

Federal Court



Cour fédérale

Date: 20200226

Docket: T-479-18

Citation: 2020 FC 308

Ottawa, Ontario, February 26, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

AYAN ABDIRAHMAN JAMA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. INTRODUCTION

[1] The Court is being asked by the Respondent to make an advance ruling striking the affidavit of Mr. Navaid Aziz, an expert on counter-radicalization and counter-terrorism in Canada, filed by the Applicant, on January 31, 2020, in support of her judicial review application [Underlying Application] challenging the decision of a delegate of the Minister of Public Safety and Emergency Preparedness [Delegate], dated February 5, 2018, not to issue her a passport

pursuant to section 10.1 of the *Canadian Passport Order*, SI/81-86 [CPO] and to refuse her the delivery of passport services pursuant to section 10.2(2) of the CPO for a 4-year period beginning on December 31, 2015, which is the date the Applicant filed her passport renewal application. The Delegate's decision was made on the basis that it was necessary to prevent the commission of a terrorist offence, or for the national security of Canada or of a foreign country or state.

[2] As a general rule, judicial review focusses on the impugned decision itself and is based on the material that was before the administrative decision-maker. In other words, the record before the Court on judicial review is normally restricted to the evidentiary record before the decision-maker. Therefore, evidence that was not before the decision-maker and that goes to the merits of the matter before it is inadmissible on judicial review (*Assn of Universities & Colleges v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Access Copyright*] at para 19; *Morton v Canada (Minister of Fisheries and Oceans)*, 2015 FC 575 at para 36; *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 85-87 and 97).

[3] This jurisprudential rule reflects “the different roles played by judicial review courts and the administrative decision-makers they review” (*Access Copyright* at para 14), a difference which has been recently reemphasized by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 13-14 and 24-28. As the Federal Court of Appeal stated in *Access Copyright*, because of this demarcation in roles between the

reviewing court and the administrative decision-maker, the reviewing court “cannot allow itself to become a forum for fact-finding on the merits of the matter” (*Access Copyright* at para 19).

[4] There are three recognized exceptions to this general rule. Hence, evidence that (i) provides general background in circumstances where that information might assist the reviewing court in understanding the issues relevant to the judicial review; (ii) supports an argument going to procedural fairness; or (iii) highlights the complete absence of evidence before the decision-maker when it made a particular finding, may be received by the reviewing court (*Access Copyright* at para 20).

[5] However, these exceptions are only available where the receipt of evidence by the reviewing court “is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker [...]” (*Access Copyright* at para 20). With respect to the general background exception in particular, the Federal Court of Appeal has cautioned against receiving evidence that goes “further” and is “relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider” (*Access Copyright* at para 20).

[6] Mr. Aziz’s affidavit, which is dated January 29, 2020, and which, including its annexes, totals close to 750 pages, deals with the following three matters:

- a. The meaning, in Islam, of the term *shaheed* (paras 22 to 28 to the Aziz Affidavit);

- b. The profile of Muslims from the West who adopt radical, apocalyptic Islamic worldviews, and travel abroad to support terrorist organizations like Islamic State [IS], Al-Shabaab [AS], and other groups (paras 29 to 41 to the Aziz Affidavit); and
- c. The methods for determining whether Muslim returnees from abroad who have lived in territories controlled by terrorist organizations like IS, AS and other groups pose a threat to national security (paras 42 to 48 to the Aziz Affidavit).

[7] The Applicant claims that Mr. Aziz's evidence falls under both the general background and procedural fairness exceptions to the general rule regarding the inadmissibility of fresh evidence on judicial review. The Respondent asserts that none of these exceptions apply in this case. According to the Respondent, Mr. Aziz's evidence goes to the ultimate question before the Court, which is whether judicial review should be granted with respect to the Delegate's decision, and amounts to an attempt by the Applicant, to supplement the record that was before the Delegate.

