

CITIZENSHIP AND IMMIGRATION

IMMIGRATION PRACTICE

Informer privilege

Judicial review of Immigration and Refugee Board, Immigration Appeal Division (IAD) decision directing Minister of Citizenship and Immigration (applicant) to provide it with unredacted appeal record, including portion over which applicant asserting informer privilege — Respondent sponsoring wife to come to Canada but application refused by visa officer — In context of appeal from that decision by respondent, applicant providing appeal record in which portion of visa officer's notes redacted — Applicant submitting that information: protected by informer privilege; irrelevant as not relied on by visa officer, applicant — IAD ordering applicant to provide it with redacted material so that it could assess whether information irrelevant or protected by informer privilege — IAD concluding that questions of whether informer privilege applied and whether information at issue relevant could be determined only by IAD and only with benefit of reviewing redacted information — Principal issue herein whether IAD erred in its decision — Correctness standard applicable to review of decision as matter raising question of central importance to legal system as whole (i.e. statutory entitlement of IAD to access privileged information), outside IAD's specialized area of expertise — *Canada (Attorney General) v. Quadrini*, 2011 FCA 115 providing guidance on screening process to be followed by administrative tribunal when confronted with privilege claim — Screening conducted without inspecting document — At first stage, tribunal assessing whether document could possibly fall within privileged category — At second stage, tribunal assessing whether document may be relevant to issues in dispute — Where outcome of claim cannot be determined through screening, necessary to consider whether tribunal having legal authority to determine privilege claim — That question considered in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 — IAD not erring in treatment of relevance of redacted portion of visa officer's notes — Correctly extrapolating from conclusions in case law that it, as tribunal deciding appeal, was required to be arbiter of what was relevant for purposes of appeal record — Also correctly referencing principle that any document before decision maker when decision made is presumed relevant — IAD correctly rejecting applicant's position that IAD could dispose of issue before it based on applicant's assertion that material not relevant — However, IAD erring in concluding having authority to inspect information over which informer privilege claimed, in order to determine whether or not privilege applying — *Blood Tribe* requiring express statutory language for tribunal's enabling statute to be interpreted as entitling it to access privileged information — While *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 162, 174 providing IAD with machinery that could be used to review documentation, provisions falling short of express, clear, unambiguous statutory language *Blood Tribe* requiring — Also, *Federal Courts Act*, R.S.C., 1985, c. F-7 providing IAD with alternative effective remedy, i.e. reference of matter (of privilege) to Federal Court for determination — Finally, IAD erring in finding it was required to review redacted information to confirm existence of privilege; misunderstanding test for application of informer privilege; stating that privilege triggered where communicator requesting confidentiality *and* recipient of information making corresponding promise of confidentiality (express or implied) — Case law not supporting that interpretation — Required analysis not conjunctive — Not necessary to consider informer's expectations as separate element of test where explicit promise of confidentiality made — Implicit promise of confidentiality also sufficient to support application of informer privilege — Here, evidence before IAD supporting conclusion that informer privilege applying to redacted portion of notes — Application allowed — Matter remitted to IAD for continuation of appeal but not necessary for IAD to revisit privilege question as it should have upheld applicant's assertion of privilege.

judgment dated February 23, 2018, 31 pp.)