Federal Court  Cour fédérale

Date: 20171109

Docket: IMM-4072-16

Citation: 2017 FC 1026

Ottawa, Ontario, November 9, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

AIERKEN MALIKAIMU
AYOOB HAJI MOHAMMED

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

ORDER AND REASONS
ON THE MOTION FOR THE APPOINTMENT OF A SPECIAL ADVOCATE

[1] The Applicants, Ayoob Haji Mohammed [Mr. Mohammed] and Airken Malikaimu [Ms. Malikaimu], are husband and wife. They are seeking leave to judicially review a decision of a visa officer stationed at the Canadian Embassy in Rome, Italy [the Visa Officer], who, on July 11, 2016, rejected Mr. Mohammed's application for permanent residence on national

security grounds. Mr. Mohammed's application was sponsored by Ms. Malikaimu, who is a Canadian citizen.

[2] In the course of the leave proceedings, the Respondent was ordered to produce the notes of an interview Mr. Mohammed attended at the Canadian Embassy in Tirana, Albania, on January 15, 2015, while his permanent residence application was being assessed. When that order became definitive, the Respondent brought a motion under section 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "Act"] claiming that the disclosure of these notes could be injurious to national security or endanger the safety of a person.

[3] The Applicants urge the Court, in such context, to appoint a special advocate pursuant to section 87.1 of the Act. That provision allows a judge of this Court, during a judicial review, to appoint a special advocate where he/she is of the opinion that considerations of fairness and natural justice require such appointment in order to protect the interests of the applicant.

[4] For the reasons that follow, I have determined that the appointment of a special advocate is not necessary in this case, at least at this stage of the proceeding.

I. Background Facts

[5] Mr. Mohammed is a citizen of China of Uighur ethnicity. He resides in Albania as a refugee since March 2006. While in Albania, he met Ms. Malikaimu through an online social networking site. They married in March 2010. The couple have two children. A few years after

their wedding, Ms. Malikaimu submitted a spousal sponsorship application to sponsor Mr. Mohammed to come to Canada as a permanent resident.

[6] In their written submissions in response to the Respondent's section 87 motion [the Section 87 Motion] and in support of their request for the appointment of a special advocate, the Applicants describe, as follows, a series of events. These events allegedly began in 2001 when Mr. Mohammed says he travelled to Pakistan to obtain a student visa that would allow him to study in the United States. This led to Mr. Mohammed being detained by the US military in Afghanistan in the aftermath of the September 11, 2001 attacks on the World Trade Center in New-York City, transferred to the American military prison of Guantanamo Bay, Cuba, and eventually released and flown to Albania with refugee protection:

> 3. Mr. Mohammed travelled with a friend to Pakistan in fall 2001 to obtain his student visa. His friend would also be travelling to the US, and so after Mr. Mohammad was issued his visa, he decided to wait for his friend's visa to be issued. The pair knew that Pakistan was a dangerous place for individuals of Uighur ethnicity, which necessitated them to go to Afghanistan and wait there until the remaining visa was issued.
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> 4. After the US began military operations in Afghanistan after the events of September 11, 2001, however, Mr. Mohammad was forced to slip back into Pakistan to escape the rising hostilities. Pakistan proved to be no safer, since he was there captured by bounty hunters, along with a number of other Uighurs, and sold to the US military.
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> …
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> 7. Mr. Mohammad was first held in an American prison in Kandahar, Afghanistan, and was then transferred to the prison at Guantanamo Bay, Cuba. While in Guantanamo Bay, however, the Combatant Status Review Tribunal determined that Mr. Mohammad was not an enemy combatant. This was confirmed by the US Department of Justice in a Reply Memorandum in 2005 as part of a *habeas corpus* application submitted by Mr. Mohammad.

> 8. Mr. Mohammad could not be released from Guantanamo Bay, however, since the US government had difficulty finding a country where Mr. Mohammad could be transferred, but would not be subject to torture. The US government also opposed release of Mr. Mohammad on *habeas corpus* grounds, since they wanted to wait for the resolution of appeals of other Guantanamo Bay detainees' cases. Albania ultimately agreed to take Mr. Mohammad as a refugee in 2006, and he was finally released from Guantanamo Bay and flown to Albania on May 5, 2006.

