Federal Court  Cour fédérale

**Date: 20240306**

**Dockets: T-806-23**
**T-1280-23**

**Citation: 2024 FC 370**

**Ottawa, Ontario, March 6, 2024**

**PRESENT: Mr. Justice Norris**

**Docket: T-806-23**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**KHALIL MAMUT AND AMINIGULI AIZEZI**

**Respondents**

**Docket: T-1280-23**

**AND BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**SALAHIDIN ABDULAHAD AND ZULIPIYE YAHEFU**

**Respondents**

## ORDER AND REASONS

## I. OVERVIEW

[1] Salahidin Abdulahad and Khalil Mamut are Chinese citizens of Uyghur ethnicity. They were both captured in Pakistan and turned over to United States authorities after coalition forces invaded Afghanistan in response to the terrorist attacks in the United States on September 11, 2001. In early 2002, Mr. Abdulahad and Mr. Mamut were transferred to the Guantanamo Bay detention facility. They were held there until 2009, when they were cleared to be released to Bermuda.

[2] Mr. Abdulahad's spouse, Zulipiye Yahefu, has been granted refugee protection by Canada. When she applied for permanent residence in Canada in December 2013, Ms. Yahefu included Mr. Abdulahad on her application as a dependent. Ms. Yahefu became a permanent resident in July 2014 but Mr. Abdulahad's application remains outstanding.

[3] Mr. Mamut's spouse, Aminiguli Aizezi, has also been granted refugee protection in Canada. When she applied for permanent residence in Canada in June 2015, she included her son as well as Mr. Mamut on her application as dependents. Ms. Aizezi and her son became permanent residents in March 2017 but Mr. Mamut's application remains outstanding.

[4] On February 14, 2022, Mr. Mamut and Ms. Aizezi commenced an application for judicial review (IMM-1407-22). They seek an order in the nature of *mandamus* and other relief arising from what they allege is an unreasonable delay in the processing of Mr. Mamut's application for permanent residence.

[5] On August 31, 2022, Mr. Abdulahad and Ms. Yahefu commenced a similar application for judicial review (IMM-8585-22). They too seek an order in the nature of *mandamus* and other relief arising from what they allege is an unreasonable delay in the processing of Mr. Abdulahad's application for permanent residence.

[6] Because the two applications for judicial review share a number of issues in common, they have been joined and are being determined together.

[7] Under the Court's settlement project, Production Orders were issued in both matters under Rule 14(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (*FCCIRPR*) – on October 21, 2022, in IMM-1407-22, and on February 9, 2023, in IMM-8585-22.

[8] The Minister of Citizenship and Immigration has objected to the disclosure of certain information his officials included in the Certified Tribunal Records (CTRs) provided in response to the Production Orders. The CTRs have been redacted accordingly pending the Court's determinations.

[9] Some information has been redacted under section 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) on the basis that its disclosure would be injurious to national security or endanger the safety of any person. The validity of these non-disclosure claims will be addressed in a separate Order and Reasons.

[10] Other redacted information relates to a contrary outcome process that was engaged with respect to Mr. Abdulahad's and Mr. Mamut's respective applications for permanent residence (the contrary outcome process is described below). The information is found in a single document in each CTR: at pages 769 to 780 in the CTR produced in IMM-1407-22; and at pages 968 to 980 in the CTR produced in IMM-8585-22. These pages have been redacted in their entirety. (Some of the information on these pages is also subject to claims under section 87 of the *IRPA*.)

[11] The Minister has objected to the disclosure of information relating to the contrary outcome process on two overlapping grounds. One is that the information is protected by the common law principle of deliberative secrecy or deliberative privilege. The other is that disclosure of the information would encroach upon a specified public interest under section 37 of the *Canada Evidence Act*, RSC 1985, c C-5 (*CEA*), and the public interest in non-disclosure outweighs the public interest in disclosure. The Minister opted to proceed first with the common law objection to disclosure. It was understood that *CEA* section 37 would be invoked only if the common law objection to disclosure was unsuccessful.

[12] Following a hearing, I concluded that the common law principle of deliberative secrecy did not protect information relating to the contrary outcome process: see *Mamut v Canada (Citizenship and Immigration)*, 2023 FC 1108. The Minister then proceeded with the present applications under *CEA* section 37. On these applications, the Minister filed public records in support of the non-disclosure claims. I received public written and oral submissions from all parties. I also heard *in camera*, *ex parte* submissions from counsel for the Minister. Apart from the information in question, the Minister did not rely on any confidential information or evidence to support the *CEA* section 37 objections.

[13] For the reasons that follow, I am satisfied that the disclosure of most but not all of the information at issue would encroach upon a specified public interest and, further, that the public interest in non-disclosure of that information outweighs the public interest in disclosure. Accordingly, while I will authorize the disclosure of some information in the two documents in question pursuant to *CEA* subsection 37(4.1) (subject to any outstanding claims over that information under *IRPA* section 87), I am prohibiting disclosure of the balance of the information under *CEA* subsection 37(6). Pursuant to *CEA* subsection 37(5), I will authorize disclosure of a non-injurious summary of the information whose disclosure is being prohibited.

## II. THE INFORMATION AT ISSUE

[14] In support of the *CEA* section 37 applications, the Minister filed two public affidavits from an Acting Senior Analyst in the Case Management Branch at Immigration, Refugees and Citizenship Canada (IRCC) – one for each application. The analyst was not cross-examined on either of his affidavits. (The Minister had filed substantially the same affidavits from the same

analyst in support of the common law objection to disclosure.) As contemplated in *CEA* subsection 37(1), the affidavits certify on behalf of the Minister that the information at issue should not be disclosed on grounds of a specified public interest.

[15] The essential facts underlying the *CEA* section 37 applications are not in dispute. Taken together, the analyst's affidavits and the unredacted information in the two CTRs establish the following:

- The applications for permanent residence have raised concerns over whether Mr. Abdulahad and Mr. Mamut are inadmissible to Canada under section 34 of the *IRPA* due to their alleged association with the East Turkistan Islamic Movement (ETIM).

- Security screening of applicants for permanent residence is a joint undertaking involving the IRCC decision maker (in the present cases, a visa officer) and the Canada Border Services Agency (CBSA).

- IRCC and the CBSA have developed a process to ensure that IRCC decision makers undertake a final consultation with its screening partners before making a decision that is contrary to the security recommendation provided by the CBSA. This process is referred to as the contrary outcome process. It is described in an excerpt from the CBSA Immigration Control (IC) Manual that is attached as an exhibit to both affidavits.

- The contrary outcome process applies in two circumstances: (1) when IRCC has received a non-favourable inadmissibility recommendation from the CBSA and the IRCC decision maker wishes to issue a visa with no finding of inadmissibility; or (2) when IRCC has received a favourable recommendation from the CBSA and the IRCC

decision maker wishes to refuse the visa on a ground of inadmissibility under sections 34, 35 or 37 of the *IRPA*.

- The CBSA provided IRCC with a non-favourable inadmissibility recommendation in the case of Mr. Abdulahad on November 20, 2015.

- The CBSA provided IRCC with a non-favourable inadmissibility recommendation in the case of Mr. Mamut on January 25, 2018.

- According to the analyst's affidavits, the information at issue in each CTR "consists of correspondence from the IRCC visa officer to CBSA in which the IRCC visa officer initiates the contrary outcome process" (*Affidavit of Mohamad Zeineddine sworn April 13, 2023* (T-806-23), para 11; *Affidavit of Mohamad Zeineddine sworn June 21, 2023* (T-1280-23), para 11).

- In accordance with the contrary outcome process, in each case the IRCC visa officer "provided a detailed rationale as to why he disagrees with CBSA's non-favourable inadmissibility recommendation and requests feedback from CBSA. In doing so, the IRCC visa officer reveals his thoughts and deliberations regarding whether [Mr. Mamut/Mr. Abdulahad] is inadmissible" (*Affidavit of Mohamad Zeineddine sworn April 13, 2023* (T-806-23), para 12; *Affidavit of Mohamad Zeineddine sworn June 21, 2023* (T-1280-23), para 12).

## III. ANALYSIS

### A. *Statutory Provisions*

[16] Subsection 37(1) of the *CEA* states:

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|---|---|
| **Objection to disclosure of information** | **Opposition à divulgation** |
| **37 (1)** Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest. | **37 (1)** Sous réserve des articles 38 à 38.16, tout ministre fédéral ou tout fonctionnaire peut s'opposer à la divulgation de renseignements auprès d'un tribunal, d'un organisme ou d'une personne ayant le pouvoir de contraindre à la production de renseignements, en attestant verbalement ou par écrit devant eux que, pour des raisons d'intérêt public déterminées, ces renseignements ne devraient pas être divulgués. |

[17] The Court's determination of the Minister's objection to disclosure is governed by subsections 37(4.1), (5), (6), and (6.1):

| | |
|---|---|
| **Disclosure order** | **Ordonnance de divulgation** |
| **(4.1)** Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order | **(4.1)** Le tribunal saisi peut rendre une ordonnance autorisant la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1), sauf s'il conclut que leur divulgation est préjudiciable |

the disclosure of the information.

au regard des raisons d'intérêt public déterminées.

**Disclosure order**

**Divulgation modifiée**

**(5)** If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

**(5)** Si le tribunal saisi conclut que la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1) est préjudiciable au regard des raisons d'intérêt public déterminées, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public déterminées, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice au regard des raisons d'intérêt public déterminées, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

**Prohibition order**

**Ordonnance d'interdiction**

**(6)** If the court does not authorize disclosure under subsection (4.1) or (5), the court shall, by order, prohibit disclosure of the information.

**(6)** Dans les cas où le tribunal n'autorise pas la divulgation au titre des paragraphes (4.1) ou (5), il rend une ordonnance interdisant la divulgation.

**Evidence**

**Preuve**

**(6.1)** The court may receive into evidence anything that, in

**(6.1)** Le tribunal peut recevoir et admettre en preuve tout

| | |
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| the opinion of the court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence. | élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut fonder sa décision sur cet élément. |

B. *Preliminary Issue: Should the Court Appoint an* Amicus Curiae*?*

[18] In connection with both the common law deliberative secrecy claims and the claims under *CEA* section 37, the respondents in the present applications (the applicants in the underlying matters) submitted that it would be in the interests of justice to appoint an *amicus curiae* to assist the Court in any *ex parte* proceedings that may be held. Since I concluded that it was not necessary to review the information in question or to conduct any part of the proceeding *ex parte* to dispose of the Minister's common law deliberative secrecy claims, it followed that there was no need to appoint an *amicus* at that stage: see *Mamut,* at paras 23-25.

[19] On the other hand, as explained below, after hearing from the parties in the public part of these applications, I concluded that it was necessary and appropriate to review the information in question to dispose of the Minister's claims under *CEA* section 37. Having informed the parties of this, the Minister requested an opportunity to provide *ex parte* submissions. I also informed the parties that, despite the fact that part of this proceeding would therefore be taking place *ex parte,* but subject to what I saw once I reviewed the redacted information, I was not persuaded that the assistance of an *amicus* was required.

[20] Upon reviewing the information in question, I remained of the view that the appointment of an *amicus* was not necessary for the just adjudication of the Minister's *CEA* section 37 claims.

I reached this conclusion for the following reasons. First, the information in question is limited in scope and could readily be grasped by the Court without the assistance of an *amicus*. Second, since the Minister's claims raised essentially one issue, there was no room for any sort of narrowing of issues by an *amicus*. Third, apart from the information itself, the Minister was not relying on any *ex parte* evidence so there would be no need for an *amicus* to cross-examine witnesses. Finally, the Minister's claims did not raise any novel or complex legal issues; rather, as will be seen below, they turned on a straightforward application of a settled legal test. Importantly in the latter regard, the respondents themselves had a full opportunity to address the elements of that test in the open proceedings. In short, while the exclusion of a party always raises serious procedural fairness concerns, I was satisfied that, in the circumstances of this case, the absence of an *amicus* would not leave either the respondents or the Court at a disadvantage.

C. *Analytical Framework*

[21] The test under *CEA* section 37 consists of the following steps. First, as a preliminary matter, the Court must determine whether the application can be dealt with based upon the affidavit material filed or whether an apparent case for disclosure has been established requiring the Court to examine the information at issue. Next, the Court must determine whether disclosure of the information would encroach upon a specified public interest. If not, the Court may authorize disclosure of the information. If disclosure of the information would encroach upon a specified public interest, the Court must then determine whether the public interest in disclosure outweighs in importance the specified public interest. If the public interest in disclosure outweighs in importance the specified public interest, the Court may authorize disclosure. If the public interest in disclosure does not outweigh in importance the specified

public interest, the Court shall prohibit disclosure of the information. See *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 493 at paras 32-38; *Canadian Constitution Foundation v Canada (Attorney General)*, 2022 FC 1233 at paras 74-79; and *Canada (Attorney General) v Animal Justice Canada*, 2024 FC 277 at para 15.

[22] The Court may receive into evidence, and base its decision on, anything that it deems reliable and appropriate, even if it would not otherwise be admissible under Canadian law (*CEA*, subsection 37(6.1)). Nevertheless, the Minister must ground these applications on "specific and concrete assertions, rather than on vague and overly generalized statements" and "must present sufficient evidence to convince the Court that the assertion of public interest privilege is legitimate in the circumstances" (*Canada (Attorney General) v Chad*, 2018 FC 319 (*Chad #1*) at para 15; *Canada (National Inquiry into Missing and Murdered Indigenous Women and Girls) v Canada (Attorney General)*, 2019 FC 741 at para 47).

[23] The allocation of burdens in the application of this test is not in dispute. The burden is on the respondents to establish an apparent case for disclosure. The burden is on the Minister to establish that disclosure would encroach upon a specified public interest. If this is established, the burden then shifts to the respondents (the parties seeking disclosure) to establish that the public interest in disclosure outweighs in importance the specified public interest.

[24] I will examine each of these elements of the test in turn.

(1) Have the respondents established an apparent case for disclosure?

[25] In *Khan v Canada*, [1996] 2 FC 316, Justice Rothstein (then a member of the Federal Court) wrote: “The party seeking disclosure must first make out an ‘apparent case’ for disclosure before any documents are inspected. If the party seeking disclosure establishes an apparent case for disclosure, the court then proceeds to examine the documents in issue” (at para 25). See also *Wang*, at para 47.

[26] Justice Rothstein observed in *Khan* (at para 26) that a variety of factors have been considered by the Federal Court in determining whether an apparent case for disclosure has been established; however, he found the most helpful guidance in the then recent Supreme Court of Canada jurisprudence dealing with disclosure and third-party production in criminal matters. In particular, Justice Rothstein concluded that the “likely relevance” test articulated by the Supreme Court of Canada in *R v O’Connor*, [1995] 4 SCR 411, is appropriate for the “apparent case for disclosure” stage in proceedings under *CEA* subsection 37(2) (*Khan*, at para 37). As he had observed earlier in the decision, “Although the reasons for nondisclosure in *O’Connor* are different, the analysis to be performed in deciding whether to order disclosure is similar to cases under the CEA” (*Khan*, at para 33). The underlying proceeding in *Khan* was a criminal prosecution but there has been no suggestion that a different test should apply when, as in the present cases, the underlying proceeding is not a criminal prosecution. I would therefore adopt the likely relevance test (as it is now understood in light of jurisprudence subsequent to *O’Connor* and *Khan*) as the appropriate test for determining whether the respondents have established an apparent case for disclosure.

[27] *O'Connor* established a two-step test for the production of records from a third party in criminal proceedings. At the first step of the test, before the Court will inspect the records in issue, the party seeking production must establish that the information being sought is likely relevant. "Likely relevance" is a lower threshold than "true relevance." It has a "wide and generous connotation" that "includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence" (*R v McNeil*, 2009 SCC 3 at para 44; see also *O'Connor*, at para 21; and *R v Gubbins*, 2018 SCC 44 at para 27). The Supreme Court of Canada has emphasized that this burden is "significant" but not "onerous" (*O'Connor*, at para 24; see also *McNeil*, at para 29). Meeting the likely relevance threshold cannot be an onerous burden "because accused persons cannot be required, as a condition to accessing information that may assist in making full answer and defence, 'to demonstrate the specific use to which they might put information which they have not seen'" (*O'Connor*, at para 25, quoting from *R v Durette*, [1994] SCR 469 at 499). This concern about placing an unfair burden on a party seeking disclosure applies equally whether the proceeding is criminal or civil. This threshold is only meant to forestall speculative and clearly unmeritorious applications that would consume scarce judicial resources unnecessarily. It serves to prevent fishing expeditions, but nothing more (*Gubbins*, at para 28).

[28] In the present context, I would understand the test as being whether there is a reasonable possibility that the information in question is logically probative of an issue in the underlying applications for judicial review.

[29] The Minister submits that the respondents have not established an apparent case for disclosure but I am unable to agree. The Minister included the two documents in question in the CTRs prepared in response to Production Orders. There is no suggestion that the documents were included by mistake (e.g. they relate to someone other than the respondents). Nor, in the absence of any evidence to this effect, is it appropriate for counsel for the Minister to try to suggest that the officials who prepared the CTRs had applied an unduly broad understanding of what would be relevant to the underlying judicial review applications. In short, I do not think it is now open to the Minister to contend that the respondents have not established that the documents are likely relevant in the sense described above. On the record before me, the fact that the Minister included the documents in the CTRs is sufficient to establish an apparent case for disclosure (*Chad #1*, at para 39; see also *Animal Justice Canada*, at para 16). Put another way, it cannot reasonably be suggested that, by seeking disclosure of information the Minister included in the CTRs, the respondents are engaged in a fishing expedition.

[30] In any event, according to the Minister's affidavit evidence, the redacted information relates to the contrary outcome processes that were triggered in connection with the outstanding applications for permanent residence that are the subjects of the underlying applications for judicial review. The respondents have raised issues regarding the process by which their applications for permanent residence have been handled by IRCC and other agencies; the contrary outcome process is indisputably part of that process. This alone is sufficient to give rise to a reasonable possibility that the information in the documents produced pursuant to that process is logically probative of one or more issues in the underlying applications. For example, one of the central issues in the judicial review applications is the reasonableness of the delay in

processing the applications for permanent residence. (For a discussion of the issue of delay as it relates to applications for *mandamus*, see *Abu v Canada (Citizenship and Immigration)*, 2021 FC 1031 at paras 44-47.) On the Minister's own account of the information in issue, there is a reasonable possibility that that information is logically probative of this issue.

[31] For these reasons, I concluded that the respondents had established an apparent case for disclosure and that it was therefore necessary and appropriate for me to review the two documents in issue. Furthermore, having done so, I am not satisfied that the claim of likely relevance is not borne out; in other words, I am not satisfied that the documents are clearly irrelevant (*c.f. McNeil*, at para 40). As a result, it is necessary to proceed to the next parts of the test.

(2) What is the specified public interest?

[32] Subsection 37(1) of the *CEA* provides that the Minister may object to disclosure of information before a court "on the grounds of a specified public interest." This is sometimes referred to as a claim of Crown or public interest privilege. "Public interest" for the purpose of *CEA* section 37 is undefined. It has been found to apply to various types of information that are deserving of protection (*Canadian Constitution Foundation*, at para 74). The categories of public interest that may be damaged by disclosure of information are not closed (*Canadian Human Rights Commission v Northwest Territories*, 2001 FCA 259 at para 8). By its own terms, however, when engaging *CEA* section 37, the Minister must specify the public interest(s) on which he relies.

[33] In the present case, the Minister has specified two public interests on the grounds of which he objects to disclosure of the information at issue. One is the common law principle of deliberative secrecy. The other is the integrity of the contrary outcome process. There is no dispute that these are public interests within the ambit of *CEA* section 37. What is in dispute is whether disclosure of the information at issue would encroach upon either of these interests. I turn to this question next.

(3) Would disclosure of the information encroach upon the specified public interests?

[34] Looking first at the objection to disclosure on the basis of the common law principle of deliberative secrecy, in my view, my earlier determination that the principle does not apply to the visa officer who is the author of the information at issue is dispositive of this objection.

[35] Despite welcoming further submissions from the parties on this point (notwithstanding that I considered the question to be *res judicata*), the Minister has not persuaded me that my earlier conclusion is incorrect. Crucially, I remain of the view that the visa officer is not an *adjudicative* decision maker in the sense necessary to attract the protection of what is, in effect, a class privilege for work product relating to the officer's decision making. Regarding the essential connection between the adjudicative character of the decision maker (in particular, the requirement of independence) and the protections of deliberative privilege, see *Mamut*, at paras 37 to 47 and the authorities cited therein. I adopt that analysis here.

[36] In response to the Minister's further submissions attempting to demonstrate that the visa officer is entitled to the protections of deliberative privilege, as the Supreme Court of Canada

explained in *Ocean Port Hotel v British Columbia*, 2001 SCC 52, while administrative tribunals may sometimes be independent from the executive, as a general rule they are not (at para 24). The degree of independence required of a particular tribunal or decision maker is a matter of discerning the intention of Parliament or the legislature (*ibid.*). In the present case, even accepting that, under the *FCCIRPR*, the officer is considered a "tribunal", he simply does not have the independence from the executive necessary to warrant the protection accorded to decision makers who have such independence, whether as a matter of constitutional principle or of legislative choice. On the contrary, the officer's authority is that of the Minister himself: see *IRPA*, subsection 4(1). Since the common law principle of deliberative secrecy does not apply to the officer's decision-making process, disclosure of information relating to that process cannot encroach upon this public interest.

[37] On the other hand, I am satisfied that the disclosure of some (but not all) of the information at issue before final decisions are made concerning whether Mr. Mamut and Mr. Abdulahad are inadmissible would encroach on the integrity of the contrary outcome process.

[38] As described in paragraph 17.3 of the Immigration Control (IC) Manual, the contrary outcome process was developed "to establish a dynamic consultation process that ensures that reasonable efforts are made among partners to resolve contrary admissibility opinions before an admissibility decision is rendered. This process also ensures that decision makers have all the necessary information to make a well informed decision." Accordingly, the process requires the IRCC decision maker (in the present cases, the visa officer) to provide the CBSA with, among

other things, "[g]eneral reason(s) for the contrary opinion of the IRCC decision maker" as well as a "detailed explanation and rationale for 'contrary outcome' opinion." As the manual goes on to explain, "a more detailed explanation will make it easier for the CBSA and other security screening partners to address specific concerns of the IRCC decision maker."

[39] This underlying rationale of the contrary outcome process is articulated in the analyst's affidavits as follows:

> The contrary outcome process ensures that reasonable efforts are made amongst partners to resolve contrary admissibility opinions before an admissibility decision is rendered. The process also ensures that decision makers have all the information necessary to make a well informed decision. Should a potential contrary outcome not be resolved through this process, the IRCC decision maker remains the final decision maker and will proceed with their admissibility determination.
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> *Affidavit of Mohamad Zeineddine sworn April 13, 2023* (T-806-23), para 4; *Affidavit of Mohamad Zeineddine sworn June 21, 2023* (T-1280-23), para 4

[40] I accept that, for the contrary outcome process to work effectively, the visa officer must be able to share his reasons for disagreeing with the CBSA's inadmissibility assessments fully and candidly. It is only by doing so that the issue of inadmissibility can be examined thoroughly and sound decisions can be made. It goes without saying that sound decision making on matters touching on national security is of the utmost importance. The IRCC decision maker must be able to consult with specialists at the CBSA and other security partners in a candid and open manner; he must be able to share his perspectives freely and unreservedly for the decision making process to work properly (*c.f. Canada (Attorney General) v Chad*, 2018 FC 556 (*Chad #2*) at para 48). While the manual explains that the contrary outcome process can also

help to “mitigate potential bilateral irritants” between IRCC and the CBSA (something upon which I place no importance in the present context), I find that it mainly serves to ensure that decision makers at both IRCC and the CBSA have a complete understanding of the question of inadmissibility in the circumstances of the particular case at hand, including one another’s perspectives on this question. This is possible only if the visa officer is able to present his contrary opinion to the CBSA completely and candidly.

[41] I also accept that the prospect of disclosure of the substance of the visa officer’s responses to the CBSA’s inadmissibility assessments before final decisions are made could have a chilling effect on the officer such that the rationale offered by the officer would be less than complete, detailed, and candid than it otherwise would be. Importantly, until the contrary outcome process has concluded, the visa officer’s opinion on inadmissibility is a provisional one. The officer does not make a final decision until the contrary outcome process has been completed. In this regard, I consider the substance of the officer’s communications with the CBSA pursuant to the contrary outcome process to be analogous to the draft recommendation discussed in *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1086 at paras 21-23. Since the contrary outcome process contemplates that the visa officer may end up changing his mind about how to assess the evidence and even about the ultimate issue of inadmissibility, the potential disclosure now of his current reasoning may make him less candid in sharing that reasoning with the CBSA because he may be reluctant to risk giving false hopes to the respondents or creating an expectation of a certain result.

[42] There is no evidence that the visa officer in the present matters had any such concerns. The important point, however, is that decision makers could be chilled in the future if the substance of their rationale for disagreeing with the CBSA's inadmissibility assessment were subject to disclosure before a final decision is made. As the Supreme Court of Canada has observed in other contexts, a chilling effect like this can be inferred from known facts and experience and in the absence of specific evidence to prove it (*R v National* Post, 2010 SCC 16 at para 78; *R v Khawaja*, 2012 SCC 69 at para 79; *R v Vice Media Canada Inc*, 2018 SCC 53 at para 29). I am prepared to draw that inference here. Such a chill on complete and candid communications on the part of the visa officer would encroach on the integrity of the contrary outcome process.

[43] To be clear, the question of whether the details of that process should be disclosed to the respondents in connection with an application for judicial review of an adverse decision by the visa officer (should such be made) is not before me.

[44] Before concluding on this point, I would add only that I do not find persuasive the Minister's submission that, by analogy with investigative privilege (see, for example, *Chad #2*, at paras 74-77), the disclosure of ongoing inquiries into the question of inadmissibility would prejudice those inquiries by tipping off the respondents prematurely to the concerns that are driving them. As has often been emphasized, in assessing objections to disclosure under *CEA* section 37, "context is everything. Each invocation of the section involves a weighing of the factors for and against disclosure in the unique circumstances of the case" (*Al Kaddah v Canada*, 2021 FC 1292 at para 46, quoting Robert W. Hubbard et al., *The Law of Privilege in Canada*

(Thomson Reuters, 2021) at 3-12). In the present case, the respondents have already been informed of the substance of the concerns about inadmissibility through procedural fairness letters and (subject to non-disclosure claims under *IRPA* section 87) through inclusion of the CBSA inadmissibility assessments in the CTRs prepared in connection with the underlying judicial review applications.

[45] Moreover, the information at issue (the visa officer's explanations for why he disagrees with the CBSA's adverse inadmissibility determinations) is actually favourable to the respondents. It is therefore difficult to see how informing the respondents about how the visa officer sees their respective cases could affect the process in any way, let alone in a negative way, as the Minister suggests. The Minister's argument that disclosure of this information would have a deleterious effect on the contrary outcome process because, having learned why the visa officer disagreed with the CBSA's initial assessment, the respondents could tailor their evidence or even attempt to inundate the officer with more evidence to shore up his original assessment is entirely speculative. It falls well short of demonstrating that the assertion of public interest privilege is legitimate in the circumstances of these cases.

[46] While I have found, for the reasons set out above, that disclosing the substance of the visa officer's analyses at this time would encroach on a specified public interest, I am not satisfied that this is the case with respect to the entirety of the officer's communications with the CBSA pursuant to the contrary outcome process. More particularly, I am not persuaded that disclosing the contrary outcomes templates or the "tombstone" and certain other background information pertaining to Mr. Mamut and Mr. Abdulahad would be injurious in any way. The template is

already known to the respondents (it is set out in paragraph 17.3 of the Immigration Control (IC) Manual), as is some of the basic information filled in by the officer in relation to items 1 through 6 in each of the communications with the CBSA. I make the same finding with respect to the officer's synopsis of the findings of the CBSA in items 7, 8, and 9 of the templates, as well as the headings in the officer's analyses under item 9, which simply track the main allegations in the CBSA inadmissibility assessments. (For greater certainty, I reiterate that some of this information is also subject to claims under section 87 of the *IRPA* which remain to be determined.) I also make the same finding with respect to the email headers and signature lines of the two communications with the CBSA (one for each matter), including the dates the officer sent the emails to the CBSA. None of this information reveals in any way the visa officer's thoughts and deliberations regarding whether Mr. Mamut or Mr. Abdulahad is inadmissible.

[47] Accordingly, in the absence of any injury following from the disclosure of this information, I have concluded that disclosure of this information should be authorized under *CEA* subsection 37(4.1). The lifts the Court is ordering are reflected in the two documents attached hereto as Annex A (excerpts from the contrary outcome process communication regarding Mr. Mamut) and Annex B (excerpts from the contrary outcome process communication regarding Mr. Abdulahad).

[48] That being said, as I will explain in the next section, I am not persuaded that any additional lifts pursuant to *CEA* subsection 37(5) are warranted. The Minister has, however, agreed to the release of a generic summary of the information that remains redacted in the two documents. This will be addressed further below.

(4) Does the public interest in disclosure outweigh the public interest in non-disclosure?

[49] Any discussion under *CEA* section 37 of the public interest in disclosure of information in a legal proceeding must begin by acknowledging the strong presumption that court proceedings and court records will be open to the public (*Chad #1*, at paras 13-15; *Al Kaddah*, at para 26; *Animal Justice Canada*, at para 17). The general rule is that justice should be carried out in the open and not in secret. Doing so helps to ensure the integrity of court proceedings, enhances the legitimacy of decisions, fosters public confidence in the court system, and promotes public understanding of the administration of justice. As well, because the news media often act as the eyes and ears of the public, the open court principle has an important constitutional dimension, engaging the rights guaranteed by section 2(b) of the *Charter*. See *Sherman Estate v Donovan*, 2021 SCC 25 at paras 30 and 37-39 as well as the authorities cited therein. Still, as the existence of *CEA* section 37 itself suggests, the open court principle is not absolute. The presumption of openness can be rebutted, provided that any derogation from the open court principle is done in a manner that is duly sensitive to the fundamental importance of this principle (*Chad #1*, at para 15).

[50] Furthermore, as an aspect of procedural fairness, there is also a public interest in ensuring that a party to litigation is not unjustifiably deprived of information necessary to advance its case in court and, where warranted, to obtain a legal remedy (*Carey v Ontario*, [1986] 2 SCR 637 at para 38). The presumption, therefore, is that there will be full disclosure of relevant evidence; however, as with the open court principle, this presumption can be rebutted in certain limited circumstances (*Chad #2*, at para 64; *Animal Justice Canada*, at para 17).

[51] Several factors have been identified in the jurisprudence as potentially bearing on the balancing of interests under *CEA* section 37 in a given case: see *Chad #2*, at paras 52-54. In concluding that the balance in the present cases favours non-disclosure, I consider determinative the lack of probative value of the information the respondents are seeking.

[52] For the respondents to prevail in the weighing of competing public interests, it is not sufficient for the information whose disclosure I have found would encroach on a specified public interest to be likely relevant in the sense that established an apparent case for disclosure (*Chad #2*, at para 68). Nor, having now examined the information, is it sufficient for me to be satisfied that the information actually is logically probative of an issue in the underlying applications for judicial review. Rather, the information sought must be of such importance for the underlying proceeding that disclosure is warranted notwithstanding the injury this would cause to a public interest (*Goguen v Gibson*, 1983 CanLII 5059 (FC), [1983] 1 FC 872 at para 77, aff'd 1984 CanLII 5403 (FCA), [1983] 2 FC 463 (FCAD); *Pereira E Hijos SA v Canada (Attorney General)*, 2002 FCA 470 at para 17; *Chad #2*, at para 68; *Canada (National Inquiry into Missing and Murdered Indigenous Women and Girls*, at para 71).

[53] In the circumstances of the present cases, I would understand the importance of the information to encompass two related considerations: first, whether the respondents require the information to establish a fact in issue in the applications for judicial review; and, second, even if they do, whether the information has real probative value in relation to that fact, either alone or in combination with other information available to the respondents.

[54] I am not satisfied that the information now in issue meets the necessary threshold given the importance of protecting the integrity of the contrary outcome process. As discussed above, the respondents raise issues concerning the process by which their applications for permanent residence have been dealt with by IRCC and other agencies. The contrary outcome process is part of that process. As a result, broadly speaking, the two documents at issue are relevant to the issues raised in the underlying applications. However, the specific information in issue at this stage (the visa officer's rationales for disagreeing with the CBSA's inadmissibility assessments) has little if any relevance to the concerns raised by the respondents. The question to which the officer's analysis is addressed – whether Mr. Mamut or Mr. Abdulahad should be found inadmissible on grounds of security – is engaged only indirectly, if at all, in the underlying judicial review applications. Given the at best marginal relevance of the officer's assessments to the underlying applications, I am not satisfied that the respondents require the assessments to make their respective cases in those applications.

[55] Moreover, and in any event, the officer's assessments have little probative value, at least at this stage of the proceedings. The respondents know from the Minister's affidavits that, as of the time the contrary outcome process was engaged, the visa officer disagreed with the CBSA's non-favourable inadmissibility recommendations. What they do not know is *why* the officer reached this conclusion. However, as they have been articulated pursuant to the contrary outcome process, the officer's assessments are provisional opinions that may be subject to revision following further input from the CBSA. As a result, they would add little if anything to the case the respondents are otherwise able to make in support of their applications (which now can include the information I have authorized disclosed under *CEA* subsection 37(4.1)). Instead,

in my view, as with the draft recommendation at issue in *Douze*, their disclosure at this time would create an unhelpful distraction from the issues engaged in the underlying judicial review applications. Importantly, and contrary to what the respondents (understandably) inferred from the information currently available to them, the information at issue does not reflect any sort of change of mind on the part of the visa officer. As will become apparent to them once they see the dates of the visa officer's emails, the officer's communications with the CBSA post-date the procedural fairness letters sent to the respondents in February 2020.

[56] In sum, to the extent that the respondents seek to engage with the issue of inadmissibility in seeking legal remedies against the Minister, they do not require the officer's assessments to do so effectively. As well, given their provisional character, the officer's assessments fall well short of being necessary for a proper determination of any of the issues raised in the applications for judicial review.

[57] For these reasons, but subject to the following paragraph, I am not satisfied that any further disclosure should be authorized pursuant to *CEA* subsection 37(5).

[58] Following the *ex parte* proceeding, the Court inquired of counsel for the Minister whether a non-injurious summary of information that remained redacted could be provided to the respondents. Counsel for the Minister responded that, while they maintained their primary position that the visa officer's communications with the CBSA pursuant to the contrary outcome process should be protected in their entirety under the principle of deliberative secrecy, in the event that the Court were to take a different view but nevertheless upheld redactions over parts of

those communications, the Minister did not object to disclosure of a summary to the effect that the redacted paragraphs set out information considered by the officer and the officer's assessment of that information. In my view, such a summary is warranted under *CEA* subsection 37(5). Accordingly, I will authorize its release to the respondents.

## IV. CONCLUSION

[59] For the foregoing reasons, the applications will be allowed in part. The specific terms of the Court's orders are set out below.

[60] Pursuant to *CEA* subsection 37.1(2), the Minister may appeal my determinations within 10 days of the date of this Order and Reasons. Pursuant to *CEA* subsection 37(7), my determinations do not take effect until the time provided for an appeal has expired (and subject, of course, to the disposition of any appeal that may be taken). Accordingly, this Order and Reasons (including Annexes A and B) shall be provided first to counsel for the Minister. If no appeal is taken in the time provided, or if the Minister informs the Court earlier than this that no appeal will be taken, the Order and Reasons (including Annexes A and B) shall be provided to the respondents. If an appeal is taken, the Minister shall, within 14 days of the date of this Order and Reasons, provide his position in an *ex parte* communication to the Court concerning the parts (if any) of the Order and Reasons (including Annexes A and B) that should be redacted in order to permit release of the Order and Reasons to the respondents pending the determination of the appeal. Public release of the Order and Reasons (which will not include Annexes A or B in any event) will also be determined accordingly.

[61] The Minister did not seek costs in either matter. No costs will be ordered.

**ORDER IN T-806-23 AND T-1280-23**

**THIS COURT ORDERS that**

1. The applications are allowed in part without costs.
2. Pursuant to subsection 37(4.1) of the *Canada Evidence Act*, disclosure of pages 769, 770, 778, 779, and 780 of the Certified Tribunal Record prepared in IMM-1407-22 as they are found in Annex A is authorized.
3. The foregoing term is subject to any outstanding claims for non-disclosure under section 87 of the *Immigration and Refugee Protection Act*.
4. Disclosure of the balance of the information on pages 769, 770, 778, 779, and 780, and all of the information on pages 771, 772, 773, 774, 775, 776, and 777 is prohibited pursuant to subsection 37(6) of the *Canada Evidence Act.*
5. Pursuant to subsection 37(5) of the *Canada Evidence Act*, disclosure of the following summary of information redacted under the foregoing term is authorized: "The redacted paragraphs set out information considered by the officer and the officer's assessment of that information."
6. Pursuant to subsection 37(4.1) of the *Canada Evidence Act*, disclosure of pages 968, 969, 978, 979 and 980 of the Certified Tribunal Record prepared in IMM-8585-22 as they are found in Annex B is authorized.
7. The foregoing term is subject to any outstanding claims for non-disclosure under section 87 of the *Immigration and Refugee Protection Act*.
8. Disclosure of the balance of the information on pages 968, 969, 978, 979 and 980 and all of the information on pages 970, 971, 972, 973, 974, 975, 976, and 977 is prohibited pursuant to subsection 37(6) of the *Canada Evidence Act.*

9. Pursuant to subsection 37(5) of the *Canada Evidence Act*, disclosure of the following summary of information redacted under the foregoing term is authorized: "The redacted paragraphs set out information considered by the officer and the officer's assessment of that information."
10. This Order and Reasons (including Annexes A and B) shall be provided first to counsel for the Minister. If no appeal is taken in the time provided, or if the Minister informs the Court earlier than this that no appeal will be taken, the Order and Reasons (including Annexes A and B) shall be provided to the respondents. If an appeal is taken, the Minister shall, within 14 days of the date of this Order and Reasons, provide his position in an *ex parte* communication to the Court concerning the parts (if any) of the Order and Reasons (including Annexes A and B) that should be redacted in order to permit release of the Order and Reasons to the respondents pending the determination of the appeal.
11. Annexes A and B shall not form part of the public version of this Order and Reasons.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-806-23 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v KHALIL MAMUT ET AL |
| **AND DOCKET:** | T-1280-23 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v SALAHIDIN ABDULAHAD ET AL |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 30 AND DECEMBER 7, 2023 |
| **ORDER AND REASONS:** | NORRIS J. |
| **DATED:** | MARCH 6, 2024 |

**APPEARANCES:**

| | |
|---|---|
| Gregory George<br>Bradley Bechard | FOR THE APPLICANT |
| Prasanna Balasundaram | FOR THE RESPONDENTS |

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| Downtown Legal Services<br>Toronto, Ontario | FOR THE RESPONDENTS |