06-4216-cv

United States Court of Appeals
for the
Second Circuit

MAHER ARAR,

Plaintiff-Appellant,

– v. –

JOHN ASHCROFT, Attorney General of the United States, LARRY D. THOMPSON, formerly Acting Deputy Attorney General, TOM RIDGE, Secretary of State of Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement,

(For Continuation of Caption See Next Page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF-APPELLANT MAHER ARAR'S MOTION FOR JUDICIAL NOTICE

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Defendants' Responses provide no legitimate objections to Mr. Arar's Motion for Judicial Notice of the Canadian Commission Report. See the "United States' Response,"[1] the "Officials' Response,"[2] and "Ashcroft's Response".[3] The fact that the Canadian Commission Report was issued is in itself relevant to the issues on appeal, as is the fact that the Commission made various findings.

Defendants concede that the fact that the Commission Report was issued could be the subject of judicial notice, but argue that it is irrelevant to this appeal.[4] United States' Response at 3-5. In deciding that special national-security and foreign policy factors foreclosed a *Bivens* remedy, the District Court relied on the "need for much secrecy," and the potential "negative effect on our relations with Canada…were it to turn out that certain high Canadian officials had, despite public

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[1] Appellees the United States of America, the Official Capacity Defendants, and Individual Capacity Defendants Edward J. McElroy, J. Scott Blackman and Robert Mueller's Response to Motion for Judicial Notice.

[2] Defendants-Appellees Larry D. Thompson, James W. Ziglar, J. Scott Blackman, and Robert Mueller's Opposition to Plaintiff-Appellant's Motion for Judicial Notice.

[3] Individual Capacity Defendant-Appellee John Ashcroft's Additional Response to Motion for Judicial Notice.

[4] Presumably Defendants are objecting on relevance grounds pursuant to Federal Rules of Evidence, section 402, but they do not cite any Rule.

denials, acquiesced in Arar's removal to Syria."[5] SPA-72. The District Court found that extending a *Bivens* remedy could risk "'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" SPA-73 (quoting *Sanchez-Espinoza v. Reagan,* 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.) (quoting *Baker v. Carr,* 369 U.S. 186, 226, 217 (1962)).

The very fact that an extensive three-volume public report was issued by the Commission established by the Canadian Government to investigate the actions of Canadian officials relating to what was done to Mr. Arar is relevant to the issue of the "need for much secrecy," and the potential embarrassment that discovery in this case might cause the U.S. or the Canadian Governments. The court in *Liu v. China* found that because China had conducted an investigation and held a public trial, "rather than attempting to hide the sordid circumstances" at issue in the case, adjudication in a U.S. court could "cause no more embarrassment than the exposures already made…." 892 F.2d 1419, 1434 (9th Cir. 1989). The Court should take judicial notice of the very fact that the Canadian Commission Report

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[5] Defendant Ashcroft acknowledged that the District Court's reasoning that the case would interfere with foreign relations because it might touch on matters of secrecy or embarrass the U.S. or other governments was "central" to the District Court's *Bivens* special factors conclusion. Ashcroft's Response at 4, n. 2.

was issued, which is clearly relevant to the issue on appeal of whether national-security and foreign policy factors foreclose a *Bivens* remedy.[6]

The United States also argues that the content and conclusions of the Commission Report are not judicially noticeable.[7] United States' Response at 3. Mr. Arar asks the Court to take judicial notice that the Inquiry made the findings that it did, not to take judicial notice of the findings themselves. Plaintiff-Appellant Maher Arar's Memorandum of Law in Support of Motion for Judicial Notice ("Memorandum"), at 2. That the Commission, after reviewing public and *in camera* evidence, made a finding that "[t]here is no evidence that Canadian officials participated or acquiesced in the American authorities' decisions to detain Mr. Arar and remove him to Syria," is certainly relevant to the issue the District Court addressed – namely whether a judicial inquiry into that question is inappropriate because it could harm our relations with Canada. Commission Report: ANALYSIS AND RECOMMENDATIONS at 14.

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[6] Concerns regarding embarrassment to the Executive from "multifarious pronouncements" are also pertinent to the political question doctrine, which was raised by two of the Defendants below, although not ruled on by the court. SPA-77, n. 14. Defendants' Responses to Mr. Arar's Opening Appellate Brief may raise other matters regarding which the Commission Report may be relevant.

[7] Defendants point to Mr. Arar's failure to cite his assertion that he was "falsely labeled as a member of al-Qaeda" as such an example. United States' Response at 3, n.2 (quoting Opening Appellate Brief at 56). Mr. Arar does not rely on the Commission Report to support this fact, as he asserted in his Complaint that he "is neither a member of nor involved with Al Qaeda or any other terrorist organization." A-23, ¶ 13.

The Officials' Response complains that the four findings enumerated in Mr. Arar's Memorandum of Law are not the only findings of the Commission. Officials' Response at 2-3. The Officials cite several specific examples of information about Mr. Arar that the Commission found was inflammatory and inaccurate, was given by Canadian officials to U.S. officials, and was very likely relied upon by U.S. officials. Officials' Response at 2-3 (citing Commission Report: FACTUAL BACKGROUND, VOLUME I, at 113); see also, ANALYSIS AND RECOMMENDATIONS at 59. These findings demonstrate other facts that this Court could decide to take judicial notice of: that the Canadian Commission found, and made public, that Canada provided specific inflammatory information to the United States. It may not be appropriate for the Court to take notice of the fact that the information was actually provided to the United States, or notice of the fact that the information was inaccurate, but it cannot reasonably be questioned that the Canadian Commission has stated that this specific information was given to U.S. officials. Therefore making public such information could not possibly embarrass the Canadian government.

The list of findings highlighted in Mr. Arar's Memorandum is certainly not exhaustive. The Commission Report has been submitted to the Court in full, and the Court could take judicial notice that the Commission made any of the findings or conclusions contained therein.

Defendants are certainly correct that Mr. Arar's allegations must be accepted as true for the purposes of their Rule 12(b) motions and this appeal. United States' Response at 4. However, the District Court cited information that had been revealed through the Canadian Commission proceedings (A-190) to attempt to cast doubt on Mr. Arar's allegation that there was no reasonable suspicion that he was involved in terrorist activity. SPA-10-11, n. 1 (referring to allegation at A-20, ¶ 2). The fact that the Commission found no evidence implicating Mr. Arar in terrorist activities after reviewing all of the evidence available to the Canadian investigators is directly relevant to the court's remarks.[8] Commission Report: ANALYSIS AND RECOMMENDATIONS at 59.

Defendant Ashcroft argues that Mr. Arar's motion for judicial notice implicates "sweeping separation of powers concerns." Ashcroft's Response at 2. Defendant Ashcroft's claim that judicial notice would "interfere" with the Executive's decision not to participate in the Canadian proceedings, and "would be making a foreign policy decision about the worth to be accorded findings of [a]

[8] The Officials' Response misleadingly asserts that the "Commission obtained *no evidence* from the U.S. authorities." Individual's Response at 3, n.4 (emphasis in original). Although it is true that the U.S. refused to participate in the Commission proceedings, the Commissioner heard evidence gathered by Canadian investigators in relation to Mr. Arar, which included information obtained from American authorities. Commission Report: ANALYSIS AND RECOMMENDATIONS at 59. The Commission found that U.S. officials never provided Canadian authorities "any information of their own that would have supported the removal order," and given their close cooperation, it "seems likely that, if they had such information, they would have supplied it…." *Id.* at 30.

commission created by a foreign nation," (Ashcroft's Response at 5), misunderstands the issues before this Court. This Court is not being asked to decide anything about the Executive's attitude toward the Canadian proceedings or how much weight to accord the Commission's findings. In deciding that foreign policy and national security concerns precluded a remedy, the District Court concluded that judicial inquiry into the facts of Mr. Arar's rendition could impermissibly harm U.S. relations with Canada. That Canada itself has undertaken that inquiry and issued a Report containing various findings on the matter is certainly relevant to the issues on appeal.

Defendant Ashcroft also seeks to have this Court "review the classified submission made in support of the state secrets claim." Ashcroft's Response at 6. This inappropriate request must be rejected. Contrary to Defendant Ashcroft's contention, the record does not contain the classified declarations.[9] Ashcroft's Response at 5. The Government did not file the classified declarations with the District Court, but notified the District Court that if it determined that review was necessary, it would make them available for the *ex parte in camera* review. A-127

[9] The Federal Rules of Appellate Procedure provide that the following items constitute the record on appeal: "(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." FRAP 10.

(Government's Notice of Filing). There is no indication that the District Court reviewed the classified declarations *in camera*.

More importantly, the Government did not contend that the classified information could be made available to aid in "understand[ing] the factual underpinnings of Arar's claim," (Ashcroft's Response at 5), but rather to invoke the state secrets privilege, asserting that litigating most of Mr. Arar's claims would necessitate disclosure of classified information. A-131 (Declaration of James B. Comey). Because the District Court did not address the state secrets issue below (SPA-85-86), it should not be reached by this Court in the first instance. *See, e.g., NCAA v. Smith*, 525 U.S. 459, 470 (1999).

For the foregoing reasons, Mr. Arar's Motion for Judicial Notice should be granted, and Defendant Ashcroft's improper request should be denied.

Dated: January 16, 2007

Respectfully submitted,

Maria C. LaHood

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the Reply Memorandum In Support of Plaintiff-Appellant Maher Arar's Motion for Judicial Notice in *Arar v. Ashcroft, et al,* 06-4216-cv, to be served by mail, and sent via electronic mail, on this 16th day of January 2007, to the following:

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