

Federal Court



Cour fédérale

Date: 20141031

Docket: DES-5-08

Citation: 2014 FC 1034

BETWEEN:

MOHAMED HARKAT

Applicant

and

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

Respondents

REASONS FOR ORDER

NOËL, S.J.

[1] As previously done in the early part of the summer of 2013, Mr. Mohamed Harkat (“Mr. Harkat”) is asking the Court to vary his terms and conditions of release pursuant to subsection 82.2(4) and paragraph 82(5)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] For the purposes of this review of the terms and conditions of release, Mr. Harkat is asking for the following modifications:

1. Allowing him the use of a mobile phone with a sim card and Internet connectivity (under the Canadian Border Safety Agency (“CBSA”) monitoring);
2. Allowing him to possess a laptop and/or tablet with Internet connectivity (under the CBSA monitoring as above) to be used anywhere;
3. For employment purposes, allowing him the use of a computer with Internet connectivity and telephone access (without the CBSA monitoring);
4. Decreasing of the bond agreed to by Ms. Pierrette Brunette and Mr. Philippe Parent, each, from \$50,000.00 to \$25,000.00;
5. Cancelling the condition that obliges Mr. Harkat to report in person to the CBSA once a week, to be replaced by reporting to the CBSA by telephone once a week. In the alternative, Mr. Harkat requests a mix of both so that he may report in person to the CBSA once a month and for the remaining monthly weeks that it be done by phone to the CBSA;
6. Changing the current requirement of providing written notice of traveling outside the National Capital Region with a detailed itinerary of five days to the CBSA, to a 24 hour written notice to the CBSA mentioning only the final destination and the date of return;
7. Clarifying conditions 7(d) and 7(e) which deal with the CBSA’s monthly access to and examination of Mr. Harkat’s computer.

[3] The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness (“the Ministers” or “the Respondents”) object to all the changes being sought except that they agree that Mr. Harkat could use a landline telephone for employment purposes and that the weekly reporting in person to the CBSA be changed to one report in person every two weeks. In general, the Ministers do not want sim card use or Internet connectivity because Mr. Harkat may enter into unauthorized contacts and that the monitoring compliance would not be feasible. It is also their submission that Mr. Harkat has not presented evidence that shows the need for a laptop or tablet with internet connectivity and they note that he can access a desktop with Internet connectivity at home under the present terms and conditions of release. The same can be said for the request for a computer with Internet connectivity for employment purposes. The Ministers also submit that no evidence was presented to explain the variance in the bonds agreed upon by each of Ms. Brunette and Mr. Parent from \$50,000.00 to \$25,000.00 and that no new circumstances call for it. Furthermore, the Respondents consider that a 24 hour notice of travel is not possible since the CBSA does not have the resources to organize monitoring on such short notice. Lastly, the Ministers submit that the CBSA monthly examination of Mr. Harkat’s computer is clearly specified in condition 7(d) as being on a monthly basis without the approval of a designated judge, but that if there had to be another monthly examination, a designated judge would have to authorize it.

[4] The CBSA completed an updated risk assessment in September 2014. The previous one dates back to January 2012. This recent risk assessment confirms in large part the one from 2012 and assesses the risks associated to Mr. Harkat as medium to medium low. Except for the use of counter-surveillance techniques, which in itself is not a breach of the terms and conditions of

release, Mr. Harkat has demonstrated a respect of the said terms and conditions and there have been no breaches. The CBSA's risk assessment reminds the reader that monitoring is a key factor which permits it to conclude that the terms and conditions have been proceeding smoothly since the last detention review.

[5] As noted in the first paragraph, the preceding review of the terms and conditions of release resulted in Reasons for Order dated July 17, 2013 (amended as of September 3, 2013) and in an Order of October 7, 2013 (*see Harkat v Canada (Minister of Citizenship and Immigration)*), [2013] FCJ No 869 [*Harkat*] and for the Order DES-5-08). At that time, the Court decided to make important changes to the conditions of release. In the following paragraphs, the Court updates its reasons in light of the most recent submissions and the new 2014 CBSA risk assessment.

Analysis

[6] Since that time, a little more than a year ago, what has changed that might justify, or not, further changes to the terms and conditions of release? The Supreme Court of Canada has upheld among other matters the decision of the Federal Court of December 10, 2009 finding the security certificate against Mr. Harkat reasonable (*see Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] SCJ 37). A new CBSA risk assessment has been done which in essence confirms the one done in January 2012. It finds again that Mr. Harkat's risk of non-compliance with the terms and conditions of release to be medium to medium-low since 2013 and that there has been no breach to the terms and conditions of release. Lastly, close to 15 months has gone by

since the last detention review and the passage of time favours easing up some of the terms and conditions of release.

[7] As a brief reminder, the legal principles at play are whether Mr. Harkat's release poses a danger to the security of Canada and whether or not the terms and conditions of release neutralize the danger identified. Finally, if conditions are required, then the question to be answered is whether or not they are proportional to the danger posed (see *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 at paras 119 and 72-87 and 108-109). In order to conduct this exercise, a list of factors can be reviewed, such as the assessment of the danger, the history of the facts related to Mr. Harkat, the finding on the reasonableness of the certificate, the passage of time, etc. [...] (see *Harkat v Canada (Minister of Citizenship and Immigration)*, 2007 FC 416, [2007] FCJ No 540 at para 9). Finally, the burden is on the Ministers to show that a danger exists and that if released, the terms and conditions of release must be enacted in order to neutralize that danger (see *Mahjoub (Re)*, 2013 FC 10, [2013] FCJ No 77 at para 14).

[8] It is not my intention to review all the factors since I consider that in large part, the Reasons for Order of July 17, 2013, which dealt with all the factors, (see *Harkat, supra*) are still applicable subject to the following comments.

[9] During the last review, I had assessed the danger associated to Mr. Harkat to be at the low end of the spectrum and for that reason I decided to significantly attenuate the terms and conditions of release (see *Harkat, supra* at para 32). GPS supervision was abolished, access to a

desktop computer at home with Internet connectivity subject to supervision by the CBSA was given and access to a mobile phone without the sim card and Internet connectivity was also offered. A notice to travel outside the National Capital Region of five days with an obligation to submit a precise itinerary was established and any change to the itinerary itself must be communicated.

[10] Having reviewed the recent 2014 CBSA risk assessment and keeping in consideration the important findings made in the reasonableness of the certificate decision and considering Mr. Harkat's behaviour over the recent 15 months, I come to the conclusion that the danger associated to Mr. Harkat remains at the low end of the spectrum, but is not lower than the one identified last time. I say this because I have not identified any circumstances that could justify lowering the danger.

[11] Having said that, I think it is important to remember that the supervision by the CBSA remains an important component of the actualization of the terms and conditions of release. As it was said in *Harkat, supra* at para 54, supervision of Mr. Harkat's activities is important to the existence of the terms and conditions of release.

[12] If there is an acceptable way for the CBSA to assume the supervision of the use of a mobile phone with a sim card and Internet access, this Court may consider positively such a change. The same could be said for the laptop or the tablet. It must be said that supervision by the CBSA should be practical and feasible. In addition, Mr. Harkat would also have to present evidence to show the need for such devices. This Court is conscious of the daily needs that these

devices create and that it can be a "... significant hindrance in contemporary society", but at the same time the findings made in the reasons for the reasonableness of the certificate must also be taken in consideration. It remains that since October of last year, Mr. Harkat can access the Internet from his desktop computer at home.

[13] As for the request pertaining to work, this Court will consider any specific requirements whenever Mr. Harkat will have a real opportunity to work. At the present time, the request remains academic since no such possibility was presented. This Court has noted the Ministers' acceptance of Mr. Harkat's use of a landline telephone for the purposes of outside work.

[14] Concerning the request to report to the CBSA by phone, the Court has noted that the CBSA accepts that Mr. Harkat may report in person every two (2) weeks. This is acceptable.

[15] The request for a notice of 24 hours for travelling outside the National Capital Region with an itinerary limited to the point of destination rather than a specific one remains unclear. This Court has read Mr. Harkat's submissions for such a change, but is not persuaded by them. The CBSA's response to such requests is informative and persuasive for the present. In the future, there may be avenues to improve this condition keeping in mind the supervisory role of the CBSA.

[16] On another matter, I have reviewed the affidavits of Mrs. Brunette and Mr. Parent in light of Mr. Harkat's request to respectively vary their bonds from \$50,000 to \$25,000. No evidence from them was presented to support such a request.

[17] As for the clarification sought by both parties concerning the CBSA access to Mr. Harkat's desk top computer, section 7(d) of the terms and conditions of release is clearly written. Mr. Harkat shall give access on a monthly basis to his computer upon a request made by the CBSA. Condition 7(e) provides for the CBSA wanting to access again within a thirty (30) day period when monthly access has already been exercised. In such a case, judicial authorization must be obtained.

[18] I conclude that the terms and conditions of release, subject to the two amendments to be made (reporting in person every second week and access to a land line telephone for employment purposes) and the clarification to be inserted to paragraph 7(d) of the terms and conditions of release, if the parties see fit, as they exist neutralize the danger as defined in the present Reasons for Order, but also the ones of July 2013. They are proportional to the danger identified.

[19] In light of the preceding comments, I ask counsel to draft a new version of the terms and conditions and to submit it for approval. A new Order with an Annex containing the terms and conditions of release will then be signed.

“Simon Noël”

Judge

Ottawa, Ontario
October 31, 2014

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-5-08

STYLE OF CAUSE: MOHAMED HARKAT v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION ET AL

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