Federal Court of Appeal | Cour d'appel fédérale

Date: 20190606

Docket: A-73-18

Citation: 2019 FCA 202

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

KAMRAN SOLTANIZADEH

Respondent

Heard at Ottawa, Ontario, on June 5 and September 24, 2018.

Judgment delivered at Ottawa, Ontario, on June 6, 2019.

PUBLIC REASONS FOR JUDGMENT BY: THE COURT

Federal Court of Appeal  Cour d'appel fédérale

Date: 20190606

Docket: A-73-18

Citation: 2019 FCA 202

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

KAMRAN SOLTANIZADEH

Respondent

PUBLIC REASONS FOR JUDGMENT BY THE COURT

THE COURT

I. Introduction

[1] The Attorney General of Canada (the Attorney General) appeals from an Order of Mosley J. of the Federal Court (the Judge) in file IMM-2523-17. Public Reasons for Order were issued on February 2, 2018 (2018 FC 114), whereas the Classified Order and Reasons were issued on February 14, 2018. An Amended Classified Order and Reasons was issued on

March 27, 2018 in order to correct various clerical errors. The substance of the Order was not changed. In his Order, the Judge granted only in part the Attorney General's motion, brought pursuant to section 87 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA, and the section 87 motion). The section 87 motion was for non-disclosure of redacted information contained in a visa officer's Certified Tribunal Record (CTR). In this appeal, the Attorney General submits that the Judge erred in his assessment of the section 87 motion.

[2] For the reasons set out below, the appeal should be allowed.

II. Background

[3] The underlying matter is an application for judicial review, filed by the applicant, Mr. Kamran Soltanizadeh (the respondent in this appeal) of a visa officer's decision dated May 22, 2017. The visa officer concluded that the respondent was inadmissible to Canada pursuant to section 34 of the IRPA. Leave to seek judicial review before the Federal Court was granted on September 8, 2017.

[4] On October 30, 2017, within this application for judicial review, the Attorney General filed a section 87 motion on behalf of the Minister of Citizenship and Immigration (the Minister) for a non-disclosure order. On November 3, 2017, the respondent's counsel sent a letter to advise the Federal Court that the respondent takes no position on the section 87 motion. No special advocate was appointed at that stage of the proceedings. The Attorney General's motion record indicated that the Minister would not be relying on the redacted materials in order to justify the visa officer's decision in the underlying judicial review application, since the Minister intended

to consent to the application at the hearing (Public Reasons at para. 6). The Attorney General's section 87 motion record does not indicate that there are any other redactions besides those made pursuant to section 87 of the IRPA (Public Reasons at para. 11).

[5] In addition to the redactions made pursuant to section 87 of the IRPA, the CTR contained redactions made pursuant to section 18.1 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (the CSIS Act). The fact that the CTR contained privilege claims under section 18.1 of the CSIS Act was disclosed in the cover letter from the Embassy of Canada at Paris, France, dated November 1, 2017, which accompanied the CTR. No indication was made, however, with respect to which redactions were subject to section 87 of the IRPA and which redactions were subject to section 18.1 of the CSIS Act (Public Reasons at para. 17).

[6] A hearing of the section 87 motion took place before the Judge on December 7, 2017. Two affiants — one from CSIS and one from the Canada Border Services Agency (CBSA) filed classified affidavits on November 10, 2017 in support of the Attorney General's motion. The Judge requested that he be provided with a read-through version of the section 18.1 CSIS Act redactions and further requested that the affiants be prepared to testify regarding the basis for those privilege claims. The Attorney General argued that the Judge lacked jurisdiction to inquire into the basis of the section 18.1 CSIS Act redactions absent an application under subsection 18.1(4). Ultimately, the Judge's Order only dealt with the section 87 issue.

