Federal Court  Cour fédérale

Date: 20230815

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

Citation: 2023 FC 1108

Ottawa, Ontario, August 15, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

Docket: IMM-1407-22

KHALIL MAMUT
AMINIGULI AIZEZI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-8585-22

S.A. AND Z.Y.

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] This Order and Reasons concerns claims for non-disclosure made by the respondent, the Minister of Citizenship and Immigration, over parts of Certified Tribunal Records (CTRs) produced in connection with two separate applications for judicial review. In these applications, the applicants seek various forms of relief in relation to the processing of outstanding applications for permanent residence by Khalil Mamut and S.A. The two applications have been joined because they have a number of factual and legal issues in common. Among the common issues is the respondent's objection to the disclosure of parts of the CTRs on the basis of the common law principle of deliberative secrecy.

[2] For the reasons that follow, I find that the information at issue is not protected by this principle.

[3] Briefly, in the context of administrative decision-making, the common law principle of deliberative secrecy has two elements. The first is the general rule that the deliberative process is secret. The second is that secrecy will be lifted when this is necessary for effective judicial review of the administrative decision. As the proponent of non-disclosure, the burden rests on the respondent to establish that the general rule applies to the decision making in question here. If this is established, the burden then shifts to the applicants to establish that an exception should be made in their cases.

[4] The parties' submissions focused primarily on whether the applicants had established a basis for making an exception to the general rule. However, in my view, the claims for non-disclosure fail at the first step because the respondent has not established that the general rule of secrecy applies to the decision making in question. The common law principle of deliberative secrecy has only been extended from judicial decision makers to administrative tribunals – in other words, to administrative decision makers who perform adjudicative functions. The decision maker in question here is not an administrative tribunal so information relating to his decision making is not protected by the common law principle of deliberative secrecy on which the respondent relies. As a result, the respondent is not entitled to withhold disclosure of the information in issue on this basis.

[5] Whether the respondent is entitled to withhold disclosure of some or all of this information on other grounds remains an open question pending the determination of related motions for non-disclosure.

II. PRELIMINARY MATTERS

A. *The Style of Cause in IMM-8585-22*

[6] In accordance with Rule 8.1 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (*FCCIRPR*), the applicants in IMM-8585-22 have requested an order "that all documents that are prepared by the Court and that may be made available to the public be amended and redacted to the extent necessary to make the party's identity anonymous." The respondent opposes this request.

[7] Under Rule 8.1(4) of the *FCCIRPR*, the request for an anonymity order will not be determined until the application for leave is determined. The parties have been informed that leave will be granted but the application for leave has not yet been formally determined, in part because of the need to adjudicate the respondent's claims for non-disclosure first.

[8] Notwithstanding the respondent's opposition to the request for an anonymity order, in the interim the parties have agreed to refer to the applicants in IMM-8585-22 by initials. I agree that this is the appropriate way to proceed. I have therefore followed suit in this Order and Reasons pending the determination of the request for an anonymity order.

B. *Overlapping Claims for Non-Disclosure and the Duty of Candour*

[9] Orders granting leave to proceed with the applications for judicial review have not been issued yet. However, under the Court's settlement project, in both matters orders were issued under Rule 14(2) of the *FCCIRPR* for the production of CTRs – on October 21, 2022 in IMM-1407-22, and on February 9, 2023, in IMM-8585-22.

[10] In IMM-1407-22, the Consulate General of Canada in New York City – the office responsible for processing both sponsorship applications – produced a CTR under a covering letter dated December 22, 2022. The covering letter states that information in the records being produced had been redacted for "deliberative privilege under the common law" and under section 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The covering letter identifies by page number the documents in which information is redacted for deliberative privilege or *IRPA* section 87, as the case may be.

[11] On December 23, 2022, the respondent filed a Motion Record in IMM-1407-22 seeking an Order upholding the non-disclosure of information redacted from the CTR under *IRPA* section 87. The applicants filed a responding Motion Record on January 17, 2023. The respondent filed a Reply on January 23, 2023.

[12] On February 9, 2023, a case management conference took place before Justice Brown to discuss the procedure for determining the respondent's claims for non-disclosure in IMM-1407-22. During the discussion, counsel for the respondent explained that, in the respondent's view, and as indicated in the December 22, 2022, covering letter, some information in the CTR was covered by both common law deliberative privilege and *IRPA* section 87. Counsel for the respondent also advised that the information over which deliberative privilege was claimed may also be protected under section 37 of the *Canada Evidence Act*, RSC 1985, c C-5 (*CEA*).

[13] On March 23, 2023, Justice Brown issued an Order and Reasons (2023 FC 406) directing that, if the respondent is maintaining its position that deliberative privilege or *CEA* section 37 applies to information redacted from the CTR, motions under Rules 318 and 369 of the *Federal Courts Rules*, SOR/98-106 (*FCR*) seeking relief from the disclosure of this information should be filed within 21 days of the Order. (At that stage, only a Motion Record relating to *IRPA* section 87 had been filed.)

[14] For clarity, neither Rule 317 of the *FCR* (which concerns requests for material relevant to an application for judicial review from the tribunal whose decision is being reviewed) nor Rule 318 (which provides a mechanism for raising objections to producing material in response

to a Rule 317 request) applies to applications for judicial review under the *IRPA*: see Rule 4(1) of the *FCCIRPR*. Nevertheless, it appears to be common ground that a procedure analogous to that provided for in Rule 318(2) is the appropriate way for the respondent to bring forward an objection to the disclosure of information in a CTR produced in response to an order under either Rule 14(2) or Rule 17 of the *FCCIRPR*.

[15] Accordingly, pursuant to the March 23, 2023, order, the respondent filed a Motion Record seeking an order confirming the non-disclosure of information on the basis of deliberative secrecy (also referred to as deliberative privilege) under the common law. The respondent also filed an Application Record seeking an order under *CEA* section 37 prohibiting the disclosure of the same information. Since the latter is an application, as opposed to a motion, it has been given its own file number (T-806-23).

[16] In a separate motion, the respondent also sought reconsideration or variance of the March 23, 2023, order on the basis that, without foundation, Justice Brown had made remarks that were prejudicial to the respondent and that were damaging to the professional reputation of the respondent's counsel. Specifically, the respondent and his counsel were concerned that Justice Brown had questioned the accuracy of their characterization of the scale of the redactions under *IRPA* section 87 and whether that characterization was in accordance with their duty of candour in *ex parte* proceedings.

[17] The concerns that gave rise to this latter motion can be dealt with briefly.

[18] As I indicated during a case management conference on May 24, 2023, I do not read Justice Brown's March 23, 2023, Order and Reasons as calling into question the professional integrity of respondent's counsel or their compliance with the duty of candour in *ex parte* proceedings.

[19] The respondent and respondent's counsel have always been clear that: (1) twelve pages of the CTR in IMM-1407-22 (pages 769-780) were redacted on grounds of deliberative secrecy; (2) on four of these pages, information was *also* redacted under *IRPA* section 87; and (3) on eleven other pages of the 795-page CTR, information was redacted only under *IRPA* section 87. Having carefully reviewed the December 22, 2022, covering letter, the materials filed on the *IRPA* section 87 motion in IMM-1407-22 (in particular, paragraph 20 of the respondent's reply submissions and the footnote thereto), and the transcript of the February 9, 2023, case management conference, I am satisfied that the submission that the redactions were "not extensive or significant" related exclusively to the *IRPA* section 87 claims. It had nothing to do with the deliberative privilege claim or, more particularly, to the twelve pages redacted in their entirety on that basis. There is no basis to think otherwise or that, as a result, counsel for the respondent were not fully candid with the Court.

[20] Turning to IMM-8585-22, in response to the production order, the Consulate General produced a CTR under a covering letter dated June 14, 2023. As with IMM-1407-22, information in the CTR had been redacted on grounds of deliberative privilege as well as *IRPA* section 87. The covering letter identifies by page number the documents in which information is redacted for deliberative privilege or *IRPA* section 87, as the case may be. In particular, twelve

pages of the CTR (pages 968-980) have been redacted for deliberative privilege. Information on five of these pages is also redacted under *IRPA* section 87. Information on twenty-two other pages in the 979-page CTR is redacted only under *IRPA* section 87.

[21] Again as with IMM-1407-22, the respondent has brought a motion for non-disclosure of information in the CTR on the basis of common law deliberative privilege, an application for a prohibition of disclosure of the same information under *CEA* section 37 (Court File No. T-1280-23), and a motion for non-disclosure of information under *IRPA* section 87.

[22] These parts all fit together in the following way. First, the respondent has made identical claims for non-disclosure based on common law deliberative secrecy in both matters. It is common ground that there are no material differences between the two matters in this regard. Second, in each matter, the common law deliberative secrecy motions and the *CEA* section 37 applications relate to the same information. The respondent was entitled to defend the non-disclosure of this information on the basis of common law deliberative secrecy first, before invoking *CEA* section 37: see *R v Pilotte* (2002), 156 OAC 1 at para 44. Third, since I am dismissing the common law deliberative secrecy motions, it is now open to the respondent to proceed with the *CEA* section 37 applications, if so advised. Accordingly, the respondent may continue to withhold disclosure of the information in question pending the determination of those applications. Finally, the information that must be considered under *IRPA* section 87 depends on the result of those applications and any appeal that may arise therefrom. There will be no need to consider the *IRPA* section 87 redactions in the information over which deliberative secrecy is claimed if an order prohibiting disclosure of that information is made under *CEA* section 37.

Adjudication of the *IRPA* section 87 motion will therefore await the determination of the *CEA* section 37 applications, should the respondent elect to pursue them.

C. *The Procedure Followed on these Motions*

[23] In *Girouard v Canadian Judicial Council*, 2019 FCA 252 (*Girouard FCA*), the Federal Court of Appeal endorsed a three-step procedure followed by Justice Noël for adjudicating claims of privilege, including deliberative secrecy: see *Girouard v Canada (Attorney General)*, 2018 FC 1184 at para 5 (*Girouard FC*). In doing so, the Court of Appeal found that "It was entirely appropriate, and consistent with the case law, to establish that the documents themselves would be reviewed only if the Court were to consider itself unable to decide on the claimed privileges solely on the basis of the parties' representations" (*Girouard FCA* at para 24).

[24] The respondent filed unredacted versions of the twelve pages in issue in each matter under seal. Since I have been able to determine on the basis of the parties' public representations that the information in issue is not protected by deliberative secrecy, it was not necessary for me to consider the information itself. Whether it becomes necessary to do so at some future date in connection with another motion or application will be determined at that time. Until then, the documents remain under seal.

[25] The respondent requested the opportunity to make *ex parte* and *in camera* submissions in the event that the Court found it necessary to consider the information itself. For their part, the applicants requested the appointment of an *amicus curiae* if the Court were to proceed in this fashion. Since it was not necessary to consider the information itself to decide the two motions

based on the common law principle of deliberative secrecy, there is no need for an *ex parte* and *in camera* hearing, nor for the assistance of an *amicus*. Whether any of these things are required in connection with the *CEA* section 37 applications will be determined at a future date, if and when the question arises.

III. BACKGROUND

[26] Khalil Mamut and S.A. are both Chinese citizens of Uyghur ethnicity. Both were captured in Pakistan in 2001 after coalition forces invaded Afghanistan in response to the terrorist attacks on September 11, 2001. US authorities eventually transferred them to the Guantanamo Bay detention facility. They were held there from 2002 until 2009, when they were cleared to be released to Bermuda.

[27] After resettling in Bermuda, Mr. Mamut met and married Aminiguli Aizezi. Ms. Aizezi is also a Chinese citizen of Uyghur ethnicity. Their first son was born in Bermuda in April 2013. In 2014, Ms. Aizezi sought refugee protection in Canada for herself and her son. This was granted in March 2015. In June 2015, Ms. Aizezi applied for permanent resident status in Canada, listing both her son and Mr. Mamut as dependents. Ms. Aizezi and her son were granted permanent resident status in March 2017 but Mr. Mamut's application remains outstanding.

[28] On February 14, 2022, Mr. Mamut and Ms. Aizezi commenced an application for judicial review (IMM-1407-22). They seek various forms of relief arising from the failure of

Immigration, Refugees and Citizenship Canada (IRCC) to make a timely decision on Mr. Mamut's application for permanent residence.

[29] For his part, after resettling in Bermuda, S.A. met and married Z.Y. Z.Y. is also a Chinese citizen of Uyghur ethnicity. When she was introduced to S.A., Z.Y. was living in Turkey. In March 2013, she sought refugee protection in Canada. This was granted in November 2013. In December 2013, Z.Y. applied for permanent residence in Canada. She included S.A. on her application as a dependent. Z.Y. became a permanent resident in July 2014 but S.A.'s application remains outstanding.

[30] On August 31, 2022, S.A. and Z.Y. commenced an application for judicial review (IMM-8585-22). They seek various forms of relief arising from the failure of IRCC to make a timely decision on S.A.'s application for permanent residence.

[31] As noted above, leave to proceed with the applications for judicial review has not been granted yet. However, pursuant to the Court's settlement project, orders under Rule 14(2) of the *FCCIRPR* for the production of CTRs were issued in both matters.

IV. THE INFORMATION AT ISSUE

[32] In support of the motions for orders upholding the non-disclosure of information in the CTRs on the basis of common law deliberative secrecy, the respondent filed two essentially identical public affidavits from an Acting Senior Analyst in the Case Management Branch at

IRCC – one for each matter. The affidavits describe in general but nevertheless helpful terms the nature of the information at issue. The analyst was not cross-examined on either affidavit.

[33] The analyst's affidavits and unredacted information in the CTRs establish the following:

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

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

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

- The contrary outcome process applies in two circumstances: (1) when IRCC has received a non-favourable inadmissibility recommendation from the CBSA and the IRCC decision maker wishes to issue a visa with no finding of inadmissibility; or (2) when IRCC has received a favourable recommendation from the CBSA and the IRCC decision maker wishes to refuse the visa on a ground of inadmissibility under sections 34, 35 or 37 of the *IRPA*.

- The CBSA provided a non-favourable inadmissibility recommendation in the case of S.A. on November 20, 2015.

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

- According to the analyst's affidavits, the twelve pages at issue in each CTR "consists of correspondence from the IRCC visa officer to CBSA in which the IRCC visa officer initiates the contrary outcome process" (*Affidavit of Mohamad Zeineddine sworn April 13, 2023* (IMM-1407-22), para 10; *Affidavit of Mohamad Zeineddine sworn June 21, 2023* (IMM-8585-22), para 10).

- In accordance with that process, in each case the IRCC visa officer "provided a detailed rationale as to why he disagrees with CBSA's non-favourable inadmissibility recommendation and requests feedback from CBSA. In doing so, the IRCC visa officer reveals his thoughts and deliberations regarding whether [Mr. Mamut/S.A.] is inadmissible" (*Affidavit of Mohamad Zeineddine sworn April 13, 2023* (IMM-1407-22), para 11; *Affidavit of Mohamad Zeineddine sworn June 21, 2023* (IMM-8585-22), para 11).

[34] It is not entirely clear whether the same IRCC visa officer is responsible for both matters but, for the sake of simplicity, I will assume that this is the case. Nothing turns on the number of decision makers involved on the part of IRCC.

V. ANALYSIS

[35] The respondent submits that deliberative secrecy "applies to administrative decision makers" (Respondent's Memorandum of Argument, para 12). Since, the respondent submits, the IRCC visa officer dealing with the applications for permanent residence is an administrative decision maker, and since the information at issue concerns his decision-making process, that information is protected by the common law principle of deliberative secrecy unless the applicants can establish grounds for disclosing the information. According to the respondent, to establish such grounds, the applicants must show that there are valid reasons for believing that the process the visa officer followed did not comply with the rules of natural justice. Since the applicants have failed to do so, the secrecy of the information in question should be preserved.

[36] As I stated at the outset, I have concluded that these motions must fail because the respondent has not established that the common law principle of deliberative secrecy applies to the decision maker in question. In my view, the jurisprudence does not support the respondent's broad understanding of the types of decision making protected by deliberative secrecy. On the contrary, the jurisprudence establishes that, in the administrative context, the principle of deliberative secrecy applies only to administrative tribunals – that is, to bodies that make adjudicative decisions. It does not apply to "administrative decision makers" writ large, as the respondent contends. Since there is no question that the IRCC visa officer is not an administrative tribunal, the common law principle of deliberative secrecy simply does not apply to his decision making. It therefore cannot protect information relating to the officer's decision making from disclosure.

[37] The starting point for any discussion of deliberative secrecy in the administrative context is *Tremblay v Quebec (Commission des affaires sociales),* [1992] 1 SCR 952. Among the issues considered by the Court was whether the Commission could refuse to disclose information relating to the internal review of a draft decision. The decision in question dismissed an appeal by Ms. Tremblay of a decision by the Ministère de la Main-d'œuvre et de la Sécurité du revenu denying her claim for reimbursement for the cost of certain dressings and bandages.
Ms. Tremblay challenged the Commission's decision by an action in nullity in the Quebec Superior Court, arguing that the internal consultation process the decision had gone through violated the rules of natural justice. In the course of the hearing of that action, counsel for the Commission objected to the Commission's secretary answering questions about the process by which draft decisions were reviewed internally.

[38] Writing for the Court, Gonthier J. concluded that the Commission's objections should be dismissed because the questions "did not touch on matters of substance or the decision makers' thinking on such matters" but, rather, were directed instead at the formal process established by the Commission to ensure consistency in its decisions (*Tremblay* at 964).

[39] Having said this, Gonthier J. goes on to observe that, in the case of administrative tribunals, it is not always easy to distinguish between "facts relating to an aspect of the deliberations which can be entered in evidence and those which cannot" (*Tremblay* at 965). This is because "The institutionalization of the decisions of administrative tribunals creates a tension between on one hand the traditional concept of deliberative secrecy and on the other the fundamental right of a party to know that the decision was made in accordance with the rules of

natural justice" (*ibid.*). In particular, an institutionalized process of internal review of draft decisions to ensure consistent decision making like the one the Commission had adopted may raise questions about "whether justice is seen to be done" (*ibid.*). Consequently, "the very special way in which the practice of administrative tribunals has developed requires the Court to become involved in areas into which, if a judicial tribunal were in question, it would probably refuse to venture" because of the need to safeguard judicial independence (*ibid.*).

[40] In support of this last point concerning judicial independence and the "traditional concept" of deliberative secrecy, Gonthier J. quotes *MacKeigan v Hickman*, [1989] 2 SCR 796, as follows (emphasis added by Gonthier J.):

> The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to <u>how</u> and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence: *Valente v. The Queen, supra*; *Beauregard v. Canada* . . . To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how or why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence.
>
> (Tremblay at 965)

[41] Justice Gonthier then continues:

> Additionally, when there is no appeal from the decision of an administrative tribunal, as is the case with the Commission, that decision can only be reviewed in one way: as to legality by judicial review. It is of the very nature of judicial review to examine *inter alia* the decision maker's decision-making process. Some of the grounds on which a decision may be challenged even concern the internal aspect of that process: for example, was the decision made at the dictate of a third party? Is it the result of the blind application of a previously established directive or policy? All these events accompany the deliberations or are part of them.

(*Tremblay* at 965-66)

[42] On this basis, Gonthier J. holds: “Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals” (*Tremblay* at 966).

[43] Justice Gonthier then states the general rule and the test for making an exception on which the respondent relies in seeking to withhold disclosure of the information at issue in the CTRs: “Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice” (*Tremblay* at 966).

[44] In my view, the analysis of deliberative secrecy in *Tremblay* is premised on the decision maker in question being an administrative tribunal that enjoys a form of independence analogous to that of a judicial decision maker. Such independence is the foundation for the presumption of deliberative secrecy. If the decision maker were a judicial tribunal, there would be no question that its deliberations are protected by the traditional concept of deliberative secrecy because this is an essential element of judicial independence. If the decision maker is an administrative tribunal, it is also entitled to protect the secrecy of its deliberations because it enjoys a form of independence analogous to that of judicial decision makers. Nevertheless, in the case of an administrative tribunal, this principle may need to yield to other interests, such as the need to ensure on judicial review that the process followed by the tribunal complied with the rules of natural justice. However, there is no suggestion in *Tremblay* that this principle of deliberative secrecy applies to administrative decision makers that are not administrative

tribunals – in other words, to decision makers that do not perform adjudicative functions and that do not enjoy a form of independence that is analogous to that of judicial decision makers. On the contrary, the link between adjudicative independence and deliberative secrecy affirmed in *Tremblay* suggests that, in the absence of the former, there is no foundation for the latter.

[45] *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 SCR 29, confirms that the scope of the principle of deliberative secrecy in administrative decision making is not as broad as the respondent submits. At issue there was an interlocutory decision by a grievance arbitrator permitting the examination of three members of a school board's executive committee concerning the board's reasons for dismissing a teacher from his employment. In particular, the arbitrator had ruled that it was permissible to question the members about *in camera* proceedings of the board's executive committee during which the teacher's case was discussed.

[46] In upholding the arbitrator's decision, Gascon J. acknowledged that, following *Tremblay*, "deliberative secrecy also protects the deliberations of administrative tribunals" (*Commission scolaire de Laval* at para 58). However, he rejected the submission that the executive committee in question, which holds its powers and makes its decisions under the Quebec *Education Act*, is an administrative decision-making authority to which *Tremblay* applies. As Gascon J. explains, *Tremblay* does not apply to every type of administrative organization required to perform decision-making functions. On the contrary, "*Tremblay* is clear and does not have the scope the appellants seek to attribute to it. That case concerns the deliberative secrecy that applies to

administrative tribunals, that is, to bodies that perform adjudicative functions" (at para 60).

Justice Gascon then continues:

> But when the executive committee decided to dismiss B after deliberating in camera, it was not performing an adjudicative function and was not acting as a quasi-judicial decision maker. Rather, it was acting as an employer dismissing an employee. Its decision was therefore one of a private nature that falls under employment law, not one of a public nature to which the constitutional principles of judicial independence and separation of powers would apply. No valid analogy can be drawn between the administrative tribunal in *Tremblay*, whose quasi-judicial decision was final and could not be appealed, and the decision-making authority of a public employer — even where the authority in question is the employer's executive committee — that decides to resiliate an employee's employment contract.
>
> (*Commission scolaire de Laval* at para 61)

[47] In my view, *Commission scolaire de Laval* leaves no room for doubt that the common law principle of deliberative secrecy applies only to judicial decision makers and administrative tribunals.

[48] The respondent cites several decisions in support of the proposition that the principle articulated in *Tremblay* applies to administrative decision makers writ large but none of them alter my conclusion that the scope of the principle is not as broad as the respondent contends. *Toshiba Corporation v Canada (Anti-Dumping Tribunal)*, [1984] FCJ No. 247 (CA) pre-dates *Tremblay* and, as such, is of little assistance. *Weerasinge v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 330, *Payne v Ontario Human Rights Commission* (2000), 136 OAC 357, *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37, 253 NSR (2d) 134, and *Girouard FC* all concerned bodies that are indisputably administrative tribunals – respectively, the Refugee Division of the Immigration and Refugee Board, the

Ontario Human Rights Commission, the Board of Examiners constituted under the Nova Scotia *Stationary Engineers Act*, and the Canadian Judicial Council. (Indeed, Gascon J. cites *Cherubuni Metal Works* in *Commission scolaire de Laval* as an example of the application of deliberative secrecy to the deliberations of an administrative tribunal performing adjudicative functions (at para 60).) *Village Commissioners of Waverley v Nova Scotia (Minister of Municipal Affairs)*, 1994 NSCA 58, simply mentions *Tremblay* in passing. In *Taseko Mines Ltd v Canada (Minister of the Environment)*, 2015 FCA 254, there is no analysis of whether the decision maker was protected by the common law principle of deliberative secrecy. It appears that this was not in dispute.

[49] The respondent also cites three other decisions of this Court. None, in my view, are of assistance. *Tajgardoon v Canada (Minister of Citizenship and Immigration)*, [2001] 1 FC 591, does not address the principle of deliberative secrecy. *Nguesso et le Ministre de la Citoyenneté et de l'Immigration* (April 14, 2015) (IMM-1144-14) (an unreported Order of Justice de Montigny, then a member of this Court) does not address this principle either. *Nguesso et le Ministre de la Citoyenneté et de l'Immigration* (September 27, 2016) (IMM-1431-16) is an unreported Order of Justice Roussel (then a member of this Court). In that Order, Justice Roussel upheld claims for non-disclosure of a visa officer's notes and working documents on grounds including claims of "privilège décisionnel ou du délibéré." In doing so, Justice Roussel cites *Cherubini Metal Works*, where the Nova Scotia Court of Appeal held (at para 14) that "The principle of deliberative secrecy prevents disclosure of how and why adjudicative decision-makers make their decisions." However, she does not explain why she

considered a visa officer to be an adjudicative decision maker. *Commission scolaire de Laval*, which was decided six months earlier, is not mentioned.

[50] None of these other decisions could displace *Tremblay* or *Commission scolaire de Laval*, which are the controlling authorities. In any event, with the exception of Justice Roussel's Order, they are all consistent with the narrow scope of the principle of deliberative secrecy in the administrative context articulated by the Supreme Court of Canada. In my respectful view, Justice Roussel's Order is inconsistent with *Tremblay* and *Commission scolaire de Laval*.

[51] Turning to the present cases, in my view, no valid analogy can be drawn between the decision maker in question and the administrative tribunals whose deliberations have been found to be protected by the principle of deliberative secrecy. The IRCC visa officer who is deciding whether to approve the applications for permanent residence is not performing an adjudicative function. Moreover, and critically, he does not enjoy the independence of a judicial or quasi-judicial decision maker. As we have seen, this is a necessary precondition for the principle of deliberative secrecy to apply. Although the visa officer is performing public duties pursuant to the *IRPA*, his decisions are not of the sort "to which the constitutional principles of judicial independence and separation of powers would apply" (*Commission scolaire de Laval* at para 61). Consequently, the necessary foundation for the principle that "secrecy remains the rule" to apply to his decision making is absent.

[52] Since the general rule does not apply, it is not necessary for the applicants to demonstrate that an exception should be made in their cases.

[53] Before concluding, I would note that, in reply submissions on these motions, the respondent raises additional arguments supporting the non-disclosure of the information in question. The respondent submits that the fact that the decision-making process is ongoing "weighs heavily against lifting the privilege" (Respondent's Reply Submissions (IMM-1407-22), para 6, citing *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1086 at paras 21 and 22). The respondent also submits that releasing the officer's "deliberations" risks prejudicing the ongoing administrative decision-making process while maintaining the secrecy of the decision making would help prevent the applicants from tailoring their evidence to meet the officer's concerns. Finally, the respondent submits that, since there is a public interest in decision makers "be[ing] able to consult with internal specialists in a candid and free manner," it is not in the public interest to inhibit such discussions, something the respondent alleges would happen if the information in question were to be disclosed (Respondent's Reply Submissions (IMM-1407-22), para 7, citing *Canada (Attorney General) v Chad*, 2018 FC 556 at paras 48, 51, 74 and 89).

[54] I do not find these submissions persuasive in the context of the present motions.

[55] First, they are based on the premise that the information in question is "privileged" (by which I understand the respondent to mean "presumptively secret") and the only question to be determined is whether to make an exception to this presumptive secrecy. For the reasons set out above, I have found that no such presumption applies to the information in question.

[56] Second, the considerations the respondent relies on are not part of the common law principle of deliberative secrecy with which these motions are concerned. By relying on *Douze*, the respondent appears to be conflating the test applied there, which balanced the probative value of the undisclosed information with the prejudicial effects of its disclosure, with the common law principle of deliberative secrecy: see *Douze* at para 22; see also my discussion of *Douze* in *Abu v Canada (Citizenship and Immigration)*, 2021 FC 1031 at paras 57-63. The same is true of the respondent's reliance on *Chad*, which concerns an application for non-disclosure under *CEA* section 37. It also involves a balancing test that is not part of the common law principle of deliberative secrecy.

[57] Third, in any event, the respondent's submissions rest on factual assertions about potential injury to the decision-making process that would result from disclosure that are not supported by any evidence. Broad, unsubstantiated assertions about potential injury do not provide a sound foundation for maintaining the non-disclosure of information that the respondent must have determined is relevant to the underlying applications for judicial review (otherwise the information would not have been included in the CTRs).

[58] With a sufficient evidentiary foundation, the fact that a decision-making process is still underway could well be a sound basis for withholding information relating to that process. Indeed, the respondent advances an argument along these lines in support of the *CEA* section 37 applications. To be clear, I am not commenting on the validity of that argument in that context. My point is simply that it is an entirely different argument from one based on the common law principle of deliberative secrecy articulated in *Tremblay*. While I have found that this principle

does not apply to the information in question, it remains open to the respondent to argue in the *CEA* section 37 context that disclosing the information would nevertheless encroach on a public interest.

VI. CONCLUSION

[59] For these reasons, the respondent's motions for non-disclosure of information on the basis of the common law principle of deliberative secrecy will be dismissed. As stated above, it is open to the respondent to proceed with the *CEA* section 37 applications, if so advised. Accordingly, the respondent may continue to withhold disclosure of the information in question pending the determination of those applications.

[60] Concurrently with the release of these reasons, the Court will issue a Direction to the parties seeking their availability for a case management conference in which the next steps in this litigation will be discussed.

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

THIS COURT ORDERS that

1. The motions are dismissed.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1407-22
STYLE OF CAUSE:	KHALIL MAMUT ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	IMM-8585-22
STYLE OF CAUSE:	SA ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 25, 2023
ORDER AND REASONS:	NORRIS J.
DATED:	AUGUST 15, 2023

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