II. PROCEDURAL HISTORY

[8] On June 21, 2019, I released a Public Top Secret Order and Reasons (*Jama v Canada (Attorney General)*, 2019 FC 533 [Disclosure Order]) which dealt with the validity of the redactions made by the Respondent, on national security grounds, to the Certified Tribunal Record [CTR] it filed with the Court. It also dealt with the summaries, if any, of the evidence and other information the Respondent made available to me, in my capacities as the Designated Judge assigned to this case, which ought to be provided to the Applicant, so as to enable her to

be reasonably informed of the reasons for the Delegate's decision. The Disclosure Order offers the following description of this case's procedural history:

A. *The Passport Application and the Impugned Decision*

[6] The Applicant was born in Mogadishu, Somalia, in March 1989. She is a Canadian citizen.

[7] On or about December 31, 2015, the Applicant submitted a passport application in her name with the Edmonton Passport Program Office of the Department of Immigration, Refugees and Citizenship of Canada [Passport Program]. On January 4, 2016, she was notified that her passport application would undergo a secondary security screening review.

[8] In May 2016, the Applicant filed proceedings with this Court seeking a writ of mandamus to compel the Passport Program to render a decision on her passport application. In September 2016, the Passport Program informed the Applicant that it had developed a new review process for passport applications filed by individuals who, like her, are subject to secondary screening. The Applicant agreed to participate in this new review process and to discontinue, as a result, her legal proceedings.

[9] The stages of this new review process were set out in a letter to the Applicant dated September 14, 2016. Under that process, the Applicant was to be provided with an unclassified summary of the information available to the Delegate so that she may be reasonably informed of the case on which the refusal to issue her a passport may be based. Upon receipt of the summary, the Applicant would have an opportunity to provide any information in support of the application, or refute the information contained in said summary. The letter indicated that the Minister or his delegate would then make a decision on the Applicant's application based on the information before him, including any information the Applicant may have provided. The Applicant would then be informed of the Minister's decision or that of his delegate by the Passport Program.

[10] In a letter dated February 1, 2017, the Applicant was provided with an unclassified summary of the information supporting a possible refusal of her passport application [Fairness Letter]. That summary reads as follows:

- Ms. JAMA has maintained associations with individuals of concern to national security and has

facilitated extremist activities. Ms. JAMA is associated with an entity listed pursuant to subsection 83.05(1) of the Criminal Code, Al Shabaab (AS).

- Government records indicate that Ms. JAMA left Toronto in 2010 to go to Somalia to visit family. Ms. JAMA lived with her husband (Mohamed SAKR) in an AS-controlled area in Mogadishu, Somalia; her husband would speak about AS because of where they lived. However, Ms. JAMA claimed that neither she nor her husband were involved with AS. As of mid-2012, Ms. JAMA was mourning the death of her husband who had died a few months earlier. Sakr was killed by a drone attack in Somalia in February 2012. Sakr, identified as a senior figure in AS, had been stripped of his British citizenship by UK authorities on national security grounds.
- Ms. JAMA was arrested by Northern Somalian Police (Somaliland Police) in July 2011; her belongings were confiscated and she was deported. Ms. JAMA transited via the UK where she was briefly detained by UK authorities and deported to Canada on July 15, 2011.
- Government records indicate that Ms. JAMA was deported from Somaliland. Somaliland authorities seized various electronic devices from Ms. JAMA. During a meeting with a Canadian agency in 2011, Ms. JAMA revealed that she was married, and discussed the will that she had written to her husband. When discussing her declaration of being a ‘shaheed’ (martyr) as noted in her will, Ms. JAMA said that she wanted to be a martyr like a good Muslim, and explained that in Islam those who die as martyrs are accorded a special place in heaven. Ms. JAMA added that she did not intend to harm herself or others.
- Media reporting also indicates that Ms. JAMA was arrested by the police in Hargeysa (Somaliland), on July 15, 2011, and that Ms. JAMA was an AS member based on the information found in her laptop. Additional media reporting, also in

relation to the arrest of Ms. JAMA, identified her as a senior member of AS.

- In addition to the foregoing information, Public Safety Canada relies on classified information. This information, which further illustrates Ms. JAMA's support for AS, as well as her desire to be a martyr, cannot be released as its disclosure would be injurious to international relations and/or national defence and/or national security.

[11] The Applicant, through her counsel, responded to the unclassified summary on March 4, 2017, addressing the allegations contained therein. In a letter dated June 1, 2017, the Applicant was notified that based on the current information, including the information she had provided to date, Public Safety Canada officials were not convinced that she had abandoned her association with individuals of concern for national security or had ceased to facilitate extremist activities, and were prepared, therefore, to recommend to the Minister that her passport application be denied. She was also notified that prior to any recommendation being made, she would be provided with a second opportunity to submit information to address the officials' concerns [Pre-Recommendation Letter].

[12] On June 29, 2017, the Applicant responded to the Pre-Recommendation Letter, outlining, for the most part, how not having a passport and being denied her passport application had negatively affected her.

[13] As indicated at the outset of these Reasons, the Applicant was informed of the Delegate's decision to not issue a passport in her name pursuant to section 10.1 of the CPO and to impose on her a period during which passport services would be refused to her for four years as per subsection 10.2(2) of the CPO, by way of a letter dated February 8, 2018.

B. Procedural History

[14] The present judicial review proceedings were filed on March 13, 2018. The Applicant is seeking the following substantive reliefs:

- a. An Order for a writ of certiorari and for a writ of mandamus quashing the Minister's decision to refuse to issue the Applicant a passport in her

name and directing the Passport Program to issue said passport; and

b. An Order declaring that the Minister's decision is ultra vires and invalid, as it unreasonably infringes upon the Applicant's rights, including her statutory, procedural and Charter rights.

[15] On April 13, 2018, it was ordered that the present matter proceed as a specially managed proceeding. On April 30, 2018, Justice Simon Noël was assigned as case management judge to this case.

[16] A first case management conference was held by Justice Noël on May 8, 2018, with counsel for the Applicant and Counsel for the Attorney General attending. Further to said case management conference, Justice Noël issued an order setting out a timetable for the filing of redacted and unredacted copies of the CTR, as well as a classified affidavit explaining the basis for the redactions to the CTR, and a public affidavit explaining the nature of these redactions in a manner that would not injure national security or endanger the safety of any person.

[17] The unredacted version of the CTR was to be filed with the Court's Designated Registry [DES Registry] and "clearly identify the information that the Respondent asserts, pursuant to s. 6(2)(a) of the PTTA, could be injurious to national security or endanger the safety of any person, if disclosed". It was not to form part of the public Court file. The redacted version of the CTR was to clearly identify the redacted portions and was to be provided to the Applicant and form part of the public Court file. The classified affidavit was to be filed with the DES Registry and the public affidavit was to be provided to the Applicant and form part of the public Court file.

[18] On July 12, 2018, to a further case management conference held on June 6, 2018, with counsel for the Applicant and counsel for the Attorney General attending, Justice Noël appointed Mr. Colin Baxter as amicus curiae [Amicus] in this matter and set out the terms of his appointment. Justice Noël also advised that the Chief Justice would be assigning a Designated Judge "to deal with all further matters".

[19] On July 30, 2018, as the Designated Judge assigned to this case, I held a case management conference with counsel for the Applicant, counsel for the Attorney General and the Amicus. At said case management conference, the dates of October 30 and 31,

2018, were set aside as tentative dates for an in camera, ex parte hearing where the Minister's claim that the disclosure of the redacted portions of the CTR would be injurious to national security or endanger the safety of any person would be assessed by the Court with the assistance of the Amicus.

[20] Said in camera, ex parte hearing was held, as originally contemplated, on October 30 and 31, 2018, with counsel for the Attorney General and the Amicus attending. A public summary of that hearing was placed on the case's public record and communicated to counsel, including counsel for the Applicant, on November 5, 2018. It reads as follows:

The Court, (LeBlanc, J.) issued an oral direction today (November 5, 2018) asking that the summary found below be communicated to all Counsel of Record and be placed on the public record of the above cited matter.

Summary

“The Court held ex parte in camera hearings in this matter on October 30 and 31, 2018.

Ms. Barrett-Morris and Mr. Seguin appeared for the Attorney General of Canada, and Mr. Baxter appeared as amicus.

The Attorney General called a witness from CSIS who gave evidence regarding the redactions to the CTR and why disclosure would, in the witness's opinion, injure national security or endanger the safety of any person. The witness gave evidence on both days and was cross-examined by Mr. Baxter and questioned by the Court.

During the hearing, the Attorney General consented to remove some redactions from the CTR.

Regarding summaries, the amicus will provide proposed summaries to the Court and to the Attorney General by November 2, 2018, to which the Attorney General will respond, though counsel are not prevented from engaging in informal discussions amongst themselves to reach agreement on summaries.

Counsel will also provide written submissions in advance of an oral ex-parte, in camera hearing to be held to hear oral submissions from counsel for the Attorney General of Canada and the amicus. The date for the filing of submissions and the hearing will be determined later by the Court, based on the availability of the hearing transcripts, and subject to the schedule of the Court and counsel. Submissions will address the following matters that the Court is required to decide in this judicial review pursuant to the Prevention of Terrorist Travel Act (PTTA):

- (1) Would disclosure of the redacted information in the CTR injure national security or endanger the safety of any person? Can additional redactions, beyond those already proposed by the Attorney General, be lifted from the CTR? See s. 6(2)(b) of the PTTA
- (2) In discharging its judicial duty, is the Court required to perform a legal balancing test between reasonably informing the Applicant of the case to meet and the requirement to prevent disclosing information that would injure national security or endanger the safety of any person? If not, what is the appropriate legal test under the PTTA?
- (3) To ensure that the Applicant is reasonably informed of the reasons for the Minister's decisions, what summaries can be provided that would not injure national security or endanger the safety of any person? See s. 6(2)(c) of the PTTA

Counsel for the Applicant is permitted to file with the Court, and serve on counsel for the Attorney General of Canada, and the amicus, written submissions on issue 2, above. The date for the filing and service of these submissions will be determined later by the Court, along with the date for the filing of the submissions from counsel for the Attorney General of Canada and the amicus referred to above.”

[...]

[21] Dates for the filing and service of written submissions by the parties and the Amicus on issues #1, #2 and #3, as set out in said public summary, and dates for conducting a public hearing and an in camera, ex parte hearing to hear oral submissions on those issues, were discussed at a case management conference held on December 6, 2018, with counsel for the Applicant, counsel for the Attorney General and the Amicus attending.

[22] The public hearing on issue #2 was held on February 4, 2019, by way of videoconference, with counsel for the Applicant, counsel for the Attorney General and the Amicus attending. The in camera, ex parte hearing regarding issues #1 and #3 was held on February 7, 2019, in a secure courtroom, with counsel for the Attorney General and the Amicus attending. Both parties, as well as the Amicus, filed public written submissions in advance of the February 4 hearing. The Attorney General and the Amicus also filed classified written submissions on issues #1 and #3 for the purposes of the February 7 hearing.

[9] The Disclosure Order ordered that some of the redacted information in the CTR be lifted and that the following summaries be disclosed to the Applicant:

- a. She is believed to use a number of aliases, including name variances on those aliases;
- b. She left Canada for Somalia in 2010 to join AS;
- c. In September 2011, she attempted to return to East Africa;
- d. She maintained contact with individuals associated with AS;
- e. She has indicated a desire to attain martyrdom in countries outside Canada;
- f. Materials found in her files and possessions in Hargeysa in 2011, including her will and other electronic files, indicates an ability to undertake threat-related activities, consistent with her desire to become a martyr;
- g. She was/is a senior member of AS;
- h. She has participated in the recruitment and radicalization of a Canadian, whose eventual travel overseas to Syria was encouraged and partially financed by her;
- i. She supports IS and AS and was reported having expressed extremist views;
- j. Information redacted from the [CTR] includes information dated after June 2012, and includes information up to December 2016.

[10] On July 10, 2019, the Applicant signaled her intention to challenge the constitutionality of the *Prevention of Terrorist Travel Act*, SC 2015, c 36, s 42 [PTTA] and to amend her Notice of Application accordingly [Constitutional Challenge]. The PTTA, on the basis of which the Disclosure Order was issued, governs the judicial review of decisions taken under section 10.1 of the CPO where such decisions are based, in whole or in part, on classified information. In particular, the PTTA governs how that information is to be handled, including how claims for non-disclosure on national security grounds or for the safety of any person, are to be processed.

[11] On July 30, 2019, a case management conference [CMC] was held to follow up on the Disclosure Order and on the Applicant's declared intention to challenge the constitutionality of the PTTA. This CMC's main purpose was to set up a timetable for the next steps in this proceeding leading to the hearing on the merits of the Underlying Application, including the Constitutional Challenge.

[12] However, a few days prior to this CMC, the Respondent informed the Court that a new matter [New Matter], the results of which could affect the Underlying Application, had come up. Given that the potential impact of the New Matter on the Underlying Application needed to be assessed, the setting up of a timetable for the next steps leading to the actual hearing on the merits of the Underlying Application was held to be premature, although a timetable for the next steps leading to the Constitutional Challenge being ready to be argued was set up during the CMC.

[13] In a public direction dated November 25, 2019, the Court informed the Applicant that it had reached the conclusion, similar to those of the Respondent and of the Amicus, that the New Matter has no material impact on the Underlying Application. The Applicant was also informed that the Court's conclusion had been reached on the basis of the consideration, further to two *ex-parte, in camera* hearings, of the classified evidence filed by the Respondent as well as the written and oral classified submissions filed by the Respondent and the Amicus who had participated on both *ex-parte, in camera* hearings.

[14] In the same direction, counsel for both parties were directed to provide the Court with the following information:

- a. A proposed schedule for the filing of the Applicant and Respondent's Records on the merits of the Underlying Application, including dates for the cross-examinations on affidavit, if any;
- b. Tentative agreeable date(s) for the hearing on the merits, the estimated duration of the said hearing and the preferred location of same;
- c. Whether necessary for said hearing to be held *in camera, ex-parte* and tentative agreeable date(s) and the estimated duration for the *in camera, ex-parte* portion of the hearing for the Court's consideration;

[15] A CMC was then held on December 11, 2019, in order to follow up on the November 25, 2019, direction. During said CMC, counsel for the Applicant advised the Court that he was considering filing expert evidence "to contextualize and fill the gaps in the record to provide the

Court with the necessary grounding to make a fair determination of the issues before it.” He undertook to make his decision in that regard known to the Court, counsel for the Respondent and the Amicus, by December 20, 2019, which he did by confirming, on December 17, 2019, that he would file said evidence by January 31, 2020. Counsel for the Respondent indicated at said CMC that they reserved their right to oppose the filing of the Applicant’s expert evidence should said evidence exceed the limits set out in *Access Copyright*.

[16] On January 16, 2020, a further CMC was held with a view of setting out a procedural timetable leading to the hearing on the merits, including the Constitutional Challenge, of the Underlying Application. The public and *ex-parte, in camera* hearings on the merits of the Underlying Application, including the Constitutional Challenge, were tentatively scheduled for March 26 and March 27, 2020, respectively. Counsel for the Respondent undertook to let the Court and counsel for the Applicant know, by February 4, 2020, whether they would seek an advance ruling on the admissibility of the Applicant’s expert evidence to be filed on January 31, 2020.

[17] On February 4, 2020, counsel for the Respondent informed the Court and counsel for the Applicant that they would seek an advance ruling on the admissibility of Mr. Aziz’s affidavit. The Respondent’s motion record was filed on February 10, 2020, and the Applicant’s record in response was filed on February 17, 2020.

III. THE ACCESS COPYRIGHT EXCEPTIONS DO NOT APPLY IN THIS CASE

A. *The procedural fairness exception*

[18] The Applicant claims that Mr. Aziz's evidence, by providing current academic research on deradicalization of Muslims in the West, will assist in bringing the Court's attention to the defects of the procedure developed by the Government of Canada, in the context of the passport application review process, to determine the risks returnees from areas controlled by terrorist organizations may pose to national security.

[19] According to the Applicant, this current literature advocates that the better way to deal with returnees from these areas is by conducting interviews focussing on their reasons for their departure to fight in conflict zones and for wanting to return to Canada, the organizations they associated with and the location and the nature of the activities they undertook while abroad. Since the Applicant was not interviewed by the passport authorities during the process that led to the Delegate's decision not to renew her passport, she claims, on the basis of Mr. Aziz's evidence, that this process was procedurally unfair.

[20] With respect, I cannot adhere to this submission. The Applicant concedes that "[m]ost of the literature exploring this phenomenon [of Muslims returnees from abroad] in the Canadian context was published after the [Delegate] rendered his decision to deny the Applicant her passport" and that, therefore, "it would not have been available to [her] at the time her

submissions were sought by the initial decision maker” (Memorandum of Fact and Law, at para 35).

[21] By the Applicant’s own admission, this literature was not – and could not have been - available to the Delegate himself at the time he made his decision. Therefore, even assuming, without deciding it, that Mr. Aziz’s current academic research could now support an argument that the Applicant should have been interviewed during the process that led to the Delegate’s decision not to renew her passport in the manner suggested by said research, those who conducted said process can certainly not be faulted for not considering a theory that did not exist at the time. Mr. Aziz’s evidence cannot be, as a result, of any assistance to the Court, even in “contextualizing” the Applicant’s procedural fairness arguments, as she puts it.

[22] It is fair to assume that had that theory existed at the time her passport application was processed, the Applicant would have sought an interview and any refusal to conduct same on the part of the passport authorities could have been the basis for a procedural fairness argument on judicial review. But this is not how things unfolded or could have unfolded given the unavailability of said theory at all relevant times.

[23] It is worth underscoring, at this point, that procedural fairness, which content in any given case is context specific, is about whether there was meaningful participation and an unbiased process (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 30-34 and 45), whereas this portion of Mr. Aziz’s evidence appears first and foremost to

deal with the question of how to determine whether Muslims returnees from abroad may pose a threat to national security, an issue which goes to substance rather than process.

[24] Furthermore, if the Applicant thought, as she is now saying, that the basis of the Delegate's decision was related to concerns he might have had with the fact that she is a returnee within the meaning of Dr. Aziz's academic research, nothing, in my view, precluded the Applicant from addressing, on either opportunity she was given to respond to the Delegate's concerns, as outlined in the fairness letter sent to her on February 1, 2017 [Fairness Letter], the reasons for her departure to conflict zones, her reasons for wanting to return to Canada, the organizations she associated with and the location and the nature of the activities she undertook while abroad.

[25] In fact, she did just that in her response to the Fairness Letter. Commenting on her trip to Somalia in 2010, she acknowledged that she lived with her husband in parts of Somalia controlled by AS but stressed the fact this did not "equate being a part [*sic*] of the group nor [did] it reflect support for them." She denied, at the same time, being a senior figure of AS, an allegation, she said, which "[had] never been proven and [was] completely false." Regarding the fact that her husband, also identified as an AS senior figure, had been stripped of his British citizenship by the British authorities, she claimed that this "[did] not prove that he was a risk to the country" as "he [had] always maintained his innocence from their claims."

[26] As for the reasons for her return to Canada, she essentially claimed that her deportation from Somaliland, after having been arrested in the middle of the night at her mother's home by

the Somaliland authorities, had been set up by the Canadian government, which, according to what she was told by the Somaliland authorities, “wanted [her] back in the country.” In other words, returning to Canada was not her first choice.

[27] Finally, the Applicant did address in her response to the Fairness Letter the organization to which she was alleged to be associated by the Delegate as well as the location and the nature of the activities she undertook while in Somalia. In fact, she denied any association with – or support for – AS. She did acknowledge having maintained association with individuals she met in Somalia but claimed that none of these individuals “[were] known to [her] as national security risks.” Regarding the activities she undertook while in Somalia, it is subsumed in her response to the Fairness Letter that she never engaged in any AS activities while in that country.

[28] I will also add that the Applicant is, since January 1, 2020, in a position to re-apply to have her passport renewed since the 4-year period of non-passport services imposed by the Delegate in his decision, has now expired, and to seek, as a result, the interview she now believes being entitled to in the course of the processing of her renewal application.

[29] For all these reasons, I am of the view that the *Access Copyright* exception relating to procedural fairness is not available to the Applicant.

B. *The general background information exception*

[30] This exception is not available to the Applicant either.

[31] The Applicant claims that Mr. Aziz's evidence addresses issues that are relevant to the Underlying Application and beyond the Court's knowledge. As indicated previously, these issues are:

- a. The meaning, in Islam, of the term *Shaheed*;
- b. The profile of Muslims from the West who adopt radical, apocalyptic Islamic worldviews, and travel abroad to support terrorist organizations like IS, AS, and other groups; and
- c. The methods for determining whether Muslim returnees from abroad who have lived in territories controlled by such organizations pose a threat to national security.

[32] First, with respect to the concept of *shaheed* or martyrdom in Islam, Mr. Aziz's evidence is that this concept is not central to Islam as a whole and has not historically been the primary subject of discourse on war among Sunni jurists and theologians. Mr. Aziz opines that martyrdom is not restricted to dying on the battlefield but also encompasses dying in a manner that is out of one's choice. This concept, therefore, requires, according to Mr. Aziz, "in-depth analysis of the Quran and hadiths by qualified scholars" as it is "much more nuanced than often perceived." According to the Qur'an, the hadiths and the opinions of Muslim jurists, Mr. Aziz says, it is clear that "Muslims are not instructed to seek martyrdom by inflicting violence on others nor by committing suicide" (Mr. Aziz's Affidavit, Respondent's Motion Record, p. 14, at para 28).

[33] This clearly goes to the heart of one of the concerns expressed by the Delegate in the Fairness Letter, where the Applicant is said to have declared wanting to be a martyr like a good Muslim during an interview with Canadian authorities. As a matter of fact, the Applicant responded to this concern along the line of Mr. Aziz's evidence, in her response of March 4, 2017, to the Fairness Letter, by saying that "[t]here are many forms of being a Shaheed in Islam, it doesn't equate battle solely – and this is far from my intention." In my opinion, what stems from both said response and Mr. Aziz's evidence, is that the Delegate did not pay enough attention to the different meanings of *shaheed* or martyrdom in Islam and that therefore, his decision, to the extent it is based on that particular concern, is unreasonable.

[34] Mr. Aziz's evidence on that point is clearly not neutral background information aimed at assisting the Court in understanding the history and nature of the case that was before the Delegate (*Delios v Canada*, 2015 FCA 117, at para 44-45). It serves, in my view, at bolstering an argument that the Applicant has put forward before the Delegate. The Court is at a loss as to why that evidence was not put before the Delegate at the appropriate time.

[35] I agree with the Respondent that Mr. Aziz's evidence on that point is an attempt on the part of the Applicant to supplement the record that was before the Delegate and that, therefore, it should not be permitted. This is simply not what is being contemplated by the general background information exception set out in *Access Copyright*.

[36] The same is true, in my view, regarding the evidence submitted by Mr. Aziz on the profile of Westerners who travel abroad to support terrorist organizations. Mr. Aziz's evidence is

that there is no consistent profile amongst radicalized Westerners who decide to join or support a terrorist group abroad. These people, he says, come from a variety of backgrounds and their radicalization may depend on a variety of factors, such as ideology, political grievances, psychological factors, social networks, charismatic mentorship, and criminal history. He stressed however that not all who travel abroad support terror or engage in violence.

[37] The Applicant, again, has denied, in her response to the Fairness Letter, having ever engaged in terrorist activities while she was living in parts of Somalia controlled by AS. Implicit in Mr. Aziz's evidence is that the Delegate might not have paid enough attention to this nuanced landscape, casting a doubt, therefore, on the soundness, if not the legality, of the Delegate's concerns to the extent they are related to the Applicant's activities when she travelled to Somalia in 2010.

[38] I must also conclude, here, that Mr. Aziz's evidence on this particular point is clearly not neutral background information aimed at assisting the Court in understanding the history and nature of the case that was before the Delegate. It serves, as was the case of his evidence on the meaning of the concept of *shaheed*, at bolstering before this Court an argument the Applicant put forward before the Delegate. The Court is again at a loss as to why that evidence was not put before the Delegate at the appropriate time.

[39] Finally, I have already decided that Mr. Aziz's evidence respecting the phenomenon of Muslims returnees from abroad and the best way to assess the risk they might represent for Canada's national security upon their return did not assist the Court in assessing the point the

Applicant intends to make respecting the procedural defects of the passport application and review process that led to the refusal of her passport renewal application.

[40] The main reason for reaching that conclusion is that this evidence, according to the Applicant's own admission, stems from a review of academic research which deals with concepts and ideas that only emerged after the Delegate's decision was rendered. On its face, this evidence cannot, in any way, shape or form, assist the Court in understanding the history and nature of the case that was before the Delegate, because it did not exist at the time the Delegate considered the Applicant's passport renewal application and rejected it.

[41] Permitting that evidence to be received on judicial review would, for all intents and purposes, transform the consideration of the merits of the Underlying Application in a trial *de novo*, something which is inconsistent with the role of the Court on judicial review (*Access Copyright* at para 20).

[42] The Respondent was seeking an advance ruling on the admissibility of Mr. Aziz's evidence. The Applicant did not oppose that this issue be determined in that manner. I am satisfied that an advance ruling will allow the hearing on the merits of the Underlying Application, which has been pending for close to two years now, to proceed in a timelier and more orderly fashion.

[43] The Respondent's motion will therefore be granted and Mr. Aziz's affidavit, including all of its annexes, will be struck from the record. The Respondent is seeking its costs in a fix amount

in any event of the cause. Given the result of said motion, costs will be awarded to the Respondent, in any event of the cause. Pursuant to Rule 401(1) of the *Federal Courts Rules*, SOR/98-106, I fix the amount of costs on this motion at \$500.00, which corresponds to the lower-end of Column III of Tariff B. That column is the default column as per Rule 407, unless the Court orders otherwise.

ORDER in file T-479-18

THIS COURT ORDERS that:

1. The motion is granted;
2. The Affidavit of Mr. Navaid Aziz, dated January 29, 2020, is struck from the record;
3. Costs in a fixed amount of \$500.00, disbursement included, are awarded to the Respondent in any event of the cause.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-479-18

STYLE OF CAUSE: AYAN ABDIRAHMAN JAMA v ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

REASONS FOR ORDER AND ORDER: LEBLANC J.

DATED: FEBRUARY 26, 2020

WRITTEN REPRESENTATIONS BY:

Mr. Avnish Nanda FOR THE APPLICANT

Mr. Robert Drummond FOR THE RESPONDENT

SOLICITORS OF RECORD:

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