

**Date: 20080728**

**Docket: IMM-2639-08**

**Citation: 2008 FC 916**

**Ottawa, Ontario, July 28, 2008**

**PRESENT: The Honourable Mr. Justice Blanchard**

**BETWEEN:**

**John Doe**

**Applicant**

**and**

**Minister of Justice**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The applicant filed an application for leave and judicial review of

[TRANSLATION]

[t]he interim decisions of February 22 and March 4, 2008, and the final decision of the Minister of Justice made on or about May 23, 2008, appointing 28 lawyers as special advocates under the IRPA and rejecting the applicant's application.

[2] The application for judicial review is based on the following grounds:

[TRANSLATION]

There was an unlawful delegation of powers.

The decision is unlawful.

No regulation establishing the selection criteria for special advocates was adopted.

The decision maker erred in law by not considering the criteria set out in the *Immigration and Refugee Protection Act* and described in the call for applications.

The decision maker used arbitrary selection criteria.

The decision maker disregarded the applicable fundamental principles of staffing.

The rule of law must prevail.

Setting the decisions aside will not cause any prejudice because, *inter alia*, other options are available in pending cases or in future cases requiring a special advocate.

Alternatively, some appointments are tinged with favouritism, not based on the merits and are unlawful.

The confidentiality order is based on the following:

The applicant took part in a selection process in good faith, on the basis that his participation would be confidential. His participation was unlawfully [*sic*] to at least 43 applicants, which caused him humiliation, trouble and inconvenience and damaged his reputation.

He fears that his reputation will be irreparably damaged if these proceedings reveal that his application was rejected and that the rejection was connected with the security investigation, as suggested by the respondent's e-mail to the 44 applicants dated January 31, 2008; more details will be given in the motion record to follow. The impugned decisions suggest that he is an unqualified lawyer.

He will quite simply no longer be able to earn his living from his professional activities.

[3] If leave is granted, the applicant seeks the following relief by way of judicial review:

An order setting aside the decisions appointing the special advocates and rejecting the applicant's application.

A confidentiality order with respect to the identity of the applicant and the respondent's other victims as well as any information that could identify them. A motion record to this effect will follow.

If the motion is dismissed, an order granting an extension of time to serve and file an amended application for leave and judicial review.

An extension of time in this court if the documents requested from the respondent are not transmitted in a timely manner.

If necessary, an extension of time to serve and file this proceeding.

[4] In this motion in writing, under Rule 369 of the *Federal Courts Rules* (Rules), the applicant seeks to:

[TRANSLATION]

**Obtain** an exemption from the obligation to disclose his name in the style of cause of all proceedings by replacing it with John Doe (section 66 of the *Federal Courts Rules*, section 5 of the *Federal Courts Immigration and Refugee Protection Rules*).

**Obtain** an exemption from the obligation to disclose his name in any affidavit or oath (section 80 of the *Federal Courts Rules*) and to sign John Doe instead. In the alternative, obtain leave to produce, serve and file an affidavit or affidavits of his lawyer (section 82 of the *Federal Courts Rules*).

**Obtain** a confidentiality order granting him leave to bring the application for leave and judicial review and this motion record under the name of John Doe; that the applicant's affidavit or affidavits and oaths be made in the name of John Doe, to conceal any information that might identify him in all documents submitted to the court: as an example, but not limited to: his home and e-mail addresses, date of birth, place of practice, curriculum vitae, titles such as: Ms. Mr. In the alternative, an order that all proceedings and exhibits be sealed.

**Obtain** an order to conceal information in any document that could identify the respondent's other victims who were not selected as special advocates. In the alternative, an order that documents containing information that could identify them be sealed.

**Obtain** an order that any decision, any Court registry – where the applicant’s name must appear – will identify him as John Doe.

**Obtain** an order that this motion, affidavit in support of this motion and exhibits be sealed.

I. Evidence

[5] In support of his motion for exemption and confidentiality, the applicant filed an affidavit containing 74 paragraphs. In the following paragraphs, I summarize the relevant portions of this evidence that pertain to the motion before the Court.