[7] As part of the processing of his application for permanent residence, Mr. Mohammed was asked by the Visa section of the Canadian Embassy in Rome to attend two interviews. One was held on January 15, 2015 [the First Interview], the other on March 10, 2016 [the Second Interview].

II. The Visa Officer's Decision

[8] As indicated at the outset of these Reasons, the Visa Officer held that Mr. Mohammed did not qualify for the issuance of a permanent resident visa to Canada on inadmissibility grounds. More particularly, the Visa Officer found Mr. Mohammed to be inadmissible pursuant to paragraphs 34(1)(c) and (f) of the Act for engaging in terrorism and for being a member of an organization - the East Turkistan Islamic Movement [ETIM] - for which there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism.

[9] In her letter of July 11, 2016 informing Mr. Mohammed of her decision, the Visa Officer outlined as follows the grounds for her belief that Mr. Mohammed was a member of the ETIM:

> During your interview on March 10, 2016, you stated that you went to Afghanistan and lived for 3 months with a group of individuals who were fighting for the political objective of the independence of Turkistan. You stated during your interview that

the group was armed and that you saw Kalashnikovs in the cave where you lived with this group. You stated that the political orientation of this group was against China and that they were in Afghanistan to train against the Chinese authorities. You stated that this group was maybe named the "ETIM" by the Americans. You did not deny that you may have been with this group that the Americans labeled as "ETIM" and that you shared their political vision and lived/traveled with them for 3 months in Afghanistan.

You were accused by the tribunal at Guantanamo Bay in 2004 as travelling to Afghanistan to learn how to use weapons. A US report states that you received training in an ETIM training camp in Afghanistan. You were arrested there and detained and brought to Guantanamo Bay as you were considered an enemy combatant i.e. someone who has supported the hostilities against the US or its allies. You stated on March 10 2016 during your interview that, "after the interrogation (in Afghanistan), they told us that they captured us at the wrong place at the wrong time." Credibility concerns were raised during your interview on March 10 2016 as the officer did not find it credible that the American authorities made an error in capturing you at the wrong place and at the wrong time. You were asked on March 10 2016 during your interview why the American authorities would not simply release you if the had no reason to believe that you were connected to a terrorist group, and why they would have sent you to Guantanamo if they did not have concerns about your personal history. Your responses at interview did not disabuse me of my concerns.

Furthermore, credibility concerns were raised in relation to your travel to Afghanistan. The officer raised the concern that it did not appear credible that you would travel to Afghanistan just after the 9/11 attacks because you were waiting for your friend's visa and that you would choose to travel there for touristic purposes. Another credibility concern was raised during your interview on March 10, 2016 in relation to your narrative that you coincidentally ended up in a camp of Uigher people in Afghanistan who were training to fight for the liberation of Turkistan. You stated that, "In Afghanistan there is a group of people who come together to train against China." It is unclear how you knew that there was a group of people training to fight in this location if you had no interest in fighting. You stated that, "When I was with the people who were fighting for the independence of Turkistan we were fighting for political independence not religion." It is unclear why you would state "we were fighting" for this objective if you were not yourself involved in the fight. There are reasonable grounds to believe that, as the group was armed and you stated that members of this group went to Afghanistan to be trained against

> Chinese authorities, and as you lived with this group for 3 months, that you also received training to fight for ETIM's political objectives. Your responses at interview did not disabuse me of my concerns.

[10] In order to arrive at these findings, the Visa Officer indicated in her letter having considered "the information [Mr. Mohammed] provided, the information [Mr. Mohammed] provided during the interview and open-source information." The only interview to which the letter refers is the Second Interview.

III. The Background to the Section 87 Motion

[11] What led to the filing of the Respondent's motion under section 87 of the Act [the Section 87 Motion] is rather unusual.

[12] After having filed their application for leave and judicial review on September 29, 2016, the Applicants indicated not having received the written reasons of the Visa Officer's decision. In accordance with rule 9(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [CIRP Rules], the Visa Officer was requested to provide a copy of her reasons for decision. On October 4, 2016, in response to that request, the Visa Officer filed a 9-page document consisting of the notes she entered in the Visa Section's Global Case Management System [GCMS] regarding Mr. Mohammed's application for permanent residence. These notes only make reference to what was stated by Mr. Mohammed at the Second Interview.

[13] On November 10, 2016, the Applicants' former counsel complained that the notes of the First Interview as well as the "open source information" relied upon by the Visa Officer to make

her decision were missing, resulting in an incomplete Rule 9 disclosure. The Respondent disagreed, claiming that the Visa Officer's obligations under Rule 9 had been met.

[14] On December 23, 2016, the Applicants filed a motion under rule 14(2) of the CIRP Rules, seeking an order directing the Respondent to disclose the notes of the First Interview and the open source information. Rule 14(2) empowers the leave judge to order the production of documents in possession or control of the decision maker that he/she considers required for the proper disposition of the leave application.

[15] The Applicants claimed that without this information, they were unable to properly prepare the application record - and the Court to properly exercise its authority to grant or deny leave - since the full basis of the Visa Officer's findings was not known to either of them.

[16] The Respondent opposed the Applicants' motion, claiming that the notes of the First Interview [the Notes] were unnecessary for the disposition of the Applicants' leave application. In support of its contention, the Respondent filed an affidavit from the Visa Officer. The affidavit states that the January 15, 2015 interview was conducted by "partners" and that the Visa Officer neither had access to, nor considered, the Notes in making her decision.

[17] On February 15, 2017, a judge of this Court [the Motion Judge] granted the Applicants' motion, thereby ordering the Respondent to produce, by March 15, 2017, both the Notes and the open source information relied upon by the Visa Officer in support of her decision [the Rule 14 Order]. No reasons were provided.

[18] On February 27, 2017, the Respondent sought reconsideration of the Rule 14 Order pursuant to rule 397 of the *Federal Courts Rules*, claiming that the Motion Judge had either overlooked or accidentally failed to consider the Visa Officer's evidence that she did not have access to - let alone relied upon - the Notes in making her decision. In its written submissions, the Respondent indicated that should the Motion Judge uphold the production of these notes, a motion under section 87 of the Act would be brought on the basis that the disclosure of this information could be injurious to national security or endanger the safety of any person. The Respondent also suggested that the matter be referred to a judge of this Court designated to deal with national security issues.

[19] The Respondent's motion to reconsider was dismissed on March 22, 2017. The Motion Judge held that the Respondent had failed to identify "any matter that should have been dealt with that I overlooked or accidentally omitted to deal with." The Motion Judge added that the Respondent would have the opportunity to address its relevancy arguments "at the hearing of the Application."

[20] On March 27, 2017, the Respondent disclosed the open source information it was directed to produce by the Motion Judge. As for the Notes, the Rule 14 Order was met with the Section 87 Motion in order to protect these notes from disclosure. That motion was filed on March 31, 2017, and led, as indicated at the outset of these Reasons, to the Applicants' request for the appointment of a special advocate.

[21] It would appear that this is the first time a motion under section 87 of the Act has been brought at the leave stage of a judicial review proceeding initiated under the Act.

IV. The Steps taken to Deal with the Special Advocate Issue

[22] In *A.B. v Canada (Citizenship and Immigration)*, 2012 FC 1140 [*A.B.*], Justice Simon Noël stated that in order to properly exercise his or her discretion to appoint or not a special advocate under section 87.1 of the Act, the presiding judge ought to (i) examine the redactions, (ii) keep in mind the whole record, (iii) preside, if required, over an *ex parte, in camera* hearing, (iv) ask for justification for the redactions, (v) question the relevancy as presented, (vi) suggest and, if necessary, order the unveiling of the information if it is not justified in law and fact and (vii) read the decision subject to the judicial review proceeding. It is only then, according to Justice Noël, that the standards of fairness and natural justice will, in light of the knowledge gained from such approach, be better understood and applied to the case at bar (*A.B.*, at para 9).

[23] In accordance with that approach, I first became apprised of the interview notes at issue by calling an *in camera* hearing, which was held on May 11, 2017, in the presence of one counsel and the deponent of the Classified Affidavit filed in support of the Section 87 Motion. In the course of that hearing, I was able to ask the deponent questions regarding the Notes and the grounds underlying the claim for non-disclosure. I also heard submissions from counsel who, in the course of these submissions, sought leave to file a supplemental Classified Affidavit. Leave was granted. The same day, I held a case management teleconference with counsel for the Applicants and the Respondent to apprise them of how the special advocate issue would be dealt with.

[24] On June 16, 2017, I held a second *in camera* hearing with counsel and the deponent of the supplemental Classified Affidavit where, again, I was able to ask questions regarding the grounds underlying the claim for non-disclosure and hear submissions from counsel. Responses to undertakings given at that hearing were provided at the end of July 2017, by way of an additional Classified Supplemental Affidavit.

[25] I then heard both parties' submissions on the special advocate appointment issue by way of a teleconference call held on September 26, 2017.

V. The Applicants' Submissions

[26] The Applicants claim that without the appointment of a special advocate, they will be denied the opportunity to be heard and to meet the case against them in respect of both the Section 87 Motion and the underlying leave application of the Visa Officer's decision. They say that appointing a special advocate in this case "is the only way for this Court to honour an inherent and basic principle of fairness underlying the Canadian legal system."

[27] In particular, they submit that having no notion of what is contained in the Notes impacts their ability not only to respond to the section 87 motion but also to know the identity and agency of the person who interviewed Mr. Mohammed. This in turn impacts their ability to know whether their rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*) are engaged. More particularly, the Applicants contend that Mr. Mohammed's *Charter* rights would be engaged if Canadian state actors allowed Mr. Mohammed to be interviewed by foreign state agents at the Canadian Consulate in Tirana under the guise of gathering information as part of

Mr. Mohammed's application for permanent residence. They add that this information would be all the more important given Mr. Mohammed's status as a former Guantanamo Bay detainee. Only the presence of a special advocate can, in their view, prevent the introduction, in the present proceedings, of information and evidence derived from Mr. Mohammed's detention at Guantanamo Bay that is neither reliable nor appropriate.

[28] The Applicants further claim that the undisclosed information in the present case is much more significant than in the cases where the Court declined to appoint a special advocate since unlike these cases, the application of the *Charter* to the present proceedings may depend upon the redacted information, the secret affidavits filed in support of the Section 87 Motion or information that may be derived from a cross-examination of the authors of these affidavits. They note that in the cases where the appointment of a special advocate was refused, the undisclosed material was held to be minimal compared to the disclosed material whereas here, it is, according to them, significant and extensive.

[29] The Applicants also make the point that the non-disclosure of the Notes impairs their ability to address, and the Court's ability to assess on a preliminary basis, the credibility concerns raised by the Visa Officer. They claim that only a full set of the statements made by Mr. Mohammed, which would include those made during the First Interview, can enable them and the Court to properly address this issue.

[30] Finally, the Applicants contend that the factors set out in the seminal case of *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] weigh strongly in favour of a

high degree of procedural fairness in determining whether a special advocate should be appointed in this case. They claim that unlike decisions made on applications for permanent residence made outside Canada, which are administrative in nature and attract a minimal degree of procedural fairness, decisions regarding the non-disclosure of information and the appointment of a special advocate pursuant to sections 87 and 87.1 of the Act, are judicial in nature and require, therefore, greater procedural protection. To the extent that this important distinction has been overlooked, they say prior Federal Court decisions on such issues "misconceived the appropriate context within which to measure the duty of procedural fairness owed to foreign nationals."

VI. Analysis

[31] As this Court has stated on a number of occasions, the Act's special advocate provisions were introduced as a result of the Supreme Court of Canada decision in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*]. In that case, the Supreme Court determined that the challenges to the fairness of the process leading to possible deportation and the loss of liberty associated with detention in the context of security certificates issued under the Act raised important issues of liberty and security and on that basis, concluded that section 7 of the *Charter* was engaged. It held that to satisfy the section 7 analysis there must be meaningful and substantial protection, the question being whether the basic requirements of procedural fairness have been met, either in the usual way or in an alternative fashion appropriate to the context, having regard to the government's objective and the interest of the person affected (*Charkaoui*, at paras 18 and 27; see also: *Malkine v Canada (Citizenship and Immigration)*, 2009 FC 496, at para 20; *Farkhondehfall v Canada (Citizenship and Immigration)*, 2009 FC 1064, at

para 28 [*Farkhondehfall*]; *Kanyamibwa v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 66, at para 43).

[32] The special advocate system was identified in *Charkaoui* as an example of a less intrusive alternative to reconcile the demands of national security with the procedural protections guaranteed by the *Charter* (*Charkaoui*, at paras 86-87).

[33] In the wake of *Charkaoui*, Parliament made it mandatory to appoint a special advocate in security certificate proceedings. However, in other types of immigration cases, the appointment of special advocates was left to the discretion of the presiding designated judge. In these cases, as the wording of section 87.1 clearly contemplates, a special advocate will only be appointed where the presiding designated judge is of the opinion that considerations of fairness and natural justice require such appointment in order to protect the interest of the applicant (*Farkhondehfall*, at para 29; *Karakachian v Canada (Citizenship and Immigration)*, 2009 FC 948, at para 24 [*Karakachian*]; *Afanasyev v Canada (Citizenship and Immigration)*, 2010 FC 737, at para 24 [*Afanasyev*]).

[34] There is therefore no absolute right to have a special advocate appointed when an *in camera* hearing is requested under section 87 of the Act (*Dhahbi v Canada (Citizenship and Immigration)*, 2009 FC 347, at para 21). By the very wording of section 87, proceedings brought under that provision, which are governed by the procedure outlined in section 83 of the Act applicable to security certificate matters, are explicitly not subject to the obligation to appoint a special advocate.

[35] Although of the utmost importance, the right to know the case to be met is not absolute either. So far, Canadian courts have declined to recognize notice and participation as invariable constitutional norms. The approach to procedural fairness remains, as stated in *Baker*, context-specific (*Baker*, at para 21; *Charkaoui*, at para 57).

[36] The same can be said of the open-court principle which, despite its fundamental nature in our legal system, remains subject to a number of exceptions, national security considerations being one. As the Court pointed out in *Karakachian*, at paragraph 21, "Canadian courts have repeatedly recognized the constitutionality of in camera or ex parte hearings where national security considerations so require." The Applicants correctly point out, however, that these exceptions need to be carefully delineated and assessed on a case by case basis (*Afanasyev*, at para 22).

[37] With these principles in mind, this Court has proceeded to identify a number of factors to consider in determining whether fairness and natural justice require the appointment of a special advocate. These factors include the degree of procedural fairness owed to the applicant, the extent of non-disclosure, the materiality/probity of the information subject to non-disclosure and the applicant's ability to meet the case against him/her (*Farkhondehfall*, at paras 31 to 41; *Jahazi v. Canada (Citizenship and Immigration)*, 2010 FC 242, at para 30 [*Jahazi*]).

[38] It is trite law that the duty of procedural fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected (*Baker*, at para 21; *Farkhondehfall*, at para 33). Again, a number of factors are relevant to determining how much

fairness will be owed in a given case: (i) the nature of the decision being made and the process followed in making it; (ii) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (iii) the importance of the decision to the individual affected; (iv) the legitimate expectations of the person challenging the decision; (v) and the choices of procedure made by the agency itself (*Baker*, at paras 23-27).

[39] So far, this Court, when called upon to determine whether considerations of fairness and natural justice require the appointment of a special advocate in the context of a motion brought under section 87 of the Act in cases where the underlying decision being challenged is, as is the case here, that of a visa officer rejecting an application for permanent residence submitted outside Canada, has always held that the duty of fairness owed to the person affected by such a decision is at the lower end of the spectrum (*Karakachian*, at para 26).

[40] This is generally so because:

a) The person affected - a non-citizen - has no right to enter or remain in Canada;

b) Contrary to what is the case of individuals named in security certificates, that person is not facing detention or removal;

c) The consequences for that person of the decision dismissing his/her permanent residence application, although they may be serious, do not engage his/her *Charter* rights; and

d) Decisions made by visa officers granting or rejecting an application for permanent residence submitted abroad are highly discretionary.

(*Jahazi*, at para 32)

[41] As indicated previously, the Applicants submit that this approach to the *Baker* factors is incorrect as it fails to take into account the appropriate context within which to measure the duty of procedural fairness owed to foreign nationals facing an application for non-disclosure pursuant to section 87 of the Act. They claim that the *Baker* factors must be situated within the regime Parliament created for the discretionary appointment of special advocates under section 87.1, which, in their view, signals a clear intention that a special advocate be available to foreign nationals in the Applicants' position and entails the exercise of judicial, as opposed to quasi-judicial or administrative, discretion. In other words, what matters is the context leading to the decisions to be made under sections 87 and 87.1, not the one leading to the decision denying the permanent residence application. That context, the argument goes, calls for a high level of procedural protection because of the judicial nature of the decisions to be rendered. I understand the argument to mean that the appointment of a special advocate in a section 87 motion context should be the norm, and non-appointment the exception.

[42] Accepting this submission would mean that I would deviate from prior decisions of this Court on this issue, something the principle of judicial comity discourages in order to prevent the creation of conflicting lines of jurisprudence and promote, as a result, certainty in the law (*Apotex Inc. v Allergan Inc*., 2012 FCA 308, at paras 43-48 [*Apotex*]; *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952, at paras 42-45 [*Alyafi*]). As applied by this Court, this principle is to the effect that the conclusions of law reached by a judge "will not be departed from by another judge unless he or she is convinced that the departure is necessary and can articulate cogent reasons for doing so" (*Apotex*, at para 48). Departure may be deemed necessary

when the judge is convinced that the decision of the other judge is wrong (*Apotex*, at para 47; *Alyafi*, at para 44).

[43] Here, I respectfully see no reason to depart from what has been so far, for this Court, a clear and non-conflicting line of authority. My understanding of the appropriate context that must inform the assessment of the *Baker* factors in a situation like the present one differs from that of the Applicants. First, the Applicants' contention that Parliament clearly intended that a special advocate be available to foreign nationals in their position needs to be nuanced. As I pointed out earlier, Parliament has expressly removed the obligation to appoint a special advocate (and to provide a summary of the non-disclosed information) in the context of motions brought under section 87 of the Act. This means that, as a general rule, such motions will be considered without the participation of a special advocate. As we have seen, such participation can only occur in instances where a designated judge of this Court is of the opinion that considerations of fairness and natural justice require the appointment of a special advocate so as to protect the interests of the applicant. This signals, in my view, a less generous approach to participatory rights than the one put forward by the Applicants.

[44] Second, the discretion conferred on the Court by section 87.1 is aimed at protecting the interests of the permanent resident or foreign national. This can only be, ultimately, the applicant's interests in the outcome of the underlying judicial review proceeding and in his/her ability to meet the case against him/her in this respect. When, as here, the case to meet involves procedural fairness issues and concerns the rejection of an application for permanent residence submitted abroad, the proper context is one where, as determined by the Federal Court of Appeal

in *Canada (Citizenship and Immigration) v Khan*, 2001 FCA 345, at para 31, the duty of fairness owed to the foreign national is at the low end of the spectrum. This is, no doubt, a relevant contextual consideration as it is informative of the nature and importance of the rights at stake.

[45] Such consideration is not ousted simply because the Court is called upon to decide, as an interlocutory matter to the underlying main proceeding, whether some information in the case should be withheld from disclosure and whether, in so deciding, the appointment of a special advocate is required in order to protect the interests of the applicant. In such instances, the participatory rights of the applicant, as we have seen, are precisely curtailed: they are not established as a statutory right, contrary to what the Act provides for security certificate proceedings, they are left to the discretion of the Court, and they are very much dependent on the nature and context of the underlying judicial review application.

[46] The Applicants further claim that the *Baker* factors militate in favor of a broader content of procedural fairness because their *Charter* rights are potentially engaged by the fact the First Interview may have been a pretext allowing foreign state agents to interview Mr. Mohammed under the guise of gathering information as part of his application for permanent residence. This is a real possibility, they contend, because of Mr. Mohammed's status as a former Guantanamo Bay detainee.

[47] Having reviewed the notes of the First Interview, I can only say that this apprehension is unfounded.

[48] The Applicants also contend that the Rule 14 Order created a legitimate expectation that someone would be allowed to stand in the place of their counsel and advocate for their interests in disclosure in the Section 87 Motion so as to preserve the rule of law and the interests of justice. On the surface, one could say that the Rule 14 Order did indeed create a legitimate expectation that the Notes would be made available to the Court and the Applicants. However, in the immigration context, that Order was only one step in the judicial process that could lead to the disclosure of these notes given the national security considerations at play.

[49] Although it is unfortunate that the Section 87 Motion was not brought earlier in the process, it is properly before the Court and poses the important question of whether the Rule 14 Order can be enforced in light of these considerations. Any legitimate expectation arising from that Order must therefore be tempered by the possibility that a motion under section 87 of the Act be brought in order to protect the Notes from disclosure. The Applicants, as was the Motion Judge, were made aware of that inevitable possibility when the Respondent filed its motion for reconsideration. Not being a designated judge, the Motion Judge had no authority to pursue the matter further and deal with that aspect of the Applicants' request for disclosure of the Notes, which is very much part of the regime set out by Parliament for the processing of judicial review proceedings initiated under the Act.

[50] In other words, rule 14 of the CIRP Rules cannot be read and applied in isolation. The Rule 14 Order was therefore not the end of the road leading to the disclosure or non-disclosure of the impugned interview notes. The Applicants knew - or ought to have known - this. I therefore

fail to see how that Order could reasonably have created a reasonable expectation that the Notes would be disclosed or that a special advocate would be appointed.

[51] In sum, I see no reason to depart from this Court's jurisprudence applying the *Baker* factors to requests for the appointment of a special advocate made by failed permanent residence applicants residing abroad in the context of motions brought under section 87 of the Act. In other words, I do not accept the expanded application of these factors to the case at hand, as advocated by the Applicants.

[52] This brings me to the other factors set out by the Court in considering a request made under section 87.1 of the Act. As I have already indicated, these factors are the extent of non-disclosure, the materiality/probity of the information subject to non-disclosure and the applicant's ability to meet the case against him/her. The Court, in *Farkhondehfall*, pointed out that not one of these factors will necessarily be determinative, the Court's task being "to balance all of the competing considerations in order to arrive at a just result" (*Farkhondehfall*, at para 31).

[53] The Applicants claim that compared to the other cases where the Court has declined to appoint a special advocate under section 87.1 because the redacted information was minimal or insignificant, the non-disclosure in this case is far more significant and extensive. In *Jahazi*, Justice Yves de Montigny, now a judge of the Federal Court of Appeal, reminded that the extent of non-disclosure was not merely a quantitative exercise but also required the significance of the redacted information to be taken into account.

[54] Here, I note that this factor can hardly be assessed from a quantitative standpoint as we are at the leave stage of the Applicants' judicial review proceedings. As such, the Court does not have before it, contrary to what was the case in all the other cases where the Court was seized of concurrent sections 87 and 87.1 motions, the Certified Tribunal Record [the CTR] which, according to rule 17 of the CIRP Rules will have to be filed by the "Tribunal" once leave is granted. The CTR is comprised, among other things, of "all papers relevant to the matter that are in the possession or control of the tribunal" and of "any affidavits, or other documents filed during any such hearing." For example, the open source information relied upon by the Visa Officer in making her decision, which was disclosed to the Applicants pursuant to the Rule 14 Order, would presumably be part of the CTR and would account for 70 pages of that record.

[55] From a significance standpoint, Mr. Mohammed admits that the same topics were discussed at both the First and Second Interviews. In the affidavit he signed in response to the section 87 Motion, Mr. Mohammed offers a detailed account of his recollection of the First Interview. Therefore, this is not a case where an applicant ignores the information which is being refused to him, but rather ignores its possible interpretation. In *Karakachian*, Justice de Montigny held that such a situation "[did] not strike [him] as a valid ground for appointing a special advocate" (*Karakachian*, at para 27). I respectfully agree with Justice de Montigny all the more so that in the present case, the Visa Officer did not consider the Notes in making her decision and that the Respondent does not intend to rely on them to defend that decision.

[56] For the same reasons, I find that the materiality/probity of the information subject to non-disclosure does not require appointing a special advocate. When the Rule 14 Order and the Order

dismissing the Respondent's motion for reconsideration are read together, it appears to me that the Motion Judge, despite evidence that the Notes were neither before the Visa Officer nor considered by her in rendering her decision, took a broad view of relevancy so as to leave the final word on this issue to the leave judge. This, I believe, is what she meant when she wrote in her Order denying the motion for reconsideration that the Respondent would have the opportunity to address its "relevancy arguments" at the "hearing of the Application," which, in the immigration context, can only be a reference to the leave stage of the application.

[57] Not having been seen or considered by the Visa Officer when she made her decision and the Respondent having indicated that it does not intend to rely on them to defend that decision, the Notes, although "relevant" in the sense that they relate to an interview that was held in the course of the processing of Mr. Mohammed's permanent residence application, can hardly be characterized as being "material," that is as permitting, in such context, the quashing of the decision (*Yadav v Canada (Citizenship and Immigration)*, 2010 FC 140 at para 37; see also *El Dor v Canada (Citizenship and Immigration)*, 2015 FC 1406; *Aryaie v Canada (Citizenship and Immigration)*, 2013 FC 469 at paras 23-27).

[58] The Applicants insist that the Notes are material to the question of whether their *Charter* rights are engaged. As I already indicated, this argument is based on an apprehension which has no basis in the facts of this case.

[59] Finally, I am satisfied that the non-disclosure of the Notes, should the Section 87 Motion be granted, would not prevent the Applicants from availing themselves of all means against the

impugned decision. As the Respondent correctly points out, they are quite aware of the reasons why Mr. Mohammed was found inadmissible for being a member of a terrorist organization. Both the Visa Officer's decision letter and the notes of the Second Interview show the basis of the Visa Officer's inadmissibility concerns regarding Mr. Mohammed's membership in a terrorist organization. They indicate that Mr. Mohammed stated that he went to Afghanistan and ended up living three months with a group of individuals who were fighting for the political objective of the independence of Turkistan; that the group was armed and that he saw Kalashnikovs in the cave where he lived with his group; that this group was maybe named ETIM by the American authorities; that he shared the group's political vision and lived and travelled with the group for three months.

[60] The Visa Officer's credibility concerns are also cogently expressed and detailed in the decision letter as well as in the notes of the Second Interview.

[61] In other words, I am satisfied that the Applicants have had access so far to the gist of the information on which the Visa Officer relied to deny Mr. Mohammed a permanent resident visa. This, in my view, allows them to meet the case against them (*Karakachian*, at para 28). I believe it is also important to underscore that, at this stage of their judicial review proceeding, the Applicants only need to show that their challenge of the Visa Officer's decision raises a fairly arguable case. The Applicants' ability to meet the case against them must therefore be measured against a significantly lower threshold than the one applicable once leave is granted. The combined effect of these considerations does not support, in my view, the claim for the appointment of a special advocate in the circumstances of this case.

[62] Being satisfied that no injustice will result to the Applicants, I find that the appointment of a special advocate is not required to ensure procedural fairness before this Court.

[63] The Section 87 Motion itself will be dealt with in a separate Order.

THIS COURT ORDERS that the Applicants' motion for the appointment of a special advocate is dismissed.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4072-16
STYLE OF CAUSE:	AIERKEN MALIKAIMU, AYOOB HAJI MOHAMMED v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

MOTION HELD VIA TELECONFERENCE ON SEPTEMBER 26, 2017 BETWEEN OTTAWA AND TORONTO, ONTARIO

ORDER AND REASONS ON THE MOTION FOR THE APPOINTMENT OF A SPECIAL ADVOCATE:	LEBLANC J.
DATED:	NOVEMBER 9, 2017

APPEARANCES:

Prasanna Balasundaram	FOR THE APPLICANTS
John Loncar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services University of Toronto, Faculty of Law Toronto, Ontario	FOR THE APPLICANTS
Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT