Federal Court  Cour fédérale

Date: 20240628

Docket: IMM-6940-23

Citation: 2024 FC 1024

Toronto, Ontario, June 28, 2024

PRESENT: Mr. Justice Diner

BETWEEN:

JOHN DOE 1 AND JOHN DOE 2,
AND JOHN DOE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Respondent [AG] brings a motion seeking to be relieved from this Court's order dated April 23, 2024 [Production Order] that requires him to file a Certified Tribunal Record [CTR] pursuant to Rule 14(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Immigration Rules*]. In particular, the AG seeks to be relieved from the requirement to "send a certified copy of its record electronically to the parties and to the

Registry of the Court," even in the event that the underlying consolidated application for leave and for judicial review [Application] is granted.

[2] In the Application, the Applicants seek review of the *Temporary Public Policy to Exempt Ukrainian Nationals from Various Immigration Requirements in Support of the Canada-Ukraine Authorization for Emergency Travel* [CUAET], alleging that it is unconstitutional on account of it being discriminatory.

[3] The AG argues on this motion that the Applicants do not challenge a specific decision or order for which he could produce a CTR. Rather, he states that the Application poses only a legal question that may be fully answered with reference to the affidavit evidence and legal arguments already before the Court.

[4] For the following reasons, I will grant the motion in part, ordering that the AG is relieved from filing documents relating to any program or application that the Applicants have not directly challenged in the Application. However, he must still produce the CTR with relevant documents relating to the impugned CUAET program, pursuant to the Production Order.

I. Background

[5] The CUAET is a public policy created by the Minister of Immigration, Refugees and Citizenship Canada [Minister] under subsection 25.2(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. It is part of Canada's response to the humanitarian crisis

in Ukraine, facilitating temporary safe harbour in Canada for Ukrainian nationals and their immediate family members fleeing the conflict.

[6] The Applicants are Canadian citizens living in Canada, with extended family members whom are Afghan nationals living abroad. In the Application, they allege that the CUAET discriminates on the basis of nationality, contrary to section 15 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[7] Specifically, the Applicants argue that the CUAET unfairly provides greater immigration benefits than those provided by the *Temporary public policy for extended families of former language and cultural advisors* [LCA], a policy enacted under section 25.2 of the IRPA to aid Afghan nationals who worked for the Department of National Defence between 2001 and 2021 in Afghanistan, and their families. Certain family members of the Applicants applied for and were refused permanent resident visas under the LCA. Notably, the Applicants do not challenge any individual immigration decision in their Application.

II. Positions of the Parties

[8] The AG emphasizes that neither the Applicants nor their extended family members have submitted applications under the CUAET. As such, he argues that there is no individual litigant whose personal documents should be adduced in a CTR. The AG further submits that there are no documents that may affect the Court's decision to grant leave which should be included in a CTR.

[9] The Applicants oppose the motion, arguing that the Minister has documents in his possession and control that are relevant to the Court's determination of the Application. Specifically, they submit that these relevant documents are those reflecting the information and submissions that were directly or indirectly considered by the Minister:

1) in making the CUAET;

2) in making the LCA; and

3) in refusing immigration applications under the LCA for:

   i. John Doe 1's sister and her four dependent children;

   ii. John Doe 1's stepbrother and his seven dependent children;

   iii. John Doe 2's brother, his wife, and his six dependent children;

   iv. John Doe 2's sister, her two sons, and the wife and two dependent children of one of the sons;

   v. John Doe 2's other sister, her three daughters, and the husband and two dependant children of one of the daughters; and

   vi. John Doe's six siblings, their spouses, and their children.

[10] The Applicants submit that these documents are relevant in determining whether the CUAET is discriminatory under the *Charter* by providing better immigration benefits to Ukrainians than to Afghans. They argue that they are also relevant for determining the objectives of the policies and any alternative measures considered, which are necessary in determining whether any subsection 15(1) violation may be saved by subsection 15(2) or section 1 of the *Charter*.

III. Analysis

[11] Under Rule 14(2) of the *Immigration Rules*, a judge may order a tribunal to produce documents in its possession or control, prior to leave, where the judge considers that the documents are required for properly disposing the application for leave: see Rule 14(2) and other rules noted in these Reasons reproduced at Schedule A to this Order and Reasons.

[12] Rule 14(2) regarding production orders must be read harmoniously with Rule 17(b), that specifies a CTR must include "all relevant documents that are in the possession or control of the tribunal" (*Abu v Canada (Citizenship and Immigration)*, 2021 FC 1031 [*Abu*] at para 40).

[13] It is well established that the test for relevance under Rule 17 is the same as that under Rule 317 of the *Federal Courts Rules*, SOR/98-106 (*Abu* at paras 28 and 43, citing *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1086 at para 19 and *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 102 at para 94). That is, a document is "relevant" in this context where it "may affect the decision that the Court will make on the application," determined in relation to "the grounds of review and any affidavit filed in support of the application" (*Abu* at para 43).

[14] I also note that under the Federal Court's settlement project to assist with the efficient resolution of applications for leave and for judicial review, this Court routinely issues production orders for parties to obtain CTRs before the application for leave is formally adjudicated. Considering the 90-day post-leave requirement to hold the hearing imposed by section 74 of the

IRPA, such early production orders allow sufficient time for any meaningful settlement discussions to take place between the parties. This has the salutary effect of avoiding late settlements (see *Abu* at paras 30, 32; along with this Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* dated June 24, 2022 (last amended October 31, 2023) at para 40).

[15] In these proceedings, the Applicants challenge the CUAET's legality under section 15 of the *Charter*. Importantly, they do not challenge any decision of the Minister under the CUAET, nor the Minister's interpretation of his discretionary powers to enact the CUAET pursuant to subsection 25.2(1) of the IRPA.

[16] The Applicants contend that the documents they seek in a CTR are required for the Court to properly assess the *Charter* challenge. Namely, they are relevant to determine whether the CUAET *prima facie* violates section 15 and, if so, whether it may be saved by demonstrating that either any distinctions are necessary to achieve an ameliorative purpose under subsection 15(2) or it is otherwise justified under section 1.

[17] I agree with the Applicants concerning the documents related to the CUAET's development and implementation. While the Application at its core raises a legal question, there is the possibility that the Court will be unable to properly assess a section 15 challenge solely based on the affidavit evidence and parties' legal arguments filed to date. This matter is distinct from *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration),* 2024 FC 128 [*CARL*], where the Court relieved the respondent from producing a CTR in a

proceeding where the underlying application for leave similarly did not challenge any individual decision. However, in *CARL*, the applicant failed to establish the existence, let alone relevancy, of the requested documents (see also *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2022 FC 1204).

[18] Here, by contrast, both subsection 15(2) and section 1 of the *Charter* require courts to determine the objective of the impugned law (*Law v Canada*, [1999] 1 SCR 497 at para 80; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 79-80). Proof of legislative intent to discriminate is not required to establish a violation of section 15. However, the CTR could assist the Court in assessing the section 15 *Charter* challenge.

[19] Furthermore, in *R v Sharma*, 2022 SCC 39 [*Sharma*], which also dealt with a section 15 challenge, the Supreme Court held at paragraph 88 that "the most significant and reliable indicator of legislative purpose would, of course, be a statement of purpose within the subject law. Beyond that, generally, courts seeking to identify legislative purpose look to the text, context, and scheme of the legislation and extrinsic evidence which can […] include Hansard, legislative history, government publications and the evolution of the impugned provisions." Although the Supreme Court cautioned courts from relying on extrinsic evidence in *Sharma*, it nonetheless recognized its usefulness in assessing legislative purpose.

[20] This Court has adopted a similar approach in ordering disclosure for applications for judicially reviewing regulations (see, for instance, *Janssen Inc v Canada (Health)*, 2023 FC 870 at para 61, citing *Portnov v Canada (Attorney General)*, 2021 FCA 171 [*Portnov*] at

paras 33-34). That is, Courts may order respondents to produce all documents directly or indirectly considered in making a certain policy decision (see also *Canada Mink Breeders Association v British Columbia*, 2022 BCSC 1731 at para 35; *Airth v Canada (National Revenue)*, 2007 FC 415 at para 7). Though the AG correctly notes that the underlying application here is not for a traditional judicial review of a policy decision, but rather the constitutionality of such policy, I do not find that to be a material distinction in view of the jurisprudence cited above.

[21] Ultimately, determining what documents are relevant is a fact-specific inquiry. Under these circumstances, many of the documents that would be relevant in judicially reviewing the CUAET are similarly relevant in assessing its legality under section 15 of the *Charter*. Both require information demonstrating the objectives of the CUAET, and may include documents that "shed light on the reasoning process" and "any submissions made to the decision-maker" (*Portnov* at para 33). Such information has yet to be produced.

[22] I note that in the underlying Application, the Respondent's Record includes an Affidavit by Erin Cato, Senior Director of Visa Policy and Issues Management at Immigration, Refugees and Citizenship Canada [IRCC], responsible for leading the CUAET policy design in 2022. Ms. Cato provided a discussion of the background to the policy, and attached a variety of documents from both within and outside IRCC at Exhibits A-H of her Affidavit.

[23] While helpful, the annexed documents are all publicly available, having been published on the IRCC website (Exhibits B-H) or elsewhere (Exhibit A). They do not provide what the

Applicants are seeking and should have a right to receive, subject to any exemptions claimed by the Minister pursuant to section 87 of the IRPA or on some other basis. In particular, the Applicants ought to receive the requested information that informed the Minister's decision to enact the CUAT, which may be necessary to assess their section 15 challenge.

[24] Given the foregoing, I am granting the AG's motion to be relieved in part from the Production Order, such that production of the CTR will be limited only to relevant information concerning the CUAET. I note that this does not entitle the Applicants to everything that they request be included in the CTR (as listed in paragraph 9 of these Reasons). As the AG observes, the Application does not include a challenge to the lawfulness of the LCA, nor does it seek review of any decisions that may have been made on individual applications under that policy.

IV. Conclusion

[25] The AG remains bound by the requirement under the Production Order to timely produce a CTR containing documents relating to the CUAET. However, he need not produce documentation relating exclusively to the LCA program, or concerning individuals whose applications were refused under that program. The Minister will have 21 days from the date of this Order to produce all relevant documents defined herein within his control and possession.

ORDER in IMM-6940-23

THIS COURT ORDERS that:

1. This motion is partially granted. The Attorney General need not produce documents relating to the LCA and applications made under that program.

2. The Attorney General is required to adhere to the Court's order dated April 23, 2024, to produce a Certified Tribunal Record within 21 days of this order with respect to relevant documentation relating to the CUAET.

3. No costs will issue.

"Alan S. Diner"
Judge

SCHEDULE A

***Federal Courts Rules*, SOR/98-106**
***Règles des Cours fédérales*, DORS/98-106**

Material in the Possession of a Tribunal	Obtention de documents en la possession d'un office fédéral
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 application, the applicant shall serve the request on the other parties.	(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

***Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22**
***Règles des cours fédérales en matière de citoyenneté, d'immigration et de protection des réfugiés* (DORS/93-22)**

Disposition of Application for Leave	Décision sur la demande d'autorisation
14(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.	14(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.
Obtaining Tribunal's Record	Production du dossier du tribunal administratif
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:	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) the decision or order in respect of which the application for judicial review is made and the written reasons given therefor,	a) la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents;
(b) all relevant documents that are in the possession or control of the tribunal,	b) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif,

(c) any affidavits, or other documents filed during any such hearing, and	c) les affidavits et autres documents déposés lors de l'audition,
(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,	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,
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.	dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6940-23
STYLE OF CAUSE:	JOHN DOE 1 ET AL v AGC
PLACE OF HEARING:	IN WRITING BY WAY OF RULE 369 MOTION
REASONS FOR ORDER AND ORDER:	DINER J.
DATED:	JUNE 28, 2024

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