Federal Courts Reports

Recueil des décisions des Cours fédérales

T-669-19

2021 FC 932

IN THE MATTER OF THE *SECURE AIR TRAVEL ACT*

Bhagat Singh Brar (*Appellant*)

v.

Canada (Minister of Public Safety and Emergency Preparedness) (*Respondent*)

INDEXED AS: BRAR V. CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Federal Court, Noël J.—Ottawa, October 5, 14-16, 19, 20, and 22, 2020, June 16 and17 and August 30, 2021; October 5, 2021.

Security Intelligence — Amended public order dealing with appropriateness, justification of redactions in appeal book, judicial task of providing appellant with summary of evidence, other information available so as to enable designated Judge to be reasonably informed of Minister's case — Order part of appeal from decision to maintain appellant on no-fly list pursuant to Secure Air Travel Act (SATA), ss. 15, 16 — Delegate for Minister of Public Safety and Emergency Preparedness concluding reasonable grounds to suspect that appellant would engage or attempt to engage in act that would threaten transportation security, or travel by air to commit certain terrorism offences — Appellant filing notice of appeal seeking order to remove his name from SATA list — Attorney General presenting evidence on injury to national security of disclosing contested redactions, summaries proposed by amici curiae — Amici questioning justifications for redactions, summaries proposed by Attorney General — Attorney General arguing, inter alia, that SATA not authorizing Court to balance different interests that could be at play when assessing disclosure — Submitted appellants reasonably informed — Amici arguing Canada (Citizenship and Immigration) v. Harkat (S.C.C.) applying herein, requiring Minister to withdraw information whose non-disclosure preventing appellant from being reasonably informed — Asking Court to make declaration of irreconcilable tension where information cannot be lifted or summarized without injury — Whether disclosure of redacted information injurious to national security or endangering safety of any person — If so, whether protected information, other evidence should be disclosed in form of summary — Attorney General having burden to satisfy designated judge that redactions justified by presenting evidence that injury probable, having factual basis, related to national security or to safety of person — SATA forbidding disclosure of information that would be injurious — Verb "would" calling for elevated standard — Must be "sound" evidentiary basis to every national security claim — Concept of "national security" general, broad, adaptable — Still, Attorney General must present evidence of a potentially serious threat — And while designated judge having to show deference to Attorney General's assessment of injury to national security, applications for non-disclosure should not be blindly endorsed — Where redaction justified, designated judge having to determine whether

summary of protected information can be provided to appellant — SATA, s. 16(6)(c), Prevention of Terrorist Travel Act, s. 6(2)(c) both clear that such summaries must not contain injurious information — Principles established in Harkat helpful in present proceedings, applying to SATA appeal scheme — Appellant must receive sufficient disclosure to know, meet case against him or her — Information may be withdrawn if non-disclosure preventing appellant from being reasonably informed — In present case, some redactions injurious if revealed — No summary injurious to national security could be conceptualized — Some redactions remaining contested — Decision with regard thereto included in classified annex — Summary of allegations now disclosed made available to appellant — Revised appeal book to contain further information in respect of contested redactions — Order: some redactions remaining, others fully or partially lifted, others summarized.

This was an amended public order dealing with the appropriateness and justification of redactions in an appeal book filed by the Attorney General and the judicial task of providing the appellant Brar (present docket) and the appellant Dulai (docket T-670-19) with a summary of the evidence and other information available to enable them to be reasonably informed of the Minister's case.

The order is part of an appeal from an administrative decision made by the Associate Deputy Minister, as delegate for the Minister of Public Safety and Emergency Preparedness, to maintain the appellant on the no-fly list pursuant to sections 15 and 16[1] of the *Secure Air Travel Act* (SATA). After he was denied boarding at the Vancouver International Airport, the appellant submitted an application for administrative recourse to the Passenger Protect Inquiries Office seeking to remove his name from the SATA list. The Minister advised the appellant of his decision to maintain his status as a listed person under SATA. The delegate concluded that there were reasonable grounds to suspect that the appellant would engage or attempt to engage in an act that would threaten transportation security, or travel by air to commit certain terrorism offences. In 2019, the appellant filed a notice of appeal asking the Court to order the removal of his name from the SATA list or to order the remittance of the matter back to the Minister for redetermination, and to declare that sections 8, 15, 16 and paragraph 9(1)(a) of SATA are unconstitutional. In 2020, an *ex parte*, *in camera* hearing was held wherein the Attorney General presented evidence on the injury to national security of disclosing the contested redactions and summaries proposed by the *amici curiae* (*amici*), as well as the reliability and credibility of the redacted information. The *amici* questioned the justifications for the redactions and the summaries proposed by the Attorney General. The Attorney General argued, *inter alia*, that SATA does not authorize the Court to balance different interests that could be at play when assessing disclosure, including whether or not the appellant is reasonably informed. The Attorney General submitted that at this time, the appellants were reasonably informed. The *amici* argued that the decision of the Supreme Court in *Canada (Citizenship and Immigration) v. Harkat* requires that the Minister must withdraw the information or evidence whose non-disclosure prevents the appellant from being reasonably informed. The *amici* also argued that in some instances, redactions were not necessary. In other instances, the a*mici* agreed that disclosure would be injurious but proposed a summary that would avert the injury while allowing the appellant to be reasonably informed. The *amici* asked the Court to make a declaration of irreconcilable tension where information or evidence could not be lifted or summarized without injury.

At issue was whether disclosure of the redacted information and other information adduced during the *ex parte*, *in camera* hearings would be injurious to national security or endanger the safety of any person, and if so, whether the protected information and other evidence should be disclosed to the appellant in the form of a summary.

Held, some redactions should remain, others should be fully or partially lifted and others should be summarized.

The Attorney General has the burden to satisfy the designated judge that each redaction is justified by presenting evidence that the injury is probable, has a factual basis, and is related to

[1] Section 16 of SATA establishes the role of the designated judge in an appeal and sets out how redacted information must be handled. [31]

national security or to the safety of any person. Paragraphs 16(6)(b) and (c) of SATA forbid any disclosure of information that would be injurious. The use of the verb "would" calls for an elevated standard compared to the use of the verb "could". There must be a "sound" evidentiary basis to every national security claim. The concept of "national security" is meant to be general, broad and adaptable to a world in evolution. While a designated judge must give a fair, large and liberal interpretation to the term "national security", the Attorney General must present evidence of a potentially serious threat. The designated judge must show deference to the Attorney General's assessment of the injury to national security "because of his access to special information and expertise". However, it does not mean that the Court should blindly endorse the applications for non-disclosure filed by the Attorney General. If a redaction is justified on national security grounds, the designated judge must then determine whether a summary of the protected information that does not contain any sensitive information can be provided to the appellant. Paragraph 16(6)(c), like paragraph 6(2)(c) of the *Prevention of Terrorist Travel Act*, makes it clear that such summaries must not contain anything that would be injurious to national security or endanger the safety of any person if disclosed. The designated judge must also ensure that the appellant is reasonably informed of the Minister's case. In *Harkat*, the Supreme Court interpreted this concept in the context of the *Immigration and Refugee Protection Act* security certificate scheme. Given the very close similarity between provisions, the principles established in *Harkat* were helpful in the present proceedings and apply to the SATA appeal scheme. The appellant must receive sufficient disclosure to know and meet the case against him or her. The judge is the arbiter of whether that standard has been met. If there is an irreconcilable tension between the requirement that the appellant be reasonably informed and the imperative that sensitive information not be disclosed, the Minister may be asked to withdraw the information or evidence whose non-disclosure prevents the appellant from being reasonably informed. Subsection 16(5) of SATA states that the judge *may* order that the appellant's name be removed from the no-fly list if it is determined that the Minister's decision to maintain the appellant's name on the list is unreasonable. It follows that the judge has the discretion to order the removal of the appellant's name from the list or not.

In the present case, a review of all the redactions revealed that some of them would be injurious if disclosed. No summary that would not be injurious to national security or endanger the safety of any person could be conceptualized. Some redactions remained contested. A decision on these contested redactions and summaries were included in a classified annex. A summary of the allegations now disclosed was made available to the appellant. The new revised appeal book will contain further information resulting from the determinations made in respect of contested redactions. The appellant will have an opportunity to be heard.

In conclusion, more information was disclosed to the appellant in the form of lifts, partial lifts and summaries, allowing the appellant to give a more knowledgeable response to the case made against him and thus helping the designated judge make a decision on the reasonability of the delegate's decision.

STATUTES AND REGULATIONS CITED

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 38.06.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 6, 7.

Canadian Passport Order, SI/81-86, s. 10.1.

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23, ss. 2 "human source", 17(1), 18(1), 18.1.

Criminal Code, R.S.C., 1985, c. C-45, ss. 2 "terrorism offence", 83.18, 83.19, 83.2.

Federal Courts Rules, SOR/98-106, rr. 80, 83.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 53(1)(b), 78, 83(1)(d),(e),(i), 87.

Prevention of Terrorist Travel Act, S.C. 2015, c. 36, s. 42, s. 6(2).

Secure Air Travel Act, S.C. 2015, c. 20, s. 11, ss. 8, 9(1)(a), 15, 16.

CASES CITED

APPLIED:

Canada (Citizenship and Immigration) v. Harkat, 2014 SCC 37, [2014] 2 S.C.R. 33; *Jama v. Canada (Attorney General)*, 2019 FC 533 (with some adaptation); *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, [2008] 3 F.C.R. 248; *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

CONSIDERED:

Brar v. Canada (Public Safety and Emergency Preparedness), 2020 FC 729, [2020] 4 F.C.R. 557; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Jaballah (Re)*, 2009 FC 279, 340 F.T.R. 43; *Canada (Attorney General) v. Ribic*, 2005 FCA 246, [2005] 1 F.C.R. 33; *Harkat (Re)*, 2010 FC 1242, [2012] 3 F.C.R. 432; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3.

REFERRED TO:

Dulai v. Canada (Public Safety and Emergency Preparedness), 2022 FC 1164; *Soltanizadeh v. Canada (Citizenship and Immigration)*, 2018 FC 114, 38 Admin. L.R. (6th) 271; *Canada (Attorney General) v. Telbani*, 2014 FC 1050.

ORDER dealing with the appropriateness and justification of redactions in an appeal book filed by the Attorney General and the judicial task of providing the appellant with a summary of the evidence and other information available to enable him to be reasonably informed of the Minister's case. Order: some redactions remaining, others fully or partially lifted, others summarized.

APPEARANCES

Nathalie Benoit and *Michelle Lutfy* for respondent.

Colin Baxter and *Gib van Ert* as *amici curiae*.

SOLICITORS OF RECORD

Fowler and Blok Criminal Defense Lawyers, Vancouver, for appellant.

Deputy Attorney General of Canada for respondent.

Colin Baxter and *Gib van Ert* as *amici curiae*.

The following is the amended public order and reasons (pursuant to subsection 397(2) of the Federal Courts Rules) rendered in English by

NOËL J.:

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I. INTRODUCTION [TABLE OF CONTENTS]

[1] This order and reasons is part of an appeal of an administrative decision dated December 21, 2018, made by Mr. Vincent Rigby, Associate Deputy Minister, as delegate (Delegate) for the Minister of Public Safety and Emergency Preparedness (Minister), to maintain Mr. Bhagat Singh Brar (Mr. Brar or Appellant) on the no-fly list pursuant to sections 15 and 16 of the *Secure Air Travel Act*, S.C. 2015, c. 20, s. 11 (SATA). Another appeal, brought by Mr. Parvkar Singh Dulai (Mr. Dulai or, together with Mr. Brar, Appellants), raises the same issues and has its own set of order and reasons (see *Parvkar Singh Dulai and Canada (Minister of Public Safety and Emergency Preparedness)*, T-670-19 [*Dulai v. Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1164]). These are the first appeals brought pursuant to the SATA.

[2] The SATA requires the designated judge to proceed “without delay” to determine if the decision of the Minister is reasonable (subsection 16(4)). I note that a lot of work has been done since the appeals were brought to this Court in 2019 (see section II.B below). However, the various restrictions imposed by the provincial authorities in light of the pandemic have slowed down the proceedings by, among other things, limiting access to the secure facilities, where proceedings dealing with information whose release could be injurious have to be held. I do think that in normal circumstances and with the experience of the present proceedings, future appeals will be able to move “without delay”.

[3] As part of this appeal, the Attorney General of Canada (AGC) filed an appeal book that contains numerous redactions made to protect information he believed would be injurious to national security or endanger the safety of any person if disclosed. The present public order and reasons deal with (1) the appropriateness and justification of these redactions and (2) the judicial task of providing the Appellants with a summary of the evidence and other information available to the designated judge so as to enable him to be reasonably informed of the Minister’s case, but that does not include anything that, in the judge’s opinion, would be injurious to national security or endanger the safety of any person if disclosed (paragraph 16(6)(c) of the SATA).

[4] In accordance with the SATA, the Minister can request a closed hearing for national security reasons, meaning that the public and the Appellant and his counsel cannot be present while the government puts information or other evidence before the judge that could be injurious to national security or endanger the safety of any person (paragraph 16(6)(a)). In order to ensure a fair judicial process for the Appellant during

the *ex parte*, *in camera* proceedings, I have appointed two *amici curiae*, Mr. Colin Baxter and Mr. Gib van Ert (*Amici*). I invite the reader to consult the reasons issued in the present file in *Brar v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 729, [2020] 4 F.C.R. 557 (*Brar*) and the order dated July 17, 2020, which contains the mandate of the *Amici*.

[5] The *ex parte, in camera* hearings were held on October 5, 14, 15, 16, 19, 20, and 22, 2020, in the presence of counsel for the AGC and the *Amici*. Two affiants were examined, cross-examined by the *Amici* and responded to questions from the bench during the seven days. Most of that time was with the Canadian Security Intelligence Service (CSIS) affiant, the remaining time being with the Public Safety Canada (PSC) affiant. These hearings not only dealt with the appropriateness and justification of the redactions but also gave counsel for the AGC an opportunity to present the classified portions of the Minister's case and allowed the *Amici* to test the case in a robust way. It must also be noted that additional information came out of these hearings and became the subject matter of a summary.

[6] As a result of these hearings, new information will be disclosed to the Appellants in the form of additional disclosed text (resulting from lifts and partial lifts by the AGC following discussions with the *Amici* and with the accord of the Court) and summaries of text that will be informative but not to the point of disclosing sensitive information.

[7] These reasons are written to be public and their purpose is to inform the Appellant, as much as possible, about the legal rationales underpinning the determinations made without disclosing any sensitive information. Although the Appellant will see the result of this stage of the appeal by receiving a new version of the appeal book that contains fewer redactions, the rationales will be contained in a confidential chart (Chart – Annex C) for national security reasons.

[8] The next stage of this appeal will be public hearings where the Appellants and the AGC have an opportunity to be heard. To that effect, both parties can file affidavits in support of their respective position and present and test the respective evidence of the other party pursuant to rules 80 and 83 of the *Federal Courts Rules*, SOR/98-106. The next stage will also deal with any question(s) of law that this legislation raises. A public case management conference will be scheduled to discuss the next steps and establish timelines.

II. BACKGROUND [TABLE OF CONTENTS]

A. *Facts* [TABLE OF CONTENTS]

[9] On April 23, 2018, Mr. Brar's name was included on the no-fly list, which is a list of individuals for whom the Minister or his delegate has determined there are reasonable grounds to suspect that the Appellant will (1) engage or attempt to engage in an act that would threaten transportation security and/or (2) travel by air for the purpose of committing an act or omission that is an offence under sections 83.18, 83.19 or 83.2 of the *Criminal Code*, R.S.C., 1985, c. C-45 (*Criminal Code*) or an offence referred to in paragraph (c) of the definition "terrorism offence" in section 2 of that act. The following day, he was denied boarding on two occasions at the Vancouver International Airport by West Jet and Air Canada. Each time, a written denial of boarding under the Passenger Protect Program (the PPP) was issued pursuant to

paragraph 9(1)(a) of the SATA. Mr. Brar was scheduled to take two flights that would have eventually transported him from Vancouver to Toronto.

[10] On June 2, 2018, Mr. Brar submitted an application for administrative recourse to the Passenger Protect Inquiries Office (the PPIO) that sought the removal of his name from the SATA list pursuant to section 15 of the SATA. In response, the PPIO provided him with a two-page unclassified summary of the information supporting the decision to place his name on the SATA list. The PPIO further advised that the Minister would consider additional classified information when assessing his application under section 15 of the SATA. In addition, pursuant to subsection 15(4) of the SATA, Mr. Brar was provided with the opportunity to make written representations in response to the unclassified information disclosed to him, which he submitted to the PPIO on December 3, 2018.

[11] On December 21, 2018, the Minister advised Mr. Brar of his decision to maintain his status as a listed person under the SATA. Following a review of the classified and unclassified information provided, including Mr. Brar's written submissions, the delegate of the Minister "concluded that there [were] reasonable grounds to suspect that [Mr. Brar] will engage or attempt to engage in an act that would threaten transportation security, or travel by air to commit certain terrorism offences" [*Brar*, at paragraph 12].

[12] On April 18, 2019, Mr. Brar filed a notice of appeal with this Court pursuant to subsection 16(2) of the SATA. In this notice of appeal, Mr. Brar asks this Court to order the removal of his name from the SATA list pursuant to subsection 16(5) of the SATA, or to order the remittance of the matter back to the Minister for redetermination. In addition, Mr. Brar also asks this Court to declare that sections 8, 15, 16 and paragraph 9(1)(a) of the SATA are unconstitutional and therefore of no force and effect, or to read in such procedural safeguards that would cure any constitutional deficiencies in the SATA.

[13] More specifically, Mr. Brar argues the following as the grounds of his appeal: (1) the Minister's decision was unreasonable; (2) section 8 and paragraph 9(1)(a) of the SATA infringe his rights pursuant to section 6 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (Charter) in a manner that cannot be justified by section 1 of the Charter; (3) sections 15 and 16 of the SATA infringe his rights pursuant to section 7 of the Charter, notably his rights to liberty and security of the person, in a manner that cannot be justified by section 1 of the Charter; and (4) the procedures set out in the SATA violate his common law rights to procedural fairness seeing as the SATA deprives him of his right to know the case against him and the right to answer that case. The constitutional matters being raised will be dealt with at a later time and will be one of the subject matters discussed at the next public case management conference. As mentioned earlier, the present order and reasons are a part of the appeal process and deal solely with the disclosure issues related to the redacted parts in the appeal book and additional information and evidence produced during the *ex parte*, *in camera* hearings.

[14] Finally, in his notice of appeal, Mr. Brar requests that the respondent disclose all related material to his application for recourse, all related material to the Minister's decision to designate him as a listed person, all material before the delegate of the

Minister on the application for recourse, and all other materials relating to the Minister's delegate decision to confirm his status as a listed person under the SATA.

B. *Procedural history* [TABLE OF CONTENTS]

[15] On June 20, 2020, this Court issued detailed reasons answering the preliminary legal questions in these appeals (see *Brar*, above). These reasons addressed the role of the designated judge in appeals under the SATA, the role and powers of the *Amici* in these appeals, the procedure applicable to the withdrawal of information by the Minister under the SATA, and the possibility and purpose of *ex parte*, *in camera* hearings on the merits under the SATA. For more information on the facts up to the issuance of these reasons, see paragraphs 22 to 28 in *Brar*.

[16] On July 15, 2020, a public case management conference was held to discuss the next steps in the appeals. On July 17, 2020, an order was issued to replace the order dated October 7, 2019, appointing the *Amici* to better reflect the Court's reasons dated June 30, 2020, and set out the next steps in the appeals.

[17] On September 10, 2020, the AGC filed a replacement *ex parte* affidavit for the CSIS affiant due to the unavailability of the previous affiant. Additionally, in light of the reasons in *Brar*, the AGC filed a supplemental *ex parte* affidavit from the same affiant on September 25, 2020.

[18] On September 22, 2020, an *ex parte*, *in camera* case management conference was held to discuss the progress of the appeals. A public summary of the discussion that took place was communicated to the Appellants (Public Communication No. 5).

[19] On October 5, 2020, an *ex parte*, *in camera* hearing was held. Counsel for the AGC and the *Amici* presented to the Court their agreed upon lifts and summaries of redacted information in preparation for the upcoming *ex parte*, *in camera* hearing on the contested redactions. This Court approved the proposed lifts and summaries (see Annex A). On October 7, 2020, a public summary of the hearing was issued to the Appellants (Public Communication No. 6).

[20] The *ex parte*, *in camera* examination and cross-examination of the AGC's witnesses in Mr. Brar's appeal took place over six days on October 14, 15, 16, 19, 20 and 22, 2020. The AGC presented evidence on the injury to national security of disclosing the contested redactions and summaries proposed by the *Amici*, as well as the reliability and credibility of the redacted information. The *Amici* questioned the justifications for the redactions and the summaries proposed by the AGC and questioned the affiants with documentary evidence. On November 3, 2020, a public summary of the hearings was communicated to the Appellant (Public Communication No. 7), which summarizes the hearings as follows:

> October 14, 2020
>
> Court began at 10:00 am on October 14, 2020. The Minister called a CSIS witness who filed two (2) classified affidavits in these proceedings, one (1) on September 10, 2020, and another on September 25, 2020. The first affidavit relates primarily to the injury to national security of disclosing the redacted information and the second affidavit relates primarily to the reliability and credibility of the redacted information.

The witness gave evidence on various points, including:

- aspects of CSIS' operations that are relevant to the *Secure Air Travel Act* (SATA) and the Passenger Protect Program (PPP);
- CSIS policies and procedures relating to the PPP including policies and procedures in relation to preparing, reviewing and updating case briefs;
- the Khalistani extremism threat in Canada;
- the reasons for Mr. Brar's nomination in exigent circumstances;
- subsequent occasions where Mr. Brar's case brief was reviewed and/or revised, and Mr. Brar was relisted, including reasons for changes to Mr. Brar's case brief;
- the harm to national security that would result if each contested redaction and summary was disclosed; and
- the reliability and credibility of the redacted information, including the origin of some of this information and how it was assessed by the Service.

October 15, 2020

Court resumed in the morning of October 15, 2020, at 9:30 a.m. and counsel for the AG completed its examination of the CSIS witness late in the morning. Immediately after the examination in chief, the *Amici* commenced their cross-examination of the CSIS witness, which continued for the remainder of the day. The cross-examination on this day included questions on a variety of topics, including CSIS' policies, procedures and practices in respect of the PPP and the reliability and credibility of the redacted information.

During the cross-examination, counsel for the AG reminded the Court and the *Amici* that public counsel for the appellant would play an important role, and objected that the *Amici's* role should not be to duplicate that of public counsel. The Court endorsed those comments, and so directed the *Amici*. The *Amici* filed a number of exhibits on various topics.

October 16, 2020

The *Amici* continued to cross-examine the CSIS witness for part of the morning on October 16, 2020, at 9:30 a.m., after which Court was adjourned until Monday.

October 19, 2020

Court resumed the morning of October 19, 2020, at 9:30 a.m., and the *Amici* continued their cross-examination of the CSIS witness for the remainder of the day. The cross-examination continued to address the reliability and credibility of the redacted information.

October 20, 2020

The cross-examination of the CSIS witness continued for the morning of October 20, 2020. Among other things, the questions focused on the injury to national security of releasing certain information or summaries. After lunch, counsel for the AG conducted its re-direct of the CSIS affiant, which was concluded mid-afternoon.

October 22, 2020

Court commenced at 9:30 am on October 22, 2020, and the Minister called a witness from Public Safety Canada. The Public Safety witness gave evidence on various points, including:

- the PPP, the Passenger Protect Advisory Group and the Passenger Protect Inquiries Office;

- the documents that were prepared in relation to Mr. Brar's listing; and

- injury to national security that would result from releasing certain information.

The *Amici* completed its cross-examination of the Public Safety affiant mid-afternoon on that same day, which focused on the PPP, the Passenger Protect Advisory Group, the Passenger Protect Inquiries Office and the documents relating to Mr. Brar's listing.

[21] The *ex parte*, *in camera* examination and cross-examination of the Minister's witnesses in Mr. Dulai's matter was held on November 16, 17 and 23, 2020. At the outset of the hearing, the AGC and the *Amici* consented to an order that would render the evidentiary record resulting from the *Brar* hearings on October 14, 15, 16, 19, 20 and 22, 2020, and the evidentiary record resulting from the *Dulai* hearings evidence in both appeals, subject to any arguments in relation to the weight, relevancy and admissibility of the evidence. This allowed for efficiencies in the *Dulai* examinations and cross-examinations. On December 2, 2020, a public summary of the hearings was communicated to Mr. Dulai (Public Communication No. 8), which summarizes the hearings as follows:

November 16, 2020

Court began at 9:45 a.m. on November 16, 2020. The AG commenced by filing four (4) charts, namely (i) a classified chart listing all of the contested redactions and contested summaries, (ii) a classified chart itemizing the proposed uncontested redactions, uncontested summaries and lifts agreed to by the AG, (iii) a classified chart containing only the CSIS contested redactions and summaries organized in a way to guide the examination of the CSIS witness; and (iv) a classified chart listing excerpts from the transcript of the *Brar* hearings that apply to the present hearings.

The Minister called the same CSIS witness that it called in the *Brar* appeal. This witness filed two (2) classified affidavits in these proceedings, one (1) on September 10, 2020, and another on September 25, 2020. The first affidavit relates primarily to the injury to national security of disclosing the redacted information and the second affidavit relates primarily to the reliability and credibility of the redacted information.

Because of the Evidentiary Order, the examination and cross-examination of the CSIS witness in the present appeal was shorter than it was in *Brar*. That said, the witness gave evidence on various points including:

- the threat posed by Khalistani extremism;

- the reasons for Mr. Dulai's nomination in exigent circumstances;

- subsequent occasions where Mr. Dulai's case brief was reviewed and/or revised, and Mr. Dulai was relisted, including reasons for changes to Mr. Dulai's case brief;

- the harm to national security that would result if each contested redaction and summary was disclosed; and

- the reliability and credibility of the redacted information, including the origin of some of this information and how it was assessed by the Service.

The AG completed its examination of the CSIS witness mid-day, after which the *Amici* commenced their cross-examination of the CSIS witness for the remainder of the day. The

cross-examination on this day focused on the reliability and credibility of the redacted information, while also exploring the process by which Mr. Dulai was nominated for and has been maintained on the SATA list.

November 17, 2020

Court resumed in the morning of November 17, 2020, at 9:30 am. The *Amici* continued to cross-examine the CSIS witness, and questions focused on the reliability and credibility of the redacted information and the injury to national security of releasing certain information or summaries. The *Amici* filed a number of exhibits on various topics. The cross-examination was complete near the end of the day, after which the AG conducted a brief re-direct of the CSIS witness.

November 23, 2020

Court resumed at 10:00 a.m. on November 23, 2020. The Minister called a witness from Public Safety Canada. This witness also testified in the *Brar* appeal. Because of the Evidentiary Order, the examination and cross-examination of the Public Safety witness in the present appeal was shorter than it was in *Brar*.

The AG conducted its direct examination for the first half of the morning, which focused primarily on the documents that were prepared in relation to Mr. Dulai's listing. The *Amici* completed its cross-examination of the Public Safety affiant by the lunch break, which focused on the documents relating to Mr. Dulai's listing and the process by which individuals are placed on the SATA list.

[22] On December 16, 2020, a public case management conference was held with all counsel to update the Appellants on the next steps in the appeals. In addition, counsel for the AGC filed an *ex parte* motion record to strike certain evidence resulting from the *ex parte, in camera* hearings from the record.

[23] Following the *ex parte, in camera* hearings, the AGC and the *Amici* filed confidential submissions concerning the redactions on January 8, 2021.

[24] On January 14, 2021, the Court issued Public Communication No. 9 to advise the Appellants about the progress of the appeals in light of the COVID-19 situation and, more specifically, the recent orders enacted by the provinces of Quebec and Ontario. The AGC and the *Amici* then informed the Court that they were of the view that in-person hearings in these matters should be postponed until the stay-at-home order was lifted.

[25] On February 4, 2021, an *ex parte* case management conference was held in the presence of the AGC and the *Amici* to discuss the status of the appeals. I also raised a question of law, namely whether the principles set out by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 (*Harkat*), in relation to the requirement to provide the Appellant summaries or information that would permit him or her to know the Minister's case, apply to the SATA appeal scheme. I requested comments and further submissions from the AGC and the *Amici*. On February 5, 2021, a public summary of the discussion was communicated to the Appellant (Public Communication No. 10). On February 9, 2021, counsel for the Appellants requested permission to provide the Court with submissions respecting this question of law. The Court granted leave. Counsel for the Appellants, the AGC and the *Amici* filed their written representations on February 19, 2021. The AGC filed their reply on February 24, 2021.

[26] On February 24, 2021, the *Amici* filed *ex parte* written representations concerning the AGC's motion to strike certain evidence from the record.

[27] On March 3, 2021, an *ex parte* case management conference was held in the presence of the AGC and the *Amici* to discuss the possible adjournment of the *ex parte*, *in camera* hearing scheduled on March 4, 2021. A public communication was then communicated to all parties to explain that the Court proposed, and the AGC and the *Amici* agreed, to adjourn the hearing scheduled for the next day for COVID-19 related reasons and schedule an *ex parte*, *in camera* case management conference on March 9, 2021, to discuss the specific legal issues for which the Court was seeking to receive submissions.

[28] An *ex parte*, *in camera* hearing was held on June 16 and June 17, 2021. The purpose of the hearing was for counsel for the AGC and the *Amici* to make submissions on disclosure, the reasonably informed threshold, and the AGC's motion to strike. The following is a public summary of the hearing. On July 21, 2021, a public summary of the hearing was communicated to the Appellants (Public Communication No. 11), which summarizes the hearing as follows:

> June 16, 2021
>
> Court commenced at 9:30 am on June 16, 2021, and submissions were made by counsel for the AG and the *Amici* on disclosure and the requirement to reasonably inform the appellants.
>
> AG Submissions on Disclosure and Reasonably Informed
>
> The AG filed the following documents at the commencement of the proceedings:
>
> - an updated chart for each file containing the contested claims and summaries;
> - an updated chart for each file containing the summaries and redactions agreed to by the AG and the *Amici*;
> - an updated chart for each file containing the lifts made by the AG;
> - a chart for each file listing all of the allegations against the appellants that have been disclosed, partially disclosed or summarized, and withheld; and
> - a copy of the Recourse Decision in each file reflecting the agreed-upon summaries and redactions and the lifts made by the AG.
>
> The AG made submissions on the applicable test for disclosure in appeals under section 16 of the *Secure Air Travel Act* (SATA). The AG argued that if disclosure of information would result in injury to national security or endanger the safety of any person, it should not be disclosed. Additionally, it argued that SATA does not authorize the Court to balance different interests that could be at play when assessing disclosure, including whether or not the appellant is reasonably informed. The AG then went through the chart containing the contested claims and summaries to highlight why lifting or summarizing these claims would result in injury to national security.
>
> The AG then made submissions on the reasonably informed threshold and argued that at this point in time, the appellants are reasonably informed. The AG highlighted that the scheme allows for some information to not be disclosed or summarized, and that the assessment of whether or not the appellants are reasonably informed is fact specific and should be made throughout the appeals. The AG stressed that the threshold under section

8(1) of SATA, namely “reasonable grounds to suspect”, must inform the Court’s consideration of whether or not the appellants are reasonably informed.

Amici’s Submissions on Disclosure and Irreconcilable Tension

The *Amici* made submissions on two issues.

First, the *Amici* argued that the decision of the Supreme Court of Canada in *Harkat* 2014 SCC 37 requires, in circumstances where redacted information or evidence cannot be lifted or summarized without national security injury, but also comes within the incompressible minimum amount of disclosure that the appellant must receive in order to know and meet the case against him, that the Minister withdraw the information or evidence whose non-disclosure prevents the appellant from being reasonably informed: *Harkat* para 59. The *Amici* argued that this situation, described in *Harkat* as an irreconcilable tension, arises in both the Brar appeal and the Dulai appeal. The *Amici* further argued that given the Minister’s disagreement with the *Amici* that irreconcilable tensions arise in these appeals, he will not withdraw evidence of his own motion. The Court must therefore decide whether or not the appeals involve irreconcilable tensions.

To that end, the *Amici* proposed a form of order the Court should make if it agrees with the *Amici* that either or both of the appeals involve situations of irreconcilable tension. The order would identify the specific information or evidence that gives rise to the irreconcilable tension and declare that the Minister must withdraw that information or evidence within a fixed period (the *Amici* proposed 60 days), failing which the Court will be unable to determine the reasonableness of the appellant’s listing and must allow the appeal.

Second, the *Amici* reviewed the contested claims and summaries in each appeal. In some instances, the *Amici* argued that the AG’s redactions were not necessary (because the information or evidence was not injurious). In other cases, the *Amici* agreed that disclosure would be injurious but proposed a summary that would avert the injury while allowing the appellant to be reasonably informed of the case he must meet. In other cases still, the *Amici* argued that the information or evidence could not be lifted or summarized without injury, but had to be disclosed for the appellant to be reasonably informed. In these latter cases, the *Amici* asked the court to make the declaration of irreconcilable tension described above.

The *Amici* emphasized that the applicable standard is that of a “serious risk of injury”, and that the judge must ensure throughout the proceeding that the Minister does not cast too wide a net with his claims of confidentiality.

Other Issues

The parties discussed other procedural issues, including the format and timing for filing a revised appeal book following the Court’s decision on disclosure, a timeline for appealing this decision and staying the order if an appeal is filed, and potential redactions to the list of exhibits.

June 17, 2021

The hearing resumed at 9:30 am on June 17, 2021, and the Court heard arguments from both counsel for the AG and the *Amici* on the AG’s motion to strike. The AG withdrew its motion to strike following the mid-day break.

In the afternoon, the Court discussed with the *Amici* and counsel for the AG the possibility of preparing a further summary of the evidence in the *ex parte, in camera* hearings, to expand on the summaries provided in Public Communication No 7 (T-669-19) and Public Communication No 8 (T-670-19) in a way that would not be injurious to national security. Counsel for the AG and the *Amici* agreed to prepare a draft summary in this regard.

> The Court asked that this summary include confirmation that there is no information or evidence against either appellant in relation to 8(1)(a) of SATA, and that both listings concern information and evidence in respect of 8(1)(b).

[29] The issues of the redacted list of exhibits and disclosing additional information through summaries was a constant endeavour after the June hearing. The Appellants were informed of this through communication No. 12. Concerning the list of exhibits, it was later agreed that it would be released in a redacted format once the counsel for the AGC and the *Amici* had reviewed the determinations made on the redactions at issue as a result of the *ex parte*, *in camera* hearings. As for the summary of additional information, both set of counsel undertook to submit it to the Court no later than August 31, 2021. As soon as it was submitted and reviewed and then agreed by the undersigned, it was released as communication No. 13 on August 31, 2021, after an *ex parte*, *in camera* hearing on that same day. From then on, all outstanding matters were taken under reserve with the objective of issuing order and reasons as soon as possible.

III. LEGISLATION [TABLE OF CONTENTS]

A. *A brief outline of the legislation* [TABLE OF CONTENTS]

[30] As part of the reasons in *Brar*, it was essential to review and analyze the SATA (see *Brar*, at paragraphs 58 to 89, in particular the appeal provisions at paragraphs 80 to 89). It is not necessary to duplicate what has already been written except to note that the SATA sets out rules governing the appeal process.

[31] In summary, section 16 of the SATA establishes the role of the designated judge in an appeal and sets out how redacted information must be handled. The designated judge is given the responsibility of ensuring the confidentiality of sensitive information (paragraph 16(6)(b)). At the same time, if the redactions are justified on national security grounds, the designated judge must provide the Appellant with summaries of the redacted information that will reasonably inform them of the Minister's case but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person (paragraph 16(6)(c)). This is a challenging task. The objective is to be as informative as possible while respecting the national security parameters enunciated in the SATA appeal scheme. As it was said in *Brar*, at paragraph 112:

> …. Like an elastic, designated judges must stretch their statutory and inherent powers to ensure that as much disclosure is provided to the appellant while stopping short of the breaking point. A designated judge must feel satisfied that the disclosure (through summaries or by other means) is, in substance, sufficient to allow an appellant to be "reasonably informed" (paragraph 16(6)(e)) of the case made against them and be able to present their side of the story, at the very least via the assistance of a substantial substitute (*Harkat (2014)*, at paragraphs 51–63 and 110). Only then will the designated judge have the necessary facts and law to render a fair decision.

B. *Legal test* [TABLE OF CONTENTS]

[32] In *Jama v. Canada (Attorney General)*, 2019 FC 533 (*Jama*), Justice LeBlanc, now a judge of the Federal Court of Appeal, dealt with the judicial review of a decision of a delegate of the Minister not to issue a passport pursuant to section 10.1 of the *Canadian Passport Order*, SI/81-86 (CPO). The proceeding was governed by the

Prevention of Terrorist Travel Act, S.C. 2015, c. 36, **s. 42** (PTTA), and the order dealt more specifically with subsection 6(2) of the PTTA, which sets out in general a similar framework to subsection 16(6) of the SATA subject to some differences that will be discussed below. Given that these are the first appeals under the SATA, this Court's interpretation of a similar scheme is helpful in interpreting the SATA appeal scheme.

[33] Subsection 6(2) of the PTTA reads as follows:

> *Prevention of Terrorist Travel Act*, S.C. 2015, c. 36, **s. 42**
>
> **Judicial Review**
>
> …
>
> **6 (1)** …
>
> **Rules**
>
> **(2)** The following rules apply for the purposes of this section:
>
> **(a)** at any time during the proceeding, the judge must, on the Minister's request, hear submissions on evidence or other information in the absence of the public and of the applicant and their counsel if, in the judge's opinion, the disclosure of the evidence or other information could be injurious to national security or endanger the safety of any person;
>
> **(b)** the judge must ensure the confidentiality of the evidence and other information provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;
>
> **(c)** the judge must ensure that the applicant is provided with a summary of the evidence and other information available to the judge that enables the applicant to be reasonably informed of the reasons for the Minister's decision but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;
>
> **(d)** the judge must provide the applicant and the Minister with an opportunity to be heard;
>
> **(e)** the judge may base his or her decision on evidence or other information available to him or her even if a summary of that evidence or other information has not been provided to the applicant;
>
> **(f)** if the judge determines that evidence or other information provided by the Minister is not relevant or if the Minister withdraws the evidence or other information, the judge must not base his or her decision on that evidence or other information and must return it to the Minister; and
>
> **(g)** the judge must ensure the confidentiality of all evidence and other information that the Minister withdraws.

[34] Subsection 16(6) of the SATA reads as follows:

> *Secure Air Travel Act*, S.C. 2015, c. 20, s. 11
>
> **Appeals**
>
> …

16 (1) …

Procedure

(6) The following provisions apply to appeals under this section:

> **(a)** at any time during a proceeding, the judge must, on the request of the Minister, hear information or other evidence in the absence of the public and of the appellant and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;
>
> **(b)** the judge must ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;
>
> **(c)** throughout the proceeding, the judge must ensure that the appellant is provided with a summary of information and other evidence that enables them to be reasonably informed of the Minister's case but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;
>
> **(d)** the judge must provide the appellant and the Minister with an opportunity to be heard;
>
> **(e)** the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;
>
> **(f)** the judge may base a decision on information or other evidence even if a summary of that information or other evidence has not been provided to the appellant;
>
> **(g)** if the judge determines that information or other evidence provided by the Minister is not relevant or if the Minister withdraws the information or evidence, the judge must not base a decision on that information or other evidence and must return it to the Minister; and
>
> **(h)** the judge must ensure the confidentiality of all information or other evidence that the Minister withdraws.

[35] As noted above, there are some differences between the two proceedings. First, the present case is an appeal while *Jama* is a judicial review. Second, it is noteworthy that the record in a judicial review under the PTTA is limited to what the decision maker's file reveals, while in an appeal under the SATA, new evidence can be introduced if, in the judge's opinion, it is reliable and appropriate (see paragraph 16(6)(e) of the SATA). Third, the Appellant under paragraph 16(6)(c) of the SATA must be reasonably informed of the Minister's case while the Applicant under paragraph 6(2)(c) of the PTTA must be reasonably informed of the reasons of the Minister's decision. That being said, overall, there are important similarities between the two proceedings.

[36] In *Jama*, Justice LeBlanc determined that the appropriate test in a judicial review under the PTTA is to determine whether disclosing the redacted information would be injurious to national security or endanger the safety of any person, as claimed by the Attorney General, and what summary of the evidence and other information available to the designated judge, if any, can be provided to the applicant so as to ensure that the

applicant is reasonably informed of the reasons for the Minister's decision (at paragraph 24). I agree that these two issues identified in *Jama* are applicable to proceedings under the SATA with some adaptation since the present proceeding is an appeal.

[37] In addition to the designated judge's duties to determine whether disclosing the redacted information would be injurious and to determine what summary can be provided to the appellant, the judge must also decide whether any additionally adduced evidence during the *ex parte*, *in camera* hearings is reliable and appropriate, and then decide whether it should be communicated to the appellant in the form of summaries or otherwise.

[38] Therefore, I consider that the appropriate legal test with respect to disclosure in an appeal under the SATA is as follows. The first question is whether the disclosure of the redacted information and other information adduced during the *ex parte*, *in camera* hearings would be injurious to national security or endanger the safety of any person. If the answer is no, the information must be disclosed to the appellant. If the answer is yes, the second question is whether the protected information can be disclosed to the appellant in the form of a summary or otherwise in a way that would not be injurious to national security or endanger the safety of any person. If the information cannot be summarized in a way that would not be injurious to national security of endanger the safety of any person, it must remain protected.

[39] The judge must then determine whether the appellant is reasonably informed of the Minister's case. An issue in this matter is to determine when (i.e. at what stage in the proceeding) it is appropriate to make such a determination. More on this later.

IV. ISSUES [TABLE OF CONTENTS]

[40] The issues raised are as follows:

1. Would disclosure of the redacted information and other information adduced during the *ex parte*, *in camera* hearings be injurious to national security or endanger the safety of any person?

2. If so, can the protected information and other evidence be disclosed to the Appellant in the form of a summary or otherwise in a way that would not be injurious to national security or endanger the safety of any person?

3. At what stage of the proceeding is it appropriate to determine whether the Appellant has been reasonably informed of the Minister's case?

V. SUBMISSIONS [TABLE OF CONTENTS]

[41] At this stage of the appeal, the AGC and the *Amici* filed *ex parte* written submissions and presented oral submissions to the Court during *ex parte*, *in camera* hearings that dealt with the disclosure element and other matters. These submissions must remain confidential for national security reasons.

[42] In addition to the *ex parte* proceedings, the Court raised a question of law, namely whether the principles set out by the Supreme Court of Canada in *Harkat* concerning the requirement to provide the appellant summaries of information that

would permit them to know the Minister's case apply to the SATA appeal scheme. As I will discuss later, the principles in *Harkat* were established in the context of the security certificate regime of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

A. *AGC's submissions* [TABLE OF CONTENTS]

[43] The AGC submits that the principles enunciated in *Harkat* are helpful to understand the provisions relating to the protection of information in the SATA since they are very similar to those in the IRPA. The AGC claims that "fairness likely requires the disclosure of an incompressible minimum amount of information to reasonably inform the Appellants of the Minister's case", but that the exact content of procedural fairness in the context of the SATA may vary as the SATA scheme for listing individuals is different from the certificate regime under the IRPA. The AGC submits that the duty of procedural fairness in administrative law is "'eminently variable', inherently flexible and context-specific": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paragraph 77.

[44] The AGC is of the opinion that the determination of whether the Appellants are reasonably informed of the Minister's case should occur at the merits phase of the appeal, not at the present stage.

B. Amici*'s submissions* [TABLE OF CONTENTS]

[45] The *Amici* submit that based on the very close similarity between the IRPA and SATA provisions alone, this Court must conclude that the principles enunciated in *Harkat* apply to the SATA. The SATA postdates the *Harkat* decision and was adopted by Parliament in full appreciation of *Harkat*'s interpretation of the IRPA provisions' legal and constitutional significance. They note that "[t]here is simply no relevant difference between the IRPA and SATA provisions that would permit a different approach to the SATA than that endorsed by the Court in *Harkat*".

C. *Appellants' submissions* [TABLE OF CONTENTS]

[46] Counsel for the Appellants state that the principles set out in *Harkat* confirmed that fundamental requirements of procedural fairness exist where information cannot be disclosed to an individual for national security reasons. They note that nothing in *Harkat* suggests that the Supreme Court sought to limit the principles to the IRPA context. There is a significant overlap between the IRPA and SATA provisions in terms of the rights and interests at play and relevant statutory language. In these circumstances, counsel submits that the principles enunciated in *Harkat* apply to the present appeals.

VI. APPEAL PROVISIONS IN THE SATA [TABLE OF CONTENTS]

[47] Before addressing the issues, I will go over the burden of proof of the AGC (A), the deference owed to the AGC (B), the limits on the content of summaries (C), the duty to reasonably inform the Appellant of the Minister's case (D), and the categories of information and evidence that can be redacted (E). The last item is an attempt to give the Appellants a better understanding of what the redactions are all about.

A. *Burden of proof of the Attorney General of Canada* [TABLE OF CONTENTS]

[48] The AGC has the burden to satisfy the designated judge that each redaction is justified, meaning that disclosure of the redacted information would be injurious to national security or endanger the safety of any person. The AGC has to present evidence that: (1) the injury alleged is probable, (2) the injury has a factual basis, established by evidence, and (3) the injury is related to national security or to the safety of any person.

[49] First, the injury alleged must be probable, and not simply a possibility or merely speculative. Paragraphs 16(6)(b) and (c) of the SATA forbid any disclosure of information that would be injurious. The use of the verb "would" calls for an elevated standard compared to the use of the verb "could". See *Soltanizadeh v. Canada (Citizenship and Immigration)*, 2018 FC 114, 38 Admin. L.R. (6th) 271, at paragraphs 2 and 21 in the context of section 87 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, [2008] 3 F.C.R. 248 (*Arar*), at paragraph 49 in the context of section 38.06 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, both dealing with the use of the verb "would" but in different pieces of legislation.

[50] In *Jaballah (Re)*, 2009 FC 279, 340 F.T.R. 43, at paragraph 9, Justice Dawson commented on the use of the verb "would" in paragraph 83(1)(d) of the IRPA in relation to the burden of the AGC: "[i]t is the Ministers who bear the burden of establishing that disclosure not only could but would be injurious to national security, or endanger the safety of any person" (emphasis added).

[51] In *Harkat*, the Supreme Court, in the context of the IRPA, held at paragraph 61 that "only information and evidence that raises a serious risk of injury to national security or danger to the safety of a person can be withheld from the named person" (emphasis added).

[52] Second, my colleague Justice Mosley stated that there must be a "sound" evidentiary basis to every national security claim (see *Canada (Attorney General) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547, at paragraph 157, see also *Jama*, at paragraph 72). The designated judge must be satisfied that the injury "has a factual basis, established by evidence" (*Arar*, at paragraph 47).

[53] Third, the injury alleged must be related to national security or to the safety of any person. The concept of "national security" is not specifically defined in Canadian law. It is meant to be general, broad and adaptable to a world in evolution. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (*Suresh*), when dealing with the concept of the "danger to the security of Canada" in the context of paragraph 53(1)(b) of the IRPA, a unanimous Court wrote that [at paragraph 85]:

> Subject to these qualifications, we accept that a fair, large and liberal interpretation in accordance with international norms must be accorded to "danger to the security of Canada" in deportation legislation. We recognize that "danger to the security of Canada" is difficult to define. We also accept that the determination of what constitutes a "danger to the security of Canada" is highly fact-based and political in a general sense. All this suggests a broad and flexible approach to national security and, as discussed above, a deferential standard of judicial review. Provided the Minister is able to show evidence that

reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister's decision.

[54] The same can be said for paragraph 16(6)(c) of the SATA which refers to the concept of "national security". Additionally, the injury should be such that there is a real and serious possibility of an adverse impact on Canada, although "the threat need not be direct" (*Suresh*, at paragraph 88). In *Suresh*, while commenting on paragraph 53(1)(b) of IRPA, the Court wrote [at paragraphs 88–89]:

> First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them in the terrorist activity. Second, terrorism itself is a worldwide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered. Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism. These considerations lead us to conclude that to insist on direct proof of a specific threat to Canada as the test for "danger to the security of Canada" is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security.
>
> While the phrase "danger to the security of Canada" must be interpreted flexibly, and while courts need not insist on direct proof that the danger targets Canada specifically, the fact remains that to return (*refouler*) a refugee under s. 53(1)(*b*) to torture requires evidence of a serious threat to national security. To suggest that something less than serious threats founded on evidence would suffice to deport a refugee to torture would be to condone unconstitutional application of the *Immigration Act*. Insofar as possible, statutes must be interpreted to conform to the Constitution. This supports the conclusion that while "danger to the security of Canada" must be given a fair, large and liberal interpretation, it nevertheless demands proof of a potentially serious threat. [Emphasis added.]

[55] These teachings are useful when interpreting the SATA. While a designated judge must give a fair, large and liberal interpretation to the term "national security", the AGC must present evidence of a potentially serious threat.

B. *Deference* [TABLE OF CONTENTS]

[56] The designated judge must show deference to the AGC's assessment of the injury to national security "because of his access to special information and expertise" (*Canada (Attorney General) v. Ribic*, 2005 FCA 246, [2005] 1 F.C.R. 33 (*Ribic*), at paragraphs 18–19). However, it does not mean that this Court should blindly endorse the applications for non-disclosure filed by the AGC (see *Canada (Attorney General) v. Telbani*, 2014 FC 1050, at paragraph 44). The government has a tendency to exaggerate claims of national security confidentiality (*Harkat*, at paragraph 63). The designated judge, as "the gatekeeper against this type of overclaiming" (*Harkat*, at paragraph 64), must ensure the redactions are justified. At the end, if the Court finds that the AGC's assessment of injury is reasonable, then the judge should accept it (*Ribic*, at paragraph 19; *Arar*, at paragraph 47; *Khawaja*, at paragraph 66; *Jama*, at paragraph 77).

C. *Limits on the content of summaries* [TABLE OF CONTENTS]

[57] If a redaction is justified on national security grounds, the designated judge must then determine whether a summary of the protected information that does not contain any sensitive information can be provided to the appellant so as to ensure he or she is reasonably informed of the Minister's case.

[58] As Justice LeBlanc observed in *Jama*, the PTTA does not require the designated judge to perform a balancing test between the requirement to reasonably inform the individual of the case to meet and the requirement to protect the confidentiality of information that would injure national security or endanger the safety of any person if disclosed. Rather, the provisions prohibit the disclosure of sensitive information [at paragraphs 47–48 and 89–90]:

> First, I fully agree with the Attorney General in that the provisions of the PTTA clearly and unambiguously contain a categorical prohibition on the disclosure of sensitive information and do not, in a like manner to other provisions in national security legislation (IRPA, ss 83(1), 86, 87; *Secure Air Travel Act*, s 16(6); *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 18.1), authorize the Designated Judge, either explicitly or implicitly, to balance competing public interests.
>
> I agree, too, that when a balancing test is required, Parliament uses explicit statutory language, as evidenced by subsection 38.06(2) of the Canada Evidence Act, referred to and reproduced above, which empowers the Designated Judge to disclose all or part of the information which, according to him or her, would be injurious to national security if disclosed, after having balanced the public interest in disclosure against the public interest in non-disclosure. …
>
> …
>
> Here, although the Designated Judge must strive to ensure that an applicant is provided with a summary of the evidence or other information available to him or her that enables the applicant to be reasonably informed of the reasons for the Minister's decision, paragraph 6(2)(c) of the PTTA makes it clear that such summary can imperatively not contain anything that, in the judge's opinion, would, if disclosed, be injurious to national security or endanger the safety of any person. There is no possible middle ground for this apparent conundrum. Any reasonable interpretation of that provision does not allow for it.
>
> Hence, assuming that the Applicant, as contended by the *Amicus*, is entitled to a summary that provides her with an "incompressible minimum amount of disclosure", this minimum amount of disclosure cannot contain information which, if disclosed, would injure national security or endanger the safety of any person. In other words, at this stage of the present judicial review application, any "irreconcilable tension" between the need to provide the Applicant with a summary enabling her to be reasonably informed of the reasons for the Minister's decision and the need to protect from disclosure sensitive information cannot be resolved in the Applicant's favour as, again, no reasonable interpretation of paragraph 6(2)(c) of the PTTA allows for it. The summary envisaged by that provision can only be on information that is not injurious to national security or to the safety of any person. Any contrary view would defeat Parliament's clear and non-equivocal intention.

[59] I agree with his interpretation. Paragraph 16(6)(c) of the SATA, like paragraph 6(2)(c) of the PTTA, makes it clear that such summaries must not contain anything that, in the Judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed.

D. *Duty to reasonably inform the appellant of the Minister's case* [TABLE OF CONTENTS]

[60] Along with the designated judge's duties to ensure the confidentiality of the redacted information and to provide the appellant with summaries of information without disclosing sensitive information, the judge must also ensure that the appellant is reasonably informed of the Minister's case (paragraph 16(6)(c) of the SATA).

[61] In *Harkat*, the Supreme Court interpreted this concept in the context of the IRPA security certificate scheme. The relevant provisions of the SATA and the IRPA are very similar and both schemes give the designated judge a statutory duty to ensure the named person is reasonably informed of the Minister's case. Paragraph 83(1)(e) of the IRPA provides that:

> **Protection of information**
>
> **83 (1)** …
>
> …
>
> **(e)** throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

[62] The exact same subsection exists in the SATA (see paragraph 16(6)(c)) except for two differences. First, the obligation to provide the appellant with a summary is on a "shall ensure" basis in the SATA and on a "must ensure" basis in the IRPA. In both cases, this obligation is subject to the limitation not to disclose information that would be injurious to national security or the safety of any person. The second difference is that the summaries are intended for a "permanent resident or foreign national" in the IRPA and for the "appellant" in the SATA. Both distinctions are of no significance for our purposes. Given the very close similarity between the provisions, the principles established in *Harkat* are helpful in the present proceedings.

[63] The Supreme Court made the following findings in relation to the IRPA's requirement that the named person be reasonably informed of the Minister's case:

- The requirement that the named person be reasonably informed indicates that the named person must receive an incompressible minimum amount of disclosure (at paragraph 55). In order to ensure a fair hearing, the named person must receive sufficient disclosure to know and meet the case against him or her and be permitted to respond to it (at paragraph 54; see also *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 [*Charkaoui or Charkaoui I*], at paragraph 53).

- To be "reasonably informed" means to be able to give meaningful instructions to his or her public counsel and meaningful guidance and information to his or her special advocates (at paragraph 55).

- The named person needs to be given sufficient information about the allegations against him or her and about the evidence on the record (at paragraph 56).

- At the very least, the named person must know the essence of the information and evidence supporting the allegations (at paragraph 57).

- The level of disclosure required for a named person to be reasonably informed is case-specific and the judge is the arbiter of whether this standard has been met (at paragraph 57).

- If there is an irreconcilable tension between the requirement that the named person be reasonably informed and the imperative that sensitive information not be disclosed, the Minister must withdraw the information or evidence whose non-disclosure prevents the named person from being reasonably informed (at paragraphs 58–60).

[64] These principles established by the Supreme Court apply to the SATA appeal scheme.

[65] In writing these reasons, I am aware that paragraph 16(6)(f) of the SATA allows a designated judge to base a decision on information and evidence even if a summary of that information or other evidence has not been provided to the appellant. The IRPA has a similar provision at paragraph 83(1)(i) and in *Harkat* the Court noted that "[i]t does not specify expressly whether a decision can be based in whole, or only in part, on information and evidence that is not disclosed to the named person" (at paragraph 39). The Court further noted [at paragraph 43] that:

> Full disclosure of information and evidence to the named person may be impossible. However, the basic requirements of procedural justice must be met "in an alternative fashion appropriate to the context, having regard to the government's objective and the interests of the person affected": *Charkaoui I*, at para. 63. The alternative proceedings must constitute a substantial substitute to full disclosure. Procedural fairness does not require a perfect process — there is necessarily some give and take inherent in fashioning a process that accommodates national security concerns: *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at para. 46.

[66] In *Harkat (Re)*, 2010 FC 1242, [2012] 3 F.C.R. 432, this Court made a determination as to whether or not Mr. Harkat had been reasonably informed of the case against him (see paragraphs 152, 153, 196–199). This determination was made after having offered Mr. Harkat an opportunity to be heard and after hearing submissions on all matters including the constitutional challenge of the new certificate regime. When discussing whether a decision could be made without the named person knowing the allegation, I wrote that it was possible (at paragraph 59). This interpretation was found to be erroneous by the Supreme Court in *Harkat* [at paragraphs 53–54]:

> The combination of ss. 83(1)(*e*) and 83(1)(*i*) could conceivably lead to a situation where the judge makes a decision on the reasonableness of the security certificate despite the fact that the named person has only received severely truncated disclosure. Noël J. even contemplated a scenario where the named person receives virtually no disclosure: "There may come a time when the only evidence to justify inadmissibility on security ground originates from a very sensitive source, and that the disclosure of such evidence, even through a summary, would inevitably disclose the source" (2010 FC 1242, at para. 59). He nevertheless found the disclosure provisions of the *IRPA* scheme to be constitutional.
>
> In my view, Noël J. erred in interpreting the *IRPA* scheme in a manner that allows for that scenario. *Charkaoui I* makes clear that there is an incompressible minimum amount of disclosure that the named person must receive in order for the scheme to comply with s. 7

of the *Charter.* He or she must receive sufficient disclosure to know and meet the case against him or her.

[67] The Supreme Court established in *Charkaoui I* that an incompressible minimum amount of disclosure must be provided to the appellant in order for the certificate scheme to comply with section 7 of the Charter. It was held in *Harkat* that the appellant must receive sufficient disclosure to know and meet the case against him or her. The judge is the arbiter of whether that standard has been met. If there is an irreconcilable tension between the requirement that the appellant be reasonably informed and the imperative that sensitive information not be disclosed, the Minister may be asked to withdraw the information or evidence whose non-disclosure prevents the appellant from being reasonably informed. If the appellant is not reasonably informed, it may be that the designated judge cannot confirm the reasonableness of the Minister or his delegate's decision to maintain the appellant on the "no-fly list" pursuant to section 15 of the SATA. The issue of how these principles apply to an appeal under the SATA will be discussed after the Appellant and the counsel for the AGC have been given an opportunity to be heard.

[68] I am also aware of my legislative duty to provide the Appellant, *throughout the proceeding*, with a summary of information and other evidence that will enable him to be reasonably informed of the Minister's case but that does not include anything that would be injurious (paragraph 16(6)(c) of the SATA).

[69] Having said this, there is another distinction between the IRPA and SATA's appeal scheme concerning the outcome of a designated judge's determination that the Minister's decision under appeal is unreasonable. Section 78 of the IRPA reads as follows:

> **Determination**
>
> **78** The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not. [Emphasis added.]

Subsection 16(5) of the SATA reads as follows:

> **16 (1)** …
>
> …
>
> **Removal from list**
>
> **(5)** If the judge finds that a decision made under section 15 is unreasonable, the judge may order that the appellant's name be removed from the list. [Emphasis added.]

[70] In *Harkat*, the Supreme Court determined that if the named person is not reasonably informed, the designated judge cannot confirm the certificate's reasonableness and *must* quash the certificate (at paragraph 60). However, subsection 16(5) of the SATA states that the judge *may* order that the appellant's name be removed from the no-fly list if he or she determines that the Minister's decision to maintain the appellant's name on the list is unreasonable. It follows that the judge has the discretion to order the removal of the appellant's name from the list or not.

[71] In the following paragraphs, I will go over the categories of information and evidence that can be justifiably redacted in accordance with the legislation and the evolving jurisprudence.

E. *Categories of information and evidence that can be redacted* [TABLE OF CONTENTS]

[72] The AGC seeks to maintain the redactions on the basis that disclosure of this information would be injurious to national security or endanger the safety of any person. The AGC identifies five categories of information to be protected:

1. CSIS's interest in what was, is and will be investigated.

2. Investigative methods and modes of operation.

3. The third-party rule.

4. CSIS's internal administration, methodologies and protection of employees.

5. Informants.

[73] Each redaction of information in the appeal book was justified by the AGC by one or more categories. Some of these were debated at length during the *ex parte, in camera* hearings. The descriptions that follow are taken from the public affidavits filed as well as information arising from my own experience in national security matters. For the purposes of the following reasons, it should be noted that the categories listed do not relate specifically to the redactions contained in the appeal book.

(1) Information which would identify or tend to identify CSIS's interest in individuals, groups or issues, including the existence or non-existence of past or present files or investigations, the intensity of investigations or the degree or lack of success in investigations [TABLE OF CONTENTS]

[74] This category relates to information which would identify or tend to identify CSIS's interest in individuals, groups or issues. The AGC submits that disclosure of this type of information would inform the subjects of investigation of CSIS's level of interest in them, which could jeopardize the efficacy of CSIS's operations and investigations. The release of such information could prompt the subjects to take measures to thwart the investigations. Some pieces of information could also give astute observers indicators that would allow them to deduct this type of information.

(2) Information which would identify or tend to identify methods of operation or investigative techniques used by CSIS and others [TABLE OF CONTENTS]

[75] This category relates to information which would identify or tend to identify methods of operation or investigative techniques used by CSIS and other police agencies, some of which are known by the public but without specifications, others not at all. The AGC submits that these methods of operation and techniques must remain confidential in order to be fully effective. Disclosure of this type of information could allow the subjects of investigation to employ counter-measures to circumvent the use of these methods and techniques. It could also permit a knowledgeable observer to know what type of information CSIS has gathered on them.

(3) Information which would identify or tend to identify relationships that CSIS maintains with foreign police, security and intelligence agencies and information exchanged in confidence with such agencies [TABLE OF CONTENTS]

[76] This category relates to information that would identify or tend to identify relationships that CSIS maintains with foreign and national police, security and intelligence agencies and information exchanged in confidence with such agencies.

[77] Subsection 17(1) of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23 (CSIS Act) authorizes CSIS, with the Minister's approval, to enter into an arrangement or otherwise cooperate with foreign or Canadian agencies to share information. Such arrangements have to be reviewed by the National Security and Intelligence Review Agency. This is commonly known as the "third-party rule". The sharing of information occurs with the express or implicit understanding that both the source and the information will not be disclosed unless, following a request, consent is given by the providing agency. It is understood among the agencies that the confidentiality requirement will be respected and that proper procedural safeguards are in place.

[78] In *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at paragraphs 44–45, Justice Arbour, writing on behalf of the Court, dealt with the sensitivity of the "third-party rule" and the situation of Canada on the world stage:

> The mandatory *ex parte in camera* provision is designed to avoid the perception by Canada's allies and intelligence sources that an inadvertent disclosure of information might occur, which would in turn jeopardize the level of access to information that foreign sources would be willing to provide. In her reasons, Simpson J. reviewed five affidavits filed by the respondent from CSIS, the RCMP, the Department of National Defense ("DND"), and two from the Department of External Affairs ("DEA"). These affidavits emphasize that Canada is a net importer of information and the information received is necessary for the security and defence of Canada and its allies. The affidavits further emphasize that the information providers are aware of Canada's access to information legislation. If the mandatory provisions were relaxed, all predict that this would negatively affect the flow and quality of such information. This extract from one of the affidavits from the DEA is typical:
>
> > Canada is not a great power. It does not have the information gathering and assessment capabilities of, for instance, the United States, the United Kingdom or France. Canada does not have the same quantity or quality of information to offer in exchange for the information received from the countries which are our most important sources. If the confidence of these partners in our ability to protect information is diminished, the fact that we are a relatively less important source of information increases our vulnerability to having our access to sensitive information cut off.
> >
> > … Without these extra procedural protections [the mandatory *in camera* nature of the hearing and the right to make *ex parte* representations provided for in s. 51] the substantive protections in sections 19 and 21 are greatly diminished in value. The confidence in foreign states would be diminished because, while the Government of Canada could give assurances that a request for such information could and would be refused under Canadian law, it could not give assurances that it would necessarily be protected from inadvertent disclosure during a hearing.
>
> In her reasons Simpson J. provided a brief overview of the affidavit evidence. The affidavit from CSIS stated that sensitive information is received on the understanding that neither the source nor the information will be disclosed unless the provider consents. The

affidavit from the RCMP representative discussed the agreements, as for example with Interpol, which operate on the basis that information will be kept confidential. The DND affidavit predicts that increasing the number of persons with access to information during the legal review process would "almost certainly restrict, if not completely eliminate" the possibility of Canada receiving information in the future. One of the affidavits from DEA observed that international convention and practice dictates that such information is received in confidence unless there is an express agreement to the contrary. The other DEA affidavit noted first that confidentiality is necessary to protect information critical to diplomacy, intelligence, and security. This affidavit acknowledged that whether the predicted drying up of information would actually occur if the mandatory protections were loosened would be hard to know since "you don't know what you are not getting", but he stressed his belief that under a different calculation of risks and benefits, foreign sources would likely screen information passed to Canada for fear that it would be compromised.

[79] These relationships with foreign agencies allow Canada's intelligence community to have access to sensitive information pertinent to the national security of Canada that would otherwise not be available. Disclosure of this type of information would jeopardize the relationships of trust with these agencies and the level of access to such information.

[80] To justify a redaction on the basis of the "third-party rule", the AGC must show that the information is "protected" and that the foreign agency does not want to release the said information, or agrees only to partial disclosure as long as any information that would identify the source of the information remains redacted. When dealing with a Canadian agency, the same concerns exist subject to proper adaptation in accordance with existing policies.

> (4) Information which would identify or tend to identify employees, internal procedures and administrative methodologies of the service, such as names and file numbers, and telecommunication systems used by the service [TABLE OF CONTENTS]

[81] This category relates to information that would identify or tend to identify employees, internal procedures, administrative methodologies and telecommunications systems of CSIS. Subsection 18(1) of the CSIS Act forbids disclosure of the identity of a present or past employee engaged or likely to become engaged in covert operational activities of CSIS or of any information from which identity could be inferred. It is submitted that disclosure of such information could impair the security and operational activities of these employees. When reviewing redacted information, such information is evident as it is identifiable (i.e. employee names, file numbers). It can also be submitted that such information is not relevant to the issues under appeal. There may be exceptions, but that is rare.

[82] Disclosure of information related to CSIS's internal procedures, administrative methodologies and telecommunications systems would reveal how CSIS operates administratively and manages its own data and documents in a highly technological world. The way agencies communicate and conduct their research can reveal a lot about their DNA. Again, this type of information is not relevant to the issues related to the appeal subject to exceptions that rarely occur.

(5) Information which would identify or tend to identify persons that provided information to the service or the information provided by a person which, if disclosed, could lead to the identification of the person [TABLE OF CONTENTS]

[83] This category relates to information that would identify or tend to identify individuals who cooperated with CSIS. It is well established that investigative agencies receive information from individuals who expect that their role be kept confidential. The AGC submits that this climate of secrecy, privacy and mutual trust is fundamental to preserve CSIS's relationship with these individuals, whose participation is crucial to the operations. Moreover, the safety of these individuals depends on their anonymity.

[84] The CSIS Act at section 2 defines "human source" as "an individual who, after having received a promise of confidentiality, has provided, provides or is likely to provide information to the service." Section 18.1 of the same act prohibits the disclosure of the identity of human sources, unless certain conditions are met. Subsection 18.1(1) provides that the purpose of the protection of human sources is to ensure that their identity is kept confidential in order to protect their life but also to encourage individuals to provide information to CSIS.

[85] In the next section, I will review the issues identified with a view to giving the Appellant a better understanding of the determinations made. I note that although I am legislatively obligated to ensure the confidentiality of the Minister's information, I also have an obligation to ensure that the proceeding is as public as possible in the interest of the Appellant as long as what I disclose would not be injurious to national security or endanger the safety of any person.

VII. ANALYSIS [TABLE OF CONTENTS]

[86] The Court must determine, in accordance with the statutory provisions, the evidence presented and the submissions received, whether the redactions are justified and if so, whether the information can be disclosed to the Appellant in a way that would not be injurious.

[87] As stated earlier, an *ex parte*, *in camera* hearing took place on October 5, 2020. Counsel for the AGC and the *Amici* presented to the Court the agreed upon lifts and proposed summaries of redacted information. The *Amici* also indicated to the Court which redactions would not be contested. The Court agrees with the proposed lifts and summaries (see a public list of the lifts and partial lifts in Annex A).

[88] After reviewing all the redactions, the Court agrees with the AGC and the *Amici* that some of the redactions would be injurious if disclosed. No summary that would not be injurious to national security or endanger the safety of any person could be conceptualized. These redactions are confirmed (see a classified list of uncontested redactions in Annex B).

[89] Some redactions remained contested and were the subject of *ex parte, in camera* submissions during hearings held on October 14, 15, 16, 19, 20, and 22, 2020, as well as June 16 and 17, 2021. The AGC and the *Amici* disagreed either on the legitimacy of the redactions or the content of the summaries. The Court's decision on these contested redactions and summaries is in a classified list in Annex C.

[90] As a result of the closed hearings, the Appellant will be better informed of the Minister's case against him. Here is a summary of the allegations now disclosed to the Appellant:

Allegation	**Reference in Decision[2]**
Disclosed Allegations	
Mr. Brar is suspected to be a facilitator of terrorist-related activities. He is involved in Sikh extremism activities in Canada and abroad.	Page 2 of 9 Tab E, August 2018 case brief, p 3
Mr. Brar is a Canada-based Sikh extremist who has been engaged in, and will continue to be engaged in terrorist activities, particularly in fundraising in support of terrorist attacks overseas; promoting extremism, including the radicalization of youth, with the aim of achieving Khalistan independence; and attack planning and facilitation, including weapons procurement, to conduct attacks in India.	Page 5 of 9
Mr. Brar is a subject of Service investigation due to his association related to Sikh extremism and being an international operational contact for his father, Lahkbir Singh Brar (aka RODE), the Pakistan-based leader of the International Sikh Youth Federation (ISYF), which is a listed terrorist entity in Canada.	Page 2 of 9
Mr. Brar is associated with the ISYF.	Tab E, August 2018 case brief, p 4
Mr. Brar has close connections to both Canadian, and internationally based, Sikh extremists, including Gurjeet Singh Cheema and Mr. Dulai.	Page 2 of 9 Tab E, August 2018 case brief, p 4
Mr. Brar is a close contact and business associate of Mr. Dulai. Mr. Dulai has	Page 3 of 9

[2] Reference is to memorandum for the Associate Deputy Minister, Application for Recourse Case No. 6343-02-13 (AGC0007) and to the case brief dated August 16, 2018, attached to the memorandum at Tab E (AGC0004) where information was contained in the attached case brief but not in the memorandum.

been described as a very vocal supporter of Khalistan.	Page 8 of 9
Mr. Brar and Gurjeet Sigh Cheema had been planning an India-based terrorist attack. Most specifically, it was revealed that during his visit to Pakistan in 2015, Brar planned for the attack on the behest of the Pakistan Inter-Services Intelligence Directorate (Pak ISI), and his job was to make available arms and ammunition in India.	Page 2 of 9 Page 3 of 9 Page 9 of 9
Information dated early 2018, revealed that Brar was among a group of individuals linked to, and cooperating with, the Pak ISI to thwart the Indian Government's community outreach and reconciliation efforts. An April 17, 2018, media report identified Brar as a Canadian Khalistani extremist having received a Pakistani visa for a Sikh pilgrim visit in April 2018. The report referred to a meeting in Lahore between the leaders of Lashkar-e Tayyiba (LeT) and Sikh militants, and claimed that Pakistan is inciting pro-Khalistan/anti-India sentiment. The report also referred to the Pak ISI being hand-in-glove with Pakistani terrorists supporting global Khalistanis. Pakistan denied India's allegations. Included in the article was a photograph of Brar's visa and passport page with the heading, "Proof #6 Pak Visas for Canadian Khalistan Extremists".	Page 3 of 9
Information dated November and December 2017 described Brar as a prominent Sikh extremist element in Canada engaged in anti-India activities. Mr. Brar is described as the President of ISYF's youth wing in Canada. Brar is reportedly closely associated with a number of Canada-based Sikh radical elements. During Brar's 2015 visit to Pakistan, he had tasked Cheema to arrange to obtain arms and ammunition in India. Mr. Brar was known to have also visited Pakistan in the Fall of 2016	Page 3 of 9 Page 7 of 9 Page 8 of 9

and again in 2017. He is reportedly collecting funds from members of the Canadian Sikh community in order to renovate some Gurdwaras in Pakistan and is suspected to have been diverting a major part of the funds for anti-India activities.	
Media reporting of April 2007 presented Dulai as the Vaisakhi parade organizer in Surrey, B.C., that included a tribute to late Babbar Khalsa (BK) founder Talwinder Singh Parmar. (Parmar was found by the B.C. Supreme Court to be the leader of the conspiracy to blow up the two Air India planes on June 23, 1985).	Page 4 of 9
Mr. Brar was involved in collecting funds, and these funds were transferred to his father and another individual in Pakistan for further distribution to terrorist families in Punjab.	Page 4 of 9 Page 7 of 9
Mr. Brar and others have discussed the incarceration of several individuals in Punjab and how financial and legal support was needed for them, including financial support for Jagtar Singh Johal.	Page 4 of 9 Page 8 of 9
Mr. Brar travelled to Pakistan in late March 2018, where he visited his father, and returned to Canada on April 19, 2018.	Page 5 of 9
Mr. Brar travelled many times to the U.S. in 2016 by land.	Tab E, August 2018 case brief, p 10 of 13
Mr. Brar arrived at Toronto Pearson International Airport on November 19, 2016, on January 13, 2017, on July 27, 2017, on November 14, 2017.	Tab E, August 2018 case brief, p 7
Mr. Brar filed an incident report regarding travel from Toronto to Abu Dhabi; Mr. Brar claimed that on October 24, 2017, he was informed by agents that they were told by the Department of Homeland Security that he could not	Tab E, August 2018 case brief, p 7

travel.	

[91] In addition to what is above, the new revised appeal book will contain further information resulting from the determinations made in respect of contested redactions. As part of the next step in this appeal, a public hearing will be held and the Appellant will have an opportunity to be heard. Although the Appellant is now better informed of the allegations against him, not all of the information can be communicated to him because disclosure of that information would be injurious to national security or endanger the safety of any person. At this stage, I cannot know the importance of the information or whether this is material to the overall case. The AGC may also decide to withdraw some information or may be asked to withdraw it. It may also become possible to summarize some of the undisclosed information in a way that would not be injurious. As the proceeding unfolds, I will be in a better position to determine whether the Appellant has been reasonably informed of the Minister's case.

VIII.CONCLUSION [TABLE OF CONTENTS]

[92] As a result of this process, more information is disclosed to the Appellant in the form of lifts, partial lifts and summaries. This will allow the Appellant to give a more knowledgeable response to the case made against him, which will help the designated judge make a decision on the reasonability of the Delegate's decision. Although summaries are useful, they do not constitute full-fledged disclosure. The reality is that in national security matters, not everything can be disclosed due to national security constraints. As required by the SATA legislation, the designated judge has no discretion in the matter: information that would be injurious to national security or that would endanger the security of any person cannot be disclosed to the Appellant.

[93] Now for the next steps to be followed, at first the order and reasons will only be released to the AGC counsel and the *Amici* for them to review and to insure that the order and reasons, including Annex A can be released to the Appellant as is. They will have 10 days to do so. Within that period, the AGC will decide whether or not he is appealing any of the determinations in respect of the contested redactions. Thereafter, the AGC counsel in collaboration with the *Amici*, will have 14 days to prepare a revised public appeal book that shall be in accordance with the conclusions contained in Annexes A, B and C and will include a revised redacted list of exhibits filed during the *ex parte*, *in camera* hearings.

[94] As a last comment, I want to say that I have done my utmost to be as transparent as possible. I have expressed opinions that both the Appellant and the Respondent will want to comment on later. I have done so with full knowledge of the file. This new legislative procedure is exceptional and affects basic legal principles. The parties will have an opportunity to discuss the legitimacy of this procedure.

ORDER

THIS COURT ORDERS that:

1. Some redactions remain, others are fully or partially lifted and others are summarized in accordance with the following annexes:

   Public Annex A—Lifts and partial lifts;

   Classified Annex B—Uncontested redactions and summaries;

   Classified Annex C—Contested redactions and summaries.

2. The AGC and the *Amici* shall have 10 days to review the reasons and order, including Annex A, the purpose being to ensure that they can be made public. Within that period, the AGC will decide whether or not to appeal any of the determinations made in respect of the contested redactions. Only then, the Court will consider releasing the public reasons and order to the appellant and counsel.

3. From then on, the AGC, with the collaboration of the *Amici*, shall have 14 days to prepare and communicate to the Appellant a revised appeal book that will contain all the disclosures approved by the Court in accordance with the enclosed Annexes and the redacted list of exhibits.

PUBLIC AMENDED ANNEX A
Brar v. AGC (T-669-19)
AGC LIFTS AND PARTIAL LIFTS*

Item Number	*Amici* Item Number	Appeal Book Reference	Redaction
1	1 42 81 120	AGC0001, p. 1 AGC0004, p. 5 AGC0005, p. 5 AGC0006, p. 5	Table showing Brar recommendations for flight constraints.
2	26 67 109 137 159	AGC0001, p. 5 AGC0004, p. 10 AGC0005, p. 10 AGC0006, p. 9 AGC0007, p. 5	"and will continue to be engaged in"
3	XX 141	AGC0004, p.11 (*paragraph 4 only*) AGC0006, p. 10 (*second part of paragraph 3 only*)	"With the ultimate destination of Fort Lauderdale, US".
4	3 9 47 52 86 92 125 123A	AGC0001, p. 2 AGC0001, p. 3 AGC0004, p. 7 AGC0004, p. 8 AGC0005, p. 7 AGC0005, p. 8 AGC0006, p. 7 (similar to) AGC0006, p. 8	"a subject of Service investigation 'and' due to"

***The Court agrees to all AGC lifts and partial lifts.**

PUBLIC AMENDED ANNEX A
Brar v. AGC (T-669-19)
AGC LIFTS AND PARTIAL LIFTS*

Item Number	*Amici* Item Number	Appeal Book Reference	Redaction
5	13 55 96 129	AGC0001, p. 3 AGC0004, p. 8 AGC0005, p. 8 (similar to) AGC0006, p. 8	"was […] investigated by the Service […] due to […] been a subject of investigation for"
6	143	AGC0007, p. 2	All yellow redactions
7	166	AGC0007, p. 8	Further, Mr. Brar claims to have no associations with any individual suspected of engaging in terrorist activities, or any terrorist organizations.

***The Court agrees to all AGC lifts and partial lifts.**