Federal Court  Cour fédérale

Date: 20240405

Dockets: IMM-1407-22
IMM-8585-22

Citation: 2024 FC 536

Ottawa, Ontario, April 5, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

Docket: IMM-1407-22

KHALIL MAMUT
AMINIGULI AIZEZI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-8585-22

SALAHIDIN ABDULAHAD
ZULIPIYE YAHEFU

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] In separate applications, the applicants have applied for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). Because the applications have a number of issues in common, they have been joined and are being determined together.

[2] The Court ordered the production of a Certified Tribunal Record (CTR) in both matters under Rule 14(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (*FCCIRPR*). Pursuant to Rule 17 of the *FCCIRPR*, the tribunal's record must contain, among other things, "all relevant documents that are in the possession or control of the tribunal." When CTRs were prepared in response to the Production Orders, the Minister of Citizenship and Immigration objected to the disclosure of certain information found in documents included in the CTRs. The CTRs were redacted accordingly pending the Court's determinations.

[3] Previous Orders and Reasons addressed the Minister's objections to disclosure on the basis of the common law principle of deliberative secrecy and under section 37 of the *Canada Evidence Act*, RSC 1985, c C-5 (*CEA*): see *Mamut v Canada (Citizenship and Immigration)*, 2023 FC 1108 (*Mamut #1*) and *Canada (Citizenship and Immigration)v Mamut*, 2024 FC 370 (*Mamut #2*), respectively.

[4] The present Order and Reasons addresses the Minister's applications for the non-disclosure of information under section 87 of the *IRPA*.

[5] The Minister's application for the non-disclosure of information in the *Mamut* matter (IMM-1407-22) will be granted. In the course of the litigation of the motion, the Minister agreed to lift a redaction. The Minister also agreed to the release of a non-injurious summary of certain information, which the Court will authorize. (The Court's authority to issue a non-injurious summary in the context of *IRPA* section 87 is discussed below.) The Minister's claims with respect to the remaining redactions under *IRPA* section 87 are accepted.

[6] The Minister's application for the non-disclosure of information in the *Abdulahad* matter (IMM-8585-22) will also be granted. The Minister agreed to lift a redaction. The Minister also agreed to the release of the same non-injurious summary along with a second summary that is specific to Mr. Abdulahad; the Court will authorize disclosure of both summaries. The Minister's claims with respect to the balance of the information redacted under *IRPA* section 87 are accepted.

[7] The main body of this Order and Reasons will address the applicants' request for the appointment of a special advocate. It will also discuss in general terms the nature of the information at issue in these matters as well as the test for non-disclosure under *IRPA* section 87. It is not possible to explain in any detail in public reasons why I am upholding the Minister's remaining claims for non-disclosure in both matters. This detailed discussion is set out in Appendix A, which is classified.

[8] In the *Abdulahad* matter, the information in issue is found in three documents. Redacted versions of these documents reflecting the Court's non-disclosure determinations are attached as annexes A-1, A-2 and A-3 to this Order and Reasons.

[9] In the *Mamut* matter, the information in issue is also found in three documents. Redacted versions of these documents reflecting the Court's non-disclosure determinations are attached as annexes B-1, B-2 and B-3 to this Order and Reasons.

[10] The process for releasing this Order and Reasons to the parties and to the public will be addressed below.

II. BACKGROUND

[11] The background to this matter is set out in my previous Orders and Reasons but I will summarize it again here for the sake of convenience.

[12] Salahidin Abdulahad and Khalil Mamut are Chinese citizens of Uighur 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.

[13] Mr. Abdulahad's spouse, Zulipiye Yahefu, was 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. Ms. Yahefu is now a Canadian citizen.

[14] Mr. Mamut's spouse, Aminiguli Aizezi, was also granted refugee protection in Canada. When she applied for permanent residence in Canada in June 2015, she included her then only child (a 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. Ms. Aizezi and her son are now Canadian citizens.

[15] There appears to be no issue that the delay in processing their applications for permanent residence has been due, at least in part, to concerns that Mr. Abdulahad and Mr. Mamut may be inadmissible to Canada for security reasons under *IRPA* section 34. More particularly, in procedural fairness letters sent to both Mr. Abdulahad and Mr. Mamut, the Minister has raised the concern that they may be inadmissible to Canada due to their alleged association with the East Turkistan Islamic Movement (ETIM). US authorities had also relied on this alleged association with the ETIM to justify the men's detention at Guantanamo Bay until they were eventually cleared for release.

[16] On February 14, 2022, Mr. Mamut and Ms. Aizezi commenced an application for judicial review (IMM-1407-22). They seek an order staying the security inadmissibility proceedings and

directing the Minister to proceed with the processing of Mr. Mamut's application for permanent residence. In the alternative, they seek an order in the nature of *mandamus* requiring the Minister to determine the issue of Mr. Mamut's admissibility and render a decision on his application for permanent residence within 30 days of the Court's order.

[17] On August 31, 2022, Mr. Abdulahad and Ms. Yahefu commenced a similar application for judicial review (IMM-8585-22). They too seek an order staying the security inadmissibility proceedings and directing the Minister to proceed with the processing of Mr. Abdulahad's application for permanent residence. In the alternative, they seek an order in the nature of *mandamus* requiring the Minister to determine the issue of Mr. Abdulahad's admissibility and render a decision on his application for permanent residence within 30 days of the Court's order.

[18] As noted above, the Minister has objected to the disclosure of certain information included in the CTRs produced in response to the Production Orders. The bulk of the information that is the subject of the present applications for non-disclosure is found in the following six documents:

- A letter dated August 18, 2015, from the Security Screening Branch, Canadian Security Intelligence Service (CSIS or the Service), to the National Security Screening Division (NSSD), Canada Border Service Agency (CBSA), concerning Mr. Abdulahad (CTR pp. 964-966) [Annex A-1].

- An Inadmissibility Assessment dated November 20, 2015, prepared by the NSSD concerning Mr. Abdulahad (CTR pp. 953-963) [Annex A-2]. This assessment concluded that there are reasonable grounds to believe that Mr. Abdulahad is inadmissible to Canada

pursuant to *IRPA* paragraph 34(1)(c) for engaging in terrorism and paragraph 34(1)(d) for being a danger to the security of Canada.

- An email concerning Mr. Abdulahad dated May 26, 2021, from a Migration Program Manager with the Consulate General of Canada in New York to the NSSD (CTR pp. 968-980) [Annex A-3]. In the email, the manager sets out his reasons for disagreeing with the NSSD's conclusion that there are reasonable grounds to believe Mr. Abdulahad is inadmissible to Canada on security grounds. This email was sent pursuant to a contrary outcome process established between the CBSA and Immigration, Refugees and Citizenship Canada (IRCC). (The contrary outcome process is described in *Mamut #1* at para 33 and in *Mamut #2* at para 15.)

- A letter dated August 5, 2016, from the CSIS Security Screening Branch to the NSSD concerning Mr. Mamut (CTR pp. 792-795) [Annex B-1].

- An Inadmissibility Assessment dated January 25, 2018, prepared by the NSSD concerning Mr. Mamut (CTR pp. 781-791) [Annex B-2]. This assessment concluded that there are reasonable grounds to believe that Mr. Mamut is inadmissible to Canada pursuant to *IRPA* paragraph 34(1)(d) for being a danger to the security of Canada and paragraph 34(1)(f) for being a member of an organization that there are reasonable grounds to believe has engaged or will engage in acts of terrorism.

- An email concerning Mr. Mamut dated June 3, 2022, from the same Migration Program Manager to the NSSD (CTR pp. 769-780) [Annex B-3]. In the email, the manager sets out his reasons for disagreeing with the NSSD's conclusion that there are reasonable

grounds to believe Mr. Mamut is inadmissible to Canada on security grounds. This email was also sent pursuant to the contrary outcome process.

[19] The Minister objected to the disclosure of the two contrary outcome process emails in their entirety pursuant to the common law principle of deliberative secrecy and under *CEA* section 37. In *Mamut #1*, I dismissed the Minister's claim for non-disclosure under the common law principle of deliberative secrecy. In *Mamut #2*, I allowed the Minister's applications under *CEA* section 37 in part. It is not necessary to address the *IRPA* section 87 claims over information that is covered by the *CEA* subsection 37(6) non-disclosure order. On the other hand, some of the information I authorized to be disclosed pursuant to *CEA* subsection 37(4.1) is subject to claims under *IRPA* section 87 so it is necessary to resolve those claims. Only those pages containing *IRPA* section 87 claims not otherwise covered by the *CEA* subsection 37(6) orders are reproduced in Annexes A-3 and B-3.

III. ANALYSIS

A. *Statutory Provisions*

[20] Section 87 of the *IRPA* states:

Application for non-disclosure — judicial review and appeal	**Interdiction de divulgation — contrôle judiciaire et appel**
87 The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to appoint a special advocate	**87** Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à

and to provide a summary — applies in respect of the proceeding and in respect of any appeal of a decision made in the proceeding, with any necessary modifications.	l'instance et à tout appel de toute décision rendue au cours de l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé.

[21] In relevant part, *IRPA* subsection 83(1) provides as follows:

Protection of information	**Protection des renseignements**
83 (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	**83 (1)** Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2
[…]	[…]
(c) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;	**c)** il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
[…]	[…]
(d) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national	**d)** il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité

security or endanger the safety of any person;	nationale ou à la sécurité d'autrui;
[…]	[…]
(h) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;	**h)** il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;
(i) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national;	**i)** il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'intéressé;

[22] The role and responsibilities of a special advocate are set out in *IRPA* subsections 85.1(1) and (2):

Special advocate's role	**Rôle de l'avocat spécial**
85.1 (1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.	**85.1 (1)** L'avocat spécial a pour rôle de défendre les intérêts du résident permanent ou de l'étranger lors de toute audience tenue à huis clos et en l'absence de celui-ci et de son conseil dans le cadre de toute instance visée à l'un des articles 78 et 82 à 82.2.
Responsibilities	**Responsabilités**
(2) A special advocate may challenge	**(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.

[23] The powers of a special advocate are set out in *IRPA* section 85.2:

Powers	**Pouvoirs**
85.2 A special advocate may	**85.2** L'avocat spécial peut :
(a) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;	**a)** présenter au juge ses observations, oralement ou par écrit, à l'égard des renseignements et autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil;
(b) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel; and	**b)** participer à toute audience tenue à huis clos et en l'absence de l'intéressé et de son conseil, et contre-interroger les témoins;
(c) exercise, with the judge's authorization, any other	**c)** exercer, avec l'autorisation du juge, tout

powers that are necessary to protect the interests of the permanent resident or foreign national.	autre pouvoir nécessaire à la défense des intérêts du résident permanent ou de l'étranger.

[24] Finally, section 87.1 of the *IRPA* states:

Special advocate	**Avocat spécial**
87.1 If the judge during the judicial review, or a court on appeal from the judge's decision, is of the opinion that considerations of fairness and natural justice require that a special advocate be appointed to protect the interests of the permanent resident or foreign national, the judge or court shall appoint a special advocate from the list referred to in subsection 85(1). Sections 85.1 to 85.5 apply to the proceeding with any necessary modifications.	**87.1** Si le juge, dans le cadre du contrôle judiciaire, ou le tribunal qui entend l'appel de la décision du juge est d'avis que les considérations d'équité et de justice naturelle requièrent la nomination d'un avocat spécial en vue de la défense des intérêts du résident permanent ou de l'étranger, il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à ce titre dans le cadre de l'instance. Les articles 85.1 à 85.5 s'appliquent alors à celle-ci avec les adaptations nécessaires.

B. *Preliminary Issue: Should the Court Appoint a Special Advocate?*

[25] The applicants submit that considerations of fairness and natural justice require the appointment of a special advocate to protect their interests in proceedings from which they are excluded on grounds of national security or to protect the safety of any person. The Minister opposes the appointment of a special advocate.

[26] The applicants' request for the appointment of a special advocate echoes their requests for the appointment of an *amicus curiae* in connection with the Minister's common law deliberative secrecy claims as well as the Minister's claims under *CEA* section 37. 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, there was no need to appoint an *amicus* at that stage: see *Mamut #1*, at paras 23-25. Furthermore, while I concluded that, to dispose of the Minister's claims under *CEA* section 37, it was necessary and appropriate to review the information in question and to hear *ex parte* submissions from the Minister, I was nevertheless not persuaded that the assistance of an *amicus* was required for the just adjudication of those applications: see *Mamut #2*, at paras 18-20. However, since the requests for an *amicus* were made in proceedings dealing with claims for non-disclosure of substantially different information than is currently in issue (there is only a small degree of overlap), since there was no suggestion that the Minister would be relying on the contrary outcome process emails in the underlying applications for judicial review, and since a statutory test must be applied in determining whether to appoint a special advocate, my earlier conclusions that the assistance of an *amicus* was not required have little bearing on the applicants' request for the appointment of a special advocate.

[27] If appointed, *IRPA* subsection 85.1(1) provides that the role of a special advocate would be to protect the applicants' interests in any proceeding from which they and the public are excluded for reasons of national security or to protect the safety of any person. Pursuant to *IRPA* subsection 85.1(2), it would be the responsibility of the special advocate to challenge 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 to challenge the relevance, reliability, and sufficiency of any information or other evidence that is not disclosed to the applicants as well as the weight to be given to that evidence. Finally, if appointed, pursuant to *IRPA* section 85.2, the special advocate would be permitted to make oral and written submissions with respect to the information or other evidence that is not disclosed to the applicants and to cross-examine any witness who testified in their absence. In all of these ways, the participation of a special advocate helps guard against the risk of imbalance in the adversarial process that can arise when, in order to protect national security or the safety of any person, a party cannot be permitted to participate in part of a proceeding. In short, a special advocate is meant to serve as a "substantial substitute" for the personal participation of the excluded party: see *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at paras 35 and 47.

[28] In contrast to a security certificate proceeding, where the appointment of a special advocate is required (see *IRPA*, paragraph 83(1)(b)), whether to appoint a special advocate in the present applications is a matter for the Court's discretion. Under *IRPA* section 87.1, the question to be answered is whether "considerations of fairness and natural justice require that a special advocate be appointed to protect the interests" of the applicants in any closed proceeding, including any closed proceeding dealing with the Minister's objections to disclosure under *IRPA* section 87.

[29] I understand this to be a compendious way of referring to the right to a fair hearing articulated in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 29, the decision that led Parliament to enact the special advocate regime. For present purposes, the

essential elements of such a hearing are the applicants' right to know the case put against them in their applications for judicial review, their right to answer that case, and their right to a decision on the facts and the law. Given the interests implicated by the security certificate process, the Supreme Court's analysis in *Charkaoui* was grounded in section 7 of the *Charter*. Although the present applications do not implicate the same interests or, as a result, section 7 of the *Charter*, the features of a fair hearing identified in *Charkaoui* are also well-established elements of the right to a fair hearing at common law.

[30] In deciding whether the appointment of a special advocate is required, the Court must consider a variety of factors, including: the degree of procedural fairness owed to the party from whom the information has been withheld; the importance of the matter to that party; the nature of the interests implicated in the proceeding; the extent of the non-disclosure; the relevance, materiality and probative value of the undisclosed information; and the ability of the party from whom the information has been withheld to know and meet the case against them (*Farkhondehfall v Canada (Citizenship and Immigration)*, 2009 FC 1064 at paras 31-41; *Malikaimu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1026, [2018] 3 FCR 512, at para 37). Whether the Minister is relying on the undisclosed information is also an important consideration. No one factor is necessarily determinative; the Court's task is to "balance all of the competing considerations in order to arrive at a just result" (*Farkhondehfall*, at para 31).

[31] Generally speaking, the requirements of procedural fairness for a foreign national seeking to enter and remain in Canada fall at the lower end of the spectrum (*Karakachian v Canada*

(Citizenship and Immigration), 2009 FC 948 at para 26; *Malikaimu*, at paras 39-40). Nevertheless, I am satisfied that serious interests and issues are implicated in the present applications. These include the lengthy delays in processing the applications for permanent residence, family reunification, the best interests of the applicants' children (who are all Canadian citizens), and the consequences for Mr. Abdulahad and Mr. Mamut of being found inadmissible to Canada on security grounds, not least the stigma this would carry (*c.f. Charkaoui*, at para 14). This all forms part of the context in which the requirements of procedural fairness in the present applications must be determined.

[32] The fact that the underlying proceedings are judicial rather than administrative does not necessarily entitle the applicants to a higher degree of procedural fairness than would be the case before an administrative decision maker dealing with the underlying matters – namely, the applications for permanent residence. In this regard, I agree with the discussion in *Malikaimu*, at paras 44-45. At the same time, Parliament clearly contemplated that the requirements of procedural fairness can vary depending on the nature of the proceeding, even proceedings concerning the very same matter. After all, while there is no provision for the appointment of a special advocate when a matter is before an administrative decision maker, this is possible once the matter reaches the Court on judicial review. In other words, even if the requirements of procedural fairness before the administrative decision maker do not entail the right to address undisclosed information through a substantial substitute for the personal involvement of the affected party, in the judicial context there can be circumstances in which this is warranted, even with respect to the very same matter. Had Parliament thought otherwise, it would not have enacted *IRPA* section 87.1 in the first place.

[33] In *Malikaimu*, Justice LeBlanc (then a member of the Federal Court) held that the fact that Parliament has made the appointment of a special advocate in the context of motions brought under *IRPA* section 87 discretionary rather than obligatory meant that "as a general rule such motions will be considered without the participation of a special advocate" (at para 43). Respectfully, I am unable to agree that this was Parliament's intent. In my view, Parliament simply established that whether a special advocate is required in *IRPA* section 87 motions is to be determined on a case by case basis having regard to considerations of fairness and natural justice. As a matter of logic, it does not follow from the fact that the appointment of a special advocate is not *required* in every case under *IRPA* section 87 that, as a general rule, they will not be appointed or that exceptional circumstances must be demonstrated for an appointment to be warranted. Had this been Parliament's intent, it could easily have stated the test this way. At the same time, I would join Justice LeBlanc in rejecting the applicants' submission (made by the same counsel in both *Malikaimu* and the case at bar) that, as a general rule, special advocates should be appointed under *IRPA* section 87.1 (see *Malikaimu*, at para 41). In my view, the legislation does not create a general rule, one way or the other. Whether considerations of fairness and natural justice require the appointment of a special advocate depends on the particular circumstances of the case at hand.

[34] In sum, there can be no dispute that, at common law, the applicants are entitled to a fair hearing encompassing the features identified above. This is the case not only for their applications for judicial review but also for the Minister's applications for non-disclosure. Nor is there any question that "the imperative of protecting confidential national security information" must be taken into account when determining what a fair hearing requires (*Harkat*, at para 44).

The only question is whether, in the particular circumstances of these cases, a fair hearing requires the participation of a special advocate.

[35] At the conclusion of a public hearing on January 22, 2024, I informed the parties that, for reasons to be provided later, I was not persuaded that the appointment of a special advocate was required. My reasons are as follows.

[36] First, as set out above, the information over which the Minister has made non-disclosure claims under *IRPA* section 87 is found in a small number of documents in the CTRs and it is limited in extent (although somewhat more information is redacted in the *Abdulahad* matter than in the *Mamut* matter). The grounds on which the Minister objects to the disclosure of this information are familiar to the Court; they do not raise any novel or complex issues.

[37] In seeking the appointment of a special advocate, the applicants attempt to draw a parallel between the role of a special advocate and the role of an *amicus curiae* in applications under the *CEA* section 38 scheme. While there are obvious similarities between the two roles (especially when, in the exercise of its discretion, the Court's order appointing an *amicus* gives the *amicus* a role more like a special advocate than that of a "friend of the court" in the traditional sense), I do not find the parallel the applicants seek to draw particularly useful. The sources of the legal authority to appoint a special advocate and an *amicus* are entirely distinct: one is statutory; the other flows from the Court's inherent jurisdiction to manage its own process to ensure a fair proceeding and the just adjudication of the matter (*R v Kahsai*, 2023 SCC 20 at paras 36-39; see also *Gaya v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 731 at paras 37-40).

The considerations a Court weighs when deciding, on the one hand, whether to appoint a special advocate under *IRPA* section 87.1 and, on the other hand, whether to appoint an *amicus* in a *CEA* section 38 proceeding, are often very similar but they are not necessarily the same. As well, contrary to the applicants' submission, it does not follow from the fact that *amici* are appointed more frequently in *CEA* section 38 proceedings than special advocates are in *IRPA* section 87 motions that the Court's determinations under *IRPA* section 87.1 are falling short in some way. This is because it cannot be presumed that the circumstances warranting the appointment of an *amicus* in *CEA* section 38 applications are also present to the same degree, or even at all, in *IRPA* section 87 motions.

[38] That being said, I do not agree with the Minister that the analogy the applicants seek to draw breaks down simply because the role of a special advocate in relation to the disclosure of information is statutorily more limited than that of an *amicus* in a *CEA* section 38 application. The Minister correctly points out that, unlike the *CEA* section 38 scheme, *IRPA* paragraph 83(1)(d) does not involve any form of balancing of the public interest in disclosure of information implicating national security or a person's safety against the public interest in non-disclosure of that information. The Minister submits that, since the Court's disclosure determinations are more circumscribed in a proceeding where *IRPA* section 87 has been invoked than in one under *CEA* section 38, the Court will require less assistance in the former than in the latter and, accordingly, there will be less need for an *amicus*. While there is a purely formal sense in which this is true, I would not give this consideration much weight. How much assistance a Court requires, and how much assistance a special advocate can provide, are not dictated by the legal test for disclosure alone. They also depend very much on the nature and

scale of the information at issue, among other things. It must also be recalled that the statutorily defined role of the special advocate is to protect the interests of the party who has been excluded from a closed proceeding (*IRPA*, subsection 85.1(1)). Any assistance the Court receives as a result of the special advocate's participation, as important as this may be, is a derivative benefit flowing from the exercise of this primary mandate.

[39] As well, even the application of the binary test under *IRPA* paragraph 83(1)(d) entails significant challenges and responsibilities. As the Supreme Court of Canada underscored in *Harkat*, only information that raises a *serious* risk of injury to national security or danger to the safety of a person can be withheld under that paragraph (*Harkat*, at para 61). Moreover, given the government's well-documented tendency to exaggerate claims of national security confidentiality, the Court must be "vigilant and skeptical with respect to the Minister's claims of confidentiality" (*Harkat*, at para 63). While the Court is certainly capable of bringing this mindset to a matter without the assistance of a special advocate, in some cases such assistance can be necessary to ensure that it does so as effectively as possible. It all depends on the nature of the case and the nature of the undisclosed information.

[40] Since it appeared that the *IRPA* section 87 motions in the cases at bar would be relatively straightforward, I concluded that there was little a special advocate could contribute by challenging the Minister's non-disclosure claims through written or oral submissions, through the cross-examination of the Minister's affiants, or through the narrowing of issues in dispute. I was therefore satisfied that considerations of fairness and natural justice in connection with the adjudication of the non-disclosure claims did not warrant the appointment of a special advocate.

[41] Second, subject to a caveat I discuss below, the Minister has stated that he would not be relying on any undisclosed information to respond to the applications for judicial review. If this is the case, there would be no role for a special advocate to *challenge* the relevance, reliability, and sufficiency of the undisclosed information or the weight that should be given to it in the adjudication of the judicial review applications (see *IRPA*, paragraph 85.1(2)(b)).

[42] Before addressing the Minister's caveat, it will be helpful to say a little more about how the applicants have framed their applications for judicial review.

[43] Mr. Abdulahad and Mr. Mamut contend that there has been unreasonable and inordinate delay in the processing of their applications for permanent residence – in particular, in connection with determining whether they are inadmissible to Canada on security grounds. They therefore submit, in part, that under the well-known test for *mandamus* (*Lukács v Canada (Transportation Agency)*, 2016 FCA 202 at para 29, summarizing the test established in *Apotex v Canada (Attorney General)* (1993), 1993 CanLII 3004 (FCA), [1994] 1 FC 742 (CA) (aff'd 1994 CanLII 47 (SCC), [1994] 3 SCR 1100), the Minister should be ordered to render a decision on their applications for permanent residence without further undue delay. This, however, is the applicants' alternative position. Their primary submission is, first, that the Minister's delay in determining the issue of their inadmissibility on security grounds is so inordinate as to constitute an abuse of process (see *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, and *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29); second, that the appropriate and just remedy for this is a stay of the security inadmissibility proceedings; and third, the Minister

should be directed to proceed with the processing of their applications without a security admissibility determination.

[44] Returning to the Minister's caveat, the Minister brought separate applications for non-disclosure in respect of each of the underlying applications for judicial review. The public motion records are identical in all material respects. In both matters, the Minister (the respondent in the underlying applications) has added a caveat to his statement that he will not rely on the classified information in the underlying applications for judicial review. Specifically, the Minister's written representations on the *IRPA* section 87 applications state the following (at paragraph 4 in both matters):

> The Respondent does not intend to rely on the classified information for the purpose of responding to the Applicants' application for leave and for judicial review for *mandamus*. However, the Respondent may rely on the classified information if the Court is going to seriously contemplate granting the Applicant[s'] request for an Order staying the security admissibility proceedings.

[45] With respect, this caveat is unhelpful. The Minister states only that he "may" rely on the classified information if the Court "is going to seriously contemplate" staying the security admissibility proceedings. This unwillingness to make a commitment is not helpful. The applicants bear the burden in all respects in the underlying applications for judicial review. The Minister knows the case being advanced by the applicants; he should be able to say what his own case in response will be. This is important because, among other things, the Court needs to know the case being put against the applicants (including on the issue of remedy) in order to decide whether the participation of a special advocate is required.

[46] As well, it is not clear when or how the Minister will decide whether he is relying on the undisclosed information or not. No one has suggested – at least, not yet – that the Court should rule first on the issue of abuse of process and then invite further submissions on remedy, if necessary. Rather, the plan has been to argue all the issues at once at a single public sitting. The Minister is correct that there is an analytical process the Court must follow before reaching the question of remedy: see *Abrametz*, at paras 101-102. However, the Minister cannot expect that, as the hearing proceeds, he will be told which way the wind is blowing and given an opportunity to change tacks.

[47] All this being said, it is possible to reframe the Minister's caveat into something more helpful – namely, that the Minister will not rely on the undisclosed information to argue that there has not been an abuse of process and that the delay is not unreasonable but will rely on the undisclosed information in opposing a stay of the security admissibility proceedings. It follows from this that, if the Court reaches the issue of remedy, the Minister could request a closed proceeding in relation to this issue. I will assume for the sake of this discussion that there would be such a hearing. As I have worded it, the revised caveat may go farther than the Minister intends – and, of course, the Minister may ultimately decide not to rely on the undisclosed evidence, even if the Court reaches the issue of remedy – but framing it this way provides the clarity that is required to decide properly whether a special advocate should be appointed.

[48] Even if the Minister were to rely on undisclosed information to oppose a stay of the security admissibility proceedings, I am still not persuaded that the participation of a special advocate is required to ensure procedural fairness and natural justice for the applicants. On the

contrary, I am satisfied that, even without the participation of a special advocate, the Court will be well positioned to assess the relevance, reliability and sufficiency of the classified information and the weight to be given to it.

[49] Importantly, as I understand the Minister's position, he has no intention of supplementing the classified record; rather, he would rely only on the classified information found in the CTRs. The significance of that information for the issues raised in the judicial review applications would be addressed through submissions. Since there would be no additional classified evidence in relation to the merits of the judicial review applications, there would be no role for a special advocate in cross-examining witnesses called *ex parte* and *in camera*. As well, given the nature of the undisclosed information in the CTRs, in my view, there is little a special advocate could add by way of submissions.

[50] Third, without in any way prejudging the matter, it appears that much of the classified information in the CTRs is of limited relevance to the issues raised in the applications for judicial review. To be clear, as mentioned above, unlike a claim for non-disclosure under *CEA* section 38, the relevance and probative value of the information or, more broadly, the importance of the information for the party seeking its disclosure, is not part of the test under *IRPA* paragraph 83(1)(d). Nevertheless, these can be salient considerations when determining whether the participation of a special advocate is required, either to effectively counter the Minister's reliance on the information or to fully advance the excluded party's position when the information could be of assistance to that party. In the present case, however, the nature of the

information the Minister seeks to protect does not call for the appointment of a special advocate to ensure a fair hearing.

[51] Finally, flowing from the last point, I am satisfied that not having access to the undisclosed information does not hamper the applicants unduly, if at all, in the underlying litigation. Even if they do not know all the details, they do know *why* the Minister opposes the remedy of a stay of the security inadmissibility proceedings. The Minister contends that there is a compelling societal interest in obtaining a decision on whether the applicants are inadmissible to Canada due to their association with the ETIM, a group labelled as a terrorist organization by both the United States and the United Nations (the US designation was withdrawn in October 2020). As demonstrated by their responses to the procedural fairness letters, the applicants are well equipped to address this argument without access to the undisclosed information. As a result, there is little, if any, risk of imbalance in the adversarial process.

[52] In sum, while the exclusion of a party always raises serious concerns relating to procedural fairness and natural justice, I am satisfied that, in the circumstances of these cases, the participation of a special advocate is not required for the just adjudication of either the Minister's claims for non-disclosure or the underlying applications for judicial review.

C. *The Test for Non-Disclosure Under* IRPA *Section 87*

[53] *IRPA* section 87 provides that, apart from the obligations to appoint a special advocate and to provide a summary that enables the excluded party to be reasonably informed of the case made by the Minister, the provisions of *IRPA* section 83 apply in respect of the proceeding in

which the application for non-disclosure is made. This includes paragraph 83(1)(d), which states that "the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person."

[54] As noted above, *IRPA* paragraph 83(1)(d) only prohibits the disclosure of information where disclosure would raise a serious risk of injury to national security or danger to the safety of a person (*Harkat*, at para 61). The Minister bears the burden of establishing that disclosure not only *could* but *would* be injurious to national security or endanger the safety of any person (*Harkat*, at para 62, quoting with approval *Jaballah (Re)*, 2009 FC 279 at para 9, *per* Dawson J (as she then was); see also *Canada (Citizenship and Immigration) v Issanov*, 2022 FCA 87 at para 4). The stringency of the test reflects the fact that *IRPA* paragraph 83(1)(d) is a limitation on the open court principle and any such limitation requires that openness present "a serious risk to a competing interest of public importance" (*Sherman Estate v Donovan*, 2021 SCC 25 at para 3). This is a "high bar [that] serves to maintain the strong presumption of open courts" (*ibid.*). Asserting the need for confidentiality unnecessarily serves "only to foster an appearance of opacity" in a proceeding, "which runs contrary to the fundamental principles of transparency and accountability" (*Harkat*, at para 26).

[55] In determining whether the Minister has met the burden imposed by *IRPA* paragraph 83(1)(d), the Court may "receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence" (*IRPA*, paragraph 83(1)(h)). While this provision relaxes the usual rules

concerning what may be received into evidence, it remains the case that, just as under the *CEA* section 38 scheme (which includes a similar provision), the Court must be satisfied that the alleged injury "has a factual basis which has been established by evidence" (*Canada (Attorney General) v Ribic*, 2003 FCA 246, [2005] 1 FCR 33, at para 18). The Court "must be vigilant to ensure that the application for non-disclosure is based on solid evidence and a realistic prospect of harm and not over-claiming by the state" (*Karahroudi v Canada (Citizenship and Immigration)*, 2016 FC 522, [2017] 1 FCR 167, at para 27).

[56] Many types of information the disclosure of which *could* be injurious to national security or endanger the safety of any person are well known: see *Henrie v Canada (Security Intelligence Review Committee)*, [1989] 2 FC 229 at paras 29-30 (aff'd 1992 CanLII 8549 (FCA)) Commonly cited examples are information relating to the targets of intelligence investigations, the sources and methods used to gather information and intelligence, and information shared in confidence by another agency. As a general proposition, disclosure of information like this can be expected to risk injury to national security or endanger the safety of any person but this alone is not sufficient to warrant non-disclosure under *IRPA* paragraph 83(1)(d). Rather, the Minister must establish with evidence and argument that the disclosure *would* be injurious to national security or endanger the safety of any person in the specific circumstances of the case in which the claim for non-disclosure is made.

[57] Relying on certain comments in *Henrie*, the Minister often frames the case for injury with reference to the informed reader and the "mosaic effect." That is the case here: see Respondent's Written Representations, paragraph 13. However, more recent jurisprudence cautions against

continuing to place too great a reliance on the observations of Justice Addy in *Henrie*. As Justice Mosley observed in *Soltanizadeh v Canada (Citizenship and Immigration)*, 2018 FC 114, *Henrie* dates from the early days of the legislative transition "from absolute Crown immunity to a legislative framework in which the judiciary must consider whether claims of injury to national security are reasonable" (at para 37). For this reason, *Henrie* and other decisions rendered during this transition period "have to be read with caution and with due regard to the context in which they were decided and subsequent developments in law and practice" (*ibid.*). Justice Mosley adds: "The early decisions of this transition period also reflect what can only be described as a generous and unquestioning acceptance of national security arguments put forward by the Attorney General on behalf of CSIS" (*Soltanizadeh*, at para 39).

[58] Regarding the mosaic effect in particular, according to which "apparently innocuous items of information can be assembled by an informed and hostile reader and used to cause injury," Justice Mosley observed in *Soltanizadeh* that the logic of this concept, "beguiling on its face, can be taken to the extreme that everything is capable of being part of the mosaic and nothing therefore should ever be disclosed" (at para 41). Justice Mosley goes on to state: "But the bald assertion that the information could be of value to an informed reader is not enough. There must be a reasonably articulated evidentiary basis for the claim that makes sense to the judge [citation omitted]" (*ibid.*). While *Soltanizadeh* was subsequently reversed, it was on other grounds: see *Canada (Attorney General) v Soltanizadeh*, 2019 FCA 202 (*Soltanizadeh FCA*). The Federal Court of Appeal did not express any concerns about the foregoing observations.

[59] If the Minister establishes that disclosure of the information would be injurious to national security or endanger the safety of any person, the Court must ensure the confidentiality of the information; it has no discretion in this regard (*Jaballah (Re)*, at para 10; *Soltanizadeh*, at para 34). Importantly, unlike the *CEA* section 38 scheme, there is no balancing of the public interest in disclosure against the public interest in non-disclosure (*Harkat*, at paras 65-66; *Soltanizadeh FCA*, at para 26).

[60] However, even when the Minister's claims for non-disclosure are accepted, it remains open to the Court, in the interests of fairness, to authorize the release of a summary of undisclosed information, as long as the summary would not itself be injurious to national security or endanger the safety of any person: see *Karahroudi*, at paras 21-26 and *Soltanizadeh*, at para 34. The Federal Court of Appeal has taken note of the Federal Court's practice of releasing public summaries in *IRPA* section 87 applications in appropriate cases, mentioning *Soltanizadeh* in particular in this regard: see *Canada (Attorney General) v Almrei*, 2022 FCA 206 at paras 39-40. In post-hearing correspondence, counsel for the Minister on the underlying applications for judicial review confirmed their agreement that this option is open to the Court.

D. *The Test Applied*

[61] The Minister did not offer any public evidence to support the non-disclosure claims. In both matters, the only public evidence filed on behalf of the Minister was an affidavit from a paralegal confirming that the Minister was bringing a motion for non-disclosure of information pursuant to *IRPA* section 87. The affidavits state that the motions for non-disclosure "will be

supported by one or more classified affidavits that will contain the classified information the Respondent seeks to protect" and that will "explain the basis for the non-disclosure of the classified information." The written submissions in the public motions records were entirely generic; they said nothing about the nature of the information at issue or the harms that would be caused by its disclosure.

[62] The Minister's motions for non-disclosure was indeed supported by classified affidavits. For obvious reasons, their contents cannot be discussed in these unclassified reasons. It must suffice simply to say that I found it necessary to hear from only one of the two affiants. This affiant attended two *ex parte, in camera* proceedings and was questioned by counsel for the Minister and by the Court. Several supplemental filings were provided that were responsive to concerns raised by the Court.

[63] The information the Minister seeks to protect from public disclosure in the cases at bar may reveal or tend to reveal one or more of the following types of information:

a) the Service's interest in individuals, groups or issues, including the existence or non-existence of past or present files or investigations, the intensity of investigations, or the degree or lack of success of investigations;

b) methods of operation and investigative techniques utilized by the Service;

c) relationships that the Service maintains with foreign police, security and intelligence agencies, and information exchanged in confidence with such agencies;

d) employees, internal procedures and administrative methodologies, and telecommunication systems used by the Service; and

e) individuals who provided information to the Service.

[64] As stated above, one can accept that, as a general proposition, disclosure of information like this could be injurious to national security or endanger the safety of any person. The issue for the Court to determine is whether, in the particular circumstances of the cases at bar, disclosure of the information in question *would* be injurious to national security or endanger the safety of any person.

[65] As noted at the outset of these reasons, the Minister agreed to lift redactions over certain information. The Minister also agreed to the release of a non-injurious summary in both matters. This summary relates to the validity period of the Service's assessments, which is redacted in both matters (at page 966 of the CTR in the *Abdulahad* matter and at page 795 of the CTR in the *Mamut* matter). On the basis of the evidence presented in the closed hearing, and for reasons provided in the classified appendix, I am satisfied that disclosure of the validity periods would be injurious to national security. I also agree with the Minister that the following summary of the redacted information would not be injurious: "The validity period has elapsed." The release of this summary will therefore be authorized in both matters.

[66] In the *Abdulahad* matter, the Minister also agreed to the release of the following summary of information in the CSIS brief dated August 18, 2015: "The redacted information in paragraphs 3 and 4 concerns Mr. Abdulahad's purported support for Uighur nationalism as it

may relate to Uighur separatist movements." I agree with the Minister that this summary is non-injurious. I also find that disclosure of the summary is warranted in the interests of fairness to Mr. Abdulahad. My reasons for so concluding are set out in the classified appendix. The classified appendix also explains why I am satisfied that any further disclosure of the underlying information would be injurious to national security or endanger the safety of any person.

[67] The Minister agreed that the same summary can be applied to redacted information in the CBSA inadmissibility assessment (Annex A-2, pages 953 and 954) and to redacted information in the contrary outcome process email (Annex A-3, page 968). In my view, the disclosure of the summary in these connections would not be injurious and it is warranted in the interests of fairness to Mr. Abdulahad.

[68] My reasons for upholding the remaining non-disclosure claims are set out in the classified appendix.

[69] For clarity, in Annexes A-3 and B-3, the remaining *IRPA* section 87 redactions are identified as such to distinguish them from the *CEA* section 37 claims upheld in my previous Order and Reasons. In the other annexes, all the redactions are made under *IRPA* section 87.

IV. CONCLUSION

[70] For the foregoing reasons together with those in the classified appendix, the Minister's non-disclosure application in the *Abdulahad* matter (IMM-8585-22) is granted. The Court's principal non-disclosure determinations are reflected in Annexes A-1, A-2 and A-3.

[71] For the foregoing reasons together with those in the classified appendix, the Minister's non-disclosure application in the *Mamut* matter (IMM-1407-22) is also granted. The Court's principal non-disclosure determinations are reflected in Annexes B-1, B-2 and B-3.

[72] This Order and Reasons together with the classified appendix and the six annexes will be released first on a confidential basis only to counsel for the Minister. They shall confirm no later than 4:00 p.m. on April 8, 2024, that neither the main body of the Order and Reasons nor any of the annexes contain any classified information. Upon receiving this confirmation, the main body of the Order and Reasons and the annexes will be released to counsel for the applicants. Given how it is drafted, no useful purpose would be served by attempting to redact the classified appendix so that it may be disclosed to the applicants.

[73] Upon receipt of confirmation from counsel for the Minister that the main body of the Order and Reasons does not contain any classified information, it will be released to the public as well. For greater certainty, the public version of the Order and Reasons will not include the annexes.

[74] Concurrently with the release of the Order and Reasons to counsel for the Minister, the Court will issue a Direction informing counsel for the applicants that a decision has been made on the Minister's applications for non-disclosure and informing them of the next steps in these matters, as set out in the preceding paragraphs.

ORDER IN IMM-1407-22 & IMM-8585-22

THIS COURT ORDERS that

1. The Minister's non-disclosure application in IMM-8585-22 is granted. The Court's principal non-disclosure determinations are reflected in Annexes A-1, A-2 and A-3. All other redactions in the Certified Tribunal Record are confirmed.
2. The Minister's non-disclosure application in IMM-1407-22 is granted. The Court's principal non-disclosure determinations are reflected in Annexes B-1, B-2 and B-3. All other redactions is the Certified Tribunal Record are confirmed.
3. This Order and Reasons together with the classified appendix and the six annexes will be released first on a confidential basis only to counsel for the Minister.
4. Counsel for the Minister shall confirm to the Court no later than 4:00 p.m. on April 8, 2024, that neither the main body of the Order and Reasons nor any of the annexes contain any classified information.
5. Upon receiving this confirmation, the main body of the Order and Reasons and the six annexes will be released to counsel for the applicants.
6. Upon receipt of confirmation from counsel for the Minister that the main body of the Order and Reasons does not contain any classified information, it will be released to the public as well.
7. For greater certainty, the public version of the Order and Reasons will not include the annexes.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1407-22
STYLE OF CAUSE:	KHALIL MAMUT ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-8585-22
STYLE OF CAUSE:	SALAHIDIN ABDULAHAD ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATES OF HEARING:	JANUARY 22, 29 AND MARCH 26, 2024
ORDER AND REASONS:	NORRIS J.
DATED:	APRIL 5, 2024

APPEARANCES:

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