Federal Court  Cour fédérale

Date: 20220113

Docket: IMM-2107-21

Citation: 2022 FC 34

Ottawa, Ontario, January 13, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

MUKHTARI ABDULLAH ABU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] This motion by the Minister of Citizenship and Immigration arises from an application for judicial review by Mukhtari Abdullah Abu under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). In that application, Mr. Abu seeks an order of *mandamus* compelling the Minister to make a decision on his eligibility for a work permit and temporary resident visa ("TRV"), a matter that is currently being considered by Immigration,

Refugees and Citizenship Canada ("IRCC") officials at the Canadian High Commission in Nairobi, Kenya.

[2] In response to this Court's Order and Reasons requiring the Minister to provide a more complete Certified Tribunal Record ("CTR") than had been filed (see *Abu v Canada (Citizenship and Immigration)*, 2021 FC 1031), on November 16, 2021, the High Commission in Nairobi filed a supplementary CTR containing documents that had not been included in the original CTR. Among these documents are emails whose contents have been almost entirely redacted on the basis that they are protected by solicitor-client or litigation privilege. The Minister now moves for an Order maintaining these privilege claims.

[3] This motion proceeded in writing. The Minister filed written submissions along with an affidavit from Ranbir Randhawa, a Litigation Analyst with IRCC who was party to several of the contested emails. Mr. Abu also filed written submissions. Since he and his counsel do not know the contents of the contested emails, these submissions were necessarily limited. The Minister filed a brief written reply to Mr. Abu's submissions.

[4] As well, the Minister filed under seal unredacted copies of the contested emails for the Court's consideration only.

[5] For the reasons that follow, I am satisfied that the privilege claims over all of the emails sent or received by litigation analysts at IRCC should be maintained. However, I am not satisfied that the contents of the remaining emails are protected by either solicitor-client or

litigation privilege. I therefore order that the redactions over the latter emails (described more particularly below) be lifted.

II. BACKGROUND

[6] The background to this matter is set out in detail in the Order and Reasons cited in paragraph 2, above.

[7] Briefly, Mr. Abu is a citizen of Nigeria. He, his wife and their three children came to Canada under the Nova Scotia Provincial Nominee Program in April 2019. Their application under this program was based on a proposal to establish a business in Nova Scotia. Mr. and Mrs. Abu established a fish exporting business in Halifax, Ahead Fisheries Inc., which they continue to operate.

[8] In August 2020, Mr. Abu returned to Nigeria to attend to the estate of his late father. He has been unable to return to Canada because of the cancellation of his work permit and TRV in October 2020.

[9] On December 3, 2020, Mr. Abu commenced an application for judicial review challenging the refusal to permit him to return to Canada (Court File No. IMM-6319-20). That application was discontinued by settlement on December 18, 2020. Pursuant to the settlement, IRCC would inform Mr. Abu of the concerns that had led to the cancellation of his work permit and TRV and provide him with an opportunity to respond as part of a redetermination of his eligibility for these authorizations.

[10] On January 7, 2021, IRCC sent Mr. Abu a procedural fairness letter. The letter requested various documents and information relating to Mr. Abu's employment in Canada and the activities of Ahead Fisheries Inc. No specific concerns relating to Mr. Abu's admissibility to Canada were raised. With the assistance of counsel, Mr. Abu provided his response on January 22, 2021.

[11] The terms of settlement provided that IRCC would make a decision within 30 days of receipt of Mr. Abu's response to the procedural fairness letter "barring any additional concerns arising." After IRCC failed to make a decision within this timeframe, on March 29, 2021, Mr. Abu commenced a second application for judicial review (Court File No. IMM-2107-21). In that application, he seeks an order of *mandamus* requiring the Minister to make a decision on his outstanding application for a work permit and TRV.

[12] Global Case Management System ("GCMS") notes included in the CTR indicate that, as of February 18, 2021, a visa officer was satisfied that a one-year work permit should be issued. However, as set out in an affidavit from this officer (affirmed April 26, 2021) that was filed by the Minister in response to the application for judicial review, on or about February 26, 2021, the visa office in Nairobi received a report dated February 8, 2021, relating to Mr. Abu prepared by the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"). The report had been requested by the Canada Border Services Agency ("CBSA"), which then forwarded it to IRCC. The visa officer states that, upon receiving the report, he submitted a request for additional security screening by CBSA's National Security Screening Division ("NSSD"). The

final decision on Mr. Abu's eligibility for a work permit and TRV was held in abeyance in the meantime.

[13] The NSSD assessment of Mr. Abu's admissibility to Canada was forwarded to IRCC in Nairobi on April 21, 2021. It recommends that there are reasonable grounds to believe that Mr. Abu is inadmissible to Canada on grounds of organized criminality under paragraphs 37(1)(a) and (b) of the *IRPA*.

[14] Mr. Abu was unaware of the FINTRAC report when he commenced his second application for judicial review. This document and the subsequent NSSD assessment were not included in the original CTR but they have now been provided as part of the supplementary CTR filed on November 16, 2021. Prior to the filing of the supplementary CTR, counsel for the parties agreed that certain third-party information should be redacted from the FINTRAC report. There are no redactions over any part of the NSSD assessment.

[15] To date, no decision has been made by IRCC on Mr. Abu's application for a work permit and TRV. Consequently, Mr. Abu continues to pursue his application for *mandamus*.

III. THE CONTESTED EMAILS

[16] The contested emails are a series of communications that begins on December 21, 2020, and in substance ends on February 25, 2021. After this, on September 16, 2021, Sean Morency, the visa officer who previously had carriage of Mr. Abu's matter, forwarded the email chain to Erik Mjanes, the visa officer who currently has carriage of it. The last in the series is an email

dated November 1, 2021, in which Mr. Mjanes simply emails the chain to himself without adding anything new. In total, fifteen emails are at issue: eleven sent by or to litigation analysts with IRCC, two sent by a CBSA officer, and two exchanged by visa officers amongst themselves.

[17] The emails are included in partially redacted form in the supplementary CTR. The date, sender, recipient(s), and (for the most part) subject of each email is not redacted. Almost all of the contents of the emails has been redacted.

[18] There is no issue that all of the emails concern the reconsideration of Mr. Abu's eligibility for a work permit and TRV following the settlement of the earlier application for judicial review in December 2020.

[19] Most of the emails are communications between either Shobnom Hussain or Ranbir Randhawa, who are both Litigation Analysts with IRCC's Litigation Management Branch ("LMB") and IRCC officials in Nairobi. All of these emails carry the following disclaimer: "This correspondence may be subject to litigation privilege and/or legal advice privilege. No further disclosure should occur without appropriate authorization." However, legal counsel is not copied on these or any of the other contested emails.

[20] In an affidavit filed on this motion, Mr. Randhawa explains that the LMB "facilitates communication and acts as a liaison between the Department of Justice counsel, decision-makers and other client officials." Further, LMB analysts "both convey legal advice and provide

instruction for files under litigation." Both Mr. Randhawa and his colleague, Ms. Hussain, served as litigation analysts in relation to Mr. Abu's two applications before this Court.

[21] The first email in the chain, dated December 21, 2020, is from Ms. Hussain to Mr. Morency. The subject line refers to Mr. Abu and notes file number IMM-6319-20, the file number of the earlier application for judicial review. Part of the body of this email is not redacted. The unredacted part is a block of text setting out the terms on which the earlier application was settled. (This same block of text is also found in the GCMS notes included in the CTR.) It is no secret that this is the point at which Mr. Abu's matter was referred back to the visa office in Nairobi pursuant to the settlement of the previous application. Further email communications are exchanged between the litigation analysts and IRCC officials in Nairobi up until February 24, 2021.

[22] In addition, two of the contested emails are from Tyson George, a CBSA Liaison Officer based in Accra, Ghana. Both are dated February 25, 2021. One is from Mr. George to himself. The other is from Mr. George to Mr. Morency, the visa officer in Nairobi. No one else is copied on these emails.

[23] The remaining two emails only involve IRCC visa officers. One is from Mr. Morency to Mr. Mjanes dated September 16, 2021. The other is from Mr. Mjanes to himself dated November 1, 2021. No one else is copied on these emails.

[24] To assist in the adjudication of this motion, and without waiving any applicable privilege, Mr. Randhawa states in his affidavit that the contested emails "relay or exchange information, queries, instruction or advice related to the settlement of the applicant's prior litigation (IMM-6319-20), including various considerations related to processing the reopening of the applicant's temporary resident visa ("TRV") application." He also states: "Although legal counsel is not copied on these e-mails, several of them communicate advice or instruction of a legal nature or explicitly refer to ongoing communication with the Department of Justice regarding processing the reopening of the TRV or other issues related to the settlement of IMM-6319-20."
Mr. Randhawa provides specific examples by date of such emails.

[25] As I have already noted, the Minister filed unredacted copies of the contested emails for the Court's consideration only.

IV. ANALYSIS

[26] The Minister seeks an Order maintaining the redactions over the contested emails on the basis that the redacted contents are protected by either solicitor-client or litigation privilege. As I will explain, despite the fact that none of the contested emails involving IRCC litigation analysts are communications directly with lawyers, I am nevertheless satisfied that they are protected by solicitor-client privilege. On the other hand, I am not satisfied that the four remaining contested emails are protected by either solicitor-client or litigation privilege.

A. *Solicitor-Client Privilege*

[27] I note at the outset that the issue here is not whether an exception should be made to the nearly absolute protection accorded to solicitor-client privileged communications but, rather, whether the communications in question are privileged in the first place.

[28] Solicitor-client privilege attaches to "(i) a communication between a solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties" (*Solosky v The Queen*, [1980] 1 SCR 821 at 837). Among other circumstances, it can arise when government lawyers give legal advice to client departments or agencies: see *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at paras 19-21; see also *Province of New Brunswick v Enbridge Gas New Brunswick Limited Partnership et al*, 2016 NBCA 17 at paras 13-19.

[29] Further, "it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context" (*Samson Indian Nation and Band v Canada*, [1995] 2 FC 762 at para 8). Where solicitor-client privilege is found, it is "considerably broad and all-encompassing;" it "applies to a broad range of communications between lawyer and client" (*Pritchard* at paras 19 and 21).

[30] Solicitor-client privilege was once simply a rule of evidence but "it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity" (*Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10). Almost by definition, to be protected by solicitor-client privilege, the communication must be between a client and his or her lawyer. This necessary condition is the foundation for the nearly absolute protection accorded to communications protected by this privilege. As Justice Fish explains in *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at paras 26:

> The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[31] As noted above, no lawyer was party to any of the communications in issue here. Thus, on a strict application of the concept of solicitor-client privilege, none of the contested emails attract its protection. However, this cannot be determinative in this case given the nature of the solicitor-client relationship and the lines of communication in place here.

[32] IRCC is a client department for the Department of Justice ("DOJ"). Litigation analysts with the LMB play a particular role on behalf of IRCC in the obtaining and communicating of legal advice from DOJ lawyers. To reiterate, they facilitate communication and act as a liaison

between DOJ lawyers, IRCC decision-makers and other client officials. It is their role to convey legal advice and provide instruction for files under litigation. It is apparent that, but for the participation of litigation analysts, DOJ counsel would have to communicate directly with IRCC decision-makers. Moreover it is indisputable that, other things being equal, solicitor-client privileged communications that are repeated in confidential internal client communications retain that status.

[33] In the present case, the December 21, 2020, email from Ms. Hussain to Mr. Morency recounts legal advice received from the DOJ. This advice is protected by solicitor-client privilege. It did not lose this protection by virtue of having been communicated internally within the client department. Further, all the subsequent emails in the chain that involve a litigation analyst also relate to the reconsideration of Mr. Abu's application for a work permit and TRV in light of the settlement of the earlier litigation. Thus, I am satisfied that solicitor-client privilege is properly claimed over the entire chain of emails beginning with the one dated December 21, 2020, from Ms. Hussain to Mr. Morency and ending with the one dated February 24, 2021, from Mr. Randhawa to Mr. Morency.

[34] On the other hand, despite their being links in the continuation of this same chain of emails, I can find no nexus between the four remaining contested emails and the seeking or providing of legal advice. Thus, even on the broad understanding of solicitor-client communications adopted here in view of the institutional setting and the lines of communication between the DOJ and client departments, there is no basis to find that these latter emails are protected by solicitor-client privilege.

[35] The Minister also contends in the alternative that these remaining emails are protected by litigation privilege. I turn to this question now.

B. *Litigation Privilege*

[36] Justice Fish explains the rationale of litigation privilege as follows in *Blank*:

> Litigation privilege [. . .] is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[37] Of course, IRCC is not an unrepresented litigant. In connection with the previous application for judicial review, it had the benefit of representation by the DOJ. This continues to be the case with the present litigation.

[38] In *Blank*, Justice Fish quoted with approval the following description of litigation privilege by R.J. Sharpe (later Sharpe JA):

> Litigation privilege [. . .] is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

(*Blank* at para 28)

[39] The Minister submits that while the earlier application for judicial review concluded with the settlement reached in December 2020, there is still a sense in which the Minister and Mr. Abu "remain locked in what is essentially the same legal combat" (quoting *Blank* at para 34) until a new decision on the application for a work permit and TRV has been made. Indeed, this is reinforced by the fact that new litigation relating to the same subject is now underway.

[40] In my view, even on this expansive view of the potential lifespan of litigation privilege in this case, there is no nexus whatsoever between the contents of the other contested emails and the preparatory work of lawyers in relation to actual or anticipated litigation. The mere appearance of these emails in a chain linking back to the earlier work of legal counsel is insufficient. They relate to the decision-making process regarding Mr. Abu's application for a work permit and TRV. They have nothing to do with preparing for litigation. Thus, despite the continuation of essentially the same legal dispute between Mr. Abu and the Minister, the absence of any link to the preparatory work of an adversarial advocate means that these emails cannot be protected by litigation privilege.

[41] In any event, I would also point out that the substance of the February 25, 2021, email from Tyson George, the CBSA Liaison Officer, to Mr. Morency has already been disclosed in this proceeding. Specifically, as set out above, Mr. Morency stated in his affidavit affirmed on April 26, 2021, that the Nairobi visa office received the February 8, 2021, FINTAC report from the CBSA. The redacted information simply confirms that it was Mr. George who forwarded the report to Mr. Morency. Even if this email could otherwise have been found to be protected by

litigation privilege (which I have found not to be the case), there would be no basis for maintaining the redactions over this email given what has already been disclosed to Mr. Abu.

[42] In summary, my determinations are as follows:

- The redactions over the chain of emails beginning on December 21, 2020, and continuing up to and including February 24, 2021, are upheld on the basis of solicitor-client privilege.

- The redactions over the two emails from Tyson George dated February 25, 2021, are not upheld.

- The redactions over the email from Sean Morency to Erik Mjanes dated September 16, 2021, are not upheld.

- The redaction over the email Erik Mjanes sent to himself on November 1, 2021, is not upheld.

V. CONCLUSION

[43] For these reasons, the Minister's motion seeking an Order upholding redactions to documents in the supplementary CTR filed on November 16, 2021, is allowed in part. Within fourteen (14) days of the date of this Order, the Minister shall file a replacement copy of the contested emails that is redacted in accordance with these reasons.

ORDER IN IMM-2107-21

THIS COURT ORDERS that

1. The Minister's motion seeking an Order upholding redactions to documents in the supplementary Certified Tribunal Record filed on November 16, 2021, is allowed in part.
2. Within fourteen (14) days of the date of this Order, the Minister shall file a replacement copy of the contested emails that is redacted in accordance with these reasons.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2107-21
STYLE OF CAUSE:	MUKHTARI ABDULLAH ABU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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

ORDER AND REASONS:	NORRIS J.
DATED:	JANUARY 13, 2022

WRITTEN REPRESENTATIONS BY:

Lorne Waldman C.M.	FOR THE APPLICANT
John Provart Alex Kam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT