Federal Court Cour fédérale

**Date: 20190215**

**Docket: IMM-4072-16**

**Citation: 2019 FC 193**

**Ottawa, Ontario, February 15, 2019**

**PRESENT: The Honourable Mr. Justice Norris**

**BETWEEN:**

**AYOOB HAJI MOHAMMED AND AIERKEN MAILIKAIMU**

**Applicants**

**and**

**THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP**

**Respondent**

# ORDER AND REASONS

## I. OVERVIEW

[1] The applicants, Ayoob Haji Mohammed and Aierken Mailikaimu, are husband and wife. Mr. Mohammed is a citizen of China of Uighur ethnicity. He has resided in Albania as a refugee since 2006. Ms. Mailikaimu is a Canadian citizen. The two were married in March 2010 and have a child together.

[2] In April 2014, the applicants submitted an application for permanent residence in Canada for Mr. Mohammed under Ms. Mailikaimu's sponsorship. The sponsorship application was approved in July 2014 and the application for permanent residence was forwarded to the visa office in Rome, Italy, for further processing.

[3] As part of the processing of his application for permanent residence, Mr. Mohammed attended two interviews at the Canadian Consulate in Tirana, Albania. The first, held on January 15, 2015 has been described in the present proceeding as having been conducted by "partners." The second, held on March 10, 2016 was conducted by Jennifer Woo, an immigration officer with the visa section at the Canadian Embassy in Rome.

[4] By letter dated July 11, 2016 Ms. Woo informed Mr. Mohammed that he did not qualify for the issuance of a permanent resident visa to Canada because he was inadmissible on security grounds. Specifically, she had determined that he was inadmissible under paragraphs 34(1)(c) and (f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] because she had reasonable grounds to believe that he was a member of an organization – the East Turkistan Islamic Movement [ETIM] – that engaged in terrorism.

[5] In September 2016 the applicants commenced an application for leave and judicial review of this decision. The history of the proceeding from then until relatively recently is summarized comprehensively by Justice LeBlanc in *Malikaimu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1026, and *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 973.

[6] On November 6, 2018 the hearing of the judicial review application was scheduled for February 25, 2019.

[7] Over the course of this matter, the respondent has filed two affidavits from Ms. Woo. Counsel for the applicants requested to cross-examine Ms. Woo on these affidavits. The cross-examination was scheduled for January 10, 2019 via videoconference. In connection with the cross-examination, counsel for the applicants provided Ms. Woo with a Direction to Attend [DTA] dated January 2, 2019. Among other things, the DTA directed Ms. Woo to bring with her and produce at the cross-examination "all documents and other material in your possession, power or control that are relevant to the application." The DTA then set out a non-exhaustive list of particular items sought by the applicants.

[8] The cross-examination proceeded as scheduled. Certain additional items were produced to the applicants in response to the DTA. The applicants maintain, however, that the DTA was not complied with fully. Accordingly, by motion filed on January 25, 2019 they sought an order directing the respondent to comply with their request to produce all documents and other material falling within the terms of the DTA. The applicants also sought amendments to the filing deadlines for material on the judicial review application as well as an adjournment of the February 25, 2019 hearing date.

[9] This motion came before me at the General Sittings in Toronto on February 5, 2019. At the conclusion of oral argument, I informed the parties that, apart from adjusting the deadlines for the filing of the memoranda of fact and law on the judicial review application (which was

done subsequently on the basis of a joint proposal from the parties), I was dismissing the motion for reasons which would be provided in due course. These are those reasons.

## II. BACKGROUND

[10] Mr. Mohammed was born in China in 1984. He was accepted as a refugee in Albania after he was released from U.S. custody in Guantanamo Bay, Cuba, in May 2006. He had been detained by the U.S. military in Afghanistan shortly after they began operations there in October 2001. Mr. Mohammed explained in his application for permanent residence that he and 17 other Uighurs had been kidnapped by bounty hunters and turned over to the U.S. military. After being held at an American prison in Kandahar, Afghanistan, for six months, they were eventually transferred to the U.S. detention facility at Guantanamo Bay.

[11] As part of his application for permanent residence, Mr. Mohammed provided documentation relating to his detention at Guantanamo Bay which stated that U.S. authorities believed that he had received training at an ETIM camp in Afghanistan and was a probable member of this group. (The ETIM has been listed by the United Nations and the United States as a terrorist group. It has been described as a Uighur separatist organization dedicated to the creation of a Uighur Islamic homeland in China through armed insurrection and terrorism.) Eventually U.S. authorities determined that Mr. Mohammed was not an enemy combatant and he was cleared for release to a third country. The application for permanent residence was also supported by documentation relating to the circumstances of Uighur detainees who had been held at Guantanamo Bay.

[12] At the interview on March 10, 2016 Ms. Woo explored with Mr. Mohammed many aspects of his experiences in Afghanistan and Pakistan prior to his detention by U.S. forces.

[13] As noted above, Mr. Mohammed was found to be inadmissible to Canada because Ms. Woo found there were reasonable grounds to believe he was a member of the ETIM, an organization that engaged in terrorism. Ms. Woo stated in her letter of July 11, 2016 that her conclusions were based on the information contained in Mr. Mohammed's application, his statements at the interview conducted on March 10, 2016 and open-source information.

[14] The applicants have not filed their written submissions on the merits of the application for judicial review yet. As I understand their position from various filings in this matter (including their written submissions at the leave stage), they intend to challenge the visa officer's decision on at least the following grounds:

- Procedural fairness was breached because the visa officer failed to ensure proper interpretation for Mr. Mohammed during the March 10, 2016 interview;

- Procedural fairness was breached because the visa officer failed to provide Mr. Mohammed with an opportunity to address her concerns with respect to his alleged membership in the ETIM;

- Procedural fairness was breached as a result of the failure to provide Mr. Mohammed with notice of the true purpose of the January 15, 2015 interview;

- Mr. Mohammed was detained arbitrarily during the January 15, 2015 interview, thereby infringing his rights guaranteed by section 9 of the *Charter*;

- The failure to inform Mr. Mohammed of the true purpose of the January 15, 2015 interview infringed his rights guaranteed by section 10(a) of the *Charter*;
- The failure to inform Mr. Mohammed of his right to retain and instruct counsel at the January 15, 2015 interview infringed his rights guaranteed by section 10(b) of the *Charter*;
- The failure to inform Mr. Mohammed of the true purpose of the January 15, 2015 interview denied him meaningful access to counsel;
- The visa officer approached Mr. Mohammed's case with a pre-determined outcome in mind; and
- The decision finding Mr. Mohammed to be inadmissible on security grounds is unreasonable.

[15] Many of the preliminary proceedings in this matter have concerned the production and disclosure of information to the applicants. I will not reiterate the history of those proceedings here. For present purposes, it suffices to note that by the time Ms. Woo was to be cross-examined, the Certified Tribunal Record [CTR] had been provided to the applicants. The record available to them thus included Mr. Mohammed's original application for permanent residence; the Global Case Management System [GCMS] notes pertaining to the application, including those from the March 10, 2016 interview with Mr. Mohammed as well as Ms. Woo's notes of her analysis of the information she considered; the open-source information Ms. Woo considered in making her decision; and redacted versions of security assessments prepared in connection

with Mr. Mohammed's application for permanent residence by CSIS and the CBSA. (On October 12, 2018 Justice LeBlanc made an order under section 87 of the *IRPA* for the non-disclosure of information redacted from the CTR filed by the respondent on June 8, 2018. Previously, on December 4, 2017 Justice LeBlanc made another order under section 87 of the *IRPA* for the non-disclosure of the notes of the January 15, 2015 interview with Mr. Mohammed after they were ordered produced as a result of a motion brought by the applicants.)

[16] As noted above, Ms. Woo provided two affidavits in connection with the present proceeding. The first, affirmed on January 18, 2017, was filed by the respondent in response to the motion brought by the applicants under Rule 14(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*FCCIRP Rules*] for production of notes of the January 15, 2015 interview. (Rule 14(2) provides that where a judge "considers that documents in possession or control of the tribunal are required for the proper disposition of the application for leave, the judge may, by order, specify the documents to be produced and filed and give such other directions as the judge considers necessary to dispose of the application for leave.") In this affidavit, Ms. Woo confirmed that she was the officer who assessed Mr. Mohammed's application and determined that he did not qualify for issuance of a permanent resident visa to Canada. She provided the designation by which her GCMS notes pertaining to Mr. Mohammed's application could be identified. She also stated the following:

> It has been brought to my attention that the Applicants brought a motion requesting disclosure of the interview notes from the interview held on January 15, 2015. I confirm that the interview held on January 15, 2015 was conducted by partners and that I did not have access to these notes and hence did not consider them before making my decision.