[6] In December 2007, the respondent published an expression of interest soliciting applications from private sector lawyers interested in being appointed as special advocates under the new provisions of the *Immigration and Refugee Protection Act, 2001, c. 27* (the IRPA/the Act).

[7] The applicant submitted his application in December 2007. The Minister of Justice put the names of 28 lawyers on the list of special advocates established under section 85 of the Act, but the applicant’s name was not on the list.

[8] As part of processing his application, the applicant submits, and it is not denied, that a departmental employee circulated his name by e-mail on January 31, 2008, to 43 applicants without his consent, thus revealing his confidential participation in the selection process for special advocates. The Department had undertaken to keep the applicants’ participation in the selection process confidential.

[9] The applicant argues that his reputation was damaged by the respondent's actions in the selection process. He bases this on the fact that the other applicants found out that the applicant had not been accepted, which casts serious doubts on his reputation and respectability.

[10] The applicant essentially maintains that the news releases issued by the Minister announcing the list of [TRANSLATION] "qualified" applicants suggest that the applicants who were not chosen were not qualified.

[11] The applicant states that he filed this motion to prevent further humiliation and damage to his reputation. The objective of the motion is to safeguard the applicant's privacy and identity and that of the applicants who were not chosen by the respondent as special advocates.

## II. The law

[12] The public interest in open and accessible court proceedings is vitally important to the Canadian justice system. The open court rule is akin to freedom of expression, a protected right under the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

[13] Before making a discretionary order under subsection 151(1) of the Rules, the Court must be convinced that it is necessary to treat the documents or materials as confidential. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 at paragraph 53, the

Supreme Court set out the following test for determining whether a confidentiality order should be granted:

53. . . .

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk;

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[14] Accordingly, the applicant must demonstrate that the salutary effects of protecting his identity in his application for leave and judicial review outweigh the public interest in open and accessible court proceedings.

### III. Analysis

[15] In this case, the applicant states that his reputation will be further damaged by having his identity divulged as a party to this proceeding and to the application for leave and judicial review. He submits that his files come to him through word of mouth and that the resource persons would stop referring files to him if they found out that his application to the Department was rejected. Moreover, the applicant states that disclosing his application to the 43 other applicants would cause him humiliation, trouble and inconvenience and damage his reputation.

[16] After reviewing the applicant's entire affidavit filed in support of the motion to justify the necessity for a confidentiality order, I am of the view that this evidence does not justify the Court granting the order sought. The evidence does not satisfy me that there is a serious risk to the applicant's reputation and privacy. The deleterious effects that the applicant alleges are not supported by the evidence. The applicant's statements are speculative and insufficient to disregard the open court rule. Under the circumstances, the salutary effects for the applicant that could result from issuing the order he seeks do not outweigh the deleterious effects, particularly the public interest in open and accessible court proceedings.

[17] Moreover, although the applicant seeks to set aside the decisions appointing the special advocates and rejecting his application, his arguments about alleged damage to his reputation and privacy are not relevant to the application for judicial review that underlies this motion. Rather, the application challenges the process whereby the special advocates were selected, as set out in the notice of application. On this point, I essentially concur with the respondent's submissions.

#### IV. Conclusion

[18] For these reasons, the motion will be dismissed with costs.

[19] The applicant will be granted a fifteen-day extension from the date of this order to allow him to have issued and to serve and file an amended notice of application for leave and judicial review indicating the applicant's real name in the style of cause.

**ORDER**

**THE COURT ORDERS that**

1. The motion is dismissed with costs.
2. The applicant is granted a fifteen-day extension from the date of this order to allow him to have issued and to serve and file an amended notice of application for leave and judicial review indicating the applicant's real name in the style of cause.

“Edmond P. Blanchard”

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Judge

Certified true translation  
Mary Jo Egan, LLB



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

**DOCKET:** IMM-2639-08

**STYLE OF CAUSE:** John Doe v. Minister of Justice

**PLACE OF HEARING:** Ottawa, Ontario

**DATE: MOTION WITHOUT APPEARANCE:** June 13, 2008

**REASONS FOR ORDER AND ORDER BY:** Mr. Justice Blanchard

**DATED:** July 28, 2008

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