

Federal Court



Cour fédérale

**Date: 20150312**

**Docket: IMM-740-14**

**Citation: 2015 FC 313**

**Ottawa, Ontario, March 12, 2015**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**ABDUL KHALIL ALEAF, RAIHANA  
ALEAF and TAYEBA ALEAF and ABDUL  
SABOOR ALEAF (by their Litigation  
Guardian  
ABDUL KHALIL ALEAF)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**ORDER AND REASONS**

[1] Abdul Khalil Aleaf's application for permanent residence as a member of the Convention refugee class or country of asylum class was refused because a visa officer found that Mr. Aleaf's story was not credible. No finding was made by the officer that Mr. Aleaf was inadmissible to Canada on security grounds.

[2] Mr. Aleaf seeks judicial review of the visa officer's decision. In the context of this application, the Minister has brought a motion under section 87 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 for the non-disclosure of portions of the Certified Tribunal Record, asserting that the disclosure of the redacted information would be injurious to national security or to the safety of any person. In response to the Minister's motion, Mr. Aleaf has brought his own motion seeking the appointment of a Special Advocate to protect his interests in the section 87 proceedings. These reasons pertain only to Mr. Aleaf's motion.

[3] For the reasons that follow, I have determined that considerations of fairness and natural justice do not require the appointment of a Special Advocate in this case. As a consequence, Mr. Aleaf's motion will be dismissed.

#### **I. Analysis**

[4] The Special Advocate provisions of IRPA were enacted as a result of the Supreme Court of Canada's decision in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350. In *Charkaoui*, the Supreme Court held that in light of the significant liberty interests at stake in Security Certificate proceedings, the requirements of fundamental justice necessitated that the individual named in the Certificate be provided with full disclosure of the case against him or her, or a "substantial substitute" for such disclosure had to be found: see *Charkaoui*, at para. 61.

[5] While the amendments to *IRPA* enacted following the *Charkaoui* decision make the appointment of Special Advocates mandatory in Security Certificate proceedings, the appointment of Special Advocates is left to the discretion of the presiding designated judge in other types of immigration cases. That is, section 87.1 of *IRPA* gives this Court the discretion to

appoint a Special Advocate where “it is of the opinion that considerations of fairness and natural justice require” such an appointment in order to protect the interests of an applicant.

[6] A number of factors have to be weighed in assessing whether fairness and natural justice require the appointment of a special advocate to protect the interests of the individual in a given case. No one factor will necessarily be determinative – rather, the Court must balance all of the competing considerations in order to arrive at a just result: *Freeman v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 875, at para. 18, [2013] F.C.J. No. 1438; *Farkhondehfall v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1064 at para. 31, [2009] F.C.J. No. 1323.

[7] I accept that this matter is undoubtedly of great importance to Mr. Aleaf and his family. However, in contrast to Security Certificate proceedings, there are no rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c.11, at stake in this case. This is because non-citizens outside of Canada do not generally hold Charter rights: *Tabingo v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 377 at para. 75, 362 D.L.R. (4th) 166; *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957 at paras 81-82, [2012] F.C.R. 413.

[8] I recognize that there are limited exceptions to this principle, where, for example, the non-Canadian is physically present in Canada or is subject to a criminal trial in Canada: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Slahi v Canada (Minister of Justice)*, 2009 FC 160, 340 F.T.R. 236, aff'd 2009 FCA 259, 394 N.R. 352, leave to appeal refused [2009] S.C.C.A. No. 444. None of the exceptions identified in the jurisprudence apply here. Mr. Aleaf is not in

Canada, and he is not a Canadian citizen. He is not in detention or facing trial in Canada, and there is no issue of his removal from Canada to a place where his life or freedom would be at risk.

[9] Because section 7 of the Charter is not engaged in this proceeding, the issue is therefore one of common-law procedural fairness.

[10] As the Supreme Court of Canada observed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, the content of the duty of fairness varies depending on the context of the specific case at issue.

[11] As noted earlier, the decision in issue in this case is of considerable importance to Mr. Aleaf and his family, a factor that militates in favour of a higher level of procedural fairness being owed to him. So too does the fact that no appeal is provided for by *IRPA* with respect to the decision under review: see *Mekonen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133 at para.17, 66 Imm. L.R. (3d) 222.

[12] That said, there are other factors that limit the content of the duty of fairness owed to visa applicants, including Mr. Aleaf: *Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 at paras. 30-31, [2002] 2 F.C. 413. In particular, the visa officer's decision in this case did not deprive Mr. Aleaf of any legal rights because, as a foreign national, he has no right to enter Canada: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at para. 24, [1992] S.C.J. No. 27. This reduces the level of procedural fairness owed to Mr. Aleaf: *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, at paras. 38-41, [2000] F.C.J. No. 2043.

[13] Also relevant is the fact that the amount of information that has not been disclosed to Mr. Aleaf is limited. As the Court observed in *Segasayo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 585, 66 Imm. L.R. (3d) 111, in Security Certificate proceedings, the amount of information that is not disclosed to the subject of the Certificate is usually extensive. Moreover, the individual in question will have no way of knowing the extent of the non-disclosure: see *Segasayo*, at para. 28. In contrast, in this case, the Tribunal record is some 156 pages in length, and redactions appear on just a few pages.

[14] As Justice Noël observed in *Dhahbi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 347, [2009] F.C.J. No. 400, in cases such as this, the information redacted from the record often adds little to the matters in issue. Examples cited by Justice Noël include references to investigative techniques; administrative and operational methods; names and telephone numbers of CSIS personnel; and information regarding relationships between CSIS and other agencies in Canada and abroad: at para. 24. Many of the redactions in this case fall within that description.

[15] Moreover, a review of the un-redacted Certified Tribunal Record reveals that Mr. Aleaf has already had access to much of the information on the record, and has been made aware of the nature of the Minister's concerns with respect to his past activities.

[16] Finally, the issues raised by the respondent's section 87 motion appear to be narrow, and the Court is clearly well-positioned to address the national security claims in this case without the involvement of a Special Advocate.

## **II. Conclusion**

[17] Taking all of the above considerations into account, I have concluded that considerations of fairness and natural justice do not require the appointment of a Special Advocate in this case. As a result, Mr. Aleaf's motion is dismissed.

[18] The Court will, however, be holding an *ex parte, in camera* hearing in accordance with the provisions of paragraph 83(1)(c) of *IRPA* in order to determine whether disclosure of the redacted information would indeed be injurious to national security or to the safety of any person.

**ORDER**

**THIS COURT ORDERS** that Mr. Aleaf's motion for the appointment of a Special Advocate is dismissed.

"Anne L. Mactavish"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-740-14

**STYLE OF CAUSE:** ABDUL KHALIL ALEAF 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:** MACTAVISH J.

**DATED:** MARCH 12, 2015

**WRITTEN REPRESENTATIONS BY:**

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