Federal Court  Cour fédérale

Date: 20190917

Docket: T-1094-18

Citation: 2019 FC 1177

Ottawa, Ontario, September 17, 2019

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH

Applicant

and

THE ATTORNEY GENERAL OF CANADA AND NUR CHOWDHURY

Respondents

JUDGMENT AND REASONS

I. Overview

[1] In 1996, Mr Nur Chowdhury and his wife, citizens of Bangladesh, were granted visitor status in Canada. Soon thereafter, they applied for refugee protection.

[2] Meanwhile, in Bangladesh, Mr Chowdhury was tried and convicted in 1998 *in absentia* as a co-conspirator in the 1975 coup that resulted in the death of President Sheikh Mujibur

Rahman and his family. President Rahman is considered by many to be the Father of the Bangladeshi nation.

[3] In 2002, Mr Chowdhury and his wife were found to be excluded from refugee protection for having committed a serious non-political crime. Then, in 2006, they were found to be inadmissible to Canada for serious criminality.

[4] In 2009, Mr Chowdhury requested a pre-removal risk assessment (PRRA).

[5] Since 2010, Bangladesh has been in discussions with Canadian officials about Mr Chowdhury's status in Canada and has expressed concern about the delay relating to Mr Chowdhury's PRRA application. In 2018, the High Commissioner of Bangladesh wrote to the Minister of Immigration, Refugees and Citizenship requesting that he invoke his powers under s 8(2)(m)(i) of the *Privacy Act*, RSC 1985, P-21, to disclose, in the public interest, information about the status of Mr Chowdhury's PRRA application and his immigration status in Canada.

[6] The Minister refused the High Commissioner's request on the basis that the requirements of s 8(2)(m)(i) had not been met, and that there was no information-sharing agreement between Bangladesh and Canada. The High Commissioner sought to achieve a limited information-sharing agreement with Canada, but the Minister refused.

[7] Bangladesh now seeks judicial review of the Minister's decision to refuse to disclose the status of Mr Chowdhury's PRRA application. Bangladesh argues that the Minister applied the

wrong test. In particular, Bangladesh maintains that the Minister failed to consider the public interest in disclosure. In addition, Bangladesh submits that the Minister's reasons for refusing its request were inadequate.

[8] In response, the Minister, along with Mr Chowdhury, submits that Bangladesh's request is premature and non-justiciable. Further, the Minister says that the decision and reasons were clear, and adequately accounted for the public interests at stake.

[9] In my view, Bangladesh's application for judicial review should be allowed because the Minister failed to give serious consideration to the public interest that would be served if the information sought were disclosed.

[10] There are four issues:

1. Is the application for judicial review premature?
2. Should portions of the affidavits filed by Bangladesh be struck?
3. Is this matter justiciable?
4. Was the Minister's decision unreasonable?

II. Issue One – Is the application for judicial review premature?

[11] The Minister and Mr Chowdhury argue that Bangladesh's failure to file a complaint with the Privacy Commissioner bars its application for judicial review in this Court. They say that it would be open to Bangladesh to seek a judicial remedy later in the process if its complaint to the Commissioner were unsuccessful.

[12] I disagree. There is no requirement that the Privacy Commissioner conduct an investigation before judicial review can be sought. The situation is different where information is sought under s 12 of the *Privacy Act*; there, judicial review is available only after an investigation by the Commissioner. But here, the request was made under s 8(2)(m)(i) and there is no similar requirement for an investigation prior to making an application for judicial review.

[13] Further, the availability of a non-binding investigation by the Commissioner is not an effective alternative remedy to judicial review (*Canada (Syndicat des agents correctionnels) c Canada (Procureur Général)*, 2019 CAF 212 at para 37).

III. Issue Two – Should portions of the affidavits filed by Bangladesh be struck?

[14] The Minister submits that much of the affidavit evidence filed by Bangladesh is of little relevance and was not before the Minister when he rendered his decision. Therefore, that evidence should be struck.

[15] I agree that evidence not before the Minister is not relevant to this application for judicial review. Therefore, I have not considered it.

IV. Issue Three – Is this matter justiciable?

[16] The Minister submits that Canada's communications with foreign states are conducted pursuant to the Crown's prerogative relating to foreign relations and not subject to judicial review unless they affect individual rights (*Black v Canada*, (2001) 54 OR (3d) 215 at paras 47-51 (ONCA)).

[17] Mr Chowdhury maintains that Bangladesh has no standing to make the request because it is not an individual under s 12 of the *Privacy Act* and is not a signatory to an information-sharing agreement with Canada as recognized under s 8(2)(*f*) of the Act.

[18] I disagree both with the Minister and Mr Chowdhury. Bangladesh specifically requested the Minister to act in accordance with s 8(2)(m)(i) of the *Privacy Act* for which there is no exemption for the Royal Prerogative. It is only where a question is purely political and lacks a sufficient legal component that the Court should decline to answer it (*Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545), which is not the case here.

[19] The Minister's decision was not purely political, or primarily within the ambit of foreign affairs. It was simply the product of an interpretation of a federal statute, and is therefore justiciable.

V. Issue Four – Was the Minister's decision unreasonable?

[20] The Minister and Mr Chowdhury submit that the Minister's decision was reasonable because there was simply no public interest that would justify disclosure of the requested information. They say that disclosure of the kind of personal information sought by Bangladesh would be exceptional (*Canada (Minister of Public Safety and Emergency Preparedness) v Kahlon*, 2005 FC 1000 at para 36).

[21] Further, the Minister and Mr Chowdhury argue that the request by Bangladesh was merely an informal inquiry not requiring a formal response. Further, they say that Bangladesh failed to articulate what public interest would be served by disclosing the information it sought.

[22] In addition, the Minister and Mr Chowdhury submit that there is an important privacy interest in information relating to a PRRA application. Only where the expectation of privacy of the individual involved is minimal or inconsequential should it be disclosed.

[23] Finally, the Minister and Mr Chowdhury maintain that the Minister provided adequate reasons for refusing to disclose the requested information, and he provided an example of where the public interest might outweigh privacy concerns (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at paras 51-55).

[24] I cannot agree with the submissions of the Minister and Mr Chowdhury. While the Minister stated the correct test, he either did not apply that test or failed to explain how he was applying it.

[25] I would first point out that the request from Bangladesh was actually characterized and treated as a formal request.

[26] The Minister stated the test as requiring that the public interest clearly outweigh any invasion of privacy. He went on: "the rationale for disclosure must clearly demonstrate that the public interest is such that the expectation of privacy on the part of the individual is minimal or inconsequential." This test amounts to a weighing of the public interest against privacy concerns.

[27] Bangladesh stated that disclosure would enable it to seek legal advice in respect of Mr Chowdhury's case. It also maintained that disclosure would further the relationship between

Canada and Bangladesh. Finally, Bangladesh observed that the people of Canada and Bangladesh would be well-served by ensuring that convicted criminals are not allowed to live freely.

[28] None of those factors was mentioned by the Minister. In the departmental advice the Minister received and apparently relied on, the sole consideration was the fact that Mr Chowdhury might be harmed by the disclosure and that the consequences could be severe. That is obviously a relevant and important factor, but it is not the only one. That factor must be weighed against the public interest in disclosure.

[29] It appears, therefore, that the Minister failed to balance the applicable considerations. Alternatively, the Minister's reasons are deficient for failing to mention the appropriate criteria (*Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at paras 119-123,141-144).

VI. Conclusion and Disposition

[30] The Minister did not apply the proper test in deciding whether to disclose the information Bangladesh requested. Alternatively, the Minister's reasons are inadequate for failing to address the relevant criteria.

[31] I must, therefore, allow this application for judicial review and remit the decision back to the Minister for redetermination, with costs.

JUDGMENT IN T-1094-18

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, with costs.

"James W. O'Reilly"
Judge

Annex

Privacy Act, RSC 1985, P-21	***Loi sur la protection des renseignements personnels***, LRC (1985) ch P-21
Where personal information may be disclosed	Cas d'autorisation
8 (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	**8 (2)** Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
…	[…]
(f) under an agreement or arrangement between the Government of Canada or any of its institutions and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation as defined in subsection 2(1) of the First Nations Jurisdiction over Education in British Columbia Act, the council of a participating First Nation as defined in section 2 of the Anishinabek Nation Education Agreement Act, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or	**f)** communication aux termes d'accords ou d'ententes conclus d'une part entre le gouvernement du Canada ou l'un de ses organismes et, d'autre part, le gouvernement d'une province ou d'un État étranger, une organisation internationale d'États ou de gouvernements, le conseil de la première nation de Westbank, le conseil de la première nation participante — au sens du paragraphe 2(1) de la Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique —, le conseil de la première nation participante — au sens de l'article 2 de la Loi sur l'accord en matière d'éducation conclu avec la Nation des Anishinabes — ou l'un de leurs organismes, en vue de

enforcing any law or carrying out a lawful investigation;

l'application des lois ou pour la tenue d'enquêtes licites;

…

[…]

(m) for any purpose where, in the opinion of the head of the institution,

m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure …

(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée, …

Right of access

Droit d'accès

12 (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act has a right to and shall, on request, be given access to:

12 (1) Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés ont le droit de se faire communiquer sur demande :

(a) any personal information about the individual contained in a personal information bank; and

a) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels;

(b) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably

b) les autres renseignements personnels le concernant et relevant d'une institution fédérale, dans la mesure où il peut fournir sur leur localisation des indications suffisamment précises pour que l'institution fédérale puisse les retrouver sans

retrievable by the government institution.

problèmes sérieux

Other rights relating to personal information

Autres droits

(2) Every individual who is given access under paragraph (1)(a) to personal information that has been used, is being used or is available for use for an administrative purpose is entitled to

(2) Tout individu qui reçoit communication, en vertu de l'alinéa (1)a), de renseignements personnels qui ont été, sont ou peuvent être utilisés à des fins administratives, a le droit :

(a) request correction of the personal information where the individual believes there is an error or omission therein;

a) de demander la correction des renseignements personnels le concernant qui, selon lui, sont erronés ou incomplets;

(b) require that a notation be attached to the information reflecting any correction requested but not made; and

b) d'exiger, s'il y a lieu, qu'il soit fait mention des corrections qui ont été demandées mais non effectuées;

(c) require that any person or body to whom that information has been disclosed for use for an administrative purpose within two years prior to the time a correction is requested or a notation is required under this subsection in respect of that information

c) d'exiger :

(i) be notified of the correction or notation, and

(i) que toute personne ou tout organisme à qui ces renseignements ont été communiqués pour servir à des fins administratives dans les deux ans précédant la demande de correction ou de mention des

corrections non effectuées soient avisés de la correction ou de la mention,

(ii) where the disclosure is to a government institution, the institution make the correction or notation on any copy of the information under its control.

(ii) que l'organisme, s'il s'agit d'une institution fédérale, effectue la correction ou porte la mention sur toute copie de document contenant les renseignements qui relèvent de lui.

Extension of right of access by order

(3) The Governor in Council may, by order, extend the right to be given access to personal information under subsection (1) to include individuals not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

Extension par décret

(3) Le gouverneur en conseil peut, par décret, étendre, conditionnellement ou non, le droit d'accès visé au paragraphe (1) à des individus autres que ceux qui y sont mentionnés.

FEDERAL COURT

SOLICITORS OF RECORD

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