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IMM-6497-18

2022 FC 1276

Issam Al Yamani (*Applicant*)

v.

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

INDEXED AS: *AL YAMANI V. CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)*

Federal Court, Roy J.—By videoconference, September 13, 2021; Ottawa, September 9, 2022.

Citizenship and Immigration — Exclusion and Removal — Removal of Permanent Residents — Application for judicial review of respondent Minister's decision to refuse to grant Applicant relief under Immigration and Refugee Protection Act (Act), s. 34(2) — Applicant, stateless Palestinian, became permanent resident in 1985 — Acknowledged his membership in Popular Front for the Liberation of Palestine (PFLP), i.e. terrorist organization — Security Intelligence Review Committee concluded Applicant inadmissible to Canada — Security certificate issued — Immigration Division (ID) found reasonable grounds to believe that Applicant member of PFLP, had engaged in acts of terrorism — Considered Applicant's involvement with PFLP sufficient to find him inadmissible — Act, s. 34(2) relief denied by Minister — Minister's decision relied on ministerial brief provided by Canada Border Services Agency (CBSA) suggesting more limited scope of notion of "national interest" than that described by Supreme Court in Agraira v. Canada (Public Safety and Emergency Preparedness) where more room is left for considerations other than national security, public safety — Ministerial brief showing tendency to quickly downplay positive features while adding undue emphasis on what it considers less positive features — Not dealing at any length with Applicant's statement that he was a changed man — Contending that Applicant's inadmissibility should be maintained because he failed to satisfy that his presence in Canada would not be detrimental to national interest — Whether Minister's decision reasonable — Decision not reasonable — There must be some proportionality between reasons given, impact of decision on person's rights and interests — No doubt Minister's decision had serious impact on Applicant — Only question was whether possible relief created by Parliament reasonably denied by Minister — For that to be reasonably done, decision had to be justified and reflect stakes, which was not the case — Not sufficient to summarize arguments made, then state peremptory conclusion, because that does not assist in understanding decision made, its rationale — Decision maker having to engage with evidence — Here, focus exclusively on activities of Applicant in support of PFLP, which ended in 1991 — Emphasis throughout CBSA assessment was on predominant factors in examining "national interest" (national security, public safety) — However, Supreme Court in Agraira resisted attempts to turn "national interest" into "public safety", "national security" only — In making decision to grant relief or not, reasons given must be commensurate with person's interests — Scope of Act, s. 34(2) broader than national security, public safety — Personal factors having to be considered in

application of s. 34(2) — Here, no escaping examination of Applicant's personal characteristics that related directly to whether or not he posed threat to security of Canada — In conclusion, ministerial brief deficient — Focus having to be national interest, which is broader than national security, public safety —Access to relief of s. 34(2) not limited to innocent or coerced membership — Minister having considerable discretion in making decision under s. 34(2) — But discretion not arbitrariness — Decision unreasonable because decision-making process not meeting modern requirements set out in Vavilov — Matter remitted to decision maker for reconsideration — Application allowed.

Administrative Law — Judicial Review — Standard of Review — Applicant, stateless Palestinian, becoming permanent resident in 1985 — Acknowledged his membership in Popular Front for the Liberation of Palestine (PFLP), i.e. terrorist organization — Security Intelligence Review Committee concluded Applicant inadmissible to Canada — Security certificate issued — Applicant found inadmissible —- Respondent Minister refusing to grant Applicant relief under Immigration and Refugee Protection Act (Act), s. 34(2) — Minister's decision relying on ministerial brief provided by Canada Border Services Agency — That brief showing tendency to quickly downplay positive features while adding undue emphasis on what it considers less positive features — Brief not dealing at any length with Applicant's statement that he was a changed man — Contending that Applicant's inadmissibility should be maintained because he failed to satisfy that his presence in Canada would not be detrimental to national interest — Whether Minister's decision reasonable — Canada (Minister of Citizenship and Immigration) v. Vavilov giving new prominence to need for decision makers to not only reach reasonable outcome, but also for reviewing court to be concerned with decision-making process — There must be some proportionality between reasons given, impact of the decision on the person's rights and interests — Decision maker having to engage with evidence — This was not done here — Focus was exclusively on Applicant's activities in support of PFLP — Minister's decision not reasonable because decision-making process not meeting modern requirements since Vavilov.

This was an application for judicial review of the respondent Minister's decision to refuse to grant the Applicant relief under subsection 34(2)[1] of the *Immigration and Refugee Protection Act* (Act).

The Applicant, a stateless Palestinian, arrived in Canada in 1985 and became a permanent resident. The Applicant acknowledged his membership in the Popular Front for the Liberation of Palestine (PFLP) only later. The PFLP has been engaged in activities commonly associated with terrorism. Background checks in relation to the Applicant's citizenship application in 1988 led to a report by the Security Intelligence Review Committee (SIRC), which concluded that the Applicant was inadmissible to Canada. A security certificate was issued following a decision of the Governor General in Council. The SIRC report and the Governor General in Council decision were the subject of two applications for judicial review, the first of many such applications over the following years. A second SIRC report concluded that the Applicant had "engaged in acts of subversion by assisting and facilitating the objective of the PFLP". In the decision that established the Applicant's inadmissibility (2005 CanLII 56976 (I.R.B.)), the Immigration Division (ID) found that there were reasonable grounds to believe that the Applicant was a member of the PFLP and that there were reasons to believe this organization had engaged in acts of terrorism. The association with the PFLP was found to have continued after the Applicant was landed. The ID considered the Applicant's involvement with the PFLP as sufficient to find him inadmissible. The Federal Court confirmed that the ID's decision was reasonable. The Minister of Public Safety and Emergency Preparedness denied the relief sought by the Applicant in accordance with subsection 34(2) of the Act. The judicial review of that decision was granted (2007 FC 381) and the matter was sent back for a new determination. The Minister once again refused to grant relief in March 2012. Another challenge on judicial review resulted in an agreement between the parties to conduct a new determination following the decision of the Supreme Court in *Agraira v. Canada (Public Safety and Emergency*

[1] Now repealed and replaced by section 42.1 of the Act. Subsection 34(2) provided that "[t]he matters referred to in subsection (1) [relating to inadmissibility on security grounds] do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest".

Preparedness).

The Minister's decision at issue herein followed the format used in the past. It relied on a document signed by the President of the CBSA (the 2018 ministerial brief), which offered the Minister an option: to grant the relief sought or not. In that brief, the CBSA provided the Minister with its take on the decision in *Agraira*. The brief is somewhat tendentious in suggesting a more limited scope of the notion of "national interest" than that described in *Agraira* where more room is left for considerations other than national security and public safety. The 2018 ministerial brief suffers fundamentally from the same flaw as previous briefs. The ministerial brief shows a tendency to quickly downplay, or simply ignore, positive features while adding undue emphasis on what it considers less positive features. The assessment is not favourable to the Applicant. It reads as a charging document for his past membership in the PFLP. The Applicant's renunciation of his membership in 1991 is discounted. The brief speculates that he would have continued his activities had he not been a person of interest to the Canadian authorities. [50] In effect, the assessment in the ministerial brief dwells on the activities that undoubtedly were in support of the PFLP but were not found to be of a violent nature. The ministerial brief never explains the relevance of activities having led to the Applicant's inadmissibility and, more importantly, how that impacts national security and public safety 27 years after leaving the PFLP. The brief does not deal at any length with the Applicant's statement that he was a changed man and not a danger to anyone , as also claimed by numerous supporters who provided often long written testimonies. In the end, the brief contends that the Applicant's inadmissibility should be maintained because he failed to satisfy that his presence in Canada would not be detrimental to the national interest.

At issue was whether the Minister's decision was reasonable.

Held, the application should be allowed. [jugement]

The decision was not reasonable. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court gave new prominence to the need for decision makers to not only reach a reasonable outcome, but also for the reviewing court to be concerned with the decision-making process. There must be some proportionality between the reasons given and the impact of the decision on the person's rights and interests. There was no doubt that the Minister's decision had a serious impact on the Applicant. The only question was whether the possible relief created by Parliament was reasonably denied by the Minister. For that to be reasonably done, the decision had to be justified and had to reflect the stakes. That was missing here. It does not suffice to summarize arguments made and then state a peremptory conclusion, because that does not assist in understanding the decision made and its rationale. The decision maker must engage with the evidence. In the case at bar, the ministerial brief does not engage with the evidence. The focus was exclusively on the activities of the Applicant in support of the PFLP, which ended in 1991, and the view taken that the Applicant nevertheless presented a danger for the security of Canada. How the activities in support of the PFLP that ceased in 1991 supported the conclusion is unknown. The emphasis throughout the assessment made by the CBSA was on the predominant factors in examining the "national interest" that are national security and public safety. It appears at times that the brief seeks to punish the Applicant for his activities of more than 27 years ago. If that is to be the case, the reasons for finding that national security and public safety are engaged must be presented for the decision to be reasonable. Furthermore, the interpretation that appears to be given to *Agraira* in the ministerial brief may not be consonant with the decision itself. The brief repeats on numerous occasions that national interest" relates predominantly to national security and public safety. However, the *Agraira* Court resisted attempts to turn "national interest" into public safety" and national security" only, in spite of arguments to that effect presented by the government in that case. In deciding whether an applicant ought to be granted the relief sought, the reasons given by the Minister must be commensurate with the person's interests. It is without a doubt that the scope of subsection 34(2) of the Act is broader than national security and public safety. Personal factors, other than national security and public safety, must be considered in the application of subsection 34(2). In the case at bar, there was no escaping an examination of the Applicant's personal characteristics that related directly to whether or not he posed a threat to the security of Canada.

In conclusion, the ministerial brief, which constituted the Minister's decision once adopted by the Minister, was deficient. There were significant shortcomings that commanded the conclusion that the decision was unreasonable. The focus must be the national interest, which is broader than national security and public safety. The presence in Canada must be measured against the standard in the legislation: the Minister would have to say why they are not satisfied that the presence in Canada would not be detrimental to the national interest. The reasons for inadmissibility have their relevance, but they have to relate to the national interest. The decision defined the national interest in terms of national security and public safety, in spite of *Agraira* having explicitly rejected that notion. The ministerial brief juxtaposed the reasons for inadmissibility on top of the national interest" narrowly defined and considered. The decision never considered redeeming factors. There is a requirement to engage with the facts, the submissions and relevant factors. The access to the relief of subsection 34(2) is not limited to membership that is completely innocent or coerced. There is no doubt that the Minister has considerable discretion in making his decision under subsection 34(2). But discretion is not arbitrariness. Reasons matter. This decision was not reasonable not because of the outcome, a matter not addressed in the reasons, but because the decision-making process did not meet the modern requirements since *Vavilov*. The matter was remitted to the decision maker for reconsideration.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 34, 42.1, 72, 74.

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. 2, 7, 12, 25.

Criminal Code, R.S.C., 1985, c. C-46, Part II.1.

Immigration Act, R.S.C., 1985, c. I-2, ss. 19(1)(e),(g), 40.

CASES CITED

APPLIED:

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559, affg 2011 FCA 103, [2012] 4 F.C.R. 538, 415 N.R. 121; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

CONSIDERED:

Al Yamani v. Canada (Solicitor General), [1996] 1 F.C. 174 129 D.L.R. (4th) 226 (T.D.); *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 433 72 C.R.R. (2d) 259 (T.D.); *Canada (Citizenship and Immigration) v. Al Yamani*, 2005 CanLII 56976 (I.R.B.); *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1162, [2003] 3 F.C. 345 *Al Yamani v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 381, 304 F.T.R. 222; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Shekari v. Canada (Citizenship and Immigration)*, 2022 FC 70.

REFERRED TO:

Al Yamani v. Canada (Public Safety and Emergency Preparedness), 2006 FC 1457, 149 C.R.R. (2d) 340; *Shandi (Re)* (1992), 51 F.T.R. 252, 17 Imm. L.R. (2d) 54 (F.C.T.D.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711; *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482, 314 N.R. 347; *Al Yamani v. Canada (Public Safety and Emergency Preparedness)*, 2006 FC 1457, 304 F.T.R. 222; *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229; *Canada (Immigration and Citizenship) v. Laing*, 2021 FCA 194.

APPLICATION for judicial review of the respondent Minister's decision to refuse to grant the Applicant relief under subsection 34(2) of the *Immigration and Refugee Protection Act*. Application allowed.

APPEARANCES

Barbara Jackman for applicant.

James Todd and *Emma Arenson* for respondent.

SOLICITORS OF RECORD

Jackman & Associates, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

[1] ROY J: This is an unusual case. This is a case out of the ordinary.

[2] Mr. Issam Al Yamani (the Applicant) immigrated to Canada in 1985. He was a member of the Popular Front for the Liberation of Palestine (PFLP). On numerous occasions over the following years, the Government of Canada has conducted proceedings, the purpose of which was to conclude his removal from Canada.

[3] The current proceedings were initiated by Mr. Al Yamani in order to benefit from a provision in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA or the Act) which allows for ministerial relief from a determination of inadmissibility. Once the Minister of Public Safety and Emergency Preparedness (the Minister or the Respondent) makes a determination "that it was not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations" (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*), at paragraph 1), the person is at risk to be deported. But that determination must be made.

[4] The Minister declined in this case to grant the remedy requested by the Applicant. On judicial review, pursuant to section 72 of the Act, Mr. Al Yamani argues that the Minister's decision is unreasonable; he also challenges the constitutionality of subsection 34(2) of the Act, which is the provision allowing the Minister to grant the exception, when someone has been found to be inadmissible, requested by Mr. Al Yamani. I reproduce the portions of section 34 that are relevant:

Security

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for

…

(c) engaging in terrorism;

…

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

Exception

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

I note that subsection 34(2) has been replaced by what is now section 42.1 of the IRPA. I reproduce section 42.1, for the sake of completeness. However, this case is not concerned with section 42.1, or its constitutionality, as was agreed by the parties.

Exception — application to Minister

42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

Exception — Minister's own initiative

(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.

Considerations

(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.

The transmission letter of the Minister's decision (December 7, 2018) to Mr. Al Yamani and the memorandum to the Minister from the Canada Border Services Agency (CBSA), making a recommendation to deny relief, specifically refer to a decision made pursuant to subsection 34(2). That is because the inadmissibility decision was made by the Immigration and Refugee Board on November 22, 2005. Thirteen years later, the Minister declined to grant the remedy.

[5] Having heard the representations of counsel and having fully considered the considerable written submissions, the Court must conclude that the decision of the Minister fails the reasonableness test found in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*). As a result, there is no need to consider the constitutionality of section 34.

I. The facts

[6] The Applicant, Mr. Issam Al Yamani, is seeking the judicial review of the Minister's November 29, 2018, decision to refuse to grant him relief under subsection 34(2) of the IRPA. The Applicant is a foreign national who has been found to be inadmissible to Canada pursuant to paragraph 34(1)(f) of the IRPA because there are reasonable grounds to believe that he engages, has engaged or will engage in terrorism. The Applicant's inadmissibility was based on his prior involvement with the PFLP.

[7] The Applicant is challenging the Minister's decision on administrative law and constitutional law grounds. The Applicant submits that the Minister's decision was unreasonable since it ignores and misinterprets evidence, and lacks balance and context. The Applicant also submits that the security inadmissibility scheme in the IRPA, including paragraph 34(1)(f) and former subsection 34(2), are in violation of sections 2, 7, 12 and 15 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).

[8] The Applicant is a stateless Palestinian, born on January 23, 1956, in a refugee camp in Lebanon. He was issued an immigrant visa on March 21, 1984. He arrived in Canada on April 27, 1985 and became a permanent resident on that date. Although the Applicant acknowledged his membership in the PFLP only later, he was a member of

that organization when he arrived in Canada (Applicant's affidavit in file IMM-6497-18, dated July 11, 2021). It is when Mr. Al Yamani applied for Canadian citizenship in May 1988 that the Applicant became involved in proceedings in this country relating to his immigration status. Evidently, these proceedings are still ongoing. In his affidavit of July 11, 2021, the Applicant notes that his father was one of the PFLP's founders and "in 1997 I acknowledged that I would be considered to have been a member of the PFLP in the past" (at paragraph 3).

[9] The PFLP has been engaged in activities commonly associated with terrorism, such as airline hijackings, kidnappings, shootings and bombings including suicide bombings (*Al Yamani v. Canada (Public Safety and Emergency Preparedness)*, 2006 FC 1457, 149 C.R.R. (2d) 340 (as per Justice Snider), at paragraph 31). Moreover, since November 2003, under Canada's anti-terrorism legislation, the PFLP has been listed as a "terrorist group" under Part II.1 of the *Criminal Code*, R.S.C., 1985, c. C-46.

[10] The background checks in relation to the citizenship application in 1988 led eventually to a report by the Security Intelligence Review Committee (SIRC) which concluded that Mr. Al Yamani was inadmissible to Canada (August 3, 1993). The SIRC recommended that a certificate be issued in accordance with section 40 of the *Immigration Act*, then in force (R.S.C., 1985, c. I-2). A security certificate was issued by the Solicitor General following a decision of the Governor General in Council being satisfied that Mr. Al Yamani was a person described in paragraph 19(1)(g) of the *Immigration Act* ("persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence").

[11] The SIRC report and the Governor General in Council decision were the subject of two applications for judicial review, the first of many such applications over the following years. In *Al Yamani v. Canada (Solicitor General)*, [1996] 1 F.C. 174, 129 D.L.R. (4th) 226 (T.D.), Mr. Justice MacKay found that by providing ultimately for deportation of permanent residents who are members of an organization loosely defined, the statute does infringe on the freedom of permanent residents to associate together in organizations" (at page 225).

[12] There was a second SIRC report, that one dated April 17, 1998. This time around, the focus of the inquiry became subversion against a democratic government (Israel). The SIRC concluded that “Mr. Yamani has engaged in acts of subversion by assisting and facilitating the objective of the PFLP. By virtue of his resort to counter-surveillance tactics and code words, his actions in transferring PFLP funds, involving himself in facilitating the travel of persons from PFLP military training, and establishing cells, Mr. Yamani must be seen as someone who, through his efforts to further the PFLP’s objective, has participated in the subversive acts of the PFLP” (at page 19).

[13] It is to be noted that it is before the second SIRC report that Mr. Al Yamani conceded having been a member of the PFLP, something he had not done before the first SIRC report. He contended that “since 1991, he is no longer in contact with any of the PFLP leaders. The last social or political ‘PFLP related event’ he attended was in February 1993 in Damascus for the resignation of his father” (SIRC report, April 17, 1998, at page 13).

[14] The challenge before this Court on judicial review ended up being decided on the basis of whether subversion had been established. The decision of this Court is to be found at *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 433, 72 C.R.R. (2d) 259 (T.D.). One reads, at paragraph 11 of the judgment, Justice Gibson’s summary of the SIRC findings:

> The Review Committee made the following findings: the applicant was tasked with handling the transfer of large sums of money for the PFLP into the Israeli occupied territories. This tasking is strongly suggestive of his being a person in a position of trust [page 446] and particular importance to the PFLP; the applicant facilitated the travel of persons for military training; the applicant agreed to deliver PFLP documents, believed to have been applications for membership in the PFLP, to the Middle East; the applicant, up until 1990, assisted with the accumulation of materials and documents which would facilitate the production of false travel documents for members of the PFLP; in 1977, while he was head of the PFLP in Abu Dhabi, the applicant was “involved” in a bomb attack on an Air Egypt office in the United Arab Emirates; the PFLP is a long-standing member of the Palestine Liberation Organization and itself has “an international reputation as a particularly ruthless terrorist group”; despite the peace process that is unfolding between Israel and the Palestine Authority, the objective of the PFLP has not changed since the ministerial report; and the applicant admits only to what he believes is known or can no longer be held

against him and demonstrated a lack of transparency essential to convey a sense of truthfulness.

The description of the Applicant's involvement in the PFLP (except for the Air Egypt office bombing) remains largely the same throughout the years. The Court concluded that the term "subversion" in paragraph 19(1)(e) of the *Immigration Act* was vague, the Court stating at paragraph 32 that "'subversion' … is an extraordinarily elusive concept". Nevertheless, the Court did not find the term to be unconstitutionally vague.

[15] Rather the Court came to the conclusion that, on a standard of review of correctness for questions of law, the SIRC relied on another Federal Court decision (*Shandi (Re)* (1992), 51 F.T.R. 252, 17 Imm. L.R. (2d) 54 (F.C.T.D.)) which did not consider carefully enough the description of "subversion". That, says Gibson J., constituted reviewable error (at paragraph 85).

[16] That conclusion was preceded by two paragraphs in which Gibson J. sought to provide context about the evidence proffered before the SIRC [at paragraphs 83–84]:

> Certainly there can be no doubt as to the credibility of the evidence from the Canadian Security Intelligence Service (CSIS) that was before the Review Committee and this Court; but the difficulty I find with respect to that evidence is whether much of it is reasonable inference or whether it is speculation and conjecture without adequate foundation. One could certainly argue that it is the latter with regard to the 1977 United Arab Emirates terrorist act. One could also argue that it is the latter with respect to the ultimate use of funds channelled back to the PFLP by the applicant, but this is not a major issue since the ultimate purpose to which those funds were put and the applicant's knowledge of that purpose were not heavily relied on by either CSIS or the Review Committee. Rather, the undisputed fact that funds were channelled through the applicant was relied on by the Review Committee simply as an indicator of the trust that was placed in him by the PFLP.
>
> The evidence regarding the current and future capacity of the PFLP was to the effect that it is not the potent organization it once was, nor is it the radical terrorist organization that it was in the early 70s. Justice MacKay, in the first Al Yamani case [*Al Yamani v. Canada (Solicitor General)*, [1996] 1 F.C. 174 (T.D.), at p. 241], described the PFLP as a "multi-faceted" organization, and I think the evidence here before the Court supported that description. It continues to work within the PLO and, at least on its right wing, and that was the wing with which the applicant's father was identified, it appears committed to a peaceful solution based upon a "two-nation" model.

The other provision advanced before the SIRC was paragraph 19(1)(g) which prohibits the admission of “persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence”. The Court disposes of the utility of paragraph 19(1)(g) of the *Immigration Act*, in one paragraph that puts in doubt the influence of the PFLP [at paragraph 87]:

> The Review Committee makes no mention of the evidence before it that the PFLP is a “spent force”. It does not reject the evidence from the applicant that the PFLP has no interest in Canada. The Review Committee cites no evidence before it that would make its conclusion that “there is still a possibility that the PFLP may commit acts of violence in Canada” anything more than sheer speculation.

[17] The Applicant’s involvement in a “spent force” is not seen by our Court as rising to the level of violent actions. It is not particularly surprising that a new approach was favoured after the second successful judicial application: no security certificate was used. The matter of the inadmissibility of Mr. Al Yamani was sent to the Immigration and Refugee Board for determination. According to the front page of the Immigration Division (ID) decision of November 22, 2005, [*Canada (Citizenship and Immigration) v. Al Yamani*, 2005 CanLII 56976 (I.R.B.)], hearings took place over 15 days, starting on May 15, 2001, and ending on February 16, 2005. At the end of the day, the Applicant was found to be inadmissible and a removal order was issued. To this day, that is the decision that establishes Mr. Al Yamani’s inadmissibility.

[18] The *Immigration Act* was replaced by the IRPA shortly after the hearings before the ID commenced. The basis for the inadmissibility proceedings changed and Mr. Al Yamani was advised on April 11, 2002, that the allegation to address would be paragraph 34(1)(f) of the IRPA. The relevant passages of section 34 are already reproduced at paragraph 4 of these reasons for judgment.

[19] The ID found that there were reasonable grounds to believe that Mr. Al Yamani was a member of the PFLP and there are reasons to believe this organization has engaged in acts of terrorism. The ID conducted what I would consider to be a careful review of the evidence, including the periods of time, from the time the Applicant was 18 and joined a PFLP cell, until he arrived in Canada in April 1985, when he lived and

worked in various countries where it is arguable that the Applicant was not actively involved within the PFLP.

[20] The association with the PFLP is found to have continued after the Applicant was landed. The ID notes that Mr. Al Yamani denied before the first SIRC panel his membership in the PFLP but he has since acknowledged the membership until his leaving which is situated in 1991 or 1992. The ID also easily found that the PFLP resorted to acts of terrorism, some of which having taken place during the period Mr. Al Yamani acknowledges he was a member. The ID panel member writes [at paragraph 26]:

> Mr. Al Yamani tries now to distance himself from the activities publicly claimed by the PFLP over the years during which he belonged to the organization, but at the time of his active participation, he did nothing to distance himself from either the organization or its activities. He made a conscious choice, both as a young adult and as an adult, to join the group founded in part by his father. Many activities for which the PFLP is most notorious took place just before the outset of his membership in the student ring. He nonetheless embraced the ideology of the group, gained a trusted position within it, and participated in activities on behalf of the organization.

[21] The ID did not take issue with the characterization by this court of the Applicant's involvement with the PFLP. It is rather that this involvement was seen as sufficient to find the Applicant inadmissible. The ID was made aware that Mr. Al Yamani sought the exercise of the discretion found at subsection 34(2) of the IRPA even before the inadmissibility proceedings were completed. There was no finding on that basis and the ID, following as it should the letter of the law, concluded that Mr. Al Yamani was inadmissible in Canada. The organization of which he was a member was involved in acts of terrorism and the Applicant had acknowledged his membership. His leaving the PFLP in 1991 was irrelevant.

[22] The ID also proceeded to an examination of the Applicant's contention that paragraph 34(1)(f) was unconstitutional for violating sections 2 and 15 of the Charter. It found that the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (*Suresh*) had addressed the issue with regard to a provision in the *Immigration Act* which closely mirrors paragraph 34(1)(f) of the Act. Paragraph 34(1)(f) does not violate the constitutional guarantee

about freedom of association. As for section 15 of the Charter, the ID found that the Supreme Court decision in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 (*Chiarelli*) was a complete answer. The deportation order was signed on November 22, 2005.

[23] While the inadmissibility matter was proceeding before the ID, other litigation was happening before this Court and before the Federal Court of Appeal. In *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1162, [2003] 3 F.C. 345, Kelen J. dealt with arguments according to which the Minister of Citizenship and Immigration was barred from commencing the inquiry before the ID because of *res judicata*, issue estoppel and abuse of process. Justice Kelen dismissed the arguments. The appeal before the Federal Court of Appeal ([*Al Yamani v. Canada (Minister of Citizenship and Immigration)*] 2003 FCA 482, 314 N.R. 347) did not prove to be more successful.

[24] However, that was not the end of the matter as the decision on inadmissibility came before this Court on judicial review. The matter came before Madam Justice Snider and the judgment is found at [*Al Yamani v. Canada (Public Safety and Emergency Preparedness)*] 2006 FC 1457, 304 F.T.R. 222 [cited above].

[25] Our Court, having found that the standard of review is reasonableness, suggested that its analysis would include a somewhat probing examination of the reasons given by the ID. The following are the main findings made by our Court. There is no temporal component to the analysis of paragraph 34(1)(f). The acts of terrorism may take place today, or they occurred in the past or will take place in the future. Whether the acts of terrorism have ceased or there was a period during which there were no terrorism acts that were carried out is irrelevant. The temporal component is not present either where one considers a person's membership. As Justice Snider puts it at paragraph 12, "[t]here need not be a matching of the person's active membership to when the organization carried out its terrorist acts". Subsection 34(2) is therefore an important feature of the scheme, as noted by Justice Snider [at paragraph 14]:

> In sum, s. 34 of *IRPA* provides a comprehensive approach to inadmissibility determinations. The section addresses the goals of maintaining the security of Canadian society (*IRPA*, s. 3(1)(h)) and denying access to our country to persons who are security risks (*IRPA*, s. 3(1)(i)) while providing (through s. 34(2)) an avenue for all persons to have

> an individualized assessment of their impact on the national interest. The Board carries out a factual analysis as to the nature of an organization and the individual's membership. The Minister determines whether the individual, notwithstanding his or her inadmissibility, should be allowed to remain in Canada. In my view, that is what Parliament intended with s. 34.

[26] It is without much difficulty that our Court confirmed that the ID's decision was reasonable as its finding concerning Mr. Al Yamani's membership was even supported by his own admissions. Similarly, the conclusion that the PFLP was a terrorist organization was found to be reasonable. The Court was particularly unimpressed by an argument "to infer that a terrorist organization is only a terrorist organization on the days when a specific act of terrorism occurs. This point of view is illogical" (at paragraph 25). At any rate, the Court notes that "the record demonstrates that there is linkage between the periods of Mr. Al Yamani's admitted membership in the PFLP and the time when the organization carried out terrorist acts" (at paragraph 26). With the acknowledged membership of Mr. Al Yamani in the PFLP and its numerous activities which met the definition of "terrorism" in *Suresh* (at paragraph 98), our Court was satisfied the ID's decision stood up to the somewhat probing examination it conducted.

[27] On the Charter issues raised by Mr. Al Yamani, our Court found again support in *Suresh* to conclude that his right to freedom of thought, belief, opinion and expression was not violated. The ID was correct in concluding that paragraph 34(1)(f) of the IRPA did not violate the rights of Mr. Al Yamani under section 2 of the Charter.

[28] The same conclusion was reached concerning the alleged violation of section 15 of the Charter. The Court was less than convinced that the difference Mr. Al Yamani sought to assert between being a citizen who could not be subjected to paragraph 34(1)(f) and a non-citizen who could (*Chiarelli*, at paragraph 32). But assuming unequal treatment, "[m]embership in the PFLP cannot be described as an immutable characteristic, such as race or sex … Mr. Al Yamani's existence as a Palestinian is, I agree, a constant. The same cannot be said about his voluntary membership in the PFLP" (at paragraph 54).

[29] Justice Snider was satisfied that the reasons given by the ID were comprehensive and detailed: "the Board engaged in a thorough analysis of the

arguments made to it" (at paragraph 59). Having reviewed carefully the reasons given by the ID, I would readily echo that conclusion.

[30] Finally, the Court refused to state questions for certification.

[31] The debate then moved to the relief Mr. Al Yamani sought in accordance with subsection 34(2) of the Act.

[32] The Minister of Public Safety and Emergency Preparedness of the day denied the relief. The decision consists in the endorsement by the Minister of a four-page memo from the President of the CBSA recommending that relief not be granted.

[33] The judicial review of that decision was granted by this Court (per Mactavish J., then of this Court). The Court observed that "the Minister is mandated to consider whether, notwithstanding the applicant's membership in a terrorist organization, it would be detrimental to the national interest to allow the applicant to stay in Canada" (*Al Yamani v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 381, 304 F.T.R. 222 (*Al Yamani (2007)*), at paragraph 12). That is a decision that must be made by the Minister in a personal capacity: it cannot be delegated.

[34] Our Court in 2007 reached the conclusion that the Minister could endorse the recommendation made by the CBSA, which would then become the reasons for the decision. However, on a standard of review of patent unreasonableness (the judgment came before *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, where the standards of patent unreasonableness and reasonableness *simpliciter* were "collapsed into a single form of 'reasonableness' review", at paragraph 45), which required the most deference to the decision maker, the Court found the decision to be lacking enough that it had to be sent back for a new determination. In effect, the finding on a standard of patent unreasonableness highlights the magnitude of the defect and how flagrant it is. As the Supreme Court put it in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, "[a] decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand" (at paragraph 52). That is therefore on that basis that our Court ruled against the ministerial decision.

[35] So, what was the defect in 2007 that was so prominent as not allowing for any amount of curial deference? The evidence submitted by Mr. Al Yamani is said to have

been “replete with references to Mr. Al Yamani’s moderate political views, and to his commitment to achieving a peaceful solution to the situation of the Palestinian people” (*Al Yamani (2007)*, at paragraph 79). Our Court found that the Minister had to address “the recurring theme in the letters of support: namely that Mr. Al Yamani is now a man of moderate political views, who does not now support violence as a means of effecting political change in the Middle East, and who is committed to achieving a peaceful solution to the problems of the Palestinian people” (*Al Yamani (2007)*, at paragraph 84). Moreover, our Court notes that there is no reference to the considerable body of evidence concerning the separation operated by Mr. Al Yamani from the PFLP.

[36] Thus, our Court concluded at paragraphs 88 and 89:

> However, in order for the Minister to be able to make an informed decision in this regard, the Briefing Note prepared for the Minister must properly address the facts of the case, the submissions of the applicant, and the relevant factors identified in the Guidelines. This is especially so where, as in this case, the Minister adopts the Briefing Note as his reasons.
>
> As noted previously, a central thrust of Mr. Al Yamani’s application for Ministerial relief was his renunciation of violence and his commitment to finding a peaceful resolution of the Palestinian issue.

To put it differently, the briefing note endorsed by the Minister had to address factors, not merely mention them, that are central to the application made by Mr. Al Yamani. The issue before the Minister is not admissibility anymore. It does not suffice to send the submissions to the Minister. There is a requirement that factors that are central to the relief sought be conveniently addressed.

[37] As a result, the matter was remitted to the Minister for redetermination. The Court declined to certify a question pursuant to section 74 of the IRPA.

[38] The Minister chose to conduct a redetermination which resulted in another refusal to grant relief in March 2012. The Applicant argued that the new decision suffered from the same flaws identified in *Al Yamani (2007)*. The ten-page document presented by the President of the CBSA to the Minister sought to find support in the Federal Court of Appeal decision in *Canada (Public Safety and Emergency Preparedness) v. Agraira*, 2011 FCA 103, [2012] 4 F.C.R. 538, 415 N.R. 121. The relief was again denied by the Minister. The challenge on judicial review before this Court

resulted (Federal Court order of December 3, 2013) in an agreement between the parties to conduct a new determination following the decision of the Supreme Court in *Agraira*. I note that the judicial review application had been held in abeyance by order of this Court, on June 1, 2012, until the Supreme Court of Canada had rendered its decision in *Agraira*. There is therefore no decision on the merits of the Minister's decision to refuse to grant relief.

II. The decision under review

[39] The decision of the Minister follows the format used in the past. There is a document signed by the President of the CBSA, dated May 14, 2018, which runs for 24 pages. It offers the Minister an option: to grant the relief sought or not. Here, the Minister denied the relief in the following words: "I am not satisfied that the presence of Mr. Al Yamani in Canada would not be detrimental to the national interest". There is no further observation or comment about the document which provides advice and recommends that the application for ministerial relief be denied. The decision itself is a one-page document, signed by the Minister of Public Safety and Emergency Preparedness on November 29, 2018.

[40] The memorandum to the Minister states upfront that the burden of proof rests on Mr. Al Yamani who must satisfy the Minister that his presence in Canada would not be detrimental to the national interest. Those are the words of subsection 34(2) and they do not offer any particular insight. Rather, the memorandum provides the Minister with the CBSA's take on the Supreme Court of Canada decision in *Agraira*. It is encapsulated in one paragraph at page 3 of the memorandum:

> In *Agraira*, the SCC held that the predominant considerations in assessing national interest are national security and public safety, which ought to be interpreted in the context of Canada as a parliamentary democracy committed to protecting fundamental values of the Charter and meeting Canada's international obligations. In addition, the SCC noted that the Ministerial relief is not intended to be an alternative form or a review of humanitarian and compassionate factors; nevertheless, personal factors of an applicant may be considered in an assessment for relief, insofar as they relate to determining whether the applicant's presence would be detrimental to the national interest.

As I will attempt to show later, this description is somewhat tendentious in suggesting a more limited scope of the notion of "national interest" than that described in *Agraira*

where, in my view, more room is left for considerations other than national security and public safety. Moreover, as a result of the view of *Agraira* taken by CBSA, the focus is on inadmissibility and little room is left for anything other that national security and public safety. As a matter of fact, even with the scope of national interest limited largely to “national security and public safety”, one is left with wondering about the justification for reaching that conclusion in this case. One may be reminded of the view taken by Gibson J. in his judgment concerning the second SIRC report, the said view expressed at paragraph 87, which is reproduced at paragraph 16 of my reasons for judgment. The reader is left with the amalgamation of the reasons for the inadmissibility permeating into national interest. In effect, the ministerial brief, which constitutes the reasons for the decision, juxtaposes the reasons for the inadmissibility and the “national security and public safety”, leaving the inadmissibility as being the justification for denying the relief on grounds of national security and public safety. That looks very much like the reasons why our Court, in *Al Yamani (2007)*, ruled the then decision as being patently unreasonable. The 2018 ministerial brief is longer but, as I will seek to show, it suffers fundamentally from the same flaw as previous briefs.

[41] The memorandum describes clinically the long immigration history of the Applicant. It then goes into what it considers are the “elements considered”. That actually constitutes a description of the Applicant’s history since joining the PFLP. The memorandum insists on the activities of the Applicant while being an acknowledged member of the PFLP since 1974, although he contends that there were periods, between 1974 and 1991, when he withdrew from the PFLP (when he was not active, for instance while he was in Abu Dhabi and in Ghana). At any rate, the memorandum never asserts that the Applicant was involved directly in violent action. Rather, he was the assistant of George Habash, the co-founder of the PFLP, for a time in 1981, as well as a fundraiser while in Lebanon. In Canada, the ministerial brief does not allege activities other that those found by the ID.

[42] The Applicant continued his membership after he immigrated to Canada in 1985. He acted as an intermediary for transferring funds to the Middle East. The amounts were significant, but the Applicant contends that the funds were for humanitarian causes only. The memorandum also reports that he acted as a courier of information and middleman between various PFLP groups. It is also stated that the Applicant facilitated

travel for PFLP members for military training and collecting material and documents for fraudulent travel documents for organization's members. There is in effect nothing new.

[43] The purpose in listing here various activities while in Canada is evidently not to suggest that Mr. Al Yamani was not a member of the PFLP: he is inadmissible in Canada because he was a member and the decision to that effect has been made. This Court confirmed its validity. It is rather to confirm that the memorandum does not offer any indication of Mr. Al Yamani's personal involvement in violent acts, or other activities since 1991.

[44] I note however that twice the memorandum refers to a bombing incident of the offices of Air Egypt in 1977, first on page 7, and then on pages 14–15. Both times, the memorandum, after referring to the incident, states that it does not rely on the incident for the purpose of the ministerial relief assessment. It is unfortunate that the memorandum is rather equivocal concerning comments about the bombing made by Gibson J. in the judicial review of the second SIRC report. At page 19, the memorandum speaks of a "concern" expressed by the Court concerning the ultimate end use of the funds channelled back to the Middle East by Mr. Al Yamani, as the inference from the evidence may actually be speculation or conjecture without adequate foundation. An examination of paragraph 83 of the decision ([2000] 3 F.C. 433 [cited above]) suggests more than a "concern" on the part of the Court. Furthermore, the "difficulty" is not limited to the end use of the funds, but is also related to the bombing incident in 1977. I reproduce again paragraph 83 for ease of reference:

> Certainly there can be no doubt as to the credibility of the evidence from the Canadian Security Intelligence Service (CSIS) that was before the Review Committee and this Court; but the difficulty I find with respect to that evidence is whether much of it is reasonable inference or whether it is speculation and conjecture without adequate foundation. One could certainly argue that it is the latter with regard to the 1977 United Arab Emirates terrorist act. One could also argue that it is the latter with respect to the ultimate use of funds channelled back to the PFLP by the applicant, but this is not a major issue since the ultimate purpose to which those funds were put and the applicant's knowledge of that purpose were not heavily relied on by either CSIS or the Review Committee. Rather, the undisputed fact that funds were channelled through the applicant was relied on by the Review Committee simply as an indicator of the trust that was placed in him by the PFLP. [My emphasis.]

It is unclear why the ministerial brief refers at all, twice, to the bombing without even noting the “difficulty” the Court had with speculation and conjecture. With all due respect, it is also an exaggeration to say that the Court “found that what was clear is that this channelling of funds was an indicator of the level of trust placed on him by the organization”. When read in context, that is not what is implied by Gibson J. in paragraph 83.

[45] The ministerial brief shows a tendency to quickly downplay, or simply ignore, positive features while adding undue emphasis on what it considers less positive features.

[46] Another example of an exaggeration is the reference to a pre-removal risk assessment denied by the Citizenship and Immigration department. The memorandum notes that the judicial review application was “dismissed” instead of stating in a more neutral fashion that the authorization of the judicial review application was simply not granted. It is of course a matter of semantics, but the impression conveyed has in my estimation some importance. Leave applications are denied without reasons.

[47] Under the title “elements considered”, the memorandum refers quickly to Mr. Al Yamani’s efforts to portray himself as a person who does not support violence; indeed he was never involved in violence. Thus, he withdrew from the PFLP in 1991 because he did not want to jeopardize his family after he became a subject of interest for the Canadian Security Intelligence Service. The memorandum notes that:

- he formed relationship with many people from many different backgrounds;
- he has many strong community-based relationships;
- letters from a variety of persons attest to his claim as a changed man.

But the ministerial brief does not engage with the evidence. It mentions it without more. No indication is given of the weight it should be given.

[48] In the same vein, the memorandum reports the contention that the PFLP is a multi-faceted organization, that the Applicant never supported violence against civilians. He did not condone terrorism and he has not been involved in any terrorist act. It is reported that Mr. Al Yamani says that he does not pose a threat to our national security

and public safety. The memorandum notes that Mr. Al Yamani reiterates his strong ties to Canada, which include his wife, his children and grandchildren who are all Canadians. He owns a house, completed a Bachelor of Arts in Political Science in 1995. Finally, the memorandum states without more that Mr. Al Yamani complained about the CBSA's assessment as being unfair and unbalanced. His criticism is summarized in the memorandum as Mr. Al Yamani having "stated that the assessment distorts his past and present circumstances, and 'fails to recognize any positive factors that favour [him] over the last thirty-two years'" (memorandum of May 14, 2018, at page 14). Again, these are mentioned quickly, without more.

[49] The memorandum then proceeds to provide the assessment that will lead to the recommendation to deny relief under subsection 34(2).

[50] The assessment is not favourable to Mr. Al Yamani. It reads as a charging document for the past membership of Mr. Al Yamani in the PFLP. He is faulted for having continued his support of the PFLP after he immigrated to Canada in 1985. The fact that he renounced his membership in 1991 is discounted because it came as a result of discovering that he was a person of interest to Canada authorities. Mention is made of the indication that Mr. Al Yamani was concerned about his family's establishment in this country, but only to highlight that he did not abandon his membership out of dissatisfaction with the organization or rejection of its terrorist policies. The brief speculates that he would have continued his activities had he not been a person of interest to the Canadian authorities; it also speculates that while in Ghana (for about 18 months) he would have participated in activities had the "PFLP secured a foothold in the country" (ministerial brief, at page 16). Once again, sheer speculation. No explanation or evidence is offered in support of such a statement. In fact, the brief insists that the Applicant was a member for close to twenty years, in spite of joining the organization in 1974 and leaving it in 1991, and despite periods of inactivity while travelling and staying in different countries. The colour given to his membership by speaking about a number of years is especially striking in view of the fact that there is nothing to report for the 27 years between 1991 and 2018.

[51] The Applicant's support for the PFLP is presented as substantial and his role as being "pivotal" for the transfer of funds in North America and arranging some travel for military training. The brief challenges the argument that the Applicant was never

involved in violence or terrorist activities, but rather that he was part of the political wing of the PFLP, which is a multi-faceted organization. To that effect, the brief contends that "membership in a political wing does not necessarily exclude him from supporting or being connected with the militant wing and its associated goal" (memorandum of May 14, 2018, at page 17). I note that this is merely argumentative and, to some extent, speculative in that no evidence is offered of any involvement. The following sentence is even more tendentious: "It merely implies that he may not have been among those personally executing orders".

[52] In effect, the assessment in the ministerial brief dwells on the activities which undoubtedly were in support of the PFLP but were not found to be of a violent nature. Any indication of a more nuanced role emerging from the evidence is immediately discounted, often on a dubious basis. The following paragraph is a good example of the content and tone of the brief:

> Mr. Al Yamani states that his membership in the PFLP is so far in the past that it should no longer count as having any effect in the present or the future. He objects to still being under a removal order even though he left the PFLP in 1991. It is recognized that, according to his statements, Mr. Al Yamani no longer considers himself a member of the PFLP. However, as noted above, Mr. Al Yamani provided information stating that he left the organization not out of any dissatisfaction with the organization, but because his family was more important, and because his continued involvement was undermining his efforts to attain citizenship. The fact remains that Mr. Al Yamani voluntarily belonged to the organization for approximately 20 years while reasonably knowing of its involvement in violence amounting to terrorism. As to being the subject of a removal order, Mr. Al Yamani is still inadmissible to Canada under paragraph 34(1)(f) of IRPA and under a removal order. His PRRA application has been denied by IRCC, his application for judicial review of the decision has been dismissed by the FC, and steps to effect his removal order are proceeding in accordance with the law.

The inadmissibility in Canada of Mr. Al Yamani ought to be accepted. However, as put by Snider J., the purpose of subsection 34(2) of the Act is that, in spite of the inadmissibility, the Minister is to consider whether he is satisfied that the presence of Mr. Al Yamani in Canada would not be detrimental to the national interest. The ministerial brief never explains the relevance of activities having led to the Applicant's inadmissibility and, more importantly, how that impacts national security and public

safety 27 years after leaving the PFLP, if national security and public safety are to be given the prominence CBSA wishes to give them.

[53] On that front, the brief focuses on national security and public safety. Mr. Al Yamani argues that he is not a danger to anyone: he does not even have a criminal record. The CBSA immediately notes that this is not determinative in the context of the ministerial brief. In fact, the brief declares that "CBSA is of the opinion that Mr. Al Yamani presents a danger to the security of Canada" (memorandum of May 14, 2018, at page 20). That is not explained.

[54] That opinion appears to be based solely on membership already 27 years old when the brief was submitted. The brief states that the past activities undermined national security. The CBSA declares that:

> … the CBSA has assessed a number of factors relating to the predominant grounds of national security and public safety, such as, for example, the length and depth of Mr. Al Yamani's involvement in the PFLP, his contributions, knowledge of the organization while involved and proximity to organizational leadership. Based on its assessment of these factors, the CBSA is not satisfied that Mr. Al Yamani should be relieved from his inadmissibility under the security provisions of IRPA.

The brief fails to provide this assessment. It is stated, not demonstrated.

[55] The brief does not deal at any length with Mr. Al Yamani's statement that he is a changed man, a man of peace, as also claimed by numerous supporters who have provided often long written testimonies. Instead, the ministerial brief brings the matter back to Mr. Al Yamani's involvement for 17 years (referred to repeatedly as close to or approximately 20 years), without noting the period from 1991 to 2018:

> Throughout his accounts, Mr. Al Yamani states that he has changed since coming to Canada. He argued that he is now a man of peace, who rejects the use of violence outside of war and whose goal is to encourage a peaceful solution to the Palestinian/Israeli conflict. He and those supporting him convey clearly their conviction that he has become a champion for peace and has renounced the PFLP and the violence it represents. In addition, Mr. Al Yamani's supporters find that he has integrated into society and that he has demonstrated democratic values. They find him a moderate, reasonable person; a hard working member of the community, who volunteers and has devoted a large part of his life to those in need both here and abroad. The strong community support for Mr. Al Yamani

> has been noted as has his change in approach towards the Palestinian/Israeli conflict. However, even if, as Mr. Al Yamani has stated, he has dissociated from the PFLP and is now pursuing a Palestinian solution through peaceful means, his late conversion and commitment to peace do not overcome other predominant concerns in this case : that is, the level, duration and depth of his previous involvement with and commitment to the PFLP for approximately 20 years, including his substantial involvement whilst in Canada.
>
> (Ministerial brief of May 14, 2018, at page 21)

[56] The Applicant is criticized for a speech given in July 2014 in Toronto calling for a third Intifada at a time when there were troubles in Israel involving the Palestinian population. The CBSA wrote that "(w)hile Mr. Al Yamani has explained that his 2014 call for a renewal Intifada should be contextualized as him advocating for peaceful, unarmed opposition/popular resistance against the occupation of their lands, and furthered that he does not believe that armed actions would advance the goals of the Palestinian population, the CBSA believes that it is reasonable to interpret his speech within the context of being a former, long-time member of an organization that is now a listed terrorist entity by Canada and several other countries, which committed acts of terrorism during previous Intifadas" (ministerial brief of May 14, 2018, at pages 21–22).

[57] In the end, the brief contends that the Applicant's inadmissibility should be maintained because he failed to satisfy that his presence in Canada would not be detrimental to the national interest. In reaching that recommendation, the CBSA focuses almost exclusively on "the predominant factual elements of this case which relate to national security and public safety" (ministerial brief of May 14, 2018, at page 22) without addressing why they are now in some jeopardy. The national security and public safety are said to have been undermined by Mr. Al Yamani's contribution to the PFLP, that is before 1991. The ministerial brief considers that it was drafted "in a manner consistent with the overreaching decision in *Agraira*, which speaks to the predominance of factors relating to national security and public safety" (ministerial brief of May 14, 2018, at page 22).

III. Analysis

[58] I have provided a rather long exposé about the decision under review because, in my view, it does not meet the requirement for a decision to be reasonable following

the Supreme Court of Canada decision in *Vavilov*. In fairness to the decision and the Minister, the decision did not have at the time the benefit of *Vavilov*, which is now the controlling authority on the requirement of reasons in administrative law cases.

[59] In *Vavilov*, the Court gave new prominence to the need for decision makers to not only reach a reasonable outcome, but also for the reviewing court to be concerned with the decision-making process. As put at paragraph 83 of *Vavilov*, "the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome".

[60] The Supreme Court maintains the need for reviewing courts to follow the principle of judicial restraint (*Vavilov*, at paragraph 13), which translates into the requirement to defer to a reasonable decision (*Vavilov*, at paragraph 85). It remains however that "administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be 'justified to citizens in terms of rationality and fairness': the Rt. Hon. B. McLachlin, 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law' (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted)" (*Vavilov*, at paragraph 14).

[61] The emphasis on the justification that addresses "those to whom the decision applies" is strengthened at paragraph 86 of *Vavilov*:

> Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis. [My emphasis.]

As I wrote in *Shekari v. Canada (Citizenship and Immigration)*, 2022 FC 70 [at paragraph 25]:

> The *Vavilov* majority quoted with approval the article "Reasons for Decision in Administrative Law", by R. A. Macdonald and D. Lametti, (1990), 3 CJALP 123, at p. 139, where one reads that reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" ... "are no substitute for statements of fact, analysis, inference and judgment". The majority stated that they "will rarely assist a reviewing court in understanding the rationale underlying a decision" (*Vavilov*, para 102). That is, it seems to me, the situation encountered in this case. The issue here is not to require a standard of perfection, but rather to satisfy the reasonableness review that there is "an understanding of the reasoning that led to the administrative decision", thus enabling "a reviewing court to assess whether the decision as a whole is reasonable" (*Vavilov*, para 85). The reviewing court is tasked with reviewing the reasons, not with attempting to substitute its own reasons (*Vavilov*, para 96).

[62] Perfection is certainly not the standard against which an administrative decision is to be measured on a reasonableness standard. We should not expect every possible argument to be refuted (*Vavilov*, at paragraph 128). But that does not detract from the requirement to justify the decision [at paragraph 95]:

> That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, <u>not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision,</u> but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party. [My emphasis.]

[63] Reviewing courts are instructed by the *Vavilov* Court to develop an understanding of the decision under review. That is because the task at hand is to determine that the decision bears the hallmarks of a reasonable decision, that is that it is justified, intelligible and transparent. The decision must be "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at paragraph 99). Indeed, the reasons are the "primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts" (*Vavilov*, at paragraph 81).

[64] Thus, reasonableness review focuses on justification, which is seen as the lynchpin of institutional legitimacy; the culture of justification surely requires justification so that transparency and intelligibility will be shown [*Vavilov*, at paragraph 79]:

> Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S. A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 S.C.L.R. (2d) 211, at p. 220. [My emphasis.]

[65] What is the quality of the reasons that is to be expected of decision makers? The *Vavilov* Court, once again, addresses the issue. In essence, there must be some proportionality between the reasons to be given and the impact the decision will have on the person's rights and interests. We read at paragraphs 133 to 135:

> It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
>
> Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh,

> and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.
>
> Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law. [My emphasis.]

[66] There is no doubt that the Minister's decision has a serious impact on Mr. Al Yamani. There is a removal order that is pending against him. He has been in this country since 1985, has raised his family here and has been contributing to his community as the testimonials on file attest. His children are Canadian citizens, as are his grandchildren. There is equally no doubt that he was a member of the PFLP for some 17 years, which made him inadmissible in Canada. But there is also a complete absence of evidence that he did not abandon his membership in 1991, some 27 years before the 2018 decision. Without evidence to the contrary, it must be accepted that he has not been a member of the PFLP since 1991. It is not easy to understand the gratuitous comment by CBSA that this constitutes a "late conversion and commitment to peace". At the time the "conversion" occurred, Mr. Al Yamani was 35 years old: he is now 66 years old. The only question is whether the possible relief created by Parliament was reasonably denied by the Minister. For that to be reasonably done, the decision had to be justified and must reflect the stakes. That in my view is what is missing here.

[67] Fifteen years ago, Justice Mactavish reviewed a briefing note, like in the case at bar, and found that "there is no reference to, nor any attempt to come to grips with the considerable body of evidence put forward by Mr. Al Yamani regarding his separation from the PFLP, and his current belief in non-violence as a means of resolving the situation of the Palestinian people, both of which would arguably prevent him from becoming active in the PFLP in the future" (*Al Yamani (2007)*, at paragraph 86). It is disappointing to see that the same deficiencies are present in the decision under

review. Although the ministerial brief is significantly longer than the one addressed by our Court in the 2007 decision, it suffers in my view from the same significant flaws.

[68] As noted by the *Vavilov* Court, it does not suffice to summarize arguments made and then state a peremptory conclusion, because that does not assist in understanding the decision made and its rationale. The decision maker must engage with the evidence. Peremptory conclusions “are no substitute for statements of fact, analysis, inference and judgment”, in the words of the professors R. A. Macdonald and D. Lametti, as quoted by the Supreme Court of Canada in *Vavilov* at paragraph 102. This is especially so where the impact on someone’s interests is as severe as that in this case.

[69] In the case at bar, the ministerial brief does not engage with the evidence. In the words of the 2007 decision, it does not “come to grips with the considerable body of evidence put forward”. The focus is for all intents and purposes exclusively on the activities of the Applicant in support of the PFLP, which ended in 1991, and the view taken that Mr. Al Yamani nevertheless presents a danger for the security of Canada. How the activities in support of the PFLP that ceased in 1991 support the conclusion is unknown. Quite frankly, it is possible that it be so, but one does not know how that decision is arrived at based on the ministerial brief. It looks very much like a peremptory conclusion.

[70] The emphasis throughout the assessment made by the CBSA is on the predominant factors in examining the “national interest” that are the national security and public safety. I have reviewed the ministerial brief on numerous occasions and I have not been able to find another consideration that would have been taken seriously into account. Thus, not only are the national security and public safety solely related to events that were at least 27 years old at the time the brief was prepared, but the national security and public safety appear to be the only considerations. It appears at times that the brief seeks to punish Mr. Al Yamani for his activities of more than 27 years ago. If that is to be the case, the reasons for finding that national security and public safety are engaged must be presented for the decision to be reasonable. Surely the connection between activities in the distant past and the view taken that “the CBSA is of the opinion that Mr. Al Yamani presents a danger to the security of Canada” (ministerial brief of May 14, 2018, at page 20) was deserving of an explanation.

[71] Furthermore, the interpretation that appears to be given to *Agraira* in the ministerial brief may not be consonant with the decision itself. The brief repeats on numerous occasions that “national interest” relates predominantly to national security and public safety. However, the *Agraira* Court resisted attempts to turn “national interest” into “public safety” and “national security” only, in spite of arguments to that effect presented by the government in that case. The Supreme Court stresses that Parliament chose to use “national interest”, which “strongly suggests that Parliament did not intend the term ‘national interest’ to relate exclusively to national security and public safety” (*Agraira*, at paragraph 70).

[72] The Supreme Court rejected explicitly the argument made by the Minister of Public Safety and Emergency Preparedness “that s. 34(2) is focused exclusively on national security and public safety, and that it provides for relief only for innocent or coerced members of terrorist organizations” (*Agraira*, at paragraph 78). The ministerial brief not only focuses almost exclusively on the national interest relating predominantly on national security and public safety, to the exclusion of other considerations, but it also shows significant reluctance towards relief for persons who are not innocent members of terrorist organizations. It is a given that someone is a member of a terrorist organization, which makes the person inadmissible in Canada, before the subsection 34(2) stage is reached. It may even be that the nature of the activities and how recent they are, are relevant factors in that assessment to be made. However that must be weighed, together with other considerations. Again, the point of the matter is not that Mr. Al Yamani ought to be granted the relief sought: it is for the Minister to decide. But in making the decision, the reasons given must be commensurate with the person’s interests. When reading the ministerial brief, which constitutes the reasons for the Minister’s decision, it must be the national interest that must be weighed. It is not only an innocent member of a terrorist organization that can be considered for relief.

[73] It is without a doubt that the scope of subsection 34(2) of the Act is broader than national security and public safety (*Agraira*, at paragraph 81). The Court writes: “Contrary to what the Federal Court of Appeal held in the case at bar, in determining whether a person’s continued presence in Canada would not be detrimental to the national interest, the Minister must consider more than just national security and whether the applicant is a danger to the public or to the safety of any person” (*Agraira*,

at paragraph 82). It appeared to me that the ministerial brief was actually going back to that notion argued before the Supreme Court that national interest equates with national security and public safety, a notion soundly rejected by the Court.

[74] Finally, what are the factors, other than national security and public safety, that must be considered in the application of subsection 34(2) of the Act? The Minister in *Agraira* had argued that the availability of humanitarian and compassionate (H&C) relief dictates that these factors not be relevant under subsection 34(2). In view of that comment, it is less than clear what the effect of curtailing legislatively access to the H&C relief would have on the interpretation to be given to subsection 34(2). Be that as it may, even with the availability of the H&C relief, the Supreme Court finds that personal factors may have their place in determining the threat to the security of Canada. We read at paragraph 84 of the *Agraira* judgment:

> …. But s. 34 does not necessarily exclude the consideration of personal factors that might be relevant to this particular form of review. For example, such considerations may have an impact on the assessment of the applicant's personal characteristics for the purpose of determining whether he or she can be viewed as a threat to the security of Canada. Of the considerations in the Guidelines unrelated to national security and public safety which formed part of the Minister's implied interpretation, only very few are H&C factors. The fact that the Minister considered such factors did not render his interpretation of the term "national interest" unreasonable. [My emphasis.]

In the case at bar, there was no escaping an examination of those personal characteristics which would appear to relate directly to whether or not the Applicant poses a threat to the security of Canada.

IV. Conclusion

[75] I have tried to demonstrate that the ministerial brief, which constitutes the Minister's decision once adopted by him, is deficient. It does not satisfy the requirements for that decision to be reasonable in view of the serious shortcomings in the decision; the decision must present a requisite degree of justification, intelligibility and transparency that comes from reasons that are commensurate with the harsh consequences affecting a person, that which the Supreme Court of Canada labelled as "the principle of responsive justification" at paragraph 133 of *Vavilov*.

[76] They are in my view significant shortcomings that command the conclusion that the decision is unreasonable. Subsection 34(2) of the Act instructs the Minister to consider for possible relief that the Minister be satisfied that the presence in Canada of a permanent resident would not be detrimental to the national interest. It stands to reason that the focus must be the national interest, which is broader than national security and public safety. The presence in Canada must be measured against the standard in the legislation: the Minister would have to say why he is not satisfied that the presence in Canada would not be detrimental to the national interest.

[77] Moreover, subsection 34(2) is not meant to punish a person. The reasons for inadmissibility have their relevance, but they have to relate to the national interest. We do not find in the ministerial brief why non-violent activities some 27 years ago are still relevant with respect to national security and public safety.

[78] The decision in my view fails on both fronts. It defines the national interest in terms of national security and public safety, in spite of the Supreme Court in *Agraira* having explicitly rejected that notion. Furthermore, the decision never provides reasons why the decision maker is not satisfied that the presence of the Applicant is not contrary to the national interest when defined in accordance with the controlling authority that is *Agraira*.

[79] Instead of that analysis, the ministerial brief juxtaposes the reasons for inadmissibility on top of the “national interest” narrowly defined and considered. The decision never considers redeeming factors such as those identified in *Al Yamani (2007)* (at paragraphs 84 and 86), such as a renunciation to violence in 1991, the moderate political views attested to by numerous testimonials, and the Applicant’s separation from the PFLP some 27 years earlier at the time the decision was made. Merely stating those redeeming features and personal characteristics will not suffice. There is a requirement even more so since *Vavilov* to engage with the facts, the submissions and relevant factors. That was not done in *Al Yamani (2007)* and that is also clearly missing here.

[80] The access to the relief of subsection 34(2) is not limited to membership that is completely innocent or coerced. Why the Minister was not satisfied that the Applicant’s presence in Canada would not be detrimental to the national interest requires an

explanation. On this record, the justification, the transparency and the intelligibility of the decision were simply not present. There is no doubt that the Minister has considerable discretion in making his decision under subsection 34(2). But discretion is not arbitrariness. Reasons matter.

[81] To put it succinctly, the ministerial brief does not explain why the Minister is not satisfied that the presence of Mr. Al Yamani would not be detrimental to the national interest; it treats national security and public safety as if they were the considerations that are not only predominant, but rather as crowding out any other. It seems to require that the person seeking relief be innocent of, or coerced into, being a member of a terrorist organization; it never explains why, 27 years after the Applicant left the PFLP, the Applicant is still a threat to national security and public safety; the brief reads as if it is relevant that the Applicant be punished for past activities without providing reasons.

[82] This is not meant as any suggestion as to the merits of the application under subsection 34(2) of the Act. The Court never considered the merits of the application, but rather it is concerned with the justification, the intelligibility and the transparency of the decision. With the greatest of respect, this decision is not reasonable not because of the outcome, a matter not addressed in the reasons, but because the decision-making process does not meet the modern requirements since *Vavilov*.

[83] As a result, following the guidance of the Supreme Court in *Vavilov* (at paragraphs 139 to 142), the matter is remitted to the decision maker for reconsideration if he so chooses [at paragraph 141]:

> Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

V. Certified question and other issues

[84] The Applicant had raised some five questions for certification. In view of the outcome of this judicial review application, the conditions for certification are not met (*Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229; *Canada (Immigration and Citizenship) v. Laing*, 2021 FCA 194). None of

the proposed questions would be dispositive of the appeal of a decision which, at any rate, is favourable to the Applicant.

[85] This case is decided on the basis of administrative law principles. The constitutional law issues raised by the Applicant were accordingly never reached. I agree with counsel for the Respondent that there exists no need to pursue the matter any further in view of the Court's decision to remit the case on administrative law grounds.

JUDGMENT in IMM-6497-18

THIS COURT'S JUDGMENT is:

1. The judicial review application is granted. The matter is remitted to the Minister of Public Safety and Emergency Preparedness for redetermination.

2. There is no question to be certified in accordance with section 74 of the IRPA.