Federal Court  Cour fédérale

Date: 20100927

Docket: IMM-1474-09

Citation: 2010 FC 957

Ottawa, Ontario, September 27, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE TORONTO COALITION TO STOP THE WAR,
THE OTTAWA PEACE ASSEMBLY,
THE SOLIDARITY FOR PALESTINIAN HUMAN RIGHTS,
GEORGE GALLOWAY, JAMES CLARKE, YAVAR HAMEED,
HAMID OSMAN, KRISNA SARAVANAMUTTU,
CHARLOTTE IRELAND, SID LACOMBE, JUDITH DEUTSCH,
JOEL HARDEN, DENIS LEMELIN, and LORRAINE GUAY

Applicants

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS
and
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

and

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] As framed by the applicants, this is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision made by the

Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness that the applicant, George Galloway, was inadmissible to Canada. The decision, the applicants submit, was communicated by a letter dated March 20, 2009, to Mr. Galloway, from Robert J. Orr, Immigration Program Manager of the Canadian High Commission in London, United Kingdom.

[2] The other applicants are groups and individuals who were involved in bringing Mr. Galloway to Canada for a speaking tour. They wished to hear Mr. Galloway express his views in person at the several venues in Canada at which he was scheduled to speak in March and April, 2009. His topics related to the wars in Iraq and in Afghanistan and to the situation in the Palestinian territories.

[3] The applicants assert that Mr. Galloway was “barred from Canada” because of the respondents’ opposition to his political views. They contend that the decision to declare him inadmissible was biased, made in bad faith and constituted an abuse of executive power for purely political reasons.

[4] The respondents submit that whether they approve of Mr. Galloway’s political beliefs or not is legally irrelevant because his admissibility was legitimately evaluated on the basis of his own actions and in accordance with the relevant legislation. They say there is no evidence of bad faith, bias or a breach of fairness in the performance of their public duties. Moreover, they submit, no legally reviewable decision to exclude Mr. Galloway was in fact made.

[5] I agree with the respondents that as a matter of law this application must be dismissed. As a result of the respondents' actions, Mr. Galloway may have been found to be inadmissible to Canada had he actually presented himself for examination to an officer at an airport or a border crossing. That did not happen. A preliminary assessment prepared by the Canada Border Services Agency (CBSA), at the request of the respondents' political staff, concluded that Mr. Galloway was inadmissible. The steps taken by the respondents' departments to implement that assessment were never completed. Mr. Galloway made the decision not to attempt to enter Canada because he might be detained. Thus, the respondents' intentions and actions did not result in a reviewable decision to exclude him.

[6] Mr. Orr's letter, conveying CBSA's preliminary assessment to Mr. Galloway, had the desired effect of discouraging Mr. Galloway from testing the respondents' resolve to deny him entry. However, that letter did not constitute a decision nor did it communicate a formal inadmissibility finding that had been made in accordance with the applicable legislation. Mr. Galloway chose not to present himself at the border for examination and did not seek the exercise of ministerial discretion in the form of an exemption or a temporary residence permit. As such, no final decision was made regarding his admissibility. There is, therefore, no decision which this Court can review.

[7] These findings should not be taken as agreement with the respondents' position that there are reasonable grounds to believe that Mr. Galloway may be inadmissible pursuant to s. 34 of the Act. It is clear from the record that CBSA's preliminary assessment to that effect was hurriedly produced in response to instructions from the office of the Minister of Citizenship and Immigration

and from departmental officials that assumed Galloway was inadmissible on scant evidence. The result, in my view, was a flawed and overreaching interpretation of the standards under Canadian law for labelling someone as engaging in terrorism or being a member of a terrorist organization. The Court is under no illusions about the character of the organization in question, Hamas. But the evidence considered by the respondents falls far short of providing reasonable grounds to believe that Mr. Galloway is a member of that organization.

[8] The record contains statements which counsel for the respondents fairly characterized in argument as “unwise”. Taken into consideration with the haste with which officials reached the conclusion that Mr. Galloway was inadmissible and took steps to have him barred before the assessment of his admissibility was completed, these statements could have supported findings of bias and bad faith against the respondents. It is clear that the efforts to keep Mr. Galloway out of the country had more to do with antipathy to his political views than with any real concern that he had engaged in terrorism or was a member of a terrorist organization. No consideration appears to have been given to the interests of those Canadians who wished to hear Mr. Galloway speak or the values of freedom of expression and association enshrined in the *Canadian Charter of Rights and Freedoms*.

[9] The foregoing comments are not intended in any way to convey approval of Mr. Galloway’s political views or disapproval of the respondents’ opinions with respect to those views. In this application, the Court was asked to consider whether the actions taken to bar Mr. Galloway from expressing his views in Canada are judicially reviewable and if so, whether they meet the legal standard of reasonableness. On the basis of the evidence before me, I must conclude that the

respondents' efforts to bar Mr. Galloway did not result in a decision or action for which a remedy may be provided by this Court.

[10] If I have erred in this conclusion, I am satisfied that the evidence considered by the respondents was insufficient to support a finding that there are reasonable grounds to believe that Mr. Galloway is a member of a terrorist organization or has engaged in acts of terrorism. It was, therefore, unreasonable for the respondents to rely on those grounds to deem him inadmissible to Canada.

Background

George Galloway

[11] George Galloway is a British citizen and was, at the material times, a Member of the Parliament of the United Kingdom for the Respect Party. He has since been defeated in the most recent parliamentary elections. Galloway is notorious in Britain and abroad for the controversies which have arisen from his participation in various protest movements including a campaign against the sanctions imposed on Iraq following the Gulf War. He was investigated and temporarily suspended from Parliament for allegedly improperly benefiting from the United Nations Oil for Food Program. Galloway successfully sued a British paper for libel over similar allegations. He was ultimately expelled from the U.K. Labour Party for allegedly inciting attacks against British troops in Iraq following the 2003 invasion, which he denies. In short, Galloway is a highly controversial figure who provokes strong reactions to his public statements and actions.

[12] Mr. Galloway's sympathies for the Palestinians and their cause are well known and are described at length in the court record. He was vehemently opposed to the Israeli intervention in the Gaza Territory in December 2008 and in January 2009. He also opposed the ensuing blockade of goods to the territory. In early March 2009, Galloway was part of a convoy organized by a group called Viva Palestina which delivered financial and material assistance to Gaza in an effort to break the blockade. As Mr. Galloway publicly declared, his participation in the convoy was intended as a political statement in opposition to the blockade as well as a means to provide humanitarian aid to the people of the territory. There is a considerable amount of evidence in the record about other opposition to the blockade and the donations of aid from many other sources, including western governments, through organizations such as the Red Crescent Society.

[13] The Viva Palestina convoy consisted of 109 trucks loaded with medical supplies, toys, clothes and vehicles including ambulances and a fire truck. Mr. Galloway also contributed GBP25,000 ($45,000) raised from donations by individuals wishing to support the relief effort. After some delay involving negotiations with the Israeli and Egyptian Governments, most of the aid was allowed to enter Gaza through an Egyptian border crossing. Non-medical aid was conveyed to Gaza through Israel security controls.

[14] Gaza is currently under the control of the Harakat Al-Muqawama Al-Islamiya ("Islamic Resistance Movement"), more commonly known by the acronym, Hamas. Following elections in 2006, Hamas gained a majority of the seats on the Palestinian Legislative Council for Gaza and took

control of the local government. Hamas controls the security, health, education and social services in the territory.

[15] Hamas was listed as a terrorist entity under subsection 83.05(1) of the *Criminal Code*, R.S. C. 1985, c. C-46, by the Governor in Council in November 2002. The listing was reviewed and maintained in November 2008. Hamas is similarly proscribed by the United States and the European Union. The identification of Hamas as a terrorist organization for the purposes of paragraph 34(1)(f) of the IRPA, was not questioned in these proceedings.

[16] Mr. Galloway says he respects the democratic right of Palestinians to elect their own leaders and, in that regard, respects the decision of Gazans to elect Hamas in January 2006 to a majority in the Palestinian Legislative Council for the territory. However, Galloway denies being a member or a supporter of Hamas. To the contrary, he claims to support another Palestinian organization, Fatah, which has long been opposed in interest to Hamas.

[17] Galloway asserts that his purpose in delivering goods and cash to Gaza was to support the Palestinian people, not Hamas. He says he delivered humanitarian aid to the Government of Gaza, not to Hamas. However, it is also clear from the record that Mr. Galloway was aware that his actions might be construed as support for Hamas and was prepared to accept that risk. He also delivered the cash donations directly to the head of the Hamas government in a highly publicized gesture.

[18] The purpose and distribution of the aid delivered by the convoy is not disputed by the respondents. There is no evidence in the record that it was used by Hamas for any terrorist purpose. The unchallenged evidence in the record is that the cash delivered by Galloway was used to buy incubators and pediatric dialysis units for a Gaza hospital.

[19] Following these events, Galloway was invited to visit Canada for a speaking tour to discuss topics such as the conflict in Gaza and the war in Afghanistan. His visit was scheduled to run from March 30 to April 2, 2009 with appearances in Toronto, Mississauga, Ottawa and Montreal, after a similar tour in the United States. The organizers, including other applicants in this proceeding, expended a considerable amount of time, money and energy to make the arrangements.

[20] Galloway had previously entered Canada without difficulty and had spoken to Canadian audiences in September 2005 and in November 2006. On each of these occasions, Galloway's visit attracted hundreds of people to public debates on Canada's foreign policy, the wars in Iraq and in Afghanistan, and the political situation in the Middle East. There is no indication in the record that his prior appearances in Canada fomented public disorder, or created a security risk. Galloway was not on any watch list maintained by CBSA prior to these events, according to the evidence.

The impugned "decision":

[21] The plan to have Mr. Galloway speak again in this country came to the attention of some Canadians opposed to his views on the Middle East. On March 15, 2009, they published an open

letter to Jason Kenney, Minister of Citizenship and Immigration, asking him to bar Mr. Galloway from Canada.

[22] Early in the afternoon of March 16, 2009, Mr. Alykhan Velshi wrote an e-mail to Mr. Edison Stewart, Director General of the Communications Branch at Citizenship and Immigration Canada (CIC). In the email, Mr. Velshi reported to have received a "media call" asking him why Canada was going to admit Mr. Galloway as a visitor, given Mr. Galloway's previous public statements and actions. Mr. Velshi was not a CIC officer but was a member of the Minister's political staff. He served as Director of Communications and Parliamentary Affairs in the Minister's office.

[23] In the email to Mr. Stewart and in several follow-up e-mails, Mr. Velshi expressed the view that Mr. Galloway was inadmissible. He shared the results of some personal, on-line research he had conducted. He also advised Mr. Stewart that the Minister would not grant a temporary resident permit (TRP) if one were to be requested by Mr. Galloway. A TRP may be issued under s. 24 of the Act to a person who is inadmissible to Canada at the discretion of an officer who is of the opinion that it is justified in the circumstances. In exercising that discretion the officer shall act in accordance with any instructions that the Minister may make. Mr. Stewart passed Mr. Velshi's enquiry on to Stephane Larue, who was then the Director General of the Case Management Branch of CIC.

[24] As admissibility determinations fall within the scope of the responsibilities of the Department of Public Safety and Emergency Preparedness (PSEP), Mr. Larue referred the request

to Ms. Connie Terreberry of CBSA. Ms. Terreberry agreed to do a quick admissibility assessment. She forwarded Mr. Velshi's and Mr. Larue's e-mails to colleagues with instructions "to do a quick check on this and let me know what we've got". Within approximately two hours of Mr. Velshi's initial message, CBSA officials were exchanging e-mails with CIC personnel indicating that their preliminary checks were complete and that "[w]ith the extensive info available in open source, the applicant is inadmissible 34(1)(f) and possibly 34(1)(c)."

[25] Early the next morning, Ms. Terreberry advised a CIC official that the research to confirm inadmissibility was done but that a formal assessment would take a little time and require consultation with their partner, the Canadian Security Intelligence Service (CSIS). Apart from the open sources cited by Mr. Velshi in his e-mails, it does not appear from the record what, if any, additional research was conducted. When consulted, CSIS advised CBSA that they had no concerns with Mr. Galloway's visit from a security perspective. That does not appear to have influenced CBSA's view of the matter.

[26] The written assessment, completed late on March 17, 2009, is more cautious regarding the question of Mr. Galloway's admissibility than is the earlier string of e-mails. It states in the opening paragraph:

> Current information available **suggests** that the subject, Mr. George Galloway **may be** inadmissible to Canada pursuant to paragraph 34(1)(c) and 34(1)(f) of the [IRPA]. [Emphasis added]

[27] The concluding recommendation was that there were reasonable grounds to invoke the s. 34 grounds "…should a Visa Officer decide to do so after examining all of the facts of this case" (emphasis added). This preliminary assessment was then circulated within CBSA, CIC and other

government offices while discussions ensued about what to do with Mr. Galloway should he show up at an airport or land crossing seeking entry into Canada.

[28] The record shows that e-mails concerning the matter were distributed widely within the government, including to the Prime Minister's Office and to the Privy Council Office. The Canadian High Commissioner in London, Mr. James Wright, wrote to a broad distribution of senior personnel to urge that consideration be given to a number of factors, including the fact that neither the British nor the Americans had taken action against Mr. Galloway for his support to the Palestinians. His public statements, while widely criticized, would be defended as free speech in Great Britain. This was taking place in advance of a visit by the Prime Minister to London and Mr. Wright's immediate concern was with the anticipated reaction of the British press.

[29] When it was noted by the High Commission press officer that Galloway was eligible for entry to the US, the response from Mr. Larue was that Canada's laws were different and prescriptive, leaving not much discretion on determining admissibility. He noted that there was flexibility in the use of the TRP under s. 24 and the exemption for humanitarian and compassionate grounds under s. 25 of the Act but "our Minister has indicated that he does not wish to use those in this particular case."

[30] Another of Mr. Kenney's assistants, Kennedy Hong, wrote to Larue and others at 11:59 a.m. on March 18th to advise that Galloway may already be in the US and to inquire whether there was something "on the border security system already so he doesn't get let in accidentally."

[31] In an e-mail at 12:14 on the 18th , Mr. Velshi wrote to Mr. Larue:

> Stephane, an old associate of mine says that he [Mr. Galloway] is currently speaking in New York. He may try to cross the land border. Can you confirm that if he tries to cross the Canada-US border, or tries to fly in via Pearson (either from the US or the UK) he will be turned back. The minister has said he will not issue a TRP and doesn't want one issued. So I just need confirmation that, assuming he's not already in the country, he will not be allowed in under any circumstances.

[32] A flurry of e-mails followed to assure political staff that border officials would be alert to the possible arrival of Mr. Galloway by land, sea or air. At 12:34 Hong wanted to know whether officials would enter Galloway's name into their computer system: "how can CBSA ensure that he won't just be waived into Canada? Can we provide them with a profile? A photo?" At 12:40, Velshi sought confirmation that:

> [s]ince the Min won't issue a TRP, there is no change [sic] he will be allowed entry though otherwise inadmissible? i.e., is there a chance that the border agent or NHQ will accidentally issue a TRP?

Larue offered assurances that Port of Entry officials did not have that authority. He undertook to ensure that the inadmissibility grounds were clearly indicated in the lookout (i.e., the alert sent to border officials).

[33] Also on March 18, 2010, Velshi told a press officer at the High Commission in London that Mr. Galloway would be informed the next day that he would not be allowed to enter Canada because the CBSA had deemed him inadmissible. He instructed that all press inquiries be directed to him.

[34] As Mr. Galloway was, presumably, unaware of these efforts to deny him entry, CIC officials had decided that it would be appropriate to give him advance notice. Mr. Robert Orr, Immigration Program Manager and highest-ranking CIC employee at the Canadian High Commission in London was enlisted in this effort. In his affidavit, Mr. Orr says that he merely functioned as the liaison between CIC National Headquarters and Mr. Galloway and made no decisions respecting Mr. Galloway's admissibility. He says he was advised that Minister Kenney did not want Mr. Galloway allowed entry under any of the exemptions to inadmissibility.

[35] Mr. Orr initially tried, unsuccessfully, to contact Mr. Galloway by phone through his parliamentary office in London on March 19th. On March 20, 2009, Mr. Orr spoke to Mr. Galloway's parliamentary assistant who expressed concern that the information had appeared in a British newspaper before they were informed. Disclosure of this personal information, Mr. Orr acknowledged on cross-examination, may have been a breach of the *Privacy Act*. He did not know how it had been disclosed other than it was not from the High Commission.

[36] Mr. Velshi had previously requested, and received from the High Commission, contact particulars for all of the major UK newspapers. Velshi is quoted in the story that appeared in the Sun newspaper on the morning of the 20th. When asked whether Galloway would receive a special permit from the Immigration Minister, he is quoted as saying:

> George Galloway is not getting the permit-end of story. He defends the very terrorists trying to kill Canadian forces in Afghanistan.

[37] Mr. Velshi approached other media sources to convey the same message. In an interview with a U.K. television network on the same date, Mr. Velshi stated:

> Mr. Galloway has um, is on the record bragging about providing financial support to Hamas, an organization which is a banned terrorist organization in Canada. He's expressed sympathy for the, ah, Taliban murderers who are trying to kill Canadian and British soldiers in Afghanistan.
>
> This is not someone who, we believe, we should be, ah, giving special treatment in terms of allowing him access to our country. Essentially, here's someone who, as, Mr. Galloway, who said that, um, Mr. Galloway has said he wants to come to Canada to raise money for, ah, for these groups, um, that are out there killing Canadians. Its actually, its actually quite odious and I think it's entirely appropriate for our security agencies to say, that if, ah, that if they have advance notice that Mr. Galloway is going to come to Canada to pee on our carpet, that we should deny him entry to the home.
>
> …this has nothing to do with, with freedom of speech whatsoever. The decision on whether or not, um, individuals constitute a national security threat to Canada are made by our border security agencies by applying the criteria of our immigration laws. And they've made the determination that Mr. Galloway is inadmissible on national security grounds. And so, our position as the Government is that we're not going to second guess, we're not going to question, we're not going to overturn the decision of our border security agencies to, ah, hold that Mr. Galloway is inadmissible.
>
> Ah, you know, he's perfectly free to, ah, to go onto his, um, you know, to go onto soap box and to say, ah, whatever he wants. But what he's not free, ah, to do, is um, to, pose a threat to the safety and security of Canadians and that's something that our security agencies are ultimately responsible for determining.

[38] In this and other communications to the press, Mr. Velshi states that the decision had been made to bar Mr. Galloway on national security grounds. As noted above, the evidence is that CSIS had no concerns with Mr. Galloway's visit on such grounds. Nor is there any indication in the preliminary assessment that Mr. Galloway posed "a threat to the safety and security of Canadians". Later comments by Minister Kenney attempted to distance his office from involvement in the process by describing it as an operational decision by CBSA officials.

[39] In two e-mails to the High Commissioner, Mr. Orr advised that a decision regarding Mr. Galloway had been made in Ottawa. On March 19th, he wrote that he had instructions from the Minister's office to contact Galloway's office to "convey the decision". In an e-mail on March 20th, Mr. Orr wrote that in speaking to the parliamentary assistant he had "stated that Mr. Galloway has been deemed inadmissible by Canada's immigration minister, Jason Kenney, and that he would be denied entry at a Canadian port of entry." Mr. Orr was not questioned about this in his cross-examination but he described other comments in the string of e-mails between Ottawa and London that suggested that a decision had already been made as being poorly phrased ("sloppy drafting"). He said that officials were aware that such a decision depended upon the examination process that would follow any attempt by Mr. Galloway to enter Canada.

[40] Mr. Orr wrote to Mr. Galloway later on the 20th. His letter constitutes the reasons that were communicated to Mr. Galloway for why he was deemed inadmissible. With the deletion of the statutory references, the letter reads as follows:

> Further to my conversation with your parliamentary office, this letter confirms the preliminary assessment of the Canada Border Services Agency that you are inadmissible to Canada….
>
> Hamas is a listed terrorist organization in Canada. There are reasonable grounds to believe you have provided financial support for Hamas. Specifically, we have information that indicates you organized a convoy worth over one million British pounds in aid and vehicles, and personally donated vehicles and financing to Hamas Prime Minister Ismail Haniya. Your financial support for this organization makes you inadmissible to Canada pursuant to paragraph 34(1)(c) and paragraph 34(1)(f) of IRPA.
>
> It is our understanding that it is your intent to come to Canada on March 30, 2009. You are invited to make any submissions you deem necessary with respect to this preliminary assessment of inadmissibility in advance of this date. Any submissions you provide will be considered. Please forward these submissions to my attention at the above address.

> If we do not receive any submissions on or before March 30, 2009, and you present yourself at the Port-of-Entry, the Canadian Border Services Agency officer will make a final determination of inadmissibility based on this preliminary assessment and any submissions you make at that time.
>
> In order to overcome this inadmissibility, you could submit an application for a Temporary Resident Permit. I have been asked to convey to you that it is unlikely that the application would be successful. However, a final determination with respect to a temporary permit will only be issued upon application.

[41] On cross-examination, Mr. Orr indicated that the information in the letter was dictated to him by phone. He was adamant that he did not make a decision to find Mr. Galloway inadmissible but merely conveyed the CBSA's preliminary assessment as it was described to him by telephone and e-mail. In his experience, this type of warning was rare but not unknown. He was not aware of any instances, such as this, where the issue arose because of a "media call" to a political staff member.

[42] Mr. Orr confirmed that had Mr. Galloway arrived at a Canadian Port of Entry there were several possible outcomes. He would be examined by an officer and an immediate decision could be made as to his admissibility. Alternatively, he could be directed back to the US for several weeks while an admissibility report was considered by an officer. He could also be detained as a suspected terrorist. The preliminary assessment would be relied upon by the deciding officer, as the memo was from a specialized unit, although it was open to the officer to do further research. He maintained that the officer would not be obliged to agree with the opinion expressed in the preliminary assessment while conceding that he had not seen this happen. He acknowledged that the border officer would be aware of what had transpired in Ottawa and that this would be a factor in the decision making. It was also open to Mr. Galloway to apply to the PSEP Minister for an exemption under s. 34 (2). This requires a determination that the applicant's presence in Canada,

notwithstanding the presence of the factors in s. 34 (1), would not be detrimental to the national interest.

[43] In a letter dated March 23, 2009, but received by Mr. Orr on March 25, 2009, Mr. Galloway's counsel provided submissions to the High Commission regarding his admissibility. The applicant requested that the High Commission review his submissions and provide a response by March 24, 2009.

[44] Later that same day (March 25, 2009), Mr. Galloway's counsel sent an e-mail to Mr. Orr at the High Commission indicating that the applicant could not wait for Mr. Orr's reply and that he had already filed an application for leave and judicial review with the Federal Court, precluding any further action on Mr. Orr's part, in his view.

The judicial review proceedings:

[45] On March 29, 2009, Mr. Galloway and his supporters sought an interim injunction before this Court to allow him to enter Canada for the purposes of the speaking tour. On March 30, 2009, Justice Luc Martineau dismissed the applicant's motion. Justice Martineau determined that the applicant's arguments raised a serious issue on the low threshold established by the case law and that his arguments were not frivolous or vexatious. However, the applicant had failed to meet another essential requirement for obtaining an interim injunction, that is that he would suffer irreparable harm if the injunction were not granted: *Toronto Coalition to Stop the War v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 326.

[46] On the afternoon of March 30, 2009, the applicant was in the United States. Depending on the outcome of the injunction application, he intended to present himself at the Lacolle, Québec border post. As Mr. Galloway explains in his affidavit evidence, he had no desire to be possibly detained by CBSA while the matter of his admissibility was being determined. Thus he chose not to appear at the border post. It also appears that no consideration was given to applying for an exemption under s. 34 (2) or a TRP.

[47] Mr. Galloway's speaking engagements in Canada were carried out, with considerable difficulty and with increased costs, by telephone and video conference facilities from New York. According to the affidavit evidence submitted by the applicants, participation was lower than expected, contributing to a significant loss of revenue, as many persons who had bought tickets in anticipation of hearing Galloway directly sought refunds. Since these events occurred, Galloway has returned to the United States on three occasions without difficulty for speaking engagements.

[48] At the outset of these proceedings, the respondents sought to have the applicants other than Mr. Galloway struck from the record as parties by way of a cross-motion to the applicants' motion for an interim stay. The cross-motion was dismissed by the Court on March 27, 2009. It was dismissed without prejudice to it being brought on again by motion before a regular sitting of the Court.

[49] The respondents have contended from the outset that there was no decision made to refuse Mr. Galloway entry to Canada. In response to the request from the Registry under Rule 9 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 to provide a certified copy

of the decision and any written reasons for the decision, the Canadian High Commission in London replied on May 21, 2009. They reported that they had no record of a decision made on March 20, 2009 pertaining to Mr. Galloway.

[50] A hearing of this matter was delayed by reason of a series of motions brought by the parties relating to the content of the certified record, ultimately produced by the High Commission in response to the Court's order granting leave for the application to be heard. The certified record consists largely of copies of e-mail messages exchanged between government offices in Ottawa and the High Commission in London.

[51] The respondents were concerned that the certified tribunal record contained information of a sensitive nature that should not be disclosed. They brought a motion pursuant to section 87 of the Act for a protection order, which I granted, in part, in an Order issued in December, 2009. As a result, the time required to complete the remaining stages of the application was extended.

[52] The applicants moved for the disclosure of additional information that was not included in the tribunal record, alleging that the respondents had not disclosed all of the relevant communications between government offices relating to Mr. Galloway. The parties were urged to reach agreement on what constituted the record but were unable to do so. The respondents produced two witnesses who were cross-examined on their affidavits.

[53] The applicants then sought additional production and an order to compel the witnesses to answer certain questions which I declined to issue. In my view, the respondents had produced an

adequate record of what had led to the impugned decision and the applicants were engaged in a "fishing expedition" to find additional evidence of bad faith and bias they could not demonstrate existed, such as further communications between government offices in Ottawa. Applying the proportionality principle, I considered that the discovery process had gone on long enough and had to be brought to a close.

[54] I note that on April 9, 2010, following the cross-examination of a CBSA witness, the respondents voluntarily disclosed a number of unredacted CBSA e-mails which had not been included in the certified record dated January 13, 2010. The applicants continue to maintain that the record is incomplete and that they should have been allowed to explore whether there was additional evidence of decisions made in other government offices that affected their interests.

[55] Notwithstanding these concerns, I am satisfied that the respondents produced what appears to be a complete record of the communications within CIC and CBSA that led to the March 20, 2009 letter to Mr. Galloway. Prior to the hearing, they waived the claim of public interest privilege on the content for which they had previously sought protection.

[56] The applicants served and filed a Notice of Constitutional Question on March 12, 2010 asserting that section 34 of the IRPA breaches their freedoms of expression and association, their equality rights and their liberty and security of the person rights under sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*).

[57] The Canadian Civil Liberties Association sought, and was granted, limited intervenor status to submit written and oral argument respecting the constitutionality and interpretation of section 34 of the IRPA.

Issues

[58] As noted, the applicants served and filed a Notice of Constitutional Question alleging that their rights to freedom of expression and association, security of the person and equality were breached by section 34 of the IRPA. They filed written representations on those issues but did not press them in oral argument. The intervenor, the Canadian Civil Liberties Association, did not question the validity of the section at the hearing but focused their submissions on the proper interpretation and application of the legislation, having regard to *Charter* values.

[59] The Court should generally avoid making any unnecessary constitutional pronouncement and is not bound to answer constitutional questions when it may dispose of the matter without doing so: *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 at page 571; *Smoke-Graham v. The Queen*, [1985] 1 S.C.R. 106 at page 121.

[60] Accordingly, I do not consider it necessary to address the constitutional validity issue. Had I done so, I would have agreed with the respondents that based on the established jurisprudence, section 34 withstands constitutional scrutiny on a subsection 2 (b) or (d) *Charter* analysis so long as the discretion it affords is exercised in accordance with the statute: *Suresh v. Canada (Minister of*

Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3 ("*Suresh*"); *Khalil v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 66.

[61] In the event that I have erred with respect to the conclusion that I have reached regarding the disposition of this matter, I think it necessary to address the merits of the preliminary assessment made by CBSA. In oral argument, the applicants asked me to comment on the assessment, even if I determined there was no reviewable decision to exclude Mr. Galloway, as there continues to be a live controversy between the parties on that issue. Galloway may wish to come to Canada again and the assessment, if unquestioned, may be used to inform any future decision by a visa officer as to his admissibility.

[62] The issues raised by the parties can therefore be narrowed to the following:

1. Do the applicants, other than Mr. Galloway, have standing in this application for judicial review? Were their *Charter* section 2 rights infringed?

2. Was CBSA's preliminary assessment that Mr. Galloway may be inadmissible on security grounds reasonable?

3. Was there a "decision, order, act or proceeding" subject to judicial review pursuant to section 18.1 of the *Federal Courts Act*?

Analysis

Legislative Framework:

[63] Section 18.1 of the *Federal Courts Act*, R.S. 1985, c. F-7 sets out the authority of the Court to review and set aside decisions or actions of federal institutions. The relevant provisions are subsections 18.1 (1), (3) and (4) which read as follows:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
…	…
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:
(a) acted without jurisdiction,	a) a agi sans compétence,

acted beyond its jurisdiction or refused to exercise its jurisdiction;	outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

[64] The relevant provisions of section 34 of IRPA are the following:

s.34 (1) A permanent resident or a foreign national is inadmissible on security grounds for …	art.34 (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants : …
(c) engaging in terrorism;	c) se livrer au terrorisme;

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[65] Section 33 of the statute provides a guide to interpretation of s. 34 in these terms :

s.33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	art.33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

Standard of Review

[66] The "reasonable grounds to believe" standard in paragraph 34(1)(f) and the guide to interpretation in section 33 of the IRPA has been held to require more than mere suspicion, but less than the civil standard, or proof on a balance of probabilities. It is said to be a *bona fide* belief in a serious possibility based on credible evidence: *Mohammad v. Canada (Minister of Citizenship and*

Immigration), 2010 FC 51 at para. 50; *Almrei (Re)*, 2009 FC 1263 at para. 100. The application of this test or guide to the evidence is a mixed question of fact and law calling for the application of the reasonableness standard: *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 ("*Poshteh*").

[67] The interpretation of the term "member" in paragraph 34(1)(f) is a question of law. Whether someone has "engaged in terrorism", as set out in paragraph 34(1)(c), or is a "member of an organization" that has engaged in terrorism within the meaning of paragraph 34(1)(f) are mixed questions of fact and law and have been traditionally reviewed on the reasonableness standard: *Poshteh*, above, at paras. 16-23.

[68] The reasonableness standard reflects the factual element present in questions of membership and the expertise that officers possess when assessing applications against the inadmissibility criteria contained in subsection 34(1) of the Act: *Ugbazghi v. Canada (Minister of Citizen and Immigration)*, 2008 FC 694, [2009] 1 F.C.R. 454; *Saleh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 303.

[69] Under paragraph 18.1(4)(c) of the *Federal Courts Act*, questions of law are reviewable on a standard of correctness. A determination that an act was an act of terrorism must be legally correct: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at para. 116.

[70] On questions of fact, the Federal Court can intervene under paragraph 18.1(4)(d) only if it considers that the decision maker "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it". The Supreme Court has made it clear that in enacting this ground of review, Parliament intended administrative fact finding to be given a high degree of deference: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 46 ("*Khosa*").

[71] Overall, application of the reasonableness standard calls for a high degree of deference: *Khosa*, above, at para. 59.

Do the applicants, other than Mr. Galloway, have any standing in this application? Were their Charter s.2 rights infringed?

[72] As already mentioned, the respondents have taken the position from the outset of these proceedings that the applicants, other than Mr. Galloway, have no standing in this matter. The respondents' pre-hearing motion to strike the other applicants from the record was dismissed without prejudice to their bringing the question back on before the judge hearing the application, which they have done.

[73] The test for standing in a judicial review application is that set out in subsection 18.1(1) of the *Federal Courts Act*. An application may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[74] The phrase “anyone directly affected” focuses attention on the rights as well as the interests of the applicant. It is not enough to have an interest in the outcome. This Court has held, for example, that sponsors and family members of a foreign national seeking an immigrant visa lack the required standing to bring a judicial review application because their rights are not directly affected: *Carson v. Canada (Minister of Citizenship and Immigration)* (1995), 95 F.T.R. 137, 55 A.C.W.S. (3d) 389 at para. 4 (“*Carson*”); *Wu v. Canada (Minister of Citizenship and Immigration)* (2000), 4 Imm. L.R. (3d), 183 F.T.R. 309 at para. 15 (“*Wu*”).

[75] The respondents argue that the steps taken by the respondent ministers in this matter did not directly affect the other applicants’ legal rights, impose any legal obligations upon them or prejudicially affect them so as to bring them within the scope of subsection 18.1(1). The applicants, other than Mr. Galloway, submit that this does not take into account their *Charter* right to freedom of expression which encompasses a right to receive information. They argue that *Carson* and *Wu* are distinguishable, as issues of that nature did not arise in those cases.

[76] The applicants rely on the decision of the New Brunswick Court of Appeal in *Province of New Brunswick v. Morgentaler*, 2009 NBCA 26 at paras. 34-35, for the proposition that a party has standing if they have a personal stake in the outcome of the controversy. But in that case, the applicant had a direct interest in the application of the policy in question. He would not be paid by the province for services performed if the policy were upheld. Moreover, he had sought public interest standing which raises different considerations as I discuss below.

[77] In *Henry Global Immigration Services v. Canada (Citizenship and Immigration)* (1998), 158 F.T.R. 110, 84 A.C.W.S. (3d) 756, also cited by the applicants, Justice Frederick Gibson of the Federal Court found that an immigration consultant had standing in the judicial review of a decision respecting failed applications for landing in Canada. In the particular circumstances of that case, the consultant was at risk of being put out of business if the decision in question was upheld. In *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229, the applicant's members were farmers and fishermen. There was abundant evidence that they would be directly affected by the cancellation of the ferry service to Prince Edward Island. There is no evidence of similar economic interests in this case.

[78] It could be argued that the other applicants were directly affected by the decision not to allow Mr. Galloway entrance to Canada. As noted above, the reduced participation from individuals who originally signed up to attend the event contributed to a significant loss of revenue. It also resulted in the return of many tickets by those who wished to see Mr. Galloway speak directly. While I recognize that there is certain merit to this claim, I am not persuaded that it rises to the level of an interest that would meet the directly affected standard.

[79] I find, therefore, that the other applicants were not directly affected by the impugned and putative decision. However, that does not end the question of their standing. The wording of subsection 18.1 (1) has been held to be broad enough to encompass applicants who are not directly affected when they meet the test for public interest standing: *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)* (2003), 227 F.T.R. 96, 120 A.C.W.S. (3d) 197, affirmed by 2003 FCA 484, leave to appeal to the Supreme Court of Canada refused, May 20, 2004,

331 N.R. 190; *Canada (R.C.M.P.) v. Canada (Attorney General)*, 2005 FCA 213, [2006] 1 F.C.R. 53.

[80] The test for public interest standing was articulated by the Supreme Court in *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236, 16 Imm. L.R. (2d). The Court held that three aspects of the claim must be considered when public interest standing is sought. First, is there a serious issue raised? Second, has it been established that the plaintiff is directly affected or, if not, does the plaintiff have a genuine interest in the issue? Third, is there another reasonable and effective way to bring the issue before the Court? It is clear that serious issues have been raised in this application and that the other applicants have a genuine interest in those issues. That leaves the question of whether there is another reasonable and effective way to bring the issue before the Court.

[81] In the particular circumstances of this case, it is not apparent that there was another reasonable and effective way to bring the issue of the other applicants' *Charter* interests before the Court. The rights and freedoms protected under section 2 of the *Charter* could not have been invoked on Mr. Galloway's behalf as he is not a Canadian citizen, was outside of Canada at the time the impugned actions took place and lacks any "nexus" to Canada: *Slahi v. Canada (Minister of Justice)*, 2009 FC 160 at para. 48, application for leave to appeal dismissed by the Federal Court of Appeal on September 9, 2009, 2009 FCA 259, 394 N.R. 352 and leave dismissed by the Supreme Court of Canada on February 18, 2010.

[82] The respondents deny that CIC or CBSA actually applied Canadian law to Galloway and made a reviewable decision. Had they done so, they concede, such a nexus might exist. I note that courts of the United Kingdom have held that the rights of freedom of expression and association under the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5, may be invoked by a non-citizen excluded in similar circumstances: *R (on the application of Farrakhan) v. Secretary of State for the Home Department*, [2002] EWCA Civ 606, [2002] 4 All E.R. 289; *GW v. An Immigration Officer*, [2009] UKAIT 00050. But in those cases, there was evidence of a formal decision having been made by a Minister or official having the appropriate statutory authority. An analogous situation may have arisen if Mr. Galloway had applied for a TRP from outside Canada and the application had been refused.

[83] The applicants and the intervenor have drawn my attention to several decisions of the American courts which have held that denying a visa to a foreign visitor who was invited to speak in the United States constitutes a denial of American First Amendment rights: *Kleindienst et al. v. Mandel et al*., 408 U.S. 753 (1972); *De Allende, et al., v. Schultz*, 605 F. Supp. 1220 (U.S. Dist. 1985); *Kleindienst* has been favourably cited by the Supreme Court of Canada: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827 at para. 18 ("*Harper*").

[84] I accept the applicants' position that the effect of denying the other applicants standing would prevent the Court from considering the argument that their rights of association and freedom of expression under the *Charter* had been infringed by the exclusion of Mr. Galloway from Canada. The potential breach is that they were unable to meet him in person and hear his views directly. In

these circumstances, therefore, I think it appropriate to grant the other applicants public interest standing.

[85] There is no dispute between the parties that the right to freedom of expression under section 2 (b) of the *Charter* also protects the listener in that it includes the "right to hear" and the right to receive information: *Irwin Toy Ltd. v. Québec (Attorney General),* [1989] 1 S.C.R. 927; *Harper*, above, at paras. 17-18.

[86] In this case, the evidence is not that the government sought to restrict the right of the other applicants to receive the information. They could, through many other means, and in fact did, hear Galloway speak, albeit under strained conditions. Rather, the evidence is that the government wished to prevent Mr. Galloway from expounding his views on Canadian soil. I agree with the applicants that based on the evidence of the e-mails and public statements in the record, the concern with Galloway's anticipated presence in Canada related solely to the content of the messages that the respondents expected him to deliver. But it is not clear that the actions taken prevented the transmission of those messages. Indeed, they arguably attracted more publicity both here and abroad to what Mr. Galloway had to say.

[87] The applicants, supported by the intervenor, argue that I should reject the government's position that they were not denied the right to hear Mr. Galloway speak, only the choice of platform on which he was to deliver, and they were to receive, his comments. They submit that the mere fact of attending one of the venues where he was scheduled to appear is a form of expression. This is so because it puts the participant in a camp of persons who are concerned about the issues he would

address. In their view, the government's interference with Galloway's visit to Canada denied them the right of expression by association with him at those venues and denied them the right to directly receive his views.

[88] The applicants assert that they are not seeking to require the government to provide Mr. Galloway with a platform on which to express his views. They wish, instead, to quash a decision that interferes with his ability to come to Canada and which infringes on their rights to freedom of expression and association. The respondents say that wanting to meet with someone in Canada who is inadmissible under Canadian law is not a form of protected expression. While there may have been some interference with the other applicants' rights, it was not a substantial interference to the extent that would constitute a breach of s. 2: *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 at para. 48.

[89] The intervenor agrees with the government that the goals of s. 34 of the IRPA – to protect the safety of Canadians and to ensure that national security concerns are met – are pressing and substantial. But, they argue, the administration of s. 34 requires a balancing of interests. In cases where a significant number of Canadian citizens and permanent residents wish to engage on a temporary basis with a foreign national whose admission is not a security threat, the balance should favour the free speech and associations of those citizens and permanent residents over the other interests involved. They rely on the decision of the Supreme Court of Canada in *Suresh*, above, at paragraph 32 for this proposition.

[90] *Suresh* dealt with the deportation of a refugee claimant by reason of a security certificate. In that decision, the Supreme Court made it clear that in reviewing government action against an individual in that context, the Court must determine whether the Minister has exercised his decision-making power within the constraints imposed by the Constitution. I don't think the ruling goes as far as the intervenor suggests to require a balancing of the interests of the state and those of third parties not directly affected by the decision.

[91] In the result, I agree with the applicants that the activity for which they seek s. 2 (b) protection is a form of expression. I also agree with the applicants that the main reason why the respondents sought to prevent Mr. Galloway from entering Canada was that they disagreed with his political views. If the respondents' purpose was to restrict the content of the expression in order to control access by others to the meaning being conveyed, it limits freedom of expression: *R. v. Ahmad*, [2009] O.J. No. 6151 at para. 123, citing the concurring judgment of Justice Lamer in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123.

[92] However, I don't agree that the implication which flows from such a conclusion is that the rights of the other applicants under s. 2 of the *Charter* were breached. To enjoy such rights, there is no requirement for the government to accommodate the applicants by permitting someone entrance to Canada to meet with and speak to them. Under the jurisprudence interpreting s.2, as I understand it, there is no obligation on the part of the government to provide the means, and in this case the forum, by which the applicants may exercise their rights of expression: *Dunmore. v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Haig v. Canada*, [1993] 2 S.C.R. 995.

[93] On all of the evidence, there was no substantial interference with the rights of the other applicants to hear Galloway's views or to associate themselves with his understanding of world events by attending at the scheduled venues. Nor is it the purpose of the legislative scheme, under which the respondents sought to bar Galloway, to deny the applicants their freedoms of speech or association. Rather, the purpose of the legislation is to protect Canadians from the admission of persons who may have committed or may, in the future, commit terrorist acts or who are members of an organization that does.

[94] The other applicants were denied the physical presence of Mr. Galloway as opposed to his image and his voice transmitted by video and telephone. As stated in *Baier*, above at paragraph 27, claimants must seek more than a particular channel for exercising their fundamental freedoms. I appreciate that the conditions under which Mr. Galloway eventually spoke to his Canadian audience in April 2009 were not optimal and that, as a result, some who had bought tickets chose not to attend. But this does not amount to a *Charter* breach. There was no infringement of their right to receive the content of Galloway's message.

Was CBSA's preliminary assessment that Mr. Galloway may be inadmissible pursuant to paragraphs 34(1)(c) and 34(1)(f) of the IRPA reasonable?

[95] As discussed above, I think it necessary to address this issue in the event that my conclusion on the outcome of this application is found to be in error. Moreover, there continues to be a live controversy between the parties as to the validity of the assessment.

[96] The overall standard of review for an inadmissibility decision based on paragraphs 34(1)(c) and (f) and s. 33 is reasonableness. The Court must afford the fact-finder a high degree of deference. This is not a case in which there was any issue as to the character of the organization in question. The issues were whether the applicant Galloway had engaged in terrorism or was a member of the organization. Deference does not require that the Court turn a blind eye to evident failings in the assessment.

[97] Having said that, I think it only fair to acknowledge that the authors of the preliminary assessment in this case did not have the benefit of argument by counsel or several months to consider the matter. The situation was novel as they would not normally encounter questions of inadmissibility relating to a sitting Member of Parliament. Moreover, they were being asked to provide a rapid assessment in circumstances where Ministers' offices were actively engaged and where political staff and senior officials had already staked out a position. From my reading of the evidence, the assessment was written after political staff and senior officials had prematurely reached the conclusion that Galloway was inadmissible. It is not surprising that the resulting assessment confirmed that position, albeit in more cautious language.

[98] The assessment is not reasonable, in my view, as it overreaches in its interpretation of the facts, errs in its application of the law and fundamentally fails to take into account the purposes for which Galloway provided aid to the people of Gaza through the Hamas government. I think it necessary to discuss my reasons for this conclusion in some detail to assist the parties should the question of Mr. Galloway's admissibility arise again.

[99] Much of the assessment consists of background information concerning Galloway's involvement in matters such as the UN sponsored Iraqi Oil for Food program obtained from open sources such as the Internet. It is impossible to determine from the document whether this information is accurate as the sources are not identified. The authors include some details in Mr. Galloway's favour, such as a finding by an investigative body that he had not breached the UN sanctions and that he had won a libel action over such accusations. This background information would not support a finding that Galloway had engaged in terrorism or was a member of an organization that engages in terrorism as it provides no evidence in support of either proposition.

[100] The primary focus of the analysis is said to be "Galloway' s inadmissibility pursuant to paragraph 34(1)(c) and 34(1)(f) of IRPA" due to his support for Hamas. No evidence of such support is referred to other than the Viva Palestina aid convoy. The assessment states:

> The terrorist activities of the Hamas are well documented. Furthermore it is considered a listed entity according to the Government of Canada. The *Anti-terrorism Act* provides measures for the Government of Canada to create a list of entities. **Public Safety Canada states that it is an offense to knowingly participate in or contribute to, directly, or indirectly, any activity of a terrorist group. This participation is only an offense if its purpose is to enhance the ability of any terrorist group to facilitate or carry out terrorist activity**. (Highlighting added)
>
> Galloway has publicly shown his support for Hamas. Not only has Galloway organized a convoy worth over 1 million British pounds in aid and vehicles, he also personally donated three vehicles and $44,000 (CDN) to Hamas leader, Haniya.

[101] The highlighted reference in the first paragraph to a statement by Public Safety Canada is presumably derived from Part II.1 of the *Criminal Code* R.S.C. 1985, c. C-46 as amended. The offences set out in that part deal with, among other things, the provision of material support to an organization that engages in terrorist activity.

[102] In an administrative law case involving the interpretation of s.34 of the IRPA, it is appropriate to consider the *Criminal Code* definition of terrorism: *Soe v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 671. “Terrorist activity” is defined in section 83.01 of the *Code* as encompassing a range of offences contrary to the UN Anti-terrorism Conventions to which Canada is a party, and other specified crimes of violence and serious property damage committed for a political, religious or ideological purpose, objective or cause.

[103] That portion of the definition which requires a political, religious or ideological purpose was struck down in *R. v. Khawaja*, [2006] O.J. No. 4245, 214 C.C.C. (3d) 399. The issue is currently before the Ontario Court of Appeal on appeal from that decision. Nonetheless, there is no question that the crimes in Part II.1 of the *Code* require proof of a necessary mental element; that is “…that an accused both knowingly participated in or contributed to a terrorist group, but also knew that it was such a group and intended to aid or facilitate it's terrorist activity.”: *Khawaja* at para. 38.

[104] Section 83.18 of the *Code* defines the criminal offence of knowingly participating in or contributing to, directly or indirectly, the activity of a terrorist group. For the purpose of proving an 83.18 offence, it must be established that the accused’s purpose is to enhance the ability of a terrorist group to facilitate or carry out a terrorist activity. The necessity to establish knowledge, intent, purpose or wilfulness is also found in the offences defined in sections 83.02, 83.03 and 83.04 which focus on the collection, provision and use of property to carry out terrorist acts.

[105] Canadian law in this regard is similar to that in the United States but differs in a significant respect which should be kept in mind by officials administering Canada’s legislation. The US

material support statute contains an offence similar to those in the Criminal Code which require proof of both knowledge and purpose: 18 U.S.C. § 2339A. However, under 18 U. S. C. s.2339B, the more commonly used offence, it is sufficient to establish that the person knowingly made a contribution to a group which has been designated a "foreign terrorist organization" whether or not it was for a terrorist purpose: *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) ("*Holder*").

[106] As noted by Chief Justice John Roberts for the majority in *Holder*; while other anti-terrorism provisions in US law require an intent to further terrorist activity, Congress did not import that requirement when it enacted 18 U. S. C. §2339B in 1996 or when it clarified the knowledge requirements in 2004. The Parliament of Canada did import a purpose requirement in enacting Part II.1.

[107] The assertions that Galloway has publicly shown support for Hamas and delivered aid to them are repeated on several occasions in the assessment. They appear to be the basis for the conclusion that there may be reasonable grounds to believe Galloway has engaged in terrorism or is a member of a terrorist organization. However, there is no analysis in the document of Mr. Galloway's purpose in delivering the aid or analysis of how his purpose would enhance the ability of Hamas to facilitate or carry out a terrorist activity. Nor is there any apparent consideration whether Galloway, in going to Gaza, was making a political statement in opposition to the blockade rather than expressing support for Hamas.

[108] The respondents argue, fairly, that funds provided to an organization for one purpose may be used by the organization for another purpose that falls within the Code definition of a terrorist activity. This may be the case, for example, where aid provided for an innocent purpose frees up resources that can be employed to carry out a terrorist attack. As stated by Chief Justice Roberts at page 10 in *Holder*, above, "designated foreign terrorist organizations do not maintain organizational firewalls between social, political, and terrorist operations, or financial firewalls between funds raised for humanitarian activities and those used to carry out terrorist attacks".

[109] While this is no doubt true in many instances, there is no evidence on the record that it happened in this case. The respondents do not challenge the applicants' evidence that the money was used for humanitarian purposes.

[110] The Court is not so naïve as to believe that Hamas is above taking advantage of the goodwill of others who contribute funds to them for humanitarian reasons. To suggest, however, that contributions to Hamas for such purposes makes the donor a party to any terrorist crimes committed by the organization goes beyond the parliamentary intent and the legislative language. The purpose to which the funds are donated must be to enhance the ability of the organization to facilitate or carry out a terrorist activity. Absent such a purpose, the mere assertion that material support was provided to such an organization is not sufficient. To hold otherwise could ensnare innocent Canadians who make donations to organizations they believe, in good faith, to be engaged in humanitarian works.

[111] In discussing the question of membership in a terrorist organization, the assessment states the following:

> A member of a terrorist or a subversive or criminal organization does not have to personally commit acts or be involved in the management of the organization: **it is only required that (s)he has knowledge of the essential nature of the organization and that there is an objective manifestation of the agreement to participate in the conduct of the affairs of the organization.** The applicant provided financial support to a group which the Canadian government deemed was engaging in acts of terrorism. **He was aiding the cause of Hamas and his role can be legally interpreted as assisting and providing a support function, in this case by providing financial backing. (Highlighting added)**

[112] There is no reference in the document to any evidence of an agreement on the part of Galloway to participate in the affairs of Hamas nor is there any evidence cited of an intent to aid the cause of Hamas other than in contributing to it as the government of Gaza for the relief of suffering by the civilian population. To characterize the delivery of a convoy of humanitarian aid as "providing a support function" or "financial backing" amounting to an agreement to participate in the affairs of a terrorist organization is overreaching on the interpretation of the law.

[113] Reference is made in the assessment to the Federal Court decision in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867, 116 A.C.W.S. (3d) 570 ("*Pushpanathan*"), for the proposition that complicity in support of the activities of a terrorist organization is sufficient to constitute an act of terrorism or to establish membership in the organization. The assessment states:

> It is also important to note that complicity in respect to a terrorist activity can be considered to be an act of terrorism itself. While the case law in respect to complicity has been developed in the context of war crimes and crimes against humanity, these principles would also apply to acts of terrorism. Providing support functions, such as providing financial backing to the organization for the purpose of

> supporting the group and its activities, can be interpreted as activity that amounts to complicity.

[114] As there is no evidence of Galloway actually participating in a terrorist activity, complicity is the only basis upon which it can be asserted that he could fall within the scope of paragraph 34(1)(c) as "engaging in terrorism", assuming that this extension of the complicity principle is warranted. Again, I think that it is overreaching on the facts of this case and the law to suggest that Galloway is complicit in the terrorist activities of Hamas.

[115] In *Pushpanathan*, above, before Justice Pierre Blais, as he then was, complicity was an issue because the Refugee Protection Division had found that the applicant was excluded from refugee protection because of his support for the terrorist activities of the Liberation Tigers of Tamil Eelam (LTTE). The applicant had raised funds for the LTTE through narcotics trafficking. Justice Blais specifically found, at paragraph 48, that the applicant's criminal activities demonstrated that he had a "personal knowing participation" and "shared a common purpose" with the LTTE. The evidence in this case falls far short of painting Galloway with the same brush.

[116] The authors of the assessment note that in *Suresh v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 247 at para. 22, Justice Max Teitelbaum stated that, "membership cannot and should not be narrowly interpreted when it involves the issue of Canada's national security. Membership also does not only refer to persons who have engaged or who might engage in terrorist activities".

[117] While this is an accurate reference to a portion of Justice Teitelbaum's decision, it does not reflect the other factors which he took into account. Suresh had denied being a member of the LTTE because he had never taken an oath of commitment or loyalty towards Tamil Eelam. Justice Teitelbaum dismissed that claim as Suresh had been involved with the LTTE from an early age and had taken on increasingly greater responsibilities including raising funds, being part of the LTTE executive and heading a component part of the organization. There is no evidence of a comparable connection to the organization in this case.

[118] The phrase "member of an organization" is not defined in the statute. The courts have not given it a precise and exhaustive definition. It is well-established in the jurisprudence that the term is to be given an unrestricted and broad definition: *Poshteh* above at para. 27; *Canada (Minister of Citizenship and Immigration) v. Singh*, (1998), 151 F.T.R. 101, 44 Imm. L.R. (2d) 309 at para. 52. But an unrestricted and broad definition is not a license to classify anyone who has had any dealings with a terrorist organization as a member of the group. Consideration has to be given to the facts of each case including any evidence pointing away from a finding of membership: *Poshteh*, at para. 38. I see no indication in the preliminary assessment that the authors gave any weight to factors other than the financial and other material assistance which Galloway delivered to Hamas.

[119] It is worth noting that *Suresh* and several of the other cases cited by the CBSA authors in support of their assessment were cases in which national security concerns were invoked. From the evidence on the record, the question of Galloway's admissibility was never an issue of national security. As indicated above, CSIS was consulted prior to the writing of the CBSA assessment and had no national security concerns about his visit. It is not clear whether the authors were aware of

that fact. It is not reflected in the assessment and only came to light on production of the e-mail record.

[120] The assessment cites the decision of the Federal Court of Appeal in *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, in support of a statement that "membership in an organization implies the existence of an institutional link between the organization and an individual, accompanied by more than a nominal involvement in the activities of the organization". There is no discussion of whether Galloway had an institutional link with Hamas nor is there evidence that he had more than nominal involvement in their activities. In *Harb*, the Court declined to clarify what it had meant by the phrase "membership in a group" in an earlier complicity decision as each case turns on its facts and the degree of participation in the group's activities. In this case, there was no evidence of participation beyond the aid convoy.

[121] The authors of the assessment take the following statement out of context from *Canada (Minister of Citizenship and Immigration) v. Hajialikhani*, [1999] 1 F.C. 181 ("*Hajialikhani*"): "[t]here is no doubt that financing crimes makes one complicit therein". Again, there is no evidence that Galloway was knowingly and purposefully financing crimes. The undisputed evidence is that he was donating humanitarian aid, albeit to make a political statement in addition to his altruistic purpose.

[122] *Hajialikhani* was another case of exclusion because of a long association with a terrorist organization. The quotation from the judgment is coupled in the assessment with the comment that: "Galloway's open support for Hamas and its cause demonstrates that his support is more than

nominal". Apart from the lack of any connection to the point made in *Hajialikhani*, Hamas' cause is not defined. It may be that the authors had in mind that Hamas' cause was to defeat the blockade. They may have viewed Galloway's opposition to the blockade as support for that cause. But that still does not make him complicit in any crimes Hamas has or will commit without evidence of support for that purpose.

[123] In their written representations, the respondents take the position that:

> This Court, the Federal Court of Appeal and the Supreme Court of Canada have all confirmed that a person becomes a member of a terrorist organization within the meaning of ss. 34(1)(f) of IRPA, by donating financial and material support to a terrorist organization.
> [Respondents' Further Memorandum of Argument, para. 32]

[124] That is, I believe, an overstatement of the effect of the jurisprudence on this question. Counsel for the respondents fairly conceded in oral argument that donating financial and material support is but one factor that may assist in arriving at a determination that there are reasonable grounds to believe that a person is a member of a terrorist organization. This is borne out by an examination of cases cited by the respondent in support of this proposition, including *Suresh*, as discussed above.

[125] In *Ugbazghi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 694, [2009] 1 F.C.R. 454, for example, the applicant had admitted to being a member of a group which supported the aims of the organization and had engaged in a series of activities over time such as attending meetings, making donations, distributing materials which encouraged others to join the armed struggle and/or to give donations. Similar facts appear in other cases cited by the respondents where

the Court has upheld determinations of membership in a terrorist organization: *Sepid v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 907; *Qureshi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 7.

[126] In a post-hearing communication from the respondent, my attention was drawn to the recent decision of my colleague Madam Justice Ann Mactavish in *Farkhondehfall v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 471 ("*Farkhondehfall*"). Counsel submits that this decision also holds that contributing money to a terrorist organization (in that case, the Mujahedin-e-Khalq or "MEK") brings a person within the meaning of paragraph 34(1)(f) of IRPA.

[127] In *Farkhondehfall*, Justice Mactavish found that there was considerable evidence in the record to support the officer's finding that the applicant was a member of MEK, including his attendance at meetings, selling books and making financial contributions. He was a long-term member of a MEK fund raising front organization in Iran and India and continued activities in support of MEK following his arrival in Canada. Thus, the financial contributions were just one of several factors pointing to membership.

[128] Evidence of financial or other forms of material support may well be sufficient in a particular case to provide reasonable grounds to believe that an individual is a member of a terrorist organization depending on the context and purpose for which the support is provided. An individual who knowingly delivers cash or goods to a group to assist in the commission of terrorist acts cannot avoid the label of membership in that group simply because he has never formally joined or put himself under the direction and control of its leaders. Membership may be found from the evidence

as a whole, as was done in the cases cited above, including statements and actions that provide a basis from which to infer that the purpose of the contribution was to facilitate or to enable the terrorist objects of the organization. Purpose may be inferred where the donor has failed to provide a reasonable explanation for a contribution that points away from an intent to further terrorism.

[129] The intervenor submits that it is not reasonable to apply s. 34(1)(f) so broadly as to capture an individual's mere association with an organization without some evidence of the individual's participation in or propensity or likelihood to engage in acts of violence; citing the Supreme Court's decision in *Suresh*, above, at paragraph 110 in support of this proposition.

[130] The Supreme Court's comments in paragraph 110 arose in the context of a discussion of s. 19(1) of the former *Immigration Act*, the predecessor of s. 34. As described by the Court at paragraph 103 of the decision, s. 19(1) had another use under the former legislation. It was also referenced in s. 53(1), the deportation section, to define the class of Convention refugees who could be deported as a danger to the security of Canada. Given the legislative changes brought into effect with IRPA, I do not believe that the Court's comments in paragraph 110 of *Suresh* stand for the proposition that an inadmissibility determination requires evidence of participation in or propensity to engage in acts of violence. It is sufficient if it can be established that the applicant knowingly supports the commission of acts of terrorism by the organization and does some act in furtherance of those objects.

Whether the impugned Ministerial decision and letter from the Immigration Program Manager are subject to judicial review

[131] The applicants' argument, essentially, is that a reviewable decision was taken by the respondent ministers to bar Mr. Galloway entry to Canada and the decision was then confirmed by Mr. Orr's letter of March 20, 2009. In their conception of the events, it is not relevant that the decision was not administratively enforced because Mr. Galloway did not appear at a Port of Entry and present himself for examination.

[132] As referenced above, on an application for judicial review, the Federal Court may, under paragraph 18.1(3)(b), declare invalid "a decision, order, act or proceeding of a federal board, commission or other tribunal". The traditional view of this authority was that to be reviewable, the decision must be the final determination of the substantive question before the decision-maker: *Mahabir v. Canada (Minister of Employment & Immigration)*, [1992] 1 F.C. 133 (C.A.) at para 10; *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (S.C.C.), [1993] 1 S.C.R. 554. Under that approach, the actions of the executive in this matter would not be reviewable as there was no final decision regarding Mr. Galloway's admissibility. It remained open to him to make representations and to have a determination made by an officer at the border.

[133] More recently, it has been considered that the Court's judicial review mandate extends to any decision that determines a party's rights and to any matter for which a remedy might be available under section 18 or 18.1(3): *Larny Holdings Ltd. v. Canada (Ministry of Health)*, [2003] 1 F.C. 541, 222 F.T.R. 29. The Court's jurisdiction extends beyond reviewing formal decisions and includes an act or proceeding that flows from a statutory power: *Markevich v. Canada (T.D.)*, [1999] 3 F.C. 28 reversed on a unrelated issue, 2001 FCA 144 ("*Markevich*"); *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2004 FC 85.

[134] The applicants contend that it is clear on the evidence that direction had been given to border officials to find Mr. Galloway inadmissible and that the preliminary assessment had been prepared for that purpose. While border officials are theoretically decision makers, they are subject to Ministerial direction and would rely on the assessment prepared by specialists in carrying out their duties. Moreover, the officers are required under subsection 15(4) of the IRPA to conduct border examinations in accordance with any instructions that the Minister may give.

[135] The difficulty with the applicants' position is that it is clear from the evidence that all of the efforts to keep Mr. Galloway out of Canada anticipated that the actual decision to bar him would have to be made by an immigration officer at a border post or airport. The meaning conveyed by Mr. Orr's letter was that a decision regarding admissibility was yet to be made and would only be made in accordance with the statutory scheme if, and when, he presented himself for examination. This was Mr. Orr's understanding of the legislative scheme and of the administrative process that would be followed. He held firm to that view under cross-examination.

[136] The Act requires, under Part 1, Division 1, that anyone seeking to enter Canada must first present himself or herself before an officer for examination. While Mr. Galloway, as a British citizen, did not require a visa to enter Canada, he remained subject to the examination requirements. In the normal course of events, that would have been satisfied by a brief exchange between Mr. Galloway and a CBSA officer at the border or an airport. Mr. Orr's letter advised Mr. Galloway of the possibility that he might be found inadmissible if he presented himself for examination as required by the statute and if found inadmissible under s. 34 of the Act, the letter informed him that

it was unlikely that ministerial discretion would be exercised in his favour to grant a TRP. As noted above, that message was also conveyed to the British press by Mr. Velshi.

[137] There is a body of jurisprudence in the Federal Courts that such "courtesy" or "informational" letters are not reviewable decisions, particularly when written by a person not authorized to make a decision: *Demirtas v. Canada (Minister of Employment and Immigration)* (C.A.), [1993] 1 F.C. 602, at para. 8; *Nkumbi v. Canada (Minister of Citizenship and Immigration)*, 160 F.T.R. 194, 50 Imm. L.R. (2d) 155 at paras. 37-40 ("*Nkumbi*"); *Carvajal v. Canada (Minister of Employment and Immigration)*, 82 F.T.R. 241, 48 A.C.W.S. (3d) 787 at para. 4 ("*Carvajal*").

[138] In *Nkumbi*, for example, the applicant sought judicial review of an immigration counsellor's letter explaining that she could not make a new claim for refugee status as a departure order had been made against her. Mr. Justice Blais, as he then was, held that this information letter was not reviewable as the officer had not made the departure order and was not empowered to deny the claim. In *Carvajal*, the immigration officer had written to the applicants to remind them that they were ineligible for permanent residency status because of an earlier determination for which they had not sought judicial review. Mr. Justice McKeown relied, in part, in dismissing the application on the fact that the officer communicating the information was not empowered under the legislation to make the decision which the applicants wished to challenge. Similarly, in this case, Mr. Orr was not in a position to examine Mr. Galloway for admissibility at a Canadian port of entry.

[139] There are undoubtedly circumstances in which a letter is evidence of a decision taken by a person or body authorized to make the decision. The decision will be judicially reviewable even if it

flows from the actions of the individual and not from the actions of the deciding person or body. In *Bouchard v. Canada (Minister of National Defence)*, 187 D.L.R. (4th) 314, 255 N.R. 183, for example, a letter advising the applicant that she could not be reinstated to her position after she had voluntarily resigned evidenced a reviewable decision.

[140] In *Markevich*, above, the applicant had been sent a letter by Revenue Canada advising him that he owed an amount in unpaid taxes that had previously been deemed uncollectable. The Court held that the letter constituted an administrative action by a person having statutory powers and who had determined to use them. It was, therefore, a reviewable "act or proceeding". In the context of this case, the analogy would be that Mr. Orr's letter constituted a reviewable act as it conveyed an intent to employ the statutory powers. The difficulty with the analogy is that the evidence is that Mr. Orr had no intention to exercise the relevant powers and was not in a position to do so as he would not be the examining officer.

[141] The information conveyed in Mr. Orr's letter put Mr. Galloway on notice but did not affect his rights or carry legal consequences. Only a decision having those effects would be amenable to judicial review: *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15 at paras. 9-10; *Pieters v. Canada (Attorney General)*, 2007 FC 556 at para. 60.

[142] The applicants' submit that the letter is reflective of a decision that had already been taken at the highest levels of government to exclude Mr. Galloway. There is support in the record for that proposition, such as in Mr. Velshi's statements to the press and Mr. Orr's e-mails of March 19 and 20 to Mr. Wright. It is also clear that the preliminary assessment was prepared with the intention

that it be used to justify a CBSA officer's determination that Mr. Galloway was inadmissible should he appear at the border. Nonetheless, the decision was inchoate or incomplete until it was acted upon, which in this case did not occur. Nor was any action taken to confirm the statements that a TRP would not be granted as none was requested.

[143] While CBSA border officials had been alerted to Mr. Galloway's possible arrival at the land border with the United States, or by air to Pearson airport, and had been apprised of the preliminary assessment by NSCS officials, the occasion did not arise for any final determination to be made by a CBSA officer regarding Mr. Galloway's admissibility.

[144] This Court has held that advance indications of a future ministerial position are not subject to judicial review: *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue)*, 148 F.T.R. 3, [1998] 2 C.T.C. 176 at para. 28. The Ministers' position that no TRP would be granted conveyed by Mr. Orr's e-mails or Mr. Velshi' statements to the press did not have the legal effect of settling the matter of Mr. Galloway's entitlement to a TRP as he had not requested one.

[145] I agree with respondents' counsel assessment that Mr. Velshi's comments to the press were no more than "unfortunate expressions of opinion". They were not made by a "federal board, commission or other tribunal" empowered to exercise statutory authority and must be read in the context provided by the legislative scheme. While one might hope that a ministerial aide would exercise greater restraint in purporting to speak on behalf of the government, his comments to the press amount to little more than posturing. As the Federal Court of Appeal has held, such remarks may be construed as nothing more than an excess of confidence in the strength of the case:

Mohammad v. Canada (Minister of Employment and Immigration) (C.A.), [1989] 2 F.C. 363 at para. 31. Here, there appears also to have been an intent to gain some political advantage from publicly condemning Galloway. In any event, the remarks had no direct effect on the question of Galloway's admissibility as he did not attempt to enter Canada.

[146] The applicants have suggested in post-hearing correspondence that the recent decision of my colleague, Mr. Justice Russel Zinn in *Khadr v. Canada (Prime Minister),* 2010 FC 715, may have a bearing on this case ("*Khadr*"). In *Khadr,* the applicant had relied on statements by a Minister and the Prime Minister's communications assistant to the media on two occasions as evidence that a decision affecting his interests had been made. Mr. Justice Zinn held that the comments reflected the decision that had been taken by the executive regarding the remedy they would provide the applicant in response to a decision by the Supreme Court of Canada. Such decision was judicially reviewable as it affected the applicant's established right as a citizen to enjoy the protection of his country.

[147] I agree with the respondents that *Khadr* is not helpful in the present matter. There was no evidence in that case to call into question the applicant's claim that the public statements demonstrated that a decision had been made at the highest levels of the government, as it was obliged to do. In the present case, there is the evidence of Mr. Sauvé and Mr. Orr that a visa officer had not found Mr. Galloway inadmissible and the structure of the legislative scheme is incompatible with a finding to the contrary.

[148] Had Galloway actually been found inadmissible by a visa officer relying on the preliminary assessment and the alerts sent to the border points, I would have had little difficulty in concluding that the officer's discretion had been fettered by the process followed in this case and that the e-mails and statements to the press raised a reasonable apprehension of bias.

[149] In the absence of such evidence, I find that there was no legally reviewable decision to bar Mr. Galloway from Canada and that this application must be dismissed.

Proposed questions for certification

[150] The parties were given an opportunity to propose questions for certification. As set out in paragraph 74(d) of the IRPA and Rule 18(1) of the *Federal Courts Immigration and Refugee Protection Rules*, as amended, there can be no appeal of this decision if the Court does not certify a question.

[151] In *Kunkel v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347 at para. 9, the Federal Court of Appeal held that a certified question must lend itself to a generic approach leading to an answer of general application. That is, the question must transcend the particular context in which it arose.

[152] The respondents submitted the following proposed questions for consideration:

> a. *Can giving a voluntary and significant cash donation to an entity listed as "terrorist" pursuant to Canada's Criminal Code, make the donor inadmissible on security grounds under s. 34(1)(f) of IRPA?*

b. *Do the fundamental freedoms of expression and association guaranteed to everyone in Canada pursuant to section 2 (b) and (d) of the Canadian Charter of Rights and Freedoms, require Canada to admit a person who is inadmissible under IRPA, if people in Canada wish to meet him?*

c. *With respect to a visa-exempt, foreign national who indicates a future intention to visit Canada, is a "preliminary assessment" of admissibility, a "decision or order" properly subject to judicial review in the Federal Court pursuant to section 18.1 of the Federal Courts Act?*

[153] The applicants do not agree that the questions posed above by the respondents raise serious issues of general importance or are appropriate on the facts before the Court.

[154] The applicants submit the following alternative questions which they say are serious and are of general importance:

a. *Can the concept of "member" in a terrorist organization, in s. 34(1)(f) of the IRPA, extend to a person who, on behalf of the other individuals, organizations and himself, in response to an egregious humanitarian crisis, provide humanitarian assistance to civilians through their democratically elected government, the governing party of which, is listed by Canada as a terrorist organization under the ATA?*

b. *When a person has engaged in expression and association outside of Canada, of a nature which would be recognized as protected if it had occurred in Canada, can the exercise of these freedoms form the basis for a finding of inadmissibility under Canadian law, in this case s. 34(1)(f) of IRPA?*

[155] While the applicants maintain that a "decision" has effectively been made in respect of Mr. Galloway's admissibility to Canada, in the alternative, should the Court conclude that the information imparted to Mr. Galloway and to the international press did not constitute a decision, the applicants would pose two further questions.

3. *Does the Federal Court have jurisdiction to review a "matter", as contemplated under s. 18.1(1) of the FCA or an "act" as contemplated under s. 18.1(3) of the FCA, where the 'matter' or 'act' impacts on the rights of Canadians in the same way as in Markevich v. Canada (T.D.) [1999] 3 F.C. 28, overturned on appeal on a different issue in Markevich v. Canada, 2001 FCA 144?*

4. *Does the Federal Court have jurisdiction under s. 18.1(1) of the FCA to review a predetermination by the Minister of CIC and CBSA of inadmissibility to Canada of a foreign national, in the form of a preliminary assessment which has been made and communicated to the foreign national (and publicly)?*

[156] The intervenor took no position with respect to the appropriateness of either the respondents' or the applicants' proposed questions and requested consideration of the following questions:

a. *Does the term "member of an organization" under section 34(1)(f) of IRPA encompass giving a donation to civilians for humanitarian purposes through a democratically-elected government, the governing party of which is listed by Canada as a terrorist group or organization?*

b. *When making decisions on inadmissibility and exercising discretion under section 34 of IRPA is the Government required to balance security interests with the interests of freedom of expression and association under sections 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms in circumstances where people in Canada wish to associate with or hear from a foreign national or permanent resident seeking admission to Canada.*

[157] Having considered the questions proposed by the parties and the intervenor, I consider that the following questions transcend the particular context in which this application arose and are serious questions of general importance which would be dispositive of an appeal:

a. *With respect to a visa-exempt foreign national who indicates a future intention to visit Canada, is a "preliminary assessment" of inadmissibility a decision, order, act or proceeding properly subject to judicial review in the Federal Court pursuant to section 18.1 of the Federal Courts Act?*

b. *Does a voluntary contribution of cash and goods to an organization listed as a "terrorist entity" pursuant to the Criminal Code, without other acts or indicia of membership, constitute reasonable grounds to believe that the donor has engaged in terrorist acts or is a member of a terrorist organization so as to make the donor inadmissible on security grounds under s. 34(1)(c) or (f) of IRPA?*

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. The following questions are certified:

1. *With respect to a visa-exempt, foreign national who indicates a future intention to visit Canada, is a "preliminary assessment" of inadmissibility a decision, order, act or proceeding properly subject to judicial review in the Federal Court pursuant to section 18.1 of the Federal Courts Act?*

2. *Does a voluntary contribution of cash and goods to an organization listed as a "terrorist entity" pursuant to the Criminal Code, without other acts or indicia of membership, constitute reasonable grounds to believe that the donor has engaged in terrorist acts or is a member of a terrorist organization so as to make the donor inadmissible on security grounds under s. 34(1)(c) or (f) of IRPA?*

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1474-09
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