Federal Court Cour fédérale

~~**TOP SECRET**~~

Date: 20190621

Docket: T-479-18

Citation: 2019 FC 533

Ottawa, Ontario, June 21, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

AYAN ABDIRAHMAN JAMA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC CORRECTED ~~TOP SECRET~~ ORDER AND REASONS
(Corrected ~~Top Secret~~ Order and Reasons issued on April 29, 2019)

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I. INTRODUCTION

[1] This Order is delivered in the course of judicial review proceedings initiated by the Applicant, Ms. Ayan Abdirahman Jama [Applicant], against the decision of a delegate [Delegate] of the Minister of Public Safety and Emergency Preparedness [Minister], dated February 5, 2018, to not issue a passport to the Applicant pursuant to section 10.1 of the *Canadian Passport Order*, SI/81-86 [CPO]. The Delegate's decision also imposes on the Applicant, pursuant to subsection 10.2(2) of the CPO, a period during which passport services are refused to her for a duration of four years starting on the date she submitted her passport application, December 31, 2015. Said decision was apparently received by the Applicant on February 14, 2018 by way of a letter to her dated February 8, 2018.

[2] Section 10.1 of the CPO empowers the Minister to decide not to issue a passport if he or she has reasonable grounds to believe that such decision "is necessary to prevent the commission of a terrorism offence, as defined in section 2 of the *Criminal Code*, or for the national security of Canada or a foreign country or state". In turn, subsection 10.2(2) of the CPO enables the Minister to decide, on those same grounds, that passport services are not to be delivered for a maximum period of 10 years.

[3] When, as is the case here, the Minister's decision under section 10.1 or subsection 10.2(2) of the CPO is based on classified information, the proceedings challenging such decision are governed by the *Prevention of Terrorist Travel Act*, SC 2015, c 36, s 42 [PTTA] which was

adopted on June 23, 2015 as part of the *Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015* (Bill C-59).

[4] The PTTA sets out rules governing how that information is to be handled. In particular, in the case, as here, of judicial review proceedings, it sets out the conditions under which: (i) hearings in the absence of the public and of the applicant and their counsel must be held (PTTA, paragraph 6(2)(a)); (ii) the confidentiality of the classified information relied upon by the Minister must be ensured (PTTA, paragraph 6(2)(b)); and (iii) a summary of the evidence and other information available to the "judge" (defined as the Chief Justice of this Court or as a judge of this Court designated by the Chief Justice [Designated Judge]), is to be provided to the applicant so as to enable him or her to be reasonably informed of the reasons for the Minister's decision (PTTA, paragraph 6(2)(c)).

[5] The present Order deals more specifically with paragraphs 6(2)(b) and (c) of the PTTA. It determines whether the disclosure of the redacted information in the Certified Tribunal Record [CTR] filed by the Respondent would be injurious to national security or endanger the safety of any person. It also determines what summaries of the evidence and other information available to the Designated Judge can be provided to the Applicant so as to enable her to be reasonably informed of the reasons for the Minister's decision.

II. BACKGROUND

A. *The Passport Application and the Impugned Decision*

[6] The Applicant was born in Mogadishu, Somalia, in March 1989. She is a Canadian citizen.

[7] On or about December 31, 2015, the Applicant submitted a passport application in her name with the Edmonton Passport Program Office of the Department of Immigration, Refugees and Citizenship of Canada [Passport Program]. On January 4, 2016, she was notified that her passport application would undergo a secondary security screening review.

[8] In May 2016, the Applicant filed proceedings with this Court seeking a writ of *mandamus* to compel the Passport Program to render a decision on her passport application. In September 2016, the Passport Program informed the Applicant that it had developed a new review process for passport applications filed by individuals who, like her, are subject to secondary screening. The Applicant agreed to participate in this new review process and to discontinue, as a result, her legal proceedings.

[9] The stages of this new review process were set out in a letter to the Applicant dated September 14, 2016. Under that process, the Applicant was to be provided with an unclassified summary of the information available to the Delegate so that she may be reasonably informed of the case on which the refusal to issue her a passport may be based. Upon receipt of the summary, the Applicant would have an opportunity to provide any information in support of the

application, or refute the information contained in said summary. The letter indicated that the Minister or his delegate would then make a decision on the Applicant's application based on the information before him, including any information the Applicant may have provided. The Applicant would then be informed of the Minister's decision or that of his delegate by the Passport Program.

[10] In a letter dated February 1, 2017, the Applicant was provided with an unclassified summary of the information supporting a possible refusal of her passport application [Fairness Letter]. That summary reads as follows:

- Ms. JAMA has maintained associations with individuals of concern to national security and has facilitated extremist activities. Ms. JAMA is associated with an entity listed pursuant to subsection 83.05(1) of the *Criminal Code*, Al Shabaab (AS).
- Government records indicate that Ms. JAMA left Toronto in 2010 to go to Somalia to visit family. Ms. JAMA lived with her husband, (Mohamed SAKR) in an AS-controlled area in Mogadishu, Somalia; her husband would speak about AS because of where they lived. However, Ms. JAMA claimed that neither she nor her husband were involved with AS. As of mid-2012, Ms. JAMA was mourning the death of her husband who had died a few months earlier. Sakr was killed by a drone attack in Somalia in February 2012. Sakr, identified as a senior figure in AS, had been stripped of his British citizenship by UK authorities on national security grounds.
- Ms. JAMA was arrested by Northern Somalian Police (Somaliland Police) in July 2011; her belongings were confiscated and she was deported. Ms. JAMA transited via the UK where she was briefly detained by UK authorities and deported to Canada on July 15, 2011.
- Government records indicate that Ms. JAMA was deported from Somaliland. Somaliland authorities seized various electronic devices from Ms. JAMA. During a meeting with a Canadian agency in 2011, Ms. JAMA revealed that she was married, and

discussed the will that she had written to her husband. When discussing her declaration of being a 'shaheed' (martyr) as noted in her will, Ms. JAMA said that she wanted to be a martyr like a good Muslim, and explained that in Islam those who die as martyrs are accorded a special place in heaven. Ms. JAMA added that she did not intend to harm herself or others.

- Media reporting also indicates that Ms. JAMA was arrested by the police in Hargeysa (Somaliland), on July 15, 2011, and that Ms. JAMA was an AS member based on the information found in her laptop. Additional media reporting, also in relation to the arrest of Ms. JAMA, identified her as a senior member of AS.

- In addition to the foregoing information, Public Safety Canada relies on classified information. This information, which further illustrates Ms. JAMA's support for AS, as well as her desire to be a martyr, cannot be released as its disclosure would be injurious to international relations and/or national defence and/or national security.

[11] The Applicant, through her counsel, responded to the unclassified summary on March 4, 2017, addressing the allegations contained therein. In a letter dated June 1, 2017, the Applicant was notified that based on the current information, including the information she had provided to date, Public Safety Canada officials were not convinced that she had abandoned her association with individuals of concern for national security or had ceased to facilitate extremist activities, and were prepared, therefore, to recommend to the Minister that her passport application be denied. She was also notified that prior to any recommendation being made, she would be provided with a second opportunity to submit information to address the officials' concerns [Pre-Recommendation Letter].

[12] On June 29, 2017, the Applicant responded to the Pre-Recommendation Letter, outlining, for the most part, how not having a passport and being denied her passport application had negatively affected her.

[13] As indicated at the outset of these Reasons, the Applicant was informed of the Delegate's decision to not issue a passport in her name pursuant to section 10.1 of the CPO and to impose on her a period during which passport services would be refused to her for four years as per subsection 10.2(2) of the CPO, by way of a letter dated February 8, 2018.

B. *Procedural History*

[14] The present judicial review proceedings were filed on March 13, 2018. The Applicant is seeking the following substantive reliefs:

a. An Order for a writ of *certiorari* and for a writ of *mandamus* quashing the Minister's decision to refuse to issue the Applicant a passport in her name and directing the Passport Program to issue said passport; and

b. An Order declaring that the Minister's decision is *ultra vires* and invalid, as it unreasonably infringes upon the Applicant's rights, including her statutory, procedural and *Charter* rights.

[15] On April 13, 2018, it was ordered that the present matter proceed as a specially managed proceeding. On April 30, 2018, Justice Simon Noël was assigned as case management judge to this case.

[16] A first case management conference was held by Justice Noël on May 8, 2018, with counsel for the Applicant and Counsel for the Attorney General attending. Further to said case management conference, Justice Noël issued an order setting out a timetable for the filing of redacted and unredacted copies of the CTR, as well as a classified affidavit explaining the basis for the redactions to the CTR, and a public affidavit explaining the nature of these redactions in a manner that would not injure national security or endanger the safety of any person.

[17] The unredacted version of the CTR was to be filed with the Court's Designated Registry [DES Registry] and "clearly identify the information that the Respondent asserts, pursuant to s. 6(2)(a) of the PTTA, could be injurious to national security or endanger the safety of any person, if disclosed". It was not to form part of the public Court file. The redacted version of the CTR was to clearly identify the redacted portions and was to be provided to the Applicant and form part of the public Court file. The classified affidavit was to be filed with the DES Registry and the public affidavit was to be provided to the Applicant and form part of the public Court file.

[18] On July 12, 2018, to a further case management conference held on June 6, 2018, with counsel for the Applicant and counsel for the Attorney General attending, Justice Noël appointed Mr. Colin Baxter as *amicus curiae* [Amicus] in this matter and set out the terms of his

appointment. Justice Noël also advised that the Chief Justice would be assigning a Designated Judge "to deal with all further matters".

[19] On July 30, 2018, as the Designated Judge assigned to this case, I held a case management conference with counsel for the Applicant, counsel for the Attorney General and the Amicus. At said case management conference, the dates of October 30 and 31, 2018, were set aside as tentative dates for an *in camera, ex parte* hearing where the Minister's claim that the disclosure of the redacted portions of the CTR would be injurious to national security or endanger the safety of any person would be assessed by the Court with the assistance of the Amicus.

[20] Said *in camera, ex parte* hearing was held, as originally contemplated, on October 30 and 31, 2018, with counsel for the Attorney General and the Amicus attending. A public summary of that hearing was placed on the case's public record and communicated to counsel, including counsel for the Applicant, on November 5, 2018. It reads as follows:

> The Court, (LeBlanc, J.) issued an oral direction today (November 5, 2018) asking that the summary found below be communicated to all Counsel of Record and be placed on the public record of the above cited matter.
>
> **Summary**
>
> "The Court held *ex parte in camera* hearings in this matter on October 30 and 31, 2018.
>
> Ms. Barrett-Morris and Mr. Seguin appeared for the Attorney General of Canada, and Mr. Baxter appeared as *amicus*.
>
> The Attorney General called a witness from CSIS who gave evidence regarding the redactions to the CTR and why disclosure

would, in the witness's opinion, injure national security or endanger the safety of any person. The witness gave evidence on both days and was cross-examined by Mr. Baxter and questioned by the Court.

During the hearing, the Attorney General consented to remove some redactions from the CTR.

Regarding summaries, the *amicus* will provide proposed summaries to the Court and to the Attorney General by November 2, 2018 to which the Attorney General will respond, though counsel are not prevented from engaging in informal discussions amongst themselves to reach agreement on summaries.

Counsel will also provide written submissions in advance of an oral *ex-parte, in camera* hearing to be held to hear oral submissions from counsel for the Attorney General of Canada and the amicus. The date for the filing of submissions and the hearing will be determined later by the Court, based on the availability of the hearing transcripts, and subject to the schedule of the Court and counsel. Submissions will address the following matters that the Court is required to decide in this judicial review pursuant to the *Prevention of Terrorist Travel Act* (PTTA):

> (1) Would disclosure of the redacted information in the CTR injure national security or endanger the safety of any person? Can additional redactions, beyond those already proposed by the Attorney General, be lifted from the CTR? See s. 6(2)(b) of the PTTA
>
> (2) In discharging its judicial duty, is the Court required to perform a legal balancing test between reasonably informing the Applicant of the case to meet and the requirement to prevent disclosing information that would injure national security or endanger the safety of any person? If not, what is the appropriate legal test under the PTTA?
>
> (3) To ensure that the Applicant is reasonably informed of the reasons for the Minister's decisions, what summaries can be provided that would not injure national security or endanger the safety of any person? See s. 6(2)(c) of the PTTA

> Counsel for the Applicant is permitted to file with the Court, and serve on counsel for the Attorney General of Canada, and the amicus, written submissions on issue 2, above. The date for the filing and service of these submissions will be determined later by the Court, along with the date for the filing of the submissions from counsel for the Attorney General of Canada and the amicus referred to above."
>
> […]

[21] Dates for the filing and service of written submissions by the parties and the Amicus on issues #1, #2 and #3, as set out in said public summary, and dates for conducting a public hearing and an *in camera, ex parte* hearing to hear oral submissions on those issues, were discussed at a case management conference held on December 6, 2018, with counsel for the Applicant, counsel for the Attorney General and the Amicus attending.

[22] The public hearing on issue #2 was held on February 4, 2019, by way of videoconference, with counsel for the Applicant, counsel for the Attorney General and the Amicus attending. The *in camera, ex parte* hearing regarding issues #1 and #3 was held on February 7, 2019, in a secure courtroom, with counsel for the Attorney General and the Amicus attending. Both parties, as well as the Amicus, filed public written submissions in advance of the February 4 hearing. The Attorney General and the Amicus also filed classified written submissions on issues #1 and #3 for the purposes of the February 7 hearing.

III. ISSUES

[23] The issues to be considered for the purposes of this Order are those identified in the public summary of the *in camera*, *ex parte* hearing held on October 30 and 31 2018 referred to above. However, they will be addressed in a different order so as to deal first with the appropriate legal test applicable to the determination of the non-disclosure claims made by the Attorney General and the scope or amount of disclosure the Applicant is entitled to under the subsection 6(2) framework, respectively [Issue 1].

[24] I will then proceed, on the basis of what I consider to be the appropriate test, to determine whether disclosing the redacted information would be injurious to national security or endanger the safety of any person, as claimed by the Attorney General [Issue 2] and what summary of the evidence and other information available to me, if any, can be provided to the Applicant so as to ensure that she is reasonably informed of the reasons for the Minister's decision [Issue 3].

IV. ANALYSIS

A. Issue 1: In discharging its judicial duty under the PTTA, is the Court required to perform a legal balancing test between reasonably informing the Applicant of the case to meet and the requirement to prevent disclosing information that would injure national security or endanger the safety of any person? If not, what is the appropriate legal test?

(1) The principles of statutory interpretation and the PTTA

[25] This first issue must be determined by applying the principles of statutory interpretation. As is now well settled, the modern approach to statutory interpretation entails discerning legislative intent by examining the words of a statute in their entire context and their

grammatical and ordinary sense, in harmony with the statute's scheme and object (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 23; *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21; *Bayer Cropscience LP v Canada (Attorney General)*, 2018 FCA 77 at para 67).

[26] It is also well settled that the appropriate context in determining the meaning of a statute can be drawn "from similar or comparable legislation within the jurisdiction or elsewhere" (*Sharbern Holding Inc v Vancouver Airport Centre Ltd*, 2011 SCC 23 at para 117; *Vancouver Oral Centre for Deaf Children v Assess. Area #09*, 2002 BCCA 667 at para 17). This is evidenced in the present case by the parties' and the Amicus' reference to provisions of a similar nature, namely to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the *Canada Evidence Act*, RSC 1985, c C-5 and the *Secure Air Travel Act*, SC 2015, c 36, s 11. The parties and the Amicus have cited these statues in their respective attempts to define what the appropriate legal test is in resolving what they characterize as the "tension" between the State's legitimate interest in conducting national security investigations and limiting the disclosure of materials collected through these investigations to individuals affected by the non-disclosure and these persons' right to be reasonably informed of the reasons for the Minister's decision in the manner permitted by the PTTA.

[27] The CPO is also very much part of this context, as the PTTA's sole purpose is to provide a procedural framework aimed at resolving this tension when ministerial decisions, made under the CPO, to cancel, revoke or refuse to issue a passport or to deliver passport services in order to

prevent the commission of a terrorism offence or for the national security of Canada or of a foreign country or state, are being appealed or judicially reviewed.

[28] The CPO provides the requirements for the issuance, refusal, cancellation, and revocation of passports as well as for the refusal of passport services. It specifies however in subsection 4(3), that nothing in said Order "in any manner limits or affects the royal prerogative over passports" and states, in subsection 4(4), that said prerogative, for the purposes of a number of provisions, including section 10.1, can be exercised on behalf of Her Majesty in right of Canada by the Minister of Public Safety and Emergency Preparedness.

[29] In 2004, the CPO was amended to confirm the authority of the Minister of Foreign Affairs to revoke or refuse to issue a passport on grounds of national security (*Order Amending the Canadian Passport Order*, SI/2004-113, (2004) C Gaz II, 1310). This was part of the Government of Canada's strategic framework and action plan for national security, entitled *Securing an Open Society: Canada's National Security Policy*. This action plan was presented as an integrated, comprehensive approach for ensuring the safety of Canadians and for responding to emerging threats to national and international security and the Passport Program was identified as in need of adjustment to meet the evolving threat environment.

[30] The CPO was amended again in 2015 to empower the Minister to cancel, refuse or revoke a passport to prevent the commission of a terrorism offence or for the national security of Canada or of a foreign country or state and to provide more precise language regarding the

grounds on which a passport could be refused or revoked for national security purposes (*Order Amending the Canadian Passport Order*, SI/2015-33, (2015) C Gaz II, 1429).

[31] As the Attorney General points out in his public written submissions, the PTTA was enacted only four years ago and has not yet been interpreted by any Court.

[32] The PTTA is a seven-provision piece of legislation. It pertains to "the protection of information in relation to certain decisions made under the Canadian Passport Order". As I have just indicated, it is essentially procedural in nature. Its main provisions are sections 4 and 6, subsection 6(2) being at issue in this case.

[33] The remaining provisions of the PTTA (sections 2, 3, 5 and 7) are of little assistance in determining what the answer to Issue 1 is. Sections 5 and 7 provide, respectively, that subsections 4(4) and 6(2) apply, with any necessary modifications, to any appeal – and further appeal - of a decision made under these provisions. Sections 2 and 3, for their part, define the terms "judge" and "Minister", respectively. I note that there was little debate in Parliament over the PTTA, which was adopted as part of the *Economic Action Plan 2015 Act, No.1*, SC 2015, c 36. The Attorney General has filed the relevant Hansard excerpts regarding this bill but they are of little, if any, assistance in the case at bar.

[34] Section 4 creates a right of appeal to a Designated Judge against any decision cancelling a passport so as to prevent the commission of a terrorism offence or for the national security of Canada or of a foreign country or state. It provides that when such an appeal is made, the

Designated Judge must, without delay, determine whether cancelling the passport is reasonable on the basis of the information available to him or her. The Judge may quash the Minister's decision if he or she finds that cancelling the passport is unreasonable (PTTA, s 4(3)). Subsection 4(4) sets out procedural rules governing such appeals. Those rules are aimed at protecting sensitive information while ensuring that the appellant is provided with a summary of evidence and other information that enables that person to be reasonably informed of the Minister's case throughout the proceeding.

[35] Section 6 sets out the rules applicable to judicial review proceedings in respect of decisions made under the CPO, either to revoke or not to issue a passport on grounds similar to those applicable to a passport cancellation, or to not deliver passport services, on these same grounds, to the person whose passport has been revoked or who has been refused the issuance of a passport. As is the case for subsection 4(4), subsection 6(2) sets out rules aimed at protecting sensitive information, while ensuring that the applicant to the judicial review proceeding is provided with a summary of evidence and other information that enables that person to be reasonably informed, not of the Minister's case throughout the proceeding, as provided for under subsection 4(4), but of "the reasons for the Minister's decision".

[36] In particular, these rules provide that the Designated Judge: (i) may hear evidence or other information in the absence of the public and of the person concerned; (ii) must ensure the confidentiality of the evidence and other information provided by the Minister if the Judge is of the opinion that the disclosure of that evidence or other information would be injurious to national security or the safety of any person; (iii) must ensure that the person is provided with a

summary of non-sensitive evidence that enables him or her to be reasonably informed of the reasons for the Minister's decision; and (iv) may base his or her decision on all the information provided by the Minister, even if a summary of that information has not been provided to the person concerned. These rules also allow the Minister to withdraw evidence or other information from the record, in which case such evidence or other information must be returned to the Minister and cannot form the basis of the Designated Judge's decision.

[37] Subsection 6(2) reads as follows:

Rules	**Règles**
(2) The following rules apply for the purposes of this section:	(2) Les règles ci-après s'appliquent au présent article :
(a) at any time during the proceeding, the judge must, on the Minister's request, hear submissions on evidence or other information in the absence of the public and of the applicant and their counsel if, in the judge's opinion, the disclosure of the evidence or other information could be injurious to national security or endanger the safety of any person;	a) à tout moment pendant l'instance et à la demande du ministre, le juge doit tenir une audience pour entendre les observations portant sur tout élément de preuve ou tout autre renseignement, à huis clos et en l'absence du demandeur et de son conseil, dans le cas où la divulgation de ces éléments de preuve ou de ces renseignements pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
(b) the judge must ensure the confidentiality of the evidence and other information provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national	b) le juge est tenu de garantir la confidentialité des éléments de preuve et de tout renseignement que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité

security or endanger the safety of any person;	nationale ou à la sécurité d'autrui;
(c) the judge must ensure that the applicant is provided with a summary of the evidence and other information available to the judge that enables the applicant to be reasonably informed of the reasons for the Minister's decision but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;	c) le juge veille à ce que soit fourni au demandeur un résumé de la preuve et de tout autre renseignement dont il dispose et qui permet au demandeur d'être suffisamment informé des motifs de la décision du ministre et qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
d) the judge must provide the applicant and the Minister with an opportunity to be heard;	d) le juge donne au demandeur et au ministre la possibilité d'être entendus;
(e) the judge may base his or her decision on evidence or other information available to him or her even if a summary of that evidence or other information has not been provided to the applicant;	e) le juge peut fonder sa décision sur des éléments de preuve ou tout autre renseignement dont il dispose, même si un résumé de ces derniers n'est pas fourni au demandeur;
(f) if the judge determines that evidence or other information provided by the Minister is not relevant or if the Minister withdraws the evidence or other information, the judge must not base his or her decision on that evidence or other information and must return it to the Minister; and	f) si je [*sic*] juge décide que les éléments de preuve ou tout autre renseignement que lui a fournis le ministre ne sont pas pertinents ou si le ministre les retire, il ne peut fonder sa décision sur ces éléments ou renseignements et il est tenu de les remettre au ministre;
(g) the judge must ensure the confidentiality of all evidence and other information that the Minister withdraws.	g) le juge est tenu de garantir la confidentialité des éléments de preuve et de tout autre

renseignement que le ministre retire de l'instance.

[38] The only difference between the sets of rules in subsections 4(4) and 6(2) is that in an appeal under section 4, the Designated Judge "may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base his or her decision on that evidence" (PTTA, s 4(4)(e)). There is no equivalent provision in subsection 6(2), presumably because of the differing nature of the judicial recourse contemplated by both provisions, one being what appears to be a fact-based appeal whereas the other is a judicial review proceeding where no evidence, as such, is "received" by the Designated Judge.

[39] The object and scheme of the PTTA are, therefore, as I see it, to provide for procedural rules to be applied to appeals or judicial review applications against certain decisions made under the CPO in order to protect sensitive information from disclosure while ensuring that the persons directly affected by these decisions are provided, to the extent permitted by these rules, with a summary of the evidence and other information available to the Designated Judge so as to enable these persons to be reasonably informed of the Minister's case, in the case of an appeal, or of the reasons for the Minister's decision, in the case of a judicial review.

(2) The PTTA does not require a balancing test

[40] It is readily apparent that nothing in the wording of subsection 6(2) requires the Designated Judge to perform a balancing test between reasonably informing the Applicant of the case to meet and the requirement to prevent disclosing information that would injure national

security or endanger the safety of any person or, at least, to perform a balancing test in the nature of the one found at subsection 38.06(2) of the *Canada Evidence Act* [CEA Test], as claimed by the Applicant. This provision reads as follows:

Disclosure — conditions	**Divulgation avec conditions**
(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.	(2) Si le juge conclut que la divulgation des renseignements ou des faits porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements ou des faits, d'un résumé des renseignements ou d'un aveu écrit des faits qui y sont liés.

[41] But does a purposive and contextual interpretation of subsection 6(2) of the PTTA allow for the CEA Test, or any other balancing test for that matter, to be read into that provision?

[42] The Applicant says yes. Conceding that subsection 6(2) does not contain any balancing language, she urges the Court to "go beyond the text of the statute" and adopt a disclosure framework similar to the CEA Test. This would involve balancing the public interest in ensuring that she is reasonably informed of the case to meet against the need to prevent disclosure of information that would injure national security or endanger the safety of any person.

[43] She claims that this outcome is open to the Court because of its duty to interpret the PTTA in a manner that respects her procedural rights. She contends, in that regard, that in light of the framework established in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], she was owed robust procedural rights given the impact of the Minister's decision on her rights, including her mobility rights guaranteed by section 6 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], the significant stigma around the non-renewal of her passport, the two-year delay in rendering the decision, and her legitimate expectation that she would be provided adequate procedural safeguards in challenging that decision. These procedural rights, she says, imply, in such context, a robust disclosure framework.

[44] The Applicant opines that the parties and the Court have recognized that the PTTA lacks sufficient procedural protections as the Court appointed the Amicus on the consent of the Attorney General. She further opines that the PTTA framework must be distinguished from the information protection framework outlined in the IRPA that was found to be *Charter*-compliant in *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 [*Harkat*]. First, she says the

security certificate regime under the IRPA applies to non-citizens, while the PTTA pertains to Canadian citizens, who are, according to her, entitled to greater procedural rights. Second, her *Charter*-protected freedom of association, mobility rights, and liberty interest are at stake, whereas *Harkat* only dealt with liberty interests. Third, the IRPA framework provides for the appointment of special advocates in security certificate proceedings to ensure that named persons are provided adequate procedural protections, whereas the PTTA does not. Although the Court appointed the Amicus in the present case, the Applicant notes that such an appointment is an *ad hoc* determination, left entirely to the discretion of the Court. In essence, the IRPA and PTTA frameworks are not analogous.

[45] While not seeking to strike down the PTTA, the Applicant urges the Court to render a remedy under subsection 24(1) of the *Charter* should it come to the conclusion that subsection 6(2), or the PTTA as a whole, does not allow for a robust disclosure framework which ensures that the right to be reasonably informed of the case to meet is properly balanced against the need to prevent disclosure of information that would injure national security or endanger the safety of any person.

[46] The Applicant’s approach is rather novel but, with respect, does not stand up to scrutiny.

[47] First, I fully agree with the Attorney General in that the provisions of the PTTA clearly and unambiguously contain a categorical prohibition on the disclosure of sensitive information and do not, in a like manner to other provisions in national security legislation (IRPA, ss 83(1), 86, 87; *Secure Air Travel Act*, s 16(6); *Canadian Security Intelligence Service Act*, RSC 1985, c

C-23, s 18.1), authorize the Designated Judge, either explicitly or implicitly, to balance competing public interests.

[48] I agree, too, that when a balancing test is required, Parliament uses explicit statutory language, as evidenced by subsection 38.06(2) of the *Canada Evidence Act*, referred to and reproduced above, which empowers the Designated Judge to disclose all or part of the information which, according to him or her, would be injurious to national security if disclosed, after having balanced the public interest in disclosure against the public interest in non-disclosure. Subsection 6(2) of the PTTA contains no such language. On the contrary, it requires the Designated Judge to ensure the confidentiality of the evidence or other information provided by the Minister if the Judge is of the opinion that disclosure of that evidence, or other information, would be injurious to national security or endanger the safety of any person (PTTA, s 6(2)(b)). It further prohibits the Designated Judge from providing the Applicant with a summary of the evidence or other information available to him or her that contains anything that, in the Judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed (PTTA, s 6(2)(c)). There is no room, in my view, in the language of subsection 6(2), for any balancing of the competing public interests contemplated by subsection 38.06(2) of the *Canada Evidence Act* when a Designated Judge is called upon to apply the rules set out in that provision of the PTTA.

[49] The structure and language of the subsection 6(2) framework is much closer to the information protection mechanism found at subsection 83(1) of the IRPA and, by extension, at section 87 of the IRPA applicable in judicial review matters not involving security certificates

brought before this Court under the IRPA. I believe it is fair to say that this mechanism, which came into force in 2008, served, in a way, as the blueprint for the subsection 6(2) framework, adopted in 2015, as it did for the information protection scheme found at subsection 16(6) of the *Secure Air Travel Act*, which was adopted the same year and which mirrors, for all intents and purposes, subsection 6(2) of the PTTA. Subsections 83(1) of the IRPA and 16(6) of the *Secure Air Travel Act* are appended as Annex A to this Order and Reasons.

[50] In *Harkat*, the Supreme Court of Canada found, in the context of a *Charter* claim, that "Parliament's choice to adopt a categorical prohibition against disclosure of sensitive information, as opposed to a balancing approach, does not constitute a breach of the right to a fair process" (*Harkat* at para 66).

[51] In interpreting subsection 6(2) of the PTTA, this Court must give effect to Parliament's choice not to use language akin to what is found in subsection 38.06(2) of the *Canada Evidence Act* but to rather use language similar to what is found in subsection 83(1) of the IRPA and other statutes with national security components (*Section 18.1 of the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, as Amended (Re)*, 2018 FCA 161 at para 32). In my view, the language used in subsection 6(2) of the PTTA signals a clear intention on the part of Parliament to adopt a categorical prohibition against disclosure of sensitive information, as opposed to a balancing approach. Like paragraph 83(1)(d) of the IRPA, paragraph 6(2)(b) of the PTTA makes it imperative for the Designated Judge to "ensure the confidentiality of the evidence and other information provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person". In *Jaballah (Re)*, 2009 FC 279 at

paragraph 10 [*Jaballah*], Justice Eleanor Dawson, now a judge of the Federal Court of Appeal, stated that this type of language left the Designated Judge with no discretion in this regard, rendering therefore any balancing test between the public interests in disclosure, on the one hand, and non-disclosure, on the other, "irrelevant".

[52] In sum, contrary to the Applicant's submissions, subsection 6(2) of the PTTA contains no language providing for a balancing test, be it explicitly or implicitly.

(3) No "reading-in" is warranted nor is a remedy under subsection 24(1) of the *Charter* available at this stage of the proceedings

[53] As indicated previously, the Applicant urges me, if I was to find that the language of subsection 6(2) is not capable of sustaining a broad interpretation, which would encompass a balancing scheme similar to the CEA Test, to read that scheme into the provision or, in the alternative, to revert to section 24 of the *Charter* to provide her with a remedy that would signal to Parliament and the Minister that a more procedurally fair process needs to be considered.

[54] First, it is simply not this Court's – or any other Court's - function, except in very limited circumstances, where it is considered to be a suitable remedy to a declaration of constitutional invalidly under section 52 of the *Constitution Act, 1982* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, to add to the laws adopted by Parliament. Doing what the Applicant urges me to do would certainly be viewed as a dangerous precedent encroaching on Parliament's sovereignty and the principle of the separation of powers (*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 35-36 [*Mikisew*];

Reference re Pan-Canadian Securities Regulation, 2018 SCC 48 at paras 54, 58; *Vriend v Alberta*, [1998] 1 SCR 493 at para 136 [*Vriend*]; *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 91).

[55] The Supreme Court has notably cautioned that "reading in" is "a remedy sparingly used, and available only where it is clear that the legislature, faced with a ruling of unconstitutionality, would have made the change proposed" (*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 66). This is in line with the respective constitutional roles bestowed on the Courts and the legislature:

> Longstanding constitutional principles underlie this reluctance to supervise the law-making process. The separation of powers is "an essential feature of our constitution" (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 52; see also *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 27). It recognizes that each branch of government "will be unable to fulfill its role if it is unduly interfered with by the others" (*Criminal Lawyers' Association*, at para. 29). It dictates that "the courts and Parliament strive to respect each other's role in the conduct of public affairs"; as such, there is no doubt that Parliament's legislative activities should "proceed unimpeded by any external body or institution, including the courts" (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 20).
>
> (*Mikisew* at para 35)

[56] In *Vriend*, the Supreme Court reiterated these longstanding principles in stating that "in carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches" (*Vriend* at para 136).

[57] Second, because the constitutional validity of the PTTA is not challenged, and that it must thus be presumed to be valid (*Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 21), the only potential constitutional remedy open to this Court to issue would fall under subsection 24(1) of the *Charter*. However, that subsection was meant to remedy unconstitutional State action against individuals, and not to provide a stand-alone remedy for laws with unconstitutional effects (*R v Ferguson*, 2008 SCC 6 at para 63), which is what the Applicant appears to be seeking.

[58] Here, the issue of whether a section 24 remedy is warranted is first and foremost a matter for the application judge. In other words, this is a question for the merits of the case, where the Minister's compliance with the *Charter* in rendering his decision to not issue a passport to the Applicant and to deprive her of passport services for a certain period of time will be scrutinized on the basis of a full record. Again, the Applicant has made it clear, both at the first case management conference I presided over on July 30, 2018 and in her written submissions on Issue 1, that her constitutional claim was aimed at the Minister's decision only and that, as a result, she was not seeking to strike down the PTTA. Absent, therefore, a *Charter* claim against the PTTA itself, its information protection framework must, again, be presumed valid and the Court must defer to it (*Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 22).

[59] The Applicant further claims that the information protection scheme set out in subsection 83(1) of the IRPA, which was found to be *Charter*-compliant in *Harkat*, is not a proper comparison because, among other things, it makes it imperative to appoint a special advocate in

order to ensure a person named in a security certificate adequate procedural protection, a feature lacking in the subsection 6(2) framework. Again, to the extent that this framework is not being constitutionally challenged, I fail to see how this argument assists the Applicant. It may be that the subsection 6(2) framework, when compared to the IRPA information protection scheme, does not provide sufficient procedural safeguards to survive a *Charter* challenge but this issue is not before the Court.

[60] The Applicant's argument based on *Baker* cannot succeed either. A *Baker* analysis, which is highly dependent on an appreciation of the context of the particular statute and the rights affected (*Baker* at para 21), is certainly highly relevant in determining the degree of procedural fairness owed to the Applicant by the Minister but it is of no assistance in determining whether Parliament should have opted for a balancing approach, rather than a categorical prohibition against disclosure of sensitive information in conceiving the subsection 6(2) framework. As I have said, a purposive interpretation of that provision leads clearly to the conclusion that Parliament opted for a categorical prohibition, as opposed to a balancing approach. Here, the Designated Judge can only issue evidentiary summaries that do not include anything that would be injurious to national security or endanger the safety of any person if disclosed. This is the choice made by Parliament. The wisdom of that decision is not for the Court to adjudicate. Nor is, at this point in time, its compliance with the *Charter*.

[61] Finally, there is no merit in the Applicant's contention that, somehow, the Court, by appointing the Amicus, and the Attorney General, by consenting to that appointment, have both recognized that the PTTA lacks sufficient procedural protections. As the Attorney General

rightfully pointed out in his written reply submissions to the Applicant's, the appointment of an amicus curiae is a discretionary power of the Court which is carried out in a variety of contexts, including *ex parte* proceedings, and for various reasons, including assisting the Court in accomplishing its statutory mandate. It is not, by any stretch of the imagination, an indication that something is wrong with the statutory scheme the Court is called upon to apply and interpret.

[62] Having said all this, I am mindful of the Supreme Court's concluding remarks on the constitutionality of the IRPA's information protection scheme in *Harkat* where it signaled that such a scheme "remain[s] an imperfect substitute for a full disclosure in an open court", noting that "[t]here may be cases where the nature of the allegations and of the evidence relied upon exacerbate the limitations inherent to the scheme, resulting in an unfair process" (*Harkat* at para 77). In light of that "reality", the Court said that the Designated Judge "has an ongoing responsibility to assess the overall fairness of the process and to grant remedies under s. 24(1) of the *Charter*, where appropriate – including, if necessary, a stay of proceedings" (*Harkat* at para 77).

[63] Here, for the time being at least, I see no basis for contemplating a section 24 remedy with respect to the manner in which the process dictated by subsection 6(2) of the PTTA has unfolded so far as:

a. An *amicus curiae* was appointed;

b. The Amicus was permitted to communicate with counsel for the Applicant, and the Applicant herself, prior to gaining access to the CTR's unredacted (see-through) material and other confidential material filed by the Attorney General, and with leave of the Court, after gaining such access;

c. The Amicus has participated in all *ex parte*, *in camera* hearings held thus far;

d. Counsel for the Applicant was permitted to provide the Amicus with a list of relevant questions and/or submissions he would like the Amicus to raise and submit to the Court during the *ex parte, in camera* hearing that was held on October 30 and 31 2018;

e. Counsel for the Applicant was permitted to request that an *ex parte*, *in camera* hearing be held in the absence of the Attorney General and his representatives;

f. The Applicant has a pending motion for a production order of the will referred to in the "Unclassified Summary of the Information Used to Review Eligibility to Passport Services under Section 10.1 of the Canadian Passport Order" attached to the Fairness Letter, which she opted to defer pending the outcome of the present disclosure proceedings; and

g. Given, as a result of this Order, that some of the redactions in the CTR have been lifted, that a number of summaries have been provided to the Applicant and that the

Minister can always opt, under the authority under paragraph 6(2)(f) of the PTTA, to withdraw evidence or other information, including evidence or other information for which disclosure has been ordered by the Court, the assessment of whether the process leads to the Applicant being reasonably informed of the reasons for the Minister's decision, within the limits prescribed by the PTTA, cannot be finally performed as the factual matrix underlying the Minister's reasons for decision has evolved and may evolve further.

(4) Principles of disclosure and non-disclosure under subsection 6(2) of the PTTA

[64] Having found that subsection 6(2) of the PTTA does not require a balancing test, what is the applicable legal test for making determinations under paragraphs 6(2)(b) and 6(2)(c)? In other words:

a. What is the degree of judicial oversight applicable to the Attorney General's claim that the information redacted from the CTR cannot be disclosed to the Applicant because its disclosure would be injurious to national security or endanger the safety of any person? and

b. What is the scope of the Court's duty to provide the Applicant with a summary enabling her to be reasonably informed of the reasons for the Minister's decision while ensuring at the same time that such summary does not contain anything that, in

the Court's opinion, would be injurious to national security or endanger the safety of any person if disclosed?

(a) The degree of judicial oversight for non-disclosure claims

[65] I will begin by quoting from *Jahazi v Canada (Citizenship and Immigration)*, 2010 FC 242, at paragraph 22 [*Jahazi*], in which Justice Yves de Montigny, now a judge of the Federal Court of Appeal, observed that Courts in Canada, including the Supreme Court, "have repeatedly recognized the importance of the state's interest in conducting national security investigations and that the societal interest in national security can limit the disclosure of materials to individuals affected by the non-disclosure" (references omitted). As was noted by the Supreme Court in *Ruby v Canada (Solicitor General)*, 2002 SCC 75, at paragraph 46, the states' interest in national security is "significant and legitimate".

[66] Justice de Montigny also observed that in a country like ours, governed by the rule of law upheld by an independent judiciary, it is the courts that must ultimately determine whether and when the confidentiality principle must give way to the interests of justice which requires, subject to very limited and well-defined exceptions, openness of the judicial process (*Jahazi* at para 23; see also: *Henrie v Canada (Security Intelligence Review Committee)*, [1989] 2 FC 229 at para 19 [*Henrie*], confirmed by *Henrie v Canada (Security Intelligence Review Committee)*, [1992] FCJ No 100 (FCA)).

[67] The Attorney General submits that the case law has, over the years, formulated a number of factors for the purposes of assessing whether the disclosure of redacted information would be

injurious to national security, such as the broad discretionary power conferred on the Designated Judge by use of the words "in the opinion of the judge", the need for a factual basis to sustain an injury claim, and the recognition, through a deferential approach, of the state's interest and expertise in conducting national security investigations and protecting national security, which both involve the weighing of numerous and complex considerations and circumstances. He further asserts that the threshold in reviewing a claim of injury to national security has been held, in light of these factors, to be one of reasonableness.

[68] While he recognizes the importance of these jurisprudential teachings, the Amicus cautions the Court against the State's tendency to over claim confidentiality in national security matters and emphasizes that the Attorney General must demonstrate that the disclosure of the information or evidence being withheld poses a probable and serious, as opposed to a mere possible or speculative, risk of injury to national security or danger to the safety of a person. In sum, he says that the assessment of the alleged injury must be reasonable. This means, for example, that information already in the public domain ought not to be protected from disclosure.

[69] The Attorney General and the Amicus are both correct. Here is how, in my view, an assessment of an injury claim regarding disclosure of alleged sensitive information is to be conducted under paragraph 6(2)(b) of the PTTA.

[70] First, borrowing from the case law that has developed in other national security statutory contexts, where similar language is used ("if, in the judge's opinion, disclosure would be

injurious to national security"), the onus is on the Attorney General to convince the Court that disclosure of the redacted information in the CTR would injure national security or endanger the safety of any person and that, therefore, an infringement of the open court principle is warranted (*Jaballah (Re)* at para 9; *Canada (Attorney Genera) v Canada (Commission of inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766 at para 47 [*Arar*]; *Canada (Attorney General) v Ribic*, 2003 FCA 246 at para 20 [*Ribic*]; *Canada (Attorney General) v Khawaja*, 2007 FC 490 at para 65 [*Khawaja*]; *Soltanizadeh v Canada (Citizenship and Immigration)*, 2018 FC 114 at para 21 [*Soltanizadeh*]).

[71] Second, although the use of the word "would" suggests an elevated standard when compared to the use of the word "could" in the determination of whether a closed hearing is necessary, the expression "in the opinion of the judge" nevertheless confers on the Designated Judge a "broad discretion", as the Attorney General correctly pointed out (*Soltanizadeh* at paras 21-22, quoting from *Harkat* at para 4).

[72] Third, said standard requires the Designated Judge to be satisfied that the "executive's opinion as to injury has a factual basis, established by evidence" and that the alleged injury is "probable, and not simply a possibility or merely speculative" (*Arar* at paras 47, 49). The evidentiary basis to every claim must be "sound"; a mere assertion of injury will not be enough (*Khawaja* at paras 65, 157). In assessing the alleged injury, the Designated Judge "must be vigilant and skeptical with respect to the Minister's claim of confidentiality" and be mindful, as pointed out by the Amicus, of the "government's tendency to exaggerate claims of national security confidentiality" (*Harkat* at para 63).

[73] Fourth, in submitting a claim for non-disclosure, the Attorney General "must ensure that the information presented to the Court is complete and that due diligence has been met with respect to ensuring that the privileges are properly claimed". In other words, the Attorney General is under a duty of utmost good faith when making his case for non-disclosure to the Court (*Khawaja* at para 158).

[74] Fifth, that being said, it is not the Designated Judge's role, as cautioned by the Federal Court of Appeal in *Ribic*, to second-guess or substitute his or her opinion for that of the Executive given the Attorney General's protective role vis-à-vis the security and safety of the public. As such, "considerable weight" is to be given to the Attorney General's submissions regarding his assessment of the injury to national security "because of his access to special information and expertise" (*Ribic* at paras 18-19; see also *Khawaja* at paras 64, 157). One other factor attracting this deferential approach lies with the difficulty of defining the concept of "national security", a concept which is "fluid and [which] does not lend itself to a specific definition" (*Canada (Attorney General) v Telbani*, 2014 FC 1050 at para 43 [*Telbani*]).

[75] Sixth, this deferential approach does not mean, however, that the Court is to "abdicate the role entrusted to it by Parliament and merely blindly endorse the applications for non-disclosure which may be filed by the Attorney General" (*Telbani* at para 44).

[76] Seventh, in assessing non-disclosure issues, the Designated Judge must also be guided by the statutory framework which gave rise to the decision under review in the underlying judicial review proceeding. Here, this is the CPO, which applies a "reasonable grounds to believe"

standard to the determination of the facts necessary to determine whether a passport ought not be issued as a measure necessary for the national security of Canada or of a foreign country or state, a standard, as the Court pointed out in *Soltanizadeh*, that falls short of a balance of probabilities, but that requires an objective basis for the belief based on credible evidence (*Soltanizadeh* at para 23).

[77] In the end, if the Designated Judge is satisfied that the Attorney General's assessment of injury is "reasonable", then he or she "should accept it" (*Ribic* at para 19; *Arar* at para 47; *Khawaja* at para 66).

[78] These are the principles which must guide my analysis of Issue 2 in this disclosure proceeding, which is whether the Attorney General has met his onus of establishing his claim that the disclosure of the redacted information in the CTR would be injurious to national security or endanger the safety of any person.

(b) The scope of the duty to ensure that a summary of the evidence is provided to the Applicant

[79] This particular issue concerns Issue 3 of the present disclosure proceeding. In other words, it concerns the application of paragraph 6(2)(c) of the PTTA. As we have seen, this provision makes it mandatory for the Designated Judge to ensure that the applicant is provided with a summary of the evidence or other information available to the Designated Judge that enables the applicant to be reasonably informed of the reasons for the Minister's decision. At the same time, it makes it equally mandatory for the Designated Judge to not disclose in such

summary anything that, in his or her opinion, would be injurious to national security or endanger the safety of any person.

[80] The Amicus agrees that the PTTA mirrors provisions in other national security legislation mandating a categorical prohibition on disclosure of sensitive information and does not contemplate a legal balancing test. He nevertheless stresses the fact that the PTTA requires the Court to ensure that the Applicant receives sufficient disclosure, both in terms of evidence and information, about the allegations the Applicant faces, and/or a summary of the key evidence that would enable her to be reasonably informed of the case against her.

[81] Given that the information protection regimes in the IRPA and the PTTA are substantially the same, he proposes that the Court adopt a similar approach to the one described in *Harkat*. This would mean that the Applicant should receive the "incompressible minimum amount of disclosure" contemplated by *Harkat*, so as to enable her to: (i) fully understand the breadth and depth of the information and analysis that underlies the Minister's decision; (ii) meaningfully instruct her public counsel; (iii) provide additional documents to him; (iv) take his legal advice; and (v) make strategic decisions about the various steps in the litigation, such as whether to call witnesses or give evidence herself, to retain experts or to instruct counsel to cross-examine the Attorney General's witnesses.

[82] Recognizing that any summary provided to the Applicant cannot include specific information that would be injurious to national security or endanger the safety of any person if disclosed and that the level of disclosure is case-specific, it must still contain, according to the

Amicus, sufficient information to enable the Applicant to be reasonably informed of the basis of the Minister's decision to deny her a passport. In other words, subsection 6(2) of the PTTA requires, in his view, that the duty to protect sensitive information be reconciled with the statutory requirement that a person in the position of the Applicant be reasonably informed of the reasons for the Minister's decision, something that can only be accomplished by conveying to that person the "essence of the information and evidence supporting the allegations" (*Harkat* at para 57). Short of that, the argument goes, the Minister must withdraw the sensitive information or evidence, even if, as suggested in *Harkat*, this brings an end to the proceeding (*Harkat* at para 59).

[83] In the present case, this means providing the Applicant with an "incompressible minimum amount of disclosure" about her alleged associations and activities because these associations and activities form the basis of the Minister's reasons for denying her a passport.

[84] The Attorney General responds that the fact subsection 6(2) of the PTTA does not contain a balancing test does not mean that a person in the position of the Applicant would not be reasonably informed of the reasons for the Minister's decision, although he concedes that, as is the case with the IRPA, the PTTA "is silent as to what happens if there is an irreconcilable tension between the requirement that the named person be "reasonably informed", on the one hand, and the imperative that sensitive information not be disclosed, on the other" (*Harkat* at para 58).

[85] The Attorney General claims in that regard that the PTTA provides several tools to ensure the overall process is fair: providing summaries that do not include any injurious information, holding *ex parte* and *in camera* hearings, even on the merits, and the possibility that the Designated Judge not base a decision on irrelevant or withdrawn information or evidence, being some of them.

[86] He agrees that *Harkat* requires that an "incompressible minimum of information" be disclosed to the named person where there is an "irreconcilable tension" between the requirement that the named person be "reasonably informed" of the case to meet and the requirement that sensitive information not be disclosed. However, he urges the Court to consider the differences between the two regimes before applying, with the necessary changes, this threshold to cases governed by the PTTA. He observes that, contrary to cases brought under the security certificates regime under the IRPA, an applicant in a matter governed by the PTTA will generally have already received the essence of the information and evidence supporting the reasons for the Minister's decision to refuse the issuance of a passport. This is because procedural fairness requires that the affected party be allowed meaningful participation in the making of the Minister's decision, as determined by this Court in *Kamel v Canada (Attorney General)*, 2008 FC 338, rev'd on other grounds 2009 FCA 21, leave to appeal to SCC refused, 33088 (August 20, 2009) [*Kamel*].

[87] In *Kamel*, Justice Simon Noël had this to say on the procedural guarantees owed by the Minister to a passport applicant before denying his or her application:

[66] The decision of the Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, and more specifically the comments we read at paragraph 115, offers some assistance in identifying those guarantees:

115 What is required by the duty of fairness — and therefore the principles of fundamental justice — is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker*, *supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J. More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker*, *supra*, at paras. 23-27. This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker*, *supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.

[…]

[72] Having regard to the five factors, the Court concludes that the CPO had an obligation to follow a procedure that was in compliance with the principles of procedural fairness, meaning fairness to the applicant. This does not mean that a right to a hearing would automatically be a necessary part of the investigation (for example, where the passport applicant's credibility is in issue). It is sufficient if the investigation includes disclosure to the individual affected of the facts alleged against him and the information collected in the course of the investigation and gives the applicant an opportunity to respond to it fully and informs him of the investigator's objectives; as well, the decision-maker must have all of the facts in order to make an informed decision. Did the CPO adhere to those principles in conducting the investigation?

[88] A few years later, Justice André Scott reiterated this framework in *Kamel v Canada (Attorney General)*, 2011 FC 1061 (upheld by *Kamel v Canada (Attorney General)*, 2013 FCA 103):

> [67] Because the consequences of denying a passport are significant, the Court concludes that evaluating and weighing the national security of Canada and other countries, having regard to the applicant's rights and obligations, calls for the application of particularly stringent procedural guarantees, which must include real participation by the applicant in the investigative process.

[89] Here, although the Designated Judge must strive to ensure that an applicant is provided with a summary of the evidence or other information available to him or her that enables the applicant to be reasonably informed of the reasons for the Minister's decision, paragraph 6(2)(c) of the PTTA makes it clear that such summary can imperatively not contain anything that, in the judge's opinion, would, if disclosed, be injurious to national security or endanger the safety of any person. There is no possible middle ground for this apparent conundrum. Any reasonable interpretation of that provision does not allow for it.

[90] Hence, assuming that the Applicant, as contended by the Amicus, is entitled to a summary that provides her with an "incompressible minimum amount of disclosure", this minimum amount of disclosure cannot contain information which, if disclosed, would injure national security or endanger the safety of any person. In other words, at this stage of the present judicial review application, any "irreconcilable tension" between the need to provide the Applicant with a summary enabling her to be reasonably informed of the reasons for the Minister's decision and the need to protect from disclosure sensitive information cannot be

resolved in the Applicant's favour as, again, no reasonable interpretation of paragraph 6(2)(c) of the PTTA allows for it. The summary envisaged by that provision can only be on information that is not injurious to national security or to the safety of any person. Any contrary view would defeat Parliament's clear and non-equivocal intention.

[91] I agree with the Attorney General that the *Harkat* concept of an "incompressible minimum amount of disclosure", if applicable in a proceeding under the PTTA, would be part of the substantive underlying judicial review and overall assessment of the legality of the Minister's decision.

B. Issue 2: Would disclosure of the redacted information in the CTR injure national security or endanger the safety of any person? Can additional redactions, beyond those already proposed by the Attorney General, be lifted from the CTR?

(1) The information at issue

[92] The CTR is comprised of seven documents, two of which contain redactions. These two documents are : (i) a "Recommendation For Initiating the Process of Possible Refusal to Issue a Passport", dated August 25, 2016, from the Passport Advisory Group chaired at the time by the Director General of the National Security Policy Directorate at Public Safety Canada [Initiating Recommendation]; and (ii) a Memorandum for the Senior Deputy Minister of Public Safety Canada, dated January 18, 2018, recommending to not issue a passport to the Applicant and to impose on her a period of refusal of passport services [Refusal Recommendation]. A redacted version of these two documents was filed as part of the public CTR through the public affidavit of Stephanie Hodgson, a senior paralegal with the Department of Justice of Canada. An un-

redacted (see-through) version of these same two documents was filed as part of Ms. Hodgson's *ex parte* affidavit. They were respectively marked as Exhibit B and Exhibit A to both of Ms. Hodgson's affidavits.

[93] The Initiating Recommendation contains a Passport Decisions for National Security Purposes Case Brief [Case Brief] prepared by the Canadian Security Intelligence Service [Service or CSIS]. This document is heavily redacted. The Refusal Recommendation contains information drawn from the Case Brief. That information is, for the most part, redacted. It also contains a summary of the submissions filed by the Applicant in response to the Fairness Letter and the Pre-Recommendation Letter and outlines the rationale for recommending to not issue a passport to the Applicant and to impose on her a period of refusal of passport services. Said rationale also draws from the Case Brief and is partially redacted.

[94] The redacted information in both the Initiating Recommendation, including the Case Brief, and the Refusal Recommendation, provides details of the Applicant's alleged association with individuals and entities of concern to national security, threat-related activities and capabilities, recruitment and radicalization activities, terrorist travel, and criminal history.

[95] In particular, the redacted information indicates that the Applicant, in addition to her publicly disclosed association with Al Shabaab [AS], an entity listed pursuant to subsection 83.05(1) of the *Criminal Code*, RSC 1985, c C-46, and her ex-husband, Mohamed Sakr, believed to be an AS senior figure who was killed in a drone attack in Somalia in February 2012:

a. is believed [redacted] to be in contact with AS foreign fighter, Ahmed Ibrahim Mohamed Halane;

b. is a supporter/committed to the Islamic State of Iraq and the Levant [ISIL] [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

f. [redacted]

[96] The undisclosed information relating to the Applicant's threat-related activities and capabilities, recruitment and radicalization activities, terrorist travel, and criminal history can be summarized as follows:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

[redacted]

e. [redacted]

f. [redacted]

g. [redacted] the Applicant [redacted] supported ISIL. [redacted]

[redacted]

h. [redacted]

i. The Applicant is further reported to have expressed extremist views, including [redacted] martyrdom, [redacted] Somalia [redacted] Her reported intent for travelling to that country was to join AS [redacted]

j. [redacted]

[redacted]

k. [redacted]

l. Material found on the Applicant's laptop seized by the Somaliland authorities in July 2011, contained a folder titled "Explosives", which included a document on how to build a plastic hydrogen bomb. [redacted]

m. [redacted]

(2) The Attorney General's evidence regarding the claim for non-disclosure

[97] The Attorney General's position, at the outset of this disclosure proceeding, was that none of the redacted information in the CTR could be disclosed as its disclosure would be injurious to national security or endanger the safety of any person.

[98] As required by Justice Noël's case-management Order, dated May 8, 2018, the Attorney General filed a classified affidavit [Main Classified Affidavit] explaining the basis of the redactions in the CTR as well as a public affidavit explaining the nature of these redactions in a manner that does not injure national security or endanger the safety of any person.

(a) Public Affidavit

[99] On June 1, 2018, the Attorney General filed and served on the Applicant the affidavit of a Service employee who, for security reasons, identified herself by her first name only, Erin [Public Affidavit]. On August 17, 2018, the Attorney General, as directed by the Court, provided a classified attested version of that affidavit with the affiant's full-name. At the time of signing the affidavit, the employee held the position of Head of the Security Screening Branch.

[100] The stated-purpose of the Public Affidavit was "to provide an explanation, in general terms, of the types or categories of information that CSIS seeks to protect from disclosure in legal proceedings, and the injuries to national security or the danger to any person that would result from disclosure of such information" (Public Affidavit at para 24).

[101] The Public Affidavit identifies five types or categories of information providing "a broad overview of the types of information that CSIS seeks to protect" (Public Affidavit at para 24). Those are the five types or categories of information relied upon by the Attorney General in order to protect the redacted information in the CTR from disclosure. They are:

a. **Information that identifies or tends to identify Service employees and the Service's internal procedures and administrative operations**

The public deponent claims that disclosing information identifying employees, particularly for those who engage in covert activities, would endanger their personal safety or that of their family, whereas disclosing the Service's administrative methodologies or internal procedures could reveal how investigations are managed;

b. **Information that identifies or tends to identify operational or investigative techniques utilized by the Service**

The public deponent claims that disclosing this type of information would reveal the capabilities, limitations, and degree of expertise of the Service regarding the specific methodology used, thereby impeding the effectiveness of the Service's investigative techniques, some being known to the general public, some not, and allowing current and future targets to employ countermeasures as well as to discern what information the Service has already gathered and by which means;

c. **Relationships that the Service maintains with other security and intelligence agencies and information exchange in confidence from such agencies**

The public deponent claims that disclosing this type of information would impede the willingness of such agencies to provide information in the future since global cooperation and intelligence sharing is done in confidence, as per a widely recognized rule governing foreign agency reporting, and is particularly necessary given that terrorist activities are not confined to domestic borders;

d. **Individuals who cooperate with the Service**

The public deponent claims that disclosing information that would identify or tend to identify these individuals, who volunteer information in confidence to the Service, would expose them and put them at risk of possible harm, harassment or damage to their reputation, and would jeopardize the Service's capability to rely on the information and assistance provided by these sources to conduct its investigations, as without assurances that the Service is able to protect their anonymity, current sources would cease to cooperate while fewer individuals would agree to cooperate with the Service in the future;

e. **Service's interests in individuals, groups or issues, including the existence or absence of past or present files or investigations, the intensity of investigations, or the degree of - or lack of success of – investigations**

The public deponent claims that disclosing this type of information would indicate the level of interest that the Service has in a subject of investigation and allow that subject to introduce false or misleading information into the investigation and use countermeasures, jeopardizing thereby the investigation.

[102] The redacted information related to each of these five categories of information was highlighted in different colours in the CTR's un-redacted (see-through) version. These colours are:

a. [redacted] "Services employees or internal procedures and administrative methodologies of the Service such as classification, names and file numbers";

b. [redacted] "Operational or investigative techniques utilized by the Service";

c. [redacted] "Relationships that the Service maintains with other security and intelligence agencies and information exchange in confidence from such agencies";

d. [redacted] "Individuals who cooperate with the Service", and

e. [redacted] the "Service's interests in individuals, groups or issues".

(b) Classified Evidence

[103] The Attorney General filed the Main Classified Affidavit with the Court's DES Registry on May 25, 2018. This is the affidavit of a Service employee who, at the time of signing said affidavit, had 28 years of experience with the Service and held the position of Chief of Litigation Case Management [Main Deponent]. Like the Public Affidavit, the Main Classified Affidavit identifies the same five categories of information for which protection is sought but details the risks of injury claimed by the Attorney General with reference, under each category, to the sensitive or potentially injurious information contained in the Initiating Recommendation, including the Case Brief, and the Refusal Recommendation.

[104] The Main Deponent explained that in some instances, the same redacted information would fall under more than one category of injury to national security. This could be the case, she says, where, for example, the information that the Service seeks to protect reveals methods of operation, or may identify the Service's interest in an individual, the existence of a file or investigation or the fact that information derives from individuals who cooperate with the Service.

[105] She gave evidence at the *ex parte, in camera* hearing held on October 30 and 31, 2018. She was asked to describe each item of redacted information and explain why it was necessary to protect that information from disclosure. She gave evidence on both days. She testified in chief and was cross-examined by the Amicus and was questioned by the Court.

[106] Her evidence can be summarized as follows:

> "Services employees or internal procedures and administrative methodologies of the Service"

[107] The Main Deponent explains that as part of the administration of the Service, all documents require a security classification. Such classification is based on the sensitivity of the information and may entail limits to the information's distribution. It may also reveal the nature and technique used in terms of how the type of information is gathered. It may also reveal where, with whom and through which accredited networks such classified information can be shared.

[108] On this basis, she says, the Service seeks to protect from disclosure the acronyms [redacted] acronyms appear at various places in the Initiating Recommendation, including the Case Brief, and the Refusal Recommendation, but mostly in the Case Brief.

[109] The Main Deponent claims that disclosing this information would be injurious to national security since the Applicant and an informed reader could then determine what information the Service protects, under which classification and which types of information the Service characterizes as highly sensitive. She also claims that the disclosure of these acronyms would reveal that the information about the Applicant contained in the two redacted documents is derived from highly sensitive sources and not simply from open source information, or that it is derived from investigative techniques that attract a lower classification. Ultimately, she says, this would reveal the nature and depth of the Service investigation into the Applicant.

[110] The Service also seeks to redact, on page 1 of the Initiating Recommendation, the name of a Service employee, who is a member of the Passport Advisory Group that recommended that the process for possible refusal of the Applicant's passport application be initiated, as well as the signature of a Service employee who signed said recommendation on behalf of that other employee. It also seeks to redact, on page 2 of that document, a Service contact telephone number.

[111] The Main Deponent affirms that the disclosure of this information would injure national security or endanger the safety of any person as publicly identifying Service employees, many of whom are employed as intelligence officers and have worked, currently work or may be called to work on matters of a covert nature, by their name would not only put them at risk, but would also impair both the employee's and the Service's ability to investigate threats to the security of Canada by being harmful to their current and future operational effectiveness. This is so, the argument goes, because, for example, sources or other Service contacts may be unwilling to engage or meet with an intelligence officer whose identity as a Service employee is publicly known, or because a target may be in a position, in such context, to identify the intelligence officer, thereby confirming the Service's investigative interest, and to introduce false information into the investigation. The same injury could occur if other non-public information, such as Service phone numbers, is disclosed as this would help reveal the identity of Service employees, thereby endangering their safety.

[112] The information redacted under this category is limited to [redacted] acronyms, a Service employee's name, a Service employee's signature and a Service phone number. Although, as we will see, the Amicus expressed concerns regarding a number of the redactions sought in the other categories of information, he has not expressed any regarding these redactions.

[113] In such context, the injury claims under this category can be decided right away. In my view, they must be accepted, as it has long been recognized by this Court, that the disclosure of information that would reveal or tend to reveal the identity of Service employees is information that must be kept confidential (*Telbani* at paras 45-46). The same goes of information regarding

the Service's internal procedures and administrative methodologies that, if disclosed, would reveal or tend to reveal the nature and even the depth of a Service investigation (*Henrie* at paras 29-31; *Jahazi* at para 25).

[114] Therefore, I am satisfied, on the grounds set out in the Main Classified Affidavit and in the Main Deponent's testimony, that the removal of the redactions sought under the category "Services employees or internal procedures and administrative methodologies of the Service" would cause injury to national security or endanger the safety of any person. As Justice Noël observed in *Dhahbi v Canada (Citizenship and Immigration)*, 2009 FC 347, at para 24, a matter brought under section 87 of the *IRPA*,this type of information is normally not disclosed and, in any event, does not assist the person concerned in understanding the case to meet.

"Methods of operation and investigative techniques utilized by the Service"

[115] This is a category of information under which a significant number of redactions are being sought and where most of the Amicus' concerns lie.

[116] The Main Deponent explained that the disclosure of the Service's method of operation and investigative techniques would reveal the capabilities and degree of expertise it possesses and, at the same time, the limitations of its methods and techniques. This, she claims, may allow current and future subjects of investigation to counter the efforts of the Service, reducing thereby the effectiveness of the Service's investigations. The same goes, according to her, for the specific information collected through various investigative techniques which, if released, would allow

an informed reader to identify the technique used in the collection of that information and, again, counter the efforts of the Service.

[117] She insisted that an important distinction must be drawn on redactions over the use of a technique. On the one hand, redactions can be placed over the use of a technique that was novel or unknown to the outside world, and, therefore, not in the public domain. There are none here. On the other hand, and this is the bulk of the [redacted] redactions in this case, redactions can be placed over information that, if disclosed, would reveal that a particular technique, even if it was "notorious", was used against a particular individual. This, according to the Main Deponent, would allow for the identification of said technique and would, therefore, hinder the ability for future use, or the efficacy of, that same technique against the same subject of investigation or against individuals associated with that subject.

[118] This is why, the Main Deponent says, the Service seeks to protect from disclosure the information it obtained [redacted] The information obtained [redacted] concerns:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

f. [redacted]

g. The folder titled “Explosives”, containing the document on how to build a plastic hydrogen bomb, found from a search of the hard drive of the Applicant’s laptop.

[119] The following timelines [redacted] regarding the Applicant’s general activities [redacted]

a. September 26, 2011: the Applicant attempted to travel to Kenya;

b. [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

"Relationships that the Service maintains with other security and intelligence agencies"

[120] The Main Deponent explained that the Service relies on its partnerships with security intelligence agencies of foreign countries for information and intelligence relevant to the national security of Canada. She says that such partnerships are only possible if the participating agencies protect the shared information and refrain from taking any action that would compromise or jeopardize the providing agency. This is known, she further says, as the "third party rule", which recognizes that sensitive information shared between partners is provided in confidence and with the express or implied understanding that neither the information nor its source will be disclosed without the prior consent of the providing agency. Breach of this rule could result, according to her, in a number of consequences prejudicial to the national security of Canada ranging from a

cessation of future exchange with the providing agency to restrictions in information sharing with other partner agencies.

[121] In the present matter, information was received from security agencies [redacted] Letters were sent to [redacted] agencies to inquire as to whether they would allow the Service to disclose their information in the context of the present proceedings. At the time of signing the Main Classified Affidavit, only [redacted] agency had given permission to release the information. That information concerns [redacted] and is found at the first paragraph of page 7 of the Initiating Recommendation, lines 2-4, and reads: [redacted]

[122] The Main Deponent affirms that despite being given permission to release that information, the Service chose not to, as it is only aware of [redacted] The Service was eventually given permission by [redacted] intelligence agencies to disclose some of their information. This is reflected, below, in the list of redactions the Attorney General agreed to lift.

[123] The information and intelligence gathered from these foreign security and intelligence agencies concerns:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

f. [redacted]

"Individuals who cooperate with the Service"

[124] There are only a few redactions under this category of information and they concern information provided by individuals who cooperate with the Service by volunteering information. The Main Deponent explains that these individuals are crucial to the operation of the Service. It is imperative for the Service, she claims, to protect their anonymity since disclosing the identity of these individuals could endanger their safety, send the message that the Service is unable to protect their anonymity, and deter other individuals from assisting the Service in the future.

[125] The three pieces of information redacted under this category concern:

a. [redacted]

b. [redacted]

c. [redacted]

"The Service's interests in individuals, groups or issues"

[126] The Main Deponent affirms that the disclosure of information which would identify or tend to identify subjects of investigations, be it individuals or groups, could jeopardize the efficiency of the Service's operations and investigations because this would confirm the

Service's current or previous interest in these individuals or groups and prompt them to take countermeasures to thwart the Service investigation by, for example, introducing false or misleading information in the investigation process. Disclosing this type of information would also enable these individuals or groups, the Main Deponent says, to assess the depth, deployment and sophistication of the Service's resources, and to ascertain the level of the Service's interest in them, the state of the Service's operational knowledge on them at certain points in time and the specific operational assessment made by the Service.

[127] The redactions falling under this category of information, some being located in the Case Brief's footnotes, concern:

a. Reference to [redacted]

b. Reference to the Applicant's support for ISIL [redacted]

c. Reference to [redacted]

d. Reference to brief assessments, taking the form of "believed to be" (or "btb") statements, of particular pieces of information inserted in the Case Brief in order to clarify that information - or to give meaning to it - to less informed readers;

e. Reference to [redacted] "facilitation" work in the recruitment and radicalization [redacted]

f. Reference to the Applicant's connection to other individuals or groups of interest to the Service, to public websites and open source material which identify such individuals or groups;

g. [redacted]

h. Reference to [redacted]

(c) Additional classified evidence

[128] Following the *ex parte, in camera* hearing held on October 30 and 31, 2018, the Attorney General's classified evidence was supplemented with two short classified supplementary affidavits:

a. One from the Main Deponent, filed on December 6, 2018, providing two examples of injury occurring as a result of either inadvertent or conscious disclosure [redacted]

b. The other, from another Service employee, filed on January 16, 2019, responding to a query from the Amicus as to [redacted]

[129] On that last point, the Main Deponent insisted during the course of her testimony that [redacted] according to her, the Service still has reasonable grounds to suspect that the Applicant's activities pose a threat to the security of Canada.

(3) The Amicus position

[130] The Amicus contends that the reason why the Applicant is entitled to additional information, over and above what has already been disclosed to date in the public redacted version of the CTR, is that she is currently unaware of six key allegations upon which the Minister relied to deny her a passport. As the record currently stands, he says, the Applicant is not aware of:

a. Any allegations of recruitment and radicalization [redacted]

b. Allegations that she facilitated the travel [redacted] to Syria;

c. The Service's concerns about her associations with any groups of concern for national security [redacted] and with any other individuals of similar concern other than the Applicant's ex-husband, Mr. Sakr;

d. The Service's concerns with any material extracted from her laptop other than her last will;

e. The Service's concerns about her support [redacted] ISIL [redacted]

f. [redacted] a short reference to a traffic violation in Edmonton.

[131] In an effort to ensure that the Applicant is reasonably informed of the case to meet, the Amicus is proposing to lift a number of redactions as well as to provide the Applicant with various bullet point summaries of additional information which, if accepted by the Court, "could reduce the amount of work entailed by a painstaking, line-by-line review of the specific redactions on each page" (Confidential Memorandum of Fact and Law of the Amicus at para 38). These proposed bullet point summaries were crafted, says the Amicus, with the following factors in mind:

a. The information summarized is sufficiently general or vague; and/or

b. The summarized information is reasonably known or knowable by the Applicant [redacted] and/or

c. The summarized information is reasonably known or knowable by the Applicant to have been the possible result of analysis of her property (laptop, etc.) that she knows was in the possession of police or security agencies in Canada or of agencies with whom Canada cooperates; and/or

d. The summarized information is already the subject of press and media reporting, some of which is contained in the CTR and others, in the evidence on this application; and/or

e. The summarized information is an elaboration upon information already disclosed in the redacted CTR; said elaboration adding details for which public release is not opposed by other agencies or countries; and/or

f. The summarized information is publicly available and known or knowable to the Applicant.

[132] This *modus operandi* overlaps Issue 2 and Issue 3. At first glance, it is appealing but it does not relieve me of the responsibility of ensuring that the redactions claimed by the Attorney General meet, in each and every case, the threshold set out in subsection 6(2) of the PTTA, which requires me to be satisfied that lifting these redactions would injure national security or endanger the safety of any person. As we have seen, the public interest in the non-disclosure of sensitive information in the area of national security is a legitimate and important one, but it remains an exception to the open court principle which, as stated in *Henrie* at para 18, "must be jealously guarded and rigorously applied, especially where evidence which appears to be relevant to a judicial determination is at stake".

[133] The actual proposed summaries, of which more than half were found acceptable by the Attorney General, will be discussed under Issue 3. For the time being, I will try to summarize the Amicus' concerns regarding the redactions he considers problematic. As I see it, the Amicus has two main concerns.

[134] First, the Amicus claims that there must be particularly compelling evidence in support of the serious harm likely to occur from the disclosure of information that is already in the public realm through media reporting. This is the case, he says, for two very key allegations that led to the Minister's decision: (i) the Applicant's alleged recruitment and radicalization [redacted] and alleged support for ISIL; and (ii) the fact that her laptop was seized and analyzed and that documents (explaining, among other things, how to build a plastic hydrogen bomb) were recovered from it. In particular, he contends that if that information was to be disclosed, the Applicant and the Islamic community in Edmonton would not be surprised to learn that the Service believes that the Applicant supports ISIL [redacted] alleged recruitment and radicalization of [redacted] and the facilitation of [redacted] travel to Syria [redacted]

[135] Absent such compelling evidence, which is the case here he argues, the Applicant ought to know, in order to meet the case against her, that the Minister is relying on the underlying facts found in these media reports.

[136] Second, the Amicus contends that there can be no harm to national security in disclosing information that may reveal the use, by the Service, of notorious investigative methods or techniques, [redacted] This is evidenced, he says, by the Supreme Court of Canada's decision in *R v Vu*, 2013 SCC 60, at para 43, or by the Ontario Superior Court of Justice's decision in *R v Somogyi*, 2010 ONSC 8039, at para 101 to 110, which speak of the notoriety of these techniques. It cannot therefore be plausibly argued, he adds, that the mission of the Service would be hindered if it is indirectly

acknowledged that it can [redacted] especially since this alleged risk is based on the highly speculative possibility [redacted] This is no evidence, he claims, of a serious risk of harm to national security or to the safety of any person.

[137] He acknowledges, however, that the disclosure of investigative techniques in a case where there is an ongoing investigation could be harmful to national security, as it could alert the target and degrade the usefulness of the investigative technique. This would also be the case, in his view, with the disclosure of information that would reveal the identity of a human source, which, he agrees, must be protected. A third example, he says, of disclosure that could frustrate the Service in carrying out its mandate is where the investigative technique used by the Service is so novel that its availability to the Service is generally unknown. This could have been the case, years ago, [redacted] but these are no longer, he reiterates, unknown or novel capabilities.

[138] The Amicus claims that since none of these exceptions apply to some of the redacted information in the CTR, there would be no harm in disclosing this information. Examples of this would be the allegations that the Applicant: (i) continues to maintain contacts with AS or individuals affiliated with that group; [redacted]

[139] The Amicus says that for the most part, these concerns can be alleviated by his proposed summaries, if accepted by the Court. This will be discussed under Issue 3.

[140] The Amicus also opines that there are a few specific instances of redactions which, although not captured by his proposed summaries, are nonetheless unsubstantiated under the legal test for protecting redacted information from disclosure. These instances are: (i) the Applicant's traffic violation for driving with her class 7 driver's license; (ii) [redacted]

[141] With respect to the Applicant's traffic violation, the Amicus claims that there is no basis for redacting the fact that the Applicant received a ticket, when pulled over by the Edmonton Police on November 26, 2016, "for driving with her class 7 driver's license" (Case Brief, p. 14, para 2) as this is a matter of public record. The fact, he says, that the Service is unaware that this information is contained in the police report, is no justification for redacting such information.

[142] This redaction was lifted by the Attorney General on February 6, 2019, along with the related footnote 12 (Case Brief, p. 14), as appears from the list, above, of the lifts the Attorney General consented to. This redaction is no longer at issue.

[143] With respect to the [redacted] Proposed Lift, the Amicus contends that the Applicant's association with individuals or groups of concern to national security is one of the main reasons underlying the Minister's decision in this case. In order to be fairly and reasonably informed of

the case she must meet, he says, the Applicant needs to know all that she can about these associations.

[144] The Amicus observes that the Service's interest in [redacted] He submits, therefore, that in such context, all of the redactions concerning [redacted] (Case Brief, p. 6-7) should be lifted as no serious or plausible argument has been - or can be - made that this lift will harm national security or the safety of any person.

[145] With respect to the [redacted] Proposed Lift, the Amicus submits that the Applicant should also be made aware of the fact that the Service knows of her association with [redacted] as this was seen as a significant demerit to her passport application. This forms part, he says, of the "incompressible minimum disclosure" the Applicant is entitled to, [redacted] The Amicus contends that the Service's fear that disclosure of this information might reveal [redacted] – is not justification for redacting that information since:

a. these techniques, again, are widely known and expected by the general public to be used by the Service;

b. indirectly revealing the use of these techniques would not harm the Service [redacted]

c. the [redacted] agency, from whom information [redacted] is perfectly at ease with this information being disclosed.

[146] Finally, the Amicus contends that there is no evidence that disclosing [redacted] would injure national security. This is because there is no evidence that the fact the Applicant might make, through the disclosure [redacted] - would be injurious to national security.

[147] At the February 7, 2019, *ex parte*, *in camera* hearing during which the Court heard the submissions of the Attorney General and the Amicus on the Attorney General's claim for non-disclosure and the summary to be provided to the Applicant pursuant to paragraph 6(2)(c) of the PTTA, the Amicus proposed additional lifts.

[148] First, he claims that the Applicant should know that the Minister is aware that [redacted] she reportedly expressed extremist views, including [redacted] martyrdom, [redacted] (Case Brief, p. 10, para 1 under the heading "TRAVEL"). Second, he contends that the names of the individuals the Applicant is said to have associated with, [redacted] should all be disclosed to her.

[149] The third and final proposed additional lift is in fact a proposed addition to one of the Amicus' proposed summaries - the one regarding the materials found on the hard drive of the Applicant's laptop after it was seized by the Somaliland authorities. However, from my understanding, this proposal was made on the assumption that [redacted] on that topic. [redacted] this proposed additional lift is no longer at issue.

[150] Following the February 7 hearing, a third classified supplementary affidavit, dated March 7, 2019, addressing the issue of whether a Court had previously considered whether the [redacted] should be protected from disclosure, was filed by the Attorney General. The answer provided was that so far, no Court had considered or adjudicated that issue. Because that information was collected [redacted] this third classified supplementary affidavit also addresses the Amicus' proposed additional lift regarding the extremist views the Applicant reportedly expressed [redacted] The deponent opines that lifting the redaction over that information would be injurious to national security as it would reveal the Service's knowledge [redacted] and would allow the Applicant [redacted] in that particular instance.

(4) Lifts consented to by the Attorney General

[151] The Attorney General has consented to a number of lifts proposed by the Amicus. These lifts are all in relation to non-disclosure claims found in the Case Brief. They are:

a. The [redacted] claims, at page 3, over the "Type", "List ID", "Gender", and "Place of Birth" columns;

b. The [redacted] claims, at page 4, paragraph 6, over: "On September 26, 2011, JAMA attempted to travel to Kenya, presumably with the intent of returning to Somalia.";

c. The [redacted] claims, at page 6, second bullet, over: "According to a foreign agency and … JAMA is in contact with AS foreign fighter Ahmed Ibrahim Mohamed HALANE. (S)";

d. The [redacted] claim [redacted] at page 6, third bullet, over: "JAMA has a well-established association with and support for";

e. The [redacted] claim [redacted] at page 10, over the heading "FACILITATION";

f. The [redacted] claim [redacted] at page 12, footnote 10, over: "*Shaheed* – In Arabic shaheed means martyr (U)";

g. The [redacted] claim [redacted] at page 14, paragraph 2, over: "for driving with her class 7 driver's license, and";

h. The [redacted] claim [redacted] at page 14, footnote 12, over "An individual driving with a class 7 driver's license requires the presence of another driver with a class 5 license in order to be the driver. (U)".

[152] On March 7, 2019, the Attorney General informed the Court that [redacted] the disclosure of the following information found at page 12 of the Case Brief, under the heading "CAPABILITIES":

> "While no evidence of attack planning has been found to date, other material of concern has been discovered. JAMA's laptop contained a folder titled "Explosives", which included a document on how to build a plastic hydrogen bomb."

(5) Contested Lifts

[153] The Attorney General points out that the vast majority of the remaining redactions are not contested. The contested ones are:

a. The [redacted] Proposed Lift (p. 18-19);

b. The [redacted] Proposed Lift (p. 19-20);

c. The [redacted] Proposed Lift (p. 22-23);

d. The proposed lift regarding [redacted] [Proposed Travel Lift];

e. The proposed lift regarding the names of the individuals the Applicant is said to have associated with, [redacted] [Proposed Associates Names Lift].

The [redacted] Proposed Lift

[154] As I indicated above, the Amicus asserts that because her association with individuals or groups of concern to national security was one of the main reasons underlying the Minister's decision, the Applicant needs to know all that she can about these associations in order to be fairly and reasonably informed of the case to meet. [redacted] it cannot seriously or plausibly be argued that lifting the redactions over the information concerning [redacted] would injure national security or endanger the safety of any person. He further says that harm to national security is even more implausible in this particular instance since the

[redacted] and the Service's interest in the Applicant has come to a head when the Minister decided not to renew her passport.

[155] With respect, I do not share the Amicus' views for a number of reasons.

[156] First, they are premised on the idea that [redacted] and that, therefore, there is no harm in disclosing [redacted] in this matter. The evidence before me is that [redacted] In other words, according to the Service, there are still reasonable grounds to suspect that the Applicant's activities pose a threat to national security [redacted]

[157] As the Attorney General points out, unlike police investigations, investigations conducted under the CSIS Act are aimed, ultimately, at preventing the commission of acts that may constitute threats to the security of Canada rather than at identifying, after the fact, a guilty party to a criminal offence. In other words, in contrast to police investigations, there is no defined end to security intelligence gathering and the fact that the government may have acted upon the fruits of such investigations for a particular purpose, [redacted]

[redacted]

This is a key consideration here.

[158] [redacted]

[159] According to the evidence, the Applicant came to the attention of the Service [redacted] What the Service seeks to protect is the fact, [redacted] the Applicant and the public, [redacted]

[160] [redacted]

[161] [redacted]

[162] One the one hand, there is obviously no certainty that the Applicant [redacted] but this is not the test the Attorney General has to meet. As I indicated earlier, I must be satisfied that the Attorney General's assessment of injury is reasonable, that is not based on mere speculation. Here, I think it is safe to say that [redacted] I think it

[163] On the other hand, the Amicus' argument, This appears to be a golden rule of intelligence investigation work. It requires protection.

[164] I am therefore satisfied that

[165] Third, this Court has, on many occasions, recognized that information about the technical means and capacities of surveillance and about certain methods or techniques of investigation of the Service "must be kept confidential" where its disclosure "would assist persons of interest to the Service to avoid or evade detection or surveillance or the interception of information" (*Telbani* at paras 45-46, quoting from *Harkat (Re)*, 2005 FC 393 at para 89). [redacted] Also, as underscored by Justice de Montigny in *Telbani*, it is well-settled too that a security agency "cannot operate effectively if the subjects of its investigations are able to ascertain that they are persons of interest or determine the state of the agency's operational knowledge about them at a particular point in time, the resulting operational evaluation and even the fact that the agency is able to make some findings regarding the targets of its investigations" (*Telbani* at para 50).

[166] Here, evidence of injury, in relation to two specific instances, resulting from the inadvertent or conscious disclosure [redacted] which caused countermeasures to be used against the Service, was filed by the Main Deponent.

[167] I am satisfied, therefore, [redacted] that these two core informational features, which "must be kept confidential", would be negatively impacted if the redacted information regarding the [redacted] Proposed Lift was disclosed.

The [redacted] Proposed Lift

[168] The same rationale applies, in my view, to the [redacted] Proposed Lift as it is rests on the same core considerations, that is: [redacted] would, in my opinion, be detrimental to national security in the same manner as accepting the [redacted] Proposed Lift would. [redacted] I am satisfied, from the evidence before me, that it is more probable than not that such injury would occur if the information redacted over the [redacted] Proposed Lift was to be disclosed.

[169] A further consideration raised by the Amicus with respect to the [redacted] Proposed Lift is the fact that [redacted] is perfectly at ease with the information it shared with the Service concerning [redacted] being disclosed. The Amicus notes that the Attorney General is prepared to lift the redaction over information coming from [redacted] regarding the fact the Applicant is in contact with foreign fighter Ahmed Ibrahim Mohammed Halane but is not prepared to do the same with respect to the information shared by [redacted] despite that

agency's consent to disclosure. He says that this is wholly inconsistent on the part of the Attorney General.

[170] However, the evidence before me is that any of the other redacted details in the Case Brief where [redacted]

[171] All this sensitive information, therefore, [redacted] not, be it in whole or in part, [redacted] for that matter. This is what distinguishes the Attorney General's position on the information regarding [redacted] from his position regarding the information on Mr. Halane. In the latter case, the Service's knowledge that the Applicant is in contact with Mr. Halane comes from [redacted] agency [redacted] The Attorney General explains that he would only release that information if it was clear that it came from a foreign agency (which had consented to its release), [redacted] the Service does not seek to protect the information regarding Mr. Halane on the basis that it has an interest in him.

[172] I am therefore of the view that disclosing the redacted information on [redacted]

[173] Finally, the Amicus insists that the redacted information over the [redacted] Proposed Lift is part of the "incompressible minimum amount of disclosure" the Applicant is entitled to, but as paragraph 6(2)(b) of the PTTA clearly states, the Designated Judge is under a duty to protect from disclosure any of the evidence provided by the Minister which, if disclosed, would, in the Designated Judge's opinion, injure national security or endanger the safety of any person. In other words, whatever "minimum amount of disclosure" there has to be, it cannot be comprised of sensitive information. I am therefore satisfied that the Attorney General has established that it is more probable than not that disclosing the redacted information over the [redacted] Proposed Lift would injure national security.

The [redacted] Proposed Lift

[174] As indicated previously, the [redacted] Proposed Lift [redacted] which is found at footnote 8 of the Case Brief. [redacted]

[redacted] Footnote 8 provides [redacted]

[175] The Amicus contends that there is no evidence that disclosing [redacted] would injure national security because it is highly unlikely that the Applicant would be able to make, [redacted]

[176] The Attorney General asserts that it is more likely than not that the Applicant [redacted]

[177] I believe the Attorney General's concern is more than merely speculative. The evidence is that of all [redacted] I am therefore satisfied that with the contextual information already available to her [redacted] is a footnote in the section of the Case

Brief on information related to her threat-related activities), the disclosure of [redacted] would allow her, as an informed reader, [redacted] Again, there is no certainty that she will, but that is not the onus the Attorney General has to meet. The onus is rather that I be satisfied that it is more probable than not that she will. That onus has been met.

The Proposed Travel Lift

[178] This proposed lift concerns redacted information over the fact that [redacted] According to the evidence, that information originates from [redacted] The Attorney General asserts that lifting the redactions over that information would reveal or tend to reveal [redacted]

[179] In my view, it is the redacted information's [redacted] coupled with the presence of the un-redacted heading "TRAVEL", which could assist the Applicant [redacted]

[180] Hence, I see little, if no, risk of injury in disclosing, under the form of a summary, the fact that the Applicant was reported to have expressed extremist views. I note that the Applicant has already been put on notice, through the unclassified summary of information attached to the Fairness Letter, that she "has facilitated extremist activities", is associated with AS, an entity listed as a terrorist organization under our criminal legislation, and has been identified as a senior member of that organization.

[181] The Applicant will also be put on notice, [redacted] that material of concern was discovered on her laptop, including a folder titled "Explosives" containing a document on how to build a plastic hydrogen bomb.

[182] Therefore, with all that in mind, one would not be surprised to learn that the Applicant might have expressed extremist views at some point. Without any indicia as to when and in which context she would have expressed these views and in light of the very general, non-specific, nature of that particular piece of information, I am satisfied that it is highly unlikely that

the Applicant would link this to [redacted] the use of a particular investigative technique.

[183] I would, as a result, amend the following proposed summary: "The Applicant supports ISIL and AS", with which, again, the Attorney General agrees, to read as follows: "The Applicant supports ISIL and AS and was reported to have expressed extremist views".

The Proposed Associates Names Lift

[184] Finally, as stated earlier, the Amicus contends that because the Applicant's association with individuals of concern to national security was one of the main reasons underlying the Minister's decision, she needs to know as much as she can about these associations. He says that the bare minimum is that she be provided with the names of these associates.

[185] I have already decided that the names [redacted] as well as the redacted information [redacted] should not be disclosed. What needs to be decided then is whether disclosing the names [redacted] other individuals with whom the Applicant is said to have associated [redacted] – would injure national security or endanger the safety of any person.

[186] According to the evidence before me, [redacted] Disclosing their names, the Attorney General submits, would reveal the Applicant's connection to [redacted]

[redacted] It would also reveal, or tend to reveal, [redacted]

[187] In my view, it is more probable than not that the injury to national security apprehended by the Service if the names [redacted] were to be disclosed, would occur. In other words, it is more probable than not that this would reveal, or tend to reveal, [redacted] The disclosed information would, in my opinion, be specific enough to allow the Applicant, [redacted] and an informed reader to connect these dots.

[188] Again, it is well-settled that information about the technical means and capacities of surveillance and about certain methods or techniques of investigation of the Service "must be kept confidential" where its disclosure "would assist persons of interest to the Service to avoid or evade detection or surveillance or the interception of information" (*Telbani* at paras 45-46). Here, I am satisfied that disclosing the names [redacted] would have such detrimental effect on the Service [redacted] It is well-settled too that a security agency "cannot operate effectively if the subjects of its investigations are able to ascertain that they are persons of interest or determine the state of the agency's operational knowledge about them at a particular point in time, the resulting operational evaluation and even

the fact that the agency is able to make some findings regarding the targets of its investigations" (*Telbani* at para 50). Again, I am satisfied that such harm would more probably that not occur if the names [redacted] are revealed.

[189] The Amicus suggests that [redacted] is different [redacted]

[190] The Attorney General responds that [redacted] I agree with the Attorney General that it is far from being clear that [redacted]

[191] [redacted]

[redacted]

[192] In summary, the information related to the [redacted] Proposed Lift, [redacted] Proposed Lift, [redacted] Proposed Lift and Proposed Associates Names Lift, shall not be disclosed. With respect to the Proposed Travel Lift, it will not be disclosed but the information that the Applicant was reported to have expressed extremist views shall form part of the summary of evidence and other information provided to the Applicant.

[193] The list of the redactions that are being lifted is appended as Annex B to this Order and Reasons.

(6) Non-contested redactions

[194] Again most of the redactions in the CTR are not contested. However, as I indicated earlier, I still need to be satisfied that the non-contested redactions meet the non-disclosure threshold set out in paragraph 6(2)(b) of the PTTA. After having reviewed each and every non-contested redactions, I am satisfied that they do meet this threshold based on the various grounds invoked by the Attorney General.

C. Issue 3: To ensure that the Applicant is reasonably informed of the reasons for the Minister's decisions, what summaries can be provided that would not injure national security or endanger the safety of any person?

[195] I stated earlier in these Reasons that if paragraph 6(2)(c) of the PTTA makes it clear that the Designated Judge must strive to ensure that an applicant is provided with a summary of the evidence or other information available to him or her that enables the applicant to be reasonably informed of the reasons for the Minister's decision, it makes it equally clear that such summary cannot contain any information which, if disclosed, would be injurious to national security or endanger the safety of any person. Therefore, any claim that the Applicant is entitled to a summary that provides her with an "incompressible minimum amount of disclosure", is, at this stage of the present judicial review proceedings, subject to this limitation. Any contrary view would, in my opinion, defeat Parliament's intention.

[196] As stated earlier too, the Amicus, in furtherance of the Court's duty set out in paragraph 6(2)(c) of the PTTA, has proposed a number of summaries – 11 in total – to be provided to the Applicant. Some have been agreed to by the Attorney General, some remain contentious. The Attorney General has proposed one summary, which has been accepted by the Amicus further to an amendment agreed to by the Attorney General.

[197] These proposed summaries are preceded by an "Overarching paragraph" proposed by the Amicus, and agreed to by the Attorney General, which reads as follows:

> "In some cases, where reference in these summaries is made to facts and allegations that are also the subject of public media reporting, the Minister has information obtained by other means to

> justify the Minister's belief in the truth of the underlying facts and allegations."

[198] [redacted]

(1) The non-contested proposed summaries

[199] The Attorney General has agreed to the following proposed summaries, some in the form originally submitted by the Amicus, some in an mutually agreed upon amended form:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

f. [redacted]

[200] These summaries will be provided to the Applicant. As I have indicated previously in discussing the Proposed Travel Lift, this last summary will read as follows: [redacted]

[201] The summary proposed by the Attorney General and agreed to by the Amicus will also be provided to the Applicant. It reads as follows:

> "Information redacted from the Certified Tribunal Record includes information dated after June 2012, and includes information up to December 2016"

(2) The contested proposed summaries

[202] There are five of them; the contentious parts are underlined:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

[redacted]

[203] As for the first contested proposed summary, the Attorney General's objection lies with [redacted]

[204] To avoid this, the Attorney General proposes that [redacted]

[205] The Amicus argues that it is important that the Applicant be advised that the Minister believes [redacted] The Amicus further submits that the Service's concern that this nuance [redacted] which is, by now, [redacted] is utterly without foundation.

[206] [redacted]

[207] [redacted] I have issued, on April 18, 2019, a classified direction asking for further submissions from the Attorney General on this particular issue to be filed no later than April 24, 2019, with the Amicus being provided with the opportunity to respond to these submissions by April 25, 2019.

[208] On April 23, 2019, the Attorney General, after further review and consultation, responded to the classified direction by agreeing to the wording proposed by the Amicus.

[209] This summary will therefore read as proposed by the Amicus.

[redacted]

[210] The Attorney General objects [redacted] Therefore, the Attorney General contends that releasing this proposed summary in its current wording, [redacted]

[211] [redacted]

[212] The Amicus contends that this is a distinction without a difference. [redacted]

[213] I accept the Attorney General's position that disclosing that information would allow the Applicant I am satisfied, therefore, that it is more probable than not that injury to national security would ensue.

[214] Again, I am not saying that this information would not assist the Applicant in being reasonably informed of the reasons for the Minister's decision, but since I am of the opinion that its disclosure would be injurious to national security, paragraph 6(2)(c) of the PTTA prevents me from providing it to the Applicant.

[215] This proposed summary will therefore read as follows: This will put the Applicant on notice that the Minister believes that

[216] The Attorney General submits that [redacted] Therefore, he contends that providing that summary to the Applicant would allow her to realize that [redacted]

[217] The Amicus raises essentially the same arguments as for the [redacted] Proposed Lift. He insists that [redacted] the Applicant is entitled to know that [redacted] even if this piece of information leads her to [redacted] is part of the case against her. This forms part, he says, of the incompressible minimum amount of disclosure she is entitled to.

[218] To the extent that it is more probable than not that this proposed summary would make the Applicant think that it refers to [redacted] I see no reason to depart from my finding on the [redacted] Proposed Lift. Again, the evidence before me is that all the redacted information regarding the Service's awareness of [redacted] I am therefore satisfied that providing a summary to the Applicant that, despite its anonymity, leads almost inevitably to [redacted] in a context where the Applicant [redacted]

[redacted]

[219] I therefore accept the Attorney General's objection to the Applicant being provided with this summary as I am satisfied that it contains information which, if disclosed, would injure national security and that no alternative formulation can alleviate this problem.

[redacted]

[220] The Attorney General is prepared to disclose to the Applicant the fact that one of the reasons for the Minister's decision is that [redacted]

[221] The Amicus submits that it is important that the Applicant know that the Service believes that [redacted] He further contends that

[redacted] the minute nuance the presence of [redacted] does not justify the Attorney General's objection to the wording of this proposed summary.

[222] I can appreciate that the reference to the Applicant's [redacted]

[223] With respect to the issue as to how to refer to the Applicant's [redacted] we are, in my respectful view, in the presence of a distinction without a difference. Both are vague and general and convey essentially the same meaning. In particular, I fail to see how a reference to [redacted]

[224] The nuance is minute, at best. If the Attorney General is prepared to accept that the Applicant be informed that one of the reasons for the Minister's decision is that [redacted] I see no harm with the formulation proposed by the Amicus, which essentially convey the same meaning.

[225] For these reasons, I would reformulate the proposed summary [redacted] The summary provided to the Applicant will therefore read as follows: [redacted]

[redacted]

[226] This is closely connected with the [redacted] Proposed Lift as it stems from [redacted]

[227] Here, I am faced with the same arguments that were submitted to me by the Attorney General and the Amicus with respect to the [redacted] Proposed Lift.

[228] As I have already indicated in relation to the discussion on this proposed lift, the evidence before me is that [redacted] I have already decided that the disclosure of [redacted] would allow the Applicant [redacted] Providing the Applicant, under the form of a summary, with the actual information to which the disclosure of [redacted] might lead, would, even more so, result in the same apprehended injury.

[229] Again, this is not to say that this information would not assist the Applicant in being reasonably informed of the reasons for the Minister's decision, but since I am satisfied that its disclosure would be injurious to national security, it cannot, by the operation of the PTTA, be disclosed.

[230] This proposed summary will therefore not be provided to the Applicant.

(3) Conclusion

[231] The Applicant will be provided with the summaries of evidence and other information listed in Annex C of this Order and Reasons.

[232] Of the six key allegations supporting the Minister's decision to deny the Applicant a passport that, according to the Amicus, she was unaware of when these disclosure proceedings began, she is now put on notice, through the disclosure of some of the redacted information in the CTR and through the summaries that are being provided to her, that:

a. She participated in the recruitment and radicalization of a Canadian;

b. She encouraged and partially financed the travel of that person to Syria;

c. Materials found among her files and possessions in Hargeysa in 2011, including her will and her laptop, which contained a folder entitled "Explosives" and a document

on how to build a plastic hydrogen bomb, indicate an ability to undertake threat-related activities consistent with her desire to become a martyr;

d. She supports ISIL; and

e. She not only did but she still maintain contact with individuals associated with AS and was/is a senior member of AS.

[233] The Applicant is therefore now on notice of what the Amicus characterized as "the two most significant, and likely damaging, allegations upon which the Service relies", that is, that her laptop contained materials, other than her will, that might indicate extremist associations or sympathies, and that she recruited and facilitated the travel of others to Syria.

[234] Of these six allegations, the Applicant remains, at this point, unaware of the allegation based on her associations with any individuals of concern for national security [redacted] As I indicated previously, any claim that the Applicant may have in this regard, in terms of procedural fairness, would be part of the substantive underlying judicial review and overall assessment of the legality of the Minister's decision.

[235] In sum, I am satisfied that the Applicant, as required by paragraph 6(2)(c) of the PTTA and within the limits imposed by that provision, is being provided, as a result of this Order, with a summary of the evidence and other information available to me that enables her to be reasonably informed of the reasons for the Minister's decision, and that anything in this

summary contains information which would be injurious to national security or endanger the safety of any person if disclosed.

ORDER in T-479-18

THE COURT ORDERS that:

1. Disclosure of the information found at Annex B to this Order and Reasons is authorized;

2. The redacted information in the CTR, except for the information found at Annex B, shall be kept confidential in accordance with paragraph 6(2)b) of the PTTA as its disclosure would be injurious to national security or endanger the safety of any person;

3. As required by paragraph 6(2)(c) of the PTTA, disclosure of the summaries listed in Annex C of this Order and Reasons is authorized;

4. The Amicus appointed to assist the Court in this matter may have access to this Order and Reasons, including Annex B and C, at the Federal Court's secure facility in Ottawa;

5. The Respondent shall have thirty (30) days following the day on which this Order and Reasons is made to appeal;

6. The period during which the Applicant may bring an appeal shall be considered to run from the date of disclosure to the Applicant of the information authorized for disclosure or such further time as the Federal Court of Appeal may consider appropriate;

7. If no appeal is brought, the Respondent shall file and serve on the Applicant, no later than on the expiry of the appeal period, an amended version of the

public CTR incorporating the information that was ordered disclosed as listed in Annex B to this Order and Reasons;

8. If no appeal is brought, the Respondent shall file with the Federal Court's Designated Registry, no later than on the expiry of the appeal period, an amended version of the classified CTR incorporating the information that was ordered disclosed as listed in Annex B to this Order and Reasons;

9. The Respondent, in consultation with the Amicus, shall propose redactions to this Order and Reasons for disclosure to the Applicant no later than ten (10) days after the expiry of the appeal period contemplated at paragraph 5 or at any time earlier should the Respondent decide that no appeal will be brought;

10. This Order and Reasons shall not form part of the public record of these proceedings;

11. The *ex parte* Court record shall be kept in a location to which the public has no access; and

12. There is no order as to costs.

"René LeBlanc"

Judge

ANNEX A

Immigration and Refugee Protection Act

Protection of information

83 (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:

(a) the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

(b) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;

(c) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

(c.1) on the request of the Minister, the judge may exempt the Minister from the obligation to provide the special advocate with a copy of information under paragraph 85.4(1)(b) if the judge is satisfied that the information does not enable the permanent resident or foreign national to be reasonably informed of the case made by the Minister;

(c.2) for the purpose of deciding whether to grant an exemption under paragraph (c.1), the judge may ask the special advocate to make submissions and may communicate with the special advocate to the extent required to

Loi sur l'immigration et la protection des réfugiés

Protection des renseignements

83 (1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :

a) le juge procède, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et selon la procédure expéditive;

b) il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à titre d'avocat spécial dans le cadre de l'instance, après avoir entendu l'intéressé et le ministre et accordé une attention et une importance particulières aux préférences de l'intéressé;

c) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

c.1) il peut, sur demande du ministre, exempter le ministre de l'obligation de fournir une copie des renseignements à l'avocat spécial au titre de l'alinéa 85.4(1)b), s'il est convaincu que ces renseignements ne permettent pas à l'intéressé d'être suffisamment informé de la thèse du ministre;

c.2) il peut, en vue de décider s'il exempte ou non le ministre au titre de l'alinéa c.1), demander à l'avocat spécial de présenter ses observations et peut communiquer avec lui dans la mesure nécessaire pour lui permettre

enable the special advocate to make the submissions, if the judge is of the opinion that considerations of fairness and natural justice require it;

de présenter ses observations, s'il est d'avis que les considérations d'équité et de justice naturelle le requièrent;

(d) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(e) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

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

(f) the judge shall ensure the confidentiality of all information or other evidence that is withdrawn by the Minister;

f) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance;

(g) the judge shall provide the permanent resident or foreign national and the Minister with an opportunity to be heard;

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

(h) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;

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

(i) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national;

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

(j) the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if

j) il ne peut fonder sa décision sur les renseignements et autres éléments de preuve que lui fournit le ministre et les remet à celui-

the judge determines that it is not relevant or if the Minister withdraws it; and

(k) the judge shall not base a decision on information that the Minister is exempted from providing to the special advocate, shall ensure the confidentiality of that information and shall return it to the Minister.

ci s'il décide qu'ils ne sont pas pertinents ou si le ministre les retire;

k) il ne peut fonder sa décision sur les renseignements que le ministre n'a pas fournis à l'avocat spécial en raison de l'exemption et il lui incombe de garantir la confidentialité de ces renseignements et de les remettre au ministre.

Secure Air Travel Act

Procedure

16 (6) The following provisions apply to appeals under this section:

(a) at any time during a proceeding, the judge must, on the request of the Minister, hear information or other evidence in the absence of the public and of the appellant and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

(b) the judge must ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

(c) throughout the proceeding, the judge must ensure that the appellant is provided with a summary of information and other evidence that enables them to be reasonably informed of the Minister's case but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

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

(e) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is

Loi sur la sûreté des déplacements aériens

Procédure

16 (6) Les règles ci-après s'appliquent aux appels visés au présent article :

a) à tout moment pendant l'instance et à la demande du ministre, le juge doit tenir une audience à huis clos et en l'absence de l'appelant et de son conseil dans le cas où la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

b) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

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

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

e) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice —

inadmissible in a court of law, and may base a decision on that evidence;	qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;
(f) the judge may base a decision on information or other evidence even if a summary of that information or other evidence has not been provided to the appellant;	f) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'appelant;
(g) if the judge determines that information or other evidence provided by the Minister is not relevant or if the Minister withdraws the information or evidence, the judge must not base a decision on that information or other evidence and must return it to the Minister; and	g) s'il décide que les renseignements et autres éléments de preuve que lui fournit le ministre ne sont pas pertinents ou si le ministre les retire, il ne peut fonder sa décision sur ces renseignements ou ces éléments de preuve et il est tenu de les remettre au ministre;
(h) the judge must ensure the confidentiality of all information or other evidence that the Minister withdraws.	h) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance.

ANNEX B – Lifts Granted

Content of the lift	Location in the record
Information contained in the "Type", "List ID", "Gender", and "Place of Birth" columns	Case Brief, p. 3
"On September 26, 2011, JAMA attempted to travel to Kenya, presumably with the intent of returning to Somalia."	Case Brief, p.4, para 6
"According to a foreign agency and … JAMA is in contact with AS foreign fighter Ahmed Ibrahim Mohamed HALANE. (S)"	Case Brief, p. 6, second bullet
"JAMA has a well-established association with and support for"	Case Brief, p. 6, third bullet
The heading "FACILITATION"	Case Brief, p. 10, under para 11
"Shaheed – In Arabic shaheed means martyr (U)"	Case Brief, p. 12, footnote 10
"for driving with her class 7 driver's license, and"	Case Brief, p. 14, para 2
"An individual driving with a class 7 driver's license requires the presence of another driver with a class 5 license in order to be the driver. (U)"	Case Brief, p. 14, footnote 12
"While no evidence of attack planning has been found to date, other material of concern has been discovered. JAMA's laptop contained a folder titled "Explosives", which included a document on how to build a plastic hydrogen bomb."	Case Brief, p. 12, under heading "CAPABILITIES"; Refusal Recommendation, p. 3, eighth bullet; Refusal Recommendation, p. 6, second bullet

ANNEX C – Summaries of the Evidence and Other Information

- Overarching Paragraph:

  > In some cases, where reference in these summaries is made to facts and allegations that are also the subject of public media reporting, the Minister has information obtained by other means to justify the Minister's belief in the truth of the underlying facts and allegations.

- The Applicant is believed to use a number of aliases, including name variances on those aliases.

- The Applicant left Canada for Somalia in 2010 to join AS.

- In September 2011, the Applicant attempted to return to East Africa.

- The Applicant maintains contact with individuals associated with AS.

- The Applicant has indicated a desire to attain martyrdom in countries outside Canada.

- Materials found among the Applicant's files and possessions in Hargeysa in 2011, including her will and other electronic files, indicate an ability to undertake threat-related activities, consistent with her desire to become a martyr.

- The Applicant was/is a senior member of AS.

- The Applicant has participated in the recruitment and radicalization of a Canadian, whose eventual travel overseas to Syria was encouraged and partially financed by the Applicant.

- The Applicant supports ISIL and AS and was reported to have expressed extremist views.

- Information redacted from the Certified Tribunal Record includes information dated after June 2012, and includes information up to December 2016.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-479-18
STYLE OF CAUSE:	Ayan Abdirahman Jama v. Attorney General of Canada
PLACE OF PUBLIC HEARING:	Ottawa, Ontario
PLACE OF CLOSED HEARING:	Ottawa, Ontario
DATES OF PUBLIC HEARING:	February 4, 2019
DATES OF CLOSED HEARING	October 30 and 31, 2019 February 7, 2019
TOP SECRET ORDER AND REASONS:	LeBlanc, J.
DATED:	April 29, 2019
PUBLIC ORDER AND REASONS	June 21, 2019

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