Federal Court  Cour fédérale

Date: 20200428

Docket: IMM-5454-18

Citation: 2020 FC 559

[REVISED ENGLISH TRANSLATION]

Ottawa, Ontario, April 28, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

SMAIL KHANICHE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Preliminary remarks

[1] I would like to begin by pointing out that this case was heard by conference call at the request of the parties, in accordance with the protocol established by this Court in the context of the COVID-19 pandemic (*Updated Practice Direction and Order (COVID-19) and FAQ* dated April 4, 2020).

II. Overview

[2] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] In this case, the applicant applied to enter Canada to visit his Canadian brother for a period of one month. According to the applicant, he was questioned, intimidated and insulted by a Canadian immigration officer during the process of entering Canada. The same officer allegedly confiscated his personal belongings and forcibly boarded him on a return flight with the assistance of another officer and the police.

[4] The respondent submits that the application for judicial review must be dismissed since the present controversy is moot; moreover, there is no decision which may be judicially reviewed.

[5] According to the respondent, the applicant made his own decision to withdraw his application for entry into Canada and leave, a purely voluntary decision that is not subject to judicial review. On the other hand, the applicant denies having voluntarily withdrawn his application to enter Canada and argues that these facts show that the Canadian immigration officer made a disguised decision against him, refusing him entry into Canada in an unfair and unreasonable manner.

[6] It is quite obvious that a decision was in fact made. The Canadian immigration officer made a disguised decision to refuse the applicant entry, which is tainted by a serious breach of procedural fairness.

[7] The mere fact that no formal decision was made cannot protect the officer's disguised decision from judicial review. To find otherwise would undermine the rule of law by creating areas of government activity free from the requirements of procedural fairness and would have the effect of encouraging non-compliance with formal procedures.

[8] For the following reasons, the application for judicial review is allowed.

III. Facts

[9] The applicant is an Algerian citizen.

[10] On May 25, 2017, he applied for a visa to enter Canada. He was issued a multiple entry visa on June 5, 2017. This visa is valid until June 9, 2025.

[11] Following the issuance of this visa, the applicant came to Canada on January 16, 2018, to visit his brother, who is a Canadian citizen living in Montréal. The Canadian immigration officer admitted the applicant to Canada, but only after the applicant signed a visitor record allowing him to be in Canada until March 3, 2018, a period of time set in accordance with subsection 183(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002 227 [IRPR].

[12] The applicant left Canada and returned to Algeria on the date indicated on his visitor record.

[13] The applicant decided to return to Canada a few months later.

[14] On November 2, 2018, the applicant arrived at Montréal's Pierre Elliott Trudeau International Airport on a round-trip ticket, with a return date of November 30, 2018.

[15] As was the case for his stay in January 2018, the applicant wanted to travel to Canada for the purpose of sightseeing with his brother, who worked in Fort McMurray, Alberta, but had a residence in Montréal, where he resided during his time off.

[16] When he appeared at the immigration examination, the applicant contends that he was aggressively questioned by an immigration officer about his employment and financial status, as well as that of his brother. However, the Canadian immigration officer refused the applicant's offer to call his brother, who was waiting for him outside the airport.

[17] The officer confiscated the applicant's cell phone and compelled the applicant to reveal the device's password. The officer examined the personal contents of the phone. The officer is also alleged to have forcibly removed the applicant's passport, airline ticket and other identification. The Canadian immigration officer did not immediately return these personal effects to the applicant.

[18] Then the officer ordered him to be quiet and called the police. According to the applicant, the officer yelled, [TRANSLATION] ““[S]ince you are doing pretty well in your country, why did you come here to Canada”” and [TRANSLATION] ““tonight you are going back home””.

[19] The officer then attempted to force the applicant to sign a voluntary departure form (“Autorisation de quitter le Canada” [Allowed to Leave Canada form] coded “IMM1282 (06-2017)F”) without giving the applicant an opportunity to read its contents; the applicant refused. The officer continued to yell at the applicant and attempted to physically force him to sign the form, but the applicant continued to refuse to sign it. Finally, the officer signed the form, but the applicant did not.

[20] The officer then led the applicant to the aircraft on which he had arrived in Canada.

[21] According to the applicant, the officer boarded him on the flight and told him to [TRANSLATION] ““get the hell back to your country””. The applicant’s identification and telephone number were given to the captain by another immigration officer.

