Federal Court Cour fédérale

Date: 20180202

Docket: IMM-2523-17

Citation: 2018 FC 114

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KAMRAN SOLTANIZADEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

MOSLEY J.

[1] These public reasons for order refer to an application by the Attorney General of Canada on behalf of the Respondent, the Minister of Citizenship and Immigration, under Rules 8, 36 and 369 of the *Federal Courts Rules*, SOR/98-106 (FCR), and Rule 21 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (FCCIRPR). The Respondent applies for the non-disclosure of information redacted from the Certified Tribunal

Record (CTR) in the underlying judicial review proceeding, pursuant to s 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA or the Act).

[2] These public reasons will be issued to the parties in the underlying proceeding and placed on the Federal Court Registry's public file. A Classified Order and Reasons will be issued only to the Respondent and the Attorney General, placed on the Federal Court's Designated Proceedings Registry file and kept in a secure location.

[3] For the purposes of the Respondent's application pursuant to s 87 of the IRPA, it is not necessary to delve deeply into the procedural history of the underlying matter but there are some relevant background facts. In early 2010, the Applicant, a citizen of Iran, applied to immigrate to Canada under the Quebec Skilled Worker Category as a veterinarian. On February 16, 2010, the Province of Quebec issued a selection certificate approving his application. On April 26, 2010, the Applicant applied for a permanent resident visa for landing in Canada. His application was initially denied by a visa officer on October 22, 2015 on the ground that the Applicant was inadmissible to Canada under s 34 of the IRPA. An application for judicial review of that decision was discontinued on consent in April 2016 following a settlement agreement that required reconsideration of the file by a different officer.

[4] The second visa officer denied the application on May 22, 2017 on similar grounds which prompted a fresh judicial review application. Leave was granted on September 8, 2017. The Respondent offered to settle the second application on consent, acknowledging that the reasons

provided in the May 22, 2017 decision were not sufficiently intelligible and transparent to meet the reasonableness standard of review.

[5] The Applicant declined the second settlement offer. The Respondent then brought a motion for an Order to quash the second visa officer's decision and to return the application for redetermination by a third officer. The Respondent's motion was opposed and was denied by Madame Justice McDonald on October 17, 2017. Justice McDonald's order required that the CTR be delivered within 20 days of the date of her Order and confirmed a hearing date of November 22, 2017.

[6] On October 30, 2017, the Respondent filed the present application for a non-disclosure order under s 87 of the IRPA. The Respondent's public motion record indicates that the Respondent would not be relying upon the redacted material for the purposes of defending the visa officer's decision as the Minister intends to consent to the application for judicial review at the hearing.

[7] A redacted version of the CTR was filed with the Court on November 3, 2017 and copies were provided to counsel for the parties. The CTR cover letter from the Embassy of Canada at Paris, France dated November 1, 2017 states that "some redactions have been made pursuant to s 18.1 of the CSIS Act and s 87 of IRPA." It was thus publicly disclosed that the statutory privilege under s 18.1 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (CSIS Act) was invoked.

[8] By letter dated November 3, 2017, counsel for the Applicant advised the Court that the Applicant took no position on the s 87 motion. The letter goes on to state:

> The Applicant does request that the Court review all of the redacted and non-disclosed information to ensure that it would, if disclosed, be injurious to national security. The Applicant also asks that the Court ensure that the Respondent not be permitted to rely on any new evidence that is contained in any new affidavits filed in support of the motion to substantiate the decision of the officer under review.

[9] The Applicant's letter is silent with respect to the information redacted and not disclosed under s 18.1 of the CSIS Act. It is unclear to the Court whether the Applicant's request that "the Court review all of the redactions and non-disclosed information to ensure that it would, if disclosed, be injurious to national security" was meant to include the information redacted pursuant to s 18.1 of the CSIS Act. If it was, the Applicant and his counsel may not appreciate the limitations of the statutory framework I will discuss below.

[10] On November 21, 2017, the Honourable Mr. Justice Simon Noël ordered that the hearing of the judicial review application be adjourned to Monday, February 26, 2018 and the matter be assigned to a Designated Judge.

[11] In the Respondent's public record filed on October 30, 2017, there is no indication that information is redacted and not disclosed under s 18.1 of the CSIS Act. The written representations outline the rationale for protecting classified information under s 87 of the IRPA in broad terms and assert that the "information redacted from the CTR […] falls within the net of information which, if released, would be injurious to the national security of Canada or endanger

the safety of persons and therefore ought not to be disclosed to the public or to the Applicant and Applicant's counsel."

[12] On November 10, 2017 the Respondent filed two classified affidavits with attached exhibits relating to the s 87 redactions in the CTR. The Court has read the affidavits and exhibits as well as all of the redacted text in clear see-through formats including the text redacted under s 18.1 of the CSIS Act. The Court received additional written representations from the Respondent and heard oral testimony and submissions in a closed hearing on December 7, 2017.

[13] In the closed proceeding, the Respondent's evidence and submissions were not presented with a view to justify the visa officer's decision. As a result of this process, I think that I can safely state in response to the Applicant's concern that there is nothing in the affidavits filed in support of the s 87 application that constitutes "new evidence […] to substantiate the decision of the officer under review".

[14] Respondent's counsel and the affiant/witness sought to present information and evidence in support of the claims that disclosure of certain information contained and redacted in the CTR pursuant to s 87 of the IRPA would be injurious to national security or endanger the safety of any person. This was to allow the Court to reach an informed opinion as to which of the claims invoked should indeed be protected under s 87 of the IRPA. These are the matters that I have dealt with in the Classified Reasons and Order.

[15] Departing from the norm on these applications, which is to issue an order with a brief endorsement of the reasons for decision, I have come to the conclusion, exceptionally, that it is necessary for me to elaborate on the legal principles that apply in these matters.

[16] Before doing that, I wish to stress that no affidavit evidence was filed, or *viva voce* testimony presented by the Attorney General with respect to the redactions made pursuant to s 18.1 of the *CSIS Act.* The Attorney General takes the position that this Court has no jurisdiction to ascertain whether or not the human source privilege has been properly invoked and applied by CSIS personnel in the absence of an application made under s 18.1(4) of the *CSIS Act* by a party to a proceeding or an *amicus curiae* or special advocate appointed in respect of the proceeding.

[17] It is worth noting here that all of the information in the CTR is *prima facie* relevant to the underlying application as information which is required to be produced to the Applicant pursuant to Rule 17 of the FCCIRP Rules subject to any claim of privilege or a non-disclosure order under IRPA s 87. There is no application before the Court respecting the CSIS Act s 18.1 redactions. As a result, assuming that the Attorney General is correct, there is no process underway by which the Court could determine whether the statutory requirements for invoking the human source privilege are satisfied. Nor is there any means by which the Applicant could learn how much of the information in the CTR is redacted under s 18.1 of the CSIS Act or whether that information is material to his application for judicial review.

[18] With those limitations in mind, I think it may be useful to provide some comments in these reasons about the scope and effect of the s 87 process.

[19] Section 87 of the *IRPA* reads as follows:

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 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.	**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 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.

[20] As is apparent from the text, s 87 of the Act contains no standard for the determination of a non-disclosure application other than the reference to s 83 of the Act. Section 83 of the Act, amongst other things, provides that the judge (defined in s 76 of the IRPA as the Chief Justice or a designated judge of the Federal Court) shall, upon request of the Minister, conduct a hearing in the absence of the public if, <u>in the judge's opinion</u>, disclosure of the information <u>could</u> be injurious to national security or endanger the safety of any person. The judge <u>shall</u> ensure the confidentiality of the information or other evidence if, <u>in the judge's opinion</u>, disclosure <u>would</u> be injurious or endangering. I have underlined these words because they describe the nature of the discretion accorded the designated judge by Parliament and because the distinction between "could" and "would" in the text of the statute is meaningful.

[21] As discussed by Madam Justice Dawson in *Jaballah, Re*, 2009 FC 279 at paras 8–10, 340 FTR 43 [*Jaballah*], the decision to hold a closed hearing under s 83 is discretionary. But once satisfied that disclosure <u>would</u> be injurious or endangering, the designated judge <u>must</u>, pursuant

to paragraph 83(1)(d) of the Act, ensure the confidentiality of the information. The Minister bears the burden of establishing that disclosure "would" be injurious to national security, or endanger the safety of any person. This is an elevated standard compared to the use of the permissive "could" in the determination of whether a closed hearing is necessary.

[22] The expression, "in the opinion of the judge", is frequently found in the statutes and gives the judge broad discretion. In this context, it specifically applies to the determination of whether disclosure of the classified information would cause injury or endanger safety. This was recognized by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] 2 SCR 33 [*Harkat*], in the context of the security certificate regime to which s 83 of the Act also applies. As the Supreme Court stated at para 4:

> […] Crafting a regime that achieves a fundamentally fair process while protecting confidential national security information is a difficult task. The scheme must apply to a broad range of cases, implicating a variety of national security concerns. Parliament's response to this challenge has been to confer on judges the discretion and flexibility to fashion a fair process, in the particular case before them […]

[23] In assessing disclosure questions, the designated judge is also guided by the language of s 33 of the IRPA which applies a "reasonable grounds to believe" standard to the determination of the facts necessary to find inadmissibility under sections 34–37 of the IRPA. The reasonable grounds standard has been defined as a standard of proof falling short of a balance of probabilities. There must be an objective basis for the belief based on credible evidence: *Chiau v Canada (MCI)*, [2001] 2 FC 297 (CA) at para 60, 195 DLR (4th) 422; *R v Zeolkowski*, [1989] 1 SCR 1378 at p 1385; *Mugesera v Canada (MCI)*, 2005 SCC 40 at para 114, [2005] 2 SCR 100.

[24] In the present matter, as the Applicant was denied a visa because of concerns that he is a member of the inadmissible category of persons described in s 34(1)(d) of the IRPA, in determining the merits of the underlying application the judge will review the officer's application of the reasonable grounds to believe standard.

[25] Section 87 of the IRPA expressly excludes obligations set out in s 83 of the IRPA that are applicable to certificate proceedings: the requirements to provide a summary of the information and other evidence or to appoint a special advocate. Section 87.1 of the IRPA provides that the judge may appoint a special advocate where the judge is of the opinion that it is required in the interests of fairness and natural justice.

[26] Whether potentially injurious information can be withheld or not under s 87 of the IRPA is a determination to be made by the Court and not by the Respondent alone: *Mohammed v Canada*, 2006 FC 1310 at para 19, [2007] 4 FCR 300. This is because in a country governed by the rule of law upheld by an independent judiciary, it is the courts that ultimately determine whether the secrecy essential to the work of the security services must give way to the interests of justice: *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs*, [2010] EWCA Civ 65.

[27] This principle was not well established in the common law until the landmark decision of the House of Lords in *Conway v Rimmer,* [1968] AC 910. In that case, the House departed from the traditional view of Crown Privilege, or public interest immunity, expressed in *Duncan v Cammell Laird & Co,* [1942] AC 624. Under the traditional view of public interest immunity, the

assertion of privilege by a Minister of the Crown was considered to be an absolute bar to disclosure of the information in question.

[28] The traditional view of public interest immunity was the rule in Canada well into the 1980's. Section 41(2) of the *Federal Court Act,* RSC 1970 (2nd Supp), c10, expressly barred the judiciary from inspecting documents subject to a claim of public interest privilege pertaining to international relations, national security and defence. As discussed by Mr. Justice Mahoney in *Landreville v The Queen (1976)*, 70 DLR (3d) 122, [1977] 1 FC 419:

> [Section 41(2)] had no counterpart in the *Exchequer Court Act*, R.S.C. 1970, c. E-11. Prior to the enactment of s 41(2) in 1970, "Crown privilege" as it pertains to the Crown in right of Canada was determined by the common law.
>
> Bearing in mind the fact that the House of Lords rendered its unanimous decision in *Conway v Rimmer*, [1968] AC 910, in February 1968, it is apparent that Parliament deliberately codified the common law as stated in *Duncan v. Cammell, Laird & Co*., [1942] AC 624, to forestall application of *Conway v. Rimmer* in Canada. […]
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> [Emphasis added]

[29] That approach proved to be unacceptable in Canada due to the events that led to the McDonald Commission inquiry and report into the activities of the RCMP security service: Canada, *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, Second Report - Vol. 1: Freedom and Security under the Law, Ottawa, August 1981 [McDonald Commission]. It was apparent from the findings of the Commission that the security service had operated outside the scope of the law without adequate supervision by the Executive and had lost the confidence of the public: *Goguen v Gibson*, [1983] FC 872, 53 DLR (4th) 568; *Atwal v Canada*, [1988] 1 FC 107.

[30] As part of the broad restructuring of the security intelligence function in Canada following the McDonald Commission report, Parliament repealed s 41 of the *Federal Court Act* and replaced it with s 36.2 of the *Canada Evidence Act*, RSC 1970, c E-10 (CEA (1970)), as enacted by SC 1980-81-82-83, c 111, s 4, Schedule III.

[31] Section 36.2 provided for judicial review of claims of public interest immunity pertaining to international relations, national security and defence. It contained no bar to examination of the information by the judge and created a test for balancing the public interests in disclosure and non-disclosure. The successor legislation is now found in sections 38 and 38.01 to 38.15 of the *Canada Evidence Act*, RSC, 1985, c. C-5 (CEA), as amended by SC 2001, c 41 and SC 2015, c 3.

[32] In the immigration context, security and criminal intelligence reports were privileged. They could not be produced in evidence in any court or other proceeding and there was no authority to review the privilege claims by the judiciary: s 39 and 119 of the *Immigration Act 1976*, SC 1976-77, c 52 (assented to August 5, 1977). It was only in 1988, following the recommendations of the McDonald Commission and the introduction of s 40.1(4) by *An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, SC 1988, c 36, s 4, that the judiciary would be permitted to examine national security information:

> I have concluded that, in enacting section 40.1 of the Immigration Act, Parliament developed a procedure in which it attempted to strike a reasonable balance between the competing interests of the individual and the state. In particular, Parliament placed the responsibility of reviewing the reasonableness of the ministerial certificate on an independent member of the judiciary and accorded him the power to examine the security or criminal intelligence reports, to hear evidence, to give disclosure with a

> view to permitting the person to be "reasonably informed", and to provide the person with a "reasonable opportunity to be heard."
> […]
>
> *Ahani v R*, [1995] 3 FC 669, [1995] FCJ No. 1190 at para 38, aff'd [1996] FCJ No 937, 119 FTR 80 (note).

[33] In 2001, enactment of the IRPA substantively changed the security certificate regime and introduced s 87 to authorize the Court to examine non-disclosure claims to determine whether disclosure of the information would be injurious to national security or would endanger the safety of any person. Later, in response to *Charkaoui v Canada (MCI)*, 2007 SCC 9, [2007] 1 SCR 350, Parliament amended the legislation to provide for the appointment of special advocates to protect the interests of the person concerned.

[34] One significant difference between s 38 of the CEA and s 87 of the IRPA is that the latter enactment does not provide for a balancing of the public interests in favour of disclosure with those against disclosure. As discussed by Justice Dawson in *Jaballah*, above, the Court is left with no choice but to authorize redaction of the information when satisfied that injury would result from its disclosure. While the mandatory requirement to provide a summary of the protected information in certificate cases does not apply, as that part of s 83 is expressly excluded from s 87 applications, there is no bar to the Court exercising its discretion to do so and it has – usually at a high level of abstraction.

[35] Under s 87, the Court does not determine the relevance of the redacted information. As noted above, relevance is determined by the requirement in s 17 (b) of the *FCCIRP Rules* that all "papers relevant to the matter that are in the possession or control of the tribunal" be produced in

the CTR. By including the documents in the CTR, the Respondent has acknowledged their relevance to the underlying application.

[36] In applications under s 87 of the IRPA and other national security proceedings, reference is frequently made to the decision of Mr. Justice Addy in *Henrie v Canada (Security Intelligence Review Committee)*, [1989] 2 FC 229, [1988] FCJ No 965 (Fed TD) [*Henrie*], aff'd (1992) 5 Admin LR (2d) 269 (FCA), 88 DLR (4th) 575.

[37] The Respondent's written representations rely on *Henrie* for the proposition that information related to national security ought not to be disclosed as an important exception to the principle that the court process should be open and public. *Henrie* was decided just a few years after the repeal of s 41 of the *Federal Court Act* and the enactment of s 36.2(1) of the CEA (1970). It reflects the transition from absolute Crown immunity to a legislative framework in which the judiciary must consider whether claims of injury to national security are reasonable. In my view, *Henrie* and the 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.

[38] For example, designated judges at that time refrained from actually examining the classified documents to determine whether the Minister's claims were valid, preferring to rely on the confidential affidavits and submissions with which they were provided by the government: *Henrie*, above, at para 23 (page 240 in the original report). Today, it is inconceivable that

designated judges assigned to consider s 38 of the CEA or s 87 of the IRPA applications would rely on the assertion of injury claims by the Minister without reading the information at issue.

[39] The early decisions of this transition period also reflect what can be described as a generous and unquestioning acceptance of national security arguments put forward by the Attorney General on behalf of CSIS.

[40] Of particular concern in *Henrie* are several references to a “might prove injurious” standard (at pages 235, 241 and 244). In his reasons, Justice Addy candidly acknowledged that he was unwilling to assume the risk that disclosure of what appeared to be innocuous information, “might in fact prove to be injurious to national security.” As noted above, this is not the test that the Court is to apply. It sets too low a threshold. The onus is on the Minister to establish that disclosure <u>would</u> cause injury to the national interest on credible evidence.

[41] Justice Addy also placed great weight on what has been called the “mosaic effect”. This is a theory wherein apparently innocuous items of information can be assembled by an informed and hostile reader and used to cause injury. The logic of that 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. 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: *Canada (AG) v Almalki*, 2010 FC 1106 at paras 115–119.

[42] A litigant who seeks to challenge a government decision that affects his or her interests and for that purpose seeks access to information for which public interest immunity is claimed, faces an uphill battle. This was recognized by Mr. Justice La Forest in *Carey v Ontario*, [1986] 2 SCR 637 at para 99, albeit in a different but analogous context.

> What troubles me about this approach is that it puts on a plaintiff the burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation. But they deal with precisely the subject matter of the action and what one party was doing in relation to the relevant transactions at the time.

[43] These concerns remain valid to-day. A party faced with a non-disclosure application by the government has only a limited ability to contest those applications before the Court under s 87 of the IRPA or s 38 of the CEA and even less so under s 18.1 of the *CSIS Act*. There is the possibility of requesting that the Court appoint a special advocate or an *amicus curiae*. Under the IRPA and the CEA, respectively, the special advocate or *amicus* will be authorized by the Court to review the redacted information to more effectively participate in the closed proceedings and question the government's evidence.

[44] As discussed by Mr. Justice Noël in *X (Re)*, 2017 FC 136, 278 ACWS (3d) 207, the position of the Attorney General is that information which discloses the identity of a CSIS human source or from which the identity of the source may be inferred may be disclosed only to the judge.

[45] Justice Noël concluded, at paras 27–29:

> I agree with Counsel for the Government's position that allowing the designated judge to review the un-redacted information strikes the appropriate balance between the legislative intent behind s. 18.1, the s. 7 rights of CSIS human sources, <u>and the designated judge's overarching statutory duties to promote fairness and the proper administration of justice.</u>
>
> […]
>
> I further endorse Counsel for the Government's contention that s. 18.1 must be interpreted in a manner allowing the designated judge to perform his or her duties as an independent adjudicator. Counsel for the Government themselves submit that they should not be the sole arbiters of what information should or should not be disclosed to any other party. <u>In practice, the designated judge must be provided the un-redacted information in order to determine whether the privilege exists or if any exceptions to it apply.</u>
>
> [Emphasis added]

[46] Justice Noël is correct I believe. But how can the Court exercise its duty to promote fairness and the proper administration of justice and determine whether the privilege exists, or any exceptions apply, to the un-redacted information subject to s 18.1 claims? For the Court to effectively review and assess s 18.1 claims, according to the Attorney General, it must do so pursuant to an application under s 18.1(4) of the *CSIS Act* seeking an order declaring that an individual is not a human source, or that the information at issue is not information from which the identity of a human source can be determined or inferred. It is the Attorney General's position that nothing can be done about such claims in the context of s 38 of the CEA or s 87 of the IRPA, absent an application under s 18.1 (4) of the *CSIS Act*, notwithstanding that on the face of the information, or the context in which it is found, there is nothing that would appear to support a s 18.1 claim.

[47] A party to a proceeding before a court that has jurisdiction to compel the production of information, an *amicus curiae* or a special advocate appointed for the purpose of that proceeding, may apply to a judge of the Federal Court for a disclosure order under s 18.1(4) if it is relevant to the proceeding. Subsection 18.1(5) contemplates the filing of "the applicant's affidavit deposing to the facts relied on in support of the application." But as Justice La Forest noted in *Carey*, above, what the documents contain must be a matter of speculation. Any application under s 18.1(4) is, therefore, a shot in the dark.

[48] In his reasons for the Supreme Court in *Carey,* Mr. Justice La Forest noted, at paras 84 and 85, that there may well be a need for disclosure of sensitive information to address abuses by the state in a particular case:

> 84. There is a further matter that militates in favour of disclosure of the documents in the present case. The appellant here alleges unconscionable behavior on the part of the government. As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely the proper functioning of the executive branch of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed.
>
> 85. Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts. As Lord Keith of Kinkel noted in the Burmah Oil case, supra, at p. 725, it has a bearing on the perception of the litigant and the public on whether justice has been done.

[49] I am not suggesting that the actions of the visa officer in the present matter amounted to improper conduct in dealing with the Applicant. The merits of the case have yet to be

determined. But I do suggest that where one party controls relevant evidence that it seeks to exclude from consideration on the underlying application, fairness dictates that it present evidence justifying that action on reasonable grounds to an independent and impartial judge. This can be done in a manner to protect the information, as contemplated by s 18.1(7) which provides for the hearing of such an application to be held in private and in the absence of the applicant and their counsel, unless the judge orders otherwise.

[50] It is unquestionable that the state has an important interest in conducting national security investigations and protecting national security. This interest can limit the disclosure of materials to individuals who have been affected by actions of the state and are engaged in litigation to assert their own personal interests including rights guaranteed by the *Charter*. This has been recognized by the Supreme Court of Canada in decisions such as *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at 744, [1992] SCJ No 27; *Suresh v Canada (MCI)*, 2002 SCC 1 at para 122, [2002] 1 SCR 3; *Ruby v Canada (Solicitor General)*, 2002 SCC 75 3 at paras 42–43, [2002] 4 SCR; *Charkaoui*, above at para 58.

[51] The Supreme Court of Canada has referred to the "gatekeeper role" of designated judges: *Harkat*, above, at para 46. In applying s 83 of the IRPA, it has stated that the judge must be "vigilant and skeptical with respect to the Minister's claims of confidentiality" given "the government's tendency to exaggerate claims of national security confidentiality": *Harkat*, at para 63. The current practice of providing the Court with a see-through version of the s 18.1 redactions in the absence of a supporting rationale and evidence from an informed deponent falls short of enabling the Court to carry out the gatekeeper role or, as was stated by Justice Noël in *X*

(Re), above at para 27, "the designated judge's overarching statutory duties to promote fairness and the proper administration of justice."

[52] Deference to the Minister's assessment of injury is warranted where the Minister has provided evidence that reasonably supports a finding that disclosure of the information would be injurious to national security: *Sellathurai v Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 1082 at para 31 (appeal allowed regarding the appointment of an *amicus curiae*, 2011 FCA 223 at para 63).

[53] In assessing the Minister's evidence, the Court may consider that the redacted information is of little or no evidentiary value for the underlying proceedings. As stated by Mr. Justice Noël in *Dhahbi v Canada (MCI)*, 2009 FC 347 at para 24, ACWS (3d) 225 [*Dhahbi*]:

> Experience in similar cases shows that, in such situations, it has often been found that the redacted information adds nothing to the facts in issue. For example, for reasons relating to investigative techniques, administrative and operating methods, such as file numbers, CSIS staff names and dealings between CSIS and other agencies in or outside Canada, are not disclosed. Such information in itself does not help in understanding the case.

[54] This is not to say that such information may never be relevant to the underlying judicial review application but that in most cases it is unlikely. In the immigration context, CSIS may provide security reports to immigration decision makers, such as visa officers or CBSA agents. The content of such reports may prove to be relevant in certain circumstances. But it is unlikely that it would be necessary to identify the individual officers. Parliament has reinforced that through the creation of the offence in s 18 of the *CSIS Act*, subject to limited exceptions.

[55] Where the redacted information is of a more substantive nature and would have probative value in the underlying application, the Court should look closely at whether the redactions are justified. In some instances, the essence of the information may have been conveyed to the subject of the decision through the written reasons provided and disclosure of the redacted text would add nothing to the understanding of the case: see for example *Pusat v Canada (MCI)*, 2011 FC 428 at para 9, 226 ACWS (3d) 206. In others, the subject may be left entirely in the dark as to the reasons why the application has been denied.

[56] The importance of the decision to the applicant is a factor to be taken into consideration. The Court must be conscious of the burden that prospective immigrants to Canada often face. The processing of a visa application can often take many years and be very costly to the individual only to be denied at the very end. But when the applicant is seeking admission rather than facing removal the stakes are less serious. The individual's fundamental rights protected by the *Charter* are not in jeopardy, there is no legal right to the grant of a visa and the impact of a refusal is less serious than that of the removal of an entitlement such as continuing residence in Canada. Nonetheless, there is at least a minimum duty to act fairly: *Khan v Canada (MCI)*, 2001 FCA 345 (Fed CA), at para 39; *Dhahbi,* above at para 12.

[57] In the present matter, I closely questioned the witness tendered by the Respondent in the closed hearing on the grounds for the claims for protection of the redacted information under s 87 of the *IRPA*. Based on the evidence of that witness and having considered the submissions of counsel for the Respondent, I reached certain conclusions regarding the reasonableness of the s 87 claims. Those conclusions are set out in my Classified Reasons and Order.

[58] Should no appeal be brought from my Classified Reasons and Order, this may result in certain of the s 87 redactions being lifted and the relevant pages of the CTR reissued with additional disclosure. An appeal will result in the suspension of the execution of the decision, as well as the judicial review, until the appeal has been finally determined: IRPA, s 87.01.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2523-17
STYLE OF CAUSE:	KAMRAN SOLTANIZADEH V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
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DATED:	FEBRUARY 2, 2018

APPEARANCES:

N/A	FOR THE APPLICANT
Robert Reid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Larlee Rosenberg Barristers & Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT