Federal Court of Appeal | Cour d'appel fédérale

Date: 20240619

Dockets: A-213-22
A-217-22

Citation: 2024 FCA 114

CORAM: **STRATAS J.A.**
BOIVIN J.A.
BIRINGER J.A.

BETWEEN:

BHAGAT SINGH BRAR and PARVKAR SINGH DULAI

Appellants

and

CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Respondent

Heard at Vancouver, British Columbia, on June 13, 2024
and at Ottawa, Ontario on June 17, 2024.

Judgments delivered at Ottawa, Ontario, on June 19, 2024.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BOIVIN J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] Based on confidential security information and other information, the Minister had reasonable grounds to suspect that the appellants would travel by air to commit a terrorism

offence. Thus, acting under the *Secure Air Travel Act*, S.C. 2015, c. 20, s. 11, the Minister decided to place the appellants on a list, sometimes colloquially but erroneously called a "no-fly list".

[2] Placement on the list does not trigger any immediate consequences. Rather, it creates potential consequences. Each time a person on the list tries to fly, the Minister decides whether a direction to an air carrier should be made concerning the listed person (s. 9(1)). Directions can range from enhanced security screening for the listed person at the airport to prohibiting the person from flying. This scheme allows the Minister to regulate flyers on the list using all available information at the time they try to fly, not just the information available at the time of listing.

[3] At some point, the appellants tried to fly. They could not. They were on the list and the Minister had directed that they not fly.

[4] Under the Act, after being denied transportation, the appellants can ask the Minister to de-list them (s. 15). De-listing prevents any directions concerning future flights. Here, the appellants asked the Minister for de-listing. The Minister refused and kept the appellants on the list.

[5] After the Minister maintains the listing, the appellants can appeal to the Federal Court to review the listing decision "without delay" based on the information available to the Court (ss. 16(2) and 16(4)). Here, the appellants did just that:

- The appellant Dulai submitted that the Act and the Minister's listing decision unjustifiably violated s. 6 of the Charter (mobility rights).

- Both appellants submitted that ss. 15 and 16 of the Act and the Minister's listing decisions unjustifiably violated s. 7 of the Charter, in particular the rights to liberty and security of the person and the right not to be deprived thereof except in accordance with fundamental justice.

- Both appellants submitted that the Minister's listing decisions were unreasonable and should be quashed.

[6] In comprehensive, careful and detailed reasons, the Federal Court disagreed with the appellants (2022 FC 1163, 2022 FC 1164 and 2022 FC 1168; see also 2020 FC 729). The Federal Court held that:

- Section 8 and para. 9(1)(*a*) of the *Secure Air Travel Act* and the Minister's decision offended Mr. Dulai's mobility rights under s. 6(1) and para. 6(2)(*b*) of the Charter (2022 FC 1168 at paras. 76-108) but the Act and the Minister's decision were justified under s. 1 of the Charter (2022 FC 1168 at paras. 109-137).

- Sections 15 and 16 of the *Secure Air Travel Act* and the Minister's decisions deprived the appellants of their security of the person rights under s. 7 of the

Charter but did so in accordance with the principles of fundamental justice (2022 FC 1168 at paras. 186-191 and 226-229); and in this case, all procedures were conducted in accordance with the principles of fundamental justice.

- The Minister's decisions to maintain the appellants on the list were reasonable (2022 FC 1163 and 2022 FC 1164).

[7] The appellants now appeal to this Court on all issues.

B. Analysis

(1) The Charter issues

[8] The respondent submits that neither the provisions of the Act nor the placement of the appellants on the list offends their mobility rights within or to and from Canada under s. 6 of the Charter. Among other things, the respondent submits that s. 6 does not protect rights to a mode of transport. The respondent adds that neither the provisions of the Act nor the placement of the appellants on the list offends the appellants' rights to liberty and security of the person under s. 7 because the appellants have suffered only some inconvenience with the running of their businesses and psychological stress, not serious harm of a medical nature.

[9] It is unnecessary to decide upon the respondent's submissions and, more generally, whether the *Secure Air Travel Act* violates the appellants' mobility rights under s. 6 of the Charter or rights to liberty and security of the person under s. 7 of the Charter.

[10] Legislation that violates s. 6 of the Charter can be justified as a reasonable limit prescribed by law under s. 1. And deprivations of the rights to liberty and security of the person under s. 7 of the Charter can be in accordance with the principles of fundamental justice. As explained below, to the extent s. 8 and para. 9(1)(*a*) of the *Secure Air Travel Act* violate s. 6 of the Charter, they are justified under s. 1. And to the extent ss. 15 and 16 of the Act deprive the appellants of rights to liberty or security of the person under s. 7 of the Charter, the deprivation is in accordance with the principles of fundamental justice.

[11] In a future case, both the Federal Court and this Court should regard the ss. 6 and 7 issues in this case as open to full argument. There is reason to doubt the correctness of the Federal Court's view that Mr. Dulai's s. 6 rights were infringed because the Federal Court may have departed from the accepted approach for interpreting the Charter in general and s. 6 of the Charter in particular: *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426 at paras. 8-18; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, 166 D.L.R. (4th) 1 at paras. 49-92; *Canada v. Boloh 1(a)*, 2023 FCA 120 at paras. 14-51. And there is reason to doubt the correctness of the Federal Court's finding of a rights breach under s. 7 because of the high quality and rare nature of the evidence needed in this context to establish a breach: *New Brunswick (Minister of Health and Community Services) v. G.*

(J.), [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 at paras. 59-60; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at paras. 47-57.

(a) Section 6 of the Charter and justification under section 1 of the Charter

[12] For argument's sake, I am prepared to assume that s. 6 of the Charter has been violated. However, the Act is justified under s. 1. I substantially agree with the Federal Court's reasons on all of the branches of the test for justification under s. 1 and I adopt those reasons.

[13] All parties agree that the objectives of the *Secure Air Travel Act*, including para. 8(1)(*b*) and s. 9(1), are to protect Canadians when they fly, uphold national security, and fulfil Canada's international obligations to counter terrorism. All agree that these are pressing and substantial objectives.

[14] As well, all parties agree that the *Secure Air Travel Act* rationally connects to these objectives: the Minister can place individuals on the list where the Minister has reasonable grounds to suspect they will threaten transportation security or travel by air to commit a terrorism offence.

[15] However, the parties part company on the minimal impairment branch of the justification test. The appellants submit that the *Secure Air Travel Act* violates mobility rights in a non-minimal way. I disagree. In the assessment of minimal impairment or, for that matter, the proportionality between the benefits of the Act and its deleterious effects, context matters.

[16] In some cases, Parliament is addressing a concrete and tangible problem within the ken of the courts. As a result, in those sorts of cases, courts feel confident, empowered and institutionally capable to second-guess Parliament's choices. They can hold Parliament to the option that is the very least impairing of rights and freedoms: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 at 994 S.C.R.

[17] In other cases, Parliament is addressing a more abstract and intangible problem outside the ken of the courts. As a result, courts—though still duty-bound to be vigilant in the protection of rights and freedoms—must necessarily give Parliament some leeway. In these sorts of cases, courts often speak of Parliament having a reasonable range of available alternatives to accomplish its purposes, a margin of appreciation or a measure of deference: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 at para. 149; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at para. 53; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 at paras. 63 and 68-70; *Irwin Toy* at 989-990 and 993-994; and many others.

[18] The *Secure Air Travel Act* is just the sort of legislation where Parliament must be given a margin of appreciation. Here, Parliament is acting in the fields of national security, international relations and global cooperation to prevent terrorism. These are fields full of sensitive, imprecise and complex assessments, evaluations and choices lying within the experience, knowledge and judgment of Parliament and the executive of government empowered under the Act, not judges and courts: *Boloh 1(a)* at paras. 64-65; *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006 at para. 94. As well, the Act is

not directed to past events that are tangible, certain and known. Rather, it is forward-looking, designed to act preventatively, proactively and pre-emptively to deal with perhaps imprecise but nevertheless very real risks of harm to property, public safety and human life. Here, exactitude is elusive. The stakes are sky-high. Some leeway is warranted.

[19] The *Secure Air Travel Act* meets the requirement of minimal impairment. Several of its features show careful tailoring to minimize the impairment of rights and freedoms: after placement on the list, individuals are not automatically denied boarding but instead may or may not be subject to a direction; if subject to a direction, individuals may be subject to gradual and proportional measures such as additional security screening (s. 9); any listing decisions must be re-evaluated every 90 days using the most current available information (s. 8(2)); and when individuals seek to have their name removed, the Minister must review the listing decisions anew (s. 15(4)). Further protection is provided by a neutral, thorough judicial assessment in the Federal Court "without delay" of the Minister's decisions based on all the evidence, including any new, up-to-date evidence (s. 16(4) and para. 16(6)(*e*)). And as we shall see, the Act also leaves it open to the Federal Court to take all possible measures to protect the individual's rights to disclosure, to know the case to meet, and to make full answer and defence, such as by appointing an *amicus curiae* to protect the individual's interests in any closed proceedings.

[20] The appellants submit that the *Secure Air Travel Act* could accomplish its objectives with less intrusion by simply revoking individuals' Canadian passports. I disagree. Domestic air travel could still occur and individuals can still fly abroad using foreign passports.

[21] In this case, it is noteworthy that the appellants and the *amici curiae* have not been able to offer any effective ways by which Parliament could have accomplished the important objectives furthered by the *Secure Air Travel Act* in a less impairing way. Nor can I. The Act meets the requirement of minimal impairment.

[22] Finally, justification under s. 1 of the Charter also requires an overall balance or proportionality between the benefits of the Act and its deleterious effects. Here, this requirement is met. The deleterious effects are relatively few, ranging from the potential of enhanced screening to a flying ban—measures that might be only temporary and brief—and pale next to the need to prevent domestic and international terrorism, and the destruction, butchery and carnage wrought by it.

[23] The decision to list the appellants also does not violate s. 6 of the Charter. Here again, it is only necessary to consider s. 1. To the extent the decision violated the appellants' mobility rights, the listing was demonstrably reasonable under s. 1. The analysis mirrors the analysis, below, of the reasonableness of the Minister's listing decision. On the facts and the law, this was not a close case: see paragraphs 44-73 below.

(b) Section 7 of the Charter and the principles of fundamental justice

[24] Here again, I substantially agree with the Federal Court, for the reasons it gave. Any deprivation of the appellants' s. 7 rights to liberty and security of the person was in accordance with the principles of fundamental justice. I adopt the Federal Court's reasons on this point.

[25] The scheme under the *Secure Air Travel Act* is quite similar to the security certificate scheme established under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Both are prompted by national security and public safety concerns. Both prescribe or permit rigorous measures and mechanisms to give affected individuals as much procedural fairness as possible in the circumstances. For example, just like those in security certificate proceedings under the *Immigration and Refugee Protection Act*, individuals placed on the list under the *Secure Air Travel Act* are entitled, among other things, to reasonable disclosure of the case against them, a fair hearing presided by an independent and impartial judge, and independent, neutral decisions based on the facts and the law: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 ("*Charkaoui 2007*") at para. 29; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 at paras. 40-44.

[26] When confidential security information is in play, as it is here, the interests of individuals placed on the list under the *Secure Air Travel Act* can be represented in closed security hearings by an *amicus curiae*, with a role almost identical to the "special advocates" who represent affected individuals in closed security hearings under the *Immigration and Refugee Protection Act*. The involvement of an *amicus curiae* ensures the protection of the appellants' right to know the case against them and their right to answer it: *Harkat* at paras. 28-77.

[27] The Supreme Court has ruled the procedural protections in the *Immigration and Refugee Protection Act*, including the use of special advocates, to be constitutionally sufficient: *Harkat* at para. 77. Given the substantially similar protections under the *Secure Air Travel Act* and the ability of the Federal Court to make use of *amici curiae*, the same result must follow.

[28] This is especially so given the lesser consequences that affected individuals face as a result of listing under the *Secure Air Travel Act*: a range of measures ranging from enhanced security screening to a ban on flying, perhaps only temporary and brief, and perhaps no measures at all. While these measures can greatly affect some, they pale in comparison to the consequences affected individuals face in security certificate proceedings under the *Immigration and Refugee Protection Act*: permanent removal from Canada or indefinite detention.

[29] The appellants point to the fact that unlike security certificate proceedings under the *Immigration and Refugee Protection Act*, the *Secure Air Travel Act* does not explicitly provide for the involvement of an *amicus curiae* or a special advocate to access confidential security information and represent the interests of affected persons in closed proceedings. The *Secure Air Travel Act* merely leaves open the possibility that an *amicus curiae* might be appointed. This, the appellants say, is a fatal procedural shortcoming in the Act, one that is contrary to the principles of fundamental justice under s. 7. They say that the Supreme Court's decision in *Charkaoui 2007* supports their position. I disagree.

[30] The *Secure Air Travel Act* allows the Federal Court the flexibility to tailor its procedures to the particular circumstances to meet the requirements of procedural fairness and the principles of fundamental justice. Flexibility is needed because the circumstances giving rise to placement on the list under the *Secure Air Travel Act* vary considerably and confidential security information may not be in issue:

- At one end is placement on the list based only on publicly available information. There, the Federal Court's hearing can be public and an affected individual's counsel can participate fully. An *amicus curiae* to represent the interests of the individual is not needed.

- At the other end is placement on the list based in whole or in part on confidential security evidence. There, an *amicus curiae* to represent the interests of the individual may be needed.

[31] This is quite unlike security certificate proceedings under the *Immigration and Refugee Protection Act* where, due to the nature of the proceeding and the specific standards set out in the Act, confidential security information will be pervasive. The *Immigration and Refugee Protection Act* provides that highly sensitive "security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization" (s. 76) is to be used to prove inadmissibility or to prove the need for detention, continued detention or variation of detention (ss. 82-82.2). Given the pervasiveness of the confidential security information, it makes sense that the *Immigration and Refugee Protection Act* has to expressly provide for special advocates to receive that information and represent the interests of affected individuals.

[32] That is not all. In *Charkaoui 2007* (at para. 60), the Supreme Court highlighted the drastic consequences of security certificate proceedings under the *Immigration and Refugee Protection*

Act—potential removal from Canada or indefinite detention—and held that those consequences required the highest of procedural protections under s. 7 of the Charter. Thus, in *Charkaoui 2007*, the Supreme Court held (at paras. 80-84) that the Act could specifically set out the protective mechanism of special advocates to represent the interests of affected individuals.

[33] However, in words apposite to the present case, the Supreme Court added (at paras. 57-59) that procedural protections under s. 7 of the Charter need not be as high in other contexts where the consequences are less drastic.

[34] That is the case here. As noted at paragraph 28 above, the consequences of listing under the *Secure Air Travel Act*—a range of measures ranging from enhanced security screening to a ban on flying, perhaps only temporary and brief, and perhaps no measures at all—are far less drastic than those in security certificate proceedings under the *Immigration and Refugee Protection Act*.

[35] Accordingly, in this case, it is not constitutionally incumbent on Parliament to require the use of an *amicus curiae* to protect the affected individual's interests in every case arising under the *Secure Air Travel Act*. Instead, the *Secure Air Travel Act* leaves it up to the Federal Court to decide what is necessary in the circumstances.

[36] Is there anything we should be concerned about here? No. Under many legislative regimes and in many hearings and processes in our legal system, it is left to judges to devise and implement protective procedures based on the particular circumstances that present themselves:

see, *e.g.*, *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110 at para. 40 and sensitive proceedings under legislation such as the *Canada Evidence Act*, R.S.C. 1985, c. C-5 and the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23. And there is no gap in protection. If the Federal Court fails to devise and implement any necessary protective procedures while operating under this particular legislative regime, for example by not appointing an *amicus curiae* when one is needed to protect an affected individual's interests, this Court will quash its decision.

[37] For the foregoing reasons, ss. 15 and 16 of the *Secure Air Travel Act* are consistent with the principles of fundamental justice.

[38] However, we must now examine what actually happened in this case. Did the appellants enjoy the benefit of the principles of fundamental justice under s. 7 of the Charter? Were they treated in a procedurally fair and adequate way?

[39] The answer to both is yes. The Federal Court played a robust and active role throughout in ensuring that the appellants were treated in a procedurally fair way:

- The Federal Court recognized that this particular case involved confidential security information. So it appointed two well-qualified, experienced lawyers to serve as *amici curiae* to advance the appellants' interests in the confidential portions of the hearings dealing with that information. The Federal Court gave the *amici curiae* a broad mandate, nearly identical to "special advocates" in security certificate proceedings under the *Immigration and Refugee Protection Act* and

they discharged that mandate thoroughly. The appointment of persons like this is a substantial substitute to full disclosure in sensitive cases involving confidential and classified national security evidence, and essential to ensure fairness: *Harkat* at paras. 34-37, 46-47, and 67-73. Given the extent and quality of the participation of the *amicus curiae* in the present case (see 2020 FC 729 at para. 217 and the resulting order issued by the Federal Court), the appellants' interests were represented and advanced very well.

- The Federal Court played an active, robust, interventionist, non-deferential, gatekeeper role in ensuring procedural fairness throughout, in particular by giving the appellants full disclosure or a substantial substitute to full disclosure in the form of in-depth analyses and high-quality, very detailed public summaries. In doing so, the Federal Court ensured the appellants received an "incompressible minimum amount of disclosure" and discharged the requirement under para. 16(6)(*c*) of the *Secure Air Travel Act* to keep the appellants reasonably informed: *Charkaoui 2007* at paras. 61-63; *Harkat* at paras. 40-44 and 51-64.

[40] Having examined the unredacted confidential security information, I conclude without hesitation that the Federal Court disclosed as much as it could to the appellants and to the *amici curiae*, mindful of its obligation not to allow disclosure if, in its opinion, it would be injurious to national safety or endanger the safety of any person (para. 16(6)(*c*)). The appellants themselves, or through the *amici curiae* representing their interests, had sufficient information to know the case to meet and to make full answer and defence. The Federal Court was so satisfied: 2022 FC

1163 at para. 126; 2022 FC 1164 at para. 124; 2022 FC 1168 at para. 222. This is a finding that can be set aside only on the basis of palpable and overriding error—an obvious error capable of changing the outcome—and none has been shown here.

[41] The appellants submit that the *amici curiae* in this case could not represent their interests adequately, citing *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 at para. 49. I disagree. *Criminal Lawyers* stands for the proposition that a court cannot give an *amicus curiae* a mandate that obliges them to take on a solicitor-client role. That didn't happen here. Instead, the *amici curiae* were appointed to represent the appellants' interests to the fullest extent possible by serving as a substantial substitute for the appellants' full participation in the confidential portion of the proceedings and full disclosure of confidential material. This salutary procedure is regularly followed in national security proceedings, with demonstrably beneficial results: 2020 FC 729 at paras. 157-177. In this case, the *amici curiae* represented the appellants' interests fully and effectively. The Federal Court so found. That finding is not vitiated by palpable and overriding error.

[42] For nearly forty years, the Supreme Court has repeatedly reminded us that s. 7 of the Charter guarantees those facing state-run proceedings "adequate" procedural fairness, not "the most favourable procedures that could possibly be imagined": *R. v. Lyons*, [1987] 2 S.C.R. 309, 44 D.L.R. (4th) 193 at para. 88; in the national security context, see also *Harkat* at para. 43 and *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 at para. 46.

[43] In the present case, knowing what was disclosed to the appellants and the *amici curiae*, considering the activities of the *amici curiae* in reviewing the confidential evidence and making submissions on it, and taking into account the exceptional vigilance of the Federal Court in ensuring procedural fairness throughout, I conclude that the procedures followed were not just adequate. They were well beyond adequate.

(2) The reasonableness of the Minister's decisions to maintain the appellants' listing

[44] The Minister placed the appellants on the list under the *Secure Air Travel Act* and, following submissions from the appellants, maintained them on the list. The Federal Court upheld the Minister's decisions. The appellants now ask this Court to reverse the decision of the Federal Court and quash the Minister's decisions.

[45] In order to maintain a person on the list, the Minister must have "reasonable grounds to suspect" the person would either threaten transportation security or travel by air to commit a terrorism offence (s. 8).

[46] The "reasonable grounds to suspect" standard speaks to rational possibilities, not likelihoods. This distinguishes it from the higher standard of "reasonable and probable grounds". Nevertheless, "reasonable grounds to suspect" is a standard that must be articulated and applied with discipline and rigor. Only then can a reviewing court conduct "an independent after-the-fact review" and stop any "arbitrary state action" in its tracks. See *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 at para. 45.

[47] Imaginings, musings, hunches, speculations or guesses, educated or otherwise, do not meet the standard. Rather, the standard is met through evidence and inferences drawn from evidence that create a constellation of objective, discernable and ascertainable facts. The evidence and inferences must tie the relevant individuals, here the appellants, to the relevant circumstance, here the travelling by air to commit a terrorism offence. There need not be verifiable and reliable proof. See *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at paras. 23-45; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Monney*, [1999] 1 S.C.R. 652, 171 D.L.R. (4th) 1 at paras. 49-52; *Farwaha* at paras. 96-98.

[48] In an appeal to the Federal Court, the Federal Court decides whether the Minister's listing of the person is "reasonable" (s. 16(4)), *i.e.*, tenable and defensible given the evidence and the degree of impact upon the individual. The Federal Court can receive new evidence, including more up-to-date evidence (para. 16(6)(*e*)). Where the Federal Court receives new evidence, it decides whether the Minister's decision is reasonable in light of the totality of the evidence placed before the Court.

[49] On appeal from the Federal Court to this Court, the appellants must show that the Federal Court erred in law or extricable legal principle or, on other issues, committed palpable and overriding error. This is the normal appellate standard: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Harkat* at para. 108.

[50] The Federal Court charged itself properly on the meaning of "reasonable" in s. 16(4), the standard of "reasonable grounds to suspect" in s. 8, the nature of the record before the Court and

the robust, interventionist, non-deferential, gatekeeper role that the Court must play to protect the appellants' interests: 2022 FC 1163 at paras. 85-88; 2022 FC 1164 at paras. 81-84; 2020 FC 729 at paras. 53, 116-119 and 126-127; *Brar v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 932 at paras. 68-69.

[51] The *amici curiae* submit that the Federal Court cannot use new evidence adduced under para. 16(6)(*e*) of the *Secure Air Travel Act* when considering whether the "reasonable grounds to suspect" standard was met. They say that the Federal Court should have limited its review of the Minister's decision to the evidence that was before the decision-maker. In part, they base this submission on their view that the Federal Court is engaged in a judicial review of the Minister's decision to maintain the appellants on the list, much like it would review the decision of any other administrative decision-maker. Thus, in their view, all the normal rules in judicial review apply, many of which are set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

[52] I reject this submission. So did the Federal Court: 2020 FC 729 at paras. 117-119. I adopt the reasons of the Federal Court and add the following.

[53] The Federal Court's review of the Minister's decisions to maintain the appellants on the list under the *Secure Air Travel Act* is analogous to its review of the Ministers' decision to issue a security certificate against an individual under s. 78 of the *Immigration and Refugee Protection Act* and to a Minister's decision to cancel a passport under s. 4 of the *Prevention of Terrorist*

Travel Act, S.C. 2015, c. 36, s. 42. Review in the Federal Court in these regimes is not traditional judicial review of the sort regulated by *Vavilov*.

[54] The Supreme Court has repeatedly emphasized that security certificate proceedings in the Federal Court under the *Immigration and Refugee Protection Act* are not judicial review proceedings governed by the normal methodology for reviewing substantive decision-making in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 or its successor, *Vavilov*: *Charkaoui v. Canada*, 2008 SCC 38, [2008] 2 S.C.R. 326 ("*Charkaoui 2008*"); *Harkat*. The same must be true here.

[55] This makes sense. None of the three regimes, identified above, deals with a decision that has finally resolved the merits of a matter and cannot be reopened. None looks backward, examining matters that are finished and settled. None has an evidentiary record that has been settled once and for all and cannot be supplemented in the reviewing court.

[56] Instead, all are special, forward-looking regimes aimed not at crystallizing what happened in the past but rather preventing future harm. All recognize that future harm may be better defined by new information. All can be based on security information that, by its nature, is ever-evolving. All aim at ensuring that restrictive, deleterious and potentially rights-impairing consequences are visited upon individuals only using the most up-to-date, current information. Thus, all allow for the admission of new evidence in the Federal Court. This works both ways: the new evidence can enhance the state's case or weaken it.

[57] The *amici curiae* also submit that in the Federal Court the respondent introduced far too much new evidence, making the process less of a judicial review of the Minister's decision and more like a *de novo* determination by the Federal Court. I disagree for two reasons.

[58] First, as just explained, the Federal Court is not deciding a judicial review of the Minister's decision that is over and done with. Rather, it is assessing whether the decision to maintain the appellants' listing continues to be reasonable on the basis of all evidence, including the most up-to-date evidence available.

[59] Second, I am not persuaded that by introducing new evidence the respondent committed any abuse of process or engaged in a process contrary to the framework of the *Secure Air Travel Act* of the sort described in *Charkaoui 2008*. There, the Supreme Court recognized (at para. 71) that the state could abuse the security certificate regime under the *Immigration and Refugee Protection Act* if it intentionally submitted an incomplete record to the Ministers to get a security certificate and then, after the security certificate was issued and the affected individual was arrested and detained, continued to accumulate evidence to bolster, bootstrap, or backfill its case for the certificate. Here, the respondent is doing nothing of the sort. Much of the new evidence the respondent introduced was in response to new evidence understandably introduced by the appellants and the *amici curiae*, in part due to disclosure they received. And the new evidence was necessary to ensure that the Federal Court assessed the reasonableness of the maintenance of the appellants on the list using the most up-to-date evidence available.

[60] The *amici curiae* also submit that the requirement that there be reasonable grounds to suspect that the listed individual will commit a terrorism offence listed under para. 8(1)(*b*) of the *Secure Air Travel Act* is quite demanding. The Minister must have in mind a particular offence, perhaps even the individual elements of the offence, look at the words and conduct of the listed individual, and then assess whether there are reasonable grounds to suspect that the offence with its elements will be committed.

[61] The *Secure Air Travel Act* does not so provide. Paragraph 8(1)(*b*) of the Act requires the Minister to have reasonable grounds to suspect that the individual will travel by air for the purpose of committing acts or omissions that are offences under that paragraph of the Act. The focus in para. 8(1)(*b*) is on whether there are reasonable grounds, established by a constellation of information of the quality discussed in paragraphs 46-47 above, that the statements, actions, and behaviours of the individual are such that it is possible, not probable, that the individual will travel by air for the purpose of committing acts or omissions that are offences under para. 8(1)(*b*) of the Act. Under this view, a person who openly declares support for certain terrorist action and has the means and motivation to carry it out might be listed. Under the view of the *amici curiae* that same person perhaps might not be listed because of the particular state of current information bearing on the particular elements of the offence. The former view better advances the purposes of the Act. To similar effect, see *Farwaha* at para. 78 and *Randhawa v. Canada (Transport)*, 2017 FC 556.

[62] Some of the submissions of the *amici curiae* suggest that the offences listed under para. 8(1)(*b*) of the *Secure Air Travel Act* are rather exacting and narrow. I disagree. The offences

have been interpreted to be broad and to encompass a broad range of conduct: see, *e.g.*, *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555 at para. 12; *R. v. Nutall*, 2018 BCCA 479 at para. 216; *R. v. Ahmad*, (2009), 257 C.C.C. (3d) 199 (Ont. S.C.) at paras. 26 and 59-61. In this regard, I agree with the submissions of the respondent at paragraphs 51-61 of the redacted public version of its *ex parte* memorandum of fact and law.

[63] The appellants submit that the Federal Court's public reasons do not permit meaningful appellate review. I reject this. The public reasons, exacting and voluminous, provide this Court with more than enough information to conduct a meaningful appellate review, especially viewed in light of the public and confidential evidence filed. Further, the Federal Court's public reasons, seen in light of the public evidence and the public disclosures of the confidential proceedings, easily pass the threshold of informing the appellants of what the Federal Court decided and why: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at para. 17.

[64] In dismissing the appellants' appeals in this case, the Federal Court found that the evidence supporting the placement of the appellants on the list was more than sufficient in quantity and quality to meet the statutory standard of "reasonable grounds to suspect". The Federal Court found that it was reasonable for the Minister to form a reasonable suspicion that both appellants would travel by air for the purpose of committing one of the broad range of terrorism offences identified in para. 8(1)(*b*) of the *Secure Air Travel Act*. These findings stand: the appellants have not shown any error of law or palpable and overriding error. In fact, on the evidence, I agree with the Federal Court's findings.

[65] The appellants also submit that the Federal Court (and the Minister for that matter) failed to consider the appellants' "Charter values", in particular the values surrounding ss. 2, 6, and 7 of the Charter, or, alternatively, considered them improperly: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31.

[66] In its cases, the Supreme Court says that "Charter values" are just factors for administrators to take into account in their decision-making. They do not change, supplement or override the written text of the rights and freedoms in the Charter, the written justification provision in s. 1 of the Charter, or the cases decided under the Charter during the past forty-three years. Nor are they putty to be used to fill unwanted gaps in the Charter. Still less can they strike down or change legislation governing an administrator's decision, or authorize an administrative decision not authorized by the governing legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at para. 16; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 at 1077-1081 S.C.R. Lastly, if "Charter values" are to be matters of constitutional import, they must be substantial, well-founded and well-sourced, not just a litigant's musings about the vibe of the thing. On a number of these points, see *Sullivan v. Canada (Attorney General)*, 2024 FCA 7 at paras. 9-12 and see also *Khodykin v. Canada (Attorney General)*, 2024 FCA 96 at paras. 8-9.

[67] Here, the appellants do not misuse Charter values in the ways just described. However, the values they do articulate suffer from poor definition and vagueness. To the extent the values have the same content as the rights and freedoms under the Charter that the appellants have

invoked in this case, I have already found justification under s. 1 of the Charter and consistency with the principles of fundamental justice. And overall, the appellants seem to be using Charter values in this case as a vehicle to quibble about the weight the Minister and the Federal Court gave to certain considerations the appellants wish to stress—an argument foreclosed to them given the standard of review of palpable and overriding error.

[68] In this case, the record, both public and confidential, including the appellants' submissions, shows that when the Minister and the Federal Court assessed the reasonableness of the listing, they were well aware of the rights, freedoms and interests of the appellants, including anything that might conceivably qualify as "Charter values". But they were also aware of the public and confidential evidence, the need to continue the international fight against terrorism, and the imperatives of public safety. In this case, the balance fell in favour of maintaining the listing of the appellants, decidedly so. Here, the Federal Court did not commit any legal error or palpable and overriding error.

[69] In the course of oral argument in this Court, the appellants raised a new issue for the first time. They queried whether a court could ever review Ministerial directions under s. 9 of the *Secure Air Travel Act*.

[70] As noted above (at paragraph 2), the Minister's listing decisions do not cause any immediate consequences for persons on the list. Instead, they create only the potential of a Ministerial direction to an air carrier against a listed person that becomes relevant at the time of flying based on the information then available. The Act provides no recourse against a

Ministerial direction, for example by way of judicial review (with potentially fast interim emergency remedies, as discussed in *Wilson v. Meeches*, 2023 FCA 233), likely because the direction may be made moments before the time of flying. Is a judicial review legally and practically available to redress a Ministerial direction on the basis of *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, 489 D.L.R. (4th) 191? On the other hand, as the respondent suggests, is recourse against the Minister's listing decision sufficient? These questions need a full evidentiary record and full argument, which we do not have here. We should not comment further: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712 at para. 36; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 at paras. 32-34.

[71] I do wish to close by commenting on the confidential hearing that this Court conducted with the *amici curiae* and the respondent to consider the confidential security evidence offered in support of the appellants' listings. The confidential hearing took place soon after all parties participated in a public hearing. As much business as possible was conducted in the public hearing. The public hearing was far longer than the confidential hearing.

[72] In this case, confidential reasons dealing with the confidential evidence and confidential submissions are not necessary. As a result, these public reasons deal with all of the issues in this appeal. This is because the *amici curiae* did not try to argue in the confidential hearing that the Federal Court committed palpable and overriding error in finding that:

- many of the appellants' explanations and justifications were not credible;

- there were reasonable grounds to suspect the appellants might travel by air for the purpose of committing acts or omissions that are offences under para. 8(1)(*b*) of the *Secure Air Travel Act*; and

- the evidence before the Federal Court was sufficient in quality and quantity and was sufficiently reliable to support maintaining the appellants on the list (see, in particular, the respondent's confidential memorandum of fact and law, in particular at paras. 76-77 and 81-82).

[73] The *amici curiae* were right not to try. Looking at all the evidence, close this case was not.

C. Proposed disposition

[74] For the foregoing reasons, I would dismiss the appellants' appeals. The respondent does not seek its costs and so none should be awarded.

"David Stratas"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-213-22 A-217-22
STYLE OF CAUSE:	BHAGAT SINGH BRAR AND PARVKAR SINGH DULAI v. CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA AND OTTAWA, ONTARIO
DATES OF HEARING:	JUNE 13, 2024 JUNE 17, 2024
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BOIVIN J.A. BIRINGER J.A.
DATED:	JUNE 19, 2024

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