[22] The applicant arrived back in Algeria on November 3, 2018.

[23] According to Global Case Management System [GCMS] notes of November 2, 2018, the officer concluded that the applicant had not satisfied him that he was a bona fide visitor and would leave Canada at the end of the authorized period. The officer had noted several factors in support of this decision in GCMS notes:

> [TRANSLATION]
>
> ~SUBJECT IS NOT A CANADIAN CITIZEN -SUBJECT IS NOT A PERMANENT RESIDENT OF CANADA -SUBJECT IS A CITIZEN OF ALGERIA -SUBJECT REQUESTS ADMISSION FOR 999 DAYS, HAS NO HOTEL RESERVATION, MENTIONS THAT HE IS VISITING HIS BROTHER FOR 1 MONTH WHO LIVES IN ALBERTA. MENTIONS THAT HE IS GOING TO STAY IN QUEBEC FOR THE MONTH AND THAT HIS BROTHER IS COMING HERE FOR 1 WEEK ONLY. SUBJECT BOUGHT HIS TICKET 2 DAYS AGO IN CASH, WHICH IS THE EQUIVALENT OF ONE MONTH'S SALARY. SUBJECT MENTIONS THAT HE WANTS TO VISIT THE LANDSCAPE AND CANADA BUT DOES NOT KNOW WHAT HE WANTS TO SEE OR WHAT HE IS GOING TO VISIT. SUBJECT MENTIONS THAT HE HAS A SALARY OF $500/MONTH BUT THAT HE CANNOT PROVE THE FINANCIAL MEANS TO TRAVEL. SUBJECT DOES NOT HAVE MUCH CONNECTION WITH HIS COUNTRY. SUBJECT'S LUGGAGE IS NOT REPRESENTATIVE OF THE DURATION OF THE TRIP. -SUBJECT FAILED TO SATISFY THE OFFICER THAT HE WAS A BONA FIDE TRAVELLER AND WOULD LEAVE AT THE END OF THE AUTHORIZED PERIOD.

[24] In addition, GCMS notes indicate that the applicant [TRANSLATION] "[f]ailed" his assessment at the screening checkpoint and was [TRANSLATION] "allowed to leave Canada".

[25] These notes make no mention of the applicant's return flight itinerary (Algiers–Montréal on November 2, 2018 and Montréal–Algiers on November 30, 2018), the fact that his brother has a residence in Montréal and has a job that allows him to travel from Montréal to Alberta, or the applicant's travel history.

IV. Preliminary issues

A. *Amendment to style of cause*

[26] This application for judicial review was originally brought against the Minister of Citizenship and Immigration. The respondent submits that this designation is problematic, since it is of the opinion that the style of cause of the present case should be amended to designate the Minister of Public Safety and Emergency Preparedness as respondent (citing the *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10; section 2 of the *Ministerial Responsibilities under the Immigration and Refugee Protection Act Order*, SI/2015-52). During the hearing, the applicant conceded the respondent's argument on this point.

[27] I agree with the parties that the style of cause of this case should be amended to refer to the Minister of Public Safety and Emergency Preparedness as a respondent (rule 303(1) of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*]; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 at paras 18–21; *Bajraktari v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1136 at paras 8–9).

B. *Applicant's affidavit*

[28] The applicant, being in Algeria, attached to the record an affidavit signed and solemnly affirmed by him in Algiers on August 8, 2019, before an Algerian lawyer in support of his application for leave and for judicial review.

[29] Affidavits received outside Canada by a judicial officer of a foreign state authorized under domestic law to receive affidavits are as valid and effective and have the same force and effect for all purposes as if they had been taken or received in Canada by a person authorized to take or receive affidavits in Canada that are valid or effective under subsection 52(e) and section

53 of the *Canada Evidence Act*, RSC 1985, c C-5 [Evidence Act]; sections 53 and 54 of the *Federal Courts Act*, RSC 1985, c F-7).

[30] This Court has some residual discretion to accept affidavits sworn abroad where evidence of compliance with foreign law in receiving the affidavit is not fully established (*A Paschos K. Katsikopoulos S.A. v Polar (The)*, 2003 FCT 584 (CanLII), 2003 FC 584 at para 10).

