

## CITIZENSHIP AND IMMIGRATION

### IMMIGRATION PRACTICE

Judicial reviews related to warrantless seizure of Mohamed Abdi Siyaad's cellphone by Canada Border Services Agency (CBSA)— Siyaad asserting in docket IMM-4747-18 that CBSA violating *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, his constitutional rights — Minister of Public Safety and Emergency Preparedness in docket IMM-5184-18 seeking review of Immigration and Refugee Board's Immigration Division's (ID) decision granting Siyaad access to his cellphone— Siyaad entering Canada on fraudulent passport — CBSA alerted to fact that Siyaad subject of international investigation into human trafficking — Warrant executed; Siyaad arrested, detained, cellphone seized— Minister appealing RPD's finding granting refugee claim— Siyaad applying to ID for return of cellphone or access to it — ID first denying access to cellphone — ID later reversing decision, granting application for access order to cellphone — Issue in IMM-4747-18 whether continued seizure of cellphone reasonable, lawful — Issues in IMM-5184-18 whether ID having jurisdiction to make access order, whether decision maker *functus* — Continued seizure of cellphone authorized by statute — Act, *Immigration and Refugee Protection Regulations*, SOR/2002-227 representing comprehensive code in dealing with seized items — *Criminal Code*, R.S.C., 1985, c. C-46 not taking precedent over federal statutes when those statutes providing for comprehensive seizure regime — Siyaad fundamentally erring by assuming that searches, seizures by CBSA officers same as those performed by police officers generally — Rules for CBSA officers on search, seizure not required to be precisely the same as those for peace officers — CBSA officers not required to conform to aspects of the *Criminal Code* that make little sense in context— CBSA lawfully authorized to seize, retain cellphone without having to follow *Criminal Code* sections when Act having its own code regarding seizure, retention of property — With respect to issues in IMM-5184-18, while ID had jurisdiction to make access order (authority within Act allowing ID to make needed orders, including orders regarding evidence), decision maker herein *functus*, could not reverse initial decision denying application for access order to cellphone — General rule held up by Supreme Court in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 clear that decision cannot be revisited because “the tribunal has changed its mind”, as was case herein— Problematic to allow ID such discretion to flip-flop on such interlocutory decisions — Improper to allow decision maker to revisit decision three months after making a first decision given that no request made to revisit decision — ID decision unreasonable — ID not addressing fact that Siyaad's social media accounts can be accessed from any device — ID erring in its assessment of *Immigration Division Rules*, SOR/2002-229, r. 49 — Hardly necessary for Siyaad to access cellphone — ID's decision extrapolating based on tenuous, unreasonable explanations — Application in IMM-4747-18 dismissed; application in IMM-5184-18 allowed.

CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) V. SIYAAD (IMM-5184-18, IMM-4747-18, 2019 FC 448, McVeigh J., reasons for judgment dated April 11 2019, 25 pp.)