Federal Court Cour fédérale

Date: 20211005

Docket: IMM-2107-21

Citation: 2021 FC 1031

Ottawa, Ontario, October 5, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

MUKHTARI ABDULLAH ABU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] This motion arises from an application for judicial review by Mukhtari Abdullah Abu under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). In that application, Mr. Abu seeks an order of *mandamus* compelling the Minister of Citizenship and Immigration to make a decision on his eligibility for a work permit and temporary resident

visa ("TRV"), a matter that is currently being considered by Immigration, Refugees and Citizenship Canada ("IRCC") officials at the Canadian High Commission in Nairobi, Kenya.

[2] In response to an order under Rule 14(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 ("*FCCIRPR*"), the High Commission provided a Certified Tribunal Record ("CTR") in May 2021.

[3] Mr. Abu brings the present motion because, he submits, the CTR is missing documents that should have been produced in accordance with the Rule 17 of the *FCCIRPR*. More specifically, he submits that the CTR does not contain "all papers relevant to the matter that are in the possession or control of the tribunal," as required by paragraph (b) of Rule 17. He asks the Court to order the Minister to produce the missing documents.

[4] The Minister does not dispute that documents are missing from the CTR. Rather, the Minister contends that, in connection with an application for *mandamus*, Rule 17(b) should be interpreted in a "limited manner" and, under this interpretation, he is not required to produce the missing documents. In the alternative, the Minister contends that he should only be required to produce some but not all of the missing documents at this time.

[5] For the reasons that follow, I do not agree with the Minister that he is not required to produce the missing documents. On the contrary, I agree with Mr. Abu that all the missing documents are relevant and should be produced in accordance with the usual requirements of Rule 17(b). There is no basis for interpreting those requirements any differently when the

application for judicial review in question is an application for an order of *mandamus*, as the Minister contends. If there are legitimate grounds to withhold or delay disclosure of relevant documents (whether in whole or in part), there are well-established mechanisms for doing so that the Minister can engage, if so advised.

II. BACKGROUND

[6] Mr. Abu is a citizen of Nigeria. He, his wife and their three children came to Canada under the Nova Scotia Provincial Nominee Program in April 2019. Their application under this program was based on a proposal to establish a business in Nova Scotia. Mr. and Mrs. Abu established a fish exporting business in Halifax, Ahead Fisheries Inc., which they continue to operate today.

[7] In August 2020, Mr. Abu returned to Nigeria to attend to the estate of his late father. His wife and children stayed in Halifax. Mr. Abu was booked on a flight to return to Canada on October 20, 2020. To his understanding, at this time his work permit and multiple entry visa were still valid and he did not expect to encounter any difficulty returning to Canada. However, on October 20, 2020, when he attempted to board his flight from Lagos, Mr. Abu was denied boarding. He states that he was not given a reason for this.

[8] With the assistance of a consultant, Mr. Abu contacted the Canadian High Commission in Lagos to see if he could find out why he had been denied boarding. The High Commission requested various documents and information about Mr. Abu's travel history and his business in Canada. Mr. Abu provided the documents and information that had been requested. Suspecting

that he may have been denied boarding because of a misunderstanding about his right to return to Canada despite COVID-19 travel restrictions, Mr. Abu also provided submissions addressing this.

[9] On December 3, 2020, Mr. Abu attempted to board another flight to Canada but was denied boarding again. He then commenced an application for judicial review challenging the refusal to permit him to return to Canada (Federal Court File No. IMM-6319-20).

[10] In connection with this application, the Minister disclosed an excerpt from Global Case Management System ("GCMS") notes relating to Mr. Abu. The excerpt was a note from the Montreal Call Centre dated October 29, 2020, relating to an inquiry from the office of the Member of Parliament for Halifax West concerning why Mr. Abu had been refused boarding on his flight from Lagos on October 20, 2020. The note states the following:

> Information provided re: Subject who was refused boarding his flight from Lagos on 20Oct2020 [. . .]:
>
> As per GCMS notes dated 07Oct2020, CBSA LO ACCRA refused to allow boarding of subject, due to derogatory information brought to their attention (details not disclosed as per Access to Information Act 16(1)(b) and (c), 17 and/or the Privacy Act 22(1)(b)**). Subject's WP and TRV were deactivated on the same day; both files were subsequently referred to the Lagos V/O for further review. Unable to provide a timeframe for review at this time.

[11] The Minister also disclosed GCMS records reflecting that Mr. Abu's work permit and TRV were cancelled on October 21, 2020.

[12] While the "derogatory information" was not disclosed to Mr. Abu, there does not appear to be any dispute that it relates, at least in part, to information concerning the possible involvement of Mr. Abu and Ahead Fisheries Inc. in fraud and trade-based money laundering.

[13] The first *mandamus* application was discontinued by settlement on December 18, 2020. Pursuant to the settlement, IRCC was to advise Mr. Abu of the concerns that led to the cancellation of his work permit and TRV and provide him with an opportunity to respond as part of a redetermination of his eligibility for these authorizations. As things turned out, the application would be processed under the supervision of an IRCC Deputy Migration Program Manager based at the Canadian High Commission in Nairobi ("the IRCC Manager").

[14] On January 7, 2021, IRCC sent Mr. Abu a procedural fairness letter. The letter requested various documents and information – essentially what had already been requested in October and November 2020 – but did not raise any specific concerns about Mr. Abu's eligibility for a work permit or a TRV. With the assistance of counsel, Mr. Abu provided his response on January 22, 2021.

[15] GCMS notes dated February 18, 2021, entered by an IRCC officer in Nairobi state that the officer was satisfied that a one-year work permit should be issued. The notes also state that the last step in the processing of the application was to request Mr. Abu's current passport. This request was sent to Mr. Abu on February 18, 2021. The letter states that a decision had been made on his application and his passport was required to finalize processing the application.

While the letter does not say what the decision was, it appears from the GCMS notes that it was a favourable one.

[16] On or about February 26, 2021, the IRCC office in Nairobi received a report dated February 8, 2021, from the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"). This report had been requested by the Canada Border Services Agency ("CBSA"), which then forwarded it to IRCC. In an affidavit filed on the underlying judicial review application (affirmed on April 26, 2021), the IRCC Manager describes the report as "relevant to the Applicant's TRV application." The IRCC Manager states that, upon receiving the report, he submitted a request for additional security screening by CBSA's National Security Screening Division ("NSSD"). As the IRCC Manager explains, the NSSD "has expertise in assessing potential inadmissibility under ss. 34-37 of the IRPA, and typically prepares assessment reports for IRCC to consider in deciding visa cases."

[17] On March 2, 2021, IRCC sent Mr. Abu a letter stating the following:

> A request for your valid passport or travel document was recently sent to you. Since that time, additional information has been received which requires additional procedures to reach a decision, and so a work permit will not be issued at this time.

[18] This "additional information" has not been disclosed to Mr. Abu but there does not appear to be any dispute that it relates, at least in part, to the FINTRAC report.

[19] On March 29, 2021, Mr. Abu commenced a second application for judicial review seeking an order of *mandamus* requiring the Minister to make a decision on his outstanding

application for a work permit and a TRV. When he did so, apart from the letter requesting his passport, he was not aware of the information summarized in paragraphs 15 and 16, above, or in the following paragraph. This information was disclosed subsequently in the context of the application for leave and judicial review.

[20] The IRCC Manager states in his affidavit (which, as already noted, was affirmed on April 26, 2021) that the NSSD had completed its response to IRCC's request for further screening. The IRCC Manager anticipated being able to access the report as of April 26, 2021. This, in turn, would allow him "to continue processing this file towards a decision."

[21] Shortly after filing his application for *mandamus*, Mr. Abu requested that the matter be expedited. This motion came before me on April 13, 2021. After hearing from the parties, I set a schedule for the leave materials to be completed by April 29, 2021. On May 6, 2021, I ordered that the matter would continue as a specially managed proceeding. (Subsequently, on May 14, 2021, I was appointed Case Management Judge in this matter.) I also ordered production of the CTR pursuant to Rule 14(2) of the *FCCIRPR*.

[22] On May 25, 2021, I issued a Direction requesting the parties to provide their availability for a hearing of the application for judicial review within the next 30 to 60 days. After that, for various reasons the matter did not move forward until the end of July 2021, when Mr. Abu brought this motion for an order directing the Minister to produce a CTR that complies with Rule 17 of the *FCCIRPR*. This motion was eventually heard on September 23, 2021.

III. ISSUES

[23] I would frame the issues raised in this motion as follows:

(a) What is the scope of the requirement to produce a certified tribunal record in connection with an application for *mandamus*?

and

(b) Has the Minister produced all the documents he is required to produce?

IV. ANALYSIS

A. *What is the scope of the requirement to produce a certified tribunal record in connection with an application for mandamus?*

[24] The Minister submits that the requirement to produce a CTR in connection with a *mandamus* application arising under the *IRPA* should be interpreted in a "limited manner" and, further, that the documents at issue here fall outside the scope of the "limited" CTR he is required to produce.

[25] In support of this submission, the Minister relies on *Alberta Wilderness Association v Canada (Attorney General)*, 2013 FCA 190. In that decision, the Federal Court of Appeal determined that Rule 317 of the *Federal Courts Rules*, SOR/98-106, which is the usual mechanism for obtaining material from a tribunal relevant to an application for judicial review under the *Federal Courts Act*, RSC 1985, c F-7, does not apply when the application in question is for an order of *mandamus*. This is because it is a necessary precondition for a request under this rule that the tribunal have made an order that is now the subject of an application for judicial

review. When, as is the case in an application for *mandamus*, there is no express decision under review, Rule 317 does not apply and, consequently, no record can be requested under it.

[26] The Minister acknowledges that Rule 317 does not apply to judicial review proceedings arising under the *IRPA* and, further, that there are distinct rules under the *FCCIRPR* governing the production of CTRs in citizenship, immigration, and refugee matters. However, the Minister argues that these rules should be interpreted harmoniously with Rule 317, as that provision has been interpreted in *Alberta Wilderness Association*. More specifically, as set out in the Minister's written representations on this motion, the Court should "interpret CTR production requirements for *mandamus* applications in a limited manner, irrespective of whether they are under Rule 317 or Rule 17 of the *FCCIRPR*." According to the Minister, properly interpreted, the rules governing the production of a CTR do not require him to produce the documents that are admittedly missing from the CTR that was produced. This motion should therefore be dismissed.

[27] For the following reasons, I do not agree.

[28] First, as the Minister acknowledges, the *FCCIRPR* adopts a distinct approach to the production of a CTR that expressly excludes the application of Rule 317: see Rule 4 of the *FCCIRPR*. Caution should therefore be exercised when interpreting the former in light of the latter. (This is not to say that the interpretation of one will never assist the interpretation of the other. As discussed below, it is well-established that the test for relevance is the same under Rule 17 and Rule 317.)

[29] Second, unlike Rule 317, which requires that the tribunal have made an order that is the subject of the application for judicial review, the *FCCIRPR* does not contain any such requirement. As Justice Tremblay-Lamer held in *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1086 (at para 17), Rule 17 is broader than Rule 317. Unlike Rule 317, there is nothing in the wording of Rule 17 that precludes its application to *mandamus* applications. Significantly, *Alberta Wilderness Association* simply states the Federal Court of Appeal's agreement with Federal Court jurisprudence interpreting Rule 317, the very jurisprudence the Minister had relied on earlier in *Douze* but which Justice Tremblay-Lamer found to be inapplicable to Rule 17: compare *Douze* at para 15 and *Alberta Wilderness Association* at para 39. I do not agree with the Minister that *Alberta Wilderness Association* calls this determination into question.

[30] Third, the mechanisms for obtaining a CTR under Rule 317, on the one hand, and under the *FCCIRPR*, on the other, are entirely different. Rule 317 provides that, in connection with an application for judicial review, a party may request material relevant to the application from the tribunal whose order is the subject of the application. Such a request may be made as long as an application for judicial review of a decision of the tribunal has been commenced. Indeed, the request for the tribunal record may be included in the originating notice of application for judicial review: see Rule 317(2). In contrast, under the *FCCIRPR*, the CTR is produced in response to a Court order. Importantly, the requirement for leave to proceed with an application for judicial review in citizenship, immigration and refugee matters (including *mandamus* applications) provides a check on abusive production requests that is absent in other areas of administrative decision making. Subject to the settlement project (about which I will say more

below), in immigration, refugee and citizenship matters, a CTR will be ordered produced only when a judge is satisfied that the application has sufficient merit to be permitted to proceed. Consequently, the concerns about a party using the production process for a collateral purpose or to impose unwarranted obligations on a tribunal that underlie a restrictive interpretation of Rule 317 – see, for example, *Western Wilderness Committee v Canada (Minister of the Environment)*, 2006 FC 786, which is cited with approval in *Alberta Wilderness Association* – do not arise under the *FCCIRPR*: see *Douze* at para 18.

[31] Fourth, at the risk of belabouring the obvious, in proceedings governed by the *FCCIRPR*, the CTR is produced in response to a Court *order*, not simply a request from a party. (Under the *Federal Courts Rules*, the Court becomes involved only if there is an objection to production: see Rule 318.) Unless or until the production order is varied or set aside, the Minister must comply with it.

[32] The production of a CTR under the *FCCIRPR* happens in either of two ways. Under Rule 14(2), a judge may, by order, require the tribunal to produce its record (or parts thereof) 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." Rule 14(4) provides that, on receipt of an order under Rule 14(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 the parties and to the Court. As drafted, this rule provides for the production of discrete documents which are identified by the Court as being necessary for the proper disposition of the leave application. However, under the Federal Court's settlement project for matters arising under the

IRPA, production orders under Rule 14(2) are also used to put the full CTR in the hands of the parties in selected cases so that they are equipped to conduct meaningful settlement discussions within a short timeframe after leave has been granted: see the Notice to the Profession dated July 4, 2019, describing this project. (The settlement project was initially a pilot project limited to matters filed in Toronto. It has now been expanded nationally.)

[33] The other way a CTR is produced under the *FCCIRPR* is in response to an order under Rule 15 granting an application for leave. More particularly, Rule 15(1)(b) provides that an order granting an application for leave "shall specify the time limit within which the tribunal is to send copies of its record required under Rule 17." Rule 17, in turn, provides that, on receipt of an order under Rule 15, "a tribunal shall, without delay" prepare and send to the parties and to the Court a record certified to be correct containing the following:

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

(b) all papers relevant to the matter 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.

[34] Whether under Rule 15 or, in connection with the settlement project, under Rule 14(2), it is the uniform practice of the Court to order the production of a CTR in the case of *mandamus* applications that meet the test for leave. Indeed, as noted above, such an order was made in this

case under Rule 14(2). Apart from the disputed documents, this order was complied with through the production of a CTR under covering letter dated May 10, 2021.

[35] The Minister does not appear to want to go as far as saying that Rule 17 of the *FCCIRPR* has no application at all to *mandamus* applications and that there is therefore no requirement to produce a CTR in this case. Rather, relying on *Alberta Wilderness Association*, he urges an interpretation of Rule 17 that would give rise to only a "limited" obligation to produce a CTR. However, I do not understand how Rule 317, as interpreted in *Alberta Wilderness Association*, could be said to give rise to a "limited" requirement to produce a CTR in *mandamus* applications, as the Minister suggests. According to *Alberta Wilderness Association*, Rule 317 simply does not apply when an order of *mandamus* is sought (because there is no decision or order that is the subject of the application). Apart from this proposition, I do not see how *Alberta Wilderness Association* could have any bearing on the interpretation of Rule 17, as the Minister submits it should. However, under the "harmonious" interpretation urged by the Minister, Rule 17 would not apply either if, like Rule 317, it required that there be a decision or order that is subject to judicial review. That is to say, in relation to *mandamus* applications, Rule 17 would not apply in a "limited manner" but, rather, not at all. As Justice Tremblay-Lamer pointed out in *Douze*, the logical result of an interpretation of Rule 17 that, like Rule 317, required there to be a decision or order under review is that no documents would ever be required to be produced under that rule in the context of a *mandamus* application (at para 14). This is contrary to established practice in *mandamus* applications under the *IRPA*. It is also difficult to reconcile with the fact that the Minister has produced a CTR in this matter (albeit one whose completeness is in dispute).

[36] Before leaving this subject, I should acknowledge that Rule 17 operates somewhat awkwardly when the underlying application for judicial review is an application for *mandamus.* When a tribunal has made a decision and that decision becomes subject to judicial review, by the very nature of the matter, the decision-making process will have concluded by the time an order for the production of the CTR is made. When responding to such an order, it makes abundant sense as a general rule to fix the tribunal's record as of the time the decision was made and to produce a CTR accordingly: see *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 112-13. On the other hand, in the case of an application for *mandamus*, given that no decision has been made, the decision-making process can still be ongoing even after the CTR has been produced. As a result, the CTR may be only a snapshot of the tribunal's record as it was at the moment when it was compiled into the CTR; it will obviously omit any relevant documents or information that post-date its preparation. (Of course, documents or information that post-date the preparation of the CTR can still find their way into the record by way of the parties' further materials, including affidavits and cross-examinations, as provided for in the standard form of the order granting an application for leave: see Rule 15(1) of the *FCCIRPR*.)

[37] Be that as it may, it is not this awkwardness that gives rise to the central dispute between the parties in the present matter. Instead, their dispute relates to the completeness of the CTR as of May 10, 2021, the date on which it was submitted to the Court. For the reasons set out above, I do not agree with the Minister that *Alberta Wilderness Association* casts any doubt on the settled understanding of the scope of the requirements of Rule 17 of the *FCCIRPR* in relation to *mandamus* applications.

[38] The next question, then, is whether the Minister has produced a complete CTR in accordance with Rule 17, as the Court ordered him to do. I turn to this now.

B. *Has the Minister produced all the documents he is required to produce?*

[39] Mr. Abu submits that, contrary to what is required by Rule 17(b), the Minister has not produced "all papers relevant to the matter that are in the possession or control of the tribunal." According to Mr. Abu, the Minister should be ordered to produce the missing documents to bring the required production into compliance with Rule 17.

[40] Before explaining why I agree with Mr. Abu, I pause to note that, strictly speaking, Rule 17 is engaged only indirectly in this case. This is because an order granting leave under Rule 15 has not been made yet and this is a precondition for triggering the requirement to produce a CTR under Rule 17. Instead, as noted above, the Court ordered the tribunal to produce a certified copy of its record pursuant to Rule 14(2) of the *FCCIRPR*. It is the common understanding of the parties – with which I agree – that the purpose of this order was to have a CTR produced in accordance with Rule 17. It is also important to point out that, as part of the case management of this matter, the parties have been informed that an order granting leave will be issued in due course. However, to complicate matters somewhat, in accordance with the standard form of such orders when an earlier order has been made under Rule 14(2), the order granting leave under Rule 15 will not require the tribunal to produce another copy of the CTR. Thus, strictly speaking, Rule 17 will never be engaged directly. Nevertheless, given the intended purpose of the order under Rule 14(2) in this case, the parties properly focused their submissions on the substantive question of whether the requirements of Rule 17(b) have been met.

[41] In this regard, the present case may be contrasted with *Tursunbayev v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 532, and *Abdulahad v Canada (Citizenship and Immigration)*, 2020 FC 174, where motions were brought at the pre-leave stage for orders under Rule 14(2) of the *FCCIRPR*. At that stage, the only issue is whether "documents in the possession or control of the tribunal are required for the proper disposition of the application for leave." In contrast, under Rule 17(b), the issue is whether the disputed papers in the possession or control of the tribunal are "relevant to the matter" – i.e. to the application for judicial review for which leave to proceed will be granted.

[42] This brings us, finally, to the question of relevance.

[43] I begin by noting that one of the usual indicators of relevance in the judicial review context – was the document or information before the tribunal when it made its decision? – does not apply in a *mandamus* application because it is the failure or refusal of the tribunal to make a decision that has prompted the application in the first place. While this is a sound indicator of relevance when a decision is being reviewed, it is not exhaustive of the concept of relevance in the judicial review context generally. It is well-established that the test for relevance in the context of the production of a CTR is whether a document in the possession or control of the tribunal in question "may affect the decision that the Court will make on the application" (*Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 at para 10). The test is the same whether one is under Rule 317 or Rule 17: see *Douze* at para 19; see also *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 102 at para 94. Relevance must be determined

in relation to the grounds of review and any affidavit filed in support of the application: *Pathak* at para 10.

[44] When the application for judicial review seeks an order of *mandamus*, relevance must be further determined in relation to the eight requirements stemming from *Apotex v Canada (Attorney General)*, [1994] 1 FC 742 (CA). These requirements were summarized in *Lukacs v Canada (Transportation Agency),* 2016 FCA 202 at para 29 as follows:

> (1) there must be a legal duty to act;
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> (2) the duty must be owed to the applicant;
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> (3) there must be a clear right to performance of that duty;
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> (4) where the duty sought to be enforced is discretionary, certain additional principles apply;
>
> (5) no adequate remedy is available to the applicant;
>
> (6) the order sought will have some practical value or effect;
>
> (7) the Court finds no equitable bar to the relief sought; and
>
> (8) on a balance of convenience an order of *mandamus* should be issued.

[45] Justice Little recently offered the following concise description of the remedy of *mandamus*:

> *Mandamus* is an order that compels the performance of a public legal duty. The duty is typically set out in a statute or regulation. An order of *mandamus* is the Court's response to a public decision-maker that fails to carry out a duty, on successful application by an applicant to whom the duty is owed and who is currently entitled to the performance of it. The test for *mandamus* thus requires careful consideration of the statutory, regulatory or other public obligation at issue, to determine whether the decision-maker has an obligation to act in a particular manner as proposed by an applicant and whether the factual circumstances

> have triggered performance of the obligation in favour of the applicant.
>
> (*Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 76)

[46] A key consideration in determining whether an applicant is entitled to the performance of a duty to make a decision is whether the tribunal has taken unreasonably long to do so: see, *Conille v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9097 (FC), [1999] 2 FC 33, *Abdolkhaleghi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 729 at para 13, *Almuhtadi v Canada (Citizenship and Immigration)*, 2021 FC 712 at para 31, and *Canada (Attorney General) v Sharafaldin*, 2021 FC 22 at paras 41-44. Documents and information compiled by the tribunal responsible for making the decision can have a direct bearing on this question. While *Alberta Wilderness Association* held that, since only the failure to make a decision is in issue in an application for *mandamus*, "the documents before the decision-make[r] are irrelevant, except for certain narrow exceptions" (at para 39), I do not read this *obiter* comment so broadly as to overturn the well-established principle that the reasonableness of the delay in making a decision is a central issue in *mandamus* applications and, as a result, that documents or information bearing on this question are therefore relevant to the application.

[47] This question is squarely engaged in this case. Documents relating to the processing of Mr. Abu's application can be expected to shed light on why a decision has not been made yet and whether the delay is reasonable or not. Consequently, any documents relating to this question (or, of course, to any other aspect of the test for *mandamus*) are relevant and must be

included in the CTR (provided they are in the possession or control of the tribunal responsible for making the outstanding decision).

[48] As noted above, the Minister argues in the alternative that, if something more than a "limited" CTR is required on a *mandamus* application, the present motion should be granted only in part and he should only be required to provide updated case processing notes up to the date the CTR was produced. I agree that this concession (in the alternative) is well-founded. I would, however, go farther than the Minister proposes.

[49] First, it is clear (and the Minister does not dispute) that there are relevant GCMS notes that pre-date May 10, 2021 – the date the CTR was produced – that are not included in the CTR. For example, apart from a reference to "possible derog[atory] information" being received by the Lagos office on October 21, 2020, no notes relating to the deactivation and subsequent cancellation of Mr. Abu's work permit and visa in October 2020 are included in the original version of the CTR. While they may not bear directly on why a decision on the redetermination has not been made yet, any such notes provide important background and context to the question of whether the delay is reasonable given that Mr. Abu has been prevented from returning to Canada (where his wife and children remain) since October 2020.

[50] Further, pursuant to the settlement of the earlier application for judicial review, the redetermination of Mr. Abu's eligibility for a work permit and TRV began in or around late December 2020. While it is evident that this application was being processed prior to February 18, 2021 (e.g. a procedural fairness letter was sent to Mr. Abu on January 7, 2021), the

original CTR does not include any GCMS notes between December 9, 2020, and February 18, 2021. It is also apparent that processing of the application continued after February 18, 2021 – for example, the receipt of the FINTRAC report and the request for and receipt of the NSSD report, as described by the IRCC Manager in his affidavit. However, no GCMS notes relating to any of this activity have been produced. Given the usual record keeping practices of IRCC, I am satisfied that there are such notes. They are clearly relevant to the underlying application. So too is any correspondence relating to the FINTRAC and NSSD reports that pre-dates May 10, 2021.

[51] Finally, without limiting the generality of what else should be produced (provided that it is relevant and was in the possession or control of the Minister of Citizenship and Immigration as of May 10, 2021), the Minister must also produce any FINTRAC reports relating to Mr. Abu or his business activities as well as any CBSA reports – particularly, any reports from the NSSD – relating to Mr. Abu's application for a work permit and visa. (I have singled out these particular reports only because they were referred to specifically in the IRCC Manager's affidavit as well as in the parties' submissions on this motion; there may well be others.)

[52] The Minister acknowledges that FINTRAC and NSSD reports exist. I do not understand him to argue strongly, if at all, that they are irrelevant to the application for *mandamus*. To the extent that the Minister takes this position, I must disagree. There is a clear nexus between the FINTRAC report in particular and the fact that a decision has still not been made on the work permit and TRV application. Information in the report could, for example, bear on whether Mr. Abu is inadmissible to Canada under paragraph 37(1)(b) of the *IRPA* for having engaged in

money laundering in the context of transnational crime. The need to inquire further into this question could, in turn, explain why a decision on his application has still not been made. The FINTRAC report caused the processing of Mr. Abu's application to be paused while further inquiries were undertaken, including an assessment by the CBSA. That assessment has yielded a report which is being considered in the processing of the application. All of this has a direct bearing on the question of unreasonable delay. These and any other relevant reports will provide insight into the level of activity surrounding the processing of the application as well as the complexity of the matter (cf. *Douze* at para 20).

[53] Apart from the question of relevance, the Minister appears to resist producing these reports at this time on three main grounds: first, Mr. Abu is using Rule 17 for a collateral purpose (namely to obtain prematurely disclosure of information relating to a potential inadmissibility determination); second, Mr. Abu may very well receive this information in the future in any event as a matter of procedural fairness in the processing of his work permit and TRV application; and third, the reports are in the nature of recommendations for a final decision on that application and, as such, they should not be produced now.

[54] In my view, none of these objections are tenable. With respect to the first objection, considering that the Court has determined that leave to proceed with the application for judicial review will be granted, there is no basis for any concern that Mr. Abu is abusing Rule 17. It cannot be said that he is engaged in an improper fishing expedition or that he is seeking the documents for a collateral purpose. If the records are relevant to the judicial review application, they must be produced. Any overlap between the judicial review application and ongoing

inquiries into Mr. Abu's potential inadmissibility (or his wife's, for that matter) is simply inherent in the nature of this case.

[55] With respect to the second objection, nothing in the rules permits the Minister to determine unilaterally *when* relevant documents should be produced. On the contrary, when triggered by an order under Rule 14(2) or Rule 15, the Minister is required to produce the record "without delay" and, in any event, by the deadline specified in the order. Nor is there anything in the rules that permits the Minister to decline to include relevant documents in the CTR because they might end up being produced to an applicant in some other way.

[56] As discussed above, unlike an application for judicial review of a decision that has been made, in a *mandamus* application the decision-making process is presumably continuing after the application for judicial review has been commenced. Consequently, further disclosure could well be provided to an applicant as a matter of procedural fairness or for some other reason while the judicial review application is proceeding. In fact, in the present case it is clear that investigations into Mr. Abu's potential inadmissibility (and his wife's) are currently underway. However, this does not exempt the Minister from compliance with an order to produce relevant documents in his possession or control in a CTR when such an order has been made. If there is a legal basis to withhold or delay disclosure of relevant documents or parts thereof, there are established procedures for raising this with the Court. The Minister cannot, however, simply decline to produce relevant documents when ordered to do so.

[57] With respect to the Minister's third objection to production of the FINTRAC and NSSD reports, he relies on Justice Tremblay-Lamer's determination in *Douze* that, in the context of a *mandamus* application, the Minister is not required to produce draft recommendations for a decision. As Justice Tremblay-Lamer put it: "A *mandamus* application is not to be used as a means of obtaining an early indication as to what the ultimate decision will be" (at para 21).

[58] I am not persuaded that this exception is as broad as the Minister suggests. Moreover, properly understood, there is no basis for finding in the present case that it exempts the disputed reports from the requirements of Rule 17.

[59] To understand the scope and rationale of the exception recognized in *Douze*, it is necessary to consider what exactly was at issue in that case.

[60] Mr. Douze was a citizen of Haiti. His application for permanent residence in Canada was rejected because he was determined to be inadmissible under paragraph 35(1)(b) of the *IRPA* for having served as part of the Haitian judiciary under a designated regime. In January 2008, Mr. Douze applied for Ministerial relief under subsection 35(2) of the *IRPA* as it then read (this provision has since been repealed). Not being satisfied with how long it was taking the Minister of Public Safety and Emergency Preparedness to make a decision on his request for relief, Mr. Douze applied for an order of *mandamus* in March 2010. In the course of the litigation of that application, he learned that a draft recommendation for a decision had been prepared in February 2010. However, this document had not been included in the CTR. A Senior Program Officer with the CBSA explained that the document was not included because it was "still a draft

recommendation and [had] not yet been approved by the president of the CBSA for disclosure." (There was also evidence that it was standard practice to disclose the draft recommendation to the party seeking Ministerial relief once it had been approved for disclosure so that they could comment on it before the recommendation was finalized and forwarded to the Minister.) Mr. Douze then brought a motion before a Prothonotary for an order that the Minister comply with Rule 17 and provide relevant documents that were missing from the CTR, including the draft recommendation. The Prothonotary granted the motion. The Minister appealed this decision. Justice Tremblay-Lamer granted the appeal in part, concluding that the Minister was not required to disclose the draft recommendation.

[61] As I understand Justice Tremblay-Lamer's reasoning, her main concern was that the draft recommendation in question had not yet been approved for disclosure. As she explained:

> While I recognize that the preliminary draft recommendation may be of some relevance in this regard, when this limited relevance is balanced against the potential for prejudice, I must ultimately conclude that the preliminary draft recommendation is not captured by Rule 17. Requiring the disclosure of a preliminary draft recommendation would have the potential to create, in the applicant, an expectation for a certain result. Given the multiple levels of approval and revision that are still required before this preliminary draft recommendation becomes finalized, it is easy to envisage a scenario whereby the recommendation undergoes a number of significant changes. Exposing this process by requiring production of draft recommendations has the potential to shift the focus on subsequent applications such that the MPS is required to justify each incremental substantive change. This could occasion even more delay in terms of arriving at the final determination.
>
> (*Douze* at para 22, emphasis added)

[62] In short, the concern arose from the *preliminary* nature of the document, not from the fact that it was a draft recommendation for a decision (which, after all, was meant to be disclosed to

the applicant once it had been approved for disclosure in any event). It is also important to note that this exception was determined on a case-by-case balancing of relevance and potential prejudicial effect as opposed to on a categorical basis applicable to all draft recommendations for decision. Evidence concerning the nature of the document – in particular, its preliminary character – enabled Justice Tremblay-Lamer to determine that the prejudice that would be caused by producing it in the CTR outweighed the limited relevance of the document.

[63] For present purposes, I am prepared to accept that there can be such an exception to the general obligation under Rule 17(b) to produce "all papers relevant to the matter that are in the possession or control of the tribunal." However, the Minister has not put forward any information or evidence about the disputed reports that could establish that they fall within this exception. Put another way, the Minister has not offered any basis on which to find that the disputed reports are "analogous" to the draft recommendations at issue in *Douze*, as he submits. Further, even assuming for the sake of argument that the reports in question include recommendations for a final decision, there is nothing to suggest that any of them are *preliminary* draft recommendations for a decision, as was the case in *Douze*. Thus, in contrast to *Douze*, there is no basis to find that production of these reports would have a prejudicial effect that outweighs their relevance to the issues that must be determined in the *mandamus* application.

V. CONCLUSION

[64] For these reasons, I have concluded that the CTR produced under the covering letter dated May 10, 2021, does not comply with Rule 17(b) of the *FCCIRPR*. The Minister is

therefore required to produce a CTR that complies with this rule and in accordance with these reasons. He may do so by filing a supplementary CTR containing all relevant papers in his possession or control as of May 10, 2021, that were not included in the original CTR or by filing an entirely new CTR to replace the original one. Since this matter has already been much-delayed, the supplementary or replacement CTR (as the case may be) shall be filed no later than 30 days from the date of this order. If more time is required to produce the record, the Minister may submit an informal request for an extension of time.

[65] Finally, as indicated at the outset of these reasons, this order is without prejudice to the right of the Minister, if so advised, to object on public interest grounds to the disclosure of any part of what is now being ordered produced – for example, under section 87 of the *IRPA* or sections 37 to 39 of the *Canada Evidence Act*, RSC 1985, c C-5.

ORDER IN IMM-2107-21

THIS COURT ORDERS that

1. The Minister shall serve and file a supplementary Certified Tribunal Record containing all relevant documents not included in the record produced under covering letter dated May 10, 2021, that were in the possession or control of the Minister as of that date.
2. In the alternative, the Minister may instead produce a replacement Certified Tribunal Record containing all relevant documents that were in the possession or control of the Minister as of May 10, 2021.
3. In either case, the Minister shall do so within thirty (30) days of the date of this order.
4. If more time to produce the record is required, the Minister may submit an informal request for an extension of time.
5. This order is without prejudice to the right of the Minister, if so advised, to object on public interest grounds to the disclosure of any part of what is now being ordered produced.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2107-21
STYLE OF CAUSE:	MUKHTARI ABDULLAH ABU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 23, 2021
ORDER AND REASONS:	NORRIS J.
DATED:	OCTOBER 5, 2021

APPEARANCES:

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