

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

**DEFENDANTS-APPELLEES LARRY D. THOMPSON, JAMES W. ZIGLAR, J. SCOTT BLACKMAN, AND ROBERT MUELLER'S
OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR JUDICIAL
NOTICE**

EDWARD J. McELROY, formerly District Director of Immigration and Naturalization Services for New York District; ROBERT MUELLER, Director of the Federal Bureau of Investigation; JOHN DOE 1-10; FEDERAL BUREAU OF INVESTIGATION and/or IMMIGRATION AND NATURALIZATION SERVICE AGENTS; JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services; and UNITED STATES,

Defendants-Appellees.

Defendants-Appellees Larry D. Thompson, James W. Ziglar, J. Scott Blackman, and Robert Mueller jointly submit this opposition to the December 12, 2006 motion of Plaintiff-Appellant Maher Arar asking the Court to take judicial notice of the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the "Report").¹ As the United States explains in its separate opposition, Arar improperly seeks judicial notice of the factual assertions contained within the Report, and not merely the fact of the Report's existence. *See Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (judicial notice extends to the existence of document "to establish the fact of such" a document but "not for the truth of the matters asserted therein"). Defendants Thompson, Ziglar, Blackman, and Mueller accordingly join the United States' argument in full.²

Judicial notice would be improper for a second reason. In general, facts are not judicially noticeable unless they are "capable of accurate and ready

¹ On December 20, 2006, the defendants-appellees filed an unopposed motion for a two-week extension to respond to Arar's motion.

² Although Arar claims that he seeks judicial notice not of the findings themselves but of the fact that the Report "made the findings," Pl. Mem. at 2, 3, it is hard to see how that distinction makes any difference in this case. This is not a case where the fact that the findings "were made" has legal significance or effect. The findings, and the fact that they were made, are relevant only if Arar also contends that the findings are *true*. But the one thing this Court cannot do is judicially notice the Report "for the truth of the matters asserted therein." *Liberty Mut. Ins. Co.*, 969 F.2d at 1388.

determination by resort to sources whose accuracy *cannot be reasonably questioned.*” Fed. R. Evid. 201(b)(2) (emphasis added). Here, the “facts” for which Arar seeks judicial notice do not even accurately convey the contents of the Report on which Arar purports to rely. For example, Arar asks this Court to take judicial notice of the Report’s assertion that its author found “no evidence that Canadian officials participated or acquiesced in the American authorities’ decisions to detain Mr. Arar and remove him to Syria.” Pl. Mem. at 2. Without more context, that assertion is misleading. As the remainder of the Report makes clear, Canadian officials did *much* to prompt the decision to detain and remove Arar. Among other things, they told U.S. officials that Arar is an “Islamic Extremist . . . suspected of being linked to the Al Qaeda terrorist movement.” Report at 113. “It is very likely,” the Report found, that U.S. officials “relied on information received from the [Royal Canadian Mounted Police] in making the decision to remove Mr. Arar to Syria.” *Id.* at 157; *see also id.* at 162 (“[N]othing has come to the attention of Canadian officials or the Inquiry to suggest that the American authorities did not rely on Canadian information in deciding to remove Mr. Arar to Syria. On the contrary, . . . the Americans have asserted the opposite, consistently and clearly.”).

Arar likewise offers only a partial disclosure when he asks the Court to take notice of the Report’s supposed finding that, during Arar’s detention in New York,

Canadian officials sent a fax stating that they had been “unable to indicate links to al-Qaeda.” Pl. Mem. at 2.³ Arar omits the finding that, before that fax was sent, the Royal Canadian Mounted Police *repeatedly* told U.S. officials that Arar was “suspected of being linked to the Al Qaeda terrorist movement”; a “principal subject” of the Mounted Police’s terrorist investigation; a “person with an ‘important connection’” to an alleged al Qaeda operative; and a person listed on a document titled “Bin Laden’s Associates: Al Qaeda Organization in Ottawa.” Report at 113. In the end, the Report concluded that it could not tell what weight U.S. officials gave to the later fax compared to the earlier reports, but found it “obvious” that U.S. officials were likely to rely on the earlier reports. *Id.* at 148-50.⁴

For the foregoing reasons and those stated in the United States’ opposition, the Court should deny Arar’s motion to take judicial notice of the Report, and the four specific “findings” identified by Arar.⁵

³ Once again, it is hard to see how that finding has any relevance unless one takes its substance as true.

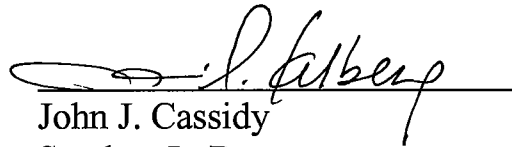
⁴ The Report itself, in any event, hardly claims to be conclusive. As the United States points out in its opposition, and as the Commission that authored the Report explicitly acknowledged, the Commission obtained *no evidence* from the U.S. authorities. U.S. Opp. at 4; Report at 156. The Commission thus had no basis to address and did not purport to pass on the conduct of U.S. officials.

⁵ For the same reasons, it would be error to accept the factual assertions from the Report that Arar and at least one amicus brief rely upon in their merits

Dated January 4, 2007

Respectfully submitted,

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briefs. See Pl. Br. at 13-14, 41-42; *Amici Curiae* Brief of U.S. and Canadian Scholars at 25-28.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Defendants-Appellees Larry D. Thompson, James W. Ziglar, J. Scott Blackman, And Robert Mueller's Opposition To Plaintiff-Appellant's Motion For Judicial Notice to be served upon the following counsel of record, via e-mail and First Class Mail, on January 4, 2007:

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