Federal Court  Cour fédérale

Date: 20190411

Dockets: IMM-5184-18

IMM-4747-18

Citation: 2019 FC 448

Ottawa, Ontario, April 11, 2019

PRESENT: The Honourable Madam Justice McVeigh

Docket: IMM-4747-18

BETWEEN:

MOHAMED SIYAAD

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-5184-18

AND BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

MOHAMED ABDI SIYAAD

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Both of these separate applications are related to the warrantless seizure of a cellphone by the Canada Border Services Agency [“CBSA”] from Mohamed Abdi Siyaad [“Siyaad”].

[2] In IMM-4747-18, Siyaad asserts that the CBSA violated the *Immigration and Refugee Protection Act*, SC 2001, c 27 [“IRPA”] and his constitutional rights when the CBSA seized his cellphone and did not subsequently seek judicial authorization to keep the cellphone in its possession.

[3] In IMM-5184-18, the Minister of Public Safety and Emergency Preparedness [the “MPSEP”] brings an application to review the Immigration Division’s [“ID”] decision granting Siyaad access to his cellphone. The MPSEP asserts that ID Member Adamidis [the “Member”] exceeded his jurisdiction in ordering that the CBSA provide access to the cellphone, was *functus* when the decision was made, and in any case made an unreasonable decision.

[4] For ease of reference, I will call the parties by their proper names. I do this to avoid confusion as they are alternate between being applicant and respondent in each of the matters.

II. Joint Background Facts

[5] In May 2017, Siyaad allegedly entered Canada on a fraudulent passport under the name Adnan Mahamed Digale. Siyaad allegedly has numerous other aliases. The date on which Siyaad entered Canada is under contention. The CBSA asserts that Siyaad entered Canada using a fraudulent passport on May 10, 2017. In Siyaad's Basis of Claim Form, however, he states that he entered Canada by air on May 24, 2017.

[6] Shortly after entering the country, Siyaad made a refugee claim in Kitchener, Ontario, on June 6, 2017. He acknowledged at the time that he was being deported from the United States.

[7] Siyaad's refugee hearings took place on August 9, 2017 and August 30, 2017. On October 5, 2017, the Refugee Protection Division ["RPD"] granted his refugee claim.

[8] On January 3, 2018, the US Department of Homeland Security ["DHS"] provided a memo to the CBSA alerting them to the fact that Siyaad was a subject of an international investigation into human trafficking. DHS said Siyaad was a human smuggler who was based out of Sao Paulo, Brazil, where he smuggled foreign nationals (predominantly from Somalia and other East African countries) into the United States.

[9] On January 10, 2018, Siyaad was referred to the ID for an admissibility hearing on the grounds of being inadmissible on the basis of past human smuggling. On January 12, 2018 a

warrant was executed and Siyaad was arrested and detained. Upon arrest, Siyaad's cellphone was seized and placed under the custody of the CBSA.

[10] In February 2018, the MPSEP appealed the RPD's finding. The Refugee Appeal Division ["RAD"] set aside the RPD's decision in March 2018 and sent the matter back to the RPD for re-determination. That matter was heard in the Federal Court and at the time of the hearing, it was under reserve.

[11] On June 20, 2018, Siyaad made a request for the return of his cellphone, seized upon arrest by the CBSA. Siyaad made this application to the CBSA on three basis:

i. The seizure was unlawful because it was unreasonable, as the search that took place was without a warrant. Siyaad asserts that the cellphone was seized on nothing more than a hunch that the cellphone may contain evidence, rather than the reasonable grounds stressed in *Hunter v Southam*, [1984] 2 SCR 145 ["*Hunter v Southam*"];

ii. The Minister did not comply with section 138 of the IRPA, which in Siyaad's submission requires an officer to comply with sections 487-492.2 of the *Criminal Code*, RSC 1985, c C-46 ["*Criminal Code*"]. By not seeking the judicial authorizations required under the *Criminal Code*, Siyaad asserts that the Minister has ignored the constitutional obligations set out in the *Criminal Code*.

iii. The Minister has retained a seized item longer than is required to carry out a purpose under the IRPA. As the seizure does not appear to be required for any purpose, the cellphone should be returned.

[12] Siyaad's ostensible reason for gaining access to the cellphone was premised on the notion that Siyaad is not the same person as the impugned human trafficker known as "Hassan". He is identified as Hassan by an eye witness account and an intelligence report that claims that a social media account operated by "Hassan" belongs to Siyaad.

[13] In contrast, Siyaad's submission is that a smuggler known as "Hassan" is responsible for the crimes that he is alleged to have committed. Siyaad argues that there is limited evidence to suggest that Siyaad and Hassan are the same person. Siyaad argues that the cellphone contains exculpatory evidence so he needs to access it.

[14] On July 6, 2018, the CBSA refused his request. Anne Raposo ["Officer Raposo"], Inland Enforcement Supervisor for the CBSA, wrote to Siyaad to inform him that there were reasonable grounds to believe that the continuance of the seizure was required in order to carry out the purposes of the IRPA.

[15] Siyaad, believing that the CBSA had a responsibility to make representations on the continued seizure of the cellphone to a superior court judge, sought a remedy at the Ontario Superior Court of Justice. On September 10, 2018, the Ontario Superior Court of Justice dismissed Siyaad's application by refusing to exercise jurisdiction regarding the matter as this matter was reviewable by the Federal Court, if at all.

[16] Siyaad made an application to the ID to either return the cellphone to him or to allow him to have access to the cellphone.

[17] On June 21 and June 26, 2018, a case management conference with the ID took place regarding Siyaad's admissibility hearing. Siyaad made an application to the ID for, among other things, an order that the CBSA provide access to his cellphone.

[18] On August 14, 2018, the ID contacted the parties to seek dates of availability for the scheduling of the admissibility hearing. In response, Siyaad's counsel issued a letter to the ID stating that he was advised orally by the ID that the CBSA did not have to provide access to the cellphone. Counsel requested written reasons of the ID's decision ["First Decision"]. While there is no written or transcribed copy of the First Decision, it is undisputed that the First Decision denied Siyaad access to the cellphone.

[19] There was some back and forth between the parties and the Member between August and late September 2018. There was a question about whether written reasons could be provided. Siyaad submits that on September 27, 2018, the Member stated that he had denied Siyaad's application in the First Decision, and that he would provide oral directions subsequent to the First Decision at the next sitting.

[20] On October 12, 2018, the Member indicated that he had decided to reverse the First Decision ["Second Decision"]:

> At the previous sitting, I had indicated that I would not be granting this application. Upon further review, I have determined that that finding was incorrect. I will be granting the application. I'm going to go through everything and explain why things have occurred the way they have.

[21] Siyaad was arrested shortly after the ID's Second Decision, and there are currently parallel proceedings to have Siyaad extradited to the United States for the human smuggling trials. Siyaad's admissibility hearing is ongoing.

[22] At the hearing, the parties agreed to proceed with IMM-4747-18 being argued first, and then IMM-5184-18. Siyaad indicated that if he was successful in IMM-4747-18, he should be given back his cellphone because if the continued seizure is unlawful (IMM-4747-18) then the second matter (IMM-5184-18) is moot.

III. IMM-4747-18

A. *Issues*

[23] The issue is:

A. Is the continued seizure of the cellphone reasonable and lawful?

B. *Standard of Review*

[24] In *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 ["*Sellathurai*"], the Federal Court of Appeal was looking at an appeal arising from a judicial review application where it was argued that the Minister's delegate declining to return $123, 000 of undeclared currency (which had been seized by the CBSA) was an improper exercise of discretion. The Federal Court of Appeal indicated that the standard of review of the decision is reasonableness (paragraph 25 of *Sellathurai*).

[25] Therefore, in accordance with *Sellathurai*, the standard of review in this matter is reasonableness.

[26] For the reasons that follow, I will dismiss the application.

IV. Relevant provisions

[27] The relevant provisions are attached as Annex A.

V. Analysis

A. *The Unlawfulness of the CBSA's Actions*

[28] While Siyaad originally suggested in his letter to the CBSA that the search and seizure itself was unlawful, he has since abandoned this argument. Siyaad now accepts that the warrantless search is saved by the fact that the search was done incidental to the arrest.

[29] Siyaad submits that section 138(1) of the IRPA gives a CBSA officer the authority and powers of a peace officer under the *Criminal Code*. At the same time, the section also imposes the appropriate limitations that are on peace officers under the requisite sections of the *Criminal Code*. Siyaad argues that peace officers who seize items under the *Criminal Code* must either return it or bring it before a judge.

[30] Siyaad argues that the *continued* "detention" of the cellphone is not authorized by law because it was not taken before a judge as required in the *Criminal Code*.

[31] Siyaad submits that a judge must be satisfied that there is a *bona fide* purpose for the continued detention of the item. As the CBSA officer never made such a report or brought an application before a judge (as a peace officer under the *Criminal Code* would have done), Siyaad submits that the continued seizure was never subjected to judicial oversight; therefore, the seizure is unreasonable and offends section 8 of the *Charter*.

[32] Thus, any and all language – including that of the Enforcement Manual which does not require appearing in front of a judge – is in contravention of the statute and/or legislative intent. Thus, the action of the CBSA officer is presumptively in error.

B. *Section 8 of the Charter Requires Independent Judicial Oversight of Seizures*

[33] Siyaad submits that any regime that allows for search and seizure without judicial oversight is unconstitutional. Both parties concede that if the CBSA obtains a warrant under the *Criminal Code*, that the seized item must then be brought before a judge, but if it is a warrantless search incident to arrest, Siyaad suggests that there is no oversight body. I note of course, as I did at the hearing, that the matter of the continued seizure was before me, and therefore there was oversight from a judge.

[34] Siyaad relies on an Ontario Court of Appeal decision, *R v Garcia-Machado*, 2015 ONCA 569, to support his proposition. In that case, the Court of Appeal, in looking at section 489 of the *Criminal Code*, examined whether a constable's failure to make a report to a justice as soon as practicable also rendered the continued detention of the seized item contrary to section 8 of the *Charter*. The Court of Appeal's answer was yes.

[35] Siyaad submits that individuals must always retain a residual reasonable expectation of privacy with respect to seized items; thus, by not reporting the seized item to a judge, the CBSA is violating both the IRPA and the *Charter*.

[36] Siyaad sought the following remedies:

- A declaration that the continued seizure is unlawful and unconstitutional;
- An order for the return of the cellphone;
- As this behaviour is systematic, Siyaad requests a reporting order that has the CBSA report back to the court in six months and tell the court how the CBSA now has to ensure on warrantless searches that there is a report to justice as set out in the *Criminal Code*.

(1) Analysis

[37] I find that the continued seizure of the cellphone is authorized by statue.

[38] Section 138 of the IRPA gives the power and authority of a peace officer to a CBSA officer (including those set out in sections 487 to 492.2 of the *Criminal Code*), to enforce the IRPA. Section 489(2) of the *Criminal Code* gave the CBSA officer the power and authority to seize the cellphone without a warrant if the officer believed on reasonable grounds in enforcing the *Criminal Code* or any "other Act of Parliament" where that thing been obtained by the commission of an offence been used in the commission of an offence or will afford evidence in respect of an offense. In this case, at the time of the arrest, the CBSA officer seized the cellphone on a warrantless search incident to arrest.

[39] Further, section 140 of the IRPA gives the officer the power to seize and hold an item if the officer has reasonable grounds that it was used fraudulently or is necessary to prevent its fraudulent use or to carry out the purposes of the act.

[40] Section 140(3) of the IRPA allows for regulations to be developed in the application of the seizure provisions of the IRPA. Under sections 252-254, the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [IRPR] sets out a complete code of how the CBSA should manage a seized item.

[41] In addition, there is an Enforcement Manual that details how items seized under section 140 of the IRPA should be dealt with. While Siyaad argues that the Enforcement Manual is not in compliance with what is lawful, as is discussed below, I cannot agree that the Enforcement Manual is not in compliance with the IRPA, the IRPR, and the *Charter*.

[42] If an item is seized under section 140 of the IRPA, then it is placed without delay with the relevant agency. In this case, there is no contention that this step was not undertaken. There is no authority to suggest, nor is it specified in the IRPA, the IRPR, or the Enforcement Manual, that there is a requirement for the CBSA seizure in a warrantless search to be reviewed by a superior court or provincial court judge as Siyaad argued is required by law.

[43] In this case, a Notice of Seizure pursuant to section 253 of the IRPR was completed and Siyaad was informed about the reason for the seizure. The reasonable grounds in the Notice of Seizure were set out as: the seizure was necessary as it was to carry out the purposes of the act;

Siyaad is engaged in organized crime; and his cellphone may contain evidence to further support an allegation of admissibility under section 37 of the IRPA.

[44] On July 6, 2018, Officer Raposo noted in the letter of refusal to Siyaad that the cellphone was seized pursuant to section 140(1) of IRPA and pursuant to section 253(2)(d) of the IRPR. The CBSA officer was satisfied there were reasonable grounds to believe they needed to continue to hold the cellphone as provided for in section 253(c)(i) of the IRPR.

[45] This reason was different than the one given at the time of the arrest, which is not an issue, as often what happens at the time of arrest is that further developments and matters morph as time progresses.

[46] Taken together, as noted above, the IRPA and the IRPR represent a comprehensive code in dealing with seized items. If a decision needs to be reviewed (after all alternative remedies are exhausted) it can be by a Federal Court judge as evidenced by this hearing.

[47] This is a similar process that is found in other federal statute that involve comprehensive schemes for seizures, such as: the *Fisheries Act*, RSC 1985, c F-14; the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, SC 1992, c 52; and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17. The *Criminal Code* does not take precedent over the federal statutes when those federal statutes provide for a comprehensive seizure regime.

[48] Simply put, I find that Siyaad fundamentally errs by assuming that searches and seizures by CBSA officers are the same as searches and seizures by police officers generally. The law recognizes that they simply are not.

[49] *R v Simmons*, [1988] 2 SCR 495 [“*Simmons*”] is the eminent authority on the question. In *Simmons*, the Supreme Court of Canada [“SCC”] was examining a search of the appellant while crossing the border into Canada.

[50] The SCC held that the impugned sections of sections 143 and 144 of the *Customs Act* do not infringe the right to be secure against unreasonable search and seizure enshrined in section 8 of the *Charter*. The Court held that while it is true that these sections do not meet the safeguards articulated in *Hunter v Southam*, these standards do not apply to customs searches. The degree of personal privacy reasonably expected at customs is lower than in most other situations. Sovereign states have the right to control both who and what enters their boundaries. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process (paragraph 49 of *Simmons*).

[51] What *Simmons* establishes, then, is that the rules for CBSA officers on a search and seizure are not required to be precisely the same as those for peace officers. That is precisely why the IRPA sets out its own internal search and seizure procedure.

[52] While it is true that an inland search and seizure is clearly different from a search and seizure at a port of entry, *Simmons* clearly establishes that there may be differing rules for CBSA

officers on searches and seizures than other peace officers in Canada. There are obvious policy reasons that such a regime should be maintained.

[53] The legislative intent of section 138 of the IRPA cannot possibly be read to require that CBSA officers conform to aspects of the *Criminal Code* that make little sense in context. It is a reasonable interpretation that section 138 stands for the proposition that section 138 references the search and seizure provisions of the *Criminal Code* that only apply when a search warrant is issued.

[54] I find there was lawful authority for the CBSA to seize and then retain the cellphone without having to follow the *Criminal Code* sections when the IRPA has its own code regarding the seizure and retention of property. In this case CBSA complied with all the procedures as required in the IRPA and the IRPC.

C. *Certified Question*

[55] Siyaad proposed a question for certification:

> Does s. 489 of the Criminal Code of Canada govern warrantless seizures made by persons designated as peace officers under the Immigration and Refugee Protection Act?

[56] This Court has held that a certified question must satisfy a number of requirements. A certified question must be:

A. A question of general importance:

> This means it "transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or

> general application" [(*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22; *Liyanagamage v Canada* (MCI) (1994), 176 NR 4 (FCA)]. A certified question of general importance will be a question of law because facts are specific to the parties as per *Dotsenko v Canada (MCI)*, 2000 CarswellNat 1515 (FCA) at para 6.

B. Dispositive of the appeal (*Zazai v Canada (MCI)*, 2004 FCA 89 at para 11); and

C. Brought up in the Federal Court hearing where it must first be dealt with (*Lai v Canada (MPSEP)*, 2015 FCA 21).

[57] Many other Federal Acts that allow for warrantless seizures had been reviewed by this Court, the Federal Court of Appeal, and the SCC (*Flaro v Canada*, 2018 FC 229), but the IRPA and the IRPR have not yet been reviewed. Siyaad argued that means that the proposed question then is of general importance.

[58] I disagree with Siyaad's argument here, as of the interpretation of federal statutes regarding warrantless seizures has already been determined by the SCC. For example, see paragraph 37 of *R v Ulybel Enterprises Ltd*, 2001 SCC 56:

> 37 It makes sense that the *Fisheries Act* would deal exhaustively with property seized under the Fisheries Act given the special nature of the kinds of property at issue: fish, fishing vessels, and equipment. The respondent argues that s. 489.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, also applies to the seized property of a person accused of an offence under the *Fisheries Act*. However, s. 489.1 begins with the words, "Subject to this or any other Act of Parliament...". Therefore, because the federal Fisheries Act also deals with the property of a person accused of an offence under that Act, in my view, s. 489.1 of the *Criminal Code* has no application in this case.

[59] Given that the IRPA and the IRPR have a complete code for what occurs after a warrantless seizure, this question is not of general importance, as it has already been determined in other federal statutes that are similar in nature. Therefore, I find that there is no question of broad significance.

[60] I will not certify this question.

D. *Summary*

[61] The application is dismissed.

VI. IMM-5184-18

A. *Issues*

[62] The issues are:

A. Does the ID have jurisdiction to make an access order?

B. Was the decision maker *functus*?

C. Was the decision reasonable?

B. *Standard of Review*

[63] The MPSEP agrees with Siyaad on the standard of review; namely, correctness on matters of procedural fairness and jurisdiction, and reasonableness on the issues regarding the adjudication of the facts as per *Dunsmuir v New Brunswick*, 2008 SCC 9.

C. *Relevant Provisions*

[64] Relevant provisions are reproduced in Annex B.

D. *Analysis*

(1) The ID's Jurisdiction

[65] The MPSEP argued that the decision should be overturned because the ID exceeded its jurisdiction by issuing an order that allowed Siyaad access to his cellphone.

[66] Siyaad argued that each division has the power to make disclosure access orders. In this case, the division is specifically authorized to make various orders under section 162 of the IRPA. Further support for jurisdiction was that this Court has affirmed that the divisions under section 162 of the IRPA may, "do any other thing they consider necessary" and that the RPD, is for example, "master of its own procedure" (*Canada (Minister of Public Safety and Emergency Preparedness) v Kahlon*, 2005 FC 1000 at para 24).

[67] Siyaad submitted that he had sought an order that would allow him to access his own property to prepare his own defence. In Siyaad's submission, this evidence is material and relevant. Therefore, in Siyaad's argument, it was not disputed that the ID has the jurisdiction to do what it needs to do, which was to order his cellphone to be released by the CBSA.

[68] Siyaad further augments the argument by saying if the Minister believes that access to the cellphone is not in the public interest (policy grounds) then the Minister remedy is found in section 37 of the *Canada Evidence Act*, RSC 1985, c C-5.

[69] When the transcript is reviewed, the ID member first determined that he had the authority to make the order, and then went on to make the determination:

> So under the circumstances, the first question that needs to be answered is whether I have the authority to issue the order being sought by Mr. Siyaad. The answer to this question is 'yes'.
>
> I'll refer to Rule 49 of the Immigration Division Rules, which states: 'In the absence of a provision in these rules dealing with a matter raised during the proceedings, the division may do whatever is necessary to deal with the matter' (As read).

[70] The Minister does not agree, and argued that Rule 49 is designed for procedural matters and not for this situation.

[71] The jurisdiction issue was not argued at that hearing and not fully argued at this hearing. Based on the information before this Court and the interpretation by the ID member of their rules, I agree that they have jurisdiction. The authority within the IRPA allows for the ID to make the orders that they need, including orders regarding evidence, as the ID is the master of their own authority, as per paragraph 8 of *Rogan v Canada (Citizenship and Immigration)*, 2010 FC 532.

[72] While the ID had jurisdiction in this case, there may be circumstances where, given a full oral argument and different facts, the ID may not have the authority to make certain orders.

(2) The ID was *functus* from issuing the Second Decision

[73] The MPSEP argues that on or about August 14, 2018, the ID notified Siyaad orally that it was refusing his request for access to or return of the cellphone.

[74] As noted above (para 20), the ID suddenly reversed that direction on October 12, 2018, after the Member had the opportunity to refer to the transcript.

[75] MPSEP argues that the principle of *functus officio* is relevant here. The doctrine of *functus* states that once a decision is taken, the decision maker has no more authority on the matter. Therefore, after the Member had made his decision on or about August 14, 2018, he was *functus* from changing his mind.

[76] MPSEP does concede that there is some flexibility in the doctrine when dealing with certain proceedings; but argues that in the current administrative context, the principle of *functus* must be strictly interpreted, and the Member cannot reverse his decision or there is no certainty.

[77] Further factors supporting this proposition are that:

- A decision to refuse Siyaad's applications was rendered and confirmed three times over the course of one and a half months; and
- No party made a request to reconsider the decision to refuse the request.

[78] To go back to the first principle, *functus officio* is a common law rule that prohibits a statutory decision-maker from changing a determination once it has been rendered (*Chandler* v Alberta Association of Architects, [1989] 2 S.C.R. 848 ["*Chandler*"].

[79] Justice Sopinka further noted in *Chandler*, above, that there are two general exceptions to the *functus* rule, "1.where there had been a slip in drawing it up, and, 2.where there was an error in expressing the manifest intention of the court."

[80] In *Chandler*, Justice Sopinka further noted that in the administrative law context, *functus* still applies:

> It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> [no paragraph numbers are in the original decision]

[81] However, Justice Sopinka was also clear in stating that, "As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances."

[82] The exceptions laid out in *Chandler* have been revisited by the Federal Court and the Federal Court of Appeal (see *Chopra v Canada (Attorney General),* 2014 FCA 179 ["*Chopra*"]).

In *Chopra*, the Federal Court of Appeal held that a Public Sector Integrity Commissioner was not *functus* when he reopened a closed complaint file. While he lacked statutory authority to do so, in *Chandler*, the SCC explained that administrative tribunals may reopen a decision for which there is no right of appeal.

[83] In this case, there is an option to appeal decisions of the ID to the IAD as per section 5 of the *Immigration Appeal Division Rules,* SOR/2002-230. While the Applicant disputed this, I do not agree. Therefore, the exception from *Chandler* does not appear to apply.

[84] The general rule held up by Justice Sopinka seems to be clear: the decision cannot be revisited because "the tribunal has changed its mind".

[85] That is precisely what happened here. There was no new evidence; there was no request for reconsideration. Rather, a decision maker reversed his own decision, months later, at a cost to both Siyaad and the MPSEP.

[86] It would be problematic to allow the ID such discretion to flip-flop on such interlocutory decisions. This was recognized in a case cited by neither Siyaad nor the MPSEP, but one that is well on point. In *Monongo v Canada (Citizenship and Immigration)*, 2009 FC 491, Justice Frenette noted that:

> [18]…This Court's decisions have applied this classic rule of functus officio to administrative decisions, i.e. that the decision is final after it is signed and has been disclosed to the parties: *Chudal v. Minister of Citizenship and Immigration*, 2005 FC 1073 (CanLII); *Pur v. Minister of Citizenship and Immigration*, 2008 FC

1109 (CanLII); *Dumbrava v. Minister of Citizenship and Immigration* (1995), 101 F.T.R. 230.

[87] While the decision was not "signed" in written notice, it was certainly disclosed and relied on by both parties. It would be improper to allow a decision maker to revisit his decision three months after making a first decision given in this case no one even asked him to revisit his decision. As such, I will grant this application as the decision maker was *functus*.

(3) The ID's Decision is Unreasonable

[88] If I am wrong and the matter was not *functus*, then the application would be successful in any event as it was unreasonable.

[89] The MPSEP submits that the reasoning of the Member is unreasonable on the face of the evidence before him.

[90] While the ID's decision is premised on the fact that Siyaad required access to the cellphone to prepare a defence, the MPSEP argues that this premise itself is faulty.

[91] The CBSA submitted (and Siyaad did not dispute) that social media accounts are accessible from many devices and not only from Siyaad's cellphone. Siyaad then claimed that he forgot his social media accounts passwords and required the cellphone to access his accounts. The CBSA then submitted that passwords can be accessed and reset from any computer (device). Siyaad did not dispute this.

[92] However, nowhere in its decision does the ID address this crucial fact. Instead, the Member appears to assume that the "only way" for Siyaad to address the social media question would be to have direct access to his cellphone. In fact, the evidence was that there were other ways for Siyaad to access his social media accounts and that he could reset his passwords. The Member appeared to ignore this, or failed to address this in his reason.

[93] I find that the Member erred in his assessment of Rule 49. Rule 49 allows the ID to do what is "necessary"; but in this case, it is hardly necessary for the Respondent to physically access the cellphone.

[94] Siyaad suggests that he has no computer or internet access in jail. I do not see how that prevents him from working with counsel to have counsel or someone else provide the passwords to his social media accounts, or otherwise to provide alternative access through password recovery etc. Access to your social media accounts can be done on anyone's device.

[95] Nor do I accept the underlying narrative of Siyaad. If he submits that this is a case of false identity, and that the social media account of a "Hassan" was accessed while he was in prison, why would Siyaad need access to his own cellphone to prove that? In my assessment, Siyaad's evidence led to support why access to the cellphone is "necessary" is ultimately quite tenuous. The Member's decision extrapolates based on the most tenuous and unreasonable explanations. On that basis, I think that the decision is unreasonable.

(4) Summary

[96] I will grant this application and send it back to be re determined by a different decision maker.

[97] No questions for certification were presented and none arose.

JUDGMENT in IMM-4747-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is certified.

JUDGMENT in IMM-5184-18

THIS COURT'S JUDGMENT is that:

1. The Application is granted. The matter will be sent back to be re determined by a different decision maker;

2. No question is certified.

"Glennys L. McVeigh"
Judge

ANNEX A

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

Officers Authorized to Enforce Act

Powers of peace officer

138 (1) An officer, if so authorized, has the authority and powers of a peace officer — including those set out in sections 487 to 492.2 of the Criminal Code — to enforce this Act, including any of its provisions with respect to the arrest, detention or removal from Canada of any person.

Seizure

140 (1) An officer may seize and hold any means of transportation, document or other thing if the officer believes on reasonable grounds that it was fraudulently or improperly obtained or used or that the seizure is necessary to prevent its fraudulent or improper use or to carry out the purposes of this Act.

Interpretation

(2) Despite subsection 42(2) of the Canada Post Corporation Act, a thing or document that is detained under the Customs Act and seized by an officer is not in the course of post for the purposes of the Canada Post Corporation Act.

Regulations

(3) The regulations may provide for any matter relating to the application of this section and may include provisions respecting the deposit of security as a guarantee to replace things that have been seized or that might otherwise be seized, and the return to their lawful owner, and the

Agents d'application de la loi

Attributions d'agent de la paix

138 (1) L'agent détient, sur autorisation à cet effet, les attributions d'un agent de la paix, et notamment celles visées aux articles 487 à 492.2 du Code criminel pour faire appliquer la présente loi, notamment en ce qui touche l'arrestation, la détention et le renvoi hors du Canada.

Saisie

140 (1) L'agent peut saisir et retenir tous moyens de transport, documents ou autres objets s'il a des motifs raisonnables de croire que la mesure est nécessaire en vue de l'application de la présente loi ou qu'ils ont été obtenus ou utilisés irrégulièrement ou frauduleusement, ou que la mesure est nécessaire pour en empêcher l'utilisation irrégulière ou frauduleuse.

Précision

(2) Par dérogation au paragraphe 42(2) de la Loi sur la Société canadienne des postes, tout objet ou document détenu sous le régime de la Loi sur les douanes et saisi par un agent n'est pas en cours de transmission postale.

Règlements

disposition, of things that have been seized.

(3) Les règlements régissent l'application du présent article et portent notamment sur le dépôt d'une garantie en remplacement des biens saisis, la remise des biens saisis à leur propriétaire légitime et la disposition de ces biens.

Immigration and Refugee Protection Regulations (SOR/2002-227)

Seizure

Custody of seized thing

252 A thing seized under subsection 140(1) of the Act shall be placed without delay in the custody of the Department or the Canada Border Services Agency.

Notice of seizure

253 (1) An officer who seizes a thing under subsection 140(1) of the Act shall make reasonable efforts to

(a) identify the lawful owner; and

(b) give the lawful owner written notice of, and reasons for, the seizure.

Disposition after seizure

(2) Subject to subsection (3), a thing seized shall be disposed of as follows:

(a) if it was fraudulently or improperly obtained, by returning it to its lawful owner unless section 256 applies;

(b) if it was fraudulently or improperly used, by disposing of it under section 257 unless section 254, 255 or 256 applies;

(c) if the seizure was necessary to prevent its fraudulent or improper use

Saisie

Garde d'un objet saisi

252 Tout objet saisi en vertu du paragraphe 140(1) de la Loi est immédiatement placé sous la garde du ministère ou de l'Agence des services frontaliers du Canada.

Avis de saisie

253 (1) L'agent qui saisit un objet en vertu du paragraphe 140(1) de la Loi prend toutes les mesures raisonnables :

a) d'une part, pour retracer le propriétaire légitime;

b) d'autre part, pour lui en donner, par écrit, un avis motivé.

Disposition des objets saisis

(2) Sous réserve du paragraphe (3), il est disposé de l'objet saisi de l'une des façons suivantes :

a) s'agissant d'un objet obtenu irrégulièrement ou frauduleusement, il est restitué à son propriétaire légitime, à moins que l'article 256 ne s'applique;

b) s'agissant d'un objet utilisé irrégulièrement ou frauduleusement, il en est disposé conformément à l'article 257, à moins que les articles 254, 255 ou 256 ne

(i) by returning it to its lawful owner, if the seizure is no longer necessary for preventing its fraudulent or improper use, or

(ii) by disposing of it under section 257, if returning it to its lawful owner would result in its fraudulent or improper use; or

(d) if the seizure was necessary to carry out the purposes of the Act, by returning it to its lawful owner without delay if the seizure is no longer necessary to carry out the purposes of the Act.

Additional factor

(3) A thing seized shall only be returned if its return would not be contrary to the purposes of the Act. If its return would be contrary to the purposes of the Act, it shall be disposed of under section 257.

Application for return

254 (1) The lawful owner of a thing seized or the person from whom it was seized may apply for its return.

Return

(2) A thing seized, other than a document, shall be returned to the applicant if

(a) paragraph 253(2)(b) applies to the thing and the seizure is no longer necessary to prevent its fraudulent or improper use or to carry out the purposes of the Act; and

(b) the applicant provides cash security equal to the fair market value of the thing at the time of the seizure or, if there is no significant risk of being unable to recover the debt, a combination of cash and guarantee of performance.

s'appliquent;

c) si la saisie de l'objet était nécessaire pour en empêcher l'utilisation irrégulière ou frauduleuse :

(i) soit il est restitué à son propriétaire, si la saisie n'est plus nécessaire pour en empêcher l'utilisation irrégulière ou frauduleuse,

(ii) soit il en est disposé conformément à l'article 257, dans le cas où la restitution aurait pour conséquence son utilisation irrégulière ou frauduleuse;

d) si la saisie était nécessaire pour l'application de la Loi mais qu'elle ne l'est plus, l'objet est restitué sans délai à son propriétaire légitime.

Demande de restitution

254 (1) Le propriétaire légitime ou le saisi peut demander la restitution de l'objet.

Restitution

(2) L'objet — autre qu'un document — est restitué au demandeur lorsque :

a) d'une part, l'alinéa 253(2)b) s'applique à l'objet et que la saisie de celui-ci n'est plus nécessaire pour empêcher son utilisation irrégulière ou frauduleuse ou pour l'application de la Loi;

b) d'autre part, le demandeur donne, à titre de garantie, une somme en espèces représentant la juste valeur marchande de l'objet au moment de la saisie ou, si le recouvrement de la créance ne pose pas de risque, une combinaison d'espèces et d'autres garanties d'exécution.

11.13. **Decision by the Minister not to return a seized object**

If the decision following review made under R253, R254, R255 or R256 is not to return a seized object, then it remains in CIC or the CBSA custody (depending on the nature of the seizure and the item seized) or is disposed of in accordance with R257.

Examples of things that would not be returned are:

• fraudulent documents (photo-substituted passports, travel documents);

• lost or stolen items;

• altered documents (passports with illegal alterations, pages missing);

• counterfeit money;

• illegally obtained driver's licence, social security or credit cards.

Criminal Code (R.S.C., 1985, c. C-46)

Seizure of things not specified

489 (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of

Saisie de choses non spécifiées

489 (1) Quiconque exécute un mandat peut saisir, outre ce qui est mentionné dans le mandat, toute chose qu'il croit, pour des motifs raisonnables :

a) avoir été obtenue au moyen d'une infraction à la présente loi ou à toute autre loi fédérale;

b) avoir été employée à la perpétration d'une infraction à la présente loi ou à toute autre loi fédérale;

c) pouvoir servir de preuve touchant la perpétration d'une infraction à la présente loi ou à toute autre loi fédérale.

Parliament.

Seizure without warrant

(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

Restitution of property or report by peace officer

489.1 (1) Subject to this or any other Act of Parliament, where a peace officer has seized anything under a warrant issued under this Act or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as is practicable,

(a) where the peace officer is satisfied,

(i) that there is no dispute as to who is lawfully entitled to possession of the thing seized, and

(ii) that the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry,

Saisie sans mandat

(2) L'agent de la paix ou le fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale qui se trouve légalement en un endroit en vertu d'un mandat ou pour l'accomplissement de ses fonctions peut, sans mandat, saisir toute chose qu'il croit, pour des motifs raisonnables :

a) avoir été obtenue au moyen d'une infraction à la présente loi ou à toute autre loi fédérale;

b) avoir été employée à la perpétration d'une infraction à la présente loi ou à toute autre loi fédérale;

c) pouvoir servir de preuve touchant la perpétration d'une infraction à la présente loi ou à toute autre loi fédérale.

Remise des biens ou rapports

489.1 (1) Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale, l'agent de la paix qui a saisi des biens en vertu d'un mandat décerné sous le régime de la présente loi, en vertu des articles 487.11 ou 489 ou autrement dans l'exercice des fonctions que lui confère la présente loi ou une autre loi fédérale doit, dans les plus brefs délais possible :

a) lorsqu'il est convaincu :

(i) d'une part, qu'il n'y a aucune contestation quant à la possession légitime des biens saisis,

(ii) d'autre part, que la détention des biens saisis n'est pas nécessaire pour les fins d'une enquête, d'une enquête préliminaire,

trial or other proceeding,

return the thing seized, on being issued a receipt therefor, to the person lawfully entitled to its possession and report to the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, a justice having jurisdiction in respect of the matter, that he has done so; or

(b) where the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii),

(i) bring the thing seized before the justice referred to in paragraph (a), or

(ii) report to the justice that he has seized the thing and is detaining it or causing it to be detained

to be dealt with by the justice in accordance with subsection 490(1).

d'un procès ou d'autres procédures,

remettre les biens saisis, et en exiger un reçu, à la personne qui a droit à la possession légitime de ceux-ci et en faire rapport au juge de paix qui a décerné le mandat ou à un autre juge de paix de la même circonscription territoriale ou, en l'absence de mandat, à un juge de paix qui a compétence dans les circonstances;

b) s'il n'est pas convaincu de l'existence des circonstances visées aux sous-alinéas a)(i) et (ii) :

(i) soit emmener les biens saisis devant le juge de paix visé à l'alinéa a),

(ii) soit faire rapport au juge de paix qu'il a saisi les biens et qu'il les détient ou veille à ce qu'ils le soient,

pour qu'il en soit disposé selon que le juge de paix l'ordonne en conformité avec le paragraphe 490(1).

ANNEX B

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

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

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

Sole and exclusive jurisdiction	**Compétence exclusive**
162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.	162 (1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont elle est saisie.
Procedure	**Fonctionnement**
(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	(2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

Immigration Division Rules (SOR/2002-229)

No applicable rule	**Cas non prévus**
49 In the absence of a provision in these Rules dealing with a matter raised during the proceedings, the Division may do whatever is	49 Dans le cas où les présentes règles ne contiennent pas de dispositions permettant de régler une question qui survient dans le cadre d'une affaire, la Section peut prendre toute

necessary to deal with the matter.

mesure nécessaire pour régler la question.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4747-18
STYLE OF CAUSE:	MOHAMED SIYAAD V THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	IMM-5184-18
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v MOHAMED ABDI SIYAAD
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 28, 2019
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	APRIL 11, 2019

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