Federal Court  Cour fédérale

Date: 20230323

Docket: IMM-1407-22

Citation: 2023 FC 406

Ottawa, Ontario, March 23, 2023

PRESENT: The Hon. Mr. Justice Henry S. Brown

BETWEEN:

KHALIL MAMUT & AMINIGULI AIZEZI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The Applicant applied for permanent residence in 2015 under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*]. Essentially because Khalil Mamut [Mr. Mamut] has waited coming up to 8 years for a decision, he applied under *IRPA* for leave to commence proceedings for, among other things:

> a) an Order staying a pending security admissibility proceedings for inordinate delay and abuse of process, as contemplated by the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, 2000

> SCC 44, and an Order directing the Respondent to proceed with the processing of his permanent residence application pursuant to s. 18.1(3)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 ["*Federal Courts Act*"]; and
>
> b) in the alternative, an Order of mandamus pursuant to s. 18.1(3)(a) of the *Federal Courts Act* requiring the Respondent to determine Mr. Mamut's admissibility and process his application for permanent residence under *IRPA* within 30 days of the date of the Court's Order; ….

I. Background facts

[2] Mr. Mamut was detained for seven years in Guantanamo Bay by American military authorities as a suspected enemy combatant of the United States. On October 7, 2008, the District of Columbia Circuit Court cleared him of enemy combatant status, finding no evidence he posed any danger to the US or its allies. This finding has not been overturned. Mr. Mamut was subsequently released from Guantanamo Bay. He relocated to Bermuda in 2009, where he has been living since.

[3] Mr. Mamut's wife, the Applicant [Ms. Aizezi], and their four young children, live in Toronto. His wife and oldest son are protected persons and permanent residents of Canada having obtained refugee status and thereafter permanent resident status. The three younger children are Canadian citizens by birth. Ms. Aizezi has travelled to and stayed with Mr. Mamut in Bermuda from time to time.

[4] Ms. Aizezi applied for permanent residence on June 5, 2015, and included Mr. Mamut as an accompanying dependent. While Ms. Aizezi and her first child were approved in 2017, Mr.

Mamut's application has remained in processing ever since. This June he will have waited 8 years.

II. Procedural history generally

[5] Procedurally, the Applicants filed their application for leave in 2022. Justice Elliott issued a production Order dated October 21, 2022 requiring the Respondent to produce his Certified Tribunal Record [CTR], and did so acting pursuant to paragraph 40 of the Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* of June 24, 2022. A purpose of this sort of production Order is to give time for the parties to discuss settlement options with the benefit of as full a record as possible, before leave might be granted by subsequent Order which Order might grant leave and set dates for additional filings and the date of the JR hearing.

[6] Leave has not yet been granted.

[7] This is an immigration case brought under *IRPA*, as already noted. The production Order was made pursuant to Rule 14 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Immigration Rules*] which requires the Respondent Minister to produce documents in his possession or control that a judge orders. Pursuant to Rule 17 of the *Immigration Rules*, the CTR includes "all relevant documents that are in the possession or control of the tribunal."

[8] The Respondent Minister objected to disclosing parts of several documents, and did so based on section 87 of *IRPA,* which authorizes this Court to relieve the Respondent Minister of his disclosure obligation where disclosure would be injurious to national security or endanger the safety of any person.

[9] The production Order of Justice Elliott exempts its operation where section 87 *IRPA* or other non-disclosure proceedings are intended by the Minister, as occurred in this case. Therefore, acting under Rule 14 of the *Immigration Rules*, and the Court's inherent jurisdiction over its processes, I ordered the Respondent, by Direction dated February 1, 2023, to serve and file a public copy of the CTR with redactions in respect of information the release of which the Respondent alleges would be injurious to national security or endanger the safety of any person.

[10] I should note that the Attorney General of Canada, who represents the Respondent, has erected the usual non-disclosure walls, with one counsel responsible for matters on the public record, and a different counsel responsible for matters covered by section 87. The two work independently. Counsel for the Minister on the public side, as I understand it, does not see the Respondent's section 87 classified filings. This may account for some of the lack of clarity in the Respondent's position mentioned below.

[11] The Applicants filed a written response to the Minister's section 87 non-disclosure motion, asking that it be dismissed, because in their view the redacted material would be essential to the determination of their application. The Applicants in the alternative asked the

Court to appoint a special advocate to advocate for their interests in any classified *in camera ex parte* proceedings before the Court.

[12] Section 87 motions are usually decided by this Court after the Respondent files classified unredacted copies of the CTR, after which the Court may hold a public case management hearing to go over basic matters, and then holds an *in camera ex parte* classified hearing to determine the merits of the Respondent's section 87 objections to disclosure.

[13] So far there was nothing unusual in this case.

III. Special procedural issues in this case

[14] On reviewing the unredacted material filed by section 87 counsel, a fairly large document, 12 pages in length, was redacted in its entirety. Filing this redacted material with the unredacted section 87 material was not clearly explained except that claims of deliberative privilege, or in the alternative, references to section 87 non-disclosure were indicated. Counsel in earlier correspondence had also referred to the possibility of a claim under section 37 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 (concerning "public interest").

[15] In section 87 cases, I consider it generally advisable to have a public case management conference before moving to make decisions on the merits, as set out in *Khowaja v Canada (Citizenship and Immigration)* 2021 FC 1473:

> [4] Upon receipt of this [section 87 ed.] motion, I convened a public case management hearing on November 9, 2021, at which and for the benefit of the parties, I reviewed the nature of a section

> 87 motion, and how it would proceed. I advised the parties I would consider the matter in two parts: first at a public hearing, and then at a private (*ex parte*) hearing. I advised the parties that at the public hearing, I would consider the public written filings of both parties, and their oral submissions. Matters to be canvassed would include such matters relevant to the second private hearing as the parties might raise, including the appropriate test or tests to be applied, the advisability of the appointment of a special advocate to assist the Court (given the required absence of counsel for the Applicant), the test(s) to be applied by the Court in considering redactions, and remedies. I also advised counsel that at the second and private hearing (*in camera* and *ex parte*) that is, without the presence of the Applicant or his counsel, I would review the unredacted versions of the pages sought to be redacted, hear submissions from *ex parte* counsel for the Respondent, and thereafter make a determination on this motion. I also advised that more routine matters might be redacted from the CTR, such as the names of public servants involved.
>
> [5] I note the Respondent is represented by two counsel: (1) a public counsel who will not have access to the unredacted material, and (2) *ex parte* counsel with access to the unredacted material. Both were present at the case management hearing on November 9, 2021. There is an ethical non-disclosure wall between the Respondent's public and *ex parte* counsel.

[16] A public case management meeting is an opportunity for the Court to see the entire record and assess the full context in which non-disclosure proceedings might develop. A public case management hearing is also useful because it has been my experience that some counsel, although not in this case, have never encountered a classified section 87 *IRPA* proceeding before.

[17] Such a preliminary public hearing is also an opportunity for the Court to explain in a public forum how it intends to approach the issues, what is involved, and to outline what the Court will be doing, as noted above. This is important because proceedings on the merits of a section 87 motion are entirely classified, *in camera* and *ex parte*. In addition, while the Court hears from section 87 counsel for the Minister, it will not hear from counsel for an applicant, nor

will it hear from public counsel for the Minister except through its public filing which of course does not discuss classified information.

[18] However, *IRPA* allows the Court to appoint a state-funded (government approved) special advocate to advocate for the interests of an otherwise unrepresented applicant(s) in the classified proceedings. The appointment of a special advocate is not mandatory and lies in the discretion of the Court. In many cases a special advocate is not appointed because the redactions are matters of routine for the designated judges.

[19] It is also important to keep in mind that paragraph 73(2)(d) of *IRPA* requires judges to dispose of applications "without delay and in an summary way". This is relevant, as will be seen later.

A. *The case management hearing: what process to follow*

[20] In various written filings before the public case management hearing, public counsel for the Respondent indicated the Minister was claiming deliberative privilege—a privilege that is not statutory but based on the common law. It appeared, but was not clear, that public counsel was likely to claim deliberative privilege over the redacted 12 pages filed by section 87 counsel. Based on the Court's review of material filed in Designated Proceedings Registry, it appeared the 12 pages of entirely redacted material might involve section 87 claims in the alternative.

[21] A public case management meeting was scheduled for February 3, 2023. However, as the date approached, the Court was concerned with the utility of such a hearing given a) counsel for

the Applicants had not yet received their redacted copy of the CTR, b) the Respondent had prepared a redacted copy of the CTR but had not yet served or filed it given that no such requirement had yet been issued, c) neither public counsel nor section 87 counsel had provided the Court with unredacted copies of all material in respect of which non-disclosure might be sought, and d) in common with the Applicants, the Court did not yet have even a redacted copy of the CTR.

[22] Therefore, the Court cancelled the public case management hearing set for February 3, 2023, and directed the service and filing of a redacted CTR and the filing of an unredacted CTR by February 6, 2023 after which the public case management meeting could proceed on February 9, 2023. The objective was to give the parties and Court time to properly prepare for the rescheduled public case management hearing:

> The Respondent is directed to served and file his redacted CTR with the Court, and to file an unredacted copy of his CTR complete with all exhibits with the Court's secure facility, all by close of business Monday February 6, 2023.
>
> Assuming that is done, the CMC may proceed at a time agreeable to the parties on February 9, 2023.

[23] The Respondent served the Applicants and filed his redacted CTR as required.

[24] Notably, neither public counsel nor section 87 counsel complied with the Court's Direction of February 1, 2023 requiring the filing of all unredacted material.

[25] Public counsel for the Respondent filed written submissions on February 2, 2023 concerning the process for determining non-disclosure of his claim for deliberative privilege, section 87 privilege and/or section 37 *Canada Evidence Act*.

[26] It appeared the processes suggested by the Respondent might be contrary to settled practices of the Court when dealing with section 87 proceedings, and might also be contrary to a number of decisions of the Federal Court of Appeal. In this connection public counsel relied on cases in the superior courts of Ontario, Nova Scotia, and New Brunswick in addition to a case from the Supreme Court of Canada. Public counsel submitted that case law establishes a procedure where a common law privilege is claimed. These are discussed later.

[27] Given this and given the contrary Federal Court of Appeal jurisprudence dealing directly with claims of "deliberative privilege", the Court wished to know why it should not follow the Federal Court of Appeal in this claim for deliberative privilege. Therefore, by Direction of February 3, 2023, counsel were invited for input on the process issue for the public case management hearing scheduled for February 9, 2023:

> Before that hearing, the Court invites counsel to review *Tsleil-Waututh v. AGC*, 2017 FCA 128 especially para 90 which deals among other things with claims of "deliberative privilege" such as advanced by the Respondent's counsel in yesterday's public email. I also direct counsel's attention to the additional authorities referred to at para 90 of the Federal Court of Appeal's reasons which state: "[90] Under Rule 318, the administrative decision-maker can object to production of the material. Usually the objection is based on relevance, deliberative privilege, solicitor-client privilege or public interest privilege. The objection is litigated in the manner specified by cases such as *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 and *Bernard v. Public Service Alliance of Canada*, 2017 FCA 35."[Emphasis added]

> I would appreciate being advised why this Court should not follow the Federal Court of Appeal's rulings regarding the manner specified in the cases just referred to.

[28] The public case management hearing proceeded on February 9, 2023. The discussion was on process, and was not on the merits of the claims of privileges and non-disclosure.

[29] Public counsel took the position some documents are so sensitive even the Court may not see them, as per the Federal Court of Appeal's decision in *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 [*Lukács*] per Stratas JA at paras 15 and 16:

> [15] These Rules and powers allow the Court determining a Rule 318 objection to do more than just uphold or reject the administrative decision-maker's objection to disclosure of material. The Court may craft a remedy that furthers and reconciles, as much as possible, three objectives: (1) meaningful review of administrative decisions in accordance with Rule 3 and s. 18.4 of the Federal Courts Act and the principles discussed at paras. 6-7 above; (2) procedural fairness; and (3) the protection of any legitimate confidentiality interests while permitting as much openness as possible in accordance with the Supreme Court's principles in Sierra Club. Page: 7
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> [16] Where there is a valid confidentiality interest that could sustain an objection against inclusion of a document into the record, the Court must ask itself, "Confidential from whom?" Perhaps the general public cannot access the confidential material, but the applicant and the Court can, perhaps with conditions attached. Perhaps the only party that can access the confidential material is the Court, but a benign summary of the material might have to be prepared and filed to further meaningful review, as much procedural fairness as possible, and openness. <u>In other cases, the objection may be such that confidentiality must be upheld absolutely against all, including the Court. Legal professional privilege is an example of this.</u>
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> [Emphasis added]

[30] Section 87 counsel advised the Court (for the first time) that a claim for deliberative privilege was indeed being advanced by public counsel over the redacted 12 page document, and if that failed, only 72 words would be the subject of a non-disclosure motion under section 87 of *IRPA*. This clarification was welcome. I am not sure why it was not stated at the outset.

[31] As an aside but also in this connection, in Reply to the Respondent's section 87 motion, public counsel stated that the redactions claimed were "not extensive or significant", footnoting to the statement: "The Respondent notes that there are other redactions in the CTR due to deliberative privilege under the common law." Nowhere did public counsel indicate that the redactions to the claim for deliberative privilege covered the 12 redacted pages. I noted at the hearing that one might disagree with describing the redaction of 12 pages as simply "not extensive or significant". I made this observation given it is well established that counsel (as well as affiants) on *in camera ex parte* applications such as those under section 87, are under a duty of candour and must therefore take care not to misrepresent the nature of classified material to Applicants — who are not allowed to see behind counsel's representations. The Respondent must take care not to mislead or misrepresent what such applicant(s) are told.

[32] The issue to resolve now is how to proceed with the determinations of the Respondent's several requests for non-disclosure of documents in the CTR, be they claims under section 87 of *IRPA* regarding national security/danger to safety, deliberative privilege at common law, or under section 37 of the *Canada Evidence Act* "specified public interest."

[33] Two options were discussed regarding the claims for deliberative privilege and any section 37 claim.

[34] On the one hand, the Respondent urged the Court to adopt processes developed in some common law jurisdictions, arguing in effect that common law processes derived from various provincial jurisdictions should be used to assess a common law claim to deliberative privilege in the Federal Court. Counsel pointed to: *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4 at para 52; *R v Richards (1997)*, 34 OR (3d) 244 (OCA); *Payne v Ontario Human Rights Commission (2000)*, 192 DLR (4th) 315 (OCA) [*Payne*] at paras 85, 96, 100, 104, 172; *R v Pilotte* (2002), 156 OAC 1 (OCA), at para 43; *Cherubini Metal Works Ltd v Nova Scotia (Attorney General)*, 2007 NSCA 37 [*Cherubini*] at paras 14-22 and *Attorney General of New Brunswick v The Dominion of Canada General Insurance Company*, 2010 NBCA 82 at para 40.

[35] I note the Respondent did not point to any Federal Court or Federal Court of Appeal authority for his submissions. Nor did he make any reference to jurisprudence from or processed in Quebec, which on the Respondent's theory may or may not engage an entirely different process.

[36] In essence, referring to provincial court jurisprudence, the Respondent submitted the Applicants should be required to bring a motion and persuade the Court they are not able to make their case for a stay or for a *mandamus*, without the material allegedly protected by deliberative privilege. They would do so without knowing what the Respondent withholds from

them. I note this statement of the test might require the Applicants to prove a negative – never easy - and could add an additional step in proceedings with resulting and attendant delays.

[37] The Respondent also submitted the Applicants must overcome a high bar to obtain an order allowing the examination of a decision-maker [*Payne* and *Cherubini*]. In this, the Court is hardly able to disagree. However, and with respect, everyone knows that is not the issue before the Court. No one is seeking to cross-examine the decision-maker in this case, which if it were would be a very extraordinary step to take and might well engage a relatively high threshold. All that is before the Court now are documents and parts of documents the Respondent does not wish the Applicant or the Court to see, at least for now.

[38] In addition, the Respondent asks the Court to set out the test applicable to determine the merits of his various requests to prevent the disclosure of allegedly confidential material in the CTR. However it seems to me the test applicable is a matter that may be raised when the merits are actually considered.

[39] Notably also, there is no suggestion any of the several provincial jurisdictions giving rise to the Respondent's case law have anywhere close to the sort of comprehensive scheme for determining the contents of a CTR, and for resolving related disputes arising in immigration cases brought under *IRPA* as exist in relation to the present case.

[40] In fact it is not clear what any provincial rules are for determining the contents of a CTR, nor for resolving disputes which is the issue before the Court now. All I can determine from the

material submitted by the Respondent is that the processes advanced for consideration are judge made.

[41] However, that is not the nature of the regime under which the Federal Court deals with the contents and or disputes concerning the CTR in the immigration context. That is fully legislated and set out in two complimentary and harmonious sets of Federal Court rules derived from and enacted with reference to two federal statutes.

[42] The first set of Federal Court rules, as noted earlier, are the various Rules including Rule 14 of the *Immigration Rules*. Rule 14 requires the tribunal (such as the Respondent) to produce documents in its possession or control that a judge orders. Rule 14 works at the leave stage in conjunction with Rule 17 of the *Immigration Rules,* which operates after leave is granted and which says that the CTR includes "all relevant documents that are in the possession or control of the tribunal." These Rules applies to *IRPA* stays, *mandamus,* and judicial review applications alike.

[43] Rules 14 to 17 of the *Immigration Rules* provide:

Disposition of Application for Leave	**Décision sur la demande d'autorisation**
14 (1) Where	**14 (1)** Dans l'un ou l'autre des cas suivants :
(a) any party has failed to serve and file any document required by these Rules within the time fixed, or	**a)** une partie n'a pas signifié et déposé un document dans le délai imparti, conformément aux présentes règles,

(b) the applicant's reply memorandum has been filed, or the time for filing it has expired, a judge may, without further notice to the parties, determine the application for leave on the basis of the materials then filed.

b) le mémoire en réplique du demandeur a été déposé, ou le délai de dépôt de celui-ci est expiré, un juge peut, sans autre avis aux parties, statuer sur la demande d'autorisation à la lumière des documents déposés.

