool is that the ISSC will know that the officers were there, but not why or when they will come again. When applied properly, this tool may be more effective than continuous physical monitoring.

6. Section 9.9 deals with approvals of outings:

Outing Approval

[...]

The ISSC may be required to contact the CBSA prior to the start of the outing and upon return. The decision about whether to conduct physical monitoring or surveillance of an outing will depend on the level of risk.

7. Section 5.2 requires that any surveillance or monitoring "be carefully balanced" against the threat the person named in the security certificate poses to the security of Canada, and to the conditions imposed by the Federal Court. [emphasis added]

[136] No information was provided as to why the standard operating procedure in the Toronto area is inconsistent with the national policy manual. A particularly troubling inconsistency is the apparent failure of the Toronto region to individually assess the threat posed by Mr. Jaballah, and to assess such risk on an ongoing or dynamic basis so as to allow the CBSA to select "the appropriate tool ... to neutralize or contain that risk." Such an individualized risk assessment might lead the CBSA to consider options such as covert surveillance and spot checks.

[137] During oral argument, in response to questions from the Court, counsel for the Ministers stated that the Court "should make advice and comments on a going-forward basis" about the proportionality of the CBSA's monitoring techniques.

[138] The advice and direction that I consider appropriate is, as contemplated by IC 7, to direct the CBSA to immediately conduct a risk assessment that takes into account all of Mr. Jaballah's current circumstances. Thereafter the CBSA should, as IC 7 directs, make the most efficient use of its resources, strategically apply the tools available to it (including covert surveillance and spot checks as the CBSA considers appropriate) and create a consistent framework for assessing and responding to the risk posed by Mr. Jaballah. As IC 7 sets out as a foundational principle, all surveillance or monitoring of Mr. Jaballah must be carefully balanced against the threat Mr. Jaballah now poses and may continue to pose to the security of Canada.

#### **Photographing Mr. Jaballah and his family**

[139] Mr. Jaballah asks that the CBSA be prohibited from taking pictures of him or his family while they are on outings, unless officers perceive a potential breach of any condition of release, or conclude that a photograph is required in order to monitor the threat he poses.

[140] Exhibit 18 contains the transcript of Mr. Al-Shalchi's testimony before Justice Mactavish in the related proceeding on November 18, 2008. There, he testified that CBSA officers are

instructed not to take photographs of Mr. Jaballah or his family while they are on an outing, unless the officers perceive a potential breach of the conditions of release. I see no need for an order to be made confirming this instruction.

[141] The CBSA should safeguard the photographs now, or in future, in its possession, and should not release any photograph in its possession to any other entity unless a photograph depicts an activity which is relevant to a threat perceived to be posed by Mr. Jaballah or to a perceived breach of any condition of release.

### **Mail interception**

[142] Mr. Jaballah asks that his mail not be copied unless there are reasonable and probable grounds to believe that the information contained therein would assist in determining the threat he poses or whether there has been a breach of any condition.

[143] In a related proceeding, Mr. Jaballah brought a motion seeking clarification of some of the now existing conditions. One issue he raised was whether the CBSA was entitled to copy intercepted mail. In reasons reported as *Canada (Minister of Citizenship and Immigration) v. Jaballah*, [2009] F.C.J. No. 23, my colleague Justice Mactavish concluded that the existing conditions of release entitle the CBSA to copy mail. She further concluded that, while making and retaining copies of the mail amounted to a "seizure" under section 8 of the Charter, it was not an unreasonable seizure (see paragraph 54 of the reasons).

[144] At paragraphs 61 through 64 of her reasons, Justice Mactavish explained why "the making and retaining of photocopies of mail is entirely reasonable, in all of the circumstances."

[145] I adopt those reasons as my own. For those reasons, no order will issue restricting the CBSA's right to copy intercepted mail.

[146] That said, the CBSA should safeguard the privacy of the contents of all copies of intercepted mail now or in future in its possession. The CBSA should not release copies of any intercepted mail to any entity unless the document is relevant to a threat perceived to be posed by Mr. Jaballah or to a perceived breach of any condition of release.

[147] Mr. Jaballah also asks that the CBSA forward intercepted mail to him within 24 hours of its interception. In my view, the CBSA should use its best efforts to see that the intercepted mail is forwarded within 24 hours. I am not, however, prepared to order categorically that mail must be forwarded within 24 hours as there may be circumstances (such as intervention of a holiday) where that is not possible, and such an order might prove to be the source of unnecessary controversy.

### **Telephone intercepts**

[148] Mr. Jaballah asked in his November 20, 2008 document that the residence telephone line and his wife's cellphone be live monitored so that only calls that bear upon a breach or potential

breach of the conditions of release would be recorded. In the document filed during the course of oral argument, he asked that recordings of telephone calls which are unrelated to the threat he poses, or to his compliance with the conditions of release, be destroyed or caveated. I take this later request to supersede the first request.

[149] I am not prepared to order the destruction of telephone intercepts for two reasons. First, the relevance of an individual telephone conversation may not be readily apparent. Only with the benefit of a subsequent conversation may the significance of an earlier conversation be apparent. Second, citing *Charkaoui 2*, Justice Mactavish noted in her reasons, cited above, that the destruction of copies of mail could potentially give rise to fairness concerns (see paragraph 64 of her reasons). Similarly, in my view, destruction of telephone intercepts could also give rise to fairness concerns in subsequent proceedings.

[150] Again however, the CBSA should safeguard the contents of telephone intercepts in its possession and should not release the content of any telephone intercept in its possession to any other entity unless the intercept is relevant to a threat perceived to be posed by Mr. Jaballah or to a perceived breach of any condition of release.

[151] Having dealt with the restrictions Mr. Jaballah seeks to have imposed upon the CBSA, I turn to the requests the CBSA makes for modification of the terms of release.



### **The CBSA Requests for Variations**

[152] I have previously reviewed the existing supervisory scheme. There are, therefore, only four requested variations to consider.

#### **Mail interception**

[153] Paragraph 13 of the conditions of release permits the CBSA to intercept "written communications." The CBSA wishes the word "written" to be removed so as to allow other forms of communication to be intercepted, for example, a DVD.

[154] The amended public summary contains allegations that Mr. Jaballah exchanged extremist materials, including tapes, using a covert postal box (see paragraph 85 of the summary) and distributed cassettes believed to promote the jihad (see paragraph 95).

[155] In my view, in light of these allegations, the requested variation is reasonable and should be allowed. Mr. Jaballah testified that he would not mind if the CBSA checked any package that came to the house (transcript January 19, 2009, page 108 at lines 15-18). I give no weight to Ahmad Jaballah's stated concern that this amendment would allow the interception of things such as groceries because this concern is, in my view, unfounded.

#### **Notification of deliveries**

[156] In the past, items have been delivered to the Jaballah residence, including mail that should

have been intercepted. The CBSA asks that when this occurs, Mr. Jaballah be required to immediately notify the CBSA of this and to make the item available for its inspection.

Mr. Jaballah testified that he would have “no problem” calling the CBSA if items were delivered to the residence (transcript January 20, 2009, pages 75-76).

[157] In my view this is also a reasonable request. It is consistent with the intent of the conditions of release as they exist, and as they will continue to exist. The conditions should be amended in this respect with one exception. There is no obligation to notify the CBSA of the delivery of prepared foods, such as pizza, from entities whose business it is to sell and deliver prepared food.

[158] For certainty, the requirement to notify of deliveries does not apply to items delivered to the basement apartment.

### **OnStar prohibition**

[159] The CBSA wishes to prohibit Mr. Jaballah from travelling in a vehicle that is equipped with OnStar. In my view, there is no reason to prohibit Mr. Jaballah from travelling in such a vehicle. He can now travel in vehicles with a supervisor who may carry a Blackberry or a cellphone that has a hands-free feature. The OnStar technology is similar to this.

[160] However, as explained above, the existence of OnStar with enabled hands-free calling

does pose an increased challenge to the CBSA's ability to monitor compliance with the terms of release. Therefore, if Ahmad Jaballah intends to activate the hands-free calling service in the future, and if Mr. Jaballah intends to ride in one of Ahmad Jaballah's trucks when this service has been activated, Mr. Jaballah must give advance and timely notice of this to the CBSA.

### **Photographing CBSA officers**

[161] The CBSA wishes to prohibit Mr. Jaballah and members of his family from taking photographs, video tapes or audio tapes of CBSA officers.

[162] There is only evidence of one instance where any concern was expressed about Mr. Jaballah attempting to photograph officers. This occurred on an outing to Canada's Wonderland. It is not established that CBSA officers were actually photographed.

[163] Mr. Al-Shalchi has no knowledge of Mr. Jaballah ever posting a photograph of a CBSA officer on the internet or elsewhere.

[164] As I have previously set out, Mr. Al-Shalchi characterizes his relationship with Mr. Jaballah to be "very amicable" and states that Mr. Jaballah "has proven to be extremely cooperative."

[165] Ahmad Jaballah testified that, to his knowledge, no one in the family has photographed or taped CBSA officers. He observes that generally people take pictures of officers when they

perceive some wrongdoing.

[166] On this evidence, I am not inclined to vary the conditions as requested by the CBSA. Should, however, the CBSA become concerned that its officers are being photographed or taped when there is no suggestion of any wrongdoing, it may renew this request. Mr. Jaballah and his family should continue their wise practice of not photographing or taping officers in the absence of demonstrated wrongdoing.

#### **Geographic boundary**

[167] While subparagraph 10(i) of the conditions of release requires that Mr. Jaballah not "leave the area bordered by the streets or geographic features agreed upon by counsel and CBSA," there has been no such agreement. Counsel were confident an agreement could be reached.

[168] Notwithstanding such confidence, agreement did not prove possible. While this decision was under reserve, counsel wrote to advise that no agreement was reached. The parties proposed geographic boundaries and asked the Court to set the appropriate boundaries.

[169] The Ministers proposed boundaries encompassing the City of Toronto and the City of Mississauga. Also included would be portions of Markham and Vaughan. Those inclusions would allow Mr. Jaballah to visit an approved supervisor, Hayat Mabruk, and Canada's Wonderland.

[170] Mr. Jaballah proposed boundaries encompassing the Greater Toronto Area which comprises the regions of Halton, Peel, York, Durham and City of Toronto.

[171] Upon receipt of counsel's letter, I issued a direction seeking further factual information.

[172] Specifically I inquired as follows:

1. Has Mr. Jaballah ever sought approval for an outing outside the geographic perimeter proposed by the Ministers?
2. If so:
  - a) Where?
  - b) Were such requests approved?
3. Are there specific areas outside of the boundaries proposed by the Ministers that Mr. Jaballah wishes to be able to visit? If so, what are they?

[173] The following information was provided:

1. On March 7, 2008, Mr. Jaballah phone GTEC and asked if he could go to Niagara Falls on an outing. Mr. Jaballah was informed that the Court Order does not specify boundaries. He was invited to submit an outing request form, but was informed that the likelihood of rejection was high. Subsequently, an outing request form for Niagara Falls was not received from Mr. Jaballah. This was the only instance of Mr. Jaballah enquiring about an outing outside of the boundaries proposed by the Ministers.
2. Mr. Jaballah's daughter and supervisor Ash Shaymaa Es Sayyid will be moving in May 2009. It is currently unknown exactly where Ms. Es Sayyid will be residing. Mr. Jaballah would like to be able to visit her upon her

moving and upon his providing CBSA with her new address.

3. Mr. Jaballah wishes to go on family outings to several locations outside of the boundaries proposed by the Ministers and outside of the GTA, specifically Niagara Falls, Blue Mountain Ski Resort, and African Lion Safari.

[174] It is necessary for a geographic boundary to be set so that there is certainty as to where Mr. Jaballah is not permitted to travel.

[175] On the basis of the information provided by the parties it appears that the locations Mr. Jaballah wishes to visit are not within the greater Toronto area. Therefore, fixing the geographic boundary as he requests would not allow him to visit the places he wishes to go.

[176] I have already decided that the CBSA should be given discretion to approve outings outside the fixed geographic boundary. Given that flexibility, I am of the view that the geographic boundary should be as proposed by the Ministers, subject to one caveat. That caveat is that the geographic boundary should permit Mr. Jaballah to visit his daughter and supervisor, Ash Shaymaa Es Sayyid, at both her current and new residence.

### **Conclusion**

[177] As set out above, as a matter of law, conditions of release must be subject to a meaningful process of ongoing review. Some of the changes made to the conditions in these reasons have been introduced incrementally. These changes may well be subject to further change on a

subsequent review if Mr. Jaballah continues to demonstrate his cooperative relationship with the CBSA and his commitment to compliance with the conditions.

[178] To summarize, I have concluded as follows:

- (1) Zahra Malek and Sandra Noe are added as supervising sureties.
- (2) The CBSA is granted discretion to approve requests for outings outside the geographic boundary set by the Court. This discretion should be exercised in accordance with certain limits to be agreed to by counsel respecting the maximum distance Mr. Jaballah would be permitted to travel, the number of such outings that the CBSA may approve and a requirement of reasonable advance notice of any requested outing outside the geographic boundary. If these limits cannot be agreed to, they will be settled by the Court.
- (3) Afnan Jaballah will be permitted to have a cellphone on the same conditions that apply to her brother with one additional condition. While calls placed or received by the cellphone will not be intercepted, the telephone service provider must be irrevocably directed to provide the CBSA with copies of the cellphone records that show particulars of the cellphone's usage, including all numbers called.

- (4) The CBSA's right to enter and search the Jaballah residence is qualified in that any search of the belongings of Mr. Jaballah's wife or daughter and any search of any space primarily used by Mr. Jaballah's wife or daughter should be conducted by a female officer of the CBSA.
- (5) The video surveillance equipment installed at the front and back doors of the Jaballah residence will remain in place.
- (6) Mr. Shehab may be removed as a cash surety if Mr. Jaballah can secure either a cash surety who will pay \$5,000.00 into Court, or an individual acceptable to the CBSA who is prepared to execute a performance bond in the amount of \$5,000.00.
- (7) Mr. Jaballah may remain at home alone (excluding the garage) during fixed hours on weekdays provided these additional conditions are met:
  - a. Counsel should endeavour to agree to fixed hours during weekdays that Mr. Jaballah will be permitted to be home alone. If they cannot be agreed, the Court will set the hours. The hours should not initially exceed six hours per day.
  - b. Mr. Jaballah must notify the CBSA immediately prior to the departure of his supervisor that he is about to be alone.



- c. While Mr. Jaballah is in the residence without a supervisor, no one shall have access to the computer room and it shall remain locked. A contact switch shall be installed on the door to the computer room and must be activated and functional at all times when Mr. Jaballah is home alone. The contact switch must either record the times at which the door to the computer room is opened, or transmit a signal to the CBSA or its agent that notifies the recipient of the signal that the computer room door has been opened.
  
- d. Mr. Jaballah must not leave the residence except in the event of an emergency or if requested by the CBSA to stand in front of the video surveillance equipment for the purpose of verifying his presence.
  
- e. Mr. Jaballah shall telephone representatives of the CBSA, as they may request, to confirm his presence in the residence. When a supervisor enters the residence, so that Mr. Jaballah is no longer unsupervised, the supervisor shall promptly notify the CBSA of his or her arrival. If one of Mr. Jaballah's minor children enters the residence while Mr. Jaballah is alone, Mr. Jaballah shall promptly notify the CBSA of this.

- f. While without a supervisor, Mr. Jaballah will receive no visitors and receive no deliveries (other than from the CBSA). If his minor children are in the residence, they may not have visitors or receive deliveries.
  - g. Contact switches must be placed on all entrances into the residence, including the entrance from the basement apartment. The switches must be activated and functional at all times when Mr. Jaballah is home alone.
- (8) If Mr. Jaballah is in his front or backyard, he must remain within sight of a supervisor. While in the yard without the physical presence of a supervisor, Mr. Jaballah cannot have any contact or communication with others (other than a casual greeting to a neighbour) and cannot receive any delivery or any thing.
- (9) The hours within which Mr. Jaballah may leave the residence, 8 a.m. to 9 p.m., are extended to 8 a.m. to 11 p.m.
- (10) The requirement that the CBSA must give prior approval to Mr. Jaballah's outings remains in force. Counsel are asked to attempt to find a practical solution to what should occur if an issue, such as a need to stop for a bathroom or to pick up bread, arises on an outing. If counsel are unable to reach agreement, the Court will settle the issue.

- (11) No wireless laptop computer is permitted in the residence.
- (12) The children shall be permitted to use the PSP unit that was seized by the CBSA provided that:
- a. The PSP remains in the computer room at all times.
  - b. Mr. Jaballah must instruct all PSP users that the unit is not to be connected to the internet.
  - c. Mr. Jaballah shall make the PSP unit available for inspection and forensic examination by the CBSA as the CBSA may reasonably request. If such examination reveals the unit has been connected to the internet, it shall not be returned to the Jaballah residence.
- (13) Mr. Jaballah will have to return to Court for approval to attend his son's wedding and wedding reception. It is premature to make any ruling on this matter on the basis of the evidentiary record before the Court. However, as a matter of principle, every effort should be made to permit this. Timely advice as to the details and guest list should be provided to the CBSA.

- (14) If Ahmad Jaballah and Zahra Malek move into the basement apartment, it may be treated as a separate residence subject to the following conditions:
- a. If Mr. Jaballah wishes to visit the apartment he will have to seek CBSA approval as for any other outing.
  - b. The surveillance camera that is located in the garage must be activated.
  - c. The interior door between the basement apartment and the main Jaballah residence must be closed and kept locked when neither Ahmad Jaballah nor Ms. Malek are in the basement apartment. Mr. Jaballah shall not have access to that key.
  - d. Neither Ahmad Jaballah nor Ms. Malek can supervise Mr. Jaballah from the basement apartment.
- (15) If Ahmad Jaballah and Ms. Malek move into the basement apartment, mail addressed to the basement apartment will be treated in the same manner as the current tenant's mail is, and any phone line in the basement will not be intercepted. The mail delivered to the Jaballah residence and the telephone line in the Jaballah residence will still be intercepted.
- (16) No order is made concerning Mr. Jaballah's requests regarding the electrical costs of the video surveillance equipment or the reimbursement of parking expenses.

- (17) The CBSA is not prohibited from conducting overt surveillance on Mr. Jaballah when he is with his family.
- (18) The CBSA is to conduct a risk assessment regarding Mr. Jaballah forthwith.
- (19) No order will issue prohibiting the CBSA from taking pictures of Mr. Jaballah or his family. The CBSA shall safeguard photographs now, or in the future, in its possession and should not release any photograph in its possession to any entity unless a photograph depicts an activity which is relevant to a threat perceived to be posed by Mr. Jaballah or to a perceived breach of any condition of release.
- (20) No order will issue restricting the CBSA's right to copy intercepted mail. The CBSA shall safeguard any intercepted mail in the manner detailed above for photographs of Mr. Jaballah and his family.
- (21) The CBSA should use its best efforts to see that intercepted mail is forwarded to Mr. Jaballah within 24 hours.
- (22) No order will issue directing the destruction of telephone intercepts. Again, however, the CBSA should safeguard the contents of telephone intercepts in the same manner as that discussed above in regard to photographs and copies of intercepted mail.

- (23) The word “written” in paragraph 13 of the conditions of release shall be deleted.
  
- (24) Mr. Jaballah must notify the CBSA when items, including mail that should have been intercepted, are delivered to the residence, and make the items available for inspection. The one exception is that there is no obligation to notify the CBSA of the delivery of prepared foods from entities whose business it is to sell and deliver prepared foods.
  
- (25) No order will issue prohibiting Mr. Jaballah from traveling in a vehicle that is equipped with OnStar. However, if Ahmad Jaballah intends to activate the hands-free calling service and if Mr. Jaballah intends to ride in one of those vehicles when this service has been activated, Mr. Jaballah must give advance and timely notice of this to the CBSA.
  
- (26) No order will issue prohibiting Mr. Jaballah and members of his family from taking photographs, video tapes or audio tapes of CBSA officers.
  
- (27) The geographic boundary beyond which Mr. Jaballah cannot travel is as proposed by the Ministers. That area includes the City of Toronto, the City of Mississauga, and

portions of Markham and Vaughan. It also includes the location of Ash Shaymaa Es Sayyid's new residence.

[179] Counsel should proceed forthwith to prepare a draft order embodying these reasons.

[180] As well, counsel have seven (7) days from the date of these reasons to advise whether they propose a question for certification. If they do, the question or questions should be provided to the Court, with supporting submissions, within seven (7) days of the date of these reasons. The party opposite shall then have seven (7) days to serve and file reply submissions.

“Eleanor R. Dawson”

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Judge

**APPENDIX A**

**SCHEDULE “A”**

**to the**

**Order dated January 17, 2008**

**in**

**MAHMOUD ES-SAYYID JABALLAH**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**DES-04-01**

**CONDITIONS RESPECTING THE RELEASE OF MR. JABALLAH**

1. Mr. Jaballah is to be released from detention on condition that he sign a document, to be prepared by his counsel and to be approved by counsel for the Ministers, in which he agrees to comply strictly with each of the terms and conditions that follow.
2. Mr. Jaballah, before his release from custodial detention, shall be fitted with an electronic monitoring device as will be, from time to time, arranged by the CBSA, along with a tracking unit. Thereafter, Mr. Jaballah shall wear the monitoring device at all times and shall not tamper with the monitoring device or the tracking unit or allow them to be tampered with. Where for medical reasons a qualified medical doctor directs that the electronic monitoring device must be removed, the CBSA shall be notified beforehand and shall arrange for its removal as well as for Mr. Jaballah's supervision while it is removed. Mr. Jaballah shall consent to the installation by CBSA in the residence specified below of a separate dedicated land-based telephone line meeting the CBSA's requirements to allow effective electronic monitoring. Mr. Jaballah shall consent to the disabling as necessary of all telephone features and services for such separate dedicated land-based telephone line. Mr. Jaballah shall follow all instructions provided to him regarding the use of the monitoring equipment and any other requirement necessary for the proper and complete functioning of the electronic monitoring equipment and system.
3. Mr. Jaballah shall allow for the installation of video surveillance equipment at all entrances to the property. The CBSA shall install and test the necessary equipment and shall report to the Court, within 10 days of the date of this Order, as to whether it is satisfied that the equipment is functioning properly and that all requirements to initiate electronic monitoring have been completed.
4. Prior to Mr. Jaballah's release from detention, the sum of \$43,250.00 is to be paid into Court pursuant to Rule 149 of the *Federal Courts Rules* and is to be paid by the following persons:

Ahmed Jaballah	\$ 3,000.00
Mubarach Adan	\$ 1,000.00
Jamal Azawi	\$10,000.00
Mahmoud Idris	\$ 2,000.00
James Loney	\$ 250.00
Hayat Mabruk	\$ 4,000.00
Adel Qablawi	\$10,000.00
John Valleau	\$ 5,000.00
Ahmad Shehab	\$ 5,000.00
Remzi Bekri	\$ 3,000.00

In the event that any term of the order releasing Mr. Jaballah is breached, the Ministers may seek an order that the full amount, plus any accrued interest, be paid to the Attorney General of Canada.



5. Prior to Mr. Jaballah's release from custodial detention, the following persons 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 provide that if Mr. Jaballah 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. Jaballah 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, and shall indicate, in particular, his or her understanding of this condition.

i)	Mubarach Adan	\$ 5,000.00
ii)	Mahmoud Idris	\$ 5,000.00
iii)	Raza Mohammad	\$ 5,000.00
iv)	Adel Qablawi	\$10,000.00
v)	Mohammed Aberra Dawud	\$ 6,000.00
vi)	Adnan Srajeldin	\$20,000.00
vii)	John Valteau	\$ 5,000.00

6. Upon his release from detention, Mr. Jaballah shall be taken by the RCMP (or such other agency as the CBSA and the RCMP may designate), and he shall thereafter reside at, \_\_\_\_\_ in the City of Toronto, Ontario (the residence) with Husnah Al Mashtouli, his wife, and his sons, Ahmad, Al Munzir, Osama and Ali, and his daughter, Afnan. 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. Except for a medical emergency or as otherwise provided in this order, Mr. Jaballah shall remain in such residence at all times. Mr. Jaballah is not to be left alone in the residence. That is, at all times when he is in the residence, either Husnah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen, or Raza Mohammad must also be in the residence. The term "residence" as used in these conditions refers exclusively to the dwelling house and does not include any outside space associated with it.

7. Between the hours of 8:00 a.m. and 9:00 p.m., Mr. Jaballah may exit the residence but he shall remain at all times within the boundary of any outside space associated with the residence (that is, the front or backyard). He must at all times be accompanied by either Husnah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen, or Raza Mohammad. While in the yard, he may meet only with persons referred to in paragraph 9 below. This restriction does not apply to casual greetings to neighbours. Mr. Jaballah may

not speak to other persons who may be visiting the neighbours unless they are persons otherwise authorized to visit or supervise Mr. Jaballah.

8. Mr. Jaballah may, between the hours of 8:00 a.m. and 9:00 p.m.:
  - i) with the prior approval of the CBSA, leave the residence five times per week, for a duration not to exceed five hours on each absence, so long as he remains within the perimeter determined pursuant to paragraph 10(i) below . Requests for such approval shall be made on a weekly basis with not less than 72 business hours notice for the following week's absences and shall specify the location or locations that Mr. Jaballah wishes to attend as well as the times when he proposes to leave and return to the residence. If such absences are approved, Mr. Jaballah shall, prior to leaving the residence and immediately upon his return to the residence, report as more specifically directed by a representative of the CBSA. The CBSA may consider special requests by Mr. Jaballah to extend one of the weekly absences to go on a family outing that exceeds 4 hours (*sic*), so long as such outing would be within the perimeter determined pursuant to paragraph 10(i). Mr. Jaballah may be permitted to go on such an outing up to 3 times per month. Such requests must be made to the CBSA at least one week in advance of the proposed family outing. CBSA, in its discretion and where it considers it appropriate to do so, may extend the above-noted hours beyond 9:00 p.m.;
  - ii) leave the residence on a school day between the hours of 8:00 – 9:30 a.m. and/or 3:00 – 4:30 p.m. in the company of Husnah Al Mashtouli, Ash Shaymaa Es Sayyid or Ahmad Jaballah to take Afnan, Osama and Ali (Mr. Jaballah's youngest children) to school in the morning and to pick them up after school but only where this is necessary because there is no supervising person available to supervise Mr. Jaballah in his home and only where CBSA has advance notice in the weekly itinerary provided by Mr. Jaballah. In such a case, Mr. Jaballah shall go directly to and from the schools, shall not enter into contact with any person en route, and shall provide the yearly school calendar for each child to the CBSA. The address of the school or schools shall be provided to the CBSA prior to Mr. Jaballah's release from detention. In the event that the children need to leave school for a legitimate and unanticipated reason outside of these times, Mr. Jaballah may be permitted to accompany Husnah Al Mashtouli, Ash Shaymaa Es Sayyid or Ahmad Jaballah to pick them up, provided that CBSA is notified, before he leaves, of the circumstances and is also notified when he returns home;
  - iii) with the prior knowledge of the CBSA, leave the residence as required and for the duration required for the purpose of medical or psychological appointments and related tests, treatment or operations. Notification shall be given not less than 72 business hours in advance of the intended absence and shall specify the location or locations that Mr. Jaballah must attend as well as his departure time and his

anticipated return time. Following completion of appointments, proof of attendance must be provided to the CBSA. Mr. Jaballah shall, before leaving the residence and immediately upon his return, report as more specifically directed by a representative of the CBSA. Should Mr. Jaballah experience a medical emergency requiring hospitalization, the CBSA shall be notified forthwith by Mr. Jaballah, Husnah Al Mashtouli, Ash Shaymaa Es Sayyid or Ahmad Jaballah. CBSA shall be informed of the location where Mr. Jaballah has been taken and shall be further informed of his return to the residence;

- iv) should an emergency arise whereby Husnah Al Mashtouli, any of Mr. Jaballah's children or his grandchildren are required to be taken to hospital and no one is available to supervise Mr. Jaballah in the residence, Mr. Jaballah may go to the hospital with Husnah Al Mashtouli, Ash Shaymaa Es Sayyid or Ahmad Jaballah, regardless of the time of the occurrence, until such time as another individual is available to supervise him. Mr. Jaballah shall notify the CBSA of the circumstances forthwith, and shall notify the CBSA immediately upon his return to the residence. Should Mr. Jaballah, due to illness, not be well enough to leave the home in the context of such an emergency and should no other supervisor be available, the CBSA must be contacted immediately;
- v) during all approved absences from the residence, Mr. Jaballah shall have on his person at all times the tracking unit enabling electronic monitoring and shall be accompanied at all times by either Husnah Al Mashtouli, Ahmad Jaballah, or Mohammed Aberra Dawud. Only when one of these three persons is not available and where necessary, he shall be accompanied by Ash Shaymaa Es Sayyid, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen or Raza Mohammad, each of whom shall bear responsibility for supervising Mr. Jaballah and for ensuring that he complies fully with all of the terms and conditions of this order. Any of these individuals must remain continuously with Mr. Jaballah while he is away from the residence, except for times that he is actually in consultation with his doctors or taking tests or undergoing treatment or therapy. In such cases, Husnah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen and Raza Mohammad will remain as close as is reasonably possible to the room in which Mr. Jaballah is receiving his consultation, treatment or therapy. Should Hoonah Al Masterly, Ash Sharma Es Spayed, or Heat Mark need to visit a public restroom while supervising Mr. Jaballah away from the home, Mr. Jaballah must remain as close as is reasonably practicable to the restroom. Prior to acting as supervisor, each of Hoonah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen and Raza Mohammad shall sign a document in which each acknowledges and accepts such responsibility, specifically including the obligation to

immediately report to the CBSA any breach of any term or condition of this order. The document shall be prepared by Mr. Jaballah's counsel and shall be submitted to the Ministers' counsel for approval.

- vi) CBSA, in its discretion and where it considers it appropriate to do so, may approve Mr. Jaballah's attendance at significant religious observances such as Ramadan and Eid. Mr. Jaballah's weekly attendance at Friday mosque shall not be counted as an outing. CBSA may, in its discretion and where it considers it appropriate to do so, permit Mr. Jaballah to leave his residence with a supervisor to attend to unanticipated family matters. In such cases, prior approval is required and Mr. Jaballah must report as specifically directed by a CBSA officer.
9. No person shall be permitted to enter the residence at any time except:
- i) Mr. Jaballah's immediate family members, including his wife, Husnah Al Mashtouli, his sons, Ahmad, Al Munzir, Osama and Ali, his daughters, Afnan and Ash Shaymaa, his son in law, Ahmad Bassam Mohammad Ali and his grandchildren;
  - ii) the other individuals who are acting as supervisors;
  - iii) his legal counsel, Barbara Jackman, John Norris and Paul Copeland;
  - iv) in an emergency, fire, police and health-care professionals;
  - v) children under the age of 15 years who are friends of Mr. Jaballah's children;
  - vi) the landlord and such authorized and qualified repair persons as are employed by the landlord, pursuant to an arrangement between CBSA and the landlord. Twenty-four hours notice of repairs must be given to the CBSA, except in the case of [an] emergency. Mr. Jaballah shall not have contact with any such person;
  - vii) a person approved in advance by the CBSA. To obtain such approval, the name, address, date of birth and photocopy of such person's driver's licence must be provided to the CBSA. If the person does not have a driver's licence, CBSA may request a substitute photo I.D. CBSA may waive the requirement for photo I.D. where it considers appropriate to do so. Prior approval need not be required for subsequent visits by a previously approved person. However, CBSA may withdraw its approval at any time.

Subject to paragraph 12, those persons identified above, who are permitted to enter the residence, shall not bring with them any electronic device that is wireless or capable of

- being connected to the internet or a cellphone.
10. When Mr. Jaballah leaves the residence, as provided in paragraph 8, he shall not:
- i) leave the area bordered by the streets or geographic features agreed upon by counsel and CBSA;
  - ii) attend any airport, train station, bus depot or car rental agency, or enter upon any subway, boat or vessel, except the Toronto Island Ferry;
  - iii) meet any person by prior arrangement other than:
    - (a) Barbara Jackman, John Norris, Paul Copeland or Matthew Behrens while Mr. Behrens is in the company of Ms. Jackman or Messrs. Norris or Copeland;
    - (b) members of his family, including his wife, Husnah Al Mashtouli, his sons, Ahmad, Al Munzir, Osama and Ali, and his daughters, Afnan and Ash Shaymaa, his son in law, Ahmad Bassam Mohammad Ali and his grandchildren ;
    - (c) the persons appointed by the Court to act as supervisors in accordance with paragraph 6;
    - (d) any person approved in advance by the CBSA;
  - iv) go to any location other than a location(s) approved in accordance with paragraph 8.
11. Mr. Jaballah shall not, at any time or in any way, associate or communicate directly or indirectly with:
- i) any person whom Mr. Jaballah knows, or ought to know, supports terrorism or violent Jihad or who attended any training camp or guest house operated by any entity that supports terrorism or violent Jihad;
  - ii) any person Mr. Jaballah knows, or ought to know, has a criminal record, except Matthew Behrens and immediate family members; or
  - iii) any person whom the Court may specify in an order amending this order.
12. Except as provided herein, Mr. Jaballah shall not possess, have access to or use any radio or radio device with transmission capability or any communication equipment or equipment capable of connecting to the internet or any component thereof, including but not limited to: any cellular telephone; any computer of any kind that contains a modem or

that can access the internet or a component thereof; any pager; any fax machine; any public telephone; any telephone outside the residence; any internet facility; any hand-held device, such as a blackberry. The internet connection for the computers used by Mr. Jaballah's children shall be a dry loop DSL connection to the telephone jack located in the room designated as the computer room on the first floor of the Jaballah residence. Internet service to all other telephone jacks in the Jaballah residence is to be blocked. Alternatively, if the internet connection is not a DSL connection, the internet connection for the computers used by Mr. Jaballah's children shall be kept solely in the designated computer room. The computer room is to be locked at all times when it is not in use. When the computer room is in use, the door shall remain closed. Only Ahmad Jaballah and Husnah Al-Mashtouli shall have possession of the key to the computer room. Mr. Jaballah is not permitted access to the computer room at any time. Each computer with internet capability shall be housed in, and shall remain in, the designated computer room. Each computer with internet capability shall have a password to access it. Only Ahmad Jaballah and Husnah Al-Mashtouli shall have access to the computer passwords. No computer with wireless capability shall be brought into the residence. Ms. Al-Mashtouli (or such other member of the Jaballah family), as the subscriber to the internet service, shall provide written consent to periodic disclosure, by the internet service provider to the CBSA, of information regarding the websites visited and the e-mail addresses to or from which messages were sent or received from the internet connection at the Jaballah residence. The fax machine shall also be kept in the designated computer room at all times. The subscriber to the residence telephone line shall provide such written consent as may be required to allow for the interception by or on behalf of the CBSA of faxes. The cellphones owned by Husnah Al Mashtouli, and Mr. Jaballah's children, Ash Shaymaa, Ahmad and Al Munzir shall remain with them at all times and they must ensure that Mr. Jaballah does not have access to them. The numbers of these cellphones must be provided to the CBSA, and their use, while in the residence, must be confined to the room in which the computer with access to the internet is situated. Husnah Al Mashtouli, Ash Shaymaa, Ahmad and Al Munzir shall agree in writing to these conditions. Mr. Jaballah may use a conventional land based telephone line located in the residence (telephone line) other than the separate CBSA dedicated line. Mr. Jaballah and the subscriber to the residence telephone line shall consent in writing to the interception by or on behalf of the CBSA, of all communications conducted using such service. For greater certainty, this includes allowing the CBSA to intercept the content of oral communications and also to obtain the telecommunication records associated with such telephone line service. Prior to Mr. Jaballah's release from detention, Husnah Al Mashtouli shall consent in writing to the interception by or on behalf of the CBSA of all communications conducted using her cellphone. The form of these consents shall be prepared by counsel for the Ministers. In the event of a medical emergency outside the residence, and if no one is able to make the call on his behalf, Mr. Jaballah shall be permitted use of a telephone outside his residence to call the CBSA to inform it of the situation and his whereabouts. Mr. Jaballah may also call 911, in the event of an emergency.

13. Prior to his release from detention, Mr. Jaballah and all of the adult persons who reside at the residence shall consent in writing to the interception, by or on behalf of the CBSA, of incoming and outgoing written communications delivered to or sent from the residence by mail, courier or other means. Prior to occupying the residence, any new occupant shall similarly agree to provide such consent. The form of consent shall be prepared by counsel for the Ministers.
14. Mr. Jaballah shall allow employees of the CBSA, any person designated by the CBSA or any peace officer access to the residence at any time (upon the production of identification) for the purposes of verifying Mr. Jaballah's presence in the residence or ensuring that Mr. Jaballah or any other persons are complying with the terms and conditions of this order. For greater certainty, Mr. Jaballah shall permit such individual(s) to search the residence, remove any item, install, service and maintain such equipment as may be required in connection with the electronic monitoring equipment or the separate dedicated line. Prior to Mr. Jaballah's release from detention all other adult occupants of the residence shall sign a document, in a form acceptable to counsel for the Ministers, agreeing to abide by this term. Prior to occupying the residence, any new occupant shall similarly agree to abide by this term.
15. Mr. Jaballah and his supervisors shall provide written consent to being interviewed by CBSA, individually or together, as CBSA may require, to ascertain whether Mr. Jaballah or other persons are complying with the terms and conditions of this order. The Court may also request a periodic report from Husnah Al Mashtouli, Ahmad Jaballah, Ash Shaymaa Es Sayyid, Mohammed Aberra Dawud, Jamal Azawi, Hayat Mabruk, Adel Qablawi, Hashim Siwalen, or Raza Mohammad as to how the conditions are functioning.
16. Prior to his release, Mr. Jaballah shall surrender his passport and all travel documents, if any, to a representative of the CBSA. Without the prior approval of the CBSA, Mr. Jaballah is prohibited from applying for, obtaining or possessing any passport or travel document, any bus, train or plane ticket, or any other document entitling him to travel. This does not prevent Mr. Jaballah from travelling on public city surface transit within the City of Toronto (including the Toronto Island Ferry) or the City of Mississauga as authorized in paragraph 8.
17. If Mr. Jaballah is ordered to be removed from Canada, he shall report as directed for removal. He shall also report to the Court as it from time to time may require.
18. Mr. Jaballah shall not possess any weapon, imitation weapon, noxious substance or explosive, or any component thereof.
19. Mr. Jaballah shall keep the peace and be of good conduct.

20. Any officer of the CBSA or any peace officer, who has reasonable grounds to believe that any term or condition of this order has been breached, may arrest Mr. Jaballah 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, whether the terms of this order should be amended and whether Mr. Jaballah should be detained in custody.
21. If Mr. Jaballah does not strictly observe each of the terms and conditions of this order, he will be liable to detention upon further order by this Court.
22. Mr. Jaballah may not change his place of residence without the prior approval of this Court. Mr. Jaballah must provide [...] CBSA with 60 clear days notice of any proposed change of residence.
23. A breach of this order shall constitute an offence within the meaning of section 127 of the Criminal Code and shall constitute an offence pursuant to paragraph 124(1)(a) of the *Immigration and Refugee Protection Act*.
24. The terms and conditions of this order may be amended at any time by the Court upon the request of any party or upon the Court's own motion with notice to the parties.



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

**DOCKET:** DES-6-08

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION and THE MINISTER OF  
PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS  
v. MAHMOUD ES-SAYYID JABALLAH

**PLACE OF HEARING:** Ottawa, Ontario and Toronto, Ontario

**DATES OF PUBLIC HEARING:** November 24-28, 2008  
December 1-4, 2008  
January 19, 20, 22 and 23, 2009

**DATES OF *IN CAMERA* HEARING:** October 6-10, 2008  
October 14-17, 2008  
November 17-19, 2008  
November 27, 2008 (Toronto)  
December 16, 2008  
January 8, 9 and 12, 2009  
February 5-6, 2009

**PUBLIC REASONS FOR ORDER**  
**THE HONOURABLE MADAM JUSTICE DAWSON**

**DATED:** March 20, 2009

**APPEARANCES:**

Donald MacIntosh  
Angela Marinos  
Caroline Carrasco  
David Knapp  
John Provart  
Robert Batt

Counsel on behalf of the applicants

Barbara Jackman  
Marlys Edwardh  
Adriel Weaver

Counsel on behalf of the respondent

Paul Cavalluzzo

Special Advocates

John Norris

**SOLICITORS OF RECORD:**

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For the applicants

Deputy Attorney General of Canada

Barbara Jackman

For the respondent

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