III. The Judge's Public Reasons for Order

[7] In his Public Reasons for Order, the Judge expressed some concern about the fact that there was no indication of which redactions were subject to which privilege, and that it would be difficult for the respondent to know whether to challenge the section 18.1 CSIS Act claims if he did not know how many there were, or where they were located (Public Reasons at paras. 15-18). He went on to provide some history with respect to the courts' involvement in the assessment of privilege claimed by the state. In so doing, he discussed section 87 of the IRPA, section 18.1 of the CSIS Act, sections 37 and 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the CEA), as well as the predecessors to these various provisions (Public Reasons at paras. 19-56). He indicated that he questioned the Attorney General's witness on the section 87 IRPA issue, and "reached certain conclusions regarding the reasonableness of the s[ection] 87 claims" (Public reasons at para 57). His conclusions on section 87 are found in his Classified Reasons.

IV. The Judge's Classified Order and Reasons

[8] In the Judge's Classified Reasons, he again discussed his concerns with respect to section 18.1 of the CSIS Act. He noted that he was unconvinced that the redactions made under that section were proper applications of CSIS human source privilege. Indeed, he stated that "[i]n the absence of supporting information and evidence, such a proposition [that the redacted information was a proper application of privilege under subsection 18.1(2) of the CSIS Act] requires a leap of faith on the part of the Court" (Classified Reasons at para. 17).

[9] The Judge noted, however, that this Court was seized [redacted] with the question of whether the Federal Court has jurisdiction over section 18.1 privilege claims absent a challenge under subsection 18.1(4) — [redacted] *Section 18.1 of the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, as Amended (Re)*, 2018 FCA 161, [2018] F.C.J. No. 941 (QL) — and, accordingly, saw "no reason to issue a further Order on the issue at this time" (Classified Reasons at para. 21). [redacted]: no leave to appeal was filed with respect to *Section 18.1 of the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, as Amended (Re)* [redacted]

[10] The Judge did, however, address the section 87 IRPA issue. He refused to withhold disclosure of approximately half of the claimed redactions subject to that section. It is from this Order that the Attorney General appeals. Since the Judge made no order in respect of section 18.1 of the CSIS Act, that section is not relevant in this appeal.

[11] In terms of procedural matters, the hearing of the underlying judicial review application was originally scheduled for February 26, 2018. The Judge issued an Order on February 23, 2018 vacating that hearing date and adjourning it to a date to be scheduled by the Chief Justice.

[12] On appeal, this Court held an *in camera ex parte* hearing on June 5, 2018 with only the Attorney General appearing before the Court. However, after the hearing, being of the view that this Court would benefit from an independent view of that of the Attorney General, an *amicus*

curiae, Mr. Lorne Waldman, who also happens to be a special advocate, was appointed on August 1, 2018. An additional hearing in this matter was thus held in the presence of the Attorney General and the *amicus* on September 24, 2018.

V. Issues

[13] The issues raised in this appeal are the following:

a. What is the standard of review?

b. Did the Judge err in failing to apply the proper test under section 87 of the IRPA?

c. Did the Judge err in concluding that disclosure of information subject to the section 87 privilege claims would not be injurious to national security?

VI. Relevant Statutory Provisions

[14] Section 87 of the IRPA provides as follows:

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 d'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.

[15] Section 83 of the IRPA, in relevant part, provides as follows:

Protection of information	**Protection des renseignements**
83 (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	**83 (1)** Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :
…	[…]
(*d*) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;	*d*) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

[16] Section 87.01 of the IRPA, which provides for appeals, reads as follows:

87.01 (1) The Minister may, without it being necessary for the judge to certify that a serious question of general importance is involved, appeal, at any stage of the proceeding, to the Federal Court of Appeal any decision made in a judicial review requiring the disclosure of information or other evidence if, in the Minister's opinion, the disclosure would be injurious to national security or endanger the safety of any person.	**87.01 (1)** Le ministre peut, en tout état de cause, interjeter appel en Cour d'appel de toute décision rendue au cours du contrôle judiciaire et exigeant la divulgation de renseignements ou autres éléments de preuve qui porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui, sans que le juge soit tenu de certifier que l'affaire soulève une question grave de portée générale.
(2) The appeal suspends the execution of the decision, as well as the judicial review, until the appeal has been finally determined.	**(2)** L'appel suspend l'exécution de la décision, ainsi que le contrôle judiciaire, jusqu'à ce qu'il soit tranché en dernier ressort.

VII. Analysis

A. *Standard of Review*

[17] The Attorney General submits that this appeal is "the first appeal of a s[ection] 87 decision under s[ection] 87.01 of the IRPA", such that "this Court is required to determine the proper standard of review" (Memorandum of Fact and Law of the Attorney General (A.M.) at para. 23).

[18] The Attorney General submits that the standard of review is "the general standard of appellate review" as outlined by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. The Court agrees. This Court in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] F.C.J. No. 943 (QL) [*Hospira*] has indicated that the standard expressed in *Housen* is the appropriate standard of review in respect of decisions of courts of first instance (*Hospira* at para. 28). This Court in *Canada (Attorney General) v. Almalki*, 2011 FCA 199, [2012] 2 F.C.R. 594 (leave to appeal to the Supreme Court of Canada denied: 34502) [*Almalki*] adopted the *Housen* standard in an appeal regarding section 38 of the CEA (*Almalki* at paras. 5-6) and recently affirmed in *Shen v. Canada (Attorney General)*, 2018 FCA 7 that the *Housen* standard is to govern an appeal from a Federal Court's decision in respect of a section 38 CEA application (at para. 27).

[19] Under the *Housen* framework, questions of law are reviewable for correctness, whereas questions of mixed fact and law as well as questions of fact are reviewable only for palpable and overriding error.

[20] It is also recalled that our Court in *Almalki*, held at paragraph 8 that "[a] palpable and overriding error exists when, in rendering his decision, the judge 'took irrelevant factors into account, omitted to consider those that ought to have been considered, or weighed the relevant factors in an unreasonable manner': see *Canada v. Furukawa*, [2001] 1 C.T.C. 39 at paragraph 35 (FCA)". The paragraph in *Furukawa*, to which the Court in *Almalki* refers, states, in relevant part, the following:

> [35] … since it was agreed that the Judge formulated the legal test correctly, and did not otherwise misstate the law, the Court should not intervene unless it can be inferred from the result reached that he must have taken into consideration irrelevant factors, omitted those that he ought to have considered, or weighed the relevant factors in an unreasonable manner.

[21] Hence, if this Court is of the view that the Judge did not misstate the legal test, it has to assess whether the result reached by the Judge leads it to infer that an error must have been made as a result of taking into account irrelevant factors.

B. *Did the Judge apply the wrong test under section 87 of the IRPA?*

[22] The Attorney General submits that the Judge correctly articulated the test to be applied under section 87 of the IRPA, but then "added considerations of factors to the test that changed the nature of the test" (A.M. at para. 27). More particularly, he argues that the Judge imported a balancing exercise into the test. This was an error, since section 87 does not provide that the injury from disclosure must be balanced "against the interests of the respondent" (A.M. at para. 27).

[23] As the Attorney General observes, the Judge acknowledges in his analysis the distinction between section 38 of the CEA and section 87 of the IRPA. At paragraph 34 of his Public Reasons, he notes that section 87 "does not provide for a balancing of the public interests in favour of disclosure with those against disclosure" (Public Reasons at para. 34).

[24] The Attorney General contends that the relevance of redacted information to the respondent's underlying judicial review application, as well as any considerations of fairness, are relevant considerations at the underlying hearing, but not at the section 87 motion stage. In other words, the Attorney General contends that the judge who is seized of the section 87 motion is to rule on that motion and withhold any information that is injurious without conducting any balancing analysis. For his part, the *amicus* agrees that section 87 of IRPA does not allow a balancing that might permit disclosure of information when its disclosure is found to be injurious, but submits that issues of fairness must be considered and in particular the respondent's ability to know and meet the case. The issue, says the *amicus*, is whether an interpretation of sections 83 and 87 of IRPA provides an indication that the Judge must balance in its consideration of section 87 "the interest of fairness and the open court principle as opposed to the interests of the state to protect confidential information" (Submissions of the *amicus curiae* at para. 50).

[25] More specifically, the Attorney General submits that the Judge erred in providing comments with respect to the relevance of the section 87 information to the respondent's underlying application for judicial review. This amounts to the importation of an irrelevant factor

into the appropriate legal test. Examples of such comments can be found in the Public Reasons as well as the Classified Reasons:

> **Public Reasons**
>
> [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 [citation omitted]. 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. … there is at least a minimum duty to act fairly [citation omitted].
>
> **Classified Reasons**
>
> [24] While it may be appropriate to [redacted], the highly relevant information [redacted] should be disclosed unless the Judge is of the opinion that disclosure would result in injury to national security or endanger any person. The fact that [redacted] does not in itself establish such injury or danger.
>
> …
>
> [36] The Service witness sought to protect references to [redacted] As noted above, [redacted] The assessment document itself clearly states that it was provided by a manager of the CSIS Security Screening Branch. This was acknowledged by the CSIS witness in his affidavit and oral testimony. I do not, therefore, accept that all of the information from which it may be inferred that [redacted] should be protected from disclosure particularly as it appears [redacted] will be an issue on the underlying application.
>
> [Emphasis added.]

[26] The Attorney General and the *amicus* both recognize that section 87 of the IRPA does not contain a public interest balancing test like the one found in section 38 of the CEA. The Court is

in agreement with both the Attorney General and the *amicus* and would further add that the assessment made by a judge in reaching his or her conclusion on injury is determinant and should be enunciated clearly. As such, if a judge concludes that disclosure would be injurious in the context of a section 87 motion, the disclosure must be prohibited. As mentioned earlier, the Judge acknowledges as much at paragraph 34 of his Public Reasons. He also indicates that "the Court does not determine the relevance of the redacted information" under section 87 of the IRPA, since "[b]y including the documents in the CTR, the [Minister] has acknowledged their relevance to the underlying application" (Public Reasons at para. 35).

[27] However, in this case, although, on the one hand, the Judge's references to the relevance of the redacted information or its usefulness to the respondent were indeed inappropriate, the Court cannot, on the other hand, agree, on a fair reading of the Judge's reasons, that he ordered disclosure of information which he found to be injurious on the basis that the respondent's interests outweighed any potential injury. While he did discuss relevance and the respondent's interests, the Court remains unconvinced that he conducted a public interest balancing exercise akin to the one that would be done under section 38 of the CEA. Rather, if he accepted injury, he confirmed the prohibition on disclosure. Therefore, it is difficult to determine what effect, if any, the Judge's consideration of relevance had on his final Order. This question will be further addressed under the next issue: the Judge's assessment of injury.

C. *Did the Judge otherwise err in finding that material withheld under section 87 of the IRPA would not be injurious to national security if disclosed?*

[28] The Attorney General submits on this second issue that the Judge failed to make a definite finding on injury with respect to several pieces of information which he ordered

disclosed. Furthermore, he submits that he made a contradictory finding with respect to injury in at least one instance, and that his conclusion that no injury would result from disclosure of certain pieces of information was not well-founded.

[29] The Attorney General submits that the Judge's only clear finding that disclosure would not cause injury was made in respect of information [redacted] (A.M. at para. 36). Nowhere else did he specifically indicate that he was unsatisfied that injury would result from disclosure of information which he ordered disclosed on pages [redacted] and [redacted] of the CTR (A.M. at para. 36).

[30] In addition, he points to the contradiction in the Judge's findings with respect to injury, whereby he confirmed the redaction of the paragraph on page [redacted] of the CTR but ordered disclosure of the last portion of paragraph [redacted] on page [redacted] of the CTR. These passages were subject to [redacted] redactions [redacted] and said the same thing. No explanation was given as to why the information was protected in one case and not in the other.

[31] Finally, where the Judge implicitly found that injury would not result from disclosure of information, the Attorney General submits that he put an undue emphasis on [redacted] inadvertently disclosed some of that information. The Attorney General submits that inadvertent disclosure should not be a relevant consideration at all, but that even if it is, the inadvertent disclosure in this case does not mean that no further injury would result from wider or more complete dissemination of that information (A.M. at para. 45).

[32] The Attorney General's first submission under this issue, namely that the Judge erred in failing to make specific findings regarding injury is tenuous. The Judge provided general reasons in his Amended Classified Order and Reasons, and appended a detailed Schedule in which his comments explain and justify his decision in respect of each page of the CTR and the *amicus* provided a number of examples to that effect (Submissions of the *amicus curiae* at paras. 42-44).

[33] However, with respect to the Judge's purportedly contradictory finding related to pages [redacted] and [redacted] of the CTR, the Court cannot agree with the *amicus* that there is "no significant inconsistency". Indeed, if disclosure of the information would be injurious in one instance, it would also be injurious in the other. Moreover, this discrepancy does not appear to have been addressed in the Amended Classified Order and Reasons, such that one cannot conclude it to be a clerical error. There may well be reasons for this discrepancy, but they have not been indicated. In our view, this type of discrepancy warrants this Court's intervention.

[34] Finally, the Attorney General contends that the Judge placed undue reliance on inadvertent disclosure. The Attorney General points out that this reliance is "at odds with [the Judge's] own statement that: '[r]eferences to [redacted] and to aspects of [redacted] can be selectively redacted" (A.M. at para. 45). Mr. [redacted] (Affidavit of [redacted] at para. 22). Mr. [redacted] but he noted that information as specific as that

contained in the claimed redactions [redacted] is not publicly known (Affidavit of [redacted] at para. 23).

[35] While this information was inadvertently disclosed [redacted] the Attorney General argues that inadvertent disclosure should not matter or, at least, should not be determinative. In *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1082 at para. 41 [*Sellathurai*] Justice Snider found that "a case-by-case determination of privilege must be made when documents are inadvertently disclosed". This finding was in respect of documents over which the Minister claimed privilege under section 87 of the IRPA, and which had inadvertently been sent to counsel for Mr. Sellathurai. The Federal Court found that privilege was not lost (*Sellathurai* at para. 42). The *amicus* agrees on the principle that inadvertent disclosure of a protected document does not constitute a waiver (Submissions of the *amicus curiae* at para. 83).

[36] Although the Federal Court's judgment in *Sellathurai* may not be binding on the Judge, it remains that the Judge owed deference to the evidence of injury led by the Minister — namely, the affidavit and *viva voce* evidence of Mr. [redacted] In this case, the Judge did not accept the evidence of Mr. [redacted] that injury would result notwithstanding prior inadvertent disclosure. While the Judge did express reasons for ordering disclosure of the claimed information — [redacted] and the specific information at issue had previously been inadvertently disclosed — he did not give much weight to Mr. [redacted] evidence that injury would result if it became known specifically that [redacted].

[37] While the Judge's reliance on inadvertent disclosure is not, in the circumstances, as concerning as the contradictory finding in respect of pages [redacted] and [redacted] of the CTR, the Judge should have nonetheless further justified his decision not to accept Mr. [redacted] evidence on this point. The Court also notes the Judge's comment at paragraph 36 of his Classified Reasons wherein he states that [redacted] will be relevant to the underlying judicial review application. As discussed earlier, The Court agrees with the Attorney General that relevance does not form part of the section 87 IRPA analysis, and it appears that relevance may have affected to some extent the Judge's decision to order disclosure of this specific information.

VIII. Disposition

[38] For all of these reasons, the appeal should be allowed. The Court would remit the matter to the Judge for reconsideration in accordance with these reasons.

[39] These public reasons were first released on a classified basis on June 6, 2019 to ensure compliance with national security requirements prior to public release.

"Richard Boivin"
J.A.

"Yves de Montigny"
J.A.

"Judith Woods"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-73-18
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. KAMRAN SOLTANIZADEH
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 5 AND SEPTEMBER 24 2018
PUBLIC REASONS FOR JUDGMENT BY THE COURT:	BOIVIN J.A. DE MONTIGNY J.A. WOODS J.A.
DATED:	JUNE 6, 2019

APPEARANCES:

Max Binnie Craig Collins-Williams	FOR THE APPELLANT
Lorne Waldman	FOR THE *AMICUS CURIAE*

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPELLANT
Waldman and Associates Toronto, Ontario	FOR THE *AMICUS CURIAE*