

Federal Court



Cour fédérale

Date: 20120531

Docket: DES-7-08

Citation: 2012 FC 672

Ottawa, Ontario, May 31, 2012

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

**IN THE MATTER OF A CERTIFICATE
SIGNED PURSUANT TO SUBSECTION 77(1)
OF THE IMMIGRATION AND REFUGEE
PROTECTION ACT (*IRPA*)**

**IN THE MATTER OF THE REFERRAL OF A
CERTIFICATE TO THE FEDERAL COURT
OF CANADA PURSUANT TO SUBSECTION
77(1) OF THE *IRPA***

**AND IN THE MATTER OF MOHAMED ZEKI
MAHJOUB**

REASONS FOR ORDER AND ORDER

[1] By notice of motion dated January 30, 2012, Mr. Mahjoub seeks:

- “(a) Authorization to file a sealed affidavit of Jennifer Jans, with a copy of the affidavit to the Respondents but a non-communication order; and
- (b) Granting leave to call as witnesses the three (3) lawyers (Mr. Madgy Salem, Mr. Mohammed Abbas Suleiman and

Mr. Mohammed Hassan Abdullah), Mr. Mubarak Al-Duri and the person(s) whose identity has not been disclosed publicly (“person”);

For the person(s) unidentified:

- (c) Leave to allow oral argument for Directions regarding the adjudication of the *ex parte* issue; and
- (d) Leave to allow the filing before Justice Blanchard and sealing of a further, more detailed affidavit, without the Respondents receiving a copy; and
- (e) Leave to allow oral arguments in support of *ex parte viva voce* testimony of the person(s); and
- (f) The hearing of *ex parte viva voce* testimony of the person(s) by video-link; OR
- (g) The filing of an affidavit as evidence without allowing cross-examination.”

[2] It is useful to restate in simple terms the relief sought by Mr. Mahjoub on this motion. Mr. Mahjoub seeks leave to call *viva voce* evidence from Mr. Madgy Salem, Mr. Mohammed Abbas Suleiman, Mr. Mohammed Hassan Abdullah, Mr. Mubarak Al-Duri and further witness(es) whose identity has not been disclosed (unnamed witness). Further, Mr. Mahjoub requests that the unnamed witness testify *in camera* and *ex parte* the Ministers, or in the alternative, in the presence of Ministers’ counsel with an undertaking not to disclose confidential information to the Ministers.

Finally, if the Court does not allow *in camera* and *ex parte* testimony of the unnamed witness, Mr. Mahjoub seeks leave to file an affidavit without allowing cross-examination.

[3] By order dated February 22, 2012, the Court granted Mr. Mahjoub's request to file a sealed affidavit of Jennifer Jans with a copy to the Ministers. This affidavit was before the Court at the time of the April 3-4, 2012 hearing.

[4] At the hearing, without prior notice, Mr. Mahjoub informed the Court that he was no longer seeking leave to call Mr. Al-Duri as a witness. He also informed the Court that he was no longer seeking to have the third sealed affidavit of Jennifer Jans first filed before another judge who would determine whether it would be appropriate to have the hearing judge receive the additional affidavit *ex parte*. Mr. Mahjoub had argued that this has the effect primarily of protecting the Respondents but since the Ministers were opposed to the involvement of another judge, Mr. Mahjoub informed the Court that he would not be pursuing this request. Finally, Mr. Mahjoub informed the Court that he was no longer seeking to call Minister Diane Finlay as a witness.

[5] Consequently, only the following issues remain to be decided:

- i. Should leave be granted to allow Mr. Madgy Salem, Mr. Mohammed Abbas Suleiman, and Mr. Mohammed Hassan Abdullah to testify?
- ii. Should leave be granted to allow the unnamed witness to testify?

- iii. Should Mr. Mahjoub be permitted to file a third, sealed, affidavit of Jennifer Jans *ex parte* the Ministers or alternatively with a copy to Ministers' counsel with an undertaking not to disclose confidential information to the Ministers?

[6] Mr. Mahjoub argues that if leave is granted to file a third, sealed, affidavit of Jennifer Jans, the Court should entertain oral arguments to determine whether the unnamed witness should testify *in camera* and *ex parte* the Ministers. If a third, sealed, Jennifer Jans affidavit is not filed, Mr. Mahjoub submits that the Court should render its decision based on the second, confidential, Jennifer Jans affidavit already filed.

[7] In the event leave to call the unnamed witness is not granted, Mr. Mahjoub asks that he be permitted to make further submissions on his alternative request that an affidavit be allowed as evidence without being subject to cross-examination by the Ministers. It is noted that the Court directed that the parties be prepared to address all of the issues raised on the motion, including alternative arguments.

[8] I will deal in turn with the remaining issues.

- i. *Should leave be granted to allow Mr. Madgy Salem, Mr. Mohammed Abbas Suleiman, and Mr. Mohammed Hassan Abdullah to testify?*

[9] The Ministers contend that the witness list is closed given that the Court has issued multiple orders requiring Mr. Mahjoub to finalize his witness list. The Ministers also contend that allowing the calling of additional witnesses would delay the proceedings and cause prejudice. They cite the Federal Court's decision in *Sawbridge Band v Canada*, 2005 FC 1476 at paragraphs 180-183, 275

F.T.R. 1, aff'd 2006 FCA 228, leave to appeal to SCC refused 364 N.R. 400, in support of their argument that when the Court sets deadlines as to when witnesses should be called, it is open to the Court to enforce those deadlines. The Ministers acknowledge, however, that the Court has the discretion to allow further witnesses if Mr. Mahjoub can demonstrate that with due diligence the witnesses could not have been called earlier and that the proposed evidence is relevant.

[10] The Ministers argue that the fact that there were Egyptian lawyers familiar with the Returnees from Albania case and other cases involving the Vanguard of Conquest is not new and that Mr. Mahjoub has not demonstrated that he could not have called these witnesses at an earlier time. They further argue that Mr. Mahjoub has not demonstrated that the proposed evidence is relevant to the proceedings, or why the testimony of three lawyers would be necessary.

[11] Mr. Mahjoub argues that in deciding whether leave should be granted to allow additional witnesses to be called, the Court needs only to be satisfied that (i) he exercised due diligence to ensure that the witnesses could not have been called at an earlier time; and (ii) that the proposed testimony is relevant to the proceeding. I agree that this is the applicable test in deciding whether additional witnesses are to be called.

[12] Messrs. Salem, Suleiman and Abdullah are practicing lawyers in the same firm in Egypt. Mr. Mahjoub claims that they were identified by (a) source(s) in Egypt who was/were reluctant to provide any information prior to the fall of President Hosni Mubarak. According to Mr. Mahjoub, his source(s) have been providing information since March 2011 but were only able to provide details of the evidence of the proposed witnesses in December 2011. Counsel for Mr. Mahjoub

explain that since the details of the evidence of the proposed witnesses were not established, they did not inform the Court that additional witnesses were being pursued.

[13] It is of concern that Public Counsel elected not to inform the Court of their intention to call additional witnesses. The record on the within motion indicates that contact with the unnamed sources relied upon by Mr. Mahjoub in his efforts to identify additional witnesses from Egypt occurred sometime in March 2011. The record now reveals that Public Counsel have made “consistent efforts” in pursuing the option of identifying such additional witnesses since their initial contact with the unnamed sources in Egypt. On June 3, 2011, the Court dismissed a motion brought by Mr. Mahjoub seeking leave to call unidentified Egyptian witnesses due to insufficient evidence about who the proposed witnesses were. At no point between June 3, 2011, and November 2011, did Public Counsel inform the Court that they might be pursuing the option of calling additional Egyptian witnesses.

[14] Given the late stage of the proceedings, with only four witnesses on Mr. Mahjoub’s witness list remaining to be called, it would have been useful and helpful at the time of the adjournment on July 14, 2011 or earlier, to inform the Court of their intention to call additional witnesses. This would have been of assistance to the Court in its case management function in moving the proceedings forward expeditiously. This lack of cooperation is regretful.

[15] Mr. Mahjoub alleges that the Egyptian witnesses are acquainted with the Returnees from Albania trial and other cases that relate to the *Vanguards of Conquest*. The first Jennifer Jans affidavit states:

I am advised by Mr. Hameed and am also aware through my review of information resulting from public counsel preparatory interviews with the potential witnesses, and accordingly do believe, that these witnesses will testify to the context and background of the cases in Egypt relating to the Vanguards of Conquest and the absence of relationship of these cases to Mr. Mahjoub. These witnesses will therefore provide evidence that directly contradicts evidence on the record and/or information provided to public counsel in disclosure.

[16] At the hearing, counsel for Mr. Mahjoub assured the Court that the three Egyptian lawyers were not the same unnamed Egyptian witnesses they sought to add to the witness list in May 2011. As mentioned above, the Court denied that request on June 3, 2011.

[17] When asked at the hearing why the testimony of three lawyers was necessary, Public Counsel for Mr. Mahjoub informed the Court that Mr. Salem had been convicted and served time in an Egyptian jail by reason of his membership in the Vanguards of Conquest, and that corroborating evidence from other sources may be necessary to ensure that the Court is presented with reliable and credible evidence. Public Counsel for Mr. Mahjoub also informed the Court that there are some differences between what Mr. Salem knows and what the other two lawyers know. The above assertions by Public Counsel are not supported in the evidence. Mr. Mahjoub argues that the number of witnesses is not a factor to consider if he can demonstrate due diligence and that the witnesses' evidence is relevant.

[18] The Ministers contend that the affidavit evidence adduced by Mr. Mahjoub does not indicate that the lawyers have different evidence to give or that more than a single lawyer's testimony is necessary because the credibility or another's testimony may be challenged. Further, aside from the broad statement that the Egyptian lawyers will provide information that contradicts evidence on the

record, there is very little further evidence as to the substance of their proposed testimony. The Ministers contend that there is no reason why Mr. Mahjoub could not have provided such information by affidavit.

[19] Notwithstanding the concerns raised by the Ministers, I am satisfied that the evidence of the three proposed witnesses is relevant to the proceeding. Apart from asserting that their evidence will provide information that contradicts evidence on the record, the affidavit evidence also states that the witnesses will speak to cases in Egypt relating to the Vanguards of Conquest and the absence of relationship of these cases to Mr. Mahjoub. In my view this is sufficient to support a finding of relevance.

[20] I also accept that detailed information about the nature of evidence to be adduced by the three witnesses was not available until December 2011. In the circumstances, I am satisfied that Public Counsel acting on behalf of Mr. Mahjoub exercised due diligence in ensuring that the proposed witnesses could not have been called at an earlier time. Without detailed information about their proposed testimony, no decision could be made on whether to call them as witnesses. Consequently, they could not have been called earlier.

[21] In the result, leave will be granted to Mr. Mahjoub to call Mr. Madgy Salem, Mr. Mohammed Abbas Suleiman, and Mr. Mohammed Hassan Abdullah as witnesses in the underlying proceedings.

ii. *Should leave be granted to allow the unnamed witness to testify?*

[22] Mr. Mahjoub's seeks leave to adduce certain evidence on an *ex parte* basis. First, he seeks leave to call the unnamed witness. Second, he seeks that leave to file a third affidavit of Jennifer Jans, which would identify the person(s) and describe their evidence in some detail. This affidavit, if allowed, would be sealed and filed *ex parte*, or alternatively, provided to the Ministers' counsel on their undertaking not to provide the information to their clients. Third, Mr. Mahjoub seeks leave to call the unnamed witness on an *ex parte* basis or alternatively in the presence of the Ministers' counsel only. Fourth, and alternatively, he seeks leave to allow the filing of an affidavit as evidence without cross-examination by the Ministers.

[23] The requests to have the evidence called on an *in camera* and *ex parte* basis is founded on the belief that the identity of the proposed unnamed witness, now residing in Egypt, must be protected, for fear for his personal safety. It is submitted that if the unnamed witness testifies in open court and in the presence of the Ministers, the information he will provide will find its way to Egyptian authorities, his identity will not be protected, and his personal safety would be at risk. It is further argued that, in the circumstances, the Court must impose such measures to protect his identity and comply with international law.

[24] Mr. Mahjoub argues that any order issued to protect the identity of the unnamed witness would not suffice. Mr. Mahjoub submits that Canadian Security Intelligence Service (CSIS) would "narrowly construe" a protection order or seek ways to get around it. Mr. Mahjoub argues CSIS exhibits a general lack of concern for the rule of law. In essence, Mr. Mahjoub argues that CSIS

cannot be trusted to comply with a court order. Mr. Mahjoub's position is that if the Ministers are not excluded from access to the evidence, the unnamed person will not testify and the third affidavit of Jennifer Jans will not be filed.

[25] Given Mr. Mahjoub's position, it is useful to deal with the request to have matters heard and filed *ex parte* the Ministers at the outset.

[26] Mr. Mahjoub advances four arguments in support of his contention that CSIS or the Canadian Border Services Agency (CBSA) cannot be trusted to respect a protection order.

[27] First, Mr. Mahjoub argues that CSIS' obligations under information sharing agreements it allegedly has with the Egyptian authorities will be interpreted so as to override any protection order issued by the Court. Mr. Mahjoub contends that CSIS has shown disregard for the law in the past, and therefore should not be trusted to respect any court order in the future. In support of his argument, he points to the following factors: allegations relating to CSIS' destruction of evidence and non-cooperation with other investigative agencies in the Air India case; giving unreliable information to the United States without caveats in circumstances where they knew or should have known Maher Arar would be sent to Syria to be tortured; CSIS' continued destruction of records as discussed by the Supreme Court in *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 28, [2008] 2 S.C.R. 326; and CSIS' participation in events leading to the torture of Mr. Khadr in Guantanamo Bay, as found by the Supreme Court of Canada.

[28] Second, Mr. Mahjoub argues that, in the present case, CSIS misled CBSA and the Ministers in relation to the signing of the security certificate.

[29] Third, Mr. Mahjoub argues that CSIS cannot be trusted because it participated in the interception of solicitor-client communications.

[30] Fourth, Mr. Mahjoub contends that CSIS' disregard for the rule of law can be gleaned from the testimony of a witness, Mr. Hindi, in a separate proceeding, where he testified that he was detained by the Egyptian authorities on a request by CSIS and for no other reason.

[31] In further support of his position, Mr. Mahjoub cites the example of certain witness protection orders issued by the International Criminal Tribunal in Rwanda's that were not being respected by Rwandan government officials, and alleges that similar concerns arise in the case now before the Court.

[32] Mr. Mahjoub points to the Ministers' intention to seek leave to call additional witnesses in the event that the unnamed witness is allowed to testify. He argues that this demonstrates that the Ministers would risk disclosing information that could reveal the identity of the unnamed person(s) and supports his argument that CSIS should not have access to information about the person(s). Mr. Mahjoub contends that the adversarial process could be safeguarded by the participation of Ministers' counsel, as long as they undertake not to share any information with their clients.

[33] The Ministers take issue with each of the above arguments advanced by Mr. Mahjoub. In response, they maintain that there is no evidence that they or CSIS would not respect a court order. They view the contention as “outrageous”. They argue the examples cited by Mr. Mahjoub are not situations in which CSIS disobeyed a Court order. The destruction of documents in the Air India case and discussed in *Charkaoui*, above, was a result of a CSIS policy in place at that time. They point to the jurisprudence where the courts have not retroactively found that CSIS acted in bad faith in respect to these policies. Regarding Mr. Arar’s and Mr. Khadr’s cases, the Ministers contend that even though the courts may have been critical of the actions of certain government agencies involved, there is nothing to suggest in these cases that CSIS would disregard a Court order. Further, regarding the allegations that CSIS would have misled the CBSA and the Ministers about signing the certificates, the Ministers contend that there is disputed evidence on which the Court has yet to make a finding.

[34] Regarding the allegations relating to CSIS’ participating in intercepts of solicitor-client calls, the Ministers argue that there is no evidence it was deliberate, and the matter remains before the Court in the abuse of process motion. In any event, based on this event, it is submitted that no inference could be drawn that CSIS would disrespect a Court order.

[35] With respect to the testimony of Dr. Hindi, the Ministers argue that there is no evidence the Court in that proceeding found the witness credible or gave the testimony any weight. The Ministers point to a 2007 decision by Justice Mosley that found that Dr. Hindi would not be a suitable surety for Mr. Jaballah because his writings could be interpreted as expressing sympathy or defence for the cause of Islamic terrorism.

[36] The Ministers also argue that the situation in Rwanda, if the allegations were true, is not applicable to the conduct of CSIS.

[37] Finally, in respect to Mr. Mahjoub's alternative argument that Ministers' counsel only be privy to the evidence, the Ministers contend that counsel are no substitute for the client in an adversarial process. They argue that the courts have been reluctant to order counsel not to disclose information to their clients. In support of their position, the Ministers cite *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, where the Supreme Court, at paragraph 49 of its reasons, wrote:

We recognize that the procedural flexibility of the s. 38 scheme allows for arrangements (such as the one that was reached between the prosecution and the defence in the *Malik* prosecution previously discussed), whereby defence counsel might be allowed to access the withheld material on an undertaking not to disclose it to the accused. However, we would urge caution in resorting to such procedures. In *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, we noted that even where the client's consent is obtained, arrangements of this nature will "at best, strain the necessary relationship between defence counsel and their accused clients" (para. 45). At worst, such arrangements may place lawyers in a conflict between their duty to represent the best interests of their client and their duty to honour the undertakings they have given with respect to the privileged information, such that they are forced to withdraw their representation (para. 46).

[38] In essence, I agree with the various positions expressed by the Ministers relating to the four arguments advanced by Mr. Mahjoub to the effect that the Respondents cannot be trusted to comply with a court protection order. Section 6 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, provides that, "The Director, under the direction of the Minister, has the control and management of the Service and all matters connected therewith." The evidence before me simply does not support the proposition that the Ministers, CSIS or the CBSA would purposely circumvent

or ignore a court order aimed at protecting the identity of certain witnesses. I am satisfied that the appropriate protection order can be crafted to protect the identity of the unnamed witness. In the circumstances, I deny Mr. Mahjoub's request that the evidence be treated on an *ex parte* basis. Such an exceptional measure is not justified in the circumstances. To do so would be tantamount to dispensing with the adversarial process so central to our system of justice. There is no valid reason, in the circumstances, not to have the evidence at issue tested on cross-examination in the usual manner. I am satisfied that the Respondents would comply with a carefully crafted confidentiality/protection order aimed at protecting the identity of the unnamed witness and addressing his personal safety concerns.

[39] For the same reasons, I am not prepared to allow the filing of an affidavit as evidence without permitting the Ministers the opportunity to cross-examine the affiant. Again, I am satisfied the Respondents will comply with any order the Court may issue to protect the identity of any person or any information.

[40] Since Mr. Mahjoub's position is clear that the evidence at issue will be adduced only "without the participation of the respondents" (Transcript of April 4, 2012 hearing at p. 123), there is no need to consider the applicable test for the calling of the unnamed witnesses articulated at paragraph 11 above.

[41] Given my above determination, the request for an *in camera* proceeding and the arguments relating to the open court principle need not be considered.

ORDER

THIS COURT ORDERS that:

1. Mr. Mahjoub's request for leave to allow Mr. Madgy Salem, Mr. Mohammed Abbas Suleiman, and Mr. Mohammed Hassan Abdullah to testify is granted.
2. Mr. Mahjoub's request for leave to allow the unnamed witness to testify on an *ex parte* basis is denied.
3. Mr. Mahjoub's request for leave to file a third, sealed, Jennifer Jans affidavit *ex parte* the Ministers is denied.
4. Mr. Mahjoub's request for leave to file an affidavit as evidence without cross-examination by the Ministers is denied.

“Edmond P. Blanchard”

Judge



FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: DES-7-08

STYLE OF CAUSE: The Minister of Citizenship and Immigration
and The Minister of Public Safety v.
Mohamed Zeki Mahjoub

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING : April 3-4, 2012

REASONS FOR ORDER: BLANCHARD J.

DATED: May 31, 2012

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