(2) Where the judge considers that documents in the possession or control of the tribunal are required for the proper disposition of the application for leave, the judge may, by order, specify the documents to be produced and filed and give such other directions as the judge considers necessary to dispose of the application for leave.

(2) Dans le cas où le juge décide que les documents en la possession ou sous la garde du tribunal administratif sont nécessaires pour décider de la demande d'autorisation, il peut, par ordonnance, spécifier les documents à produire et à déposer, et donner d'autres instructions qu'il estime nécessaires à cette décision.

(3) The Registry shall, without delay after an order is made under subrule (2), send a copy of the order to the tribunal.

(3) Le greffe envoie sans délai au tribunal administratif une copie de l'ordonnance rendue en vertu du paragraphe (2).

(4) Upon receipt of an order under subrule (2), the tribunal shall, without delay, send a copy of the materials specified in the order, duly certified by an appropriate officer to be correct, to each of the parties, and two copies to the Registry.

(4) Dès réception de l'ordonnance rendue en vertu du paragraphe (2), le tribunal administratif envoie à chacune des parties une copie des documents spécifiés, certifiée conforme par un fonctionnaire compétent, et au greffe de la Cour deux copies de ces documents.

15 (1) An order granting an application for leave

15 (1) L'ordonnance faisant droit à la demande d'autorisation:

(a) shall specify the language and the day and place fixed for the hearing

a) spécifie la langue ainsi que la date et le lieu fixés pour l'audition de la

of the application for judicial review;	demande de contrôle judiciaire;
(b) shall specify the time limit within which the tribunal is to send copies of its record required under Rule 17;	**b)** spécifie le délai accordé au tribunal administratif pour envoyer des copies de son dossier, prévu à la règle 17;
(c) shall specify the time limits within which further materials, if any, including affidavits, transcripts of cross-examinations, and memoranda of argument are to be served and filed;	**c)** spécifie le délai de signification et de dépôt d'autres documents, le cas échéant, dont les affidavits, la transcription des contre-interrogatoires et les mémoires;
(d) shall specify the time limits within which cross-examinations, if any, on affidavits are to be completed; and	**d)** spécifie le délai dans lequel les contre-interrogatoires sur les affidavits, le cas échéant, doivent être terminés;
(e) may specify any other matter that the judge considers necessary or expedient for the hearing of the application for judicial review.	**e)** peut spécifier toute autre question que le juge estime nécessaire ou pratique pour l'audition de la demande de contrôle judiciaire.
(2) The Registry shall, without delay after an order is made under subrule (1), send a copy of the order to the tribunal.	**(2)** Le greffe envoie sans délai au tribunal administratif une copie de l'ordonnance visée au paragraphe (1).
(3) [Repealed, SOR/2021-149, s. 9]	**(3)** [Abrogé, DORS/2021-149, art. 9]
16 Where leave is granted, all documents filed in connection with the application for leave shall be retained by the Registry for consideration by the judge hearing the application for judicial review.	**16** Lorsque la demande d'autorisation est accueillie, le greffe garde les documents déposés à l'occasion de la demande, pour que le juge puisse en tenir compte à l'audition de la demande de contrôle judiciaire.

Obtaining Tribunal's Record

17 Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:

(a) the decision or order in respect of which the application for judicial review is made and the written reasons given therefor,

(b) all relevant documents that are in the possession or control of the tribunal,

(c) any affidavits, or other documents filed during any such hearing, and

(d) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review,

and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

Production du dossier du tribunal administratif

17 Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement :

a) la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents;

b) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif,

c) les affidavits et autres documents déposés lors de l'audition,

d) la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire,

dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

[44] The second set of legislated Federal Court rules that apply in Federal Court proceedings are the *Federal Courts Rules*, SOR/98-106 enacted pursuant to the *Federal Courts Act*, R.S.C., 1985, c. F-7 as amended. Notably, and in my respectful opinion, the provisions of the *Immigration Rules* dovetail with Rules 317 and 318 of the *Federal Courts Rules* dealing both with access to CTRs (Rule 317), and with resolution of disputes between parties concerning the content of redacted and unredacted CTRs (Rules 318(2) and following).

[45] Rules 317 and 318 of the *Federal Courts Rules* provide:

Material from tribunal	**Matériel en la possession de l'office fédéral**
317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	**317 (1)** Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.
Request in notice of application	**Demande inclue dans l'avis de demande**
(2) An applicant may include a request under subsection (1) in its notice of application.	**(2)** Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.
Service of request	**Signification de la demande de transmission**
(3) If an applicant does not include a request under subsection (1) in its notice of	**(3)** Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de

application, the applicant shall serve the request on the other parties.

demande, il est tenu de signifier cette demande aux autres parties.

Material to be transmitted

318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

Documents à transmettre

318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

(a) a certified copy of the requested material to the Registry and to the party making the request; or

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

(b) where the material cannot be reproduced, the original material to the Registry.

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Opposition de l'office fédéral

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directions as to procedure

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Directives de la Cour

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original,

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que

of all or part of the material requested be forwarded to the Registry.	les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[46] These complimentary provisions of the *Immigration Rules* and *Federal Courts Rules* apply in a proceeding such as this, in relation to relief in respect of matters under *IRPA*, including but not limited to stays, *mandamus* and judicial review.

[47] In my respectful view, these two sets of Federal Court rules create a useful procedure for the production of a CTR in cases under *IRPA.* Importantly for this proceeding, these two sets of Federal Court rules (along with the Court's inherent jurisdiction) also allow the Court to establish processes for the resolution of different opinions as to what should or should not be produced in redacted or unredacted CTRs. There is, in addition, a great deal of flexibility in how disputes may be considered and resolved: see *Lukács* at paragraph 14.

[48] Thus, it is not surprising there is already considerable jurisprudence from the Federal Court of Appeal on how to assess and determine a claim for deliberative privilege.

[49] To recall, prior to the public case management hearing, the Court asked counsel to advise why it should not follow Federal Court of Appeal jurisprudence: see Direction of February 3, 2023.

[50] Having received and considered both written and oral submissions, I am not persuaded to depart from exisdting Federal Court of Appeal jurisprudence.

[51] First, the Federal Court of Appeal per Stratas JA in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paragraph 90, specifically directs itself to the issue of "deliberative privilege" (the very same privilege advanced by the Respondent) and concludes: "The objection [re deliberative privilege, among others, ed.] is litigated in the manner specified" by earlier decisions of the Federal Court of Appeal, but essentially, by following Rules 317 and 318 of the *Federal Courts Rules* which are designed for determining and resolving disputes over a CTR. The Federal Court of Appeal determines:

> [90] Under Rule 318, the administrative decision-maker can object to production of the material. Usually the objection is based on relevance, deliberative privilege, solicitor-client privilege or public interest privilege. The objection is litigated in the manner specified by cases such as *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 and *Bernard v. Public Service Alliance of Canada*, 2017 FCA 35.
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> [Emphasis added]

[52] Note the specific reference to claims for "deliberative privilege."

[53] The second relevant decision of the Federal Court of Appeal is *Lukács*, where Justice Stratas amplifies Rule 318. In my view, the Federal Court of Appeal addresses the situation in the case at bar:

> [8] Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).
>
> [9] In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons

> given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.
>
> [10] In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.

[54] In a third decision, also of the Federal Court of Appeal per Stratas JA, the issue of dispute resolution is discussed in further detail: *Bernard v Public Service Alliance of Canada*, 2017 FCA 35:

> [11] But *Lukács* also tells us that sometimes the facts are in dispute and so evidence must be filed.
>
> [12] In *Lukács* this Court explained the relevant principles in the following way (at paras. 8-10):
>
> > Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).
> >
> > In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2).

> In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.
>
> In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.

[13] In this case, the applicant does not accept that the documents are privileged. The burden of proving the documents are privileged lies on the Board. The say-so of the Board does not discharge that burden.

[14] Even if we accepted the say-so of the Board, it does not go far enough. The Board says the documents were sent to and from its legal services branch. That's fine as far as it goes. But that alone does not establish legal professional privilege. For example, the dominant purpose of the creation of the documents must be proven. The dominant purpose may be something other than providing legal advice, such as the communication of general Board business.

[15] In this case, the Board was asked to supply submissions, nothing more. It was not allowed to file evidence. Further, the issue on which it was asked to file submissions was whether disclosure of the documents is necessary for the applicant to prepare her affidavit in support of her application for judicial review. In substance, the Board has never had an opportunity to file evidence on the existence of the privilege. And the applicant also has not had an opportunity to file evidence on that issue and, if necessary, cross-examine on the evidence offered by the Board.

[16] The solution, as counselled by *Lukács*, is for the Board to bring a motion under Rule 369 for an order upholding its Rule 318 objection, *i.e.*, its claim of legal professional privilege. The Board

> is the proper party to bring the motion as it bears the burden of proving its claim of legal professional privilege. The motion process solves the problems identified in the preceding paragraph: it allows the parties a full opportunity to file evidence and, if necessary, to test it.

[55] While I appreciate the Respondent's suggestion the Court adopt procedures developed in the provincial superior courts, and while I acknowledge the flexibility the Federal Court has in determining its own procedures, I am not persuaded to depart from the jurisprudence, or the *Immigration Rules* or the *Federal Courts Rules*, including Rules 317 and 318.

[56] I say this for a number of reasons. First the already well-developed procedures are well known to the bar and the Court. They have the advantage of being equally applicable to common law provinces and to cases arising in Quebec, which is appropriate for this bijural and bilingual Court. They provide the additional advantage of consistency across Canada in this national Court regardless of changing provincial rules and common law developments. Rules 317 and 318, moreover, are not subject to changes in or differences between provincial jurisprudence.

[57] Notably also, the Court deciding these issues is the Federal Court. Section 46 of the *Federal Courts Act* establishes the process and authority to enact the *Federal Courts Rules*, already referred to and notably Rules 317 and 318. In addition, the Federal Court in cases under *IRPA* such as the present, proceeds and acts pursuant to the *Immigration Rules* authorized by section 75 of *IRPA*. Both the *Federal Courts Rules* and the *Immigration Rules* are legislated by these two complimentary federal statutes.

[58] Given this, I see no need to depart from the normal processes for settling disputes relating to the contents of a CTR as set out in Rules 317 and 318. These are tailor- made to resolve the dispute at hand. This Court also benefits from fulsome jurisprudence of the Federal Court of Appeal.

[59] I would add in this case, while it is not a distinguishing feature by any means, that the dispute at one level involves section 87 of *IRPA* and that the Application before the Court is brought pursuant to both *IRPA* and the *Federal Courts Act*. I recognize it is possible a section 37 claim will be advanced as an alternative argument. However, none of that militates in favour of having two or three separate processes given the Court's over-riding duty to deal with these issues without delay as Parliament requires by paragraph 73(2)(d) of *IRPA*: the Court is to dispose of motions and applications such as this "without delay and in an summary way."

[60] Before concluding on the issue of privilege and non-disclosure the Federal Court of Appeal also determines as follows in *(Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72, setting out points both counsel should consider:

> [102] For a long time now, Canadian courts have opposed attempts by public authorities to immunize administrators completely from judicial review, whether that be done by full privative clauses or the withholding of evidence or explanations essential for a meaningful review. The complete barring of review by a court by whatever means, whether by appeal or by judicial review, even on the issue whether an administrator has exceeded its legislative authority, is an unwarranted interference with the core, constitutional powers of the judiciary and the constitutional principle of the rule of law:
>
> [citations deleted]
>
> ….

[106] Courts are alert to attempts by public authorities and administrators to immunize their decision-making by withholding documents and information necessary for judicial review or by failing to give explanations and rationales for decision-making: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 51; *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at para. 24; *Slansky* at para. 276 (dissenting but not disputed by the majority); see also Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 Can. J. Admin. L. & Prac. 87 at 113; and see the requirement for reasoned explanations behind administrative decision-making in *Vavilov* at paras. 83-87 and 91-104.

[107] To ensure that judicial reviews are available, effective and fair, both sides have many tools to compel the production of evidence or the provision of information such as production of the administrative record under Rule 317, subpoenas under Rule 41, and oral and documentary discoveries when the judicial review can be treated like an action under subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7: see the general discussion in *Tsleil-Waututh Nation* at 86-105; on subsection 18.4(2), see *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at paras. 23-26 and *Meggeson v. Canada (Attorney General)*, 2012 FCA 175, 349 D.L.R. (4th) 416 at paras. 31-34. The Federal Courts have additional tools under the plenary powers they possess as courts: see *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at para. 20 and cases cited therein.

[108] The primary tool available to parties is to request that the administrative decision-maker produce its record under Rule 317. In dealing with a request, administrative decision-makers can object to disclosing documents under Rule 318 based, for example, on privileges. After receiving submissions, the Court can rule on the objections. See, generally, *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 5-18; and see *Bernard v. Public Service Alliance of Canada*, 2017 FCA 35 on the procedure for litigating objections.

[109] When dealing with privileges, the Court will scrutinize them carefully. Some privileges, such as public interest privilege, have demanding requirements that must be met: see, *e.g.*, *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24, [2018] 3 F.C.R. 633. When a claim of privilege over a document is before a Court under Rule 318, the Court is not always limited to the all-or-nothing choice of making an order requiring the

document to be produced or keeping the document secret. Often the Court can craft an order that protects confidentiality interests while permitting sufficient access to confidential material to facilitate effective and meaningful judicial review: *Lukács* at paras. 12-18; see also *Canada Evidence Act*, s. 37(5) and ss. 39.1(7) and (8). When the record assembled under Rules 317 and 318 is settled, it can be filed with the Court hearing the judicial review: on this, see *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 at paras. 7-24.

[110] There are cases where the Court cannot craft an order permitting some disclosure and so an assertion of privilege over an important document is entirely upheld. But the judicial review is not stopped in its tracks. The Court has some mechanisms to deal with this.

[111] Assertions of privileges over a challenger's constant and firm objection can lead to adverse inferences being drawn against the party asserting the privilege—and sometimes the adverse inference can be pivotal in the outcome of the judicial review: see, *e.g.*, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 at paras. 165-166; and see discussion of this in *Tsleil-Waututh Nation* at para. 54.

[112] The assertion of privileges over a challenger's constant and firm objection can also lead to serious gaps in the evidentiary record that either leave the administrator unable to demonstrate the reasonableness of its decision to the reviewing court or undermine the requirement that there be a reasoned explanation for an administrator's decision. Either can lead to the quashing of the administrative decision: *Vavilov*, above; *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 at paras. 313-324.

[113] Despite the assertion of privileges, challengers and the Court do not necessarily have to be deprived of what they need for an effective, meaningful and fair judicial review.

[114] Public authorities and administrative decision-makers can sometimes prepare and disclose a summary of how they went about their task, what they took into account and why they acted the way they did, providing enough information to allow for an effective and meaningful judicial review. In law, the provision of such a summary in these circumstances does not waive privilege. For example, in *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, 444 D.L.R. (4th) 298, a certificate under section 39 of the *Canada Evidence Act*—the most drastic privilege

> on the books—was issued to render secret the Governor in Council's deliberations and the sensitive documents and information it relied upon. But the Governor in Council provided a summary of its decision-making in the preambles to its Order in Council approving an infrastructure project. This was sufficient in the circumstances to make the judicial review effective, meaningful and fair.
>
> [115] Of course, the summary must be adequate and accurate. Some evidence should be offered regarding who prepared the summary and how it was prepared. Some of the mechanisms, discussed immediately below, may facilitate the making of submissions concerning the adequacy and accuracy of the summary.
>
> [Emphasis added]

[61] Notably also, in the foregoing the Federal Court of Appeal spoke unanimously through Justice Stratas, Noël JC and Laskin JJA concurring.

[62] Therefore the Court will process and decide claims under section 87 in the usual way, namely at an *in camera ex parte* hearing at a time and date to be set. I will hear from section 87 counsel at that time. Of course, I will decide whether or not to appoint a special advocate before that hearing. Because the section 87 claims are now known to be alternatives to deliberative privilege at common law and possible claims under section 37, this hearing will take place after resolving those matters.

[63] Also given the jurisprudence, I will Order the Respondent, if he maintains objections over all or part of the 12 redacted pages, to apply in writing under Rules 318 and 369 of the *Federal Courts Rules* within 21 days of this Order, supported by what material is considered

advisable, to be filed in the Court's secure facility, for an order granting relief from filing unredacted copies of material he wishes to keep confidential.

[64] It is not clear whether the Respondent will in fact bring a section 37 claim. Regardless, the Respondent shall make submissions both in respect of his claim to deliberative privilege and in relation to any claim deemed advisable under section 37 of the *Canada Evidence Act* in the same written filings just referred to.

[65] As presently advised, after the Court has considered and determined the foregoing, the Court will determine whether or not to appoint a special advocate and any related terms.

[66] Thereafter, and as currently advised, the Court will the convene an *in camera* and *ex parte* hearing to deal with any section 87 claim.

ORDER in IMM-1407-22

THIS COURT'S ORDER is that:

1. The Respondent and/or the Attorney General of Canada, if they or either of them maintain objections over all or part of the 12 redacted pages discussed in the Reasons issued with this Order, shall apply under Rules 318 and 369 of the *Federal Courts Rules* within 21 days of this Order, supported by what material is considered advisable to be filed in the Court's secure facility, for an order granting relief from filing unredacted copies of material they wish to keep confidential based on deliberative privilege and or under section 37 of the *Canada Evidence Act*.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1407-22
STYLE OF CAUSE:	KHALIL MAMUT & AMINIGULI AIZEZI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO SECTION 87 OF *IRPA*

WRITTEN REPRESENTATIONS BY:

Prasanna Balasundaram Asiya Hirji	FOR THE APPLICANTS
Bradley Bechard Gregory George Kieran Dyer	FOR THE RESPONDENT

PLACE OF HEARING:	CASE MANAGEMENT CONFERENCE BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 9, 2023
ORDER AND REASONS:	BROWN J.
DATED:	MARCH 23, 2023

APPEARANCES:

Prasanna Balasundaram Asiya Hirji	FOR THE APPLICANTS
Bradley Bechard Gregory George Kieran Dyer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT