Federal Court  Cour fédérale

Date: 20211224

Docket: IMM-585-21

Citation: 2021 FC 1473

Ottawa, Ontario, December 24, 2021

PRESENT: The Hon. Mr. Justice Henry S. Brown

BETWEEN:

ALLAH DINO KHOWAJA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Nature of the matter and background

[1] The Respondent (DOJ) moves in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106 within an application by the Applicant for leave to apply for judicial review of a refusal by Immigration, Refugees and Citizenship Canada [IRCC] to issue the Applicant a Temporary Resident Visa [TRV]. Justice Roy of this Court, acting pursuant to Rule 14(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22

[*Immigration Rules*], ordered the Respondent to disclose the Certified Tribunal Record [CTR] in a production Order dated October 6, 2021. The Respondent seeks relief pursuant to sections 87 (and 83(1)(d)) [collectively referred to as section 87] of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*] in the form of an Order permitting the filing of a redacted CTR. The redactions requested would authorize non-disclosure of certain information in the CTR which, if disclosed, would be injurious to national security or would endanger the safety of any person, pursuant to section 87 and of *IRPA*.

[2] The Motion is for:

A. an Order pursuant to s.87 of the IRPA for the non-disclosure to the public and to the Applicant and his counsel of the classified information that will be filed with the Court;

B. a hearing, if deemed necessary by this Court, in the absence of the public, the Applicant and his counsel (ex parte and in camera) under paragraph 83(1)(c) of *IRPA* to determine this application; and,

C. such further and other relief as Counsel may advise and this Honourable Court deems just.

[3] The grounds for the Motion are:

A. Section 87 of *IRPA* authorizes the Court to make an order for non-disclosure of information or other evidence which, if disclosed, would be injurious to national security or endanger the safety of any person.

B. The material ordered disclosed contains classified information which must be protected and cannot be disclosed to the public or to the Applicant and her counsel as its disclosure would be injurious to national security or endanger the safety of any person as set out in paragraph 83(1)(d) of *IRPA*. The Respondent does not intend to rely on the redacted information for the purpose of responding to the Applicant's application for leave and for judicial review.

[4] Upon receipt of this motion, I convened a public case management hearing on November 9, 2021, at which and for the benefit of the parties, I reviewed the nature of a section 87 motion, and how it would proceed. I advised the parties I would consider the matter in two parts: first at a public hearing, and then at a private (*ex parte*) hearing. I advised the parties that at the public hearing, I would consider the public written filings of both parties, and their oral submissions. Matters to be canvassed would include such matters relevant to the second private hearing as the parties might raise, including the appropriate test or tests to be applied, the advisability of the appointment of a special advocate to assist the Court (given the required absence of counsel for the Applicant), the test(s) to be applied by the Court in considering redactions, and remedies. I also advised counsel that at the second and private hearing (*in camera* and *ex parte*) that is, without the presence of the Applicant or his counsel, I would review the unredacted versions of the pages sought to be redacted, hear submissions from *ex parte* counsel for the Respondent, and thereafter make a determination on this motion. I also advised that more routine matters might be redacted from the CTR, such as the names of public servants involved.

[5] I note the Respondent is represented by two counsel: (1) a public counsel who will not have access to the unredacted material, and (2) *ex parte* counsel with access to the unredacted material. Both were present at the case management hearing on November 9, 2021. There is an ethical non-disclosure wall between the Respondent's public and *ex parte* counsel.

[6] At the case management meeting and in subsequent filing through counsel, the Applicant indicated a wish to have a special advocate appointed given the extent of the redactions, the fact the Officer made the notes in question after reviewing security related documentation, and the

possibility that access to the notes would assist the Applicant in establishing either unreasonableness or procedural unfairness. The Respondent advised he would seek instructions on this matter. The Applicant also requested a brief extension of time to file a responding motion record, to accommodate the fact counsel had quite reasonably decided to delay filing one until after participating in the case management conference. I granted a one week extension and gave the Respondent the same time to advise of its position on the appointment of a special advocate. I note section 87 of *IRPA* states the appointment of a special advocate is not required, and at least in my experience, such appointments are more the exception than the rule; it is a matter of the Court's discretion. This was to be further canvassed in the written material.

[7] I will next summarize some submissions of the parties in their public filings.

II. Respondent's Submissions on this Motion

A. *Purpose of s. 87 Application*

[8] Section 87 of *IRPA* allows for the non-disclosure of information if its disclosure would be injurious to national security or would endanger the safety of any person.

[9] The Respondent relies on *Mohammed v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1310 [von Finckenstein J] at para 19, where this Court held: "the decision as to whether something can be withheld or not should be made by the Court and not by the Respondent alone." The Respondent further relies on *Mekon v Canada (Citizenship and Immigration)*, 2007 FC 1133 [Dawson J as she then was] at para 10, where this Court held: "It is

for the Court and not the tribunal to decide what information can be withheld from an applicant…"

[10] The combined effect of Rule 14(2) of the *Immigration Rules* and this Court's decisions in *Mohammed* and *Mekonen*, mean that a section 87 motion is required where the Respondent takes the position information that otherwise must be disclosed, should not be disclosed because its "disclosure could be injurious to national security or endanger the safety of any person" per paragraph 83(1)(c) of *IRPA*. I agree this accurately reflects the law in this connection.

B. *National Security and Protection of Persons*

[11] The disclosure of confidential information could have a detrimental effect on the ability of investigative agencies to fulfil their mandates in relation to Canada's national security. The Respondent relies on *Almrei v Canada Minister of Citizenship and Immigration),* 2004 FC 420 at para 58 (overturned by the Supreme Court of Canada on other grounds), where Justice Blanchard found the Federal Court has a duty to ensure the confidentiality of information if, in the opinion of the judge, its disclosure would be injurious to national security or would endanger the safety of any person.

[12] In *Henrie v Canada (Security Intelligence Review Committee),* [1989] 2 FC 229 at para 18 (which was affirmed in [1992] FCJ No 100 (CA)), Justice Addy recognized that information related to national security ought not to be disclosed as an important exception to the principle that our Court's process should be open and public:

> [18] […] There are, however, very limited and well defined occasions where the principle of complete openness must play a secondary role and where, with regard to the admission of evidence, the public interest in not disclosing the evidence may outweigh the public interest in disclosure. This frequently occurs where national security is involved for the simple reason that the very existence of our free and democratic society as well as the continued protection of the rights of litigants ultimately depend on the security and continued existence of our nation and of its institutions and laws.

[13] Moreover, disclosure of confidential information related to national security or which would endanger the safety of any person, could cause damage to the operations of investigative agencies. See *Henrie* at para 30 for the test:

> [30] It is of some importance to realize than an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security. He might, for instance, be in a position to determine one or more of the following: (1) the duration, scope intensity and degree of success or of lack of success of an investigation; (2) the investigative techniques of the Service; (3) the typographic and teleprinter systems employed by C.S.I.S.; (4) internal security procedures; (5) the nature and content of other classified documents; (6) the identities of service personnel or of other persons involved in an investigation.

[14] The rationale underlying the need to protect national security information has been considered by this Court in the context of immigration cases. Applications for non-disclosure have been granted by the Court on the Court being satisfied that disclosure of the information

would be injurious to national security or would endanger the safety of any person. See *Fallah v Canada (Citizenship and Immigration),* 2015 FC 1094 [Barnes J] at para 3; *Freeman v Canada (Citizenship and Immigration),* 2013 FC 1065 [Mactavish J] at para 17; *Krishnamoorthy v Canada (Minister of Citizenship and Immigration),* 2011 FC 729 [Mosely J] at para 1-6.

[15] The Respondent submits that in the present case, the Minister cannot produce the document as its disclosure would be injurious to national security, or would endanger the safety of any person. The Respondent must safeguard this information. The classified affidavit(s) and the attachment(s) thereto provide support for the request for non-disclosure and must also be safeguarded.

[16] Consequently, if the classified information provided in the classified affidavit(s) and the attachment(s) thereto were publicly released an informed reader could determine one or more of the following:

a) the duration, scope, intensity and degree or success or lack of success of an investigation;

b) the investigative techniques of the foreign state;

c) the nature and content of the investigation;

d) the identities of the individuals working for the foreign state or of other persons involved in an investigation;

e) the techniques and methodology of the investigation;

f) the degree of success or lack of success of the investigation;

g) the relationships between Canadian government institutions and foreign governmental institutions which could be jeopardised by the disclosure of this information since foreign governments would not be prepared to enter into those kinds of arrangements in the future;

h) individuals who are the subject or targets of the investigation by Canadian and foreign governments; and,

i) in addition, it could jeopardise the lives of the people involved.

III. Applicant's Submissions on this Motion

A. *Are Redactions Warranted?*

[17] The Applicant submits he has not had access to the reports the Respondent is wishing to redact in the CTR. He submits that requests for non-disclosure in an immigration proceeding are to be viewed carefully, as such requests run contrary to the overarching "open court" principle: *Vancouver Sun (Re),* 2004 SCC 43. Therefore, the Applicant submits particular attention must be paid to the following general principles:

- The Minister bears the burden of establishing that disclosure "would" be injurious to national security, or endanger the safety of any person. This is an elevated standard compared to the use of the permissive "could" in the determination of whether a closed hearing is necessary; see *Soltanizadeh v Canada (Minister of Citizenship and Immigration*), 2018 FC 114 [Mosely J] at para 21 (reversed on other grounds)

- The Supreme Court of Canada has stated that the "gate-keeper" judge must be "vigilant and skeptical with respect to the Minister's claims of confidentiality" given "the government's tendency to exaggerate claims of national security confidentiality"; see *Canada (Citizenship and Immigration) v Harkat,* 2014 SCC 37 at para 46

IV. Special Advocate

A. *Applicant's Submissions*

[18] The Applicant submits a special advocate ought to be appointed to assist the Court in its determination of whether the redactions are properly the subject of non-disclosure pursuant to section 87. The Applicant submits the presence of a special advocate would ensure a perception of an independent judiciary, allowing the Court an opportunity to hear arguments from both sides, despite the non-attendance of the Applicant prior to rendering a decision. The perception of impartiality and fairness is important, given the Applicant has already put forward arguments in this case, that his procedural rights - particularly related to his right know the case against him - have been breached.

[19] The Applicant has submitted, for example, that the purpose of the interview initiated by the visa officer to assess inadmissibility was not disclosed to him, in violation of procedural fairness. The Applicant says he also made requests for disclosure of the officer's notes that emanated from the interview, as well as disclosure of any additional documents upon which the officer relied upon to inform their assessment of inadmissibility. While the Applicant was given a few website pages for documents relied upon by the officer, the documents in question were voluminous and no pinpoint references were provided.

[20] Therefore, the Applicant submits, in the context of a case in which his right to know the case against him was breached, further requests for non-disclosure erodes his sense of confidence

in the administration of justice. This can be remedied by the assurances of fairness that the appointment of a special advocate can provide.

[21] The Applicant also submits that a finding of inadmissibility is very important to him, given he has a pending application for permanent residency. He notes he has sought judicial intervention three times with respect to this file.

[22] The Applicant also submits the redaction in this case are extensive, given most of the remainder of the application record contains the Applicant's own submissions and evidence. The evidence that the visa officer had relied on in determining inadmissibility appears to consist almost exclusively of the reports where redactions are sought.

[23] Finally, the Applicant submits concerns regarding the extension of timelines required if a special advocate is appointed can be easily accommodated, given that a decision on leave remains outstanding and that therefore, no timelines have been set.

[24] The Applicant requests that the Court appoint a special advocate in the resolution of the Respondent's section 87 motion.

B. *Respondent's Submissions*

[25] The Respondent submits there is no absolute right to have a special advocate appointed when an *in camera ex parte* hearing is requested under section 87, as per Justice Noël in *Dhahbi v Canada (Citizenship and Immigration)*, 2009 FC 347 at para 21. Only where the judge is of the

opinion that considerations of fairness and natural justice require the appointment of a special advocate to protect the interests of the permanent resident or foreign national must a special advocate be appointed. The Respondent notes this Court has rarely appointed a special advocate in immigration judicial review proceedings and therefore submits such an appointment is not necessary in this case.

[26] Pursuant to section 85.1(2) of *IRPA*:

Responsibilities	**Responsabilités**
85.1(2) A special advocate may challenge	**85.1(2)** Il peut contester:
(a) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and	**a)** les affirmations du ministre voulant que la divulgation de renseignements ou autres éléments de preuve porterait atteinte à la sécurité nationale ou à la sécurité d'autrui;
(b) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.	**b)** la pertinence, la fiabilité et la suffisance des renseignements ou autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil, et l'importance qui devrait leur être accordée.

[27] The Respondent submits in the present case, the Court will be able to determine whether the disclosure of the redacted material would be injurious to national security or endanger the safety of any person. Furthermore, the Respondent submits given the redacted information was not relied upon, it is difficult to see the value in appointing a special advocate to challenge the

relevance, reliability, and sufficiency of the redacted information or the weight to be given. Therefore, a special advocate's assistance is not required to challenge the Minister's claims.

[28] The Respondent submits it is well established that national security considerations can limit the extent of disclosure of information to an affected individual. While security interests may be engaged for individuals who have been found to be protected persons, are subject to a security certificate, and may face a potential risk of deportation, this must be contrasted to the facts of the case at bar. As such, the Respondent submits limiting the disclosure of information has little impact on the Applicant who is applying from overseas for permanent residence, is not detained, and is not facing removal to a country where he has been found to be at risk.

[29] In response to the Applicant's argument that the redaction of evidence requires the appointment of a special advocate, the Respondent submits the material in question was not relied upon by the Visa Officer and will not be relied upon to defend the reasonableness of the decision. Even where redacted information has been relied upon in other judicial reviews, which is not the case here, this Court has declined to appoint a special advocate.

[30] In response to the Applicant's argument that he needs the material in question in order to challenge the decision, the Respondent submits this argument is without merit as the same topics were discussed at his interview and he was provided with an opportunity to respond via a procedural fairness letter. The decision-maker based their decision on the Applicant's evidence and open source documentary evidence. This mitigates against the appointment of a special advocate.

[31] In response to the Applicant citing the "perception of impartiality" or the "perception of an independent judiciary" as a factor weighing in favour of the appointment of a special advocate, the Respondent submits there is no jurisprudence cited in support of the argument that a special advocate is necessary to ensure the perception of the Court's impartiality.

[32] Overall, the Respondent submits a special advocate is not necessary to protect the interests of the Applicant and should not be appointed. Moreover, the appointment of a special advocate would not be consistent with paragraph 83(1)(a) of *IRPA* as it would not allow for an expeditious proceeding.

V. Procedure after written submissions

[33] After the close of the time for written submissions, I determined and advised the parties a Special Advocate is not necessary in the present matter. I asked the Applicant to advise whether he wished a public hearing of the section 87 motion, which he did not.

[34] Therefore, the matter proceeded to a private *in camera ex parte* hearing where the Court considered the redactions requested. It heard oral testimony and from *in camera* counsel for the Respondent.

[35] At the conclusion of the oral hearing, I issued the following oral decision from the bench:

> 1. JUSTICE BROWN: Well, thank you very much. I have read the material that you have submitted and have considered the affidavits of XXX and XXX, which I found comprehensive and very helpful. I have also heard their evidence today in response to your questions and questions from the Court.

2. I note that, before hearing from them, I reiterated the legal propositions governing the duty of candour and full disclosure, as enunciated by this Court and many others; most importantly, as enunciated by the Supreme Court of Canada. And I emphasized to XXX and, as well, to XXX, who was in the room at that time, that this is a continuing obligation, and I would add that it is a personal obligation. As the expression is, it lies on you, the two witnesses, to make sure, if something comes up, that you are back here with an explanation. Things do come up; we know that.

3. I have also considered the legal submissions contained in the public memorandum and I have noted the case law cited, which is very helpful. That said, I have seen and heard these arguments before over the years and I have satisfied myself that the redactions either cover material the disclosure of which would be injurious to national security or would endanger the safety of persons, as set out in *IRPA*, the *Immigration and Refugee Protection Act*, section 83(1)(d).

4. Having been satisfied that the facts presented and the factual matrix that has been presented in the affidavits and in today's submissions lines up with the statutory requirements as established by Parliament, I am satisfied that the motion should be granted, and therefore order that the redactions proposed shall be made and that they are accepted as made in the material filed, and now delivered to counsel for the applicant.

5. A brief order to this effect will issue, which should re-engage, then, the trial coordinator of the Federal Court to set a date for the public hearing of the application. The application for leave for judicial review will have to be decided technically, and that won't take long, and the trial coordinator will then set a date for the public hearing of the application for judicial review itself.

6. I wish to thank counsel and the affiants for their attendance and evidence this morning. And, therefore, the hearing is concluded.

ORDER in IMM-585-21

THIS COURT'S ORDER is that:

1. The Respondent's motion under section 87 and 83(1)(d) of *IRPA* is granted.

2. The redactions to the CTR delivered by the Respondent to the Applicant found on the pages set out in the Respondent's letter of October 29, 2021, are approved.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-585-21
STYLE OF CAUSE:	ALLAH DINO KHOWAJA 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:	DECEMBER 24, 2021

WRITTEN REPRESENTATIONS BY:

Naseem Mithoowani	FOR THE APPLICANT
Prathima Prashad	FOR THE RESPONDENT

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