Federal Court of Appeal | Cour d'appel fédérale

Date: 20110317

Docket: A-31-10

Citation: 2011 FCA 103

CORAM: **BLAIS C.J.**
NOËL J.A.
PELLETIER J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

MUHSEN AHMED RAMADAN AGRAIRA

Respondent

Heard at Toronto, Ontario, on November 17, 2010.

Judgment delivered at Ottawa, Ontario, on March 17, 2011.

REASONS FOR JUDGMENT OF THE COURT BY: PELLETIER J.A.

CONCURRED IN BY: BLAIS C.J.
NOËL J.A.

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REASONS FOR JUDGMENT OF THE COURT

INTRODUCTION

[1] Mr. Agraira is a foreign national who was found to be inadmissible to Canada on security grounds. He attempted to avoid this finding of inadmissibility through an application for ministerial relief under the relevant legislation. The legislative landscape changed significantly during the life of Mr. Agraira's application.

[2] The Minister refused to grant relief. His application to the Federal Court for judicial review of that decision was successful. The Minister of Public Safely and Emergency Preparedness appeals to this Court from the decision of the Federal Court. While there is abundant jurisprudence on the issue of ministerial relief in the Federal Court, this appeal is this Court's first opportunity to consider the relevant provision.

[3] For the reasons which follow, I would allow the appeal and set aside the decision of the Federal Court.

THE FACTS

[4] Mr. Agraira is a citizen of Libya who, in 1996, left his homeland for Germany where he made a claim for Convention Refugee status on the basis of his membership in the Libyan National Salvation Front (LNSF, also referred to in some of the material as NFSL). His application was unsuccessful because the refugee determination authority found he lacked credibility.

[5] In March 1997, Mr. Agraira entered Canada using an Italian passport, illegally purchased in Germany. He applied for Convention Refugee status on March 13, 1997, once again on the basis of his involvement with the LNSF. In his Personal Information Form, he described the nature of his activities with the LNSF. As part of an eleven member cell, he delivered envelopes to members of other cells, raised or attempted to raise funds and watched and reported on the movements of supporters of the Libyan regime. Members of his cell were told that they were in training for future activities; they were taught how to engage people in political discourse and to raise funds. At the hearing before the Convention Refugee Determination Division, Mr. Agraira tendered, in support of

his application, a letter from the LNSF attesting to his membership in the organization. Notwithstanding this evidence, on October 24, 1998, his claim for Convention Refugee status was refused on the basis of his lack of credibility.

[6] Meanwhile, Mr. Agraira met a Canadian woman whom he married in a Muslim ceremony in December 1997 and subsequently in a civil ceremony on March 7, 1999. Mr. Agraira's wife sponsored his application for permanent residence in August 1999. After the Immigration authorities satisfied themselves of the *bona fides* of the marriage, they told Mr. Agraira that his application for permanent residence would be considered.

[7] On May 1, 2002, a senior immigration officer wrote to Mr. Agraira to advise him that "Immigration National Headquarters in Ottawa has received new information which suggests that your application for landing may have to be refused." The letter went on to say that the issue was whether Mr. Agraira was inadmissible on the grounds that there were reasonable grounds to believe that he was or had been a member of an organization that is or was engaged in terrorism, contrary to clause 19(1)(*f*)(iii)(B) of the *Immigration Act*, R.S.C. 1985, c. I-2 [*Immigration Act*] (Appeal Book at 106). The source and nature of the new information is not disclosed in the letter.

[8] According to Mr. Agraira's affidavit sworn June 15, 2009 (Appeal Book at 46-49), he was interviewed by an agent of the Canadian Security Intelligence Service (CSIS) during the summer of 2000 in the course of which he was asked about his membership with the LNSF. In his affidavit

filed with the Federal Court, Mr. Agraira suggests that this was the source of the “new” information but this is purely speculation.

[9] Mr. Agraira was interviewed by an immigration officer on May 21, 2002. In the course of that interview, he admitted that he had been a member of the LNSF. According to the report prepared by the officer who interviewed him, Mr. Agraira claimed that he “made up stories regarding the extent of his involvement” in order to bolster his refugee claim (Appeal Book at 221-223).

[10] In her report, the officer identified several inconsistencies in the information provided to her by Mr. Agraira. Although the latter claimed not to know much about the LNSF, he was able to name the founder and the current leader of the organization. Then, having stated that he attended meetings of the LNSF in Libya, he asserted that he did not attend meetings but only discussed the group with his friends. Finally, Mr. Agraira said that he had had no contact with the group since leaving Libya but then acknowledged that he had received newsletters from chapters of the organization in the United States since arriving in Canada. The officer indicated to Mr. Agraira that the answers he had given her appeared to contradict answers given to the CSIS agent.

[11] At the conclusion of the interview, the officer advised Mr. Agraira that there were grounds to believe that he belonged, or had belonged, to an organization that engaged in terrorism and that he had a right to seek ministerial relief from a finding of inadmissibility on that ground. Mr. Agraira indicated that he would retain counsel to seek such relief.

[12] When preparing her report on the results of Mr. Agraira's interview, the immigration officer had Mr. Agraira's request for ministerial relief in hand. The report noted further inconsistencies between Mr. Agraira's submissions in support of his request for ministerial relief and his earlier statements. For example, in his request for ministerial relief, as in his Personal Information Form, Mr. Agraira claimed that he had attended clandestine meetings where he was taught how to approach potential members and how to solicit donations. In the interview with the immigration officer, Mr. Agraira said that he did not know how the LNSF funded itself or how it recruited members.

[13] The officer also made the following finding regarding Mr. Agraira's continued membership in the LNSF (Appeal Book at 223):

> In my opinion Mr. Ramadan Agraira was and continues to be a member of the NFSL. He declared to the IRB that he was a member, he declared [redacted] that he was a member and he has through his own legal counsel stated that he was and still considers himself a member of this organization.

[14] The officer's report concluded (Appeal Book at 223):

> Without evidence that Mr. Ramadan Agraira was directly linked to any acts of violence, I would accept the evidence before me, that he was mainly involved in distributing leaflets and garnering support for the NFSL. Thus I would recommend that Ministerial Relief be granted.

[15] At the same time, on July 22, 2002, the immigration officer prepared a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], which came into effect on June 28, 2002, indicating that in her opinion, Mr. Agraira was inadmissible to

Canada pursuant to paragraph 34(1)(*f*) of the *IRPA*, on the ground that he was a member of an organization that had engaged, engages, or will engage in terrorism. The grounds for the immigration officer's opinion were set out in the following terms (Appeal Book at 224-225):

> Mr. Agraira stated in a written submission prepared by his legal counsel, that he was an active member of the National Front for the Salvation of Libya. His duties included distributing leaflet, seeking potential members and soliciting donations. He stated he has never taken part in any NFSL meetings since coming to Canada However, he does [illegible] still a member because he does support the general goal of seeing Col. Gadaffi removed from power and democratic principles instated in Libya.

[16] As a result of amendments to the *IRPA* following the passage of the *Canada Border Services Agency Act*, S.C. 2005 c. 38 [*CBSAA*], the next step in the Ministerial relief process was the preparation of a briefing note for the consideration of the Minister of Public Safety and Emergency Preparedness (the Minister of Public Safety). The draft Briefing Note is date stamped August 19, 2005 and recommended that Mr. Agraira be granted ministerial relief. It was provided to counsel for Mr. Agraira by Citizenship and Immigration Canada on August 22, 2005. On August 30, 2005, Mr. Agraira's counsel indicated that he had nothing to add to the submissions already made on behalf of his client. The Briefing Note was put before the Minister at a later date, probably March 9, 2006, as indicated by the date stamp.

[17] After setting out Mr. Agraira's procedural history to date, the Briefing Note observed that, following his interview on May 21, 2002, Mr. Agraira "was found to be inadmissible to Canada due to his past membership in the LNSF, an organization described in paragraph 34(1)(*f*) of *IRPA*" and that "he was reported pursuant to section 44 of *IRPA* on July 22, 2002."

[18] The Briefing Note repeated much of the information already on the record as to Mr. Agraira's involvement in the LNSF. Under the heading Considerations, the Briefing Note summarized the information with respect to Mr. Agraira's personal circumstances as well as the submissions made on his behalf by his counsel.

[19] The Briefing Note concluded with a recommendation that ministerial relief be granted to Mr. Agraira on the basis that "there is not enough evidence to conclude that Mr. Ramadan Agraira's continued presence in Canada would be detrimental to the national interest" (Appeal Book at 43). The basis for this recommendation appears in the following paragraph:

> Mr. Ramadan Agraira admitted to joining the LNSF but was only a member for approximately 2 years. There is some information to suggest that he became a member at a time when the organization was not in its most active phase and well after it was involved in an operation to overthrow the Libyan regime. He initially stated that he had participated in a number of activities on behalf of the organization but later indicated that he had exaggerated the extent of his involvement so that the could make a stronger claim to obtain refugee status in Canada. This is supported to some extent by the fact that his attempts to obtain refugee status in Germany and Canada were rejected on the basis of credibility. Mr. Ramadan Agraira denied having been involved in any acts of violence or terrorism and there is no evidence to the contrary. He appears to have been a regular member who did not occupy a position of trust or authority within the LNSF. He does not appear to have been totally committed to the LNSF specifically as he indicated to the immigration officer at CIC Oshawa that he would support anyone who tried to remove the current regime in Libya through non-violent means.

[20] The Minister responded on January 27, 2009, thirty-four months after the Briefing Note was submitted to his office. The Minister did not accept the Canada Border Services Agency's recommendation. His response was relatively brief and is reproduced in full below (Appeal Book at 45):

> After having reviewed and considered the material and evidence submitted in its entirety as well as specifically considering these issues:
>
> - The applicant offered contradictory and inconsistent accounts of his involvement with the Libyan National Salvation Front (LNSF).
>
> - There is clear evidence that the LNSF is a group that has engaged in terrorism and has used terrorist violence in attempts to overthrow a government.
>
> - There is evidence that LNSF has been aligned at various times with Libyan Islamic opposition groups that have links to Al-Qaeda.
>
> - It is difficult to believe that the applicant, who in interviews with officials indicated at one point that he belonged to a "cell" of the LNSF which operated to recruit and raise funds for LNSF, was unaware of the LNSF's previous activity.
>
> It is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist connected organizations. Ministerial relief is denied.
>
> "The Honourable Peter Van Loan" "January 27/09"
> Minister of Public Safety

[21] On March 24, 2009, Mr. Agraira was notified by mail by Citizenship and Immigration Canada that he was inadmissible to Canada based on his membership in an organization that there are grounds for believing engages, has engaged or will engage in terrorism (Appeal Book at 48). As a result, his application for permanent residence was dismissed.

THE DECISION UNDER APPEAL

[22] Mr. Agraira applied for, but was denied, leave to have the decision under subsection 34(1) of the *IRPA* that he was inadmissible judicially reviewed. However, he was granted leave to seek judicial review of the Minister's determination under subsection 34(2) that his continued stay in

Canada was detrimental to Canada's national interest. The application for judicial review was heard and disposed of by Mr. Justice Mosley (the application judge) in a decision reported as *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1302, [2009] F.C.J. No. 1664 [Reasons for Judgment].

[23] The application judge described the issue in the application as whether the Minister's decision was reasonable. In his view, significant deference should be accorded to discretionary ministerial decisions particularly when, as here, the discretion is non-delegable. He noted that the Minister had acquired expertise in matters of national security and the national interest in course of exercising his duties. The application judge then touched upon the role of the judiciary in reviewing "political" decisions, citing a passage from a decision of the House of Lords to the effect that political actors should decide political questions, *A & others v. Secretary of State for the Home Department*, [2004] UKHL 56 at para. 29. The application judge noted that, at first blush, the question of whether or not to grant Ministerial relief appeared to be closer to the political end of the spectrum and therefore not a matter for judicial intervention. Nonetheless, he concluded that the decision was reviewable.

[24] The application judge questioned the Minister's stated conclusion that Mr. Agraira was a member of a terrorist group. He found that the evidence before the Minister that the LNSF had engaged in terrorism was minimal at best. In particular, he noted that Al Qaeda was mentioned only once in the documentation which was available to the Minister and that reference related to other Libyan opposition groups generally and not to the LNSF specifically. The application judge also

noted that the LNSF was not mentioned in the list of terrorist organizations maintained by the Canadian government and that it had appeared to have received support from western governments in its attempts to overthrow the Libyan government. That said, the application judge correctly noted that the question of whether or not the LNSF is, or was, a terrorist organization was not before him.

[25] The application judge then referred to another decision of the Federal Court, *Abdella v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1199, [2009] F.C.J. No 1493 [*Abdella*], in which the Federal Court referred to the departmental guidelines for the processing of applications for ministerial relief, *IP-10 Refusal of National Security Cases/Processing of National Interest Requests* [*IP-10*], which set out five questions to be considered by departmental officials in the processing of applications for ministerial relief under subsection 34(2). The questions are:

1. Will the applicant's presence in Canada be offensive to the Canadian public?
2. Have all ties with the regime organization been completely severed?
3. Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?
4. Is there any indication that the applicant might be benefiting from previous membership in the regime organization?
5. Has the person adopted the democratic values of Canadian society?

[26] The application judge found that while the five questions had been addressed in the Briefing Note, they had not been considered by the Minister.

[27] The application judge further found that the Minister had not balanced the factors identified in prior decisions of the Federal Court as relevant to the determination of what is in the national

interest. Those factors include: whether the applicant posed a threat to Canada's security; whether the applicant posed a danger to the public; the period of time the applicant had been in Canada; whether it is consistent with Canada's humanitarian reputation of allowing permanent residents to settle in Canada; the impact on both the applicant and all other members of society of the denial of permanent residence; and the adherence to all of Canada's international obligations, (Reasons for Judgment at para. 25.)

[28] The application judge agreed with Mr. Agraira's counsel that there were concerns whether the Minister's decision "turned on the simplistic view that the presence in Canada of someone who at some time in the past may have belonged to a terrorist organization abroad can never be in the national interest of Canada", referring to the Federal Court's decision in *Kanaan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 241, [2008] F.C.J. No. 301 at para. 8. Along the same lines, the application judge noted it could be said that the Minister's analysis had rendered the exercise of his discretion meaningless, referring to the Federal Court's decision in *Soe v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 461, [2007] F.C.J. No. 620 [*Soe*], where the Court said at paragraph 34: "It is tantamount to saying that an individual who commits an act described in subsection 34(1) cannot secure Ministerial discretion because they committed the very act that confers jurisdiction on the Minister to exercise discretion under subsection 34(2)."

[29] In the end result, the application judge allowed the application for judicial review and certified the following question:

> When determining a ss. 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest? Specifically, must the Minister consider the five factors listed in the Appendix D of IP10?

[30] In doing so, the application judge must be taken to have concluded that the Minister's exercise of his discretion was unreasonable due to his failure to consider the five questions identified in the Guidelines or to deal with the factors identified in the Federal Court jurisprudence.

ISSUES

[31] This case raises the following issues:

1- The standard of review of the Minister's decision.

2- The burden of proof.

3- The interpretation of subsection 34(2) of the *IRPA.*

   a. The legislative evolution of subsections 34(2) and section 6 of the *IRPA*.

      i. The separation of "national interest" and national security from humanitarian and compassionate considerations.
      ii. The term "national interest" must be understood within the context of national security and public safety.

   b. The scope of subsection 34(2) of the *IRPA.*

4- The reasonableness of the Minister's decision.

1. THE STANDARD OF REVIEW OF THE MINISTER'S DECISION

[32] This first question is what standard of review applies to the statutory interpretation of subsection 34(2) of the *IRPA*. Specifically, what is the meaning of "national interest" within the scope of the provision? This is a question of law that does not involve a review of the Minister's

decision-making and so should be assessed on the standard of correctness. The Minister has no relative expertise in the interpretation of these provisions of the *IRPA* so there is no reason for the Court to defer to him on these questions.

[33] The second question is what standard should be adopted with respect to the Minister's decision that a foreign national's presence in Canada is detrimental to the national interest. The application judge concluded, and I agree, that the standard of review of the Minister's exercise of his discretion is reasonableness.

2. THE BURDEN OF PROOF

[34] The jurisprudence of the Federal Court is consistently to the effect that, in a ministerial relief application, the onus is on the applicant to satisfy the Minister (see *Tameh v. Canada (Minister of Public Safety and Emergency Preparedness*), 2008 FC 884, [2008] F.C.J. No. 1111 at para. 40 [*Tameh*]; *Miller v. Canada (Solicitor General)*, 2006 FC 912, [2007] 3 F.C.R. 438 at para. 64; *Al Yamani v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2007 FC 381, 62 Imm. L.R. (3d) 203 at para. 69 [*Al Yamani*]. I agree with this conclusion as it represents the unambiguous language of subsection 34(2).

[35] In this case, the Briefing Note put before the Minister reversed the onus when it stated that "there is not enough evidence to conclude that Mr. Ramadan Agraira's continued presence in Canada would be detrimental to the national interest." This reversal of onus was a sufficient reason for the Minister to disregard the Briefing Note's recommendation.

3. THE INTERPRETATION OF SUBSECTION 34(2) OF THE *IRPA*

A. The legislative evolution of subsection 34(2) and section 6 of the IRPA

[36] The legislative landscape changed significantly between the date when Mr. Agraira first made his application for permanent resident status and the date the Minister of Public Safety refused his request for ministerial relief.

[37] The legislative evolution of the ministerial exemption provision demonstrates a significant policy shift in the administration of ministerial relief for foreign nationals found to be inadmissible on security grounds. Parliament changed the relevant decision-maker from the Minister of Citizenship and Immigration to the Minister of Public Safety. With this change in the responsible Minister, the provision must now be read in light of the objects of the *Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c. 10 [*DPSEPA*], as the Minister of Public Safety's enabling statute, the *Canada Border Services Agency Act*, *supra*, as the statute governing the Agency responsible for assisting the Minister in his duties, as well as those of the *IRPA.*

[38] To understand subsection 34(2), we must apply the principle of "presumption of coherence" – that provisions of legislation, or a legislative scheme, are meant to work together as a functional whole – and consider the objects of the *IRPA*, the mandate of the Minister of Public Safety, and goals of the CBSA. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, [2002] S.C.R. 559 at para. 27, Iaccobucci J. discussed the approach to be taken to the construction of a statutory scheme whose elements are found in a number of enactments:

> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis

> incisively noted in his seminal article "Statute Interpretation in a Nutshell", "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the applicant of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.* as the "principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.

[39] As we shall see, the changes made to the legislative scheme allow us to draw two important conclusions:

i) Parliament has intentionally separated considerations of national interest from humanitarian and compassionate considerations;

ii) Parliament has placed the consideration of national interest within the context of national security and public safety

a. The separation of "national interest" from humanitarian and compassionate considerations.

[40] At the time of Mr. Agraira's admissibility interview on May 21, 2002, the *Immigration Act* was in force. Following that interview, he was advised that he was thought to be inadmissible and was advised of his right to apply for a ministerial exemption. The provisions which applied to Mr. Agraira's admissibility at that time were the following:

19(1) No person shall be granted admission who is a member of any of the following classes:	19(1) Les personnes suivantes appartiennent à une catégorie non admissible:
…	[…]
(f) persons who there are reasonable grounds to believe	(f) celles dont il y a des motifs raisonnables de croire qu'elles :
…	[…]

(iiii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in	(iii) soit sont ou ont été membres d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée :
	[…]
….	
(B)Terrorism except persons who have satisfied the Minister that their admission would not be detrimental to the national interest	(B) soit à des actes de terrorisme Le présent alinéa ne visant toutefois pas les personnes qui convainquent le ministre que leur admission ne serait nullement préjudiciable à l'intérêt national

[41] At that time, the Minister of Citizenship and Immigration was responsible for both the determination of inadmissibility and the decision as to whether a ministerial exemption was warranted. In addition, the same Minister was also responsible for applications for exemptions from the provisions of the *Immigration Act* based on humanitarian and compassionate [H&C] grounds.

[42] Effective June 28, 2002, the *Immigration Act* was repealed and replaced by the *IRPA*. As a proceeding which was pending at the time *IRPA* came into force, Mr. Agraira's application for a ministerial exemption was governed by *IRPA* (see *IRPA*, s. 190). Thus, by the time Mr. Agraira's counsel forwarded his submissions with respect to ministerial relief to the Canada Immigration Centre on July 16, 2002, section 19 of the *Immigration Act*, as it related to inadmissibility on security grounds had been carried into section 34 of the *IRPA:*

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in	34.**(**1) Emportent interdiction de territoire pour raison de sécurité les faits suivants : a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

Canada; (b) engaging in or instigating the subversion by force of any government; (c) engaging in terrorism; (d) being a danger to the security of Canada; (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (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).	b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force; c) se livrer au terrorisme; d) constituer un danger pour la sécurité du Canada; e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada; 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.

[43] When the *IRPA* first came into force, the Minister responsible for determinations under subsection 34(2) remained the Minister of Citizenship and Immigration (see s. 4 of the IRPA as originally enacted). The responsible Minister changed, however, with the passage of the *Canada Border Services Agency Act.* Among the consequential amendments following the passage of the *CBSAA*, the *IRPA* was amended to transfer the non-delegable responsibility for making the determination under subsection 34(2) from the Minister of Citizenship and Immigration to, first, "the Minister as defined in section 2 of the *Canada Border Services Agency Act*" (see *IRPA*, s. 4, as am. by S.C. 2005, c. 38, s. 118) and later the Minister of Public Safety (IRPA, s. 4, as am. by S.C. 2008, c. 3, s.1) At the time the Minister of Public Safety made his decision, on January 27, 2009, the relevant portions of the IRPA read as follows:

4.(1) Except as otherwise provided in this section, the Minister of Citizenship and Immigration is responsible for the administration of this Act.

…

(2) The Minister of Public Safety and Emergency Preparedness is responsible for the administration of this Act as it relates to
(a) examinations at ports of entry;
(b) the enforcement of this Act, including arrest, detention and removal;
(c) the establishment of policies respecting the enforcement of this Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; or

(d) determinations under any of subsections 34(2), 35(2) and 37(2).

…

6.(1) The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated.

(2) Anything that may be done by the Minister under this Act may be done by a person that the Minister authorizes in writing, without proof of the authenticity of the authorization.
(3) Notwithstanding subsection (2), the

4.(1) Sauf disposition contraire du présent article, le ministre de la Citoyenneté et de l'Immigration est chargé de l'application de la présente loi.

[…]

(2) Le ministre de la Sécurité publique et de la Protection civile est chargé de l'application de la présente loi relativement :
a) au contrôle des personnes aux points d'entrée;
b) aux mesures d'exécution de la présente loi, notamment en matière d'arrestation, de détention et de renvoi;
c) à l'établissement des orientations en matière d'exécution de la présente loi et d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou pour activités de criminalité organisée;

d) à la prise des décisions au titre des paragraphes 34(2), 35(2) ou 37(2).

[…]

6. (1) Le ministre désigne, individuellement ou par catégorie, les personnes qu'il charge, à titre d'agent, de l'application de tout ou partie des dispositions de la présente loi et précise les attributions attachées à leurs fonctions.
(2) Le ministre peut déléguer, par écrit, les attributions qui lui sont conférées par la présente loi et il n'est pas nécessaire de prouver l'authenticité de la délégation.
(3) Ne peuvent toutefois être

Minister may not delegate the power conferred by subsection 77(1) or the ability to make determinations under subsection 34(2) or 35(2) or paragraph 37(2)(a)	déléguées les attributions conférées par le paragraphe 77(1) et la prise de décision au titre des dispositions suivantes : 34(2), 35(2) et 37(2)a).

[44] The Minister of Citizenship and Immigration may still grant exemptions from the requirements of the Act based on H & C grounds pursuant to subsection 25(1) of the *IRPA*. At the time the Minister made his decision, section 25(1) read: [emphasis added]:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[45] Thus, while Parliament transferred the responsibility for deciding whether ministerial relief ought to be granted to the Minister of Public Safety, it left the discretion to waive the provisions of the *IRPA* on the basis of H & C considerations with the Minister of Citizenship and Immigration. It is significant that this discretion can be exercised in favour of persons who have been found to be

inadmissible. It is clear that Parliament intended ministerial relief to be granted or withheld on the basis of considerations other than those that could support an application for H & C relief. The proper forum in which to advance an application based on H & C considerations is under section 25 of *IRPA*, not in an application for ministerial relief under subsection 34(2).

b. The term "national interest" must be understood within the context of national security and public safety.

[46] The grant of decision-making authority to the Minister of Public Safety brings into consideration his enabling statute, the *Department of Public Safety and Emergency Preparedness Act*, [DPSEPA] and the mandate of the Canada Border Services Agency.

[47] The Minister of Public Safety must act within the terms of reference provided to him in the *DPSEPA.* Section 4 of the *DPSEPA*, *supra*, which sets out the powers, duties and functions of the Minister, emphasizes his responsibility for public safety and emergency preparedness at a national level [emphasis added]:

4.**(**1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction — and that have not been assigned by law to another department, board or agency of the Government of Canada — relating to public safety and emergency preparedness.	4.**(**1) Les attributions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement liés à la sécurité publique et à la protection civile qui ne sont pas attribués de droit à d'autres ministères ou organismes fédéraux.
(2) The Minister is responsible for exercising leadership at the national level relating to public safety and emergency preparedness.	(2) À l'échelon national, le ministre est chargé d'assumer un rôle de premier plan en matière de sécurité publique et de protection civile.

[48] The Minister of Public Safety is also responsible for the CBSA, pursuant to section 6 of the *CBSAA, supra*; the Agency's mandate is defined in section 5 of that Act [emphasis added]:

5. (1) The Agency is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation, by	5. (1) L'Agence est chargée de fournir des services frontaliers intégrés contribuant à la mise en oeuvre des priorités en matière de sécurité nationale et de sécurité publique et facilitant le libre mouvement des personnes et des biens — notamment les animaux et les végétaux — qui respectent toutes les exigences imposées sous le régime de la législation frontalière. À cette fin, elle :
(a) supporting the administration or enforcement, or both, as the case may be, of the program legislation;	a) fournit l'appui nécessaire à l'application ou au contrôle d'application, ou aux deux, de la législation frontalière;
…	[…]

[49] The legislative mandate of the Minister of Public Safety makes it clear that national security and public safety are at the heart of his mission. Such considerations are also present in the objectives of the *IRPA* which have remained unchanged throughout its evolution [emphasis added]:

3. (1) The objectives of this Act with respect to immigration are	3. (1) En matière d'immigration, la présente loi a pour objet :
…	[…]
(h) to protect the health and safety of Canadians and to maintain the security of Canadian society;	h) de protéger la santé des Canadiens et de garantir leur sécurité;
(i) to promote international justice and security by fostering respect for human rights and by denying access to	i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne

Canadian territory to persons who are criminals or security risks; and	et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;
….	[…]

[50] The Minister of Public Safety exercises his discretion under subsection 34(2) of the *IRPA* in the context of the entire legislative scheme. When that scheme is taken as a whole, it is clear that the transfer of responsibility of the processing of applications for ministerial relief to the Minister of Public Safety was intended to bring security concerns to the forefront in the treatment of those applications. As a result, the notion of "national interest" in the context of subsection 34(2) must be understood in terms of the Minister of Public Safety's mandate. In my view, this means that the principal, if not the only, consideration in the processing of applications for ministerial relief is national security and public safety, subject only to the Minister's obligation to act in accordance with the law and the Constitution. As a finding of inadmissibility does not necessarily result in the removal of the foreign national from Canada, the exercise of the Minister's discretion does not raise any issue of Canada's international obligations.

[51] The test whether a foreign national's presence in Canada is detrimental to the national interest is not a net-detriment test. The Minister of Public Safety is not required to balance the possible contribution to the national interest by an applicant against the possible detriment to the national interest and to refuse only those applications that result in a net detriment to the national interest. There is nothing in the statutory language which mandates such a balancing and the very specific mandate of the Minister of Public Security militates against such a balancing requirement.

[52] The idea that the processing of requests for ministerial relief involves a balancing of various factors is drawn from the Department of Citizenship and Immigration's departmental guidelines dealing with the processing of requests for ministerial relief, *IP-10, supra*, where the following definition of national interest appears:

> The consideration of national interest involves the assessment and balancing of all factors pertaining to the applicant's admission against the stated objectives of the Act as well as Canada's domestic and international interests and obligations.

[53] It is trite law that a departmental document cannot alter the law as laid down by Parliament. While this definition may have had some utility for departmental staff at a time when the Minister of Citizenship and Immigration was responsible for applications for ministerial relief as well as applications based on humanitarian and compassionate considerations, it has, in my view, been overtaken by events. Given that the responsibility for deciding applications for ministerial relief now lies with the Minister of Public Safety, the Department of Citizenship and Immigration's department guidelines have limited application to the latter's exercise of his non-delegable discretion. This is particularly true when one considers that the responsibility for establishing policies respecting "inadmissibility on grounds of security, organized criminality or violating human or international rights" has been assigned to the Minister of Public Safety (see *IRPA*, s. 4(2)(*c*) as am. by. S.C. 2008, c. 3, s.1). If guidelines are to be promulgated with respect to the treatment of ministerial relief applications, they will have to be promulgated by the Minister of Public Safety. To my knowledge, no such guidelines exist.

[54] It follows from this that the five factors which are referred to in the certified question are not, simply by virtue of being found in *IP-10*, factors the Minister of Public Safety must take into account in disposing of applications for ministerial relief.

[55] The jurisprudence of the Federal Court has generally taken the view that departmental guidelines, in this case *IP-10*, can be taken as an indication of the reasonableness of the Minister's decision. This reasoning is based on the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 where the following appears at paragraph 72:

> The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

[56] This passage has been relied upon by the Federal Court in several cases to justify reference to these questions, and to *IP-10* generally, to determine whether the Minister's decision is reasonable, see: *Abdella, supra* at para. 19 and following; *Alfridi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1192, [2008] F.C.J. No. 1471 para. 45; *Ismeal v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1366, [2008] F.C.J. No. 1728 at para. 15 and following; *Naeem v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 123, [2007] 4 F.C.R. 658 at para. 56 and following; *Soe, supra* at para. 24 and following; *Tameh, supra* at para. 41 and following; *Al Yamani, supra* at para. 70 and following.

[57] In my view, even if one sets aside the fact that the guidelines were not issued by the minister whose decision is under review, the Federal Court's reliance upon *Baker* in connection with *IP-10* is problematic. The guidelines in issue in *Baker* provided instances of circumstances where the granting of an H&C application was warranted. As summarized in *Baker*, the guidelines provided that:

> Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

[58] Where the guidelines specifically direct an officer to consider whether certain identified conditions will result in "unusual, undeserved or disproportionate hardship", it is appropriate to conclude that the failure to consider those conditions or the failure to consider their effects upon the applicant is an indication of an unreasonable decision.

[59] That is not the case with respect to the five questions raised in *IP-10, supra,* which I reproduce below for ease of reference:

1. Will the applicant's presence in Canada be offensive to the Canadian public?
2. Have all ties with the regime organization been completely severed?
3. Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?

4. Is there any indication that the applicant might be benefiting from previous membership in the regime organization?
5. Has the person adopted the democratic values of Canadian society?

[60] In *Baker*, it was possible to reason that the inclusion of certain conditions in the guidelines meant that departmental officials considered those conditions to be indicators of unusual, undeserved or disproportionate hardship. In ministerial relief cases, the questions appear to be designed to identify foreign nationals whose presence in Canada would be detrimental to the national interest e.g. applicants who maintain contact with terrorist organizations, who benefit from assets obtained while a member of a terrorist organization, etc. To that extent, the reasoning in *Baker* would apply only to eliminate unsuitable applicants. It would not assist in identifying suitable applicants, even if an applicant answered all the questions "correctly" because the list is not exhaustive, nor could it ever be, of all the possible reasons for which a person's presence in Canada would be detrimental to the national interest. As a result, the *Baker* reasoning does not justify the use of *IP-10* in the way suggested by the Federal Court jurisprudence.

[61] To summarize, the transfer of responsibility for disposing of applications for ministerial relief to the Minister of Public Safety is intended to bring security and public safety issues to the forefront in the assessment of those applications. Thus the aspect of the national interest which is in issue in these applications is national security and public safety. The assessment of such applications does not require the Minister to engage in a balancing exercise because the test is not a net-detriment test. The Department of Citizenship and Immigration's departmental guidelines, in particular *IP-10*, are not relevant to the Minister of Public Safety's exercise of his discretion since

the Minister is the one responsible for setting policy in this area and, in any event, recourse to them is not justified under the authority of the Supreme Court's decision in *Baker*.

B. The scope of subsection 34(2) of the *IRPA*

[62] The question which arises at this point is the one raised in *Soe, supra*: does the emphasis on national security and public safety mean that individuals who commit an act described in subsection 34(1) cannot obtain ministerial relief because they committed the very act that confers jurisdiction on the Minister to exercise the discretion conferred by subsection 34(2)? Such a result would deprive the provision 34(2) of any effect, an absurd result.

[63] A partial answer to this question is provided by the decision of the Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 [*Suresh*]. The Supreme Court dealt with section 19 of the *Immigration Act*, *supra*, which, as set out above, contained substantially the same inadmissibility and ministerial relief provisions as are now found in section 34. Given the broad sweep of section 19, Mr. Suresh argued it could be applied to persons who innocently joined or supported organizations that, unbeknownst to them, were terrorist organizations and thus lead to their deportation to places where they faced the risk of inhumane treatment. The Supreme Court dealt with this argument by invoking the ministerial relief provision, as follows, *Suresh, supra* at para. 110:

> We believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to the national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to

> Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.

[64] As I read the Supreme Court's decision, it concluded that the saving provision of section 19 of the *Immigration Act* would apply to protect persons who innocently joined or contributed to organizations that, unbeknownst to them, were terrorist organizations. There may be other cases in which persons who would otherwise be caught by subsection 34(1) of the *IRPA* may justify their conduct in such a way as to escape the consequence of inadmissibility. For example, those who could persuade the Minister that their participation in a terrorist organization was coerced might well benefit from ministerial relief.

[65] There is thus an area in which subsection 34(2) of the *IRPA* operates to provide ministerial relief to persons who would otherwise be found inadmissible as a result of activities described in subsection 34(1). I agree with Shore J. who wrote at paragraph 54 of his reasons in *Chogolzadeh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 405, [2008] F.C.J. No. 544: "The relief, in subsection 34(2), is not illusory, but it is clearly intended to be exceptional."

4. THE REASONABLENESS OF THE MINISTER'S DECISION

[66] The argument made before us was that the Minister failed to consider relevant evidence and that his reasons were inadequate. As indicated earlier in these reasons, the Department of Citizenship and Immigration's guidelines, including *IP-10*, are neither exhaustive nor determinative

of what evidence is relevant or must be considered. The relevant question is whether Mr. Agraira's submissions were addressed.

[67] Setting aside Mr. Agraira's arguments regarding humanitarian and compassionate considerations that, as set out above, are not relevant to the Minister's decision, the primary argument raised by Mr. Agraira was that his involvement in the LNSF was either innocent or trivial. Mr. Agraira on his own behalf, and through counsel, raised several contradictory arguments on this point. In his initial application for relief dated July 16, 2002, counsel for Mr. Agraira set out the statements made by Mr. Agraira as to his membership in the LNSF and concluded (Appeal Book at 110):

> Therefore, it is respectfully submitted that, when assessing this request for Ministerial Relief, that the Minister take into account the low level, ordinary nature of Mr. Agraira's activities on behalf of the NFSL. The facts reveal that he was only active in this low-level capacity from 1994-1996 and that Mr. Agraira has not engaged in any actual activities since 1996.

[68] Mr. Agraira sought to distance himself from this admission and explain his inconsistent claims in his affidavit of June 15, 2009, filed with the Federal Court, where he stated (Appeal Book at 48):

> The truth in this matter is that I have never been a member of the LNSF and have never been involved with the organization in any way. I was ill-advised when I arrived in Canada and that stating this would help my refugee claim. After I made the claim in my [Personal Information Form] I was afraid of contradicting my statements and continued to state that I was a member of the organization under pressure from the immigration officer at my interview in 2000. I have never been a member of the LNSF and have never engaged in any of their activities. I stated this at my interview in May of 2002. I further stated that I had no knowledge of their violence and would no have been involved with a group that supported violence.

[69] The Minister directly addressed this argument in his dismissal of Mr. Agraira's application for ministerial relief. The Minister found Mr. Agraira's account of his involvement with the LNSF to be "contradictory and inconsistent" and that his claims that he was unaware of the LNSF's violent activities were "difficult to believe".

[70] Whether Mr. Agraira had renounced his ties to the LNSF was not in issue as Mr. Agraira admitted his on-going sympathy with the organization. Further, the denials of his continuing involvement in Canada also lack credibility as, in his interview with the immigration officer, he admitted that he continued to receive newsletters from chapters of the LNSF in the United States.

[71] The Minister found that Mr. Agraira was not credible, a conclusion which is amply supported by the various conflicting versions of his story offered by Mr. Agraira at various points in his dealings with the immigration system and the courts. This lack of credibility is fatal to Mr. Agraira's application as the Minister can have no faith in any of his representations. In the result, the Minister cannot be said to have acted unreasonably in concluding that Mr. Agraira's presence in Canada is detrimental to the national interest.

[72] I am aware of the apparent absurdity of the position in which Mr. Agraira finds himself. Twice, his application for refugee status on the basis of his membership in the LNSF was refused for lack of credibility. Then, when he applied for permanent residence, his previously discounted assertions of membership in the LNSF are raised against him and his application for ministerial

relief is dismissed, once again on grounds of lack of credibility. From Mr. Agraira's point of view, it is difficult to see how he could be lying about both being, and not being, a member of the LNSF.

[73] The absurdity is more apparent than real. Mr. Agraira claimed to be a member of the LNSF when it suited his purposes and denied being a member when it suited his purposes. The findings of the various decision-makers before whom he has pleaded his cause are only as inconsistent as Mr. Agraira, by his lack of candour, has allowed them to be.

CONCLUSION

[74] For these reasons, I would allow the appeal, set aside the judgment of the Federal Court, and giving the judgment which the Federal Court should have given, I would dismiss Mr. Agraira's application for judicial review. I would answer the certified question as follows:

1- When determining a ss. 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest?

   Answer: National security and public safety, as set out in para. 50 of these reasons.

2- Specifically, must the Minister consider the five factors listed in the Appendix D of IP10?

   Answer: No.

"J.D. Denis Pelletier"
J.A.

"I agree
Pierre Blais C.J."

"I agree
Marc Noël J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

ALEXIS SINGER LAOURA CHRISTODOULIDES	FOR THE APPELLANT
LORNE WALDMAN	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JOHN H. SIMS, Q.C.	FOR THE APPELLANT
WALDMAN & ASSOCIATES TORONTO, ONTARIO	FOR THE RESPONDENT