Federal Court  Cour fédérale

[redacted]

Date: 20170323

Docket: DES-6-16

Citation: 2017 FC 118

Ottawa, Ontario, March 23, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

SHIYUAN SHEN

Respondent

PUBLIC ORDER AND REASONS

UPON the application of the Attorney General of Canada pursuant to s 38.04 of the *Canada Evidence Act*, RSC 1985, c C-5 for an order maintaining the confidentiality of portions of two documents generated by the Canada Border Services Agency [CBSA] in 2012;

AND UPON reading the public and *ex parte* materials filed, including the public and *ex parte* affidavits of David Hartman, Executive Director, Greater China Division, Global Affairs Canada;

AND UPON hearing the testimony of Mr. Hartman at a public hearing on January 6, 2017, and in a closed *ex parte* hearing on January 18, 2017;

AND UPON hearing counsel for the Attorney General of Canada and counsel for Shiyuan Shen at a public hearing on January 6, 2017, and counsel for the Attorney General of Canada in a closed *ex parte* hearing on January 18, 2017;

AND UPON issuing a confidential Order and Reasons on January 30, 2017, and giving the Attorney General of Canada an opportunity to inform the Court whether, in her opinion, the confidential Order and Reasons contain information that ought to be redacted prior to publication;

AND UPON reading correspondence sent on behalf of the Attorney General of Canada dated February 13, 2017 requesting that portions of paragraphs 7, 8, 11, 12, 13, 16 and 17 of the confidential Order and Reasons be redacted prior to publication;

AND UPON hearing counsel for the Attorney General of Canada in a closed *ex parte* hearing on March 7, 2017, during which the Court was informed that the Attorney General of Canada no longer requests redaction of certain portions of paragraphs 11, 12 and 17 of the confidential Order and Reasons, but maintains her request to redact certain portions of paragraphs 7, 8, 11, 12, 13 and 16 prior to publication;

AND CONSIDERING the following:

[1] In these reasons, I refer to the Attorney General of Canada, the Minister of Foreign Affairs, the Minister of Public Safety and Emergency Preparedness, and the Minister of Citizenship and Immigration collectively as “the Crown”.

[2] The two CBSA documents in issue concern an admissibility assessment conducted by the CBSA in relation to a police officer employed by China’s Public Security Bureau [PSB]. They arise from a proposal to bring the PSB officer to Canada to testify at the first hearing before the Refugee Protection Division [RPD] of the Immigration and Refugee Board into Mr. Shen’s refugee claim. The background to Mr. Shen’s refugee claim and the Crown’s assertion that he is ineligible for refugee protection in Canada due to serious non-political criminality may be found in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70.

[3] Mr. Shen seeks full disclosure of both CBSA documents. He maintains that the protected portions of the CBSA documents may assist him in demonstrating that the evidence relied upon by the Crown to oppose his refugee claim is derived from torture. Mr. Shen also claims that the protected information is relevant to his allegation that the Crown breached the duty of candour and abused the process of both the RPD and this Court.

[4] The sole issue to be determined is whether this Court should confirm the Attorney General of Canada’s decision to prohibit disclosure of the protected portions of the CBSA documents. Pursuant to the Federal Court of Appeal’s decision in *Canada (Attorney General) v Ribic*, 2003 FCA 246 at paragraphs 17, 18 and 21 [*Ribic*], the Court must consider the following questions:

A. Is the protected information relevant to a fact or matter in issue in Mr. Shen's refugee claim, including his arguments concerning the duty of candour or abuse of process?

B. Would disclosure of the protected information be injurious to international relations?

C. If so, does the public interest favour maintaining the confidentiality of the protected information or public disclosure, with or without conditions?

[5] The Crown concedes that the protected information is potentially relevant to Mr. Shen's refugee claim, in particular whether the evidence relied upon by the Crown to oppose his refugee claim on the ground of serious, non-political criminality is derived from torture. The Crown also concedes that the protected information is potentially relevant to Mr. Shen's arguments that the Crown breached the duty of candour in not disclosing the CBSA documents until late 2016, and abused the process of both the RPD and this Court. I am satisfied that the first branch of the *Ribic* test is met.

[6] The Crown's assessment of the injury to international relations that would result from disclosure of the protected information contained in the two CBSA documents is entitled to deference by this Court (*Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*), 2007 FC 766 at para 46 [*Arar*]). However, as Justice de Montigny noted in *Canada (Attorney General) v Telbani*, 2014 FC 1050 at paragraph 44 [*Telbani*], the Court cannot abdicate the role entrusted to it by Parliament and blindly endorse the applications for non-disclosure filed by the Attorney General:

> Even though the Court must show deference, it is nonetheless entitled to expect the Attorney General to demonstrate, from the facts established by the evidence, that the alleged injury is not merely possible or speculative, but probable: *Arar*, para 49; [*Canada (Attorney General) v Almalki*, 2010 FC 1106], para 70. In other words, it is not sufficient to speculate that a piece of information could be potentially injurious to national security; it must be established, through concrete and reliable evidence, that the injury is serious and not based on mere speculation.

[7] Much of the information contained in the public affidavit of Mr. Hartman might be charitably described as "boilerplate". Many of the Crown's written public submissions are to similar effect. The primary focus of Mr. Hartman's public affidavit is the injury that would result from the disclosure of information received in confidence from representatives of foreign states or private sources whose identity must be protected. None of these issues arise in the present case.

[8] In particular, paragraphs 14 to 29 and 34 to 50 of Mr. Hartman's public affidavit are irrelevant, and therefore inadmissible (*Morris v The Queen*, [1983] 2 SCR 190 at 199-200; Sidney Lederman et al, *The Law of Evidence in Canada*, 4th ed (Toronto: LexisNexis Canada, 2014) at 51-60; David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto, Irwin Law, 2015) at 27-37). The same may be said of paragraphs 20 to 34, 39 to 47, and 51, 52, 56 and 67 of the Crown's public submissions.

[9] At the public hearing on January 6, 2017, Mr. Shen submitted two reported cases dealing with the admissibility into Canada of members of the PSB: (a) this Court's decision in *Han v Canada (Minister of Citizenship and Immigration)*, 2006 FC 432 [*Han*]; and (b) the decision of the Immigration Division of the Immigration and Refugee Board in *Yuan v Canada (Public*

Safety and Emergency Preparedness), 2015 CanLII 97787 [*Yuan*]. Mr. Shen noted that Canada has previously taken public positions regarding the admissibility into Canada of members of the PSB. He argued that, to the extent the protected portions of the two CBSA document may reveal similar expressions of opinion by government officials, their disclosure is unlikely to cause injury to international relations.

[10] Having been apprised of *Han* and *Yuan*, Crown counsel sought an adjournment of the closed *ex parte* hearing in order to seek instructions. The Court was subsequently advised that the Attorney General wished to maintain her objection to the disclosure of the protected portions of the two CBSA documents. The proceedings resumed in a closed *ex parte* hearing on January 18, 2017.

[11] Mr. Hartman's *ex parte* affidavit offers little in the way of "concrete and reliable evidence" of the injury that would result from revealing the protected portions of the two CBSA documents at issue in this case. In oral testimony, he acknowledged that: (a) he is unaware of any expression of concern by China regarding the *Han* and *Yuan* decisions; (b) [redacted]; and (c) he is unaware of any expression of concern by China regarding the public versions of the two CBSA documents that have been disclosed in the ongoing proceedings before the RPD or this Court.

[12] Mr. Hartman's oral testimony was a significant expansion of the very general information contained in both of his affidavits. He testified about [redacted]. He insisted that the bilateral relationship between Canada and China is dynamic and changes over time, [redacted] He provided particulars of current diplomatic priorities and risks. He noted that Mr. Shen's refugee claim and related court proceedings have attracted media attention. [redacted]

[13] I found Mr. Hartman to be a credible and capable witness. While some of the evidence he offered to prove the likelihood of injury might be considered speculative, this Court owes deference to the Crown in the conduct of foreign affairs (*Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 35-37, 39-41; *Ribic* at para 17; *Arar* at para 47). [redacted]

[14] The question to be answered under the second branch of the *Ribic* test is whether disclosure of the protected information would be injurious to Canada's relationship with foreign nations (*Arar* at para 61). Given Mr. Hartman's undoubted expertise in these matters, and his

concrete examples of the harm that would result if the protected information were disclosed, I accept that the second branch of the test is met.

[15] Turning to the third branch of the *Ribic* test, the vast majority of the information contained in the two CBSA documents has been disclosed to Mr. Shen without redactions. Less-redacted versions of both documents have been disclosed, subject to an undertaking of confidentiality, to Mr. Shen's counsel, the RPD and counsel involved in Mr. Shen's motion before this Court regarding the Crown's alleged breach of the duty of candour and abuse of process.

[16] The remaining protected portions of the two CBSA documents consist of observations by CBSA officials regarding the PSB's human rights record and the admissibility of its members into Canada. All of the observations are based upon information that is disclosed in the public portions of the documents. That information is excerpted from published reports of government bodies and non-governmental organizations, all of which are available to Mr. Shen. No further factual basis for the officials' opinions is contained in the protected portions of the two CBSA documents.

[17] The conclusion regarding the admissibility into Canada of the PSB officer who was called to testify at Mr. Shen's first refugee hearing has been disclosed to Mr. Shen's counsel, the RPD and counsel involved in Mr. Shen's motion before this Court regarding the Crown's alleged breach of the duty of candour and abuse of process. I am the presiding judge in Mr. Shen's

motion regarding the Crown's alleged breach of the duty of candour and abuse of process, and I am fully apprised of the contents of both CBSA documents.

[18] Numerous factors may be considered in assessing the third branch of the *Ribic* test (*Telbani* at para 78; *Arar* at para 98). The most pertinent factors in this case are the extent of the anticipated injury, the importance of the underlying proceedings, the relevance or usefulness of the information, and the availability of the information through other means. In my view, a balancing of these factors militates in favour of confirming the Attorney General's decision to protect the information in issue.

[19] The protected information contained in the two CBSA documents provides little, if any, additional evidence of the matters that Mr. Shen wishes to establish before either the RPD or this Court. It was apparent during the public hearing of this application that, even without access to the protected information, Mr. Shen's counsel are well-positioned to advance their argument regarding the risk that the evidence relied on by the Crown to oppose Mr. Shen's refugee claim was derived from torture. They are also well-positioned to advance their argument regarding the Crown's alleged breaches of the duty of candour and abuse of process, both before the RPD and before this Court.

[20] I am therefore satisfied that the public interest favours maintaining the confidentiality of the protected portions of the two CBSA documents. It is unnecessary to order disclosure of the protected portions of the CBSA documents subject to conditions.

THEREFORE THIS COURT ORDERS that:

1. The application by the Attorney General of Canada to maintain the confidentiality of the protected portions of the two CBSA documents is allowed; and

2. For reasons explained during the closed *ex parte* hearing on March 7, 2017, the request of the Attorney General of Canada to redact portions of paragraphs 7, 8 and 16 of this Order and Reasons is denied, and the request to redact portions of paragraphs 11, 12 and 13 is allowed in part.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	MARCH 23, 2017

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