[31] In the absence of any indication that the affidavit was not duly sworn and signed in accordance with Algerian law and considering the absence of opposition from the respondent, I find that, on a balance of probabilities, the affidavit was solemnly affirmed by an authorized official within the meaning of paragraph 52(e) and section 53 of the Evidence Act (*R v Jahanrakhshan*, 2013 BCCA 128 (CanLII) at para 19; *Tang v The Queen*, 2017 TCC 168 (CanLII) at paras 30–33; *R v Ho and Coral Sea*, 2006 BCPC 112 (CanLII) at paras 10–11, 20–21).

[32] This affidavit therefore benefits from the presumption of authenticity without the need to prove the signature or status of the official (section 53 and subsection 54(2) of the Evidence Act).

[33] While the respondent does not argue that the affidavit should be struck out in its entirety, it submits that the applicant's affidavit in support of this application is largely argumentative and asks this Court to disregard the paragraphs of the affidavit that are purely argumentative (*Ray v Canada*, 2003 FCA 317 at paras 12–14; *Duyvenbode v Canada (Attorney General)*, 2009 FCA

120 at paras 2–3 [*Duyvenbode*]; *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18 [*Quadrini*]). The respondent does not specifically identify those paragraphs.

[34] Before me, the applicant conceded that several passages in the affidavit are argumentative, but considers that it contains important information for the purposes of these proceedings, given the absence of an account of the interactions between the officer and the applicant (*Nazir v Canada (Citizenship and Immigration)*, 2010 FC 553 at para 14 [*Nazir*]; *Association des universités et collèges du Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20 [*Access Copyright*]).

[35] The first part of the applicant's affidavit is essentially a statement of the facts that occurred between his first visa application in May 2017 and after he left Canada in November 2018. This part of the affidavit is not problematic, as it sets out facts that are within the personal knowledge of the applicant, including the behaviour of Canadian immigration officers when the applicant arrived at the Montréal airport and the nature of his visits to Canada.

[36] In contrast, the second part of the affidavit (entitled [TRANSLATION] "My Comments on the Officer's Notes") consists, in part, of a series of argumentative and polemical observations on the GCMS notes entered by the officer. Much of this portion of the affidavit is more suitable for written submissions (*Krah v Canada (Citizenship and Immigration)*, 2019 FC 1506 at para 42; rule 81 of the *Federal Courts Rules*).

[37] In such a case, the classical measure is to strike out portions of submissions that are not based on the personal knowledge of the affiant (*Duyvenbode* at paras 3–4; *Quadrini* at paras 18–19). However, I consider that it is possible to separate the argumentative content from the facts based on the personal knowledge of the applicant in order to fill the absence of evidence regarding the officer's words and behaviour towards the applicant (*Nazir* at para 14; *Access Copyright* at para 20).

[38] Accordingly, I give no weight to the argumentative sentences in paragraphs 25 to 31 of the affidavit, namely: the third sentence of the 24th paragraph, the second, third and fourth sentences of the 25th paragraph, the full 26th paragraph, the first and second sentences of the 28th paragraph, the first and second sentences of the 29th paragraph, the third sentence of the 30th paragraph and the second sentence of the 31st paragraph.

C. *Exhibit P-1*

[39] In the present application for leave and for judicial review, the applicant has attached to the record, according to his affidavit, [TRANSLATION] "a number of documents" (Exhibit P-1) which were [TRANSLATION] "filed" "in support of [his] application" for entry into Canada.

[40] Exhibit P-1 consists of a series of documents (photocopies of identification, a letter of invitation for a tourist visit in 2017, income tax returns of the applicant's brother, a family civil status form, proof of employment and pay slips) that are not part of the certified tribunal record.

[41] The respondent submits that the entire Exhibit P-1 should not be considered by this Court because the decision-maker at the port of entry did not have them available to him (*Goyal v Canada (Citizenship and Immigration)*, 2019 FC 433 at para 24).

[42] I agree with this argument.

[43] In a recent judgment, *Jama v Canada (Attorney General)*, 2020 FC 308 [*Jama*], Justice LeBlanc summarized the law applicable to the admissibility of evidence in judicial review proceedings:

> [2] As a general rule, judicial review focusses on the impugned decision itself and is based on the material that was before the administrative decision-maker. In other words, the record before the Court on judicial review is normally restricted to the evidentiary record before the decision-maker. Therefore, evidence that was not before the decision-maker and that goes to the merits of the matter before it is inadmissible on judicial review (*Assn of Universities & Colleges v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Access Copyright*] at para 19; *Morton v Canada (Minister of Fisheries and Oceans)*, 2015 FC 575 at para 36; *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8; *Tsleil-Waututh Nation v Canada (Attorney General*), 2017 FCA 128 85-87 and 97).
>
> [3] This jurisprudential rule reflects "the different roles played by judicial review courts and the administrative decision-makers they review" (*Access Copyright* at para 14), a difference which has been recently reemphasized by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 13-14 and 24-28. As the Federal Court of Appeal stated in *Access Copyright*, because of this demarcation in roles between the reviewing court and the administrative decision-maker, the reviewing court "cannot allow itself to become a forum for fact-finding on the merits of the matter" (*Access Copyright* at para 19).
>
> [4] There are three recognized exceptions to this general rule. Hence, evidence that (i) provides general background in circumstances where that information might assist the reviewing court in understanding the issues relevant to the judicial review;

> (ii) supports an argument going to procedural fairness; or (iii) highlights the complete absence of evidence before the decision-maker when it made a particular finding, may be received by the reviewing court (*Access Copyright* at para 20).
>
> [5] However, these exceptions are only available where the receipt of evidence by the reviewing court "is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker […]" (*Access Copyright* at para 20). With respect to the general background exception in particular, the Federal Court of Appeal has cautioned against receiving evidence that goes "further" and is "relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider" (*Access Copyright* at para 20).

[44] In my view, Exhibit P-1 does not fall within the recognized exceptions to this rule of general application, as it contains contextual information which is not essential to the resolution of the issues in dispute and which can (for the most part) be found elsewhere in the record (*Access Copyright* at para 20; *Jama* at paras 4–5; *Nazir* at para 14; *Obozuwa v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1007 at para 15).

[45] For these reasons, I will pay no attention to Exhibit P-1 in the context of these proceedings.

V. Issues

[46] Four issues arise in this case:

A. Was there a "decision" made against the applicant?

B. Is this case moot?

C. Was the officer's decision tainted by a breach of procedural fairness?

D. Was the officer's decision reasonable?

[47] However, as a result of my conclusions with respect to the first three issues, it is not necessary to discuss the last one.

VI. Standard of review

[48] The third issue (issue C) concerns an alleged breach of procedural fairness and is reviewable on a standard of correctness (*Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 at paras 37–56; *Canada (Citizenship and Immigration) v Khosa*, 2009 CSC 12, [2009] 1 SCR 339 at para 43; *Kyari v Canada (Citizenship and Immigration)*, 2020 FC 159 at para 23).

VII. Discussion

A. *Was there a decision made against the applicant?*

[49] The exact nature of the events at issue is the subject of dispute and controversy between the parties.

[50] According to the applicant, the event at issue is the disguised refusal of his application for entry by the officer, which constitutes a “decision”.

[51] On the other hand, the respondent insists that there is no “decision” that is subject to judicial review because no inadmissibility was found and no removal order was made against the applicant (section 44 of IRPA). The respondent submits that the applicant simply boarded the

plane voluntarily without signing the Allowed to Leave Canada form; no formal “decision” as to the applicant’s admissibility was made.

[52] I completely reject the respondent’s argument.

[53] In my view, the definition of “decision” put forward by the respondent is too formalistic and is based on an erroneous view of the facts in this case.

[54] Although no formal inadmissibility was recorded and no formal removal order was issued against the applicant, it is clear that a decision was made regarding the applicant’s admissibility.

[55] In the present case, this was a disguised decision to deny entry.

[56] First of all, I note that the officer took steps before making his decision. The officer questioned the applicant about his economic situation and examined several of his personal effects.

[57] After these steps, the officer clearly concluded that the applicant was not admissible to Canada. The officer’s disguised decision is obvious for three reasons.

[58] First, the Canadian immigration officer told the applicant that he was inadmissible and, with the assistance of another officer, forcibly boarded the applicant onto the plane with his

documents and telephone, which had been confiscated by the officer. The applicant arrived in Algeria on November 3, 2018.

[59] The fact that the applicant was taken to the plane to leave Canada in these circumstances means that the officer's decision was final.

[60] Moreover, this decision had an adverse effect on the applicant (*Laurentian Pilotage Authority v Corporation des pilotes du Saint-Laurent Central Inc*, 2019 FCA 83 at para 31; *Sganos v Canada (Attorney General)*, 2018 FCA 84 at para 6; *a contrario Air Canada v Toronto Port Authority et al*, 2011 FCA 347, [2013] 3 FCR 605 at para 29; *Democracy Watch v Canada (Attorney General)*, 2018 FCA 194 at para 29).

[61] Second, the officer attempted to force the applicant (several times) to sign a form entitled "Autorisation de quitter le Canada" (form IMM1282 (06-2017)F). The fact that the form was not signed by the applicant does not change the fact that the officer found the applicant inadmissible. It appears from the officer's insistence that the applicant sign the IMM1282 form that the officer had already implicitly made the decision to exclude the applicant from admission to Canada.

[62] Third, the GCMS notes for the applicant (under the heading [TRANSLATION] "Inadmissibility to Canada") indicate that the officer concluded that the applicant was inadmissible to Canada because the [TRANSLATION] "SUBJECT [the applicant] FAILED TO SATISFY THE OFFICER THAT HE WAS A BONA FIDE TRAVELLER AND THAT HE WOULD LEAVE AT THE END OF THE AUTHORIZED PERIOD".

[63] Therefore, I find it difficult to see how the forcible removal of the applicant, in addition to a clear finding of the applicant's inadmissibility, cannot constitute a decision within the meaning of section 18.1 of the *Federal Courts Act*.

[64] An overly formalistic view of what constitutes a "decision" would undermine the rule of law in this case since it would create areas of government activity that would be immune from judicial review and would encourage decision-makers to dispense with formal procedures in favour of disguised decisions (*Saulnier v Commission de police du Québec*, 1975 CanLII 215 (SCC), [1976] 1 SCR 572; *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121; *Vavilov* at para 2).

B. *Is this case moot?*

[65] The respondent submits that the present controversy is purely theoretical since any judgment this Court might render on the merits would be superfluous and would have no practical effect on the rights of the parties (citing *Singh v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 403 at paras 12–13 [*Singh*]).

[66] I reject the respondent's premise.

[67] In *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at paragraphs 29 to 42, the Supreme Court identified three factors that a judge must consider in deciding whether or not to exercise his or her discretion to decide the merits of an action or application for judicial review that he or she considers moot: (1) the existence of adversarial

debate between the parties; (2) the need to conserve judicial resources; and (3) the need for judges not to encroach on legislative functions.

[68] Assuming that this case is moot, all of the criteria established in the *Borowski* case law militate in favour of the exercise of discretion to hear this case.

[69] That said, I am of the view that this case is not moot; the applicant is not seeking judicial review of the voluntary withdrawal of an application for admissibility (see *Driessen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1480 at para 10). Rather, it is an application for judicial review of a decision that has adverse effects on the applicant that are not of the applicant's own making (*a contrario Solis Perez v Canada (Citizenship and Immigration)*, 2009 FCA 171 at paras 5–6).

[70] In particular, the decision was made against the applicant, and especially the GCMS notes indicating that he [TRANSLATION] "failed" his assessment and was [TRANSLATION] "[a]llowed to leave" will certainly have an impact on his future ability to enter Canada. The applicant is seeking the reversal of a negative decision that may, in the future, result in the rejection of a future application to enter to Canada (*Mandivenga v Canada (Citizenship and Immigration)*, 2019 FC 1631 at paras 13–14). The legal basis for these findings is the real controversy in these proceedings (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at para 38).

[71] The *Singh* case law is of no use to the respondent. In that case, the application for judicial review concerned a decision by a law enforcement officer rejecting the applicant's request for an administrative stay seeking a deferral of his removal to India. Justice Martineau found that the application was moot because the applicant "was not removed from Canada" and there was no date set for his removal from Canada (*Singh* at para 12).

[72] In contrast, the case at bar involves a person who was forcibly removed from Canada by a government official.

[73] For these reasons, I find that the officer's decision is subject to judicial review.

C. *Was the officer's decision tainted by a breach of procedural fairness?*

[74] The applicant submits that his right to procedural fairness was violated by the dismissive behaviour of the officer, who ordered his removal from Canada after attempting to force the applicant to sign the Allowed to Leave Canada form. According to the applicant, these attempts were based on a misinterpretation of subsection 42(1) of the IRPR and a lack of understanding of the nature of the administrative process underlying the Allowed to Leave Canada form.

[75] Section 42 of the IRPR reads as follows:

Withdrawing application	**Retrait de la demande**
42 (1) Subject to subsection (2), an officer who examines a foreign national who is seeking to enter Canada and who has indicated that they want to withdraw their application to	42 (1) Sous réserve du paragraphe (2), l'agent qui effectue le contrôle d'un étranger cherchant à entrer au Canada et à qui ce dernier fait savoir qu'il désire retirer sa

enter Canada shall allow the foreign national to withdraw their application and leave Canada.	demande d'entrée lui permet de la retirer et de quitter le Canada.
Exception — report	**Exception — rapport**
(2) If a report is being prepared or has been prepared under subsection 44(1) of the Act in respect of a foreign national who indicates that they want to withdraw their application to enter Canada, the officer shall not allow the foreign national to withdraw their application or leave Canada unless the Minister decides either not to make a removal order or not to refer the report to the Immigration Division for an admissibility hearing.	(2) Si un rapport est en cours d'établissement ou a été établi en application du paragraphe 44(1) de la Loi à l'égard de l'étranger qui fait savoir qu'il désire retirer sa demande d'entrée au Canada, l'agent ne lui permet ni de la retirer ni de quitter le Canada, sauf si le ministre décide de ne pas prendre de mesure de renvoi ou de ne pas déférer l'affaire à la Section de l'immigration pour enquête.
Obligation to confirm departure	**Obligation de confirmer son départ**
(3) A foreign national who is allowed to withdraw their application to enter Canada must appear without delay before an officer at a port of entry to confirm their departure from Canada.	(3) L'étranger auquel la permission de retirer sa demande d'entrée au Canada a été accordée doit comparaître sans délai devant un agent à un point d'entrée pour confirmer son départ du Canada.

[76] The form entitled "Autorisation de quitter le Canada" (form IMM1282 (06-2017)) in the record reads as follows:

> [TRANSLATION]
>
> . . .
>
> Pursuant to paragraph 42(1) of the *Immigration and Refugee Protection Regulations*, I am allowing you to withdraw your application to enter and to leave Canada without delay.

> The information you provided on this form is collected under the authority of the *Immigration and Refugee Protection Regulations* for the purpose of allowing you to leave Canada. This information will be stored in Personal Information Bank number CIC PPU 001, Enforcement Data System, and you have the right of access to it and to its protection under the provisions of the *Privacy Act*.
>
> Dated at P.E. TRUDEAU INTERNATIONAL AIRPORT on 2018/11/02 (yyyy/mm/dd)
>
> [Officer's signature]
>
> Signature of officer
>
> I hereby voluntarily withdraw my application to enter Canada and agree to leave Canada without delay.
>
> [* refusal to sign]
>
> Signature of the person concerned

[77] As the applicant points out, the withdrawal of the application is a procedure that depends on the free and informed will of the applicant himself. The choice to withdraw the application cannot be the result of coercion by a Canadian immigration officer.

[78] It is clear from the wording of subsection 42(1) itself that the intention of the applicant is necessary for the withdrawal of an application for admissibility: "an officer who examines a foreign national who is seeking to enter Canada and who has indicated that they want to withdraw their application to enter Canada shall allow the foreign national to withdraw their application and leave Canada" [emphasis added]. The choice rests with the applicant and not with the officer.

[79] The voluntary nature of the authorization is confirmed by the instructions on the Allowed to Leave Canada form: [TRANSLATION] "I hereby voluntarily withdraw my application to enter Canada and agree to leave Canada without delay" [emphasis added].

[80] The officer's unilateral findings constitute a breach of procedural fairness in a manner reminiscent of *Reyes Garcia v Canada (Citizenship and Immigration)*, 2020 FC 66 [Reyes Garcia]. In that case, Justice Ahmed found that the officer had breached procedural fairness by giving himself, contrary to the law, the discretion to make his own decision on the issue of the applicant's admissibility, and by his reckless disregard for the administrative aspects of the report referred to in subsection 44(1) of the IRPA (*Reyes Garcia* at paras 29–40).

[81] In this case, the officer skirted the process of withdrawing the application in order to obscure a decision of inadmissibility to make a removal order that was in fact made unilaterally by the officer. He did not even prepare the report required by subsection 44(1) of IRPA (*Reyes Garcia* at paras 14, 34; see also *Wong v Canada (Citizenship and Immigration)*, 2011 FC 971 at para 7; *Correia v Canada (Minister of Citizenship and Immigration)*, 2004 FC 782 at para 20; *Khan v (Public Safety and Emergency Preparedness)*, 2019 FC 1029 at para 31).

[82] Failure to prepare a report under section 44 of the IRPA deprives the applicant of the right of review by the Minister's delegate (subsection 44(1) of the IRPA). Once prepared, the Minister's delegate makes a decision on the merits of the report (subsection 44(2) of IRPA). Before me, the respondent stated that the decision of the Minister's delegate on the merits of the report is made on the spot and in an expeditious manner.

[83] What we have here is simply a disregard for the voluntary nature of the application withdrawal process and the applicant's decision-making autonomy.

[84] The officer's actions fall far below the standards of conduct applicable to Canadian government officials and constitute a clear breach of procedural fairness. No one deserves to be treated with such contempt at an immigration examination.

D. *GCMS notes*

[85] As I noted earlier, the GCMS notes indicate that the applicant [TRANSLATION] "failed" his assessment at the checkpoint and was "allowed to leave Canada".

[86] These notes are based on an erroneous premise and give the impression that the applicant had in fact asked to leave voluntarily. I find that the inclusion of these notes constitutes a gratuitous act performed in the absence of any apparent authority. They should therefore be deemed unwritten and null and void.

VIII. Conclusion

[87] For these reasons, the application for judicial review is allowed.

[88] In his memorandum, the applicant asks for costs in this case for the abusive treatment at the hands of the officer and the adverse effects of his decision.

[89] The respondent submits that there is no basis for costs in this case in light of the general prohibition against awarding costs, codified in section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 (*Green v Canada (Citizenship and Immigration)*, 2016 FC 698 [*Green*]).

[90] I reject the respondent's argument.

[91] In my view, the actions of the officer who is the subject of this application are abusive and demonstrate a disregard for procedural fairness and the law. The law is well established: the abusive conduct of an immigration officer is one of the "special reasons" that may justify an award of costs under section 22 of the *Federal Courts Immigration and Refugee Protection Rules* (*Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at para 7; *Manivannan v Canada (Citizenship and Immigration)*, 2008 FC 1392 at para 51; *Paul v Canada (Citizenship and Immigration)*, 2010 FC 1075 at para 14; *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262 at para 26).

[92] The officer's conduct is far more serious and prejudicial than a mere prolongation of a judicial review proceeding (*Green* at para 41) and departs significantly from the usual administrative failures in such a context (*Ndererehe v Canada (Citizenship and Immigration)*, 2007 FC 880 at para 29).

[93] For these reasons, I exercise my discretion to award costs of $500 to the applicant for the officer's conduct (section 400 of the *Federal Courts Rules*; *Specialized Bicycle Components Canada, Inc v Groupe Procycle Inc*, 2007 FCA 135 (CanLII), [2007] 4 FCR 694 at para 11).

JUDGMENT in IMM-5454-18

THIS COURT'S JUDGMENT is as follows**:**

1. The style of cause in this matter is amended so as to designate the Minister of Public Safety and Emergency Preparedness as respondent.
2. The application for judicial review is allowed, and the decision resulting from the GCMS notes with respect to the applicant, issued by the Canadian immigration officer on November 2, 2018, is set aside.
3. The GCMS notes indicating that the applicant [TRANSLATION] "Failed" his assessment at the screening checkpoint and was [TRANSLATION] "Allowed to Leave" Canada are null and void.
4. The applicant is awarded $500 in costs.
5. No question is certified for consideration by the Federal Court of Appeal.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5454-18
STYLE OF CAUSE:	SMAIL KHANICHE v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MATTER HEARD BY TELECONFERENCE AT MONTRÉAL, QUEBEC
DATE OF HEARING:	APRIL 16, 2020
JUDGMENT AND REASONS:	PAMEL J.
DATED:	APRIL 28, 2020

APPEARANCES:

Annabel E. Busbridge	FOR THE APPLICANT
Patricial Nobl	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bertrand, Deslauriers Avocats Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT