Federal Court  Cour fédérale

Date: 20101103

Docket: IMM-152-09

Citation: 2010 FC 1082

Ottawa, Ontario, November 3, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

CHANTHIRAKUMAR SELLATHURAI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] In this motion, the Minister of Emergency Preparedness and Public Safety (the Minister) seeks the return of material inadvertently forwarded to counsel for Mr. Chanthirakumar Sellathurai (the Applicant). The Minister maintains that three unredacted confidential documents (the Disputed Documents) attract national security privilege, that certain portions of the Disputed Documents should not have been disclosed, and that the inadvertent disclosure of the Disputed Documents did not waive the claimed privilege.

[2] The Minister requests an order of non-disclosure of the relevant portions of the Disputed Documents and an order requiring the Applicant to return the unredacted Disputed Documents to the Minister.

[3] This motion raises unique issues in the context of an already complicated set of proceedings. For the reasons that follow, I have concluded that the motion of the Minister should be granted.

II. Issues

[4] As I would frame them, the issues and sub-issues in this motion are the following:

1. Does the Federal Court have jurisdiction to determine this motion and grant the relief sought by the Minister pursuant to s. 87 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*)?

2. Should the Minister's motion to recall the Disputed Documents succeed?

    (a) Are these documents the subject of national security privilege?

    (b) Did the Minister waive national security privilege on the Disputed Documents?

    (c) Is national security privilege an exception to the "open court principle"?

3. Should the Court designate a special advocate, pursuant to s. 87.1 of *IRPA*, to advance the interests of the Applicant?

III. Background

[5] The context of Court File IMM-152-09 is an admissibility hearing before the Immigration Division of the Immigration and Refugee Board (the ID). The admissibility hearing would determine the Applicant's admissibility to Canada pursuant to s. 34(1) of *IRPA*. In an interlocutory decision dated December 29, 2008, the ID refused to stay the s. 34(1) hearing pending the outcome of the Applicant's 2002 application made under s. 34(2) of *IRPA* (the Ministerial Relief Application). The Applicant filed an Application for Leave and Judicial Review of the interlocutory decision of the ID, and brought a motion before the Court seeking a stay pending a determination of the Ministerial Relief Application. The Federal Court granted the Applicant's motion for a stay pending the disposition of the Application for Leave and Judicial Review (*Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)* (7 December 2009), Toronto IMM-152-09 (F.C.) per Mosley J)).

[6] Leave was granted in the underlying judicial review application, and a hearing date was set for February 23, 2010. Justice Roger Hughes adjourned the judicial review hearing *sine die*, as he concluded that judicial economy favoured a practical resolution of the Ministerial Relief Application before a judicial review of the ID proceeding should be heard.

[7] The key milestones leading to the motion now before me are as follows:

- On July 12, 2010, officers with Canada Border Services Agency (CBSA) provided the Applicant with a fairness disclosure package relating to the Ministerial Relief Application. This package contained the unredacted Disputed Documents.

- On August 12, 2010, after becoming aware, on August 11, 2010, of the inadvertent disclosure, counsel for the Minister wrote to the Applicant's counsel to inform her that classified information was inadvertently disclosed. The Minister's counsel requested that the entire package of documents be sealed and returned. A second request was sent on August 16, 2010.

- In a letter dated August 19, 2010, Applicant's counsel advised the Minister's counsel that the Disputed Documents had been pulled from the disclosure package and put in a sealed envelope. Applicant's counsel requested that redacted versions of the Disputed Documents be sent to her.

- On August 30, 2010, counsel for the Minister wrote to the Court seeking direction regarding the inadvertent disclosure of the Disputed Documents. The Applicant responded to this letter on September 2, 2010.

[8] Following this sequence of events, on September 2, 2010, Justice Hughes issued the following Direction in this matter:

- Applicant's counsel was to place the Disputed Documents in a sealed envelope and file it with the Court by September 8, 2010;

- The Minister's counsel was to provide the Applicant's counsel with the redacted versions of the Disputed Documents by September 8, 2010; and

- The Minister was to file a motion on or about September 8, 2010 "to be heard by a designated Judge, if required as to the further manner in which said documents are to be dealt".

These directions were followed.

IV. Analysis

A. *Issue 1: Does the Federal Court have jurisdiction to determine this motion pursuant to s. 87 of IRPA?*

[9] After hearing oral argument from both the Applicant and the Respondent, it is apparent that neither party is seriously asserting that the Federal Court does not have jurisdiction to determine this motion. However, the disputed issue is whether this motion should be heard and determined

pursuant to s. 87 of *IRPA*, or pursuant to s. 38 of the *Canada Evidence Act*, R.S.C., 1985 c. C-5 (*CEA*).

[10] The Minister acknowledges that neither *IRPA* nor the *Federal Courts Rules*, SOR/98-106 provide an explicit statutory procedure for issues of inadvertent disclosure in the *IRPA* context. However, the Minister points to the fact that the Federal Court has been expressly tasked by Parliament to protect information in the *IRPA* context where disclosure would be injurious to national security or endanger the safety of any person (*IRPA*, s.77 to 87.1). The Minister further argues that this Court has plenary supervisory jurisdiction over the statutory scheme of *IRPA* which would allow this motion to be heard pursuant to s. 87 of *IRPA*, combined with the "gap rule" in s. 4 of the *Federal Courts Rules*.

[11] The Applicant, on the other hand, argues that this motion cannot be heard pursuant to s. 87 of *IRPA* because the inadvertent disclosure "has nothing to do" with any current judicial review application. The Applicant argues that the only vehicle for the Federal Court to determine this motion is s. 38 of *CEA*. The Applicant further submits that it is in the interests of justice to apply s. 38 of *CEA*, because this section, and not s. 87 of *IRPA*, allows for the proper balancing of the interests for and against disclosure.

[12] For the reasons that follow, I find the position of the Minister to be preferable. Specifically, I conclude that this Court has jurisdiction to apply s. 87 of *IRPA* to the Disputed Documents.

[13] The importance of preventing (and, therefore, in my view, recalling) the release of inadvertently disclosed documents has been specifically addressed by this Court. In *Jahazi v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 242, 363 F.T.R. 278 (*Jahazi*) at paragraph 21 (citing *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 at para.42-43) Justice Yves de Montigny stated:

> In [*Ruby*], the Supreme Court acknowledged that the state has a legitimate interest in preserving Canada's supply of intelligence information received from foreign sources and noted that the inadvertent release of such information would significantly injure national security. [Emphasis added]

[14] The state has an important interest in protecting national security and the security of its intelligence services. Inadvertent disclosure of confidential information goes to the heart of what the state has an interest in protecting. There will always be a competing interest between the public's right to an open system and the state's need to protect information that could be injurious to the public as a whole.

[15] The Supreme Court has recognized the importance of both the state's and society's interest in national security. Both of these reasons have been found to be sufficient to rationalize limiting the disclosure of materials to individuals affected by the non-disclosure (see, *Jahazi, above,* citing *Charkaoui, Re*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 58; *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289 at p. 744; *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (*Suresh)*, at para. 122; *Ruby v. Canada (Solicitor General)*, above, at paras. 38 - 44).

[16] A natural extension of these principles is the state's interest in recalling documents that have been inadvertently disclosed with the objective of regaining protection of information that is properly the subject of national security. It would be illogical to prevent the recalling of inadvertently disclosed documents only because the documents have been disclosed, if putting the information into the hands of an "informed reader" would be injurious to national security. Therefore, the principles should apply to documents that are properly the subject of national security privilege, regardless of whether they were inadvertently disclosed documents or the subject of a non-disclosure order.

[17] Neither the Applicant nor the Minister argues before me that the state should not protect information that is properly the subject of national security privilege. The thrust of the arguments relates to "how" and "whether" the state should protect the information inadvertently disclosed in the Disputed Documents.

[18] The Applicant argues that the only vehicle for the Federal Court to determine this motion is by way of s. 38 of *CEA*. I do not agree.

[19] Under s. 38 of *CEA*, an application may be made to the Federal Court for a disclosure order pursuant to s. 38.06(2). The purpose of s. 38 of *CEA* is "to protect information where disclosure could be injurious to national defence or international relations" and to provide "for judicial oversight of government claims of confidentiality for such information" (*Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547 (*Khawaja*) at paras. 87-88). Further, in *Almrei v. Canada (Minister of Citizenship & Immigration)*, 2005 FCA 54, [2005] 3 F.C.R. 142 , the

Federal Court of Appeal stated that s. 38 of *CEA* seeks to prevent the public release of information relating to or potentially injurious to national security in the course of a proceeding before a court (para. 74).

[20] The Applicant argues that s. 38 of *CEA* provides a complete code that outlines the procedures to be taken into account when the release of sensitive information is at issue. Specifically s. 38.06(2) mandates a balancing of the public interest in disclosure, against the public interest in non-disclosure (*Khawaja*, above, at para. 89). The Applicant argues that s.38 of *CEA* is the only vehicle to deal with the Disputed Documents in this case.

[21] It is apparent that s. 38 of *CEA* is meant to be applied as a complete code to proceedings where there is no statutory scheme in place to deal with the non-disclosure of documents that are the subject of national security privilege. This is not the case at bar. *IRPA* contains a statutory scheme specifically designed to deal with the non-disclosure of information within the immigration context. An application of *CEA* to this motion, rather than *IRPA*, would arguably run contrary to the presumption against redundancy, a principle of statutory interpretation.

[22] It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose (Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 158).

[23] The same principle was expressed by Iacobucci J. in *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388, [1991] S.C.J. No. 89 (QL) at paragraph 36:

> It is a principle of statutory interpretation that every word of a statute must be given meaning: "A construction which would leave without effect any part of the language of a statute will normally be rejected" (*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 36).

[24] The presumption against redundancy would prevent this Court from applying s. 38 of *CEA* to this case. If Parliament intended this Court to utilize s. 38 every time a non-disclosure issue arose in the immigration context then s. 87 of *IRPA* would be redundant. Taking into consideration the statement by Justice Iacobucci that every word of a statute must be given meaning, this could not have been the intent of Parliament.

[25] Having determined that s. 38 of CEA is not the proper vehicle for dealing with the subject matter of this motion, I now turn to the application of s. 87 of *IRPA* and its principles.

[26] The Federal Court has been expressly tasked by Parliament to protect information in the *IRPA* context where disclosure would be injurious to national security or endanger the safety of any person if disclosed (*IRPA*, s.77 to 87.1). Section 87 of *IRPA* states:

The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 – other than the obligations to appoint a special advocate and to provide a summary – applies to the proceeding with any necessary modifications.	Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé.

[27] The Applicant argues that s. 87 cannot apply to this motion because s. 87 of *IRPA* limits the application to "during a judicial review"; in the Applicant's view, this motion "has nothing to do with a judicial review". I disagree. The Applicant's own action, in seeking a stay of the ID hearing and an adjournment of the judicial review, has inextricably linked the Ministerial Relief Application and the judicial review of the ID's interlocutory decision. As a result, there is little question in my mind that documents disclosed in the context of the Ministerial Relief Application would have relevance to the judicial review application when, and if, it is heard. It follows that, although the Disputed Documents were disclosed pursuant to the Ministerial Relief Application, this disclosure forms part of the substance of the judicial review motion that currently stands adjourned *sine die*.

[28] Even if it is possible to conclude that the Disputed Documents do not directly fall within the judicial review currently adjourned and, hence, are not within the explicit words of s. 87, the result would be the same. The Disputed Documents were clearly sent for the purposes of a matter within *IRPA* – specifically s. 34(2). The unique facts of this case and the close relationship of the s. 34(1) proceeding and the Ministerial Relief Application lead me to conclude that Rule 4 of the *Federal Courts Rules* can be relied on to bridge the gap (*Segasayo v. Minister of Emergency Preparedness*, 2007 FC 585, 313 F.T.R. 106 (*Segasayo)*; *Mohammed v. Canada (Minister of Citizenship and Immigration*, 2006 FC 1310, [2007] 4 F.C.R. 300). Adopting, by analogy, the well-established procedure of s. 87 of *IRPA* for the purposes of this motion would secure the just, most expeditious and least expensive determination of this motion (Rule 3, *Federal Courts Rules*).

[29] In summary, I find that the Federal Court has jurisdiction to consider this motion either directly or by analogy pursuant to s. 87 of *IRPA*.

B. *Issue 2: Should the Minister's motion to recall the documents succeed?*

(1) Are these documents the subject of national security privilege?

[30] The Minister argues that the documents are properly the subject of national security privilege.

[31] The Supreme Court of Canada confirmed that a broad and flexible approach to national security issues should attract a deferential standard of review, provided that "… the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, Courts should not interfere with the Minister's decision." (*Suresh*, above, at para. 85).

[32] The Minister refers to the considerations that were outlined by Mr. Justice Addy in *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229, [1988] F.C.J. No. 965 at paragraphs 27 and 28 for determining what information might prove to be injurious to national security:

> In considering whether the release of any particular information might prove injurious to national security and in estimating the possible extent of any such injury, one must bear in mind that the fundamental purpose of and indeed the *raison d'être* of a national security intelligence investigation is quite different and distinct from one pertaining to criminal law enforcement, where there generally exists a completed offence providing a framework within the perimeters of which investigations must take place and can readily be confined. Their purpose is the obtaining of legally admissible evidence for criminal prosecutions. Security investigations on the other hand are carried out in order to gather information and intelligence and are generally directed towards predicting future events by identifying patterns in both past and present events.

> There are few limits upon the kinds of security information, often obtained on a long-term basis, which may prove useful in identifying a threat. The latter might relate to any field of our national activities and it might be an immediate one or deliberately planned for some time in the relatively distant future. An item of information, which by itself might appear to be rather innocuous, will often, when considered with other information, prove extremely useful and even vital in identifying a threat. The very nature and source of the information more often than not renders it completely inadmissible as evidence in any court of law. Some of the information comes from exchanges of intelligence information between friendly countries of the western world and the source or method by which it is obtained is seldom revealed by the informing country.
>
> [Emphasis added]

[33] The Applicant, on the other hand, submits that the Minister bears the burden of establishing that the disclosure was inadvertent and that a failure to recall these documents would be injurious to national security. The Applicant argues that the affidavit of Ms. Barrette (provided as part of the motion record) does not indicate why the release of the unredacted Disputed Documents would jeopardize national security. In addition, the Applicant argues that the issue is whether a valid national security claim can be maintained, given that the documents have already been disclosed.

[34] For the reasons that follow, I conclude that the redacted portions of the Disputed Documents are properly the subject of national security privilege.

[35] The Applicant refers to portions of the redacted Disputed Documents that appear not to be of importance to 'national security' (i.e. names, addresses). However, as discussed in the recent decision of *Rajadurai v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 119, 340 F.T.R. 179 (*Rajadurai)*, while a document alone may appear to be innocuous, from the perspective

of an "informed reader", it may impinge on national security. At paragraph 16 Justice de Montigny observed:

> It is of some importance to realize than an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security. He might, for instance, be in a position to determine one or more of the following: (1) the duration, scope intensity and degree of success or of lack of success of an investigation; (2) the investigative techniques of the Service; (3) the typographic and teleprinter systems employed by C.S.I.S.; (4) internal security procedures; (5) the nature and content of other classified documents; (6) the identities of service personnel or of other persons involved in an investigation.

[36] From the perspective of an "informed reader" and as a designated judge, I have reviewed the Disputed Documents, the proposed redactions and the testimony of the affiant who swore the secret affidavit provided to me. My review was informed by the above comments of Justice de Montigny in *Rajadurai* and the recommendations of Justice Eleanor Dawson in *Ugbazghi v. Canada (Minister of Citizenship & Immigration)***,** 2008 FC 694, [2009] 1 F.C.R. 454. The secret affidavit was not a mere assertion of conclusions, but detailed the evidence and the reasoning as to why, in the opinion of the affiant, each redaction was necessary in order to protect national security or the safety of any person. Having undertaken this serious obligation to review the material, I agree with the Minister that the redacted portions of the Disputed Documents should be the subject of national security privilege.

(2) Did the Respondent waive the national security privilege on the documents?

[37] The Minister argues that the disclosure of the Disputed Documents was inadvertent and was not intended to waive the national security privilege attached to these documents. The Applicant, on the other hand, argues that even if national security privilege had originally attached, the Minister has waived that privilege by disclosing the Disputed Documents to the Applicant's counsel.

[38] Canadian courts have established that inadvertent disclosure of privileged information does not automatically amount to waiver, and privileged information relating to Canada's national security is not an exception (Alan W. Bryant, Sydney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant*: *The Law of Evidence in Canada*, 3rd edition (Toronto: LexisNexis Canada Inc., 2009)). Further, public interest immunity cannot, in any ordinary sense, be waived (*Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at para 32).

[39] The Court in *Abou-Elmaati v. Canada (Attorney General)*, 2010 ONSC 2055, 101 O.R. (3d) 424, considering s. 38 of *CEA*, stated that inadvertent disclosure does not oust the Federal Court's jurisdiction to protect national security documents on the basis of waiver. In my view, this also applies to s. 87 of *IRPA*. Justice Richard Mosley, in *Khawaja*, above, referred to the decision in *Chapelstone v. Canada*, 2004 NBCA 96, 277 (N.B.R. (2d) 350, where the New Brunswick Court of Appeal held that inadvertent disclosure of privileged information does not automatically result in a loss of privilege, and more is required before the privileged communication will be admissible (*Khawaja*, above, at para. 109; *Chapelstone*, above, at para. 55).

[40] The Court in *Khadr v. Canada (Attorney General)*, 2008 FC 549, 329 F.T.R. 80 (*Khadr*), considered the scenario of if and when inadvertent disclosure could waive national security privilege. The Court concluded that the approach to determine if a document should not be disclosed to the public is the same for all documents whether or not the information was released inadvertently.

[41] I agree with the assertion of the Applicant that a case-by-case determination of privilege must be made when documents are inadvertently disclosed (*Khawaja*, above, at para. 109).

[42] Having considered the unique circumstances of this motion, I conclude that the claim to national security privilege over the portions of the Disputed Documents at issue was not lost by the inadvertent disclosure of them. While the Minister acknowledges that unredacted copies of the Disputed Documents should never have been sent to the Applicant's counsel, it was not done intentionally, and there is nothing before me that would give rise to the 'circumstances' discussed in *Khawaja* and *Khadr* that would necessitate the waiver of privilege to the Disputed Documents. The importance of protecting national security does not end when a mistake is made which results in inadvertent disclosure of information. It is in the interest of the public to ensure that natural security information is kept confidential and that, in the event of an 'inadvertent' error, there are procedures in place to restore that confidentiality.

(3) Is national security privilege an exception to the open court principle?

[43] The Applicant argues that national security privilege is contrary to the "open court principle" requiring "public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution" (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 at para. 1).

[44] There are clear exceptions to the "open court principle," and national security privilege is one such exception (*Ugbazghi*, above, at paras. 24-28).

C. *Issue 3: Should the Court designate a Special Advocate to advance the interests of the Applicant?*

[45] The Applicant argues that if there is to be evidence led and submissions made *in camera* and *ex parte*, the Court should appoint a special advocate to the Applicant pursuant to s. 87.1 of *IRPA*.

[46] The Applicant is aware that the appointment of a special advocate is discretionary. However, the Applicant asserts that the discretion ought to be exercised positively where considerations of fairness require it. The Applicant submits that, in this case, considerations of fairness require the appointment of a special advocate.

[47] The Applicant argues that his rights pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter)* are engaged, in that this is part of the overall decision which could lead to his

removal to face persecution and torture in Sri Lanka. The Applicant refers to the decision of *Charkaoui*, above, where the Supreme Court specifically emphasized that non-disclosure and breach of fairness in a proceeding that could lead to removal to harm would violate an individual's *Charter* rights.

[48] Section 87.1 of *IRPA* states:

> If the judge during the judicial review, or a court on appeal from the judge's decision, is of the opinion that considerations of fairness and natural justice require that a special advocate be appointed to protect the interests of the permanent resident or foreign national, the judge or court shall appoint a special advocate from the list referred to in subsection 85(1). Sections 85.1 to 85.5 apply to the proceeding with any necessary modifications"
>
> Si le juge, dans le cadre du contrôle judiciaire, ou le tribunal qui entend l'appel de la décision du juge est d'avis que les considérations d'équité et de justice naturelle requièrent la nomination d'un avocat spécial en vue de la défense des intérêts du résident permanent ou de l'étranger, il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à ce titre dans le cadre de l'instance. Les articles 85.1 à 85.5 s'appliquent alors à celle-ci avec les adaptations nécessaires.

[49] As noted in *Farkhondehfall v. Canada (Citizenship and Immigration)*, 2009 FC 1064, [2009] F.C.J. No. 1323 at paragraph 29, the appointment of a special advocate is within the discretion of the designated judge:

> While the amendments made to IRPA in the wake of the *Charkaoui* decision made the appointment of special advocates mandatory in security certificate proceedings, the appointment of special advocates in other types of cases under the Act is left to the discretion of the designated judge.

[50] Recently, Justice de Montigny, in *Kanyamibwa v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 66, 360 F.T.R. 173, at paras. 43-56 canvassed the requirements that a Court should consider when determining whether the appointment of a special advocate is necessary in a non-security certificate case. In that case, Justice de Montigny concluded that a special advocate was not necessary to assist in the s. 87 non-disclosure motion. In reaching this conclusion, Justice de Montigny considered a number of factors:

1. Injury: Would disclosure be injurious to national security or endanger the safety of any person?

2. Immediate Impact: Would the Minister's decision have a limited immediate impact on the Applicant's life, liberty and security interests?

3. Convention Refugee: Has the Applicant already been found to be a Convention refugee?

4. Type of Application: Is this a denial of a ministerial relief application or a security certificate?

5. Extent of non-disclosure: Is the extent of the non-disclosure limited?

6. Materiality: What is the materiality or probity of the information in question?

[51] In the motion before me, almost all of the factors weigh against the appointment of a special advocate. As noted above, I have concluded that disclosure of the unredacted Disputed Documents would be injurious to national security. Secondly, a judicial review of a denial of ministerial relief under subsection 34(2) differs substantially from both a judicial determination concerning the reasonableness of a security certificate and a judicial review of the detention of a person subject to a security certificate (*Segasayo*, above, at para. 28). Further, in this case, a determination has not been made as to whether the Applicant will be denied ministerial relief. In my view, the information sought to be protected is minimal. At this stage, it is uncertain whether this information will be relied upon by the Minister in the Ministerial Relief Application. Finally, the Applicant is not facing imminent removal and is not being detained.

[52] Considering all of the factors above, I conclude that the considerations of fairness and natural justice do not require that a special advocate be appointed to protect the interests of the Applicant.

V. Conclusion

[53] In conclusion, I am satisfied that the motion of the Minister should be granted. As I understand the situation, the parties have complied with the order of Justice Hughes. There is no need to repeat, in my order, those matters that have already been addressed.

[54] Given that the context of this motion is under the provisions of *IRPA*, I asked counsel at the end of oral submissions whether there was a question for certification. I declined a request to defer

that issue until after my reasons were released. As observed by the Court of Appeal in *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129, "a serious question of general importance arises from the issues in the case and not from the judge's reasons" (para. 29). I gave the Applicant until Friday, October 22, 2010 and the Minister until Tuesday, October 26, 2010 to provide submissions on any proposed certified question.

[55] Applicant's counsel's submissions were not received until October 25, 2010. Her reasons for filing late were totally inadequate. The Court does not set deadlines so that they may be ignored. However, in any event, although the late-filed letter contained some musings, the letter concluded by stating that: "So at this point there are no issues for which certification is being sought."

[56] In responding submissions (that were delayed due to the lateness of the Applicant's counsel's submissions), counsel for the Minister indicated that it might be premature to certify a question but that "it may be prudent to certify a question pertaining to the appropriate or preferable procedure to follow in the circumstances." The vagueness of this request does not assist the Court.

[57] Given the unique circumstances that arise on this motion, I am satisfied that there is no question of general importance for certification.

ORDER

THIS COURT ORDERS, DECLARES AND DIRECTS that:

1. the Order of Justice Hughes, dated September 2, 2010, is confirmed;

2. the national security claim of privilege over those portions of the Disputed Documents, as asserted by the Minister, is upheld;

3. to the extent that any of the following steps have not been taken, the Court orders that:

    - the Applicant seal and return to the Minister, through his counsel, any paper copy of the unredacted Disputed Documents;

    - the Applicant destroy any electronic copy of the unredacted Disputed Documents in the control or possession of the Applicant or his counsel; and

    - the Applicant and his counsel destroy any notes in their possession or control relating to the redacted portions of the Disputed Documents.

4. The unredacted Disputed Documents, that currently are in a sealed envelope filed with the Court and that form part of this Court File, are to be returned by the Registry to the Minister's counsel; and

5. no question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-152-09
STYLE OF CAUSE:	SELLATHURAI v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 20, 2010
REASONS FOR ORDER AND ORDER:	SNIDER J.
DATED:	NOVEMBER 3, 2010

APPEARANCES:

Barbara Jackman	FOR THE APPLICANT
Jamie Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT