Federal Court

Cour fédérale

Date: 20120110

Docket: IMM-2732-11

Citation: 2012 FC 22

Ottawa, Ontario, this 10th day of January 2012

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Yoonis Samtar GULEED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Karine Amato, an immigration officer for the Canada Border Services Agency (the "officer"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27, (the "Act") by Yoonis Samtar Guleed (the "applicant"). In her decision, the officer concluded that the applicant's claim for refugee status was ineligible for referral to the Refuge Protection Division ("RPD") pursuant to paragraphs

101(1)(*d*) and 104(1)(*a*) of the Act: the applicant had been recognized refugee status in the United States and could be returned to that country.

* * * * * * * *

[2] The applicant is a citizen of Somalia. Due to the conditions in Somalia, notably the coup d'État occurring in 1991 and the state of continual violence within the country, the applicant being from the minority Migdan tribe, left his home and subsequently moved around. In 2002, he left for the United States and claimed refugee status. In April 2003, he was granted refugee status in the United States.

[3] In 2009, he was convicted of the crimes of hit & run and arson in Virginia, serving a prison term from October 2009 to March 2010. However, after being released, the applicant alleges that his American lawyer had told him that he risked losing his refugee status and being deported to Somalia due to these criminal convictions. Consequently, he left the United States on September 31, 2010, arriving in Canada on October 1, 2010. The applicant subsequently claimed refugee status based on race and membership in a particular social group, in addition to a risk to his life and a risk of cruel and unusual treatment if forced to return to Somalia.

[4] However, upon arrival in Canada, the applicant used his cousin's name as an alias to enter the country (Ilyas Ali Gulet), fearing his criminal convictions in the United States would hinder his refugee claim in Canada. On February 18, 2011, the applicant was reported inadmissible under paragraphs 20(1)(*a*) and 41(*a*) of the Act due to his failure to obtain a permanent resident visa

before seeking admission to Canada on a permanent basis. Consequently, a departure order was issued against him. His refugee claim was nonetheless found to be eligible and was referred to the Immigration Refugee Board ("IRB"). It is at this time that the applicant revealed his true identity and that he had been granted refugee status in the United States.

[5] On February 25, 2011, the Canada Border Services Agency ("CBSA") informed the officer by email that the American authorities had confirmed that the applicant could return to the United States, despite his prior criminal conviction. The enforcement superintendent for the CBSA, Mr. Storozuk, later met with the U.S. immigration officer to obtain the necessary information on the applicant's US refugee claim and to obtain a verbal confirmation that the applicant would be admitted upon return.

[6] In a letter dated March 24, 2011, the officer scheduled an interview with the applicant for April 14, 2011, in order to discuss his refugee status in the United States. The applicant was invited to provide written submissions and additional evidence before the officer would render her final decision. In a letter dated April 18, 2011, the applicant's legal counsel outlined his major arguments, notably that he could not return to the United States due to his prior criminal convictions which made him an alien guilty of a crime of moral turpitude under the *Immigration and Nationality Act*, Pub. L. 82-414, 66 Stat. 163 (June 27, 1952) (the "*INA*") (sections 212(2)A(i)(I) and 101(3) of the *INA*). Moreover, the applicant argued that he could not return to the United States because he did not possess the valid travel documents required to be readmitted into the country.

[7] On April 20, 2011, after the interview between the applicant and an associate of the officer's, the officer notified the applicant of his ineligibility. Afterwards, the applicant was informed that he could apply for a Pre-Removal Risk Assessment, which he did on May 27, 2011.

[8] In her letter to the applicant dated April 20, 2011, pursuant to section 104 of the Act, the officer notified the applicant that his claim for refugee protection in Canada was ineligible for consideration: he was found to be a Convention refugee in another country than Canada and can be returned to that country as per paragraph 101(1)(*d*) of the Act. The officer does not provide any additional information and does not comment on any of the representations made by the applicant at the interview.

[9] Consequently, on April 26, 2011, the applicant filed the present application for judicial review of the officer's finding of ineligibility.

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[10] The relevant legislation is annexed to these reasons for convenience.

[11] The applicant raises the following issues:

i. *Did the officer breach her duty of procedural fairness in failing to provide adequate reasons for her decision?*

ii. *Did the officer further breach her duty of procedural fairness by refusing to disclose the information she received from the U.S. authorities, thereby depriving the applicant of the opportunity to respond?*

[12] The applicable standard of review to such issues of procedural fairness is correctness (*Cha v. Minister of Citizenship and Immigration*, 2004 FC 1507 at para 41 [*Cha*]; *Ha v. Minister of Citizenship and Immigration*, 2004 FCA 49 at para 45; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 [*Dunsmuir*]).

* * * * * * * *

i. Did the officer breach her duty of procedural fairness in failing to provide adequate reasons for her decision?

[13] The applicant claims the officer breached her duty of procedural fairness in failing to provide reasons for her ineligibility finding. Her written reasons consist of one sentence and do not address any of the applicant's submissions, nor whether he can actually return to the United States. The applicant relies on *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 [*Baker*] to establish the officer's duty to provide reasons.

[14] The applicant alleges that the officer did not explain why the applicant can be returned to the United States despite his criminal convictions and the lack of the requisite refugee travel documents (section 223.1 of the *Code of Federal Regulations*, 8 C.F.R.). The applicant therefore claims that the officer's reasons do not allow for a meaningful review of the merits of her ineligibility finding (*VIA Rail Canada Inc v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.)).

[15] The respondent, for his part, relying on the recent decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*,

2011 SCC 62, comes to a different conclusion. The respondent submits that the officer's decision, while short, contains all the necessary information allowing for a meaningful review. The respondent submits that the applicant's record is evidence that he had all the materials necessary to contest the merits of the officer's ineligibility determination.

[16] In *Newfoundland and Labrador Nurses' Union*, *supra*, on the issue of the "adequacy" of reasons, the Supreme Court of Canada stated the following at paragraphs 14, 15, 16 and 18:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses – one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) at § 12:5330 and 12:5510). It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> [15] . . . This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

> [18] . . . I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:
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> “When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties’ submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]”

[17] With these principles in mind, the officer did have an obligation to inform the applicant of her ineligibility finding (paragraph 104(1)(*a*) of the Act). However, the officer did not have a duty to provide detailed reasons. The officer did not have any obligation to provide extensive reasons in making her decision under section 104 of the Act, but rather had to appraise the evidence.

[18] In her decision, the officer told the applicant why he was ineligible: he had been recognized refugee status in the United States and could be returned to that country, as per paragraph 101(1)(*d*) of the Act. The applicant was given a meaningful opportunity to advance his views and present evidence at the interview. I further agree with the respondent that since the applicant was fully capable of bringing the present application for judicial review, the reasons given by the officer were sufficient.

[19] Moreover, the Guidelines do not impose any additional procedural safeguards on the officer, besides requiring that her decision be based on the evidence, that it take into account the applicant’s observations, that the applicant be notified of her decision and that the evidence be disclosed. There is no longer any specific requirement under the Act obligating the officer to provide reasons, contrary to the former requirement under the Act. Under former subsection 45(3) of the Act, reasons

were required in cases of an ineligibility finding terminating an applicant's claim for refugee protection.

[20] For these reasons, given that the burden of proving eligibility was on the applicant (subsection 100(4) of the Act), the officer's reasons were adequate. We do know why the applicant was ineligible: he has refugee status in the Untied States and can be returned to that country since the officer obtained assurances from the American authorities. In my view, in the context of the evidence, "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union*, *supra*, at para 16).

ii. Did the officer breach her duty of procedural fairness by refusing to disclose the information she received from the U.S. authorities, thereby depriving the applicant of the opportunity to respond?

[21] The applicant further argues that the officer erred in refusing to disclose the specific information she received from the U.S. authorities, thereby depriving him of an opportunity to respond. Rather, the officer had a duty to disclose the emails between the Canadian and American authorities regarding the applicant's return to the United States. The applicant submits that while he was informed by the CBSA of the U.S. authorities' assurances, his request to review the emails was denied. Consequently, he was left to speculate as to why he would be allowed to return, considering the provisions of the *INA* dealing with aliens and crimes of moral turpitude.

[22] The respondent, for his part, asserts that the officer did not have a duty to disclose the email correspondences between the Canadian and American authorities because such information was

protected under article 6 of the *Statement of Mutual Understanding on Information Sharing* and article 7 of the *Annex Regarding the Sharing of Information on Asylum and Refugee Status Claims to the Statement of Mutual Understanding on Information Sharing*.

[23] The applicant was informed of the assurances provided by the U.S. authorities. While he requested the disclosure of these assurances, the respondent claims that the information is also privileged under sections 37 and 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

[24] The respondent goes on to explain that an officer's duty to disclose evidence in the present context must also be accessed in light of the factors set out in *Baker* (*Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 (C.A.) [*Haghighi*]). Unlike the case of *Haghighi*, the officer's ineligibility determination does not put an end to the applicant's quest for protection within Canada, but restricts his choice of procedure. In such circumstances, the respondent does not believe the officer had any obligation to provide copies of the emails and disclose their specific contents.

[25] Therefore, the officer did not violate any principles of natural justice: her decision was based on the evidence, her reasons were sufficient and she communicated to the applicant the available evidence, allowing him to meaningfully participate in the ineligibility determination.

[26] The test to determine if an officer had a duty to disclose extrinsic evidence is whether the disclosure of the document was required to provide the applicant with a reasonable opportunity in all circumstances to participate in a meaningful manner in the decision-making process (*Haghighi* at

para 26; *Monemi v. Solicitor General*, 2004 FC 1648 at para 24 [*Monemi*]; *Thamotharampillai v. Minister of Citizenship and Immigration*, 2003 FC 836 at paragraphs 37 and 40). In applying the factors set out in *Baker*, in order to qualify an officer's duty to disclose, this Court must be mindful of the extent to which a duty to disclose the emails would likely have avoided the risk of error in making the decision (*Haghighi* at para 28).

[27] Unlike in *Haghighi*, disclosure of the emails would not have provided the applicant with the opportunity to comment on alleged errors, omissions or other deficiencies (at para 37). In *Haghighi*, an officer considering a claim on humanitarian and compassionate grounds had a duty to disclose in order to avoid such errors, given that the evidence at issue, a post-claim determination officer's risk assessment report, was derived from voluminous, nuanced and inconsistent information in different sources on country conditions (at para 37). In *Ormankaya v. Minister of Citizenship and Immigration*, 2010 FC 1089, the applicability of *Haghighi* was limited to its specific context: an officer determining an application based on humanitarian and compassionate grounds had a duty to disclose to the applicant a risk assessment report (at para 33). Hence, past case law is of limited utility: an inquiry into what is required to satisfy an officer's duty of fairness must be contextualized (*Monemi* at para 15). Thereby a conclusion reached in one context cannot automatically be transposed to another (*Monemi* at para 15).

[28] Moreover, in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, the Supreme Court of Canada tempers the duty to disclose, acknowledging that the material on which the Minister bases his decision must be provided to the refugee, subject to privilege and other reasons for reduced disclosure.

[29] The officer did not have a duty to disclose the contents of the emails between the Canadian and American authorities. Rather, it was sufficient that the applicant was aware of their existence. This disclosure of their existence was sufficient, in my opinion, to provide the applicant with a reasonable opportunity in all circumstances to participate in a meaningful manner in the officer's determination. Even if the applicant had read the specific contents of the emails, it would not have enabled him to comment on alleged errors, omissions or other deficiencies in these messages (*Haghighi*).

[30] Rather, the officer had the obligation to make further inquiries about the applicant's status in the United States, which she did. She also granted the applicant an interview and allowed him to make submissions, as per the Guidelines.

[31] Moreover, the emails appear to be protected by the *Statement of Mutual Understanding on Information Sharing* between Canada and the United States.

[32] Therefore, I do not believe the officer had a duty to disclose the emails between the Canadian and American authorities to the applicant. It was sufficient that the applicant was aware of their existence and the assurances they provided: the applicant was given a reasonable opportunity in all circumstances to participate in a meaningful manner in the officer's determination (*Baker, Haghighi*).

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[33] For the above-mentioned reasons, the application for judicial review is dismissed.

[34] The parties declined to propose any question for certification.

JUDGMENT

The application for judicial review of the decision of Karine Amato, an immigration officer for the Canada Border Services Agency, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is dismissed.

"Yvon Pinard"

Judge

ANNEX

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

Referral to Refugee Protection Division

Consideration of claim

100. (3) The Refugee Protection Division may not consider a claim until it is referred by the officer. If the claim is not referred within the three-day period referred to in subsection (1), it is deemed to be referred, unless there is a suspension or it is determined to be ineligible.

Duty of claimant

(4) The burden of proving that a claim is eligible to be referred to the Refugee Protection Division rests on the claimant, who must answer truthfully all questions put to them. If the claim is referred, the claimant must produce all documents and information as required by the rules of the Board.

Ineligibility

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

(*d*) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;

Notice of ineligible claim

104. (1) An officer may, with respect to a claim that is before the Refugee Protection Division or, in the case of paragraph (*d*), that is before or has been determined by the Refugee Protection Division or the Refugee Appeal Division, give notice that an officer has determined that

(*a*) the claim is ineligible under paragraphs 101(1)(*a*) to (*e*);

Examen de la recevabilité

Saisine

100. (3) La saisine de la section survient sur déféré de la demande; sauf sursis ou constat d'irrecevabilité, elle est réputée survenue à l'expiration des trois jours.

Obligation

(4) La preuve de la recevabilité incombe au demandeur, qui doit répondre véridiquement aux questions qui lui sont posées et fournir à la section, si le cas lui est déféré, les renseignements et documents prévus par les règles de la Commission.

Irrecevabilité

101. (1) La demande est irrecevable dans les cas suivants :

d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;

Avis sur la recevabilité de la demande d'asile

104. (1) L'agent donne un avis portant, en ce qui touche une demande d'asile dont la Section de protection des réfugiés est saisie ou dans le cas visé à l'alinéa *d*) dont la Section de protection des réfugiés ou la Section d'appel des réfugiés sont ou ont été saisies, que :

a) il y a eu constat d'irrecevabilité au titre des alinéas 101(1)*a*) à *e*);

Termination and nullification

(2) A notice given under the following provisions has the following effects:

(*a*) if given under any of paragraphs (1)(*a*) to (*c*), it terminates pending proceedings in the Refugee Protection Division respecting the claim; and

(*b*) if given under paragraph (1)(*d*), it terminates proceedings in and nullifies any decision of the Refugee Protection Division or the Refugee Appeal Division respecting a claim other than the first claim.

Classement et nullité

(2) L'avis a pour effet, s'il est donné au titre :

a) des alinéas (1)*a*) à *c*), de mettre fin à l'affaire en cours devant la Section de protection des réfugiés;

b) de l'alinéa (1)*d*), de mettre fin à l'affaire en cours et d'annuler toute décision ne portant pas sur la demande initiale.

Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (June 27, 1952):

Alien

101. (3) The term "alien" means any person not a citizen or national of the United States.

212. – General classes of aliens ineligible to receive visas and ineligible for admission; waivers of inadmissibility.

Sec. 212.

(a) Classes of Aliens Ineligible for Visas or Admission.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(2) Criminal and related grounds.

(A) Conviction of certain crimes.

(i) In general.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or

an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the *Controlled Substances Act* (21 U.S.C. 802), is inadmissible.

Code of Federal Regulations, 8 C.F.R. Part 223 – Reentry permits, refugee travel documents, and advance parole documents.

223.1 Purpose of documents

(b) *Refugee travel document.* A refugee travel document is issued pursuant to this part and article 28 of the United Nations Convention of July 29, 1951, for the purpose of travel. Except as provided in §223.3(d)(2)(i), a person who holds refugee status pursuant to section 207 of the Act, or asylum status pursuant to section 208 of the Act, must have a refugee travel document to return to the United States after temporary travel abroad unless he or she is in possession of a valid advance parole document.

Canada Evidence Act, R.S.C., 1985, c. C-5:

Specified Public Interest

Objection to disclosure of information

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.

Renseignements d’intérêt public

Opposition à divulgation

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.

Obligation of court, person or body

(1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.

Mesure intérimaire

(1.1) En cas d'opposition, le tribunal, l'organisme ou la personne veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

Objection made to superior court

(2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.

Opposition devant une cour supérieure

(2) Si l'opposition est portée devant une cour supérieure, celle-ci peut décider la question.

Objection not made to superior court

(3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by

(*a*) the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a court established under a law of a province; or

(*b*) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

Opposition devant une autre instance

(3) Si l'opposition est portée devant un tribunal, un organisme ou une personne qui ne constituent pas une cour supérieure, la question peut être décidée, sur demande, par :

a) la Cour fédérale, dans les cas où l'organisme ou la personne investis du pouvoir de contraindre à la production de renseignements sous le régime d'une loi fédérale ne constituent pas un tribunal régi par le droit d'une province;

b) la division ou le tribunal de première instance de la cour supérieure de la province dans le ressort de laquelle le tribunal, l'organisme ou la personne ont compétence, dans les autres cas.

Limitation period

(4) An application under subsection (3) shall be made within 10 days after the objection is made or within any further or lesser time that the court having jurisdiction to hear the application considers appropriate in the circumstances.

Délai

(4) Le délai dans lequel la demande visée au paragraphe (3) peut être faite est de dix jours suivant l'opposition, mais le tribunal saisi peut modifier ce délai s'il l'estime indiqué dans les circonstances.

Disclosure order

(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 the disclosure of the information.

Disclosure order

(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.

Prohibition order

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

Evidence

(6.1) The court may receive into evidence anything that, in the opinion of the court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its

Ordonnance de divulgation

(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 au regard des raisons d’intérêt public déterminées.

Divulgation modifiée

(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.

Ordonnance d’interdiction

(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.

Preuve

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

decision on that evidence.

When determination takes effect

(7) An order of the court that authorizes disclosure does not take effect until the time provided or granted to appeal the order, or a judgment of an appeal court that confirms the order, has expired, or no further appeal from a judgment that confirms the order is available.

Introduction into evidence

(8) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (5), but who may not be able to do so by reason of the rules of admissibility that apply before the court, person or body with jurisdiction to compel the production of information, may request from the court having jurisdiction under subsection (2) or (3) an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that court, as long as that form and those conditions comply with the order made under subsection (5).

Relevant factors

(9) For the purpose of subsection (8), the court having jurisdiction under subsection (2) or (3) shall consider all the factors that would be relevant for a determination of admissibility before the court, person or body.

International Relations and National Defence and National Security

Definitions

38. The following definitions apply in

sur cet élément.

Prise d’effet de la décision

(7) L’ordonnance de divulgation prend effet après l’expiration du délai prévu ou accordé pour en appeler ou, en cas d’appel, après sa confirmation et l’épuisement des recours en appel.

Admissibilité en preuve

(8) La personne qui veut faire admettre en preuve ce qui a fait l’objet d’une autorisation de divulgation prévue au paragraphe (5), mais qui ne pourrait peut-être pas le faire à cause des règles d’admissibilité applicables devant le tribunal, l’organisme ou la personne ayant le pouvoir de contraindre à la production de renseignements, peut demander au tribunal saisi au titre des paragraphes (2) ou (3) de rendre une ordonnance autorisant la production en preuve des renseignements, du résumé ou de l’aveu dans la forme ou aux conditions que celui-ci détermine, pourvu que telle forme ou telles conditions soient conformes à l’ordonnance rendue au titre du paragraphe (5).

Facteurs pertinents

(9) Pour l’application du paragraphe (8), le tribunal saisi au titre des paragraphes (2) ou (3) prend en compte tous les facteurs qui seraient pertinents pour statuer sur l’admissibilité en preuve devant le tribunal, l’organisme ou la personne.

Relations internationales et défense et sécurité nationales

Définitions

38. Les définitions qui suivent

this section and in sections 38.01 to 38.15.	s'appliquent au présent article et aux articles 38.01 à 38.15.
"potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.	« renseignements potentiellement préjudiciables » Les renseignements qui, s'ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales.
"sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.	« renseignements sensibles » Les renseignements, en provenance du Canada ou de l'étranger, qui concernent les affaires internationales ou la défense ou la sécurité nationales, qui se trouvent en la possession du gouvernement du Canada et qui sont du type des renseignements à l'égard desquels celui-ci prend des mesures de protection.

Statement of Mutual Understanding on Information Sharing ("SMU") (entered into by Citizenship and Immigration Canada (CIC), the U.S. Immigration and Naturalization Service (INS), and the U.S. Department of States (DOS) and their successors, collectively referred to as the "Participants"):

Article 1: Definitions

c. "Need to know" means a determination made by a Participant that specific information is needed by the requesting Participant in order to perform or assist in a lawful and authorized government function.

d. "Information" includes, but is not limited to, all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics including electronic format, made or received by a Participant that concerns persons, businesses, organizations, entities, activity or statistical data.

Article 2: Purpose and Scope

Subject to the domestic laws of the United States and Canada, the Participants are to assist each other by sharing information in accordance with the provisions of this SMU for the following purposes:

a. to assist in the effective administration and enforcement of the Participants' citizenship and immigration laws;

b. to facilitate the secure flow of people to Canada or the United States through co-operative border management among the Participants;

c. to promote international justice and security by fostering respect for human rights and by denying access to the United States and Canada to persons who are criminals or security risks.

Article 3: Conditions for Exchange of Information Under the SMU

Unless otherwise specified in any Annex to this SMU, the Participants are to share information under the SMU consistent with domestic law and the purposes set out in Article 2 if any of the following circumstances exist:

a. there are reasonable grounds to suspect that the information would be relevant to the administration or enforcement of the citizenship or immigration laws of either Canada or the United States;

Article 6: Subsequent Uses and Treatment

Subsequent uses and treatment of information shared under this SMU and its annexes are restricted by the following conditions:

a. Information is shared between the Participants pursuant to an express understanding of strict confidentiality. Such information, as well as inquiries and requests for information, received by a Participant under this SMU is to be accorded protection from disclosure to third parties as provided under the laws and policies of the receiving Participant with regard to such information;

b. Receiving Participants are not to use or disclose the information provided under this SMU except for the purposes enumerated in Article 2 or the Annexes, or as otherwise required by the laws of the Participant;

c.

   i. The Participants are to obtain written permission for the disclosure to third parties of any confidential information received pursuant to this SMU prior to such disclosure, or as specified in the Annexes, unless there is a compelling need that would justify a Participant's not making such a written request, in which case the requesting Participant is to give written notice of the disclosure to the providing Participant as soon as practicable; however

   ii. The Participants acknowledge that written permission is not required

for disclosure of information to agencies participating as signatories of the SMU and other agencies in the performance of their citizenship, immigration or border management functions (including the U.S. Coast Guard, U.S. Customs Service, U.S. Department of Agriculture, U.S. Federal Bureau of Investigation, U.S. Central Intelligence Agency, U.S. Department of Defense, Canada Customs and Revenue Agency, Canadian Food Inspection Agency, Health Canada, Canadian Security Intelligence Service, Canadian Department of Fisheries and Oceans, Canadian Department of Foreign Affairs and International Trade, Canadian Department of National Defence; Royal Canadian Mounted Police, or their successors and with oversight and review agencies within the United States and Canada);

iii. A receiving Participant is to provide notice to any third party to which it discloses information received in confidence under the SMU that the third party is prohibited from further disclosure unless it obtains authorization from the providing Participant; and

d. To prevent the unauthorized disclosure, copying, use, or modification of information provided to a Participant under this SMU, receiving Participants are to restrict access to such information on a need to know basis, and use recognized security mechanisms such as passwords, encryption, or other reasonable safeguards to prevent unauthorized access.

Annex Regarding the Sharing of Information on Asylym and Refugee Status Claims to the Statement of Mutual Understanding on Information Sharing:

<u>Article 3: Applicability</u>

This Annex does not apply to refugee status claims made by persons who are citizens of Canada or the United States or who, not having a country of nationality, are habitual residents of Canada or the United States. This Annex applies to sharing, on a systematic or case-by-case basis, of information concerning refugee status claims made in either Participant’s territory. This Annex does not preclude sharing of information on a case-by-case pursuant to the SMU or any other annex to the SMU.

<u>Article 5: Data Elements to be shared</u>

There are four broad categories of information that may be shared:

- information relating to the identity of the refugee status claimant;
- information relating to the processing of the refugee status claim;
- information relevant to a decision to deny a refugee status claimant access to, to exclude such a claimant from the protection of, the refugee determination system, or to terminate, cancel or revoke an individual's existing refugee status in the United States or Canada; and
- information regarding the substance or history of previous refugee status claim(s) that will assist in determining a subsequent refugee status claim.

1. Information relating to the identity of the refugee status claimant

   Information concerning the identity of a refugee status claimant is essential to the determination of a refugee status claim. In order to establish the identity of a refugee status claimant, the officer relies upon biographic, descriptive or biometrics data. Not all of the identifying data characteristics listed below may be available for each refugee status claimant. The identification information that may be shared under this Annex includes, but is not limited to:

   - Name and aliases used;
   - Client identification number (for respective Participant's reference only);
   - Gender (both birth and post-operative, if applicable);
   - Physical description;
   - Biometrics, including fingerprints, photographs and physical descriptions;
   - Date of birth (both claimed and actual);
   - Country of birth (both claimed and actual);
   - Nationality or nationalities (both claimed and actual);
   - Information relating to identity documents (e.g. passport number); and
   - Other relevant identification data (e.g., FBI number, driver's license number).

2. Information relating to the processing of the refugee status claim

   Information regarding the status of a previous or ongoing refugee status claim in the country of one Participant is relevant to the determination of a refugee status claim in the country of the other Participant. This information refers to the processing of the person's refugee status claim in Canada or the United States, and consists of, but is not limited to:

   - Information regarding whether the refugee status claim was denied access to the refugee determination system, has been decided, remains pending, or has been declared abandoned or voluntarily withdrawn;

- If the refugee status claim has been decided, information on whether protection was granted or denied, including the disposition of any appeals; and
- Information regarding the cessation or vacation of a determination on a refugee status claim.

3. Information relevant to a decision to deny a refugee status claimant access to, or exclude such a claimant from the protection of, the refugee status determination system or to terminate, cancel or revoke an individual's existing refugee status in the United States or Canada.

   This information is relevant to the decision whether or not to allow the refugee status claimant access to the refugee status determination system. This information may also be relevant to the decision as to whether or not a person ought to be excluded from refugee protection pursuant to Article 1E or 1F or denied protection according to Article 33(2) of the 1951 Convention, as implemented in the refugee status determination systems of the Participants. In Canada, this information may also be relevant to the decision as to whether the Minister of Immigration decides to participate in the refugee status determination process pursuant to Canadian law. The information that may be shared includes, but is not limited to:

   - Information related to a determination that a refugee status claimant falls or fell within the provisions of Article 1E or 1F of the 1951 *Convention Relating to Status of Refugees,* as implemented by the Participant;
   - Information related to a determination that a refugee status claimant falls or fell within the provisions of Article 33(2) of the 1951 *Convention Relating to Status of Refugees,* as implemented by the Participant;
   - Information concerning any outstanding criminal warrants or criminal convictions pertaining to a refugee status claimant, or the nature of any criminal offence that either Participant has reasonable grounds to suspect a refugee status claimant has committed;
   - Information concerning security allegations pertaining to a refugee status claimant, or the nature of any security risk that either Participant has reasonable grounds to suspect a refugee status claimant might present;
   - Information related to outstanding immigration warrants pertaining to a refugee status claimant or the nature of any immigration offence(s) that either Participant has reasonable grounds to suspect a refugee status claimant has committed.

4. Information regarding the substance or history of any previous refugee status claim(s) that will assist in determining a subsequent refugee status claim.

Information regarding previous refugee status claims is relevant to the assessment of subsequent claims, including the assessment of credibility. Such information includes, but is not limited to:

- Country of last habitual residence;
- Address;
- Marital status and family composition;
- Immigration status;
- Date(s) of arrival;
- Places(s) of entry;
- Manner of entry;
- Information concerning routes of travel;
- Occupational information;
- Education;
- Information submitted in support of a refugee status claim;
- Information related to the substance of the refugee status claim; and
- Records of decisions taken with respect to the refugee status claim, including reasons.

Article 6: Mechanism for Sharing Data

b. Case-by-case sharing of information
In addition to the systematic sharing of information, the Participants may, in accordance with procedures set forth in the SMU, share information described in Article 5 of this Annex concerning refugee status claims on a case-by-case basis pursuant to the request of either Participant.

Article 7: Confidentiality

a. Each Participant is to protect from disclosure to any non-participant, to the fullest extent provided under its country's laws and regulations, any and all information, inquiries and requests for information received from the other Participants under this Annex.

b. Protection of a refugee status claimant includes protecting the confidentiality of an individual's identity and of the information provided in the individual's refugee status claim, including the fact that an individual has submitted a refugee status claim. Unauthorized release of such information may place the refugee status claimant or a member of the refugee status claimant's family at risk of serious harm, including persecution and torture. Consequently, each Participant is to treat as confidential and protect from disclosure to any non-participant, to the fullest extent provided under its country's laws and regulations,

any and all information, inquiries, and requests for information received from the other Participant under this Annex. The Participants are to seek to ensure that information is not exchanged or disclosed to a Participant or non-Participant in such a way as to place refugee status claimants or their families at risk in their countries of nationality, or if stateless, countries of last habitual residence.

c. The Participants acknowledge that written permission is not required, pursuant to Article 6(c)(i) of the SMU, for the disclosure of information related to the refugee status claim to other agencies to further their adjudication or review of refugee status claims. Thus, a Participant may, for example, release confidential information to the Executive Office for Immigration Review, United States federal courts, and the Immigration and Refugee Board and Federal Court of Canada, in connection with or in furtherance of the adjudication of a refugee status claim.

d. Disclosure by the receiving Participant of any information received under this Annex to foreign governments or international organizations requires the written consent of the providing Participant.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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