Federal Court  Cour fédérale

Date: 20220810

Docket: T-670-19

Citation: 2022 FC 1164

Ottawa, Ontario, August 10, 2022

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

PARVKAR SINGH DULAI

Appellant

and

CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Respondent

JUDGMENT AND REASONS

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I. Overview

[1] This appeal consists of a multi-pronged case in which the Appellant's claims that pertain to the reasonableness of the Minister's decision and his claims relating to sections 6 and 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], are addressed in separate decisions; this Judgment and Reasons deal with reasonableness, and a concurrent decision addresses the constitutional issues (*Brar et al v Canada (Minister of Public Safety and Emergency Preparedness*), 2022 FC 1168 . Confidential reasons on the reasonableness of the Minister's decision, which are complementary to this decision, include specific findings on this appeal and its companion case (see *Brar v Canada (Minister of Public Safety and Emergency Preparedness) 2022 FC 1163*). These are the first appeals filed pursuant to the *Secure Air Travel Act*, SC 2015, c 20, s 11 [SATA] since its enactment in 2015. The parties to these appeal proceedings have

contested parts of the legislation which therefore requires that the Court examine the legislation and provide clarity and guidance where deemed necessary.

[2] This Judgment and Reasons [the "Decision"] addresses the appeal of an administrative decision dated January 30, 2019 and made by Mr. Vincent Rigby, Associate Deputy Minister, and delegate [delegate] for the Minister of Public Safety and Emergency Preparedness [the Minister or Respondent], to maintain Mr. Parvkar Singh Dulai [Mr. Dulai or Appellant] on the no-fly list pursuant to sections 15 and 16 of the SATA.

[3] The Appellant remains a listed individual pursuant to section 8 of the SATA given the Minister's delegate's decision to deny his application for administrative recourse under section 15 of the SATA, by which the Appellant had sought to have his name removed from the list.

[4] The Minister's delegate made the decision on the basis that he had reasonable grounds to suspect that the Appellant would either "engage or attempt to engage in an act that would threaten transportation security" or "travel by air for the purpose of committing an act or omission that (i) is an offence under sections 83.18, 83.19 or 83.2 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] or an offence referred to in paragraph (c) of the definition "terrorism offence" in section 2 of that Act, or (ii) if it were committed in Canada, would constitute an offence referred to in subparagraph (i)" (see paragraphs 8(1)(a) and 8(1)(b) of the SATA).

[5] As a result, the Appellant filed a statutory appeal of the Minister's delegate's decision to dismiss his administrative recourse application, as permitted by section 16 of the SATA. In his appeal, Mr. Dulai submits that the procedure set out in the SATA for determining the reasonableness of the Minister's decision whether to designate him as a listed person, and thereafter maintain that designation, violates his common law right to procedural fairness because it deprives him of the right to know the case against him and the right to answer that case.

[6] As mentioned above, another appeal brought by Mr. Bhagat Singh Brar [Mr. Brar or, together with Mr. Dulai, Appellants], raises similar issues regarding the reasonableness of the Minister's decision in addition to constitutional matters.

[7] Confidential reasons complementary to this judgment address classified evidence made available to assist me, the designated judge, in rendering a judgment in both appeals. This decision, which is contained in Annex C, is not publicly available as it contains information that, if revealed, would injure national security or endanger the safety of any person. This tension between the rights of individuals and the collective interests in security was discussed at length in two related decisions published in October 2021 (*Brar v Canada (Minister of Public Safety and Emergency Preparedness)* 2021 FC 932 [*Brar 2021*] and *Dulai v Canada (Public Safety and Emergency Preparedness)* 2021 FC 933 [*Dulai 2021*]).

[8] In those decisions, I considered whether disclosing the redacted information and other evidence adduced during *ex parte* and *in camera* hearings would be injurious to national security

or endanger the safety of any person. Upon finding in the affirmative with respect to certain information, I then asked if the protected information and other evidence could be disclosed to the Appellants in the form of a summary or otherwise in a way that would not jeopardize national security or endanger the safety of any person. The outcome of those decisions was that some redactions were confirmed by the Court, some were fully or partially lifted, and the information underneath other redactions was summarized. The delicate balance between protecting sensitive information and the right of the person to know the case against them is not uncommon in national security matters, as demonstrated by *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui I*]:

> [55] Confidentiality is a constant preoccupation of the certificate scheme. The judge "shall ensure" the confidentiality of the information on which the certificate is based and of any other evidence if, in the opinion of the judge, disclosure would be injurious to national security or to the safety of any person: s. 78(b). At the request of either minister "at any time during the proceedings", the judge "shall hear" information or evidence in the absence of the named person and his or her counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person: s. 78(e). The judge "shall provide" the named person with a summary of information that enables him or her to be reasonably informed of the circumstances giving rise to the certificate, but the summary cannot include anything that would, in the opinion of the judge, be injurious to national security or to the safety of any person: s. 78(h). Ultimately, the judge may have to consider information that is not included in the summary: s. 78(g). In the result, the judge may be required to decide the case, wholly or in part, on the basis of information that the named person and his or her counsel never see. The person may know nothing of the case to meet, and although technically afforded an opportunity to be heard, may be left in a position of having no idea as to what needs to be said.
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> [58] More particularly, the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual. In *Chiarelli*, this Court found that the Security Intelligence Review Committee (SIRC)

> could, in investigating certificates under the former Immigration Act, 1976, S.C. 1976-77, c. 52 (later R.S.C. 1985, c. I-2), refuse to disclose details of investigation techniques and police sources. The context for elucidating the principles of fundamental justice in that case included the state's interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources" (p. 744). In *Suresh*, this Court held that a refugee facing the possibility of deportation to torture was entitled to disclosure of all the information on which the Minister was basing his or her decision, [s]ubject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents" (para. 122). And, in *Ruby v Canada (Solicitor General*), [2002] 4 S.C.R. 3, 2002 SCC 75 (S.C.C.), the Court upheld the section of the *Privacy Act*, R.S.C. 1985, c. P-21, that mandates *in camera* and *ex parte* proceedings where the government claims an exemption from disclosure on grounds of national security or maintenance of foreign confidences. The Court made clear that these societal concerns formed part of the relevant context for determining the scope of the applicable principles of fundamental justice (paras 38-44).

[9] Reasons dealing with the SATA were also issued in July 2020 (*Brar v Canada (Public Safety and Emergency Preparedness*, 2020 FC 729 [*Brar 2020*]). They answered a number of questions raised by the parties and explained at length the process to be followed.

[10] In these Judgment and Reasons, to which the complementary and confidential reasons in Annex C add, I assess the overall evidence presented by both parties in relation to whether there are reasonable grounds to suspect that the listed person, in this case, Mr. Dulai, will engage or attempt to engage in an act that would threaten transportation security, or travel by air to commit certain terrorism offences.

[11] In order to ensure fairness, I appointed two *amici curiae* [*Amici*] with the mandate of representing the interests of the Appellant. I expand on the impact of their role in the concurrent decision on the constitutional issues.

[12] For the following reasons, this appeal is allowed in part.

II. Background

A. *Facts in Mr. Dulai's Appeal*

[13] On March 29, 2018, Mr. Dulai's name was included on the no-fly list. It was concluded that there were reasonable grounds to suspect that he would (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*, or an offence referred to in paragraph (c) of the definition "terrorism offence" in section 2 of that Act.

[14] On May 17, 2018, Mr. Dulai was issued a written Denial of Boarding under the Passenger Protect Program (PPP) preventing him from boarding a flight at the Vancouver International Airport pursuant to a direction under paragraph 9(1)(a) of the SATA. Mr. Dulai was scheduled to travel from Vancouver to Toronto.

[15] On June 8, 2018, the Passenger Protect Inquiries Office (PPIO) received Mr. Dulai's application for administrative recourse in which he 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. Pursuant to subsection 15(4) of the SATA, Mr. Dulai was provided with the opportunity to make written representations in response to the unclassified information disclosed to him, which he submitted to the PPIO.

[16] On January 30, 2019, the Minister advised Mr. Dulai 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. Dulai's written submissions, the Minister's delegate "concluded that there [were] reasonable grounds to suspect that [Mr. Dulai would] engage or attempt to engage in an act that would threaten transportation security, or travel by air to commit certain terrorism offences."

[17] On April 18, 2019, Mr. Dulai filed a Notice of Appeal with this Court pursuant to subsection 16(2) of the SATA. Mr. Dulai 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. Mr. Dulai also asks this Court to declare that sections 8, 15 and 16 as well as paragraph 9(1)(a) of the SATA are unconstitutional and are therefore of no force and effect, or to read-in such procedural safeguards that would cure any constitutional deficiencies in the SATA.

[18] More specifically, Mr. Dulai enumerates the following grounds of appeal: that the Minister's decision was unreasonable and that 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. In his Notice of Appeal, Mr. Dulai also requested that the Respondent disclose all material related to his application for recourse, all material related to the Minister's decision to designate him as a listed person, all material before the Minister on the application for recourse, and all other material relating to the Minister's decision to confirm his status as a listed person under the SATA.

B. *Procedural history covering both Appeals (Mr. Dulai and Mr. Brar)*

[19] Since these appeals have been initiated, several documents have been exchanged, case management conferences (both public and *ex parte*) have been held, public and *ex parte* hearings took place in both Ottawa, Ontario, and Vancouver, British Columbia and three decisions applicable to each case were published (*Brar 2020*, *Brar 2021* and *Dulai 2021*).

[20] Navigating the SATA legislation has been laborious, lengthy, and complex. The appeals required that the Appellants, Counsel, *Amici* and this Court think about and test many areas of the law. Due to its length, the complete judicial history of these two appeals is available at Annex A. It includes information on every procedural step taken over the last three years and reflects both parties' dedication to these matters, and the great level of detail with which each step was handled.

III. Legislation

[21] As part of the Reasons in *Brar 2020*, it was essential to review and analyze the SATA (see *Brar 2020* at paras 58 to 89, in particular with respect to the appeal provisions at paras 80 to 89). It is not necessary to duplicate what has already been written except to note that the SATA sets out specific rules governing the appeal process.

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

***Secure Air Travel Act*, SC 2015, c 20, s 11**	***Loi sur la sûreté des déplacements aériens*, LC 2015, c 20, art 11**
Appeals	**Appel**
Procedure	**Procédure**
16(6) The following provisions apply to appeals under this section:	**16(6)** Les règles ci-après s'appliquent aux appels visés au présent article :
(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;	**a)** à tout moment pendant l'instance et à la demande du ministre, le juge doit tenir une audience à huis clos et en l'absence de l'appelant et de son conseil dans le cas où la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
(b) the judge must ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's	**b)** il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et

opinion, its disclosure would be injurious to national security or endanger the safety of any person;

dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(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;

c) il veille tout au long de l'instance à ce que soit fourni à l'appelant un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui et qui permet à l'appelant d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

(d) the judge must provide the appellant and the Minister with an opportunity to be heard;

d) il donne à l'appelant et au ministre la possibilité d'être entendus;

(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;

e) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

(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;

f) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'appelant;

(g) if the judge determines that information or other evidence provided by the Minister is not relevant or if

g) s'il décide que les renseignements et autres éléments de preuve que lui fournit le ministre ne sont

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	pas pertinents ou si le ministre les retire, il ne peut fonder sa décision sur ces renseignements ou ces éléments de preuve et il est tenu de les remettre au ministre;
(h) the judge must ensure the confidentiality of all information or other evidence that the Minister withdraws.	**h)** il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance.

[23] In summary, section 16 of the SATA establishes the role of the designated judge in an appeal and sets out how information related to national security must be handled. The designated judge is given the responsibility to ensure the confidentiality of sensitive information (paragraph 16(6)(b)). At the same time, if the protection of information is justified on national security grounds, the designated judge must provide the appellant with summaries of this redacted information. This will reasonably inform the appellant of the Minister's case against them, but 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 articulated in *Brar 2020* 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 paras 51–63 and 110). Only then will the

> designated judge have the necessary facts and law to render a fair decision.

[24] In addition to determining if disclosing the redacted information would be injurious, the designated judge must also establish whether any additional evidence introduced during the *ex parte* and *in camera* hearings is reliable and appropriate, and whether it can be communicated to the appellant in the form of summaries or otherwise. The judge must then ascertain if the appellant is reasonably informed of the Minister's case.

IV. The public evidence presented by the Appellant

[25] In an affidavit dated January 30, 2022, Mr. Dulai provides information about himself, his family, religion, beliefs, business, volunteer activities, travel history and how being placed on the SATA list has affected his and his family's life. Mr. Dulai seeks to address the allegations against him but mentions that it is difficult because the redactions to the Public Safety Canada Memorandum cover the information that formed the basis of the decision to refuse his application for recourse and keep him on the no-fly list. As a result, he does not feel like he has a sufficient understanding of what the Government says he has done to be able to provide a full response to the allegations and fully defend himself.

[26] In reference to the allegation that he is suspected to be a facilitator of terrorist-related activities, Mr. Dulai replies that he has never planned or facilitated terrorist-related activities anywhere in the world. He says that he is not, nor has ever been, knowingly associated with Sikh extremism or a Sikh extremist milieu and has never been involved with Babbar Khalsa (BK), or

International Sikh Youth Federation (ISYF) as alleged in the Memorandum. To his knowledge, he has no connection to Canadian or internationally based Sikh extremists.

[27] The Memorandum raises concerns about foreign travel in 2012 but Mr. Dulai replies that to the best of his recollection, and based on the records he has, the only foreign travel he did in 2012 was to the United States to promote an Indian Punjabi film called Sadda Haq (meaning "Our Right"). It was released in Australia, the United Kingdom, the United States, and Canada, but was banned in India.

[28] Mr. Dulai does not deny knowing Jagtar Singh Johal, arrested in India on November 4, 2017 for his alleged role in several high-profile killings of religious and political leaders in Punjab. However, he questions the allegations against Mr. Johal that were reported in the media. After speaking with Mr. Johal's defence lawyer, he learned that Mr. Johal was not charged with the murder of Rulda Singh but rather repeated charges of conspiracy to murder. Moreover, the name Rulda Singh is not mentioned in Mr. Johal's charge sheet and summary of the allegations. Mr. Johal's charges have been dismissed in at least one district but have been reinvigorated in other districts and Mr. Johal is still in custody. No evidence has been presented in his case to date.

[29] Mr. Dulai is of the opinion that several supporters of an independent homeland for Sikhs were arrested worldwide for their involvement in the killing of Rulda Singh, the Punjab-based chief of Rashtriyasikh Sangat's arm, but were later released for lack of evidence.

[30] Mr. Dulai shares the sentiment that everyone has a right to a fair trial and that no one should be subjected to torture. This is why he re-tweeted the words of Diljit Dosanjh, a Punjabi singer and actor, expressing sadness towards the reports of torture of Mr. Johal after his arrest in Punjab, and pleading for the right to a fair trial, no matter the allegations. Mr. Dulai never thought the Government could, or would, use a tweet condemning torture as evidence against him. He now feels like he cannot make public statements, even about things like basic human rights, without feeling as if he is putting himself at risk.

[31] Mr. Dulai agrees with the allegation that he is a vocal supporter of Khalistan. He believes in the right to self-determination, based on respect for equal rights and fair equal opportunity. He believes that individuals should be free to choose their sovereignty and international political status without interference or external compulsion. He believes the only means of achieving an independent state called Khalistan is through non-violent means. Before this case, he also believed that being a vocal supporter of Khalistan was the kind of speech that would not be used against him in Canada.

[32] Mr. Dulai affirms that he does not know the organization Lashkar-e-Tayyiba referred to in the Memorandum in relation to Mr. Brar. He says he is also not aware of any connection that Mr. Brar may have to terrorism or terrorist entities and if he had such information, he would not associate with Mr. Brar. Mr. Dulai also submits that he has not provided financial support to any terrorist-related activity and to his knowledge, Mr. Brar has not been involved in collecting funds in support of any terrorist activity either.

[33] In reference to the allegation that he was involved in the $175,000 mortgage to Ajaib Singh Bagri a year after his 2000 arrest in connection with the Air India bombing, Mr. Dulai replies that he was not involved because at that time, he was retained to work as a consultant by Peck and Company Barristers, which was representing Mr. Bagri. He therefore had a clear conflict of interest. He says he has no knowledge of the purported mortgage and that the source for this allegation appears to be a newspaper article written by someone who was declared "far from impartial" by Wesley Wark, adjunct professor at the University of Ottawa, professor emeritus at the University of Toronto's Munk School and senior fellow at the Centre for International Governance Innovation who is also an expert on national security and intelligence issues.

[34] Mr. Dulai says he has engaged in non-violent activism by attending the United Nations to raise awareness about the human rights violations that have been committed against the Sikhs in India. He has also attended peaceful protests to raise awareness about Sikh-related issues.

[35] Mr. Dulai says that he was at the height of establishing a Punjabi-speaking television channel with the aim of connecting the diaspora of Punjabi-speaking people across the world through celebrating their language and culture when his name was registered on the SATA list in 2018.

[36] Due to his inability to fly to tend to his studios in Toronto, Winnipeg, Calgary and Edmonton, he eventually had to close them, suffering major financial losses. Mr. Dulai says that

closing these studios harmed him both financially and psychologically. He is saddened that the vision he had for Channel Punjabi could not be realized due to his inability to fly.

[37] Mr. Dulai says that he has suffered psychological harm because of his listed status. He has been affected by the stigma of being branded a terrorist facilitator and his family has also felt the effects of these allegations through questioning, boarding denial at airports, etc. He also believes that he is being targeted and punished for being a vocal Sikh activist who believes in the right to self-determination through non-violent means. He believes that his speech, associations, faith, ethnicity and religion have formed the basis for his listing on the no-fly list in Canada.

[38] During his testimony in Vancouver on April 19, 2022, Mr. Dulai mentioned that the fact that his beliefs for self-determination are a consideration that were before the Minister scares him and as a result, he stopped talking about it. He said that he does not attend rallies or protests anymore, does not tweet about political views anymore, and does not post online. He also stopped doing interviews on his own channel.

V. The public evidence presented by the Minister

[39] On September 13, 2019, a first appeal book was produced in the current proceeding. A revised version of the material was filed on October 12, 2021. Public evidence that the Minister relied on to support Mr. Dulai's inclusion on the SATA list may be found in both appeal books.

[40] An affidavit dated September 12, 2019 from Lesley Soper, the Acting Director General of the National Security Directorate within the National and Cyber Security Branch at the

Department of Public Safety, is available at pages 25–34 in both the original and the Revised Appeal Book. Her affidavit describes the PPP and the legislative framework that supports the SATA process. It also states that the Passenger Protect Advisory Group (PPAG), which is comprised of several departments and chaired by Public Safety Canada, is responsible for determining who is placed on the SATA list based on names and supporting information provided by its members.

[41] Ms. Soper refers to the decision rendered in exigent circumstances by the delegated decision maker, on March 29, 2018, to place Mr. Dulai on the SATA list. This was the result of information obtained from the PPAG to the effect that there were reasonable grounds to suspect that [Mr. Dulai] may present a threat to transportation security or seeking to travel by air for certain terrorism-related purposes.

[42] The events that followed the listing of the Appellant on the SATA list are also described in the affidavit. Among others is the fact that Mr. Dulai was allowed to board one scheduled flight from Calgary to Vancouver with additional screening on April 1, 2018, pursuant to a direction under subsection 9(1) of the SATA. Furthermore, on April 10, 2018 and August 21, 2018, with the benefit of the recommendations of the PPAG, the Senior Assistant Deputy Minister decided that Mr. Dulai's name should remain on the SATA list. On May 17, 2018, Mr. Dulai was denied boarding on one scheduled flight from Vancouver to Toronto pursuant to a direction under subsection 9(1) of the SATA.

[43] Ms. Soper's affidavit details Mr. Dulai's recourse application that began on May 28, 2018 when he first applied for recourse requesting that his name be removed from the SATA list. On August 10, 2018, the PPIO provided an unclassified summary to Mr. Dulai to allow him to be reasonably informed of the information to be relied on and to provide an opportunity for him to make submissions or present information in support of his recourse application. Mr. Dulai sought extensions of time to make submissions in email correspondence with the PPIO.

[44] On January 2, 2019, Mr. Dulai provided written submissions and supporting documents including reference letters and information obtained from his access to information requests to government agencies. On January 30, 2019, the Minister's delegate decided to maintain Mr. Dulai's status as a listed person on the SATA list.

[45] Ms. Soper also explains that pursuant to subsection 8(2) of the SATA, the Minister's delegate has continued to review the SATA list every 90 days to determine whether the grounds for which Mr. Dulai's name was added to the list still existed and whether his name should remain on the list. At the time she affirmed the affidavit (September 12, 2019) Mr. Dulai's name remained on the SATA list.

[46] A number of documents relating to the listing of Mr. Dulai are attached to Ms. Soper's affidavit, as are additional media reports that were not included in the case brief that was before the PPAG and the Minister's delegate in making the decision to list and to maintain Mr. Dulai on the SATA list.

[47] On March 1, 2022, this Court received a supplementary public affidavit from the Attorney General of Canada (AGC), signed by Lesley Soper on February 25, 2022. In the document, she provides legislative history and policy documents relating to the SATA. In this supplementary affidavit, she also provides further details about the PPP, including administrative and exigent listing, de-listing, and the operations of the Government Operations Centre (GOC).

[48] Ms. Soper clarifies circumstances surrounding the listing of Mr. Dulai by stating that the recommendation to list him in exigent circumstances was approved by the Director General at the time, on the same day the request to list was presented, that is, on March 29, 2018. The recommended direction included that Mr. Dulai be denied boarding on international inbound and outbound flights, and that additional screening be required for domestic flights.

[49] Ms. Soper affirms that on April 1, 2018, Public Safety Canada reported the direction allowing Mr. Dulai to board his scheduled flights from Calgary to Vancouver with additional screening. Based on an event report dated April 1, 2018, and referred to in the September 2019 affidavit as document (ii) of Exhibit A (Revised Appeal Book, pp 42–51), it is Ms. Soper's understanding that the GOC was contacted at the time Mr. Dulai tried to board the plane. A Senior Operations Officer from the GOC, as the section 9 delegated decision maker, decided to allow boarding with additional security screening after considering the information in the case brief, the information provided by Transport Canada and Air Canada and information provided by the nominating agency, which was contacted on that day.

[50] Subsequently, a PPAG meeting occurred on April 5, 2018, following which the PPAG submitted a recommendation to re-list Mr. Dulai, and recommended the adoption of a direction to guide future section 9 decisions that Mr. Dulai be denied boarding on international inbound and outbound flights, and that additional screening be required for domestic flights. On April 13, 2018, the Senior Assistant Deputy Minister agreed with the recommended direction and re-listed Mr. Dulai. The April 5, 2018 PPAG recommendation and April 13, 2018 decision to re-list is referred to in Ms. Soper's first affidavit as document (iv) of Exhibit A (Revised Appeal Book, pp 60–70).

[51] On April 27, 2018, an administrative update was made to Mr. Dulai's case brief, modifying the recommended direction to guide future section 9 decisions. In particular, the recommended direction was changed to deny boarding on international inbound and outbound flights, as well as domestic flights. Although the document is dated April 5, 2018, Ms. Soper confirms that the administrative update and amended direction occurred on April 27, 2018. The modified recommendation is referred to in her September 2019 affidavit as document (iii) of Exhibit A (Revised Appeal Book, pp 52–59).

[52] In reference to Mr. Dulai's denial of aircraft boarding, Ms. Soper mentions that Public Safety Canada prepared an event report to that effect on May 17, 2018, which is also referred to in her September 2019 affidavit as document (v) of Exhibit A (Revised Appeal Book pp 71–78). She says that from reading the event report, it appears the GOC was contacted at the time Mr. Dulai tried to board a flight from Vancouver to Toronto. A Senior Operations Officer from the GOC made the decision to deny boarding after considering the information in the case brief,

the information provided by Transport Canada and Air Canada, and the information provided by the nominating agency, which was contacted on that day.

[53] In her public testimony on April 20, 2022 in Vancouver, however, Ms. Soper admitted to having no record of the administrative decision made on April 27, 2018 and therefore no signature to authorize it.

[54] At the next meeting on August 16, 2018, the PPAG recommended that Mr. Dulai's name be kept on the SATA list and approved the recommendation made administratively on April 27, 2018. The acting Senior Assistant Deputy Minister of Public Safety decided to re-list Mr. Dulai and approved the recommendation to deny Mr. Dulai transportation for inbound and outbound international flights, as well as domestic flights. The PPAG recommendation and decision are referred to in documents (vi) of Exhibit A to her September 2019 affidavit (Revised Appeal Book pp 79–93).

VI. The public submissions of the Appellant

[55] Mr. Dulai presented his written submissions in a document dated March 21, 2022. In this document, he submits that the Minister's decision was unreasonable because it is not based on the facts and law before the Court. He also claims that the reasoning process that led to maintaining his name on the list was not rational, intelligible, or transparent. For these reasons, Mr. Dulai wants the Court to order the Minister to remove his name from the list.

[56] Mr. Dulai submits that the review conducted by the designated judge in a SATA appeal is consistent with a correctness standard of review and inconsistent with a reasonableness standard

of review, as those standards are described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. In these circumstances, Mr. Dulai believes it is more appropriate to call the designated judge's review one of correctness rather than reasonableness, despite the awkwardness of this label in light of the wording of subsection 16(4) of the SATA. However, from Mr. Dulai's perspective, the name given to the standard of review is less important than what the judge is empowered to do in a SATA appeal. For the reasons outlined above, the judge's duty in a SATA appeal to vigorously scrutinize and closely consider all the information and evidence before them without deference to the Minister's reasoning or conclusions is vital to affording procedural and substantive fairness to the listed person. Achieving such fairness is, in turn, critical to achieving Parliament's overarching objective regarding national security: ensuring a careful balance between the rights and freedoms of individuals while protecting Canada's national security and the safety of Canadians.

[57] Mr. Dulai states that his name can only be maintained on the no-fly list if there are "reasonable grounds to suspect" that he will travel by air to commit a terrorism offence. To be reasonable, the suspicion must be grounded in, and based upon, objectively discernible facts that can then be subjected to independent judicial scrutiny. As per *R v Chehil*, 2013 SCC 49 [*Chehil*], reasonable suspicion is a robust standard to meet. To be reasonable, the basis for the suspicion needs to be more than educated guesses, hunches, mere suspicions, or generalized suspicions. According to Mr. Dulai, the information and evidence before this Court do not establish reasonable grounds to suspect that he will travel by air to commit a terrorism offence. He states that the evidence presented by CSIS is incapable of meeting this legal standard because for the most part, it contains no objective facts capable of establishing a reasonable suspicion. Where it

does contain objectively discernible facts capable of contributing to a reasonable suspicion, Mr. Dulai affirms that he has provided a credible and reliable explanation for these facts. The Minister's withdrawal of a key piece of evidence (see written representations of the Appellant Parvkar Singh Dulai at page 28, para 86) against him further supports the conclusion that maintaining his name on the list is not reasonable.

[58] Mr. Dulai maintains that he does not have sufficient disclosure to know the critical evidence against him. These submissions are his best effort to respond to a case against him of which, he submits, he has not been made fully aware. As a result, some of these submissions may be irrelevant to the Court's analysis because he is responding to evidence that he incorrectly believes lies under the redacted portions of the PPIO memorandum.

[59] Mr. Dulai refuted every allegation presented against him and provided his own evidence in support of his arguments. A detailed summary of the allegations and his responses can be found at Annex B.

[60] Mr. Dulai submits that the evidence as a whole suggests that he is a well-respected, law-abiding, and effective advocate for Sikhs in Canada and across the globe. He claims that the Government has presented no evidence in a public setting that establishes that he has used violence, threats, or intimidation to promote Sikh interests and Sikh self-determination. Rather, all of the evidence shows that Mr. Dulai works within existing legal, social, and political structures to help the Sikh community. Mr. Dulai believes that his effective advocacy for Khalistan may make him a target for false accusations and political reprisals.

[61] Mr. Dulai suggests that the timing of his inclusion on the SATA list seems to support the theory that it was done at India's request and/or for political reasons. He explains that in February 2018, Prime Minister Justin Trudeau visited India where he met with Punjab Chief Minister Amarinder Singh and was reportedly given a list of nine Canadians "allegedly involved in promoting radicalism here as the 'Khalistan' issue [was] featured prominently in the talks between the two leaders" (see Zhao Affidavit, Exibit 3.1, p 322). An Indian news outlet subsequently reported that Mr. Dulai's and Mr. Brar's names were on the list that the Chief Minister gave to Prime Minister Trudeau. On March 29, 2018, the Minister rendered a decision in exigent circumstances to place Mr. Dulai on the SATA list. Mr. Dulai believes that the timing of events supports a reasonable suspicion that he has been placed on a no-fly list because of India's pressure resulting from his and Mr. Brar's involvement and advocacy for Sikh self-determination.

[62] Furthermore, Mr. Dulai believes the Minister's decision to prefer the CSIS evidence over the evidence he provided was irrational and unreasonable. He claims that the Minister did not conduct the requisite fact-finding and analysis to determine the credibility and reliability of CSIS evidence. According to Mr. Dulai, the Minister failed to read the media articles relied upon for the vast majority of the allegations against him. This was unreasonable, given that a review of the content and the tone of each article as a whole was necessary to allow the Minister to assess the credibility or reliability of the claims made in the articles.

[63] Mr. Dulai also believes it was unreasonable for the Minister to accept the information presented by CSIS at face value after he had persuasively refuted much of CSIS's unclassified

information. This should have caused the Minister to pause and examine the rest of CSIS's information more closely, but it did not. Instead, without any analysis or scrutiny, the Minister accepted CSIS's information as the truth and used it to reject Mr. Dulai's evidence and justify maintaining his name on the list.

[64] Mr. Dulai is of the opinion that the Minister's reasons for rejecting his evidence are not transparent because they are largely based on information that has been redacted without any meaningful summaries. He refers to *Vavilov* to say that the Supreme Court of Canada [SCC] held that it was "unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party" (*Vavilov* at para 95). According to Mr. Dulai, this is exactly what happened in his case and as a result, the Minister's reasoning is not transparent or intelligible.

[65] Lastly, Mr. Dulai claims that the Minister repeatedly relied on his *Charter*-protected speech, expressions of his religion and beliefs, and innocent associations as evidence that he would travel by air to commit a terrorism offence. He considers that using his non-violent expressions of his beliefs and his non-violent advocacy for Khalistan as evidence that he is a terrorist subverts the protection of the *Charter* and creates a chilling effect on public participation in the political realm. Mr. Dulai also argues that the Minister's reasoning is inconsistent with the objective of the SATA, which is to respect individual rights and freedoms while protecting national security. According to Mr. Dulai, the Minister's reliance on his

Charter-protected conduct as a basis for his suspicion is irrational because, under the law, it cannot form part of the grounds for suspicion.

VII. The public submissions of the Minister

[66] The Minister presented his written submissions on April 11, 2022, in which he requests an order that this appeal be dismissed and that Mr. Dulai's name be maintained on the SATA list. The Minister argues that SATA proceedings are procedurally fair and consistent with sections 6 and 7 of the *Charter*, and that the recourse decision is reasonable and justified on the evidence and the law.

[67] In the present decision, I focus on the submissions relating to the reasonableness of the Minister's decision. However, the Minister's submissions supporting the argument that SATA proceedings are procedurally fair and consistent with sections 6 and 7 of the *Charter* are available in the decision dealing with constitutional questions, issued concurrently.

[68] In his submissions, the Minister raises questions about the standard of review. He acknowledges the Court's obligation to ensure a fair appeal process and agrees that this requires that the Court play a robust, interventionist and gatekeeper function. However, the Minister submits that this function does not extend to the Court conducting a "correctness review" or an inquisitorial, *de novo* determination of whether there are "reasonable grounds to suspect" the person will engage or attempt to engage in an act that will threaten transportation security or travel by air for the purpose of committing a terrorist act or omission. While the wording of subsection 16(4) of the SATA contemplates that the record before the judge on appeal may be

different, the Minister is of the opinion that reasonableness is still the review standard that must be applied. Therefore, the focus of the reasonableness review must be on the decision actually made by the decision maker, including the reasoning process and outcome.

[69] The Minister asserts that the recourse decision is rational and tenable. The reasoning for the recourse decision as set out in the Memorandum dated January 30, 2019 explains the background and chronology of Mr. Dulai's case, the allegations set out in the CSIS case brief and the summary of Mr. Dulai's submissions. The recourse decision specifically addresses the contradictions between Mr. Dulai's assertion that he has never facilitated terrorist-related activities or been involved with Sikh extremists with information that demonstrates a pattern of involvement with Sikh extremism, and concerns about Mr. Dulai's foreign travel in 2012.

[70] The Minister asserts that the public summary of the evidence of the CSIS witness who testified during closed proceedings supports the credibility and reliability of the information contained in the case brief before the Minister's delegate. The Minister believes that the recourse decision to maintain Mr. Dulai on the SATA list is reasonable, and the reasons for doing so are internally coherent and contain a rational chain of analysis that is justified in relation to the facts and law.

[71] Both counsel for the AGC and one of the *Amici* made submissions on the incompressible minimum disclosure at the hearing in Vancouver in April 2022. The AGC counsel argued that when applied to the facts, both *ex parte* and open evidence met the reasonable grounds to suspect threshold and were consistent with the SCC decision in *Canada (Citizenship and Immigration) v*

Harkat, 2014 SCC 37 [*Harkat*]. The *Amici*, for their part, claimed to have specifically identified undisclosed allegations and evidence that, in their opinion, were within the incompressible minimum. They believe that both appeals still contain allegations and evidence to which the Appellants are unable to respond, instruct their counsel on, or even assist the *Amici* in their endeavours by providing them with information.

VIII. Issue

[72] The issue raised in this appeal is as follows:

1. Is the Minister's delegate's decision of January 30, 2019 reasonable based on the information available?

[73] The SATA appeal proceedings (section 16) require the designated judge to evaluate the evidence presented during the public and *ex parte* and *in camera* hearings, the evidence presented by the Appellant during the public hearings, and the *Amici*'s evidence. Thereafter, the designated judge must decide whether the decision to keep Mr. Dulai's name on the no-fly list is reasonable.

A. *The applicable standards*

(1) Standard of Review

[74] The SATA provides at subsection 16(2) that a listed person who has been denied transportation as a result of a direction made under section 9 may appeal a decision referred to in section 15 to a judge within 60 days after the day on which the notice of the decision referred to

in subsection 15(5) is received. Moreover, the statute mandates that if an appeal is made, the judge must, without delay, determine whether the decision to list the appellant is reasonable on the basis of the information available to the judge (subsection 16(4)).

[75] As outlined above, the Minister submits that based on subsection 16(4) of the SATA, the decision should be reviewed on a reasonableness standard while the Appellant submits that the review conducted by the designated judge in a SATA appeal is consistent with a correctness standard of review.

[76] As explained by the SCC in *Vavilov,* "where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision […] Of course, should a legislature intend that a different standard of review applies in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute" (*Vavilov*, para 37).

[77] I do not accept the Minister's argument that since the word "reasonable" appears in the subsection 16(4) of the SATA, the legislature intended that a reasonableness standard, as understood in the administrative law context, apply to the appellate review. That standard would entail that "the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable" (*Vavilov*, para 83). However, the SATA specifies that the appellate judge must "determine whether the decision is reasonable *on the basis of the information available to the judge*." Indeed, the SATA allows for fresh evidence to be presented

on appeal. As a result, a designated judge hearing a SATA appeal may be of the view that the Minister's rationale, based on the information that was before him, is thoroughly unreasonable even though the judge may agree that the outcome is reasonable based entirely on the fresh evidence presented in the appeal. Put differently, the SATA regime could lead to a situation where the factual foundation for the Minister's decision is refuted during the appeal proceedings, but that new reliable and appropriate evidence received by the designated judge would be sufficient to justify a decision for an appellant to remain on the no-fly list. The rationale for a decision cannot be reviewed on a reasonableness standard when the record on appeal is no longer the same. This analysis is reflected in Parliament's choice in opting for an appellate scheme – which is less concerned with the rationale – over a judicial review framework.

[78] Neither do I believe the Appellant is correct in stating that the appellate standard of review in the SATA resembles a correctness standard given that the decision is one of mixed fact and law, which would attract the standard of the palpable and overriding error standard of review.

[79] Considering the text of subsection 16(4) in conjunction with the SCC's guidance in *Vavilov*, the appellate standard of review prescribed by statute is that the designated judge must determine whether the outcome of the decision under review – effectively the listing of the individual pursuant to section 8 of the SATA – is reasonable in light of the evidentiary record on appeal. In essence, this requires that the designated judge evaluate, based on the appeal record, whether it is reasonable to find that there are reasonable grounds to suspect the appellant will engage in the acts described in section 8 of the SATA.

[80] Determining the applicable review standard in the SATA legislation was not a simple endeavour and I benefited from counsel's submissions at the public hearings. I had concerns, expressed during the public hearings, that the applicable standard of review could not simply amount to "rubber-stamping" the administrative recourse decision given the scheme of the SATA, in particular the fact that I had access to more information than was before the Minister's delegate. I am satisfied that the legislatively prescribed standard, as I have outlined it, constitutes a robust review, and is coherent with the active role a designated judge must play in a SATA appeal.

(2) The threshold standard

[81] In assessing whether the overall evidence is sufficient to find that the decision to list the individual, in this case Mr. Dulai, is reasonable, a designated judge must remain cognizant that the decision to list must be evaluated on the reasonable grounds to suspect threshold.

[82] Such a threshold implies that the evidentiary record must show grounds that are more than mere suspicion and less than belief, and it must be based on objective evidence that suggests a possibility, but not necessarily a probability.

[83] The SCC explained the standard of reasonable grounds to suspect in *Chehil*, a criminal case involving the use of drug-detection dogs. I believe it is informative to quote a portion of that decision as such teachings, I suggest, are applicable to the SATA appeals:

> [26] Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This

scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown*, Binnie J. provided the following definition of reasonable suspicion, at para 75:

> The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.

[27] Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.

[29] Reasonable suspicion must be assessed against the totality of the circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience: see *R. v Bramley*, 2009 SKCA 49, 324 Sask. R. 286, at para 60. A police officer's grounds for reasonable suspicion cannot be assessed in isolation: see *Monney*, at para 50.

[30] A constellation of factors will not be sufficient to ground reasonable suspicion where it amounts merely to a "generalized" suspicion because it "would include such a number of presumably innocent persons as to approach a subjectively administered, random basis" for a search: *United States v. Gooding*, 695 F.2d 78 (4th Cir. 1982), at p 83. The American jurisprudence supports the need for a sufficiently particularized constellation of factors. See *Reid v. Georgia*, 448 U.S. 438 (1980), and Terry v. Ohio, 392 U.S. 1 (1968). Indeed, the reasonable suspicion standard is designed to avoid indiscriminate and discriminatory searches.

[32] Further, reasonable suspicion need not be the only inference that can be drawn from a particular constellation of factors. Much as the seven stars that form the Big Dipper have

> also been interpreted as a bear, a saucepan, and a plough, factors that give rise to a reasonable suspicion may also support completely innocent explanations. This is acceptable, as the reasonable suspicion standard addresses the possibility of uncovering criminality, and not a probability of doing so.
>
> [33] Exculpatory, neutral, or equivocal information cannot be disregarded when assessing a constellation of factors. The totality of the circumstances, including favourable and unfavourable factors, must be weighed in the course of arriving at any conclusion regarding reasonable suspicion. As Doherty J.A. found in *R. v Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p 751, "[t]he officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable". This is self-evident.
>
> [Emphasis added.]

[84] From these reasons, "reasonable grounds to suspect," applicable in the present appeal, represents a lower standard than "reasonable and probable grounds to believe." The totality of the evidence, which includes exculpatory evidence, public evidence and the confidential evidence presented during *ex parte* and *in camera* hearings must be considered. Findings must not be based on a single set of facts but rather on some consistent indicators, whether in the public or confidential evidence, or both. This does not imply that there must be only one inference drawn from a set of facts; but such a determination must take into account the entirety of all the evidence presented. Overall, the threshold requires determining whether there exists a possibility that the Appellant would engage or attempt to engage in an act that would jeopardize air transportation security or travel by air for the purpose of committing an act or omission related to terrorism elsewhere or in Canada, rather than the probability of him doing so.

[85] I may add that in an appeal where evidence was presented *ex parte* and *in camera* without the presence of the Appellant but with the participation of *Amici*, such evidence must be

scrutinized in order for the designated judge to depend solely on what is reliable, factual and serious. In these cases, the principles mentioned above must be applied meticulously, with vigour and consistency.

B. *Conflicting evidence has to be assessed on the basis of the balance of probabilities*

[86] The Minister's witnesses were examined and cross-examined at the first stage of the *ex parte* and *in camera* proceedings over three (3) days in the matter of *Dulai 2021* in November 2020. The Minister submitted new evidence, including some pertaining to the injury to national security caused by the disclosure of contested redactions and proposed summaries, as well as some on the reliability and credibility of the redacted information. Essentially, the initial burden of justifying why certain information should be kept confidential was on the Minister. Following these hearings, new information was disclosed to the Appellant through lifts of redacted information and the issuance of summaries of redacted information.

[87] Both parties were given the opportunity to be heard; they made written submissions and public hearings were convened to hear oral evidence. The Minister retained the initial burden of proof, but as the Appellant presented his own evidence in response to the charges levelled against him, some contradicting information emerged.

[88] These conflicting factual viewpoints had to be assessed. The *Immigration and Refugee Protection Act*, (SC 2001, c 27) [IRPA] certificate proceedings, which share many of the same legal aspects as the SATA (see reasons in *Brar 2020* at paras 128–139), provide useful guidance in assessing evidence where opposing facts are presented, namely that conflicting facts should be

assessed on the balance of probabilities standard. The following IRPA jurisprudence reflects this principle. In *Almrei (Re)*, 2009 FC 1263, Justice Richard Mosley had this to say:

> [101] I am of the view that "reasonable grounds to believe" in s. 33 implies a threshold or test for establishing the facts necessary for an inadmissibility determination which the Ministers' evidence must meet at a minimum, as discussed by Robertson, J.A. in *Moreno*, above. When there has been extensive evidence from both parties and there are competing versions of the facts before the Court, the reasonableness standard requires a weighing of the evidence and findings of which facts are accepted. A certificate can not be held to be reasonable if the Court is satisfied that the preponderance of the evidence is to the contrary of that proffered by the Ministers.

[89] In *Jaballah (Re)*, 2010 FC 79, Justice Eleanor Dawson (as she then was) adopted a similar view:

> [45] Further, notwithstanding the interpretive rule contained in section 33 of the Act, where there is conflicting evidence on a point, the Court must resolve such conflict by deciding which version of events is more likely to have occurred. A security certificate cannot be found to be reasonable if the Court is satisfied that the preponderance of credible evidence is contrary to the allegations of the Ministers.

[90] In this spirit, the challenge now shifts to analyzing whether the Minister's decision is reasonable in light of the evidence available to the judge (see subsection 16(4) of the SATA and para 117 in *Brar 2020*).

[91] In light of the aforementioned principles, it is appropriate to go over the public evidence submitted by both parties and make necessary determinations. I shall begin with a description of the Minister's delegate decision before moving on to the public evidence presented.

C. *The Minister's decision under review*

[92] The decision dated January 30, 2019 is an 11-page document, including the cover letter, which concludes that there are reasonable grounds to suspect that 1) the Appellant will engage or attempt to engage in an act that would threaten transportation security, or 2) travel by air to commit certain terrorism offences. As a result, the Appellant's status as a listed person under the SATA is maintained.

[93] In the same decision, one can also see 10 pages from a PPAG redacted document that was provided to the Associate Deputy Minister to consider before making a decision. It includes a backgrounder, a recourse case chronology with five tabs (four of which relate to Mr. Dulai's application and exchanges of public correspondence, while one refers to a confidential CSIS case brief), the considerations from both parties (including the Appellant's submissions and a redacted summary of the CSIS case brief), an analysis, and the options presented to the Minister's delegate, including the one chosen.

[94] I will now turn to the public disclosure of the information and the case against Mr. Dulai as it evolves through the appeal process.