[17] Ms. Woo's second affidavit was sworn on December 19, 2018. In it she described steps she took to confirm that Mr. Mohammed was comfortable with the interview being conducted in English. She also described the results of some internet research she conducted prior to interviewing Mr. Mohammed by searching his name in Google. She described two documents which she retrieved in this fashion and which she discussed with Mr. Mohammed in the interview. One of the articles is included in the CTR (see pages 27-28). The other was missing from both the CTR and Mr. Mohammed's file in Rome so a copy was attached as an exhibit to Ms. Woo's affidavit. (The other open source information Ms. Woo consulted in making her decision is included in the CTR (see pages 244-69).)

[18] As noted above, counsel for the applicants provided Ms. Woo with a Direction to Attend for cross-examination on her affidavits. As well as confirming the date and time of the cross-examination, the DTA stated the following:

> You are also required to bring with you and produce at the examination all documents and other material in your possession, power or control that are relevant to the application including but not limited to the following documents and things:
>
> 1. All emails, correspondence, notes, memorandums and/or documents concerning the convoking of the January 8, 2015 examination subsequently conducted on January 15, 2015 with Mr. Ayoob Haji Mohammed.
>
> 2. All emails, correspondence, notes, memorandums and/or documents you initiated, authored, received and/or reviewed concerning the report and inadmissibility assessment prepared by the Security Screening Branch, Canada [*sic*] Security Intelligence Service and the Canada Border Service Agency National Security Division respectively.
>
> 3. All emails, correspondence, notes, memorandums and/or documents you initiated, authored, received and/or reviewed in convoking the March 10, 2016 examination of Mr. Ayoob Haji Mohammed.

> 4. All documents and/or URLs of websites that you reviewed prior to the March 10, 2016 interview that you did not discuss with Mr. Ayoob Haji Mohammed.
>
> 5. All material that was before you at the time you made your decision, including all emails, correspondence, notes, memorandums and/or documents that you examined, consulted or reviewed that is not contained in the Certified Tribunal Record regardless of whether relied upon in the decision.

[19] On the day of the cross-examination, counsel for the respondent produced some additional documents pursuant to the DTA. Counsel explained that a further search had been conducted after receiving the DTA and some additional emails involving Ms. Woo had been found.

[20] The emails (which were marked as Exhibit A on the cross-examination) relate primarily to an exchange between Ms. Woo and Immigration, Refugees and Citizenship Canada National Headquarters – Case Management, in May 2016. They consist of the following:

a) An email dated May 5, 2016 from Ms. Woo to NHQ Case Management with the subject line "Potential High Profile Inadmissibility Refusal." Ms. Woo stated the following in the body of the email:

> Please see the attached refusal letter. I sought advice from Case Review when drafting it, however as it is a A34 refusal for a family class case, I thought I would send it to your desk for review as per OB 344. Please advise if any changes should be made or anything else taken into account.

The draft refusal letter attached to this email has been redacted by the respondent. As discussed below, the applicants challenge this redaction.

b) An email dated May 5, 2016 from Yerusalem Ogbazgi of NHQ Case Management replying to Ms. Woo's email from earlier that day and asking her to forward the guidance that had previously been provided to her.

c) An email dated May 6, 2016 from Ms. Woo to Yerusalem Ogbazgi forwarding an email she had received from Simon Ouellet, a Litigation Analyst with NHQ Case Management. Ms. Woo described the guidance there as "very helpful." The respondent has redacted the email from Mr. Ouellet. It is evident from the context that this is the advice Ms. Woo referred to above which she had sought from Case Review when drafting the refusal letter. As discussed below, the applicants challenge this redaction.

d) Another email dated May 6, 2016 from Ms. Woo to Yerusalem Ogbazgi forwarding an email dated November 18, 2015 from Mr. Ouellet. In this email, which has been disclosed, Mr. Ouellet provides Ms. Woo with detailed advice about how to conduct her interview with Mr. Mohammed. At the cross-examination on her affidavits, Ms. Woo stated that she could not recall whether this email came about as a result of a phone call with Mr. Ouellet or a previous email. She did recall that somehow she had communicated to Mr. Ouellet her concerns about how to provide procedural fairness in this case and this resulted in his email to her.

e) An email dated May 9, 2016 from Yerusalem Ogbazgi to Ms. Woo confirming receipt of the preceding email and stating that they would look into the matter and get back to her as soon as possible.

f) An email dated May 20, 2016 from Ms. Woo to Yerusalem Ogbazgi following up on their previous exchange of emails and stating that she would be on leave and then on training for the next few weeks.

[21] In cross-examination, Ms. Woo described the steps she had taken to collect documents and other material in response to the DTA. She explained that after receiving the DTA she reviewed the CTR and realized that, to the best of her recollection, there may have been correspondence related to the case that had not been included. She found some emails in her Outlook account but she thought there could be more. She was no longer posted to the Canadian Embassy in Rome so her access to her old emails was limited. Upon making inquiries, she learned that her emails may not have been archived properly when she was transferred from Rome to a new posting. She contacted IT at the embassy in Rome to see if they could retrieve anything but had not heard back from them. She also attempted to contact Mr. Ouellet to see whether he could retrieve any of their email correspondence. She did not hear back from him (she understood that he was no longer in the Litigation Branch and may not have access to his old emails in any event). She also made inquiries about whether there might be a central server where her emails could have been archived. She did not meet with any success on this front, either. As a result, the only emails she could provide were the ones described above.

[22] The respondent filed an affidavit on the present motion stating that further efforts were made in Rome to retrieve any additional emails but it was determined that Ms. Woo’s mailbox and backups of her emails no longer existed.

## III. ISSUES

[23] The Direction to Attend covered a wide range of items but the dispute over whether it has been complied with has crystalized around the following three issues:

a) Was Ms. Woo required to produce additional emails?

b) Was Ms. Woo required to produce Operational Bulletin 344 [OB 344]?

c) Was Ms. Woo required to produce her draft refusal letter and any advice she received in relation to it?

## IV. ANALYSIS

[24] Before addressing the specific points in dispute, it may be helpful to begin with a few general observations.

[25] The evidentiary record on an application for judicial review of an administrative decision generally is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 13 [*Bernard*]). The rationale for this rule is grounded in the respective roles of the administrative decision-maker and the reviewing court (*Access Copyright* at paras 17-18; *Bernard* at paras 17-18). The decision-maker decides the case on its merits. The reviewing court can only review the overall legality of what the decision-maker has done.

[26] Compliance with this general rule in the context of the judicial review of decisions made under the *IRPA* is facilitated by the *FCCIRP Rules*. Rule 15(1)(b) provides that an order granting leave to proceed with judicial review shall specify the time limit within which the tribunal is to provide copies of its record required under Rule 17. Rule 17 in turn provides as follows:

| | |
|---|---|
| **17** Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order: | **17** Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement : |
| **(a)** the decision or order in respect of which the application for judicial review is made and the written reasons given therefor, | **a)** la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents; |
| **(b)** all papers relevant to the matter that are in the possession or control of the tribunal, | **b)** tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif, |
| **(c)** any affidavits, or other documents filed during any such hearing, and | **c)** les affidavits et autres documents déposés lors de l'audition, |
| **(d)** a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review, | **d)** la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire, |
| and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to | dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux |

| the Registry. | copies de ces documents. |
|---|---|

[27] The general rule admits of exceptions. Sometimes less information than was before the original decision-maker will be considered by the reviewing court (as when a non-disclosure order is made under section 87 of the *IRPA*). Sometimes more information will be before the reviewing court, as when the exceptions discussed in *Access Copyright* (at para 20) and *Bernard* (at paras 19-28) are engaged. Thus, for example, it may be open to the parties to file additional evidence to address alleged breaches of procedural fairness or to establish or rectify gaps in the record. Ms. Woo's affidavits arguably fall within such recognized exceptions to the general rule. So too might the affidavits filed on behalf of the applicants (e.g. Mr. Mohammed's affidavit sworn November 15, 2018, in which he describes, among other things, his understanding of the purpose of the January 15, 2015, interview and the difficulties he had because the March 10, 2016, interview was conducted in English). I mention these affidavits simply as illustrations of how the record on judicial review can be expanded. I offer no opinion as to their ultimate admissibility. Should this issue be raised, it will be for the judge hearing the judicial review on its merits to determine.

[28] Rule 15(1) also provides that the order granting leave shall specify the time limits within which further materials, if any, including affidavits and transcripts of cross-examinations on such affidavits, shall be served and filed. Such deadlines can be extended by the Court when warranted. Needless to say, this is something that has happened several times in the present application.

[29] When a party intends to conduct an oral examination, Rule 91(1) of the *Federal Courts Rules*, SOR/98-106, requires that a Direction to Attend in Form 91 be served on the person to be examined. When the examination is a cross-examination on an affidavit, Rule 91(2)(c) provides that the DTA may direct the person to be examined to produce for inspection at the examination "all documents and other material in that person's possession, power or control that are relevant to the application or motion" (emphasis added). This is to be contrasted with an examination for discovery, with respect to which Rule 91(2)(a) provides that the person to be examined may be directed to produce for inspection at the examination "all documents and other material in the possession, power or control of the party on behalf of whom the person is being examined that are relevant to the matters in issue in the action" (emphasis added). Thus, the scope of the respective obligations to produce documents and other material is different in this important respect. In this connection, see *Merck Frosst Canada Inc v Canada (Minister of Health)*, [1997] FCJ No 1847 at paras 4-8 (FC) (aff'd [1999] FCJ No 1536 (CA)); *Simpson Strong-Tie Co v Peak Innovations Inc*, 2009 FC 392 at para 24 (aff'd 2009 FCA 266); and *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at para 138.

[30] Rule 94(1) of the *Federal Courts Rules* obliges a person who is to be examined or the party on whose behalf that person is being examined to "produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230."

[31] The DTA served on Ms. Woo followed the language of Rule 91(2)(c). It also provided a non-exhaustive list of specific items which, in the applicants' view, could fall within the general class of documents and other material that are relevant to the judicial review application. Since the examination was a cross-examination on her affidavits, the DTA properly limited Ms. Woo's duty to produce relevant documents and other material to those which were in her possession, power or control. Her duty to produce documents and other materials under Rule 94(1) was similarly limited to that which was in her possession and control.

[32] The respondent submits that the DTA served on Ms. Woo is vague and unduly broad. I disagree. It was drafted with a commendable degree of precision which would have assisted Ms. Woo in responding to it. While it did not bear the fruit which the applicants doubtless hoped it would, this was not due to any flaws in how the DTA was drafted.

[33] The duty to produce relevant, non-privileged documents and other materials established in Rule 94(1) is subject to Rule 94(2). The latter rule provides that, on motion, the Court may relieve a person to be examined or the party on whose behalf a person is being examined from the requirement to produce documents and other material requested in the direction to attend "if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or the party to produce it."

[34] With this backdrop in mind, I will now turn to the specific areas of dispute concerning Ms. Woo's compliance with the DTA.

A. *Was Ms. Woo required to produce additional emails?*

[35] This issue can be dealt with easily. I am satisfied on the evidence before me on this motion that any additional emails besides the ones Ms. Woo produced, if such there are, are not within her possession, power or control and, as a result, she is not required to produce them. Ms. Woo produced all the emails she herself had access to. Believing that there could be more emails that she could not find, she sought the assistance of others in an effort to gain access to her old emails. Those steps did not yield any additional results. Since Ms. Woo actually took these additional steps, it is not necessary for me to decide whether she was legally required to do so. Between her own efforts and those of others, I am satisfied that Ms. Woo has met her obligation to produce relevant documents and other materials that are in her possession or control. This being a cross-examination on her affidavits (as opposed to an examination for discovery), this is sufficient to satisfy Rule 94(1).

[36] I hasten to add that there is little reason to think on the record before me that there is much (if anything) that is missing. The only email Ms. Woo had any degree of confidence could be missing was one to Mr. Ouellet which initiated their exchange in November 2015. Even then, however, Ms. Woo was not sure whether this exchange began with an email or a phone call. (In this connection, it is worth noting that the subject line of Mr. Ouellet's November 18, 2015 email is "RE: follow-up on our conversation.") The DTA listed emails, correspondence, etc. touching upon a number of subjects (e.g. concerning the CSIS and CBSA Security Assessments) but no questions were asked of Ms. Woo on cross-examination to lay a foundation for the submission that she was party to or aware of any such emails. Finally, while we know that Ms. Woo was

party to an exchange of emails in May 2016 with National Headquarters, no questions were asked of her to lay a foundation for the submission that there are emails following from that exchange that are missing.

B. *Was Ms. Woo required to produce Operational Bulletin 344?*

[37] As set out above, on May 5, 2016 Ms. Woo forwarded a draft of her refusal letter to National Headquarters by email under the subject line "Potential High Profile Inadmissibility Refusal." She explained in the body of the email that she was doing so "as per OB 344" because it was a refusal for a family class case under section 34 of the *IRPA* (i.e. a refusal on security grounds). Ms. Woo asked NHQ to "advise if any changes should be made or anything else taken into account."

[38] In cross-examination, Ms. Woo stated that she could not remember what exactly OB 344 is but she believed that it stated that "if something is an A34 refusal for a family class case, it – we should give them [i.e. NHQ] a head's up."

[39] The applicants contend that OB 344 "is legally relevant because it relates to the procedure Ms. Woo followed in drafting her decision to find Mr. Mohammed inadmissible." As such, it should have been produced in response to the DTA. The respondent contends that OB 344 is irrelevant because it post-dates Ms. Woo's determination that Mr. Mohammed is inadmissible and, as such, Ms. Woo was not required to produce it.

[40] I pause to note that neither Ms. Woo nor counsel for the respondent acting on her behalf brought a motion under Rule 94(2) to be relieved of the requirement to produce OB 344 on the grounds that it is irrelevant. This, however, is not fatal to the respondent's position here. Upon the initiative of the applicants, the question of whether OB 344 must be produced has been brought before the Court for determination. In making that determination, I am guided by the fact that, had counsel for the respondent brought a motion under Rule 94(2), the respondent would have borne the burden of establishing that the document is irrelevant. Separate and apart from Rule 94(2), this is only fair. OB 344 has a clear nexus to the underlying application for judicial review because Ms. Woo took a step in the preparation of her final reasons for refusal pursuant to it. This nexus having been demonstrated, the legal burden should fall upon the respondent to establish irrelevance rather than upon the applicants (who, of course, have never seen OB 344) to establish relevance. As the Supreme Court of Canada has observed in an analogous context, it is essential not to place an unfair burden on the party seeking production of information they have never seen (cf. *R v Mills*, [1999] 3 SCR 668 at para 71; *R v McNeil*, 2009 SCC 3 at para 33). That being said, it would still be prudent for the party seeking production to make their best efforts to establish relevance if they can.

[41] I am satisfied that the respondent has established that OB 344 is irrelevant to the issues engaged in the underlying application for judicial review. I base this conclusion on the following considerations.

[42] First, there is nothing to suggest that OB 344 deals with anything other than what Ms. Woo suggested in her cross-examination (and as reflected in her email of May 5, 2016) –

namely, the need to give NHQ a heads-up before a potentially high-profile decision is released. There is nothing to suggest that OB 344 deals with the substance of a potentially high-profile decision as opposed to the procedure to follow before releasing it. Counsel for the applicants did not challenge Ms. Woo's understanding of OB 344 or explore it further in cross-examination.

[43] Second, Ms. Woo had already decided to refuse the visa on security grounds and had drafted a refusal letter when she sent the email to NHQ pursuant to OB 344 on May 5, 2016. Clearly, nothing that Ms. Woo did pursuant to OB 344 changed the decision she had already made when she sent the email because that remained her decision. While she did invite suggestions from NHQ concerning her refusal letter, there is no evidence that this invitation was pursuant to OB 344 as opposed to her own initiative. Counsel for the applicants did not explore this area in cross-examination and, in any event, there is no evidence that NHQ took Ms. Woo up on her invitation.

[44] Third, I cannot see any potential link between OB 344 and the grounds upon which the applicants are challenging Ms. Woo's decision. Counsel for the applicants suggested in submissions that OB 344 is indicative of an institutional bias against Mr. Mohammed. With respect, this is sheer speculation with no grounding in the evidence.

[45] I am therefore satisfied that OB 344 is irrelevant and was not required to be produced in response to the DTA.

C. *Was Ms. Woo required to produce her draft refusal letter and any advice she received in relation to it?*

[46] As set out above, the respondent has redacted the draft refusal letter Ms. Woo forwarded to NHQ on May 5, 2016, as well as input she received from Mr. Ouellet previously, when she was drafting the letter. The applicants maintain that these documents are relevant and should have been produced in response to the DTA. The respondent submits that such documents cannot be part of the CTR prepared in accordance with Rule 17 and, therefore, the applicants are not entitled to them pursuant to a DTA. Otherwise, the applicants would be obtaining something indirectly which they are not entitled to obtain directly. In the alternative, the respondent submits that these documents are protected by deliberative privilege.

[47] As I will explain, while I agree with the respondent that Ms. Woo was not required to produce these documents in response to the DTA, it is on a narrower basis than that advanced by the respondent. Specifically, having regard to the record before me, I am not satisfied that there is a sufficient nexus between these documents and the issues raised in the underlying application to bring it within the scope of the DTA. As a result, it is not necessary to inquire into questions of relevance or privilege.

[48] First, the draft refusal letter clearly has nothing to do with the procedural fairness and *Charter* arguments the applicants may be raising in connection with the January 15, 2015, and March 10, 2016, interviews. The same is true of the input provided to Ms. Woo by Mr. Ouellet when she was drafting the refusal letter.

[49] Further, I find that there is an insufficient nexus between, on the one hand, the draft refusal letter and Mr. Ouellet's input and, on the other hand, the applicants' challenge to the reasonableness of the decision.

[50] As is well-known, reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47 [*Dunsmuir*]). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met.

[51] In the present case, Ms. Woo had determined the outcome of the visa application by May 5, 2016, at the latest. The reasons for her decision consist of the refusal letter dated July 11, 2016, and her GCMS notes of the same date. The entirety of Ms. Woo's analysis is found in the GCMS notes. The refusal letter adds nothing of substance to them. Given this, there is no reason to think that an earlier draft of the refusal letter could have any bearing on the reasonableness of the decision. There is also no reason to think that the guidance provided by

Mr. Ouellet when Ms. Woo was drafting the refusal letter on or about May 5, 2016, could have any bearing on the reasonableness of the decision, either.

[52] The Supreme Court of Canada has held that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision" (*Dunsmuir* at para 48, quoting David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p 286). While this directive has caused considerable debate within the realm of administrative law, it has never been suggested that reasonableness review should also consider the reasons that may have been considered by the decision-maker but were ultimately not advanced in the final decision.

[53] I acknowledge that Ms. Woo records in her GCMS notes for July 11, 2016, that she drafted the decision "after input from case management." The difficulty for the applicants on the present motion is that this issue was left unexplored in the cross-examination of Ms. Woo. All we know on the record on this motion is that Mr. Ouellet provided guidance with respect to the drafting of the refusal letter at some point on or before May 5, 2016. As I have said, there is an insufficient nexus between that guidance and the issues on the application for judicial review to warrant further inquiry.

[54] Finally, without in any way commenting on the merits of the applicants' submission that Ms. Woo approached Mr. Mohammed's case with a pre-determined outcome in mind, there is an insufficient nexus in the evidence before me between that ground of review and Mr. Ouellet's

input into the drafting of the refusal letter. Critically, there was no cross-examination of Ms. Woo on this point to lay a foundation for this as a basis for further disclosure.

[55] As a result, Ms. Woo was not required to produce either the draft refusal letter attached to her email to NHQ dated May 5, 2016, or the email from Mr. Ouellet in which he provided guidance to her on the preparation of that draft refusal letter.

## V. CONCLUSION

[56] For these reasons, I find that Ms. Woo complied with the Direction to Attend dated January 2, 2019, as required by Rule 94(1) of the *Federal Courts Rules*.

[57] In correspondence filed with the Court subsequent to the hearing of this motion, the parties jointly proposed new deadlines for the filing of their respective memoranda on the merits of the judicial review application. I accepted their proposal in a Direction issued on February 11, 2019.

[58] Accordingly, apart from the adjustment I have made to the schedule for the filing of memoranda of fact and law, the applicants' motion is dismissed.

**ORDER IN IMM-4072-16**

**THIS COURT ORDERS that** the motion is dismissed.

"John Norris"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4072-16 |
| **STYLE OF CAUSE:** | AYOOB HAJI MOHAMMED ET AL v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 5, 2019 |
| **ORDER AND REASONS:** | NORRIS J. |
| **DATED:** | FEBRUARY 15, 2019 |

**APPEARANCES:**

| | |
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| Gregory George<br>Bradley Bechard | FOR THE RESPONDENT |

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |