Federal Court Cour fédérale

Date: 20210720

Docket: DES-2-14

Citation: 2021 FC 719

Ottawa, Ontario, July 20, 2021

PRESENT: The Honourable Mr. Justice Simon Noël

IN THE MATTER OF THE *CANADA EVIDENCE ACT*

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

RUSTEM TURSUNBAYEV

Respondent

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AMENDED ORDER (PURSUANT TO RULE 397 OF THE *FEDERAL COURTS RULES*) AND REASONS

I. INTRODUCTION

[1] This is an application by the Attorney General of Canada [Applicant or AGC] pursuant to subsection 38.04(1) of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA] for an order with respect to the disclosure of information following a notice given pursuant to subsections 38.01(1) to (4) of the CEA [Application]. The AGC requests that the redactions made in ten (10) documents originating from Global Affairs Canada [GAC] be confirmed as information that if disclosed would be injurious to Canada's international relations.

[2] The proceeding arises in the context of a number of civil procedures issued by Mr. Tursunbayev [Respondent or Mr. Tursunbayev], which will be listed and summarized below, for a stay of proceedings based on an alleged abuse of process by the Government of Canada. It is alleged that the grounds of abuse include: (1) the improper use of a deportation rather than an extradition proceeding to return the Respondent to Kazakhstan; (2) the Government's failure

to discharge its duty of ensuring that the evidence relied upon from Kazakh officials was not obtained through torture; (3) the unlawful sharing of information with Kazakh authorities; (4) putting evidence before this Court that the Government knew or ought to have known was unreliable, perjured and/or obtained by torture, threat of torture or undue pressure; (5) improperly using deportation proceedings to obtain evidence against the Respondent for use in legal proceedings in Canada and in Kazakhstan (see the Further Amended Statement of Claim dated January 28, 2021).

[3] The reliefs being sought are: (1) an order that all proceedings that have been commenced or are to be commenced against Mr. Tursunbayev in order to effect his return to Kazakhstan and that the Government's conduct generally constitutes an abuse of process under administrative law principles and pursuant to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11 [*Charter*]; (2) a permanent injunction against Canada preventing it from initiating any proceeding to effect his return to Kazakhstan; (3) monetary relief in the amount of $20 million; (4) prejudgment interest pursuant to section 36 of the *Federal Courts Act*, RSC, 1985, c F-7 [FCA]; (5) costs of the action; and (6) such further relief as this Court may deem just.

[4] For the purpose of these reasons, I have relied on the Applicant and Respondent's records, the transcripts of cross-examination of affiants, the underlying proceedings (T-1911-12) including the Further Amended Statement of Claims and Further Amended Statement of Defence, the decisions of the case management judge, Justice Russell, and the decision of Justice Mactavish in file IMM-2877-12. In the following section, I will explain the facts

surrounding the underlying proceedings as it will be useful to understand the determinations made.

II. BACKGROUND AND FACTS

A. *Facts*

[5] Mr. Tursunbayev is a citizen of the Republic of Kazakhstan (hereafter referred to as Kazakhstan) and of St. Kitts and Nevis. He is a permanent resident of Canada, where he has lived with his wife and two children since 2009. He has a PhD in metallurgical engineering and from 2002 to 2009 was employed as Vice-President of Kazatomprom, a Kazakhstan's state-owned uranium company.

[6] On August 26, 2011, Interpol Astana issued a Red Notice [Notice] indicating that Mr. Tursunbayev was wanted in Kazakhstan for prosecution for expropriation or embezzlement of trust property, money laundering, forgery and association with a criminal organization. He is alleged to have misappropriated approximately $20 million USD from Kazatomprom.
The Notice requested that Interpol members "locate and arrest [the Respondent] with a view to extradition" and indicated that Kazakhstan "has given assurances that extradition will be sought upon [the] arrest of the person."

[7] On September 14, 2011, Interpol Ottawa forwarded the Notice and the supporting documents containing the details of the allegations to the Canada Border Services Agency [CBSA] accompanied by a cover letter advising CBSA that "[i]n the absence of a bilateral

extradition treaty between Canada and Kazakhstan Interpol Ottawa is unable to pursue legal action against this fugitive." It further asked that CBSA informs them of action taken and, if any, to provide them "with the name and coordinates of the officer assigned to this case."

[8] On October 13, 2011, CBSA Officer Steven Bean received the information and began to conduct a review of Mr. Tursunbayev's immigration file. Since there were allegations of money laundering, the officer sent the information to the Financial Transactions and Reports Analysis Centre of Canada [FINTRAC], which conducted an independent analysis. FINTRAC then made two disclosures to CBSA, which demonstrated that more than $47 million had passed through accounts in the name of Mr. Tursunbayev or his spouse. The Respondent alleges that this information was provided verbally to the Kazakh authorities and that it was illegal to do so.

[9] On or about January 4, 2012, the Government of Kazakhstan made a formal request to the Government of Canada for the extradition of Mr. Tursunbayev. The extradition request was eventually made public through legal proceedings before this Court, even though Kazakhstan did not consent to its disclosure for any purpose other than the extradition proceedings.

[10] On January 9, 2012, Officer Bean issued two inadmissibility reports pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on the basis that there were reasonable grounds to believe that Mr. Tursunbayev was inadmissible to Canada on the grounds of criminality under subsections 37(1)(a) and (b) of the IRPA. One inadmissibility report alleges that there are reasonable grounds to believe that Mr. Tursunbayev is inadmissible to Canada due to his membership in a criminal organization that is responsible

for a scheme to defraud Kazatomprom and its subsidiaries of significant financial assets. The second inadmissibility report alleges that Mr. Tursunbayev used a series of offshore companies and bank accounts to transfer a significant amount of money, obtained through criminal activity, out of Kazakhstan.

[11] On February 8, 2012, CBSA Officer Shari Fidlin issued a warrant for Mr. Tursunbayev's arrest pursuant to section 55(1) of the IRPA. On February 10, 2012, he was arrested and detained until June 1, 2012 when he was placed under house arrest.

[12] A series of detention reviews were conducted between February and March of 2012. During the third detention review on March 2, 2012, counsel for the Respondent raised the question of whether there had been an extradition request. Mr. Tursunbayev also alleged for the first time that the allegations in the Notice were the product of torture.

[13] On February 20, 2012, as a result of the inadmissibility reports, CBSA Officer Russell Gregory referred Mr. Tursunbayev to an admissibility hearing.

B. *Underlying Proceedings and Decisions Rendered*

[14] On March 5, 2012, Mr. Tursunbayev applied for leave to commence four (4) applications before this Court for judicial review under the IRPA [Initial Applications]. These applications challenged decisions made by specific CBSA officers: IMM-2220-12 and IMM-2226-12 arose from the decisions of Officer Bean to issue two section 44(1) IRPA reports against Mr. Tursunbayev, IMM-2223-12 arose from the decision of Officer Fidlin to issue a warrant for

Mr. Tursunbayev's arrest and detention pursuant to section 55(1) of the IRPA, and IMM-2224-12 arose from the decision of Officer Gregory to refer him to an admissibility hearing under section 44(2) of the IRPA.

[15] On April 13, 2012, Mr. Tursunbayev applied for a stay of the admissibility hearing pending the outcome of the Initial Applications [Stay Motion]. On May 4, 2012, Justice Russell, the case management judge, granted an interim stay of the admissibility proceedings until the hearing of the Stay Motion. In doing so, Justice Russell noted that based on the evidence that had been presented to date, there were serious grounds of concern that a removal process was being used as an alternative for extradition to a country that has a poor human rights record:

> [7] I do not as yet have a full evidentiary record before me on the abuse of process issue. The record will be supplemented in this regard before the full stay motion is heard on June 14, 2012. I may at that time form a very different view of what the evidence tells us about abuse of process. However, based upon what has been placed before me to date and in the absence of an explanation from Officer Bean on some of the things he has said in the documentation, I think it is fair to say that there are serious grounds of concern that Officer Bean, in the course of compiling his section 44 reports, saw himself to be engaged in a removal process that was an alternative to, or a substitute for, extradition to a country that has a very poor human rights record and where one of the Applicant's witnesses has testified that the Applicant will face torture. This evidence is supported by evidence from Amnesty International. Kazakhstan made an extradition request to Canada for the Applicant on 4 January 2012. Officer Bérubé of Interpol Ottawa, who forwarded the Red Notice to CBSA, advised (apparently incorrectly) that Interpol Ottawa was unable to pursue legal action "in the absence of a bilateral treaty" and Officer Bean has said in an email to Officer Bérubé that Officer Bean "can arrest the subject and send him back to Kazakhstan…." There is also evidence before me that an RCMP liaison officer has met with Kazakhstan officials and has advised of the following:
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> > KNB would like the subject to be arrested in Canada and deported to Kazakhstan. KNB is available to provide any

> type of document required by CBSA to complete its deportation process.
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> [Emphasis added.]

[16] On May 4, 2012, the Court also ordered that the respondent produce the tribunal records for each of the Initial Applications. In granting the production order, Justice Russell found that there is an air of reality to the allegations of abuse of process, at least to the notion of disguised extradition:

> [65] With regard to the abuse of process allegations raised by the Applicant in his leave and judicial review applications, I accept the Applicant's position that it is unlawful for the state to use the powers under IRPA to remove a permanent resident to a foreign state for the purpose of enabling the foreign state to prosecute that person, and I accept the authorities he relies upon for this proposition. To allow such conduct would circumvent the *Extradition Act* and the safeguards built into that legislation; it would also be an affront to the Canadian justice system and the *Charter*.
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> […]
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> [90] Notwithstanding these concerns, based upon what has been produced and disclosed so far, I think there is an air of reality at least to the notion that Officer Bean misconceived his role as being to use the admissibility process to achieve what deportation could not achieve. It has an air of reality at the moment because the evidentiary record is not full enough for the Court to see a more complete picture. However, as yet, there is insufficient evidence to suggest that Officer Bean and the other tribunals are part of, or are responding to, a broader effort by Canadian officials to accommodate Kazakhstan's request for extradition by resort to deportation.
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> [Emphasis added.]

[17] On May 2, 2012, Justice Mactavish (now with the Federal Court of Appeal) allowed an earlier application for judicial review sought by Mr. Tursunbayev for the review of a decision of the Immigration Division of the Immigration and Refugee Board [Board] refusing to release him from detention (see *Tursunbayev v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 504). One of the issues before the Court was whether the Minister's representative had misstated material facts at Mr. Tursunbayev's detention review concerning whether or not the Government of Canada had received a request for his extradition. In particular, the Court found the following statement arguably misleading (at para 37): "Does [Mr. Tursunbayev's counsel] know they have or they haven't [sought extradition]? Can he say that with a hundred percent certainty? I can't."

[18] The Minister's representative admitted after the detention hearing that at the time he made that statement he knew that the Government had received an extradition request from Kazakhstan. He asserted that the statements he made in regard to the absence of extradition request were intended only as commentary on the state of the record before the Board and not as a representation by him to the Board that Canada had not received an extradition request.

[19] While Justice Mactavish was not persuaded that the Minister's representative misled the Board, she noted that individuals representing the Crown before courts and tribunals always have an obligation to be candid and fair in their dealings (at para 42). She further noted that:

> [40] A finding that a representative of the Crown has intentionally misled a Tribunal is a very serious matter. While the comment identified above is troubling, I have decided to give the Minister's representative the benefit of the doubt in this case. I would, however, note that this was a close call, and would

> caution the Minister's representative to be more careful in the future in his representations to the Board. [Emphasis added.]

[20] On June 22, 2012, Mr. Tursunbayev filed a fifth application for leave and judicial review under the IRPA (IMM-6259-12) seeking a declaration that the conduct of the two respondents in that application, the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness, constitutes an abuse of process pursuant to the *Charter*, and also seeking a permanent injunction enjoining the respondents from commencing or carrying out an admissibility hearing against him. He sought to have this application consolidated or joined with the Initial Applications. The consolidation motion was dismissed.

[21] On October 12, 2012, Mr. Tursunbayev filed a sixth application (T-1911-12) for leave and judicial review. This application raised the same issues of abuse of process to those in IMM-6259-12, but included as additional respondents the AGC and the Minister of Foreign Affairs and Finance [collectively "the Crown"].

[22] On April 2, 2013, the Court ordered that portions of the Stay Motion be held *in camera*. In his reasons, Justice Russell noted that the Crown had not presented any evidence contradicting Mr. Tursunbayev's position in regard to the deplorable human rights record of Kazakhstan:

> [20] To begin with, and quite apart from what Mr. Horton has to say, we have objective evidence from reliable institutions (U.S. DOS, Amnesty International and Human Rights Watch) that Kazakhstan has a deplorable human rights record, deploys torture with impunity and has no rule of law. Hence, there is an inherent danger for anyone giving evidence in Court proceedings that could prevent the Kazakhstan state from achieving its objective of securing the return of the Applicant to face criminal charges. The Respondents have limited themselves to critiquing the

> evidence of Mr. Horton. But the Respondents have presented no evidence of their own to suggest that the general legal and political culture in Kazakhstan is any less deplorable than we find in the general reports. We know that the judiciary in Kazakhstan is not independent and is subject to political interference. We know that the judiciary and the police are corrupt. We know that torture is frequently used by the police during investigations and is highly likely in political cases. We also know that trial procedures in political cases do not conform with international standards of fairness. The Respondents have not even attempted to refute these general conditions;
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> […]

[23] On July 2, 2013, Justice Russell refused the Crown's motion to strike T-1911-12, but granted their alternative relief sought and converted that application into an action under section 18.4 of the *FCA*. Also by Order dated July 2, 2013, the Court refused Mr. Tursunbayev's motion for broad disclosure in IMM-6259-12 and converted that application to an action and consolidated it with T-1911-12: *Tursunbayev v HMQ et al* [Action]. In his reasons, Justice Russell noted that the claim is that the Crown has ignored, flouted, or was unaware of the Canadian and international rights owed to someone in Mr. Tursunbayev's position when dealing with a foreign regime that has a poor human rights record. He further noted that:

> [39] Canada obviously needs to be able to deal with international crime in cooperation with other countries. But it must do so in accordance with Canadian and international law. When officials charged with acting on behalf of Canada appear not to be aware of the legal restraints they must observe — for example in this case, Officer Bean's apparent determination to get the Applicant back to Kazakhstan using deportation when he thinks that extradition is not possible, or Officer Coté's apparently cooperating with the KFN and providing information to the Kazakhstan authorities in breach of Canadian law, or Officer Rustja knowingly misleading the member at a detention hearing, apparently on the instructions of the Department of Justice, by denying knowledge of an existing extradition request — Canada should not be surprised that those with an interest in ensuring that

> Canadian and international law are observed will bring such matters to the attention of the Court in one way or another. The Applicant has yet to prove his allegations of a broad abuse of process — particularly as regards entities other than CBSA — but the facilitating aspects that he wishes to have reviewed in this application are not so clearly improper as to be bereft of any possibility of success. The real issue before me in this motion, in my view, is whether the Applicant's general abuse of process complaints can or should be dealt with by way of summary proceedings.

[24] In June 2013, pursuant to the Order dated April 2, 2013, the Court heard submissions *in camera* in the Stay Motion. On July 9, 2013, Justice Russell allowed in part the request for a confidentiality order and wrote as follows:

> [46] Where the life or well-being of an affiant and their family are truly at serious risk – which I think is the case here – I do not think that the public interest in court proceedings is served by allowing a regime that has been highly criticized internationally for its poor human rights record, its frequent resort to torture, and its disregard of the rule of law to obstruct and taint Canadian proceedings by, in effect, applying the open court principle in that regime's favour. The evidence before me indicates that Kazakhstan is taking a close interest in these proceedings. Canadian justice will not be served if the internationally unacceptable threats that Kazakhstan has demonstrably brought to bear on an affiant are allowed full sway by the application of the open court principle. In my view, the salutary effects of a confidentiality order with regard to this affiant outweigh the deleterious effects of such an order, including the public interest in open and accessible court proceedings. These materials should be sealed.
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> [Emphasis added.]

[25] By order dated November 28, 2013, Justice Russell stayed the Initial Applications until disposition of the Action. In doing so, he noted the following:

> [28] The Respondent has also asked me to examine the jurisprudence on extradition/deportation and find that the Canadian officials involved in the present have done nothing wrong and the Applicant cannot, in any event, be granted a long delay. I have already dealt with that by referring to and applying the principles enunciated by Justice Stratus in *Mylan*, above, to determine whether "in all of the circumstances, it is in the interests of justice to order a stay." As Applicant's counsel points out, the cases relied upon by the Respondent are not really that much help in this case because we are dealing with a dispute about possible disguised extradition where the country involved is a notorious human rights abuser, uses torture, and has no rule of law. This case raises the issue of whether it is appropriate, in the face of a clear extradition request from a notorious regime such as Kazakhstan, to use admissibility and deportation under the *IRPA* to get the Applicant out of Canada and back to Kazakhstan.
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> [29] It is obvious that the Applicant wishes to avoid deportation to Kazakhstan and to render himself immune to either deportation or extradition. But the fact of his resistance to removal is no basis for saying that his disguised deportation and abuse of process allegations are groundless, and that he should be compelled to pursue his leave and judicial review application before the full context in which the decisions in question took place is placed before the Court.
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> [Emphasis added.]

[26] Mr. Tursunbayev filed a Statement of Claim in the Action on September 30, 2013 and an Amended Statement of Claim on February 17, 2014. The Crown filed a Statement of Defence on February 19, 2014.

[27] In the course of the Stay Motion proceedings, both parties retained an expert witness. The Crown's witness, Dr. Martha Olcott, prepared two reports which were presented in the form of an affidavit. In June 2016, she was cross-examined at length on her reports. Ms. Olcott failed to produce certain documents that she was directed to produce prior to her cross-examination, including all correspondence she exchanged with Kazakh authorities about her reports.

During the cross-examination, she produced one email and stated that "[t]his is the sole thing that exists. And I forgot that it existed" (see Justice Russell's Order dated November 24, 2016). She left the cross-examination when confronted with evidence that she had concealed approximately 16 other email chains.

[28] On November 24, 2016, Justice Russell ordered Ms. Olcott to provide all the documents to Mr. Tursunbayev prior to the continuation of her cross-examination and to answer all questions where there had been refusals. In his reasons, he wrote the following:

> [47] […] The concern here is, obviously, the extent to which the Kazakh authorities were controlling access to people and information that the Affiant relied upon for her reports, and how the Affiant went about ensuring that she was not being fed information by individuals who were under the control of the Kazakh authorities.
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> [48] This kind of information is scarce in the documentation produced by the Affiant from her own records because she either didn't keep records on important aspects of her approach to investigating relevant sources or compiling the reports, or records of communications have been lost or destroyed. In addition, as I shall discuss later in relation to disputed emails, the Affiant gave evidence under oath that, other than the single email she produced after a further search of her computer system, there has been no other communications with the Kazakh authorities. As the record before me shows, this evidence was false or inaccurate. There was a significant number of other communications with the Kazakh authorities that the Affiant did not produce or reveal in accordance with the Direction to Attend and/or in response to questions asked in cross-examination. In this motion, the Defendants are resisting allowing those emails to be put to the Affiant in cross-examination. In addition, when the Affiant became aware that the Plaintiff knew about other communications she had had with the Kazakh authorities (which she said had not taken place), she refused to identify those emails and abruptly walked out of the cross-examination without giving a reason for doing so, other than the obvious inference from the transcript that she did not want to acknowledge further communications and did not want to answer questions about them. The Affiant's conduct in this regard is not

> reassuring and the Court needs to know if the Defendant can shed any light on this issue from their own records, whether in the form of emails, notes of telephone conversations, and the like.
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> [50] In this context, I think it also has to be acknowledged that the Affiant did not just provide an opinion as an expert to a given or established set of facts. On the evidence before me, it is clear that she also played an investigative role to provide herself with the facts she needed for her reports. This is what her interactions with Kazakh authorities were intended to provide and, to this extent, she is also a fact witness. Clearly, the Court needs to know how certain facts that underlie the Affiant's expert opinions were assembled. Was she objectively able to establish them for herself, or was she dependant on the Kazakh authorities for at least these facts. So, it is crucial that the best evidence available as to who she dealt with and what was the nature of her communications, when she herself is obviously reluctant to reveal the full scope of any such communications and her record-keeping has not been thorough, and records have been destroyed.
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> […]
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> [93] The Affiant's record-keeping, the loss of records, and her failure to produce relevant documentation is a serious concern to the Plaintiff and the Court. She can produce an email that supports her version of her relationship with the Kazakh authorities but no emails that might suggest the relationship could be otherwise. This is why the Plaintiff and the Court require the fullest record possible so that checks can be made.
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> [199] There is no ambiguity here. The Affiant decided she was going to leave and Defendants' counsel, after initially agreeing that the Affiant could identify the emails, then asked the Affiant to leave the cross-examination. This is very obstructive behaviour.
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> [Emphasis added.]

[29] However, on March 24, 2017, the Crown consented to the Stay Motion. In light of their consent, the cross-examination of Ms. Olcott became irrelevant and there was no longer an obligation to produce the requested documents.

[30] On April 12, 2019, Justice Russell ordered that the Crown pay the cost of the Stay Motion to Mr. Tursunbayev. In granting cost and reimbursement of expenses, this Court noted that the Crown's "witness and counsel engaged in obstructive conduct at a key strategic moment" (at para 19); that the Crown has "offered no exculpatory reasons as to why it was reasonable to resist agreeing to a stay" or why the Crown "abandoned that resistance after several years of complex and expensive litigation" (at para 31); that the "collapse and discrediting of Professor Olcott's evidence would appear to be the only apparent reason for such a sudden change" (at para 45); and that the Crown's consent "was anything like a reasonable compromise between the parties" but "a capitulation" (at para 46). Justice Russell found that:

> [49] Given the international dimensions of this case, the difficulties and expense of finding qualified experts on Kazakhstan (which the Defendants know all too well), and the need for international travel, the disbursements claimed for this motion in the amount of $160,368.14 look entirely reasonable to me. The Defendants regard them as excessive but have produced no comparative figures.
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> […]
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> [51] The Defendants have provided little to justify the need to resist the stay motion in light of my earlier findings on serious issue and irreparable harm. In addition, the Defendants have provided no explanation for their decision – after years of litigation – to abandon their resistance to the stay motion, or why there was a need to resist for so long. This means that the necessity for the costs and other expenditures incurred by the Plaintiff is left unexplained. Consent after years of expensive and hard-fought resistance is not the same thing as consent at an earlier stage or a mutually acceptable compromise.

In the end, the total amount of costs and disbursements granted by Justice Russell was $203,082.40, an exceptional amount.

[31] On December 9, 2020, Justice Simpson granted leave to further amend the Amended Statement of Claim. The purpose of the amendment was to include an additional ground to the abuse of process allegations, namely that the Crown engaged in an abuse of process by putting evidence from Ms. Olcott before this Court that they knew or ought to have known was unreliable, perjured, and/or obtained by torture, threat of torture or undue pressure by Kazakh authorities. The damage claim was also increased from $10 millions to $20 millions. (See paragraphs 2-3 of the present Reasons for a description of the other grounds.)

[32] As a result, Mr. Tursunbayev filed a Further Amended Statement of Claim on January 29, 2021 and the Crown filed a Further Amended Statement of Defence on February 1, 2021.

III. SECTION 38 PROCEEDINGS AND APPOINTMENT OF AN *AMICUS*

[33] On July 4, 2014, the AGC initiated the Application pursuant to section 38.04 of the CEA seeking an order under subsection 38.06(3) of the CEA authorizing the non-disclosure of information contained in 17 documents that the AGC was required to disclose to Mr. Tursunbayev in the Action. It was agreed by all that the proceedings should be held in abeyance as it became apparent that new information would have to be disclosed to Mr. Tursunbayev. Due to the passage of time and the public disclosure of certain information contained in the original section 38 application, the Court ordered on October 1, 2019 that a supplemental application should be filed by the AGC and the documents subject to the first application be substituted by the new documents in this supplemental application.

[34] The Applicant filed the Supplemental Notice of Application on November 15, 2019. Counsel for the Department of Justice in the underlying proceeding identified nine (9) redacted documents disclosed to Mr. Tursunbayev that contains information that would be injurious to international relations if disclosed. A redacted version of those documents were disclosed to Mr. Tursunbayev in the context of the Action. As seen later, the AGC filed an application on February 22, 2021 to add a document.

[35] In November 2019, the AGC filed an *ex parte* affidavit to explain the specific injury to international relations that would result from disclosure of the information subject to the Application.

[36] On December 18, 2019, a public case management conference was held with all counsel to discuss the appointment of an *amicus curiae*, the Respondent's intention to amend the Statement of Claim in the underlying proceedings, and the need to schedule a public hearing.

[37] By Order dated December 20, 2019, the Court appointed Mr. Anil Kapoor as *amicus curiae* [*amicus*] to assist the Court in fulfilling its statutory duties pursuant to section 38 of the CEA. Before being given access by the Court to the classified information submitted for review, the *amicus* met with counsel for the Respondent to discuss his position in the underlying proceeding and to guide the *amicus* in reviewing the information at issue in the Application. Mr. Kapoor also attended the public hearing held in early March 2020 before being given access to the confidential information.

[38] On January 15, 2020, a public case management conference was held with counsel for the Respondent, counsel for the AGC, and the *amicus* to discuss the involvement of the *amicus* and the next steps to be taken prior to the public hearing in this matter.

[39] On January 29, 2020, an *ex parte* affidavit and a public affidavit were filed on behalf of the Applicant. The cross-examination of the public affiant, Alison Grant, took place on February 13, 2020. The transcript of her cross-examination was filed with the Court on March 2, 2020. The Respondent's record was filed on February 26, 2020 and the Applicant's record on March 2, 2020.

[40] On March 4, 2020, at the request of the Respondent, a one (1) day public hearing was held in the presence of counsel for the Applicant, counsel for the Respondent and the *amicus*. The Respondent presented an overview of the issues arising from the Action and the procedural history of the file. He also presented the geopolitical situation of Kazakhstan worldwide and in relation to Canada. This hearing gave the Respondent an opportunity to be heard and allowed him to present to the Court how he thought the redacted information may be highly relevant to the underlying proceedings. To that purpose, counsel for the Applicant and counsel for the Respondent presented oral and written submissions and referred to several documents, including the redacted documents identified in this Application as of the date of the hearing. The undersigned appreciated receiving this information.

[41] On August 14, 2020, a supplemental *ex parte* affidavit was filed on behalf of the Applicant to further explain the injury to international relations that would result from the disclosure of the redacted information.

[42] On September 2, 2020, a case management conference was held in the presence of counsel for the Applicant and the *amicus* during which the parties confirmed that an *ex parte*, *in camera* hearing would be scheduled to proceed with the examination and cross-examination of the AGC's affiant. The hearing was scheduled for October 7-8, 2020. However, due to a COVID-19 related issue, the said hearing was adjourned to November 10, 2020.

[43] The *ex parte* examination and cross-examination of the AGC's witness took place on November 10, 2020. The AGC presented evidence on the injury to international relations of disclosing the redacted information. A public summary of the hearing was communicated to the Respondent on November 17, 2020, which summarized the hearing as follows:

> The hearing lasted from 9:30 to 4:00. At the outset of the hearing, the AGC filed a chart indicating whether the *amicus curiae* and the AGC agreed with the redactions proposed in each document. The AGC also filed documents referred to by the Respondent in the March 4, 2020, public hearing that had not yet been included in the s. 38 CEA file.
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> The AGC then examined the Global Affairs Canada (GAC) *ex parte* witness who had previously signed two *ex parte* affidavits, one on November 15, 2019 and another on August 12, 2020. The first affidavit relates to the injury to international relations caused by the disclosure of information obtained in confidence from a foreign state as well as by the disclosure of assessments made by GAC officials for internal use only. The second affidavit provides additional evidence on the injury of disclosing information obtained in confidence.

> Immediately after the examination-in-chief of the GAC witness, the *amicus curiae* cross-examined the witness.
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> Once the cross-examination concluded, the Court indicated that a Public Case Management Conference would be scheduled in December.
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> The Court acknowledged that the outcome of the Respondent's motion to further amend his Statement of Claim in the underlying civil action, scheduled to be heard on November 23, 2020, could have an impact on the s. 38 proceedings.
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> The Court requested that the *amicus curiae* and the AGC discuss a timeline to present their written and oral submissions, while taking into consideration the fact that there could be a significant delay before the transcript of the hearing is available.

[44] During this hearing, counsel for the AGC and the GAC affiant referred to another document. The AGC informed the Court at the following case management conference that an application would be filed in relation to that tenth document, which would be disclosed to Mr. Tursunbayev in the Action and would be totally redacted. Given the similarities between the redacted information in this document and the other documents, the Court agreed that the AGC would make *ex parte* written submissions with respect to all ten (10) documents. An application to that effect was filed on February 22, 2021.

[45] On December 18, 2020, a public case management conference was held with all counsel to discuss the next steps in the Application. It was decided that counsel for the Applicant would provide written submissions by January 15, 2021 and that the *amicus* would file his submissions within seven (7) days of this. However, in a letter dated January 13, 2021, the Applicant asked this Court for an extension of time to present their written submissions, to February 22, 2021, and for the *amicus*' response, to March 1, 2021. The request was made in response to the recent COVID-19 provincial "stay at home order". The Court granted the request on the same day.

The AGC's submissions were filed on February 22, 2021. However, the *amicus*, being located in Toronto, requested an extension to March 19, 2021 due to the COVID-19 restrictions on travelling. The request was granted and the *amicus* filed his response on March 19, 2021.

[46] An *ex parte, in camera* hearing took place on June 9, 2021, and lasted for 4.5 hours. During this hearing, the AGC argued that the Court should maintain the prohibition from disclosure of all information subject to the Application. The *amicus* argued that some of the redacted information should be disclosed, or summarized, subject to terms and conditions. The Court requested additional information concerning the possible issuance of summaries, which was provided to the Court on June 23, 2021. Another *ex parte, in camera* hearing was held on June 28, 2021 for one hour. The purpose was to discuss the issuance of summaries in relation to certain redactions and the extent and conditions of disclosure. The subsection 38.04 (1) of the CEA application was then taken under reserve.

IV. REDACTED DOCUMENTS

[47] The documents produced by the AGC to Mr. Tursunbayev consist of the following, in redacted form [Documents]:

AGC #	**Document Description**
AGC002251	The 2010 Annual Human Rights Report (Long) on Kazakhstan produced by the Department of Foreign Affairs and International Trade.
AGC002252	Emails between various GAC officials, including Stephen Millar of the Embassy of Canada in Kazakhstan.
AGC002254	Draft Briefing Note of Chrystal Waddington titled "Kazakhstan".

AGC002255	The 2012 Annual Human Rights Report (Short) on Kazakhstan produced by the Department of Foreign Affairs and International Trade, covering the period from April 1, 2011 to March 29, 2012.
AGC002256	Email from Masud Husain dated September 27, 2013 and reply from Jennifer May dated October 2, 2013.
AGC002257	Internal emails between employees of the International Assistance Group of the Department of Justice [IAG] dated February 26, 2014.
AGC002259	A letter from the Embassy of the Republic of Kazakhstan to the Department of Justice of Canada, stamped as received by the International Assistance Group on January 29, 2014.
AGC002260	Fully redacted 259 pages.
AGC002261	Fully redacted 168 pages.
AGC002262	Fully redacted 2 pages.

[48] The unredacted documents have been filed with the Court's Designated Proceedings Registry. The Court and the *amicus* have had the opportunity to review these documents.

V. SUMMARIES OF THE SUBMISSIONS ON THE LEGAL ISSUES

A. *AGC's Submissions*

[49] The AGC has filed both public and confidential submissions. The AGC argues, in its public submissions, that the Court should confirm the prohibition on disclosure of information contained in the ten (10) documents identified by GAC on the basis that disclosure would be injurious to international relations and that the public interest in protecting the information outweighs the public interest in disclosing it.

[50] The AGC agrees that the redacted information disclosed to the Respondent is relevant to the underlying proceeding, but argue at the last step of the *Ribic* test that the information is of little value to Mr. Tursunbayev.

[51] The AGC has put forward the public affidavit of Alison Grant, representative of GAC, in which she identifies the types of information to be protected from disclosure and the rationale for doing so. The AGC also filed confidential affidavits that explain in more details why disclosure of the information would be injurious to international relations. In her affidavit, Ms. Grant explains that the information redacted under section 38 of the CEA relates to two categories of injury to international relations.

[52] The first category consists of information obtained in confidence from foreign governments or their representatives. The AGC submits that international norms and practices are such that diplomatic communications between Canada and foreign governments and their representatives are conducted with the expectation that all correspondence will be kept confidential. This confidentiality ensures a steady and timely exchange of information on political, security, economic, commercial, and other matters on which Canada relies to pursue its foreign interests and objectives effectively. Disclosure of this type of information would undermine the relationship of trust that Canada has developed with the foreign government in question as well as other governments, including key allies.

[53] The second category consists of comments about a foreign government or its officials made or reported by Canadian officials in private. The AGC submits that disclosure of this type

of information would harm Canada's relationship with that country and compromise both official and unofficial channels of communications. It would reduce Canada's overall capacity to provide consular assistance to Canadians abroad. Ms. Grant explains that Canadian officials must retain the ability to report frankly to their home department with confidence that their comments will not be disclosed publicly.

[54] The AGC also submits that deference is owed to the Crown in the conduct of foreign affairs: *Canada (Attorney General) v Shen*, 2017 FC 118 at para 13, aff'd 2018 FCA 7; *Canada (Attorney General) v Turp*, 2016 FC 795.

B. *Respondent's Submissions*

[55] On the question of relevance, counsel for the Respondent submit that the redacted information should be considered presumptively relevant since it has been included in the material to be disclosed for discovery. Counsel also submit that the redacted documents are highly relevant to the central issues in the Action, since it relates to dealings between officials of the Government of Canada and the Government of Kazakhstan. These communications between the two governments are expected to shed light on the motivation behind the use of deportation proceedings as opposed to extradition proceedings and on whether the evidence relied upon by Canada has been tainted by torture.

[56] Additionally, the Respondent believes the information would allow him to understand the reason for the delay in these proceedings, which may go to the heart of the abuse of process

allegations. The Government of Canada received the extradition request over eight years ago and yet no authority to proceed or provisional arrest warrant has been issued.

[57] Counsel for the Respondent assert that disclosure of the redacted information would not be injurious to international relations. It is submitted that during cross-examination, Ms. Grant acknowledged that not all information received from a foreign state is received with the expectation of confidentiality. I note that the affiant also said that the expectation of confidentiality would usually be explicit and that the "default is that all information shared would be kept private."

[58] Counsel for the Respondent allege that the relationship between Canada and Kazakhstan is less important than Canada's relationship with its closets allies, such as the United-States, the United Kingdom, Australia and New Zealand. It is submitted that there is no basis to conclude that a breach of the expectation of confidentiality in this context would cause any serious harm.

[59] Counsel for the Respondent submit that it cannot reasonably be suggested that information provided in the context of an extradition request was given on the understanding that it would be kept confidential. Kazakhstan knew or ought to have known that the information provided, if it was to be acted upon, would be disclosed to the Respondent as evidence in the legal proceedings in Canada. Moreover, Canada has already breached its confidentiality agreement with Kazakhstan, if any, by disclosing the request for extradition to Mr. Tursunbayev through court proceedings without Kazakhstan's consent.

[60] Counsel for the Respondent further submit that the Government of Canada's claim that disclosure of an extradition request can only occur after the authority to proceed has been issued in an extradition proceeding does not apply in the context of deportation proceedings. The Respondent alleges that the Government explicitly suggested that deportation be used instead of extradition to effect Mr. Tursunbayev's return to Kazakhstan, which was agreed to by the Kazakh authorities. As such, the agreement between states according to which the extradition request cannot be disclosed would not apply here.

[61] Counsel for Mr. Tursunbayev also submit that the information is crucial to establishing whether or not the Government of Canada engages in an abuse of process when it chooses to pursue a deportation proceeding rather than extradition proceedings, which would afford greater procedural protections to the Respondent, when it has determined that extradition is not possible because of a country's poor human rights record. It is alleged that it is in the interest of justice to disclose the redacted information if it reveals a lack of candour on the part of officials of the Government of Canada in their representations to this Court. Counsel also emphasizes the need to disclose information connected to the use of torture by Kazakh officials.

[62] Mr. Tursunbayev has obtained documents pursuant to the *Access to Information Act*, RSC, 1985, c A-1 [AIA]. Counsel for the Respondent note that in some cases, these documents revealed more information as the redactions under the AIA were applied differently than those under section 38 of the CEA. This would suggest that the Government is overclaiming in its redactions.

[63] Counsel for the Respondent submit that the Action engages his constitutional rights and liberty. Therefore, “the standard to be applied ought to be very low and the Court should ensure full disclosure or at minimum as much disclosure as possible, including summaries.” Counsel ask this Court to consider alternatives to full disclosure, which would serve to minimize the risk and scope of injury. There are currently redactions encompassing full documents, which would suggest that there were no attempt to minimize the injury claimed.

C. *Amicus' Submissions*

[64] The *amicus* has made *ex parte* oral and written submissions in relation to the redactions, which must remain confidential for national security reasons.

VI. ISSUES

[65] The issues raised in this application are as follows:

1. Should the prohibition on the disclosure of information be confirmed pursuant to subsection 38.06(1) of the CEA?

2. If so, should the disclosure of information be subject to any conditions pursuant to subsection 38.06 of the CEA?

VII. SECTION 38 LEGISLATION

[66] Section 38 of the CEA sets out a procedure whereby information may be protected from disclosure before a court, person or body with the jurisdiction to compel its production if its disclosure would be injurious to international relations, national security or national defence.

In such circumstances, notice must be given to the AGC (section 38.01), who may then authorize the disclosure of all or part of the information (section 38.03) or apply to the Federal Court for an order confirming the prohibition on disclosure (section 38.04).

[67] A designated judge must then determine, applying the test to be met, whether to confirm the non-disclosure. Only information that is relevant to the issues in the underlying proceedings will be considered for disclosure. If the information is relevant and its disclosure would be injurious, the designated judge must balance the public interest in disclosure versus non-disclosure. The judge may then consider disclosing the information subject to any appropriate condition in a format that would be adequate (e.g. disclose all the information or part of it, provide a summary or written admission of facts, etc.).

[68] The designated judge must exercise his or her discretion minutiously and with an objective to attain the highest public interest. He or she must do so by showing deference to the decision maker who applied the redactions while bearing in mind the interests of the respondent in identifying the issues at play in the underlying proceedings, and the degree of relevancy of the redacted information.

A. *Applicable Test*

[69] The test to be met is the one set by the Federal Court of Appeal in *Canada (Attorney General) v Ribic*, 2003 FCA 246 [*Ribic*] and summarized in the following way in *Khawaja v Canada (Attorney General)*, 2007 FCA 388 [*Khawaja*] at para 8:

(a) Is the information in question relevant to the proceeding in which disclosure is sought? If no, the information should not be disclosed. If yes, then,

(b) Will disclosure of the information in question be injurious to national security, national defence, or international relations? If no, the information should be disclosed. If yes, then,

(c) Does the public interest in disclosure of the information in question outweigh the public interest in prohibiting disclosure of the information in question? If yes, then the information should be disclosed. If no, then the information should not be disclosed.

[70] The party seeking disclosure has the onus of establishing that the evidence is relevant to his or her case (*Ribic* at para 17). If the information is found to be relevant, the burden shifts to the party seeking the non-disclosure to demonstrate that disclosure of such information would be injurious to international relations, national defence or national security (*Ribic* at para 20). Where injury is established, the onus shifts to the party seeking disclosure to show that there is a higher public interest in disclosing the information than in not disclosing it (*Ribic* at para 21).

[71] A section 38.04 of the CEA application is not a judicial review. Rather, the designated judge must "make his [or her] own decision as to whether the statutory ban ought to be lifted or not and issue an order accordingly" (*Ribic* at para 15).

[72] The present Application is for an order confirming the non-disclosure of information that *would be injurious to international relations* pursuant to subsection 38.06(1) of the CEA. For the purpose of the present reasons, it is useful to go over certain concepts. I will first comment on the concept of international relations itself as well as in relation to the injury required by the

legislation in order to justify a redaction. I will then enumerate some of the factors to be considered when balancing the public interest in disclosure versus non-disclosure, which will help the reader understand the judge's exercise of discretion in arriving at the decision.

B. *Canada's International Relations*

[73] There is no legislative definition of "international relations" or "injury to international relations." The jurisprudence also does not give a clear definition of the concept, although there have been some attempts by this Court to broadly define the concept.

[74] In *Canada (Attorney General) v Almalki*, [2010] FC 1106 [*Almalki*], my colleague Justice Mosley described the concept as being linked to both the impact of disclosure of such information on Canada's relations abroad and the importance of frank exchanges between diplomats. He noted the following:

> 79 The third national interest to be considered is the risk of injury to Canada's international relations. Again, this cannot be read as synonymous with either national defence or national security. Parliament deemed it necessary to protect sensitive information that would harm Canada's relations abroad if it were to be publicly disclosed, in keeping with the accepted conventions on diplomatic confidentiality.
>
> 80 This protection extends to the free and frank exchanges of information and opinions between Canada's diplomats and other public officials and their foreign counterparts, without which Canada could not effectively participate in international affairs. Similar protection is contained in mandatory and discretionary terms in the *Access to Information Act*, R.S.C., 1985, c. A-1, ss.13, 15. Absent consent, the head of a government institution shall refuse to disclose any record that contains information that was obtained in confidence from the government of a foreign state or an institution thereof (s.13). The head of a government institution may also refuse to disclose any information which may reasonably

> be expected to be injurious to the conduct of international affairs (s.15).

[75] In *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)* (F.C.), [2008] 3 FCR 248 [*Arar*], at para 61, I defined information injurious to international relations as "information that if disclosed would be injurious to Canada's relationship with foreign nations."

[76] In *Jose Pereira E Hijos S.A. v Canada (Attorney General)*, 2001 FCT 1434 [*Pereira*], Justice Nadon determined that the disclosure of certain information would undeniably have a "chilling effect" on Canada's international relations (at para 26). Although he did not define the concept of international relations, he cited at para 19 the following passage from a Certificate that was served upon the plaintiffs by Mr. Brian Buckley, a retired Canadian foreign service officer, to explain the reasons for objecting to the disclosure of certain information:

> 18. Governments of foreign states or institutions or international organizations thereof, and contacts and sources with those states and institutions and international organizations, often provide information concerning international relations under the expressed or implied condition that the information and/or the identities of the sources and contacts be protected from disclosure. Such information may be provided by and received from sources and contacts in Canada and abroad, respecting a wide variety of sensitive matters, including economic and social policies.
>
> 19. The release of such information, and/or the names, titles and other identifying features of continuing contacts and sources of that information, could be injurious to Canada's international relations because it could compromise or impair the trust or confidence of the governments, institutions, international organizations or individuals from which or from whom the information originated, and thereby jeopardize the ability of the Department of Foreign Affairs and International Trade or the Government of Canada to continue to benefit from such

> relationships and to conduct diplomatic and consular relations effectively.
>
> 20. In addition, it is essential for the effective conduct of diplomatic and consular relations and international negotiations that Canadian officials who obtain information from contacts and sources be permitted to be candid in reporting that information, as well as their opinion, views or recommendations respecting the information and contacts and sources with whom they deal, to or within the Government of Canada. Releasing the identifies of Canadian officials and their sources or contacts together with the opinions, views or recommendations of the officials may in some circumstances compromise or impair the trust or confidence of continuing sources and contacts for those officials and thereby jeopardize the ability of the Department of Foreign Affairs and International Trade of the Government of Canada to continue to benefit from such relationships and to conduct diplomatic and consular relations effectively.
>
> […]
>
> 23. Moreover, the conduct of international negotiations, and of bilateral and multilateral relations more generally, normally require a degree of candor on the part of Canadian and foreign representatives regarding the relative positions, objectives and personalities involved in those negotiations and relations, including criticisms by government officials of the position of their own or other governments or international organizations. Releasing information of this nature could reasonably be expected to have a chilling effect on the degree to which the representatives of Canada and foreign states or international organizations may be forthright in their negotiations and relations, and thereby inhibit the effectiveness, and in some circumstances the continuation, of those negotiations and relations.

[77] The Certificate filed by Mr. Buckley and relied upon by this Court in *Pereira* is helpful in understanding what constitutes international relations in the context of disclosure of information under the CEA. As it will be seen later, Mr. Buckley's reasoning is similar to the AGC's submissions in the present Application.

[78] It follows that international relations encompass the exchange of information between foreign nations and the ability to conduct such exchanges in an atmosphere of trust to ensure the information is as complete and accurate as possible. Releasing such information could compromise or impair the trust of not only the nation to whom it relates, but of other foreign nations as well. Canada benefits tremendously from these exchanges and it must maintain the trust of all foreign nations to continue to benefit from those. In addition, for international negotiations to be effective, government officials must be able to report that information and their opinion within the Government of Canada in a candid manner without fear that it will be made public.

[79] It would be a challenge to define the concept of international relations in a definitive way. A lot could be lost as a result. In *Canada (Attorney General) v Kamel*, 2009 FCA 21, the Federal Court of Appeal informed that concepts like "international relations" and "national security" must have a broad and flexible approach in order to preserve the effectiveness of the law:

> [20] I adopt the following principles from the teachings of the Supreme Court of Canada regarding the constitutional invalidity of statutory or regulatory provisions for vagueness:
>
> …
>
> (5) Some fields, such as international relations and security, do not lend themselves to precise codification in so far as the situations envisaged are variable and unpredictable. In that sense, a certain level of generality and flexibility is necessary to preserve the effectiveness of the law for the future (*Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031, at paragraph 48; *Nova Scotia Pharmaceutical*, at pages 641–642; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paragraph 85);

[80] This reasoning is based in part on the Supreme Court of Canada's decision in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, in which the Court noted the following on the concept of "danger to the security of Canada":

> 85 Subject to these qualifications, we accept that a fair, large and liberal interpretation in accordance with international norms must be accorded to "danger to the security of Canada" in deportation legislation. We recognize that "danger to the security of Canada" is difficult to define. We also accept that the determination of what constitutes a "danger to the security of Canada" is highly fact-based and political in a general sense. All this suggests a broad and flexible approach to national security and, as discussed above, a deferential standard of judicial review. Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister's decision.

[81] Having said that, only information that would be injurious to Canada's international relations if disclosed can be redacted. Designated judges are aware of the government's tendency to overclaim in national security matters. The Supreme Court of Canada noted, in *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37:

> [63] The judge must be vigilant and skeptical with respect to the Minister's claims of confidentiality. Courts have commented on the government's tendency to exaggerate claims of national security confidentiality: *Canada (Attorney General) v. Almalki*, 2010 FC 1106, [2012] 2 F.C.R. 508, at para. 108; *Khadr v. Canada (Attorney General)*, 2008 FC 549, 329 F.T.R. 80, at paras. 73-77 and 98; see generally C. Forcese, "Canada's National Security 'Complex': Assessing the Secrecy Rules" (2009), 15:5 *IRPP Choices 3*. As Justice O'Connor commented in his report on the Arar inquiry,
>
> > overclaiming exacerbates the transparency and procedural fairness problems that inevitably accompany any proceeding that can not be fully open because of [national security confidentiality] concerns. It also promotes public

> suspicion and cynicism about legitimate claims by the Government of national security confidentiality.
>
> (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006), at p. 302)
>
> [64] The judge is the gatekeeper against this type of overclaiming, which undermines the *IRPA* scheme's fragile equilibrium. Systematic overclaiming would infringe the named person's right to a fair process or undermine the integrity of the judicial system, requiring a remedy under s. 24(1) of the *Charter*.

[82] As such, the judge must test the redactions, with the assistance of the *amicus*, to ensure the redactions are justified, i.e. that disclosure of the information would be injurious.

C. *Injury to International Relations*

[83] Subsections 38.06(1) and (2) of the CEA require the protection of information that would be injurious to international relations if disclosed. This precision is important. In practical terms, it means that the evidence of injury presented must show a probability of injury to international relations. It cannot be speculative. In *Arar*, I discussed the matter with a reference to *Pereira E Hijos S.A. v Canada (Attorney General)*, 2002 FCA 470 as follows:

> 49 The CEA at section 38 offers the following definition of "potentially injurious information":
>
> > 38...
> >
> > "potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security. [Emphasis in original.]
>
> Of interest, this definition uses the word "could" whereas section 38.06 of the CEA states that a judge is [page278] to determine

> whether the disclosure of information "would" be injurious to international relations, national defence, or national security. The Federal Court of Appeal in *Jose Pereira E. Hijos, S.A. v. Canada (Attorney General)* (2002), 299 N.R. 154, at paragraph 14, spoke to the meaning of the words "would" and "could" in the context of the CEA:
>
> > Counsel for the appellants also contended that even if it could be said that Parts D and E of the Buckley certificate were effectively adopted by the respondent, the certificate is itself defective because nowhere therein is it stated, in compliance with subsection 38(1), that the release of the information "would" be injurious to Canada's international relations. That phraseology suggests that in order to secure the benefit of sections 37 and 38 a party must show a probability that a feared injury will result from disclosure. The record contains nothing showing that the disclosure of information sought by the series of "vote buying" questions "would be injurious to international relations". It is noted that the phraseology employed in Parts D and E to the Buckley certificate is "could" and "could reasonably" rather than "would". The statute would seem to require a showing of probability of injury instead of mere possibility. [Emphasis in original.]
>
> I agree with the Federal Court of Appeal. The use of the word "would" by the legislator indicates that the Government under section 38.06 of the CEA must satisfy the reviewing judge that the injury alleged is probable, and not simply a possibility or merely speculative.

[84] The verb "would" imposes a higher degree of evidence. The AGC must satisfy the judge that the injury to international relations alleged is probable, and not simply a possibility.

[85] In addition, to be considered a probability of injury, there has to be some damage, loss or negative impact on Canada's international relations. In *Arar*, this Court reviewed the ordinary meaning of the word "injury" and noted the following:

> **51** The Oxford English Dictionary [2nd ed. Oxford: Clarendon Press, 1989] defines "injury" as follows:
>
> > **1.** Wrongful action or treatment; violation or infringement of another's rights; suffering or mischief wilfully and unjustly inflicted. With an and pl., A wrongful act; a wrong inflicted or suffered. **2.** Intentionally hurtful or offensive speech or words; reviling, insult, calumny; a taunt, an affront. Obs. [Cf. [page279] F. injure = parole offensante, outrageuse.] **3. a.** Hurt or loss caused to or sustained by a person or thing; harm, detriment, damage. With an and pl. An instance of this. **b.** concr. A bodily wound or sore. Obs. rare. **4.** attrib. and Comb., as **injury-doing**, wrong-doing; **injury-feigning** vbl. n. and ppl. a.; **injury time**, the extra time allowed in a game of football or the like to make up for time spent in attending to injuries.
>
> Obviously in the context of section 38 of the CEA definition (3) is most appropriate. This definition indicates, as do the others to an extent, that to be considered an "injury" there has to be some detriment, damage or loss. For its part, the Black's Law Dictionary, 7th ed. St. Paul, Minn.: West Group, 1999, defines the term "injury" as follows:
>
> > **1.** The violation of another's legal right, for which the law provides a remedy; a wrong or injustice. See WRONG.
> >
> > **2.** Harm or damage. -- injure, vb. -- injurious, adj.
>
> Once again the concept of harm and damage is echoed in this definition.

[86] The AGC must demonstrate to the Court that the injury or harm claimed is based on facts established by the evidence (*Ribic* at para 18). Although the burden of conducting such a review rests with the AGC, the Court must show a certain degree of deference to the AGC's assessment of injury because of their protective role with respect to the security and safety of the public and their access to special information and expertise (*Ribic* at para 19). However, the Court must ensure that the non-disclosure of information is justified (i.e. would be injurious to international

relations) and if the public interest in disclosing prevails, then the judge may disclose the information.

D. *Balancing of the Interests*

[87] In carrying out the third step of the *Ribic* test, the designated judge must determine whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. If the judge concludes that the public interest favours disclosure, he or she may authorize the disclosure in the form and under the conditions that are most likely to limit any injury to international relations, national defence or national security pursuant to subsection 38.06(2) of the CEA. As the Supreme Court noted in *R v Ahmad*, [2011] 1 SCR 110 at para 44, section 38 is designed to operate flexibly:

> [44] Section 38 creates a scheme that is designed to operate flexibly. It permits conditional, partial and restricted disclosure in various sections. Section 38.06(1) affirmatively requires the Federal Court judge to consider the public interest in making disclosure along with what conditions are "most likely to limit any injury to international relations or national defence or national security" (s. 38.06(2)). In making this determination, the Federal Court judge may authorize partial or conditional disclosure to the trial judge, provide a summary of the information, or advise the trial judge that certain facts sought to be established by an accused may be assumed to be true for the purposes of the criminal proceeding. […]

[88] The judge must not do this balancing exercise in a vacuum. He or she must evaluate factors rooted in the reality of the file. Some of these factors, identified in *Khan v Canada*, 1996 2 FC 316 at para 26, and endorsed in *Khawaja*, at paras 74 and 93, and *Canada (Attorney General) v Ader*, 2017 FC 838 at para 24, include:

A. The nature of the public interest sought to be protected by confidentiality;

B. Whether the evidence in question will probably establish a fact crucial to the case to be made, in other words whether or not the relevancy of the information sought is of significant importance to the case to be made;

C. The seriousness of the charge or issues involved;

D. The admissibility of the documentation and the usefulness of it;

E. Whether the party seeking disclosure has established that there are no other reasonable ways of obtaining the information; and

F. Whether the disclosure sought amounts to general discovery or a fishing expedition.

[89] In *Arar*, the undersigned identified a somewhat similar list of factors but with some nuances:

A. The extent of the injury;

B. The relevancy of the redacted information to the procedure in which it is to be used, or the objectives of the body wanting to disclose the information;

C. Whether the redacted information is already known to the public, and if so the manner by which the information made its way into the public domain;

D. The importance of the open court principle;

E. The importance of the redacted information in the context of the underlying proceeding; and

F. Whether there are higher interest at stake, such as human rights issues, the right to make a full answer and defence in the criminal context, etc.

[90] These factors to be considered vary from case to case. They are to be rooted in the issues of the specific underlying proceeding.

VIII. PUBLIC REVIEW OF THE REDACTED DOCUMENTS

[91] As mentioned earlier, there are ten (10) documents at issue. Seven (7) of them are partially redacted while three (3) others are fully redacted, including the title. For convenience, these documents are listed at paragraph 47 as they were filed publicly and numbered by the AGC.

[92] During the closed hearing, all of the unredacted documents were discussed and examined by the witness, counsel for the AGC, the *amicus*, and the Court. The AGC and the *amicus* filed submissions in relation with the justification of each redaction. There were very limited agreements between the AGC and the *amicus* on the justification of the redactions.

[93] Relying on what is in the public record, an overview of the documents indicates that two (2) documents (AGC 002251 and AGC 002255) are GAC's own Annual Human Rights Reports on Kazakhstan: the 2010 report (long version) and the April 1, 2011 to March 29, 2012 report (short version). As it can be noted, both documents are minimally redacted.

[94] Three (3) documents are email exchanges. The first email (AGC 00252) is an internal correspondence between various GAC officials and the Canadian Ambassador in Kazakhstan. It is minimally redacted. The second is an email (AGC 002256) from Masud Husain (GAC official) dated September 27, 2013 and a reply from Jennifer May (GAC official) dated

October 2, 2013. The email is titled “MSFA bilateral with Kazakhstan” and the content is almost fully redacted. The third email (AGC 002257) is an internal correspondence between IAG’s employees, within the Justice Department, and is minimally redacted.

[95] Another minimally redacted document (AGC 002254) is a draft briefing note titled “Kazakhstan” written by a GAC official.

[96] Another document (AGC 002259) is a letter from the Embassy of Kazakhstan to the Department of Justice dated January 29, 2014. This document is partially redacted.

[97] The other two documents (AGC 002260 and AGC 002261) bear no title, are totally redacted, and have respectively 259 pages and 168 pages. The 10th document (AGC 002262) that was disclosed during the *ex parte, in camera* proceedings by the AGC is also completely redacted and has no title.

IX. ANALYSIS

A. *Is the information relevant to the underlying proceeding?*

[98] At the relevancy stage, the threshold is a low one (*Ribic* at para 17). Some relation between the redacted information and the issues in the underlying proceeding is sufficient to meet the threshold. In the present Application, I find that the undisclosed information is relevant to the issues in the Action. This assessment of relevancy will come back in the third step of the *Ribic* test when balancing the interests in disclosing or not disclosing the information.

B. *If so, would disclosure of the information be injurious to Canada's international relations?*

[99] The short answer is yes, disclosure of the redacted information would be injurious to Canada's international relations. The extent of such injury varies for each redaction. If released, some information would create a lesser injury while others a greater one.

[100] The degree of the importance of Canada's relations with Kazakhstan must be taken in consideration. In *Almaki*, [2010] FCJ No. 1391, Justice Mosley summarized the significance of Canada's relationship with foreign nations and agencies and intelligence sharing as follows:

> **150** I would also note that all countries and agencies are not equally important to Canada in terms of intelligence sharing. It is obvious that the consequences of a breach of an arrangement with Canada's major allies such as the United States and the United Kingdom would be far greater than those which may result from disclosure of information received from a country or agency not so closely linked to our national interests. As stated by Justice Noël in *Arar*, above, at paragraphs 80-81:
>
> > When determining whether disclosure would cause harm, it is also important to consider the nature of Canada's relationship with law enforcement or intelligence agencies from which the information was received. It is recognized that certain agencies are of greater importance to Canada and thus that more must be done to protect our relationship with them. Consequently, care must be taken when considering whether to circumvent the third-party rule in what concerns information obtained from our most important allies.
> >
> > This being said, the severity of the harm that may be caused by a breach of the third-party rule can be assessed under the third part of the section 38.06 test when the reviewing judge balances the public interest in disclosure against the public interest in nondisclosure. [Emphasis added.]

[101] Canada is one of the top ten foreign investors in Kazakhstan. Canadian companies invest cumulatively $2.6 billion in direct investments, mainly in the extractive industry (primarily in mining). Uranium extraction allows Canadian companies to transfer mining technology.
The years 2007-2010 were promising years and seen by GAC as ones that would deepen the Canadian companies' cooperation with Kazakh partners in the field of civilian nuclear energy. (See *Annual Human Rights Report – The Republic of Kazakhstan 2009-2010* at para 41.)
The confidential evidence presented by the AGC in the *ex parte, in camera* hearing also supports the importance to be given to Canada's relationship with Kazakhstan.

[102] I accept the AGC's position that there are two categories of injury to international relations involved in the present proceeding. First, there is the information obtained in confidence from foreign governments or their representatives. Canada has a lot to gain in showing that the information it receives from foreign nations is treated with care and kept confidential in the interest of good international relations with all nations. Without this climate of mutual respect, Canada would weaken its position in the diplomatic world.

[103] Second, there is the information relating to comments about foreign governments or officials made or reported by Canadian officials in private. Government officials and employees must be able to communicate in a frank and candid manner without fear that their opinion will be made public. It is not about keeping information secret, but rather ensuring that employees can work effectively and without restraint. A climate of confidence must exist in order to ensure straight forward exchanges.

C. *If so, does the public interest in disclosure outweighs in importance the public interest in non-disclosure?*

[104] The balancing exercise is not an easy task. It requires a complete understanding of the underlying matters, of the competing interests and of the international relations at play.

[105] Throughout my review, I have gained a good knowledge of the underlying proceedings. The issues and some of the facts raised in the Action are serious. It is also evident that the AGC has an interest in the underlying litigation. In these circumstances, a designated judge must be vigilant and ensure that the confidentiality claims are not used as a shield against disclosing material information. The process must be fair and cannot favour one litigant to the detriment of the other.

[106] While international relations are important to Canada, as detailed above, such relations cannot be protected to the detriment of legitimate public interest in disclosure. To achieve a proper balancing, the designated judge must find a way to ensure both fairness of the underlying proceedings and the protection of Canada's international relations. I must ask myself what information is pertinent or material to the ongoing litigation and whether there is a way to disclose this information in a way that would most likely limit and possibly neutralize any injury.

[107] Section 38.06(2) of the CEA provides guidance. If a judge contemplates disclosing information that would be injurious to international relations, after having concluded that balancing favours some form of disclosure, he or she must consider the form and conditions of disclosure that are most likely to limit and possibly neutralize any injury. The judge has

jurisdiction to disclose the information subject to any conditions that he or she considers appropriate.

[108] In the present case, after carefully balancing the interests, I conclude that for most redactions, the public interest in disclosure outweighs, to differing degrees, the public interest in non-disclosure. Having said that, full disclosure to the Respondent would be injurious to Canada's international relations and I do not think full disclosure is necessary to achieve fairness of the proceedings. For the purpose of the litigation, summaries of the material information identified will provide sufficient information to the Respondent and ensure fairness of the proceedings.

[109] At this stage, in order to limit any injury, the disclosure of the summaries will be limited to counsel for the Respondent and counsel for the Crown in the Action, subject to an undertaking not to further disclose the information in any way, shape or form to any person unless permission is given by a judge of this Court (see the proposed undertaking in Annex A). The Court notes that Counsel for the Respondent had raised the possibility of this approach during the cross-examination of Ms. Alison Grant (see Transcript at pages 100-101). Arrangements will have to be made to ensure that the information contained in the summaries remains confidential throughout the proceedings. The judge in the Action will also have access to the confidential summaries and, if required, some information may be issued in the reasons on a confidential basis.

[110] Once counsel for the Respondent has had access to the summaries, should they be of the view that access must be given to the Respondent, they may bring a motion to this Court requesting such access subject to conditions, including an undertaking on the part of the Respondent not to further disclose any of the information.

[111] In addition, in order to alleviate any injury that such disclosure may cause, prior to the disclosure of the summaries, the Applicant will have the opportunity, for a period of 5 days, to inform the Kazakhstan officials in Ottawa of the present order and reasons. Once done, the Applicant will inform counsel for the Respondent, the *amici* and the Court in writing that the opportunity has been exercised. The evidence heard *in camera*, *ex parte* is to the effect that this measure would be helpful in mitigating any potential injury.

[112] Subject to the conditions mentioned above, summaries will be disclosed in relation to the following documents:

1. The first summary relates to the 2010 and 2012 Annual Human Rights Reports produced by the Department of Foreign Affairs and International Trade (as it was known then) (AGC 002251 and 002255). Some redactions are confirmed by this Court and cannot be summarized (AGC 002254 and 002255), but are not material to the underlying proceeding.

2. The second summary relates to AGC 002256. It informs of two (2) subject matters discussed by the participants which are relevant to the underlying proceeding. The other topics of discussion do not relate to the underlying proceeding.

3. The third summary relates to AGC 000257, 002259, 002260, 002261 and 002262. It discloses facts unknown to the Respondent which are relevant to the underlying proceeding.

[113] The summaries are part of the present order and are kept in a confidential envelope as Annex B to be disclosed only to counsel for the parties once all of the conditions have been met. A number of copies will be made and each one will be remitted to authorized persons in accordance with the present order.

[114] As part of the order, I have listed the redactions sought by the Applicant and the reasons for my decision in a confidential chart set out in Annex C.

X. CONCLUSION

[115] Therefore, the redactions proposed by the AGC remain. Access to the three (3) summaries is limited to the judge in the Action, and to counsel involved who must undertake not to further disclose the information unless authorized by a judge of this Court. Furthermore, prior to the disclosure of the summaries, the Applicant will have the opportunity, for a period of five (5) days, to inform in general the Kazakh officials in Ottawa of the present order and reasons.

[116] The summaries capture the essence of the redacted information. I have balanced the competing public interests in disclosure and non-disclosure and have concluded that some

information must be disclosed to ensure fairness in the litigation, subject to the conditions enunciated above to protect international relations.

[117] As a last comment, I would like to thank counsel for the AGC and the *amicus*, Mr. Kapoor, for their helpful submissions and their cooperation with one another in this matter. These types of proceeding are challenging, and more so during a pandemic, and I am grateful for the efforts made on the part of all involved.

AMENDED ORDER (PURSUANT TO RULE 397 OF THE *FEDERAL COURTS RULES*) AND PARTLY IN RESPONSE TO A LETTER DATED JULY 13, 2021)

THIS COURT ORDERS that:

1. The Application is granted in part. The redactions are confirmed subject to the limited disclosure of the summaries;

2. The disclosure of the summaries shall be limited to counsel for the parties and the judge(s) involved in the Action, unless otherwise authorized by a designated judge of this Court;

3. The disclosure of the summaries to counsel is subject to the proposed undertaking (Annex A), which shall be signed and filed with the registry of the Court;

4. Counsel for the parties in these proceedings and in the Action shall have access to the summaries as long as the undertaking (Annex A) is signed and filed with the registry of the Court;

5. The summaries shall be kept in a confidential envelope (Annex B) at the registry of the Court and copies will be remitted only to authorized persons in accordance with the present order;

6. If, for the purposes of the Action, a counsel intends to use the confidential information, he or she may do so as long as the information is treated in a confidential way;

7. All those involved in the underlying proceeding shall take all necessary measures to ensure the confidentiality of the information contained in the summaries;

8. If any of the authorized persons would like to use the confidential summaries in immigration proceedings in which the Respondent is a party, upon motion, a request shall be made to a designated judge of this Court;

9. If counsel for the Respondent considers that the Respondent should have access to the summaries, a motion to that effect shall be presented to the undersigned which shall include among other requirements, the conditions surrounding the access to the confidential information and the proposed undertaking to be signed by the Respondent;

10. The present order includes a confidential chart (Annex C) which contains the reasons for the decision for each redaction sought by the AGC, and access to the chart shall be limited to counsel for the AGC and the *amicus* unless otherwise authorized by a designated judge of this Court;

11. The Applicant shall have five (5) days to inform the Kazakhstan officials in Ottawa of the present order and reasons prior to the disclosure of the summaries. Once the opportunity has been exercised, counsel for the AGC will immediately inform counsel for the Respondent, the *amici* and the Court;

12. Pursuant to subsections 38.09(2) and 38.06(3.01) of the CEA, the AGC has 10 days to inform the Court of any concerns he may have with the present reasons and order after which time, the public reasons and order will be issued;

13. There is no order as to Costs.

"Simon Noël"

Judge

ANNEX A

On July 4, 2014, the AGC filed a Notice of Application under s.38.04 of the *Canada Evidence Act* (CEA) with respect to information concerning which the Attorney General of Canada (AGC) had received notice pursuant to s.38.01 of the CEA.

The section 38 proceedings initiated in 2014 were put in abeyance until the fall of 2019 and the AGC filed a supplemental Notice of Application pursuant to s.38.04 of the CEA on November 15, 2019. A total of nine documents were covered by the 2019 Notice of Application and a tenth document was subsequently identified and is now also covered by the same Notice of Application.

Public and *ex parte* affidavits explaining the injury to international relations that would occur as a result of disclosing the information contained in the documents covered by the 2019 Notice of Application were filed on January 29, 2020, November 18, 2019, and August 14, 2020, respectively.

Public and *ex parte* affiants from Global Affairs Canada were examined on February 13, 2020 and November 10, 2020 respectively.

Public and *ex parte* submissions were heard on March 4, 2020, and June 9, 2021, respectively.

On July 20, 2021, the Court ordered the issuance of summaries in accordance with section 38.06(2) of the CEA to the solicitors of records for the parties and the Court in the underlying action (Court File Number T-1911-12) subject to conditions, including the signature by the solicitors of record of the following undertaking.

UNDERTAKING

I, _____, of the city of _____, of the [province/state of] _____, hereby undertake and agree to maintain the confidentiality of the information contained in the summaries issued by the Federal Court in Application DES-2-14, [hereinafter defined as "Summary"], and in particular:

1. I understand that the Court has issued an order in this application which includes the issuance of the Summary in accordance with section 38.06(2) of the *Canada Evidence Act* and I have read and understand the terms of the Order. I acknowledge that any breach of this undertaking by me will be considered to be a breach of the Order;

2. I will use the Summary for the sole purpose of the Claim in Court file T-1911-12, and any related appeals or settlement discussions, and for no other purposes. In addition, and in particular, I confirm that:

    a. I will not reproduce, publish or otherwise make public the Summary or its content; and

b. I will destroy the Summary upon a final decision in the Claim in Court file T-1911-12 or settlement;

3. I will take all necessary steps to maintain the confidentiality of the Summary should it be relied upon in the context of the Claim in Court file T-1911-12 or settlement discussions;

4. I acknowledge and agree that the completion of the Claim in Court file T-1911-12 and any related proceedings shall not relieve me of the obligation of maintaining the confidentiality of the Summary in accordance with the provisions of this undertaking, subject to any further order of the Court;

5. I will keep the Summary in a sealed enveloped at my office, marked as “confidential” and take all necessary measures to restrict the access to the persons who will have signed an undertaking. I will inform the Court of the names of person who have signed the undertaking; and

6. I will not discuss the content of the Summary with the Plaintiff, Mr. Tursunbayev, unless I seek and obtain the authorization of this Court.

_____ (signature)

SIGNED, SEALED AND DELIVERED before a witness this ___ day of _____, _____.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-2-14
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v RUSTEM TURSUNBAYEV
PLACE OF PUBLIC HEARING:	OTTAWA, ONTARIO
PLACE OF CLOSED HEARING:	OTTAWA, ONTARIO
DATES OF PUBLIC HEARING:	MARCH 4, 2020
DATES OF CLOSED HEARINGS:	NOVEMBER 10, 2020 AND JUNE 9, 2021
AMENDED ORDER AND REASONS:	NOËL S.J.
DATED:	JULY 20, 2021

APPEARANCES:

Ms. Nathalie Benoit Mr. Christophe Laurence Mr. Barney Brucker Ms. Kareena Wilding Ms. Andrea Bourke	FOR THE APPLICANT
Mr. Lorne Waldman Ms. Tara McElroy Mr. Brian Heller	FOR THE RESPONDENT
Mr. Anil Kapoor	AMICUS CURIAE

SOLICITORS OF RECORD:

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