

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

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

MARIA COURI LAHOOD, ESQ.
BARBARA J. OLSHANSKY, ESQ.
DAVID COLE, ESQ.
WILLIAM GOODMAN, ESQ.
KATHERINE GALLAGHER, ESQ.
JULES LOBEL, ESQ.
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6430

ROBERT F. FINK, ESQ.
STANLEY McDERMOTT III, ESQ.
JOSHUA S. SOHN, ESQ.
SARAH J. STERKEN, ESQ.
DLA PIPER US LLP
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500

(Co-counsel for Plaintiff-Appellant)
(For Continuation of Appearances See Next Page)

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,
UNITED STATES,

Defendants-Appellees.

DENNIS BARGHAAN, ESQ.
LARRY L. GREGG, ESQ.
OFFICE OF THE U.S. ATTORNEY
EASTERN DISTRICT OF VIRGINIA,
CIVIL DIVISION
Counsel for Defendant-Appellee
John Ashcroft
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3700

JOHN J. CASSIDY, ESQ.
STEPHEN L. BRAGA, ESQ.
JEFFREY A. LAMKEN, ESQ.
JAMIE S. KILBERG, ESQ.
BAKER BOTTS LLP
Counsel for Defendant-Appellee
Larry D. Thompson
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-7700

THOMAS G. ROTH, ESQ.
Counsel for Defendant-Appellee
J. Scott Blackman
395 Pleasant Valley Way, Suite 201
West Orange, New Jersey 07052
(973) 736-9090

JEREMY MALTBY
O'MELVENY & MYERS
Counsel for Defendant-Appellee
Robert Mueller
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000

DEBRA L. ROTH, ESQ.
THOMAS M. SULLIVAN, ESQ.
SHAW, BRANSFORD, VEILLEUX
& ROTH, P.C.
Counsel for Defendant-Appellee
Edward J. McElroy
1100 Connecticut Avenue, N.W.,
Suite 900
Washington, D.C. 20036
(202) 463-8400

WILLIAM A. MCDANIEL, JR., ESQ.
BASSEL BAKHOS, ESQ.
LAW OFFICES OF
WILLIAM A. MCDANIEL, JR.
Counsel for Defendant-Appellee
James Ziglar
118 West Mulberry Street
Baltimore, Maryland 21201
(410) 685-3810

ROBERT M. LOEB, ESQ.
BARBARA L. HERWIG, ESQ.
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, APPELLATE STAFF
950 Pennsylvania Ave, N.W., #7268
Washington, DC 20530
(202) 514-5425
(202) 514-4332

– and –

SCOTT DUNN, ESQ.
UNITED STATES ATTORNEY'S OFFICE
EASTERN DISTRICT OF NEW YORK
One Pierrepont Plaza, 14th Floor
Brooklyn, New York 11201
(718) 254-6029

*Counsel for Defendants in
Their Official Capacities*

Pursuant to Federal Rule of Evidence 201(b)(2), Plaintiff-Appellant Maher Arar respectfully requests this Court to take judicial notice of the three volume REPORT OF THE EVENTS RELATING TO MAHER ARAR by the COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR (2006) (“Commission Report”). See *Decl. of Maria LaHood in Support of Appellant Maher Arar’s Motion for Judicial Notice* (“Decl.”), filed herewith.

Judicial notice may be originally taken on appeal. FED. R. EVID. 201(f) (“Judicial notice may be taken at any stage of the proceeding.”). Original judicial notice on appeal is particularly appropriate where, like here, the document proffered was not available when the case was before the district court. *E.g.*, *Conopco, Inc. v. Roll Int’l.*, 231 F.3d 82, 86 (2d Cir. 2000) (original judicial notice taken of final judgment and notice of appeal in related action which happened after district court granted motion to dismiss); *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 597 (3d Cir. 2000) (original judicial notice taken of newspaper article published after district court ruling); *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000) (original judicial notice on appeal taken of deferment of department determination issued after district court's disposition).

Federal Rule of Evidence 201(b)(2) provides that a court may take judicial notice of facts “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” Federal courts may take notice

of government reports. *Hope v. Pelzer*, 536 U.S. 730, 737 n.7 (2002) (citing with approval judicial notice taken by Court of Appeals of report issued by Department of Justice); *Youdon v. Bd. of Immigration Appeals*, No. 06-2525-ag (NAC), 2006 WL 3219278, at *2-3 (2d Cir. Nov. 6, 2006) (judicial notice taken of State Department Report on Human Rights Practices for China).

The Commission Report is submitted for the purpose of noticing that the Canadian Commission of Inquiry has found the following:

- 1) There “is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada.” *Decl.* at 6 (quoting REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS at 59).
- 2) Canadian investigators “thoroughly and exhaustively followed all information leads available to them in connection with Mr. Arar’s activities and associations.” *Decl.* at 7 (quoting REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS at 59). “Canadian investigators made extensive efforts to find any information that could implicate Mr. Arar in terrorist activities,” and “they found none.” *Id.*
- 3) “There is no evidence that Canadian officials participated or acquiesced in the American authorities’ decisions to detain Mr. Arar and remove him to Syria.” *Decl.* at 8 (quoting REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS at 14).
- 4) The Commission found that on October 4, 2002, Canadian officials responded to a request by a U.S. official with a fax making clear that although a detailed investigation of Mr. Arar or a link analysis on him had yet to be completed, the investigating body was unable to indicate links to al-Qaeda. *Decl.* at 9 (citing REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS at 114). *See also*, Joint Appendix, A-330 (October 2002 fax from OIC Project A-O

Canada, attached as Ex. I to the Letter from Maria LaHood to Hon. David G. Trager (July 27, 2005)).

The Commission Report is not submitted for the fact of the matters asserted therein. *See, e.g., Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (“A court may take judicial notice of a document filed in another court “not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.”) (*citing Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)); *Staehr v. Hartford Fin. Servs. Group, Inc.*, No. 3:04CV1740 (CFD), 2006 WL 2052675, at *5 (D. Conn. July 13, 2006) (“The court notes...that it does not take judicial notice of the document for the truth of matters asserted in them, but rather to establish that the matters have been publicly asserted.”). The fact that the Canadian Commission made the above findings are facts “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned” under Federal Rule of Evidence 201(b)(2).

Based upon the foregoing, this Court can and should take judicial notice the Canadian Report attached hereto.

Dated: December 12, 2006

Respectfully submitted,



Maria C. LaHood

Attorney for Plaintiff-Appellant