D. *The scope of the public evidence resulting from the appeal proceedings*

[95] The appeal proceedings allowed the Appellant to access more information than what he was provided with during the recourse proceeding. On August 10, 2018, the Appellant received a response from the PPIO after sending his administrative review application (pursuant to section

15 of the SATA) on May 28, 2018. It was the first time that Mr. Dulai was privy to a public outline of some of the allegations levelled against him. The response from the PPIO was intended to provide Mr. Dulai with a reasonable understanding of what would eventually be presented to the Minister's delegate, as well as an opportunity to respond to the claims through written submissions. The document made it clear that classified information would be included "for the Minister's delegate's eyes only." The following is a list of the allegations and comments as found in the Revised Appeal Book dated October 12, 2021 at pages 158 and 159:

> 1. Media reporting dated November 19, 2017, revealed that the Indian (Punjab) Police linked United Kingdom national Jagtar Singh JOHAL (arrested in India on November 4, 2017 for his alleged role in several high profile killings of religious-political leaders in Punjab) with an accused in the 2009 murder case of R. SINGH. The police revealed that JOHAL went to Canada in August 2016, and met militant elements such as Mr. DULAI.
>
> 2. Open information dated November 2017 showed that Mr. DULAI released the following message related to JOHAL: "Saddened to hear the reports of torture of Jagtar Singh JOHAL after his arrest in Punjab. Whatever the allegations on him may be, every person has the right to a free trial. As Sikhs we pray for Sarrbat Da Bhalla."
>
> 3. Mr. DULAI was associated with the Sikh Vision Foundation (SVF/Sikh Vision (SV)) in the mid 2000s. Mr. DULAI worked as an investigator for the Air India defence teams, and represented the SVF. Media reporting dated February 2005 stated that the SVF gave a $175,000 mortgage to Ajaib Singh BAGRI a year after his 2000 arrest in connection with the Air India bombing. Bargri was acquitted in 2005.
>
> 4. Media reporting in 2003 described SV's website as displaying numerous photos of Babbar Khalsa (BK) founder and former B.C. resident Talwinder Singh PARMAR referred to as 'holy priest' and 'martyr'. (BK is a listed entity in Canada since June 2003 pursuant to subsection 83.05(1) of the *Criminal Code*). In one picture PARMAR was sitting in front of the Sikh holy book and two AK-47s and other weapons and there were photos of SV leaders wearing black vests emblazoned with the BK logo. A photo featured a teenage boy with a gun and ammunition belt beside a bolt lightning and another picture showed the assassins of India

> prime minister Indira Gandhi, above a caption that referred to them as ‘martyrs’. There was also a poem that criticized those who promote non-violence in the name of Sikhism. Media reporting of April 2007 represents Mr. DULAI as the Vaisakhi parade organizer in Surrey, B.C., that included a tribute to PARMAR.
>
> 5. 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.
>
> 6. Mr. DULAI is a contact of Bhagat Singh BRAR. According to an April 17, 2018 media report, BRAR was identified as a Canadian Khalistani extremist having received a Pakistani visa for a Sikh pilgrim in April 2018. The report referred to a meeting in Lahore, between the leaders of Lashkar-e-Tayyiba (LeT) (a listed entity in Canada pursuant to subsection 83.05(1) of the Criminal Code) and Sikh militancy, and claimed that Pakistan is inciting pro Khalistan / anti India sentiment. The report also referred to the Pakistan Interservices Intelligence Directorate 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’.
>
> 7. Mr. DULAI is suspected to be a facilitator of terrorist-related activities, and has shown ongoing pattern of involvement within the Sikh extremist milieu.
>
> 8. In addition to the foregoing information, Public Safety Canada relies on classified information. This information further illustrates Mr. DULAI’s support for terrorist activities, as well as his associations with individuals of concern to the national security of Canada.

[96] Mr. Dulai filed his submissions on January 2, 2019 after a number of requests for extensions were granted. As mentioned in these reasons, a decision to keep him on the SATA list was rendered on January 30, 2019.

[97] On April 18, 2019, an appeal was lodged against that ruling.

[98] An appeal book was prepared in accordance with the *Federal Courts Rules* (SOR/98-106, subsections 343(1) to (5)) and contained more information than had previously been made publicly available. Among the many documents found in the appeal book were those filed by the Appellant in support of his delisting application. It also contained 11 documents from Public Safety Canada, one of which was the Minister's delegate's decision to maintain Mr. Dulai on the SATA list. The remaining 10 documents containing redactions found in the Revised Appeal Book at pages 36–93 and 334–355 are summarized below:

> Exhibit "A"
>
> A 6-page document dated March 29, 2018: A decision of the PPAG chair to register Mr. Dulai on the *SATA* list in exigent circumstances and denying international transportation (inbound and outbound of the country) but allowing domestic flights with additional screening;
>
> An event report dated April 1, 2018 related to WestJet flights 137 (Calgary YYC to Vancouver YVR) and 702 (Vancouver to Toronto). The report mentions that Mr. Dulai was authorized to board another flight with additional screening;
>
> Unsigned handwritten notes on a *SATA* call sheet dated April 1, 2018 and describing the timeline surrounding the issuance of the direction to allow Mr. Dulai to board a WestJet flight from Calgary with additional security screening;
>
> A Government Operations Centre report dated April 1, 2018 about the incident and the direction to WestJet from the same date;
>
> A 7-page unsigned document dated April 5, 2018 (AGC0008) recommending that Mr. Dulai be kept on the *SATA* list for both domestic and international flights;
>
> A 10-page document dated April 10, 2018 in which the PPAG recommends the listing of Mr. Dulai to the Senior Assistant Deputy Minister, which was accepted on April 13, 2018. It also includes the document mentioned above signed by all PPAG members and recommending boarding denial on international flights and requiring additional screening for domestic flights;

> A 7-page document, which includes a report by Transport Canada dated May 17, 2018 and details the sequence of events that resulted in the issuance of a direction to WestJet not to allow Mr. Dulai to board the flight from Vancouver to Toronto. It also included handwritten notes on a *SATA* call sheet from the same date;
>
> A 14-page document dated August 21, 2018 and addressed to the Senior Assistant Deputy Minister in which the PPAG seeks a decision on the listing and recommended directions for […] new nominations; and ask to agree to the de-listing and to updates for […] listed individuals. It includes a recommendation to relist Mr. Dulai on August 16, 2018, which was accepted.
>
> Exhibit "C"
>
> A 10-page document dated February 14, 2019, and addressed to the Senior Assistant Deputy Minister in which the PPAG recommends (which is accepted) the update of the *SATA* list which included the name of Mr. Dulai;
>
> A 12-page dated May 15, 2019, and addressed to the Senior Assistant Deputy Minister in which the PPAG recommends (and is accepted) new listings and updates for […] listed individuals. It also includes a 6-page case brief on Mr. Dulai dated May 7, 2019.

[99] As per paragraph 16(6)(a) of the SATA, the Minister asked the Court for *ex parte* and *in camera* hearings to hear information or other evidence that he believed could be injurious to national security or endanger the safety of any person if disclosed. Two witnesses were examined and cross-examined in the presence of the Minister's counsel and the *Amici* over the course of several days of hearings. Throughout the hearings, this Court issued communications to the Appellant, his lawyers, and the Minister's public counsel summarizing the proceedings as they progressed.

[100] In addition to the public summary of the hearings that was communicated to the Appellant (Public Communication No. 7) on November 3, 2020, three additional Public

Communications were issued between September 25, 2020 and December 2, 2020. Below is an overview of what was published :

> Public Communication (no number assigned), September 25, 2020
>
> *Ex parte* and *in camera* case management conference was held on September 22, 2020 in the matters of *Brar v Canada* (T-669-19) and *Dulai v Canada* (T-670-19).
>
> Counsel for the AGC and the *Amici* provided an update on the progress of the two appeals. The AGC received the *Amici*'s position on each of the national security redactions on August 31, 2020. The Attorney General counsel and the *Amici* have met three times since then to discuss the redactions. These meetings have been productive – the Attorney General counsel and the *Amici* have largely agreed on which redactions are contentious and which are not, and which redactions can be lifted.
>
> The *Amici* advised the Court, further to this Court's oral Direction dated May 11, 2020, and in light of paragraphs 247-249 of the recent reasons, that no further steps were required regarding the information that the AGC has withdrawn.
>
> The Attorney General counsel filed a replacement *ex parte* affidavit on September 10, 2020 for the redactions claimed by CSIS. CSIS' previous affiant is no longer available. Additionally, the Attorney General counsel will file a supplemental *ex parte* affidavit by September 25, 2020 from CSIS that will address, among other things, the credibility and reliability of the redacted information in light of Justice Noël's reasons issued on June 30, 2020. The supplemental affidavit will be affirmed by the same affiant as the replacement affidavit.
>
> The *Amici* indicated that they would likely call between 2-4 witnesses for each appeal, to be determined shortly. Counsel for the AGC will canvass the potential witnesses' availability, discuss scheduling with the *Amici*, and the Attorney General counsel and *Amici* will jointly advise the Court. As for the scheduling of hearing dates, they shall be scheduled in October and if required in early November.
>
> The Attorney General counsel proposed that each witness also be provided with the proposed summaries as an aide memoire. The *Amici* explained that they are not necessarily opposed to putting proposed summaries before witnesses. The *Amici* took the position that the determination of whether a proposed summary is injurious

to national security is ultimately a question for the Court, and that the Court could make that determination with or without additional evidence from the witness on a proposed summary.

Finally, the Attorney General counsel and the *Amici* advised the Court of their joint position that written and oral arguments are necessary following the two hearings.

Public Communication No. 6, October 7, 2020

An *ex parte* and *in camera* hearing was held on October 5, 2020 in the matters of *Brar v Canada* (T-669-19) and *Dulai v Canada* (T-670-19). The *Amici* took the Court through a list of redactions about which the Attorney General counsel and *Amici* have reached an agreement. In some instances, the agreement has been to lift the redaction. In others, the agreement has been to summarize the redacted information. In others, the agreement has been that no lift of the redaction or summary can be made consistently with national security concerns. Those matters will have to be addressed in further *ex parte* and *in camera* proceedings.

The Court accepted the lifts and summaries agreed to date. They will be released to the Appellants together with further lifts and summaries of redacted information following the upcoming hearings.

The *Amici* and Attorney General counsel expect to have more agreed-upon lifts and summaries to present to the Court at the upcoming hearings. Matters that cannot be agreed by the *Amici* and the Attorney General counsel will be determined by the Court following the upcoming hearings.

Public Communication No. 8, December 2, 2020

The *ex parte* and *in camera* examination and cross-examination of the Minister's witnesses in the matter of *Dulai v Canada* (T-670-19) took place over three (3) days in November, namely November 16, 17 and 23, 2020. The Minister presented evidence on the injury to national security of disclosing the contested redactions and proposed summaries, as well as the reliability and credibility of the redacted information.

At the outset of the hearing, the Attorney General counsel and the *Amici* consented to an order that would render the evidentiary record resulting from the Brar hearings on October 14, 15, 16, 19 and 20, 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

> (the "Evidentiary Order"). This allowed for efficiencies in the Dulai examinations and cross-examinations.
>
> Court began at 9:45 a.m. on November 16, 2020. The Attorney General counsel 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 Attorney General counsel, (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.
>
> Court resumed in the morning of November 17, 2020 at 9:30 a.m. 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 Attorney General counsel conducted a brief re-direct of the CSIS witness.

[101] At the conclusion of these hearings, a decision had to be made with respect to the validity of the redactions made by the Minister over information found in documents in the revised appeal book. To that end, the Court undertook extensive work to establish which redactions should be confirmed, which redactions needed to be partially lifted, and which redactions needed to be summarized. On October 5, 2021, an updated Public Order and Reasons was issued, which comprised one public and two classified annexes:

A. Public Annex A – Lifts and partial lifts;

B. Classified Annex B – Uncontested redactions and summaries;

C. Classified Annex C – Contested redactions and summaries.

[102] On October 12, 2021, the Revised Appeal Book was filed, which included my findings regarding the redactions and added further information. A detailed examination of pages 36–93, 301-312, and 334–355 of the Revised Appeal Book reflects the amended Public Order and Reasons issued on October 5, 2021. When comparing pages 36–93, 271–284, 321–342 of the initial appeal book to the revised one, one can only conclude that the scope of disclosure is greater and additional details are provided to the Appellant. I would add that the additional information is significant in nature and gives the Appellant greater knowledge of the grounds upon which he was listed.

[103] The summary of the allegations against the Appellant is another indicator of the scope of disclosure received by him. The Court included the following table in the amended Order and Reasons dated October 5, 2021, at para 90. The table relates to the publicly disclosed allegations and refers to the documents annexed to the Minister's delegate's decision of January 30, 2019, and to the Memorandum to the Senior Assistant Deputy Minister case brief dated August 18, 2018 when Mr. Dulai was relisted:

Allegation	Reference in Decision1
Disclosed Allegations	
1. Mr. Dulai is suspected to be a facilitator of terrorist-related activities and has shown an ongoing pattern of involvement within the Sikh extremist milieu.	See footnote

[1] Reference is to the Memorandum for the Associate Deputy Minister, Application for Recourse Case # 6343-02-14 (AGC0009) and to the case brief dated August 16, 2018 attached to the Memorandum at Tab E (AGC0005) where information was contained in the attached case brief at tab E but not in the Memorandum.

2. Mr. Dulai is a subject of Service investigation.	Page 2 of 10 Page 9 of 10
3. Mr. Dulai was reported to be connected to individuals within the Sikh extremist milieu.	Page 2 of 10 Page 9 of 10
4. Mr. Dulai was previously associated with individuals implicated in the assassination of Rulda Singh, the Punjab-based chief of Rashtriyasikh Sangat's Sikh arm in India in 2019.	Page 8 of 10
5. Mr. Dulai is associated with the International Sikh Youth Federation (ISYF) and Babbar Khalsa (BK).	Tab E, August 2018 case brief, pp 5 and 8
6. Jagtar Singh Johal went to Canada in August 2016 and met militant elements such as Mr. Dulai, according to media reporting dated November 19, 2017.	Page 3 of 10
7. Mr. Dulai retweeted a message of support for Mr. Johal.	Page 3 of 10
8. Mr. Dulai is a close contact and business associate of Mr. Brar and has been described by Mr. Brar as a very vocal supporter of Khalistan. According to media reports, Mr. Brar is a Canadian Khalistani extremist. An April 17, 2018 media report identified Mr. Brar as a Canadian Khalistani extremist. 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 3 of 10 Page 4 of 10 Page 9 of 10
9. Mr. Dulai was associated with the Sikh Vision Foundation (SVF) in the mid 2000s. Mr. Dulai worked as an investigator for the Air India defence teams and represented the SVF. The SVF gave a $175,000 mortgage to Ajaib Singh Bagri a year after his 2000	Page 4 of 10

arrest in connection with the Air India bombings. Bagri was acquitted in 2005. The SVF displayed support for the BK founder and the assassins of Indian Prime Minister Indira Gandhi.	
10. Mr. Brar was involved in collecting funds and these funds were transferred to his father (Lakhbir Singh Brar, the Pakistan-based leader of the ISYF) and another individual in Pakistan for further distribution to terrorist families in Punjab.	Tab E, August 2018 case brief, Supplemental Information

[104] Mr. Dulai received disclosure of seven allegations during the administrative review (Response from the PPIO dated August 10, 2018). The 10 allegations above provide Mr. Dulai with a better understanding of the Minister's grounds against him. A close reading of these allegations shows that the grounds that led to his listing are very serious.

[105] The issuance of summaries related to information protected by a good number of redactions is also informative for Mr. Dulai. I encourage the reader to examine them. The summaries may at times indicate that part of the information is unrelated to Mr. Dulai (see pp 337–342 of the Revised Appeal Book) or convey what the redactions are about (see pp 17–18 of the Revised Appeal Book), without jeopardizing national security. These are only a few of many examples.

[106] In addition, public hearings were held in Vancouver in April 2022 where, for the first time, the Appellant had an opportunity to be heard in person.

E. *Legal principles related to the disclosure of national security information in judicial civil and administrative proceedings*

[107] The SCC has frequently acknowledged that national security grounds can limit the degree of information disclosed to the person impacted (see *Charkaoui I* at para 58). However, this constraint needs to be exercised with care and in accordance with the fundamental principles of justice. Former Chief Justice McLachlin summarizes this delicate balance in *Harkat* at para 43:

> [43] 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.

[108] As mentioned above, it should be emphasized that when national security disclosure considerations are involved in proceedings, procedural fairness does not require a perfect process. The appeal scheme in the SATA legislation reflects this reality. In the case at hand, a great deal of disclosed information relates to the grounds for the Minister's delegate's decision. As a result, Mr. Dulai was in a better position to respond to the case against him.

[109] During public hearings, the expression "incompressible minimum disclosure" was used multiple times, and it was used even more frequently during confidential hearings. Former Chief Justice McLachlin discussed the concept in *Harkat* in the context of IRPA at paras 55–56:

> [55] Parliament amended the IRPA scheme with the intent of making it compliant with the s. 7 requirements expounded in

> *Charkaoui I*, and it should be interpreted in light of this intention: *R. v Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at paras 28-29. The IRPA scheme's requirement that the named person be "reasonably informed" ("suffisamment informé") of the Minister's case should be read as a recognition that the named person must receive an incompressible minimum amount of disclosure.
>
> [56] Under the IRPA scheme, a named person is "reasonably informed" if he has personally received sufficient disclosure to be able to give meaningful instructions to his public counsel and meaningful guidance and information to his special advocates which will allow them to challenge the information and evidence relied upon by the Minister in the closed hearings. Indeed, the named person's ability to answer the Minister's case hinges on the effectiveness of the special advocates, which in turn depends on the special advocates being provided with meaningful guidance and information. As the House of Lords of the United Kingdom put it in referring to disclosure under the British special advocates regime, the named person
>
> > must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Where the open material consists purely of general assertions and the case is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be. (*Secretary of State for the Home Department v A.F.* (No. 3), [2009] UKHL 28, [2009] 3 All E.R. 643, at para 59, per Lord Phillips of Worth Matravers)

[110] Even prior to *Harkat*, however, other important cases such as *Charkaoui I* and *R v Ahmad*, 2011 SCC 6 [*Ahmad*], considered the limits imposed on the disclosure of national security information :

> [7] As we stated in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, the Court "has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual" (para 58). But we took care in *Charkaoui* to stress as well the importance of the principle of fundamental justice that "a

> person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case" (para 61). *Charkaoui* was an immigration case. In criminal cases, the court's vigilance to ensure fairness is all the more essential. Nevertheless, as we interpret s. 38, the net effect is that state secrecy will be protected where the Attorney General of Canada considers it vital to do so, but the result is that the accused will, if denied the means to make a full answer and defence, and if lesser measures will not suffice in the opinion of the presiding judge to ensure a fair trial, walk free. While we stress this critical protection of the accused's fair trial rights, we also note that, notwithstanding serious criticisms of the operation of these provisions, they permit considerable flexibility as to how to reconcile the accused's rights and the state's need to prevent disclosure. (*Ahmad* at para 7)

[111] The concept of incompressible minimum disclosure is defined as allowing the named person to receive sufficient disclosure to know and respond to the case against them (*Harkat* at para 56). That being said, where some information is redacted, a listed person will most likely always claim that further disclosure is required. The tension between disclosing enough information to allow the listed person to answer the case against them, while at the same time preserving national security interests, is heightened by the important stakes on both sides.

[112] Although some may argue that there is insufficient disclosure as long as some information remained redacted, the SCC has clearly indicated that there must be some compromise. The Appellant is expected to want to know the sources of the information that implicates him, as well as the specifics of the confidential information. Since such disclosure would threaten national security, alternatives to disclosure must be considered.

[113] Indeed, counsel for the Appellant repeatedly asked this Court to disclose details on sources of information. However, as quoted in part in *Harkat* at paragraph 56, the process can be

fair even without disclosure of the sources. Lord Phillips of Worth Matravers in *Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC)*, [2009] UKHL 28, made that clear when he wrote at para 59:

> [59] […] This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.
>
> [Emphasis added.]

[114] In *Harkat*, the SCC determined that "Parliament's choice to adopt a categorical prohibition against disclosure of sensitive information, as opposed to a balancing approach, does not constitute a breach of the right to a fair process" (*Harkat* at para 66). In this instance, the Appellant was able to obtain information that had initially been redacted because evidence that did not meet the criteria for being deemed injurious to national security was made public through lifts and summaries. Mr. Dulai may not know all of the information supporting the claims, or even all of the allegations against him, but he does know what he is alleged to have done, as evidenced by the disclosure process in this instance and his responses to the allegations made against him. Exposing more information than what is already disclosed would be injurious to national security or endanger the safety of any person. As a result, disclosure restrictions had to be established, but not to the point where the Appellant was denied access to sufficient information to understand the case against him and give proper directions to his counsel. As explained in the concurrent decision addressing constitutional issues, while these provisions may

be an imperfect substitute for full disclosure in an open court (*Harkat* at para 77), the combination of summaries, additional disclosure of information, participation of *Amici* and public hearings resulted in fairness of the proceedings.

F. *Mr. Dulai's response to the allegations made against him*

[115] During the administrative review procedure, Mr. Dulai filed submissions in response to the seven claims levelled against him, as well as on the validity of the SATA process (see pp 157–180 of the Revised Appeal Book). He also included 34 letters of support, media clippings, and his Canadian Border Services Agency air travel record, among other things, in support of his claim. Mr. Dulai's response is summarized in the Minister's delegate decision dated January 30, 2019 (see pp 14–17 of the Revised Appeal Book). All claims are discussed in the analysis portion of the aforementioned decision (see pp 17–19 of the Revised Appeal Book) in light of Mr. Dulai's submissions. The following is the conclusion:

> Although Mr. Dulai presented reasonable justifications to counter certain allegations made against him, officials would be remiss to discount the credibility of the above derogatory information presented by CSIS – in particular, that which was provided by the Canadian agency. Taken together, the seriousness of these allegations, as well as his numerous associations with individuals […] involved with the Sikh extremist milieu, there are reasonable grounds to suspect that Mr. Dulai will engage, or attempt to engage in, an act that would threaten transportation security or travel by air for the purpose of committing certain terrorism-related offences, as set out in section 8(1)(b) of SATA. As such, the PPIO is of the opinion that the legal threshold to maintain listing is met. (Revised Appeal Book at page 19, Memorandum for the Associate Deputy Minister, Passenger Protect inquiries office application for recourse case #6343-02-14, January 30, 2019)

[116] It is therefore evident from the above passage that the Minister's delegate relied on confidential information to arrive at his conclusion.

IX. Findings resulting from the appeal proceedings

[117] This Court has gone to considerable lengths to ensure that this appeal was conducted as openly as possible while adhering to obligations imposed by statute relating to national security. Accordingly, as noted above, confidential reasons are being issued concurrently with the current public reasons to address classified material that could not be shared with the public and are contained in Annex C. These confidential reasons include a table containing classified comments on the determinations made in connection to each of the 10 public allegations found in the table at Annex B of the current reasons, which contains unclassified comments on the allegations.

[118] I must remind the Appellant that my function as gatekeeper was fully assumed in both public and *ex parte* and *in camera* sessions. To that end, I had to make sure that the Minister's decision to place the Appellant on the no-fly list was reasonable. I was in charge of ensuring that the processes were fair throughout the proceedings. Hence, I envisioned the *Amici*'s role and mandate as representing the Appellant's interests as a substantial substitute for full disclosure and the Appellant's personal participation in the *in camera* portion of the proceedings. The two *Amici* have acted vigorously and effectively on behalf of the Appellant. They have performed their duties with professionalism, knowledge, and tenacity not only during closed hearings with witnesses, but also at the confidential stage of written submissions. They expressed views that differed from the Minister's not only in evaluating the redactions made, but also on a number of legal issues relating to the reasonableness of the decision prior to and after the public hearings.

The *Amici*, in my opinion, were substantial substitutes to full disclosure and participation in the confidential portion of the appeal.

[119] Having dealt with special advocates in the past, I believe that in this instance, their presence would not have changed the outcome. I consider the June 2020 mandate given to the *Amici* to be a comparable equivalent to the legislative role given to special advocates. It is also my view that the involvement of special advocates would not have facilitated the Appellant obtaining any additional disclosure of information. Once national security information is identified, it must be protected regardless of whether an *amicus* or a special advocate is involved. Furthermore, and as discussed in the constitutional decision at para 214, dealing with special advocates can be challenging because their functions, responsibilities, and power are fixed, with little room for manoeuvring. Special advocates with no restrictions on resources can present a slew of motions that can be time-consuming and sometimes ineffective.

[120] Paragraph 16(6)(e) of the SATA provides that the designated judge may receive anything that, in the judge's opinion, is reliable and appropriate. I have received and considered evidence and because of its sensitivity, it cannot be disclosed. This evidence was put on the record in response to questions asked during the *ex parte* hearings mainly by the CSIS witness and it relates to some of the public allegations, or to the Appellant. Further information is available in the confidential reasons.

[121] The SATA also provides at paragraph 16(6)(f) that a judge may rely on evidence that has not been disclosed to an appellant, even by way of a summary. In *Harkat*, former Chief Justice McLachlin commented on a similar provision in IRPA:

> [39] The IRPA scheme provides that the judge's decision can be based on information or evidence that is not disclosed in summary form to the named person: s. 83(1)(i). It 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.

The determinations in this case deal with 10 public allegations that the Appellant is aware of, but as previously stated, there is information in relation to some of them that simply cannot be disclosed, partially disclosed, or summarized. The Appellant may not be aware of all the details, but he knows the essence of the allegations levelled against him and has had the opportunity to answer to each one.

[122] Having said that, I could not ignore the material that was kept confidential for national security reasons. Each allegation that has not been disclosed to the Appellant is related to a public allegation in the appeals. Further, confidential information is related in some manner to one or more public allegations that the Appellant was aware of, or was consistent with comparable information mentioned in the public allegations. As a result, the appellant is aware of the core of the case made against him. In *ex parte* and *in camera* sessions, some of this information was discussed in depth. I want to make it clear that none of my determinations are based solely on undisclosed facts or allegations. The Court's analysis considered both sets of allegations – disclosed and undisclosed – and the determinations are all connected to the 10 allegations that were made public. Ultimately, I made a decision on whether the Minister's delegate's conclusion was reasonable based on the 10 public allegations known to Mr. Dulai.

[123] Based on the incompressible minimum disclosure doctrine discussed in *Harkat*, which was also the subject matter of the reasons in *Brar 2021* at paras 60–71, the *Amici* argued that there were irreconcilable tensions, and that this Court should order the withdrawal of some of the unknown information. For the following reasons, I made a different decision: the information in question relates to the Appellant; the information is relevant to the 10 public allegations since it directly or indirectly pertains to them; and the information is not only reliable and appropriate, but also material to the appeal. The Appellant is aware of the substance of the allegations levelled against him, and he is aware of 10 specific allegations.

[124] Based on the disclosure process and the resulting disclosed information, the 10 public allegations, examining the disclosed material and taking into account the material that cannot be disclosed due to national security concerns, I believe the Appellant had more than a passing knowledge of the essence of the case brought against him. His response to the administrative review, recent affidavit, and testimony all reflect a thorough understanding of the allegations made against him.

[125] Initially, and for a period of approximately two months, the *Amici* were allowed to converse, confer, and discuss the public case with the Appellant and his lawyers. As the case progressed, the Appellant was able to have one-way communication with the *Amici* at all times. When a problem arose, the *Amici* had the option to bring the matter to the attention of this Court. Public communications and the filing of the Revised Appeal Book provided additional disclosure, placing the Appellant in a position of increased knowledge and allowing him to make provide instructions to both his lawyers and the *Amici*. While I recognize that the Appellant does

not know everything, I am confident that he knows a lot more than he does not, and that he understands the essence of the case brought against him.

[126] I am also confident that national security has been protected during this process, as it is one of my judicial responsibilities. I did it with a bias in favour of transparency and disclosure. Ultimately, I had to follow the law knowing that I had reached the limit of what I could disclose. Had I not been convinced that Mr. Dulai knew the essence of the case, I would have made other appropriate determinations.

[127] At the conclusion of the proceedings, a range of conflicting evidence and perspectives emerged from public hearings, as well as from *ex parte* and *in camera* hearings, which required that the appropriate determinations be made.

X. The Prime Minister's trip to India

[128] The Appellant claimed that his inclusion on the no-fly list was the result of talks between Prime Minister (PM) Trudeau and high-ranking Indian officials during the PM's trip to India in February 2018. The Appellant refers to media reports according to which an envelope containing a list of Canadians was allegedly handed to the Prime Minister during one of the meetings. It was also reported that the Khalistani-India issue was being discussed (see "Khalistan issue figures in Amarinder-Trudeau meet; Capt hands over list of Canada-based radical", Outlook The News Scroll, 21 February 2018 in Affidavit Dongju Zhao at page 322).

[129] While the exact details of the meetings between Prime Minister Trudeau and Indian officials remain unknown, it is public knowledge that world leaders gather and debate a variety of themes of mutual interest, including economic challenges such as export-import commerce, societal concerns such as defence issues, and security issues such as terrorism. It is possible that the PM and his counterparts discussed national security issues, as would be expected in a diplomatic setting. Mr. Dulai's claim that his listing is due to political interference is not supported. Mr. Dulai was already on CSIS' radar before his listing in April 2018, as noted on pages 38–39 of the Revised Appeal Book where one can read "DULAI became the subject of Service investigation due to his connections with individuals within the Sikh extremist milieu." It would be erroneous to claim that Canada responds to requests from foreign countries indiscriminately. To proceed with a briefing to place someone on the no-fly list, an entity like CSIS needs insight, knowledge, and well-researched documentation. A simple request from a single country, accompanied by its own documents, will not suffice. A lot of varied information from various sources will be required, and in practice, corroboration will be required to reach a Canadian independent conclusion.

[130] I can advise that I requested, and received, the National Security and Intelligence Committee of Parliamentarians (NSICOP) unredacted Special report into the allegations related to the Prime Minister's official visit to India in February 2018. I also asked counsel for the AGC and the *Amici* to comment on certain pages of the report that I had identified as pertinent for the purposes of this appeal.

[131] The totality of the evidence I had access to, both public and confidential, allows me to conclude that other factors led to the authorization to list the Appellant on the no-fly list. Therefore, I can say with confidence that there was no political interference.

XI. The finding on whether the decision was reasonable under paragraph 8(1)(a) of the SATA

[132] As stated in Communication No. 11 dated July 11, 2021:

> 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 the SATA and that both listings concern information and evidence in respect of 8(1)(b).

The evidence presented as a whole did not contain any conclusion that Mr. Dulai would engage or attempt to engage in an act that would threaten transportation security, as per paragraph 8(1)(a) of the SATA. The AGC also recognized on March 23, 2022 that the listing of Mr. Dulai was based on concerns about paragraph 8(1)(b) rather than paragraph 8(1)(a) of the SATA. Therefore, the first portion of the conclusion, which deals with transportation security, is evidently unreasonable, given that there is no evidence to support such an allegation.

[133] I would note that, as per the public allegations, the focus of the terrorist activities is located abroad. The legislative scheme provides discretion to the Minister with respect to mechanisms to ensure safety in air travel that fall short of a complete ban on all air travel. This discretion should be exercised with that in mind. Therefore, at the subsequent 90-day review, the application should take into account the unreasonable determination made in reference to paragraph 8(1)(a) of the SATA and consider the various boarding directions that apply to listings pursuant to subsection 9(1) of the SATA.

XII. The boarding denial of May 17, 2018

[134] On a different but related matter, I have concerns about the GOC senior operations officer's directive to deny boarding to the Appellant on a Vancouver-Toronto flight on May 17, 2018.

[135] On April 13, 2018, a recommendation to the Senior Assistant Deputy Minister was approved, directing that Mr. Dulai be denied transportation on international flights inbound to Canada and international flights outbound from Canada, and that he undergoes additional screening for domestic flights. The recommendation can be found on pages 64–65 of the Revised Appeal Book.

[136] As previously mentioned, Ms. Soper, the Acting Director General of the National Security Policy Directorate within the National and Cyber Security Branch at Public Safety Canada, noted that an administrative decision made on April 27, 2018 changed the directive from Mr. Dulai being subjected to further screening for domestic flights to a complete denial of air transportation. There are no supporting documents, no signatures, and no record of this decision in the Revised Appeal Book. It does not contain any justification for the GOC senior operations officer's directive that Mr. Dulai be denied boarding on the Vancouver-Toronto flight (see Revised Appeal Book at pp 72–77). Furthermore, when I questioned Ms. Soper on the signature and author for this decision during a public hearing on April 20, 2022, she said there was no record of the decision maker (see transcript from Vancouver hearings, April 20, 2022 at pp 204–205).

[137] In and of itself, from a legally documented perspective, the April 13, 2018 decision was therefore the one in force on April 27, 2018, not the April 27, 2018 administrative decision.

[138] Having said that, I am aware that there may be extraordinary and urgent circumstances justifying a change in directive, but I have seen no evidence to support such a change in this instance, nor have I seen any supporting evidence from the GOC senior operations officer. As a result, the decision was irregular, and not supported. While this particular directive raises concern, I note that the only express statutory remedy allowed for in the SATA appeal scheme is the removal of the appellant's name from the no-fly list (subsection 16(5)). Further, in his Notice of Appeal, the Appellant can appeal the Minister's decision maintaining the status as a listed person pursuant to section 15 of the SATA. Notwithstanding what has just been said, Public Safety Canada must ensure that any decision relating to air transportation is adequately documented, especially when such decisions have a significant impact on mobility rights.

XIII. The finding on whether the decision was reasonable under subparagraphs 8(1)(b)(i) and (ii) of the SATA

[139] Despite my finding with respect to paragraph 8(1)(a) of the SATA, I nevertheless find that the decision to maintain the Appellant on the no-fly list is reasonable because there are reasonable grounds to suspect that Mr. Dulai will "travel by air for the purpose of committing an act or omission that (i) is an offence under sections 83.18, 83.19 or 83.2 of the *Criminal Code*, or an offence referred to in paragraph (c) of the definition "terrorism offence" in section 2 of that Act, or (ii) if it were committed in Canada, would constitute an offence referred to in subparagraph (i)."

[140] I reach this determination after studying and reviewing all public and confidential facts, affidavits filed, representations from all counsel including the *Amici*, and hearing the Appellant's testimony in Vancouver. I have read and heard the Appellant's explanation regarding each of the 10 public allegations and have reviewed the decision of the Minister's delegate and the related documents. In addition, I carefully examined the classified material on each allegation, re-read the testimony of the CSIS witness, and considered the Minister and *Amici*'s written submissions.

[141] Keeping in mind that this is not a criminal matter but rather an administrative judgment made in accordance with the SATA statute, I have reached this conclusion taking into account that the decision to maintain the Appellant's listing is based on the standard of reasonable grounds to suspect. The discernible facts at issue in this appeal support the possibility of specific scenarios and situations that have been put forward. As the evidence reveals, the Appellant has created a pattern of behaviour over time that, on the basis of reasonable reasons to suspect, links him to subparagraphs 8(1)(b)(i) and (ii) of the SATA.

[142] Without jeopardizing national security, I can confidently state that this Court is presented with a clear picture: on one side, the Appellant denies the claims levelled against him and on the other side, there is evidence that provides conflicting and serious explanations. Therefore, based on a reasonable suspicion standard, I have assessed the reliability and credibility of each side and I looked at independent corroboration. Because of this thorough exercise, six allegations, more specifically allegations 1, 2, 3, 4, 5, and 8 have all been deemed to be within the realm of possibility in light of discernible facts in evidence (see Annex B). These six allegations meet the criteria that support the triggering of subparagraphs 8(1)(b)(i) and (ii) of the SATA. The

allegations not retained were the result of a lack of evidence and/or lack of corroboration. For their part, the allegations not disclosed to the Appellant have been dealt with in the confidential reasons. With that in mind, I repeat that any determination on the reasonableness of the Minister's delegate's decision is based on my findings regarding the public allegations and at no point was a determination made solely on information unknown to the Appellant.

[143] For the sake of completeness, the following judgment will include three annexes:

A. Annex A – the complete public judicial history of the two appeals;

B. Annex B – a public table of the public 10 allegations with some comments;

C. Annex C – confidential and complementary reasons, which include a confidential table of the 10 public allegations with confidential comments, as well as another confidential table dealing with undisclosed redacted information.

[144] Because of national security concerns, I am unable to reveal more in this forum. I would like to expand on my conclusion in the public reasons but doing so would involve commenting on classified information.

XIV. The SATA needs improvement

[145] Given that these appeals (the current one and that of Mr. Brar's adjudged concurrently) are the first SATA appeals to be heard, they have required that all involved, including the Court, reflect on elements of the legislation that could potentially improve the procedure to ultimately fulfill the SATA's objectives and officially establish legislative fairness in the proceedings. I present some suggestions for consideration to those who may be interested in further reflection:

i. The steps leading to an individual's listing, as well as the listing itself, are both confidential pursuant to the SATA. However, there is no provision in the law regarding confidentiality in appeals. Currently, in the context of the SATA, an appellant's name is not protected unless a confidential motion under the Federal Courts Rule 151 "Filing of Confidential Material" is filed and granted. For the reasons outlined in this decision, including the stigma associated with the term "terrorist," attention should be given to incorporating some protection of appellants' identities within the legislation, subject to the open court principle;

ii. The Minister's decision pursuant to section 15 of the SATA should give some explanation for the listing of an individual and specifically state whether paragraphs 8(1)(a) or 8(1)(b) of the SATA applies, or both;

iii. In order to ensure fairness in SATA appeal proceedings, the legislation should make it obligatory that an *amicus curiae* (or *amici curiae*) or a comparable entity be appointed with a role(s) and mandate(s) equivalent to the ones assigned in the present appeal; (more on this in the constitutional reasons under the section entitled "The role and mandate of the *Amici*" at p 97); and

iv. In reference to paragraph 138, Public Safety Canada needs to find ways to ensure that all directions issued pursuant to section 9 of the SATA are documented and that all supporting information is included. Mobility rights may be limited but only in exceptional circumstances and with adequate documentation. On May 17, 2018, this was not the case.

XV. Conclusion

[146] I find the decision of the Minister's delegate reasonable in reference to subparagraphs 8(1)(b)(i) and (ii) of the SATA, but unreasonable in relation to paragraph 8(1)(a). Given that grounds under subparagraphs 8(1)(b)(i) an (ii) are sufficient to maintain the Appellant on the no-fly list, the decision to maintain his status as a listed person is reasonable. At the next 90-day review of the Appellant's case, in addition to determining whether grounds still exist for the listing of Mr. Dulai pursuant to paragraph 8(2), the Minister should also consider my findings when determining what section 9 directions, if any, should apply to Mr. Dulai, in particular with respect to flying domestically.

[147] I have made the determinations in reference to subparagraphs 8(1)(b)(i) and (ii) knowing that my reasons could not be as public as I desired. I did so being aware that, and unlike the situation in *Harkat*, the current appeal does not raise issues akin to imprisonment, conditional release, or the risk of torture if returned to the country of origin. Indeed, the challenge imposed on the Appellant in the current appeal is the inability to fly. This is not meant to minimize the difficulties that come with being listed, but rather to put things in perspective. Withdrawing information, as the *Amici* requested, would fail to adequately portray the case against the Appellant and would potentially render the SATA legislation ineffective. This, I submit, would neither respect the legislation's objective nor be in the interest of justice. Even though the Appellant may not have received as much information and details for each allegation as he would have wanted, the Appellant was heard, and he was able to respond to the case brought against him and offer adequate instruction to his counsel. Despite national security constraints, the proceedings were fair.

[148] Due to the dual proceedings—public hearings and confidential hearings—appealing the inclusion of two individuals on the SATA list is complex. In order to ensure a fair process in the interest of the parties and justice, my advice to the Chief Designated Judge is to make sure the judge assigned to these cases has plenty of time to assume the duties. In the present appeal, it was the case, and I truly appreciate it.

JUDGMENT in T-670-19

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed in part.

2. The decision of the Minister's delegate to maintain the Appellant's name on the no-fly list pursuant to subparagraphs 8(1)(b)(i) and (ii) of the SATA is reasonable.

3. The decision of the Minister's delegate to maintain the Appellant's name on the no-fly list pursuant to paragraph 8(1)(a) of the SATA is unreasonable. Therefore, at the subsequent 90-day review, this finding must be taken into consideration and the various boarding directions for domestic flights that could apply to listings pursuant to subsection 9(1) of the SATA may be considered.

4. The present judgment includes the following annexes:

   Annex A – the complete public judicial history of the two appeals;

   Annex B – a public table of the 10 public allegations with comments;

   Annex C – confidential and complementary reasons, which include a confidential table of the 10 public allegations with confidential comments, as well as another confidential table dealing with undisclosed redacted information.

5. The Appellant asked for the costs of this appeal (Revised Appeal Book at page 6). None are granted.

"Simon Noël"

Judge

Annex A

Procedural history covering both Appeals (Mr. Brar and Mr. Dulai)

[1] Following the filing of the Notices of Appeal from Mr. Brar and Mr. Dulai, this Court ordered the Respondent to serve and file a public Appeal Book for each appeal, the contents of which were agreed upon by the parties. These Appeal Books contained numerous redactions made by the Respondent in order to protect the confidentiality of information or evidence it believed would be injurious to national security or endanger the safety of any person if disclosed.

[2] Subsequently, this Court ordered on October 7, 2019, that the Respondent file with the Designated Registry of this Court an unredacted Appeal Book for each appeal, containing and clearly identifying the information that the Respondent asserts could be injurious to national security or endanger the safety of any person if disclosed. The Court also ordered that the Respondent file classified affidavits with the Designated Registry explaining the grounds for the redactions as well as file and serve public affidavits explaining the nature of the redactions in a manner that does not injure national security or endanger the safety of any person. During the process of preparing the unredacted classified Appeal Books and the affidavits, a number of redactions were lifted by the Respondent, resulting in further disclosure to the Appellants.

[3] The Respondent also advised the Court and the parties that, pursuant to paragraph 16(6)(g) of the SATA, it was withdrawing certain classified information from the Appeal Book in response to Mr. Dulai's statutory appeal. The Court accepted that the legislation provides for the withdrawal of information and issued an Order authorizing the withdrawal of the information and the replacement of the relevant pages in the classified unredacted Appeal Book. However,

the Court also ordered that, as a superior court of record, it would keep three copies of the Appeal Book containing the withdrawn information under seal in a separate location at the Designated Registry, at least until the issue of the withdrawn information retention had been dealt with.

[4] In response to the inclusion of redacted information in the Appeal Books, the Court appointed two *Amici* in an Order dated October 7, 2019. The Court originally ordered that the *Amici* be given access to the confidential information as of December 9, 2019, following which they would not be permitted to engage in two-way communication with the Appellants and their counsel, except with leave from the Court. At the request of the *Amici*, this was extended to January 20, 2020, in order to allow for more effective and meaningful communication with the Appellants in light of the redactions lifted by the Respondent.

[5] On January 16, 2020, an *ex parte* and *in camera* case management conference was held to discuss the next steps concerning the confidential information in this case. A public summary of the case management conference was provided to the Appellants shortly thereafter. During this case management conference, the Respondent and the *Amici* raised numerous legal issues regarding the withdrawn information (in Mr. Dulai's case only), the role of the *Amici* in these appeals, the bifurcation of the appeals process between the "disclosure phase" and the "merits phase," and the role of the designated judge. The Court proposed that the *Amici* and the Respondent meet to discuss the issues raised and correspond with the Court concerning the preliminary legal issues to be adjudicated before moving further in the appeals.

[6] Notwithstanding the Respondent's position that the Court should address, on a preliminary basis, the applicable standard of review in these appeals, which the Court found to be premature at this stage, a list of preliminary legal issues was agreed upon by the Appellants, the Respondent, and the *Amici* during a case management conference held on February 13, 2020. This list of preliminary questions was subsequently endorsed by the Court via its Order dated February 18, 2020.

[7] On April 16, 2020, a public hearing via teleconference was held where the parties and the *Amici* made oral submissions on these legal questions.

[8] On June 20, 2020, this Court issued detailed Reasons in *Brar v Canada* (Public Safety and Emergency Preparedness), 2020 FC 729 [*Brar 2020*] answering the preliminary legal questions in these appeals. 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* and *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 2020*.

[9] On July 15, 2020, a public case management conference was held to discuss the next steps in the appeals.

[10] 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.

[11] On September 10, 2020, the Respondent 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 2020*, counsel for the Attorney General filed a supplemental *ex parte* affidavit from the same affiant on September 25, 2020.

[12] On September 22, 2020, an *ex parte* and *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 in Public Communication No. 5.

[13] On October 5, 2020, an *ex parte* and *in camera* hearing was held. The AG's counsel and the *Amici* presented their agreed-upon lifts and summaries of redacted information to the Court in preparation for the upcoming *ex parte* and *in camera* hearing on the disputed redactions. This Court approved the proposed lifts and summaries. On October 7, 2020, a public summary of the hearing was issued to the Appellants in Public Communication No. 6.

[14] The *ex parte* and *in camera* examination and cross-examination of the AG's witnesses in Mr. Brar's appeal took place over six days on October 14, 15, 16, 19, 20 and 22, 2020. The AG's counsel 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 AG's counsel, and questioned the affiants with documentary evidence. On November 3, 2020, a public summary of the hearings was communicated to the Appellants in Public Communication No. 7, which summarizes the hearings as follows:

> October 14, 2020
>
> Court began at 10:00 a.m. 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 supplementary 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 SATA and the 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 instances 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 the AG's counsel 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, the AG's counsel 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, the AG's counsel conducted its re-direct of the CSIS affiant, which was concluded mid-afternoon.

October 22, 2020

Court commenced at 9:30 a.m. 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 PPAG and the PPIO;
- 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.

[15] The *ex parte* and *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 AG's counsel and the *Amici* consented to an Order that would render the evidentiary record resulting from the Brar and Dulai hearings subject to any arguments in relation to the weight, relevancy and admissibility of the evidence. The AG's counsel and the *Amici* agreed to an Order at the beginning of the hearing that would make the evidentiary record resulting from the Brar and Dulai hearings subject to any arguments over 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 the Appellants in 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's counsel 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 supplementary 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's counsel 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 a.m. 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's counsel 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's counsel 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.

[16] 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, the AG's counsel filed an *ex parte* motion record to strike certain evidence resulting from the *ex parte* and *in camera* hearings from the record.

[17] Following the *ex parte* and *in camera* hearings, on January 8, 2021, the AG's counsel and the *Amici* filed confidential submissions concerning the redactions.

[18] On January 14, 2021, the Court issued Public Communication No. 9 to inform the Appellants on 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 relating to the pandemic. The AG's counsel 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.

[19] On February 4, 2021, an *ex parte* case management conference was held in the presence of the AG's counsel 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 SCC in *Harkat* in relation to the requirement to provide the Appellant(s) summaries or information that would permit them to know the

Minister's case, applied to the SATA appeal scheme. I requested comments and further submissions from the AG's counsel and the *Amici*.

[20] On February 5, 2021, a public summary of the discussion was communicated to the Appellants in Public Communication No. 10.

[21] On February 9, 2021, counsel for the Appellants requested permission to provide the Court with submissions respecting the above question of law. The Court granted leave. Counsel for the Appellants, the AG's counsel and the *Amici* filed their written representations on February 19, 2021. The AG's counsel filed their reply on February 24, 2021.

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

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

[24] *Ex parte* and *in camera* hearings were held on June 16 and June 17, 2021. The purpose of the hearings was for AG's counsel and the *Amici* to make submissions on disclosure, the reasonably informed threshold, and the AG's motion to strike. On July 21, 2021, a public summary of the hearings was communicated to the Appellants in Public Communication No. 11 which can be found below:

> June 16, 2021
>
> Court commenced at 9:30 a.m. on June 16, 2021, and submissions were made by the AG's counsel and the *Amici* on disclosure and the requirement to reasonably inform the appellants.
>
> AG Submissions on Disclosure and Reasonably Informed
>
> The AG's counsel 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's counsel 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's counsel made submissions on the applicable test for disclosure in appeals under section 16 of the SATA. The AG's counsel 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's counsel 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's counsel then made submissions on the reasonably informed threshold and argued that at this point in time, the appellants are reasonably informed. The AG's counsel 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's counsel stressed that the threshold under subsection 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 SCC in *Harkat* requires (in circumstances where redacted information or evidence cannot be lifted or summarized without national security injury, such information 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 a.m. on June 17, 2021, and the Court heard arguments from both the AG's counsel 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 AG's counsel the possibility of preparing a further summary of the evidence in the *ex parte* and *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. The AG's counsel 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).

[25] The issues related to the redacted list of exhibits and disclosure of additional information through summaries were a constant endeavour after the June 2021 hearing. The Appellants were

informed of this through Public Communication No. 12. Concerning the list of exhibits, it was later agreed that it would be released in a redacted format once the AG's counsel and the *Amici* had reviewed the determinations made on the redactions at issue as a result of the *ex parte* and *in camera* hearings. As for the summary of additional information, counsel for both the Appellants and Respondent undertook to submit it no later than August 31, 2021. As soon as it was submitted, reviewed, and then agreed upon by the undersigned, it was released as Public Communication No. 13 on August 31, 2021, after an *ex parte* and *in camera* hearing was held the same day.

[26] From then on, all outstanding matters were taken under reserve with the objective of issuing an Order and Reasons as soon as possible, which was done on October 5, 2021, and resulted in two Orders (*Brar 2021* and *Dulai 2021*). The issuance of orders was announced in Public Communication No. 16.

[27] On October 12, 2021, a Revised Appeal Book was filed and made available to all parties. This resulted in a broader scope of disclosure and more information was revealed to the Appellants.

[28] On November 1, 2021, a case management teleconference was held to discuss all outstanding matters, including the opportunity to be heard for both the Appellants and the Minister pursuant to paragraph 16(6)(d) of the SATA. Then, on December 1, 2021, the Court issued an order regarding the timing for the filing of affidavits and submissions, and the scheduling of hearings planned for 2022.

[29] On December 7, 2021, and at the request of the presiding judge, an *ex parte* and *in camera* case management conference was held to discuss next steps and other scheduling matters. The Court requested additional *ex parte* and *in camera* submissions to be filed in respect of the classified and public evidence on the record that support the allegations in each appeal. A schedule was established and the Court set a few days aside in May 2022 to hold an *ex parte* and *in camera* hearing following the public hearings, if deemed necessary. This information was confirmed in Public Communication No. 17, issued on December 8, 2021.

[30] On January 31, 2022, the Court received further affidavits from Mr. Dulai including personal material that, in the view of his counsel, could jeopardize Mr. Dulai's safety or security if made public. As a result, in a letter dated January 31, 2022, his counsel requested the option to file a "public" version of the affidavit in which sensitive information would be redacted.

[31] On February 2, 2022, the AG's counsel filed their written and confidential submissions.

[32] The Court issued an oral direction on February 7, 2022, in response to Mr. Dulai's letter and the AG's counsel's reply of February 4, 2022. The Court stated that it was satisfied with the parties' agreed-upon proposal for Mr. Dulai to send a list of proposed redactions to the AG's counsel for discussion and parties to reach an agreement.

[33] On February 25, 2022, the *Amici* filed their written and confidential submissions.

[34] On March 1, 2022, the AG's counsel filed their public affidavits for each file (Mr. Brar and Mr. Dulai).

[35] On March 9, 2022, the AG's counsel filed a confidential reply in response to the *Amici*'s confidential submissions.

[36] On March 17, 2022, a public case management teleconference was held to discuss details of planned public hearings in Vancouver.

[37] On March 21, 2022, both Appellants filed their written representations related to the allegations against them.

[38] On March 23, 2022, the AG's counsel submitted a letter in response to the case management conference and Public Communication No. 11 confirming that both listings (Mr. Brar and Mr. Dulai) were based on paragraph 8(1)(b) of the SATA and not paragraph 8(1)(a).

[39] On April 5, 2022, the AG's counsel filed classified submissions pinpointing the classified evidence, if any, on which it relies in support of each of the public allegations against the Appellants found in the October 5, 2021, Amended Public Order and Reasons.

[40] On April 11, 2022, Counsel for the Minister filed their public submissions.

[41] On April 14, 2022, the *Amici* filed classified responding submissions to the AG's counsel's classified submissions.

[42] Public hearings took place over four days (April 19-22, 2022) in Vancouver, British Columbia. Both Mr. Brar and Mr. Dulai were present and testified, in addition to Ms. Lesley Soper from the Department of Public Safety Canada. Counsel for both Appellants and Respondent were present. The two *Amici* were also in attendance. The purpose of these hearings was to provide the Appellants and the Minister with an opportunity to be heard. A summary of the hearings can be found below:

> April 19, 2022
>
> Court commenced at 9:30 a.m. (PT) on April 19, 2022. Both Appellants were present and examined by their respective Counsel. Counsel for the Minister also questioned Mr. Dulai.
>
> The examination consisted of a review of each Appellant's background and questions related to the specific allegations against each one of them.
>
> In both cases, the Appellants answered all the questions and testified on the impact the listing had on them, their families and their businesses.
>
> They both categorically denied being involved in any terrorist-related activities, whether at home or abroad.
>
> April 20, 2022
>
> Court commenced at 9:30 a.m. (PT) on April 20, 2022.
>
> Counsel for the Minister introduced their witness, Ms. Lesley Soper from Public Safety Canada.
>
> Counsel for both Appellants examined Ms. Soper. Several questions regarding her four affidavits were posed focusing on her job and role.
>
> In Mr. Dulai's case, questions were raised about the administrative update and amended direction that occurred in April 2018, media

reports and information obtained as a result of alleged mistreatment.

In the case of Mr. Brar, questions were asked about the nature of the advisory group finding, the decision-making process and the nominating agency. Additionally, Counsel for Mr. Brar raised concerns about the credibility and reliability of the sources used to justify the listing of Mr. Brar.

Counsel for Mr. Dulai made submissions on procedural fairness under the common law and section 7 of the *Charter*. Counsel stated that the Minister's delegate violated Mr. Dulai's procedural fairness rights during the administrative recourse process by failing to give him adequate notice of the case to meet before requiring his response, and by failing to provide reasons for his decision to maintain his name on the no-fly list. As a result, Mr. Dulai seeks a declaration from the Court to this effect.

Counsel for Mr. Dulai also submitted that an irreconcilable tension remains between Mr. Dulai's right to an incompressible minimum amount of disclosure and national security concerns at the appeal stage. Counsel explained that certain information cannot be disclosed to Mr. Dulai because of national security concerns. Consequently, Mr. Dulai cannot know the case to meet and defend himself accordingly. Counsel submits that the only remedy for this irreconcilable tension is for the Minister to withdraw the undisclosable information. If this remedy is not granted, the proceedings will remain unfair. This, in turn, will violate natural justice and Mr. Dulai's rights under section 7 of the *Charter*.

Counsel for Mr. Dulai also raised concerns regarding the choice of witness for public hearings. Despite the fact that Ms. Soper did not have any role in Mr. Dulai's listing, she was the witness retained for the hearing while everything related to the CSIS witness remained out of reach for the Appellant. Consequently, the Appellant cannot be satisfied that alleged foreign interference is not related to Mr. Dulai's listing and cannot be satisfied that the decision was not political. Important rights are at issue when the label of terrorist is involved and this creates a problem.

Counsel for Mr. Dulai said that he feels scared about speaking freely and that he is concerned at the prospect that a country he advocates against [India] is potentially pulling the strings. Mr. Dulai had to put his entire life before this Court in part because he does not have what he needs to respond to the case against him. In these circumstances, Mr. Dulai is owed a high degree of procedural fairness.

April 21, 2022

Court commenced at 9:30 a.m. (PT) on April 20, 2022.

Counsel for Mr. Dulai carried on with their submissions arguing that the case against Mr. Dulai was based to a decisive degree on undisclosed information and that according to *Harkat* at para 59 "the Minister must withdraw the information or evidence whose nondisclosure prevents the named person from being reasonably informed."

His counsel also said that Mr. Dulai was unable to give meaningful direction to his counsel and therefore the *Amici* were not able to represent Mr. Dulai's interests.

Counsel stated that the standard of review in this case was correctness to which the Judge agreed.

Counsel reviewed most of the allegations against Mr. Dulai and provided explanations aimed at casting a doubt on the credibility of sources and/or the authenticity of the intent behind those allegations.

In summary, Mr. Dulai's lawyer feels that the Government of India has him on its radar and is attempting to discredit him because he is a prominent figure who could pose a threat to them.

Counsel for Mr. Brar indicated, at the beginning of their submissions, that they were not pursuing the amended constitutional question of overbreadth, nor the one related to section 6 of the *Charter*. They submitted that if the Court found that Mr. Brar was not provided with the incompressible minimum disclosure then it needed to ignore the reasonableness of the decision.

Counsel for Mr. Brar argued that section 7 of the *Charter* was engaged in Mr. Brar's case because being labelled as a terrorist engages security of the person. The fact that Mr. Brar was labelled by the Canadian government as a terrorist imposes psychological stress. Mr. Brar feels like he is being followed. The allegations and accusations are criminal ones. Among the highest seriousness in our society today. The mere fact of accusing someone of those crimes, this is what is different from the ordinary stresses of living in a society.

Counsel for Mr. Brar submitted that when section 7 is engaged, and they believe it is, the person must know the case and have the opportunity to meet that case. While Mr. Brar takes no issue with

the role of the *Amici* in this case, their participation is only as good as Mr. Brar is receiving enough information to direct both public counsel and the *Amici*. Confidential sources need to be tested to ensure their reliability.

Counsel for Mr. Brar agreed with the standard or review set forward by the Court, i.e., correctness and no deference. However, they disagree with the claim that Mr. Brar received the incompressible minimum disclosure. They submit that the Respondent's written submissions fail to address the new information that is before this Court. If the merit can only be addressed at a *ex parte* and *in camera* meeting than it reinforces the point that Mr. Brar did not received the incompressible minimum disclosure. Counsel states that Public Communication No.13 mentions additional evidence (about credibility and reliability of information) that was added and to which the Appellant is not privy. The concern about why the CSIS' evidence is preferred over that of Mr. Brar remains.

Counsel for Mr. Brar went over the allegations against him and pointed out that the narrative seems to have changed over time with some information that was withdrawn. For example, the allegation related to the training of youths appears in the first two case briefs but is not included in the subsequent one. Eventually, those actions were attributed to Mr. Cheema. The Appellant does not know the sources of these allegations but questions the rationale justifying why some have been withdrawn. Counsel submits that if the sources have been found to be unreliable, then the credibility of other evidence provided by these sources is doubtful.

Counsel for Mr. Brar stated that in and of itself, there is nothing wrong with anti-India activities or being an operational contact for someone, as opposed to what is claimed in the allegations. There are additional factors to consider in Mr. Brar's case, such as the fact that his father may make him a target for the Government of India in addition to his advocacy for social issues in the community. The consulate ban, which was declared in December 2017 and included Mr. Brar's name as a contact, could also play against him.

Lastly, Counsel for Mr. Brar introduced the idea that the timeline of Prime Minister Trudeau's trip to India and the listing of Mr. Brar may be connected, which would indicate foreign interference.

April 22, 2022

Court commenced at 9:30 a.m. (PT) on April 22, 2022.

Counsel for the Minister of Public Safety Canada informed the Court they would be relying on their written submissions and that three aspects would be covered, namely the standard of review, section 7 of the *Charter* and section 6.

They began by saying that neither Appellant had advanced arguments in terms of their liberty interest and that the Minister's position was that section 7 (liberty) was not engaged and had not been interpreted as the right to choose a means of transportation.

When it comes to security of the person, Counsel for the Minister submitted that recent jurisprudence (*Moretto v Canada (Citizenship and Immigration)*, 2019 FCA 261) had determined that stand-alone stigma did not engage section 7 of the *Charter*. The Minister is of the opinion that the Appellants' evidence of being saddened, scared and frustrated needs to be looked at from a broader picture and that it is not enough to meet the threshold required to engage section 7.

The Minister's Counsel claims that the Appellants were given the incompressible minimum disclosure during the appeal proceedings. The Appellants have shown they knew the case against them through the precision with which they addressed different issues. Counsel adds that the two *Amici* also acted as substantial substitutes.

The Minister's Counsel argues that the standard of review in these two cases should be reasonableness and not correctness, as agreed with the Court the day prior. Counsel submits that in the SATA context, a court that receives new information with regards to credibility has to go back to the decision and determine its reasonableness. On a statutory appeal, the court has to use the standard provided. The fact that the judge has more information still requires the court to decide if the decision is still tenable.

Counsel argued that if the decision is reasonable but is not the decision the judge would have made, it is still reasonable, as this is not about a *de novo* determination. Looking at the whole of the record, the question is whether the decision is reasonable and tenable. That is reasonableness.

Counsel for the Minister stated that one did not need to differentiate between paragraph 8(1)(a) or 8(1)(b) in a SATA appeal as the outcome remained the same; being listed. The judge disagreed.

> When it comes to section 6 of the *Charter*, Counsel for the Minister argued that subsection 6(2) (interprovincial) was not infringed under the SATA because the law does not create a differential treatment among people. Counsel submitted that the Appellants have the ability to go to other provinces, just not by air. This does not create a differential treatment. The *Charter* does not protect the type of transportation. Moreover, the Appellants have given evidence to the effect that they have been travelling. Although travel time has been longer, they still travelled.
>
> When asked by the Judge if an infringement to section 6 of the *Charter* could be saved under section 1 in this particular case, Counsel for the Minister answered that the required analysis was that of *Doré*, and not section 1 (*Oakes*). Counsel added that every breach of section 6 rights is proportionate and balanced based on national security considerations and that a lack of reasons does not constitute a breach of procedural fairness. The Minister relied on the recommendation as being the reasons.
>
> The AG's counsel was present at the hearing and claimed that the Appellants had been reasonably informed and had received the incompressible minimum disclosure. Counsel went on to say that while Appellants can never know everything, they certainly know enough in light of their submissions and the *Amici*'s. There would not be a need for subsection 16(6) if they knew everything. *Harkat* has to be applied on a case-by-case basis.
>
> The AG's counsel specified that they would argue in *ex parte* submissions that the reasonable grounds to suspect threshold has been met. This is based on confidential information but also on some responses the Appellants have given publicly.
>
> For their part, the *Amici* submitted that they had specifically identified undisclosed allegations that do not come with the incompressible minimum. They maintain that there remains allegations to which the Appellants are unable to respond and therefore unable to direct their counsel and the *Amici*. They argue that this Court should make a *Harkat* declaration in respect to specific allegations – this invites the Minister to either find a way to make further disclosure or failing that, withdraw the allegations.

[43] An *ex parte* and *in camera* case management conference was held on April 27, 2022, at the Federal Court in Ottawa. Both *Amici* and AG's counsel were present. The purpose of the

case management conference was to discuss different topics in relation to the final steps of the statutory appeals.

[44] Public Communication No. 19 was issued on April 28, 2022. It gave directions following the *ex parte* and *in camera* case management conference held the day before.

[45] On April 29, 2022, Sadaf Kashia, a lawyer from Edelmann & Co. Law Corporation specializing in complex issues concerning U.S. and Canadian immigration, provided submissions about the circumstances in which individuals may be denied admission to the United States and how that informs what may be inferred from Mr. Dulai's denial of admission on May 27, 2017.

[46] On May 6, 2022, the Court issued Public Communication No. 20 stating that it had received the NNSICOP unredacted Report on the Prime Minister's trip to India in February 2018, which would be opened and reviewed only by the judge at that time. Additional consultation was to be undertaken should the Court have determined that further disclosure was necessary.

[47] On May 16, 2022, the Court issued Public Communication No. 21 stating that it had reviewed the NSICOP Report and that the portions pertinent to the issues relating to the appeals would be made available to the AG's counsel and *Amici* for their comments, if any.

[48] The *Amici* filed written classified submissions on May 18, 2022.

[49] The Minister filed written classified submissions concerning the NSICOP report on May 18, 2022.

[50] Both the *Amici* and the Minister filed written classified reply submissions on May 24, 2022.

[51] On May 25, 2022, the Court issued Public Communication No. 22 stating that it had read the final confidential submissions and replies of the Minister and the *Amici*, and had decided to take both appeals under reserve without any further *ex parte* and *in camera* hearing.

Annex B

PUBLIC ALLEGATIONS AND RESPONSES – Mr. Dulai

10 Public Allegations Reference: Mr. Dulai's revised appeal book, October 12, 2021.	**Mr. Dulai's statements in response to the 10 public allegations** Reference: Mr. Dulai's Affidavit, January 27, 2022.	**Minister's submissions relating to allegations** Reference: Dulai – Respondent's Memorandum of Fact and Law, April 11, 2022.	**Comments from the Court concerning allegations**
1. Mr. Dulai is suspected to be a facilitator of terrorist-related activities and has shown an ongoing pattern of involvement within the Sikh extremist milieu. Revised appeal book: p 11 and p 18.	42. I have never planned or facilitated terrorist related-activities anywhere in the world. 44. I am not, nor have I ever been, knowingly associated with Sikh extremism or a Sikh extremist milieu. To my knowledge, I have no connection to Canadian or internationally based Sikh extremists. 46. I have never been involved with BK, BKI, or ISYF.	a. Mr. Dulai is suspected of being a facilitator of terrorist-related activities and has shown an ongoing pattern of involvement within the Sikh extremist milieu. (p 13)	Allegation considered
2. Mr. Dulai is a subject of Service investigation.	41. The first bullet point under the heading "CONSIDERATIONS" (Appeal Book, p 11) says:	The AGC is not relying on *ex parte* information corroborating this allegation.	Allegation considered

Revised appeal book: p 11 and p 18.	"Dulai is suspected to be a facilitator of terrorist-related activities, and has shown an ongoing pattern of involvement within the Sikh extremist milieu. Dulai became a subject of Service investigation [redacted] Dulai was reported to be connected to individuals within the Sikh extremist milieu." 42. I have never planned or facilitated terrorist related activities anywhere in the world. 43. While the term "Sikh extremist" is not defined in any of the materials I have reviewed in the Appeal Book, I understand the term to refer to Sikhs who hold extreme or fanatical views and resort to or advocate for the use of violence to achieve these goals. When the terms "Sikh extremist" or "Sikh extremism" are utilized in this affidavit, that is the definition that I attribute to them.		

	44. I am not, nor have I ever been, knowingly associated with Sikh extremism or a Sikh extremist milieu. To my knowledge, I have no connection to Canadian or internationally based Sikh extremists.		
3. Mr. Dulai was reported to be connected to individuals within the Sikh extremist milieu. Revised appeal book: p 11 and p 18.	44. I am not, nor have I ever been, knowingly associated with Sikh extremism or a Sikh extremist milieu. To my knowledge, I have no connection to Canadian or internationally based Sikh extremists.		Allegation considered
4. Mr. Dulai was previously associated with individuals implicated in the assassination of Rulda Singh, the Punjab-based chief of Rashtriyasikh Sangat's Sikh arm, in India in 2009. Revised appeal book: p 17.	88. I read in media reports that Rulda Singh was an Indian politician who was shot outside of his residence in 2009 and later died. 89. My counsel spoke with Mr. Johal's defence lawyer, Jaspal S. Manjhpur. Mr. Manjhpur advised my counsel, who then advised me, that Mr. Johal is not charged with the murder of Rulda Singh. Rather, he has been repeatedly charged with conspiracy to murder and the name Rulda		Allegation considered

	Singh is not mentioned in the charge sheet. Attached as Exhibit 10 is the charge sheet and summary of the allegations. His charges have been dismissed in at least one district (see attached as Exhibit 11). However, those same charges have been reinvigorated in other districts and Mr. Johal is still in custody. No evidence has been presented on his case to date. 90. I also understand that a number of Sikhs worldwide have been arrested and India sought their extradition to stand trial for the murder of Rulda Singh. Footnote 3 on p 12 of the Appeal Book says, "According to a July 2010 media report, the Police in England arrested radicals for their involvement in the killing of R. Singh, the Punjab-based chief of Rashtriyasikh Sangat's arm." Attached as Exhibit 12 is the media report. 91. Attached as Exhibit 13 is an article that indicates that on		

	September 23, 2021, a U.K. court discharged three British Sikhs—Piara Singh Gill, Atnritivir Singh Wahiwala, and Gursharanvir Singh Wahiwala—who were arrested pursuant to Indian extradition warrants. The warrants were executed by the Midlands Police in December of 2020. The men were accused of being part of the murder of Rulda Singh. The Court discharged the men after the prosecution conceded that there was insufficient evidence to support their extradition. All three accused persons were supporters of an independent homeland for Sikhs. 92. I learned through a media report that in 2015, a court in India acquitted Darshan Singh, Jagmohan Singh, Daljeet Singh, Gurjant Singh and Amadeet Singh, who were all accused of murdering or plotting to murder Rulda Singh (attached as Exhibit 14).		

5. Mr. Dulai is associated with the International Sikh Youth Federation (ISYF) and Babbar Khalsa (BK). Revised appeal book: p 57 and p 59.	46. I have never been involved with BK, BKI, or ISYF. 107. I understand that Mr. Brar's father was one of the leaders of ISYF. He remained active in the ISYF until 2002 and, as far as I am aware, has not been involved with the ISYF since that time. To my knowledge, Mr. Brar has never been a member of the ISYF in Canada or elsewhere. I have also never been involved with the ISYF. 113. I have never been a member of Babbar Khalsa, nor have I had any involvement with that organization. I understand that Mr. Barri and Mr. Parmar created the organization. I understand that once Mr. Parmar was killed in 1992, the organization was effectively dismantled and all that was left was the name and logo.		Allegation considered
6. Jagtar Singh Johal went to Canada in August 2016 and met militant elements such as Mr. Dulai, according to	84. The source cited for that article is Tribute News Service and the title of the article is "Police refute Johal's torture	b. Media reporting indicates the Indian police revealed that Mr. Dulai met with Jagtar Singh Johal in August	This allegation is not considered.

media reporting dated November 19, 2017. Revised appeal book: p 12.	allegations" (attached as Exhibit 27). The article states that Mr. Jagtar Singh Johal met militant elements such as "Parupkar Singh, alias Pairry." I have never used the name Parupkar Singh. My nickname is Pary. I have never spelled my nickname with two Rs. I have never been a part of a military or paramilitary organization. I do not knowingly have any association with any military element. 85. I did meet with Mr. Johal when he came to Canada in August of 2016. I had no knowledge of the allegations against Mr. Johal when I met with him. I became aware of Mr. Johal in the late 1990s through his website, www.neverforget84.com My understanding was that his website documented unreported accounts of Sikhs who had been killed by military and police forces in India. This website became a source of news for the Sikh diaspora. In the mid-2000s,	2016 in Canada. Mr. Johal was subsequently arrested in India in November 2017 for his alleged role in several high profile killings of religious/political leaders in Punjab, India. (p 13)	The Court does not draw any negative conclusion from this allegation. Mr. Dulai knows Mr. Johal.

	Mr. Johal and I became acquainted through social medial and sent each other occasional pleasantries online. 86. In August of 2016, Mr. Johal contacted me and told me that he would be coming to Canada to attend a relative's wedding in Surrey. Mr. Johal said he would like to meet me in person. I met with him at a Tim Hortons in Surrey. We talked about his website and the importance of building a record of human rights violations. Mr. Johal inquired about the existence of archives of Sikh newspapers in Canada. I told him that the Chardikala Newspaper, which was established in the 1980s, had a physical archive in their office in Surrey. I took Mr. Johal to the Chardikala Newspaper office and showed him the archives. Mr. Johal wanted to scan the newspapers to create an electronic copy. I suggested that he go to a public library, as they might have a large enough scanner. We parted ways at the Chardikala office.		

	This was my only interaction with Mr. Johal. Shortly after that, I flew to Brampton, Ontario to cover a live sporting event for Channel Punjabi. I did not see Mr. Johal when I returned to British Columbia.		
7. Mr. Dulai retweeted a message of support for Mr. Johal. Revised appeal book: p 12.	96. The tweet that I retweeted was by Diljit Dosanjh, a Punjabi singer and actor. The tweet was "retweeted" 1,160 times and over 3,500 accounts "liked" this tweet. A copy of this tweet is attached as Exhibit 17. 97. I retweeted Mr. Dosanjh's tweet because I share Mr. Dosanjh's sentiment that everyone has a right to fair trial and that no one should be subjected to torture. Attached as Exhibit 18 is a recent article about Mr. Johal's circumstances in India, in which his lawyer tells the BBC that Mr. Johal has been tortured. My counsel was also able to obtain Mr. Johal's handwritten letter describing how he was tortured (attached as Exhibit 28) and an		This allegation is not considered. The Court does not draw any negative conclusion from this allegation. Mr. Dulai knows Mr. Johal.

	application that his lawyer filed in court requesting a medical examination (attached as Exhibit 29). 98. Since learning that the Government of Canada interpreted my retweet as evidence that I am a facilitator of terrorist activity, I have felt afraid to express myself openly on social media Before this case, I never thought the government could or would use a tweet condemning torture as evidence against me. Now, I feel like I cannot make public statements, even about things like basic human rights, without feeling like I am putting myself at risk.		
8. Mr. Dulai is a close contact and business associate of Mr. Brar and has been described by Mr. Brar as a very vocal supporter of Khalistan. According to media reports, Mr. Brar is a Canadian Khalistani extremist. An April 17, 2018 media report identified Mr. Brar as a	100. I agree that I am a vocal supporter of Khalistan. I believe in the right to self-determination, based on respect for equal rights and fair equal opportunity. I believe that individuals should be free to choose their sovereignty and international political status without interference or external compulsion. I believe the only	d. Mr. Dulai was in contact with Bhagat Singh Brar, who was identified as a Canadian Khalistani extremist who visited Pakistan to meet with leaders of the Lashkar-e-Tayyiba, a listed terrorist entity, and Sikh militants. (p 13)	Allegation considered

Canadian Khalastani extremist. 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. Revised appeal book: p 12, p 13 and p 18.	means of achieving an independent state called Khalistan is through non-violent means. Before this case, I also believed that being a vocal supporter of Khalistan was the kind of speech that would not be used against me in Canada. 103. I am also not aware of any connection that Mr. Brar may have to terrorism or terrorist entities and I do not believe that he has any such connections. If I had such information, I would not associate with him. 106. I am not sure if the alleged "financial support" pertains to me or Mr. Brar. I think it just relates to Mr. Brar because there are no other references in the Memorandum to me allegedly being linked to financial wrongdoing. Still, I confirm that I have not provided financial support to any terrorist related-activity. To my knowledge, Mr. Brar has		

	not been involved in collecting funds in support of any terrorist activity.		
9. Mr. Dulai was associated with the Sikh Vision foundation (SVF) in the mid 2000s. Mr. Dulai worked as an investigator for the Air India defence teams and represented the SVF. The SVF gave a $175,000 mortgage to Ajaib Singh Bagri a year after his 2000 arrest in connection with the Air India bombings. Bagri was acquitted in 2005. The SVF displayed support for the BK founder and the assassins of Indian Prime Minister Indira Gandhi. Revised appeal book: p 13.	109. I was not involved in SVF's purported financial agreement related to Mr. Bagri because at the time, I was retained by Peck and Company Barristers, which represented Mr. Bagri. Therefore, I had a clear conflict of interest. I have no knowledge of the purported mortgage. 114. I was no longer involved with the SVF in 2003. I did not have any involvement in the decisions surrounding the publication of any photographs or other content on SVF's website in 2003 .	c. Mr. Dulai was associated with Sikh Vision foundation in the mid-2000. He worked as an investigator for the Air India defence teams. The Sikh Vision website displayed photos of Babbar Khalsa founder Talwinder Singh Parmar. Babbar Khalsa is a listed terrorist entity in Canada since June 2003. Mr. Dulai was one of the Vaisakhi parade organizers in Surrey B.C. in 2007, which included a tribute to Parmar. (p 13)	This allegation is not considered. The Court does not draw any negative conclusion from this allegation.
10. Mr. Brar was involved in collecting funds and these funds were transferred to his father (Lakhbir Singh Brar, the Pakistan-based leader of the ISYF) and another individual in Pakistan for further distribution to terrorist families in Punjab.	106. I am not sure if the alleged "financial support" pertains to me or Mr. Brar. I think it must relate to Mr. Brar because there are no other references in the Memorandum to me allegedly being linked to financial wrongdoing. Still, I confirm that I have not provided		This allegation is not considered. This allegation is related to Mr. Brar and not Mr. Dulai.

Tab E, August 2018 case brief, Supplemental Information.	financial support to any terrorist-related activity. To my knowledge, Mr. Brar has not been involved in collecting funds in support of any terrorist activity. 107. I understand that Mr. Brar's father was one of the leaders of ISYF. He remained active in the ISYF until 2002 and, as far as I am aware, has not been involved with the ISYF since that time. To my knowledge, Mr. Brar has never been a member of the ISYF in Canada or elsewhere. I have also never been involved with the ISYF.		

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-670-19
STYLE OF CAUSE:	PARVKAR SINGH DULAI v CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)
PLACE OF HEARING:	OTTAWA, ONTARIO VANCOUVER, BRITISH COLUMBIA
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JUDGMENT AND REASONS:	NOËL S. J.
DATED:	AUGUST 10, 2022

APPEARANCES:

Rebecca McConchie Sadaf Kashfi	FOR THE APPELLANT
Helen Park Courtenay Landsiedel Stephanie Morin Nathalie Benoit Michelle Lutfy	FOR THE RESPONDENT
Gib van Ert Colin Baxter	*AMICI CURIAE*

SOLICITORS OF RECORD:

McConchie Criminal Law Vancouver, British Columbia	FOR THE APPELLANT
Edelmann and Co. Law Office Vancouver, British Columbia	
Attorney General of Canada Vancouver, British Columbia Ottawa, Ontario	FOR THE RESPONDENT
Conway Baxter Wilson LLP/s.r.l. Ottawa, Ontario	*AMICI CURIAE*
Olthuis Van Ert Ottawa, Ontario / Vancouver, British Columbia	