Federal Court  Cour fédérale

**Date: 20200624**

**Docket: CONF-4-20**

**Citation: 2020 FC 864**

**Ottawa, Ontario, June 24, 2020**

**PRESENT: The Associate Chief Justice Gagné**

**BETWEEN:**

[redacted]

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**PUBLIC ORDER AND REASONS**

## I. Overview

[1] The Applicant is a citizen of Kazakhstan who challenges the decision of a visa officer to cancel his Canadian multiple-entry visa on the basis that the purpose of his visit "was in doubt".

[2] In the course of the Applicant's application for judicial review, the Respondent applied for an order pursuant to section 87 of the *Immigration and Refugee Protection Act* [*IRPA*], for

the non-disclosure of information or other evidence which is redacted from the Certified Tribunal Record [CTR]. Information in this context is defined in section 76 of the *IRPA*.

[3] The information that the Respondent seeks to protect provides the reason for the cancellation of the visa; it includes the Global Case Management System [GCMS] notes from the visa officer, as well as the [redacted]

[4] By order dated December 6, 2019, the Court appointed Mr. Lorne Waldman as special advocate to represent the interests of the Applicant and assist the Court in the determination and consideration of whether the redacted information was properly excluded pursuant to section 87 of *IRPA*.

[5] The Respondent filed the visa officer's confidential affidavit, the Applicant filed an additional affidavit, sworn January 16, 2020, specifically addressing the Respondent's motion, and counsel for the Respondent and the special advocate filed written submissions. The Court then held an *ex parte in Camera* hearing on January 28, 2020

## II. The Facts

### A. *Information provided by the Applicant*

[6] In early 2017, the Applicant, his wife and daughter were all granted ten year multiple entry visas. They used those visas to come to Canada for a short period in April 2017 to visit the applicant's stepdaughter, who lives and studies in Canada.

[7] Shortly after returning to Kazakhstan, the couple separated, and they eventually divorced in September 2017. In his affidavit, the Applicant states that he believes his wife traveled to Canada in May 2018, and that she brought their daughter without his permission. He further states that he has had no contact with them since then, so he applied to the family Court of his country for custodial rights over his daughter. He indicates that he obtained a default judgment in July 2018 granting him and his wife joint custody over their minor daughter.

[8] After receiving that judgement, the Applicant then planned to travel to Canada to visit his stepdaughter, search for his minor daughter, and see if he could enforce the family Court ruling.

[9] He booked a flight to Canada through London and while checking in at Heathrow airport in February 2019, he was told that his Canadian visa had been cancelled in July 2018. He filed for judicial review of that decision and subsequently learned that his visa was cancelled because there were reasons to believe that the visa was not going to be used for the intended purpose, namely tourism.

[10] When the Minister filed its Certified Tribunal Record [CTR], all of the information that revealed the reasons why the visa was cancelled had been redacted and, pursuant to section 87 of *IRPA*, the Minister filed the within motion for non-disclosure of the redacted information on the

basis that its disclosure would be injurious to national security or endanger the safety of any person.

[11] As noted above, the Court appointed a special advocate and held an *ex parte in camera* hearing on the Minister's motion on January 28, 2020. In advance of that hearing, the Applicant filed a further affidavit in opposition to the motion whereby he confirmed having been informed that the CTR had apparently been redacted on the basis of national security or because he could be a danger to the safety of a person in Canada. He also stated that he decided to include information about his "relationship with [his] ex-wife […] in case she has said something to the Canadian immigration officials about [him] and [their] relationship in the past. Indeed, there is precedent for her doing this with the relevant authorities". He continued to explain that they had a difficult past together and that she had made false claims about him that made their way into the public discourse. He further claimed that at the time the couple obtained a divorce in September 2017, his ex-wife had filed a police complaint to which there was no factual basis, and took their minor child to a crisis center. He notes that he responded with a private complaint against his ex-wife, for slander against him and his reputation. While the Court concluded that the evidence did not show direct intent of slandering and that "[i]t is not dissemination of willfully false information when a person applies to state bodies with an application wherein this or that information is indicated", it made that following findings:

- The Applicant's ex-wife had made a police complaint for bodily harm and threat and after having had access to a crisis center as a result of her complaint, she withdrew it;
- She made allegations on the Internet describing "her life, the situation she faced after divorce, a lack of access to her home and family assets acquired during marriage and her fear of her former spouse." This information was subsequently deleted from the Internet;

- Witnesses testified that there was no restriction on her access to the family home and that the Applicant was always polite with her and provided her with financial assistance;

- The Applicant's ex-wife pleaded not guilty and stated that she had applied to the police and published on the Internet in order to protect her rights and receive help, "while being in a difficult critical situation in connection with divorce and division of property, while she had no intention to slander [the Applicant]. Information indicated in her application was her opinion of the situation which she had during and after dissolution of the marriage."

[12] The Applicant concluded by stating that shortly thereafter, he got into an argument with his ex-wife over access to their minor child, which he believes to be why she left Kazakhstan with their minor child in May 2018, and that those are the reasons he sought a Court order confirming their joint custody over their minor child.

B. *The information the Minister seeks to protect*

[13] [redacted]

[14] As a result [redacted] a communication was sent to the Canadian Embassy in Moscow indicating that it had information the Applicant was inadmissible because the visa was not going to be used for the intended purpose, namely tourism. A visa officer in Moscow then cancelled the Applicant's visa without advising him.

[15] The visa officer had before him [redacted]

[16] Accordingly, the CTR contains [redacted] and the information relating to [redacted] in the GCMS notes are also redacted.

III. Issues

[17] The Minister's motion raises the following issues:

A. *Does section 87 of IRPA apply to the evidence that the Minister seeks to protect in this Application for judicial review?*

B. *If so, has the Minister met his burden of proving that if disclosed, the information the Minister seeks to protect would be injurious to national security or to the security of any person?*

IV. Analysis

A. *Does section 87 of IRPA apply to the evidence that the Minister seeks to protect in this Application for judicial review?*

[18] The Minister takes the position that section 87 of *IRPA* applies to any kind of information of a confidential nature, whether or not it is related to national security or any of the grounds for inadmissibility found in sections 34 to 37 of the *IRPA*. On the other hand, the special advocate takes the position that the information needs to be so related in order to fall within the scope of section 87.

[19] The conflict between the positions is, at its core, a matter of statutory interpretation. In resolving it, the Court has to read the words of Division 9 of *IRPA* in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the act, the object of the

act, and the intention of Parliament (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42; E.A. Driedger, *Construction of Statutes*, (2nd) ed. 1983, at p. 87). Following that approach leads me to agree with the special advocate on this issue.

[20] Division 9 of the *IRPA* is entitled *Certificates and Protection of Information* and it provides the following definition of the term *Information*:

> **Information** means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the Government of a foreign state, an international organization of states or an institution of such a government or international organisation.

[21] Division 9 can be subdivided in the following manner:

- Sections 77 to 85.6 deal with security certificate that can be issued by the Minister of Citizenship and Immigration on grounds of security, violating human or international rights, or serious criminality or organized criminality (as covered by sections 34 to 37 of *IRPA*). They provide a comprehensive scheme of appointing a special advocate to represent the interests of the permanent resident or foreign national; for the arrest, the detention and the release of the interested person; for the review by the Court of the reasonableness of the certificate; and, for the protection of information (as defined in section 76) or other evidence supporting the certificate if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

- Section 86 deals with the protection of information (as defined in section 76) or other evidence during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division; it also deals with special rules applicable to the judicial review and appeal of a decision made by the Immigration Appeal Division requiring the disclosure of such information or other evidence that would be injurious to national security or endanger the safety of any person (for an example of these special rules, the application for judicial review is made without leave);

> - Section 87 deals with the protection of information (as defined in section 76) or other evidence during a judicial review conducted by this Court; it also deals with special rules applicable to the appeal of a decision made by the Court requiring the disclosure of such information or other evidence that would be injurious to national security or endanger the safety of any person (for an example of these special rules, the decision can be appealed without it being necessary for the judge to certify that it raises a serious question of general importance).

[22] Another important factor in the interpretation to be given to Division 9 of *IRPA* is the fact that the jurisdiction to hear those cases is limited to that of the Chief Justice of the Court or to a judge specifically designated by the Chief Justice. A similar restriction is also imposed in several acts of Parliament dealing with national security or Canada's international relations or national defense (see for example *Canadian Security Intelligence Service Act*, RSC, 1985, c. C-23, section 2, *Canada Evidence Act*, LRC 1985, c. C-5, section 38).

[23] Considering the special treatment Division 9 gives to judicial reviews and appeals, it cannot be read to apply to any confidential information that needs to be protected in any judicial review conducted under *IRPA*. In my view, there are two possible limitations to its scope: 1) it could be limited to the judicial review of admissibility decisions (either on all grounds or on the grounds of security, violating human or international rights, or serious criminality or organized criminality (sections 34 to 37 of *IRPA*)); or 2) it could be limited to secret or classified information. Either one of these limitations would exclude the information the Minister is seeking to protect in the within application from the ambit of section 87.

[24] Bill C-3, which amended section 87 in 2008, was a direct response to the Supreme Court of Canada's ruling in *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9.

[25] According to the Library of Parliament's legislative summary on Bill C-3, the changes to sections 86 and 87 were intended to modify the security certificate procedure to bring it into compliance with the Supreme Court's decision in *Charkaoui*. It appears the intention of these changes was for the process to be applicable to inadmissibility proceedings and other immigration proceedings involving secret or classified information:

> Bill C-3 contemplates the procedure described above [applicable to security certificates], with necessary modifications, to be applied in other immigration proceedings involving secret information (new section 86). Accordingly, special advocates may play a role in admissibility hearings, detention review or appeals before the Immigration Appeal Division. During a judicial review involving secret evidence, Bill C-3 contemplates a modified version of the above process being followed without the appointment of a special advocate, unless the court believe one is required (new sections 87 and 87.1). (emphasis added)

[26] At the House of Commons debates on October 26, 2007, the Parliament Secretary of the Minister of Public Safety spoke to Parliament about Bill C-3. He emphasized the exceptional nature of the security certificate process and clearly focused on classified information:

> The *Immigration and Refugee Protection Act* provides the government with a process to remove non-Canadians who are inadmissible on grounds of security, violating human or international rights, serious criminality or organised criminality. When classified information is involved in support of the inadmissibility decision, the security certificate process may be used.
>
> […]

> Aside from security certificate cases, other decisions made under the *Immigration and Refugee Protection Act* may also involve the use of classified information. In the course of a judicial review of such a decision, a special advocate will be available if the judge, on a discretionary basis, concludes that consideration of fairness and natural justice require it.

[27] There is a significant difference between, on one hand, confidential, secret, top secret or classified information as contemplated in the various pieces of legislation concerning national security and, on the other hand, confidential or personal information as contemplated in privacy and personal information protection legislation or, for example, information that business people wish to keep confidential in the name of competitiveness. The first category needs to be protected in order to not injure national security, international relations or national defense. It is disclosed on a "need to know basis" and its protection weighs heavily in any balancing exercise with other fundamental rights.

[28] The type of information found in the first category was clearly articulated by justice Eleanor R. Dawson in *Gariev v Canada (Minister of Citizenship and Immigration)*, 2004 FC 531, a matter in which she was seized with a section 87 motion:

> [14] When considering whether disclosure of confidential information would be injurious to national security or the safety of persons, the principles applied were those articulated in *Henrie v Canada (Security Intelligence Review Committee)*, (1988), 53 DLR (4th) 575. There Mr. Justice Addy wrote at pages 578 and 579:
>
> > […] in security matters, there is a requirement to not only protect the identity of human sources or information but to recognize that the following types of information might require to be protected with due regard of course to the administration of justice and more particularly to the openness of its proceedings; information pertaining to the identity of targets of the surveillance whether they be individuals or groups, the technical means and

> sources of surveillance, the method of surveillance of the service, the identity of certain members of the service itself, the telecommunication and cypher systems and, at time, the very fact that a surveillance is being or is not being carried out. This means for instance that evidence, which of itself might not be of any particular use in identifying the threat, might nevertheless require to be protected if the mere divulging of the fact that C.S.I.S. is in possession of it would alert the targeted organization to the fact that it is in fact subject to electronic surveillance or to a wiretap or to a leak from some human source within the organisation.
>
> […]
>
> [15] Applying those principles to the confidential information and to the evidence adduced by the Minister, I was satisfied that disclosure of the redacted information contained in pages 2, 43, 155, 156 and 157 of the tribunal record would be injurious to the national security or safety [an abbreviation she gave in paragraph 6 of her decision to the expression "injurious to national security or the safety of any person"]

[29] When that type of information is protected under section 87 of *IRPA*, it is never disclosed to the permanent resident or foreign national and, as seen above, it is dealt with in exceptional procedures before the Court. Contrary to any other confidential information that can be filed in regular court proceedings, classified information filed in the context of national security proceedings is only seen by security-cleared counsel for the Attorney General, security-cleared special advocates where appointed, and a designated judge of this Court; the information is then assessed in a secure location in an *in camera ex parte* hearing. The permanent resident or foreign national will never know the content of the evidence against him or her and will never know the case to be met in that particular part of the process. Further, as referred to above, subject to the appointment of a special advocate, he or she will have no say in the procedure. It is clear that section 87 affords a unique and robust layer of protection to secret or classified information that

is not generally afforded to confidential or personal information protected by privacy laws or business interests.

[30] The visa officer who cancelled the Applicant's visa testified before the Court. The following is what he said regarding the reason not to disclose the content of the [redacted] (page 12, line 7 of the transcript):

> Q. Now, let's turn to the issue of informing or not informing [redacted] Can you explain to the Court why the visas were cancelled without first notifying him, or notifying him, that his visa was being cancelled?
>
> A. Well, it would have been -- I'm not sure why we didn't -- contact him when we cancelled the visa?
>
> Q. Yes. Yes.
>
> A. We wouldn't have contacted him because of [redacted] but it wouldn't be –
>
> Q. What do you mean by that, sorry?
>
> A. Well because [redacted] we would not have shared that information. We would not have explained to [redacted] we would not have shared any of that information with him, for the sake of [redacted] privacy.
>
> We also, in the visa application system, we don't really – like I said, this doesn't really happen that often, so we don't have very set procedures for contacting applicants after their visas have been cancelled. As a best practice, it would be to advise an applicant that their visa had been cancelled and to explain the reasons why, but, in this case, that would not have been appropriate, in my opinion.

[31] From that excerpt of the visa officer's testimony, it is clear that he was not concerned with national security protection but, rather, with [redacted] privacy rights. His concerns

were well-founded: [redacted]

[32] Therefore, and without having to determine whether section 87 applies to judicial reviews of any decision made under the *IRPA*, I am of the view that the application of section 87 is restricted to secret or classified information as described in *Henrie* above.

[33] To continue along that line of analysis, given that several provisions of Division 9 of *IRPA* proscribe that information will be protected if its disclosure would be injurious to national security or the *safety of any person*, I am of the view that Parliament intended to limit the "safety of any person" to individuals who could be individually impacted by the disclosure of secret or classified information.

[34] That is not only consistent with the definition of information found in section 76, but, as seen above, it is what Parliament intended. Further, that interpretation is supported by reading Division 9 of *IRPA* in its full context, which is that it is titled "Certificates and Protection of Information", and deals mainly with security certificates and inadmissibility on grounds of security, violation of human or international rights, or serious criminality or organized criminality.

[35] There are other means for protecting personal and confidential information, most notably including a confidentiality order issued pursuant to Rule 151 of the *Federal Courts Rules*, SOR/98-106. The Respondent could have asked that the CTR, or at least the information

concerning [redacted] be kept confidential and that the style of cause be amended to use only the Applicant's initials so that third parties would be unable to identify [redacted]

[36] Although this will be dealt with in the next section, I fail to see why this information should be kept from the Applicant. It is a [redacted] or criminal matter. In [redacted] as well as in criminal court, these allegations are always communicated to the interested party and [redacted] there are relevant authorities and means by which to provide such protection.

[37] I close on this issue by saying that, considering the large number of refugee claims [redacted] interpreting section 87 of *IRPA* the way the Minister is asking the Court to interpret it could lead to abuse, and eventually interfere with international child custody battles in a way Parliament cannot have intended or even foreseen.

B. *If so, has the Minister met its burden of proving that if disclosed, the information the Minister seeks to protect would be injurious to national security or to the security of any person?*

[38] Had I concluded differently on the first issue raised by the Minister's motion, I would still have found that he has failed to meet his burden of demonstrating that if disclosed the information would have been injurious to [redacted] safety.

[39] It has not been necessary for me to consider, for the purposes of addressing this application, whether or not [redacted] but

I wish to note for the record that it is for the [redacted] During the course of the hearing, the Court had the following exchange with the visa officer (p. 24 line 11 of the transcript):

> JUSTICE GAGNÉ: …Let's say that [redacted] And let say that I rule in favour of the Minister in this application [should be motion]
>
> THE WITNESS: Yes.
>
> JUSTICE GAGNÉ: Three or five years down the road, [redacted] makes an application for a visa.
>
> THE WITNESS: Yes.
>
> JUSTICE GAGNÉ: Would it be granted?
>
> THE WITNESS: There would be a few issues to be considered. One, there would be an issue of possible criminality or criminal inadmissibility. [redacted] is a crime in Canada; it's a crime in Kazakhstan. And my understanding of [redacted] This is not a far-out claim. So there could be issues of serious criminality, so he might be inadmissible. That would have to be examined.
>
> […]
>
> JUSTICE GAGNÉ: Now, scenario 2. Let's say that [redacted]
>
> THE WITNESS: Yes.
>
> JUSTICE GAGNÉ: And let's say I rule against the minister in the present application [motion], and the information is disclosed to [redacted] Three or five years down the road, [redacted] an application for a visa to come to Canada
>
> THE WITNESS: Yes.

> JUSTICE GAGNÉ: What happens?
>
> THE WITNESS: Again, the issue of criminality --
>
> JUSTICE GAGNÉ: Same answer. Right?
>
> THE WITNESS: to the best of my knowledge, all those issues would remain the same.

[40] The witness went on to explain that in the context of [redacted] he would take a variety of precautions to not disclose the [redacted] and admitted that he had no idea whether the information contained in the [redacted] Again, that kind of information can be protected by way of a confidentiality order.

[41] The onus is on the Minister to prove on a balance of probabilities that the disclosure of information or evidence would be injurious to national security or endanger the safety of any person. In making its determination the Court will give considerable deference to the Minister in matters related to national security or international relations, but the Minister is still required to adduce evidence to establish that the disclosure **would** be so injurious, not merely that it **could** be injurious.

[42] In *Soltanizadeh v Canada (Minister of Citizenship and immigration)*, 2018 FC 114 (reversed on other grounds, see 2019 FCA 202), Justice Richard Mosley stated the following regarding the Minister's burden of proof:

> [21] As discussed by Madam Justine Dawson in *Jaballah, Re*, 2009 FC 279 at para 8 – 10, 340 FTR 43 [*Jaballah*], the decision to hold a closed hearing under s 83 is discretionary. But once satisfied that disclosure would be injurious or endangering, the designated judge must, pursuant to paragraph 83(1)(*d*) of the Act, ensure the confidentiality of the information. The Minister bears the burden of establishing that disclosure "would" be injurious to national

> security, or endanger the safety of any person. This is an elevated standard compared to the use of the permissive "could" in the determination of whether a closed hearing is necessary.

[43] The only evidence adduced by the Minister in this case is the visa officer's affidavit and testimony during the *in camera ex parte* hearing. He testified that he had received information that [redacted] and based on that information, he formed the opinion that the Applicant did not intend to come to Canada for tourism. That rendered the Applicant inadmissible and the visa officer cancelled his visa.

[44] He further noted that it was that information that made him swear to the fact that "the Minister believes the release of the details and content of [redacted]

[45] As that is the only reason contained in the affidavit supporting the Minister's motion, and as its wording specifies "*may* endanger [their safety]" (my emphasis), I am of the view that it does not meet the requisite standard of "would… endanger [their safety]". Further, as I said above, the visa officer confirmed during his testimony that as far as he is concerned, he had the [redacted] privacy rights at heart when he decided not to inform the Applicant of his decision and not to disclose the content of the [redacted] Privacy concerns, while legitimate, do not reach the required level of "would… endanger the safety of any person."

[46] It is important to note that the Minister is seeking to protect both the fact that [redacted] as well as the details of the [redacted] Yet, there is no evidence before the Court as to whether or not [redacted]

[redacted] whether the Minister had [redacted]

[47] I am therefore of the view that the Minister has failed to meet his onus of convincing the Court that the disclosure of the redacted evidence would be injurious to national security or endanger the safety of any person.

V. Conclusion

[48] For the above reasons, the Court finds that the information the Minister seeks to protect in this file does not fall within the ambit of Division 9 of *IRPA* and that it cannot be protected by way of a section 87 motion. In any event, the Court is also of the view that the Minister's evidence falls far short of demonstrating that the disclosure of that information would be injurious to national security or endanger the safety of any person.

**THIS COURT ORDERS that**

1. The Minister of Citizenship and Immigration's motion is dismissed;
2. The Minister is given 30 days to file a motion for a confidentiality order and to provide the Court with his proposed redactions to this Confidential Order and Reasons.

3. This Confidential Order and Reasons will remain confidential until the expiration of the above 30 day period.
4. No costs are granted.

"Jocelyne Gagné"
Associate Chief Justice

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | CONF-4-20 |
| **STYLE OF CAUSE:** | [redacted] v THE MINISTER OF CITIZENSHP AND IMMIGRATION |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | JANUARY 28, 2020 |
| **PUBLIC ORDER AND REASONS:** | GAGNÉ J. |
| **DATED:** | JUNE 24, 2020 |

**APPEARANCES:**

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|---|---|
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| Lorne Waldman | SPECIAL ADVOCATE |

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