Federal Court  Cour fédérale

Date: 20210917

Docket: IMM-6937-19

Citation: 2021 FC 965

Ottawa, Ontario, September 17, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MOHAMED JAMIL JEMMO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Nature of the matter

[1] This Order is made within the context of an application for judicial review of a decision of a visa officer [Visa Officer] at the Canadian Embassy at Abu Dhabi, United Arab Emirates [Embassy]. The Visa Officer refused the Applicant's refugee application pursuant to subsections 11(1) and 16(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]

[Decision] primarily based on concerns the application was similar to another visa application received by Immigration, Refugees and Citizenship Canada [IRCC].

[2] During the course of argument, a discussion took place concerning the fact the tribunal, in this case IRCC, filed a redacted copy of the Certified Tribunal Record [CTR]. There is no Order allowing a redacted filing, nor did the Respondent seek the Court's permission, under seal or otherwise, to file a redacted copy of the CTR.

[3] Before deciding this case on its merits, I will address the issue of whether the Court should consider whether or not to proceed with judicial review on a CTR that was unilaterally redacted.

II. Redactions to the CTR

[4] The Minister submits the redactions were made pursuant to the *Privacy Act*, RSC, 1985, c P-21 [*Privacy Act*]. No motion was brought under section 87 of *IRPA*, nor under sections 37 or 38 of the *Canada Evidence Act*, RSC, 1985, c C-5, nor was a confidentiality Order sought under Rule 151 of the *Federal Courts Rules*, SOR/98-106. The Court's jurisprudence confirms these are the recognized procedures a tribunal must follow if it wishes to file a redacted CTR. As the Court has observed, it is difficult to imagine that one party, alone, would be able to determine whether or not certain information should be disclosed to the other party when this information was before the decision-maker and might have influenced the decision: see *Al Mousawmaii v Canada (Citizenship and Immigration)*, 2018 FC 1256 [*Al Mousawmaii*] at paras 36-37 [Roussel J]:

> [36] In the matter before me, the tribunal record reveals that an immigration officer had deemed that the marriage was genuine before the applicant's spouse withdrew her sponsorship undertaking in 2015. The respondent received the two-page tip-off on January 2, 2017, in the context of the second application for permanent residence. It was found to be sufficiently credible to trigger further investigation. In an interview, the applicant was not informed of the existence of the tip-off even though the immigration officer asked him questions about certain elements of this email. It was only when he received the immigration officer's notes, after filing his application for leave and judicial review, that the applicant learned of the existence of the tip-off. When he realized that the tip-off had been completely redacted when he received the CTR, the applicant raised a violation of procedural fairness in his supplementary memorandum.
>
> [37] The Court recognizes that it is important not only to protect the identity of an informant who has been promised confidentiality, but also to protect the information that could identify the informant. However, the Court must be able to perform its duties. Whether it is an application filed under section 87 of the IRPA for cases where disclosure would be injurious to national security or endanger the safety of any person, an application under section 37 of the CEA when the objection is made on the grounds of public interest, or a motion for order of confidentiality under section 151 of the Rules, it is difficult to imagine that one party, alone, would be able to determine whether or not certain information should be disclosed to the other party when this information was before the administrative decision-maker and might have influenced the administrative decision-maker's decision.
>
> [Emphasis added]

[5] Not only does unilateral redaction have great potential for unfairness to the opposing party, it prevents the Court from reviewing the record; a review of the record is of course the purpose of judicial review in the first place.

[6] Given this jurisprudence, with which I agree, tribunals such IRCC are not allowed to unilaterally redact their CTR as was done in this case, and instead must follow one of the

procedures noted by Justice Roussel in *Al Mousawmaii* at paras 36 and 37, just quoted. In my view, the unilateral redaction is an irregularity which may only be cured by the Respondent applying to this Court for an Order permitting the unilaterally redacted filing. Normally this should be done in advance of the hearing and may be done under seal.

[7] I would add the Court's permission is also required because the Order granting leave to apply for judicial review in this case was made pursuant to section 17 of IRPA's *Federal Courts Citizenship, Immigration and Protection Rules,* SOR/93-22 [*Immigration Rules*]. Subsection 17(b) of the *Immigration Rules* specifically requires the CTR to contain "all relevant documents that are in the possession or control of the tribunal":

> **Obtaining Tribunal's Record**
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> 17 Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:
>
> > **(a)** the decision or order in respect of which the application for judicial review is made and the written reasons given therefor,
> >
> > **(b)** all relevant documents that are in the possession or control of the tribunal,
> >
> > **(c)** any affidavits, or other documents filed during any such hearing, and
> >
> > **(d)** a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review,
>
> and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.
>
> [Emphasis added]

[8] There is no power in section 17 or subsection 17(b) by which either the tribunal (in this case IRCC) or the Attorney General as its counsel, acting unilaterally may partially or wholly redact any information in the CTR. This is not a new point; it was made by Justice Roussel fairly recently in *Al Mousawmaii* as just noted, and also many years ago in *Mohammed v Canada (Minister of Citizenship and Immigration),* 2006 FC 1310 [*Mohammed*] at para 19 [von Finckenstein J]:

> [19] Parenthetically, I would like to note that no one appearing before me on this motion advanced the proposition that material injurious to national security or the safety of persons must be disclosed by reason of the lack of procedure for non-disclosure. Both parties before me only stressed that the decision as to whether something can be withheld or not should be made by the court and not by the respondent alone. I certainly agree with that proposition.
>
> [Emphasis added]

[9] That said, the Respondent now submits otherwise. The Minister notes the CTR was prepared by an immigration officer in the Immigration Section of the Canadian Embassy in Abu Dhabi. The officer noted in the cover letter: "Please note redactions have been made in the CTR to protect third party information under ss. 8(1) of the *Privacy Act*."

[10] While this may or may not be the case (the Court is not able to decide the point because this relevant information is withheld), the Court cannot accept the proposition that the tribunal or its counsel may unilaterally decide such point in the face not only of the language of the legislator in section 17 of the *Immigration Rules*, but in the face of the jurisprudence cited above.

[11] The Minister starts his argument with the proposition that rights protected by the *Privacy Act* are quasi-constitutional in nature, citing *Lavigne v Canada (Office of the Commissioner of*

Official Languages), 2002 SCC 53. I agree. However, that does not mean such information may be withheld from this Court.

[12] The Minister submits ss. 83, 85, and 87 of the *IRPA* are provisions intended to provide a mechanism by which evidence may be withheld if it is injurious to national security and are limited in scope. In this case, the officer redacted what is claimed to be personal information under the control of the government, which is subject to the *Privacy Act.* If this is the case, I would agree the redactions may not engage ss. 83, 85 or 87 of *IRPA.*

[13] The Minister relies on subsection 8(1) of the *Privacy Act*, which I agree prohibits disclosure of personal information:

> 8 (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

[14] The Minister then says of subsection 8(1):

> 7. That subsection creates a prohibition on the disclosure of personal information under the control of government institutions without the consent of the individual to whom the information relates. Subsection 8(2) then grants discretion to disclose it in certain cases, including where it is required to comply with any Act pursuant to paragraph 8(2)(b) or regulation or the rules of court pursuant to paragraph 8(2)(c). The discretion is set out in the wording of s. 8(2): "Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed." [*Privacy Act*, s 8(2)(b)-(c)]
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> 8. Pursuant to paragraphs 8(2)(b) and (c), the Crown is not in breach of *Privacy Act* obligations by disclosing personal information contained in documents that are produced in court proceedings. Nevertheless, it should be noted that those exceptions are discretionary. They require that the government

institution exercise its discretion even in the face of court orders or rules that require disclosure.

9. Jurisprudence in respect to section 8 of the *Privacy Act* has developed the minimum disclosure principle that requires that a disclosing institution ensures that no more personal information than needed is disclosed. [*Privacy Act (Can.) (Re),* [2000] 3 F.C. 82, [2000] F.C.J. No. 179 at para 21 (CA.); *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon*, 2005 FC 1000 ("*Kahlon*")]

10. The application of the minimum disclosure principle was applied by the Federal Court in *Kahlon*, where the court recognized the importance of privacy rights and the obligation of the government to safeguard non-relevant personal information in the production of documents by the Crown. The Justice Tremblay-Lamer wrote as follows:

> [36] The Supreme Court of Canada has held that the *Privacy Act* has quasi-constitutional status, emphasizing the obligation of government institutions to protect personal information (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII), [2002] 2 S.C.R. 773). Thus, although the *Privacy Act* allows for disclosure of personal information pursuant to an order issued by a Court or other body such as the RPD (see paragraph 8(2)(c)), this exemption should not be liberally construed. Rather, personal information, which has no apparent relevance to the issues underlying the application to vacate, ought not to be readily disclosed.
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> *Kahlon*, para 36

11. The Judge further held that "the RPD should consider alternatives to full disclosure in order to strike a balance between the need for disclosure and the right to privacy" (at para 37). Thus, the exemption set out in 8(2)(c) should not be liberally construed. Rather, personal information, which has no apparent relevance to the issues ought not to be readily disclosed. (See also *Canada (Public Safety and Emergency Preparedness) v. Lin*, 2011 FC 431 at para 36).

12. Therefore, in determining what third party personal information should be included in a CTR, one must be mindful of the balance that must be struck between the need for disclosure

under the Federal Court immigration rules and the government's obligation to ensure that no more personal information than needed is disclosed.

13. In considering the balance that must be struck, it is important to be aware of the fact that any personal information that has been made public as a result of a federal tribunal's proceedings is no longer restricted from disclosure under the *Privacy Act* [*Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140].

14. Disclosure of such information in the context of a court proceeding could open the door to further disclosure of that information in other contexts. Moreover, due to the open courts principle, the public has access to court records and could obtain personal information contained in a CTR. Thus, the disclosure in this context of sensitive personal information can have a significant impact on an individual.

Public Interest in Protection of Personal Information

15. The recent Supreme Court of Canada decision in *Sherman Estate v. Donovan*, 2021 SCC 25 recognizes an important public interest in privacy. The Supreme Court confirmed that the federal *Privacy Act*, as well as other federal and provincial privacy and freedom of information statutes, underline privacy as a public interest (para 52). Moreover, the court summarized the important public interest in privacy in the context of limits on court openness as follows:

> [85] To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their

> integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

Sherman Estate v. Donovan, 2021 SCC 25 ("*Sherman Estate*") at para 85

16. Paragraphs 63 to 85 of that decision provide some general principles and illustrative examples of the range of sensitive personal information that, if exposed, could give rise to a serious risk to an important public interest in privacy. In sum, "the question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences," (para 77) and that the determination is very context-specific. [*Sherman Estate*, paras 63 – 85, 77]

17. The *Sherman Estate* decision provides a helpful framework to determine whether the redactions at issue are appropriate, especially given that certain persons who are the subject of records held by IRCC may have an enhanced expectation of privacy. For example, under paragraph 166(c) of IRPA, proceedings before the Immigration and Refugee Board (Refugee Protection Division) concerning a claim for refugee protection are in camera and must be held in private. This enhanced expectation is directly related to the important interests at stake in those sorts of proceedings and the particular sensitivity of the information. [*IRPA*, s. 166(c)]

Conclusion

18. The immigration officer exercised they discretion under s. 8 of the *Privacy Act* to redact third party personal information from disclosure. The information was either irrelevant to the underlying issues in the judicial review application or was information the Applicant had in his own records.

19. The redactions were properly made and do not result in an incomplete record of the matter before the Court.

20. The material redacted are not material to the issue before the Court and the Court can make a finding as to the reasonableness of the officer's decision and whether the appropriate level of procedural fairness was accorded to the Applicant.

[15] The Applicant disagrees. He submits:

> 1. The Respondent has asserted that the redactions unilaterally applied by the Respondent to the Certified Tribunal Record (CTR) were appropriately redacted in accordance with the *Privacy Act* by balancing the protection of personal information with relevance to the issues at hand before the Court.
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> 2. Despite exemptions in the *Privacy Act* clearly permitting an unredacted CTR the Respondent asserts that is appropriate (indeed "required" to do so — para 8 of the Respondent's submissions) for its own agents to exercise discretion unilaterally under the P*rivacy Act*, effectively deciding for itself what may or may not be relevant, without the Court or the Applicant being provided with notice or input on the exercise of that discretion.
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> 3. This creates a dangerous precedent that a party with an interest in the outcome can unilaterally limit the evidentiary basis of a judicial review without judicial oversight.
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> 4. Despite the importance of the protection of personal information, where a court order is in place directing the Respondent on how to compile a CT R, such discretion is improper and unlawfully exercised.
>
> 5. There are two steps in this analysis. First the provisions of the *Privacy Act*, second, the order of this Court.
>
> 6. The *Privacy Act* prohibits disclosure of personal information under the control of a government institution without the consent of that person or in accordance with legislative exemptions.
>
> > 8 (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
> >
> > *Privacy Act* R.S.C. 1985, c P-21, s. 8(1)
>
> 7. There are therefore two exceptions to the prohibition of disclosure of personal information: consent or legislative exemption.
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> 8. In this case there is no evidence that the Respondent sought the consent of the person. Without that evidence it appears that the

Respondent has acted as if it knows best and assumed that this person would not consent. Such ought not to be presumed.

9. The second exception is defined by legislation. There are at least three sections of the *Privacy Act* that may provide an exemption in this case: ss. 8 (2) (a), (b) & (c). The most directly applicable is s. 8 (2) (c):

> 8 (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
>
> (b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
>
> (c) <u>for the purpose of complying with</u> a subpoena or warrant issued <u>order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information</u>;
>
> *Privacy Act* ss. 8 (2) (a) - (c)
>
> [Emphasis added]

10. The legislative exemptions clearly permit (but do not require) the Respondent to disregard the *Privacy Act* prohibitions and provide an unredacted CTR. The Respondent asserts that it was acting in accordance with the *Privacy Act* to protect third-party information and asserts that the information that was redacted was not relevant.

11. With respect there is no evidence that relevance was applied in the redactions since the statement on the cover of the CTR says that redactions were made in accordance with section 8(1) of the *Privacy Act*. Relevance is not a criterion under that section. The Respondent is speculating that those redactions were made based on relevance.

12. The second step in this analysis is to examine the order of the Court. On March 8, 2021, this Court granted leave and ordered that a CTR be prepared by the Respondent. The CTR record must

> be prepared in accordance with the *Federal Court Rules* that require all relevant documents in possession or control of the Tribunal to be disclosed in the CTR.
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> *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 s. 17
>
> 13. The Court order must be complied with. The Court order does not allow discretion to redact other than on the grounds of relevance. The otherwise permissive exercise of discretion under the *Privacy Act* has been superseded by an order of the Court.
>
> 14. In addition the Court has commented upon the need for it to manage its judicial responsibilities - to be a fair arbiter of the facts and law. It simply cannot do so if one party is in control of information that it decides unilaterally whether it will or will not disclose.
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> *Mousawmaii v MCI*, 2018 FC 1256 at paras 36 - 37
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> 15. The Court in *Mousawmaii* identifies several sections of legislation that provide a process to authorize redactions for specific purposes. None of these were relied upon despite being available to the Respondent.
>
> 16. Even if the Respondent had concerns that fall outside the scope of those sections, it is bound to file a motion with the Court seeking permission to not comply with the Court order.
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> *Mohammed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1310 (CanLII), [2007] 4 FCR 300

[16] With respect, I am persuaded by the Applicant's submissions in this respect. In particular, I rely on subsection 8(2) of the *Privacy Act* which in my respectful opinion, and especially in the context of the Court's jurisprudence in *Al Mousawmaii* and *Mohammed*, require the Court to be provided with an unredacted copy of the CTR.

III. Conclusion

[17] In light of these reasons, the Court will invite the Respondent to move for an Order approving the unilateral redactions contained in the CTR IRCC filed. Such motion if any shall be brought within four weeks of the date of this Order. I remain seized of this application together with any such motion, and will complete the judicial review of this application after determining any such motion.

ORDER in IMM-6937-19

THIS COURT'S ORDER is that:

1. The Respondent is granted leave to apply for an Order approving the redactions made to the CTR in this file, which a motion if any is to be brought within four weeks of the date of this Order.
2. Upon the determination of any such motion, this Court will complete its determination of this application for judicial review.
3. I remain seized of this application and any motion brought under paragraphs 1 and 2 of this Order.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6937-19
STYLE OF CAUSE:	MOHAMED JAMIL JEMMO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	BROWN J.
DATED:	SEPTEMBER 17, 2021

WRITTEN REPRESENTATIONS BY:

Douglas Cannon	FOR THE APPLICANT
Brett Nash	FOR THE RESPONDENT

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