Federal Court of Appeal | Cour d'appel fédérale

Date: 20140930

Docket: A-36-12

Citation: 2014 FCA 213

CORAM: **STRATAS J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

NAWAL HAJ KHALIL

Respondent

Heard at Toronto, Ontario, on May 12, 2014.

Judgment delivered at Ottawa, Ontario, on September 30, 2014.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: STRATAS J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Matter under Appeal

[1] The Minister of Public Safety and Emergency Preparedness appeals from the November 21, 2011 decision of the Federal Court in which Justice O'Reilly granted Nawal Haj Khalil's application for judicial review of a ministerial relief decision in file number IMM-3767-10,

issued pursuant to subsection 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) (cited as 2011 FC 1332 [Reasons]). Based on an assessment and recommendation by the Canada Border Services Agency (CBSA), the Minister declined to grant Ms. Haj Khalil an exemption from a determination that she was inadmissible to Canada. The judge certified a question of general importance, enabling this Court to hear this appeal.

[2] In the same reasons, the judge also considered an application for judicial review of a different decision concerning Ms. Haj Khalil in file number IMM-3769-10. That decision, made by an immigration officer, was the one in which she was found to be inadmissible to Canada, pursuant to paragraph 34(1)(*f*) of the IRPA, because she was a former member of Fatah, a Palestinian group the Canadian government has reasonable grounds to believe has engaged in terrorism pursuant to paragraph 34(1)(*c*) of the IRPA. The judge dismissed this application for judicial review, found the decision to be reasonable, and declined to certify a general question of importance relating to that decision. As such, Ms. Haj Khalil's inadmissibility and the portion of the judge's reasons which concern the inadmissibility determination are not on appeal before this Court.

II. Facts

[3] Ms. Haj Khalil, a Palestinian woman, was born in Syria in 1955. In March of 1994, she and her two children arrived in Canada and claimed refugee status; Ms. Haj Khalil claimed that she had been detained and tortured in Syria. In December of 1994, the three family members

were recognized as refugees by the Convention Refugee Determination Division of the Immigration and Refugee Board.

[4] From the late 1970s until 1993, Ms. Haj Khalil worked as a journalist for the magazine of the Palestinian Liberation Organization (PLO) called *Filastin Al Thawra*, (FAT) where she was paid out of the so-called 'Fatah quota' (the funding allocated by the PLO to Fatah). In her interviews with immigration officials, Ms. Haj Khalil stated that she wrote primarily about the Israel-Palestinian conflict, the Syrian position in Lebanon, the occupation of South Lebanon by Israel, and conferences held outside Lebanon. Ms. Haj Khalil also often covered PLO Chairman Yasser Arafat's trips to neighbouring countries as part of his press pool. The content written by Ms. Haj Khalil was expected to be pro-Palestinian in nature for publication in FAT.

[5] It is this association with Fatah for which Ms. Haj Khalil was found to be inadmissible to Canada and for which she was denied ministerial relief under subsection 34(2) of the IRPA. Fatah is a faction within the PLO that was founded in 1959. The Canadian government considers that there are reasonable grounds to believe that Fatah is an organization which has engaged in terrorism.

[6] In its assessment to the Minister of Public Safety that Ms. Haj Khalil's application for ministerial relief be denied, the Canada Border Services Agency described the evolution of Fatah as the following:

> As the Palestine Liberation Organization's role changed to become a government for the Palestinians, Fatah's role changed to become more clandestinely militant and as a result, the Al-Aqsa Martyrs' Brigade was created in 2000, a specialist unit for armed operations against Israel. Also since 2000, Fatah has been

> suspected of collaborating with Hamas, Hezbollah and Palestine Islamic Jihad in "cocktail cells" (a cell made up of members from more than one terrorist group), which have planned and executed several attacks on Israeli targets.
>
> Today, Fatah continues to play a pivotal role in Palestinian politics and also runs several social, charitable and educational organizations which provide aid to the Palestinian people. Nevertheless, it remains that its original ideology utterly rejected the legitimacy of Israel and espoused violence as a means to drive Israel out of greater Palestine. Therefore, while Fatah and Arafat had formally committed themselves to working with Israel towards peace, in reality though many Fatah members are actively engaged in legitimate Palestine Authority governmental activities, certain factions within Fatah have recommitted themselves to violence and have been implicated in continuing terrorist activities.
>
> (CBSA assessment and recommendation, appeal book, volume 1, page 3 [CBSA recommendation])

III. Procedural History

[7] Ms. Haj Khalil's status in Canada has been the subject of ongoing proceedings before the Federal Courts for more than a decade. She was first found to be inadmissible to Canada in 1999 in a decision which was later set aside by the Federal Court of Canada Trial Division. The most recent inadmissibility determination which was judicially reviewed in the Federal Court alongside the ministerial relief decision on appeal to this Court was the fourth inadmissibility determination regarding Ms. Haj Khalil. The ministerial relief decision that is the subject of this appeal is itself the second such decision to be challenged before the Federal Courts.

[8] As this appeal only concerns the ministerial relief decision and not the inadmissibility determination, only the ministerial relief decision and the portion of the judge's reasons which apply to that decision are summarized here.

A. *Denial of Ministerial Relief*

[9] As previously mentioned, the ministerial relief decision is the second such decision to be made regarding Ms. Haj Khalil. In February 2008, the then-Minister of Public Safety Stockwell Day refused her application for ministerial relief. Ms. Haj Khalil successfully applied for judicial review of this decision; the decision was set aside and returned to the minister for re-determination. On June 3, 2010, the new ministerial relief decision was made by the new Minister of Public Safety, Vic Toews. The Minister declined to grant ministerial relief to Ms. Haj Khalil from the determination that she was inadmissible to Canada based on her association with Fatah.

B. *Judicial Review in the Federal Court*

[10] The portion of the judge's reasons analyzing the ministerial relief decision is brief. He held that what he described as the "proper considerations" for such a decision under subsection 34(2) of the IRPA were previously set out in the Federal Court of Appeal decision *Canada (Minister of Public Safety and Emergency Preparedness) v. Agraira*, 2011 FCA 103 (*Agraira FCA*).

[11] The judge determined that *Agraira FCA* had limited what the Minister could consider on a ministerial relief application mainly to considerations of national security and public safety:

> The proper considerations under s 34(2) were recently set out by Justice Denis Pelletier in *Canada (Minister of Public Safety and Emergency Preparedness) v Agraira*, 2011 FCA 103 [*Agraira*]. Justice Pelletier considered the legislative history relating to s 34(2) and concluded 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". He also made clear that the exercise is not one of balancing an applicant's contributions to Canadian national interests against potential detriments to those interests. National security and public safety are at the forefront. Factors that would be relevant to a humanitarian and compassionate analysis of an applicant's circumstances are not relevant to an application for ministerial relief. Similarly, the Minister's discretion does not involve consideration of Canada's international obligations, given that a finding of inadmissibility does not necessarily result in an applicant's removal from Canada.
>
> (Reasons at paragraph 56)

[12] Applying this test, the judge held that "[c]learly, the CBSA's analysis of Ms. Haj Khalil's application included factors Justice Pelletier regarded as irrelevant, namely considerations that would normally form part of an application for humanitarian and compassionate relief and matters relating to Canada's international relations" (Reasons at paragraph 58). He also determined that whether or not the evidence supported a finding that Ms. Haj Khalil did not pose any threat to Canada's security or safety was "not specifically addressed" in the decision and, therefore, it was "impossible to predict how the CBSA or the Minister would have dealt with her application according to the approach laid down by Justice Pelletier" (Reasons at paragraph 58).

[13] The judge found it "unnecessary" to consider submissions made by Ms. Haj Khalil that the Minister's decision infringed her rights under section 7 of the *Canadian Charter of Rights and Freedoms* (Reasons at paragraph 58).

[14] Based on his determination that the CBSA and the Minister had strayed beyond the bounds set by *Agraira FCA*, the judge allowed Ms. Haj Khalil's application for judicial review and ordered that the matter be returned to the Minister for reconsideration.

[15] Following submissions by the parties and in light of the Supreme Court's decision to grant leave to appeal *Agraira FCA*, the judge certified the following question of general importance, enabling an appeal to this Court, in an order dated December 28, 2011 (revised for a typographical error on February 2, 2012):

> When determining a s 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?

[16] This appeal was held in abeyance pending the Supreme Court's determination of the appeal of *Agraira FCA*. With the release of that decision, *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (*Agraira SCC)*, this appeal now proceeds.

IV. Legislative Framework

[17] Subsection 34(1) of the IRPA set out reasons for which permanent residents or foreign nationals are inadmissible to Canada on security grounds, while subsection 34(2) permitted the Minister of Public Safety to exempt individuals from inadmissibility where the Minister was satisfied that their presence in Canada would not be detrimental to the national interest. Although these provisions have been amended and relocated in the IRPA, at the time the ministerial relief decision was taken, it read as follows.

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 Canada;	**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;

(*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.

V. Standard of Review

[18] When hearing an appeal of a judgment by a superior court on an application for judicial review, the reviewing court is to assess whether the judge selected the correct standard of review and whether it was applied properly; in effect, this Court is required to step into the shoes of the Federal Court and focus on the administrative decision: *Agraira SCC* at paragraphs 45 to 47.

[19] In *Agraira SCC*, the Supreme Court specifically considered which administrative law standard of review applies to ministerial relief decisions taken under subsection 34(2) of the IRPA. It concluded that the reasonableness standard applies to the interpretation of the provision and the application of that interpretation to the facts of the case:

> The applicability of the reasonableness standard can be confirmed by following the approach discussed in *Dunsmuir*. As this Court noted in that case, at para. 53, "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically". Since a decision by the Minister under s. 34(2) is discretionary, the deferential standard of reasonableness applies. Also, because such a decision involves the interpretation of the term "national interest" in s. 34(2), it may be said that it involves a decision maker "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54). This factor, too, confirms that the applicable standard is reasonableness.
>
> (*Agraira SCC* at paragraph 50)

VI. Issues

[20] The issues before this Court are as follows:

A) Has the question of general importance certified by the judge in the Federal Court been answered by the Supreme Court in *Agraira SCC*?

B) Did the judge select the correct standard of review and apply it properly? Was the Minister's decision reasonable?

VII. Analysis

A. *Has the question of general importance certified by the judge in the Federal Court been answered by the Supreme Court in Agraira SCC?*

[21] The judge certified the following question of general importance which for ease of reference I reproduce as follows:

> When determining a s 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?

[22] In my view, the question certified by the judge has been answered by the Supreme Court in *Agraira SCC*. It found that "in determining whether a person's continued presence in Canada would not be detrimental to the national interest, the Minister must consider more than just national security and whether the applicant is a danger to the public or to the safety of any person" (*Agraira SCC* at paragraph 82). Further, it held that "section 34 does not necessarily exclude the consideration of personal factors that might be relevant to this particular form of review" and noted that "the fact that the Minister considered such factors did not render his interpretation of the term 'national interest' unreasonable" (*Agraira SCC* at paragraph 84).

[23] With respect to consideration of the guidelines set out in Chapter 10 of the *Inland Processing Operational Manual*: Refusal of National Security Cases/Processing of National Interest Requests (referred to in the certified question as Appendix D of IP10), the Supreme Court held that the Minister's interpretation of the term "national interest" in Mr. Agraira's application for ministerial relief did "not exclude the other important considerations outlined in the Guidelines or any analogous considerations…" (*Agraira SCC* at paragraph 86).

[24] It is clear that in *Agraira SCC*, the Supreme Court gave the Minister flexibility in determining whether a person's presence in Canada would be detrimental to the national interest under subsection 34(2) of the IRPA and in so doing answered the certified question in this matter.

[25] However, this Court's review of the judge's decision below is not limited to the contents of the certified question. The certified question serves merely as the means by which appellate review is enabled: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 25.

B. *Did the judge select the correct standard of review and apply it properly? Was the Minister's decision reasonable?*

(1) The Minister's Decision

[26] It is difficult to ascertain the standard of review applied by the judge in this matter to the ministerial relief decision pursuant to subsection 34(2) of the IRPA. Rather, the judge simply found that the Minister had considered matters outside the factors set by *Agraira FCA* and, on that basis, referred the matter back to the Minister for reconsideration. It is clear, however, that *Agraira SCC* has determined that ministerial relief decisions attract the deferential standard of reasonableness as set out above. It is also equally clear that in *Agraira SCC*, the Supreme Court determined that the factors set by the Federal Court of Appeal in *Agraira FCA* were overly restrictive and that the Minister may consider factors beyond national security and danger to the public or to the safety of any person in a ministerial relief decision pursuant to subsection 34(2) of the IRPA. Accordingly, the judge's decision, reliant on *Agraira FCA*, cannot stand on this basis, given the Supreme Court's decision.

[27] However, this is not the end of the matter. This Court must determine whether, in applying the deferential standard of reasonableness, the Minister's decision not to grant an

exemption to Ms. Haj Khalil from the inadmissibility finding against her pursuant to paragraph 34(1)(*f*) of the IRPA was reasonable based on the evidence before him.

[28] Applications for ministerial relief are put before the Minister with an accompanying assessment and recommendation from the CBSA. The final decision itself rests with the Minister, who may or may not agree with the CBSA recommendation. Here, the CBSA recommended that the Minister decline to grant relief.

[29] Ms. Haj Khalil suggests at paragraph 4 of her supplementary memorandum of fact and law that the Minister, in making his decision, did not adopt the assessment and recommendation of the CBSA. I do not accept this submission. In my view, it is evident that the Minister accepted the recommendation from the CBSA. Where the Minister agrees with the CBSA recommendation, the recommendation can form the reasons for the Minister's decision: see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paragraphs 37 to 38 (*Sketchley*) and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 15 (*Newfoundland Nurses*).

[30] The CBSA assessment set out the background and history of the PLO and Fatah from their inception to the present day and then addressed Ms. Haj Khalil's personal history with the organizations. It set out the test for ministerial relief established pursuant to subsection 34(2) of the IRPA and noted that the burden of proof that the applicant's presence in Canada would not be detrimental to the national interest rests with the applicant. In terms of the relevant factors for

consideration in the assessment of the application for ministerial relief, the CBSA framed the test as follows:

> The factors defining the national interest as indicated in the procedures manual entitled Inland Processing 10, are relevant to the consideration of this application and all evidence submitted has been reviewed in light of those factors.
>
> 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 against Canada's domestic and international interests and obligations.
>
> The Ministerial relief process is not meant to review the soundness of the inadmissibility finding. Subsection 34(2) of the Act empowers the Minister to grant relief notwithstanding the applicant's inadmissibility under subsection 34(1) of the Act.
>
> (CBSA recommendation at page 5)

[31] The CBSA assessment then set out the particulars of Ms. Haj Khalil's association with Fatah. It noted her role in Fatah (her employment as a journalist for FAT where she was paid out of the Fatah-quota), the contents of her articles, her trips abroad as part of Chairman Arafat's press pool, her knowledge of violence committed by Fatah, her disassociation from Fatah following the 1993 Oslo peace accord between Israel and the PLO, her activities in Canada following her arrival here, and other submissions made by Ms. Haj Khalil. She made submissions on the allegedly illusory nature of the ministerial relief provisions, the PLO and the right to self-determination, freedom of expression, her inadmissibility, the Palestinian situation in Canada and abroad, Canada's objectives and obligations regarding refugees and humanitarian concerns, and her acceptance of Canada's democratic values.

[32] Following the recital of the factual elements to consider, the CBSA assessment set out the analytical framework it was applying for its ministerial relief recommendation:

> For the purposes of this Ministerial relief recommendation, the objectives of the Act with respect to immigration as set out in section 3 of the Act have been taken into consideration, particularly objectives such as to permit Canada to pursue the maximum social, cultural and economic benefits of immigration, to protect the safety of Canadians, and to maintain the security of Canadian society and Canada's international obligations related to security. Furthermore, the Government priorities as set out in the November 2008 and January 2009 Speeches from the Throne, while not providing an exhaustive list, are being considered as an indication of Canada's domestic and international interests and obligations. For the purpose of Ministerial relief, four relevant government priorities have been identified: economics, public safety, national and global security, and international and bilateral relationships.
>
> While reviewing all factors pertaining to the applicant's admission to Canada, a fair consideration has been granted to all elements presented in order to respect international justice and security interests and obligations.
>
> (CBSA recommendation at page 16)

[33] The CBSA assessed factors positive to Ms. Haj Khalil (that nearly two decades had elapsed between her association with Fatah and the ministerial relief decision, that the evidence suggested that her personal activities were limited to those of a journalist and did not include violence, the evolution of the Canadian government's position on Fatah, and the steps she has taken to integrate into Canadian society); however, the CBSA assessment considered that negative factors applying to Ms. Haj Khalil outweighed these positive factors. The negative factors were the trusted nature of her position within Fatah during a time where Fatah "routinely utilized terrorist tactics to advance its political goal" (CBSA recommendation at page 16), that she "knowingly contributed to the propaganda efforts of the Palestinian Liberation Organization, glorifying its use of terrorist violence" (CBSA recommendation at page 17), and inconsistencies in information that she provided regarding her association with Fatah.

[34] As is set out in greater detail in the judge's Reasons, the CBSA also considered the information applicable to Ms. Haj Khalil's situation. It assessed the social, cultural and economic benefits which Ms. Haj Khalil has brought to Canada, the safety and security of Canada (including the character of Fatah, her role in the organization and benefits received from it, her efforts to distance herself from the association, and inconsistencies in the information which she provided to Canadian officials) as well as the country's international and bilateral relationships and obligations, and Ms. Haj Khalil's submissions on human rights and the treatment of her situation by the Canadian government.

[35] In its final balancing of Ms. Haj Khalil's file, the CBSA acknowledged her lack of personal involvement with violence, the evolution of her views on the use of terrorist tactics to achieve political ends, her efforts to integrate into Canadian society, and the successful raising of her two children. Notwithstanding those positive factors, the CBSA determined that the "presence in Canada of an individual who has been involved with a terrorist group is contrary to Canada's domestic and international interests of keeping good relations with international partners and, ultimately, to Canada's international obligations regarding its involvement in the fight against terrorism" (CBSA recommendation at page 27). The CBSA noted that Ms. Haj Khalil held what the CBSA described as a "trusted role" during a time when the PLO was engaged in terrorist activity and that her work as a journalist "served to glorify" terrorist tactics weighed against her in the balancing (CBSA recommendation at page 27). Finally, the CBSA noted that questions remain about the exact nature of Ms. Haj Khalil's involvement with Fatah based on her attempts to minimize her association with the organization and inconsistencies in information in her file. The CBSA concluded that a "thorough weighing and balancing of the

above considerations indicate that Ms. Haj Khalil has failed to demonstrate that her presence in Canada would not be detrimental to the national interest" (CBSA recommendation at page 27).

[36] In my view, the Minister considered both the positive and negative factors highlighted in the CBSA assessment and ultimately accepted the CBSA recommendation. It may be that a different decision could have been reached based on the facts of this case but this does not make the decision unreasonable. As the Supreme Court stated in *Agraira SCC*,

> a court reviewing the reasonableness of a minister's exercise of discretion is not entitled to engage in a new weighing process […]. Given that the Minister considered and weighed all the relevant factors as he saw fit, it is not open to the Court to set the decision aside on the basis that it is unreasonable.
>
> (*Agraira SCC* at paragraph 91)

[37] In adopting the recommendation from the CBSA, it is clear that the Minister was particularly concerned with the length of Ms. Haj Khalil's involvement with Fatah, the relative importance of her position, and inconsistent information she provided with respect to her activities. I find the Minister's decision not to grant an exemption to Ms. Haj Khalil from the inadmissibility determination reasonable.

[38] As previously noted, the authority to grant ministerial relief pursuant to subsection 34(2) of the IRPA rests solely with the Minister of Public Safety, but where the Minister agrees with the CBSA recommendation, the recommendation can form the reasons for the Minister's decision: see *Sketchley* at paragraphs 37 to 38 and *Newfoundland Nurses* at paragraph 15.

(2) The Charter

[39] Ms. Haj Khalil made written submissions before the judge and before this Court that her section 7 Charter "liberty, security of the person, speech, association and non-discrimination interests" were engaged (Respondent's memorandum of fact and law at paragraph 35). She argued that the law was applied to her in a manner that was arbitrary and discriminatory, such that it violated the principles of fundamental justice (Respondent's memorandum of fact and law at paragraph 43). The Charter issue was not addressed in oral argument before this Court.

[40] Ms. Haj Khalil asserts that her inability to come and go as freely as she would like from the country and her inability to acquire Canadian citizenship have been affected by the Minister's decision. She further submitted that leaving her stateless and without permanent residence "perpetuates and compounds her vulnerability" (Respondent's memorandum of fact and law at paragraph 42). Ms. Haj Khalil claims that the handling of her case "point[s] to clear problems with arbitrary and discriminatory decision making" (Respondent's memorandum of fact and law at paragraph 46) and she suggests that "the demonization of Palestininans" underlies the various reports and memoranda written about her (Respondent's memorandum of fact and law and paragraph 52). She accuses the officials involved of having been "wedded to a particular view of Ms. Haj Khalil and of the PLO/Fatah, akin to tunnel vision" (Respondent's memorandum of fact and law at paragraph 45); I take this criticism to be an accusation of bias on the part of the Minister and his officials involved in Ms. Haj Khalil's case.

[41] In my view, even if it is accepted that Ms. Haj Khalil's section 7 interests were engaged – a position that I do not accept – there is no evidence that such interests were infringed nor that Ms. Haj Khalil was treated in an arbitrary or discriminatory manner. There is no evidence of bias

on the part of the Minister in the exercise of his discretion. Nor is there evidence that either the CBSA or the Minister demonized Palestinians. The fact that the CBSA, in its assessment and recommendation, and the Minister, in his decision, consistently disagreed with the position of Ms. Haj Khalil is not evidence, in and of itself, of discrimination or bias or that Ms. Haj Khalil has not been treated in an open and fair manner.

[42] Indeed, by requiring the Minister to consider the various factors concerning Ms. Haj Khalil, subsection 34(2) of the IRPA accommodates whatever rights to liberty and security of the person she may have: see *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114 at paragraph 16. It is also telling that in *Agraira SCC*, the Supreme Court of Canada did not identify any possible Charter concerns with respect to the ministerial relief process provided for in subsection 34(2) of the IRPA.

(3) *Ezokola*

[43] At the outset of the hearing before this Court, Ms. Haj Khalil sought leave to argue that paragraph 34(1)(*f*) did not apply to her on the basis of the Supreme Court's decision in *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40 (*Ezokola*). This is a new issue that was neither the subject of the Minister's decision nor the judicial review of that decision in the Federal Court. The Court refused leave, with reasons to follow. These are the reasons.

[44] Whether a reviewing court, here the Federal Court of Appeal, will entertain a new issue on judicial review is a matter for discretion. The Supreme Court has said generally this discretion will not be exercised in favour of an applicant on judicial review where the issue could have

been but was not raised before the administrative decision-maker: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraph 23 (*Alberta Teachers*). One of the key reasons for this rule is the need for a full evidentiary record and the evidentiary record is constructed by the administrative decision-maker: *Alberta Teachers* at paragraph 26. In this case, the record before the Minister has nothing to do with paragraph 34(1)(*f*). Of course, compounding the situation for Ms. Haj Khalil is the fact that the matter has now progressed to an appeal from a judicial review – the matter is now even more remote from the original administrative decision-maker. Finally, the decision in *Ezokola* does not so radically change the legal environment such that an exercise of discretion in Ms. Haj Khalil's favour would be warranted. For these reasons, the Court exercised its discretion against entertaining the paragraph 34(1)(*f*) issue in this case.

VIII. Conclusion

[45] As a result, I would allow the appeal, set aside the judgment of the Federal Court, dismiss the application for judicial review, and restore the Minister's decision. The Minister does not seek his costs and so I would make no order as to costs.

"David G. Near"

J.A.

"I agree
David Stratas J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-36-12
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE O'REILLY DATED DECEMBER 28, 2011, NO. IMM-3676-10.	
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. NAWAL HAJ KHALIL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 12, 2014
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	STRATAS J.A. WEBB J.A.
DATED:	SEPTEMBER 30, 2014

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